

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

**AB-2010-1**

*Report of the Appellate Body*



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<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
<i>EC and certain member States – Large Civil Aircraft</i> (2 <sup>nd</sup> complaint)	<i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS347
<i>EEC – Parts and Components</i>	GATT Panel Report, <i>European Economic Community – Regulation on Imports of Parts and Components</i> , L/6657, adopted 16 May 1990, BISD 37S/132
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667

Short Title	Full Case Title and Citation
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4, DSR 1998:VI, 2201
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, 2703
<i>Japan – DRAMs (Korea)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, 2805
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
<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>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Mexico – Olive Oil</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, 3179
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, 1207
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011

Short Title	Full Case Title and Citation
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, 10127
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, 3507
<i>US – Continued Zeroing</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 – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, 5
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005, DSR 2005:XVIII, 8950
<i>US – Export Restraints</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 – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051

Short Title	Full Case Title and Citation
<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/RW, adopted 21 November 2001, as upheld by Appellate Body Report WT/DS58/AB/RW, DSR 2001:XIII, 6529
<i>US – Softwood Lumber III</i>	Panel Report, <i>United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada</i> , WT/DS236/R, adopted 1 November 2002, DSR 2002:IX, 3597
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
<i>US – Softwood Lumber IV</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, 641
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, 1937
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, 4865
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, 513
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3

Short Title	Full Case Title and Citation
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299
<i>US – Upland Cotton (Article 21.5 – Brazil)</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, DSR 2008:III, 809
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW, DSR 2008:III, 997 to DSR 2008:VI, 2013
<i>US – Wheat Gluten</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 – Wheat Gluten</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001:III, 779
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
<i>US – Zeroing (EC)</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
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009



## LIST OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1969 A300 Agreement	<i>Agreement (of 29 May 1969) between the Government of the Republic of France and the Government of the Federal Republic of Germany regarding the realization of the Airbus A-300-B (Panel Exhibit US-11)</i>
1970 A300 Agreement	<i>Agreement between the Governments of the Kingdom of the Netherlands, the Federal Republic of Germany, and the French Republic concerning the realization of the Airbus A-300 B (1970)</i>
1971 A300 Agreement	<i>Agreement (of 23 December 1971) between the Governments of the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands and the Spanish State regarding the realization of the Airbus A-300 B (Panel Exhibit EC-992 (BCI))</i>
1979 Agreement	<i>Agreement on Trade in Civil Aircraft, done at Geneva on 12 April 1979 (BISD 26S/162), as subsequently modified, rectified, or amended (attached as Annex 4(a) to the WTO Agreement)</i>
1981 A310 Agreement	<i>Agreement (of 28 September 1981) between the Governments of the Federal Republic of Germany, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and Spain concerning the Airbus programme (Panel Exhibit EC-942 (BCI))</i>
1991 A320 Agreement	<i>Agreement (of 6 February 1991) between the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Kingdom of Belgium, concerning the Airbus A320 programme (Panel Exhibit US-16)</i>
1992 Agreement	<i>Agreement between the European Economic Community and the Government of the United States of America concerning the application of the GATT Agreement on Trade in Civil Aircraft on trade in large civil aircraft, done at Brussels on 17 July 1992, Official Journal of the European Union, L Series, No. 301 (17 October 1992) 32</i>
1994 A330/A340 Agreement	<i>Agreement (of 25/26 April 1994) between the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Kingdom of Belgium concerning the Airbus A330/A340 programme (Panel Exhibit US-28)</i>
2003 Agreement	<i>Agreement (of 16 June 2003) signed at Paris-Le Bourget between the Ministers of the Four Principal Airbus Countries and Airbus (Panel Exhibit US-122 (BCI))</i>
9/11	11 September 2001 attacks on the World Trade Center
Additional Procedures	Additional Procedures to Protect Sensitive Information, adopted by the Appellate Body Division hearing this appeal (part of the Procedural Ruling of 10 August 2010 attached as Annex III to this Report)

Abbreviation	Description
Aérospatiale	French aerospace manufacturer, Aérospatiale Société Nationale Industrielle
Aérospatiale-Matra	Aérospatiale and Matra Hautes Technologies
AFUL	Association foncière urbaine libre
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
ARP programme	Aeronautics Research Programme
BAE Systems	BAE Systems PLC – 1999 merger of British Aerospace and Marconi Electronic Systems
BCI	business confidential information
CARAD programme	Civil Aircraft Research and Development Program
CASA	Construcciones Aeronáuticas SA
<i>Commissaires' report</i>	<i>Rapport des Commissaires aux apports sur la rémunération de l'apport de titres Dassault Aviation</i> (6 May 1999) (Panel Exhibit EC-892)
CSG programme	Specific Programme for Research, Technological Development and Demonstration on Competitive and Sustainable Growth established through Council Decision 1999/169/EC
Dasa	Deutsche Aerospace AG (1992); subsequently Daimler-Benz Aerospace AG (1995); subsequently DaimlerChrysler Aerospace AG (1998)
DPAC	Direction des programmes aéronautiques et de la coopération
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
EADS	European Aeronautic Defence and Space Company NV
EADS' Reference Document	EADS, <i>Reference Document – Financial Year 2000</i> (26 April 2001) (Panel Exhibit EC-54)
EC	European Communities
EC Decisions	Decisions of the European Parliament and/or the Council of the European Union (previously, the Council of the European Communities)
ECtHR	European Court of Human Rights
EEC	European Economic Community
EIB	European Investment Bank
EIG	<i>équipement d'intérêt général</i>

Abbreviation	Description
Ellis Report	NERA, <i>Economic Assessment of the Benefits of Launch Aid</i> (10 November 2006) (Panel Exhibit US-80 (BCI))
EU	European Union
Fifth EC Framework Programme	EC Council Decision 182/1999/EC of 22 December 1998 concerning the fifth framework programme of the European Community for research, technological development and demonstration activities (1998 to 2002), <i>Official Journal of the European Communities</i> , L Series, No. 26 (1 February 1999) 1 (Panel Exhibit EC-203)
Fourth EC Framework Programme	EC Council Decision 1110/94/EC of 26 April 1994 concerning the fourth framework programme of the European Community activities in the field of research and technological development and demonstration (1994-1998), <i>Official Journal of the European Communities</i> , L Series, No. 126 (18 May 1994) 1 (Panel Exhibit EC-202)
French A330-200 contract	<i>Agreement (of 28 November 1996) between the signatory authority of the agreement acting on behalf and for the account of the State, on the one hand, and Aérospatiale, on the other hand, concerning the development of the Airbus A330-200</i> (Panel Exhibit US-78 (BCI))
French A340-500/600 contract	<i>Agreement (of 29 December 1998) between the signatory authority of the agreement on behalf and for the account of the State, on the one hand, and Aérospatiale, on the other hand, concerning the development of the Airbus A340-500 and A340-600</i> (Panel Exhibit US-36 (BCI))
French A380 contract	<i>Agreement (of 20 March 2002) between the aeronautical programme service (SPAé) as signatory authority of the agreement acting on behalf and for the account of the State, on the one hand, and the company Airbus France, on the other hand, concerning the Airbus A380 repayable advance</i> (Panel Exhibit US-116 (BCI))
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
GIE	<i>groupement d'intérêt économique</i>
GMF	Global Market Forecasts
HSBI	highly sensitive business information
ICJ	International Court of Justice
IGG	<i>itinéraire à grand gabarit</i>
ILC	International Law Commission

Abbreviation	Description
ILC Articles	ILC Articles on <i>Responsibility of States for Internationally Wrongful Acts</i> . Text adopted by the ILC at its fifty-third session, in 2001, and submitted to the United Nations General Assembly as part of the ILC's report covering the work of that session. The General Assembly "{took} note of the Articles on responsibility of States for internationally wrongful acts" for the first time in General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol. I)/Corr.4, and subsequently in Resolution 59/35 of 2 December 2004, Resolution 62/61 of 6 December 2007, and Resolution 65/19 of 6 December 2010. The ILC's report, which also contains commentaries on the draft articles, appears in the <i>Yearbook of the International Law Commission, 2001</i> , Vol. II, Part Two.
ILC Report on Fragmentation	<i>Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law</i> , Report of the Study Group of the ILC at its fifty-eighth session, finalized by Martii Koskeniemi, UN Document A/CN.4/L.682 (13 April 2006)
IMT 1991 programme	Specific Programme for Research and Technological Development in the Field of Industrial and Materials Technologies established through Council Decision 91/506/EEC
IMT 1994 programme	Specific Programme for Research and Technological Development, including Demonstration, in the Field of Industrial and Materials Technologies established through Council Decision 94/571/EC
IRR	internal rate of return
ISERA programme	Specific Programme for Integrating and Strengthening the European Research Area
ITR	International Trade Resources LLC
KfW	Kreditanstalt für Wiederaufbau (German Government development bank)
KSS Study	Kerins, Smith, and Smith, "Opportunity Cost of Capital for Venture Capital Investors and Entrepreneurs" (June 2004) 39(2) <i>Journal of Financial and Quantitative Analysis</i> 385 (Panel Exhibit US-470)
LA/MSF	launch aid/member State financing
LA/MSF Programme	Alleged programme (by the United States) of consistent, up-front provision by the Airbus governments of a significant portion of the capital needed by Airbus to develop each new LCA model through loans that are (a) unsecured, (b) repayable on a success-dependent basis (i.e., through per sale levies), (c) with the levy amounts greater for later sales than earlier sales (i.e., back-loaded), and (d) with interest accruing at rates below what the market would demand for the assumption of similar risk
LCA	large civil aircraft

Abbreviation	Description
LuFo I	LuFo programme covering the period 1995-1998
LuFo II	LuFo programme covering the period 1998-2002
LuFo III	LuFo programme covering the period 2003-2007
LuFo programme	<i>Luftfahrtforschungsprogramm</i> (Aviation Research Programme)
MBB	Messerschmitt-Bölkow-Blohm GmbH
member States	Governments of Germany, France, Spain, and the United Kingdom
MHT	Matra Hautes Technologies
NERA	National Economics Research Associates
NPV	net present value
Panel Report	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R
ProFi	Projektierungsgesellschaft Finkenwerder GmbH & Co. KG
PROFIT programme	<i>Programa de Fomento de la Investigación Técnica</i> (Funding Programme for Technological Research)
PTA I	PTA programme covering the period 1993-1998
PTA II	PTA programme covering the period 1999-2003
PTA programme	<i>Plan Tecnológico Aeronáutico</i> (Technological Plan for Aviation)
R&D	research, development, and demonstration
R&TD	research and technological development
SAS	<i>société par actions simplifiée</i>
SCM Agreement	<i>Agreement on Subsidies and Countervailing Measures</i>
Second EC Framework Programme	EC Council Decision 87/516/Euratom EEC of 28 September 1987 concerning the framework programme for Community activities in the field of research and technological development (1987 to 1991), <i>Official Journal of the European Communities</i> , L Series, No. 302 (24 October 1987) 1 (Panel Exhibit EC-200)
SEPI	Sociedad Estatal de Participaciones Industriales
SETOMIP	Société d'équipement Toulouse Midi Pyrénées
SIDMI	Société industrielle aéronautique du Midi
Sixth EC Framework Programme	EC Council Decision 1513/2002/EC of 27 June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (2002 to 2006), <i>Official Journal of the European Communities</i> , L Series, No. 232 (29 August 2002) 1 (Panel Exhibit EC-204)
SMEs	small and medium enterprises
SSNIP	Small but Significant Non-Transitory Increases in Prices

Abbreviation	Description
SOGEADE	Société de gestion de l'aéronautique, de la défense et de l'espace
Spanish 1984 A320 contract	<i>Agreement (of 28 February 1984) between the Ministry of Industry and Energy and Construcciones Aeronáuticas, S.A. for the provision of a refundable deposit without interest, intended to finance development costs of the new Airbus A320</i>
Spanish 1988 A330/A340 contract	<i>Cooperation Agreement (of 1 June 1988) between the Ministry of Industry and Construcciones Aeronáuticas, S.A. relating to the provision of a repayable, interest-free advance for the financing of development costs for the Airbus A330/A340</i>
Spanish 1990 A330/A340 contract	<i>Agreement (of 30 July 1990) between the Ministry of Industry and Energy and Construcciones Aeronáuticas, S.A. for the provision of a refundable deposit without interest, intended to finance development costs for the Airbus A330/A340</i>
Spanish 1992 A320 contract	<i>Final contract (of 1 September 1992) for the termination and liquidation of the cooperation agreements between the Ministry of Industry, Trade and Tourism and Construcciones Aeronáuticas, S.A. relating to the provision of repayable funds for the financing of development costs for the Airbus A320</i>
Spanish A340-500/600 contract	<i>Framework Cooperation Agreement (of 28 December 1998) between the Ministry of Industry and Energy and the company Construcciones Aeronáuticas S.A. on financing the participation of the said company in the development of the Airbus A340-500 and A340-600 programme (Panel Exhibits EC-87 (BCI) and US-37 (BCI))</i>
Spanish A380 contract	<i>Cooperation Agreement (of 27 December 2001) between the Ministry of Science and Technology (MCYT) and the company EADS Airbus SL on financing the participation of the said company in the development of the Airbus A-380 family programme (Panel Exhibits EC-88 (BCI) and US-73 (BCI))</i>
Third EC Framework Programme	EC Council Decision 90/221/Euratom EEC of 23 April 1990 concerning the framework programme for Community activities in the field of research and technological development (1990 to 1994), <i>Official Journal of the European Communities</i> , L Series, No. 117 (8 May 1990) 28 (Panel Exhibit EC-201)
<i>Tokyo Round Subsidies Code</i>	<i>Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade</i> , BISD 26/56, entered into force 1 January 1980
TPC	Technology Partnership Canada
UK	United Kingdom
US	United States
USDOC	US Department of Commerce
VFW	Vereinigte Flugtechnische Werke
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679

Abbreviation	Description
Wachtel Report	P. Wachtel, "Critique of 'The Effect of launch Aid on the Economics of Commercial Airplane Programs' by Dr. Gary J. Dorman" (31 January 2007) (Panel Exhibit EC-12) and clarification (20 May 2007) (Panel Exhibit EC-659)
Whitelaw Report	Robert Whitelaw, Economic Assessment of Member State Financing (3 February 2007) (Panel Exhibit EC-11 (BCI))
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005 (Note: Although this version of the <i>Working Procedures</i> applied to this appeal, it has been replaced by a subsequent version, WT/AB/WP/6, 16 August 2010)
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>
ZAC	<i>zone d'aménagement concertée</i>





WORLD TRADE ORGANIZATION  
APPELLATE BODY

**European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft**

European Union<sup>1</sup>, *Appellant/Appellee*  
United States, *Other Appellant/Appellee*

Australia, *Third participant*  
Brazil, *Third participant*  
Canada, *Third participant*  
China, *Third participant*  
Japan, *Third participant*  
Korea, *Third participant*

AB-2010-1

Present:

Unterhalter, Presiding Member  
Bautista, Member  
Van den Bossche, Member

## **I. Introduction**

1. The European Union and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (the "Panel Report").<sup>2</sup> The Panel was established, on 20 July 2005, to consider a complaint by the United States that a series of measures adopted by the

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<sup>1</sup>This dispute began before the entry into force of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) on 1 December 2009. On 29 November 2009, the World Trade Organization received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the "European Union" replaces and succeeds the "European Community". On 13 July 2010, the World Trade Organization received a second Verbal Note (WT/Let/679) from the Council of the European Union confirming that, with effect from 1 December 2009, the European Union replaced the European Community and assumed all the rights and obligations of the European Community in respect of all Agreements for which the Director-General of the World Trade Organization is the depositary and to which the European Community is a signatory or a contracting party. We understand the reference in the Verbal Notes to the "European Community" to be a reference to the "European Communities". Thus, although the European Communities was a party in the Panel proceedings, and the Panel referred to the European Communities in its Report, it is the European Union that filed a Notice of Appeal in this dispute after the entry into force of the *Treaty of Lisbon*, and we will thus refer to the European Union in this Report in its capacity as appellant (and as appellee). However, when referring to events that took place during the Panel proceedings, or quoting from the Panel Report, we refer to the European Communities.

<sup>2</sup>WT/DS316/R, 30 June 2010.

European Communities and certain EC member States constituted subsidies to the Airbus companies<sup>3</sup> for the development of large civil aircraft ("LCA")<sup>4</sup> and were inconsistent with the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"). The measures at issue that were the subject of the United States' claims before the Panel include<sup>5</sup>:

- (a) "launch aid" or "member State financing" ("LA/MSF")<sup>6</sup>: the provision of financing by the Governments of France, Germany, Spain, and the United Kingdom (hereinafter, the "member States") to Airbus for the purpose of developing the following LCA—the A300, A310, A320, A330/A340 (including the A330-200 and A340-500/600 variants), A350, and A380<sup>7</sup>;
- (b) loans from the European Investment Bank (the "EIB"): 12 loans provided by the EIB to Airbus companies between 1988 and 2002 for LCA design, development, and other purposes<sup>8</sup>;
- (c) infrastructure and infrastructure-related grants: the provision of goods and services, as well as grants, to develop and upgrade Airbus manufacturing sites, including the provision by German authorities of the Mühlenberger Loch industrial site near Hamburg, and of the extended runway at the Bremen airport; the provision by French

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<sup>3</sup>The United States used the term "Airbus companies" to describe Airbus SAS, its predecessor Airbus GIE, and current and predecessor affiliated companies, including each person or entity that directly, or indirectly through one or more intermediaries or relationships, controls or controlled, is or was controlled by, or is or was under common control with Airbus SAS or Airbus GIE, such as parent companies, sibling companies, and subsidiaries, including Airbus Deutschland GmbH, Airbus España SL, Airbus France SAS, Airbus UK Limited, European Aeronautic Defence and Space Company NV ("EADS"), and BAE Systems. In this Report, for purposes of describing the measures at issue, the United States' claims, and the Panel's findings, we use the terminology used by the United States. (Panel Report, footnote 10 to para. 2.5; Request for the Establishment of a Panel by the United States, WT/DS316/2, 3 June 2005) The evolution of the corporate structure of Airbus SAS is described in section IV.B of this Report.

<sup>4</sup>The Panel defined "large civil aircraft" ("LCA") as follows:

{L}arge (weighing over 15,000 kilograms) "tube and wing" aircraft, with turbofan engines carried under low-set wings, designed for subsonic flight. LCA are designed for transporting 100 or more passengers and/or a proportionate amount of cargo across a range of distances serviced by airlines and air freight carriers. LCA are covered by tariff classification heading 8802.40 of the Harmonized System ("Airplanes and other aircraft, of an unladen weight exceeding 15,000 kg").

(Panel Report, para. 2.1)

<sup>5</sup>A detailed description of the measures at issue relevant to these appellate proceedings is contained in section IV of this Report.

<sup>6</sup>The United States used the term "launch aid"; the European Communities requested the Panel to use instead "a more neutral term—'member State Financing'". The Panel decided to "refer to the challenged measures as 'LA/MSF' or, when referring to a specific contract or measure, {to} use the relevant short titles, e.g., the 'UK A380 contract' or the 'A380 contract'". (See Panel Report, para. 7.291)

<sup>7</sup>Panel Report, para. 2.5(a).

<sup>8</sup>Panel Report, paras. 2.5(b) and 7.717.

authorities of the Aéroconstellation industrial site in Toulouse and road improvements related to that site; and regional grants by German authorities in Nordenham, by Spanish authorities in Illescas, Puerto Real, and Puerto de Santa Maria, La Rinconada, and Sevilla, and by Welsh authorities in Broughton<sup>9</sup>;

- (d) German and French restructuring measures: the provision to Airbus by Germany<sup>10</sup> and France of equity infusions, debt forgiveness, and grants through government-owned and government-controlled banks, including five equity infusions provided by the French Government to Aérospatiale consisting of three capital investments made by the French Government in 1987, 1988, and 1994, one capital contribution by Crédit Lyonnais in 1992, and the transfer by the French Government in 1998 of its 45.76% equity interest in Dassault Aviation to Aérospatiale<sup>11</sup>; and
- (e) research and technological development ("R&TD")<sup>12</sup> funding: the provision of grants and loans for R&TD undertaken by Airbus, including grants by the European Communities under the Second, Third, Fourth, Fifth, and Sixth EC Framework Programmes<sup>13</sup>; grants by the French Government between 1986 and 2005; and loans by the Spanish Government under the *Plan Tecnológico Aeronáutico* (Technological Plan for Aviation) ("PTA programme") and the *Programa de Fomento de la Investigación Técnica* (Funding Programme for Technological Research) ("PROFIT programme").<sup>14</sup>

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<sup>9</sup>Panel Report, paras. 2.5(c) and 7.1010.

<sup>10</sup>Panel Report, para. 2.5(e). The United States challenged specific transactions arising from the German Government's restructuring of Deutsche Airbus in the late 1980s, including the 1989 acquisition by the German Government, through the development bank Kreditanstalt für Wiederaufbau ("KfW"), of a 20% equity interest in Deutsche Airbus (*ibid.*, paras. 2.5(e) and 7.1250), the 1992 sale by KfW of that interest to Messerschmitt-Bölkow-Blohm GmbH ("MBB"), the parent company of Deutsche Airbus (*ibid.*, paras. 2.5(e) and 7.1253), and the forgiveness by the German Government, in 1998, of debt owed by Deutsche Airbus in the amount of DM 7.7 billion (*ibid.*, paras. 2.5(d) and 7.1308).

<sup>11</sup>Panel Report, paras. 2.5(e), 7.1326, and 7.1380.

<sup>12</sup>The United States challenged a series of what it termed "research, development, and demonstration" or "R&D" measures. (Request for the Establishment of a Panel by the United States, WT/DS316/2, section (6)) The Panel employed the term "research and technological development" or "R&TD" measures. We also use the latter term in this Report.

<sup>13</sup>See *infra*, footnotes 1475, 1476, 1478, 1479, 1481, 1482, 1484, 1485, 1487, and 1488 in section IV.E of this Report.

<sup>14</sup>Panel Report, paras. 2.5(f) and 7.1415. The United States also challenged R&TD funding in the form of grants by the German Federal Government under the *Luftfahrtforschungsprogramm* (Aviation Research Programme) ("LuFo programme") and by the regional governments of Bavaria, Bremen, and Hamburg, and grants by the UK Government under the Civil Aircraft Research and Development Program ("CARAD programme"), the Aeronautics Research Programme ("ARP programme"), and the Technology Programme.

A. *The United States' Claims before the Panel*

2. Before the Panel, the United States claimed that the LA/MSF measures by France, Germany, Spain, and the United Kingdom for the development of the A300, A310, A320, A330/A340, A330-200, A340-500/600, and A380 were "a form of highly preferential financing that amount{ed} to a specific subsidy" within the meaning of Articles 1 and 2 of the *SCM Agreement*.<sup>15</sup> In addition, the United States maintained that the "systematic and coordinated" provision of LA/MSF by these member States demonstrated the existence of an unwritten LA/MSF "Programme", distinct from the individual LA/MSF measures, which constituted a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*.<sup>16</sup> Finally, the United States claimed that the LA/MSF for the development of the A330-200, A340-500/600, and A380<sup>17</sup> constitute subsidies contingent, both in law and in fact, upon anticipated export performance within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement* and, therefore, pursuant to Article 3.2 of the *SCM Agreement*, must not be granted or maintained.<sup>18</sup>

3. The United States further claimed that 12 loans provided by the EIB to Airbus companies constituted specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*.<sup>19</sup> The United States asserted that the loans provided financial contributions in the form of direct or potential direct transfers of funds under Article 1.1(a)(1)(i), conferred a benefit under Article 1.1(b) by providing financing on terms more favourable than those available for comparable financing in the market, and were specific within the meaning of Article 2.1(a) and (c) of the *SCM Agreement*.<sup>20</sup> Further, the United States claimed that the provision by French, German, Spanish, and UK authorities of infrastructure and infrastructure-related grants conferred a benefit under Article 1.1(b) and constituted specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*.<sup>21</sup> In addition, the United States claimed that two specific transactions arising from the German Government's restructuring of Deutsche Airbus in the late 1980s, and the five equity infusions provided by the French Government to Aérospatiale, constituted specific subsidies under Articles 1

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<sup>15</sup>Panel Report, para. 7.290. The United States also claimed that an alleged commitment to provide LA/MSF by the above-mentioned four member States for the development of the A350 constituted a specific subsidy within the meaning of these provisions. (*Ibid.*, para. 7.297) Neither participant has appealed the Panel's finding regarding LA/MSF for the A350.

<sup>16</sup>Panel Report, para. 7.498 (quoting United States' first written submission to the Panel, para. 85).

<sup>17</sup>More specifically, seven LA/MSF measures were the subject of the United States' claim on export contingency, including LA/MSF for: (i) the A380 by France, Germany, Spain, and the United Kingdom; (ii) the A340-500/600 by France and Spain; and (iii) the A330-200 by France.

<sup>18</sup>Panel Report, paras. 3.1(a) and 7.582.

<sup>19</sup>Panel Report, para. 7.717.

<sup>20</sup>Panel Report, paras. 7.729, 7.739, and 7.890.

<sup>21</sup>Panel Report, para. 7.1010.

and 2 of the *SCM Agreement*.<sup>22</sup> The United States additionally submitted that the R&TD funding provided under the EC Framework Programmes and by certain member State governments constituted specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*.<sup>23</sup>

4. Finally, the United States alleged that, through the use of the above-mentioned subsidies, the European Communities, France, Germany, Spain, and the United Kingdom caused or threatened to cause "injury" to the United States' industry producing LCA and "serious prejudice" to United States' interests, within the meaning of Articles 5 and 6 of the *SCM Agreement*. With respect to its claim on serious prejudice, the United States submitted that the effect of the subsidies was: (i) to displace or impede the imports of US LCA into the EC market within the meaning of Article 6.3(a) of the *SCM Agreement*; (ii) to displace or impede the exports of US LCA from various third country markets within the meaning of Article 6.3(b); and (iii) significant price undercutting by EC LCA as compared with the price of US LCA in the same market, and significant price suppression, price depression, and lost sales in the same market, within the meaning of Article 6.3(c).<sup>24</sup>

#### B. *The Panel's Findings*

5. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 30 June 2010. The Panel declined the European Communities' request for a preliminary ruling<sup>25</sup> that certain measures be excluded from the scope of the Panel's review.<sup>26</sup> Specifically, the Panel rejected the European Communities' argument that certain measures fell outside the temporal scope of the Panel proceedings because: (i) they were granted before the *SCM Agreement* came into effect on 1 January 1995; or (ii) they were "grandfathered"<sup>27</sup> under Article 2 of the 1992 Agreement between

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<sup>22</sup>Panel Report, paras. 7.1250-7.1257, 7.1327, 7.1329, 7.1332, 7.1336, and 7.1385. The United States maintained that each of the transactions constituted a direct transfer of funds within the meaning of Article 1.1(a)(1)(i), and each conferred a benefit under Article 1.1(b) because it was inconsistent with the usual investment practice of private investors. The United States further asserted that the alleged debt forgiveness by the German Government constituted a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*, because it was a financial contribution within the meaning of Article 1.1(a)(1)(i) and, as a cash grant, placed Deutsche Airbus in a better position than it otherwise would have been in the marketplace. (*Ibid.*, paras. 7.1309-7.1311)

<sup>23</sup>Panel Report, para. 7.1415. According to the United States, this funding constituted direct transfers of funds within the meaning of Article 1.1(a)(1)(i), conferred a benefit under Article 1.1(b) by placing the relevant Airbus entity in a better position than it otherwise would have been in the marketplace, and was specific within the meaning of Article 2 because it was provided to Airbus and/or the aeronautics industry. (*Ibid.*, paras. 7.1489-7.1491 and 7.1504)

<sup>24</sup>Panel Report, paras. 3.1(b) and 7.1610.

<sup>25</sup>The European Communities submitted a request for preliminary rulings on 25 October 2005 and subsequently updated it on 7 November 2006. (Panel Report, paras. 7.12 and 7.14)

<sup>26</sup>The Preliminary Ruling of the Panel was communicated to the parties on 11 July 2007. (Panel Report, footnote 1766 to heading VII.C, p. 264) As separate matters, the Panel declined requests for enhanced third-party rights by Brazil, Canada, and Korea (*ibid.*, para. 7.168) and the request of the European Communities to be identified as the "proper respondent" in the dispute (*ibid.*, paras. 7.174-7.176).

<sup>27</sup>Panel Report, para. 7.71.

the United States and the European Economic Community concerning the application of the GATT *Agreement on Trade in Civil Aircraft* (the "1992 Agreement")<sup>28</sup>, because the 1992 Agreement rendered them "compatible with", and therefore not challengeable under, the *SCM Agreement*.<sup>29</sup> In addition, the Panel rejected the European Communities' contention that certain measures fell outside the Panel's terms of reference because they were not identified by the United States in the request for consultations<sup>30</sup>, or were not properly identified in the request for the establishment of a panel in accordance with Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").<sup>31</sup>

6. The Panel also rejected various arguments of the European Communities that, as a prerequisite to its claims on adverse effects under Articles 5 and 6 of the *SCM Agreement*, the United States was required to demonstrate "continuity" of benefits to Airbus SAS (*société par actions simplifiée* under French law), the legal entity responsible for the development and manufacture of Airbus LCA since 2001.<sup>32</sup> Specifically, the Panel rejected the European Communities' assertion that it was necessary for the United States affirmatively to demonstrate the "pass-through" to Airbus SAS of benefits conferred by financial contributions that had been provided to companies forming the Airbus Industrie consortium<sup>33</sup> prior to 2001 in order to make out a *prima facie* case under Article 5 of the *SCM Agreement*.<sup>34</sup> Moreover, the Panel rejected the European Communities' argument that certain subsidies at issue in this dispute have been "extinguished", "extracted", and/or "withdrawn" within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement* as a result of two transactions

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<sup>28</sup>*Agreement between the European Economic Community and the Government of the United States of America concerning the application of the GATT Agreement on Trade in Civil Aircraft on trade in large civil aircraft*, done at Brussels on 17 July 1992, *Official Journal of the European Communities*, L Series, No. 301 (17 October 1992) 32. Article 2 of the 1992 Agreement provides, in relevant part:

Government support to current large civil aircraft programmes, committed prior to the date of entry into force of this Agreement, is not subject to the provisions of this Agreement except as otherwise provided below.

<sup>29</sup>Panel Report, para. 7.71.

<sup>30</sup>Panel Report, para. 7.137.

<sup>31</sup>Panel Report, para. 7.158. In its request for preliminary rulings, the European Communities asserted that the challenged French R&TD measures were described in the United States' panel request in an "overly broad, ambiguous or overly inclusive manner". Subsequently, in its first written submission to the Panel, the European Communities also argued that a set of Spanish loans—known as the PROFIT programme loans—were not adequately identified in the United States' panel request. (See Panel Report, para. 7.1418)

<sup>32</sup>Panel Report, paras. 7.286-7.289.

<sup>33</sup>The Panel used the term "Airbus Industrie" to refer to the Airbus consortium as it operated between 1970 and 2001; namely each of the four Airbus partners—Aérospatiale (subsequently Aérospatiale Matra), Deutsche Airbus, CASA, and British Aerospace (subsequently BAE Systems), as well as Airbus GIE collectively. Where the Panel referred to Airbus GIE as an entity distinct from the Airbus partners, it used the term "Airbus GIE". (Panel Report, para. 7.184) Airbus GIE was registered under French law as a *groupement d'intérêt économique* ("GIE"), which is a French legal framework that allows its members to carry out collectively certain economic activities while maintaining their separate legal identities, and which does not have as its goal the retaining of profits. (*Ibid.*, footnote 2053 to para. 7.183)

<sup>34</sup>Panel Report, para. 7.286.

involving the removal of cash from two Airbus predecessor companies—DaimlerChrysler Aerospace AG ("Dasa")<sup>35</sup> and Construcciones Aeronáuticas SA ("CASA")—and/or as a result of a number of "arm's-length, fair market value" sales transactions involving Airbus companies.<sup>36</sup>

7. Turning to the United States' claims concerning the LA/MSF measures, the Panel dismissed two preliminary arguments made by the European Communities: first, that LA/MSF contracts for A320 and A330/A340 models cannot be assessed for compliance with Article 5 of the *SCM Agreement*, but must instead be examined in the light of the 1979 Tokyo Round *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*<sup>37</sup> (the "*Tokyo Round Subsidies Code*")<sup>38</sup>; and, second, that Article 4 of the 1992 Agreement is a "relevant rule{ } of international law applicable in the relations between the parties", pursuant to Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")<sup>39</sup>, which should have been applied by the Panel in assessing whether the relevant post-1992 LA/MSF conferred a "benefit" under Article 1.1(b) of the *SCM Agreement*.<sup>40</sup>

8. In considering the LA/MSF measures under the *SCM Agreement*, the Panel found that the United States had established that each of the challenged measures: (i) involved the provision of a "financial contribution by a government or any public body" in the form of direct transfer of funds, within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*<sup>41</sup>; (ii) conferred a "benefit" on Airbus, within the meaning of Article 1.1(b) of the *SCM Agreement*, because each was provided by the government on interest rate terms that were more advantageous than would otherwise have been the case if financing on the same or similar terms and conditions had been sought by Airbus from a market lender<sup>42</sup>; and (iii) was "specific", within the meaning of Article 2.1(a) of the *SCM Agreement*.<sup>43</sup> However, the Panel dismissed the United States' complaint against the alleged LA/MSF measure for the A350, finding that a clear and identifiable commitment to provide LA/MSF for the A350 on the terms and conditions specified by the United States did not exist on the date of establishment of the Panel.<sup>44</sup> The Panel also concluded that the United States failed to demonstrate

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<sup>35</sup>A full description of the entity we refer to in this Report as "Dasa" can be found in section IV.B of this Report.

<sup>36</sup>Panel Report, paras. 7.288 and 7.289.

<sup>37</sup>BISD 26S/56, entered into force 1 January 1980.

<sup>38</sup>Panel Report, para. 7.325.

<sup>39</sup>Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

<sup>40</sup>Panel Report, para. 7.389.

<sup>41</sup>Panel Report, paras. 7.377 and 7.379.

<sup>42</sup>Panel Report, paras. 7.383 and 7.384.

<sup>43</sup>Panel Report, para. 7.497.

<sup>44</sup>Panel Report, para. 7.314.

the existence of an unwritten LA/MSF Programme constituting a "specific" subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*.<sup>45</sup>

9. With respect to the alleged export subsidies, the Panel found that the United States had demonstrated that the German, Spanish, and UK A380 LA/MSF measures constituted subsidies contingent in fact upon export performance, within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*. However, the Panel found that the United States failed to show that the remaining four LA/MSF measures challenged by the United States as export subsidies<sup>46</sup> were contingent in fact upon anticipated export performance within the meaning of the same provisions.<sup>47</sup> Finally, the Panel dismissed the United States' claim that the provision of LA/MSF for the A380, A340-500/600, and A330-200 was contingent in law upon anticipated export performance, within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*.<sup>48</sup>

10. With respect to the EIB loans, the Panel found that each of the challenged loans amounted to a subsidy within the meaning of Article 1 of the *SCM Agreement*, because each consisted of a financial contribution that was provided at below-market interest rates.<sup>49</sup> However, it found that the United States failed to establish that each of the loans at issue was specific under Article 2.1(a) or (c) of the *SCM Agreement*, and therefore dismissed the United States' claim that the EIB loans constituted specific subsidies under the *SCM Agreement*.<sup>50</sup>

11. Concerning the United States' claims regarding infrastructure measures, the Panel concluded that the provision by German authorities of the Mühlenberger Loch industrial site and the extended runway at the Bremen airport, and by French authorities of the Aéroconstellation industrial site, constituted specific subsidies to Airbus in the form of the provision of goods or services "other than general infrastructure" within the meaning of Article 1.1(a)(1)(iii), and conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*.<sup>51</sup> The Panel further found that the grants by German authorities in Nordenham and Spanish authorities in Illescas, Puerto Real, Puerto de Santa Maria, La Rinconada, and Sevilla constituted subsidies within the meaning of Article 1 that were

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<sup>45</sup>Panel Report, para. 7.579.

<sup>46</sup>These four measures are the French LA/MSF contracts for the A380 and A330-200, and the French and Spanish LA/MSF contracts for the A340-500/600. (See *infra*, footnotes 1111 and 1112)

<sup>47</sup>Panel Report, para. 7.689.

<sup>48</sup>Panel Report, para. 7.713. The Panel found that the United States' claim was "improperly constituted", because the United States relied on facts extraneous to the LA/MSF contracts. Moreover, the Panel found that, even assuming that the United States was entitled to bring its case relying upon evidence that was extraneous to the LA/MSF contracts, the United States failed to demonstrate that the LA/MSF subsidies were granted contingent in law upon anticipated export performance. (*Ibid.*, para. 7.716)

<sup>49</sup>Panel Report, paras. 7.729, 7.738, and 7.885.

<sup>50</sup>Panel Report, para. 7.1008.

<sup>51</sup>Panel Report, paras. 7.1084, 7.1097, 7.1121, 7.1134, 7.1179, 7.1190, and 7.1191.



specific within the meaning of Article 2.2 of the *SCM Agreement*.<sup>52</sup> However, the Panel dismissed the United States' claims with regard to the other infrastructure and infrastructure-related grants.<sup>53</sup>

12. In addition, the Panel rejected the United States' claim that the alleged debt forgiveness by the German Government in the amount of DM 7.7 billion constituted a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*. Instead, the Panel found that the European Communities had demonstrated that the amount of DM 1.75 billion for which the German Government agreed to settle Airbus' outstanding repayment obligation was consistent with the present value in 1998 of Deutsche Airbus' outstanding indebtedness to the German Government.<sup>54</sup> As for the other corporate restructuring measures, the Panel found that the United States had established that the two specific transactions arising out of the German Government's restructuring of Deutsche Airbus, as well as the five equity infusions by the French Government to Aérospatiale, constituted specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*.<sup>55</sup> The Panel found that the four capital contributions to Aérospatiale made by the French Government between 1987 and 1994, as well as the 1998 transfer by the French Government of its 45.76% equity interest in Dassault Aviation to Aérospatiale, conferred a benefit on Aérospatiale, because the investment decisions were inconsistent with the usual investment practice of private investors.

13. Concerning the R&TD funding challenged by the United States, the Panel found that the following measures were specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*: (i) R&TD grants under the Second, Third, Fourth, Fifth, and Sixth EC Framework Programmes; (ii) French Government R&TD grants between 1986 and 2005; (iii) German Federal Government R&TD grants under the *Luftfahrtforschungsprogramm* (Aviation Research Programme) ("LuFo programme"); (iv) grants by Bavarian, Bremen, and Hamburg authorities; (v) loans under the Spanish Government PROFIT and PTA programmes; and (vi) UK Government grants under the Civil

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<sup>52</sup>Panel Report, paras. 7.1235, 7.1243, and 8.1(b)(iv).

<sup>53</sup>The Panel found that the provision of road improvements by French authorities was not a subsidy under Article 1.1(a)(1)(iii) of the *SCM Agreement*, because it constituted the provision by French authorities of "general infrastructure" within the meaning of that provision. (Panel Report, para. 7.1196) The Panel further found that grants provided by the regional government of Andalusia in Puerto Santa Maria, and by the Government of Wales in Broughton, were not specific to Airbus within the meaning of Article 2.2 of the *SCM Agreement*. (*Ibid.*, paras. 7.1137 and 7.1142)

<sup>54</sup>Panel Report, paras. 7.1321 and 7.1322.

<sup>55</sup>Panel Report, paras. 7.1302, 7.1380, and 7.1414. Specifically, the Panel found that all of these measures involved a financial contribution, in the form of a direct transfer of funds, pursuant to Article 1.1(a)(1)(i). The Panel found that a benefit was conferred within the meaning of Article 1.1(b) on Deutsche Airbus through the 1989 acquisition by KfW of a 20% equity interest in Deutsche Airbus and the 1992 transfer by KfW of that interest to MBB (which, at the time, was the parent company of Deutsche Airbus); and on Aérospatiale through the four capital contributions to Aérospatiale made by the French Government between 1987 and 1994, as well as the 1998 transfer by the French Government of its 45.76% equity interest in Dassault Aviation to Aérospatiale. Finally, the Panel found that all of these subsidies were specific within the meaning of Article 2 of the *SCM Agreement*.

Aircraft Research and Development Program ("CARAD programme") and the Aeronautics Research Programme ("ARP programme").<sup>56</sup> The Panel, however, rejected the United States' claims regarding the other R&TD funding.<sup>57</sup>

14. Finally, with regard to the United States' claims on adverse effects, the Panel found that the subsidies at issue enabled the launch of each model of Airbus LCA at a time and in a manner that would not have been possible in the absence of the subsidies. On this basis, the Panel concluded that the United States had established that the European Communities and the Governments of France, Germany, Spain, and the United Kingdom have, through the use of specific subsidies, caused serious prejudice to the United States' interests over the reference period 2001 to 2006 in the form of: (i) displacement of US imports of LCA into the European Communities market within the meaning of Article 6.3(a) of the *SCM Agreement*; (ii) displacement of US exports of LCA from the markets of Australia, Brazil, China, Korea, Mexico, Singapore, and Chinese Taipei within the meaning of Article 6.3(b) of the *SCM Agreement*, and threat of displacement of US exports of LCA from the market of India<sup>58</sup>; and (iii) lost sales of US LCA in the same market within the meaning of Article 6.3(c) of the *SCM Agreement*.<sup>59</sup> However, the Panel could not reach any conclusions regarding significant price undercutting.<sup>60</sup>

15. The Panel found that the United States failed to demonstrate that the effect of the subsidies was to impede US imports into the European Communities market and to impede US exports from third country markets, within the meaning of Article 6.3(a) and (b) of the *SCM Agreement*. The Panel further found that the United States failed to demonstrate that the specific subsidies at issue, by allowing Airbus to develop and launch its family of LCA, or by providing Airbus with the financial flexibility to lower its prices, also caused the significant price suppression and price depression that occurred between 2001 and 2006, within the meaning of Article 6.3(c) of the *SCM Agreement*.<sup>61</sup> In addition, the Panel concluded that the United States failed to establish that the European Communities

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<sup>56</sup>Panel Report, paras. 7.1608 and 7.1609.

<sup>57</sup>Panel Report, para. 7.1502. Specifically, the Panel found that the United States failed to establish that a promise to provide funds under part of the LuFo programme conferred a benefit "separate and independent" from the benefit that might have been conferred by a future transfer of the promised funds. Moreover, the Panel found that grants under the UK Technology Programme were not specific within the meaning of Article 2.1(a) of the *SCM Agreement*. (*Ibid.*, para. 7.1591)

<sup>58</sup>Panel Report, para. 7.2025. The Panel also found that, with the exception of likely displacement from the Indian market, the United States failed to substantiate its claims of *threat* of serious prejudice with respect to all forms of serious prejudice alleged in this dispute. (*Ibid.*, para. 7.2028)

<sup>59</sup>Panel Report, para. 7.1845. These relate to sales campaigns by Air Asia, Air Berlin, Czech Airlines, easyJet, Emirates Airlines, Iberia Airlines, Qantas Airways, South African Airways, Singapore Airlines, and Thai Airways International.

<sup>60</sup>Panel Report, para. 7.1840.

<sup>61</sup>Panel Report, para. 7.2026.

and certain member States, through the use of the subsidies, caused injury to the United States' domestic industry within the meaning of Article 5(a) of the *SCM Agreement*.<sup>62</sup>

C. *Appellate Proceedings*

16. On 21 July 2010, the European Union notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the DSU, and filed a Notice of Appeal<sup>63</sup> pursuant to Rule 20 of the *Working Procedures for Appellate Review*<sup>64</sup> (the "*Working Procedures*"). On 5 August 2010, the European Union requested, from the Appellate Body Division hearing this appeal, authorization to amend its Notice of Appeal pursuant to Rule 23*bis* of the *Working Procedures* in order to correct certain discrepancies in the references to paragraph numbers of the Panel Report.<sup>65</sup> The Division provided the United States and the third participants with an opportunity to comment in writing on the request.<sup>66</sup> No objections to the European Union's request were received. On 11 August 2010, the Division authorized the European Union to amend its Notice of Appeal.<sup>67</sup>

17. On 21 July 2010, the Division hearing this appeal received a joint letter from the European Union and the United States requesting that the Division adopt additional procedures to protect business confidential information ("BCI") and highly sensitive business information ("HSBI") in these appellate proceedings. They argued that disclosure of this information could be "severely prejudicial" to the originators of the information, that is, to the LCA manufacturers that are at the heart of this dispute, and possibly to the manufacturers' customers and suppliers. The European Union and the United States attached to their request proposed additional working procedures for the protection of BCI and HSBI. On 22 July 2010, the Division invited the third participants to comment in writing on the participants' request to adopt additional procedures to protect BCI and HSBI, and received written comments from Australia, Brazil, Canada, and Japan on 28 July 2010. These third participants expressed their general support for the request of the

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<sup>62</sup>Panel Report, para. 7.2186.

<sup>63</sup>WT/DS316/12.

<sup>64</sup>WT/AB/WP/5, 4 January 2005 (Note: Although this version of the *Working Procedures* applied to this appeal, it has been replaced by a subsequent version, WT/AB/WP/6, 16 August 2010).

<sup>65</sup>The European Union requested the authorization to amend "two categories of inadvertent errors". The first category arose due to a discrepancy between the paragraph numbering in the "business confidential" version of the Panel Report issued to the parties on 23 March 2010 and the final version of the Panel Report circulated to WTO Members on 30 June 2010. The second category involved two typographical errors in the Notice of Appeal. (Letter dated 5 August 2010 from the European Union to the Director of the Appellate Body Secretariat)

<sup>66</sup>Letter dated 6 August 2010 from the Presiding Member to the United States and the third participants.

<sup>67</sup>WT/DS316/12/Rev.1 (attached as Annex I to this Report).

participants, and suggested certain modifications to the procedures proposed by the participants in order to ensure that the right of third participants to participate meaningfully in these appellate proceedings would be fully protected.

18. On 22 July 2010, the Division declined the participants' request that it ask the Panel to delay the transmittal to the Appellate Body of any information classified as BCI or HSBI on the Panel record until after the Appellate Body had adopted additional measures regarding BCI and HSBI. The Division noted that Rule 25 of the *Working Procedures* requires that the panel record be transmitted to the Appellate Body upon the filing of a Notice of Appeal. The Division, taking into consideration the participants' concern with regard to the protection of BCI and HSBI contained in the Panel record decided, on a provisional basis, to provide additional protection to all BCI and HSBI transmitted to the Appellate Body during the period leading up to the definitive ruling on the participants' request for additional procedures. Furthermore, noting that consideration of the participants' joint request required modification to the timelines for filing submissions provided in the *Working Procedures*, the Division decided to extend the deadlines for filing submissions in this appeal.

19. The Division held a special oral hearing on 3 August 2010 to explore further the issues raised in the participants' joint request to adopt additional procedures to protect BCI and HSBI and in the third participants' comments concerning the request. On 10 August 2010, the Division issued a Procedural Ruling in response to the joint request, and adopted Additional Procedures to Protect Sensitive Information (the "Additional Procedures"). The Procedural Ruling and Additional Procedures are attached as Annex III to this Report.

20. On 11 and 12 August 2010, pursuant to paragraph 28(xiv) of the Additional Procedures, the participants each provided a list of persons designated as "BCI-Approved Persons" and persons designated as "HSBI-Approved Persons". Likewise, in accordance with paragraph 28(xvi) of the Additional Procedures, each of the third participants designated up to six individuals as "Third Participant BCI-Approved Persons" on 12 August 2010. On 13 August 2010, the European Union objected to the designation by Japan of an outside advisor as a Third Participant BCI-Approved Person, pursuant to paragraph 28(xvi) of the Additional Procedures.<sup>68</sup> Specifically, the European Union referred to the provision in paragraph 28(xvi) that "{t}he participants may object to the designation of an outside advisor as a Third Participant BCI-Approved Person" and that "{t}he Division will only reject the designation of an outside advisor ... upon a showing of compelling

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<sup>68</sup>Letter dated 13 August 2010 from the European Union to the Director of the Appellate Body Secretariat.

reasons".<sup>69</sup> On 23 August 2010, the European Union and Japan informed the Appellate Body that they had reached a "bilateral resolution of the issue". Consequently, the European Union withdrew its objection to Japan's list of BCI-Approved Persons and its request for a ruling by the Division.<sup>70</sup> Subsequently, the European Union<sup>71</sup>, Canada<sup>72</sup>, the United States<sup>73</sup>, and Japan<sup>74</sup> each requested to make changes to their respective list. The Division provided the participants and the third participants with the opportunity to comment in writing on the requests.<sup>75</sup> No objections were made by the participants or the third participants. The Division authorized all of the changes requested.<sup>76</sup>

21. The European Union filed an appellant's submission on 16 August 2010.<sup>77</sup> On 19 August 2010, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the DSU, and filed a Notice of Other Appeal pursuant to Rule 23 of the *Working Procedures*.<sup>78</sup> On 23 August 2008, the United States filed an other appellant's submission.<sup>79</sup> On 30 September 2010, the

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<sup>69</sup>According to the European Union, the outside advisor designated by Japan was a partner of a law firm in which another partner, as a former counsel to Airbus in this dispute, had been privy to confidential information concerning certain measures at issue during the Panel proceedings. Following a letter from the Division to the participants and third participants on 17 August 2010, the European Union submitted supplemental information in support of its objection, and requested the Division to make a ruling on its objection. (Letter dated 18 August 2010 from the European Union to the Presiding Member) Subsequently, Japan submitted its response to the European Union's objection, arguing that the European Union failed to show compelling reasons for rejecting the designation of Japan's outside advisor as a Third Participant BCI-Approved Person. (Japan's response of 20 August 2010 to the European Union's objection concerning the outside advisor in Japan's list of Third Participant BCI-Approved Persons)

<sup>70</sup>E-mail communication from the European Union and letter from Japan dated 23 August 2010 to the Director of the Appellate Body Secretariat.

<sup>71</sup>Letters dated 13 October 2010, 7 March 2011, and 19 April 2011 from the European Union to the Director of the Appellate Body Secretariat.

<sup>72</sup>Letter dated 13 October 2010 from Canada to the Director of the Appellate Body Secretariat.

<sup>73</sup>Letter dated 3 December 2010 from the United States to the Presiding Member.

<sup>74</sup>Letters dated 29 October 2010 and 2 December 2010 from Japan to the Director of the Appellate Body Secretariat.

<sup>75</sup>Letters dated 14 October 2010, 2 November 2010, 6 December 2010, and 9 March 2011 from the Presiding Member to the participants and third participants.

<sup>76</sup>By letters dated 27 October 2010, 5 November 2010, 8 December 2010, 14 March 2011, and 29 April 2011, the Division authorized the changes requested by the European Union, Canada, the United States, and Japan.

<sup>77</sup>Pursuant to Rule 21 of the *Working Procedures*. The European Union appealed the Panel's findings, that the EIB loans were within the temporal scope of application of the *SCM Agreement* and conferred a benefit and that there existed price suppression and price depression for the Boeing 777, on the condition that the United States appealed certain findings of the Panel. (European Union's Notice of Appeal, para. 11; European Union's appellant's submission, paras. 72, 685, 875) As the conditions on which these appeals were premised did not arise, the European Union withdrew, by letter dated 13 September 2010, these conditional appeals pursuant to Rule 30(1) of the *Working Procedures*.

<sup>78</sup>WT/DS316/13 (attached as Annex II to this Report).

<sup>79</sup>Pursuant to Rule 23(3) of the *Working Procedures*.

European Union and the United States each filed an appellee's submission<sup>80</sup>, and Australia, Brazil, Canada, China, Japan, and Korea each filed a third participant's submission.<sup>81</sup>

22. In their joint letter of 21 July 2010, the participants also requested that the oral hearing in this appeal be opened to public observation to the extent that this would be possible given the existence of sensitive information. On 24 September 2010, the Division issued a letter requesting the participants to clarify the extent to which they requested the oral hearing in this appeal to be opened to public observation, and to propose specific modalities in this respect. The Division invited the third participants to comment thereafter on the participants' request and proposed modalities. On 5 October 2010, the participants submitted a joint letter to the Presiding Member confirming their request for a public hearing. The participants suggested that the Division adopt a further Procedural Ruling pursuant to Rule 16(1) of the *Working Procedures* to regulate the conduct of the oral hearing in the light of the request for public observation and the existence of sensitive information, and proposed specific modalities for that purpose. Australia, Brazil, Canada, and Japan submitted comments on the participants' request to open the oral hearing to public observation.<sup>82</sup> On 27 October 2010, the Division issued a Procedural Ruling authorizing the participants' joint request for opening the hearing to public observation, and adopted Additional Procedures on the Conduct of the Oral Hearings including the protection of certain sensitive information during the oral hearing. The Procedural Ruling is attached as Annex IV to this Report.

23. On 25 October 2010, the Division received a letter from the United States indicating that it understood that this appeal was large and that the participants' requests for special rules to protect certain information and for extended periods for filing written submissions added time to the proceedings. In the light of Article 17.5 of the DSU, however, the United States considered it important to reach "agreement" on a date for circulation of the Appellate Body report in these proceedings "without further delay", and requested the Division to propose to both participants a time period for completion of this appeal "as soon as possible". On 27 October 2010, the Division received a letter from the European Union stating that the United States had both agreed to and acquiesced in derogation from the 90-day period for completion of these appellate proceedings. The European Union further submitted that the Appellate Body did not require "agreement" of the participants as to the date of circulation of its report. The European Union noted in this regard that the *Working Procedures* clearly state that the relevant time periods are set and modified by the

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<sup>80</sup>Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

<sup>81</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

<sup>82</sup>Letter dated 8 October 2010 from Australia to the Presiding Member; letter dated 11 October 2010 from Brazil to the Presiding Member; letter dated 8 October 2010 from Canada to the Presiding Member; letter dated 11 October 2010 from Japan to the Director of the Appellate Body Secretariat.

Appellate Body and do not require agreement of the participants. Furthermore, according to the European Union, requiring agreement of the participants "would open the door to potential abuse and would not be consistent with the objectives of the dispute settlement system." The European Union considered that the date of final circulation of the Appellate Body report could be fixed after the second session of the substantive oral hearing in this appeal, which was to take place in December 2010. Finally, the European Union considered that the Appellate Body should take the time it required to prepare its report, and that it would not be unreasonable if this would be at least commensurate with the relative extensions in the periods of time that the participants had required in order to prepare their submissions in this appeal.

24. By letter of 28 October 2010, the United States reiterated the importance of setting a date for issuance of the report in this appeal, noting that it understood that, consistent with Appellate Body practice, the participants would need to provide letters agreeing that additional time is needed for this appeal and that such letters would specify the date of circulation of the report. The United States further recalled that it recognized from the outset that the appeal in this case, which raises an unprecedented number of issues, would require more than 90 days to resolve. The United States also submitted that producing a high-quality report was in the interests of all.

25. In its letter to the participants and third participants of 3 November 2010, the Division explained that it had carefully considered the above submissions by the United States and the European Union, and indicated that the participants and third participants may wish to raise the matter again at the first session of the substantive oral hearing, scheduled to commence on 11 November 2010. The Division further stated that it intended to provide an estimated date for circulation of the Appellate Body report after the oral hearing, once it was in a better position to assess the amount of time reasonably required to complete its work in this appeal.

26. The substantive oral hearing in this appeal took place in two sessions: the first on 11-17 November and the second on 9-14 December 2010. Pursuant to the Procedural Ruling, the participants did not refer to any BCI or HSBI in their opening and closing statements, and the third participants did not refer to any BCI in their opening and closing statements. The opening and closing statements of the participants and the third participants were videotaped, with the exception of China (at the second session only) and Korea. After the participants reviewed the videotapes and confirmed that no BCI or HSBI had been inadvertently uttered, the recording of the opening and closing statements were broadcast to the public on 25 November and 17 December 2010 respectively.

27. At the first session of the hearing, the Division distributed written questions to the participants and third participants in order to clarify certain factual aspects of the Panel's findings concerning the evolution of the European Aeronautic Defence and Space Company NV ("EADS"), and received written responses from the participants at the hearing. In addition, upon the Division's invitation to the participants and third participants, the European Union, the United States, Australia, Brazil, China, and Japan submitted additional memoranda on 26 November 2010, pursuant to Rule 28 of the *Working Procedures*, regarding the issues discussed during the first session of the hearing. On 1 December 2010, the European Union, the United States, and Brazil submitted comments on the additional memoranda.

28. Pursuant to paragraph 28(xiii) of the Procedural Ruling of 10 August 2010, we informed the participants and the third participants, on 27 April 2011, that we had not found it necessary to include in the Appellate Body report intended for circulation to WTO Members information that was treated by the Panel as BCI or HSBI. Paragraph 28(xiii) of the Procedural Ruling foresees that an advance copy of the Appellate Body report intended for circulation to WTO Members will be provided to the European Union and the United States in order for them to indicate whether any BCI or HSBI was inadvertently included in the report. The advance copy of the Appellate Body report was provided to the European Union and the United States on 2 May 2011. They were requested to indicate, by 6 May 2011, whether any BCI or HSBI was inadvertently included in the report. On 6 May, the United States indicated that it had not found any BCI or HSBI outside of the text encompassed in square brackets in the Appellate Body report intended for circulation, and the European Union indicated that it had identified only one instance in which confidential information had been inadvertently included. On 10 May 2011, the Division informed the European Union and the United States that it had redacted the confidential information concerned from the Appellate Body report to be circulated to Members.

## **II. Arguments of the Participants and the Third Participants**

### **A. *Claims of Error by the European Union – Appellant***

#### **1. The Panel's Terms of Reference**

##### **(a) The Spanish PROFIT programme**

29. The European Union argues that the Panel's finding that the Spanish PROFIT programme loans were within the Panel's terms of reference was based on an erroneous interpretation and



application of Article 6.2 of the DSU and "defies both the letter and the spirit of Article 6.2".<sup>83</sup> Referring to recent Appellate Body jurisprudence, the European Union argues that the fact that Article 6.2 states that a panel request must "identify the *specific* measures at issue" means that not any identification of a measure is sufficient but, rather, that the identification of the measure must "point to the 'specific' measure".<sup>84</sup> For the European Union, the due process objective of Article 6.2 indicates that the term "specific" must be interpreted narrowly.<sup>85</sup>

30. The European Union contends that the Panel did not pay sufficient regard to the specificity requirement of Article 6.2. In fact, the Panel's statement that "the focus of the United States' complaint is not all Spanish government funding to Airbus for LCA-related activities; rather only funding provided 'since 1993' 'for civil aeronautics-related R&D projects'" shows that the Panel was satisfied with an extremely "un-specific" identification of the measures.<sup>86</sup> This "very generic description ... would potentially comprise a multitude of programmes and other measures without the European Union knowing which ones constitute the object of the {United States'} complaint".<sup>87</sup> The European Union states that it does not know why the United States decided not to include the PROFIT programme in its panel request, given that the United States was able to identify other specific measures in the form of the PTA programme loans, and could have been expected to know of the PROFIT programme loans at the time of its panel request on 31 May 2005. The European Union also notes that the United States must have known about the PROFIT programme since it was able to pose questions about the programme during the Annex V process, immediately following the panel request. Under these circumstances, "the European Union had to believe that {the} PROFIT {programme} was not part of the US complaint."<sup>88</sup>

31. The European Union claims that the Panel also erred when it based its assessment of the United States' panel request on "attendant circumstances" that it wrongly considered to be relevant

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<sup>83</sup>European Union's appellant's submission, para. 1206. Section 6(d) of the United States' panel request reads as follows:

Funding from the Spanish government, including regional and local authorities, since 1993 for civil aeronautics-related R&D projects in which Airbus participated, including loans and other financial support provided under the Plan Tecnológico Aeronáutico I and the Plan Tecnológico Aeronáutico II.

<sup>84</sup>European Union's appellant's submission, para. 1205 and 1207 (referring to Appellate Body Report, *US – Zeroing (Japan)* (Article 21.5 – *Japan*), para. 108; and quoting Article 6.2 of the DSU). (emphasis added by the European Union)

<sup>85</sup>European Union's appellant's submission, para. 1207. In support of its view, the European Union refers to Appellate Body Report, *EC – Selected Customs Matters*, para. 152.

<sup>86</sup>European Union's appellant's submission, para. 1208 (quoting Panel Report, para. 7.1420, in turn quoting Request for the Establishment of a Panel by the United States, WT/DS316/2).

<sup>87</sup>European Union's appellant's submission, para. 1208.

<sup>88</sup>European Union's appellant's submission, para. 1209.

under Article 6.2 of the DSU. First, the Panel did not explain how questions by the United States during the Annex V process could be relevant for assessing the panel request under Article 6.2. In the European Union's view, to the extent they are relevant, they would "at best demonstrate that the United States must have had knowledge of {the} PROFIT {programme} when it decided not to include PROFIT in its panel request."<sup>89</sup>

32. Second, the European Union argues that the Panel erred when it relied on the fact that the European Communities had not challenged in its preliminary rulings request the inclusion of the PROFIT programme loans within the Panel's terms of reference. Such a conclusion is inconsistent with the due process objectives of Article 6.2, because it obliges a defendant to raise in a request for a preliminary ruling an open-ended number of measures in order to avoid that any failure to object would bring such measures within the scope of the dispute. In any event, the Panel's conclusion was not supported by the preliminary rulings request in this case. The European Union asserts that it did not raise an issue with regard to the PROFIT programme in its preliminary rulings request because it believed that the United States had decided not to challenge it.<sup>90</sup>

33. Finally, the European Union argues that the Panel erred when referring to the United States' consultation and panel requests in dispute WT/DS347<sup>91</sup>, because the fact that those documents refer to the PROFIT programme cannot bring that measure within the scope of this dispute. The European Union similarly dismisses the relevance of the "other attendant circumstances" identified in footnote 4652 of the Panel Report, since they deal exclusively with the French Government R&TD measures.

(b) The French R&TD grants

34. The European Union argues that the Panel's finding that the French R&TD grants were within its terms of reference was based on an erroneous interpretation and application of Article 6.2 of the DSU.<sup>92</sup> Recalling prior Appellate Body jurisprudence, the European Union argues that the Panel

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<sup>89</sup>European Union's appellant's submission, paras. 1210 and 1211.

<sup>90</sup>European Union's appellant's submission, para. 1212. The European Union maintains that the Spanish PROFIT programme measures differ from the French support that the European Communities challenged in its request for preliminary rulings. Whereas the United States made "a fully unspecific reference to French R&TD support", the inadequacy of which the European Communities raised in its preliminary rulings request, the United States' panel request identified two specific Spanish measures under the PTA programme.

<sup>91</sup>*European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*.

<sup>92</sup>European Union's appellant's submission, para. 1216. Section 6(e) of the United States' panel request reads as follows:

Funding from the French government, including regional and local authorities, since 1986 for civil aeronautics-related R&D projects in which Airbus participated.

"neither examined the precision of the {United States'} panel request carefully, nor ensured its compliance with the letter or spirit of Article 6.2 of the DSU".<sup>93</sup> In particular, the European Union contends that the Panel did not pay sufficient regard to the "specificity" requirement of Article 6.2 of the DSU.

35. First, the European Union argues that the United States' panel request appears "extremely un-specific" on its face.<sup>94</sup> A complainant "should, at a minimum, be required to identify the legal basis for such a series of actions."<sup>95</sup> The Panel failed to do this, and instead considered it sufficient that "the United States {had} referred to all funding for civil aeronautics-related R&D projects in which Airbus participated provided by France (on a national, regional and local level) over a period of 19 years."<sup>96</sup> Such a broad reference, the European Union maintains, is not compatible with the due process objective of Article 6.2.

36. Second, the European Union argues that the lack of specificity in the identification of the measures is further illustrated by reading section (6) of the United States' panel request as a whole. In other parts of section (6), the United States identified the "legal basis" for the government support it was challenging, either by reference to the programme through which the funding was provided, or to the entity providing the funding. This allowed ready reference to the underlying measures authorizing the programme or the entity's funding activities. Section 6(e), by contrast, refers to funding on a national, regional, and local level without identifying the programme or granting entity at issue. The European Union adds that the global reference to funding provided over a period of 19 years added to the difficulty of preparing its defence.

37. Finally, the European Union considers that the "attendant circumstances" referred to by the Panel did not lead to an identification of "specific measures" within the meaning of Article 6.2 of the DSU. The European Union asserts that the Panel's reference to "attendant circumstances" was "not based on any proper analysis of those circumstances", because it did not evaluate any of the arguments to which the Panel referred.<sup>97</sup> Moreover, the "attendant circumstances" raised by the United States did not suffice to identify the specific measures at issue within the meaning of Article 6.2. The European Union notes, in particular, the fact that such issues were raised in consultations, which are in any event confidential and cannot be verified, would not remedy a later

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<sup>93</sup>European Union's appellant's submission, paras. 1222 and 1223 (referring to Appellate Body Report, *US – Zeroing (Japan)* (Article 21.5 – *Japan*), para. 108; and Appellate Body Report, *EC – Selected Customs Matters*, para. 152).

<sup>94</sup>European Union's appellant's submission, para. 1224.

<sup>95</sup>European Union's appellant's submission, para. 1224.

<sup>96</sup>European Union's appellant's submission, para. 1224.

<sup>97</sup>European Union's appellant's submission, para. 1226.

panel request that failed to identify specific measures. The consultation request itself "{did} not shed any light on which precise French R&D measures the United States wanted to challenge in its panel request."<sup>98</sup> The European Union equally dismisses the relevance of statements by the United States to the DSB, which would present a problematic basis for bringing measures within the scope of a dispute.<sup>99</sup> In any event, the United States made no mention of French R&TD support in those statements.

2. The Temporal Scope of Article 5 of the *SCM Agreement*

38. The European Union claims that the Panel erred in concluding that the pre-1995 measures challenged by the United States fall within the temporal scope of Article 5 of the *SCM Agreement*. In particular, the European Union argues that LA/MSF committed and paid prior to 1 January 1995 is outside the temporal scope of Article 5. According to the European Union, this includes LA/MSF funding for the A300, A310, and A320 and LA/MSF financing by the United Kingdom for the A330/A340. The European Union also argues that the extension of the runway at the Bremen Airport, which was completed in 1989, falls outside the temporal scope of Article 5. For the European Union, certain French capital contributions occurring in 1987, 1988, 1992, and 1994 and certain German share transfers occurring in 1989 and 1992 are also outside the temporal scope of Article 5. In relation to research and development funding, the European Union similarly argues that grants or disbursements made prior to 1 January 1995 under the Second and Third EC Framework Programmes are outside the temporal scope of Article 5 and should be excluded from these proceedings.<sup>100</sup> The European Union advances several lines of argument in support of its position.

39. First, the European Union contends that the Panel erred in its application of the principle of non-retroactivity of treaties reflected in Article 28 of the *Vienna Convention*<sup>101</sup> by wrongly focusing on the nature of the obligation contained in Article 5 of the *SCM Agreement* rather than on the nature of the measures challenged by the United States. The European Union recalls that Article 28 of the *Vienna Convention* requires that, if a treaty does not provide for its retroactive application or is otherwise silent, its provisions apply only to "continuing situations" and not to completed situations or

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<sup>98</sup>European Union's appellant's submission, para. 1230.

<sup>99</sup>European Union's appellant's submission, para. 1231 (referring to Panel Report, footnote 1993 to para. 7.149).

<sup>100</sup>See European Union's appellant's submission, paras. 60-76.

<sup>101</sup>Article 28 of the *Vienna Convention* provides:

*Article 28: Non-retroactivity of treaties*

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.

completed "acts" or "facts" that took place before the treaty entered into force. The relevant question before the Panel was therefore whether the pre-1995 measures challenged by the United States can be characterized as "acts" or "facts" that took place before the entry into force of the *SCM Agreement* or "completed situations", "and not, as the Panel assumed, whether the obligation contained in Article 5 of the *SCM Agreement* covers a 'situation' {i.e., causing adverse effects through the use of subsidies} which exists as of the effective date of the *SCM Agreement*, even if that situation arose as a result of the granting of a subsidy prior to that date."<sup>102</sup>

40. The European Union further argues that, by concluding that Article 5 refers to a "situation" comprising both the granting of a subsidy and its effects, regardless of when the subsidy was granted, the Panel effectively negated the principle of non-retroactivity. Yet, under general international law, the question of whether treaty obligations apply to certain government conduct depends on the nature of the government conduct and its timing. According to the European Union, "if the government conduct takes place in an instant (i.e., when 'the act is performed'), such a government conduct becomes an 'act' (or 'fact')" and, "{i}f the government conduct consists of repeated acts in time (i.e., 'continuing wrongful acts')", that government conduct amounts to a "situation".<sup>103</sup> For the European Union, the fact that certain effects may continue as a result of the government conduct is "irrelevant".<sup>104</sup>

41. The European Union finds support for its position in the Commentaries<sup>105</sup> of the International Law Commission (the "ILC") on Article 28 of the *Vienna Convention* and on the ILC Articles on *Responsibility of States for Internationally Wrongful Acts* (the "ILC Articles").<sup>106</sup> In particular, the European Union refers to Article 14 of the ILC Articles to argue that "{a} completed act occurs 'at the

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<sup>102</sup>European Union's appellant's submission, para. 28.

<sup>103</sup>European Union's appellant's submission, para. 43.

<sup>104</sup>European Union's appellant's submission, para. 43.

<sup>105</sup>*Draft articles on the Law of Treaties with commentaries*. Text adopted by the ILC at its eighteenth session, in 1966, and submitted to the United Nations General Assembly as a part of the Commission's report covering the work of that session (at para. 38). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 1966*, Vol. II.

*Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries*. Text adopted by the ILC at its fifty-third session, in 2001, and submitted to the United Nations General Assembly as part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two, as corrected.

<sup>106</sup>ILC Articles on *Responsibility of States for Internationally Wrongful Acts*. Text adopted by the ILC at its fifty-third session, in 2001, and submitted to the United Nations General Assembly as part of the ILC's report covering the work of that session. The General Assembly "{took} note of the Articles on responsibility of States for internationally wrongful acts" for the first time in General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol. I)/Corr.4, and subsequently in Resolution 59/35 of 2 December 2004, Resolution 62/61 of 6 December 2007, and Resolution 65/19 of 6 December 2010. The ILC's report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001*, Vol. II, Part Two.

moment when the act is performed', even though its effects or consequences may continue".<sup>107</sup> The European Union also refers to several rulings of the European Court of Human Rights (the "ECtHR") and the International Court of Justice (the "ICJ") to support its argument.<sup>108</sup>

42. Turning to the specifics of the *SCM Agreement*, the European Union recalls that Article 1 of that Agreement defines a subsidy as a financial contribution by a government that confers a benefit. The European Union argues that "{t}he moment these two elements are present a subsidy is granted or brought into existence and can be maintained by means of an active government conduct".<sup>109</sup> For the European Union, "{a}bsent any further active government conduct, it can be concluded that the subsidy was brought into existence and has ended."<sup>110</sup> The European Union emphasizes that under the *SCM Agreement* the only action taken by the government is the granting of the subsidy, and the effects of the subsidy are a consequence of that government conduct. Any effects derived from that government conduct are separate and should be distinguished from the "act" or "situation" attributed to the government. Accordingly, single acts are necessarily completed acts that do not turn into "situations" "because of their mere economic effect".<sup>111</sup> The European Union concludes that, under Article 28 of the *Vienna Convention*, a subsidy is a "completed act" if it has been fully disbursed, and a subsidy is a "continuing situation" if it still requires active government conduct. Similarly, a subsidy programme that has ended (in the sense that no company can benefit from it and all payments have been disbursed) amounts to a "completed situation", whereas a subsidy programme that is still ongoing after 1995 amounts to a "continuing situation" since it requires active government conduct. For the European Union, therefore, because the pre-1995 subsidies challenged by the United States were "fully granted, disbursed or brought into existence and ended before 1995", they amount to completed "acts" or "situations" and are thus outside the temporal scope of application of the *SCM Agreement*, even if the economic effects of such subsidies may continue to be felt subsequently.<sup>112</sup>

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<sup>107</sup>European Union's appellant's submission, paras. 41 and 42 (quoting ILC's Commentary on Article 14 of the ILC Articles, *supra*, footnote 106, pp. 59-60).

<sup>108</sup>European Union's appellant's submission, para. 44 (referring to ECtHR, Grand Chamber, *Malhous v. The Czech Republic*, Application No. 33071/96, p. 16). The European Union also refers to ECtHR, *Mayer, Weidlich, Fullbrecht Hasenkamp, Golf, Klausner v. Germany*, Application Nos. 19048/91, 19049/91, 19342/92, 18890/92, Decision and Reports 85-A, p. 5; ECtHR, Grand Chamber, *Von Maltzan and others v. Germany*, Decision to the Admissibility of Applications Nos. 71916/01, 71917/01, and 10260/02 (2 March 2005) ("land reform" 1945-49 in the Soviet sector of Germany), paras. 82 and 83; and ICJ, Judgment on preliminary objections, *Case Concerning Certain Property (Liechtenstein v. Germany)*, ICJ Reports (2005), para. 52. (*Ibid.*, paras. 44 and 45)

<sup>109</sup>European Union's appellant's submission, para. 47.

<sup>110</sup>European Union's appellant's submission, para. 47.

<sup>111</sup>European Union's appellant's submission, para. 52.

<sup>112</sup>European Union's appellant's submission, para. 77.

43. The European Union further contends that the Panel erred in finding that Article 5 of the *SCM Agreement* sets out an obligation not to cause certain results through a specific causal pathway, rather than an obligation not to engage in certain conduct. In particular, "the Panel ignored that the effects caused by the granting of the subsidy are *part of the obligation* contained in Article 5, but not the government conduct itself."<sup>113</sup> Instead, for the European Union, the wrongful act is "the government conduct of granting or maintaining the subsidy concerned and the obligation imposed is the withdrawal of the subsidy concerned or the removal of the adverse effects caused by the subsidy."<sup>114</sup>

44. The European Union contends, in particular, that "the formulation of the obligation in Articles 3 and 5 and the scope of the remedy indicate that both provisions refer to the same government conduct: granting or maintaining subsidies."<sup>115</sup> Regarding actionable subsidies, Article 7 of the *SCM Agreement* also confirms that the relevant government conduct for the purpose of Article 5 is "granting or maintaining a subsidy".<sup>116</sup> Thus, contrary to the Panel's assumption, the fact that Part III of the *SCM Agreement* is concerned with a situation that subsists and continues over time, rather than with specific acts performed by WTO Members, "has nothing to do with the question of whether Article 5 addresses the granting or maintaining of a subsidy and the effects caused together as part of the same government conduct."<sup>117</sup> The European Union also points to the grammatical structure of Article 5 itself to illustrate that the phrase "through the use of {a} subsidy" refers to the government conduct of granting subsidies.<sup>118</sup>

45. The European Union submits that Article 8 of the 1979 *Tokyo Round Subsidies Code*, the predecessor provision of Article 5 of the *SCM Agreement*, also confirms that the government conduct at issue is the granting of subsidies by governments, because it separately states that "subsidies are *used* by governments" and that "subsidies may cause adverse effects".<sup>119</sup>

46. The European Union considers that the Panel erred in finding that Article 28.1 of the *SCM Agreement* "was not of contextual assistance in deciding whether subsidies granted prior to 1 January 1995 may be subject to the obligations of Article 5."<sup>120</sup> Specifically, the European Union contends that Article 28.1 of the *SCM Agreement* "addresses subsidy *programmes*, as opposed to

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<sup>113</sup>European Union's appellant's submission, para. 88. (original emphasis)

<sup>114</sup>European Union's appellant's submission, para. 88.

<sup>115</sup>European Union's appellant's submission, para. 84.

<sup>116</sup>European Union's appellant's submission, paras. 84 and 88.

<sup>117</sup>European Union's appellant's submission, para. 89.

<sup>118</sup>European Union's appellant's submission, paras. 94 and 95.

<sup>119</sup>European Union's appellant's submission, para. 96 (referring to Article 8 of the 1979 *Tokyo Round Subsidies Code*). (emphasis added by the European Union)

<sup>120</sup>European Union's appellant's submission, para. 101.

*individual* subsidies", and that "{t}he fact that the Part dealing with 'Transitional Arrangements' refers only to subsidy programmes indicates the intention to exclude prior individual acts of subsidisation" from the temporal scope of Article 5.<sup>121</sup>

47. The European Union further argues that Article 32.3 of the *SCM Agreement* supports the proposition that "actions taken by Members before 1995, in the sense of bringing a subsidy into existence, insofar as they are 'completed', should be examined in view of the contemporaneous obligation at that time (i.e., the 1979 Tokyo Round Subsidies Code) and thus do not fall within the scope of Article 5 of the *SCM Agreement*."<sup>122</sup> The European Union further argues that Article 32.5 of the *SCM Agreement* also applies to "'continuing situations' in the form of 'laws, regulations and administrative procedures'" and "does not refer to completed 'acts' or 'situations' such as individual subsidies granted before 1995."<sup>123</sup>

48. The European Union submits that the Panel also erred in interpreting paragraph 7 of Annex IV to the *SCM Agreement* as suggesting that the benefit of every pre-1995 subsidy is deemed to "continue" after 1995 for Article 5 purposes. Contrary to the Panel's findings, that provision authorizes the "exceptional inclusion" of a benefit from a pre-1995 subsidy in the calculation of the overall amount of subsidization post-1995.<sup>124</sup> According to the European Union, if all pre-1995 subsidies were covered by Article 5 of the *SCM Agreement*, the requirement to allocate "existing benefits" to future production arising from such subsidies would already flow from Article 5, and therefore paragraph 7 of Annex IV would be rendered redundant.

49. Finally, the European Union submits that the Panel disregarded the fact that "there were dramatic changes between the 1979 *Tokyo Round Subsidies Code* and the *SCM Agreement*", which "called for separate rules and the need for transitional periods".<sup>125</sup> The absence of any transitional period with respect to individual subsidies brought into existence before 1995 indicates that those past government actions should be assessed in the light of the rules that were in force when the subsidies were granted, because "a common legislative technique is to provide for an appropriate *transitional period*, in order to give the persons concerned reasonable time to extricate themselves from the *lawfully created* situation."<sup>126</sup> The European Union further submits that, even if the substantive provisions in the 1979 *Tokyo Round Subsidies Code* were similar to the substantive provisions of the *SCM Agreement* insofar as actionable subsidies are concerned, "the obligation contained in Article 5

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<sup>121</sup>European Union's appellant's submission, para. 102. (original emphasis)

<sup>122</sup>European Union's appellant's submission, para. 104.

<sup>123</sup>European Union's appellant's submission, para. 105.

<sup>124</sup>European Union's appellant's submission, para. 108.

<sup>125</sup>European Union's appellant's submission, para. 114.

<sup>126</sup>European Union's appellant's submission, para. 117. (original emphasis)



of the *SCM Agreement* could not apply to government actions which took place wholly before the *SCM Agreement* came into force."<sup>127</sup> According to the European Union, the United States had until 1997 to bring dispute settlement proceedings against such actions, and "{a} failure to do so cannot lead to expanding the temporal scope of Article 5 of the *SCM Agreement* as the Panel did."<sup>128</sup>

3. The Life of a Subsidy and Intervening Events

(a) Whether the Panel erred in its interpretation and application of Articles 1, 5, and 6 of the *SCM Agreement*

50. The European Union requests the Appellate Body to find that the Panel erred in the interpretation and application of Articles 1, 5, and 6 of the *SCM Agreement*. According to the European Union, the Panel ignored the legal principle reflected in Articles 1, 5, and 6 that, when a benefit to a recipient arising from prior subsidies diminishes over time or is removed or taken away, this "significant change" must be taken into account in the application of the *SCM Agreement* and in particular in the examination of the causal link between the granting of the subsidy and the alleged adverse effects.<sup>129</sup>

51. The European Union argues that the text of Articles 1, 5, and 6 of the *SCM Agreement* supports the notion of a "continuing benefit". First, Article 1 of the *SCM Agreement* defines the conditions under which a subsidy "shall be deemed to exist". The use of the word "exist", in the present tense, demonstrates that the *SCM Agreement* is not concerned with subsidies that no longer exist and that are not capable of causing adverse effects. Moreover, once a "financial contribution" is given, the element under Article 1 that can "cease to exist" or be discontinued over time if there is a significant change, either through the passage of time or any other intervening event or action, is the "benefit".<sup>130</sup> Second, the European Union recalls that Article 5 of the *SCM Agreement* provides that WTO Members should not cause, "through the use of any subsidy", adverse effects to the interests of other Members. In the European Union's view, the word "cause", in the present tense, implies that subsidies that have been withdrawn, ceased to exist, or whose *effects* have diminished with the passage of time, cannot currently "cause" present adverse effects.<sup>131</sup> The European Union finds further support for its interpretation in the term "through the *use* of any subsidy"<sup>132</sup>, which in its view could not mean that a Member, through granting or maintaining a subsidy that is later withdrawn or

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<sup>127</sup>European Union's appellant's submission, para. 116.

<sup>128</sup>European Union's appellant's submission, para. 121.

<sup>129</sup>European Union's appellant's submission, para. 221; see also para. 199.

<sup>130</sup>European Union's appellant's submission, para. 205.

<sup>131</sup>European Union's appellant's submission, para. 207.

<sup>132</sup>European Union's appellant's submission, para. 207. (emphasis added by the European Union)

otherwise discontinued or diminished to a negligible amount, could cause present adverse effects.<sup>133</sup> Indirect effects of subsidies that have ceased to exist are not sufficient; even if "historic" subsidies caused something to happen many years ago, the continuing existence of what was caused and the fact that it may have "continuing effects" today does not satisfy the requirements of Article 5 of the *SCM Agreement*. The European Union considers that such an interpretation would "overstretch" the concept of adverse effects caused by a subsidy and render it meaningless.<sup>134</sup> Finally, the European Union refers to Article 6.3 of the *SCM Agreement*, which identifies certain situations in which "the effect of the subsidy is to" cause certain phenomena.<sup>135</sup> The use of the present tense in that phrase confirms that a subsidy that is withdrawn or has ceased to exist cannot trigger these effects, and requires an examination of whether the subsidy, because of the passage of time, is still capable of causing present adverse effects. The European Union notes that such an examination can be done through the use of "amortisation" rules that investigating authorities, panels, and the Appellate Body have recognized as a "practical way" of assessing benefit or effects over time.<sup>136</sup>

52. The European Union refers to the "privatization" case law of the Appellate Body—in particular *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products*, in which the Appellate Body found that the full privatization of state-owned companies "extinguished" the prior benefits of subsidies enjoyed by those state-owned companies. The European Union submits that this "privatization" case law is an "application" of the "principle" that the removal or diminution of subsidies over time has to be taken into account under the *SCM Agreement*. These Appellate Body reports also illustrate that the removal of the "subsidized value"—indirectly through "extinction", or directly through "extraction"<sup>137</sup>—has to be considered in the establishment of the existence of subsidization or the aggrieved Member's right to a remedy. The European Union acknowledges that this "privatization" case law arose in a countervailing duty context involving full privatizations.

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<sup>133</sup>European Union's appellant's submission, para. 207. The European Union refers to various calculations presented to the Panel that in its view show that any present benefit from the subsidies is *de minimis*. (*Ibid.*, footnote 198 to para. 207 (referring to the European Communities' comments on *US – Upland Cotton (Article 21.5 – Brazil)* submitted to the Panel, paras. 8-34 and 74-98; European Communities' first written submission to the Panel, paras. 1468-1490 and 1569-1634 (detailed description of the methodology and further references on which it is based); International Trade Resources LLC ("ITR") expert statement on subsidy allocation, "Calculating Magnitude of the Subsidies Provided to the Recipient Entities" (5 February 2007) (Panel Exhibit EC-13 (BCI/HSBI)); ITR rebuttal of the United States' critique of allocation methodology, "Response to US Assertions that ITR's Method of Calculating the Magnitude of Subsidies is Flawed" (21 May 2007) (Panel Exhibit EC-660 (BCI/HSBI)); and ITR report, "Updated Subsidy Magnitude and Cash Flow Calculations" (12 July 2007) (Panel Exhibit EC-839 (BCI))).

<sup>134</sup>European Union's appellant's submission, para. 207.

<sup>135</sup>European Union's appellant's submission, para. 208.

<sup>136</sup>European Union's appellant's submission, para. 208 (referring to Appellate Body Report, *Japan – DRAMs (Korea)*, para. 210).

<sup>137</sup>These concepts, as used by the European Union, are further explained in section V.C.2 of this Report.

However, in its view, the rationale of the Appellate Body was based on the definition of "subsidy" in Article 1 of the *SCM Agreement*, and thus is common to the entire *SCM Agreement*. The European Union therefore rejects the Panel's finding that the "continued benefit" analysis is relevant only in Part V cases because, as explained above, the panels and the Appellate Body in the privatizations cases based their decisions on a definition of subsidy in Article 1 of the *SCM Agreement*, which applies equally to Part III of the *SCM Agreement*.

53. The European Union also finds support for the concept of "continuing benefit" in Articles 4.7 and 7.8 of the *SCM Agreement*, which it likens to Articles 21.2 and 21.3 in Part V of the *SCM Agreement*. The European Union recalls that the Appellate Body noted in the privatization cases that Articles 21.2 and 21.3 require the termination of remedial action against subsidies once those subsidies have been removed in some way. According to the European Union, a "harmonious" or contextual interpretation of the provisions of the *SCM Agreement* precludes a finding that after a subsidy is "withdrawn", within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*, it can nonetheless "continue to exist" within the meaning of Article 1 of the *SCM Agreement* or be capable of having "adverse effects" within the meaning of Articles 5 and 6 of the *SCM Agreement*.<sup>138</sup>

54. Turning to the Panel's findings, the European Union recalls the Panel's statement that the word "thereby", as used in Article 1.1(b) of the *SCM Agreement*, indicates that the financial contribution and the benefit come into existence at the same time, which in turn led it to reject the notion of a "continuing benefit".<sup>139</sup> In the European Union's view, the simultaneous coming into existence of the financial contribution and benefit has no relevance for the question of whether the benefit must be continuing in order to cause adverse effects. The European Union submits that a finding that a subsidy exists or has been granted does not preclude the possibility of using amortization rules to allocate the amount of benefit over time in order to determine whether a subsidy still confers a benefit.<sup>140</sup> Moreover, the Panel attempted to replace the concept of "continuing benefit" with an examination of "how the *effect* of a subsidy is to be analyzed over time" within its causation analysis.<sup>141</sup> As the European Union sees it, the two concepts are different: a causation analysis is "obsolete" in circumstances where a subsidy does not confer a present benefit due to its withdrawal or

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<sup>138</sup>European Union's appellant's submission, para. 201.

<sup>139</sup>European Union's appellant's submission, para. 223 (referring to Panel Report, para. 7.218). The European Union submits that, in *Japan – DRAMs (Korea)*, the Appellate Body found that the calculation of the amount of benefit and the allocation of benefit over time once that amount has been established are two separate issues. (See Appellate Body Report, *Japan – DRAMs (Korea)*, para. 199)

<sup>140</sup>The European Union argues that this is particularly relevant in the causation analysis since a subsidy which can be considered to be fully amortized before the reference period cannot be found to cause adverse effects. (European Union's appellant's submission, para. 223 and footnote 211 thereto).

<sup>141</sup>European Union's appellant's submission, para. 224 (quoting Panel Report, para. 7.218 (original emphasis)).

discontinuation, or where due to amortization it is found to be non-existent or negligible.<sup>142</sup> Furthermore, the European Union observes that, despite announcing that it would do so, the Panel never addressed the "effects of the subsidy over time" in its causation analysis.<sup>143</sup>

- (b) Whether the Panel erred in its interpretation and application of the "privatization" case law

55. The European Union submits that the Panel erred by "improperly reading" the panel and Appellate Body reports in the privatization cases, and that it thereby "improperly narrowed the scope of situations in which subsidies are extinguished".<sup>144</sup> In the European Union's view, the privatization cases establish the principle that the sale of a company at arm's length and for fair market value removes any benefit of prior subsidies to the buyer. This principle is equally applicable to full and partial privatizations, as well as to "private-to-private sales".<sup>145</sup> In this regard, the European Union refers to a number of sales transactions that it contends involved partial privatizations and "private-to-private sales", resulting in changes of ownership in Airbus companies and consequently the "extinction" of a portion of the subsidies that had been granted to these companies. These transactions include: (i) the French Government's sale of shares in Aérospatiale-Matra through a public offering in 2000; (ii) the combination of the LCA-related assets and activities of the Airbus partners to form EADS and the public offering of EADS shares in 2000; (iii) market sales of EADS shares by various EADS shareholders (including the French Government) between 2001 and 2006; and (iv) the sale by BAE Systems of its interest in Airbus SAS to EADS in 2006.<sup>146</sup>

56. The European Union alleges a number of errors in the Panel's analysis of the Appellate Body privatization case law. First, the European Union submits that the Panel misrepresented the Appellate Body's findings in *US – Countervailing Measures on Certain EC Products* as to whether a distinction is to be made between a firm and its owners in analyzing whether a benefit is conferred or extinguished. In that dispute, the Appellate Body stated that both a firm and its owners could be the recipient of a subsidy, but that investigating authorities should not overlook the fact that some of the

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<sup>142</sup>European Union's appellant's submission, para. 224.

<sup>143</sup>European Union's appellant's submission, para. 224. The European Union refers to section VII.F of the Panel Report, which deals with adverse effects. The European Union submits that, since the Panel never returned to this issue, the European Union had difficulty in identifying the precise paragraph containing the Panel's error. Moreover, it notes that, although currently raised in the context of the Panel's benefit analysis, and in particular in the Panel's findings at paragraphs 7.218 and 7.222, this error also has consequences for the Panel's findings in its assessment of the causal link, including issues relating to the quantification of the amount of the subsidy and the age of the subsidy.

<sup>144</sup>European Union's appellant's submission, para. 227.

<sup>145</sup>European Union's appellant's submission, para. 226.

<sup>146</sup>Panel Report, para. 7.204. See European Union's appellant's submission, para. 147 and 226 (referring to European Communities' response to Panel Question 111, para. 311; and Panel Report, para. 7.204). We describe these transactions in further detail in section V.C of this Report.

financial contribution provided to the owners may not flow to the firm. The Appellate Body supported its conclusion on the basis that treating a firm and its owners as distinct could potentially undermine the disciplines of the *SCM Agreement* because it would allow governments to circumvent the Agreement by bestowing benefits on the firms' owners rather than on the firms themselves.<sup>147</sup> The European Union also notes that the Appellate Body in that case criticized the panel for not restricting its finding to the circumstances of that case, which involved a full privatization. The European Union submits, however, that, contrary to the Panel's suggestion, the Appellate Body did not thereby also conclude that the panel's "no distinction" finding should apply only to full privatizations; rather, the Appellate Body expressed the view that investigating authorities should not be entitled to assume that a benefit to the owners of a firm equates to a benefit to the firm in the full amount. The European Union further describes the Appellate Body's finding that a firm and its owners can both be treated as the recipients of a subsidy as "rooted in economic common sense".<sup>148</sup> In its view, an "identity of interest" between a firm and its owners extends beyond a case of full privatization to situations involving a smaller percentage of shares sold, since in either instance "the payment in a fair market, arm's length transaction would be made by the firm's new owners, whose relationship with the firm and interest in its success would be the same, whatever the amount of their shareholding."<sup>149</sup>

57. Second, the European Union rejects the Panel's finding that the European Union's approach in *US – Countervailing Measures on Certain EC Products* "conflated" two different "financial contributions"—the financial contribution originally provided to the producer and the financial contribution involved in the sale of an interest in that firm to the new owner—and the two "relevant markets" according to which the benefit conferred by the respective financial contributions is to be assessed under Article 14 of the *SCM Agreement*. The European Union recalls that it was on this basis that the Panel in this dispute found that, while a change in ownership at fair market value may prevent the creation of a new subsidy, it will have no impact on prior subsidies.<sup>150</sup> The European Union submits that the Panel's conclusion is invalidated by the Appellate Body's finding that privatizations at fair market value remove benefits of prior subsidies. The European Union further submits that, although it is "perfectly possible" to have two financial contributions, they are "not comparable".<sup>151</sup> The first financial contribution—which may be, for example, a grant or equity infusion—to the extent it confers a benefit, involves a subsidy that *increases* the value of the firm.

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<sup>147</sup>European Union's appellant's submission, paras. 237-239 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 115 and 118).

<sup>148</sup>European Union's appellant's submission, para. 241.

<sup>149</sup>European Union's appellant's submission, para. 241.

<sup>150</sup>European Union's appellant's submission, paras. 242 and 243 (referring to Panel Report, paras. 7.243 and 7.244).

<sup>151</sup>European Union's appellant's submission, para. 245.

The second financial contribution—the sale by the government of its interest in the firm—involves the transfer of the firm's value (increased by the first financial contribution) to new owners, which, if it corresponds to a fair market value, not only fails to create a *new* subsidy but also, "because it by definition *includes the market value of the subsidy created by the original financial contribution*, it also removes the benefit of this subsidy."<sup>152</sup> Accordingly, rather than being "conflated", the two financial contributions are treated appropriately under Articles 1 and 14 of the *SCM Agreement*.

58. Third, the European Union submits that, through its use of "selective, out-of-context, quotes" from the Appellate Body report in *US – Countervailing Measures on Certain EC Products*, the Panel misrepresented the Appellate Body's treatment of that panel's findings, and thereby supported its perception that the Appellate Body had invalidated those findings.<sup>153</sup> The European Union observes, however, that, with the exception of a situation where government intervention distorts the market and renders an arm's-length transaction that is apparently for fair market value "unreliable"<sup>154</sup>, the Appellate Body agreed with the panel that privatizations at arm's length for fair market value extinguish prior subsidies.<sup>155</sup>

59. Fourth, with respect to a situation involving "private-to-private" sales, the European Union recalls the Appellate Body's statement in *US – Countervailing Measures on Certain EC Products* that "{t}he Panel's absolute rule of 'no benefit' may be defensible in the context of transactions between {...} private parties taking place in reasonably competitive markets".<sup>156</sup> According to the European Union, the extinction of benefits in a situation involving two private entities is "founded on economic common sense" since, as distinct from a government-to-private sale where the government may have reason to shape the circumstances and conditions of the transaction, a private seller's only objective is to obtain maximum value.<sup>157</sup> In support, the European Union refers to the United States'

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<sup>152</sup>European Union's appellant's submission, para. 245. (original emphasis)

<sup>153</sup>European Union's appellant's submission, para. 247.

<sup>154</sup>European Union's appellant's submission, para. 252 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 121-124).

<sup>155</sup>European Union's appellant's submission, paras. 250-252 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 126, where the Appellate Body stated in relevant part that "{i}n the absence of such proof, the fact of the arm's-length, fair market value privatization is sufficient to compel a conclusion that the 'benefit' no longer exists for the privatized firm"; and para. 158, where the Appellate Body expressed its agreement with the panel that "privatization at arm's length and at fair market price will *usually* extinguish the remaining part of a benefit bestowed by a prior, non-recurring financial contribution. However, we disagree with the Panel that this result will *necessarily* and *always* follow from every privatization at arm's length and for fair market value." (original emphasis; footnotes omitted)).

<sup>156</sup>European Union's appellant's submission, para. 253 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 124).

<sup>157</sup>European Union's appellant's submission, para. 254 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 124).

countervailing duty presumptions that "now establish a presumption of extinguishment of subsidy in ... private-to-private transactions".<sup>158</sup>

60. With respect to partial privatizations, or "partial" sales, the European Union finds support in the approach taken by the compliance panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*. The European Union argues that the Panel should have recognized that the compliance panel had "legitimized a 'segmented' approach to an analysis of changes in ownership" and had approved the conclusions of the investigating authority that a portion (5.16%) of the pre-privatization benefit to the state-owned company, Usinor, had not been extinguished because it had been transferred to employees for less than fair market value.<sup>159</sup>

61. Finally, the European Union disagrees with the Panel that the recognition of a "principle" according to which changes in underlying ownership automatically or presumptively eliminate the benefit would "potentially eviscerate" the disciplines of the *SCM Agreement*, particularly where the producer is a corporation whose shares are publicly traded.<sup>160</sup> The European Union highlights that, contrary to the Panel's implication, the transactions in this case do not involve the "daily trading" of shares but, rather, significant sales by government, industry, or institutional shareholders. Moreover, they involve transactions in assets of an enterprise by strategic shareholders rather than shares held as investments, and realize for the seller the underlying enterprise value rather than the investment value of the shares. Accordingly, the European Union submits, they are analogous to kinds of sales of shares already found to extinguish or reduce benefits from past financial contributions.<sup>161</sup>

- (c) Whether the Panel erred in finding that the transactions did not "withdraw" the benefit conferred by the past subsidies, within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*

62. The European Union argues that the Panel erred in its interpretation and application of the word "withdraw" in Articles 4.7 and 7.8 of the *SCM Agreement* by failing to find that two sets of transactions involving Airbus companies had the effect of "withdrawing" the value of prior subsidies.

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<sup>158</sup>European Union's appellants' submission, para. 254, and footnote 250 thereto (referring to US Department of Commerce (the "USDOC"), Issues and Decision Memorandum for the Final Results of the 2002 Administrative Review of the Countervailing Duty Order on Certain Pasta from Italy (Case C-475-819), p. 2, footnote 1 (*United States Federal Register*, Vol. 69, No. 234 (7 December 2004) 70657)). The European Union also refers to a statement of the US Court of Appeal for the Federal Circuit that a "private seller ... seeks the highest market price for its assets". (*Delverde vs. United States*, 202 F 3d 1360, 1369 (Fed. Cir. 2000) (Panel Exhibit EC-591))

<sup>159</sup>European Union's appellant's submission, paras. 258 and 259.

<sup>160</sup>European Union's appellant's submission, paras. 261 and 262 (referring to Panel Report, para. 7.246, and para. 7.252 (in the context of private-to-private sales)).

<sup>161</sup>European Union's appellant's submission, para. 263 (referring to European Communities' response to Panel Question 197, para. 225).

The first set of transactions (referred to by the European Union as "cash extractions") were aimed at aligning the values of two Airbus predecessor companies—Dasa and CASA—with the value of the percentage share in EADS agreed to be held by their parent companies, DaimlerChrysler and the Spanish Government (through its holding company, Sociedad Estatal de Participaciones Industriales ("SEPI")) prior to and following the Initial Public Offering of EADS.<sup>162</sup> For purposes of this "alignment", €340 million in cash was removed from CASA by the Spanish Government, and €3.133 billion in cash was removed from Dasa by DaimlerChrysler.<sup>163</sup> The second set of transactions that the European Union argues resulted in the "withdrawal" of subsidies are the same sales transactions described at paragraph 55 above.

63. According to the European Union, both sets of transactions meet the definition of "withdrawal" as interpreted by the Appellate Body in *Brazil – Aircraft (Article 21.5 – Canada)* to mean the "removal" or "taking away" of a subsidy.<sup>164</sup> Moreover, the European Union observes that, to the extent that it has already "withdraw{n}" the subsidy within the meaning of Articles 4.7 and 7.8, the Panel erred in recommending that it do so.<sup>165</sup>

(i) "Cash extractions" involving CASA and Dasa

64. The European Union argues that the benefit of any prior subsidies to CASA and Dasa existed as "enhancements" to their balance sheets, meaning that, "but for" the provision of the subsidies, these entities would have been of lesser value.<sup>166</sup> The European Union submits that the "cash extractions" from CASA and Dasa therefore had the effect of reducing the companies' values and removing any "incremental value" created by subsidies<sup>167</sup>, resulting in the withdrawal, removal, or taking away of any value that was enhanced by prior subsidies. Moreover, according to the European Union, the "withdrawn" funds were not likely to return to EADS for its LCA operations or otherwise since there

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<sup>162</sup>See European Union's appellant's submission, paras. 137-140 and 174. We describe these transactions in more detail in Section V.C of this Report.

<sup>163</sup>The European Union submits that, of the €342.4 million extracted from CASA before the contribution of the company to EADS, the Spanish Government deposited €340 million into the Spanish Treasury and provided the remaining €2.4 million to Dasa, which held a 0.71% stake in CASA. With respect to Dasa, the European Union refers to the offering memorandum accompanying the public float of EADS shares that states that all Dasa assets and liabilities save €3.133 billion in cash, and certain other assets and liabilities were contributed to EADS. (European Union's appellant's submission, paras. 175 and 176 and footnotes 179 and 180 thereto (referring to EADS' Final International Offering Memorandum (9 July 2000) (Panel Exhibit EC-24), pp. 142-143))

<sup>164</sup>European Union's appellant's submission, para. 170 (quoting Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45).

<sup>165</sup>European Union's appellant's submission, para. 171.

<sup>166</sup>European Union's appellant's submission, para. 172.

<sup>167</sup>European Union's appellant's submission, para. 173.



was a "serious disincentive" for the Spanish Government or DaimlerChrysler to reinvest the extracted funds in EADS and its LCA subsidiaries.<sup>168</sup>

65. The European Union also rejects the two reasons proffered by the Panel for concluding that the "cash extractions" did not constitute "withdrawal" of prior subsidies within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*. First, the European Union disagrees with the Panel that the "cash extraction" by the Spanish Government did not constitute a "withdrawal" since it provided "something of ... value"—specifically, a reduction in CASA's equity or its capital—for the €340 million removed from CASA.<sup>169</sup> The European Union submits that, although the removal of €340 million cash from CASA did reduce CASA's capital, the removal of this cash was reflected in CASA's balance sheet. Second, the European Union rejects the Panel's finding that the cash extracted from CASA and Dasa was not truly "withdrawn", because the Spanish Government and DaimlerChrysler, with their other partners, the French Government and Lagardère, collectively "control{led}" EADS<sup>170</sup> and therefore they did not have a disincentive to re-inject the extracted cash in EADS and LCA operations. According to the European Union, the "Contractual Partnership"<sup>171</sup> had no impact on whether cash could be considered to be permanently "withdrawn" from CASA, Dasa, or their successors, since that partnership affects the exercise of voting rights but does "*nothing whatsoever*" to reduce the economic disincentive for the Spanish Government and DaimlerChrysler against re-injection of the cash given their limited claim to EADS' earnings and net assets.<sup>172</sup>

66. Finally, with respect to the "cash extraction" from CASA, the European Union submits that the Panel's finding incorrectly suggests that a government can never "withdraw", within the meaning of Articles 4.7 and 7.8, a subsidy from a company that it owns or in which it has an interest, and that a government, having "withdrawn" a subsidy, is presumed to be about to grant a new subsidy to replace it.

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<sup>168</sup>European Union's appellant's submission, paras. 178 and 180. The European Union recalls that, following the "cash extractions", the Spanish Government and DaimlerChrysler contributed CASA and Dasa, respectively, to EADS in exchange for shares in EADS, and thereafter shared returns on earnings from operations of CASA and Dasa with all other EADS shareholders, who, through EADS, owned 80% of Airbus GIE (later Airbus SAS), as well as with BAE Systems, which owned the remaining 20% of Airbus GIE. As a result, if the Spanish Government or DaimlerChrysler had re-injected the "extracted" cash in EADS for use by Airbus GIE, the European Union posits, they would have "gifted", respectively, 96% and 76% of the cash and any associated returns to their fellow shareholders. The European Union explains that diluting the Spanish Government's 5.5% stake in EADS by EADS' 80% stake in Airbus SAS results in a 4.4% stake in Airbus SAS. The European Union explains that diluting DaimlerChrysler's 30% stake in EADS by EADS' 80% stake in Airbus SAS results in a 24% stake in Airbus SAS. (*Ibid.*, footnotes 182 and 183 to para. 180)

<sup>169</sup>European Union's appellant's submission, para. 183.

<sup>170</sup>European Union's appellant's submission, para. 185 (referring to Panel Report, paras. 7.283, 7.285, and footnote 2218 to para. 7.275).

<sup>171</sup>See para. 581 and footnotes 1397 and 1398 thereto of this Report.

<sup>172</sup>European Union's appellant's submission, paras. 186 and 189. (original emphasis)

(ii) *Sales transactions*

67. The European Union submits that, although it made relevant arguments before the Panel, the Panel failed to make any findings that the sales transactions resulted in the "withdrawal" of subsidies within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*<sup>173</sup> thereby committing "legal error" under these provisions. The European Union recalls its arguments that privatization, whether partial or full, of a subsidized company at arm's length and for fair market value results in the seller retaining the benefit of the subsidy.<sup>174</sup> In such a situation, the buyer must earn a return on an investment made at fair market value rather than the subsidized value, and does not retain any of the benefit from prior subsidies. With the benefit of a subsidy remaining with the seller, that subsidy is "removed" or "taken away" from the recipient, and is therefore "withdrawn" within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*.

68. Moreover, the European Union alleges that the Panel should have found that the sales transactions were conducted at arm's length and for fair market value and therefore "withdrew" prior subsidies from the recipient entity. First, they were at "fair market value" since they occurred on the stock exchange, which "by definition" constitutes a market, or were based on valuations by independent investment banks.<sup>175</sup> Second, the transactions were conducted at "arm's length", in the sense that the parties were independent, acted in their own interests, were not in control of each other, and had roughly equal bargaining power.<sup>176</sup>

(d) Whether the Panel violated Article 11 of the DSU

69. The European Union submits that, in addition to the aforementioned errors, the Panel committed five further errors, under Article 11 of the DSU, when it made factual findings involving the alleged "cash extractions" and sales transactions at issue.

70. First, the European Union recalls the Panel's finding that the Spanish Government "provided something of equal value" for the €340 million extracted from CASA—namely a reduction in the equity or capital of CASA. Given that it is "obvious{ }" that the removal of cash from a company will

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<sup>173</sup>European Union's appellant's submission, para. 192 (referring to European Communities' first written submission to the Panel, paras. 284-288; European Communities' response to Panel Question 123, paras. 385, 391, and 392; European Communities' response to Panel Question 222, paras. 557-559; European Communities' comments on the United States' responses to Panel Question 168, para. 318 and Panel Question 222, paras. 392-394 and 402).

<sup>174</sup>European Union's appellant's submission, para. 194 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 126).

<sup>175</sup>European Union's appellant's submission, para. 195. See also paras. 131-146.

<sup>176</sup>European Union's appellant's submission, para. 196 (referring to Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.134).

reduce that company's capital, the European Union considers that the Panel acted inconsistently with Article 11 by failing to provide a "reasoned and adequate" explanation as to why the extracted cash was not considered "withdrawn" from CASA for purposes of Articles 4.7 and 7.8 of the *SCM Agreement*.<sup>177</sup>

71. Second, the European Union considers that the Panel violated Article 11 of the DSU because (i) it failed to provide a "reasoned and adequate" explanation and (ii) lacked a sufficient evidentiary basis for its finding that an agreement to pool the *voting* rights among contracting partners augmented DaimlerChrysler's and the Spanish Government's claims to earnings on any cash re-injected in EADS and its LCA operations, such that they had no disincentive to reinvest the extracted cash and therefore had not "withdrawn" prior subsidies.<sup>178</sup>

72. Third, the European Union raises an Article 11 claim regarding the Panel's finding that the Spanish Government's "cash extraction" from CASA did not constitute "withdrawal" of prior subsidies because it lacks coherence and is "internally inconsistent"<sup>179</sup> with findings elsewhere in its Report that the French Government's capital contributions, including the contribution of its 45.76% stake in a company, Dassault, to its wholly owned LCA manufacturer, Aérospatiale, qualifies as a "financial contribution".<sup>180</sup> According to the European Union, the positions are "internally inconsistent", since the Panel's logic suggests that the provision of money to a state-owned entity by a government shareholder could qualify as a "financial contribution", whereas the removal of money from a state-owned entity also by a government shareholder would not qualify as a "withdrawal" of those payments.

73. Fourth, the European Union argues that the Panel's failure to address its arguments that the sales transactions constituted "withdrawals" of subsidies within the meaning of Articles 4.7 and 7.8

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<sup>177</sup>European Union's appellant's submission, para. 273. For its "reasoned and adequate" explanation standard, the European Union relies on Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 618 to para. 293.

<sup>178</sup>European Union's appellant's submission, para. 275. For its "reasoned and adequate" explanation standard, the European Union relies on Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 293 and footnote 618 thereto. See also Appellate Body Report, *EC – Hormones*, para. 133.

<sup>179</sup>For its contention that two positions adopted by a panel that are "internally inconsistent" constitute error under Article 11 of the DSU, the European Union relies on Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292.

<sup>180</sup>European Union's appellant's submission, para. 276 (referring to Panel Report, paras. 7.1400-7.1403).

constitutes a denial of its claim, and that the Panel acted inconsistently with Article 11 by failing to provide a "reasoned and adequate" explanation of that denial.<sup>181</sup>

74. Finally, the European Union submits that the Panel's finding that the European Communities "did not argue"<sup>182</sup> that the sales transactions at issue were at arm's length is inconsistent with Article 11 because it is incorrect and ignores the fact that the European Union did make these arguments and provided supporting evidence. Further, the European Union submits that the Panel's finding that, other than the stock exchange sales, none of the transactions were at arm's length<sup>183</sup>, is also inconsistent with Article 11 of the DSU because the Panel provided no "reasoned and adequate" explanation for such a finding<sup>184</sup>, which "enjoys *no* basis" on the panel record.<sup>185</sup>

- (e) Whether the Panel erred by finding that there was no requirement to conduct a "pass-through" analysis

75. The European Union argues that the Panel's finding that there was no requirement to conduct a "pass-through" analysis between past subsidy recipients and current Airbus LCA producers was premised on an erroneous interpretation and application of the requirement to demonstrate a "continuing benefit" that is based on Articles 1, 5, and 6 of the *SCM Agreement*. In the European Union's view, contrary to the Panel's finding, a "pass-through" analysis is equally applicable to Part V as to Part III of the *SCM Agreement* given the common definition of subsidy in Article 1 of the *SCM Agreement*.

76. The European Union refers to the finding of the Appellate Body in *Canada – Aircraft* that a benefit arises only if a person (natural or legal) or a group of persons has in fact received something.<sup>186</sup> This suggests that the United States had the burden of proving that alleged subsidies to recipients other than the current producer of LCA, Airbus SAS, currently benefit Airbus SAS, since the adverse effects under Articles 5 and 6 of the *SCM Agreement* are defined as a particular type of competitive harm that is the "effect of the subsidy" and are transmitted through a recipient company's

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<sup>181</sup>European Union's appellant's submission, para. 278 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 338; and Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 288, 292, footnote 618 to 293, and 294).

<sup>182</sup>European Union's appellant's submission, para. 279 (referring to Panel Report, para. 7.249).

<sup>183</sup>European Union's appellant's submission, para. 281 (referring to Panel Report, footnote 2175 to para. 7.249).

<sup>184</sup>European Union's appellant's submission, para. 281 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 338; and Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 288, 292, footnote 618 to 293, and 294).

<sup>185</sup>European Union's appellant's submission, para. 281 (referring to Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; and Appellate Body Report, *EC – Hormones*, paras. 132 and 133). (original emphasis)

<sup>186</sup>European Union's appellant's submission, para. 271 (referring to Appellate Body Report, *Canada – Aircraft*, para. 154).

products. The European Union recalls that, in *US – Upland Cotton*, the Appellate Body found that a prerequisite to a finding of causation is that the challenged subsidy does in fact benefit the subsidized product.<sup>187</sup> For these reasons, the European Union argues, the United States was required to establish that the alleged subsidies are provided or "passed through" to Airbus SAS as the entity presently developing, producing, and selling LCA.

(f) Conclusion

77. In conclusion, the European Union requests the Appellate Body to reverse the findings of the Panel relating to "pass-through", "extinction", and "extraction" and "withdrawal" of subsidies. Moreover, as a consequence of the Appellate Body reversing the Panel's finding that Article 5 of the *SCM Agreement* does not require an additional demonstration that all or part of the "benefit" found to have been conferred by the provision of a financial contribution continues to exist or presently exists, the European Union requests a reversal of the Panel's analysis of the causal link between the alleged subsidies and present adverse effects.<sup>188</sup> In the European Union's view, the Panel should have taken into account, *inter alia*, the passage of time in order to examine whether past subsidies were still capable of causing present adverse effects by, for instance, applying amortization rules.<sup>189</sup> The European Union also requests reversal of the Panel's recommendation that the European Union "withdraw the subsidy" and "remove the adverse effects or ... withdraw the subsidy", under Articles 4.7 and 7.8 of the *SCM Agreement*, to the extent that the European Union has already done so.<sup>190</sup>

4. The 1992 Agreement

78. The European Union requests the Appellate Body to reverse the Panel's finding that Article 4 of the 1992 Agreement is not relevant to an interpretation of "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement*. The European Union argues that, contrary to the Panel's finding, Article 4 of 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*, and should be taken into account in determining whether a "benefit" was conferred through the provision of post-1992 LA/MSF for the development of Airbus models A330-200, A340-500/600, and A380.<sup>191</sup>

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<sup>187</sup>European Union's appellant's submission, para. 271 (referring to Appellate Body Report, *US – Upland Cotton*, para. 472).

<sup>188</sup>The European Union refers to the Panel's findings on adverse effects in section F of its Report, and in particular in paragraphs 7.1949, 7.1961, 7.1966-7.1968, 7.1973, 7.1976, and 7.1984.

<sup>189</sup>European Union's appellant's submission, para. 285 and footnote 283 thereto.

<sup>190</sup>European Union's appellant's submission, para. 286.

<sup>191</sup>European Union's appellant's submission, para. 701.

Alternatively, the European Union submits that the Panel should have taken into account the existence and operation of Article 4 of the 1992 Agreement as part of the facts establishing the relevant market benchmark at the time LA/MSF was granted.

79. As a result of the Panel's error, the European Union requests the Appellate Body to reverse the Panel's finding that Article 4 of the 1992 Agreement does not provide the proper benchmark for assessing whether post-1992 LA/MSF confers a benefit under Article 1.1(b) of the *SCM Agreement*<sup>192</sup>, to complete the analysis<sup>193</sup>, and to find that post-1992 LA/MSF did not confer any "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement*. Moreover, the European Union requests the Appellate Body to "declare moot and with no legal effect" the paragraphs of the Panel Report in which the Panel examined any of those post-1992 LA/MSF measures in its analysis under Articles 1 and 2 of the *SCM Agreement*<sup>194</sup> and to reverse its findings that such measures constitute prohibited subsidies and actionable subsidies causing adverse effects.<sup>195</sup>

(a) The meaning of Article 31(3)(c) of the *Vienna Convention*

80. The European Union submits that an examination of the text, context, and object and purpose of Article 31(3)(c) of the *Vienna Convention*, as well as the practice of the WTO dispute settlement bodies, confirms its view that 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>196</sup> The European Union argues for an interpretation of "the parties" to mean only to "the parties to the dispute", and not all of "the parties to the treaty being interpreted". According to the European Union, the text of Article 31(3)(c) of the *Vienna Convention* is "neutral" as between these two notions, and the definition of "party" in Article 2(1)(g) of the *Vienna Convention* ("a State which has consented to be bound by a treaty and for which the treaty is in force") could "apply equally" to

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<sup>192</sup>European Union's appellant's submission, para. 734 (referring to Panel Report, para. 7.389).

<sup>193</sup>The European Union notes that there are no relevant factual findings by the Panel as to whether the post-1992 LA/MSF provided for the A330-200, the A340-500/600, and the A380 is in compliance with the provisions of Article 4 of the 1992 Agreement. However, the European Union argues that it had demonstrated in the course of the Panel's proceedings that the LA/MSF in question was provided in conformity with the terms and conditions stipulated in Article 4 of the 1992 Agreement. (European Union's appellant's submission, para. 734 (referring to European Communities' first written submission to the Panel, paras. 405-441)) The European Union claims that the United States did not contest this. For these reasons, the European Union argues, the Appellate Body may complete the analysis based on the uncontested facts as provided by the European Union. (*Ibid.*, para. 734)

<sup>194</sup>European Union's appellant's submission, para. 734 and footnote 911 thereto (referring to Panel Report, paras. 7.365-7.497).

<sup>195</sup>European Union's appellant's submission, para. 734 and footnote 912 thereto (referring to Panel Report, paras. 7.689, 7.1949, 7.1993, 7.2025, 8.1(a)(i), 8(1)(a)(ii), and 8.2).

<sup>196</sup>European Union's appellant's submission, para. 701.

parties to the *SCM Agreement* as well as to the 1992 Agreement.<sup>197</sup> As a result, the European Union considers the context and object and purpose of Article 31(3)(c) to be "determinative".<sup>198</sup>

81. With respect to "context", the European Union notes that other provisions, including Article 31(2) of the *Vienna Convention*, refer to "all the parties"<sup>199</sup>, implying that, "{i}f the drafters' intention was to require that the relevant rules of international law must be applicable in the relation between 'all the parties', they would have said so explicitly".<sup>200</sup> Regarding the "object and purpose" of Article 31(3)(c), the European Union refers to the preambular provisions of the *Vienna Convention*, which "highlight the relevance of international treaties and their respect in the relationship between States, including in international disputes" and that "{i}f two States have signed an international agreement on a particular issue, the respect of that commitment in the context of an international dispute is of fundamental importance."<sup>201</sup> The European Union considers Article 31(3)(c) to be a principle of "systemic integration"<sup>202</sup> of all international agreements applicable in the parties' relations and notes that it has been applied in this way by other international courts, including the Permanent Court of Arbitration.<sup>203</sup>

82. Finally, the European Union draws attention to past panel and Appellate Body reports. The European Union notes the two "contradictory panel reports" on the interpretation of "the parties": on the one hand, the panel report in *US – Shrimp (Article 21.5 – Malaysia)* supports an interpretation of "parties to the dispute" and, on the other hand, the panel report in *EC – Approval and Marketing of Biotech Products* supports an interpretation of "the parties" as all WTO Members. The European Union observes that the panel report in *EC – Approval and Marketing of Biotech Products* has been "severely criticised" by the ILC Study Group for its "limitative" approach<sup>204</sup>, since it "makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under Article 31(3)(c) would be allowed."<sup>205</sup> Finally, the

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<sup>197</sup>European Union's appellant's submission, para. 703.

<sup>198</sup>European Union's appellant's submission, para. 703.

<sup>199</sup>European Union's appellant's submission, footnote 879 to para. 704 (referring also to Articles 15(c), 20(2), 30(3) and (4), 40(2), 54(b), 57, and 59(1) of the *Vienna Convention*).

<sup>200</sup>European Union's appellant's submission, para. 704.

<sup>201</sup>European Union's appellant's submission, para. 707.

<sup>202</sup>European Union's appellant's submission, para. 708.

<sup>203</sup>European Union's appellant's submission, footnote 880 to para. 709 (referring to Permanent Court of Arbitration, Final Award, *Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. the United Kingdom)* (2 July 2003), ILM Vol. 42 (2003), p. 1118, paras. 105-116).

<sup>204</sup>European Union's appellant's submission, para. 711 (referring to *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission at its fifty-eighth session, finalized by Martii Koskeniemi, UN Document A/CN.4/L.682 (13 April 2006), footnote 578 to para. 422).

<sup>205</sup>European Union's appellant's submission, para. 711 (referring to ILC Report on Fragmentation, *supra*, footnote 204, paras. 443-450).

European Union points to the Appellate Body reports in *EC – Poultry*, *US – Shrimp*, *US – FSC* (Article 21.5 – *EC*), and *EC – Computer Equipment*, in which the Appellate Body, through the interpretative tools in Article 31 and Article 32, used non-covered agreements to which not all WTO Members are parties to interpret WTO agreements.<sup>206</sup>

- (b) Whether Article 4 of the 1992 Agreement is relevant to interpreting the term "benefit" in Article 1.1(b) of the *SCM Agreement*

83. The European Union argues that Article 4 of the 1992 Agreement is relevant to the interpretation of "benefit" in two ways. First, the European Union refers to the concept of development "support" as well as to the two "thresholds" provided for—one setting out the ceiling of "support" in terms of the amount and the other setting out the minimum price for LA/MSF.<sup>207</sup> The European Union observes that the term "support" appears as part of the definition of subsidy in Article 1.1(a)(2) of the *SCM Agreement*, in Article XVI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and in Article 3.2 of the *Agreement on Agriculture*. Like Article 4 of the 1992 Agreement, other provisions of the *SCM Agreement* were "drafted having in mind the idea of a threshold", including footnote 1 and Article 14(d) of the *SCM Agreement* and paragraphs (g), (h), (i), and (k) of the Illustrative List of Export Subsidies in Annex I to the *SCM Agreement*.<sup>208</sup> On this basis, the European Union submits that the reference to "support" and the thresholds in Article 4 of the 1992 Agreement, as in other provisions of the GATT 1994, the *SCM Agreement*, and the *Agreement on Agriculture*, "speak to the existence of 'benefit' and thus to the existence of a subsidy and the obligation for the government conduct (i.e., not to exceed such a ceiling when providing development support)."<sup>209</sup>

84. Second, the European Union argues that the 1992 Agreement is the "understood benchmark" that serves to inform the benefit analysis under Article 1.1(b) of the *SCM Agreement*. The European Union notes that a subsidy has to be established on the basis of market conditions existing at the time the subsidy was granted.<sup>210</sup> The European Union submits that, as at the time "development

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<sup>206</sup>European Union's appellant's submission, paras. 713-717.

<sup>207</sup>In particular, the European Union notes that Article 4 concerns "development support" provided by governments. Such support is subject to two thresholds: one in terms of the amount (government support "shall not exceed" 33% of development costs), and the other in terms of price (the amount of royalty payments are set at an interest rate "no less than" the cost of borrowing to government). The European Union explains that Article 4.2(a) covers the part of development support equivalent to 25% of 33% of eligible costs and that, pursuant to Article 4.2(b), the remaining 8% has to be repaid at a rate of government borrowing cost plus 1%. The European Union notes that this means that, in order to respect the minimum conditions of the 1992 Agreement, European Union member States had to charge an interest rate of government borrowing rate plus 0.2424%. (European Union's appellant's submission, para. 720 and footnote 897 thereto)

<sup>208</sup>European Union's appellant's submission, para. 722.

<sup>209</sup>European Union's appellant's submission, para. 723.

<sup>210</sup>European Union's appellant's submission, para. 725.



support" was granted with respect to the A330-200, A340-500/600 and A380, "the United States had agreed that (1) the European Union and its Member States could rely on the 1992 Agreement to define the terms and conditions for the {LA/}MSF in question at the time it was granted; and that (2) the terms and conditions mentioned in the 1992 Agreement were legitimately 'available' to Airbus 'in the market'."<sup>211</sup> In the European Union's view, the United States attempts to have "two bites of the cherry", since, by signing the 1992 Agreement, it gave the European Union assurances that funding in accordance with the 1992 Agreement would allow it to comply with its international obligations, but then several years later it withdrew from the 1992 Agreement and claimed that the market benchmark should be something different.

- (c) Whether Article 4 of the 1992 Agreement is a relevant fact to establish the market benchmark

85. The European Union argues, in the alternative, that "the Panel should have taken into account the existence and operation of Article 4 of the *1992 Agreement* as part of the facts to establish the relevant market benchmark at the time {LA/}MSF was granted."<sup>212</sup> The European Union asserts that benefit does not exist in the abstract: it requires that the beneficiary be made better off by the financial contribution, compared with what it could obtain or what was available on the market. The European Union refers to the panel and Appellate Body reports in *US – Softwood Lumber IV*, which state that "{t}he text of Article 14(d) {of the} SCM Agreement does not qualify in any way the 'market' conditions which are to be used as the benchmark ... . As such, the text does not explicitly refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'."<sup>213</sup> Accordingly, the European Union submits, the existence of a benefit requires an examination of the specific market conditions existing at the time the financial contribution is granted. Since the 1992 Agreement is part of the "specific market conditions existing at the time the financial contribution is granted", it should be examined in determining the existence of benefit.<sup>214</sup>

## 5. LA/MSF Benefit Benchmark

- (a) Whether the Panel erred in finding that the LA/MSF measures confer a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*

86. The European Union submits that, to the extent that the Appellate Body disagrees with the European Union's appeal based on the 1992 Agreement, and in any event with respect to pre-1992

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<sup>211</sup>European Union's appellant's submission, para. 726.

<sup>212</sup>European Union's appellant's submission, para. 730.

<sup>213</sup>European Union's appellant's submission, para. 731 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 87, in turn quoting Panel Report, *US – Softwood Lumber IV*, paras. 7.50 and 7.51).

<sup>214</sup>European Union's appellant's submission, para. 731.

LA/MSF measures<sup>215</sup>, the Appellate Body should reverse the Panel's findings regarding the levels of the project-specific risk premium that formed part of the Panel's benchmark for LA/MSF for each of the aircraft projects at issue.<sup>216</sup> The European Union does not, however, request a reversal of the Panel's finding that the LA/MSF loans at issue confer a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*, with the exception of the French LA/MSF provided for the A330-200.<sup>217</sup>

(i) *Errors of application of the law to the facts of the case*

87. The European Union recalls that, before the Panel, the United States and the European Communities agreed that the assessment of any subsidy arising from the LA/MSF measures should be based on the difference, if any, between the member State's expected rate of return and the expected return a private investor would demand for a loan on similar terms (that is, the benchmark rate).<sup>218</sup> Moreover, it notes that the participants proposed benchmark rates against which to assess whether the returns expected by the member States reflected market rates. The benchmark rates proposed by both the United States and the European Communities for each of the projects consisted of three elements: the first was a "risk-free" rate equal to the yield on 10-year government bonds at the time each LA/MSF loan was agreed to by the respective member State; the second was a "general corporate risk" premium at the time of the LA/MSF loan agreement to capture the risk of default by the borrower (derived from the yields on 10-year bonds issued by BAE and Aérospatiale); and the third was a premium to capture project risk.<sup>219</sup> The United States and the European Communities each proposed a different project-specific risk premium. The project-specific risk premium proposed by the United States was derived by Dr. David M. Ellis from a 2004 empirical study of venture capital investments undertaken by Kerins, Smith, and Smith (the "KSS Study").<sup>220</sup> The European Communities contested the project-specific risk premium calculated by Dr. Ellis and proposed instead a project-specific risk premium derived by Professor Robert Whitelaw from the rates of return of a sample of risk-sharing suppliers that participated in the A380 project. The

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<sup>215</sup>Including LA/MSF provided for the A300, A310, and A320. (See Panel Report, footnote 2248 to para. 7.290)

<sup>216</sup>European Union's appellant's submission, para. 735 (referring to Panel Report, paras. 7.469, 7.480, 7.481, 7.483-7.488, 7.490, and 8.1(a)(i)).

<sup>217</sup>European Union's appellant's submission, footnote 915 to para. 735 (referring to Panel Report, paras. 7.489, 7.490, and 8.1(a)(i)). The European Union notes that the alleged errors could inappropriately increase its implementation burden.

<sup>218</sup>European Union's appellant's submission, para. 739 (referring to Panel Report, para. 7.434).

<sup>219</sup>European Union's appellant's submission, para. 739 (referring to Panel Report, paras. 7.432 and 7.433).

<sup>220</sup>Panel Report, para. 7.437 (referring to Kerins, Smith, and Smith, "Opportunity Cost of Capital for Venture Capital Investors and Entrepreneurs" (June 2004) 39(2) *Journal of Financial and Quantitative Analysis* 385 (Panel Exhibit US-470)). See also European Union's appellant's submission, para. 741.

European Union describes its disagreement with the United States as limited to the amount of specific risk premium.

88. The European Union acknowledges that it "agreed with the United States that ... it would be appropriate to apply a constant project-specific risk premium" to all LA/MSF measures.<sup>221</sup> The European Union states that it does not appeal the Panel's conclusion that the project-specific risk premium should vary from project to project. The European Union argues, however, that, although the Panel found that the project-specific risk premium should vary from product to product, "rather than examining the nature and circumstances surrounding each project, the Panel lump{ed} some projects together despite relevant distinctions between them".<sup>222</sup> Specifically, the European Union asserts that the Panel "considered jointly, and made findings collectively, for (i) the A300 and the A310 projects, and (ii) the A320, A330/A340, A330-200 and A340-500/600 projects".<sup>223</sup>

89. The European Union also maintains that the Panel did not take into account some of the factors that it found affected the level of project risk, including changes in the "conditions of competition in the aircraft industry" and changes in "the level of risk that the finance industry is willing to accept at different moments of its own economic cycle".<sup>224</sup> In spite of having identified these factors, the Panel did not actually apply them and could not have done so due to a lack of evidence. The European Union argues that "the absence of evidence from the Panel's record is no excuse for the Panel's failure to apply the very factors it had set out itself for determining the applicable project-specific risk premium."<sup>225</sup> Referring to the Appellate Body report in *US – Continued Zeroing*, the European Union asserts that the Panel could and should have asked the parties for evidence necessary to develop and apply the standard the Panel itself had chosen to determine project-specific risk premia for each Airbus LCA project.<sup>226</sup>

90. The European Union claims that the Panel additionally erred in the application of the two factors that it did consider, because it failed to apply them to each of the aircraft projects at issue. Instead, the Panel only applied the "relative experience" factor to the A300 and A310 and the "level of technology" factor to the A380.<sup>227</sup> The European Union notes that the Panel's failure is particularly glaring given that, in the assessment of the effect of the LA/MSF on launch decisions, "the Panel

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<sup>221</sup>European Union's appellant's submission, para. 740.

<sup>222</sup>European Union's appellant's submission, para. 760 (referring to Panel Report, paras. 7.468 and 7.481).

<sup>223</sup>European Union's appellant's submission, para. 760.

<sup>224</sup>European Union's appellant's submission, para. 761.

<sup>225</sup>European Union's appellant's submission, para. 761.

<sup>226</sup>European Union's appellant's submission, para. 761 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 347).

<sup>227</sup>European Union's appellant's submission, para. 763.

relied heavily on findings that each successive launch built on Airbus' experience gained in previous launches".<sup>228</sup>

91. Moreover, the European Union challenges the Panel's finding that the United States' project-specific risk premium would be the "*minimum* project-specific risk premium" for both the A300 and A310 projects.<sup>229</sup> The Panel justified its finding on the basis that "Airbus was in its early stages of existence" when it launched these two projects.<sup>230</sup> However, the European Union faults the Panel for failing to consider that the associated manufacturers that formed Airbus themselves had a wealth of experience in the aerospace industry. Despite recognizing elsewhere in the Panel Report that a derivative LCA poses less risk and costs less to develop, the Panel failed to take this into account in its project-specific risk premium analysis.<sup>231</sup> The European Union notes that, in grouping the A300 and A310 together, the Panel ignored its technological complexity criterion, "as the A310 builds on the A300 and, as an essentially derivative aircraft, should exhibit much *lower* technological risk."<sup>232</sup>

92. The European Union notes that the Panel made collective findings regarding a group of diverse aircraft projects, namely the A320, A330/A340, A330-200, and A340-500/600. The European Union submits that, in grouping these diverse LCA projects, "the Panel did not apply *any* of the factors composing its standard."<sup>233</sup> The European Union contends that the Panel erred by considering that the rejection of a constant project-specific risk premium could only result in increasing the benchmark above proposed by the European Communities, even where the Panel found that a particular LCA project involved lower relative risk than the LCA project that served as a basis for the European Communities' proposed benchmark. In this regard, the A330-200 and A340-500/600 were derivative aircraft, and the Panel's reasoning and financial theory support the proposition that the project-specific risk premium applicable to the A330-200 and A340-500/600 projects should be lower than the premium applicable to the A380 project.<sup>234</sup> The European Union adds that the Panel itself implied that risk-sharing suppliers would demand a lower rate of return and project-specific risk premium for their participation in a derivative aircraft project than for their

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<sup>228</sup>European Union's appellant's submission, para. 763 (referring to Panel Report, paras. 7.1932-7.1949).

<sup>229</sup>European Union's appellant's submission, para. 765 (quoting Panel Report, paras. 7.469, 7.481, and 7.487 (original emphasis)); see also para. 770.

<sup>230</sup>European Union's appellant's submission, para. 765.

<sup>231</sup>European Union's appellant's submission, para. 765 (referring to Panel Report, footnote 5657 to para. 7.1940 and footnote 5208 to para. 7.1726).

<sup>232</sup>European Union's appellant's submission, para. 765 (original emphasis) (referring to Panel Report, para. 7.1622).

<sup>233</sup>European Union's appellant's submission, para. 766. (original emphasis)

<sup>234</sup>European Union's appellant's submission, para. 768 (referring to Panel Report, para. 7.1947).

participation in the A380 project on which the European Communities' proposed project-specific risk premium was based.<sup>235</sup>

93. Regarding the assessment of the A380, the European Union challenges the Panel's finding that "'the United States' project-specific risk premium could be reasonably accepted to represent the *outer limit* of the risk premium that a market lender would ask Airbus to pay', and that the A380 project-specific risk premium lies 'in the range above those submitted by the European Communities and up to the values advanced by the United States'."<sup>236</sup> The Panel justified this finding solely on "the acknowledged technological challenges associated with the A380 project".<sup>237</sup> The European Union claims that, even assuming that the Panel was not referring to *ex post* realized risks that caused delays in A380 deliveries, but was instead referring to some *ex ante* increased risk encountered by Airbus<sup>238</sup>, the Panel failed to take account of the significantly enhanced technological experience that Airbus had built up over 30 years of "successful LCA development", which would appear to counterbalance "the acknowledged technological challenges" of the A380.<sup>239</sup>

94. In addition, the European Union alleges that the Panel's ultimate reliance on the United States' proposed risk premium with respect to the A300, A310, and A380 constitutes error under Article 1.1(b) of the *SCM Agreement*. The Panel found that the United States' project-specific risk premium constituted the "*minimum* project-specific risk premium"<sup>240</sup> for the A300 and A310 and the "*outer limit* of the risk premium"<sup>241</sup> for the A380 even though the Panel had rejected the United States' project-specific risk premium on the basis that "venture capital financing is inherently more risky than LA/MSF, even when considered in the form of a portfolio"<sup>242</sup>, that it included equity elements in a debt benchmark, that it was inappropriately based on venture capital returns that also cover fees for a fund manager, and that it was not supported by any of the United States' "cross-checks".<sup>243</sup> In the European Union's view, the Panel erred when it relied on a benchmark that is "inherently more risky" than LA/MSF for these LCA projects.<sup>244</sup>

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<sup>235</sup>European Union's appellant's submission, para. 768 (referring to Panel Report, para. 7.1947).

<sup>236</sup>European Union's appellant's submission, para. 770 (original emphasis) (quoting Panel Report, paras. 7.469, 7.481, and 7.487).

<sup>237</sup>European Union's appellant's submission, para. 770 (quoting Panel Report, para. 7.469).

<sup>238</sup>European Union's appellant's submission, para. 770 (referring to Panel Report, para. 7.1927).

<sup>239</sup>European Union's appellant's submission, para. 770 (referring to Panel Report, para. 7.463).

<sup>240</sup>European Union's appellant's submission, para. 771 (quoting Panel Report, para. 7.469 (original emphasis) and referring to paras. 7.481 and 7.483).

<sup>241</sup>European Union's appellant's submission, para. 771 (quoting Panel Report, para. 7.469 (original emphasis) and referring to para. 7.485).

<sup>242</sup>European Union's appellant's submission, para. 771 (quoting Panel Report, para. 7.464).

<sup>243</sup>European Union's appellant's submission, para. 771.

<sup>244</sup>European Union's appellant's submission, para. 772 (referring to Panel Report, para. 7.464 (original emphasis omitted)).

(ii) *Whether the Panel erred under Article 11 of the DSU*

95. The European Union submits that, in its assessment of benefit, the Panel failed to provide a reasoned and adequate explanation for its findings, was incoherent in its reasoning<sup>245</sup>, and failed to request the information it considered necessary for its assessment of the European Communities' argument. Accordingly, the European Union considers that these findings constitute reversible legal error under Article 11 of the DSU.

96. The European Union explains that, given the absence of directly applicable arguments and evidence from the parties regarding the relative risk of the various aircraft projects at issue, the Panel's findings cannot, by definition, constitute an "objective assessment of the facts".<sup>246</sup> According to the European Union, the Panel's findings lacked the required basis in positive evidence on the record.<sup>247</sup>

97. The European Union also points out that, although the Panel found that the project-specific risk premium should be determined specifically for each product, the Panel disregarded the relevance of its own finding and joined together the A300 and A310 projects and the A320, A330/A340, A330-200, and A340-500/600 projects for purposes of assessing the relative level of the applicable project-specific risk premium. The European Union submits that, in proceeding in this manner, the Panel failed to provide a reasoned and adequate explanation for grouping these projects together and that these failures also resulted in incoherent reasoning, in violation of Article 11 of the DSU.

98. The European Union asserts that, in making findings for these two project groupings and the A380, the Panel ignored most of the factors it identified for assessing the appropriate project-specific risk premium. Specifically, the Panel did not assess the impact of changes in two factors that it identified, namely "conditions of competition in the aircraft industry" and changes in "the level of risk that the finance industry is willing to accept at different moments of its own economic cycle".<sup>248</sup> Thus, the Panel failed to provide a reasoned and adequate explanation of the impact on the appropriate project-specific risk premium of each of the factors it had determined to be relevant. The European Union also claims that for the one factor used for the A380—the level of technology—the Panel did not explain why it automatically considered the A380 a more risky project, highlighting that

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<sup>245</sup>European Union's appellant's submission, para. 777.

<sup>246</sup>European Union's appellant's submission, para. 778 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 347).

<sup>247</sup>European Union's appellant's submission, para. 778 (referring to Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; and Appellate Body Report, *EC – Hormones*, paras. 132 and 133).

<sup>248</sup>European Union's appellant's submission, paras. 783 and 784 (referring to Panel Report, paras. 7.463 and 7.469).

the Panel failed to assess the totality of the evidence relating to both the "level of technology" and the "relative experience" factors.<sup>249</sup>

99. The European Union submits that the Panel's findings regarding the applicable project risk for the A300, A310, and A380 are inconsistent with other findings made by the Panel, resulting in incoherent and inconsistent reasoning. The Panel concluded that the benchmark proffered by the United States was the minimum return a market investor would demand for the A300 and A310 and the maximum return a market investor would demand in relation to the A380, but that, "only a few paragraphs before, the Panel had accepted essentially every argument by the European {Communities} that the United States' project-specific risk premium, based on venture capital returns was overstated".<sup>250</sup> For these reasons, the European Union argues that the Panel failed to comply with its duties under Article 11 of the DSU.

(b) The Panel's criticisms of the European Communities' benchmark

100. The European Union appeals the Panel's conclusion that "the European Communities' project-specific risk premium for the A380 is unreliable and understates the risk premium that a market operator would have reasonably demanded Airbus pay for financing on the same or similar terms as LA/MSF for this particular model of LCA."<sup>251</sup> As noted above, the European Communities put forward a project-specific risk premium derived by Professor Whitelaw from the rates of return of a sample of risk-sharing suppliers participating in the A380 project. The European Union challenges each of the reasons provided by the Panel to support its conclusion, namely the Panel's findings that: (i) it had "no way of verifying" Professor Whitelaw's assertion that the contracts used in the sample of risk-sharing suppliers amounted to 100% of those for which an internal rate of return could be calculated, "because the European Communities has submitted little if any of the underlying data used in Professor Whitelaw's calculations" and the size of the risk-sharing supplier sample was "clearly insufficient"; (ii) "the one contract that the European Communities has submitted shows that there is at least one major difference between the repayment terms under the contract and LA/MSF which we believe reduces its relative level of risk"; (iii) there is "logical merit to the United States' arguments suggesting that risk-sharing suppliers had incentive to lower their expected rates of return"; (iv) the Panel "agree{d} with the view expressed by Brazil and the United States" that {LA/MSF} to Airbus lowers the risk to risk-sharing suppliers; and (v) there is information that "suggests that {the} risk-

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<sup>249</sup>European Union's appellant's submission, para. 785 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 336; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 150; Appellate Body Report, *Japan – DRAMs (Korea)*, para. 139; and Appellate Body Report, *Korea – Dairy*, para. 137).

<sup>250</sup>European Union's appellant's submission, para. 786 (referring to Panel Report, paras. 7.461-7.467).

<sup>251</sup>European Union's appellant's submission, para. 791 (quoting Panel Report, para. 7.481).

sharing participants' involvement in the A380 project may not have been on strictly market terms for all participants".<sup>252</sup>

101. The European Union asserts that each of these criticisms is inconsistent with the Panel's obligations under Article 11 of the DSU to make an objective assessment of the facts because, in certain instances, there is no evidentiary basis for the finding; the Panel failed to assess the totality of the evidence; the Panel failed to request the information it considered necessary for its assessment of the European Communities' argument; and the Panel failed to provide a reasoned and adequate explanation for its findings. The European Union also claims that some of the Panel's criticisms amount to an error in the interpretation and application of Article 1.1(b) of the *SCM Agreement*.<sup>253</sup>

102. The European Union challenges, under Article 11 of the DSU, the Panel's findings that it could not verify that the contracts used by Professor Whitelaw amounted to 100% of those for which an "internal rate of return" could be calculated and that the size of the risk-sharing supplier sample was "clearly insufficient".<sup>254</sup> The Panel failed to ask for evidence that it considered necessary<sup>255</sup>, even though the United States had raised the issue of the European Communities providing summary data and a sample contract prior to the Panel posing three sets of questions to the parties.<sup>256</sup> Moreover, the Panel did not consider the totality of the evidence before it when finding that the size of the risk-sharing supplier sample was clearly insufficient.<sup>257</sup> The European Union additionally claims that the Panel failed to provide a reasoned and adequate explanation for its finding, because the Panel made a one-sentence summary finding without any explanation regarding its reasoning or its criteria for determining the adequacy of the sample size, even though the parties had submitted hundreds of pages of argument with accompanying evidence.<sup>258</sup>

103. Regarding the Panel's finding that "the one contract that the European Communities has submitted shows that there is at least one major difference between the repayment terms under this contract and LA/MSF, which we believe reduces its relative level of risk"<sup>259</sup>, the European Union

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<sup>252</sup>European Union's appellant's submission, para. 792 (quoting Panel Report, para. 7.480).

<sup>253</sup>European Union's appellant's submission, para. 793.

<sup>254</sup>European Union's appellant's submission, para. 794 (quoting Panel Report, para. 7.480).

<sup>255</sup>European Union's appellant's submission, para. 795 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 347).

<sup>256</sup>European Union's appellant's submission, para. 796 (referring to United States' oral statement at the first Panel meeting (BCI), para. 22).

<sup>257</sup>European Union's appellant's submission, para. 798 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 336; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 150; Appellate Body Report, *Japan – DRAMS (Korea)*, para. 139; and Appellate Body Report, *Korea – Dairy*, para. 137).

<sup>258</sup>European Union's appellant's submission, para. 799 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 338).

<sup>259</sup>European Union's appellant's submission, para. 801 (quoting Panel Report, para. 7.480).



asserts that the Panel failed to provide a reasoned and adequate explanation for this finding.<sup>260</sup> The European Union observes that the Panel made this one-sentence summary finding without any analysis of the parties' arguments regarding the European Communities' benchmark, including Professor Whitelaw's expert testimony addressing this specific issue.

104. The European Union argues that the Panel also erred under Article 11 of the DSU in finding that there is "logical merit to the United States' argument suggesting that the risk-sharing suppliers had incentives to lower their expected rates of return".<sup>261</sup> The Panel's one-sentence conclusion lacked any assessment or analysis of the arguments and contrary evidence submitted by the European Communities and failed to provide a reasoned and adequate explanation in the light of the evidence before it.<sup>262</sup> The European Union also claims that the Panel erred in the interpretation and application of Article 1.1(b) of the *SCM Agreement* by reasoning that the actions of a market actor that has an existing business relationship with a company that is allegedly subsidized cannot serve as a benchmark because that market actor would somehow be tainted, contradicting the Appellate Body's guidance in *Japan – DRAMs (Korea)*.<sup>263</sup>

105. Furthermore, the European Union maintains that the Panel failed to assess the European Communities' arguments and contrary evidence when it found that it "agree{d} with the view expressed by Brazil and the United States" that LA/MSF to Airbus lowers the risk to risk-sharing suppliers.<sup>264</sup> The European Union contends that the Panel also erred in the interpretation and application of Article 1.1(b) of the *SCM Agreement* to the extent that the Panel considered that LA/MSF for the A380 reduced the level of risk associated with risk-sharing supplier financing. The European Union asserts that the Panel failed to take into account Professor Whitelaw's explanation that there is no reason why LA/MSF provided to Airbus for the A380 would in any way affect how the risk-sharing suppliers perceive the project's development and market risks, in particular since risk-sharing suppliers do not know whether or on what terms Airbus will receive LA/MSF loans.

106. The European Union additionally alleges that the Panel erred under Article 11 of the DSU in finding that "'there is information contained in the Airbus A380 business case which suggests that the risk-sharing participants' involvement in the A380 project may not have been on strictly market terms

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<sup>260</sup>European Union's appellant's submission, para. 807 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 338; and Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 288, 291, 292, footnote 618 to 293, and 294).

<sup>261</sup>European Union's appellant's submission, para. 809 (quoting Panel Report, para. 7.480).

<sup>262</sup>European Union's appellant's submission, para. 820 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 338).

<sup>263</sup>European Union's appellant's submission, para. 811 (referring to Appellate Body Report, *Japan – DRAMs (Korea)*, para. 172).

<sup>264</sup>European Union's appellant's submission, para. 822 (quoting Panel Report, para. 7.480).

for all participants."<sup>265</sup> The European Union argues that the Panel's one-sentence summary finding failed to provide a reasoned and adequate explanation, because the Panel failed to address or assess unrebutted evidence to the contrary offered by the European Communities.<sup>266</sup>

107. Hence, the European Union asserts that the Panel's criticisms of the European Communities' proposed benchmark constitute error under Article 11 of the DSU and demonstrate that the Panel erred in the interpretation and application of Article 1.1(b) of the *SCM Agreement* in making some of the criticisms.

(c) The relevance of sales forecasts

108. The European Union takes issue with the Panel's statement that "the number of sales over which full repayment is expected says little, if anything, about the appropriateness of the rate of return that will be achieved by the lender."<sup>267</sup> To the extent that the Appellate Body treats this as a finding made by the Panel<sup>268</sup>, the European Union requests that it be reversed because the Panel erred under Article 1.1(b) of the *SCM Agreement*.<sup>269</sup> The European Union asserts that the Panel's conclusion "flies in the face of economic logic"<sup>270</sup> and contradicts the Panel's acceptance that an unreasonable repayment forecast may signal that a loan confers a benefit.<sup>271</sup> The European Union further argues that the Panel's reasoning is contradictory to the reasoning it employed regarding other arguments concerning LA/MSF, including the Panel's conclusions that the appropriateness of the risk premium and the rate of return should be based on an individual assessment of the supposed commercial and technical risk of each model.<sup>272</sup> The European Union acknowledges, however, that the Panel's consideration of sales forecasts did not affect its benefit finding, because the Panel aimed to compare LA/MSF with loans having the same or similar conditions, including a comparable schedule of repayment.

6. Export Subsidies

109. The European Union claims that the Panel erred in finding that the LA/MSF measures granted to Airbus by the Governments of Germany, Spain, and the United Kingdom for the A380 constituted

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<sup>265</sup>European Union's appellant's submission, para. 829 (quoting Panel Report, para. 7.480).

<sup>266</sup>European Union's appellant's submission, para. 832 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 338).

<sup>267</sup>European Union's appellant's submission, para. 839 (quoting Panel Report, para. 7.397). (emphasis added by the European Union omitted)

<sup>268</sup>At the oral hearing, the European Union confirmed its view that the statement constitutes a finding.

<sup>269</sup>European Union's appellant's submission, paras. 841 and 842 (referring to Panel Report, para. 7.397).

<sup>270</sup>European Union's appellant's submission, para. 843.

<sup>271</sup>European Union's appellant's submission, para. 844 (referring to Panel Report, para. 7.397).

<sup>272</sup>European Union's appellant's submission, para. 846 (referring to Panel Report, para. 7.469).

subsidies contingent in fact upon export performance within the meaning of Article 3.1(a) and footnote 4 thereto of the *SCM Agreement*. The European Union raises four sets of grounds of appeal.

- (a) The first set of grounds of appeal: Alleged legal errors in the Panel's interpretation of the terms "contingent", "tied-to", and "actual or anticipated"

110. The European Union's first set of grounds of appeal concerns the alleged errors in the Panel's legal interpretation of the terms "contingent", "tied to", and "actual or anticipated" in Article 3.1(a) and footnote 4 of the *SCM Agreement*. The European Union alleges that the Panel erroneously interpreted these provisions by replacing the legal standard for *de facto* export contingency with a "dependent motivation" standard, whereby a subsidy is contingent in fact upon export performance if a government grants a subsidy *because of* anticipated exportation.<sup>273</sup>

- (i) *The interpretation of Article 3.1 and footnote 4*

111. The European Union maintains that Article 3.1(a) and footnote 4 constitute a single provision containing a single standard and must be interpreted together in a coherent and harmonious manner, taking into account the overall design and architecture of that provision. Thus, the legal standard for export contingency in law and export contingency in fact is the same. The European Union further maintains that "a correct interpretation and application of the provision requires adjudicators to begin with a correct understanding of the standard and evidentiary requirements in law."<sup>274</sup>

112. The European Union maintains that the term "contingent ... upon export performance" in Article 3.1(a) of the *SCM Agreement* expresses an "if A, then B" relationship with respect to both *de jure* and *de facto* export-contingent subsidies. More specifically, A is a condition that must be fulfilled in order for B to occur, and, under Article 3.1(a), A is export performance and B is a subsidy. Thus, to establish that a subsidy is contingent upon export performance, "the obligation to grant the subsidy and the right to receive it would have to be limited by the condition of export."<sup>275</sup> Therefore, "{t}his is not a standard to be equated with *motivation*"<sup>276</sup>, and "{a}n unconditional subsidy ... does not become a subsidy contingent in law upon export merely because the granting authority adds preambular language stating that the subsidy is granted *because* exports are anticipated."<sup>277</sup> The European Union further submits that a subsidy contingent upon export performance "*favours* exports

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<sup>273</sup>European Union's appellant's submission, paras. 1282 and 1336.

<sup>274</sup>European Union's appellant's submission, para. 1307.

<sup>275</sup>European Union's appellant's submission, para. 1311.

<sup>276</sup>European Union's appellant's submission, para. 1312. (original emphasis)

<sup>277</sup>European Union's appellant's submission, para. 1312. (original emphasis)

and creates an *incentive* for a company to prefer exports over domestic sales, because an export sale attracts a payment, or the right to retain funds, which a domestic sale does not."<sup>278</sup>

113. Turning to the phrase "actual or anticipated exportation" in footnote 4, the European Union argues that, as indicated by the dictionary definitions for "actual" and "anticipated"<sup>279</sup>, the term "actual exportation" means an export that exists at the moment when the measure granting a subsidy is enacted, while the term "anticipated exportation" means an export in the future. According to the European Union, "the use of the term 'or' establishes that the terms 'actual' and 'anticipated' are alternatives, the export being either in the past/present, or in the future, the two alternatives being mutually exclusive."<sup>280</sup> The European Union submits that, "when considered together, the temporal connotations in the ordinary meanings of each of the two terms 'actual' and 'anticipated' lend mutual support to each other and mutually strengthen each other, such that the overall temporal connotation of the phrase is confirmed."<sup>281</sup>

114. The European Union maintains that its interpretation of Article 3.1(a) and footnote 4 "is consistent with the object and purpose of the *SCM Agreement*".<sup>282</sup> In the European Union's view, export-contingent subsidies are prohibited "because such measures are a particularly effective method for partitioning markets, allowing Members to create an *incentive* for companies to discriminate in favour of exports, whilst avoiding that domestic prices are driven down (and avoiding unsustainable pressure on the Member's budget), thus frustrating the basic objective of the WTO {a}greements to promote fair international trade in an open global market."<sup>283</sup> The European Union submits that its interpretation of the term "actual or anticipated" is "entirely consistent with this object and purpose, because it systematically catches those subsidies that create an *incentive* for companies to *favour* exports."<sup>284</sup>

115. According to the European Union, the difference between *in law* and *in fact* export contingency is the evidence required to meet the legal standard. For *in law* export contingency, the direct evidence is the text of the measure. Moreover, in the case of an ad hoc subsidy contingent in law upon export performance, the measure "constitutes the *initial grant* of the subsidy", and the export, once it takes place, "fulfils the condition and thus *completes the grant*".<sup>285</sup> The

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<sup>278</sup>European Union's appellant's submission, para. 1318. (original emphasis)

<sup>279</sup>European Union's appellant's submission, paras. 1326 and 1327 (referring to *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, pp. 23 and 91).

<sup>280</sup>European Union's appellant's submission, para. 1328.

<sup>281</sup>European Union's appellant's submission, para. 1328.

<sup>282</sup>European Union's appellant's submission, para. 1330.

<sup>283</sup>European Union's appellant's submission, para. 1330. (original emphasis)

<sup>284</sup>European Union's appellant's submission, para. 1330. (original emphasis)

<sup>285</sup>European Union's appellant's submission, para. 1314. (original emphasis)

European Union submits that the export "generally occurs after the initial grant" and is thus an "**anticipated**" export<sup>286</sup>, although "{i}t is also possible that the export occurs *before* the initial grant" and is therefore "**actual**" export.<sup>287</sup> As soon as the initial grant exists, the measure could be subject to challenge in WTO dispute settlement proceedings regardless of whether export occurs or the timing of the subsidy payment. The European Union adds that the above description would be "unchanged in the case of subsidy programmes", such as a programme that automatically grants subsidies where the condition on export performance expressed in the programme is fulfilled.<sup>288</sup>

116. In contrast, for *in fact* export contingency, the European Union submits that "the text of the alleged measure does not demonstrate contingency ... or is not adduced".<sup>289</sup> Rather, "other indirect evidence is adduced and a complaining Member explains how all the evidenced facts, working together, demonstrate the existence and precise content of a subsidy contingent/conditional upon export."<sup>290</sup> Thus, for an "in fact" claim, "{a} panel 'must not lightly assume' the existence and precise content of an unwritten or undisclosed measure or provision", because "there is a 'high threshold' for such claims; and a panel must exercise 'particular rigour' when considering them."<sup>291</sup> Furthermore, footnote 4 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)."<sup>292</sup>

117. The European Union further argues that establishing in fact export contingency is a "much more difficult task" than establishing in law export contingency.<sup>293</sup> In the European Union's view, the task is "particularly formidable (indeed insurmountable)"<sup>294</sup> in this dispute for two reasons: (i) the present case does not involve circumvention of the discipline under Article 3.1; and (ii) the United States' claim that the subsidies at issue were contingent upon export performance "flatly *contradict{s}*" what is provided for in the LA/MSF measures, under which funds are "unconditionally" disbursed and "remain with the company even if no export ever occurs".<sup>295</sup>

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<sup>286</sup>European Union's appellant's submission, para. 1314. (original underlining and boldface)

<sup>287</sup>European Union's appellant's submission, para. 1319. (original italics, underlining, and boldface)

<sup>288</sup>European Union's appellant's submission, para. 1320.

<sup>289</sup>European Union's appellant's submission, para. 1305.

<sup>290</sup>European Union's appellant's submission, para. 1305.

<sup>291</sup>European Union's appellant's submission, para. 1308 (quoting Appellate Body Report, *US – Zeroing (EC)*, paras. 196 and 198).

<sup>292</sup>European Union's appellant's submission, para. 1332. (original emphasis)

<sup>293</sup>European Union's appellant's submission, para. 1308 (quoting Appellate Body Report, *Canada – Aircraft*, paras. 167 and 168).

<sup>294</sup>European Union's appellant's submission, para. 1308.

<sup>295</sup>European Union's appellant's submission, paras. 1309 and 1310. (original emphasis)

(ii) *The alleged double standard of "dependent motivation" imposed by the Panel*

118. The European Union alleges that, instead of interpreting Article 3.1(a) and footnote 4 as imposing the same standard for in law and in fact export contingency, the Panel made a "fundamental legal error"<sup>296</sup> by interpreting those provisions as containing a double standard of "dependent motivation"<sup>297</sup> for assessing *de facto* export contingency. Under the "dependent motivation" standard imposed by the Panel, a subsidy is contingent in fact upon export performance when a Member grants the subsidy "*because*" it anticipates export.<sup>298</sup>

119. The European Union submits that the Panel's error in imposing a "dependent motivation" standard resulted from its erroneous interpretation of the term "actual or anticipated". According to the European Union, "{t}he erroneous interpretation that underpins the US submissions and is adopted in the Panel Report assumes that the term 'actual' refers to an export that takes place **at whatever time**—that is, 'actually' has taken place in the past or 'actually' takes place in the future."<sup>299</sup> The Panel "fail{ed} to analyse the term 'actual'" but simply used the term "actually" "without any analysis, in the sense advocated by the United States".<sup>300</sup> Consequently, "the term 'anticipated export' {was} erroneously understood {by the Panel} to refer to something else, that is, to the notional state of mind of the granting authority."<sup>301</sup> The European Union argues that, contrary to the Panel's finding, the term "anticipated" is an adjective that "describes an objective characteristic of the export; it is not a verb that describes a granting authority's hypothetical and subjective state of mind."<sup>302</sup> Thus, "{b}y reasoning that the required condition is the 'anticipating of' exports the Panel {found} that the requirement of contingency ... that is at the heart of the provision can be replaced by mere 'dependent motivation', rather than the imposition by the granting Member of a requirement that the recipient export in order to obtain (or retain) the subsidy".<sup>303</sup>

120. The European Union further argues that, by imposing a "dependent motivation" standard, the Panel was forced to enquire into the alleged state of mind of natural persons whose motivation was imputed to the granting Member in order to determine whether the granting of the subsidy was "dependent" on such motivation. However, "{t}he question of whether or not measures are ...

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<sup>296</sup>European Union's appellant's submission, para. 1336.

<sup>297</sup>European Union's appellant's submission, para. 1336.

<sup>298</sup>European Union's appellant's submission, para. 1282 (quoting Panel Report, paras. 7.636, 7.644, 7.648, 7.680, 7.681, and 7.683 (original emphasis)).

<sup>299</sup>European Union's appellant's submission, para. 1325. (original underlining and boldface)

<sup>300</sup>European Union's appellant's submission, paras. 1351 and 1352 (referring to Panel Report, para. 7.633, first sentence).

<sup>301</sup>European Union's appellant's submission, para. 1325.

<sup>302</sup>European Union's appellant's submission, para. 1352.

<sup>303</sup>European Union's appellant's submission, para. 1331.

prohibited by the *SCM Agreement* does not turn on the supposed state of mind of an unspecified number of natural persons associated in some unspecified way with the grant of a subsidy."<sup>304</sup> Moreover, "{f}aced with {the} impossible task" to determine the alleged state of mind of natural persons, the Panel was also forced to examine the effects of the measure.<sup>305</sup> Consequently, the European Union maintains, the Panel also erred in introducing an effect-based approach under Article 3.1(a) and footnote 4, even though the effects of subsidies are not addressed under these provisions but are addressed under Part III of the *SCM Agreement*.

(iii) *Other alleged legal errors in the Panel's legal interpretation*

121. The European Union further alleges the following "other legal errors"<sup>306</sup> of the Panel in its interpretation of Article 3.1(a) and footnote 4. First, the European Union submits that, although the United States made claims on both in law and in fact export contingency, the Panel wrongly began its examination with the "in fact" claim. The European Union contends that, although "{p}anels do have a margin of discretion when deciding on the order of analysis, ... {such discretion} is not unfettered."<sup>307</sup> Moreover, for the European Union, "{i}t is really impossible to understand why an adjudicator faced with both in law and in fact claims referencing substantially the same evidence and arguments would not first address the in law claims."<sup>308</sup> In the European Union's view, had the Panel "begun by properly assessing the standard and evidentiary requirements in law", the Panel could have avoided imposing a different standard for assessing the "in fact" claim.<sup>309</sup>

122. Second, the European Union submits that the double standard used by the Panel led to contradictory findings with respect to the United States' "in law" claim and its "in fact" claim. More specifically, on the basis of repayment provisions in the LA/MSF contracts and relevant market forecasts, the Panel found that the granting of LA/MSF was at least in part conditional upon anticipated exportation when examining the "in fact" claims, but found that *the same evidence* did not demonstrate in law export contingency.

123. Third, the European Union maintains that, by imposing a "dependent motivation" standard when assessing the "in fact" claims, the Panel's finding discriminates against certain types of subsidies. Specifically, "the Panel's thesis necessarily implies that financial contributions that foresee

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<sup>304</sup>European Union's appellant's submission, para. 1353.

<sup>305</sup>European Union's appellant's submission, para. 1331.

<sup>306</sup>European Union's appellant's submission, heading I.D.3, "Other legal errors that are also constituent elements of the Panel's fundamental legal error", p. 529.

<sup>307</sup>European Union's appellant's submission, para. 1339.

<sup>308</sup>European Union's appellant's submission, para. 1339.

<sup>309</sup>European Union's appellant's submission, para. 1339.

a return (such as loans) are more susceptible to be found to {be contingent on export} than financial contributions in the form of outright grants."<sup>310</sup> This result is "manifestly absurd and unreasonable"<sup>311</sup>, because the prohibition on export subsidies under Article 3.1(a) applies to all types of financial contributions. The European Union also submits that, by imposing a "dependent motivation" standard and an "effect-based" test, the Panel's findings "discriminate{ } against small or export dependent economies" because "{t}he smaller the domestic market, the more likely the finding of export contingency/conditionality."<sup>312</sup>

124. Fourth, the European Union argues that the Panel's findings rendered ineffective the second sentence of footnote 4, which states that "the mere fact that a subsidy is granted to enterprises that export shall not for that reason alone be considered to be an export subsidy".<sup>313</sup> In the European Union's view, "what the second sentence of footnote 4 does is to require an adjudicator ... to further consider whether or not {a finding of export contingency} could be sustained if the fact that the beneficiary exports would be removed from the equation."<sup>314</sup> If the finding could not be sustained, "then the adjudicator must find no export subsidy, because otherwise it would be the fact of export that would alone be determining a finding of contingency/conditionality, which is what the second sentence of footnote 4 precludes."<sup>315</sup> By including the second sentence, the negotiators during the Uruguay Round "rejected" the United States' attempt to make a recipient's export orientation a decisive criterion in determining export contingency. However, the European Union argues, the Panel failed to address properly the second sentence of footnote 4, despite the European Communities' argument before the Panel that "removing the fact that Airbus exports from the equation would ... be fatal to the US claims."<sup>316</sup>

125. Finally, the European Union argues that the Panel imputed certain arguments to the European Communities that it had not made. Specifically, contrary to the Panel's finding, the European Communities did not argue that the only way to demonstrate *de facto* export contingency is by pointing to an instrument legally requiring performance of an obligation necessitating exports. Rather, it "repeatedly expressed the view that the existence of a subsidy contingent in fact upon export must be assessed on the basis of all the facts."<sup>317</sup> The European Union also argues that the Panel wrongly imputed to the European Communities an argument it did not make by accepting the

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<sup>310</sup>European Union's appellant's submission, para. 1356.

<sup>311</sup>European Union's appellant's submission, para. 1356.

<sup>312</sup>European Union's appellant's submission, para. 1359.

<sup>313</sup>European Union's appellant's submission, para. 1359.

<sup>314</sup>European Union's appellant's submission, para. 1363.

<sup>315</sup>European Union's appellant's submission, para. 1363.

<sup>316</sup>European Union's appellant's submission, para. 1370.

<sup>317</sup>European Union's appellant's submission, para. 1345.



United States' submission that, based on the European Communities' interpretation, an inconsistency only arose when an export was realized. Instead, the European Union maintains that the export contingency standard does not require export to have taken place. However, if an export-contingent subsidy "remains hidden and unused it is quite possible that no one will know about it and there will be no evidence to make a case."<sup>318</sup> Thus, "some *evidence* that might be relevant to demonstrating the existence and operation of the hidden measure may not come into existence until export occurs."<sup>319</sup>

- (b) The second set of grounds of appeal: Alleged legal errors in the Panel's application of the standard set out by the Panel

126. The European Union's second set of grounds of appeal concerns the Panel's alleged errors in its application of the "dependent motivation" standard to the facts of the case. This set of grounds of appeal "includes an appeal pursuant to Article 11 of the DSU, because ... the evidence cannot support the findings of export contingency."<sup>320</sup> The European Union also submits that "{i}t is possible that the Appellate Body may not need to consider {these grounds of appeal}, for example if it reverses all of the Panel's findings of export contingency/conditionality on the basis of the first set of grounds of appeal."<sup>321</sup>

- (i) *The 1992 Agreement*

127. The European Union argues that, in its application of the "dependent motivation" standard to the facts of the case, the Panel should have taken the 1992 Agreement into account, because a panel must consider *all* of the *facts* constituting and surrounding the granting of the alleged subsidy. The European Union argues that "the existence and operation of the *1992 Agreement* are, by definition, facts surrounding the adoption of the relevant {LA/MSF} measures, because the *1992 Agreement* was concluded between the Parties and refers directly and expressly to the type of measures of which the United States now complains; and because the {LA/MSF} measures themselves refer back to the *1992 Agreement*."<sup>322</sup> Therefore, "the Panel was obliged to take into consideration {the existence and operation of the 1992 Agreement} when assessing the *credibility* and *plausibility* of the {United States'} claims".<sup>323</sup>

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<sup>318</sup>European Union's appellant's submission, para. 1349.

<sup>319</sup>European Union's appellant's submission, para. 1349. (original emphasis)

<sup>320</sup>European Union's appellant's submission, para. 1372.

<sup>321</sup>European Union's appellant's submission, para. 1372.

<sup>322</sup>European Union's appellant's submission, para. 1373.

<sup>323</sup>European Union's appellant's submission, para. 1377. (original emphasis)

(ii) *The alleged internal conflicts within the Panel's findings*

128. Furthermore, the European Union alleges that "{t}here are fundamental and irreconcilable internal conflicts between" the Panel's analysis of whether the LA/MSF measures conferred a benefit, on the one hand, and the Panel's findings on export contingency, on the other hand.<sup>324</sup> When finding that the LA/MSF measures constituted export-contingent subsidies, the Panel relied on contract provisions allegedly showing that the governments placed contractual reliance on certain representations made by Airbus in its LA/MSF applications when entering into the LA/MSF contracts.<sup>325</sup> For the European Union, the Panel's findings that these contract provisions demonstrate a conditional relationship between the granting of the contracts and export performance contradict the Panel's statements in its examination of the alleged benefits conferred by these contracts. Specifically, the Panel found that the LA/MSF contracts were provided "without any guarantee", that repayment depended "entirely" on the success of the projects, and that "governments have no recourse" in the event of non-payment.<sup>326</sup>

129. The European Union alleges that the sales-dependent repayment provisions, whereby Airbus is required to repay the LA/MSF loans upon the aircraft delivery over a specified period, mean that risk "remains with the provider of the finance", that is, the governments. In contrast, "{i}f there would be subsidies contingent upon export, then the relevant risk would be carried by Airbus, and not the Member State."<sup>327</sup> Thus, the European Union argues, "{t}he Panel cannot construe the risk as being with Member States for the purposes of its subsidy assessment, but as being with Airbus for the purposes of its export contingency ... assessment."<sup>328</sup>

(iii) *Whether the sales-dependent repayment provisions support a finding of export contingency*

130. The European Union maintains that the royalty-based financing mechanism provided under the sales-dependent repayment provisions does not support the Panel's finding of export contingency. The European Union maintains that, as it explained to the Panel, "the motivation for using royalty-based financing {under the sales-dependent repayment terms} has nothing to do with export contingency ... but is simply a commercial decision reflecting the particular features of LCA development."<sup>329</sup> The European Union recalls its arguments before the Panel that, because "Airbus'

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<sup>324</sup>European Union's appellant's submission, para. 1378.

<sup>325</sup>European Union's appellant's submission, para. 1381 (referring to Panel Report, paras. 7.680 and 7.683).

<sup>326</sup>European Union's appellant's submission, para. 1379 (quoting Panel Report, paras. 7.375 and 7.462).

<sup>327</sup>European Union's appellant's submission, para. 1383.

<sup>328</sup>European Union's appellant's submission, para. 1383.

<sup>329</sup>European Union's appellant's submission, para. 1386.

revenues are generated by and large from LCA sales, with between 83% and 85% of the gross price paid on delivery{,} ... aircraft deliveries {constitute} the most reliable indication that sufficient cash-flow will be on hand to make repayments".<sup>330</sup> In addition, "timing repayment with deliveries allocates the risk between Airbus and the EC member State governments in accordance with the risk each party agreed to accept."<sup>331</sup>

131. The European Union contends that, contrary to the Panel's finding that the European Communities had not provided evidence to substantiate the alleged commercial reasons, "it is immediately apparent" from the "overall design and architecture" and the "context of the LCA market" that the royalty-based financing mechanism in the repayment provisions reflects a commercial decision of the LA/MSF governments.<sup>332</sup> Yet "the Panel ignore{d} the very evidence on the basis of which it makes its benefit and adverse effects findings and which explains the true commercial reasons for the decision to use royalty-based financing."<sup>333</sup>

132. The European Union alleges that the Panel also erred in finding that the alleged "exchange of commitments" under the repayment provisions supported a finding of export contingency. The European Union maintains that, contrary to the United States' assertion, there is no "performance commitment" by Airbus to export under the repayment provisions of the LA/MSF contracts, because "{a} commitment to repay when sales occur is not an export 'performance' 'target'" but "simply reflects a decision" to allocate risk and recoup investment.<sup>334</sup>

133. The European Union further submits that, although "{t}he Panel appears to have agreed with the European {Communities}" that the alleged "exchange of commitments" and the alleged "expectations" of the member States in granting the LA/MSF did not demonstrate export contingency/conditionality<sup>335</sup>, the Panel nonetheless found that the evidence regarding alleged exchange of commitments and expectations "support{ed} the finding of export contingency".<sup>336</sup> However, the Panel failed to explain the connection between such evidence and the finding. Moreover, the Panel erroneously assumed that "royalty-based financing in a global market somehow move{d} one closer to a finding of contingency"<sup>337</sup>, and the Panel, in so doing, seemed to reason that the measures are "almost" contingent upon export performance.<sup>338</sup> The Panel's finding, in the

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<sup>330</sup>European Union's appellant's submission, para. 1386 (quoting Panel Report, para. 7.671).

<sup>331</sup>European Union's appellant's submission, para. 1386 (quoting Panel Report, para. 7.671).

<sup>332</sup>European Union's appellant's submission, para. 1389. (original underlining)

<sup>333</sup>European Union's appellant's submission, para. 1389.

<sup>334</sup>European Union's appellant's submission, para. 1395.

<sup>335</sup>European Union's appellant's submission, paras. 1394 and 1396.

<sup>336</sup>European Union's appellant's submission, paras. 1394 and 1396.

<sup>337</sup>European Union's appellant's submission, para. 1393.

<sup>338</sup>European Union's appellant's submission, paras. 1393, 1395, and 1397.

European Union's view, is "irrational and illogical"<sup>339</sup>, because "{a} subsidy is either export contingent{ } or it is not."<sup>340</sup>

134. Finally, the European Union maintains that the Panel's assessment of the LA/MSF contracts is "incomplete and erroneous"<sup>341</sup> because the Panel failed to address properly the fact that the LA/MSF contracts allow Airbus to make accelerated repayments at any time and provide for guarantees for loan repayments by other group companies. In the European Union's view, the possibility of accelerated payments means there is no obligation to repay the loans upon delivery, and the existence of guarantee for the loan repayments means that repayments need not be achieved through export revenue.

(iv) *Whether the "additional evidence" examined by the Panel does not support a finding of export contingency*

135. The European Union contends that the "additional" or "corroborating" evidence identified by the Panel with respect to the LA/MSF measures by Germany, Spain, and the United Kingdom for the A380 does not demonstrate export contingency. With respect to the "additional" evidence concerning the German measures, the European Union alleges that the Panel acted inconsistently with Article 12.7 of the DSU by failing to provide the basic rationale behind its findings. Instead, the Panel "simply listed the four pieces of evidence, and declared itself 'satisfied'" that the evidence demonstrated export contingency.<sup>342</sup> According to the European Union, the use of "corroborating evidence" involves "explaining precisely how evidenced facts work together to imply other facts, of which there is no direct evidence."<sup>343</sup> Yet the Panel simply "jumbl{ed} facts together without explanation and {declared itself} satisfied that an ambiguously expressed standard {was} met."<sup>344</sup>

136. The European Union further asserts that none of the additional evidence supports the Panel's finding that the German LA/MSF measure for the A380 was contingent upon export performance, and that, in making this finding, the Panel acted inconsistently with Article 11 of the DSU by failing to conduct an objective assessment of the facts before it. Noting the Panel's reliance on a document referenced in the preamble of the German LA/MSF contract<sup>345</sup>, the European Union maintains that the referenced document is authored by Airbus, not by the German Government, and does not

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<sup>339</sup>European Union's appellant's submission, paras. 1393, 1395, and 1397.

<sup>340</sup>European Union's appellant's submission, para. 1393.

<sup>341</sup>European Union's appellant's submission, paras. 1458 and 1460.

<sup>342</sup>European Union's appellant's submission, para. 1399.

<sup>343</sup>European Union's appellant's submission, para. 1429.

<sup>344</sup>European Union's appellant's submission, para. 1429.

<sup>345</sup>European Union's appellant's submission, para. 1400 (referring to Panel Report, para. 7.680).

"substantiate the supposed 'motivation' of Germany".<sup>346</sup> Moreover, even assuming that such a statement could be imputable to the German Government, it does not "lawfully and objectively" support a finding that the German Government granted the subsidy "dependent" upon its "motivation" concerning exportation.<sup>347</sup> Regarding the second piece of additional evidence, the European Union alleges that the Panel did not explain why Airbus' obligation under section 2.5 of the German LA/MSF contract supported a finding of export contingency. As for the Panel's reliance on section 12 of the German LA/MSF contract in reaching its finding on export contingency, the European Union alleges that the Panel "misrepresent{ed} and distort{ed} irrelevant and general contractual provisions in direct conflict with the specific {repayment} provisions of the {contract}".<sup>348</sup> In conclusion, the European Union emphasizes that "consideration of sales" by the German Government "in assessing whether to provide financial support for the project at issue was a prudent way to evaluate whether to invest taxpayers' money."<sup>349</sup> However, in finding that the granting of LA/MSF was contingent on export performance simply because sales considered by the government included export sales, the Panel's analysis is, in the European Union's view, contrary to the object and purpose of the *SCM Agreement* "to encourage governments to subject industrial policy to the disciplines of the marketplace."<sup>350</sup>

137. Turning to the additional evidence concerning the Spanish LA/MSF measure for the A380, the European Union submits that its arguments with regard to the German LA/MSF measure for the A380 apply *mutatis mutandis*. The European Union contends that the contract provisions relied upon by the Panel do not provide additional support for the United States' argument that royalty-based financing in a global market demonstrated export contingency, do not indicate any commitment to export, and are incapable of supporting a finding of "dependent motivation".<sup>351</sup> Therefore, the European Union maintains, the Panel also acted inconsistently with Article 11 of the DSU by failing to conduct an objective assessment of the facts.

138. With respect to the additional evidence regarding the UK LA/MSF measure for the A380, the European Union maintains that its arguments with respect to the German and Spanish LA/MSF measures for the A380 apply *mutatis mutandis*. The European Union recalls that the Panel noted the statement reportedly made by Prime Minister Tony Blair at the public unveiling of the A380 that

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<sup>346</sup>European Union's appellant's submission, para. 1407.

<sup>347</sup>European Union's appellant's submission, para. 1407.

<sup>348</sup>European Union's appellant's submission, para. 1423.

<sup>349</sup>European Union's appellant's submission, para. 1426.

<sup>350</sup>European Union's appellant's submission, para. 1428.

<sup>351</sup>European Union's appellant's submission, paras. 1436 and 1439.

"{t}he export gains will run into the billions of pounds".<sup>352</sup> In the European Union's view, such evidence "has no probative value at all", because the statement "refers to wings and landing gear (not aircraft)" and "was made almost five years after the date of the {LA/}MSF measure."<sup>353</sup> The European Union further recalls that the Panel also noted a press release published by the UK Department of Trade and Industry in March 2000 announcing that the UK Government had agreed to invest £530 million in the A380 project, explaining that "{w}ithin 25 years Airbus has grown to take 55% of the civil aircraft production market and contributes {£}1 billion to the UK's trade balance."<sup>354</sup> The European Union contends that this statement "has no probative value", because it "refers only to wings destined for another part of the European Union and ... the reference to the UK trade balance simply has no bearing on exports from the {European Union}."<sup>355</sup> Furthermore, the Panel additionally relied on the representation and warranty made by BAE Systems in Article 3 of the contract. However, "{t}he obligations assumed by Airbus" under the contract "do not include any obligation to manufacture or sell any aircraft".<sup>356</sup> Moreover, the European Union contends that, "with respect to the only determinative document on which the Panel relies for its finding, the Panel has simply misstated the terms of the contract."<sup>357</sup>

- (c) The third set of grounds of appeal: Alleged legal errors in the Panel's application of the correct legal standard of contingency

139. With respect to the third set of grounds of appeal, the European Union submits that, "{i}f the Appellate Body considers that the Panel applied the correct standard of contingency/conditionality (if-then), then the European Union appeals because the evidence, including the 'additional' 'corroborating' evidence, is incapable of supporting a finding of export contingency/conditionality on the basis of the correct standard."<sup>358</sup> Specifically, the Panel acted inconsistently with Article 7.2 of the DSU by failing to address relevant provisions of the covered agreements, acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the law and the facts, and acted inconsistently with Article 12.7 of the DSU by failing to provide the basic rationale for its findings. The European Union states that it incorporates all the legal errors and arguments it has identified, *mutatis mutandis*, into its third set of grounds of appeal.

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<sup>352</sup>European Union's appellant's submission, para. 1443 (quoting Panel Report, para. 7.682, in turn quoting "Blair Says Airbus A380 will repay 530 mln stg UK govt investment", *AFX News Limited*, 18 January 2005 (Panel Exhibit US-361)).

<sup>353</sup>European Union's appellant's submission, para. 1443.

<sup>354</sup>European Union's appellant's submission, para. 1444 (quoting Panel Report, para. 7.682, in turn quoting "Byers announces £530 million government investment in Airbus", UK Department of Trade and Industry, Press Release P/2000/173, 13 March 2000 (Panel Exhibit US-360)).

<sup>355</sup>European Union's appellant's submission, para. 1444.

<sup>356</sup>European Union's appellant's submission, para. 1451.

<sup>357</sup>European Union's appellant's submission, para. 1451.

<sup>358</sup>European Union's appellant's submission, para. 1461.

## (d) The fourth set of grounds of appeal: Further alleged legal errors

140. The European Union's fourth set of grounds of appeal relates to certain additional legal errors in the Panel Report.<sup>359</sup> First, the European Union argues that the Panel erroneously accepted an untimely submission by the United States. Specifically, the Panel accepted the United States' argument that the LA/MSF contracts involved an "exchange of commitments" between Airbus and the respective governments, even though the United States introduced this argument for the first time in its second written submission by referring to several new items of evidence, namely various provisions in the LA/MSF contracts. Second, the European Union contends that, although the United States never made a claim on the basis of a "dependent motivation" standard, the Panel made the case for the United States by applying such a standard to the evidence relating to the governments' anticipation on export performance.

141. Third, the European Union submits that, by accepting the United States' argument that the sales envisaged under the repayment provisions of the contracts at issue necessarily include export sales, the Panel wrongly equated performance with export performance. The European Union contends that the LA/MSF contracts are neutral as to where sales occur and are therefore not prohibited under Article 3.1(a) and footnote 4 of the *SCM Agreement*. This is because these provisions do not prohibit subsidies contingent upon performance in a global market, but only prohibit subsidies contingent upon *export* performance. The European Union further argues that the Illustrative List of Export Subsidies in Annex I to the *SCM Agreement* "all refer to exports and/or the 'favouring' thereof".<sup>360</sup> Moreover, Article XVI:4 of the GATT 1994, which is referenced in Annex I, refers to subsidies on the export of a product that result in an export price lower than the domestic price. The European Union further submits that, although the *SCM Agreement* does not have a preamble, its object and purpose can be discerned from the preamble of the GATT 1994, which states that the GATT 1994 is directed to "the elimination of *discriminatory* treatment in international commerce".<sup>361</sup> Thus, consistent with the object and purpose of the GATT 1994, subsidies that are "neutral"<sup>362</sup> as to whether export performance exists are not prohibited, although the adverse effects they cause remain subject to Parts III and V of the *SCM Agreement*. The European Union further

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<sup>359</sup>The European Union states that "{i}t is possible that the Appellate Body may not need to consider this {set of grounds} if it finds in favour of the European Union for other reasons, although it would also be possible for the Appellate Body to reverse based only on this {set of grounds} in whole or in part." (European Union's appellant's submission, para. 1464)

<sup>360</sup>European Union's appellant's submission, para. 1477.

<sup>361</sup>European Union's appellant's submission, para. 1480. (original emphasis)

<sup>362</sup>European Union's appellant's submission, para. 1481.

submits that the preparatory work of the *SCM Agreement* confirms that the rationale for prohibiting export subsidies was that "they *favoured* exports".<sup>363</sup>

142. Fourth, the European Union maintains that the Panel equated a "financial contribution" with a "subsidy" in applying its "dependent motivation" standard to the facts. Specifically, because a subsidy is "a financial contribution" that "confers a benefit", the Panel should have required the United States to demonstrate that both elements—the financial contribution and the benefit—are contingent upon export performance. Yet the Panel merely required a demonstration that each of the LA/MSF contracts was contingent/conditional upon export, and failed to require the United States to show that "'the anticipating of exports' was a 'dependent motivation' for the decision to fix the terms of the {LA/}MSF measures at below market rate{s}."<sup>364</sup> Finally, the European Union alleges that the Panel failed to assess what the United States meant by the terms "exports" and "Europe". Specifically, the United States "failed to explain or demonstrate what it meant by 'Europe' (as opposed to the European Union)", and failed to explain "how what is financed by each of the {LA/}MSF measures relates to what might eventually be 'exported' from the European Union."<sup>365</sup>

143. On the basis of the above, the European Union requests the Appellate Body to reverse the Panel's finding that the LA/MSF measures by Germany, Spain, and the United Kingdom for the A380 are contingent in fact upon anticipated export performance.

## 7. The EC Framework Programmes

144. The European Union submits that the Panel's finding that "the R&TD subsidies granted to Airbus under each of the Framework Programmes are specific within the meaning of Article 2.1(a) of the *SCM Agreement*" was based on an erroneous interpretation and application of this provision.<sup>366</sup> The European Union summarizes the Panel's view as follows: "that a subsidy programme aimed at advancing R&TD in general is, nevertheless, specific pursuant to Article 2.1(a) of the *SCM Agreement* if it constitutes a legal regime that allocates part of the funding exclusively to research activities relevant for certain industry sectors."<sup>367</sup> The European Union considers that this interpretation is flawed for several reasons.

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<sup>363</sup>European Union's appellant's submission, para. 1484. (original emphasis)

<sup>364</sup>European Union's appellant's submission, para. 1488.

<sup>365</sup>European Union's appellant's submission, para. 1491.

<sup>366</sup>European Union's appellant's submission, para. 1173 (quoting Panel Report, para. 7.1566).

<sup>367</sup>European Union's appellant's submission, para. 1184.



145. First, the European Union maintains that, in the case of general subsidy programmes such as the Framework Programmes, the reference to "subsidy" in Article 2.1(a) must mean the subsidy programme as a whole. In the European Union's view, this follows from language in Article 2.1(c) that refers to use of a "subsidy programme" by a limited number of certain enterprises, and taking into account the length of time during which the "subsidy programme" has been in operation. Since "the subsidy programme as a whole is the benchmark for assessing *de facto* specificity, there is no reason to choose another benchmark for assessing *de jure* specificity within the meaning of Article 2.1(a) of the *SCM Agreement*."<sup>368</sup> The European Union adds that the Panel's interpretation also runs the risk of rendering the specificity criterion in Article 2 meaningless, since "{e}xamining benchmarks below the level of the subsidy programme as a whole will, at a certain level, inevitably indicate specificity."<sup>369</sup>

146. The European Union submits that the Panel's description of the budget allocations to aeronautics-related research as a "closed system" of subsidisation is a "misnomer".<sup>370</sup> The European Union acknowledges that such funding could not be accessed by entities seeking support for non-aeronautics-related research, but adds that "it is equally true that entities involved in aeronautics-related R&TD projects could not access funds under the remainder (and therefore the great majority) of the Framework Programme budgets."<sup>371</sup> Because there is no discrimination or special treatment in favour of aeronautics-related research within the context of the whole programme, there is therefore no "closed system". Instead, the European Union maintains, "there is a broad-based allocation that ensures equal access to a wide range of sectors and enterprises".<sup>372</sup>

147. The European Union also finds contextual support in Article 2.1(c) of the *SCM Agreement* for its critique of the Panel's interpretation. Under that provision, two factors indicating *de facto* specificity are the "predominant use of a subsidy programme by certain enterprises" and "the granting of disproportionately large amounts of subsidy to certain enterprises". If a WTO Member seeks to pre-allocate funds in order to distribute them evenly across sectors, "such measures taken to avoid *de facto* specificity of the programme should not in turn cause its *de jure* specificity".<sup>373</sup> Rather, subparagraphs (a) and (c) of Article 2.1 of the *SCM Agreement* "must be interpreted harmoniously".<sup>374</sup>

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<sup>368</sup>European Union's appellant's submission, para. 1187.

<sup>369</sup>European Union's appellant's submission, para. 1188.

<sup>370</sup>European Union's appellant's submission, para. 1189 (referring to Panel Report, para. 7.1563).

<sup>371</sup>European Union's appellant's submission, para. 1189.

<sup>372</sup>European Union's appellant's submission, para. 1189.

<sup>373</sup>European Union's appellant's submission, para. 1190.

<sup>374</sup>European Union's appellant's submission, para. 1190.

148. Finally, the European Union claims that the Panel's reasoning penalizes WTO Members that administer their R&TD programmes in an open and transparent manner, and instead encourages them to allocate funds within a diverse research programme so as "to avoid any clear indication of sectors".<sup>375</sup> The European Union submits that a programme in which part of the funding is clearly allocated to the research area "aeronautics and space" will be considered *de jure* specific, whereas a programme allocating funding to apparently generic research areas will not, "even if the granting government decided (but did not make public) that 100% of the funding of such an apparent generic research would benefit aeronautics and space, and this turns out to be the case."<sup>376</sup>

149. For these reasons, the European Union requests the Appellate Body to reverse the Panel's finding that the R&TD subsidies granted to Airbus under each of the Framework Programmes are specific within the meaning of Article 2.1(a) of the *SCM Agreement*.<sup>377</sup>

8. Infrastructure Measures

(a) Financial contribution

150. The European Union claims that the Panel's analysis of the infrastructure measures at issue "was premised on an incorrect interpretation of Article 1.1(a)(1)(iii) of the *SCM Agreement* and accordingly resulted in an erroneous application of that provision."<sup>378</sup> According to the European Union, the Panel started its analysis by posing the wrong question: that is, "when does the provision of goods or services in the form of infrastructure constitute the provision of infrastructure which is 'other than general' within the meaning of Article 1.1(a)(1)(iii), such that there is a financial contribution by a government."<sup>379</sup> By entering into the analysis of what amounts to "general infrastructure" in the context of the provision of goods or services, "the Panel fundamentally ignored the {European Communities'} argument that a distinction must be made between, on the one hand, the creation of infrastructure and, on the other hand, the provision of infrastructure to the recipient."<sup>380</sup>

151. Quoting a passage by the panel in *US – Softwood Lumber III*, the European Union argues that a measure cannot constitute a subsidy unless it qualifies as one of the enumerated forms of financial contributions listed in Article 1.1(a)(1), consisting of "only those measures that are concerned with a direct or indirect act or an omission by the government involving the *transfer* of money or an in-kind

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<sup>375</sup>European Union's appellant's submission, para. 1192.

<sup>376</sup>European Union's appellant's submission, para. 1192.

<sup>377</sup>European Union's appellant's submission, para. 1193; Panel Report, para. 7.1566.

<sup>378</sup>European Union's appellant's submission, para. 1024.

<sup>379</sup>European Union's appellant's submission, para. 1025 (quoting Panel Report, para. 7.1014).

<sup>380</sup>European Union's appellant's submission, para. 1026.

*transfer* of resources".<sup>381</sup> In contrast, the European Union submits that government actions taken by a public authority, and "in particular those involving 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, land, etc.) are not the type of actions which qualify as 'financial contributions'"<sup>382</sup> within the meaning of Article 1.1(a)(i). Rather, until provided to a particular recipient, they are government interventions that do not constitute measures covered by the *SCM Agreement*.

152. The European Union argues that the reason that the creation or improvement of infrastructure is carved out from the *SCM Agreement* is evident: the *SCM Agreement* does not interfere with legitimate government choices to pursue public policies for the benefit of the population as a whole. In principle, the creation of infrastructure benefits society as a whole and therefore reflects such legitimate economic development policies. As the European Union explains, "{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>383</sup>

153. In the European Union's view, the Panel ignored the fact that Article 1.1(a)(1)(iii) requires that a government "provide" a good or service to a recipient in order to constitute a financial contribution. In order to conclude whether the financial contribution amounts to a subsidy, an assessment is required to determine whether the provision of that good or service by the government occurred on market terms. However, "actions taken by the government *prior* to the provision of the good or service in question are not relevant" for a panel's assessment of the existence of a financial contribution or benefit.<sup>384</sup> Accordingly, Article 1.1(a)(1)(iii) "only applies once infrastructure has been created, and establishes that the provision of general infrastructure does not amount to a financial contribution, whereas the provision of non-general infrastructure does."<sup>385</sup> According to the European Union, the Panel ignored the structure of Article 1.1(a)(1) to avoid this conclusion.

154. The European Union notes the Panel's conclusion that it was not legally required to analyze separately the "creation" and "provision" of infrastructure, and argues that this is wrong as a matter of law and upsets the balance of rights and obligations negotiated by WTO Members. Pointing to WTO jurisprudence on privatization, the European Union argues that "the measure at issue for the financial

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<sup>381</sup>European Union's appellant's submission, paras. 1027 and 1028 (referring to Panel Report, *US – Softwood Lumber III*, para. 7.24). (original emphasis; footnotes omitted)

<sup>382</sup>European Union's appellant's submission, para. 1029.

<sup>383</sup>European Union's appellant's submission, para. 1030. (original emphasis)

<sup>384</sup>European Union's appellant's submission, para. 1031. (original emphasis)

<sup>385</sup>European Union's appellant's submission, para. 1032.

contribution analysis would not be the creation of the State-owned company *and* its provision to the buyer, but *only* the provision of the company."<sup>386</sup> The question of whether a privatized company was created through the use of subsidies "is irrelevant to any subsidy assessment of the relevant transaction at issue, i.e., the 'provision' of the privatised company".<sup>387</sup> The European Union thus draws a comparison with infrastructure measures, repeating its argument that the creation of infrastructure is not covered by the paragraphs of Article 1.1(a); rather, only the provision of infrastructure at below market value may constitute a subsidy.

155. The European Union considers the Panel's concern that exclusion of the creation of infrastructure would circumvent the fundamental purpose of subsidies disciplines to be "unwarranted".<sup>388</sup> In the European Union's view, "{t}he exclusion of the creation of infrastructure ... reflects a conscious choice by Members when they negotiated the *SCM Agreement*".<sup>389</sup> Referring to the statement by the panel in *US – Export Restraints* that "not every government intervention in the market would fall within the coverage of the {*SCM Agreement*}"<sup>390</sup>, the European Union considers that the creation of infrastructure is one of the measures excluded from the *SCM Agreement*.

156. The European Union argues that the Panel ignored the fundamental difference between the creation and the provision of infrastructure, and instead "entered into a pointless analysis as to whether something (composed of a set of several measures) amounts to *provision* of general or non-general infrastructure".<sup>391</sup> The European Union submits that the Panel's analysis of what constitutes "general infrastructure" was irrelevant, because the question of whether infrastructure is general or non-general "is only relevant when it is *provided* to someone."<sup>392</sup> This is supported by the Panel's view that infrastructure may be general at one point in time and non-general at a different point in time. This indicates that the proper point of reference in determining whether a provision of goods or services is non-general infrastructure "is the time when the *act of provision* that is alleged to constitute a subsidy takes place."<sup>393</sup> Moreover, even if the circumstances surrounding the creation of infrastructure demonstrate that it was created for the particular needs of the entity or group, this is relevant only in assessing the provision—not the creation—of infrastructure. The European Union

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<sup>386</sup>European Union's appellant's submission, para. 1034. (original emphasis)

<sup>387</sup>European Union's appellant's submission, para. 1035.

<sup>388</sup>European Union's appellant's submission, para. 1036.

<sup>389</sup>European Union's appellant's submission, para. 1036.

<sup>390</sup>European Union's appellant's submission, para. 1036 (referring to Panel Report, *US – Export Restraints*, paras. 8.63 and 8.73).

<sup>391</sup>European Union's appellant's submission, para. 1037. (original emphasis)

<sup>392</sup>European Union's appellant's submission, footnote 1384 to para. 1037. (original emphasis)

<sup>393</sup>European Union's appellant's submission, para. 1038. (original emphasis)

therefore requests the Appellate Body to reverse the Panel's findings regarding whether the challenged measures constitute "general or non-general infrastructure", and to declare them moot and with no legal effect.<sup>394</sup>

157. The European Union maintains that it was legal error for the Panel to conclude that, in respect of the Mühlenberger Loch site, "the entire transaction of creating and providing an industrial site to Airbus constitutes the alleged subsidy" and that "there is no legal requirement that we separate the various elements of the project for the purposes of our analysis."<sup>395</sup> If the Panel had properly conducted its analysis by examining which part of the measures constituted the "provision" of "goods and services" in the form of "infrastructure", the Panel "should have examined only the relevant transaction and financial contribution, i.e., the provision of the industrial site to Airbus through the lease of the land and the special-purpose facilities."<sup>396</sup> According to the European Union, all steps taken by the city of Hamburg for the creation of the Mühlenberger Loch industrial site are irrelevant, and the Panel was wrong to conclude that both the creation of infrastructure and its provision to Airbus was a "single measure" that amounted to a financial contribution under Article 1.1(a)(1)(iii) of the *SCM Agreement*.

158. The European Union faults the Panel for focusing on aspects of the project indicating that it was tailor-made for Airbus. Even if true, the relevant issue in the financial contribution determination is the relevant transaction in the form of the provision of the goods or services in question. The fact that the city of Hamburg retains ownership of the Mühlenberger Loch industrial site and leases it to Airbus Deutschland indicates that only a temporary right to use a particular piece of land in the industrial site for a particular period of time is provided to Airbus. Moreover, the European Union considers that the Panel's approach of combining creation and provision of infrastructure may lead to "absurd" results, since it will be difficult to draw the line to establish whether certain measures are part of the same project. In the European Union's view, "all steps necessary for the creation of infrastructure are actions of public authority (e.g., such as 'moving waters from one side to the other', as was the case of the Mühlenberger Loch) which do not fall under the *SCM Agreement*."<sup>397</sup>

159. For these reasons, the European Union requests the Appellate Body to reverse the Panel's finding that the creation and provision of the Mühlenberger Loch industrial site constituted a financial contribution within the meaning of Article 1.1(a)(iii) of the *SCM Agreement*. Instead, the

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<sup>394</sup>European Union's appellant's submission, para. 1037; Panel Report, paras. 7.1034-7.1044.

<sup>395</sup>European Union's appellant's submission, para. 1041 (quoting Panel Report, paras. 7.1077 and 7.1078).

<sup>396</sup>European Union's appellant's submission, para. 1041.

<sup>397</sup>European Union's appellant's submission, para. 1043. (footnote omitted)

European Union requests the Appellate Body to find (i) that the creation of the Mühlenberger Loch industrial site, including the turning of the wetlands into usable land, the building of flood protection measures, and the building of special-purpose facilities on the site, amounted to infrastructure measures that do not fall within the scope of the *SCM Agreement*, and (ii) that only the lease of the land and of the special-purpose facilities in the Mühlenberger Loch industrial site constitute a financial contribution under Article 1.1(a)(1)(iii) of the *SCM Agreement*.

160. The European Union also maintains that it was legal error for the Panel to conclude that, in respect of the Bremen airport runway extension, "the entire project, extending the runway, the associated noise reduction measures, and the right of exclusive use, constitute a financial contribution to Airbus, within the meaning of Article 1.1(a)(1)(iii) of the *SCM Agreement*."<sup>398</sup> The European Union submits that the extension of the runway and the associated noise reduction measures amounted to improvements of existing infrastructure, as a government action of public authority. Thus, even if the use of the extended runway was limited to Airbus, the improvements "benefited all users of the Bremen airport since, for security reasons, the extensions of the runway can be used by any airline (e.g. interrupted take-offs, emergency landings) and the noise reduction measures had a positive impact on the people working, circulating or living close to the airport."<sup>399</sup> As the European Union contends, evidence of limitations on the use of the extended runway or that it was undertaken for the use of Airbus are not relevant for the financial contribution analysis; rather, it is the right to exclusive use of the extended runway as a provision of services to Airbus Deutschland that is the relevant transaction for the purpose of Article 1.1(a)(1)(iii).

161. For these reasons, the European Union requests the Appellate Body to reverse the Panel's finding that the entire project, the runway extension, the associated noise reduction measures, and the right of exclusive use, constitute a financial contribution to Airbus, within the meaning of Article 1.1(a)(1)(iii) of the *SCM Agreement*. Instead, the European Union requests the Appellate Body to find: (i) that extending the runway and building the associated noise reduction measures are infrastructure measures that do not fall within the scope of the *SCM Agreement*; and (ii) that the right to exclusive use of the extended runway amounts to a financial contribution in the sense of Article 1.1(a)(1)(iii) of the *SCM Agreement*.

162. The European Union also maintains that it was legal error for the Panel to conclude that, in respect of the Aéroconstellation site, the *équipement d'intérêt général* ("EIG") facilities constituted an integral part of the site, and that it therefore did not need to analyze the EIG facilities separate from its

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<sup>398</sup>European Union's appellant's submission, para. 1045; Panel Report, para. 7.1121.

<sup>399</sup>European Union's appellant's submission, para. 1045.

consideration of the provision of the Aéroconstellation site as a whole. The lease of the EIG facilities amounts to the provision of a service, and the sale of land in the industrial site amounts to the provision of a good. The European Union also maintains that only the provision of the Aéroconstellation site and the EIG facilities, rather than the creation of the site in question, is the relevant transaction for the purpose of the financial contribution determination.

163. For these reasons, the European Union requests the Appellate Body to reverse the Panel's finding that the creation and provision of the Aéroconstellation site and the EIG facilities was not a measure of general infrastructure within the meaning of Article 1.1(a)(1)(iii) of the *SCM Agreement*. Instead, the European Union requests the Appellate Body to find (i) that the creation of the Aéroconstellation site and the EIG facilities are infrastructure measures that do not fall within the scope of the *SCM Agreement*, and (ii) that the sale of land and the lease of the EIG facilities in the Aéroconstellation site to Airbus France amount to a financial contribution in the sense of Article 1.1(a)(1)(iii) of the *SCM Agreement*.

(b) Benefit

164. The European Union claims that the Panel erred in its interpretation and application of the term "benefit", within the meaning of Article 1.1(b) of the *SCM Agreement*. In particular, the Panel assessed the existence of a benefit not from the perspective of the recipient, but instead from the perspective of the governments, which the Panel found incurred costs in excess of the returns generated by Airbus' purchase and/or lease payments. In doing so, "the Panel essentially adopted what amounts to a 'return-to-government' or 'cost-to-government' standard that was explicitly rejected by the Appellate Body in *Canada – Aircraft*."<sup>400</sup> The European Union requests the Appellate Body to reverse the Panel's findings<sup>401</sup> and, consequently, also to reverse the Panel's conclusions that these measures constitute actionable subsidies.<sup>402</sup>

165. The European Union notes that the Panel recalled certain findings of the panel and Appellate Body in *Canada – Aircraft* that indicate that the existence of a "benefit" must be determined by reference to whether the terms of the financial contribution enjoyed by the recipient are consistent with a market benchmark. The European Union argues that the Panel "ignored that it must assess the terms of the financial contribution that the recipient obtained against a market benchmark"<sup>403</sup>, and instead assessed the existence of a benefit from the perspective of the granting governments.

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<sup>400</sup>European Union's appellant's submission, para. 1063 (referring to Appellate Body Report, *Canada – Aircraft*, paras. 149-161). (footnote omitted)

<sup>401</sup>Panel Report, paras. 7.1097, 7.1134, and 7.1190.

<sup>402</sup>Panel Report, paras. 7.1958, 8.1(b)(i)-(iii), and 8.2.

<sup>403</sup>European Union's appellant's submission, para. 1066.

According to the European Union, the Panel erred by asking "whether the returns enjoyed by the granting governments were sufficient, relative not to the market value of the land or facilities sold or leased or the exclusive right of use provided, but to the returns a market investor creating that land or facilities would have sought."<sup>404</sup> The European Union maintains that this error resulted from the Panel's consideration of the government as an investor, instead of, as required by Article 1.1(a)(1)(iii), as a provider of a good or service. Any benefit must rather "be measured against the market value of that good or service provided, not the cost of creating it".<sup>405</sup> The return to a government is a relevant measure for assessing "benefit" only where a financial contribution under Article 1.1(a)(1)(i) is involved. In such a case, the expected return that a market investor would have demanded constitutes the relevant benchmark for assessing whether the government's expected return constitutes the conferral of a "benefit" on the recipient. This is confirmed by Article 14(a) through (c) of the *SCM Agreement*, which provides specific guidance for assessing against a market benchmark the government return involved in an equity infusion, a loan, and a loan guarantee. However, where the financial contribution constitutes the provision of a good or a service, the European Union argues that Article 14(d) supports assessing any "benefit" based on market value and price, rather than any return earned.

166. The European Union argues that the Panel applied a legally incorrect "return-to-government" standard to the Mühlenberger Loch measures. The Panel explicitly recognized that Airbus Deutschland did not receive land and facilities "worth" €750 million, but land and facilities of a considerably lesser market value. The European Union notes that the Panel found that the Mühlenberger Loch measures conferred a benefit on Airbus Deutschland "in an amount equivalent to the extent of the difference between the actual rent paid by Airbus for the land and the facilities in question, and a reasonable rate of return on the investment of the Hamburg authorities in creating that land and those facilities."<sup>406</sup> The European Union contends that, instead of focusing on the government as a *provider* of the goods or services and on the value of the land and the special-purpose facilities, the Panel focused on the government as an *investor* and on the value of the city of Hamburg's investment, finding that the city of Hamburg received an insufficient return on an investment "worth" €750 million.<sup>407</sup>

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<sup>404</sup>European Union's appellant's submission, para. 1067.

<sup>405</sup>European Union's appellant's submission, para. 1067.

<sup>406</sup>European Union's appellant's submission, para. 1069 (quoting Panel Report, para. 7.1096).

<sup>407</sup>European Union's appellant's submission, para. 1070.



167. The European Union notes that the Panel justified its approach by asserting that the investment by the city of Hamburg in bringing the site into existence was "relevant" in its assessment, and that its approach was "simply a reflection, in the particular circumstances of this measure, of the basis on which a market actor would determine the amount of rent to be charged for that particular parcel of land, and thus the appropriate 'market' benchmark."<sup>408</sup> The European Union argues, however, that the Panel's approach departs from established panel and Appellate Body guidance on the approach to the "benefit" determination under Article 1.1(b) of the *SCM Agreement*. In *Canada – Aircraft*, the Appellate Body explicitly rejected Canada's reliance on a "cost to government" perspective, holding that "the word 'benefit', as used in Article 1.1, is concerned with the 'benefit to the recipient' and not with the 'cost to government'."<sup>409</sup> In the European Union's view, the Panel's assessment of "benefit" amounts to a reversible error. The European Union repeats its prior argument that the cost to the government in creating or improving infrastructure is irrelevant in the benefit analysis because it consists of government actions of public authority outside the scope of the *SCM Agreement*. Only when something is provided to an economic operator does the benefit analysis require examining whether the recipient obtained that something on better terms than the market would provide. The European Union also submits that the Panel's approach is "economically naïve".<sup>410</sup> The European Union argues that no market actor can set a price for a good solely on the basis of its own investment or cost, because no buyer will pay more than the market value of the good. If the market value of the good is less than the investment necessary to create it, the seller will fail to recuperate its investment.

168. The European Union maintains that the Panel also attempts to justify its departure from established panel and Appellate Body guidance by recourse to unspecified purposes and goals of the *SCM Agreement*. Noting that the Appellate Body has identified the agreement's object and purpose as "to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures"<sup>411</sup>, the European Union submits that the Panel does not explain how this broad statement of object and purpose allows it to discard an established interpretation of Article 1.1(b). The European Union also labels as "misplaced" the Panel's criticisms of the European Communities' approach as leading to a wholesale circumvention of subsidies disciplines in the *SCM Agreement*. The European Union explains that no circumvention exists because the exclusion of the creation of infrastructure from the *SCM Agreement* was a "conscious choice by Members"; rather, "it is the

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<sup>408</sup>European Union's appellant's submission, para. 1071 (quoting Panel Report, para. 7.1093).

<sup>409</sup>European Union's appellant's submission, para. 1073 (quoting Appellate Body Report, *Canada – Aircraft*, paras. 155 and 156 (original emphasis)).

<sup>410</sup>European Union's appellant's submission, para. 1074.

<sup>411</sup>European Union's appellant's submission, para. 1075 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 64, in turn referring to Appellate Body Report, *US – Carbon Steel*, paras. 73 and 74).

Panel's approach that upsets the balance of rights and obligations negotiated by Members in the *SCM Agreement*."<sup>412</sup> Moreover, the European Union considers that the Panel erred when it found that by creating infrastructure that the market might not create, governments distort the market in a manner that is disciplined under the *SCM Agreement*. The European Union argues that, on the facts at issue, the governments were not investors when they created the infrastructure and thus were not required to cover all of their costs and obtain a return. Rather, the governments were the providers of goods and services, and any benefit conferred to the recipient of those goods and services must be assessed on market terms.

169. The European Union maintains that the Panel's error is manifest in its finding that "whether the rent paid by Airbus for the land and the special purpose facilities is commensurate with a market rate for rental of existing industrial land and facilities in Hamburg ... is simply not relevant to our analysis."<sup>413</sup> To the contrary, the European Union argues, the relevant financial contribution within the meaning of Article 1.1(a)(1)(iii) was the lease of the Mühlenberger Loch industrial site, and therefore "the question whether the rent paid by Airbus Deutschland for the land and the special-purpose facilities is commensurate with a market rate is the *only* relevant question."<sup>414</sup> The European Union also disagrees with the Panel's view that there was a benefit to Airbus because the market would not have developed the land. Instead, the European Union maintains, had Hamburg not invested in the Mühlenberger Loch project, Airbus would have located the entire A380 final assembly line in Toulouse.

170. The European Union concludes that the Panel's finding that the Mühlenberger Loch measures conferred a benefit on Airbus Deutschland because the city of Hamburg is not earning a "reasonable rate of return on the investment" is in error, because it did not assess whether Airbus Deutschland received the financial contributions at issue on terms better than those available on the market.<sup>415</sup> The European Union therefore requests the Appellate Body to reverse the Panel's finding, and asserts that there are no relevant factual findings or uncontested facts on the record that would allow the Appellate Body to complete the analysis.

171. The European Union submits that the Panel wrongly relied on the "return on the investment" standard when it found that there was "no return to the City of Bremen on its investment in the runway extension and noise reduction measures" and, thus, that a benefit had been conferred to

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<sup>412</sup>European Union's appellant's submission, para. 1076.

<sup>413</sup>European Union's appellant's submission, para. 1077 (quoting Panel Report, para. 7.1096).

<sup>414</sup>European Union's appellant's submission, para. 1077. (original italics and boldface)

<sup>415</sup>European Union's appellant's submission, para. 1079 (quoting Panel Report, para. 7.1096).

Airbus "by the provision of that extension and noise reduction measures".<sup>416</sup> In particular, the Panel failed to assess whether Airbus Deutschland received the relevant financial contribution—that is, the exclusive right to use the extended runway—on terms better than those available at market. Instead, the European Union notes, the Panel observed that Airbus did not pay "additional charges for the use of the runway extension{ }" and that "no connection has been established suggesting that Airbus pays fees relating to the use of the extended runway".<sup>417</sup>

172. The European Union contends that the Panel ignored the European Communities' explanation showing that Airbus Deutschland was paying the highest user fee and how that was connected to the use of the extended runway. According to the European Union, it explained to the Panel that Airbus pays higher user fees to the city of Bremen for the use of the extended runway, since aircraft using that runway pay the highest weight-related fee, approximately three times higher than the average payment. The fact that Airbus pays the highest user fees implies that no benefit is granted by the exclusive right to use the extended runway. The Panel ignored this and wrongly focused on the "return on the investment" standard when finding that "there is no return to the City of Bremen on its investment in the runway extension and noise reduction measures."<sup>418</sup> The European Union requests the Appellate Body to reverse the Panel's finding, and asserts that there are no relevant factual findings or uncontested facts on the record that would allow the Appellate Body to complete the analysis.

173. The European Union submits that the Panel also erred when finding that the Aéroconstellation measures conferred a benefit on Airbus France. Referring to the Panel's finding that "the investment by the French authorities in developing the site to make land suitable for industrial use is the relevant basis for assessing whether a benefit was conferred on Airbus"<sup>419</sup>, the European Union argues that the Panel's assessment of "benefit" and its application of that standard to the Aéroconstellation measures amount to reversible error, for the same reasons that the European Union has set out with respect to the Mühlenberger Loch measures.

174. The European Union notes the Panel's finding that the price paid by Airbus for land at the Aéroconstellation site and the lease of 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>420</sup> Based on this finding, the Panel concluded that the provision of the Aéroconstellation site, including the EIG

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<sup>416</sup>European Union's appellant's submission, para. 1080 (quoting Panel Report, para. 7.1133).

<sup>417</sup>European Union's appellant's submission, para. 1081 (quoting Panel Report, paras. 7.1133 and 7.1132 respectively).

<sup>418</sup>European Union's appellant's submission, para. 1083 (quoting Panel Report, para. 7.1133).

<sup>419</sup>European Union's appellant's submission, para. 1084.

<sup>420</sup>European Union's appellant's submission, para. 1085 (quoting Panel Report, para. 7.1190).

facilities, constitutes a subsidy within the meaning of Article 1 of the *SCM Agreement*.<sup>421</sup> These findings were based on consideration of the return on the investment by French authorities and therefore constitute legal error, because the Panel did not assess whether Airbus France received the financial contributions at issue on terms better than those available at market. Moreover, Article 14(d) of the *SCM Agreement* confirms that the appropriate benchmark for the sale of land to Airbus France was its market price. As the European Union explains, Article 14(d) establishes that any "benefit" under Article 1.1(b) has to be assessed against "prevailing market conditions" for the good or service provided; it does not require that the authorities be able to recoup their internal costs. The European Union requests the Appellate Body to reverse the Panel's finding, and asserts that there are no relevant factual findings or uncontested facts on the record that would allow the Appellate Body to complete the analysis.

9. Equity Infusions

(a) Capital investments

175. The European Union claims that the Panel erred in the interpretation of Article 1.1(b) of the *SCM Agreement*. The European Union states that the Panel correctly noted that the question posed by Article 1.1(b) is whether the terms of the contribution are more favourable than those that would have been available on the market from a private investor. The European Union refers to the United States' arguments before the Panel that Aérospatiale was not equity worthy, and that a private investor would not have made the capital contribution at all. In the European Union's view, "the relevant question, therefore, was whether the United States had provided contemporaneous evidence demonstrating that Aérospatiale was not equity worthy, and therefore that a private investor would not have made the capital contributions at all, such that a 'benefit' was conferred."<sup>422</sup>

176. The European Union argues, however, that after correctly setting out the standard, "the Panel curiously restated the standard, noting that it would ask whether the French State 'could have expected to achieve a reasonable rate of return on its investment'."<sup>423</sup> This standard begs the question of what a "reasonable rate of return" would have been, a question that, in the European Union's view, "the Panel made no attempt to *explore*, let alone resolve."<sup>424</sup> The European Union charges that the Panel neither addressed what rate of return a private investor would have considered to be "reasonable", nor compared any such rate with the rate of return anticipated by the French Government, but concluded

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<sup>421</sup>European Union's appellant's submission, para. 1085 (referring to Panel Report, para. 7.1190).

<sup>422</sup>European Union's appellant's submission, para. 1102.

<sup>423</sup>European Union's appellant's submission, para. 1104 (quoting Panel Report, paras. 7.1364, 7.1366, 7.1370, and 7.1374). (emphasis added by the European Union)

<sup>424</sup>European Union's appellant's submission, para. 1104. (original emphasis)

nevertheless that the French Government anticipated a rate of return lower than would have been required by a private investor. In other words, the European Union argues, despite an "initial nod" to the correct standard, the Panel erred in applying the wrong "reasonable rate of return" standard.<sup>425</sup>

177. Moreover, even in applying its "reasonable rate of return" standard to the capital contributions at issue, the European Union asserts that the Panel "failed to *identify*, much less *assess*, any evidence concerning what a private investor would have considered to be a 'reasonable rate of return'."<sup>426</sup> In the European Union's view, the Panel failed to apply the legal standard it adopted to the facts of the dispute, and therefore erred in the application of Article 1.1(b). This failure also gives rise to error under Article 11 of the DSU, because the Panel made findings "without any basis in the evidence before it"; that is, without determining what rate of return a private investor would have considered "reasonable", or how that rate differed from the rate of return anticipated by the French Government.<sup>427</sup>

178. The European Union claims, in the alternative, that, even if the Panel applied the correct standard, it still erred in its application of that standard to determine whether any evidence on expected returns for the four capital contributions demonstrates a shortfall compared to a market benchmark. The Panel failed to assess properly what constitutes "usual investment practice", within the meaning of Article 14(a) of the *SCM Agreement*, and therefore failed to assess properly whether a "benefit" was conferred by the capital contributions. In particular, "the Panel failed to apply the one benchmark that provides the most relevant insight into contemporaneous private investor behaviour in the LCA sector—the behaviour of Boeing's investors."<sup>428</sup> The European Union adds that this would have enabled the Panel to assess "the *actual investment practice* of a private investor similarly situated to Aérospatiale's principal investor", thus obviating the need for the Panel "to pose the hypothetical question of how a private investor standing in the French State's shoes *would have acted*, according to 'usual investment practice'."<sup>429</sup>

179. The European Union argues that the Panel's failure to address the benchmark established by Boeing's investors is a "curious omission" since, in the absence of guidance in the *SCM Agreement* regarding the nature of evidence necessary to establish market-based terms, evidence concerning Aérospatiale's peer companies "was *a priori* relevant to the Panel's enquiry".<sup>430</sup> Moreover, the European Union notes that the Panel specifically stated that evidence concerning other firms operating

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<sup>425</sup>European Union's appellant's submission, para. 1105.

<sup>426</sup>European Union's appellant's submission, para. 1106. (original emphasis)

<sup>427</sup>European Union's appellant's submission, para. 1107.

<sup>428</sup>European Union's appellant's submission, para. 1109.

<sup>429</sup>European Union's appellant's submission, para. 1109. (original emphasis)

<sup>430</sup>European Union's appellant's submission, para. 1111.

in the same industries is "*particularly probative* of the question whether a private investor would have chosen to make the capital investments in Aérospatiale at issue in this dispute."<sup>431</sup> The European Union agrees with this statement of the Panel, adding that "Boeing was, at the time, Aérospatiale's *closest* peer."<sup>432</sup>

180. The European Union submits that "{t}he behaviour of Boeing's investors demonstrates that private investors were willing to sustain and indeed increase investment in LCA product development, even during periods of weak demand and poor financial performance, in light of positive future prospects."<sup>433</sup> Citing evidence of the poor financial performance of Boeing in the early 1990s, the European Union nevertheless notes investments by Boeing's investors that enabled the company to achieve, for example, the development and launch of the Boeing 737 and 777 programmes. The European Union insists that what drove Boeing's investors to continue investing in product development despite the company's poor current and past performance were "{c}ontemporaneous assessments by Boeing, Airbus and the US government forecasting extensive passenger traffic growth and robust demand for LCA well into the future".<sup>434</sup> Such positive forecasts "motivated Boeing's investors to support the company's decision to make massive investments in product development that would enable the company to benefit when the market improved, as was uniformly forecast."<sup>435</sup>

181. The European Union argues that the behaviour of Boeing's private investors during this period serves as a relevant benchmark against which to measure whether Aérospatiale's government investors were acting in accordance with "usual investment practice". The European Union asserts that, during this period, both Aérospatiale's and Boeing's investors decided, despite poor past performance, to support the companies' decisions to fund product development that would boost competitiveness when the market improved. The European Union adds that "a future-oriented approach to investment decisions is particularly pertinent in industries, such as LCA, with long and costly development cycles, which require investment even during periods of weak performance."<sup>436</sup> Moreover, because Boeing was, prior to its acquisition of McDonnell Douglas, even more dependent on LCA revenues than Aérospatiale, "Boeing's investments in product development were a bellwether for others making investment decisions in the LCA market."<sup>437</sup>

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<sup>431</sup>European Union's appellant's submission, para. 1112 (quoting Panel Report, para. 7.1360). (emphasis added by the European Union)

<sup>432</sup>European Union's appellant's submission, para. 1113. (original emphasis)

<sup>433</sup>European Union's appellant's submission, para. 1114.

<sup>434</sup>European Union's appellant's submission, para. 1116.

<sup>435</sup>European Union's appellant's submission, para. 1116.

<sup>436</sup>European Union's appellant's submission, footnote 1519 to para. 1117.

<sup>437</sup>European Union's appellant's submission, para. 1117.

182. The European Union submits that, instead of examining the contemporaneous behaviour of Boeing's investors, the Panel "effectively concluded that the French State, as Aérospatiale's principal investor, would have found *no appeal* in a market with future prospects bright enough to motivate Boeing's investors to maintain their investments."<sup>438</sup> This is tantamount to concluding that a private investor in Aérospatiale would have made the "utterly nonsensical decision" to cede the market to a principal competitor.<sup>439</sup> The European Union also argues that the Panel's approach required it "to pose and answer the hypothetical question of how a private investor standing in the French State's shoes *would have acted*".<sup>440</sup>

183. Thus, the European Union contends, "not only did the Panel fail ... to identify, much less assess, any evidence concerning how a private investor *would have acted*", it also "failed to apply a benchmark based on how private investors in Boeing *did in fact act*, in the face of past performance and future prospects similar to that faced by Aérospatiale."<sup>441</sup> The European Union finds this "surprising", given the Panel's statement that evidence regarding other firms operating in the same industries, presumably subject to similar business risks and cycles as Aérospatiale, was "particularly probative of the question whether a private investor would have chosen to make the capital investments in Aérospatiale at issue".<sup>442</sup> This evidence was available to the Panel, and the Panel's failure to apply that benchmark amounts to an error in the application of Article 1.1(b) of the *SCM Agreement*.

184. Moreover, the European Union argues that the Panel's failure to apply a benchmark based on the actual behaviour of Boeing's investors, without any reasoned explanation for its decision to do so, constitutes a failure to make an objective assessment of the matter, in violation of Article 11 of the DSU. The European Union contends that the Panel's failure to apply this benchmark "is particularly egregious, as evidence concerning the contemporaneous behaviour of Boeing's investors in the face of the company's weak past performance formed a central part of the European {Communities'} defence."<sup>443</sup> The European Union claims that the Panel accepted evidence by the United States concerning the financial performance of certain of Aérospatiale's peer companies, yet disregarded similar evidence regarding Boeing when offered by the European Communities. The European Union

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<sup>438</sup>European Union's appellant's submission, para. 1119. (original emphasis)

<sup>439</sup>European Union's appellant's submission, para. 1119.

<sup>440</sup>European Union's appellant's submission, para. 1120. (original emphasis)

<sup>441</sup>European Union's appellant's submission, para. 1120. (original emphasis)

<sup>442</sup>European Union's appellant's submission, para. 1121.

<sup>443</sup>European Union's appellant's submission, para. 1122.

maintains that the Panel's "variable treatment of the same class of evidence is internally incoherent, and contrary to its obligation to provide coherent reasoning, under Article 11 of the DSU."<sup>444</sup>

(b) Share transfer

185. The European Union argues that the Panel committed legal error by disregarding the relevant benchmark establishing that the French Government was paid fair market value for the transfer of its 45.76% stake in Dassault Aviation to Aérospatiale. According to the European Union, the report by the French *Commissaires aux apports* (the "*Commissaires'* report")<sup>445</sup> concluded that the exchange ratio applied for the transfer of the French Government's shares in Dassault Aviation, in exchange for new Aérospatiale shares, was consistent with a market valuation of Aérospatiale and Dassault using the discounted cash flow method. This assessment, together with the confirmation by several investment banks (Lazard Frères, Rothschild and Compagnie Financière Edmond de Rothschild), demonstrated that "the French State had been fully compensated for the market value of the Dassault shares transferred to Aérospatiale", and that Aérospatiale had therefore not received Dassault shares on terms more favourable than those available on the market.<sup>446</sup> The European Union asserts that because this confirms that no benefit was conferred, the Panel's analysis should have ended at that point.

186. The European Union maintains that, instead of heeding the benchmark assessed in the *Commissaires'* report, the Panel set out to determine whether the Dassault transfer was "inconsistent with the usual investment practice of private investors in France".<sup>447</sup> The European Union claims that the Panel's statement "shows considerable confusion about the interpretation of the 'benefit' standard", since it suggests that "*different legal standards* apply to the determination of 'benefit', when considered under Article 1.1(b) as opposed to under Article 14(a)."<sup>448</sup> According to the European Union, the guidelines set out in Article 14 "*do not replace* Article 1.1(b)"; rather, the question posed under both Articles "is the same—did Aérospatiale receive the French State's Dassault stake on terms more favourable than would have been extended by a private investor at market?"<sup>449</sup> The European Union argues that the *Commissaires'* report answers that question, confirming that the French Government, in transferring its shares in Dassault, received payment commensurate with the

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<sup>444</sup>European Union's appellant's submission, para. 1125 (referring to Appellate Body Report, *US – Upland Cotton* (Article 21.5 – Brazil), para. 294).

<sup>445</sup>*Rapport des Commissaires aux apports sur la rémunération de l'apport de titres Dassault Aviation* (6 May 1999) (Panel Exhibit EC-892), section 3.

<sup>446</sup>European Union's appellant's submission, para. 1140.

<sup>447</sup>European Union's appellant's submission, para. 1141 (quoting Panel Report, para. 7.1406).

<sup>448</sup>European Union's appellant's submission, para. 1142. (original emphasis)

<sup>449</sup>European Union's appellant's submission, para. 1142. (original emphasis)



market value of those assets. The European Union adds that "{w}here a government is paid fair market value for a capital contribution, there is no 'benefit', because the government is acting in accordance with the usual investment practice of a private investor, who would similarly seek fair market value for a capital contribution."<sup>450</sup> In finding that the benchmark used in the *Commissaires'* report could not serve as a benchmark in assessing "benefit", the Panel erred in its interpretation of Article 1.1(b). Accordingly, the European Union requests the Appellate Body to reverse the Panel's finding that the transfer to Aérospatiale of the French Government's stake in Dassault conferred a "benefit" and constituted a subsidy.

187. As a conditional appeal, the European Union submits that the Panel committed an "additional error" in applying the "benefit" standard in Article 1.1(b) of the *SCM Agreement* to the facts. The European Union recalls that the Panel set out to determine "whether the United States ha{d} demonstrated that a private investor would not have made the equity investment in question based on the information available at the time", and concluded that, without the Dassault shares on its balance sheet, Aérospatiale's financial position and future prospects were insufficient to enable it to attract the private capital necessary to privatize.<sup>451</sup> In the European Union's view, however, the fact that the Dassault transfer increased the chances that the Aérospatiale privatization would occur on schedule does not demonstrate that a private investor would not have made the transfer. The European Union argues that "{a} private owner would presumably also take actions designed to increase the chances that a planned sale of its wholly-owned assets would occur as scheduled."<sup>452</sup>

188. The European Union notes that the Panel turned to the question posed by the European Communities concerning "whether the United States had provided evidence establishing that a private owner, standing in the French State's shoes, would not have consolidated its wholly-owned aerospace assets in advance of a planned sale of those assets."<sup>453</sup> The European Union contends that the United States offered no such evidence. In contrast, the European Communities provided valuations by investment banks involved in estimating the combined value of Aérospatiale and Matra Haute Technologies, which were combined to create Aérospatiale-Matra. In providing those valuations, the investment banks arrived at an offering price for Aérospatiale-Matra's shares only after valuing Dassault separately from the other operations of Aérospatiale, thus guaranteeing that the per share price paid to the French Government in the privatization fully captured, and compensated the

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<sup>450</sup>European Union's appellant's submission, para. 1143.

<sup>451</sup>European Union's appellant's submission, para. 1146 (referring to Panel Report, paras. 7.1407 and 7.1409).

<sup>452</sup>European Union's appellant's submission, para. 1147.

<sup>453</sup>European Union's appellant's submission, para. 1148 (referring to Panel Report, paras. 7.1410 and 7.1412).

French Government for, the market value of the 45.76% stake in Dassault. In other words, "the investment banks' valuations furthered the conclusion reached in the *Commissaires'* report."<sup>454</sup>

189. The European Union argues that the Panel rejected this evidence, considering it insufficient to demonstrate that the French Government had been paid fair market value for its stake in Dassault, both at the time of the transfer to Aérospatiale, and at the time of the privatization. Instead, the Panel faulted the European Communities for failing to provide evidence demonstrating that the anticipated returns from the combined sale of Aérospatiale and the French Government's Dassault stake exceeded the anticipated returns from the sale of Aérospatiale alone, and the retention by the French Government of its stake in Dassault. The European Union argues that the Panel did not address, nor was there any evidence to demonstrate, that such returns from the combined sale were lower than the returns from the sale of Aérospatiale alone, coupled with retention by the French Government of its stake in Dassault. In the absence of such evidence, the European Union contends, "it is unclear on what basis the Panel was able to find the existence of a 'benefit', within the meaning of Article 1.1(b)."<sup>455</sup>

190. The European Union further claims that, by considering it insufficient that the European Communities had shown that the French Government was paid fair market value for its Dassault stake, the Panel in effect was demanding that the French Government had to have "anticipated earning *more* than a market return for its combined aerospace assets".<sup>456</sup> The European Union considers that the Panel's finding "is tantamount to saying that, to avoid conferring a 'benefit', a government cannot privatise a state-owned company, even in a public offering (and thus, by definition, at fair market value), *unless* the government can prove that it anticipates earning a better rate of return, through the privatisation, than it would have earned had it not privatised, and instead retained ownership of the company."<sup>457</sup> According to the European Union, the Panel's logic would require that a government "must *retain* shareholdings, *even where those shareholdings can be sold and fair market value realised*".<sup>458</sup>

191. The European Union submits that the Panel committed additional errors in rejecting the investment bank valuations provided by the European Communities. The European Union claims that the Panel discounted the investment bank valuations because they were done after the Dassault transfer, and were provided to parties other than the French Government, and therefore were not

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<sup>454</sup>European Union's appellant's submission, para. 1150.

<sup>455</sup>European Union's appellant's submission, para. 1152.

<sup>456</sup>European Union's appellant's submission, para. 1155. (original emphasis)

<sup>457</sup>European Union's appellant's submission, para. 1155. (original emphasis)

<sup>458</sup>European Union's appellant's submission, para. 1157. (original emphasis)

known to the French Government at the time of the transfer of the Dassault shares. The European Union considers that the Panel erred by requiring not only that the financial contribution was market consistent, but that the evidence was known and received by the government at the time the contribution was made. As the European Union argues, Article 1.1(b) "does not require proof that the French State knew of, received or relied on such evidence in deciding to make the capital contribution ... {but} only that the information recorded in that evidence *evaluated financial conditions that existed at the time of the capital contribution*".<sup>459</sup> Similarly, the Panel erred in disregarding the investment bank valuations, because the reports post-dated the Dassault transfer. In the European Union's view, "as long as the valuations assessed *financial facts and conditions in effect at the time the capital contribution is made*, they can serve as legitimate evidence of the absence of 'benefit'".<sup>460</sup> The European Union contends that the investment bank valuations satisfied these standards, and the Panel's findings are therefore an erroneous application of the "benefit" standard in Article 1.1(b).

10. The Subsidized Product and Product Market

192. The European Union appeals what it describes as the Panel's finding that "as a matter of law {the Panel} had no discretion to divide a broad single 'subsidized product' as alleged in a complaining Member's request for establishment {of a panel} and that it need not independently and objectively assess the scope of the 'subsidized product', as defined by the United States".<sup>461</sup> The European Union argues, first, that the Panel acted inconsistently with its duty to make an objective assessment of the matter before it, as required under Article 11 of the DSU, by failing to assess "independently" the scope of the "subsidized product" proposed by the United States. The European Union emphasizes that previous panels have found that, even where the parties agree on an issue, the panel is required to make an independent and objective assessment. The European Union adds that, if this is required in circumstances where the parties agree, it certainly is required in cases where the parties disagree.

193. The European Union further claims that the Panel erred in concluding that "there is a complete absence of any guidance in the text of the SCM Agreement as to the bases on which a decision as to the appropriate subsidized product {might (*sic*)} be made"<sup>462</sup>, and that nothing in the *SCM Agreement* required that it "make an independent determination of the 'subsidized product', as opposed to relying on the complaining Member's identification of that product".<sup>463</sup> Contrary to what

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<sup>459</sup>European Union's appellant's submission, para. 1161. (original emphasis)

<sup>460</sup>European Union's appellant's submission, para. 1162. (original emphasis)

<sup>461</sup>European Union's appellant's submission, paras. 298, 301, and 304; see also para. 288.

<sup>462</sup>European Union's appellant's submission, para. 305 (quoting Panel Report, para. 7.1656).

<sup>463</sup>European Union's appellant's submission, para. 305 (quoting Panel Report, para. 7.1653).

the Panel assumed, the text and context of Article 6.3 of the *SCM Agreement* provide guidance for an assessment of the term "subsidized product". For example, "[e]very one of the subparagraphs of Article 6.3 defines serious prejudice with respect to certain effects in 'markets'."<sup>464</sup> The European Union adds that the term "market" "covers both geographic and product markets."<sup>465</sup> With respect to the "product market dimension", the European Union argues that "two products would be in the same market if they were engaged in actual or potential competition in that market" and where there is "homogeneity of the conditions of competition".<sup>466</sup> According to the European Union, "[t]his means that a panel must objectively assess whether the product market(s) asserted by the complaining Member exist and can serve as a proper basis for analysing the complaining Member's adverse effects claims."<sup>467</sup> This analysis, the European Union argues, "must start with an assessment of the complaining Member's definition of the 'subsidized product'".<sup>468</sup>

194. Referring to the report of the panel in *Korea – Commercial Vessels*, the European Union argues that "without retaining the flexibility to analyse critically a complaining Member's proffered scope of the subsidised product within the context of actual competition and markets, a complaining Member may advance an entirely absurd definition of a 'subsidized product'."<sup>469</sup> Turning to the specifics of this dispute, the European Union argues that "[s]ubsidized aircraft may be considered to be in the same market, and hence a single 'subsidized product', only if they are engaged in actual or potential competition."<sup>470</sup> For the European Union, it follows that, to the extent the United States has identified a group of aircraft that contains products that do not "generally compete", these aircraft cannot be considered to be in the same market, and, therefore, cannot be considered a single "subsidized product".<sup>471</sup> The European Union further explains that a "coherent" adverse effects analysis "requires an assessment of the extent and nature of *actual or potential* competition among particular products in the relevant markets".<sup>472</sup> That assessment must begin with an objective assessment of the "subsidized product" in the light of the subsequent requirement to assess serious prejudice on the basis of product markets.

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<sup>464</sup>European Union's appellant's submission, para. 307. (original underlining)

<sup>465</sup>European Union's appellant's submission, para. 307 (referring to Appellate Body Report, *US – Upland Cotton*, para. 408). (underlining added by the European Union)

<sup>466</sup>European Union's appellant's submission, para. 307 (quoting Appellate Body Report, *US – Upland Cotton*, paras. 405-410).

<sup>467</sup>European Union's appellant's submission, para. 307.

<sup>468</sup>European Union's appellant's submission, para. 307.

<sup>469</sup>European Union's appellant's submission, para. 309 (referring to Panel Report, *Korea – Commercial Vessels*, para. 7.624).

<sup>470</sup>European Union's appellant's submission, para. 310.

<sup>471</sup>European Union's appellant's submission, para. 310.

<sup>472</sup>European Union's appellant's submission, para. 311. (original emphasis)

195. The European Union therefore requests the Appellate Body to reverse the Panel's "reasoning", and find that "a panel must make an independent and objective assessment of the scope of the 'subsidized' product."<sup>473</sup>

- (a) Whether the Panel erred in assessing displacement on the basis of a single product and a single-product market

- (i) *The Panel's interpretative approach*

196. The European Union claims that the Panel erred under Article 6.3(a) and (b) of the *SCM Agreement* in its interpretation of the term "market" in the context of the terms "subsidized product" and "like product" and, in applying its interpretation to the facts, "finding that there is only a single product market in which all Boeing and Airbus LCA compete."<sup>474</sup> According to the European Union, "{t}he concepts of 'markets' and 'competition'—as well as 'subsidized' and 'like' products—are inseparable concepts that play a crucial role in assessing serious prejudice under Article 6.3 of the *SCM Agreement*."<sup>475</sup> The European adds that "both Articles 6.3(a) and (b) discipline the 'displacement' in a particular 'market' of imports or exports of a 'like product' of one Member by subsidies benefiting a competing 'subsidized product' of another Member."<sup>476</sup>

197. Referring to the report of the Appellate Body in *US – Upland Cotton*, the European Union argues that the "markets" referred to in Article 6.3(a) and (b) "are defined including by reference to their product dimension"<sup>477</sup> and that "two products are in the same market if they are in 'actual or potential competition' and there exists 'homogeneity of the conditions of competition' in a market."<sup>478</sup> The "terms 'subsidized product' and 'like product' provide important context, and their previous interpretations provide guidance, for assessing whether two products are in the same product 'market'."<sup>479</sup> The European Union recalls that, in *EC – Asbestos*, the Appellate Body listed a number of criteria that could be assessed for purposes of determining whether two products are in the same product market. Such criteria include "identical or similar characteristics and qualities" based on factors that might "rang{e} from physical properties such as composition, size, shape, texture, and

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<sup>473</sup>European Union's appellant's submission, para. 313.

<sup>474</sup>European Union's appellant's submission, para. 340.

<sup>475</sup>European Union's appellant's submission, para. 341.

<sup>476</sup>European Union's appellant's submission, para. 341.

<sup>477</sup>European Union's appellant's submission, para. 342 (referring to Appellate Body Report, *US – Upland Cotton*, para. 408).

<sup>478</sup>European Union's appellant's submission, para. 343 (referring to Appellate Body Report, *US – Upland Cotton*, para. 408).

<sup>479</sup>European Union's appellant's submission, para. 344.

possibly taste and smell, to the end-uses and applications of the product."<sup>480</sup> The Appellate Body also referred to the *Border Tax Adjustment* criteria consisting of: "(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits—more comprehensively termed consumers' perceptions and behaviour—in respect of the products; and (iv) the tariff classification of the products."<sup>481</sup>

198. The European Union argues that in the LCA industry "objective evidence of the scope of an LCA product market" would consist of "contemporaneous sales campaign evidence and data demonstrating 'direct head-to-head competition' in all LCA sales during the reference period."<sup>482</sup> According to the European Union, such evidence "reflects airlines' perceptions of where competition exists", and "it is the airlines themselves that determine the competition between products and that define the product markets by demanding competing offers from Airbus and Boeing for their particular LCA needs."<sup>483</sup> To the extent that all, or the great majority, of sales campaigns involve competition *only* between certain Boeing and Airbus products, "this would constitute a strong basis to find that those products are in a 'product' market separate from other Airbus and Boeing LCA."<sup>484</sup> Moreover, "evidence of rare cases of competition or substitutability in 'unusual circumstances' is not a proper basis for finding that such products compete in the same product market."<sup>485</sup>

199. The European Union claims that the Panel further erroneously set a "no competition" threshold for two products not to be in the same product market.<sup>486</sup> The European Union underscores that "{t}he fact that certain products 'share particular characteristics' ... or that they have the 'same general uses' does not constitute a basis on which to find that they compete in the same product market."<sup>487</sup>

200. The European Union takes the position that the Panel erred when it found "relevant to its 'market' assessment the possibility of linkages and spill-over effects of the subsidies in question."<sup>488</sup> In particular, the Panel explained that these subsidies "are not limited to one model of Airbus LCA,

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<sup>480</sup>European Union's appellant's submission, para. 344 (quoting Appellate Body Report, *EC – Asbestos*, paras. 91 and 92).

<sup>481</sup>European Union's appellant's submission, para. 344 (quoting Appellate Body Report, *EC – Asbestos*, para. 101).

<sup>482</sup>European Union's appellant's submission, para. 345 (quoting Panel Report, para. 7.1668).

<sup>483</sup>European Union's appellant's submission, para. 345.

<sup>484</sup>European Union's appellant's submission, para. 345.

<sup>485</sup>European Union's appellant's submission, para. 345 (referring to Panel Report, footnote 5089 to para. 7.1668).

<sup>486</sup>European Union's appellant's submission, para. 351 (referring to Panel Report, para. 7.1668 and footnote 5089 thereto).

<sup>487</sup>European Union's appellant's submission, para. 351 (referring to Panel Report, para. 7.1664).

<sup>488</sup>European Union's appellant's submission, para. 353 (referring to Panel Report, para. 7.1655).

but rather benefit the entire family of Airbus LCA."<sup>489</sup> According to the European Union, "{t}his explanation reveals what appears to be the Panel's major concern in making its finding of a single product market—namely that any other finding would prevent it from assessing linkages and spill-over effects in separate product markets for purposes of causation."<sup>490</sup>

201. The European Union submits that the Panel's concern is "unwarranted", and explains that it "fully accepts" that any linkages and spill-over effects—for example, the relevance to Airbus' later product launches of the company's technological experience gained from earlier product launches—could be relevant to an assessment of causation under Article 6.3 of the *SCM Agreement*.<sup>491</sup> The European Union also accepts that "the relevance of Airbus' ability to offer a full product line to, for example, its ability to benefit from commonality effects or 'bundled' sales, or to gain sufficient technological experience are factors that the Panel might {have} take{n} into account when assessing causation and the effects of subsidies to one product spilling over to another product."<sup>492</sup> In addition, the European Union agrees that "such production efficiencies, if they can be traced to subsidies, might be important for assessing causation, at least to the extent they speak to Airbus' ability to launch a product or offer lower prices."<sup>493</sup>

202. The European Union considers that "{t}he Panel's reliance on these causation-related factors to support its single subsidised product finding creates the impression that the Panel, in effect, pre-judged its own causation findings."<sup>494</sup> However, "the steps necessary to assess serious prejudice cannot *start* with causation."<sup>495</sup> Rather, "they must first involve a detailed analysis of the 'market' or 'markets' in which the subsidies at issue can have effects."<sup>496</sup> This "involves assessing the nature and extent of head-to-head competition between different products."<sup>497</sup> According to the European Union, "{o}nly on that basis can a finding be made on the number of markets and the number of subsidised, and like, products that compete therein."<sup>498</sup>

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<sup>489</sup>European Union's appellant's submission, para. 353 (quoting Panel Report, para. 7.1655).

<sup>490</sup>European Union's appellant's submission, para. 353 (referring to Panel Report, paras. 7.1667 and 7.1669).

<sup>491</sup>European Union's appellant's submission, para. 354.

<sup>492</sup>European Union's appellant's submission, para. 355.

<sup>493</sup>European Union's appellant's submission, para. 356.

<sup>494</sup>European Union's appellant's submission, para. 357.

<sup>495</sup>European Union's appellant's submission, para. 357. (original emphasis)

<sup>496</sup>European Union's appellant's submission, para. 357.

<sup>497</sup>European Union's appellant's submission, para. 357.

<sup>498</sup>European Union's appellant's submission, para. 357.

203. For these reasons, the European Union requests the Appellate Body to reverse the Panel's interpretation and application of the terms "market" and "subsidized product".<sup>499</sup> According to the European Union, these interpretative "errors had significant consequences for the Panel's improper assessment of the markets to examine displacement and threat of displacement."<sup>500</sup>

(ii) *Article 11 of the DSU*

204. The European Union submits that, in finding that there is "only one, rather than several, LCA product markets" and that it "could assess displacement on the basis of a single LCA product market", the Panel acted inconsistently with its obligations under Article 11 of the DSU.<sup>501</sup> According to the European Union, the Panel's interpretative error "allowed" it "to marginalise and disregard overwhelming evidence that competition takes place almost exclusively between certain Airbus and Boeing products—and not between every Airbus product and every Boeing product."<sup>502</sup>

205. In any event, the European Union maintains that the "key factor for the Panel's determination {of} whether there is a single or multiple product market(s) is the assessment of where competition actually takes place—i.e., evidence of actual sales transactions that reflect the market(s) where the product(s) are bought and sold, as well as market perceptions by LCA manufacturers, purchasers and operators, as well as market experts."<sup>503</sup> The European Union notes that "{t}he United States provided a document with data that listed the sales campaigns Boeing and Airbus each won in the period 2000-August 2005, and that identified the competing Boeing product for each of the sales that Airbus won."<sup>504</sup> This evidence showed that "in *every* sales campaign Airbus won with its single-aisle A320 family LCA" it competed against the Boeing single-aisle family LCA.<sup>505</sup> Moreover, "{i}n approximately 75 percent of sales campaigns in which Airbus won with its 200-300 seat Airbus A330 and A350 families, it competed against Boeing 767 and 787 family LCA."<sup>506</sup> The European Union submits that, "{i}n the other 25 percent of the sales campaigns, Boeing offered the 777 in particular because the customer did not want to purchase old-technology 767, and the Boeing 787 was not yet available."<sup>507</sup> Furthermore, "in *every* sales campaign Airbus won with its 300-400 seat A340 family

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<sup>499</sup>European Union's appellant's submission, para. 358 (referring to Panel Report, paras. 7.1638, 7.1650, 7.1653, 7.1662, 7.1679, 7.1680, 7.1741, 7.1742, and 7.1777 and footnote 5465 to para. 7.1847).

<sup>500</sup>European Union's appellant's submission, para. 358.

<sup>501</sup>European Union's appellant's submission, paras. 340 and 359.

<sup>502</sup>European Union's appellant's submission, para. 360 (referring to evidence summarized in Annex II (Product Markets Annex) (BCI) to its appellant's submission, sections II.A and III.A).

<sup>503</sup>European Union's appellant's submission, para. 361.

<sup>504</sup>European Union's appellant's submission, para. 362 (referring to Panel Exhibit EC-322 (BCI)).

<sup>505</sup>European Union's appellant's submission, para. 363. (original emphasis)

<sup>506</sup>European Union's appellant's submission, para. 363.

<sup>507</sup>European Union's appellant's submission, para. 363 (referring to European Communities' response to Panel Question 114, paras. 320-328).



LCA, it competed against the 300-400 seat Boeing 777 family LCA."<sup>508</sup> That is, "there were no sales campaigns in which Airbus' 300-400 seat A340 competed with Boeing's 767 or 787, further supporting the 'unusual circumstances' that are the basis for the limited 777 v A330 competition."<sup>509</sup> The European Union further argues that "{t}here were, moreover, *no* sales campaigns in which the Airbus A380 competed against Boeing 737NG, 767, 777 or 787 family LCA."<sup>510</sup> In other words, "the United States' evidence showed that competition takes place almost exclusively between specific Airbus and Boeing products that, therefore, compete in separate product markets."<sup>511</sup>

206. The European Union also notes that the United States had presented pricing evidence "*not* on the basis of a single like product, but separately for the 737NG, the 747, the 767, and the Boeing 777."<sup>512</sup> When assessing that evidence, the Panel found that "prices for each aircraft moved in quite different directions."<sup>513</sup> The European Union argues that this evidence regarding price developments for Boeing aircraft "demonstrates that the different Boeing products—the 737NG, 767, 777 and 747 LCA families—are not facing 'homogeneity of the conditions of competition' and are, therefore, not in the same product market."<sup>514</sup>

207. The European Union further submits that "{t}he existence of more than one product market was confirmed by other uncontested evidence."<sup>515</sup> That evidence "included evidence on the LCA offered by Boeing and Airbus in sales campaigns won by Boeing."<sup>516</sup> It also included Boeing and Airbus marketing materials together with statements from both Boeing and Airbus officials<sup>517</sup>, and

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<sup>508</sup>European Union's appellant's submission, para. 363. (original emphasis)

<sup>509</sup>European Union's appellant's submission, para. 363.

<sup>510</sup>European Union's appellant's submission, para. 363. (original emphasis)

<sup>511</sup>European Union's appellant's submission, para. 363.

<sup>512</sup>European Union's appellant's submission, para. 364 (original emphasis) (referring to the United States' first written submission to the Panel, charts at paras. 803-809 and Boeing indexed average aircraft price charts (Panel Exhibit US-444 (BCI)); and United States' second written submission to the Panel, para. 734 and Boeing US market pricing chart, revised with 2006 data (Panel Exhibit US-616 (BCI)).

<sup>513</sup>European Union's appellant's submission, para. 364 (referring to Panel Report, Chart 11 at para. 7.1848 (Boeing 737NG average indexed order prices), Chart 12 at para. 7.1849 (Boeing 767 average indexed order prices), Chart 13 at para. 7.1850 (Boeing 747 average indexed order prices), and Chart 14 at para. 7.1851 (Boeing 777 average indexed order prices)).

<sup>514</sup>European Union's appellant's submission, para. 364 (quoting Appellate Body Report, *US – Upland Cotton*, para. 408).

<sup>515</sup>European Union's appellant's submission, para. 365.

<sup>516</sup>European Union's appellant's submission, para. 365 (referring to Panel Exhibit EC-323 (BCI); and Expert statement of Christian Scherer, Head of Future Programmes, Airbus, "Commercial Aspects of the Aircraft Business from the Perspective of a Manufacturer" (Panel Exhibit EC-14 (BCI)), Annex I (Airbus orders for January 2000 through December 2006) and Annex II (Boeing orders for January 2000 through December 2006)).

<sup>517</sup>European Union's appellant's submission, para. 365 (referring to Panel Exhibits EC-298, EC-307, EC-309, EC-311, EC-312, EC-313, EC-314 (HSBI), EC-315, EC-316, EC-318, EC-317 (BCI), EC-319, EC-320, EC-322 (BCI), and EC-323 (BCI)).

statements of market experts<sup>518</sup>, including experts testifying before the Panel.<sup>519</sup> The European Union considers that "{a}ll of this evidence confirmed that head-to-head competition is limited to particular Airbus and particular Boeing LCA."<sup>520</sup> This evidence "also confirmed that direct head-to-head competition reflected considerable differences between LCA in terms of their ranges, seating capacities, prices, and performance characteristics, evidence which is largely undisputed."<sup>521</sup> The European Union asserts, that "{f}or the most part, the Panel did not refer to, or otherwise address in any substantive manner, any of this evidence."<sup>522</sup> Rather, the Panel focused on some isolated occasions in which multiple Airbus and Boeing LCA from different product groupings were offered to meet a customer's needs. In these "rare instances", the evidence showed that "the airline customer simply required for *multiple* types of LCA (e.g., for both a single-aisle *and* a 300-400 seat LCA) at the same time and, therefore, requested offers from Airbus and Boeing in a single sales campaign."<sup>523</sup> However, according to the European Union, "in these sales campaigns, competition took place between Boeing and Airbus LCA in the same product groupings and markets identified by the European Union (e.g., Airbus A320 v. Boeing 737, and Airbus A340 v. Boeing 777)."<sup>524</sup>

208. Furthermore, the European Union argues that, in finding a single "subsidized product", the Panel also "relied on evidence submitted by the United States, referring to Airbus as creating an 'entire family of Airbus LCA' to suggest that all LCA compete with one another."<sup>525</sup> According to the European Union, the evidence before the Panel "shows that the use of a singular 'Airbus family' refers to production and technological cross-benefits between various products (economies of scope)."<sup>526</sup> However, "{i}t does not suggest or establish that there is competition between the LCA that make up the alleged 'Airbus family'."<sup>527</sup> Instead, the use of the term "family", as it applies to competition, "refers, for example, to the A320 'family' of the A318, A319, A320, and A321 single-aisle LCA, and

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<sup>518</sup>European Union's appellant's submission, para. 365 (referring to Expert statement of Rod P. Muddle, Airline Capital Associates Inc., "The Dynamics of the Large Civil Aircraft Industry" (Panel Exhibit EC-19); and Expert statement of Christian Scherer, *supra*, footnote 516).

<sup>519</sup>European Union's appellant's submission, para. 365 (referring to European Communities' oral statement at the second Panel meeting, paras. 311-341, and paras. 118-156. See also Expert statement of Christian Scherer, *supra*, footnote 516).

<sup>520</sup>European Union's appellant's submission, para. 365.

<sup>521</sup>European Union's appellant's submission, para. 365.

<sup>522</sup>European Union's appellant's submission, para. 365.

<sup>523</sup>European Union's appellant's submission, para. 366. (original emphasis)

<sup>524</sup>European Union's appellant's submission, para. 366 (referring to European Communities' second written submission to the Panel, paras. 721-726).

<sup>525</sup>European Union's appellant's submission, para. 369 (quoting Panel Report, para. 7.1651).

<sup>526</sup>European Union's appellant's submission, para. 369.

<sup>527</sup>European Union's appellant's submission, para. 369.

the corresponding and competing Boeing family of single-aisle LCA, the 737-600, 737-700, 737-800, and the 737-900."<sup>528</sup>

209. Finally, the European Union underscores that, under Article 11 of the DSU, the Panel was required to make an objective assessment of the facts and determine the number of markets and subsidized products. The European Union concedes that the Panel "need not have accepted the European {Communities'} argument that there were five different LCA markets."<sup>529</sup> But neither was it required to adopt the United States' proffered single subsidized product. According to the European Union, the Panel's judgement in this dispute exceeded the bounds of its discretion as the trier of fact when it found a single-product market and a single subsidized product against the considerable bulk of the evidence to the contrary. The Panel either "disregarded" or "marginalized" the European Communities' evidence on where *actual competition* takes place, and did not address it adequately in its findings. The Panel also failed to provide a "reasoned and adequate explanation" based on "coherent reasoning" of how this overwhelming evidence did not contradict, and did in fact support, its finding that there is only a single LCA product market. In doing so, the Panel erred under Article 11 of the DSU.

210. Accordingly, the European Union requests the Appellate Body to reverse the Panel's finding that there is a single LCA product market and only one subsidized product. The European Union also requests the Appellate Body to complete the analysis and find that there is a "separate product market for single-aisle LCA".<sup>530</sup> The European Union recognizes that there is "limited conflicting evidence that likely prevents the Appellate Body from completing the analysis for the other LCA product markets."<sup>531</sup> For purposes of this appeal, the European Union considers market share developments on the basis of two sets of wide-body aircraft markets, one involving four wide-body LCA markets<sup>532</sup> and one involving two wide-body LCA markets.<sup>533</sup> The European Union stresses, however, that "the weight of the evidence supports its approach based on four separate wide-body LCA product markets."<sup>534</sup> Although it considers that the Panel's errors undermine the Panel's displacement findings, the European Union explains however that it "does not request that the Appellate Body reverse the displacement findings in their entirety."<sup>535</sup>

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<sup>528</sup>European Union's appellant's submission, para. 369.

<sup>529</sup>European Union's appellant's submission, para. 370.

<sup>530</sup>European Union's appellant's submission, para. 375.

<sup>531</sup>European Union's appellant's submission, para. 375.

<sup>532</sup>These four markets are 200-300 seat, 300-400 seat, 400-500 seat, and 500+ seats.

<sup>533</sup>These two markets are twin-aisle aircraft and very large aircraft.

<sup>534</sup>European Union's appellant's submission, para. 375.

<sup>535</sup>European Union's appellant's submission, para. 376.

211. The European Union maintains that the Panel's error of assessing displacement on the basis of a single-product market resulted in distorted displacement findings. In particular, the European Union argues that market share information summarized in section 2 of Annex III (Displacement Annex) to its appellant's submission "demonstrates that the Panel's failure to conduct a 'differentiated analysis' that distinguishes LCA product markets based on actual competition resulted in significant distortions and exaggerated the extent of any displacement observed by the Panel."<sup>536</sup> The European Union points out that "the Panel even recognised the risk of 'distorting' its displacement analysis by adopting an 'undifferentiated or monolithic' subsidised product analysis."<sup>537</sup> Nonetheless, it "proceeded to ignore that recognition and failed—indeed, it refused—to return to this issue in its displacement analysis beyond asserting, without explanation, that its approach would not distort its displacement analysis."<sup>538</sup>

212. The European Union submits that, by conducting its "displacement analysis on a cumulative (single product market) basis, the Panel found that Boeing was displaced—i.e. that it lost market share—in Brazil, Mexico, Chinese Taipei and Singapore."<sup>539</sup> However, when displacement is examined "from a transparent perspective by using the product markets where actual competition took place, the data reveals that Boeing was *not* displaced in any of these markets."<sup>540</sup> Similarly, the European Union argues that "a transparent displacement analysis reveals that, in Australia, Boeing only lost market share in the single-aisle LCA market; in China and Korea it only lost market share in the single-aisle and 200-300 seat LCA markets; whereas in the {European Union}, it lost market share in the single-aisle, 200-300 and 300-400 seat LCA markets."<sup>541</sup>

213. According to the European Union, "{e}ven if one were to apply a broader categorisation of LCA product markets, a similar result emerges."<sup>542</sup> In particular, "the results again show that Boeing was not displaced in any LCA market in Brazil, Mexico, Chinese Taipei or Singapore"; in Australia, "again Boeing was only displaced in the single-aisle LCA market"; and in China, Korea and the European Communities, "Boeing was only displaced in the single-aisle and twin-aisle LCA

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<sup>536</sup>European Union's appellant's submission, para. 378 (quoting Panel Report, para. 7.1679).

<sup>537</sup>European Union's appellant's submission, para. 378 (quoting Panel Report, paras. 7.1742 and 7.1679).

<sup>538</sup>European Union's appellant's submission, para. 378 (referring to Panel Report, paras. 6.305-6.314 and 7.1742).

<sup>539</sup>European Union's appellant's submission, para. 382 (referring to Panel Report, paras. 7.1790 and 7.1791).

<sup>540</sup>European Union's appellant's submission, para. 382. (original emphasis)

<sup>541</sup>European Union's appellant's submission, para. 382.

<sup>542</sup>European Union's appellant's submission, para. 383.

markets."<sup>543</sup> Boeing was not displaced in the very large aircraft market in any of the country markets.<sup>544</sup>

214. The European Union argues that panels do not have "unlimited" discretion in assessing the existence of serious prejudice under Article 6.3 of the *SCM Agreement*.<sup>545</sup> According to the European Union, "{t}he use of a methodology to assess displacement that obscures and hides the absence of displacement in the markets where competition takes place cannot, under any justification, be a legally acceptable methodology for assessing 'displacement' within the meaning of Article 6.3(a) or (b)."<sup>546</sup> Nor would it constitute "a methodology that results in an objective assessment of the facts under Article 11 of the DSU."<sup>547</sup>

215. The European Union further argues that there was no overall threat of displacement for Boeing's market share, based on cumulative data for a single LCA product market. Nor "was there a threat of displacement in any of the separate product markets, whether assessed on the basis of five or on the basis of three such separate product markets."<sup>548</sup> In any event, the European Union contends that the Panel also erred in finding, "based on 2005 and 2006 *order* data, that there was a 'likelihood of future displacement of Boeing LCA from the Indian market' in the 'immediate future'."<sup>549</sup> According to the European Union, "the undisputed evidence before the Panel demonstrated that Boeing's market share of deliveries in the Indian market actually *increased* in the 'immediate future' post-2006, and followed an upward trend."<sup>550</sup> The European Union adds that, "while Boeing had a 24 percent market share of deliveries in 2005, its market share almost doubled in 2006, and in 2007 Boeing had 51 percent market share of LCA deliveries to India."<sup>551</sup> As a legal matter, therefore, the European Union concludes that there was "no threat of displacement in the Indian market."<sup>552</sup>

216. For all these reasons, the European Union requests the Appellate Body to reverse the Panel's single-product market finding, complete the analysis, and find that there is a separate single-aisle LCA market. With respect to the markets for wide-body LCA, the European Union recognizes that "the evidence is less clear and might support the existence of four or two wide-body LCA product

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<sup>543</sup>European Union's appellant's submission, para. 384.

<sup>544</sup>European Union's appellant's submission, para. 384.

<sup>545</sup>European Union's appellant's submission, para. 385.

<sup>546</sup>European Union's appellant's submission, para. 385.

<sup>547</sup>European Union's appellant's submission, para. 385.

<sup>548</sup>European Union's appellant's submission, para. 386.

<sup>549</sup>European Union's appellant's submission, para. 388 (referring to Panel Report, paras. 7.1784 and 7.1790). (original emphasis)

<sup>550</sup>European Union's appellant's submission, para. 389. (original emphasis)

<sup>551</sup>European Union's appellant's submission, para. 389.

<sup>552</sup>European Union's appellant's submission, para. 390.

markets."<sup>553</sup> On this basis, the European Union further requests the Appellate Body to reverse the Panel's finding that there was displacement in the LCA markets of Brazil, Mexico, Singapore, and Chinese Taipei; reverse the Panel's finding that there was a threat of displacement in the LCA markets of India; reverse the Panel's finding that there was displacement in the LCA markets of Australia, with the exception of the single-aisle LCA market; reverse the Panel's finding that there was displacement in the LCA markets of China and Korea, with the exception of the single-aisle and 200-300 seat LCA (or twin-aisle) markets; and reverse the Panel's finding that there was displacement in the LCA markets of the European Union, with the exception of the single-aisle, 200-300 seat and 300-400 LCA (or twin-aisle) markets.

11. Serious Prejudice

217. The European Union claims that the Panel erred in finding that the European Communities caused, through the use of the subsidies, serious prejudice to the United States' interests, within the meaning of Article 5(c) of the *SCM Agreement*. The European Union submits that the Panel erroneously found that serious prejudice took the form of displacement of imports of Boeing LCA into the European Communities market under Article 6.3(a), displacement (and threat thereof) of exports of Boeing LCA from certain third country markets under Article 6.3(b), and significant lost sales in the same market under Article 6.3(c) of the *SCM Agreement*. The European Union requests the Appellate Body to reverse each of these findings by the Panel for the reasons set out below.

(a) Displacement of Boeing LCA from the European Communities and certain third country markets

218. The European Union submits that the Panel erred in finding that the effect of the subsidies was to displace Boeing LCA from the markets of the European Communities, Australia, Brazil, China, Korea, Mexico, Singapore, and Chinese Taipei, and likely future displacement from the market of India, within the meaning of Article 6.3(a) and (b) of the *SCM Agreement*. Consistent with the Panel's "bifurcated approach"<sup>554</sup> to the analysis of the United States' serious prejudice claims, the European Union advances separate claims of error in relation to the Panel's findings concerning the *existence* of displacement of Boeing LCA from the various markets at issue, and the Panel's findings that such displacement was the *effect* of the subsidies.

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<sup>553</sup>European Union's appellant's submission, para. 392.

<sup>554</sup>European Union's appellant's submission, para. 289.

(i) *Existence of displacement*

219. The European Union maintains that the Panel erred under Articles 5(c) and 6.3(b) of the *SCM Agreement* in finding displacement of Boeing LCA from the markets of Brazil, Korea, Mexico, Singapore, and Chinese Taipei. The Panel correctly determined that it should evaluate the United States' displacement claims on the basis of sales and market share data, and correctly determined that a decrease in Boeing's market share would be sufficient to demonstrate the existence of displacement.<sup>555</sup> Nevertheless, the European Union submits that the data before the Panel did not support a finding of displacement because it did not permit the identification of any "discernible trend"<sup>556</sup> in those markets.

220. The European Union cites as an example the market of Brazil, where Boeing's share of LCA deliveries decreased from 50% in 2001 to 29% in 2002, increased to 100% in 2004<sup>557</sup>, and decreased to 14% in 2005 before increasing again to 57% in 2006.<sup>558</sup> Similarly, Boeing's share of LCA deliveries in Mexico decreased from 71% in 2001 to 60% in 2003<sup>559</sup>, increased to 69% in 2004, and declined to 50% in 2005 before increasing again to 79% in 2006.<sup>560</sup>

221. According to the European Union, the Panel made its displacement findings on the basis that "any market share achieved by Airbus was at the expense of Boeing."<sup>561</sup> However, the European Union posits that the existence of a duopoly in the LCA industry is an insufficient basis for a finding of displacement under Article 6.3(b). This is because, in a duopoly market, securing "any" market in a particular year does not necessarily involve a decrease in the market share of the complaining Member over the reference period examined.<sup>562</sup>

222. In this regard, the European Union notes that the Panel correctly distinguished between the concepts of "impedance" and "displacement" under Article 6.3(b). Impedance involves sales "that would have otherwise ... occurred {but} were obstructed or hindered"<sup>563</sup>, while displacement refers to "a situation where sales volume has declined".<sup>564</sup> Thus, according to the European Union, while a

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<sup>555</sup>European Union's appellant's submission, para. 319 (referring to Panel Report, para. 7.1739).

<sup>556</sup>European Union's appellant's submission, para. 323.

<sup>557</sup>There were no deliveries of either Boeing or Airbus LCA in Brazil in 2003.

<sup>558</sup>European Union's appellant's submission, para. 321 and Annex III (Displacement Annex).

<sup>559</sup>There were no deliveries of either Boeing or Airbus LCA in Mexico in 2002.

<sup>560</sup>European Union's appellant's submission, para. 322 and Annex III (Displacement Annex).

<sup>561</sup>European Union's appellant's submission, para. 323 (quoting Panel Report, para. 7.1791). (emphasis added by the European Union)

<sup>562</sup>European Union's appellant's submission, para. 324.

<sup>563</sup>European Union's appellant's submission, para. 325 (quoting Panel Report, para. 7.1739).

<sup>564</sup>European Union's appellant's submission, para. 325 (quoting Panel Report, para. 7.1738, in turn quoting Panel Report, *Indonesia – Autos*, para. 14.218).

claim of impedance does not depend on a decrease in market share, a claim of displacement necessarily does. The Panel's statement that "any market share achieved by Airbus was at the expense of Boeing" reflects an impedance rather than a displacement standard. However, the Panel made no findings of impedance. The European Union maintains further that the Panel's finding of displacement is "incongruous"<sup>565</sup> with its subsequent causation analysis, insofar as the Panel acknowledged that Airbus would have been able to obtain "*some*" market share even in the absence of the subsidies.<sup>566</sup>

223. In addition, or in the alternative, the European Union claims that the Panel erred in finding displacement of Boeing LCA from the markets of Brazil and Mexico, because Boeing's share of such markets did not decrease over the reference period. According to the European Union, the Panel's statement that "in no case did Boeing's market share recover to 2001 levels"<sup>567</sup> is erroneous. The "undisputed data"<sup>568</sup> before the Panel showed that Boeing's market share in Brazil increased from 50% in 2001 to 57% in 2006. Similarly, data before the Panel demonstrated that Boeing's market share in Mexico increased from 71% in 2001 to 79% in 2006. Thus, the European Union claims that the Panel erred in applying the displacement standard of Article 6.3(b), which requires a decline of market share during the reference period, to the facts of the case. The European Union maintains further that, in making displacement findings without a sufficient factual basis, the Panel acted inconsistently with Article 11 of the DSU.

(ii) *Causation – Observed displacement*

224. Turning to the second prong of the Panel's bifurcated analysis of the United States' serious prejudice claims, the European Union argues that the Panel erred in finding that the effect of the subsidies was to cause displacement of Boeing LCA from the markets of the European Communities, Australia, Brazil, China, Korea, Mexico, Singapore, and Chinese Taipei, and threat of displacement of

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<sup>565</sup>European Union's appellant's submission, para. 329.

<sup>566</sup>European Union's appellant's submission, para. 329. (original emphasis)

<sup>567</sup>European Union's appellant's submission, para. 332 (quoting Panel Report, para. 7.1785, in turn quoting United States' second written submission to the Panel, para. 703).

<sup>568</sup>European Union's appellant's submission, para. 332. The European Union explains that the delivery data used by the Panel was extracted from the Airclaims CASE database contained in Panel Exhibit EC-21, the accuracy of which has never been contested by the parties. (See European Union's appellant's submission, footnote 339 to para. 332)



Boeing LCA from the market of India, within the meaning of Article 6.3(a) and (b) of the *SCM Agreement*.<sup>569</sup>

225. As an initial matter, the European Union notes that the Appellate Body has established that the causation standard to be applied under Article 6.3 of the *SCM Agreement* is the "genuine and substantial relationship of cause and effect" standard, similar to that applicable under other WTO agreements.<sup>570</sup> Although panels have a "certain degree of discretion in selecting an appropriate methodology"<sup>571</sup> for establishing causation, the Appellate Body has held that a "but for" methodology is an appropriate methodology to examine serious prejudice that is "'counterfactual' in nature".<sup>572</sup> However, recourse to a counterfactual does not absolve panels from ensuring that "the effects of other factors on prices {do} not dilute the 'genuine and substantial' link"<sup>573</sup> between the subsidies and the adverse effects, including displacement under Article 6.3(a) and (b).

226. Referring to the panel report in *Indonesia – Autos*, the European Union stresses the requirement to analyze serious prejudice based on the market segments where competition is alleged to have been distorted by the subsidies.<sup>574</sup> Article 6.3(a) and (b) both discipline "displacement" in a "market" where imports or exports of a like product of a Member competes with the subsidized product of another Member. According to the European Union, an analysis of causation of displacement under Article 6.3(a) and (b) involves both geographic and product competition elements. The Appellate Body has explained that two products would be in the same market "if they were engaged in actual or potential competition in that market", depending on several factors such as "the nature of the product, the homogeneity of the conditions of competition, and transport costs".<sup>575</sup> This,

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<sup>569</sup>The European Union explains that its appeal of the Panel's displacement causation findings is limited to sales of the A320 and A330 during the reference period. For this reason, the European Union does not appeal the Panel's causation finding as applied to any sales of the A340 during the reference period. Consequently, the European Union appeals the entirety of the Panel's causation findings with respect to the displacement observed in the markets of Australia, Brazil, Korea, and Mexico, and the threat of displacement in the market of India, because these markets involved only sales of the A320 and A330 during the reference period. However, the European Union only *partially* appeals the Panel's causation findings in relation to the markets of China, the European Communities, Singapore, and Chinese Taipei, to the extent they involve A320 and A330 sales. (See European Union's appellant's submission, footnote 623 to para. 527)

<sup>570</sup>European Union's appellant's submission, para. 426 (quoting Appellate Body Report, *US – Upland Cotton*, para. 438).

<sup>571</sup>European Union's appellant's submission, para. 428 (quoting Appellate Body Report, *US – Upland Cotton*, para. 436).

<sup>572</sup>European Union's appellant's submission, para. 428 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 370).

<sup>573</sup>European Union's appellant's submission, para. 430 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 375).

<sup>574</sup>European Union's appellant's submission, paras. 433-435 (referring to Panel Report, *Indonesia – Autos*, paras. 14.215 and 14.236).

<sup>575</sup>European Union's appellant's submission, para. 436 (quoting Appellate Body Report, *US – Upland Cotton*, para. 408).

in the European Union's view, logically implies that there could be multiple product markets within a single geographic area.

227. The European Union underscores further that the requirement to examine causation based on the market segments where competition occurs precludes panels from "slavishly adher{ing}" to a particular product grouping by the complaining Member that may distort the causation analysis.<sup>576</sup> For this reason, the panels in *Indonesia – Autos*, *Korea – Commercial Vessels*, and *US – Upland Cotton* properly examined the effects of the subsidies in the particular product markets where competition took place.<sup>577</sup> The European Union adds that Articles 5(c) and 6.3, read in the context of Articles 7.8 to 7.10 of the *SCM Agreement* and Articles 3.4 and 3.7 of DSU, require panels to identify a causal link to the precise portion of the displacement that it found to exist in a given geographic market.

228. Turning to its specific claims of error, the European Union argues that the Panel improperly presumed rather than established causation in finding that the "presence" of subsidized Airbus LCA in all relevant market segments sufficiently established that the subsidies caused the entirety of the displacement observed in each of the country markets at issue. In the light of the Panel's earlier finding that, in the absence of the subsidies, Airbus could have launched "fewer LCA 'products' (models) at a later time than {it} actually did"<sup>578</sup>, the Panel was required to determine further that a non-subsidized Airbus could not have secured the same market share that it did in every country market at issue. Instead, the Panel implicitly presumed that a non-subsidized Airbus would not cover all market segments, would offer technologically inferior aircraft at non-competitive prices, and that no other non-attribution factors would have caused Boeing's market share to fall. According to the European Union, the Panel's presumption of causation is contradicted by evidence on the record, and by the Panel's own findings, which suggest that a non-subsidized Airbus: could have existed as a viable LCA manufacturer; could have launched LCA in the single-aisle and 200-300 seats market segments before 2000; could have competed aggressively for market share and deliveries in several of the market segments in each of the country markets at issue; could have offered LCA that would

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<sup>576</sup>European Union's appellant's submission, para. 437.

<sup>577</sup>European Union's appellant's submission, para. 438 (referring to Panel Report, *Indonesia – Autos*, para. 14.222; Panel Report, *Korea – Commercial Vessels*, para. 7.622; and Panel Report, *US – Upland Cotton*, paras. 7.1245, 7.1312, and 7.1313).

<sup>578</sup>European Union's appellant's submission, para. 532 (referring to Panel Report, para. 7.1985, 7.1986, 7.1993, and 7.2024).

be technologically at the same level or superior to LCA launched earlier; and could have priced its LCA aggressively in each country market.<sup>579</sup>

229. The European Union maintains further that the Panel failed to establish a "genuine and substantial relationship of cause and effect"<sup>580</sup> on the basis of a "chain of causation"<sup>581</sup> between the subsidies and the observed displacement. The Panel incorrectly articulated its causation standard as "an effect" standard, suggesting that displacement need merely be "an effect" of the subsidies.<sup>582</sup> The European Union concedes that the causal steps necessary to establish a "causal chain" under Article 6.3 will vary on a case-by-case basis.<sup>583</sup> However, the Panel's acknowledgement that a non-subsidized Airbus could have "a more limited offering of LCA models"<sup>584</sup> during the 2001-2006 reference period required it to complete the necessary causal steps by determining whether Boeing's market share in each of the country markets at issue would not have fallen "in a counterfactual competition with a non-subsidised Airbus".<sup>585</sup> In order to make this determination, the Panel had to examine evidence relating to: Airbus' ability to launch a particular LCA in the absence of the subsidies; technological advances available to a non-subsidized Airbus; levels of demand in particular LCA market segments; competitive developments such as new Boeing launches or its ageing product offering; and the availability of financing for launching a LCA. According to the European Union, "considerable evidence" on the record demonstrated that a non-subsidized Airbus could have launched a single-aisle LCA and a twin-aisle 200-300 seat LCA and could have made deliveries in these market segments during the reference period.<sup>586</sup>

230. In addition, the European Union posits that the Panel erred in failing to apply such counterfactual analysis for each of the market segments at issue. The Panel's failure to conduct a market segment analysis in each country at issue prevented it from determining whether the "more limited market presence" that Airbus would have had in the absence of the subsidies would have prevented Boeing LCA from losing market share in the relevant country markets.<sup>587</sup> In failing to

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<sup>579</sup>European Union's appellant's submission, paras. 535-538, 540, and 542 (referring to Panel Report, paras. 7.1725, 7.1726, 7.1893, 7.1906, 7.1911, 7.1934, 7.1978, 7.1979, 7.1984, 7.1993, and 7.1995) and Annex I (Counterfactual Annex) (BCI).

<sup>580</sup>European Union's appellant's submission, para. 544 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374).

<sup>581</sup>European Union's appellant's submission, para. 544 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 372).

<sup>582</sup>European Union's appellant's submission, para. 545 (quoting Panel Report, para. 7.1993).

<sup>583</sup>European Union's appellant's submission, para. 547 (referring to Panel Report, *Korea – Commercial Vessels*, para. 7.619).

<sup>584</sup>European Union's appellant's submission, para. 551 (quoting Panel Report, para. 7.1993).

<sup>585</sup>European Union's appellant's submission, para. 549.

<sup>586</sup>European Union's appellant's submission, para. 552.

<sup>587</sup>European Union's appellant's submission, para. 557.

determine whether a non-subsidized Airbus would have secured the same market share that Airbus actually obtained in each of the relevant country markets, the Panel further neglected to evaluate "non-attribution" factors that would arise in those circumstances. In particular, the Panel failed to examine whether the particular LCA that a non-subsidized Airbus would have offered would be technologically inferior, whether it would fail to satisfy a customer's preference for fleet "commonality", or whether other non-attribution factors would have influenced customers' decisions to purchase Airbus LCA. In this regard, the Panel also erred in failing to consider country-specific non-attribution factors that suggested that the decrease in Boeing's market share in Australia, Brazil, China, Korea, Mexico, Singapore, and Chinese Taipei was caused by factors other than the subsidies, such as fleet strategy and the requirements of Boeing's main customers in those countries. The European Union submits that the Panel also erred in failing to identify the extent of the displacement that was caused by the subsidies.

231. Finally, and in the alternative, the European Union maintains that the Panel acted inconsistently with Article 11 of the DSU in finding that the effect of the subsidies was the displacement (or threat thereof) of Boeing LCA from the markets of Australia, Brazil, China, European Union, India, Korea, Mexico, Singapore, and Chinese Taipei within the meaning of Article 6.3(a) and (b) of the *SCM Agreement*. The European Union argues that these findings are based on "inconsistent and incoherent reasoning"<sup>588</sup>, insofar as the Panel's presumption that a non-subsidized Airbus could not have increased its market share is contradicted by its findings that a non-subsidized Airbus could exist as a competitor, albeit one with a "more limited offering of LCA models".<sup>589</sup> Moreover, the Panel failed to provide a reasoned and adequate explanation for its finding that the subsidies caused the observed displacement by failing to determine whether the particular aircraft that Airbus could have produced in the absence of the subsidies could not have obtained similar market share in each third country market at issue. The European Union adds that the Panel failed to analyze non-attribution factors that prevented Boeing from securing market share in those countries, such as political considerations in China, and Boeing's own decision not to participate in sales campaigns in India.

(b) Lost sales in the same market

232. The European Union claims that the Panel erred in finding that the effect of the subsidies was lost sales in the same market within the meaning of Article 6.3(c) of the *SCM Agreement*. Consistent

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<sup>588</sup>European Union's appellant's submission, para. 574 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 294 and footnote 618 to para. 293).

<sup>589</sup>European Union's appellant's submission, para. 574 (quoting Panel Report, para. 7.1993).

with the Panel's "'bifurcated' approach"<sup>590</sup> to the assessment of the United States' claims of serious prejudice, the European Union advances separate claims of error in relation to the Panel's findings concerning the *existence* of a certain lost sale, and in relation to the Panel's findings that Boeing lost significant sales as a result of the subsidies.

(i) *Existence of a lost sale*

233. The European Union claims that the Panel erred in finding that the Emirates Airlines' order for the A380 in 2000 constituted a significant sale that was "lost" by Boeing within the meaning of Article 6.3(c) of the *SCM Agreement*. The European Union requests the Appellate Body to reverse this finding, and exclude that sale from the Panel's causation assessment and from its ultimate conclusion that the effect of the subsidies was to cause serious prejudice to the United States' interests, in the form of significant lost sales, within the meaning of Articles 5(c) and 6.3(c) of the *SCM Agreement*.

234. First, the European Union argues that the Panel erred in its application of Articles 5 and 6.3(c) by not addressing, or otherwise requiring proof, that Emirates Airlines would have purchased Boeing aircraft had it not decided to buy Airbus aircraft. For the European Union, the Panel improperly characterized the duopoly competition between Boeing and Airbus as a "zero sum"<sup>591</sup> game, because there are instances, such as the Emirates Airlines' purchase of the A380, where a sale won by a duopoly competitor is not "lost" by the rival firm.<sup>592</sup>

235. The European Union submits further that, similarly to the concept of "impedance" under Article 6.3(a) and (b), a finding of lost sales under Article 6.3(c) requires evidence demonstrating that, if Airbus had not secured the order, Boeing would have actually secured it. According to the European Union, instead of requiring the evidence that was necessary to make a finding of lost sales under Article 6.3(c), the Panel improperly presumed a lost sale.

236. Second, the European Union maintains that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU, by failing to address or adequately explain evidence that contradicted its finding that the Emirates Airlines' sale was one that was lost by Boeing. In particular, the European Union argues that the Panel failed to address or adequately explain evidence demonstrating that Emirates Airlines could not have purchased competing Boeing aircraft, because Boeing only started marketing its 747-X after Emirates Airlines had announced its decision to

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<sup>590</sup>European Union's appellant's submission, para. 414.

<sup>591</sup>European Union's appellant's submission, para. 585 (quoting Panel Report, para. 7.1979).

<sup>592</sup>European Union's appellant's submission, para. 585. (footnote omitted)

order the A380.<sup>593</sup> In addition, the Panel failed to address or adequately explain evidence indicating that Boeing had "no serious intention" of launching a competitor to the A380 at the time of the Emirates Airlines' sales campaign.<sup>594</sup> The European Union refers in particular to public statements by Boeing officials, Airbus officials, customers, and industry analysts indicating that Boeing never intended to launch a 747 derivative to compete directly with the A380 at the time of the Emirates Airlines sale.

(ii) *Causation – Single-aisle lost sales*

237. The European Union argues that the Panel erred in finding, with respect to sales by Airbus of single-aisle aircraft to Air Asia, Air Berlin, Czech Airlines, and easyJet, that the effect of the subsidies was significant "lost sales in the same market" within the meaning of Article 6.3(c) of the *SCM Agreement*. The European Union requests the Appellate Body to reverse the Panel's finding that the effect of the subsidies was lost sales in the same market within the meaning of Article 6.3(c), to the extent it covers the lost sales in these campaigns, for the following reasons.

238. First, the European Union maintains that the Panel erred in presuming, rather than establishing, causation in the single-aisle Airbus A320 family sales to Air Asia, Air Berlin, Czech Airlines, and easyJet. The Panel incorrectly assumed that the "presence" of the Airbus A320 in each of the four sales at issue was a "fundamental cause" of Boeing losing those sales.<sup>595</sup> According to the European Union, the Panel's conclusion that "but for" the subsidies Airbus could not have offered the "particular" LCA that it actually offered did not conclusively establish that the subsidies caused Boeing to lose all the A320 sales at issue. Given the Panel's recognition that Airbus would exist and would offer different LCA in the absence of the subsidies, the Panel should have compared the actual A320 sales during the reference period with Airbus' ability to secure such sales in the absence of the subsidies. Instead, the Panel erroneously "fill{ed} the gaps"<sup>596</sup> in its causation analysis, by implicitly presuming that a non-subsidized Airbus would have lost the four sales at issue, because it could not have launched (or would have launched technologically inferior) single-aisle LCA, would not have been able to meet any technical specifications or "commonality" requirements of the four airlines, or would have offered A320s at non-competitive prices.

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<sup>593</sup>European Union's appellant's submission, paras. 589 and 590 (referring to, *inter alia*, "We need more A380s – Emirates" (September-November 2006) *Orient Aviation/A380 Quarterly Update* (Panel Exhibit EC-365); and "Boeing and Emirates correspond about 747X/400X", *Reuters*, 2 July 2000 (Panel Exhibit EC-368)).

<sup>594</sup>European Union's appellant's submission, para. 591.

<sup>595</sup>European Union's appellant's submission, para. 447 (quoting Panel Report, paras. 7.1937, 7.1938, 7.1984, 7.1986, 7.1993, and 7.2025).

<sup>596</sup>European Union's appellant's submission, para. 472.

239. In the European Union's view, these presumptions are contradicted by the Panel's findings that a non-subsidized Airbus would have offered a "more limited" range of LCA at a later point in time, which implies that Airbus would have had "some" market presence during the reference period.<sup>597</sup> The Panel's presumptions are further contradicted by the fact that Air Asia, Air Berlin, Czech Airlines, and easyJet only purchased single-aisle aircraft during the reference period, which suggests that fleet commonality did not play a role in any of those sales. Moreover, the Panel's presumption that a non-subsidized Airbus would not have been able to offer competitive prices is contradicted by its finding that conditions of competition in the LCA market would have provided entrants with an incentive to offer prices that were lower than Boeing's. In addition, the European Union submits that more recently launched LCA would likely have been technologically superior to both the original A320 family and the competing Boeing 737. Thus, instead of relying on the conclusion that Airbus' LCA would have been "different" in the absence of the subsidies, the Panel should have determined further what kind of LCA a non-subsidized Airbus could have launched, when it could have done so, and how competitive such LCA could have been in the context of the Air Asia, Air Berlin, Czech Airlines, and easyJet sales.<sup>598</sup>

240. For the European Union, the fact that such counterfactual is "inherently speculative"<sup>599</sup> did not excuse the Panel from procuring a proper evidentiary basis for its causation findings, taking into account fully the counterfactual scenarios in which, in the absence of the subsidies, Airbus would exist and would have sold different aircraft. In recognizing that the United States "proceed{ed} too hastily"<sup>600</sup> to the conclusion that Boeing would have sold more aircraft in the absence of the subsidies, the Panel seemed to have been aware of the need to further examine what Airbus sales would have been in that counterfactual scenario. Similarly, the Panel's rejection of the United States' price effects arguments on the basis that a new market entrant could have offered lower price levels implies that the Panel required the United States to provide further evidence on the conditions of competition in the absence of the subsidies.

241. Second, the European Union argues that the Panel failed to establish properly a "chain of causation" linking the subsidies provided to Airbus to the four "significant lost sales" at issue, as required by Articles 5(c) and 6.3(c) of the *SCM Agreement*. The Panel inappropriately articulated an

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<sup>597</sup>European Union's appellant's submission, paras. 457-459.

<sup>598</sup>European Union's appellant's submission, paras. 480 and 481. The European Union further stresses that a counterfactual dating back 40 years does not excuse the Panel from having properly established causation, and that the Panel correctly required additional counterfactual demonstration in its analysis of causation for price effects. (See *ibid.*, paras. 473-480)

<sup>599</sup>European Union's appellant's submission, para. 473 (quoting Panel Report, para. 7.1980).

<sup>600</sup>European Union's appellant's submission, para. 477 (quoting Panel Report, para. 7.1979).

"an effect"<sup>601</sup> standard, when it should have applied "a 'genuine and substantial relationship' of cause and effect" standard in its causation analysis under Article 6.3(c).<sup>602</sup> Having accepted that Airbus would exist in the absence of the subsidies, the Panel should have completed "the counterfactual scenarios to a point where they would enable it to assess whether each of the specific sales at issue was lost by Boeing due to the subsidies."<sup>603</sup> This involved making findings on what kind of LCA a non-subsidized Airbus could have launched, in what market segments, and at what prices. The Panel further failed to address non-attribution factors such as Boeing's mismanagement of customer and government relationships, which partially explain why Airbus secured the sales at issue. The European Union insists that the evidence before the Panel on (i) the prior technological experience of the Airbus companies in the regional aircraft sector, (ii) the growing demand in the single-aisle and 200-300 seat market segments, and (iii) Boeing's ageing product offerings, would have enabled the Panel to complete its counterfactuals and determine that a non-subsidized Airbus could have launched a single-aisle LCA in or about 1987.

242. Third, and in the alternative, the European Union argues that the Panel acted inconsistently with Article 11 of the DSU in finding that the effect of the subsidies was to cause "significant lost sales" in A320 purchases by Air Asia, Air Berlin, Czech Airlines, and easyJet. The European Union suggests that this finding was based on "inconsistent and incoherent" reasoning, insofar as it cannot be reconciled with the Panel's findings that a non-subsidized Airbus with a "more limited offering of LCA models" could have won sales in the single-aisle market.<sup>604</sup> The European Union further submits that the Panel failed to provide a "reasoned and adequate explanation" for its finding that a different LCA that a non-subsidized Airbus could have produced would not be competitive and would not have won the four sales at issue. In particular, the Panel failed to explain adequately why a non-subsidized Airbus would not have won the four sales at issue, in the light of its other findings that price played a significant role in those sales, and that a non-subsidized Airbus would be an aggressive competitor that would offer low prices in the more limited market segments where it could compete.

(iii) *Causation – A380 lost sales*

243. The European Union argues that the Panel erred in its interpretation of Articles 5(c) and 6.3(c) of the *SCM Agreement*, and acted inconsistently with Article 11 of the DSU, in finding that the effect of the subsidies was to cause Boeing to lose the A380 sales to Emirates Airlines, Qantas

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<sup>601</sup>European Union's appellant's submission, para. 484 (quoting Panel Report, para. 7.1993).

<sup>602</sup>European Union's appellant's submission, para. 484 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374). (emphasis added by the European Union omitted)

<sup>603</sup>European Union's appellant's submission, para. 489.

<sup>604</sup>European Union's appellant's submission, paras. 507 and 508.



Airways, and Singapore Airlines. The European Union requests the Appellate Body to reverse this finding, and exclude the Emirates Airlines, Qantas Airways, and Singapore Airlines sales from the scope of its finding that the effect of the subsidies was significant "lost sales in the same market" within the meaning of Article 6.3(c), for the reasons set out below.

244. First, the European Union argues that the Panel erred in its assessment of the Airbus A380 business case. In particular, the Panel erred in finding that Airbus had an "economic incentive" to base the A380 business case on an overly "optimistic" delivery forecast.<sup>605</sup> This finding is based on the *ex post* consideration that the deliveries of the A380 were delayed many years after its launch in 2000. However, Article 6.3(c) required the Panel to evaluate the A380 business case on the basis of the information available *ex ante*, at the time of the launch of the A380. Moreover, the Panel acted inconsistently with Article 11 of the DSU in failing to address considerable evidence suggesting that "sophisticated and well-informed" private investors who financed two thirds of the A380 development costs based their own investment decisions on Airbus' delivery forecasts.<sup>606</sup> According to the European Union, the Panel's speculation concerning Airbus' "economic incentives" to base the A380 business case on overly optimistic delivery forecasts implies that Airbus would have acted against its own economic interest by launching a non-viable project, and that its directors acted in breach of their fiduciary duty to shareholders.

245. Second, the European Union submits that the Panel erred in finding that, without access to LA/MSF, Airbus could not have financed the development of the A380. The Panel incorrectly relied on Aérospatiale's financial condition in 1997 to draw the conclusion that Airbus SAS could not have financed its part of the A380 project in 2000 without access to LA/MSF.<sup>607</sup> The Panel also acted inconsistently with Article 11 of the DSU in failing to examine evidence indicating that Airbus SAS' parent companies, EADS and BAE Systems, could have funded the development of the A380 without access to LA/MSF. In particular, the Panel failed to take into account evidence that demonstrated that, as a result of a fully subscribed public stock offering, EADS held approximately €8 billion in cash, cash equivalents, and short-term securities merely 11 days after the A380 programme launch.<sup>608</sup> In addition, the Panel failed to explain adequately or address the totality of the evidence demonstrating that Airbus could have raised from risk sharing suppliers at least a significant portion of the 33% of the A380 development costs covered by LA/MSF.<sup>609</sup> Furthermore, the Panel's finding

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<sup>605</sup>European Union's appellant's submission, paras. 603 and 604 (quoting Panel Report, para. 7.1926).

<sup>606</sup>European Union's appellant's submission, para. 609.

<sup>607</sup>European Union's appellant's submission, para. 614 (referring to Panel Report, para. 7.1947).

<sup>608</sup>European Union's appellant's submission, para. 616 (referring to EADS, *Reference Document – Financial Year 2000* (26 April 2001) (Panel Exhibit EC-54)).

<sup>609</sup>European Union's appellant's submission, paras. 618-621.

that the "significant amount of debt"<sup>610</sup> generated from the development of previous LCA models would have made it impossible for Airbus to launch the A380 programme without access to LA/MSF is contradicted by its finding that a non-subsidized Airbus would have launched fewer LCA. In so finding, the Panel acted inconsistently with Article 11 of the DSU, because it failed to take into account evidence suggesting that, in the absence of the subsidies, Airbus could have launched a single-aisle LCA in or about 1987, and a twin-aisle 200-300 seat LCA in or about 1991.

246. Finally, the European Union maintains that the Panel erred in finding that, in the absence of the subsidies, Airbus would not have had the technological experience necessary to develop the A380. In order to establish causation under Articles 5(c) and 6.3(c), the Panel had to determine whether the smaller product offering that Airbus would have had in the absence of the subsidies would not have permitted it to obtain the technological experience necessary to launch the A380 in 2000. In failing to examine evidence that suggested that this was the case, the Panel acted inconsistently with its duty to conduct an objective assessment of the matter under Article 11 of the DSU.

(c) Non-LA/MSF subsidies

247. The European Union claims that the Panel erred in finding that the effect of non-LA/MSF subsidies was to cause displacement of Boeing LCA from the various markets at issue and lost sales in the same market within the meaning of Article 6.3(a), (b), and (c) of the *SCM Agreement*. In particular, the Panel erred in finding that equity and share transfer measures of France and Germany, infrastructure measures, and R&TD subsidies "complemented and supplemented" the "'product' effect of LA/MSF".<sup>611</sup> The European Union requests the Appellate Body to reverse this finding, and exclude non-LA/MSF subsidies from the scope of the Panel's finding that the effect of the subsidies was to cause displacement of Boeing LCA from the various markets at issue and lost sales in the same market within the meaning of Article 6.3(a), (b), and (c) of the *SCM Agreement*.

248. The European Union argues that the Panel erred in cumulatively assessing the effects of LA/MSF and non-LA/MSF subsidies for the purposes of establishing causation under Article 6.3(a), (b), and (c). The Panel incorrectly presumed that non-LA/MSF subsidies impacted the launch of particular LCA products, despite the absence of factual findings to this effect. Referring to *US – Upland Cotton*, the European Union notes that the panel in that dispute declined to cumulate the effects of price-contingent and non-price contingent subsidies because of differences in their nature

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<sup>610</sup>European Union's appellant's submission, para. 622 (quoting Panel Report, para. 7.1948).

<sup>611</sup>European Union's appellant's submission, para. 635 (quoting Panel Report, para. 7.1956).

and effects.<sup>612</sup> According to the European Union, it is only appropriate to aggregate the effects of the subsidies for the purpose of establishing causation where "the nature of the subsidy, the way in which the subsidy operates, {and} the extent to which the subsidy is provided in respect of a particular product or products"<sup>613</sup> is "identical or similar".<sup>614</sup> However, in the light of the distinct nature, structure, and operation of the non-LA/MSF subsidies, the Panel was required to conduct a detailed causation analysis for each of the subsidies at issue.<sup>615</sup> For the European Union, in cumulating non-LA/MSF with LA/MSF subsidies for the purposes of its causation analysis, the Panel erroneously presumed that all non-LA/MSF measures had the same effect as LA/MSF.

249. According to the European Union, the Panel's conclusion that the non-LA/MSF subsidies "complemented and supplemented" the effect of LA/MSF does not provide a sufficient basis for establishing causation under Article 6.3(a), (b), and (c) of the *SCM Agreement*. This is particularly the case where the United States' overall theory of causation is based on a specific factual finding that, but for LA/MSF, Airbus would not have been able to launch each of its LCA models of aircraft. Thus, unless the Panel could establish that each of the challenged subsidies was necessary to enable Airbus to launch a particular LCA model at a particular time, it was required to conduct a full causation analysis for each of the measures found to constitute specific subsidies in order to establish a "genuine and substantial" causal link between each of those subsidies and the observed market effects.<sup>616</sup>

250. Turning to each specific set of non-LA/MSF subsidies, the European Union submits that the Panel's conclusion that the French and German Governments' equity investments and share transfer measures "ensured the continued existence and financial stability of the respective national entities engaged in the Airbus enterprise" does not sufficiently establish the impact of those measures on Airbus' ability to launch a particular LCA at a particular point in time.<sup>617</sup> In particular, the European Union underscores that there is no evidence on the record to suggest that the transfer by the French Government to Aérospatiale of a 45.76% stake in Dassault Aviation enabled a product launch

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<sup>612</sup>European Union's appellant's submission, para. 639 (referring to Panel Report, *US – Upland Cotton*, paras. 7.1349 and 7.1350).

<sup>613</sup>European Union's appellant's submission, paras. 640 and 646 (quoting Panel Report, *Korea – Commercial Vessels*, para. 7.560).

<sup>614</sup>European Union's appellant's submission, para. 646.

<sup>615</sup>European Union's appellant's submission, paras. 639 and 640 (referring to Panel Report, *US – Upland Cotton*, paras. 7.1349 and 7.1350, and Panel Report, *Korea – Commercial Vessels*, para. 7.560 respectively).

<sup>616</sup>European Union's appellant's submission, paras. 648, 650, and 651 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 368).

<sup>617</sup>European Union's appellant's submission, para. 652 (quoting Panel Report, para. 7.1957).

by Airbus.<sup>618</sup> Similarly, the transfer of the 20% equity of Kreditanstalt für Wiederaufbau ("KfW") in Deutsche Airbus to Messerschmitt-Bölkow-Blohm GmbH ("MBB") in 1992 was presumed to have impacted Airbus' ability to launch its LCA, despite the fact that it benefited an independent entity that did not produce Airbus LCA.<sup>619</sup>

251. Similarly, the Panel erroneously found that infrastructure subsidies "relieved Airbus of significant expenses related to facilities and production, and thereby enabled Airbus to 'continue with the launch of successive models of LCA'"<sup>620</sup>, despite the lack of evidentiary support in this respect. In particular, the European Union charges the Panel with establishing "causation by association" in finding that the Mühlenberger Loch project enabled the establishment of the final assembly line in Hamburg, which in turn was necessary to ensure the launch of the A380. Furthermore, the Panel's finding that the Aéroconstellation site and the construction of EIG facilities were dependent on the development and production of the A380 does not conclusively establish that "but for the creation of the infrastructure", the A380 would not have been developed and produced.<sup>621</sup> The European Union underscores further that the Panel made no separate mention of regional aid measures in Germany and Spain, despite the fact that their purpose and effect was to offset the additional burden of investing in less-developed regions.

252. With respect to R&TD subsidies, the European Union emphasizes that the Panel found that such measures enabled Airbus to develop "features and aspects" of its LCA, but failed to link any such features and aspects to any of Airbus' actual launch decisions.<sup>622</sup> The Panel also made no finding as to the relative importance of the development of such "features and aspects" to the launch of one or more models of LCA, nor did it examine their timing. Moreover, the Panel recognized that the impact of pre-competitive R&TD on Airbus' market presence was "perhaps more attenuated, compared with the other subsidies at issue".<sup>623</sup>

253. Finally, the European Union contends that the Panel acted inconsistently with Article 11 of the DSU by making findings without a sufficient evidentiary basis, and by failing to provide a "reasoned and adequate" explanation for its findings. The European Union posits that the Panel failed to point to any evidence establishing a "genuine and substantial relationship of cause and effect"

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<sup>618</sup>European Union's appellant's submission, para. 653 (referring to Panel Report, paras. 7.1414 and 7.1957).

<sup>619</sup>European Union's appellant's submission, para. 654 (referring to Panel Report, para. 7.1294).

<sup>620</sup>European Union's appellant's submission, para. 655 (quoting Panel Report, para. 7.1958).

<sup>621</sup>European Union's appellant's submission, para. 657 (referring to Panel Report, para. 7.1177). (emphasis omitted)

<sup>622</sup>European Union's appellant's submission, para. 659 (quoting Panel Report, para. 7.1959).

<sup>623</sup>European Union's appellant's submission, para. 659 (quoting Panel Report, para. 7.1959).

between non-LA/MSF subsidies and Boeing's lost sales and market share. In addition, in finding that the non-LA/MSF subsidies "complement" and "supplement" the effect of LA/MSF, the Panel failed to provide an adequate explanation for its finding that those subsidies caused displacement or lost sales under Article 6.3(a), (b), and (c) of the *SCM Agreement*.

(d) The relevance of the 1992 Agreement

254. Finally, the European Union claims that the Panel erred in its interpretation of Article 5(c) of the *SCM Agreement*, and further acted inconsistently with Articles 11 and 12.7 of the DSU, in failing to take into account the 1992 Agreement in its analysis of the United States' adverse effects claims. The European Union argues that the United States failed to demonstrate that its interests were adversely affected by LA/MSF, insofar as these subsidies met the terms of Article 4 of the 1992 Agreement. For the European Union, the Panel's failure to take this argument into account in its analysis of the United States' adverse effects claims amounts to an error in the interpretation of Article 5(c) of the *SCM Agreement*, and failure to conduct an objective assessment and set out the basic rationale for the Panel's findings under Articles 11 and 12.7 of the DSU.

(e) Contingent appeal on the existence of suppressed and depressed prices for the Boeing 777

255. In the event that the United States appeals the Panel's finding that the United States did not establish that the effect of the subsidies was significant price suppression and price depression within the meaning of Article 6.3(c) of the *SCM Agreement*, the European Union conditionally appeals the Panel's assessment of significant price suppression and price depression on the basis of a single product market, consisting of all models of LCA, and the Panel's finding concerning the existence of significant price suppression and price depression with respect to the Boeing 777. As the United States has not appealed the Panel's finding that the United States failed to demonstrate that the price effects observed during the reference period were the effect of the subsidies, the condition upon which the European Union's appeal rests has not materialized.

B. *Arguments of the United States – Appellee*

1. The Panel's Terms of Reference

(a) The Spanish PROFIT programme

256. The United States supports the Panel's finding that the Spanish PROFIT programme loans were within the Panel's terms of reference. The United States argues that, although it did not explicitly reference the PROFIT programme in its panel request, it asked questions about the

programme four months later during the Annex V process and "demonstrated continued interest in the program by including it in an updated consultation request".<sup>624</sup> The United States also notes that the European Communities, after objecting during the Annex V process that the PROFIT programme was outside the Panel's terms of reference, failed to present that objection in its subsequent request for preliminary rulings. The United States considers the European Union's appeal "an exaggeration", noting that the Panel found that the description in section (6)(d) of the United States' panel request identified the provider, the time, the purpose, and the subject of the funding at issue. The United States further contends that its Annex V questions confirmed what it thought was clear from the panel request—that, because the PROFIT programme provided funding for aeronautics research, it fell within the scope of the United States' panel request.

257. The United States argues that the European Union has "no basis" for its supposition that references in the panel request to the Spanish PTA programme loans show that the United States should have known about the PROFIT programme at the time it filed its request and that the United States' Annex V questions show that it actually did know.<sup>625</sup> The United States maintains that its consultations request indicated both that there was a vast quantity of information and that it had listed everything of which it was aware. The United States adds that a more general reference to the Spanish subsidy programmes was sufficient to put the European Communities on notice that the issues that had been part of its consultations request, and which would become part of its Annex V procedures request, were the subject of the United States' panel request. The United States disagrees with the European Union that the Panel referred to the Annex V questions to expand the scope of the dispute; instead, it confirmed its initial conclusion that the panel request on its face was not overly expansive. The United States maintains that the Appellate Body has endorsed reference to a complaining party's first written submission for this purpose; and such reference should apply with greater force to Annex V questions because they are more contemporaneous with the panel request.

258. The United States also takes issue with the European Union's contention that it did not object to the PROFIT programme claim because it believed it was not part of the United States' case, and that to hold against the European Union would require defendants "to raise, through preliminary ruling requests, Article 6.2 issues concerning an open-ended number of measures not mentioned in a panel request."<sup>626</sup> In the United States' view, the European Communities should have been aware of the United States' continued interest in PROFIT programme loans, and its decision not to reference

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<sup>624</sup>United States' appellee's submission, para. 465.

<sup>625</sup>United States' appellee's submission, para. 468.

<sup>626</sup>United States' appellee's submission, para. 470 (quoting European Union's appellant's submission, para. 1212).

those loans in its preliminary rulings request "is evidence of how it understood the terms of reference".<sup>627</sup> Also, the United States maintains, the Panel did not purport to state a general rule that preliminary ruling requests are always relevant to requests under Article 6.2 of the DSU.

259. Finally, the United States points out that it "addressed {the} PROFIT {programme} explicitly in its first written submission".<sup>628</sup> The Appellate Body has endorsed "reference to the complaining party's first written submission 'to confirm the meaning of the words used in the panel request and {to determine if} the ability of the respondent to defend itself was prejudiced'".<sup>629</sup> In addition, the United States maintains that "the context provided by other claims against R&D subsidies in other jurisdictions indicated that the {United States'} claims were exhaustive, applying to every known example of government R&D funding".<sup>630</sup>

(b) The French R&TD grants

260. The United States contends that the Appellate Body's findings in *US – Carbon Steel* and *US – Continued Zeroing* indicate that scrutiny of a panel request for purposes of Article 6.2 allows reference to materials other than the panel request, and leaves open the possibility that a panel request can afford sufficient specificity without identifying each measure by name.<sup>631</sup> Although it did not reference funding sources by name, the United States asserts that: its consultation request referenced information on these programmes in the Statement of Available Evidence; it asked questions about these programmes during consultations; and it suggested additional questions concerning these programmes during the Annex V process. That process revealed that subsidies were conferred by the Direction des Programmes Aéronautiques et de la Coopération ("DPAC"), information that the United States referenced in its first written submission. The United States notes that, on this basis, the Panel concluded that the panel request "identifie{d} the measures at issue in a manner sufficient to present the problem clearly", thereby satisfying Article 6.2 of the DSU.<sup>632</sup>

261. The United States contends that the European Union "identifies no basis"<sup>633</sup> in the DSU or the *SCM Agreement* for its assertion that a complainant should, at a minimum, be required to identify the legal basis of the measures it challenges. The United States argues that "compliance with Article 6.2

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<sup>627</sup>United States' appellee's submission, para. 470.

<sup>628</sup>United States' appellee's submission, para. 472 (referring to United States' first written submission to the Panel, paras. 697-703).

<sup>629</sup>United States' appellee's submission, para. 472 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

<sup>630</sup>United States' appellee's submission, para. 472.

<sup>631</sup>United States' appellee's submission, paras. 462-464 (referring to Appellate Body Report, *US – Carbon Steel*, para. 127; and Appellate Body Report, *US – Continued Zeroing*, para. 169).

<sup>632</sup>United States' appellee's submission, para. 474 (quoting Panel Report, para. 7.150).

<sup>633</sup>United States' appellee's submission, para. 476.

of the DSU depends not on an abstract level of specificity or identification of the 'legal basis for such a series of actions', but on communicating enough information that the panel, the parties, and the third parties can understand what the dispute is about."<sup>634</sup> The United States submits that its panel request "did that, especially in light of the attendant circumstances", consisting of questions posed to the European Communities during consultations, information in the Statement of Available Evidence, and the United States' statement to the DSB at the time its panel request was first tabled.<sup>635</sup>

262. The United States maintains that the confidential nature of consultations does not prevent reference to the questions posed by the United States during that process. According to the United States, reference to those questions help to understand what the panel request covered, and not, as the European Union contends, that the Panel relied on the questions to remedy a deficiency in the panel request; they list pertinent facts about French R&TD subsidies, including the amounts and years of grants, which help to identify which programmes the United States sought to challenge and how they related to the Statement of Available Evidence. In the United States' view, "they elucidate, rather than add to, the panel request."<sup>636</sup>

263. The United States accepts that the French Senate reports identified in its Statement of Available Evidence do not refer to a subsidy programme or to the entity that provided the funding. However, the reports list amounts of money budgeted and link them to an official document of the French Government, thus giving the French Government and the European Communities "solid information to identify both particular programs that the United States had challenged and the agencies that administered those programs."<sup>637</sup> The French Senate reports established that the French Government subsidized Airbus research, but "did not indicate how, under what program, or by whom."<sup>638</sup> The United States argues that its claim matched the level of specificity of information that France made available to the public. To hold the United States to a higher standard of specificity "would create a rule whereby Members could shield any subsidy from WTO scrutiny by simply not talking about it."<sup>639</sup>

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<sup>634</sup>United States' appellee's submission, para. 476 (quoting European Union's appellant's submission, para. 1224).

<sup>635</sup>United States' appellee's submission, paras. 476 and 477.

<sup>636</sup>United States' appellee's submission, para. 479.

<sup>637</sup>United States' appellee's submission, para. 480.

<sup>638</sup>United States' appellee's submission, para. 481.

<sup>639</sup>United States' appellee's submission, para. 481. (footnote omitted)



264. Finally, the United States argues that the European Union "is mistaken"<sup>640</sup> when it asserts that the United States' statement to the DSB did not mention French R&TD support. The United States argues that it "provided further information that would help the government of France understand the extent of the panel request's reference to French research and development subsidies".<sup>641</sup> The United States maintains that the absence of any reference to particular programmes is irrelevant because Article 6.2 of the DSU "does not dictate *how* Members satisfy this standard, let alone require that they do so by naming specific programs or administrative agencies."<sup>642</sup> Thus, the United States concludes, it "was free to satisfy Article 6.2 with a functional description of the French R&D subsidies it challenged, rather than by naming them."<sup>643</sup>

## 2. The Temporal Scope of Article 5 of the *SCM Agreement*

265. The United States submits that the Appellate Body should uphold the Panel's finding that Article 5 of the *SCM Agreement* applies to all of the subsidies at issue in this dispute.

266. First, the United States considers that the Panel correctly applied the principle of non-retroactivity of treaties reflected in Article 28 of the *Vienna Convention* by focusing on the nature of the obligation contained in Article 5 of the *SCM Agreement*. The United States disagrees with the European Union's assertion that "the proper approach was 'to identify the relevant government conduct in the first place, characterise it as 'act' or 'situation' and examine whether such an 'act' or 'situation' was completed before 1995 or continued afterward."<sup>644</sup> The United States considers that the European Union's proposed approach "would have the Appellate Body start with the *assumption* that the grant of subsidies is the relevant act, fact, or situation in relation to which Article 5 of the *SCM Agreement* binds the Members."<sup>645</sup> According to the United States, this approach "is essentially circular", because "starting with the assumption that the only relevant activity is something that occurred in the past ... foreordains the conclusion that the provision applies to acts, facts, or situations that have already ceased to exist."<sup>646</sup>

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<sup>640</sup>United States' appellee's submission, para. 482.

<sup>641</sup>United States' appellee's submission, para. 482 (referring to United States' statement at the DSB meeting held on 13 June 2005, WT/DSB/M/191, para. 3).

<sup>642</sup>United States' appellee's submission, para. 483. (original emphasis)

<sup>643</sup>United States' appellee's submission, para. 483.

<sup>644</sup>United States' appellee's submission, para. 20 (quoting European Union's appellant's submission, para. 33).

<sup>645</sup>United States' appellee's submission, para. 20. (original emphasis)

<sup>646</sup>United States' appellee's submission, para. 20.

267. The United States maintains that "Article 28 of the Vienna Convention frames the retroactivity analysis in terms of the acts, facts, or situations with respect to which a treaty binds its parties", and argues that nothing in the text of Article 28 "limits those acts, facts, or situations to governmental 'conduct' as opposed to a government obligation that continues after particular conduct has occurred."<sup>647</sup> The United States notes that the European Union contends that, "under general international law, the question of whether treaty obligations apply is associated with the *government conduct and its timing*"<sup>648</sup>, highlighting that the European Union "does not claim to derive this conclusion from the Vienna Convention, nor even from commentary on the Vienna Convention."<sup>649</sup>

268. The United States counters that the ILC Articles<sup>650</sup>, which the European Union cites in support of its argument, "are not only irrelevant to the interpretation of the {non-}retroactivity rules reflected in Article 28 of the Vienna Convention, they also do not support the proposition for which the European Union cites them."<sup>651</sup> Where, as in the case of Article 5 of the *SCM Agreement*, "the primary obligations of a treaty are concerned with causing effects through prior government action, causing those effects itself is the 'wrongful act', and the conclusion as to retroactivity will 'depend' on whether it is 'completed' or 'has a continuing character'".<sup>652</sup> The United States points in this regard to Article 14(1) of the ILC Articles, which "applies only to 'an act of a State not having a continuous character'".<sup>653</sup> The United States further highlights that Article 14(3), which, "by contrast, deals with 'an international obligation requiring a State to prevent a given event'—analogous to the obligation in Article 5 of the *SCM Agreement* not to cause adverse effects ... {and} provides specifically, that a breach of such an obligation 'occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with the obligation.'"<sup>654</sup>

269. The United States argues that the decisions by the ICJ and the ECtHR cited by the European Union do not support the European Union's view that "government conduct alone, and not the effects of government conduct, is relevant to an analysis of retroactivity, depending on the actual text of the treaty that is being interpreted".<sup>655</sup> These rulings therefore do not provide guidance as to

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<sup>647</sup>United States' appellee's submission, para. 22.

<sup>648</sup>United States' appellee's submission, para. 24 (quoting European Union's appellant's submission, para. 43 (original emphasis)).

<sup>649</sup>United States' appellee's submission, para. 24.

<sup>650</sup>*Supra*, footnote 106.

<sup>651</sup>United States' appellee's submission, para. 24 (referring to European Union's appellant's submission, paras. 40-43).

<sup>652</sup>United States' appellee's submission, para. 27 (quoting Commentary on Article 14 of the ILC Articles, *supra*, footnote 105, para. (3), p. 60).

<sup>653</sup>United States' appellee's submission, para. 28.

<sup>654</sup>United States' appellee's submission, para. 28.

<sup>655</sup>United States' appellee's submission, para. 30.

the non-retroactivity rule reflected in Article 28 of the *Vienna Convention*, or how that rule would apply to the specific legal obligation contained in Article 5 of the *SCM Agreement*.

270. The United States further submits that the Panel correctly found that application of Article 5 of the *SCM Agreement* to "the causing of adverse effects through the use of subsidies" was consistent with the non-retroactivity principle reflected in Article 28 of the *Vienna Convention*.<sup>656</sup> The United States recalls in this regard that "the object and purpose of the *SCM Agreement* 'is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions'."<sup>657</sup> According to the United States, the Panel's approach is consistent with the established object and purpose of the *SCM Agreement* in that it allows Members to grant or maintain subsidies while ensuring that, "when they cause adverse effects, the subsidizing Member must withdraw them or eliminate the adverse effects."<sup>658</sup>

271. The United States also rejects the European Union's argument that the act, fact, or situation under Article 5 of the *SCM Agreement* is, for purposes of Article 28 of the *Vienna Convention*, limited to government conduct. For example, the indicia of serious prejudice laid out in Article 6.3 of the *SCM Agreement* "are largely independent of government action".<sup>659</sup> In addition, "Article 5 itself provides no grammatical agent for the noun 'use', indicating that the obligation applies whenever a Member causes adverse affects through the 'use' of a subsidy by anyone—whether the subsidy recipient, the government, or some other entity."<sup>660</sup>

272. The United States submits that the Panel correctly rejected the European Communities' arguments regarding the treatment of transitional issues under the *SCM Agreement* and the implications for the temporal scope question arising in this dispute. The United States argues that the Appellate Body's findings in *EC – Hormones* with regard to the application of the non-retroactivity principle to the *SPS Agreement* provide relevant guidance in this regard. The Appellate Body stated in that case that, "{i}f the negotiators had wanted to exempt the very large group of {sanitary and phytosanitary} measures in existence on 1 January 1995 from the disciplines of provisions ... , it

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<sup>656</sup>United States' appellee's submission, para. 34 (referring to Panel Report, para. 7.64).

<sup>657</sup>United States' appellee's submission, para. 42 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 64, in turn referring to Appellate Body Report, *US – Carbon Steel*, paras. 73 and 74).

<sup>658</sup>United States' appellee's submission, para. 42.

<sup>659</sup>United States' appellee's submission, para. 44.

<sup>660</sup>United States' appellee's submission, para. 46.

appears reasonable to us to expect that they would have said so explicitly."<sup>661</sup> According to the United States, the same is true for the *SCM Agreement*.

273. The United States disagrees with the European Union's critique that "paragraph 7 of Annex IV merely sets out 'a *method* to estimate the amount of subsidies granted to a particular product in a given year'."<sup>662</sup> The argument that paragraph 7 addresses a "transitional issue" of preventing circumvention of Article 6.1(a) of the *SCM Agreement* is factually incorrect, because Article 31 describes Article 6.1(a) as subject to "provisional application" rather than as a transitional measure.<sup>663</sup> According to the United States, nothing in the *SCM Agreement* serves to characterize paragraph 7 of Annex IV as an anti-circumvention measure. The United States also disputes the European Union's argument that, "if all pre-1995 subsidies are covered by Article 5, the requirement to allocate 'existing benefits' to future production arising from pre-1995 subsidies would already be covered by that rule", because the Annex states explicitly some rules that might otherwise be considered obvious.<sup>664</sup> In this context, the United States argues, the statement that the calculation includes subsidies granted prior to the entry into force of the *SCM Agreement* is not redundant since it merely "clarifies" that the "general rule" also applies under Article 6.1(a).<sup>665</sup>

274. The United States disagrees with the European Union that the absence of any mention of individual subsidies in Article 28 of the *SCM Agreement* reflects an intention to exclude individual subsidies from the *SCM Agreement* as completed acts or situations.<sup>666</sup> The United States asserts that the only conclusion to draw from the silence in Article 28 of the *SCM Agreement* with respect to *individual* pre-1995 subsidies (as opposed to subsidy *programmes*) is that Article 28 does not apply to such pre-1995 subsidies. This does not imply, however, that the other provisions of the *SCM Agreement* do not apply to such subsidies.

275. The United States also disputes the European Union's arguments regarding Article 32.3 of the *SCM Agreement*. In the United States' view, "the omission of any transitional provision for individual pre-1995 subsidies signifies only one thing—that the negotiators saw no need for a transitional

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<sup>661</sup>United States' appellee's submission, para. 48 (quoting Appellate Body Report, *EC – Hormones*, para. 128).

<sup>662</sup>United States' appellee's submission, para. 51 (quoting European Union's appellant's submission, para. 106 (original emphasis)).

<sup>663</sup>United States' appellee's submission, para. 52 (referring to European Union's appellant's submission, paras. 106 and 107).

<sup>664</sup>United States' appellee's submission, para. 54 (quoting European Union's appellant's submission, paras. 109).

<sup>665</sup>United States' appellee's submission, para. 54.

<sup>666</sup>United States' appellee's submission, para. 57 (referring to European Union's appellant's submission, para. 102).

arrangement."<sup>667</sup> Similarly, the United States argues that the explicit obligation in Article 32.5 "to bring named classes of measures into compliance with international obligations does not imply that other measures are free from the obligations."<sup>668</sup>

276. The United States submits in the alternative that, if the Appellate Body finds that the granting of the subsidy itself is the relevant act, fact, or situation under Article 28 of the *Vienna Convention*, it should complete the Panel's analysis and find that pre-1995 subsidies are "a situation that did not cease to exist before entry into force of the SCM Agreement."<sup>669</sup>

277. In support of its position, the United States argues that, "{b}y its terms, Article 1.1 indicates when a subsidy begins to 'exist,' but not when it ends."<sup>670</sup> The remainder of the *SCM Agreement* makes clear that the subsidy continues to exist after the act of conferring the financial contribution. For example, the requirement under Article 4.7 and the option under Article 7.8 of the *SCM Agreement* "to 'withdraw' the subsidy would be meaningless if the subsidy did not continue to exist."<sup>671</sup> For the United States, the same holds true for Article 21.1 of the *SCM Agreement*, which provides that a countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization that is causing injury. The United States finds support in this regard in the finding by the Appellate Body that "an investigating authority may presume, in the context of an administrative review under Article 21.2, that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution'."<sup>672</sup> In addition, the United States recalls that the Appellate Body "has confirmed that it is consistent with the SCM Agreement for Members to treat subsidies as having a 'duration' and to allocate the benefit over that period."<sup>673</sup>

278. The United States further submits that "{t}he government act of giving the subsidy may end upon final transfer of the funds."<sup>674</sup> However, under Article 1.1 of the *SCM Agreement*, a subsidy is deemed to "exist" if there is a financial contribution and a benefit is thereby conferred. A subsidy therefore exists once a complaining party establishes these conditions. A responding party is free to show that the subsidy subsequently ends at some point thereafter because "it is a {non-}recurring

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<sup>667</sup>United States' appellee's submission, para. 61.

<sup>668</sup>United States' appellee's submission, para. 62.

<sup>669</sup>United States' appellee's submission, para. 64 (referring to European Union's appellant's submission, para. 47).

<sup>670</sup>United States' appellee's submission, para. 65. (footnote omitted)

<sup>671</sup>United States' appellee's submission, para. 65.

<sup>672</sup>United States' appellee's submission, para. 65 (quoting Appellate Body Report, *US – Lead and Bismuth II*, para. 62; and referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 84).

<sup>673</sup>United States' appellee's submission, para. 65 (referring to Appellate Body Report, *Japan – DRAMs (Korea)*, para. 210F).

<sup>674</sup>United States' appellee's submission, para. 67.

subsidy or because of a full privatization, end of the allocation, or operation of some other mechanism that rebuts the evidence that the benefit exists."<sup>675</sup> There is no legal basis, however, to assume that the subsidy ends upon completion of the financial contribution. The United States submits that "{t}his legal conclusion reflects the economic reality that the benefit of a subsidy may continue long beyond actual receipt of the funds."<sup>676</sup>

279. Finally, the United States supports the Panel's conclusion that the 1979 *Tokyo Round Subsidies Code* is not relevant for purposes of the present dispute. The United States asserts that the general rule of interpretation reflected in Article 31 of the *Vienna Convention* also "places limits on the intertemporal application of international law", namely that, "{i}f the ordinary meaning of the terms of a treaty in their context and in light of the treaty's object and purpose creates a change in the legal regime applicable to existing measures, that is the legal regime that applies."<sup>677</sup> The United States disagrees with the European Union's description of the intertemporal application principle, and states that "the whole point of the SCM Agreement was to make 'dramatic changes' to existing disciplines, including the Tokyo Round Subsidies Code."<sup>678</sup>

### 3. The Life of a Subsidy and Intervening Events

#### (a) Whether the Panel erred in its interpretation and application of Articles 1, 5, and 6 of the *SCM Agreement*

280. The United States submits that the Appellate Body should uphold the Panel's finding that, on a proper interpretation of Articles 1, 5, and 6 of the *SCM Agreement*, there is no requirement to demonstrate a "continuing benefit" for purposes of an adverse effects analysis.

281. The United States contends that the structure of Article 1.1 of the *SCM Agreement* does not, by itself, require a "subsidy extinction analysis".<sup>679</sup> The United States disagrees that the use of the term "exist" in the present tense in Article 1 of the *SCM Agreement* signifies that the *SCM Agreement* does not concern subsidies that no longer exist and that are not capable of causing adverse effects. The United States claims that the phrase "shall be deemed to exist" indicates that application of the definition means that a subsidy must be considered to exist, at the time of analysis, if it meets the listed criteria in Article 1—namely that "there is" a financial contribution and a benefit "is" thereby conferred. The United States supports the Panel's finding that the use of the present tense with respect

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<sup>675</sup>United States' appellee's submission, para. 67.

<sup>676</sup>United States' appellee's submission, para. 67.

<sup>677</sup>United States' appellee's submission, para. 72.

<sup>678</sup>United States' appellee's submission, para. 74.

<sup>679</sup>United States' appellee's submission, para. 93.

to the "financial contribution" and "benefit", and the use of the term "thereby" to indicate the relationship between them, indicates that they exist at the same time.<sup>680</sup> Contrary to the European Union's arguments, the United States asserts that the use of the present tense in the definition in Article 1 has never been taken to suggest that the financial contribution must occur at the same time as the alleged adverse effects under Part III or material injury under Part V. In fact, the Appellate Body, panels, and parties have accepted that "there is" a financial contribution even where it occurred many years before the injury or adverse effects that the subsidy is alleged to have caused.<sup>681</sup>

282. Although the United States acknowledges that the Appellate Body has required a demonstration of a "continuing benefit" in situations where there is full privatization for fair market value and at arm's length in which the government no longer retains control, the United States submits that the analysis of the Appellate Body was "grounded" in Articles 19.4 and 21.1 of Part V of the *SCM Agreement*.<sup>682</sup> According to the United States, this does not mean that the definition operating by itself, or applied in the context of another part of the *SCM Agreement*, would necessitate the same result. The United States observes the Appellate Body's finding in *US – Upland Cotton* that Article 6.3(c) of the *SCM Agreement* contains no indication regarding the methodology for quantifying subsidies.<sup>683</sup>

283. The United States notes the European Union's reliance on the Appellate Body report in *Japan – DRAMs (Korea)*, in which it alleges that the Appellate Body treated the calculation of the amount of benefit and its allocation over time separately.<sup>684</sup> The United States agrees that quantification and allocation are different issues, but asserts that this does not mean either or both calculations are necessary to find the existence of a subsidy under Article 1 of the *SCM Agreement*.

284. The United States disagrees that the verb tense of the word "cause" in Article 5 and "is" in Article 6.3 supports the notion that "subsidies that have been withdrawn or ceased to exist cannot 'cause' adverse effects or trigger" the types of adverse effects set out in Article 6.3.<sup>685</sup> According to the United States, the present tense indicates only that the "effect" is in the present, in the form of one

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<sup>680</sup>United States' appellee's submission, para. 89 (referring to Panel Report, para. 7.218).

<sup>681</sup>United States' appellee's submission, para. 90 (referring to Appellate Body Report, *US – Lead and Bismuth II*, para. 60; and Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 84).

<sup>682</sup>United States' appellee's submission, para. 91.

<sup>683</sup>United States' appellee's submission, para. 91 (referring to Appellate Body Report, *US – Upland Cotton*, para. 465).

<sup>684</sup>United States' appellee's submission, para. 92 (referring to European Union's appellant's submission, para. 223, in turn referring to Appellate Body Report, *Japan – DRAMs (Korea)*, para. 199).

<sup>685</sup>United States' appellee's submission, para. 99 (referring to European Union's appellant's submission, paras. 207 and 208).

of the four situations that indicate, in the present, the existence of serious prejudice. It says nothing about whether the source of that effect is in the present or in the past.

285. With respect to "cause", the United States argues that its use in the infinitive, paired with the auxiliary verb "should", renders it mandatory through the operation of the remedies in Article 7.8 of the *SCM Agreement*. The United States argues that the use of "should", as the past tense of "shall", could refer to action in the present or future, so that its use in Article 5 conveys no indication as to whether the "causing" is in the past or the present. Furthermore, the word "subsidy" appears in an adverbial clause ("through the use of any subsidy") showing instrumentality—the means used to accomplish the action. For the United States, neither the clause, nor the use of the word "cause" indicates whether that instrumentality occurs before or at the same time as the resulting "adverse effects".<sup>686</sup> Moreover, the United States disagrees with the assertion by the European Union that it is inconceivable that a subsidy that is withdrawn or otherwise discontinued or diminished to a negligible amount could cause present adverse effects, and that "{i}ndirect effects ... cannot be sufficient".<sup>687</sup> According to the United States, Article 5 does not differentiate between direct and indirect effects, present subsidies, past subsidies, or subsidies that have ceased to confer a benefit. Although a complaining party may have difficulty in demonstrating a causal link where a subsidy is provided in the distant past or where effects are indirect, such an inquiry is part of the adverse effects analysis and is "not a matter to resolve through a presumption as to what a subsidy with a diminished benefit can do".<sup>688</sup> Moreover, the United States submits that the European Union's arguments suggest a "*de minimis*" requirement, as in Article 11.9 of the *SCM Agreement*, which requires the termination of a countervailing duty investigation if the subsidy margin is less than 1% *ad valorem*. The United States observes that Article 5 contains no such provisions. Finally, the United States believes that, contrary to the European Union's assertions, the Panel "carefully" considered, as part of its causation analysis, the effect of subsidies "over the passage of time".<sup>689</sup>

286. The United States rejects the European Union's argument that the availability of a "withdrawal" remedy under Articles 4.7 and 7.8 of the *SCM Agreement* provides contextual support for the notion of a "continuing benefit".<sup>690</sup> The United States disagrees that Articles 4.7 and 7.8 are the "equivalent of" Articles 21.2 and 21.3 of the *SCM Agreement* or that the Appellate Body had recognized that those provisions require the termination of remedial action against subsidies once

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<sup>686</sup>United States' appellee's submission, para. 100.

<sup>687</sup>United States' appellee's submission, para. 101 (quoting European Union's appellant's submission, para. 207).

<sup>688</sup>United States' appellee's submission, para. 101.

<sup>689</sup>United States' appellee's submission, para. 103 (referring to Panel Report, paras. 7.1921-7.1949).

<sup>690</sup>United States' appellee's submission, paras. 94 and 98.



those subsidies had been removed in some way.<sup>691</sup> Referring to the case law in *US – Countervailing Measures on Certain EC Products* and *US – Lead and Bismuth II*, the United States asserts that the Appellate Body did not couch its reasoning in terms of "remedies" generally, but rather in terms of the permissible levels of application of countervailing duties.

- (b) Whether the Panel erred in its interpretation and application of the "privatization" case law

287. The United States supports the Panel's finding that the Appellate Body's statements about a presumption of "extinction" of past subsidies in its privatization case law do not apply to the sales transactions involving Airbus companies between 1999 and 2006. In the United States' view, the Panel properly relied on the Appellate Body's reasoning in *US – Countervailing Measures on Certain EC Products* that "only one kind of change in ownership (that is, a privatization at arm's length and for fair market value where the government transfers all or substantially all the property and retains no controlling interest in the firm)" presumptively extinguishes past subsidies.<sup>692</sup> The United States submits that the Appellate Body should uphold the Panel's conclusion that the reasoning in that dispute does not, as the European Union asserts, create a general "principle" that "the sale of a company at arm's length and for fair market value removes any benefit of prior subsidies to the buyer"<sup>693</sup>, nor does it justify the application of such a "principle" to private-to-private sales and partial privatizations.

288. The United States disagrees with the European Union that the Appellate Body's reasoning in *US – Countervailing Measures on Certain EC Products* "effectively established a *rebuttable presumption* that there is no distinction between a firm and its owners for the purpose of the SCM Agreement."<sup>694</sup> According to the United States, the Appellate Body criticized the panel in that dispute for making the same erroneous assertion and found that the distinction between a firm and its owners was "certainly not conclusive" and "is not necessarily relevant" for determining whether a benefit exists.<sup>695</sup> In the United States' view, these statements indicate that the Appellate Body was open to consider the distinction between a firm and its owners as a relevant factor in its overall evaluation of a transaction. The United States asserts that "{a} better characterization {of the

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<sup>691</sup>United States' appellee's submission, para. 96 (referring to European Union's appellant's submission, para. 200).

<sup>692</sup>United States' appellee's submission, para. 105 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 117).

<sup>693</sup>United States' appellee's submission, para. 107 (quoting European Union's appellant's submission, para. 226, in turn quoting European Communities' response to Panel Question 197, para. 223).

<sup>694</sup>United States' appellee's submission, para. 113 (quoting European Union's appellant's submission, para. 240 (original emphasis)).

<sup>695</sup>United States' appellee's submission, para. 113 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 115).

Appellate Body's finding} would seem to be that the sameness of a firm and its owners is an analytical construct, warranted in some instances ... and not warranted in others".<sup>696</sup> The United States also rejects the European Union's attempts to defend its presumption as "rooted in economic common sense" by hypothesizing sales of less than 100% of a firm's shares, and then proceeding to ask why the Appellate Body's finding that a fully privatized firm and its new owners are the same should not apply to such sales of lesser portions of the firm.<sup>697</sup> In the United States' view, a number of factors should be analyzed in considering whether a firm and its owners are distinct, including whether the owners have the ability to control the assets of the firm.<sup>698</sup>

289. The United States also notes the European Union's criticism of the Panel on the ground that the "two financial contributions"—the original subsidy and the sale of the company to private owners—"are not comparable".<sup>699</sup> The United States explains that the two transactions are not comparable since they involve different financial contributions measured against different benchmarks.<sup>700</sup> In the United States' view, the European Union's argument that the difference is significant because the original subsidy "*increases* the value of the firm" while the sale price "*includes the market value of the subsidy created by the original financial contribution*", and therefore "removes the benefit of the subsidy", ignores the fact that the increase in the value of the firm is not the *benefit* of the subsidy, but the *effect* of the subsidy—a consideration which should not affect the evaluation of the benefit.<sup>701</sup>

290. The United States notes the European Union's argument that the Appellate Body's statement in *US – Countervailing Measures on Certain EC Products*, that "{t}he Panel's absolute rule of 'no benefit' may be defensible in the context of transactions between private parties taking place in reasonably competitive markets"<sup>702</sup>, creates an "*irrebuttable*" presumption in private-to-private sales

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<sup>696</sup>United States' appellee's submission, para. 114 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 113, 115, and 118).

<sup>697</sup>United States' appellee's submission, para. 115 (quoting European Union's appellant's submission, para. 241).

<sup>698</sup>United States' appellee's submission, para. 115 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 117 and 119, where the Appellate Body specifically disagreed with the panel's "overreaching conclusion that 'for the purpose of the benefit determination under the *SCM Agreement*, {investigating authorities should make} no distinction ... between a company and its shareholders'", and noted that the panel "should have confined its findings to {the} specific circumstances" of "a privatization at arm's length and for fair market value where the government transfers all or substantially all the property and retains no controlling interest in the firm").

<sup>699</sup>United States' appellee's submission, para. 125 (referring to European Union's appellant's submission, para. 245).

<sup>700</sup>United States' appellee's submission, para. 125 (referring to Panel Report, para. 7.243).

<sup>701</sup>United States' appellee's submission, para. 125 (quoting European Union's appellant's submission, para. 245 (original emphasis)).

<sup>702</sup>United States' appellee's submission, para. 116 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 124).

that an arm's-length, fair market value sale "precludes the pass-through of benefit from seller to buyer".<sup>703</sup> The United States submits that the caveat used by the Appellate Body—namely that it "may be defensible"—signals the Appellate Body's lack of confidence in its conclusion.<sup>704</sup> The United States argues further that, upon full privatization, the relationship between a firm and its owners changes, since private owners are "profit-maximizers"<sup>705</sup> while the government is not. Moreover, the subsidizing government receives a payment from the new owners equal to the market value of any subsidized and non-subsidized contributions to the company. As the United States sees it, these changes in the owner-company relationship and the company-government relationship in a privatization context do not occur in a transaction between two private parties. The United States observes that the US Department of Commerce (the "USDOC") methodology memorandum, relied on by the European Union for its arguments that under US law a private-to-private transaction establishes a presumption of extinction of subsidy<sup>706</sup>, demonstrates that such a presumption applies only to full privatizations and is rebuttable if "parties can demonstrate that the broader market conditions were severely distorted by the government and that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action."<sup>707</sup>

291. The United States disagrees with the European Union that the compliance panel's finding in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* supports the view that partial sales extinguish prior subsidies. The United States observes that, although the French Government in that case allowed one group of purchasers (the employees) to pay less than fair market value for their shares, the case involved a full privatization of a state-owned company, Usinor.<sup>708</sup> Even if the employee share purchases led to the conclusion that the privatization did not cover 100%, the sale of the remaining 94.84% of shares, in the context of a transfer to the public of 100% of the

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<sup>703</sup>United States' appellee's submission, para. 116 (quoting European Union's appellant submission, para. 253 (original emphasis)).

<sup>704</sup>United States' appellee's submission, para. 116 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 124).

<sup>705</sup>United States' appellee's submission, para. 122 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 103).

<sup>706</sup>United States' appellee's submission, para. 117 (referring to European Union's appellant's submission, para. 254; and USDOC, Issues and Decision Memorandum, *supra*, footnote 158, p. 2).

<sup>707</sup>United States' appellee's submission, para. 117 (quoting USDOC, Issues and Decision Memorandum, *supra*, footnote 158, p. 2).

<sup>708</sup>The United States submits that, save for 5.16% of the shares that were sold to Usinor employees at a substantial discount and not at fair market value, the privatization was exactly the "one kind of change in ownership" covered in *US – Countervailing Measures on Certain EC Products*, involving "privatization at arm's length and for fair market value where the government transfers all or substantially all the property and retains no controlling interest in the firm." (United States' appellee's submission, para. 128 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 117) (footnote omitted))

shares and complete surrender of government control, would meet the criterion of transferring "substantially all the property".<sup>709</sup>

292. Finally, the United States supports the Panel's finding that adopting a "principle" whereby "changes in the underlying ownership of a subsidized producer automatically or presumptively eliminate the benefit conferred by prior financial contributions" would "potentially eviscerate the SCM Agreement".<sup>710</sup> The United States agrees with the Panel that any exchange of shares in a publicly held company would, under the European Union's reasoning, eliminate a corresponding share of the benefit of subsidies, even though it changed nothing about the company's operations and nothing meaningful about the company's ownership.<sup>711</sup>

- (c) Whether the Panel erred in finding that the transactions did not "withdraw" the benefit conferred by the past subsidies, within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*

293. The United States submits that, contrary to the European Union's arguments, Articles 4.7 and 7.8 of the *SCM Agreement* do not create a "separate and independent" requirement to evaluate whether the subsidizing Member has "withdrawn" or "extracted" a subsidy. The provisions specify the remedies available following a finding that subsidies are prohibited or cause adverse effects, and do not contain or imply substantive rules as to when subsidies exist for purposes of Article 5 of the *SCM Agreement*. Moreover, the United States observes that the provisions create an obligation on the Member, or in the case of Article 7.8 give the Member an option, to withdraw the subsidy. Accordingly, the *Member* must do something affirmative to "remove" or "take away" the subsidy.<sup>712</sup> The United States does not consider a transfer of funds or other assets by the subsidy recipient to an entity other than the government to be action by the *Member* to remove or take away the subsidies, as required under Articles 4.7 and 7.8 of the *SCM Agreement*.

- (i) "*Cash extractions*" involving *CASA and Dasa*

294. As a general matter, the United States rejects the "theory underlying" the European Union's arguments on "extraction" or "withdrawal", namely that "benefits from subsidies existed as

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<sup>709</sup>See United States' appellee's submission, paras. 126-128 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 117).

<sup>710</sup>United States' appellee's submission, para. 129 (quoting Panel Report, paras. 7.246 and 7.252).

<sup>711</sup>The United States contends that the European Union fails to explain the distinction it draws between the daily trading of shares and the transactions in this case, which, according to the European Union, involve "significant" sales by government, industry or institutional shareholders. (United States' appellee's submission, para. 130)

<sup>712</sup>United States' appellee's submission, para. 135 (referring to Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)* para. 45; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 226 and 227; and Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.27).

enhancements to CASA's and {Dasa's} balance sheets" and that, through the "cash extraction", the "incremental value" created by the subsidies was removed.<sup>713</sup> In the United States' view, a number of other factors may increase (or decrease) the incremental value of a company, and it would be incorrect to equate the "effect of the subsidy on the company" to the "benefit" of a subsidy. Although the United States does not dispute that there are circumstances in which a Member may remove cash from a subsidized company in a way that "withdraws" the subsidy for purposes of Articles 4.7 and 7.8—such as where a Member takes back the value of the subsidy and gives nothing in return<sup>714</sup>—paying a third party, such as DaimlerChrysler in this dispute, carries no such implication.

295. Turning to the transactions at issue in this dispute, the United States agrees with the Panel's conclusions that there was no "extraction" or "withdrawal" of subsidies with respect to Dasa.<sup>715</sup> In the United States' view, since the "cash extraction" did not involve a payment to the German Government, there is no basis to conclude that "the Member granting or maintaining such subsidy ... withdr{e}w the subsidy" for purposes of Article 7.8. Moreover, in the United States' view, the European Union's argument focuses on the wrong corporate relationship, because DaimlerChrysler's incentives to return money to Dasa following the transaction were unchanged as it still owned 100% of Dasa.<sup>716</sup> The United States also notes the Panel's finding that the Airbus creation process "was structured so as to maintain the overall interests of DaimlerChrysler and the Spanish government *in Airbus Industrie as a whole*."<sup>717</sup> In the United States' view, evidence as to ongoing control of the recipient by Dasa, and by DaimlerChrysler through Dasa, is important to an inquiry into whether the "cash extraction" "removed the incremental contribution of alleged prior subsidies" and whether anything in fact left the recipient.<sup>718</sup> Finally, the United States points out that DaimlerChrysler did in fact confer "something to Dasa in exchange for the funds transferred to it".<sup>719</sup> The United States recalls that the "cash extraction" from Dasa reduced the value of its assets to a level where it was equivalent to the number

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<sup>713</sup>United States' appellee's submission, para. 136 (quoting European Union's appellant's submission, paras. 172 and 173).

<sup>714</sup>In support, the United States refers to the panel report in *Australia – Automotive Leather II (Article 21.5 – US)*, where the panel found that where the subsidized entity made cash payments to the government this could constitute "withdrawal" of subsidies. (United States' appellee's submission, para. 137 (referring to Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.28))

<sup>715</sup>The United States disagrees with the European Union's argument that the transfer of cash from Dasa to DaimlerChrysler was "permanent" on the ground that, after the formation of EADS, DaimlerChrysler held a much smaller share of EADS than it had previously held of Dasa, and any return of the money would therefore be spread over a larger shareholder base. (United States' appellee's submission, para. 142 (referring to European Union's appellant's submission, para. 190))

<sup>716</sup>United States' appellee's submission, para. 143 (referring to Panel Report, section VII.E.1 (attachment), footnote 2241 to para. 4).

<sup>717</sup>United States' appellee's submission, para. 143 (quoting Panel Report, para. 7.275 (original emphasis)).

<sup>718</sup>United States' appellee's submission, para. 144 (quoting Panel Report, para. 7.268; and referring to European Communities' response to Panel Question 200, para. 247).

<sup>719</sup>United States' appellee's submission, para. 145.

of EADS shares agreed upon.<sup>720</sup> In such a circumstance, argues the United States, no one would argue that this was a "withdrawal" for purposes of Articles 4.7 and 7.8 of the *SCM Agreement*.

296. With respect to the transaction involving CASA, the United States notes the different approach taken by the Panel given the involvement of the government. The United States agrees with the Panel that SEPI provided "something of equal value" in return for the transfer—namely, as with Dasa, the reduction of capital in CASA in preparation for its contribution to EADS.<sup>721</sup> The United States also agrees with the Panel that, given that the Spanish Government exercised the same degree of ownership and control over Airbus before and after the creation of EADS, the funds had not left the company-shareholder unit.<sup>722</sup>

(ii) *Sales transactions*

297. The United States submits that, despite the European Union's assertions to the contrary, the European Communities "never made arguments" that the sales transactions were "extractions" or constituted "withdrawals" within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*.<sup>723</sup> The United States submits that the European Communities used the term "extraction" interchangeably with "extinction".<sup>724</sup> Moreover, the European Communities' discussions on "extraction" addressed only the specific facts of the Dasa and CASA transactions.<sup>725</sup> According to the United States, the references cited by the European Communities do not contain separate arguments that the sales transactions "withdrew" prior subsidies for purposes of Articles 4.7 and 7.8 of the *SCM Agreement*, but rather reflect the European Communities' view that subsidies that have been "extinguished" for

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<sup>720</sup>In the United States' view, the transaction was no different from a situation where Dasa contributed its assets to EADS without the cash transfer, and received a higher number of shares than it was entitled to, after which DaimlerChrysler sold the excess back to EADS in exchange for cash.

<sup>721</sup>United States' appellee's submission, para. 148 (quoting Panel Report, para. 7.285).

<sup>722</sup>United States' appellee's submission, para. 149 (referring to Panel Report, para. 7.285). Finally, the United States asserts that, contrary to the European Union's arguments, the Panel did not make general statements as to whether the transfer from a government-owned company to the government for nothing in return might indicate that the relevant Member withdrew the subsidy to the extent of the transfer; rather, the Panel in this dispute simply found that the CASA-SEPI transfer did not satisfy these criteria. (*Ibid.*, para. 150)

<sup>723</sup>United States' appellee's submission, para. 151.

<sup>724</sup>United States' appellee's submission, para. 152 (referring to European Communities' first written submission to the Panel, paras. 263, 271, and 282).

<sup>725</sup>United States' appellee's submission, para. 152 (referring to European Communities' oral statement at the first Panel meeting, paras. 32 and 61; European Communities' responses to Panel Question 80, para. 152, Panel Question 81, para. 161, and Panel Question 112, paras. 313 and 315; European Communities' second written submission to the Panel, para. 990; European Communities' responses to Panel Questions 198-201, paras. 235-254, and Panel Question 222, paras. 557-559; and European Communities' comment on the United States' response to Panel Question 222, paras. 392 and 397-401).

purposes of Articles 1, 5, and 6 of the *SCM Agreement* are also "withdrawn" for purposes of Articles 4.7 and 7.8.<sup>726</sup>

298. In the United States' view, the concepts of "extinction" and "withdrawal", as argued by the European Union with respect to the sales transactions, are mutually exclusive. On the one hand, the European Union's "extinction" argument rests on the proposition that a new buyer extinguishes a subsidy by paying the owners money that reflects the value added to the company by past subsidies, such that there is an exchange of value for value. On the other hand, the European Union argues that a subsidy is "withdrawn" when the recipient pays money *without* getting something in return. According to this view, no transaction for fair market value could ever withdraw a subsidy because, by definition, the parties would be exchanging equal values. The United States also contends that, since most of the sales transactions involved private entities, they would not qualify as withdrawals under Articles 4.7 and 7.8, which only apply when *the government* removes money from the subsidy recipient. Finally, the United States argues that, since the European Communities never explained how the sales transactions "withdrew" the subsidies, the Panel would have been required to devise its own explanations to support any conclusion, which is not a permissible role for panels under the DSU.<sup>727</sup>

(d) Whether the Panel violated Article 11 of the DSU

299. The United States rejects the five claims of error alleged by the European Union under Article 11 of the DSU. According to the United States, the Panel correctly applied the relevant provisions of the covered agreements and presented a thorough and well-reasoned explanation of its findings. In the United States' view, the European Union's arguments consist primarily of a mere repetition of its arguments that the Panel improperly understood the substantive provisions of the *SCM Agreement*. The United States considers that it has shown these arguments to be "unfounded".<sup>728</sup> The United States submits that, even if the European Union were correctly to identify legal errors, this is not a sufficient basis for a claim under Article 11 of DSU. In this regard, the United States recalls the Appellate Body's statement that Article 11 claims are not to be "made lightly" or "merely as a

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<sup>726</sup>According to the United States, since the European Communities' argument that the sales transactions "extinguished" benefits failed before the Panel, its argument with respect to Articles 4.7 and 7.8 also fails. (United States' appellee's submission, para. 154 (referring to Panel Report, para. 7.266))

<sup>727</sup>United States' appellee's submission, para. 157 (referring to Appellate Body Report, *Japan – Agricultural Products II*, paras. 130 and 131).

<sup>728</sup>United States' appellee's submission, para. 163.

subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement".<sup>729</sup>

300. Second, the United States observes that the European Union bases many of its claims of violation of Article 11 of the DSU on the alleged failure by the Panel to provide a "reasoned and adequate explanation" of its findings. According to the United States, the European Union thereby attempts to apply "a new standard of review" based on whether the explanation of the Panel's finding is sufficiently robust.<sup>730</sup> While the United States acknowledges that the panel's lack of explanation and coherent reasoning was one consideration that led the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* to find that grounds for reversal existed, the Appellate Body did not put forward "lack of a 'reasoned and adequate explanation' as a new and independent basis for reversing a panel's findings."<sup>731</sup>

301. In addition to these "overarching legal flaws", the United States addresses each of the five claims of error alleged by the European Union.<sup>732</sup> First, with respect to the European Union's argument that the Panel failed to explain the significance of its finding that the reduction in CASA's capital represented something of value received from SEPI in exchange for the CASA-SEPI transfer, the United States considers that the significance of the Panel's finding was clear and that the Panel provided a reasoned and adequate explanation.

302. Second, regarding the argument that the Panel failed to provide a "reasoned and adequate explanation of", and had insufficient evidence for, its finding that the agreement to pool voting rights gave SEPI and DaimlerChrysler a greater claim to the earnings of any funds returned to EADS, the United States recalls that the Panel made no finding that the agreement affected claims on earnings. Rather, the Panel's finding that the agreement affected the control of the company was one of several reasons cited by the Panel for its conclusion that the CASA-SEPI and Dasa-DaimlerChrysler "cash

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<sup>729</sup>United States' appellee's submission, para. 164 (quoting Appellate Body Report, *US – Steel Safeguards*, para. 498).

<sup>730</sup>United States' appellee's submission, para. 165. The United States considers that there is little support in the existing jurisprudence for this argument, and does not consider that the footnote in the Appellate Body's report in *US – Upland Cotton (Article 21.5 – Brazil)* referred to by the European Union supports the proposition. By contrast, the United States reads the finding of the Appellate Body in that case to be that the compliance panel violated Article 11 of the DSU because it "effectively disregarded the re-estimates data" and used "internally inconsistent reasoning"—both grounds for past findings of Article 11 inconsistencies. (*Ibid.*, paras. 165-167 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 294, 295, and footnote 618 to paragraph 293; Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164; and Appellate Body Report, *US – Wheat Gluten*, para. 161))

<sup>731</sup>United States' appellee's submission, para. 167.

<sup>732</sup>United States' appellee's submission, para. 168.



extractions" did not move cash out of the company-shareholder unit. Therefore, the United States considers that the Panel did explain its findings in this respect carefully and in appropriate detail.<sup>733</sup>

303. Regarding the third claim by the European Union—namely that the Panel contradicted itself by finding elsewhere in its Report that the French Government's contribution of Dassault shares to Aérospatiale, a state-owned entity, was a financial contribution, while finding that "the *removal* of money from a state-owned entity by its government shareholder does not qualify as 'withdrawal' of those payments"—the United States considers this to be a "misperception" by the European Union.<sup>734</sup> The Panel did not dispute the possibility that in certain conditions, removal of money from a state-owned entity by the state could qualify as withdrawal of a subsidy; rather its finding was that those conditions were not present in this one instance.<sup>735</sup>

304. Fourth, the United States notes the European Union's argument that the Panel violated Article 11 of the DSU by not addressing whether the six sales transactions "withdrew" past subsidies for purposes of Articles 4.7 and 7.8 of the *SCM Agreement*. According to the United States, while the European Union had made arguments with regard to "cash extractions" involving CASA-SEPI and Dasa-DaimlerChrysler, it never pursued that argument with any clarity with respect to the sales transactions.

305. Finally, with respect to the European Union's claims that the Panel erred in finding that the European Communities did not argue that each of the sales transactions was at "arm's length", the United States notes that the reference cited by the European Union regarding two of the sales does not even mention the term "arm's length"<sup>736</sup>, and that other citations referred to by the European Union "can scarcely be considered 'arguments'".<sup>737</sup> With respect to other transactions that the European Union argues were at arm's length, the United States submits that a panel is not required to address every argument raised by a party.<sup>738</sup> For the United States, "the larger point" is that the Panel's statement regarding whether the sales were at "arm's length" was made in the context of its analysis of whether a "continuing benefit" requirement applies beyond the factual situation following privatization at arm's length for fair market value where the government transfers all or substantially

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<sup>733</sup>United States' appellee's submission, para. 170 (referring to Panel Report, paras. 7.275, 7.283, and 7.285, referred to in European Union's appellant's submission, para. 274).

<sup>734</sup>United States' appellee's submission, para. 171 (quoting European Union's appellant's submission, paras. 277 and 284 (original emphasis)).

<sup>735</sup>United States' appellee's submission, para. 171 (referring to Panel Report, paras. 7.283 and 7.284).

<sup>736</sup>United States' appellee's submission, para. 173 (referring to European Union's appellant's submission, para. 279, third bullet).

<sup>737</sup>United States' appellee's submission, para. 173.

<sup>738</sup>United States' appellee's submission, para. 173 (referring to Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 134, in turn quoting Appellate Body Report, *EC – Poultry*, para. 135).

all control to a privatized producer.<sup>739</sup> The United States argues that, to the extent that the Panel was incorrect, any such error did not affect the Panel's ultimate conclusion since none of the sales transactions involved the transfer of all or substantially all the property, or the surrender of all of the controlling interest by the relevant governments. Therefore, the United States concludes, regardless of whether the transactions were at "arm's length", they would in any case not have created a situation in which a subsidy extinction analysis was necessary or appropriate.

- (e) Whether the Panel erred by finding that there was no requirement to conduct a "pass-through" analysis

306. The United States submits that the Panel was correct in finding that the changes to the corporate structure through which Airbus LCA were produced did not require the United States to demonstrate, as part of its *prima facie* case, that subsidies to previous producers of Airbus LCA "passed through" to Airbus SAS. In support, the United States refers to the Appellate Body's reasoning in *US – Upland Cotton*, where it affirmed that, in contrast to a Part V context, a "pass-through" analysis is not critical for an assessment of significant price suppression under Article 6.3(c) in Part III of the *SCM Agreement*.<sup>740</sup> Moreover, the United States explains that an analysis of subsidies differs between Part III and Part V: whereas Part V addresses a Member's remedy against subsidized imports causing material injury to a domestic industry, Part III provides a multilateral remedy against a more general category of adverse effects of subsidies themselves.<sup>741</sup> Additionally, the United States observes that Part V has different substantive and procedural requirements than Part III, including a requirement to quantify the subsidy that is absent from Part III.

307. The United States submits that, as the complaining party, its only burden was to establish that the European Communities' subsidies caused adverse effects to the United States' interests, which it did by establishing that the four member States made financial contributions that each conferred a benefit on producers of Airbus LCA and that these subsidies caused adverse effects to the United States' interests. To the extent that the Appellate Body considers that the United States bore some further burden, the United States argues that it satisfied that burden by establishing that the corporate predecessors of Airbus SAS were all producers of Airbus LCA and that, as the Panel found, there was no indication that the reorganization among the Airbus entities to create Airbus SAS had any impact on the "quality or nature of control" of Airbus Industrie or on the work share distribution

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<sup>739</sup>United States' appellee's submission, para. 174.

<sup>740</sup>United States' appellee's submission, para. 159 (referring to Appellate Body Report, *US – Upland Cotton*, para. 472).

<sup>741</sup>United States' appellee's submission, para. 160 (referring to Appellate Body Report, *US – Upland Cotton*, para. 436).

between the Airbus partners.<sup>742</sup> For these reasons, the United States submits that the Panel did not err in finding that "the Airbus Industrie consortium (i.e., each of the Airbus partners, their respective affiliates and Airbus GIE) {is} the *same producer* of Airbus LCA as Airbus GIE."<sup>743</sup>

(f) Conclusion

308. For the above reasons, the United States requests the Appellate Body to uphold the Panel's finding that there was no requirement for the United States to demonstrate a "continuing benefit" pursuant to Articles 1, 5, and 6 of the *SCM Agreement*. Moreover, the United States requests that the Appellate Body reject the European Union's arguments that any and/or all of the transactions at issue resulted in "extinction" or "withdrawal" of subsidies to Airbus companies. Finally, the United States requests the Appellate Body to dismiss the European Union's claim that the Panel failed to make an objective assessment of the matter pursuant to Article 11 of the DSU.

4. The 1992 Agreement

309. The United States disagrees that Article 4 of the 1992 Agreement constitutes the relevant benchmark for a determination of "benefit" under Article 1.1(b) of the *SCM Agreement*. The United States agrees with the Panel that the 1992 Agreement contains no definition of subsidy, nor does it make any reference to the notion of benefit. First, the United States argues that, by its own terms—in particular, Article 4 and the fifth recital to the preamble of the 1992 Agreement<sup>744</sup>—the 1992 Agreement has no bearing on, and is therefore not "relevant" to, the parties' rights and obligations under the *SCM Agreement*. The United States submits that the 1992 Agreement was not aimed at putting in place a new "benchmark" for what would constitute a subsidy and a benefit under the *SCM Agreement*, but rather was only intended to place constraints on the amount and terms of LA/MSF, without any prejudice to the parties' different views as to the consistency of the measures under the GATT 1947 or any successor agreement. Second, even assuming that Article 4 were "relevant" to an interpretation of the *SCM Agreement* pursuant to Article 31(3)(c) of the *Vienna Convention*, the United States does not consider it to be "applicable in the relations between the

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<sup>742</sup>United States' appellee's submission, para. 161 (quoting Panel Report, para. 7.199, in turn referring to European Commission, Merger Procedure Article 6(2) Decision, Case No. COMP/M 1745 – EADS (11 May 2000) (Panel Exhibit US-479), para. 16 (emphasis added by the Panel omitted)).

<sup>743</sup>United States' appellee's submission, para. 161 (quoting Panel Report, para. 7.199 (original emphasis)).

<sup>744</sup>The fifth recital to the Preamble of the 1992 Agreement reads:

NOTING {the European Economic Community's and the Government of the United States of America's} intention to act without prejudice to their rights and obligations under the GATT and under other multilateral agreements negotiated under the auspices of the GATT[.]

parties" based on a proper interpretation of Article 31, and in the light of past panel and Appellate Body reports.<sup>745</sup>

(a) The meaning of Article 31(3)(c) of the *Vienna Convention*

310. The United States disagrees with the interpretation of "the parties" advocated by the European Union. The United States points to the numerous references to the term "treaty" in the subparagraphs of Article 31, and argues that its use each time "makes it clear that it refers to the treaty that is subject to 'interpretation'".<sup>746</sup> Applying the definition in Article 2(1)(g) of "party" to Article 31(3)(c) of the *Vienna Convention* could only mean "States which have consented to be bound by the treaty *subject to the interpretation* and for which that treaty is in force".<sup>747</sup>

311. Turning to "context", the United States submits that, although worded differently, Articles 31(2)(a) and 31(2)(b) of the *Vienna Convention* refer respectively to agreements "between all the parties", and that any instrument made "by one or more parties ... and accepted by the other parties" illustrates that all the parties must endorse an instrument "in some fashion" before it can become one of the interpretive tools to which Article 31 of the *Vienna Convention* refers.<sup>748</sup> The United States rejects the European Union's argument that the use of "all the parties" in Article 31.2(a) indicates that "the parties" in Article 31(3)(c) must mean "some or all of the parties".<sup>749</sup> The United States points out that, even under Article 31(2), the use of two different phrases to refer to all the parties indicates that the negotiators of the *Vienna Convention* recognized multiple ways to capture this concept.

312. With respect to the "object and purpose", the United States disagrees that the preamble of the *Vienna Convention* provides a basis for reading Article 31 in a manner that would require that an agreement between only two parties to the *SCM Agreement* would affect the meaning for other WTO Members that did not accept the bilateral agreement. The United States observes that Articles 3.2 and 11 of the DSU provide support for the view that the DSU establishes jurisdiction over only those disputes arising under the covered agreements and not over all disputes among WTO Members with regard to all treaties to which they are parties. Finally, the United States recalls that the fifth recital of the preamble of the 1992 Agreement states that the disciplines of the 1992 Agreement are "without prejudice" to the parties' rights and obligations under the GATT and other multilateral agreements negotiated under the auspices of the GATT. In the United States' view, this provision illustrates that

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<sup>745</sup> See United States' appellee's submission, paras. 230-240 and 252-263.

<sup>746</sup> United States' appellee's submission, para. 245.

<sup>747</sup> United States' appellee's submission, para. 245. (emphasis added)

<sup>748</sup> United States' appellee's submission, para. 246.

<sup>749</sup> United States' appellee's submission, para. 247.

"the 1992 Agreement itself rejects any applicability to the covered agreements, including the *SCM Agreement*."<sup>750</sup>

313. Neither does the United States consider that the various panel and Appellate Body reports relied on by the European Union support its interpretation that bilateral agreements among only two WTO Members can be used to interpret the covered agreements. First, the United States notes that the panel's ruling in *EC – Approval and Marketing of Biotech Products* was never appealed and was adopted by the DSB, and therefore remains persuasive. The United States also refers to findings of panels and the Appellate Body in *US – Shrimp*, *US – Shrimp (Article 21.5 – Malaysia)*, *EC – Poultry*, and *US – FSC (Article 21.5 – EC)*, and explains that the non-WTO rules at issue in those disputes did not qualify as instruments within the meaning of Article 31(3)(c), but were instead used to interpret the ordinary meaning of terms under Article 31(1) or the special meaning of terms under Article 31(4) of the *Vienna Convention*.<sup>751</sup> The United States also asserts that, even using these other interpretative tools, the Appellate Body did not consider the isolated practices of one or two countries.<sup>752</sup>

(b) Whether Article 4 of the 1992 Agreement is relevant to interpreting the term "benefit" in Article 1.1(b) of the *SCM Agreement*

314. The United States submits that the 1992 Agreement, on its own terms, has no bearing on parties' rights and obligations under the *SCM Agreement*. According to the United States, the use of the term "support" in Article 4 and in other provisions of the *SCM Agreement*, and the reference in Article 4 of the 1992 Agreement and the *SCM Agreement* to "thresholds" as a mechanism to trigger obligations, do not create a link that is relevant for purposes of the *SCM Agreement*. The term "support", as used in Article 1.1(a)(2) of the *SCM Agreement*, only defines income and price "supports" as a "financial contribution", which are separate from "development support" in Article 4 of the 1992 Agreement. Moreover, the United States highlights that "support" in Article 3.2 of the *Agreement on Agriculture* is not a synonym for "subsidy", since the use of the "support" as opposed to subsidy indicates that the two terms have different meanings under the covered agreements.

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<sup>750</sup>United States' appellee's submission, para. 251. The United States considers that the agreements negotiated in the Uruguay Round of Multilateral Trade Negotiations—including the *SCM Agreement*—are encompassed by the phrase "multilateral agreements negotiated under the auspices of the GATT". Thus, the Ministerial Declaration launching the Uruguay Round stated that the Contracting Parties to the GATT 1947 "DECIDE to enter into Multilateral Trade Negotiations on trade in goods within the framework and under the aegis of the General Agreement on Tariffs and Trade". Accordingly, argues the United States, the fifth recital to the 1992 Agreement confirms that the Agreement does not prejudice the rights of the United States under the *SCM Agreement*. (United States' appellee's submission, footnote 407 to para. 239)

<sup>751</sup>In this respect, the United States refers to Appellate Body Report, *US – Shrimp*, and Appellate Body Report, *US – FSC (Article 21.5 – EC)*. (United States' appellee's submission, paras. 255, 260, and 261)

<sup>752</sup>See United States' appellee's submission, para. 260 (referring to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 143).

315. The United States also rejects the European Union's argument that Article 4 is relevant because it creates "market" conditions that serve as a benchmark for the interest rates charged for LA/MSF. The United States submits that this argument "confuses government lending conditions with the broader 'market' for financing" since, although the 1992 Agreement may have put constraints on state lenders, private financiers remained free to offer whatever terms the commercial market would bear. Moreover, the 1992 Agreement did not affect the market in a way relevant for a determination of benefit under Article 1.1(b) of the *SCM Agreement*.

- (c) Whether Article 4 of the 1992 Agreement is a relevant fact to establish the market benchmark

316. The United States submits that, even if the Appellate Body were to treat Article 4 of the 1992 Agreement as a "fact", this would not affect the outcome given that the Panel never found that the 1992 Agreement influenced the market in the way alleged by the European Union. For these reasons, the United States argues that there were "no relevant facts" for the Panel to "take into account".<sup>753</sup>

5. LA/MSF Benefit Benchmark

- (a) Whether the Panel erred in finding that the LA/MSF measures confer a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*

317. The United States requests the Appellate Body to uphold the Panel's findings under Article 1.1(b) of the *SCM Agreement* regarding the applicable project-specific risk premium. The United States maintains that the Panel made an objective assessment of the facts as required by Article 11 of the DSU in criticizing and rejecting the risk premium benchmark proposed by the European Communities. The United States also claims that the Panel validly found that the reasonableness of repayment forecasts does not dictate the appropriateness of the rate of return.

- (i) *Errors of application of the law to the facts of the case*

318. The United States asserts that "there is no dispute ... as to whether {LA/MSF} conferred a benefit" and that "{t}he only question is what the market would have demanded for comparable financing".<sup>754</sup> The United States points to the Panel's finding that "even relying on the European Communities' own estimates of the rates of return and market interest rate benchmarks, it is

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<sup>753</sup>United States' appellee's submission, para. 238.

<sup>754</sup>United States' appellee's submission, para. 176 (referring to Panel Report, para. 7.490).

clear that the financial contributions provided in the form of LA/MSF conferred a benefit on Airbus."<sup>755</sup>

319. The United States contends that the European Union understates the substantial risk that the member State governments undertook in providing LA/MSF. The United States notes that financing the development of LCA is expensive and risky, costing as much as US\$10 billion or more per new LCA model, and that once the investment has been made, very little can be recovered in the event the programme fails to perform as expected. LA/MSF is a highly preferential form of financing with unique terms that absorb the extraordinary costs and offset the massive risks of LCA development. The United States asserts that the European Union has not identified any errors with the Panel's finding that all LA/MSF measures include long-term unsecured loans at zero or below-market rates of interest with back-loaded repayment schedules that allow Airbus to repay the loans through a levy on each delivery of the financed aircraft and provisions that allow outstanding balances to be indefinitely extended or forgiven if Airbus fails to sell a sufficient number of the aircraft to repay the loan.

320. The United States rejects the European Union's claim that the Panel erred in its application of Article 1.1(b) of the *SCM Agreement*. According to the United States, the European Union is challenging findings that the Panel did not make or arguments that the United States did not proffer. The United States submits that the European Union's claim under Article 1.1(b) of the *SCM Agreement* fails because "it is merely a thinly-veiled critique of the Panel's careful weighing and balancing of the facts—not a proper legal challenge to the actual application of the Article 1.1(b) 'benefit' standard".<sup>756</sup>

321. First, the United States argues that neither the Panel nor the United States agreed to apply or attempted to apply a constant project-specific risk premium to all LA/MSF measures. Instead, the Panel found that the inquiry must "identify{ } the most appropriate project-specific risk premium for *each* of the challenged LA/MSF contracts".<sup>757</sup> The Panel then identified ranges in which it considered the appropriate premium was likely to fall and found that certain groups of LCA entail levels of risk that, though not necessarily identical, fall in the same range. On this basis, the United States concludes that the Panel's finding that premia for multiple aircraft may fall in the same range is fully consistent with the Panel's criticism of a "one-size-fits-all" premium and with its finding that the "most appropriate" premium should be ascribed to each model of aircraft.<sup>758</sup> The United States also

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<sup>755</sup>United States' appellee's submission, para. 176 (quoting Panel Report, para. 7.490).

<sup>756</sup>United States' appellee's submission, para. 187. (footnote omitted)

<sup>757</sup>United States' appellee's submission, para. 189 (quoting Panel Report, para. 7.468 (original emphasis)).

<sup>758</sup>United States' appellee's submission, para. 189.

rejects the European Union's contention that the United States and the European Communities "agreed in the course of the Panel's proceedings that it would be appropriate to apply a constant project-specific risk premium to all {LA/}MSF loans."<sup>759</sup> The United States is of the view that the European Union misunderstood the testimony of the United States' expert Dr. Ellis, who proposed a single premium of 700 basis points as a conservative estimate applicable to all transactions, but recognized that "a model-based benchmark rate must reflect, in addition to the company's general level of riskiness (as reflected in the general corporate borrowing rate), project-specific risk resulting from the particular risk profile of {LCA} development and other project- or {LA/MSF}-specific features."<sup>760</sup> The United States adds that Dr. Ellis recognized that the actual premium might be higher, for example, noting that "a 40 percent risk premium or something of that order of magnitude would probably be quite appropriate for the earlier years of Airbus' existence given the high-risk of LA/MSF and the project-specific repayment during the early life of the company."<sup>761</sup>

322. Second, the United States maintains that, in paragraph 7.468 of its Report, the Panel did not lay out a roadmap that the Panel then failed to follow, but instead described the detailed factual analysis that it actually performed and which led to its conclusions. Specifically, the Panel itself noted that the categories of facts it listed are some of the "{v}arious pieces of evidence and arguments provided by the parties indicat{ing} that the risk associated with LCA development will vary over time depending on a variety of factors."<sup>762</sup> The United States therefore concludes that the factors were simply the categories of facts that the Panel considered in concluding that different projects might warrant different premia and in identifying the range in which to put each project.<sup>763</sup>

323. Third, the United States maintains that the Panel did not apply the "relative experience" factor solely to the A300 and A310 and the "level of technology" factor solely to the A380.<sup>764</sup> The United States asserts instead that the Panel's placement of the different Airbus models into three different ranges of risk premia reflects its appreciation of all of the factors that it considered relevant.<sup>765</sup> The United States clarifies that it is "unsurprising" that the Panel found that technological challenges played a noteworthy role for the A380 and that the relative experience factor was

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<sup>759</sup>United States' appellee's submission, para. 190 (quoting European Union's appellant's submission, footnote 969 to para. 759).

<sup>760</sup>United States' appellee's submission, para. 190 (quoting NERA, *Economic Assessment of the Benefits of Launch Aid* (10 November 2006) (Panel Exhibit US-80 (BCI) (hereinafter the "Ellis Report")). (emphasis added by the United States omitted)

<sup>761</sup>United States' appellee's submission, para. 190 (quoting Panel Report, para. 7.468, in turn quoting Ellis Report, *supra*, footnote 760, at footnote 28).

<sup>762</sup>United States' appellee's submission, para. 191 (quoting Panel Report, para. 7.468).

<sup>763</sup>United States' appellee's submission, para. 191.

<sup>764</sup>United States' appellee's submission, para. 192 (quoting European Union's appellant's submission, para. 763).

<sup>765</sup>United States' appellee's submission, para. 192.



particularly significant with respect to some of the first models that Airbus developed.<sup>766</sup> However, the specific mention of technological challenges or relative experience for the A300, A310, and A380 does not signal that other aircraft developments did not pose technical challenges or were not influenced by relative experience. The United States also notes that, under Article 1.1(b) of the *SCM Agreement*, the Panel was required to find that a benefit was conferred but not to quantify the exact amount of the benefit conferred.

324. Fourth, the United States contends that there is no evidence that the Panel ruled out the possibility that the project-specific benchmark might be lower than the European Communities' generalized, all-aircraft risk premium for the A330-200 and A340-500/600. For the United States, the European Union appears to be suggesting that the Panel was required to decide the issue based on an argument that the European Communities did not make before the Panel, "which is not the function of a {p}anel".<sup>767</sup> The United States argues that it is clear from the Panel's description of its analysis that it reviewed the totality of the facts before it and concluded that the A330-200 and A340-500/600 benchmarks "lie in the range of interest rates advanced by both of the parties—that is, above the interest rate benchmarks proposed by the European Communities but below the benchmark levels submitted by the United States."<sup>768</sup>

325. Furthermore, the United States claims that the European Union is incorrect in arguing that the Panel applied a risk premium based on venture capital financing with respect to the A300, A310, and A380, which the Panel had previously rejected as inherently more risky than LA/MSF. The Panel concluded, with respect to the A300 and A310 (the earliest Airbus models), that "the premium proposed by the United States was a reasonable proxy for the *minimum* project-specific risk premium".<sup>769</sup> Moreover, the Panel found "specifically that for the A380, the premium proposed by the United States 'could be reasonably accepted to represent the outer limit of the risk premium that a market lender would ask'."<sup>770</sup> Thus, the Panel merely found that "for *some* contracts, the U.S. premium was 'an appropriate proxy'".<sup>771</sup> The United States notes that, "{b}y using the premium from a venture capital *portfolio*, the United States avoided the extremely risky types of projects that may have motivated the Panel's concerns" and that "{t}he 'risk premium' that the Panel applied, moreover,

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<sup>766</sup>United States' appellee's submission, para. 192.

<sup>767</sup>United States' appellee's submission, para. 193 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 343; and Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335).

<sup>768</sup>United States' appellee's submission, para. 193 (quoting Panel Report, para. 7.486). (footnote omitted)

<sup>769</sup>United States' appellee's submission, para. 194 (referring to Panel Report, para. 7.485). (original emphasis)

<sup>770</sup>United States' appellee's submission, para. 194 (quoting Panel Report, para. 7.487).

<sup>771</sup>United States' appellee's submission, para. 194 (referring to Panel Report, para. 7.469). (original emphasis)

is only an addition to the company-specific 'general corporate borrowing rate'.<sup>772</sup> The United States concludes that the Panel's qualified use of the United States' risk premium derives from the careful factual assessment that the Panel undertook and is not incoherent or internally inconsistent.

(ii) *Whether the Panel erred under Article 11 of the DSU*

326. The United States rejects the European Union's argument that the Panel's assessment fails to meet the requirements of Article 11 of the DSU. According to the United States, the Panel undertook an analysis that was more than lengthy, thorough, and explained how the Panel arrived at its finding that the benchmark proposed by the European Communities was not valid.

327. The United States disagrees with the European Union's position that the Panel lacked the "purportedly required 'positive evidence' to make its finding".<sup>773</sup> The United States asserts that the Panel had before it substantial evidence concerning the relative riskiness of the Airbus projects at issue.<sup>774</sup>

328. The United States also argues that the Panel properly grouped together slightly different LCA models with similar risk characteristics for purposes of determining a risk premium, as the Panel was not obligated and did not attempt to provide a precise explanation of the risk applicable to each aircraft model.

329. The United States rejects the European Union's claim that the Panel failed to explain why the acknowledged technological challenges of the A380 indicate that the A380 was a more risky project, because the Panel had explicitly recognized that the eventual success of an LCA project was highly uncertain. Technological challenges, according to the United States, are a "critical component of this uncertainty".<sup>775</sup>

330. The United States denies that the Panel was inconsistent in finding that the benchmark return proffered by the United States was a suitable minimum return a market investor would demand for investment in the A300 and A310 and the maximum return an investor would demand to invest in the A380. The United States asserts that the European Union's argument rests on the flawed assumption that the Panel fully accepted the European Communities' arguments with regard to the project-specific risk premium while rejecting the United States' venture capital-based premium. The United States

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<sup>772</sup>United States' appellee's submission, para. 195. (original emphasis)

<sup>773</sup>United States' appellee's submission, para. 200.

<sup>774</sup>United States' appellee's submission, para. 200 (referring to Panel Report, footnote 2679 to para. 7.468; and United States' first written submission to the Panel, paras. 142-145, 260-265, and footnotes 113 and 185 thereto).

<sup>775</sup>United States' appellee's submission, para. 202 (quoting Panel Report, para. 7.367).

argues that, even though the Panel found that LA/MSF is not entirely comparable with venture capital investments, the Panel did not reject the use of a venture capital risk premium as a suitable analogue where warranted.

(b) The Panel's criticisms of the European Communities' benchmark

331. The United States asserts that the Panel made an objective assessment of the facts relating to the European Communities' proposed benchmark and provided the European Communities full opportunity to rebut the United States' *prima facie* case. The United States claims that the European Union's arguments relate to the Panel's conclusions as to the credibility of evidence and the particular arguments that it addressed, and do not identify any inconsistency with Article 11 of the DSU or Article 1.1(b) of the *SCM Agreement*. Specifically, the United States argues that, instead of failing to "address *some* of the {European Communities'} arguments and ... not prompt{ing} the European {Communities} to provide further arguments and information", the Panel actually made extensive findings on the evidence given by the European Communities' expert, Professor Whitelaw, and found that "the overall record did not support the expert's conclusions".<sup>776</sup> The United States argues that this approach is consistent with the Appellate Body's finding in *US – Upland Cotton (Article 21.5 – Brazil)* that "a well-considered analysis of economic evidence and modeling falls within a panel's discretion as trier of fact."<sup>777</sup> Moreover, the United States asserts that "the Panel was not required to espouse a view on every argument made in the parties' respective expert reports"<sup>778</sup>, a concept emphasized by the Appellate Body in *EC – Poultry*.<sup>779</sup>

332. The United States contends that the European Union's allegations that the Panel erred under Article 11 of the DSU address isolated findings and ignore the broad weight of the evidence on which the Panel relied. The Panel outlined several deficiencies indicating that the European Communities' proposed benchmark underestimated the appropriate level of project-specific risk properly associated with LA/MSF for each of the challenged measures, and based its ultimate conclusion on a number of flaws, rather than on any one single fault in the European Communities' proposed approach. The United States further claims that the European Union's assertions that the Panel violated Article 11 of the DSU fail at the overall level. Specifically, the United States contends that the European Union never explains why, assuming *arguendo* that its individual criticisms were valid, it would change the

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<sup>776</sup>United States' appellee's submission, para. 211. (original emphasis)

<sup>777</sup>United States' appellee's submission, para. 210 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 435).

<sup>778</sup>United States' appellee's submission, para. 211.

<sup>779</sup>United States' appellee's submission, para. 212 (referring to Appellate Body Report, *EC – Poultry*, para. 135).

Panel's conclusion based on the totality of the evidence that the European Communities' benchmark was not valid, as required by the Appellate Body's finding in *US – Continued Zeroing*.<sup>780</sup>

333. The United States asserts that the European Union has not provided a reason to overturn individual findings that led the Panel to conclude that the European Communities' proposed benchmark was invalid. Referring to the Appellate Body report in *US – Wool Shirts and Blouses*, the United States rejects the European Union's contention that "the Panel's finding that it had 'no way of verifying' the value of the European {Communities'} proposed project-specific risk premium was in error because the Panel 'failed to ask for evidence it considered necessary'."<sup>781</sup> The United States argues that the European Communities never provided the relevant underlying data. Furthermore, the United States claims that the Panel could not have expressed more detail in its Report regarding the European Communities' proposed project-specific risk premium because the European Communities had designated the specific repayment provisions of the risk-sharing supplier contract, to which it referred, as HSBI.

334. The United States rejects the European Union's contention that the Panel erred under Article 11 of the DSU by failing to assess evidence presented by the European Communities when finding that "there is 'logical merit to the United States' argument suggesting that risk-sharing suppliers had an incentive to lower their expected rates of return'."<sup>782</sup> The Panel's finding with regard to the incentives facing risk-sharing suppliers is a finding of fact that is outside the scope of appellate review. The Panel asked specific questions regarding the issue, which the Panel reviewed in the context of the totality of the evidence before it. The fact that the Panel did not discuss each of the specific arguments proffered by the European Communities is not, in itself, inconsistent with Article 11 of the DSU. In addition, as a result of the European Communities' own designations, most of the information relevant to this point was HSBI. The United States further argues that neither the Panel nor the United States can be faulted for failing to present sufficient evidence to substantiate their arguments with regard to the risk-sharing suppliers' expected rate of return because the inability to produce that evidence was a result of the European Communities' failure to provide the full information necessary. Despite the European Communities' failure to provide information, the United States demonstrated that the supplier relationships do involve significantly lower risk than LA/MSF contracts. The United States also disagrees with the European Union's claim that the Panel

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<sup>780</sup>United States' appellee's submission, paras. 213-215 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 331).

<sup>781</sup>United States' appellee's submission, para. 217 (quoting Panel Report, para. 7.480; and European Union's appellant's submission, paras. 794-800; and referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323 at 335).

<sup>782</sup>United States' appellee's submission, para. 219 (referring to the European Union's appellant's submission, paras. 809-821).

erred in the interpretation and application of Article 1.1(b) of the *SCM Agreement* by reasoning that the actions of a market actor that has an existing business relationship with a company that is allegedly subsidized cannot serve as a benchmark because that market actor would somehow be tainted.<sup>783</sup> The United States asserts that the Panel's findings on this issue do not rely on this premise, but instead the Panel found that, in this particular scenario, the risk-sharing suppliers could not in fact have been acting on strictly market terms and that they may have had incentives to lower their expected rates of return.<sup>784</sup>

335. The United States rejects the European Union's contention that "the Panel violated Article 11 of the DSU by engaging in 'speculation' when it agreed with the view expressed by Brazil and the United States that LA/MSF to Airbus lowers the risk imparted to risk-sharing suppliers."<sup>785</sup> In addition, the United States disagrees with the European Union's assertion that the Panel erred in finding that LA/MSF for the A380 reduced the level of risk associated with risk-sharing supplier financing. The United States argues that the Panel found elsewhere in its Report that LA/MSF reduced the risk associated with development of LCA, and that risk would obviously affect the company's ability to pay other debt, including risk-sharing supplier financing.

336. The United States also disagrees with the European Union's argument that "the Panel failed 'to provide a reasoned and adequate explanation of its finding' that available information 'suggests that risk-sharing participants' involvement in the A380 project may not have been on strictly market terms for all the participants'."<sup>786</sup> Specifically, the United States mentions the Panel's reference to the information cited by Dr. Ellis showing that a number of suppliers used in Professor Whitelaw's analysis themselves received financing like LA/MSF or other government subsidies that reduced their cost of capital and would therefore reduce the returns they required on contracts with Airbus.<sup>787</sup> The Panel did not use this information as an independent reason for concluding that the European Union's benchmark was invalid, but as one of a number of considerations supporting that conclusion. The United States maintains, therefore, that there was no need to show that LA/MSF-like financing to

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<sup>783</sup>United States' appellee's submission, footnote 382 to para. 221 (referring to European Union's appellant's submission, para. 811, in turn referring to Appellate Body Report, *Japan – DRAMs (Korea)*, para. 172).

<sup>784</sup>United States' appellee's submission, footnote 382 to para. 221 (referring to Panel Report, para. 7.480).

<sup>785</sup>United States' appellee's submission, para. 222 (referring to European Union's appellant's submission, para. 826).

<sup>786</sup>United States' appellee's submission, para. 223 (quoting and referring to European Union's appellant's submission, paras. 829-834).

<sup>787</sup>United States' appellee's submission, para. 223 (referring to NERA, *Response to Whitelaw Report* (24 May 2007) (Panel Exhibit US-534a (BCI/HSBI)), p. 24).

suppliers by itself explained the differential between LA/MSF terms and the terms for risk-sharing supplier financing.

337. Therefore, the United States asserts that the European Union's allegations under Article 11 of the DSU and Article 1.1(b) of the *SCM Agreement* should be rejected.

(c) The relevance of sales forecasts

338. The United States rejects the European Union's argument that the Panel erred under Article 1.1(b) of the *SCM Agreement* in finding that "the number of sales over which full repayment is expected reflects little regarding the appropriateness of the rate of return."<sup>788</sup> The United States notes the implicit uncertainty in long-term forecasts, in addition to the massive investments required for LCA projects. On that basis, the United States argues that, "even if the programs at issue could be expected to be profitable and the return expectations {could be} 'reasonable', it does not follow that a manufacturer or investor bearing the full commercial risk of the launch would 'bet the company' by investing {US}\$10 billion on the simple expectation that certain forecast sales, however reasonable, may be achieved over a 20-year period of time."<sup>789</sup>

6. Export Subsidies

339. The United States submits that, contrary to the European Union's arguments, the Panel correctly found that the LA/MSF measures by the Governments of Germany, Spain, and the United Kingdom for the A380 were contingent in fact upon export performance within the meaning of Article 3.1(a) and footnote 4 thereto of the *SCM Agreement*. The United States responds to the four sets of grounds of appeal raised in the European Union's appeal.

(a) The first set of grounds of appeal: Alleged legal errors in the Panel's interpretation of the terms "contingent", "tied-to", and "actual or anticipated"

340. The United States contends that, contrary to the European Union's argument, the Panel "carefully reviewed the specific legal meaning of each of the relevant terms in Article 3.1(a) and footnote 4 of the *SCM Agreement*{,} ... {and} examined the ordinary meaning of the terms 'contingent', 'tied to', 'actual or anticipated', in their context and in light of the object and purpose of

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<sup>788</sup>United States' appellee's submission, para. 224 (referring to European Union's appellant's submission, paras. 839-847).

<sup>789</sup>United States' appellee's submission, para. 225.

the SCM Agreement, in particular relating them to the concept of an 'in fact' as opposed to 'in law' export contingency."<sup>790</sup>

(i) *The interpretation of Article 3.1(a) and Footnote 4*

341. The United States argues that "{t}he reasoning in the *Canada – Aircraft* Appellate Body report continues to offer the primary guidance on the meaning of Article 3.1(a)" and footnote 4.<sup>791</sup> Specifically, the Appellate Body found that an "in fact" subsidy determination under these provisions involves proving three elements: (i) the "granting" of a subsidy (ii) that is "tied to" (iii) "actual or anticipated exportation or export earnings".<sup>792</sup> The Appellate Body further stated that "in fact" contingency must be "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".<sup>793</sup> In addition, "{a} relationship of 'conditionality' or 'dependence' between the subsidy and exports demonstrates the existence of a 'tie' between the granting of a subsidy and export performance."<sup>794</sup> The United States further recalls that the Appellate Body noted that "the type of evidence that may be employed to demonstrate the two types of contingency will be different, but that the standard is the same."<sup>795</sup>

342. The United States submits that, contrary to the European Union's argument, nothing in Article 3.1(a) or footnote 4 "limits the notions of a 'contingency' or 'tie' to 'if-then' relationships where subsidies lead inexorably to exports, or 'favour{ } exports' or 'create an incentive for a company to prefer exports over domestic sales'".<sup>796</sup> In the United States' view, although "the {European Union} may have identified one way to satisfy Article 3.1(a) of the SCM Agreement, there is nothing to indicate that it is the only way".<sup>797</sup> Moreover, the United States submits that "Article 3.1 and footnote 4 do not require that a subsidy follow 'as a consequence of' exports actually being 'realized' (that is, if there is export, then you get a subsidy)".<sup>798</sup> Rather, the legal standard focuses on whether a relationship of conditionality existed between exports and the granting of the subsidy.

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<sup>790</sup>United States' appellee's submission, para. 272.

<sup>791</sup>United States' appellee's submission, para. 276.

<sup>792</sup>United States' appellee's submission, para. 276 (quoting Appellate Body Report, *Canada – Aircraft*, para. 169).

<sup>793</sup>United States' appellee's submission, para. 276 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167).

<sup>794</sup>United States' appellee's submission, para. 276 (quoting Appellate Body Report, *Canada – Aircraft*, paras. 170 and 171).

<sup>795</sup>United States' appellee's submission, para. 276 (referring to Appellate Body Report, *Canada – Aircraft*, para. 167; and Appellate Body Report, *Canada – Autos*, para. 107).

<sup>796</sup>United States' appellee's submission, para. 291 (quoting European Union's appellant's submission, para. 1318).

<sup>797</sup>United States' appellee's submission, para. 291.

<sup>798</sup>United States' appellee's submission, para. 292. (original emphasis and underlining)

343. Turning to the phrase "actual or anticipated exportation" in footnote 4, the United States submits, contrary to the European Union's argument, that the word "actual", by its ordinary meaning, means "real" rather than "existing".<sup>799</sup> Thus, "actual" exports may be either current or future "real" exports. Moreover, "{a}s a participle, 'anticipated' simply acts as an adjective describing the nature or attribute of 'being anticipated'" and "implies that someone is 'anticipating'".<sup>800</sup> This interpretation is consistent with the Appellate Body's finding that the word "anticipated" means "expected" and that "anticipated exportation" refers to "the anticipation ... that exports will result."<sup>801</sup> The United States further submits that, consistent with this interpretation, actual exportation may be either current or future "real" exportation, whereas anticipated exportation is expected at present but may not necessarily occur in the future. If "anticipated" exports simply meant future exports, as the European Union alleges, then "it is unclear why that term was needed at all, as 'actual' exports would already include both current and *future* 'actual' exports."<sup>802</sup> Therefore, the United States contends that "the {European Union's} interpretations of the term{s} 'actual' as 'past or present', and 'anticipated' as 'future', and each of the conclusions it draws from this, are contrary to the ordinary meaning and context of those terms, as explained in past Appellate Body findings."<sup>803</sup>

344. As to the evidence required to demonstrate export contingency in fact, the United States contends that the European Union erroneously suggests that there is a higher threshold for finding export contingency in fact and that this threshold is "insurmountable" in this dispute.<sup>804</sup> The United States notes the European Union's assertion that a panel must determine the "precise content" of a subsidy before finding that the subsidy is contingent in fact upon export performance.<sup>805</sup> The United States argues that neither the Appellate Body nor any panel has articulated such a standard for "in fact" contingency. In prior disputes, the "precise content" criterion was referred to in the specific context of a question about the legal standard for an "as such" challenge based on an "unwritten rule or norm".<sup>806</sup> The United States further maintains that, even if a "precise content" test would apply, it is clear from the detailed and thorough assessment that the Panel made of the structure, meaning, and context of the LA/MSF agreements and the surrounding facts that its analysis met the "precise content" test that the European Union argues should apply.

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<sup>799</sup>United States' appellee's submission, para. 288.

<sup>800</sup>United States' appellee's submission, para. 287.

<sup>801</sup>United States' appellee's submission, para. 286 (quoting Appellate Body Report, *Canada – Aircraft*, para. 172).

<sup>802</sup>United States' appellee's submission, para. 288. (original emphasis)

<sup>803</sup>United States' appellee's submission, para. 307.

<sup>804</sup>United States' appellee's submission, para. 278 (quoting European Union's appellant's submission, para. 1308).

<sup>805</sup>United States' appellee's submission, para. 283.

<sup>806</sup>United States' appellee's submission, para. 283 (referring to Panel Report, *US – Zeroing (EC)*, para. 7.319).



(ii) *The alleged double standard of "dependent motivation" imposed by the Panel*

345. The United States submits that, contrary to the European Union's arguments, the Panel did not apply a double standard for determining export contingency in fact. Rather, the Panel applied the same standard for the United States' claims on in fact and in law export contingency, and examined "a different, broader set of factual evidence in its assessment of the former, as compared to the latter".<sup>807</sup> The United States maintains that the Panel's approach did not "equate" the contingency standard with "motivation" in reaching these findings<sup>808</sup> and "is entirely consistent with prior Appellate Body and panel findings and reasoning".<sup>809</sup>

346. According to the United States, "apart from its inclusion of an additional 'subjective motivation' requirement", the Panel correctly articulated the standard for finding a prohibited export subsidy based on an in fact contingency on "anticipated" exports as opposed to in law contingency.<sup>810</sup> More specifically, the Panel recalled the Appellate Body's finding that "satisfaction of the standard for determining *de facto* export contingency ... requires proof of three different substantive elements: first, the 'granting' of a subsidy; second, is 'tied to'; and third, 'actual or anticipated exportation or export earnings'".<sup>811</sup> Moreover, the United States argues that the Panel correctly applied the same standard to export contingency in fact and export contingency in law, but considered that the former may rely on different evidence, as compared to the latter. In particular, the Panel found that "in fact" contingency must be "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"<sup>812</sup>, whereas "in law" contingency must be demonstrated primarily on the basis of "the text of the challenged LA/MSF contracts" and "as a matter of law".<sup>813</sup> The United States submits that the Panel's approach was consistent with Article 3.1(a), which "makes clear that 'in fact' and 'in law' contingency are not materially different".<sup>814</sup> Moreover, the Panel's approach was also consistent with the Appellate Body's

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<sup>807</sup>United States' appellee's submission, para. 277.

<sup>808</sup>United States' appellee's submission, para. 293.

<sup>809</sup>United States' appellee's submission, para. 277.

<sup>810</sup>United States' appellee's submission, para. 279 (referring to United States' other appellant's submission, paras. 7-24).

<sup>811</sup>United States' appellee's submission, para. 280 (quoting Panel Report, para. 7.630, in turn quoting Appellate Body Report, *Canada – Aircraft*, para. 169 (original emphasis omitted)).

<sup>812</sup>United States' appellee's submission, para. 280 (quoting Panel Report, para. 7.648, in turn quoting Appellate Body Report, *Canada – Aircraft*, para. 167 (original emphasis omitted)).

<sup>813</sup>United States' appellee's submission, para. 280 (quoting Panel Report, para. 7.716).

<sup>814</sup>United States' appellee's submission, para. 281.

finding that "the legal standard expressed by the word 'contingent' is the same for both *de jure* and *de facto* contingency."<sup>815</sup>

347. With respect to the Panel's interpretation of the term "anticipated exportation", the United States submits that the Panel recalled the Appellate Body's finding that the word "anticipated" means "expected".<sup>816</sup> The United States maintains that, building on the findings of the Appellate Body, the Panel noted that the ordinary meaning of the verb "anticipate" is "{t}ake into consideration before due time", "{o}bserve ... before due time", "look forward to"<sup>817</sup>, "be aware of (a thing) in advance and act accordingly" and "expect, foresee, regard as probable".<sup>818</sup> Thus, the Panel found that "the term 'anticipated' does not impose a relationship between the granting of a subsidy and the *realization* of anticipated export performance, as is implicit in the European Union's argument that 'anticipated' exports are 'future' exports."<sup>819</sup> According to the United States, the Panel therefore correctly concluded that "anticipated" exportation "may be understood to be exportation that a granting authority considers, expects or foresees will occur *after* it has granted a subsidy".<sup>820</sup>

348. With regard to the Panel's interpretation of the terms "contingent on" in Article 3.1(a) and "tied to" in footnote 4, the United States recalls the Panel's finding that "{t}he ordinary meaning of the word 'contingent' has been held in previous dispute settlement proceedings to be 'conditional' or 'dependent for its existence on something else'."<sup>821</sup> The United States further recalls the Panel's finding that "the expression 'tied to' has been interpreted as connoting to 'limit or restrict as to ... conditions'."<sup>822</sup> Thus, the Panel followed the relevant jurisprudence and did not "equate" the contingency standard with "motivation" in reaching these findings. Furthermore, the Panel concluded that "{o}ne way of describing the standard may well be in terms of an 'if-then' relationship"<sup>823</sup>, as the European Communities contended, but cautioned that "it would be wrong to conclude that this means

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<sup>815</sup>United States' appellee's submission, para. 282 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167). (underlining added by the United States omitted)

<sup>816</sup>United States' appellee's submission, para. 286 (quoting Panel Report, para. 7.641, in turn quoting Appellate Body Report, *Canada – Aircraft*, para. 172).

<sup>817</sup>United States' appellee's submission, para. 286 (quoting Panel Report, para. 7.641, in turn quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 88).

<sup>818</sup>United States' appellee's submission, para. 286 (quoting Panel Report, para. 7.641, in turn quoting *The Concise Oxford Dictionary*, 9th edn, D. Thompson (ed.) (Clarendon Press, 1995), p. 53). The United States notes that the European Union also cites several of these same definitions. (*Ibid.*, para. 286)

<sup>819</sup>United States' appellee's submission, para. 286 (referring to Panel Report, para. 7.641). (original emphasis)

<sup>820</sup>United States' appellee's submission, para. 286 (quoting Panel Report, para. 7.641 (original emphasis)).

<sup>821</sup>United States' appellee's submission, para. 289 (quoting Panel Report, para. 7.634, in turn referring to Panel Report, *Canada – Aircraft*, para. 9.331; and Appellate Body Report, *Canada – Aircraft*, para. 166).

<sup>822</sup>United States' appellee's submission, para. 289 (quoting Panel Report, para. 7.634, in turn quoting Appellate Body Report, *Canada – Aircraft*, para. 170).

<sup>823</sup>Panel Report, para. 7.640.

that the contingency standard focuses on a relationship between the *realization* of anticipated export performance and the granting of a subsidy."<sup>824</sup> The United States submits that, in so doing, the Panel properly found that the legal standard for subsidies contingent on anticipated exportation does not require that a subsidy follow as a consequence of exports being achieved.

349. The United States maintains that the Panel's interpretation of Article 3.1(a) and footnote 4 is consistent with relevant findings of panels and the Appellate Body in prior disputes. Specifically, in *Canada – Aircraft*, it was export sales "*ensuing*" from the subsidy rather than the subsidy following as a consequence of export sales that supported a finding of export contingency.<sup>825</sup> In *Australia – Automotive Leather II*, no actual exportation was required under the grant contract found to constitute an export subsidy, and the first payment under the grant contract was made before any of the anticipated export performance had occurred.<sup>826</sup> The United States submits that, in those cases, the panels' finding of "contingency on *anticipated* exports was *not*, as the {European Communities} asserted before the Panel, that the '*consequence* required by Article 3.1(a) and footnote 4 (grant of a subsidy) was demonstrated'"<sup>827</sup>, "but that the grant contract was tied to '*anticipated*' export performance in a broader, more literal sense of that term."<sup>828</sup>

350. Finally, the United States submits that it agrees with the European Union that "the Panel imposed an unsupported and subjective *additional requirement* of 'subjective motivation'", but disagrees with the European Union that evidence of "motivation" or "intent" cannot be a relevant factor in a panel's analysis of the total configuration of the facts.<sup>829</sup> In the United States' view, "the motivation or intent behind a measure may well be probative evidence of its export contingency, but is not in and of itself an additional requirement beyond the three export subsidy criteria—granting of a subsidy, that is tied to, actual or anticipated exportation."<sup>830</sup>

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<sup>824</sup>United States' appellee's submission, para. 291 (quoting Panel Report, para. 7.640 (original emphasis)).

<sup>825</sup>United States' appellee's submission, para. 295 (referring to Panel Report, *Canada – Aircraft*, para. 9.339 (original emphasis)).

<sup>826</sup>United States' appellee's submission, para. 296 (referring to Panel Report, *Australia – Automotive Leather II*, para. 9.67).

<sup>827</sup>United States' appellee's submission, para. 296 (quoting European Communities' first written submission to the Panel, para. 669). (emphasis added by the United States)

<sup>828</sup>United States' appellee's submission, para. 296.

<sup>829</sup>United States' appellee's submission, paras. 304 and 305 (referring to the European Union's appellant's submission, paras. 1353-1355 and 1371). (original emphasis)

<sup>830</sup>United States' appellee's submission, para. 305.

(iii) *Other alleged legal errors in the Panel's legal interpretation*

351. The United States further submits that the remaining legal errors alleged by the European Union in its first set of grounds of appeal are unfounded. First, the United States contends that the Panel did not err in reviewing the "in fact" claim first, because the United States' claim was "principally a claim of *de facto* contingency".<sup>831</sup> In any event, the Panel's approach "in no way affected the outcome of its analysis" because, as the European Union also acknowledges, "there is a single standard for 'in fact' and 'in law' contingency."<sup>832</sup> Therefore, that "{i}t is ... entirely logical for a panel to begin its analysis with a party's claims of contingency 'in fact', if that party itself has indicated that it believes the evidence to be primarily supportive of such a claim."<sup>833</sup> Furthermore, the United States argues that the Panel did not find, on the basis of the same evidence, that certain subsidies were contingent in fact on export performance, but *not* contingent in law on export performance. Instead, the Panel "simply found that certain legal documents *alone* were not sufficient to establish contingency 'in law', whereas those documents in combination with additional surrounding *facts* were sufficient for a finding of contingency 'in fact'."<sup>834</sup>

352. Third, the United States maintains that the Panel's findings did not "discriminate" against certain types of subsidies or small economies. Specifically, the Panel did not find that a normal loan repayable on a monthly or quarterly basis would be export contingent, but found that a loan to be repaid through sales that cannot be achieved without exportation was export contingent. Under the Panel's finding, therefore, "{t}he subsidizing Member can structure the subsidy in different ways, and only if it does so in a way that 'ties' it to the 'anticipated exports' is a finding of 'export contingency' justified."<sup>835</sup> Similarly, the Panel did not find that anticipated exportation, which may arise more easily in a small economy, would alone be sufficient to establish export contingency, but found that the requirement to show a "tied to" relationship must be satisfied.

353. Fourth, the United States asserts that the Panel's findings did not render the second sentence of footnote 4 ineffective. Rather, the Panel "followed the Appellate Body's guidance in *Canada – Aircraft* that ... 'the export orientation of a recipient may be taken into account as a relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding'".<sup>836</sup> Thus, the Panel appropriately considered the export orientation of Airbus, but based its

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<sup>831</sup>United States' appellee's submission, para. 300 (quoting Panel Report, para. 7.628).

<sup>832</sup>United States' appellee's submission, para. 301.

<sup>833</sup>United States' appellee's submission, para. 301.

<sup>834</sup>United States' appellee's submission, para. 302. (original emphasis)

<sup>835</sup>United States' appellee's submission, para. 308.

<sup>836</sup>United States' appellee's submission, para. 306 (quoting Appellate Body Report, *Canada – Aircraft*, para. 173).

ultimate findings of export contingency on a range of factors, "the most important of which were the sales-based repayment structure of LA/MSF and the exchange of commitments between Airbus and the Airbus governments."<sup>837</sup>

354. Finally, the United States submits that the Panel did not impute to the European Communities arguments it did not make. The United States highlights the European Communities' argument before the Panel that "none of the provisions that the United States relie{d} upon as evidence of a commitment to export oblige Airbus to make any sales at all, let alone export sales."<sup>838</sup> Thus, as the Panel rightly found, the European Communities erroneously argued that the absence of a legal condition requiring the company to export is dispositive as to the lack of export contingency. Similarly, the Panel did not err in finding that the European Communities argued that "an inconsistency only arises when an export 'is realised'", because this is "precisely what the European Union does argue when it asserts that only current or future *actual* exports can give rise to the anticipation that serves as the basis for a 'tie' that establishes export contingency."<sup>839</sup>

(b) The second set of grounds of appeal: Alleged legal errors in the Panel's application of the standard set out by the Panel

355. With regard to the European Union's second set of grounds of appeal, the United States maintains that the Panel "did not err in its application of the legal standard to the facts, other than to impose on the United States the *additional requirement* of 'subjective motivation' for demonstrating 'in fact' contingency".<sup>840</sup> Moreover, the United States submits that the Panel "performed a thorough and complete assessment of the facts and carefully applied each of the elements of the legal standard", and did not act inconsistently with Article 11 of the DSU when finding that the German, Spanish, and UK A380 LA/MSF constituted subsidies contingent in fact upon export performance.<sup>841</sup>

(i) *The 1992 Agreement*

356. The United States argues that, contrary to the European Union's assertion, the Panel was not required to take into account the 1992 Agreement in examining the United States' claims on *de facto* export contingency. Rather, the Panel properly rejected the European Communities' argument that the United States "acquiesced" to the LA/MSF subsidies.<sup>842</sup> Moreover, according to the United States, the Panel rightly noted that "the 1992 Agreement, by its own terms, was 'without prejudice to the rights

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<sup>837</sup>United States' appellee's submission, para. 306.

<sup>838</sup>United States' appellee's submission, para. 303 (quoting Panel Report, para. 7.591).

<sup>839</sup>United States' appellee's submission, para. 303. (original emphasis)

<sup>840</sup>United States' appellee's submission, para. 310. (original emphasis)

<sup>841</sup>United States' appellee's submission, para. 310.

<sup>842</sup>United States' appellee's submission, para. 337 (referring to Panel Report, paras. 7.99 and 7.100).

and obligations of the parties under the GATT and any agreement negotiated under its auspices'."<sup>843</sup> The United States adds that the European Union's argument "would have required the Panel to determine the consistency of LA/MSF with the terms of an agreement that is not a 'covered Agreement' which ... {was} simply not within the competence of the Panel."<sup>844</sup>

(ii) *The alleged internal conflicts in the Panel's findings*

357. The United States argues that, contrary to the European Union's assertion, the Panel's findings regarding export contingency do not contradict its findings on the existence of benefit and adverse effects. The United States recalls the Panel's finding, in the context of its findings on benefit and adverse effects, that loans granted under the LA/MSF contracts are unsecured and depend on the success of the financed projects, because repayment is sales-dependent and the governments have no recourse to Airbus' assets if the company fails to repay. In the context of its findings on export contingency, the Panel referred to the contractual warranties concerning the accuracy of sales forecasts and other representation that reinforced the contractual tie between the provision of LA/MSF contracts and anticipated exports. Thus, the United States contends that "there is no basis for the {European Union's} argument that the Panel's 'statement{s}' in its assessment of {LA/MSF} are in direct conflict with its subsequent statements in its assessment of export contingency'."<sup>845</sup>

358. The United States further submits that the only inconsistency in the Panel's findings exist between its finding that all of the seven LA/MSF measures are at least in part contingent upon anticipated exportation, and its subsequent finding that only the German, Spanish, and UK LA/MSF contracts were contingent upon anticipated exportation. According to the United States, the Panel's finding that the sales-dependent repayment terms showed that the LA/MSF measures were "at least in part" conditional on anticipated exportation "was sufficient to determine" that all seven measures were export-contingent.<sup>846</sup> The United States submits that this inconsistency, which the European Union fails to point out, is discussed in detail in its other appellant's submission.

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<sup>843</sup>United States' appellee's submission, para. 337 (quoting Panel Report, para. 7.95).

<sup>844</sup>United States' appellee's submission, para. 337.

<sup>845</sup>United States' appellee's submission, para. 331 (quoting European Union's appellant's submission, para. 1382).

<sup>846</sup>United States' appellee's submission, para. 334.

(iii) *Whether the sales-dependent repayment provisions support a finding of export contingency*

359. According to the United States, the Panel properly found that the use of royalty-based financing in the seven LA/MSF contracts at issue, as well as the exchange of commitments between the governments and Airbus pursuant to these contracts, demonstrated that the provision of LA/MSF was "at least in part, 'conditional' or 'dependent for its existence'" upon exportation.<sup>847</sup> The United States contends that the Panel correctly found that the two legitimate commercial reasons alleged by the European Communities did not explain why the LA/MSF governments required each of the challenged LA/MSF loans to be repaid with revenue generated from aircraft sales. The United States recalls that the two alleged legitimate commercial reasons are: aircraft deliveries are the most reliable indication that sufficient cash-flow will be on hand to make repayment; and sales-based repayment reflects the allocation of risk that Airbus and the member State governments agreed to accept. According to the United States, the Panel properly found that the European Communities failed to substantiate its claim that the alleged commercial reasons explain why Airbus is required to repay the loans through revenues generated from LCA sales.

360. Moreover, the United States submits that, as the Panel correctly found, an exchange of commitments exist under all seven LA/MSF contracts because, "under each of the seven LA/MSF contracts at issue, 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.*"<sup>848</sup> Moreover, the Panel properly found that "achieving the level of sales needed to fully repay each loan would require Airbus to make a substantial number of exports" and that, consequently, the governments "must have held a high degree of certainty that the provision of LA/MSF would result in Airbus making those export sales".<sup>849</sup> On this basis, the United States submits, the Panel properly found that "the provision of {LA/MSF} on sales-dependent repayment terms was, at least in part, 'conditional' or 'dependent for its existence' upon the EC member States' anticipated exportation or export earnings."<sup>850</sup>

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<sup>847</sup>United States' appellee's submission, para. 314 (quoting Panel Report, para. 7.678).

<sup>848</sup>United States' appellee's submission, para. 314 (quoting Panel Report, para. 7.678 (original emphasis)).

<sup>849</sup>United States' appellee's submission, para. 313 (quoting Panel Report, para. 7.678).

<sup>850</sup>United States' appellee's submission, para. 314 (quoting Panel Report, para. 7.678).

361. Finally, the United States submits that it agrees with the European Union's argument that "a subsidy is either export contingent or it is not."<sup>851</sup> In the United States' view, "it is well established that even partial export contingency (that is, where exports or anticipated exports are only one among several conditions) constitutes export contingency within the meaning of Article 3.1(a)."<sup>852</sup> Thus, the Panel's finding that each of the seven measures challenged is "at least in part" contingent or "dependent for its existence" on anticipated exports is sufficient for a finding of contingency under Article 3.1(a)", and "{t}he Panel should have ended its analysis there."<sup>853</sup>

(iv) *Whether the "additional evidence" examined by the Panel did not support a finding of export contingency*

362. The United States notes that, in addition to the sales-dependent repayment provisions, the Panel also examined certain additional evidence to corroborate the existence of export contingency. The United States recalls that, as it argues in its other appeal, in examining the additional evidence, the Panel erroneously applied a standard that would require evidence of the relevant LA/MSF governments' subjective motivation in order to find that the LA/MSF contracts at issue constituted export subsidies. The United States submits, however, that, although evidence concerning a government's subjective motivation should not be required for a finding of export contingency, it could be taken into account as part of the total configuration of facts surrounding the granting of the subsidy.

363. The United States maintains that, contrary to the European Union's argument, the Panel did not err in finding that the additional evidence corroborated the finding of export contingency with respect to the German, Spanish, and UK LA/MSF contracts and that, in so finding, the Panel conducted an objective assessment of the facts, consistently with Article 11 of the DSU. As a preliminary matter, the United States notes that the European Union's arguments under Article 11 of the DSU appear to focus on the Panel's treatment of the additional evidence relating to the LA/MSF governments' motivation in providing the subsidies at issue. Thus, should the Appellate Body agree with the United States that no additional evidence concerning motivation is required in order to establish export contingency, the Appellate Body need not examine the European Union's arguments under Article 11 of the DSU.

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<sup>851</sup>United States' appellee's submission, para. 316 (referring to European Union's appellant's submission, para. 1393).

<sup>852</sup>United States' appellee's submission, para. 316 (referring to Article 3.1(a) of the *SCM Agreement*; and Appellate Body Report, *Canada – Aircraft*, para. 166).

<sup>853</sup>United States' appellee's submission, para. 316 (referring to Article 3.1(a) of the *SCM Agreement*; and Appellate Body Report, *Canada – Aircraft*, para. 166).



364. The United States argues that the Panel performed an objective assessment of the matter before it, including the facts, by taking into account all evidence and arguments, carefully reviewing the evidence, and drawing its conclusion upon the review. According to the United States, the European Union pointed to no evidence that would justify a finding that the Panel failed to conduct an objective assessment of the matter before it. Noting the Appellate Body's finding that a claim under Article 11 constitutes "a *very serious allegation*"<sup>854</sup> and requires a demonstration of "egregious error"<sup>855</sup>, the United States maintains that the European Union's claim under Article 11 does not meet the standard.

365. Moreover, the United States argues, the Panel "reviewed in detail the numerous facts it considered relevant", and its "key findings provide clear reasoning and explanation of the specific facts on which they are based and are fully consistent with the legal standard that the Panel articulated."<sup>856</sup> In addition, the United States maintains that "the European Union's approach of segregating the individual elements of fact on which the Panel relied is at odds with the requirement for the Panel to base its findings of export contingency on the *total* configuration of the facts."<sup>857</sup> Finally, the United States submits that, even if the Appellate Body were to review the European Union's arguments concerning each of the individual elements, the Appellate Body would find that none of the arguments is supported by evidence. For example, the European Union provides no evidence for its argument that a document referenced in the preamble of the German LA/MSF contract was authored by Airbus. In any event, according to the United States, the European Union's argument is irrelevant because the Panel relied, not on this particular document, but on a specific provision in the German LA/MSF contract that refers to this document and demonstrates the government's reliance on it.

- (c) The third set of grounds of appeal: Alleged legal errors in the Panel's application of the correct legal standard of contingency

366. The United States notes that, in its third set of grounds of appeal, the European Union again claims that the Panel acted inconsistently with Article 11 of the DSU. The United States submits that the European Union's claims and arguments in this respect are addressed in the context of the European Union's second set of grounds of appeal. In addition, the United States maintains that the

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<sup>854</sup>United States' appellee's submission, para. 322 (quoting Appellate Body Report, *US – Zeroing (EC)*, para. 253, in turn quoting Appellate Body Report, *EC – Poultry*, para. 133). (emphasis added by the United States)

<sup>855</sup>United States' appellee's submission, para. 322 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 186; and Appellate Body Report, *Japan – Apples*, para. 224).

<sup>856</sup>United States' appellee's submission, para. 323.

<sup>857</sup>United States' appellee's submission, para. 325. (original emphasis)

European Union failed to demonstrate that the Panel acted inconsistently with Article 12.7 of the DSU. Specifically, the Panel set out the basic rationale behind its findings and, contrary to the European Union's assertion, was not required to explain the specific reasoning with respect to its assessment of each individual piece of factual evidence. Finally, the European Union failed to explain how the Panel's findings would have resulted in a failure to meet the requirement of Article 7.2 to "address the relevant provisions in any covered agreement or agreements cited by the parties".<sup>858</sup>

(d) The fourth set of grounds of appeal: Further alleged legal errors

367. With respect to the European Union's fourth set of grounds of appeal, the United States submits that none of the European Union's allegations of errors by the Panel has any merit. First, the United States argues the Panel did not accept an untimely submission by the United States when considering the United States' argument in its second written submission that the LA/MSF contracts involved an "exchange of commitments". Rather, the Panel properly found that the United States was entitled to expand and explain certain arguments by discussing various aspects of the evidence already submitted in its first written submission. Second, the United States contends that there is no basis for the European Union's argument that the Panel made the case for the United States by adopting a "dependent motivation" standard. On the contrary, the Panel's application of a motivation-based standard led to its rejection of the United States' claim that four of the LA/MSF contracts constituted export subsidies.

368. Third, the United States maintains that the European Union's argument that the Panel equated performance with export performance is untrue and, in any event, is a restatement of one of the fundamental issues addressed by the Panel, namely whether the LA/MSF contracts were contingent upon export performance. Fourth, the United States argues that the Panel did not equate financial contribution with subsidy, because the Panel considered both benefit and financial contribution in reaching its conclusion that the LA/MSF contracts at issue were subsidies within the meaning of Article 1.1 of the *SCM Agreement*. In the United States' view, "the European Union argument ... that export contingency has to relate specifically to the 'decision to fix the terms of the {LA/}MSF measures at below market rate' equates 'benefit' with 'subsidy'".<sup>859</sup> Finally, the United States contends that the European Union failed to provide any explanation as to how the use of the terms "export" or "Europe" impacted the Panel's consideration and that, in any event, a panel is under no obligation to address every argument of a party.

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<sup>858</sup>United States' appellee's submission, para. 340.

<sup>859</sup>United States' appellee's submission, para. 348 (quoting European Union's appellant's submission, para. 1488).

369. On this basis, the United States requests the Appellate Body to reject the European Union's appeal that the Panel erred in finding that the German, Spanish, and UK LA/MSF measures for the A380 were contingent in fact upon export performance.

#### 7. The EC Framework Programmes

370. The United States rejects the European Union's contention that, because support to Airbus is organized under the EC Framework Programmes, the analysis of specificity must occur at that level. According to the United States, "{t}he European Union observes that a large number of industry sectors receive funding under each Framework, and argues that this variety is dispositive evidence of non-specificity, even though individual disbursement categories applicable to aerospace set tight limitations on eligibility."<sup>860</sup> The United States argues that, under such an approach, "the bureaucratic organization of subsidy programs, rather than the substance of how they limit funding, dictates whether they are specific", and "{n}othing in the SCM Agreement supports such a formalistic analysis."<sup>861</sup>

371. The United States considers that the term "subsidy" in Article 2 of the *SCM Agreement* is a "flexible term" that can mean either "individual acts of granting subsidies within a broader subsidy program" or "multiple grants of the same type of subsidy".<sup>862</sup> The United States contends that there is "no textual support" for the European Union's argument that the specificity analysis under Article 2.1(a) "should start with whatever 'program' generated the subsidy and examine the program as a whole".<sup>863</sup> Unlike other provisions of the *SCM Agreement*, Article 2.1(a) does not mention the word "programme".<sup>864</sup> The European Union's theory "leads it to a specificity analysis in which the bureaucratic organization of subsidization dictates the results, to the exclusion of the actual limitations on access to funds". The United States also notes that the theory indicates that, "if a funding system embraces a large enough number of targeted subsidies, none is specific because they collectively benefit a multitude of enterprises."<sup>865</sup>

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<sup>860</sup>United States' appellee's submission, para. 446.

<sup>861</sup>United States' appellee's submission, para. 446.

<sup>862</sup>United States' appellee's submission, para. 448.

<sup>863</sup>United States' appellee's submission, para. 450.

<sup>864</sup>United States' appellee's submission, para. 450. The United States also states that there is no reason to conclude that the criteria for *de facto* specificity concerning a subsidy "programme" under Article 2.1(c) "would inform the meaning of the criteria for *de jure* specificity under Article 2.1(a)". (*Ibid.*, para. 452)

<sup>865</sup>United States' appellee's submission, para. 450.

372. The United States also disagrees with the European Union's argument that focussing the specificity analysis on individual acts of granting subsidies "would reduce the specificity requirement to a nullity".<sup>866</sup> The Panel's approach examines the conditions imposed on access to pools of money, such that if the pool funds multiple subsidy grants, the Panel's analysis would not apply to individual grants. The United States also addresses the European Union's argument that the Panel's standard would prevent Members from ensuring an even distribution of funds among multiple sectors by targeting funds to particular sectors. The United States considers that "the notion that targeted subsidies lessen specificity does not comport well with the definitions of 'specific' in Article 2.1."<sup>867</sup> Moreover, the United States maintains that the facts do not support, and the Panel findings contradict, the European Union's contention that "the Framework Programmes were non-specific because companies in all sectors, including the aerospace sector, faced the same situation of access to sector-specific funds but exclusion from other funds."<sup>868</sup>

373. Furthermore, the United States addresses the European Union's argument that the Panel's analysis penalizes Members who target funds to particular sectors to avoid triggering *de facto* specificity under Article 2.1(c) of the *SCM Agreement*, or who are transparent about the administration of subsidies. First, the United States recalls that targeted subsidies that are specific are subject to *SCM Agreement* disciplines. Moreover, nothing in the Panel's reasoning prevents other methods to ensure even distribution of subsidies, such as caps on the amount that any one applicant or any one sector could access. Second, the United States maintains that the Panel's analysis only penalizes Members with transparent subsidy programmes if the criteria are specific. The United States posits that, "if a Member maintains a program that ensures impartial, general access, such as by allowing a large number of sectors access to a unitary fund based on the merit of the research project as evaluated by neutral panels of scientists, transparency can only help to establish non-specificity."<sup>869</sup>

374. For these reasons, the United States requests the Appellate Body to uphold the Panel's finding that "subsidies to Airbus under the Second through Sixth EC Framework Programmes are specific to aerospace enterprises" within the meaning of Article 2.1(a) of the *SCM Agreement*.

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<sup>866</sup>United States' appellee's submission, para. 451.

<sup>867</sup>United States' appellee's submission, para. 451.

<sup>868</sup>United States' appellee's submission, para. 457.

<sup>869</sup>United States' appellee's submission, para. 455.

8. Infrastructure Measures

## (a) Financial contribution

375. The United States submits that there is no support for the European Union's argument that creation of infrastructure is excluded from the *SCM Agreement*, and requests the Appellate Body to uphold the Panel's reasoning, "which ensures a proper analysis by using all of the available evidence to understand exactly what the government provided, and to whom it was provided".<sup>870</sup>

376. According to the United States, the Panel recognized that member State and local governments provided subsidies in the form of several infrastructure projects designed specifically for Airbus and made them available to Airbus for less remuneration than a market-based supplier would have charged. The United States observes that the Panel concluded in each case that "the authorities built the infrastructure specifically to address the needs of one company (Airbus) or group of companies (the aerospace industry)", and that "specific limitations existed on the use of and access to the infrastructure, either *de facto* (e.g., no possibility to access except from Airbus-owned land) or *de jure*".<sup>871</sup> Specifically, the United States asserts that, in evaluating whether the Mühlenberger Loch project, the Bremen runway extension, and the Aéroconstellation site were general infrastructure, "the Panel focused on exactly what the relevant governments provided, and to whom", and complied fully with the requirements of the *SCM Agreement*.<sup>872</sup>

377. The United States disagrees with the European Union's argument that the Panel failed to distinguish the "provision of infrastructure", which is covered by the *SCM Agreement*, from the "creation of infrastructure", which is "carved out" of the Agreement. The United States argues that the use of the term "provides" in the present tense in Article 1.1(a)(1)(iii) does not signify that "any pre-provision activity—such as 'creation' of infrastructure—is outside the scope of the Agreement."<sup>873</sup> The United States submits that the European Union's unsupported generalizations about the "type of actions which qualify as 'financial contributions'", and its assertion that negotiators carved creation of infrastructure out of the *SCM Agreement*, are insufficient to bolster the European Union's claims.

378. The United States argues that the meaning of the word "provides" should be properly applied to the facts in this dispute. The United States notes that several dictionary definitions "confirm that the act of 'providing' a thing includes 'making available', 'equipping', 'preparing' and, therefore, can

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<sup>870</sup>United States' appellee's submission, para. 368.

<sup>871</sup>United States' appellee's submission, para. 351 (referring to, *inter alia*, Panel Report, para. 7.1043).

<sup>872</sup>United States' appellee's submission, para. 356.

<sup>873</sup>United States' appellee's submission, para. 358.

involve or coincide with the act of 'creating' that thing."<sup>874</sup> This is especially the case, the United States contends, when the totality of the facts demonstrate that the creation of the thing and its subsequent delivery to someone else are, as a factual matter, two interrelated parts of one and the same activity. The United States further submits that the use of the present tense of "provides" does not indicate that "actions taken by the government *prior* to the provision of the good or service in question are not relevant for the notion of 'financial contribution' in Article 1.1(a)(1)(iii)."<sup>875</sup> According to the United States, events preceding the actual act of delivering a subsidy are often critical to understanding the subsidy; the totality of the facts may indicate that an assessment of the measure as a whole should take into account the broader set of circumstances.

379. The United States also considers it significant that neither Article 1.1 nor any other provision of the *SCM Agreement* refers to the "creation" of infrastructure. If the negotiators had wanted to completely exclude the creation of infrastructure from the *SCM Agreement*, they would have done so explicitly. The United States submits that the context of Article 1.1(a)(1)(iii) supports the Panel's interpretation in two ways. First, the other subparagraphs of Article 1.1(a)(1) use more specific and narrow terms than "to provide", which is used in Article 1.1(a)(1)(iii); if the drafters of the Agreement had intended that only the actual "transfer" of goods or services be covered, they could have used that term, as they did in Article 1.1(a)(1)(i). Second, the United States points to the lack of examples in Article 1.1(a)(1)(iii), which suggests the need for "a careful analysis of the total configuration of the facts", as performed by the Panel.<sup>876</sup>

380. The United States submits that the European Union takes "an overly narrow view of the government-recipient economic relationship".<sup>877</sup> The United States argues that, while the provision of infrastructure may become final upon the "act of provision", that does not mean that the "transfer" or "provision" is limited to that point in time. In respect of the Mühlenberger Loch project, the Bremen runway extension, and the Aéroconstellation site, the government did not merely provide a piece of land or an undifferentiated landing right; rather, the Panel determined that the government action included designing and building the infrastructure for the recipient. The United States also claims that the European Union speculates on the economic, social, and cultural development reasons WTO Members would have had for carving out the creation of infrastructure from the *SCM Agreement* without citing any negotiating history or text. The United States explains that other, more plausible,

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<sup>874</sup>United States' appellee's submission, para. 359 (referring to, *inter alia*, *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 2393).

<sup>875</sup>United States' appellee's submission, para. 361 (quoting European Union's appellant's submission, para. 1031 (original emphasis)).

<sup>876</sup>United States' appellee's submission, para. 364.

<sup>877</sup>United States' appellee's submission, para. 366.

intentions could be ascribed to the WTO Members, namely that they intended to include all of the steps of providing a particular piece of infrastructure within the analysis under the *SCM Agreement*.

381. The United States rejects the European Union's theory that the "creation" and "provision" of infrastructure are two distinct actions for purposes of analyzing whether a provision of goods is a financial contribution under the *SCM Agreement*. The United States asserts that the European Union "simply assumes that the facts comport with its theoretical construct", and accuses the Panel of failing to distinguish between the "creation" and "provision" of the infrastructure.<sup>878</sup> A careful review of the Panel's factual findings reveals that "the creation of infrastructure was not distinct from its provision in Hamburg, Bremen, and Toulouse *as a matter of fact*."<sup>879</sup>

382. With respect to the Mühlenberger Loch site, the United States asserts that the Panel began with a careful review of the facts pertaining to that transaction, first considering whether it was possible to review the creation of the land (that is, the turning of wetland into usable land) separately from the lease to Airbus of the land and facilities (that is, the Mühlenberger Loch site). The United States supports the Panel's finding that the lease of the land and special purpose facilities to Airbus cannot be separated from the creation of the land (including the flood protection measures and the building of the special purpose facilities), "because it was necessary to create the land in the first place in order to allow the remainder of the project, including the building and subsequent lease of the special purpose facilities, to be undertaken."<sup>880</sup> The United States also points to the Panel's findings that "the land reclamation in question was undertaken in order to make possible the expansion of Airbus' existing facilities, and not for any independent purpose" and that "the project was undertaken exclusively for Airbus."<sup>881</sup> In the United States' view, "the government of Hamburg sought to help Airbus by creating new land in Mühlenberger Loch"; "if not for the objective of giving land to Airbus, the land would not exist."<sup>882</sup> The United States concludes that "creation" and "provision" cannot be viewed separately, because they are one and the same.

383. The United States submits that similar considerations emerge from the Panel's findings with respect to the extension of the main runway at the Bremen airport. The United States supports the Panel's finding that "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", and notes the Panel's reference to statements in the Bremen Parliament indicating that the runway extension was

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<sup>878</sup>United States' appellee's submission, para. 369.

<sup>879</sup>United States' appellee's submission, para. 370. (original emphasis)

<sup>880</sup>United States' appellee's submission, para. 373 (quoting Panel Report, para. 7.1077).

<sup>881</sup>United States' appellee's submission, paras. 373 and 374 (quoting Panel Report, paras. 7.1078 and 7.1084).

<sup>882</sup>United States' appellee's submission, para. 374.

intended for Airbus' use.<sup>883</sup> Having found that the runway extension was undertaken to fulfil Airbus' specific needs, and that use of the extended runway is *de jure* limited to Airbus for the purpose of transporting aircraft wings, the Panel concluded that the entire project (including the runway extension, the associated noise reduction measures, and the right of exclusive use) constitutes a financial contribution to Airbus within the meaning of Article 1.1(a)(1)(iii) of the *SCM Agreement*. The United States argues that these facts indicate that there is no difference between the creation and provision of this infrastructure. According to the United States, the runway extension would not have occurred without the objective of transferring it to Airbus, since it was "conceived, planned, and executed as part of a single package".<sup>884</sup>

384. Regarding the Aéroconstellation site, the United States quotes the Panel at length, noting the Panel's findings that "it is clear" that the development of the 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>885</sup> The site was from the outset uniquely adapted to Airbus' needs, from its situation next to and connected to the Toulouse-Blagnac airport, to the highly specific EIG facilities. The United States argues that the Aéroconstellation site, similar to the Mühlenberger Loch and Bremen runway extension, indicates that the "project conception, project planning, and execution {are} all directed at provision of a specialized site to Airbus".<sup>886</sup> According to the United States, identifying some of these steps as "creation" of the site and others as its "provision" would be "an artificial exercise with no grounding in the SCM Agreement or in reality".<sup>887</sup> Therefore, the United States concludes, even if the Appellate Body were to find that, in principle, the creation of infrastructure and its provision could be different, the tailor-made, user-specific infrastructure in this dispute is not such a case.

385. Finally, the United States submits that the Panel did not ignore the European Communities' arguments regarding the creation of infrastructure. The United States observes that the Panel referred to the European Communities' "two-step approach" argument<sup>888</sup> whereby, first, the government may build general infrastructure, and second, a government may limit the use of that general infrastructure to certain companies. The United States notes that the Panel rejected that argument because it was "not convinced" that a distinction must be drawn between the creation of the infrastructure and subsequent limitations on its use or access. The United States also supports the Panel's conclusion

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<sup>883</sup>United States' appellee's submission, paras. 375 and 376 (quoting Panel Report, para. 7.1116).

<sup>884</sup>United States' appellee's submission, para. 376.

<sup>885</sup>United States' appellee's submission, para. 377 (quoting Panel Report, para. 7.1177).

<sup>886</sup>United States' appellee's submission, para. 377.

<sup>887</sup>United States' appellee's submission, para. 377.

<sup>888</sup>United States' appellee's submission, para. 379 (referring to Panel Report, paras. 7.1042 and 7.1043).



that, if it were to accept the European Communities' "two-step approach", this would imply that the general nature of some infrastructure is inherent and that circumstances surrounding the provision of that infrastructure do not change its general nature. The United States notes that the Panel considered that, "if an evaluation of the circumstances surrounding the creation of the infrastructure demonstrates that it was provided to a single entity or a limited group of entities, this supports the conclusion that the infrastructure created is not properly considered general."<sup>889</sup>

(b) Benefit

386. The United States notes that, having found that the provision of the Mühlenberger Loch project, the Bremen runway extension, and the Aéroconstellation site were the relevant financial contributions, the Panel "based the benefit analysis on how much a market investor would charge to provide comparable infrastructure."<sup>890</sup> In each case, the United States contends, "the government made substantial upfront investments to create infrastructure tailor-made for Airbus which the company would otherwise have had to create itself or rely on commercial project developers to create."<sup>891</sup> The United States claims that, taking into account these facts, as well as the legal standard set out in Article 1.1(b) of the *SCM Agreement*, the European Union's claim that the Panel adopted what amounts to a "return-to-government" or "cost-to-government" standard fails.

387. The United States argues that, contrary to the European Union's claim, the Panel did not apply a "cost-to-government" standard. The United States refers to the Panel's statement 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>892</sup> The Panel therefore used the cost of the initial infrastructure development "not because that was how much the subsidy cost the government, but as a *factual* element indicative of the return that a commercial investor would have demanded."<sup>893</sup> The United States submits that the Panel's approach was not a "cost-to-government" approach; instead, the Panel "simply ask{ed} what 'price' a commercial real estate developer, under the same circumstances would have demanded to provide a tailor-made site, a runway extension, or facilities exclusively for a certain company or companies."<sup>894</sup> The United States adds that the best proxy for that market price is what a commercial investor would have sought as a return on that investment, namely recovery of its cost plus a certain profit. The United States thus considers that the "cost" to

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<sup>889</sup>United States' appellee's submission, para. 380 (quoting Panel Report, para. 7.1043).

<sup>890</sup>United States appellee's submission, para. 381.

<sup>891</sup>United States appellee's submission, para. 381.

<sup>892</sup>United States' appellee's submission, para. 382 (quoting Panel Report, para. 7.1091). (emphasis added by the United States)

<sup>893</sup>United States' appellee's submission, para. 382. (original emphasis)

<sup>894</sup>United States' appellee's submission, para. 383.

the government of developing the infrastructure involved "was a *factor* in determining whether Airbus would have had to pay more on the market to receive the same thing it actually received from the governments. It was not itself the *standard* against which the Panel determined the existence of a benefit."<sup>895</sup>

388. The United States submits that Article 14(d) of the *SCM Agreement* supports the Panel's approach. By directing the benefit inquiry at "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", the Panel evaluated the adequacy of the remuneration paid by Airbus.<sup>896</sup> On that basis, in addressing the Mühlenberger Loch project, the Panel concluded that "a market actor who invested {€}750 million in land, whether by purchasing it or by creating it through reclamation, would, in renting the property, seek a return on that investment."<sup>897</sup> The United States maintains that the Panel followed a similar approach for the Bremen runway extension and the Aéroconstellation site.

389. The United States claims that the European Union does not dispute the accuracy of the Panel's findings regarding the government's costs, or that a private investor would spend that sum of money only if it could obtain a commercial return. Instead, the European Union contends that these figures are "pointless", because Article 14(d) of the *SCM Agreement* "guides towards assessing any 'benefit' based on market value and price, rather than any return earned".<sup>898</sup> This, the United States argues, is not what Article 14(d) does. Rather, it frames the benefit analysis in terms of "adequacy of remuneration" based on "prevailing market conditions", including a number of factors. The United States argues that the Panel followed the approach laid out in Article 14(d) "by considering the price the authorities paid for creating the infrastructure in question, based on prevailing market conditions".<sup>899</sup>

390. The United States also contends that the European Union's claims based on the panel and Appellate Body reports in *Canada – Aircraft* fail. The United States argues that, in *Canada – Aircraft*, the Appellate Body found that "the word 'benefit', as used in Article 1.1(b), implies some kind of comparison", and that "there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been."<sup>900</sup> The United States

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<sup>895</sup>United States' appellee's submission, para. 383. (original emphasis)

<sup>896</sup>United States' appellee's submission, para. 384 (quoting Panel Report, para. 7.1091).

<sup>897</sup>United States' appellee's submission, para. 384 (quoting Panel Report, para. 7.1094).

<sup>898</sup>United States' appellee's submission, para. 385 (quoting European Union's appellant's submission, paras. 1037 and 1067).

<sup>899</sup>United States' appellee's submission, para. 385.

<sup>900</sup>United States' appellee's submission, para. 386 (quoting Appellate Body Report, *Canada – Aircraft*, para. 157).

also notes the Appellate Body's statement that, for that determination, "the marketplace provides an appropriate basis for comparison."<sup>901</sup> The United States argues that, although the European Union insists the marketplaces in question are for the rental of industrial property in Hamburg, the usage of runways in Bremen, and the purchase of industrial property in the Toulouse region, "in none of these cases did Airbus receive the item the {European Union} seeks to value in the marketplace in which the {European Union} seeks to value it."<sup>902</sup> The proper marketplaces, the United States contends, "are for the reclamation and protection of swampland along the River Elbe, for exclusive use of a runway in Bremen, and customized aerospace-ready property in Toulouse".<sup>903</sup> In addition, the standard under Article 14(d) of the *SCM Agreement* for evaluating these items is not the generalized "market value", but the adequacy of the remuneration received by the government that provided the infrastructure. The United States considers that, "{b}y examining what a commercial investor would expect, the Panel satisfied that standard."<sup>904</sup>

391. The United States also addresses the European Union's critique that the Panel's approach was "economically naïve" because "{n}o market actor can, as the Panel implies, set a price for a good simply based on its own investment or cost, and independent from the market value of the good created."<sup>905</sup> This criticism simply reflects the "central flaw" of the European Union's analysis, because "{i}t assumes that a good, in the form of infrastructure, specially designed and developed for the recipient, can properly be compared to an ordinary good."<sup>906</sup> The United States argues, by analogy, that clothing designed by a tailor for a particular person will invariably cost more than comparable clothing purchased off the rack at a store, because it is customized; the price will be negotiated up front as a fixed fee, or based on hours worked, and therefore cannot be compared to average or "off-the-rack" goods. The United States contends that the Panel's approach "demonstrates a sophisticated understanding of the economics of the situation", and that it is the European Union that is being "unrealistic".<sup>907</sup> The United States therefore requests the Appellate Body to reject the European Union's appeal in respect of whether a benefit was conferred under Article 1.1(b) of the *SCM Agreement* and to uphold the findings of the Panel.

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<sup>901</sup>United States' appellee's submission, para. 386 (quoting Appellate Body Report, *Canada – Aircraft*, para. 157).

<sup>902</sup>United States' appellee's submission, para. 387.

<sup>903</sup>United States' appellee's submission, para. 387.

<sup>904</sup>United States' appellee's submission, para. 387.

<sup>905</sup>United States' appellee's submission, para. 388 (quoting European Union's appellant's submission, para. 1074).

<sup>906</sup>United States' appellee's submission, para. 388.

<sup>907</sup>United States' appellee's submission, para. 388.

9. Equity Infusions

(a) Capital investments

392. The United States maintains that the Panel identified the correct legal standard to determine whether the challenged equity infusions provided by the French Government to Aérospatiale between 1987 and 1994 conferred a benefit. Recalling evidence cited by the Panel, the United States notes that Aérospatiale's president told journalists in 1994 that the company's state was "repellent" from an investor's point of view, and that this statement was made at the end of an eight-year period in which the French Government had made almost FF 6 billion in capital contributions to Aérospatiale.<sup>908</sup> The United States contends that this statement is supported by the Panel's review of Aérospatiale's return on equity, debt-to-equity ratio, and debt coverage ratios, and its conclusion that, "between 1985 and 1994, Aérospatiale's financial ratios were uniformly and, in many cases, significantly inferior to the corresponding average ratios of its peer group of companies."<sup>909</sup>

393. The United States notes the Panel's observation that "it is well established that a financial contribution confers a benefit within the meaning of Article 1.1(b) where the terms of the financial contribution are more favourable than the terms available to the recipient in the market."<sup>910</sup> The Panel considered that Article 1.1(b) of the *SCM Agreement* does not describe exactly how to perform this analysis; however, Article 14 of the *SCM Agreement* provides further guidance. The Panel's approach to the issue was "to ask whether the United States ha{d} demonstrated that a private investor would not have made the capital investments in question based on information available at the time".<sup>911</sup> The United States argues that the European Union is thus incorrect to assert that the Panel considered the relevant legal standard to be whether the French Government could have expected to achieve a reasonable rate of return on its investment.

394. The United States also maintains that the Panel applied the legal standard that it had set out. The Panel noted that a private investor will seek a reasonable rate of return, but it did not "elevate this observation to become a standard in and of itself".<sup>912</sup> Instead, the Panel did three things in its analysis: first, it set out a legal standard, namely whether a private investor would not have made the capital investments in question based on the information available at that time; second, it noted that it is relevant in this regard that a private investor evaluating an equity investment will be seeking to

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<sup>908</sup>United States' appellee's submission, para. 396 (quoting "EC to Review France's Aerospatiale Capital Injection", *Aerospace Daily*, 9 February 1994 (Panel Exhibit US-275), pp. 217 and 218).

<sup>909</sup>United States' appellee's submission, para. 397 (quoting Panel Report, para. 7.1360).

<sup>910</sup>United States' appellee's submission, para. 404 (quoting Panel Report, para. 7.1353).

<sup>911</sup>United States' appellee's submission, para. 405 (quoting Panel Report, para. 7.1358).

<sup>912</sup>United States' appellee's submission, para. 406.

achieve a reasonable rate of return on its investment; and third, it gave an overview of information relevant to such an evaluation.<sup>913</sup> The United States argues that "an expectation of a reasonable rate of return is simply part of the usual investment practice of private investors as a matter of economics."<sup>914</sup> In the United States' view, the Panel therefore correctly articulated the standard set out in Articles 1.1(b) and 14(a) of the *SCM Agreement* and identified a set of factors that allowed it to apply that standard correctly.

395. The United States further contends that the Panel did not fail to assess properly the evidence, but rather performed a thorough analysis of the facts and, on that basis, concluded that the equity infusions were inconsistent with the usual investment practice of private investors. Moreover, the Panel applied a range of factors throughout its analysis and relied on an extensive factual record. The evidence on which the Panel relied, including market forecasts and studies, and statements contained in Airbus's annual reports, indicated perceptions of the company's commercial expectations and anticipated future performance. The financial ratios that the Panel reviewed and to which it attributed particular weight also reflected such potential or increased risk for future investment returns. When the Panel found that this information indicated that the government's decision was not consistent with the usual practice of private investors in France, "that necessarily implied that the investment did not promise a rate of return reasonable in the eyes of a private investor."<sup>915</sup> The United States argues that the Panel thus performed a detailed and thorough assessment, and produced a careful analysis as to each of the specific factual elements it considered relevant, and that there is no basis to argue that the Panel failed to make an objective assessment of the facts.<sup>916</sup>

396. The United States takes issue with the European Union's argument that the Panel should have used the behaviour of Boeing's investors as the market benchmark, rather than the financial performance of the peer group of aerospace and defence companies in France on which the Panel relied. The United States argues that the Panel specifically rejected the European Communities' attempt to rely on certain information relating to the market for LCA in general, as well as Boeing's performance and outlook in particular. The United States submits that the European Union's appeal "provides no reason to consider the practice of Boeing's investors to be relevant".<sup>917</sup>

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<sup>913</sup>United States' appellee's submission, para. 408 (referring to Panel Report, para. 7.1358).

<sup>914</sup>United States' appellee's submission, para. 409.

<sup>915</sup>United States' appellee's submission, para. 413.

<sup>916</sup>United States' appellee's submission, para. 414 and footnote 694 thereto.

<sup>917</sup>United States' appellee's submission, para. 415.

397. The United States contends that the Panel did not base its analysis solely on the peer group comparison, but rather on a careful review of the totality of the facts, including Airbus' own market forecasts and statements in Aérospatiale's financial reports. Even if the Appellate Body were to agree with the European Union's argument that Boeing's performance was somehow a relevant benchmark, "this would not by itself change the overall outcome of the Panel's analysis."<sup>918</sup> The United States also argues that, because Article 14(a) prescribes a comparison to the usual investment practice of private investors "in the territory of that Member", it "calls for a comparison to French peer group companies and French investors, not a U.S. company traded on U.S. financial markets."<sup>919</sup> The United States claims that the Panel's own findings reflect this territorial focus on the behaviour of private investors in France. Moreover, prior panel and Appellate Body reports "make clear that Article 1.1(b) itself requires a comparison with 'the market'", and that the market "in which Boeing's investors operate—the United States, U.S. stock exchange, U.S. dollar denominated, etc.—is of course neither the same nor easily comparable to the market in which Aérospatiale's investors or potential investors operate—France, the French stock exchange and, at the time, French franc denominated."<sup>920</sup> According to the United States, "{t}he question is not who Aérospatiale or Airbus competes with in terms of its own product markets, but rather which financial markets it is a part of and where its investors are (predominantly) active."<sup>921</sup>

398. The United States argues that further factual considerations "support the Panel's reliance on a peer group of French aerospace and defense companies as opposed to a U.S.-based {LCA} company".<sup>922</sup> The United States notes that, during the relevant time period, Aérospatiale was much more of a European *defence* company, and that Boeing had not yet merged with McDonnell Douglas and was therefore much more heavily invested in LCA markets. In other words, the United States maintains, "{f}rom a financial and private investor perspective, ... the two companies were not very easily comparable at all."<sup>923</sup>

399. Finally, the United States asserts that much of the evidence to which the European Union refers relates not to Boeing's or Aérospatiale's investors, but to general market expectations, or the expectations of Boeing's management, the United States Government, or independent and *ex post* outside observers. The United States contends that the Panel "considered this evidence and either rejected it or accorded it relatively less weight".<sup>924</sup> The United States also dismisses the

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<sup>918</sup>United States' appellee's submission, para. 416.

<sup>919</sup>United States' appellee's submission, para. 417.

<sup>920</sup>United States' appellee's submission, para. 418.

<sup>921</sup>United States' appellee's submission, para. 418.

<sup>922</sup>United States' appellee's submission, para. 419.

<sup>923</sup>United States' appellee's submission, para. 419. (footnote omitted)

<sup>924</sup>United States' appellee's submission, para. 420.

European Union's reference to Boeing's stock price and its development over time, stating that "{t}he fact that *Boeing* investors invested in *Boeing*, however, indicates nothing about their or anyone else's attitudes towards *Aérospatiale*."<sup>925</sup> Moreover, the United States claims that "it is useful to look in a little more detail" at the European Union's proposed comparison between Boeing and *Aérospatiale*, adding that the European Union's "numbers are highly selective".<sup>926</sup> The United States refers to revenues for Boeing and financial ratios for the two companies and concludes that "Boeing, in the relevant period of time, produced solid revenue and outperformed the market. The same simply cannot be said for *Aérospatiale*."<sup>927</sup>

(b) Share transfer

400. In response to the European Union's contentions that control of Dassault Aviation had no market value, and that the two-for-one exchange of *Aérospatiale* and Dassault Aviation shares was, considered in isolation, an even exchange, the United States argues that "control does have definite economic value and ceding control in a highly profitable company like Dassault Aviation is not something that a private investor would do without compensation."<sup>928</sup> The United States also argues that the Panel never reached the question of whether the evidence showed that the two-for-one exchange was an even exchange. Nor did it have to, because the investment decision challenged by the United States "was not the decision as to the ratio for the exchange of shares, but the decision whether to convey the Dassault Aviation shares to *Aérospatiale*, and to do so despite having to forego significant value in the form of control over Dassault Aviation."<sup>929</sup> The United States adds that the Panel found this decision to be inconsistent with the usual investment practice of private investors, and that the European Union offers no arguments why that finding was in error.

401. The United States maintains that the Panel, as it did for the 1987 through 1994 equity infusions, based its assessment of "benefit" in the 1998 Dassault Aviation share transfer on a standard based on the "usual practice of private investors". The United States submits that the Panel's approach was to ask whether a private investor would have transferred shares it held in Dassault Aviation to *Aérospatiale* "based on the information available at the time, including *Aérospatiale*'s financial position and health, and knowing that to do so would require surrendering control of Dassault

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<sup>925</sup>United States' appellee's submission, para. 421. (original emphasis)

<sup>926</sup>United States' appellee's submission, para. 422.

<sup>927</sup>United States' appellee's submission, para. 422.

<sup>928</sup>United States' appellee's submission, para. 426.

<sup>929</sup>United States' appellee's submission, para. 426.

Aviation."<sup>930</sup> The United States asserts that the Panel's findings "were clear" that "a private investor would not have transferred shares."<sup>931</sup>

402. The United States argues that the Panel could not have limited its analysis as the European Union maintains because "the transaction was not limited to the exchange of shares or valuation of such shares, as the French State's arrangement with the Dassault family played a critical role in the process."<sup>932</sup> Thus, the European Union's analysis fails to address the transfer "taken as a whole".<sup>933</sup> For the same reasons, the European Union's argument concerning the *Commissaires'* report also fails. That report "assesses the exchange ratio between the Aérospatiale and Dassault Aviation shares"<sup>934</sup>, and is therefore not relevant to the determination that the Panel made. The United States claims that what it challenged was the 1998 share transfer taken as a whole. The United States considers that the exchange ratio findings in the *Commissaires'* report, "even if taken at face value, go to only part of that issue", and at most "underscore{ } that the French State received nothing for surrendering control of Dassault Aviation."<sup>935</sup>

403. In response to the European Union's argument that the 1998 share transfer was consistent with the usual investment practice of private investors because it was part of a government effort to "consolidate" wholly owned assets in advance of a sale, the United States notes the Panel's conclusion that the European Communities presented no persuasive evidence that transferring the Dassault Aviation shares to Aérospatiale would improve the French Government's overall returns on its aerospace assets. The European Union now on appeal "makes essentially the same argument" it made before the Panel, and "provides no basis to reverse the Panel's finding".<sup>936</sup> The United States further notes that the Panel did not question that the 1998 share transfer was part of a broader strategy, and in fact found, as a factual matter, that the French Government's transfer of its 45.76% interest in Dassault Aviation to Aérospatiale was envisaged as a preliminary step in the consolidation of the French aeronautics industry. The United States further supports the Panel's conclusion that there was no evidence that the overall returns the French Government could expect from a public offering of shares in a combined entity exceeded the rate of return it could expect from retaining its Dassault shares, including the double voting rights, separately from its ownership of Aérospatiale.<sup>937</sup>

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<sup>930</sup>United States' appellee's submission, para. 432.

<sup>931</sup>United States' appellee's submission, para. 433.

<sup>932</sup>United States' appellee's submission, para. 434.

<sup>933</sup>United States' appellee's submission, para. 434.

<sup>934</sup>United States' appellee's submission, para. 435.

<sup>935</sup>United States' appellee's submission, para. 435.

<sup>936</sup>United States' appellee's submission, para. 436.

<sup>937</sup>United States' appellee's submission, para. 437 (referring to the Panel Report, para. 7.1411).



404. The United States supports the Panel's finding that the evidence came from a time when the French Government had already decided to transfer the Dassault Aviation shares to Aérospatiale. The Panel further found that the assessments did not provide any information that would allow the comparison the Panel considered relevant—that is, "between returns from the sale of Aérospatiale with the Dassault shares and the returns that the government would have made if it kept Dassault Aviation and Aérospatiale separate."<sup>938</sup> In its arguments, the United States refers to two scenarios: the "Combination Scenario" and the "Separate Scenario". In response to the European Union's argument that the Panel failed to establish that the rate of return for the Combination Scenario was *less* than the rate of return for the Separate Scenario, the United States maintains that this amounts to a burden of proof argument. Because the European Communities was the party that asserted that the share transfer was consistent with the usual investment practice because it was part of a larger consolidation that was itself consistent with usual investment practice, the European Communities was responsible for "proving that that was the case".<sup>939</sup>

405. The United States argues that the European Union "accuses the Panel of holding the {European Communities} to an inappropriate better-than-market standard when it rejected evidence that the French State received fair market value for its Dassault Aviation shares."<sup>940</sup> The United States maintains that the European Union "misunderstands the situation", because the Panel did not reject evidence regarding the relative value of Dassault Aviation and Aérospatiale shares themselves in the 1998 share transfer, but "instead concluded that the relative value was only one element of a larger transaction that, considered as a whole, was inconsistent with the usual investment practice of private investors in France."<sup>941</sup> The Panel found that a private investor in the shoes of the French Government would have entered into the Combination Scenario only if there was "a rational basis for believing" that it would yield greater returns than the Separate Scenario.<sup>942</sup> The United States contends that this conclusion "is axiomatic if one accepts that private investors are rational."<sup>943</sup> According to the United States, the Panel was not suggesting that the returns on the Combination Scenario had to be higher than market, only higher than the status quo, and its analysis therefore "reflects the reality that the market offers investments with many different rates of return, and that private investors routinely reject market-consistent returns that are not as high as returns on their existing investments."<sup>944</sup>

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<sup>938</sup>United States' appellee's submission, para. 437.

<sup>939</sup>United States' appellee's submission, para. 438.

<sup>940</sup>United States' appellee's submission, para. 439.

<sup>941</sup>United States' appellee's submission, para. 439.

<sup>942</sup>United States' appellee's submission, para. 440 (quoting Panel Report, para. 7.1411).

<sup>943</sup>United States' appellee's submission, para. 440.

<sup>944</sup>United States' appellee's submission, para. 440.

406. Regarding the European Union's contention that the Panel acted improperly in rejecting the relevance of the investment analyses because "they were not available to the French State at the time of the contribution"<sup>945</sup>, the United States submits that the timing was not the only reason for considering that this information did not support the European Communities' argument. The Panel considered that these assessments discussed the virtues of the Combination Scenario, but did not compare those returns to the returns of the Separate Scenario. The United States also contends that, like the *Commissaires'* report, these assessments did not address the question before the Panel as to "whether a private investor would have engaged in the transactions at all"; rather, "{t}hey assume{d} that Aerospatiale and {Matra Hautes Technologies} were to merge and that the further consolidation was to take place."<sup>946</sup>

407. In any event, the United States maintains, the Panel was right to conclude that the timing of the assessments meant that they did not support the European Communities' argument, because they do not "provide any guidance as to whether the transaction was consistent with the usual investment practice of private investors in France at the time of the transaction."<sup>947</sup> In response to the European Union's assertion that the assessments were nevertheless relevant to the Panel's analysis because they "evaluated financial conditions that existed at the time of the capital contribution"<sup>948</sup>, the United States argues that the European Union "has merely cited the assessments themselves, and has not shown that they rel{ied} on data available to a private investor at the time of the 1998 share transfer."<sup>949</sup> The United States also notes that its valuation expert found that "serious questions could be raised as to the independence of the analysis reflected in the reports, which may simply have served the purpose of supporting the government's intention to privatize {Aérospatiale-Matra}."<sup>950</sup>

408. The United States submits that each of the European Union's arguments on appeal fails because they are based on "misperception{s} of the legal standard, the Panel's actual findings in its report, and the facts underlying the issues to which this appeal relates".<sup>951</sup> The United States consequently requests the Appellate Body to reject the European Union's claims on appeal and to uphold the Panel's findings.

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<sup>945</sup>United States' appellee's submission, para. 441 (quoting European Union's appellant's submission, para. 1159).

<sup>946</sup>United States' appellee's submission, para. 441.

<sup>947</sup>United States' appellee's submission, para. 442.

<sup>948</sup>United States' appellee's submission, para. 443 (quoting European Union's appellant's submission, para. 1161). (original emphasis omitted by the United States)

<sup>949</sup>United States' appellee's submission, para. 443.

<sup>950</sup>United States' appellee's submission, para. 443.

<sup>951</sup>United States' appellee's submission, para. 444.

10. The Subsidized Product and Product Market

409. The United States submits that the Panel properly assessed the United States' adverse effects claims on the basis presented by the United States, including the United States' identification of "all Airbus LCA" as the "subsidized product". The United States disagrees with the European Union's contention that the Panel afforded the United States "absolute and unreviewable"<sup>952</sup> discretion to frame the definition of the "subsidized" and "like" products at issue. Instead, the United States argues that, as required by Article 11 of the DSU, "the Panel understood its task was to objectively assess the 'matter' before it, including whether the subsidized product identified by the United States as a basis for assessing its adverse effects claim was consistent with the SCM Agreement."<sup>953</sup> The Panel correctly recognized that a complainant has the right to structure its own complaint as it chooses, and confirmed the reasonableness of the United States' "subsidized product" and "like product" definitions in the light of the evidence before it. In particular, the Panel based its conclusion on the United States having "reasonably defined the subsidized product as all Airbus LCA on several findings of fact, including those based on characteristics and uses, a lack of clear dividing lines between models and families of Boeing and Airbus LCA, the nature of the LCA market, considerations of LCA family 'commonality,' and that the subsidies in dispute have benefited Airbus' full family of LCA."<sup>954</sup> The United States adds that "even if the European Union's approach could be considered a factually reasonable alternative to the United States' subsidized product definition, the Panel's decision to reject that alternative would not constitute reversible error in light of its finding that the definition of the product offered by the United States was reasonable."<sup>955</sup> The United States further agrees with the Panel that there is no specific guidance in the *SCM Agreement* regarding the identification of a "subsidized product" or a panel's role in that process, and rejects the European Union's contention that the Panel failed to comply with its obligations under Article 11 of the DSU. On the contrary, declining to "reformulate" the United States' claim in the manner requested by the European Communities was consistent with the Panel's obligations under Article 11 of the DSU. The United States further adds that, "{h}ad the Panel accepted the European {Communities'} argument regarding the appropriate subsidized product definition, it would have overstepped the boundaries of its mandate pursuant to Article 11 to make an 'objective assessment of the matter before it.'"<sup>956</sup>

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<sup>952</sup>United States' appellee's submission, para. 510 (quoting European Union's appellant's submission, para. 298).

<sup>953</sup>United States' appellee's submission, para. 499 (referring to Panel Report, paras. 7.1653-7.1655, 7.1662, and 7.1663).

<sup>954</sup>United States' appellee's submission, para. 512 (referring to Panel Report, paras. 7.1664-7.1667).

<sup>955</sup>United States' appellee's submission, para. 519.

<sup>956</sup>United States' appellee's submission, para. 520.

410. The United States argues that the Appellate Body should also reject the European Union's appeal of the subsidized product issue under Article 11 of the DSU "because it falls well short of the requirements for an Article 11 claim on appeal."<sup>957</sup> The European Union's claim under Article 11 of the DSU "consists of arguments that the Panel failed to correctly interpret and apply provisions of Articles 5 and 6.3 of the *SCM Agreement* and the contention that the Panel afforded the United States 'absolute and unreviewable discretion' with respect to its identification of the 'subsidized product.'"<sup>958</sup> The United States considers that "{t}his blanket assertion coupled with recast arguments going to the interpretation and application of the *SCM Agreement* cannot support a claim under Article 11."<sup>959</sup> In any event, the United States argues that the Panel's "thorough review" of the "subsidized product" disposes of the European Union's "assertion that the Panel abdicated its responsibilities or otherwise failed to act objectively."<sup>960</sup>

411. Referring to previous findings by the Appellate Body, the United States further noted that a claim pursued under Article 11 of the DSU must stand on its own and should "not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements."<sup>961</sup> In *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body rejected the claims under Article 11 of the DSU because it was "not persuaded that the claims and arguments by the European Communities under Article 11 of the DSU differ{ed} from its claims that the Panel failed to apply correctly other provisions"<sup>962</sup> According to the United States, the same basis exists here for the Appellate Body to reject the European Union's Article 11 claim, which is "nothing more than an appendage" to the European Union's arguments concerning the requirements in Articles 5 and 6.3 of the *SCM Agreement* with respect to the identification of the subsidized product.<sup>963</sup>

412. The United States also disagrees with the European Union's argument that "{s}ubsidized aircraft may be considered to be in the same market, and hence a single 'subsidized product', only if they are engaged in actual or potential competition."<sup>964</sup> According to the United States, the European Union's "proffered 'rationale'" for this supposed requirement is based on a misreading of the

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<sup>957</sup>United States' appellee's submission, para. 522.

<sup>958</sup>United States' appellee's submission, para. 522 (quoting European Union's appellant's submission, para. 301).

<sup>959</sup>United States' appellee's submission, para. 522.

<sup>960</sup>United States' appellee's submission, para. 522.

<sup>961</sup>United States' appellee's submission, para. 523 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 401).

<sup>962</sup>United States' appellee's submission, para. 524 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 402).

<sup>963</sup>United States' appellee's submission, para. 524 (referring to European Union's appellant's submission, paras. 301-304).

<sup>964</sup>United States' appellee's submission, para. 527 (quoting European Union's appellant's submission, para. 310).

Appellate Body's report in *US – Upland Cotton*.<sup>965</sup> The United States emphasizes that, in that dispute, the Appellate Body was not considering the definition of the subsidized product; rather, it was evaluating the participants' contentions regarding the geographic scope of the term "same market" in the context of Brazil's price suppression claim under Article 6.3(c) of the *SCM Agreement*.<sup>966</sup> The United States considers that "the Appellate Body's report in *US – Upland Cotton* is relevant to the European Union's appeal, however, because it demonstrates that even under Article 6.3(c) 'the determination of the relevant market under Article 6.3(c) of the *SCM Agreement depends on the subsidized product in question*.'" <sup>967</sup> Hence, "the order of analysis is to establish first the definition of the subsidized product and then the definition of the like product against which it competes, and then to determine the geographic scope of the market in which that competition occurs and adverse effects are alleged to have been caused."<sup>968</sup> Referring to further findings made by the Appellate Body in *US – Upland Cotton*, the United States argues that "'actual or potential competition' may be relevant 'for determining the *area* of competition between two products' but it is not a concept that limits the definition of the term 'subsidized product'."<sup>969</sup>

- (a) Whether the Panel erred in assessing displacement on the basis of a single product and a single-product market

- (i) *The Panel's interpretative approach*

413. The United States claims that the European Union's attempt to use the notion of "product markets" as a means of "restructuring the displacement analysis" has no basis in the *SCM Agreement* and the facts of this case.<sup>970</sup> For the United States, "it is the definition of the subsidized product and the like product that sets the product framework for the displacement analysis, while the references to 'market' in Article 6.3(a) and (b) define the geographic scope of that analysis."<sup>971</sup>

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<sup>965</sup>United States' appellee's submission, para. 527 (referring to European Union's appellant's submission, para. 307, in turn referring to Appellate Body Report, *US – Upland Cotton*, paras. 405-410).

<sup>966</sup>United States' appellee's submission, para. 527 (referring to Appellate Body Report, *US – Upland Cotton*, para. 409).

<sup>967</sup>United States' appellee's submission, para. 529 (quoting Appellate Body Report, *US – Upland Cotton*, para. 408). (emphasis added by the United States)

<sup>968</sup>United States' appellee's submission, para. 529.

<sup>969</sup>United States' appellee's submission, para. 530 (quoting Appellate Body Report, *US – Upland Cotton*, para. 408). (emphasis added by the United States)

<sup>970</sup>United States' appellee's submission, para. 540.

<sup>971</sup>United States' appellee's submission, para. 541.

414. The United States submits that European Union's argument is "anchored to a mischaracterization" of the findings by the Appellate Body in *US – Upland Cotton*.<sup>972</sup> In that case, the Appellate Body neither found nor implied that a "product market" is a requisite element of a displacement claim under Article 6.3(a) and (b) of the *SCM Agreement*. Rather, it found that Article 6.3(c) calls for evidence and argumentation to define the geographic scope of the "same market".<sup>973</sup> Moreover, "given the Panel's findings that indicate homogenous conditions of competition amongst all Airbus and Boeing LCA", the *US – Upland Cotton* report provides "no basis" for the European Union to argue that the Panel erred in treating all LCA as competing "in the same market".<sup>974</sup>

415. The United States submits that the European Union's citation to *EC – Asbestos* is also misplaced. In that dispute, the Appellate Body was not looking at the definition of "market"; rather it was considering whether domestic and imported products are "like" within the meaning of Article III:4 of the GATT 1994.<sup>975</sup> The United States notes, however, that in this case the European Union is not appealing the Panel's determination of the product that is "like" the subsidized product. Rather, "it argues that having identified the subsidized and like product, the Panel was then obligated to segment each subsidized product/like product pairing into multiple market segments for the purpose of assessing displacement of the like product."<sup>976</sup> In the United States' view, however, neither the *SCM Agreement* nor prior Appellate Body findings regarding the definition of the "like product" provide support for the European Union's arguments in this regard.

416. According to the United States, the approach taken by the panel in *Indonesia – Autos* in assessing claims concerning displacement and impedance is instructive.<sup>977</sup> After identifying the relevant subsidized product and like product for purposes of its assessment of displacement or impedance in the Indonesian market, the panel in that case "proceeded to examine market share data without the additional 'product market' inquiry proposed by the European Union in the current dispute".<sup>978</sup> The panel's assessment "properly confirmed that the identity of the subsidized product

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<sup>972</sup>United States' appellee's submission, para. 542 (referring to European Union's appellant's submission, paras. 342-344).

<sup>973</sup>United States' appellee's submission, para. 543 (quoting Appellate Body Report, *US – Upland Cotton*, para. 408).

<sup>974</sup>United States' appellee's submission, para. 543 (quoting Appellate Body Report, *US – Upland Cotton*, para. 408).

<sup>975</sup>United States' appellee's submission, para. 544 (quoting Appellate Body Report, *EC – Asbestos*, para. 103).

<sup>976</sup>United States' appellee's submission, para. 544.

<sup>977</sup>United States' appellee's submission, para. 545 (referring to Panel Report, *Indonesia – Autos*, para. 14.164).

<sup>978</sup>United States' appellee's submission, para. 546.

and like product, respectively, address 'product' issues."<sup>979</sup> Thus, "the term 'market' in Article 6.3(a) and (b) pertains only to the geographic location in which competition between the subsidized product and like product is to be assessed."<sup>980</sup> The United States concludes on this basis that the decision by the Panel in this case, after evaluating all the facts presented, to accept the United States' definition of a single "subsidized product" rather than five separate "products" offered by the European Communities, as the basis for its displacement analysis, was "a reasonable one".<sup>981</sup>

417. Regarding the issue of whether the Panel erred in considering that it would be precluded from assessing alleged linkages and spill-over effects of subsidies provided to different models of Airbus LCA in the case that it accepted the European Communities' views concerning the subsidized product, the United States submits that the European Communities made a "concerted effort" to have the Panel disregard the spill-over effect of "the subsidies prior to subsequent product launches".<sup>982</sup> In particular, the European Communities "attempted to quantify the magnitude of subsidies only with respect to those provided for a particular LCA program and, on that basis, argued that the subsidy magnitude was *de minimis* for each Airbus LCA model."<sup>983</sup> Finally, the United States argues that, even if the *SCM Agreement* "called for a separate 'product market' analysis under Article 6.3(a)-(d), there is evidence of 'product market' in which all Airbus LCA compete against all Boeing LCA under homogenous conditions of competition irrespective of the European Union's proposed 'product markets,' and there is uncontested evidence of LCA competition outside the {European Union's} proposed 'product markets'".<sup>984</sup>

(ii) *Article 11 of the DSU*

418. The United States also disagrees with the European Union's contention that the Panel "marginalised and disregarded entire categories of highly relevant and contemporaneous evidence" and "failed to provide a reasoned and adequate explanation based on a coherent reasoning", and thereby acted inconsistently with its obligations under Article 11 of the DSU.<sup>985</sup> Rather than disregarding this evidence, the United States argues that the Panel found it "unpersuasive".<sup>986</sup>

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<sup>979</sup>United States' appellee's submission, para. 546.

<sup>980</sup>United States' appellee's submission, para. 546.

<sup>981</sup>United States' appellee's submission, para. 547.

<sup>982</sup>United States' appellee's submission, para. 551 (referring to Panel Report, para. 7.1873).

<sup>983</sup>United States' appellee's submission, para. 551 (referring to Panel Report, para. 7.1963).

<sup>984</sup>United States' appellee's submission, para. 554 (referring to Panel Report, paras. 7.1725 and 7.1668, respectively).

<sup>985</sup>United States' appellee's submission, para. 555 (quoting European Union's appellant's submission, para. 359).

<sup>986</sup>United States' appellee's submission, para. 556 (referring to Panel Report, para. 7.1668).

419. The United States notes that, as a factual matter, the Panel found that "there is at least some degree of competition between adjacent product groups identified by the European Communities, for instance, between a Boeing 747 and an Airbus A380."<sup>987</sup> Consistent with the Panel's findings, the United States submits that "the evidence ... shows a number of *actual, 'head-to-head' campaigns* in which Boeing and Airbus offered LCA across every adjacent 'product market' identified by the European Union."<sup>988</sup> Pointing to a table it compiled using information from Panel Exhibits EC-322 and EC-323, the United States disagrees with the European Union's assertion that there is competition across the product groupings identified by the European Union "{o}nly in rare instances".<sup>989</sup> To the contrary, "*none* of the 'product markets' identified by the European Union is a self-contained segment, capturing the full scope of competition for the models within it"; "{i}n fact, LCA from each 'product market' have competed head-to-head against LCA from other 'product markets'."<sup>990</sup>

420. The United States further submits that, "{w}hen the European Union refers to Exhibit EC-322 and states that '{t}here were *no* sales campaigns in which Airbus A340 LCA family competed against any Boeing models other than the 777 LCA family,' it fails to mention that Exhibit EC-322 shows the Boeing 777 as having competed against the A330 (which the European Union places in a separate, 'distinct product market') in {a number of} campaigns won by Airbus."<sup>991</sup> Similarly, "when the European Union states that Exhibit EC-322 shows that '{t}here were *no* sales campaigns in which the Airbus A380 LCA family competed against Boeing 737NG, 767, 777 or 787 LCA family,' it ignores {a certain number of} competitions between the 747 and the A380, which are somehow in separate 'product markets' according to the European Union."<sup>992</sup>

421. In a similar vein, the United States notes that the European Union cites to a variety of materials in an attempt to show a "lack of direct head-to-head competition" between the A380 and 747-8 (a derivative of earlier 747 models that was launched in 2005).<sup>993</sup> According to the United States, "{w}hile it is true that the A380 and 747-8 do not have identical characteristics (e.g., the standard A380 configuration has approximately 90 more seats than the 747-8), this does not change the essential fact that the A380 has competed against the 747 for sales."<sup>994</sup> As the Panel noted,

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<sup>987</sup>United States' appellee's submission, para. 557 (quoting Panel Report, para. 7.1668).

<sup>988</sup>United States' appellee's submission, para. 557. (original emphasis)

<sup>989</sup>United States' appellee's submission, para. 558 (quoting European Union's appellant's submission, Annex II (Product Markets Annex) (BCI), para. 11).

<sup>990</sup>United States' appellee's submission, para. 558. (original emphasis)

<sup>991</sup>United States' appellee's submission, para. 559 (quoting European Union's appellant's submission, Annex II (Product Markets Annex) (BCI), para. 11, second bullet (original emphasis)).

<sup>992</sup>United States' appellee's submission, para. 559 (quoting European Union's appellant's submission, Annex II (Product Markets Annex) (BCI), para. 11, third bullet (original emphasis)).

<sup>993</sup>United States' appellee's submission, para. 561 (quoting European Union's appellant's submission, Annex II (Product Markets Annex) (BCI), section III(A) heading).

<sup>994</sup>United States' appellee's submission, para. 561.



the Airbus A380 business case clearly contemplates competition between the A380 and the 747.<sup>995</sup> In rejecting the European Union's argument that the A380 should be separated from all other LCA competition, the Panel also considered evidence that customers purchased Boeing's 777 "to replace the delayed A380".<sup>996</sup> And while the European Union finds Boeing's list of campaigns lost to Airbus persuasive in other aspects of its product arguments, the United States argues that it fails to mention that the Boeing document shows the 747 competed against, and lost to, the A380 in campaigns during the reference period.<sup>997</sup> In this connection, the European Union cites to the statement of Airbus' Christian Scherer, to the effect that "Airbus did not compete—i.e., it made no offers, in any sales campaigns that resulted in orders for Boeing 747 family LCA during the 2001-2005 period"<sup>998</sup>, without acknowledging the numerous campaigns in which the 747 lost to the A380.

422. The United States argues that the European Union cites a number of campaign-specific and other documents in an attempt to "demonstrate that demand {from (*sic*)} customers in sales campaigns for new LCA is specifically targeted at the particular groups of Boeing and Airbus LCA products".<sup>999</sup> However, "{a}ll these sources show is that, in many instances where a customer conducts a formal head-to-head campaign, the offerings from each manufacturer will have been pared down to a single aircraft—something the United States has never contested."<sup>1000</sup>

423. The United States also notes that "{t}he European Union cites to statements from Boeing officials and marketing materials from Airbus and Boeing that, in its view, 'point towards the existence of different product groupings.'"<sup>1001</sup> In doing so, "the European Union fails to acknowledge that the Panel duly considered the European Union's arguments and evidence concerning 'distinct product markets' but found them contradicted by the weight of the evidence showing competition of a far broader scope, as well as by an inadequate legal basis for disturbing the {United States'} definition."<sup>1002</sup>

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<sup>995</sup>United States' appellee's submission, para. 561 (referring to Panel Report, paras. 7.1676, 7.1831, and 7.1832).

<sup>996</sup>United States' appellee's submission, para. 561 (quoting Panel Report, para. 7.1831).

<sup>997</sup>United States' appellee's submission, para. 561 (referring to Panel Exhibit EC-322 (BCI)).

<sup>998</sup>United States' appellee's submission, para. 561 (quoting European Union's appellant's submission, Annex II (Product Markets Annex) (BCI), section III(A)(1), last bullet, p. 23).

<sup>999</sup>United States' appellee's submission, para. 562 (quoting European Union's appellant's submission, Annex II (Product Markets Annex) (BCI), para. 14).

<sup>1000</sup>United States' appellee's submission, para. 562.

<sup>1001</sup>United States' appellee's submission, para. 563 (quoting European Union's appellant's submission, Annex II (Product Markets Annex) (BCI), para. 16).

<sup>1002</sup>United States' appellee's submission, para. 563.

424. Similarly, the European Union now claims that Airbus statements relied upon by the Panel concerning the importance of a full family of LCA are "irrelevant to the question of whether all the Airbus LCA can be grouped together as one 'subsidised product' competing in one single product market."<sup>1003</sup> The United States submits that the term "Airbus family" originated in Airbus' marketing materials to its customers.<sup>1004</sup> According to the United States, it is difficult to reconcile dismissal of the term "Airbus family" as irrelevant to competition, as the European Union claims, when Airbus markets its LCA as a full family to customers, stressing the economic benefits of buying from the "Airbus family" over buying from Boeing's product line.

425. Finally, the United States argues that "the European Union's proposed multiple product market definitions have no support in the facts of the case."<sup>1005</sup> The United States submits that "Airbus and Boeing each produce a full line of LCA models that compete against each other" and that "{t}he evidence before the Panel demonstrated actual competition outside the European {Communities}' so-called 'product markets,' including: (1) bundled sales (such as the South African Airways lost sale, in which the airline chose A319s, A320s, and A340s over Boeing 737s and 777s); and (2) Emirates and FedEx ordering the 777 when Airbus' A380 delays left those customers short on capacity."<sup>1006</sup> The United States points out that the European Union itself recognizes that the Appellate Body "could reasonably find fewer, broader product markets".<sup>1007</sup> The United States further notes that the European Union concedes that the Panel "need not have accepted the European {Communities}' argument that there were five different LCA markets."<sup>1008</sup>

426. In sum, the United States considers that the European Union has offered no basis on which the Appellate Body could find that the Panel's assessment of displacement under Article 6.3(a) and (b) on the basis of the specified geographic markets in which "all Boeing LCA" compete with "all Airbus LCA" is inconsistent with Article 11 of the DSU.<sup>1009</sup> The United States also submits that there is no

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<sup>1003</sup>United States' appellee's submission, para. 565 (quoting European Union's appellant's submission, Annex II (Product Markets Annex) (BCI), para. 23).

<sup>1004</sup>United States' appellee's submission, para. 565 (referring to Airbus marketing material, "Excellence runs in the family" (Panel Exhibit US-390), available at <<http://events.airbus.com/img/media/multimedia/advertising/press/excellence.pdf>> (visited 20 September 2006)).

<sup>1005</sup>United States' appellee's submission, para. 566.

<sup>1006</sup>United States' appellee's submission, para. 566 (referring to Panel Report, paras. 7.1655, 7.1822-7.1824, and 7.1831).

<sup>1007</sup>United States' appellee's submission, para. 566 (referring to European Union's appellant's submission, para. 375).

<sup>1008</sup>United States' appellee's submission, para. 566 (quoting European Union's appellant's submission, para. 370).

<sup>1009</sup>United States' appellee's submission, para. 567.

basis for the Appellate Body to "complete the analysis and find that there is a separate single-aisle LCA product market."<sup>1010</sup>

427. Finally, the United States disagrees with the European Union's allegation of a general error of "distortion" resulting from the Panel's assessment of displacement under Article 6.3(a) and (b) on the basis of the subsidized product, like product, and geographic market.<sup>1011</sup> According to the United States, the European Union "offers no textual support" for its argument that the Panel erred in applying the applicable provisions of the *SCM Agreement*.<sup>1012</sup> The United States reiterates its position that "the framework for a displacement analysis under Article 6.3(a) and (b) is set by the definition of the subsidized product, the like product, and the geographic market."<sup>1013</sup> According to the United States, "{b}y testing the {United States'} subsidized product definition for reasonableness, the Panel ensured, in the first instance, that the analysis of displacement is not based on an 'inappropriately broad' product; and, notably, the European Union has not challenged the Panel's findings that 'all LCA' is a reasonable and coherent 'subsidized product.'"<sup>1014</sup> According to the United States, "{o}ther factors indicating that the market position of the subsidized product in any particular segment of the market is not an effect of subsidy is a legitimate issue for a causation analysis; however, the Panel raised every other factor raised by the European {Communities'} and found no attenuation of the causal link."<sup>1015</sup>

# 11. Serious Prejudice

428. The United States argues that the Panel correctly found that the European Communities caused, through the use of the subsidies, serious prejudice to the United States' interests within the meaning of Article 5(c) of the *SCM Agreement*. This serious prejudice took the form of displacement of imports of Boeing LCA into the European Communities under Article 6.3(a), displacement (and threat thereof) of Boeing LCA exports in various third country markets under Article 6.3(b), and significant lost sales in the same market under Article 6.3(c) of the *SCM Agreement*. The United States requests the Appellate Body to uphold the Panel's finding to this effect for the reasons set out below.

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<sup>1010</sup>United States' appellee's submission, para. 568 (referring to European Union's appellant's submission, para. 374).

<sup>1011</sup>United States' appellee's submission, para. 569 (referring to European Union's appellant's submission, para. 90).

<sup>1012</sup>United States' appellee's submission, para. 569.

<sup>1013</sup>United States' appellee's submission, para. 569.

<sup>1014</sup>United States' appellee's submission, para. 569.

<sup>1015</sup>United States' appellee's submission, para. 569.

(a) Displacement of Boeing LCA from the European Communities and certain third country markets

429. The United States submits that the Panel correctly held that the effect of the subsidies provided to Airbus was to displace Boeing LCA from the markets of the European Union, Australia, Brazil, China, Korea, Mexico, Singapore, and Chinese Taipei, and likely future displacement from the market of India, within the meaning of Article 6.3(a) and (b) of the *SCM Agreement*. Reflecting the Panel's "bifurcated analysis" of the United States' serious prejudice claims, and the structure of the European Union's arguments on appeal, the United States also makes separate arguments in relation to the existence of displacement, on the one hand, and the question of causation, on the other hand.

(i) *Existence of displacement*

430. The United States argues that the Panel correctly held that exports of Boeing LCA were displaced from the markets of Brazil, Korea, Mexico, Singapore, and Chinese Taipei within the meaning of Article 6.3(b) of the *SCM Agreement*. The European Union's appeal concerning the existence of displacement cannot be reconciled with the market gains that subsidized Airbus LCA made at the expense of Boeing LCA in those markets. Moreover, the Panel's analysis and findings concerning the existence of displacement are fully supported by evidence of substantial market share losses by Boeing LCA, and corresponding market share gains by Airbus LCA in the European Communities and third country markets, and should therefore be upheld by the Appellate Body.

431. According to the United States, the European Union concedes that the Panel correctly evaluated the existence of displacement on the basis of volume and market share data. The European Union also agrees with the Panel that data showing a decline in Boeing's market share during the reference period would sufficiently establish the existence of displacement. However, the European Union's assertion that the Panel found that a "*trend was absent*" in the third country markets at issue is "not accurate".<sup>1016</sup> In the United States' view, the Panel simply found that the situation in the markets of Brazil, Korea, Mexico, Singapore, and Chinese Taipei was "less compelling" than in Australia and China, because LCA sales in those markets were more "sporadic" and sales volumes were "relatively small".<sup>1017</sup> For the United States, the Panel's conclusion that the identification of a trend in a given market was "more difficult" does not indicate that a trend was absent.<sup>1018</sup>

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<sup>1016</sup>United States' appellee's submission, para. 571 (quoting European Union's appellant's submission, para. 320). (emphasis added by the United States)

<sup>1017</sup>United States' appellee's submission, para. 571 (quoting Panel Report, para. 7.1791).

<sup>1018</sup>United States' appellee's submission, para. 571.

432. The United States submits further that Article 6.3(b) does not provide textual guidance for determining "whether a given amount of data ... in the form of export volumes, market share, or both"<sup>1019</sup> provides a sufficient basis for finding the existence of displacement. The United States acknowledges that Article 6.4 contemplates a finding of displacement under Article 6.3(b) based on "a change in relative shares of the market to the disadvantage of the non-subsidized like product" where such trend occurs "over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year."<sup>1020</sup> However, the term "shall include" indicates that Article 6.4 is not exhaustive, and the Panel correctly found that a complaining Member may demonstrate displacement under Article 6.3(b) in a manner not described in that provision. The United States adds that, if the Appellate Body were to rely on Article 6.4 as context in determining the sufficiency of the evidence concerning the existence of displacement, Article 6.4 speaks of "clear trends" only in temporal terms, and does not specify the "level of data or quantum of evidence" that is required to establish a trend of displacement.<sup>1021</sup> The United States highlights that the sales and market share data reviewed by the Panel covered a period of time far longer than the one-year threshold provided for in Article 6.4, and that such data reveals an "unmistakable"<sup>1022</sup> trend of Boeing losing market share to Airbus in each of the relevant third country markets.

433. Moreover, the United States emphasizes that the European Union's attempt to show insufficient data to establish the existence of displacement is limited to evidence concerning the Brazilian and Mexican markets, and that the European Union's appeal does not address the data for the markets of Korea, Singapore, or Chinese Taipei. The United States underscores that in each of these three markets the data confirms that Boeing lost market share to Airbus over the 2001-2006 reference period<sup>1023</sup>, and that multiple LCA deliveries by both Boeing and Airbus occurred in each year of the reference period.

434. The United States considers "unavailing" the European Union's arguments on the distinction between displacement and impedance under Article 6.3(a) and (b).<sup>1024</sup> For the United States, these arguments are irrelevant for the markets where Boeing's market share did in fact fall during the

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<sup>1019</sup>United States' appellee's submission, para. 572.

<sup>1020</sup>United States' appellee's submission, para. 572.

<sup>1021</sup>United States' appellee's submission, para. 573.

<sup>1022</sup>United States' appellee's submission, para. 573.

<sup>1023</sup>The United States notes that Boeing's market share between 2001 and 2006 dropped from 83% to 58% in Korea; from 89% to 54% in Singapore; and from 62% to 44% in Chinese Taipei. (United States' appellee's submission, para. 574)

<sup>1024</sup>United States' appellee's submission, para. 575 (referring to European Union's appellant's submission, paras. 323-328).

reference period. The United States stresses that the European Union concedes that the "concept of 'displacement' revolves around the notion that market *shares* of 'like' imports or exports *fall* over a reference period."<sup>1025</sup>

435. Finally, the United States argues that the Panel did not err in its interpretation of Article 6.3(b) of the *SCM Agreement*, and did not act inconsistently with Article 11 of the DSU, in finding the existence of threat of displacement of Boeing LCA from the market of India. The United States maintains that the order data that showed a "surge" in Airbus orders in India in 2005, with Airbus obtaining more than double the orders of Boeing, provided a "sufficient and objective" basis upon which the Panel could make a finding of threat of displacement.<sup>1026</sup> Furthermore, the United States questions the European Union's assertion that "undisputed evidence before the Panel demonstrated that Boeing's market share of deliveries in the Indian market actually increased" after 2006.<sup>1027</sup> The United States considers that no such "undisputed evidence" exists on the record, insofar as the evidence referred to by the European Union refers to order rather than delivery data.<sup>1028</sup> The United States also observes that post-2006 order data was offered by the European Communities "at a very late stage" in the panel proceedings, and therefore the Panel did not err in basing its threat of displacement findings on "the most recent available, relevant and reliable data that {it} could evaluate in a manner consistent with the requirements of due process".<sup>1029</sup>

(ii) *Causation – Observed displacement*

436. The United States argues that the Panel correctly found that the subsidies caused serious prejudice to the United States' interests under Article 5(c), in the form of displacement of Boeing LCA from the European Communities and third country markets within the meaning of Article 6.3(a) and (b) of the *SCM Agreement*.

437. The United States observes that the Appellate Body's reasoning in *US – Upland Cotton* that Article 6.3(c) "requires the establishment of a causal link between the subsidy and the significant price suppression" applies with "equal force" to all the indicia of serious prejudice, including lost sales, displacement, and impedance.<sup>1030</sup> The Appellate Body also observed that Article 6.3 does not

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<sup>1025</sup>United States' appellee's submission, para. 575 (quoting European Union's appellant's submission, para. 324 (original emphasis)).

<sup>1026</sup>United States' appellee's submission, para. 577.

<sup>1027</sup>United States' appellee's submission, para. 578 (quoting European Union's appellant's submission, para. 389). (original emphasis and underlining added by the United States omitted)

<sup>1028</sup>United States' appellee's submission, para. 578 and footnote 969 thereto (referring to Airclaims CASE database, 2007 Orders, data query as of 28 January 2008 (Panel Exhibit EC-987)).

<sup>1029</sup>United States' appellee's submission, para. 578 (quoting Panel Report, para. 7.1713).

<sup>1030</sup>United States' appellee's submission, para. 593 (quoting Appellate Body Report, *US – Upland Cotton*, para. 435).

contain "the more elaborate and precise 'causation' and 'non-attribution' language" found in Part V of the *SCM Agreement*, which suggests that panels have a degree of discretion in establishing how to conduct a causation analysis.<sup>1031</sup> Referring to the Appellate Body report in *US – Upland Cotton (Article 21.5 – Brazil)*, the United States posits that a "central aspect" of any serious prejudice analysis is that "the effect ... must result from a chain of causation that is linked to the impugned subsidy."<sup>1032</sup> According to the United States, such chain of causation must focus on the way in which the subsidies were actually used and their resulting effects, and does not involve "speculative, alternate market developments or events that did not happen."<sup>1033</sup>

438. In this regard, the United States emphasizes that the European Union does not challenge the "crux of the Panel's causation finding"<sup>1034</sup>, namely that, but for LA/MSF, Airbus would not have been able to launch each of its LCA models at the time and in the manner that it did. Instead, the European Union's appeal focuses on the absence of Panel findings concerning the allegation that Airbus "*might have*, at some other point in time, under different circumstances, and in the absence of subsidies, launched different aircraft that might have won sales."<sup>1035</sup> However, the findings that the European Union alleges are missing from the Panel's analysis "do not relate to the actual use of the subsidies in light of their impact on the recipient and in relation to other factors actually present in the market at the same time as the subsidy."<sup>1036</sup> According to the United States, there is no basis in Article 6.3 for a causation standard that requires a panel to speculate about whether a non-subsidized Airbus could have launched "fewer but technologically superior aircraft" and "priced those aircraft aggressively"<sup>1037</sup> so that it would have won any sales or market share. According to the United States, in establishing "a chain of causation that is linked to the impugned subsidy"<sup>1038</sup>, a panel must examine "*what were the actual effects* in the markets in question"<sup>1039</sup>, and must ensure that it does not attribute to the subsidies the effect of other factors. Similarly, in a "but for" analysis, a panel must focus on "the market as it actually existed absent the subsidy".<sup>1040</sup> However, the United States underscores that

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<sup>1031</sup>United States' appellee's submission, para. 594 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 368).

<sup>1032</sup>United States' appellee's submission, para. 595 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 372).

<sup>1033</sup>United States' appellee's submission, para. 595.

<sup>1034</sup>United States' appellee's submission, para. 582.

<sup>1035</sup>United States' appellee's submission, para. 582. (original emphasis)

<sup>1036</sup>United States' appellee's submission, para. 582.

<sup>1037</sup>United States' appellee's submission, para. 585.

<sup>1038</sup>United States' appellee's submission, para. 595 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 372).

<sup>1039</sup>United States' appellee's submission, para. 595. (original emphasis)

<sup>1040</sup>United States' appellee's submission, para. 595 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 375).

the chain of causation that must be established under Articles 5 and 6 does not involve "speculative, alternate market developments or events that did not happen".<sup>1041</sup>

439. In the United States' view, the Panel properly found a "genuine and substantial" link between the subsidies and the effects of displacement of Boeing LCA and that no other factors attenuated such causal link. Based on the nature and magnitude of the subsidies, the conclusions of the "Dorman Report"<sup>1042</sup>, the A380 business case, undisputed public statements of government and Airbus officials, and the "individual and cumulative" effect of LA/MSF in terms of generating economies of scope and scale<sup>1043</sup>, the Panel correctly concluded that LA/MSF and other subsidies enabled Airbus to bring its LCA to the market. The United States adds that the Panel correctly rejected the European Communities' argument that the structure, operation, and design of the different subsidies at issue precluded a cumulative assessment of their effects on the basis that non-LA/MSF subsidies were granted during the period in which each successive model was being developed, and that these subsidies "complemented and supplemented" the product effect of LA/MSF.

440. According to the United States, the Panel correctly concluded that, by enabling Airbus to bring its LCA to the market, the subsidies caused Boeing to lose its position in the European Communities and third country markets, thus causing serious prejudice to the United States' interests within the meaning of Article 6.3(a) and (b) of the *SCM Agreement*. The Panel correctly based this finding on the conditions of competition in the LCA industry, where aircraft availability at the time of purchase is "the fundamental factor"<sup>1044</sup> in winning sales. Consequently, the Panel did not err in concluding that once Airbus was able to develop its LCA family, the conditions of competition in the market were such that its market presence resulted in Boeing's reduced market shares in each relevant third country market between 2001 and 2006. In reaching its findings, the Panel also took appropriate account of the "magnitude of the benefit" of LA/MSF, both in terms of percentage of development costs covered and the amount of the discount off market interest rates.<sup>1045</sup> The Panel further fulfilled its obligation to ensure that any other factors, such as Boeing's alleged mismanagement of customer relationships, geopolitical considerations, the role of engine manufacturers, or the events of the 11 September 2001 attacks on the World Trade Center ("9/11"), did not dilute the "genuine and substantial" link between the subsidies and Boeing's loss of market

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<sup>1041</sup>United States' appellee's submission, para. 595.

<sup>1042</sup>Gary J. Dorman, *The Effect of Launch Aid on the Economics of Commercial Airplane Programs* (6 November 2006) (Panel Exhibit US-70 (BCI)).

<sup>1043</sup>United States' appellee's submission, paras. 596-600; Panel Report, para. 7.1881, 7.1911, 7.1913-7.1918, 7.1923, 7.1935, 7.1937, 7.1939-7.1941, and 7.1948.

<sup>1044</sup>United States' appellee's submission, para. 604 (referring to Panel Report, paras. 7.1720, 7.1722, and 7.1724).

<sup>1045</sup>United States' appellee's submission, para. 606 (referring to Panel Report, para. 7.1972).



share in each third country market.<sup>1046</sup> The Panel correctly held that, regardless of these other factors, the availability of the subsidized LCA in the market was a "fundamental cause" of the sales and market share lost by Boeing.<sup>1047</sup> The Panel further found that the European Communities' arguments concerning the market contraction caused by the events of 9/11 did not "detract from {its} conclusions concerning the effects of the subsidies in this dispute, which enabled Airbus to have available the particular models of LCA that it sold and delivered in the distressed market."<sup>1048</sup> Therefore, the United States argues, the Panel's non-attribution analysis is fully in line with the requirements of Articles 5 and 6.3 as interpreted by the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)*.<sup>1049</sup>

441. According to the United States, once the Panel found that the subsidies were the cause of market displacement and lost sales and that no other causal factors undermined that causal link, it was unnecessary for the Panel to speculate about what else might have occurred in the LCA market in the absence of the subsidies. The possibility that an unsubsidized competitor might have emerged in the place of a subsidized Airbus does not negate the actual effects of the subsidies. In any event, the Panel concluded that it was unlikely that a non-subsidized Airbus would have been able to enter the LCA market, and that even if Airbus had done so, it would have been a much weaker entity that was incapable of achieving the same market share.<sup>1050</sup>

442. Moreover, the United States suggests that the European Union's appeal in this respect is based on an incorrect interpretation of Articles 5 and 6.3 of the *SCM Agreement*. For the United States, speculation about conditions of competition in the absence of the subsidies would not affect the Panel's finding that, "but for" the subsidies, Airbus would not have launched its LCA when and as it did, and that the presence of those aircraft in the market was the "fundamental cause" of Airbus' market share gains. According to the United States, a "but for" analysis of the effects of the subsidies is limited to determining whether the subsidy recipient could have done what it actually did in the absence of the subsidies. Therefore, a "but for" analysis does not require consideration of one or more counterfactuals and speculating how the subsidy recipient might have evolved differently without the subsidies.

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<sup>1046</sup>United States' appellee's submission, paras. 608-611.

<sup>1047</sup>United States' appellee's submission, paras. 609 and 611 (quoting Panel Report, para. 7.1985).

<sup>1048</sup>United States' appellee's submission, para. 610 (quoting Panel Report, para. 7.1987). (footnote omitted)

<sup>1049</sup>United States' appellee's submission, para. 612 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 381).

<sup>1050</sup>United States' appellee's submission, para. 617 (referring to Panel Report, para. 7.1984 and 7.1993).

443. The United States adds that the European Union mischaracterizes the Panel's findings when it claims that the Panel found that a "non-subsidized Airbus would exist" and that "there would have been different, fewer or later in time Airbus LCA products."<sup>1051</sup> The Panel never found that a non-subsidized Airbus would exist; rather, it speculated that Airbus *might* have entered the LCA market without the subsidies in two "plausible scenarios", which the Panel referred to as "the unlikely event that Airbus would have been able to enter the LCA market as an unsubsidized competitor."<sup>1052</sup> In addition, the United States emphasizes that the European Union's counterfactual scenario is contradicted by the Panel's findings concerning: (i) the existence of significant barriers to entry into the LCA market, and spillover and learning effects across models of LCA; (ii) the significant proportion of the development costs of the A300 and A310 that were covered by the subsidies; and (iii) the four-year lag between order and delivery of aircraft that suggested that Airbus could not have benefited from high demand for single-aisle aircraft during the late 1980s and early 1990s.<sup>1053</sup>

444. The United States further argues that the Panel did not act inconsistently with its duty under Article 11 of the DSU to conduct an objective assessment of the matter in reaching its findings that the effect of the subsidies was the displacement of Boeing LCA from the various third country markets at issue. The United States considers that the Panel properly considered the evidence and arguments advanced by the parties, and produced a "reasoned and comprehensive"<sup>1054</sup> analysis to support its causation findings. Referring to *US – Zeroing (EC) (Article 21.5 – EC)* as support, the United States requests the Appellate Body to reject the European Union's claims under Article 11 of the DSU as mere reiterations of its claims that the Panel erred in interpreting and applying Articles 5 and 6.3 of the *SCM Agreement*.<sup>1055</sup> The United States further requests the Appellate Body to refrain from interfering with the Panel's discretion to weigh the evidence before it.

(b) Lost sales in the same market

445. The United States argues that the Panel correctly held that the use of the subsidies caused serious prejudice to the United States' interests under Article 5(c), in the form of significant lost sales in the same market within the meaning of Article 6.3(c) of the *SCM Agreement*. Consistent with the Panel's bifurcated approach to the analysis of its serious prejudice claims, and the structure of the

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<sup>1051</sup>United States' appellee's submission, para. 631 (quoting European Union's appellant's submission, para. 401 (original emphasis omitted)).

<sup>1052</sup>United States' appellee's submission, para. 634 (quoting Panel Report, para. 7.1984).

<sup>1053</sup>United States' appellee's submission, paras. 636-638; Panel Report, paras. 7.1717, 7.1749, 7.1750, 7.1934, 7.1935, 7.1948, and 7.1976.

<sup>1054</sup>United States' appellee's submission, para. 618.

<sup>1055</sup>United States' appellee's submission, para. 620 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 401 and 402).

European Union's claims on appeal, the United States presents separate claims of error in relation to the Panel's finding concerning the *existence* of a lost sale and the Panel's finding that the significant lost sales were caused by the subsidies.

(i) *Existence of a lost sale*

446. The United States argues that the Panel did not err in finding that the Emirates Airlines sale constituted a "significant lost sale" under Article 6.3(c) of the *SCM Agreement*. The United States requests the Appellate Body to uphold this finding for the reasons set out below.

447. The United States disagrees with the European Union that the Panel presumed that Boeing would have secured the Emirates Airlines sale had Airbus not won it. According to the United States, the Panel relied on evidence contained in the A380 business case to come to the conclusion that the Boeing 747 competed with the A380. The United States further underscores the Panel's finding that customers in the LCA industry consider all available aircraft to fulfil their purchasing requirements, and therefore LCA sales campaigns involve competition between Airbus and Boeing even in the absence of a "formal, binding proposal" by either manufacturer.<sup>1056</sup>

448. In addition, the United States emphasizes that the European Union does not dispute the Panel's conclusion that "Boeing lost sales to Airbus, in the sense that the customer purchased Airbus rather than Boeing LCA."<sup>1057</sup> Instead, in noting that seating capacity was the deciding factor in the Emirates Airlines' sales campaign, the European Union acknowledges that Emirates Airlines would have purchased a Boeing 747 had it not purchased an Airbus A380.

449. Finally, the United States maintains that the European Union has failed to establish that the Panel acted inconsistently with Article 11 of the DSU in reaching its findings. The United States suggests that the evidence on the record supported the Panel's finding that Emirates Airlines would have turned to the Boeing 747 had it not purchased the A380, because it was the only other aircraft that could fulfil its seating capacity needs. The United States further dismisses the European Union's argument that Boeing was never "serious"<sup>1058</sup> about launching a competitor to the A380. For this argument to be relevant, the European Union would have had to demonstrate that Boeing's 747-X was the only aircraft that Emirates could have considered if the A380 was not available. However, the evidence before the Panel demonstrated that Emirates itself purchased other Boeing aircraft to fulfil its needs. Therefore, the United States maintains that Boeing's decision not to launch the 747-X does

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<sup>1056</sup>United States' appellee's submission, para. 642 (quoting Panel Report, para. 7.1722).

<sup>1057</sup>United States' appellee's submission, para. 643 (quoting Panel Report, para. 7.1845).

<sup>1058</sup>United States' appellee's submission, para. 646 (quoting European Union's appellant's submission, para. 591).

not provide a basis for disturbing the Panel's finding that the sale to Emirates was a "lost sale" under Article 6.3(c).

(ii) *Causation – Single-aisle lost sales*

450. The United States submits that the Panel did not err in finding, with respect to sales by Airbus of single-aisle aircraft to Air Asia, Air Berlin, Czech Airlines, and easyJet, that the effect of the subsidies was significant "lost sales in the same market" within the meaning of Article 6.3(c) of the *SCM Agreement*. On the basis of the same arguments articulated with respect to the Panel's finding that the effect of the subsidies was to displace Boeing LCA from the European Communities and certain third country markets, the United States requests the Appellate Body to uphold the Panel's finding that the effect of the subsidies was significant lost sales in the same market under Article 6.3(c), to the extent it covers the lost sales in those campaigns.

451. First, the United States disagrees with the European Union that the Panel presumed, rather than established, causation when it found that the presence of Airbus LCA in the market sufficiently established that the subsidies that enabled a particular Airbus product launch caused Boeing to lose sales. The Panel, in essence, properly established a "genuine and substantial" link between the subsidies and Boeing's lost sales on the basis of the nature and magnitude of the subsidies, the conclusions of the Dorman Report, the A380 business case, undisputed public statements of government and Airbus officials, and the "individual and cumulative" effect of LA/MSF in terms of generating economies of scope and scale.<sup>1059</sup> The Panel correctly took into account the conditions of competition in the LCA industry, where aircraft availability is "the fundamental factor"<sup>1060</sup> in winning sales, in coming to the conclusion that Airbus' market presence resulted in Boeing's significant lost sales between 2001 and 2006. In addition, the Panel correctly considered—and rejected—non-attribution factors, such as Boeing's alleged mismanagement of customer relationships, geopolitical considerations, the role of engine manufacturers, and the events of 9/11. The Panel correctly held that these factors did not dilute the "genuine and substantial" link between the subsidies and Boeing's lost sales, insofar as the availability of the subsidized LCA in the market was a "fundamental cause" of the sales lost by Boeing.<sup>1061</sup>

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<sup>1059</sup>United States' appellee's submission, paras. 596-600; Panel Report, para. 7.1881, 7.1911, 7.1913-7.1918, 7.1923, 7.1935, 7.1937, 7.1939-7.1941, and 7.1948.

<sup>1060</sup>United States' appellee's submission, para. 604 (referring to Panel Report, paras. 7.1720, 7.1722, and 7.1724).

<sup>1061</sup>United States' appellee's submission, paras. 609 and 611 (quoting Panel Report, para. 7.1985).

452. Second, the United States maintains that Articles 5 and 6.3 of the *SCM Agreement* did not require the Panel to engage in speculation about what the conditions of competition would have been in the LCA market in the absence of the subsidies. The possibility that an unsubsidized competitor might have emerged in the place of a subsidized Airbus does not negate the actual effects of the subsidies. In this sense, speculation about the conditions of competition in the absence of the subsidies would not affect the Panel's finding that, but for the subsidies, Airbus would not have launched its LCA when and as it did, and that the presence of those aircraft in the market was the "fundamental cause" of Airbus' sales.<sup>1062</sup> According to the United States, a "but for" analysis of the effects of the subsidies is limited to determining whether the subsidy recipient could have done what it actually did in the absence of the subsidies. Therefore, Articles 5(c) and 6.3 do not require consideration of one or more counterfactuals speculating how the subsidy recipient might have evolved differently without the subsidies.

453. In addition, the United States argues that the European Union mischaracterizes the Panel's findings when it claims that the Panel found that "a non-subsidized Airbus would exist".<sup>1063</sup> The Panel merely speculated that Airbus *might* have entered the LCA market without the subsidies in two "plausible scenarios" in "the unlikely event that Airbus would have been able to enter the LCA market as an unsubsidized competitor."<sup>1064</sup> In addition, the European Union's counterfactual scenario that a non-subsidized Airbus could have launched a single-aisle LCA by 1987 and a twin-aisle LCA by 1991 is contradicted by the Panel's findings concerning: (i) the existence of significant barriers to entry into the LCA market, and spillover and learning effects across models of LCA; (ii) the significant proportion of the development costs of the A300 and A310 that were covered by the subsidies; and (iii) the four-year lag between order and delivery of aircraft that suggested that Airbus could not have benefited from high demand for single-aisle aircraft during the late 1980s and early 1990s.<sup>1065</sup>

454. Finally, the United States contends that the Panel did not act inconsistently with its duty under Article 11 of the DSU to conduct an objective assessment of the matter in reaching its finding that the effect of the subsidies was significant lost sales within the meaning of Article 6.3(c). The Panel properly considered the evidence and arguments advanced by the parties, and produced a "reasoned and comprehensive"<sup>1066</sup> analysis to support its causation findings. Referring to *US – Zeroing (EC)*

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<sup>1062</sup>United States' appellee's submission, para. 626.

<sup>1063</sup>United States' appellee's submission, para. 631 (quoting European Union's appellant's submission, para. 401 (original emphasis omitted)).

<sup>1064</sup>United States' appellee's submission, para. 634 (quoting Panel Report, para. 7.1984).

<sup>1065</sup>United States' appellee's submission, paras. 636-638; Panel Report, paras. 7.1717, 7.1934, 7.1935, 7.1948-7.1750, and 7.1976.

<sup>1066</sup>United States' appellee's submission, para. 618.

(Article 21.5 – EC) as support, the United States requests the Appellate Body to reject the European Union's claims under Article 11 of the DSU as mere reiterations of its claims that the Panel erred in interpreting and applying Articles 5 and 6.3 of the *SCM Agreement*.<sup>1067</sup> The United States further requests the Appellate Body to refrain from interfering with the Panel's discretion to weigh the evidence before it.

(iii) *Causation – A380 lost sales*

455. The United States argues that the Panel correctly found that the subsidies enabled Airbus to launch the A380, thus causing Boeing to lose the Emirates Airlines, Qantas Airways, and Singapore Airlines significant sales under Article 6.3(c) of the *SCM Agreement*. The United States requests the Appellate Body to reject the European Union's claims of error and uphold the Panel's finding that the effect of the subsidies was to cause significant lost sales in the same market within the meaning of Article 6.3(c) of the *SCM Agreement* for the reasons set out below.

456. The United States considers that the European Union seeks to re-litigate a factual question decided by the Panel in arguing that Airbus could have launched the A380 in the absence of the subsidies. The United States considers that the European Union's appeal is directed at the Panel's weighing of the evidence, which, according to the Appellate Body, falls within a panel's discretion as the initial trier of facts in a serious prejudice claim.<sup>1068</sup> Nonetheless, the United States underscores that the Panel's factual findings concerning Airbus' inability to finance the A380 in the absence of LA/MSF are "sound".<sup>1069</sup>

457. The United States maintains that the Panel's finding that Airbus could not have launched the A380 in the absence of LA/MSF was not based on its assessment of the credibility of the delivery forecasts contained in the A380 business case. Instead, the Panel specifically observed that the A380 business case did not examine the viability of a worst-case scenario in the absence of LA/MSF, and that the *ex post* sensitivity analysis submitted by the European Communities for this purpose failed to demonstrate that the launch would have been possible in the absence of LA/MSF.<sup>1070</sup> The United States adds that the Appellate Body need not consider this aspect of the European Union's appeal because, despite its concerns regarding the completeness and accuracy of the A380 business

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<sup>1067</sup>United States' appellee's submission, para. 620 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 401 and 402).

<sup>1068</sup>United States' appellee's submission, para. 649 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357).

<sup>1069</sup>United States' appellee's submission, para. 651.

<sup>1070</sup>United States' appellee's submission, para. 652 (referring to Panel Report, para. 7.1922-7.1927).

case, the Panel actually assumed that "the {A380} business case ... demonstrate{s} a positive {net present value} in a no-LA/MSF and Realistic Worse Case Scenario."<sup>1071</sup>

458. Second, the United States submits that the Panel objectively assessed and correctly rejected evidence concerning the availability of financing from EADS and BAE Systems for the development of the A380. The Panel correctly found that EADS' Offering Memorandum<sup>1072</sup> did not demonstrate how its corporate restructuring would have enabled the company to raise the funds that its constituent companies were unable to raise a few years earlier. Similarly, the European Union's reference to BAE Systems' annual balance sheet does not sufficiently establish that the company would have committed additional funds to the A380 project. The United States adds that the UK Department of Trade and Industry specifically contradicted this assertion when it stated that "the fundamental rationale of {LA/MSF} is to address the apparent unwillingness of the capital markets to fund projects with such high product development costs, high technological and market risks and such long pay back periods."<sup>1073</sup>

459. In addition, the United States submits that the Panel took into account and correctly rejected the European Communities' argument that risk-sharing suppliers would have been willing to put additional capital into the development of the A380. The Panel correctly held that Boeing securing a larger share of risk-sharing supplier financing for the development of the 787 a few years later did not establish that Airbus would have been able to increase that modality of financing for the development of the A380. The fact that the Panel reached a different conclusion than the European Union in this respect does not provide a basis for a reversal of this finding.

460. Finally, the United States argues that the European Union seeks to avoid the financial and technical cumulative effects of the subsidies granted for the development of earlier Airbus LCA by invoking a counterfactual scenario in which Airbus could have launched a single-aisle aircraft in 1987, a 200-300 seat LCA in 1991, and the A380 in 2000, without access to LA/MSF. The Panel considered such a hypothetical scenario, but found it "unlikely" that Airbus would have achieved its market position, sales, and technical expertise in the absence of the subsidies.<sup>1074</sup> The United States adds that the Panel's findings concerning the effects of the subsidies would not be undermined by additional findings with respect to a "wholly speculative counterfactual under which an entirely

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<sup>1071</sup>United States' appellee's submission, para. 653 (quoting Panel Report, para. 7.1943).

<sup>1072</sup>EADS' Offering Memorandum, *supra*, footnote 163.

<sup>1073</sup>United States' appellee's submission, para. 656 (quoting Panel Report, para. 7.1917; and referring to paras. 7.1918 and 7.1920).

<sup>1074</sup>United States' appellee's submission, para. 660; see also *ibid.*, section IX.D.4.

unsubsidized Airbus could have launched fewer and different LCA at different times", and still have been able to launch the A380 in 2000.<sup>1075</sup>

(c) Non-LA/MSF subsidies

461. The United States argues that the Panel correctly held that non-LA/MSF subsidies caused displacement and lost sales within the meaning of Article 6.3 (a), (b), and (c) of the *SCM Agreement*. In particular, the Panel correctly held that equity infusion and share transfer measures undertaken by the Governments of France and Germany, infrastructure subsidies, and R&TD subsidies caused the displacement of Boeing LCA from the European Communities and third country markets under Article 6.3(a) and (b), and significant lost sales in the same market under Article 6.3(c), of the *SCM Agreement*.

462. The United States submits that the Panel's decision to analyze the effect of all subsidies at issue on an aggregated basis is consistent with the *SCM Agreement* and with past panel and Appellate Body findings in this regard. The United States stresses that Article 6.3 does not provide a methodology for the establishment of causation, and simply requires demonstration that a subsidy causes serious prejudice. According to the United States, an aggregated analysis of the effects of the subsidies at issue satisfied the requirements of Article 6.3 because each of the subsidies at issue shared a common causal link, in that they "facilitated Airbus' development of its LCA family."<sup>1076</sup> Referring to the panel and Appellate Body reports in *US – Upland Cotton*, the United States recalls that a panel may assess the effects of subsidies collectively, provided those subsidies share a sufficient nexus with the subsidized product and their effects manifest themselves collectively.<sup>1077</sup>

463. The United States maintains further that the European Union mischaracterizes the Panel's findings in arguing that the Panel established "causation by association".<sup>1078</sup> In the United States' view, the Panel's aggregated analysis was based on its finding that the nature and operation of each of the challenged subsidies enhanced Airbus' ability to develop and bring to the market its LCA family, consequently allowing Airbus to gain market share and significant sales at Boeing's expense. Thus, the Panel's finding, that differences in "structure, operation, and design"<sup>1079</sup> of the different subsidies

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<sup>1075</sup>United States' appellee's submission, para. 660.

<sup>1076</sup>United States' appellee's submission, para. 663.

<sup>1077</sup>United States' appellee's submission, para. 664 (referring to Panel Report, *US – Upland Cotton*, para. 7.1192; and Appellate Body Report, *US – Upland Cotton*, paras. 483 and 484).

<sup>1078</sup>United States' appellee's submission, para. 666 (quoting European Union's appellant's submission, para. 656).

<sup>1079</sup>United States' appellee's submission, para. 667 (quoting Panel Report, para. 7.1956).



did not preclude an aggregated analysis, was based on a "shared nexus" between each of the subsidies and the demonstrated displacement and lost sales.<sup>1080</sup>

464. The United States emphasizes that the Panel's causation findings for non-LA/MSF subsidies were based on its review of an "exhaustive record" that led it to conclude that all non-LA/MSF subsidies "were granted during the period each succeeding model of Airbus LCA was being developed and brought to market"<sup>1081</sup> and that they "complemented and supplemented" the product effect of LA/MSF.<sup>1082</sup> The United States emphasizes that, elsewhere in its appellant's submission, the European Union clearly acknowledges the nexus among the subsidies in explaining that the purpose of the French Government's capital contributions "was to fund expansion in LCA product development".<sup>1083</sup>

465. The United States charges the European Union with trying to re-litigate factual issues decided by the Panel on the nature, magnitude, and timing of each subsidy. In addition, the United States contends that the European Union entirely overlooks the Panel's analysis of the timing of each subsidy in supporting the development of the Airbus product in respect of which the subsidies were provided. The United States opines further that the European Union's argument that the Panel should have established that each subsidy was "necessary" to enable a particular product launch implies too high of a standard for an aggregated analysis of causation under Article 6.3. Such standard would permit circumvention of the disciplines of Article 6.3 by subdividing subsidy programmes into smaller measures that individually would not have been found to cause adverse effects, but which, in the aggregate, would negatively affect competition in a manner inconsistent with Articles 5 and 6.3. Thus, the Panel's decision to assess cumulatively the effects of measures operating the same causal mechanism was correct, even if certain subsidies, in isolation, would not have caused adverse effects.

466. On this basis, the United States submits that the Panel correctly applied the causation standard in Article 6.3 when it undertook an aggregated analysis of LA/MSF and non-LA/MSF measures based on its finding that these measures shared a sufficient nexus both with the subsidized product and the particular effects-related variable under consideration. The Panel correctly held that each subsidy that was provided in respect of Airbus LCA was "granted during the period {that} each succeeding model

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<sup>1080</sup>United States' appellee's submission, para. 667.

<sup>1081</sup>United States' appellee's submission, para. 668 (quoting Panel Report, footnote 5692 to para. 7.1956).

<sup>1082</sup>United States' appellee's submission, para. 668 (quoting Panel Report, para. 7.1956).

<sup>1083</sup>United States' appellee's submission, para. 670 (quoting European Union's appellant's submission, para. 1094, in turn referring to European Communities' first written submission to the Panel, paras. 1134 and 1135 (original emphasis omitted)).

of Airbus LCA was being developed and brought to market"<sup>1084</sup>, and that each subsidy operated by the same causal mechanism—facilitating Airbus' ability to bring to market its full family of LCA.

(d) The relevance of the 1992 Agreement

467. Finally, the United States rejects the European Union's claims that the Panel erred in its interpretation of Article 5(c) of the *SCM Agreement*, and acted inconsistently with Articles 11 and 12.7 of the DSU, by failing to address the European Communities' arguments with respect to the relevance of the 1992 Agreement in its assessment of the United States' claims of serious prejudice.

468. The United States argues that the European Union fails to explain why the Panel's failure to "make reference" to its arguments on the relevance of the 1992 Agreement in its serious prejudice analysis amounts to legal error under Articles 11 and 12.7 of the DSU. These provisions require panels to make an "objective examination" and to set out "the basic rationale behind any findings and recommendations that it makes." The Appellate Body has found that Article 11 of the DSU gives a panel the discretion to "address only those arguments it deems necessary to resolve a particular claim."<sup>1085</sup> The Appellate Body has also explained that Article 12.7 "establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations", one that "disclose{s} the essential, or fundamental, justification" for those findings and recommendations.<sup>1086</sup> The United States argues that the Panel's findings of violation under Article 5(c) of the *SCM Agreement* provided an objective assessment of the applicability of and conformity with the covered agreements under Article 11 and disclosed the "essential, or fundamental, justification for those findings" under Article 12.7 of the DSU.

469. In the event the Appellate Body were to consider that the European Union's arguments on the 1992 Agreement were relevant for the Panel's analysis under Article 5(c), the United States submits that the European Union's arguments in this respect would fail. As the Panel correctly noted, Article 2 of the 1992 Agreement suggests that the parties intended to preserve their right to challenge pre-1992 measures for consistency with the GATT/WTO subsidies disciplines. This suggests that the 1992 Agreement does not preclude a party from raising claims of violation in respect of WTO obligations. In addition, contrary to the European Union's suggestion, compliance with the

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<sup>1084</sup>United States' appellee's submission, para. 673 (quoting Panel Report, footnote 5692 to para. 7.1956).

<sup>1085</sup>United States' appellee's submission, para. 680 (quoting Appellate Body Report, *EC – Poultry*, para. 135). (emphasis added by the United States omitted)

<sup>1086</sup>United States' appellee's submission, para. 679 (quoting Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 243, in turn quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 106).

1992 Agreement is not a "fact" that the Panel was required to take into account, but rather a "legal conclusion" that was not within the Panel's terms of reference. Thus, in the United States' view, it would have been improper for the Panel to take into account as a "fact" something that constitutes a legal conclusion that it was not entitled to make.

C. *Claims of the United States – Other Appellant*

1. The LA/MSF "Programme"

470. In its other appeal, the United States claims that the Panel erred in concluding that the United States had not demonstrated the existence of the alleged LA/MSF "Programme". The United States requests the Appellate Body to reverse the Panel's finding and complete the analysis by ruling that the challenged measure "constitutes a specific subsidy, provided by France, Germany, Spain and the United Kingdom to Airbus, that causes adverse effects to the interests of the United States."<sup>1087</sup>

471. The United States emphasizes that it informed the Panel on "multiple occasions" that its claim against the alleged LA/MSF Programme was not an "as such" challenge.<sup>1088</sup> Rather, it challenged the LA/MSF Programme as "a measure that currently is breaching EC obligations under the {SCM Agreement} by causing adverse effects to the interests of the United States."<sup>1089</sup> Yet the Panel applied the legal framework set out by the Appellate Body in *US – Zeroing (EC)* for determining whether an alleged measure could be challenged "as such" in WTO dispute settlement proceedings. According to the United States, in so doing it "committed legal error and incorrectly inferred from the facts before it that the United States had not demonstrated the existence of the {LA/MSF} Program."<sup>1090</sup>

472. Referring to the Appellate Body report in *US – Continued Zeroing*, the United States suggests that "a Member's 'ongoing conduct' may itself be challengeable in WTO dispute settlement proceedings, separate from the specific applications of that conduct in particular circumstances."<sup>1091</sup> Rather than applying this approach in evaluating the United States' claim against the alleged LA/MSF Programme, the Panel began its analysis by reviewing the Appellate Body's findings in *US – Zeroing (EC)*, where one of the measures at issue was challenged "as such". In doing so the Panel erred by

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<sup>1087</sup>United States' other appellant's submission, paras. 82 and 83(e).

<sup>1088</sup>United States' other appellant's submission, para. 43 (referring to Panel Report, para. 7.518; United States' response to Panel Question 136, para. 4; and United States' oral statement at the second Panel meeting, paras. 34-37).

<sup>1089</sup>United States' other appellant's submission, para. 43 (quoting United States' response to Panel Question 136, para. 4 (original underlining)).

<sup>1090</sup>United States' other appellant's submission, para. 42.

<sup>1091</sup>United States' other appellant's submission, para. 44 (referring to Appellate Body Report, *US – Continued Zeroing*, paras. 180 and 181).

requiring the United States to demonstrate the "general and prospective application" of the LA/MSF Programme, although such a requirement, according to the United States, "is uniquely related to 'as such' challenges", and the United States had explained to the Panel that it was not challenging the LA/MSF Programme "as such".<sup>1092</sup>

473. The United States also takes issue with the Panel's alternative finding that, even if the United States was not required to establish the general and prospective application of the alleged unwritten LA/MSF Programme, the Panel would nevertheless have concluded that the United States had not demonstrated that an unwritten LA/MSF Programme exists. In reaching this conclusion, the Panel effectively continued to require the United States to establish general and prospective application, although the Panel had said it would not do so. The United States argues that the Panel appeared to have considered this characteristic to be inherent in any "programme" and therefore imposed a higher burden for complaining Members that direct their challenge against a "programme" instead of "some other label"<sup>1093</sup> for an unwritten measure. Yet, for the United States, the standard for evaluating whether a measure exists should not depend on whether a complaining party describes the object of its challenge as a "programme", "policy", "ongoing conduct", "continued use", or "moratorium".<sup>1094</sup>

474. The United States requests the Appellate Body to complete the legal analysis using the "proper legal framework" for evaluating the United States' claim against the alleged LA/MSF Programme and on the basis of the factual findings made by the Panel. The United States suggests that, had the Panel followed the approach set out by the Appellate Body in *US – Continued Zeroing*, where the Appellate Body found that "'ongoing conduct' itself may be challengeable in WTO dispute settlement proceedings", it would have found the existence of an unwritten LA/MSF Programme.<sup>1095</sup>

475. The United States describes the alleged LA/MSF Programme as "ongoing conduct" or "repeated provision of {LA/MSF} to each and every major Airbus model, under the same four core conditions and benefiting the same subsidized product".<sup>1096</sup> The United States further explains that its challenge before the Panel "was based on a demonstration that over the past four decades (since 1969), the Airbus governments have consistently subsidized Airbus, in the form of {LA/MSF}, by underwriting the costs of developing each and every single model through long-term unsecured loans at zero or below-market rates of interest, with back-loaded repayment schedules that allow Airbus to

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<sup>1092</sup>United States' other appellant's submission, paras. 42, 45, and 47.

<sup>1093</sup>United States' other appellant's submission, para. 51.

<sup>1094</sup>United States' other appellant's submission, para. 51.

<sup>1095</sup>United States' other appellant's submission, paras. 53 and 58.

<sup>1096</sup>United States' other appellant's submission, para. 61.

repay the loans through a levy on each delivery of the financed aircraft."<sup>1097</sup> According to the United States, the Panel's factual findings, viewed in the light of the Appellate Body's analysis in *US – Continued Zeroing*, demonstrate the existence of the LA/MSF Programme "as a measure subject to challenge in WTO dispute settlement proceedings".<sup>1098</sup> The United States emphasizes that its complaint is not directed against a measure with "general and prospective application". Instead, it refers to the alleged LA/MSF Programme as consisting "of the repeated provision of {LA/MSF} on the same four 'core terms'" and argues that "{LA/MSF} had been provided in respect of every model of aircraft for which Airbus sought such assistance over four decades."<sup>1099</sup> According to the United States, "the Panel's factual findings, viewed in the light of the Appellate Body's analysis in *US – Continued Zeroing*, make clear that the United States had demonstrated the existence of the {LA/MSF} Program as a measure subject to challenge in WTO dispute settlement proceedings."<sup>1100</sup> Additional factual findings<sup>1101</sup> by the Panel "indicate that the provision of {LA/MSF} in respect of each of the models challenged by the United States were not 'one-off grant{s}' of a single subsidy' for the development of that model"<sup>1102</sup>, but instead reflect "a concerted and coherent approach—that is, a 'program' or 'ongoing conduct'—designed to contribute to the long-term competitiveness of Airbus".<sup>1103</sup>

476. In conclusion, the United States submits that the facts found by the Panel demonstrate the existence of the measure challenged by the United States as a repeated course of action by the responding Members. Specifically, those facts show the consistent and repeated use of LA/MSF, "on the same four 'core terms', for all major models of Airbus aircraft since 1969, together with the recognition by governments and Airbus that an LCA manufacturer needed to produce a range of aircraft models in order to be successful, which was the objective of establishing Airbus."<sup>1104</sup> Thus "each individual grant of {LA/MSF} effectuated the broader scheme that the Airbus governments maintain to ensure that at least one of the world's LCA producers will be European."<sup>1105</sup> Taken collectively, the United States argues, "these facts evince the {LA/MSF} Program, a specific course

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<sup>1097</sup>United States' other appellant's submission, para. 60.

<sup>1098</sup>United States' other appellant's submission, para. 64.

<sup>1099</sup>United States' other appellant's submission, para. 64.

<sup>1100</sup>United States' other appellant's submission, para. 64.

<sup>1101</sup>United States' other appellant's submission, para. 69 (referring to Panel Report, paras. 7.1665-7.1667, 7.1721, and 7.1726).

<sup>1102</sup>United States' other appellant's submission, para. 70 (quoting Panel Report, para. 7.1975).

<sup>1103</sup>United States' other appellant's submission, para. 70.

<sup>1104</sup>United States' other appellant's submission, para. 71.

<sup>1105</sup>United States' other appellant's submission, para. 71.

of ongoing conduct comprising a 'measure', separate from the individual instances of {LA/MSF}, that is the proper subject of challenge in WTO dispute settlement proceedings."<sup>1106</sup>

477. The United States maintains that the alleged LA/MSF Programme constitutes a subsidy that causes adverse effects to the interests of the United States. In support of its position, the United States recalls that the Panel found the existence of a financial contribution and a benefit for each of the individual instances of LA/MSF, and that the Panel agreed with the United States that each of these subsidies was "specific".<sup>1107</sup> The Panel also found that the effect of the subsidies in this dispute was displacement in the EC and third country markets and significant lost sales within the meaning of Article 6.3 of the *SCM Agreement*.<sup>1108</sup> In addition, the United States points to the Panel's finding that the ability of Airbus "to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized LA/MSF."<sup>1109</sup> On this basis, the United States submits that the Panel's findings and analysis provide the factual and legal basis for the Appellate Body to find that the LA/MSF Programme "caused serious prejudice to the interests of the United States in the form of displacement of United States' LCA from the EC and certain third country markets and the significant lost sales during the period 2001-2006 found by the Panel with respect to individual instances of {LA/MSF} ".<sup>1110</sup>

## 2. Export Subsidies

478. The United States appeals the Panel's finding that the LA/MSF contracts by France for the A380 and the A330-200<sup>1111</sup>, and the LA/MSF contracts by France and Spain for the

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<sup>1106</sup>United States' other appellant's submission, para. 71.

<sup>1107</sup>United States' other appellant's submission, para. 73 (referring to Panel Report, paras. 7.377, 7.379, 7.488-7.490, and 7.497).

<sup>1108</sup>United States' other appellant's submission, paras. 77 and 78 (referring to Panel Report, para. 7.1993).

<sup>1109</sup>United States' other appellant's submission, para. 80 (quoting Panel Report, para. 7.1949).

<sup>1110</sup>United States' other appellant's submission, para. 81.

<sup>1111</sup>The "French A380 contract" (Panel Exhibit US-116 (BCI)) is the *Agreement (of 20 March 2002) between the aeronautical programme service (SPAé) as signatory authority of the agreement acting on behalf and for the account of the State, on the one hand, and the company Airbus France, on the other hand, concerning the Airbus A380 repayable advance.*

The "French A330-200 contract" (Panel Exhibit US-78 (BCI)) is the *Agreement (of 28 November 1996) between the signatory authority of the agreement acting on behalf and for the account of the State, on the one hand, and Aérospatiale, on the other hand, concerning the development of the Airbus A330-200.*

A340-500/600<sup>1112</sup>, do not constitute subsidies contingent in fact upon anticipated export performance within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*. Although the Panel also found that the United States failed to establish that the subsidies at issue were contingent in law upon anticipated export performance, the United States has not appealed this finding.

- (a) The alleged requirement imposed by the Panel on evidence concerning motivation

479. The United States submits that a *de facto* contingent relationship between the granting of a subsidy and anticipated exportation, within the meaning of footnote 4, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy. According to the United States, "{n}othing in the text of Article 3.1 or footnote 4 *compels* an inquiry into the subjective intent of a Member in the context of the *tie* between the subsidy and anticipated exports."<sup>1113</sup> Rather, the Appellate Body has emphasized that "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 ... is likely to be decisive in any given case."<sup>1114</sup> Thus, the "subjective motivation of a granting authority may be one factor in that analysis, but is not in and of itself a necessary condition for a finding of contingency".<sup>1115</sup> Furthermore, referring to the disputes in *Australia – Automotive Leather II* and *Canada – Aircraft*, the United States maintains that "{p}revious Appellate Body and panel reports examining *de facto* export subsidies make clear that the demonstration of the tie between a subsidy and anticipated exports does *not* require evidence of subjective motivation of the subsidizing Member."<sup>1116</sup>

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<sup>1112</sup>The "French A340-500/600 contract" (Panel Exhibit US-36 (BCI)) is the *Agreement (of 29 December 1998) between the signatory authority of the agreement on behalf and for the account of the State, on the one hand, and Aérospatiale, on the other hand, concerning the development of the Airbus A340-500 and A340-600*. We note that the Panel interchangeably referred to Panel Exhibits US-35 (BCI) and US-36 (BCI) as the French A340-500/600 contract, and at times it referred to Panel Exhibit US-36 (BCI) as the French A340-500/600 convention (see Panel Report, footnotes 2259 and 3243). In this Report, we refer to the agreement contained in Panel Exhibit US-36 (BCI) as the French A340-500/600 contract.

The "Spanish A340-500/600 contract" (Panel Exhibits EC-87 (BCI) and US-37 (BCI)) is the *Framework Cooperation Agreement (of 28 December 1998) between the Ministry of Industry and Energy and the company Construcciones Aeronáuticas S.A. on financing the participation of the said company in the development of the programme Airbus A340-500 and A340-600*.

<sup>1113</sup>United States' other appellant's submission, para. 8. (original emphasis)

<sup>1114</sup>United States' other appellant's submission, para. 8 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167 (original emphasis)).

<sup>1115</sup>United States' other appellant's submission, para. 8.

<sup>1116</sup>United States' other appellant's submission, para. 9. (original emphasis)

480. The United States submits that the Panel "departed significantly"<sup>1117</sup> from the objective legal standard of contingency under Article 3.1(a) and footnote 4 in its analysis of the United States' export subsidy claims. Instead, "the Panel effectively and erroneously applied a standard, not found in the text of the SCM Agreement, that *requires* evidence of specific member State 'motivation' to find export subsidization."<sup>1118</sup> The United States recalls that, as the Panel found, each of the seven LA/MSF contracts at issue established repayment terms that required Airbus to make a substantial number of exports.<sup>1119</sup> This finding led the Panel to conclude that the evidence supported the view that the provision of the seven LA/MSF contracts on sales-dependent repayment terms was, at least in part, "conditional" upon the LA/MSF governments' anticipated exportation or export earnings.<sup>1120</sup> The Panel's recognition of "conditionality" or "dependence" at this point "was sufficient to determine that the provision of all seven instances of {LA/MSF} contracts was tied to anticipated exports".<sup>1121</sup> For the United States, the Panel erroneously concluded that this demonstration was "{not} decisive" and, following a review of additional evidence provided by the United States, found that only the German, Spanish, and UK A380 LA/MSF constituted *de facto* export subsidies.<sup>1122</sup>

481. Quoting the Panel's finding in paragraph 7.690 of its Report, the United States argues that the Panel found the following four elements "critical" to its finding of *de facto* export contingency with respect to the German, Spanish, and UK A380 LA/MSF: (i) repayment terms that necessarily involved exportation; (ii) anticipation of export performance; (iii) member States' reliance on full repayment by Airbus; and (iv) the motivation of the member States to promote exports through the LA/MSF contracts. According to the United States, the Panel "found the first three of these factors to exist with respect to *all seven* challenged instances of {LA/MSF}"<sup>1123</sup>, and the "only element that the Panel did not find for the French A380, French and Spanish A340-500/600 and French A330-200 {LA/MSF} was the specific motivation of the respective member State to promote exports."<sup>1124</sup> Thus, the Panel "effectively *required* evidence of specific motivation in order to find a tie between the subsidy and anticipated exports".<sup>1125</sup>

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<sup>1117</sup>United States' other appellant's submission, para. 12.

<sup>1118</sup>United States' other appellant's submission, para. 12. (original emphasis)

<sup>1119</sup>United States' other appellant's submission, para. 13 (referring to Panel Report, para. 7.678). The seven contracts include the four that are the subject of the United States' other appeal, as well as the German, Spanish, and UK LA/MSF contracts for the A380 that were found by the Panel to be subsidies contingent in fact upon export performance. (See Panel Report, para. 7.690)

<sup>1120</sup>United States' other appellant's submission, para. 13 (referring to Panel Report, para. 7.678).

<sup>1121</sup>United States' other appellant's submission, para. 13.

<sup>1122</sup>United States' other appellant's submission, para. 14 (quoting Panel Report, para. 7.678).

<sup>1123</sup>United States' other appellant's submission, para. 16 (original emphasis) (referring to Panel Report, paras. 7.654, 7.657, 7.660, and 7.678).

<sup>1124</sup>United States' other appellant's submission, para. 16.

<sup>1125</sup>United States' other appellant's submission, para. 16. (original emphasis)



482. According to the United States, the Panel's "quest for evidence of the subjective motivation of the member States is particularly apparent in its analysis" with respect to the Spanish A340-500/600 contract.<sup>1126</sup> As the Panel acknowledged, the preambular language in the Spanish A340-500/600 contract was similar to the language contained in the Spanish A380 contract.<sup>1127</sup> Further, the Panel had found that the Spanish A380 contract constituted a subsidy contingent in fact upon export performance. However, the Panel determined that the preambular language in the Spanish A340-500/600 contract "did not reflect the motivation of the Spanish government in entering into the {LA/MSF} contract" and was therefore "meaningfully different" from the language in the Spanish A380 contract.<sup>1128</sup> Thus, given that the Panel ultimately concluded that the Spanish A340-500/600 contract did not constitute a subsidy contingent in fact upon export performance, the Panel "effectively concluded that what it considered to be the absence of direct evidence of ... specific motivation was dispositive and precluded a finding of *de facto* export subsidization."<sup>1129</sup>

483. The United States further submits that, "{a}s panels and the Appellate Body have recognized, divining the subjective motivation of a Member pursuing a particular policy may not always be possible, particularly given the multiple motivations that may underlie the adoption of a given measure."<sup>1130</sup> Thus, if "subjective motivation were a necessary requirement for reaching a finding of *de facto* export subsidization, a subsidizing Member could tie the grant of a subsidy to exports and still avoid a finding of WTO-inconsistency, for example, simply by ensuring no public statements of motivation were made or included in the measure or discussion of it, or by publicly declaring additional motivations that did not relate to the desire to increase exports."<sup>1131</sup> As a result, the prohibition on export subsidies under Article 3.1(a) and footnote 4 of the *SCM Agreement* "would be easily circumvented".<sup>1132</sup>

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<sup>1126</sup>United States other appellant's submission, para. 17.

<sup>1127</sup>United States' other appellant's submission, para. 17 and footnote 16 to para. 18 (referring to Panel Report, para. 7.681, in turn quoting the "Spanish A380 contract" (Panel Exhibits EC-88 (BCI) and US-73 (BCI)), *Cooperation Agreement between the Ministry of Science and Technology (MCYT) and the company EADS Airbus SL on financing the participation of the said company in the development of the Airbus A-380 family programme*, preamble, 7th recital, which is BCI).

<sup>1128</sup>United States' other appellant's submission, para. 18.

<sup>1129</sup>United States' other appellant's submission, para. 19.

<sup>1130</sup>United States' other appellant's submission, para. 21 (referring to Panel Report, *Japan – DRAMs (Korea)*, para. 7.104; Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 27-29, DSR 1996:I, 97, at 119-121; GATT Panel Report, *EEC – Parts and Components*, para. 5.6; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 259; Panel Report, *Japan – Film*, para. 10.87; Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.2558; and Appellate Body Report, *Chile – Alcoholic Beverages*, paras. 62 and 63).

<sup>1131</sup>United States' other appellant's submission, para. 21.

<sup>1132</sup>United States' other appellant's submission, para. 20.

484. Moreover, the United States contends that the Panel derived evidence concerning the governments' motivation from contract language revealing that the member States' decisions to enter into these contracts were driven by, or in "contractual reliance"<sup>1133</sup> on, Airbus' assurance that a substantial amount of sales would be exports. According to the United States, by explicitly making such contract language the determinative basis for finding that the subsidies were contingent upon export performance, "the Panel has essentially reduced compliance with Article 3.1 and footnote 4 to a semantic matter of deleting a few phrases from future financing agreements."<sup>1134</sup>

485. On this basis, the United States maintains that the Panel introduced a subjective requirement that does not exist in Article 3.1(a) and footnote 4, and requests the Appellate Body to reverse the Panel's finding that the United States had not shown that the French A380 contract, the French and Spanish A340-500/600 contracts, and the French A330-200 contract were contingent in fact upon anticipated export performance.

(b) The United States' request for completion of the analysis

486. The United States requests the Appellate Body to complete the analysis by applying the correct legal standard and by concluding, on the basis of the Panel's factual findings or undisputed facts, that the French LA/MSF contracts for the A380, the A340-500/600, and the A330-200, and the Spanish LA/MSF contract for the A340-500/600, constituted subsidies contingent in fact upon anticipated export performance within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*.

487. The United States maintains that, before the Panel, it established that the member States expected certain levels of export performance in return for the provision of LA/MSF, and that these expectations "were based not only on the significant export-oriented nature of Airbus, but also on assurances provided by Airbus forecasts and existing orders for certain models at the time the member States committed to provide {LA/MSF}."<sup>1135</sup> The United States further argues that "{t}hese expectations, and Airbus' commitment to meet or exceed them, were codified in the form of {LA/MSF} contracts signed by each member State for a particular model of aircraft" and that, "{w}ithout these contracts, {LA/MSF} would not have been provided."<sup>1136</sup> Thus, each of the LA/MSF contracts reflects an "exchange of commitments", whereby the governments committed to

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<sup>1133</sup>United States' other appellant's submission, para. 22 (quoting Panel Report, para. 7.683).

<sup>1134</sup>United States' other appellant's submission, para. 22.

<sup>1135</sup>United States' other appellant's submission, para. 26.

<sup>1136</sup>United States' other appellant's submission, para. 26.

provide the loans in exchange for Airbus' commitment to repay the loans on the basis of a specified number of aircraft sales that could not be achieved without exports.

488. The United States emphasizes that "it is the particular structure of the {LA/MSF} contracts that provides the 'conditionality' required under Article 3.1(a) and footnote 4".<sup>1137</sup> Specifically, the member States "could have structured these contracts in other ways", for example, "by establishing a repayment calendar based on specific dates without regard to the deliveries made by Airbus" or by requiring "repayment over much smaller numbers of deliveries" that "could be reached without necessarily exporting".<sup>1138</sup> Instead, "by tying repayment of ... loans to a specific number of deliveries that required exportation"<sup>1139</sup>, the LA/MSF contracts reflect an exchange of commitments that "is the essence of 'conditionality'" between the granting of a subsidy and export performance, within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*.<sup>1140</sup>

489. On this basis, the United States requests the Appellate Body to find that the French A380 contract, the French and Spanish A340-500/600 contracts, and the French A330-200 contract constituted subsidies contingent in fact upon export performance within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*. The United States further requests the Appellate Body to clarify that the Panel's recommendation, pursuant to Article 4.7 of the *SCM Agreement*, that the measures found to constitute export subsidies in this dispute be withdrawn within 90 days, also applies to these contracts.

#### D. *Arguments of the European Union – Appellee*

##### 1. The LA/MSF "Programme"

490. The European Union supports the Panel's finding that the United States failed to establish the existence of the alleged LA/MSF Programme. As a preliminary matter, the European Union argues that the United States has failed, in its Notice of Other Appeal, to identify the legal provision alleged to be erroneously interpreted or applied by the Panel, as required under Rule 23(2)(c)(ii) of the *Working Procedures for Appellate Review*. The European Union submits that, even in the light of the United States' other appellant's submission, "it is still not clear which legal provision(s) of the covered agreements the United States is alleging the Panel violated."<sup>1141</sup>

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<sup>1137</sup>United States' other appellant's submission, para. 31.

<sup>1138</sup>United States' other appellant's submission, para. 31.

<sup>1139</sup>United States' other appellant's submission, para. 32.

<sup>1140</sup>United States' other appellant's submission, para. 33.

<sup>1141</sup>European Union's appellee's submission, para. 203.

491. In addition, the European Union contends, a review of the actual content of the United States' arguments on appeal reveals a focus on the Panel's factual determination regarding the existence of the alleged LA/MSF Programme, yet the United States has failed to properly raise this appeal under Article 11 of the DSU. According to the European Union, the United States is confusing two distinct issues. The first is whether a measure, as described by the complaining Member, exists. For the European Union, this issue is a matter of facts and evidence, "and would have to be appealed pursuant to Article 11 of the DSU".<sup>1142</sup> The second issue relates to the legal question of whether a measure, assuming it exists, can be challenged under WTO dispute settlement. This latter issue was addressed by the Appellate Body in *US – Continued Zeroing*, and serves as the core focus of the United States' other appellant's submission. This issue is not relevant to the present case, however, "because the Parties agree that a subsidy programme is capable of being a measure for the purposes of dispute settlement."<sup>1143</sup> Based on this reasoning, the European Union argues that, to the extent the Appellate Body finds that the United States is "lodging implicit challenges" under Article 11 of the DSU, "those challenges must be dismissed due to the US failure to include them in its Notice of Other Appeal, and the lack of due process that would result if the Appellate Body were to evaluate them."<sup>1144</sup>

492. In any event, the European Union argues that the Panel properly relied on the Appellate Body report in *US – Zeroing (EC)* for guidance, given that the United States describes the alleged LA/MSF Programme in terms of the measure at issue in that dispute. According to the European Union, the United States also failed in its attempt to identify any inconsistency between the Panel's findings and the Appellate Body report in *US – Continued Zeroing*, on which the United States asserts the Panel should have relied. Moreover, while "that Appellate Body Report stands for the proposition that 'ongoing conduct' might constitute an unwritten measure that can be challenged in WTO dispute settlement, such 'ongoing conduct' must constitute *more* than simply a 'repeated course of action'."<sup>1145</sup> The European Union recognizes, however, that a "'repeated course of action' *can*, in certain circumstances, be *evidence* of an unwritten measure with prospective applicability", noting that, when completing the analysis and assessing the existence of the measures asserted by the European Communities in *US – Continued Zeroing*, the Appellate Body emphasized that "it was looking for evidence of future applicability."<sup>1146</sup> Thus, the Appellate Body assessed the "'repeated course of action' not as automatically constituting a measure, but simply as evidence of an unwritten

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<sup>1142</sup>European Union's appellee's submission, para. 205.

<sup>1143</sup>European Union's appellee's submission, para. 205.

<sup>1144</sup>European Union's appellee's submission, para. 227.

<sup>1145</sup>European Union's appellee's submission, para. 250 (original emphasis) (referring to United States' other appellant's submission, para. 58).

<sup>1146</sup>European Union's appellee's submission, para. 250 (original emphasis) (referring to Appellate Body Report, *US – Continued Zeroing*, para. 191).

measure that would 'likely continue to be applied'".<sup>1147</sup> According to the European Union, the United States has in this case disregarded this aspect of the reasoning by the Appellate Body in *US – Continued Zeroing*.

493. The European Union further argues that, in *US – Continued Zeroing*, "there was clearly an intermediate level between the zeroing methodology and the individual administrative reviews."<sup>1148</sup> According to the European Union, "{t}his intermediate level was variously referred to as the duty, or the order, or the methodology as applied to a particular product exported from the European Union to the United States."<sup>1149</sup> This is why the European Union "was able to explain that it was not challenging the methodology ('as such'), but that in addition to challenging the administrative reviews it was also challenging the intermediate level that implied the continued future use of the zeroing methodology."<sup>1150</sup> The European Union emphasizes that "the point about the intermediate level was that it was of prospective application."<sup>1151</sup> By contrast, in the present dispute "there is no intermediate level: there is only the alleged {LA/}MSF programme and the instances of its application."<sup>1152</sup> The European Union concludes from this that the attempts by the United States to articulate an alleged legal error, based on a supposed distinction with *US – Zeroing (EC)* and the assertion that the United States is not challenging the alleged LA/MSF Programme "as such", "must necessarily fail".<sup>1153</sup> The European Union further argues that any finding by the Appellate Body that the alleged LA/MSF Programme existed and constituted a subsidy that caused adverse effects would not extend the scope of the European Union's implementation obligations, "as it does not add to the 'adverse effects' to be removed under Article 7.8 of the *SCM Agreement* or those 'determined to exist', within the meaning of Articles 7.9 and 7.10 of the *SCM Agreement*" as a result of individual LA/MSF measures.<sup>1154</sup>

494. The European Union argues that the United States has changed the description of the measure it challenges on appeal, now simply combining into a single measure all instances of past LA/MSF loans. Under the United States' approach, "the whole is *not* greater than the sum of its constituent parts."<sup>1155</sup> The European Union adds that, while it asserts that the alleged LA/MSF Programme is a "broader scheme" than, and "separate from", the individual instances of LA/MSF loans, "the

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<sup>1147</sup>European Union's appellee's submission, para. 250.

<sup>1148</sup>European Union's appellee's submission, para. 211.

<sup>1149</sup>European Union's appellee's submission, para. 211.

<sup>1150</sup>European Union's appellee's submission, para. 211.

<sup>1151</sup>European Union's appellee's submission, para. 211.

<sup>1152</sup>European Union's appellee's submission, para. 212.

<sup>1153</sup>European Union's appellee's submission, para. 213.

<sup>1154</sup>European Union's appellee's submission, footnote 237 to para. 214.

<sup>1155</sup>European Union's appellee's submission, para. 209. (original emphasis)

United States fails to cite to any evidence other than that relating to the individual {LA/}MSF loans for the proposition that the alleged programme constitutes a subsidy and causes adverse effects."<sup>1156</sup> The European Union also emphasizes that the present challenge against the alleged LA/MSF Programme is "markedly different than a challenge that the United States could have attempted to lodge, but did not—i.e., an 'as such' challenge to an {LA/}MSF programme, as a whole, where the programme was demonstrated to satisfy the characteristics of an ongoing programme."<sup>1157</sup>

495. Even assuming that the Appellate Body were to find that the Panel had applied an erroneous legal standard, the European Union submits that the Appellate Body should nevertheless reject the United States' request to complete the legal analysis to find the existence of the alleged unwritten LA/MSF Programme. First, the United States failed to notify, in its Notice of Other Appeal, its request that the Appellate Body complete the analysis. Second, completing the analysis is not expressly provided for in the DSU and "should, therefore, be limited to exceptional circumstances only".<sup>1158</sup> The European Union adds that the "Appellate Body should be vigilant to preserve the due process rights of the European Union, including its right to have facts assessed by a panel, and the option of having that assessment reviewed by the Appellate Body, under Article 11 of the *DSU*."<sup>1159</sup>

496. The European Union further argues that the Appellate Body is precluded from completing the analysis regarding the existence of the alleged LA/MSF Programme "given that the United States relies on a set of facts and related factual findings that it raises on appeal for the first time in connection with the question of the existence of the alleged {LA/}MSF programme."<sup>1160</sup> In particular, the European Union asserts that, "in support of its request that the Appellate Body find that the alleged {LA/}MSF programme exists", the United States refers "for the first time to various Panel findings suggesting that 'a successful LCA manufacturer requires a *family* of aircraft' and the positive effects on its competitiveness of 'commonality' between its models."<sup>1161</sup> According to the European Union, since "the United States did not refer to that evidence in the context of its argument to the Panel about the existence of the {LA/MSF} programme, the European Union had no reason to comment on the relevance ... for the proposition it is currently being used to support—specifically whether France, Germany, Spain and the United Kingdom operated {an LA/MSF programme}."<sup>1162</sup> The European Union maintains that, if, "in the context of completing the analysis, the Appellate Body

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<sup>1156</sup>European Union's appellee's submission, footnote 233 to para. 209.

<sup>1157</sup>European Union's appellee's submission, para. 210.

<sup>1158</sup>European Union's appellee's submission, para. 266.

<sup>1159</sup>European Union's appellee's submission, para. 266.

<sup>1160</sup>European Union's appellee's submission, para. 268.

<sup>1161</sup>European Union's appellee's submission, para. 268 (quoting United States' other appellant's submission, para. 65 (original emphasis), and referring to para. 67).

<sup>1162</sup>European Union's appellee's submission, para. 268.

were to use these facts and related factual findings in an entirely new context, it would deprive the European Union of its due process rights to comment on the relevance of those facts in that new context."<sup>1163</sup>

497. Finally, even if the Appellate Body were to complete the analysis pursuant to any legal framework set out in *US – Continued Zeroing*, the European Union argues that the alleged LA/MSF Programme does not involve conduct that can be attributed to France, Germany, Spain, and the United Kingdom. Nor is there a clear definition of what the conduct entails. In particular, the European Union argues that the "four core terms" to which the United States alludes "are neither very specific, nor well defined, nor monolithic or automatic as was the zeroing methodology at issue in *US – Continued Zeroing*."<sup>1164</sup> Rather, according to the European Union, such "core terms" "constitute generic descriptions of features in a financing agreement, and mask the significant differences between the various, individually negotiated {LA/}MSF loans that the Panel pointed out in its factual findings quoted above."<sup>1165</sup> Moreover, and contrary to the measures at issue in *US – Continued Zeroing*, the European Union claims that the alleged LA/MSF Programme is not prospectively applicable.

## 2. Export Subsidies

498. The European Union maintains that the Appellate Body should reject the United States' claim that the Panel erred in finding that the French A380 contract, the French and Spanish A340-500/600 contracts, and the French A330-200 contract were not contingent in fact upon export performance. As a preliminary matter, the European Union contends that the Appellate Body should examine each of the four LA/MSF measures separately. The European Union noted that, in its other appellant's submission, the United States does not "clearly separate and distinguish between" the above four measures.<sup>1166</sup> According to the European Union, "it is appropriate and necessary" to examine each measure individually because "the United States makes 'in fact' claims and the facts of each case are different".<sup>1167</sup> The European Union notes that, before the Panel, the United States identified the four measures separately, the European Communities structured its defence by reference to each measure separately, and the Panel structured its analysis in the same way. Thus, the European Union argues

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<sup>1163</sup>European Union's appellee's submission, para. 269.

<sup>1164</sup>European Union's appellee's submission, paras. 302 and 303 (referring to Panel Report, para. 7.525).

<sup>1165</sup>European Union's appellee's submission, para. 303.

<sup>1166</sup>European Union's appellee's submission, para. 20.

<sup>1167</sup>European Union's appellee's submission, para. 21.

that "the same approach should apply in these appeal proceedings, both with respect to the US requests for reversals and the US requests for 'completion of the analysis'".<sup>1168</sup>

499. The European Union submits that the United States' appeal "is precluded by the terms of Article 17.6 of the DSU and must be rejected", because it does not concern issues of law covered in the Panel Report or legal interpretations made by the Panel.<sup>1169</sup> According to the European Union, the deficiency in the Panel's findings appealed by the United States relates to the weighing of the evidence and the Panel's failure to explain how the evidenced facts work together to demonstrate the existence and precise content of a subsidy contingent in fact upon anticipated exportation. Therefore, the United States should have brought its other appeal under Article 11 of the DSU, but the United States failed to do so. The European Union further argues that the United States neither claimed that the Panel erred in its interpretation of the legal standard, nor claimed that the Panel adopted an erroneous legal characterization of the facts. Thus, in the European Union's view, the Appellate Body should reject the United States' appeal as outside the scope of its review.

- (a) The alleged requirement imposed by the Panel on evidence concerning motivation

500. The European Union maintains that, contrary to the United States' argument, the Panel neither established, nor applied, a standard that requires evidence of motivation. Instead, the Panel established a double standard for determining export contingency by finding that the grant of the subsidy must be "*conditional*" upon actual or anticipated export performance, or, the subsidy must be granted "*because*" of actual or anticipated export performance.<sup>1170</sup> To the European Union, the "double legal standard articulated and expressly applied by the Panel, and particularly the first element of it, manifestly does not *require* any consideration of motivation."<sup>1171</sup> Therefore, the European Union argues that the Panel applied the double standard it articulated and did not require evidence of motivation in reaching its conclusion. Rather, the Panel merely stated that "it reached its finding on the basis of the *total configuration of the facts*".<sup>1172</sup> The European Union further noted that, although the United States referred to the Panel's finding in paragraph 7.690 of the Panel Report

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<sup>1168</sup>European Union's appellee's submission, para. 21.

<sup>1169</sup>European Union's appellee's submission, paras. 22 and 23.

<sup>1170</sup>European Union's appellee's submission, para. 38 (quoting Panel Report, para. 7.648 (original emphasis)).

<sup>1171</sup>European Union's appellee's submission, para. 44. (original emphasis)

<sup>1172</sup>European Union's appellee's submission, para. 45. (original emphasis)



in support of its assertion, the Panel did not state in that finding that motivation was "critical"<sup>1173</sup>, but simply stated that "the evidence it considered *included* evidence about motivation".<sup>1174</sup>

501. Moreover, the European Union maintains that, with respect to the French LA/MSF contracts for the A380, the A340-500/600, and the A330-200, the United States provides no further evidence and develops no further legal argument in support of its assertion that the Panel applied a legal standard that requires evidence of motivation. With respect to the Spanish LA/MSF contract for the A340-500/600, the European Union submits that the United States seeks to rely on the Panel's finding in paragraph 7.687, even though the Panel merely stated in that paragraph that "the evidence it considered *included* evidence about motivation."<sup>1175</sup> In these circumstances, the European Union maintains, the Appellate Body must conclude that there is simply no basis for the United States' appeal of the Panel's findings regarding these measures.

502. The European Union thus submits that the Appellate Body should reject the United States' appeal that the Panel erred in establishing and applying a standard requiring evidence of motivation in order to find that a subsidy is contingent in fact upon export performance. The European Union further maintains that, in its Other Appeal, "the United States incidentally expressly agrees with the European Union that 'motivation' cannot be 'dispositive' of a finding of export contingency."<sup>1176</sup> The European Union therefore submits that "there is no disagreement between the Parties on this point" and that, consequently, the Appellate Body should accept the European Union's first set of grounds of appeal, that the Panel erred in interpreting Article 3.1(a) of the *SCM Agreement* by imposing a dependent motivation standard.<sup>1177</sup>

(b) The United States' request for completion of the analysis

503. The European Union argues that the United States' request that the Appellate Body complete the analysis should be rejected because the United States failed to include such a request in its Notice of Other Appeal. The European Union submits that, consistent with the principle of due process, if a Notice of Other Appeal does not contain a statement of the nature of the other appeal, the other appellant is precluded from enlarging the scope of appeal by raising that matter in its written submission.

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<sup>1173</sup>European Union's appellee's submission, para. 46 (quoting United States' other appellant's submission, para. 16).

<sup>1174</sup>European Union's appellee's submission, para. 46. (original emphasis)

<sup>1175</sup>European Union's appellee's submission, para. 50. (original emphasis)

<sup>1176</sup>European Union's appellee's submission, para. 54 (quoting United States' other appellant's submission, para. 19).

<sup>1177</sup>European Union's appellee's submission, para. 54.

504. Moreover, the European Union submits that, because completion of the analysis is not expressly provided for in the DSU and is considered an "implied or inherent power"<sup>1178</sup>, it should "be exercised with restraint".<sup>1179</sup> The European Union sets out the following general principles that it considers should guide the Appellate Body's decision as to whether to complete the analysis: completion of the analysis should not take place for matters not subject to consultations pursuant to Article 4 of the DSU; completion of the analysis should respect the rights of third parties; completion of the analysis should not take place in relation to any matter with respect to which the complaining party failed to make a *prima facie* case; completion of the analysis should not extend to fact-finding; completion of the analysis should respect the "fundamental two-tier structure of WTO dispute settlement"; completion of the analysis may not be based on facts other than those submitted in the first written submission or in response to a panel's questions; completion of the analysis should not be based on factual inferences unless the party concerned was given a full opportunity during the panel proceedings to rebut such inferences; completion of the analysis should not be based on disputed facts; and completion of the analysis should not be based on facts on the panel record that have not been referenced or discussed.<sup>1180</sup>

505. The European Union argues that the Appellate Body has typically "completed the analysis" where a panel had not ruled on a claim due to considerations for judicial economy, or had erred with respect to its terms of reference. However, neither situation exists in this dispute. The European Union further submits that completion of the analysis by the Appellate Body should not extend to fact-finding, either on the basis of direct evidence or on the basis of inference drawn from the evidence on the panel record. According to the European Union, in this appeal, "it is exactly such a process of fact finding, based on inference from other facts that are evidenced, that the United States is requesting the Appellate Body to undertake."<sup>1181</sup> Specifically, the European Union notes that the United States has limited its other appeal to the Panel's findings on in fact export contingency. The European Union maintains that, for an analysis of in fact export contingency, "an adjudicator will have to first consider how the directly evidenced facts, working together, imply that *other facts* (of which there is no direct evidence) may reasonably be *found*."<sup>1182</sup>

506. Moreover, the European Union contends that, in past disputes, the Appellate Body completed the analysis only if there was sufficient factual basis on which to do so. Yet, the European Union argues, such a sufficient factual basis is lacking in this dispute. Specifically, although the issue of

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<sup>1178</sup>European Union's appellee's submission, para. 62.

<sup>1179</sup>European Union's appellee's submission, para. 63.

<sup>1180</sup>European Union's appellee's submission, paras. 62-74.

<sup>1181</sup>European Union's appellee's submission, para. 84.

<sup>1182</sup>European Union's appellee's submission, para. 84. (original emphasis)

whether the LA/MSF contracts were consistent with the terms of the 1992 Agreement was part of the total configuration of the facts surrounding the granting of the subsidies, the Panel Report contains no findings in this respect. Moreover, the facts regarding the following are in dispute: (i) the meaning of "export" and "Europe"; (ii) the size of the European Union market; (iii) the assertion that the LA/MSF contracts would be construed by a domestic judge as imposing an obligation to export; and (iv) the alleged "anticipation" regarding exports.<sup>1183</sup> The European Union further contends that, in its request for completion of the analysis, the United States "completely failed" to set out the uncontested facts and evidence on which it might seek to rely.<sup>1184</sup>

507. In addition, the European Union asserts that completion of the analysis would be "highly prejudicial" to the due process rights of the European Union.<sup>1185</sup> Specifically, the United States introduced new claims and evidence in its second written submission to the Panel. Moreover, the Panel erroneously made the case for the United States by imposing the "dependent motivation" standard<sup>1186</sup>, and erroneously transposed evidence relating to anticipated exportation into the assessment of contingency.<sup>1187</sup> Thus, all of the relevant factual assertions and evidence "have not been subject to and tested and refined in the proper procedural dialectic" before the Panel.<sup>1188</sup> For these reasons, the European Union alleges, completion of the analysis would also be prejudicial to the due process rights of the third parties to this dispute.

508. The European Union also contends that "fundamental and irreconcilable internal contradictions" in the Panel Report preclude the Appellate Body from completing the analysis. The European Union recalls the contradiction between the Panel's findings, reached on the basis of the same evidence, that the LA/MSF measures were not contingent in law upon export performance, but were contingent in fact upon export performance. According to the European Union, should the Appellate Body complete the analysis, as requested by the United States, and find all seven LA/MSF measures to be contingent in fact upon export performance, the "fundamental" contradictions in the Panel's findings would remain in the final panel and Appellate Body reports to be adopted by the DSB. In the European Union's view, the Appellate Body should avoid such an outcome.

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<sup>1183</sup>European Union's appellee's submission, paras. 88-92.

<sup>1184</sup>European Union's appellee's submission, para. 109.

<sup>1185</sup>European Union's appellee's submission, para. 93.

<sup>1186</sup>European Union's appellee's submission, para. 97.

<sup>1187</sup>European Union's appellee's submission, para. 100 (referring to European Union's appellant's submission, paras. 1471-1473).

<sup>1188</sup>European Union's appellee's submission, paras. 96 and 99.

509. In any event, the European Union argues, should the Appellate Body decide to complete the analysis, it would find that the French and Spanish A340-500/600 contracts and the French A380 and A330-200 contracts do not constitute subsidies contingent in fact upon export performance. The European Union maintains that, if the Appellate Body accepts the United States' claim that motivation, alone, cannot be "dispositive" of a determination regarding export contingency, then the Appellate Body must also reject the legal standard advanced by the United States for the purpose of completing the analysis. Specifically, the United States has advanced a legal standard whereby a subsidy must be prohibited if the granting Member's anticipation of exports motivates them to grant the subsidy. Therefore, the Appellate Body will not be able to complete the analysis, as requested, on the basis of the legal standard advanced by the United States.

510. The European Union argues that, to complete the analysis, the Appellate Body must also consider whether the facts surrounding the granting of the four LA/MSF contracts demonstrate that, "in each case", the measure constitutes a subsidy contingent in fact upon export performance.<sup>1189</sup> For this purpose, the European Union maintains, the Appellate Body should take into account all the relevant claims and arguments of the European Union in its appellant's submission. The European Union further maintains that, applying the correct legal standard, the Appellate Body should find that none of the four LA/MSF contracts constitutes an export subsidy. In particular, the European Union submits that Airbus is under no obligation to export under these contracts, and none of the contracts provides any preference to exports over domestic sales. Moreover, the European Union asserts that none of the contracts demonstrates that the member State granted a subsidy because it "anticipated" exports.<sup>1190</sup> In addition, the European Union contends that the Appellate Body should find that sales-dependent repayment provisions were incorporated under the LA/MSF contracts because such repayment provisions correspond to the allocation of risk between the relevant governments and Airbus.<sup>1191</sup> Therefore, the fact that the market for LCA "might happen to extend beyond the territory of the granting Member (as most product markets do these days) does not lead to the conclusion that there is a subsidy contingent/conditional in fact upon anticipated export."<sup>1192</sup>

511. On this basis, the European Union contends that the Appellate Body should not complete the analysis and find that the French A380 contract, the French and Spanish A340-500/600 contracts, and the French A330-200 contract are contingent in fact upon export performance, as requested by the

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<sup>1189</sup>European Union's appellee's submission, para. 124.

<sup>1190</sup>European Union's appellee's submission, paras. 130, 137, 144, and 151.

<sup>1191</sup>European Union's appellee's submission, paras. 131, 138, 145, and 152.

<sup>1192</sup>European Union's appellee's submission, paras. 132, 139, 146, and 153.

United States. Consequently, the European Union submits that the Appellate Body should also reject the United States' request that the Appellate Body recommend that the seven LA/MSF measures found to constitute export subsidies be withdrawn without delay.

E. *Arguments of the Third Participants*

1. Australia

(a) The temporal scope of Article 5 of the *SCM Agreement*

512. Australia disagrees with the European Union's 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>1193</sup> According to Australia, 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 "act" or the "fact" of the provision of the "financial contribution" has already occurred under Article 1.1(a)(1) of the *SCM Agreement*. Australia concludes that "{t}he 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."<sup>1194</sup> Australia further submits that "the 'economic effects of government {conduct}' are precisely what is disciplined by Part III of the *SCM Agreement*."<sup>1195</sup>

(b) The LA/MSF "Programme"

513. For Australia, the Panel's conclusion that the United States had not demonstrated the existence of the alleged LA/MSF Programme appears to have "turned mainly" on the fact that the United States failed to prove that the alleged measure would necessarily be continued into the future.<sup>1196</sup> However, according to Australia, such a showing "is of less relevance" when considering an alleged measure that consists of "ongoing conduct" as was the case in *US – Continued Zeroing*.<sup>1197</sup> To the extent that the Appellate Body shares the Panel's concern in this case that "future LA/MSF 'would {not} necessarily involve the provision of loans ... at below-market interest rates'"<sup>1198</sup>,

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<sup>1193</sup> Australia's third participant's submission, para. 16 (quoting European Union's appellant's submission, para. 27).

<sup>1194</sup> Australia's third participant's submission, para. 21. (original underlining)

<sup>1195</sup> Australia's third participant's submission, para. 22 (quoting European Union's appellant's submission, para. 46).

<sup>1196</sup> Australia's third participant's submission, para. 66.

<sup>1197</sup> Australia's third participant's submission, para. 69.

<sup>1198</sup> Australia's third participant's submission, para. 71 (quoting Panel Report, paragraph 7.531).

Australia argues that if a future round of LA/MSF were provided at market interest rates then this would mean that the alleged LA/MSF Programme "had either not been used in that instance and/or no longer existed."<sup>1199</sup> According to Australia, "{a}ny dispute settlement action in respect of that round of funding that relied on the existence of the {LA/MSF Programme} would thus necessarily fail."<sup>1200</sup>

(c) The 1992 Agreement

514. Australia submits that the Appellate Body must examine, "as a threshold issue"<sup>1201</sup>, whether the 1992 Agreement is a "relevant rule{ } of international law applicable in the relations between the parties" pursuant to Article 31(3)(c) of the *Vienna Convention*, given its importance to the present case, as well as the "significant systemic implications" for the WTO dispute settlement regime.<sup>1202</sup>

515. Australia submits that "the parties" in Article 31(3)(c) of the *Vienna Convention*, must be understood as referring to all the parties to the treaty being interpreted. In support, Australia refers to previous Appellate Body reports in which the Appellate Body interpreted "the parties" in Article 31(3)(a) and (b) of the *Vienna Convention* as meaning all WTO Members.<sup>1203</sup> Australia asserts that, "{i}f 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 ... 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."<sup>1204</sup> Turning to the context provided by Article 31(2) of the *Vienna Convention*, Australia supports the view of the panel in *EC – Approval and Marketing of Biotech Products* that "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 made between all the parties) and the class of documents at issue in Article 31(2)(b) (namely instruments made by some of the parties and accepted by all).<sup>1205</sup> Moreover, Australia submits that when the drafters of the *Vienna Convention* intended to refer to a subset of the parties to a treaty, they did so expressly, as evidenced in the reference to "one or more parties" in Article 31(2)(b) of the *Vienna Convention*. Australia further argues that the

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<sup>1199</sup> Australia's third participant's submission, para. 71.

<sup>1200</sup> Australia's third participant's submission, para. 71.

<sup>1201</sup> Australia's third participant's submission, para. 3.

<sup>1202</sup> Australia's third participant's submission, para. 3.

<sup>1203</sup> Australia's third participant's submission, paras. 8 and 9 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 391; and Appellate Body Report, *EC – Chicken Cuts*, footnote 515 to para. 272).

<sup>1204</sup> Australia's third participant's submission, para. 10.

<sup>1205</sup> Australia's third participant's submission, para. 11 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, footnote 242 to para. 7.68).

European Union in its submission refers mistakenly to the object and purpose of Article 31(3)(c) of the *Vienna Convention*, and not the object and purpose of the treaty overall, as mandated by Article 31(1) of the *Vienna Convention*, and as previously mandated by the Appellate Body.<sup>1206</sup>

(d) Export subsidies

516. Australia submits that "the Panel placed undue emphasis on one fact in the 'total configuration of the facts'" constituting and surrounding the granting of the subsidy, that is, "the motivation of the grantor of the subsidy."<sup>1207</sup> Australia argues that, contrary to the Panel's finding, 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".<sup>1208</sup> Australia maintains that the Panel, by using the term "because", "appears to be moving away from the interpretation of footnote 4 espoused by the Appellate Body in *Canada – Aircraft*".<sup>1209</sup> Furthermore, Australia contends that, although a government's motivations for granting a subsidy may be relevant, it will not, as the Panel found, necessarily be "highly relevant" to the question of contingency.<sup>1210</sup>

517. In Australia's view, the facts examined by the Panel regarding anticipated exportation and the sales-dependent repayment provision in the LA/MSF contracts "demonstrate a close relationship between the granting of the subsidy and anticipated exportation".<sup>1211</sup> Yet the Panel failed to "convincingly explain" why these facts were not sufficient and why the "additional evidence" in respect of the German, Spanish, and UK LA/MSF contracts, together with these facts, demonstrated the relationship of contingency.<sup>1212</sup>

518. Australia further submits that, contrary to the European Union's argument, the applicability of footnote 4 is not limited to "situations where there is no 'direct evidence' of the granting of a subsidy made legally contingent upon export".<sup>1213</sup> Rather, "footnote 4 comes into play where a complaining Member alleges 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'".<sup>1214</sup> In addition, Australia disagrees with the European Union that a subsidy is contingent in fact upon export

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<sup>1206</sup> Australia's third participant's submission, para. 15 (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348).

<sup>1207</sup> Australia's third participant's submission, para. 26.

<sup>1208</sup> Australia's third participant's submission, para. 27 (quoting Panel Report, para. 7.644 (original italics)). (underlining added by Australia)

<sup>1209</sup> Australia's third participant's submission, para. 31.

<sup>1210</sup> Australia's third participant's submission, para. 29 (quoting Panel Report, para. 7.675).

<sup>1211</sup> Australia's third participant's submission, para. 34.

<sup>1212</sup> Australia's third participant's submission, para. 34.

<sup>1213</sup> Australia's third participant's submission, para. 36.

<sup>1214</sup> Australia's third participant's submission, para. 36.

performance only if it was granted "because of" an export that has occurred, or only if the subsidy must be repaid should the anticipated export fail to occur.<sup>1215</sup> According to Australia, "the granting of the subsidies may be found to be tied to the grantor's anticipation that exports would occur" even if "a grantee does not subsequently export".<sup>1216</sup> Moreover, consistent with the panel's and the Appellate Body's approach in *Canada – Aircraft*, "{t}here was no requirement that the assistance be repaid if the exportation or export earnings did not, in fact, eventuate."<sup>1217</sup>

519. Finally, Australia requests that the Appellate Body "be mindful of"<sup>1218</sup> the European Union's concerns regarding potential discrimination created by the Panel's findings "against small or export dependent economies".<sup>1219</sup> Australia submits that the Appellate Body should consider the second sentence of footnote 4 to be relevant in this regard. In Australia's view, although export propensity of the recipient of a subsidy is one element in the total configuration of facts surrounding the granting of a subsidy, it must not be confused with export contingency.

(e) Infrastructure measures

520. Australia submits that the Panel correctly analyzed whether a government had provided goods or services other than general infrastructure to Airbus, and whether a benefit was thereby conferred. Australia argues that it is artificial to separate the "creation" and "provision" of infrastructure because the infrastructure in this case was "created" specifically for Airbus, to which it was to be "provided".<sup>1220</sup> Australia asserts that the Mühlenberger Loch site, the extension of the runway at the Bremen airport and the associated noise reduction measures, and the Aéroconstellation site and EIG facilities were "goods or services" provided by "a government", and that each was specifically created for Airbus.<sup>1221</sup>

521. In respect of benefit, Australia summarizes the Panel's assessment of the provision of the Mühlenberger Loch site, the extension of the runway at the Bremen airport and the associated noise reduction measures, and the development of the Aéroconstellation site and the construction of the EIG facilities, and argues that the Panel correctly assessed whether a benefit was conferred by focusing on whether the financial contribution was received "on terms more favourable than those available to the

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<sup>1215</sup> Australia's third participant's submission, paras. 37-42.

<sup>1216</sup> Australia's third participant's submission, para. 44.

<sup>1217</sup> Australia's third participant's submission, para. 45 (referring to Panel Report, *Canada – Aircraft*, para. 9.343).

<sup>1218</sup> Australia's third participant's submission, para. 47.

<sup>1219</sup> Australia's third participant's submission, para. 46 (quoting European Union's appellant's submission, para. 1359).

<sup>1220</sup> Australia's third participant's submission, para. 74.

<sup>1221</sup> Australia's third participant's submission, para. 75.



recipient in the market", as required by Article 1.1 of the *SCM Agreement* and the *Canada – Aircraft* decisions.<sup>1222</sup>

(f) The subsidized product and product market

522. Referring to the Panel report in *Korea – Commercial Vessels*, Australia argues that "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."<sup>1223</sup> According to Australia, in the context of a claim under Part III of the *SCM Agreement*, if the complaining Member frames its complaint in such a way that it is unable to show that the other Member 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.<sup>1224</sup> Australia adds that "{t}here is no requirement in the *SCM Agreement* that a panel 'make the case' for the complainant."<sup>1225</sup>

(g) Adverse effects

523. Australia agrees with the European Union that the Panel should have completed its counterfactual analysis in order to determine the conditions of competition in the LCA market in the absence of the subsidies. Australia asserts that in order for a subsidy to cause serious prejudice under Article 6.3 of the *SCM Agreement*, there must be a "genuine and substantial relationship of cause and effect" between the subsidy and the effect.<sup>1226</sup> Australia argues that a panel's consideration of a hypothetical situation that would have existed in the absence of the contested subsidy—a "counterfactual"—is a legitimate tool to use to determine the effect of a subsidy.<sup>1227</sup> Australia points out 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>1228</sup> Australia maintains that the Panel made multiple findings regarding causation that allowed for the possibility that Airbus could have sold LCA in competition with LCA produced by United States' manufacturers even without subsidies.<sup>1229</sup> Australia notes that the Panel did not address the fundamental question of

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<sup>1222</sup> Australia's third participant's submission, paras. 78-81 (referring to Panel Report, paras. 7.1093, 7.1096, 7.1133, 7.1182, 7.1188, and 7.1190; and Appellate Body Report, *Canada – Aircraft*, para. 157).

<sup>1223</sup> Australia's third participant's submission, para. 50 (referring to Panel Report, *Korea – Commercial Vessels*, paras. 7.559 and 7.560).

<sup>1224</sup> Australia's third participant's submission, para. 51.

<sup>1225</sup> Australia's third participant's submission, para. 51.

<sup>1226</sup> Australia's third participant's submission, para. 55 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374, in turn quoting Appellate Body Report, *US – Wheat Gluten*, para. 69).

<sup>1227</sup> Australia's third participant's submission, para. 56.

<sup>1228</sup> Australia's third participant's submission, para. 56 (quoting Panel Report, para. 7.1984).

<sup>1229</sup> Australia's third participant's submission, paras. 55-61 (referring to Panel Report, paras. 7.1967, 7.1972, 7.1984, 7.1986, and 7.1993, and footnote 5758 to para. 7.1985).

whether a non-subsidized Airbus could have launched, sold, and delivered any particular LCA that Airbus actually launched, sold, and delivered after finding that subsidies to Airbus resulted in "different" competition.<sup>1230</sup> Australia stresses that the Appellate Body should carefully assess whether the Panel should have considered counterfactual situations as part of its causation analysis.

2. Brazil

(a) The LA/MSF "Programme"

524. Brazil submits that, in finding that the LA/MSF Programme could not be challenged as an actionable subsidy, the Panel incorrectly required the United States to demonstrate that the programme existed as an unwritten norm that had "general and prospective application". Brazil emphasizes that "it would not be proper to require a demonstration of the 'general and prospective application' of measures that are not challenged on an 'as such' basis as a 'norm'."<sup>1231</sup>

525. According to Brazil, the approach followed by the Appellate Body in *US – Continued Zeroing* when examining "ongoing conduct" was the more appropriate framework given that this dispute "essentially concerns the question of continuous {LA/MSF} as a prohibited or actionable subsidy, rather than specific instances of past {LA/MSF}."<sup>1232</sup> While Brazil does not express a view on the factual findings of the Panel in this case, it suggests that the Panel's misguided approach to analyzing the LA/MSF Programme as a "norm" that required "general and prospective application" may have had an impact on its factual assessment of the evidence presented by the United States.

(b) Export subsidies

526. Brazil contends that the Panel "appears to have treated the subjective motivation of the subsidizing Member as expressed through the text of the {LA/MSF} contracts and public statements as a necessary element of proof of *de facto* export contingency."<sup>1233</sup> According to Brazil, the Panel's approach seems inconsistent with the Appellate Body's finding, in *Canada – Aircraft*, that the elements required to show *de facto* contingency "must be *inferred* from the total configuration of 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>1234</sup> Brazil recalls that the Panel found *de facto* export contingency if there

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<sup>1230</sup> Australia's third participant's submission, paras. 61 (quoting European Union's appellant's submission, para. 399) and 62.

<sup>1231</sup> Brazil's third participant's submission, para. 26 (referring to Panel Report, para. 7.518 and quoting para. 7.519).

<sup>1232</sup> Brazil's third participant's submission, para. 31.

<sup>1233</sup> Brazil's third participant's submission, para. 3 (referring to Panel Report, para. 7.690).

<sup>1234</sup> Brazil's third participant's submission, para. 4 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167 (original italics)). (underlining added by Brazil)

was an "exchange of commitments" and if there was sufficient evidence of the respective government's motivation. Furthermore, Brazil argues, the Panel reached its conclusion in relation to motivation in large part by considering public statements, and by dissecting the language of the LA/MSF contracts, with certain text being sufficient to show motivation and certain other text being insufficient. In Brazil's view, this amounts to a very narrow approach in analyzing the "total configuration of the facts". Brazil expresses concern that, if the most probative evidence of motivation is the inclusion of certain key words or phrases in a contract or in public statements, a Member could escape applicable disciplines by simply avoiding such references. According to Brazil, therefore, the Panel's approach could easily lead to circumvention of the disciplines under Article 3 of the *SCM Agreement*. Brazil thus submits that "{t}he 'motivation' of a government should remain only one element in the total configuration of the facts—not the decisive factor."<sup>1235</sup>

527. Moreover, Brazil argues that the Appellate Body should continue to follow the "precedent set out in *Canada – Aircraft*" by finding *de facto* export contingency when the three elements set out in footnote 4 of the *SCM Agreement* are present—that is: (i) the "granting" of a subsidy; (ii) is "tied to"; and (iii) "actual or anticipated exportation or export earnings".<sup>1236</sup> Based on this approach, Brazil submits that "it would be sufficient to demonstrate the existence of a relationship of conditionality, to be inferred from the facts, between the granting of the subsidy, on the one hand, and expected exportation or export earnings, possibly as one among several conditions, on the other hand."<sup>1237</sup> Brazil further submits that "{d}emonstrating that a subsidy was granted *because of* anticipated export performance (in the form of *expected* export sales or earnings) may satisfy the requirements for demonstrating *de facto* export contingency."<sup>1238</sup> Nonetheless, "{t}he 'anticipated' (or 'expected') export performance" need not "actually occur in order to find *de facto* contingency" and need not "necessarily ... be expressed in the form of a future performance obligation."<sup>1239</sup>

528. With respect to the specific measures at issue, Brazil contends that the European Union's statements that "{the LA/}MSF measures *unconditionally* advance the funds" and that such "{an} unconditional subsidy is, by its express terms, not a subsidy contingent upon export"<sup>1240</sup>, do not accord with certain factual findings of the Panel. Brazil highlights the Panel's findings that "the per-aircraft levies expressly called for under each of the challenged contracts are mandatory and

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<sup>1235</sup>Brazil's third participant's submission, para. 8.

<sup>1236</sup>Brazil's third participant's submission, para. 13 (quoting Appellate Body Report, *Canada – Aircraft*, para. 169.)

<sup>1237</sup>Brazil's third participant's submission, para. 15.

<sup>1238</sup>Brazil's third participant's submission, para. 12. (original emphasis)

<sup>1239</sup>Brazil's third participant's submission, para. 12.

<sup>1240</sup>Brazil's third participant's submission, para. 16 (quoting European Union's appellant submission, paras. 1310 and 1312). (emphasis added by Brazil)

therefore must be complied with after each and every relevant aircraft sale" and that "under each of the seven LA/MSF contracts at issue, 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>1241</sup> Brazil further notes that the Panel found that "{a}lthough the text of the repayment provisions is neutral as to the origin of the required sales, it is clear from various pieces of information that achieving the level of sales needed to fully repay each loan would require Airbus to make a substantial number of exports."<sup>1242</sup> Brazil thus contends that the evidence before the Panel "indicated that the {LA/MSF} contracts were concluded on the basis of an explicit commitment that could only be met through sales that necessarily would imply exportation of subsidized products."<sup>1243</sup> Moreover, Brazil asserts that "this pattern clearly fits into the standard whereby the 'granting of a subsidy' is 'tied to' 'anticipated exportation or export earnings,' because the conditions for the granting of the subsidy—the commitments undertaken by Airbus—involved expected export earnings."<sup>1244</sup>

(c) The subsidized product and product market

529. Brazil argues that, in finding that there is a single subsidized product in this dispute, consisting of all Airbus LCA, the Panel deferred to the United States' formulation of the subsidized product, noting that it is for the complaining Member, not the panel, to formulate its complaint. Brazil considers that this approach is consistent with the Panel's obligation to remain within its terms of reference for the particular dispute. In particular, Brazil argues that by virtue of Article 11 of the DSU, a panel is limited to the "matter" within its terms of reference, "which are based on the complainant's request for establishment of a panel and include the measures (i.e., the subsidies) and the products to which the measures apply (i.e., the 'subsidized products')."<sup>1245</sup> According to Brazil, if a panel disregards "the complainant's formulation of its claim, it would be acting outside of its terms of reference."<sup>1246</sup> Brazil underscores, however, that the complaining Member must still demonstrate the remaining elements of proving an actionable subsidy.

530. Brazil further notes that, in assessing displacement, the Panel determined that all Boeing LCA sufficiently resembled all Airbus LCA such that all Boeing LCA constituted the like product. Brazil does not take a position regarding whether the entire Boeing family of LCA is the appropriate like

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<sup>1241</sup>Brazil's third participant's submission, para. 16 (quoting Panel Report, paras. 7.668 and 7.678).

<sup>1242</sup>Brazil's third participant's submission, para. 17 (quoting Panel Report, para. 7.678).

<sup>1243</sup>Brazil's third participant's submission, para. 18.

<sup>1244</sup>Brazil's third participant's submission, para. 18.

<sup>1245</sup>Brazil's third participant's submission, para. 41.

<sup>1246</sup>Brazil's third participant's submission, para. 41.

product or products, but agrees with the Panel's interpretation of "like product".<sup>1247</sup> Brazil adds that the like product should be determined with reference to the scope of the "subsidized product". If, as was the case here, the subsidized product is defined broadly, Brazil considers that "the like product can also cover a broad range of products."<sup>1248</sup>

(d) Adverse effects

531. Brazil argues that the Panel correctly held that the effect of the subsidies was the displacement of Boeing LCA from the EC and third country markets, under Article 6.3(a) and (b); and significant lost sales, under Article 6.3(c) of the *SCM Agreement*. Brazil submits that a panel should examine whether a group of subsidies as a whole causes adverse effects to a Member's interests "if such subsidies manifest themselves collectively."<sup>1249</sup> The central question in Brazil's view is whether LA/MSF and non-LA/MSF subsidies "concern the same product and whether there exists a sufficient nexus with the subsidized product and the particular effects-related variable under examination".<sup>1250</sup> According to Brazil, the Panel was not required to determine that each of the non-LA/MSF subsidies were necessary for a specific product launch because the *SCM Agreement* does not stipulate that each specific subsidy must be found to cause adverse effects in isolation. Brazil asserts that, in this case, LA/MSF was often combined with other types of subsidies to the same recipient for the same purposes, and, therefore, the Panel correctly did not require that adverse effects be demonstrated with respect to each subsidy individually, in line with the approach adopted by the panel in *US – Upland Cotton*.<sup>1251</sup>

3. Canada

(a) The life of a subsidy and intervening events

532. Canada submits that the Panel improperly interpreted Articles 5 and 6 of the *SCM Agreement* when it concluded that there is no need for a subsidy to confer a present benefit for it to be found to cause adverse effects under the *SCM Agreement*. Canada asserts that Articles 5, 6, and 7 of the *SCM Agreement*, read together, demonstrate that, in assessing the effect of subsidies, a panel can only consider the subsidies that are still conferring a benefit at the time serious prejudice must be found.

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<sup>1247</sup> Brazil's third participant's submission, para. 47.

<sup>1248</sup> Brazil's third participant's submission, para. 47.

<sup>1249</sup> Brazil's third participant's submission, para. 68.

<sup>1250</sup> Brazil's third participant's submission, para. 70. (footnote omitted)

<sup>1251</sup> Brazil's third participant's submission, para. 68 (referring to Panel Report, *US – Upland Cotton*, paras. 7.1191 and 7.1192).

533. Canada cites to a number of provisions in support of its argument. Canada observes that Article 6.3(a) refers to the prejudicial effect of the subsidy in the market of the "subsidizing" Member. In Canada's view, the use of the present participle "subsidizing" shows that a Member must still be providing a subsidy at the time when serious prejudice must be found. Moreover, in the French version of that provision, the use of the present tense of the verb "accorder" confirms that a Member must still be providing a subsidy at the time the effect of the subsidy is assessed. Canada considers that the requirement for a current benefit is further demonstrated by the multiple references to the "subsidized product" in Articles 6.3 and 6.4. Referring in particular to Articles 6.3(c), Canada notes that the effect of the subsidy cannot be a significant price undercutting by the subsidized product if the subsidy no longer confers a benefit with respect to that product.<sup>1252</sup>

534. Canada submits that Article 7 confirms the requirement for a current benefit. Article 7.8 refers to the actions that must be taken by a Member granting or maintaining a subsidy<sup>1253</sup> that has resulted in adverse effects. Article 7.8 is only concerned with those subsidies that are still conferring a benefit after they have caused serious prejudice. Canada asserts that, in its serious prejudice analysis, a panel should similarly only consider subsidies that are currently conferring a benefit. Otherwise, a panel could analyze and make findings with respect to subsidies for which there are no available remedies.

535. For these reasons, Canada disagrees with the Panel that there is no need for a subsidy to confer a "present" or "continuing" benefit to find that it causes serious prejudice. In Canada's view, the Panel's approach has "unacceptable systemic consequences"<sup>1254</sup>, since, irrespective of whether the benefit expires, a cause of action would remain once effects of the subsidy subsist. Canada submits that such an approach could give rise to "endless potential liability" under the *SCM Agreement*, and would be contrary to the objectives of "security and predictability" that lie at the core of the WTO dispute settlement system.<sup>1255</sup>

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<sup>1252</sup>Canada refers to the Appellate Body's statement in *US – Upland Cotton*: "{W}e acknowledge that the 'subsidized product' must be properly identified for purposes of significant price suppression under Article 6.3(c) of the SCM Agreement. And if the challenged payments do not, in fact, subsidize that product, this may undermine the conclusion that the effect of the subsidy is significant suppression of prices of that product in the relevant market". (Canada's third participant's submission, footnote 28 to para. 53 (quoting Appellate Body Report, *US – Upland Cotton*, para. 472))

<sup>1253</sup>Canada notes that the French version of Article 7.8 refers to "*le Membre qui accorde ou maintient cette subvention*". (Canada's third participant's submission, footnote 29 to para. 54)

<sup>1254</sup>Canada's third participant's submission, para. 56.

<sup>1255</sup>Canada's third participant's submission, para. 59.

## (b) Export subsidies

536. Canada submits that the Panel improperly interpreted and applied Article 3.1(a) and footnote 4 of the *SCM Agreement* when it found that the LA/MSF provided by Germany, Spain, and the United Kingdom for the A380 constituted prohibited export subsidies. Moreover, Canada maintains that the absence of reasoning in the Panel Report to support the Panel's findings is inconsistent with Article 12.7 of the DSU.

537. Canada recalls the Appellate Body's finding that establishing *de facto* export contingency under Article 3.1(a) and footnote 4 requires proof of three elements: (i) the granting of a subsidy; (ii) is tied to; and (iii) actual or anticipated exportation or export earnings.<sup>1256</sup> According to Canada, "establishing that a subsidy is 'tied to' or 'contingent' on exportation requires the complaining party to establish that actual or anticipated exports were a necessary or determinative condition for the granting of the subsidy."<sup>1257</sup> Canada emphasizes that "{t}he references in Article 3.1(a) and footnote 4 to 'export performance', 'exportation' and 'export earnings' must not be conflated with the term 'sales'", because "'{s}ales' covers both domestic and export transactions while 'exportation', 'export performance' and 'export earnings' cover export transactions only."<sup>1258</sup> Thus, in this dispute, "no export contingency would exist if the EC member States would have provided the subsidy regardless of whether anticipated sales were domestic or export sales."<sup>1259</sup>

538. Canada maintains that the Panel set out an incorrect standard for *de facto* export contingency by finding that the element of conditionality or contingency is satisfied by a finding that subsidization occurred at least in part "because of" the anticipation of export performance or when the anticipation of export performance is at least one of the 'reasons for' the subsidization.<sup>1260</sup> According to Canada, "{t}he ordinary meaning of 'by reason of' or 'because of' denotes a motive or explanation for a course of action".<sup>1261</sup> In contrast, the words "conditionality" and "contingency" "go further" in that "they describe a situation where a decision or action depends for its existence on something; that something

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<sup>1256</sup>Canada's third participant's submission, para. 11 (referring to Appellate Body Report, *Canada – Aircraft*, para. 169).

<sup>1257</sup>Canada's third participant's submission, para. 13 (referring to Appellate Body Report, *Canada – Aircraft*, para. 167).

<sup>1258</sup>Canada's third participant's submission, para. 15.

<sup>1259</sup>Canada's third participant's submission, para. 14.

<sup>1260</sup>Canada's third participant's submission, para. 18 (referring to Panel Report, para. 7.677).

<sup>1261</sup>Canada's third participant's submission, para. 20 (referring to *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 205 "because", and Vol. 2, p. 2483 "reason" (Appellate Exhibit CDA-1)).

is a prerequisite for the decision or action."<sup>1262</sup> Canada argues, therefore, that "anticipation of exports may be a reason for the grant of a subsidy, but unless that anticipation is a necessary or determinative condition or a prerequisite for the granting of the subsidy, there is no export contingency."<sup>1263</sup>

539. Canada further argues that "{n}one of the evidence cited by the Panel, whether considered individually or in its totality, indicates that the EC member States' anticipation of export sales played *any* role in their decision to enter into the LA/MSF contracts with Airbus, let alone a *determinative* role."<sup>1264</sup> Canada recalls that the Panel first assessed evidence that was common to all seven LA/MSF contracts at issue and reached "a preliminary conclusion"<sup>1265</sup> when it stated that, "without being decisive, this evidence supports the view that the provision of LA/MSF on sales-dependent repayment terms was, at least in part, 'conditional' or 'dependent for its existence' upon the EC member States' anticipated exportation or export earnings."<sup>1266</sup> Canada further recalls that the Panel referred to "additional" evidence that was specific to each LA/MSF contract, and found the "additional" evidence to be decisive in its findings that the German, Spanish, and UK A380 LA/MSF constituted prohibited export subsidies while the French A380, A340-500/600, and A330-200 and the Spanish A340-500/600 LA/MSF did not.<sup>1267</sup> In Canada's view, "{a}ll of this evidence simply shows that the EC member States anticipated that Airbus would export."<sup>1268</sup> Yet, "as noted by the Panel itself, the anticipation of exportation is not enough to show that the granting of a subsidy is contingent on export performance."<sup>1269</sup>

540. Finally, Canada submits that, in examining the additional evidence specific to each contract, "the Panel did not satisfy its obligation under Article 12.7 of the DSU to provide a 'basic rationale' with respect to its findings that the German, Spanish, and UK A380 LA/MSF constituted prohibited export subsidies."<sup>1270</sup> Canada maintains that the Panel "simply set out this 'additional' evidence and then, without any explanation, immediately concluded that this evidence, together with the evidence supporting its preliminary view, demonstrated export contingency."<sup>1271</sup> In Canada's view, "this lack of a basic rationale" is "particularly problematic" because the additional evidence "was *decisive*" in

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<sup>1262</sup>Canada's third participant's submission, para. 20 (referring to *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 480 "conditional", p. 501 "contingent", and pp. 479-480 "condition" (Appellate Exhibit CDA-1)).

<sup>1263</sup>Canada's third participant's submission, para. 20.

<sup>1264</sup>Canada's third participant's submission, para. 29. (original emphasis)

<sup>1265</sup>Canada's third participant's submission, para. 24.

<sup>1266</sup>Canada's third participant's submission, para. 24 (quoting Panel Report, para. 7.678).

<sup>1267</sup>Canada's third participant's submission, para. 27 (referring to Panel Report, paras. 7.685-7.689).

<sup>1268</sup>Canada's third participant's submission, para. 28.

<sup>1269</sup>Canada's third participant's submission, para. 28 (referring to Panel Report, para. 7.641; and Appellate Body Report, *Canada – Aircraft*, para. 172).

<sup>1270</sup>Canada's third participant's submission, para. 38.

<sup>1271</sup>Canada's third participant's submission, para. 36.



the Panel's finding concerning *de facto* export contingency.<sup>1272</sup> Therefore, Canada argues, "the Panel should have provided at least some explanation or justification for its conclusions" because, without such explanation, "WTO Members are left to guess at how the 'additional' evidence" to which the Panel referred supported its overall finding of export contingency.<sup>1273</sup>

(c) The EC Framework Programmes

541. Canada argues that the Panel improperly interpreted and applied Article 2.1(a) of the *SCM Agreement* by focusing on particular segments of the EC Framework Programmes to find that they were *de jure* specific. Canada contends that "{s}pecificity in law must be determined by considering a subsidy programme as an integrated whole rather than focusing on particular segments of the programme, such as a segment defined by budget allocation."<sup>1274</sup> Analysing Article 2.1(c) of the *SCM Agreement*, Canada argues that the benchmark of comparison for *de jure* specificity should be the same as that for *de facto* specificity. Canada asserts that, although the Panel identified each Framework Programme as a "single legal regime", the Panel nevertheless "failed to consider each Framework Programme as a whole when determining whether that regime explicitly limits access to a subsidy to certain enterprises."<sup>1275</sup>

542. Canada notes, however, that a panel is not "obliged to adhere formalistically to the definition of the subsidy programme provided by the subsidizing Member when assessing whether a subsidy programme is specific."<sup>1276</sup> Rather, a proper analysis "should consider factors such as whether the programme has separate sets of objectives for different sectors or whether separate sets of criteria determine programme eligibility".<sup>1277</sup> If such factors are present, Canada maintains, "an umbrella programme may be broken up into two or more programmes for purposes of the specificity analysis."<sup>1278</sup>

(d) Infrastructure measures

543. Canada argues that the Panel's conclusion as to the scope of "general infrastructure" might be interpreted to exclude infrastructure "the use of which is limited by external circumstances instead of government action".<sup>1279</sup> Canada notes that, because "{e}ntities located near infrastructure are most

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<sup>1272</sup>Canada's third participant's submission, para. 37. (original emphasis)

<sup>1273</sup>Canada's third participant's submission, para. 37.

<sup>1274</sup>Canada's third participant's submission, para. 101.

<sup>1275</sup>Canada's third participant's submission, para. 103.

<sup>1276</sup>Canada's third participant's submission, para. 104.

<sup>1277</sup>Canada's third participant's submission, para. 104.

<sup>1278</sup>Canada's third participant's submission, para. 104.

<sup>1279</sup>Canada's third participant's submission, para. 88.

likely to access or use it ... infrastructure located in remote or rural areas may be accessed or used by a limited number of entities."<sup>1280</sup> Canada submits, however, that infrastructure should not be considered as provided to or for the advantage of only a single entity or limited group of entities, and thus as "other than general" infrastructure", "simply because it is used by a small number of entities".<sup>1281</sup> Rather, infrastructure is "general infrastructure" when it is available for access or use by all entities that could potentially access or use it, and therefore only limitations on access or use by government action should be considered to be "other than general".<sup>1282</sup>

544. Canada argues that the ordinary meaning of the word "general" supports this position, suggesting an interpretative focus on "the area surrounding a particular piece of infrastructure where potential users may be located".<sup>1283</sup> In Canada's view, "if access to or use of a particular piece of infrastructure is available to all potential users in this area, this infrastructure should be considered 'general' infrastructure even though there is only a small number of potential users."<sup>1284</sup> Canada further submits that, if limitations due to external circumstances are not distinguished from limitations due to government action, "infrastructure built in rural or remote areas may be more susceptible to being considered 'other than general' than when that same infrastructure is built in urban areas."<sup>1285</sup>

(e) Adverse effects

545. Canada argues that the Panel improperly interpreted and applied Articles 5(c) and 6.3 of the *SCM Agreement* by basing its findings on serious prejudice and threat of serious prejudice on the effects of benefits conferred by the subsidies before the time when serious prejudice was assessed. According to Canada, when examining present serious prejudice under Article 6.3, the Panel should have limited its analysis to the present benefit that is conferred by the subsidies at issue. Thus, the Panel should have evaluated the nature of the subsidies and the magnitude of the benefit that was being conferred by the subsidies at the time in which serious prejudice had to be found. Canada maintains further that the Panel improperly applied Articles 5(c) and 6.3(a) and (b) of the *SCM Agreement* in finding that the effect of the subsidies would cause displacement of Boeing LCA from the European Communities, Australian, and Chinese markets. In Canada's view, in finding that "but for the subsidies Boeing 'would have had a larger market share in the {European Communities} and certain third country markets than it actually did over {the 2001-2006 reference} period'"<sup>1286</sup>, the

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<sup>1280</sup>Canada's third participant's submission, para. 89.

<sup>1281</sup>Canada's third participant's submission, para. 90.

<sup>1282</sup>Canada's third participant's submission, para. 90. (footnote omitted)

<sup>1283</sup>Canada's third participant's submission, para. 93.

<sup>1284</sup>Canada's third participant's submission, para. 93.

<sup>1285</sup>Canada's third participant's submission, para. 94.

<sup>1286</sup>Canada's third participant's submission, para. 83 (quoting Panel Report, para. 7.1993).

Panel failed to establish a "genuine and substantial causal link" between the subsidies and the decrease in Boeing's share of those markets.<sup>1287</sup>

#### 4. China

##### (a) The life of a subsidy and intervening events

546. China notes that the Panel reached negative conclusions to the two relevant legal questions to be answered in this dispute: (i) whether an arm's-length, fair market value sale of part of a subsidized producer by a government presumptively extinguishes a corresponding portion of the benefit conferred by prior financial contributions provided to that producer; and (ii) whether an arm's-length, fair market value sale of part of a subsidized producer by a private owner presumptively extinguishes a portion of the benefit conferred by prior financial contributions provided to that producer. While China expresses no view with respect to the second question, China submits that the Panel erred in answering the first question in the negative.

547. With respect to the question of whether a privatized firm and its owner together should be considered the recipient of the benefit, China notes that the Appellate Body in *US – Countervailing Measures on Certain EC Products* did not preclude the possibility that the "no distinction" approach could be applied to situations other than full privatization. China notes that the Panel applied an "alignment of economic interests" test<sup>1288</sup> to find that, because a firm's general economic interests can be aligned with its owner and its creditors, and because it cannot be right to assess the benefit to the firm and the creditor together, it is inappropriate to consider the firm and its owner together in assessing benefit. China disagrees with the Panel's reasoning and conclusion which it considers to be "in sharp contrast" to the conclusion drawn by the Appellate Body in *US – Countervailing Measures on Certain EC Products*, namely that "the legal distinction between firms and their owners ... is not necessarily relevant, and certainly not conclusive, for the purpose of determining whether a "benefit" exists under the *SCM Agreement*".<sup>1289</sup>

548. On the question of whether the fact that the purchaser of a subsidized producer pays fair market value to acquire that producer has any relevance to the continued existence of a benefit conferred by the original provision of a financial contribution to the subsidized producer, China asserts that the Panel manifestly failed to recognize the relevance of a subsequent privatization to the

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<sup>1287</sup>Canada's third participant's submission, para. 85 (quoting Appellate Body Report, *US – Upland Cotton*, para. 438).

<sup>1288</sup>China's third participant's submission, para. 14 (referring to Panel Report, para. 7.241).

<sup>1289</sup>China's third participant's submission, para. 18 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 115).

benefit conferred by a previously granted financial contribution. China notes that, for the Appellate Body in *US – Countervailing Measures on Certain EC Products*, the fact that the privatization was effected at arm's length and for fair market value was relevant to the continued existence of a previous benefit, but for the Panel in this dispute, it was not.<sup>1290</sup> China asserts that, according to the Panel, if the sale by a government of a state-owned company to a private actor is made on terms better than market benchmark, this would involve the granting of a new subsidy, which is tantamount to "ask[ing] a panel or an investigating authority to turn a blind eye on the specific situation surrounding a privatization and to rule that no privatization would extinguish a previously conferred benefit".<sup>1291</sup>

549. Finally, China claims that the Appellate Body in *US – Countervailing Measures on Certain EC Products* clearly reached a conclusion that "privatization at arm's length and for fair market value presumptively results in the extinguishment of benefits conferred by a prior financial contribution to such producer."<sup>1292</sup> China notes that, in reaching this conclusion, the Appellate Body distinguished between the concepts of "utility value" and "market value", finding that, although the *utility value* of equipment acquired as a result of a financial contribution is not extinguished following a privatization, its *market value* is redeemed.<sup>1293</sup> Moreover, China highlights that following a privatization there would be a change to the cost of capital of the company.<sup>1294</sup> Therefore, China submits, a private investor who purchases a state-owned company (either in full or in part) at fair market value repays the subsidy received by the company back to the government and extinguishes the corresponding benefits.

(b) Export subsidies

550. China maintains that the following two aspects should be noted for the interpretation and application of the legal standard of in fact export contingency under Article 3.1(a) of the *SCM Agreement*: "(i) {p}rohibition on in fact export contingent subsidies only applies when it has been demonstrated that the granting of a subsidy is contingent upon *export performance*; and (ii) {t}he *SCM Agreement* should not be interpreted in a way that discriminate small economies or global industries".<sup>1295</sup>

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<sup>1290</sup>China's third participant's submission, para. 21 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 102).

<sup>1291</sup>China's third participant's submission, para. 24.

<sup>1292</sup>China's third participant's submission, para. 25 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 126).

<sup>1293</sup>China's third participant's submission, para. 26 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 102).

<sup>1294</sup>China's third participant's submission, para. 27 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 103).

<sup>1295</sup>China's third participant's submission, para. 36. (original emphasis)

551. China submits that, for a determination on export contingency in fact, "Article 3.1(a) must be interpreted together with footnote 4."<sup>1296</sup> China recalls the Appellate Body's finding in *Canada – Aircraft* that "{t}he second sentence of footnote 4 precludes a panel from making a finding of *de facto* export contingency for the sole reason that the subsidy is 'granted to enterprises which export'."<sup>1297</sup> In China's view, the second sentence of footnote 4, as interpreted by the Appellate Body, clarifies the meaning of Article 3.1(a) by ensuring that "only subsidies 'tied to export' and thus favoring *export* over *domestic sales* should be deemed as export subsidies under Article 3.1(a); otherwise, the subsidies should be 'export-neutral' and not subject to the prohibition."<sup>1298</sup>

552. China recalls that Article 3.1(b) of the *SCM Agreement*, which provides context to Article 3.1(a), prohibits subsidies contingent on the use of domestic over imported goods. In China's view, subsidies prohibited under Article 3.1(b) treat "imported goods in a discriminatory manner", thereby distorting trade.<sup>1299</sup> Given the "adjacent and close-related" relationship between Article 3.1(a) and Article 3.1(b), China argues, "Article 3.1(a) should be interpreted as something of {a} similar nature and of a similar distortion level to international trade as that of import substitution subsidies" under Article 3.1(b).<sup>1300</sup> Thus, "an appropriate understanding of Article 3.1(a) should be that it deals with a subsidy that favors *export* sales over *domestic* sales, which is also a {discriminatory} treatment in international trade and thus should be prohibited."<sup>1301</sup> China further submits that the items provided under the Illustrative List of Export Subsidies in Annex I to the *SCM Agreement*, which also constitute context for the interpretation of Article 3.1(a), all refer to "subsidies favoring *export* sales over *domestic* sales."<sup>1302</sup> Finally, turning to the negotiating history of Article 3.1, China highlights the view expressed by some negotiators during the Uruguay Round negotiations that "the rationale for prohibiting subsidies had always been that these subsidies aimed at distorting trade by favouring exports".<sup>1303</sup> China therefore argues that "the rationale for prohibiting export subsidies is to prohibit those subsidies aimed at distorting trade by *favoring exports*."<sup>1304</sup> In contrast, "domestic subsidies ... aimed at achieving 'important domestic objectives of socio-economic policy' ... should not be

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<sup>1296</sup>China's third participant's submission, para. 39.

<sup>1297</sup>China's third participant's submission, para. 41 (quoting Appellate Body Report, *Canada – Aircraft*, para. 173).

<sup>1298</sup>China's third participant's submission, para. 42. (original emphasis)

<sup>1299</sup>China's third participant's submission, para. 44.

<sup>1300</sup>China's third participant's submission, para. 45.

<sup>1301</sup>China's third participant's submission, para. 45. (original emphasis)

<sup>1302</sup>China's third participant's submission, para. 48. (original emphasis)

<sup>1303</sup>China's third participant's submission, para. 50 (quoting Negotiating Group on Subsidies and Countervailing Measures, Meeting of 30 November-1 December 1989, Note by the Secretariat, MTN.GNG/NG10/15, para. 4). (underlining added by China)

<sup>1304</sup>China's third participant's submission, para. 52. (original emphasis)

prohibited *ex ante*"<sup>1305</sup> but "should be subject to remedial action only when they have some 'demonstrably negative effects on trade'".<sup>1306</sup> On this basis, China submits that "a *performance* requirement *per se* on an *export-oriented* enterprise by the granting authority for the granting of a subsidy shall not, by that reason alone, prove that the subsidy is contingent upon export performance."<sup>1307</sup>

553. Turning to the issue of export contingency in the context of global industries and small economies, China submits that the legal standard for export contingency has important implications for small economies, as well as for "global industr{ies}" in which products are sold on the global market.<sup>1308</sup> According to China, the LCA industry is a global industry in which returns from both domestic and export sales are needed to cover the "huge investment cost{s}".<sup>1309</sup> Moreover, in China's view, "the whole world needs {LCA} from two or even more producers" because competition among producers would give LCA purchasers more choice and enable consumers to enjoy long-distance transportation at an affordable price.<sup>1310</sup> China argues that the export-orientation of the LCA industry "is *not*, by itself, sufficient to preclude that sector from being expressly identified as an eligible or privileged recipient of subsidies."<sup>1311</sup>

554. In addition, China contends that "{t}he smaller the WTO Member in which {a} producer is based, the greater the proportion of {the producer's} sales is likely to be for export".<sup>1312</sup> Consequently, China argues, "it is very probable" that the WTO Member, when granting a subsidy to the producer, "is aware of the fact that its domestic market is too small to absorb its domestic production and thus anticipates ... exportation or export earnings" by the producer.<sup>1313</sup> However, China emphasizes, such anticipation "alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation" within the meaning of the footnote 4 to Article 3.1(a).<sup>1314</sup> Otherwise, the

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<sup>1305</sup>China's third participant's submission, para. 52 (quoting Negotiating Group on Subsidies and Countervailing Measures, Elements of the Framework for Negotiations, Communication from the Republic of Korea, MTN.GNG/NG10/W/34, p. 1).

<sup>1306</sup>China's third participant's submission, para. 52 (quoting Negotiating Group on Subsidies and Countervailing Measures, Meeting of 30 November-1 December 1989, Note by the Secretariat, MTN.GNG/NG10/15, para. 4).

<sup>1307</sup>China's third participant's submission, para. 53. (original emphasis)

<sup>1308</sup>China's third participant's submission, para. 55.

<sup>1309</sup>China's third participant's submission, para. 56.

<sup>1310</sup>China's third participant's submission, para. 56.

<sup>1311</sup>China's third participant's submission, para. 57. (original emphasis)

<sup>1312</sup>China's third participant's submission, para. 60.

<sup>1313</sup>China's third participant's submission, para. 60.

<sup>1314</sup>China's third participant's submission, para. 61 (referring to Panel Report, *Canada – Aircraft Credits and Guarantees*, paras. 7.371-7.378, in turn quoting Appellate Body Report, *Canada – Aircraft*, para. 172 (original emphasis)).

prohibition on export subsidies could be "more easily invoked with respect to *some* Members over {the} others", making the same rule more "burdensome" for some WTO Members.<sup>1315</sup>

555. Finally, China recalls that the object and purpose for establishing the WTO, as provided in the preamble of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), states that "relations in the field of trade and economic endeavor should be conducted *with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services.*"<sup>1316</sup> In China's view, "if subsidies to global industries (such as the LCA industry) were more likely to be found as in fact export contingent subsidies and thus be prohibited *ex ante*, the development of such global industries—which are usually of critical importance to the whole world and the products of which could even be regarded as a kind of quasi-public goods—will be influenced."<sup>1317</sup> Moreover, "if subsidies granted or maintained in a small economy were more likely to be captured by the in fact export subsidy rules and thus be prohibited from the outset, the socio-economic development of that WTO member would be discriminatorily affected."<sup>1318</sup> Therefore, China submits, "the legal standard of in fact export contingency should be interpreted consistently with the object and purpose" of the covered Agreements and global industries or small economies should not be adversely discriminated against.<sup>1319</sup>

(c) Infrastructure measures

556. China considers that the Panel's interpretation of "general infrastructure" is "problematic" because the Panel "failed to see that 'general' could be defined as 'all or nearly all the parts of a ... community, organization, etc.'".<sup>1320</sup> China also submits that the "creation" of infrastructure should be distinguished from the "provision" of infrastructure, as the "creation" of infrastructure "is not a kind of 'financial contribution' for the purpose of Article 1.1 of the *SCM Agreement*".<sup>1321</sup> In China's view, it is clear from the text of Article 1.1(a)(1)(iii) that "only the 'provision' of goods or services is relevant in establishing a financial contribution", and that the two points of concern are "the act of *provision*" and "*what* is being provided".<sup>1322</sup> China notes, by way of example, that although Hamburg built the flood protection dykes for the Mühlenberger Loch, those dykes were not provided to Airbus

<sup>1315</sup> China's third participant's submission, para. 62. (original emphasis)

<sup>1316</sup> China's third participant's submission, para. 64. (original emphasis)

<sup>1317</sup> China's third participant's submission, para. 66.

<sup>1318</sup> China's third participant's submission, para. 67.

<sup>1319</sup> China's third participant's submission, para. 68.

<sup>1320</sup> China's third participant's submission, para. 74.

<sup>1321</sup> China's third participant's submission, para. 75.

<sup>1322</sup> China's third participant's submission, para. 77. (original emphasis)

and therefore were not the subject of the financial contribution. China submits, rather, that what was provided to Airbus was "the use rights to the industrial land and the special purpose facilities for a definitive period of time".<sup>1323</sup>

557. China also argues that, in distinguishing the "creation" from the "provision" of infrastructure, the "creation" of infrastructure "bears unique considerations by a government in discharging its public policy duties", including the pursuit of social benefits such as employment, regional development, and government revenue.<sup>1324</sup> China contends that the *SCM Agreement* does not interfere with legitimate government choices. It adds that, "to drag the 'creation' of infrastructure into the scope of financial contribution would amount to requiring a government to act in a manner consistent with a private actor when *creating* infrastructures", which would "deprive a government of its inherent right to implement public policy."<sup>1325</sup> China notes that the negotiating history of the *SCM Agreement* highlights that several delegations expressed the view that certain subsidies such as infrastructure "should be acceptable, because they merely contribute to setting the terms and conditions of a country's economic and business environment, but do not alter the competitive position of firms."<sup>1326</sup>

558. China also considers that the problem with the Panel's comparison of the actual rental or fees paid by Airbus, with the market rate of return on the investment of the granting authorities, "flows from its previous decision to consider creation and provision of infrastructures together".<sup>1327</sup> By doing so, "the Panel failed to consider the legitimate functions and considerations of a government in its capacity as an authority serving the general interests of the people, in *creating* infrastructure."<sup>1328</sup> In China's view, a private investor will presumptively look for the market return for its investments, but a government will often create infrastructure for public policy reasons, "and therefore may not expect to recover its investment costs *solely* from the direct economic return".<sup>1329</sup> The Panel's conclusion is based on the assumption that any investment by a government in creating infrastructure is to be recovered by rent or other financial income directly accrued, but this "ignores the public functions of a government and prevents a government from considering any public policies or social benefit objectives in its decision-making process."<sup>1330</sup> Referring again to the example of the Mühlenberger Loch, China submits that "the inquiry of the benefit issue should be conducted by comparing the price at which Airbus obtained use rights of the lands and facilities at issue with the

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<sup>1323</sup> China's third participant's submission, para. 80.

<sup>1324</sup> China's third participant's submission, para. 83.

<sup>1325</sup> China's third participant's submission, para. 83. (original emphasis)

<sup>1326</sup> China's third participant's submission, para. 84. (footnote omitted)

<sup>1327</sup> China's third participant's submission, para. 88.

<sup>1328</sup> China's third participant's submission, para. 89. (original emphasis)

<sup>1329</sup> China's third participant's submission, para. 91. (original emphasis)

<sup>1330</sup> China's third participant's submission, para. 92.



prevailing market price of obtaining the use rights to the same or similar lands and facilities." China finds support for this position in Article 14(d) of the *SCM Agreement*.<sup>1331</sup>

## 5. Japan

### (a) The life of a subsidy and intervening events

559. Japan agrees with the Panel's rejection of the European Union's argument that the presumption of extinction of benefits "always applies" in circumstances where of all or part of a subsidized state-owned enterprise is sold at arm's length for fair market value to a private purchaser.<sup>1332</sup> Japan notes that the Appellate Body in *US – Countervailing Measures on Certain EC Products* rejected the original panel's determination that the presumption of extinction must apply to sales of a subsidized state-owned enterprise at arm's length for fair market value, and further stated that "the actual exchange value of the continuing benefit of past non-recurring financial contributions bestowed on the state-owned enterprise will be fairly reflected in the market price."<sup>1333</sup> Given that the "issue turns on whether the sales price of the subsidized state-owned enterprise to private entities reflected the actual exchange value of the continuing benefit" conferred on the subsidized producer, Japan "requests that the Appellate Body, taking into account this perspective, examine the Panel's findings on {the} question of whether there is a presumption of extinction of subsidy benefits."<sup>1334</sup>

### (b) Export subsidies

560. Japan contends that the Panel failed to conduct "a rigorous and fact-intensive application of Article 3.1(a) and Footnote 4 of the *SCM Agreement*", and instead "applied an 'inherently subjective' standard".<sup>1335</sup> Japan argues that "the Panel determined the existence of *de facto* export subsidization in the absence of any implicit export requirements in the LA/MSF A380 contracts analyzed."<sup>1336</sup> In Japan's view, "the Panel determined that the commercial or effective need for Airbus to export ... LCAs ... to meet sales targets was not only decisive, but determinative as to the issue of export subsidization."<sup>1337</sup> In addition, Japan recalls that the Panel considered "*other 'additional' evidence*"<sup>1338</sup>

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<sup>1331</sup> China's third participant's submission, para. 95 (referring to Appellate Body Report, *Canada – Aircraft*, para. 155).

<sup>1332</sup> Japan's third participant's submission, para. 50.

<sup>1333</sup> Japan's third participant's submission, para. 51 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 122). (emphasis added by Japan omitted)

<sup>1334</sup> Japan's third participant's submission, para. 51.

<sup>1335</sup> Japan's third participant's submission, para. 14 (quoting European Union's appellant's submission, para. 1371).

<sup>1336</sup> Japan's third participant's submission, para. 15.

<sup>1337</sup> Japan's third participant's submission, para. 16.

<sup>1338</sup> Japan's third participant's submission, para. 17 (quoting Panel Report, subheading to paras. 7.679-7.688). (emphasis added by Japan)

when it discerned "government's motivation ... that alluded to the need for Airbus to improve its export competitiveness."<sup>1339</sup> Japan contends that "{m}otivation is therefore an inappropriate tool to determine the WTO-permissibility" because it "risks being over-inclusive, in that an otherwise WTO-consistent subsidy may be deemed an export subsidy owing to overzealous drafting on the part of a government."<sup>1340</sup>

561. Moreover, Japan submits that the wording of footnote 4 of the *SCM Agreement* "renders clear that mere anticipation of exportation, in and of itself, is insufficient to warrant a finding of export subsidization."<sup>1341</sup> Japan therefore argues that "a tension" exists between, on the one hand, the Panel's conclusion that a subsidy contract containing sales targets at levels that cannot be met without exportation constitutes an export subsidy and, on the other hand, the "explicit requirement" under footnote 4 that possible exportation, alone, should not be determinative of a finding of export subsidization.<sup>1342</sup>

562. Japan further maintains that the Panel's above conclusion has a "critical logical flaw", which "places small economies at risk of having any subsidy granted to domestic producers be deemed export subsidies."<sup>1343</sup> Japan illustrates its argument with an example, where Member A has a small domestic market and wants to offer production subsidies to domestic producers in a given industry. In Japan's view, according to the Panel's finding on export contingency, "{u}nless the size of Member A's relevant domestic market exceeds the minimum size of efficient production, the viability of pertinent domestic producers to meet sales targets will necessarily rely on the foreign markets"<sup>1344</sup>, and thus it runs a greater risk that a "given production subsidy conferred by it to domestic producers be found '*export contingent*'".<sup>1345</sup> Japan thus contends that the Panel's interpretation of Article 3.1 and footnote 4 "risks arbitrarily discriminating against economies such as that of Member A, in a manner that 'adds to or diminishes' the rights of WTO Members under the WTO Agreements."<sup>1346</sup> Therefore, Japan requests that the Appellate Body re-examine the Panel's standard for export contingency, so as to avoid the misinterpretation that "production subsidies granted by a government whose domestic market is relatively small would more likely be found as '*export contingent*'".<sup>1347</sup>

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<sup>1339</sup> Japan's third participant's submission, para. 17.

<sup>1340</sup> Japan's third participant's submission, para. 19.

<sup>1341</sup> Japan's third participant's submission, para. 21.

<sup>1342</sup> Japan's third participant's submission, para. 22.

<sup>1343</sup> Japan's third participant's submission, para. 23.

<sup>1344</sup> Japan's third participant's submission, para. 26.

<sup>1345</sup> Japan's third participant's submission, para. 25. (original emphasis)

<sup>1346</sup> Japan's third participant's submission, para. 26.

<sup>1347</sup> Japan's third participant's submission, para. 27. (original emphasis)

## (c) Infrastructure measures

563. Japan agrees with the Panel that a case-by-case analysis "is more appropriate towards evaluating what constitutes 'general' and 'other than general' infrastructure than sweeping characterizations, which may otherwise unduly constrain WTO Members' sovereign prerogatives to provide constituents with a broad range of public infrastructure."<sup>1348</sup> Japan contends that the Panel rightly dismissed the European Communities' approach to distinguishing between the *creation* and *provision* of infrastructure "as it leads to a presumption that any infrastructure is general in nature."<sup>1349</sup> Japan also considers that "there is no textual basis" for the distinctions the European Union seeks to draw.<sup>1350</sup> Japan submits that reading the word "create" and the phrase "limit use or access" into the word "provides" in Article 1.1(a)(1)(iii) "is contrary to the customary rules of treaty interpretation and would unduly narrow the intended scope of this provision."<sup>1351</sup> Japan therefore agrees with the Panel's conclusion that certain infrastructure may be constructed for non-general purposes.

## (d) Adverse effects

564. Japan notes that there is not a single test that a panel must apply when analyzing causation, but maintains that causation under Article 6.3 of the *SCM Agreement* always requires a finding that there is a "genuine and substantial relationship of cause and effect".<sup>1352</sup> Japan asserts that the Panel held that the requirement to find a "genuine and substantial relationship of cause and effect" applies to the "entire universe of claims of adverse effects".<sup>1353</sup> Japan argues that the Panel failed to establish a "genuine and substantial" link between the subsidies at issue and serious prejudice to the United States' interests because the Panel failed to engage in a meaningful non-attribution analysis, instead merely citing and summarily discarding intervening factors pleaded by the European Communities. Japan notes that the Panel found that Airbus would still exist without subsidization, albeit with one less launched LCA model, and therefore argues that the Panel should

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<sup>1348</sup>Japan's third participant's submission, para. 52.

<sup>1349</sup>Japan's third participant's submission, para. 53 (referring to Panel Report, para. 7.1043).

<sup>1350</sup>Japan's third participant's submission, para. 55.

<sup>1351</sup>Japan's third participant's submission, para. 56.

<sup>1352</sup>Japan's third participant's submission, para. 30 (quoting Appellate Body Report, *US – Upland Cotton*, para. 438, in turn quoting Appellate Body Report, *US – Wheat Gluten*, para. 69). (emphasis added by Japan omitted)

<sup>1353</sup>Japan's third participant's submission, para. 34 (quoting Panel Report, para. 7.1967). (emphasis added by Japan omitted)

have conducted a non-attribution analysis, focusing on the difference in serious prejudice caused by a subsidized Airbus and a non-subsidized Airbus<sup>1354</sup>, as required by Appellate Body jurisprudence.<sup>1355</sup> Japan is concerned that the Appellate Body upholding the Panel's causation analysis will imply that a causal link will near-automatically be inferred despite the existence of other factors that may have affected the level of serious prejudice. Japan therefore requests that the Appellate Body clarify that a panel should clearly examine and identify the effects of other, non-subsidy factors when finding causation under Articles 5 and 6.3 of the *SCM Agreement*.

6. Korea

(a) Export subsidies

565. Korea submits that, in the light of the findings in *Canada – Aircraft*, "in order to establish that the challenged program is 'tied to' export performance, the question is whether the subsidy would *not* have been granted to Airbus if the Airbus Governments had known that no export sales may ensue from the subsidy to be provided under the program."<sup>1356</sup> Korea argues that the Panel seemed "to have adopted a looser threshold" and "apparently focuse{d} on the motivation of the granting government", as opposed to "the demonstration of {a relationship of} conditionality or dependence".<sup>1357</sup>

566. Korea argues that, under the standard adopted by the Panel, "when it is demonstrated that there is the anticipating of exports by the granting authority, and that *because* of such anticipating of exports a subsidy is granted, that is also inconsistent with Article 3.1(a) and footnote 4."<sup>1358</sup> Moreover, Korea recalls the Panel's finding that a government's motivation for granting a subsidy is "highly relevant" to an examination of export contingency under Article 3.1(a) and footnote 4.<sup>1359</sup> Korea argues that the Panel's approach focused on the motivation of the granting government, as opposed to the demonstration of conditionality or dependence between the programme and actual or anticipated export performance. Korea also argues that the Panel, in exploring a correct standard for determining *de facto* export contingency, has adopted a "totality of circumstances" test in which all

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<sup>1354</sup>Japan's third participant's submission, para. 36 (referring to Panel Report, paras. 7.1985-7.1987 and 7.1993).

<sup>1355</sup>Japan's third participant's submission, paras. 37-42 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374; Appellate Body Report, *US – Upland Cotton*, paras. 437 and 438; Appellate Body Report, *US – Line Pipe*, para. 215; Appellate Body Report, *US – Hot-Rolled Steel*, para. 223; and Appellate Body Report, *US – Lamb*, para. 179).

<sup>1356</sup>Korea's third participant's submission, para. 28. (original emphasis)

<sup>1357</sup>Korea's third participant's submission, para. 29 (quoting Panel Report, para. 7.640, in turn quoting Appellate Body Report, *Canada – Aircraft*, para. 171).

<sup>1358</sup>Korea's third participant's submission, para. 29 (referring to Panel Report, para. 7.636 (original emphasis)).

<sup>1359</sup>Korea's third participant's submission, para. 29 (quoting Panel Report, para. 7.675).

relevant elements are taken into account.<sup>1360</sup> Korea is of the view that such a "totality of circumstances" test would require caution, as it "seems always vulnerable to the selective adoption of information and evidence from a wide range of sources, including sometimes unsubstantiated press reports or government officials' statements."<sup>1361</sup>

567. Korea contends that, consistent with the approach adopted by the Appellate Body in *Canada – Aircraft*, a determination of *de facto* contingency requires a panel to "look into the very nature of {a subsidy} to confirm the existence of the 'tied to' requirement as opposed to merely speculating on 'motivation' of a granting government."<sup>1362</sup> Korea notes that the Panel's approach "has its own merit", because "this approach may be able to deter a circumvention attempt by certain Members."<sup>1363</sup> Nonetheless, Korea contends that the approach "would have the potential of creating a situation where findings of export contingency becomes more likely in the case of small or export dependent economies in the global markets."<sup>1364</sup>

(b) Infrastructure measures

568. Korea argues that the explicit exclusion of "general infrastructure" in Article 1.1(a)(1)(iii) of the *SCM Agreement* ensures certain "maneuvering room" for WTO Members to pursue legitimate public objectives.<sup>1365</sup> Thus, "to the extent the infrastructure takes the form of 'general infrastructure' which benefits the population as a whole, the SCM Agreement simply excludes it from the reach of the agreement."<sup>1366</sup> Korea considers, however, that the Panel's analysis in this case may in certain respects unduly restrict WTO Members' ability to carry out the important socio-economic function of providing "general infrastructure".

569. Korea considers that "the provision of infrastructure to a specific recipient, which, by reference to its technical requirements and use, is only suitable to the needs of that recipient, would fall outside the scope of 'general infrastructure'".<sup>1367</sup> Korea therefore agrees with the Panel's reasoning that "where the relevant infrastructure is not accessible by the public at large or where the infrastructure is not for the common good of the public ... these facilities simply do not fall under the category of the general infrastructure within the meaning of Article 1.1(a)(1)(iii)."<sup>1368</sup>

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<sup>1360</sup>Korea's third participant's submission, para. 30.

<sup>1361</sup>Korea's third participant's submission, para. 30.

<sup>1362</sup>Korea's third participant's submission, para. 32.

<sup>1363</sup>Korea's third participant's submission, para. 33. (footnote omitted)

<sup>1364</sup>Korea's third participant's submission, para. 34.

<sup>1365</sup>Korea's third participant's submission, para. 13.

<sup>1366</sup>Korea's third participant's submission, para. 13.

<sup>1367</sup>Korea's third participant's submission, para. 14.

<sup>1368</sup>Korea's third participant's submission, para. 15.

570. Korea expresses concern, however, about the Panel's finding that infrastructure can be general at certain points of time but not at others. Korea argues that "the overly broad reference of the Panel regarding the amorphous nature of the general infrastructure may cause an unintended problem in the long run as it may carry the potential of undermining the concept of 'general infrastructure'."<sup>1369</sup> Korea suggests that the term "general infrastructure" may have been understood as a single term, as opposed to the combination of two different words of "general" and "infrastructure". Korea adds that, in its view, it is "difficult to read into Article 1.1(a)(1)(iii) a term which qualifies 'provision of "general infrastructure"' with a temporal element".<sup>1370</sup> Korea thus contends that, by holding that "general infrastructure" is a malleable concept that does not exist on its own, the Panel's finding "may offer an erroneous signal that sometimes legitimate general infrastructure projects (such as airports, railroads, highways, harbours, etc.) may constitute financial contribution{s} by a government ... simply because of the disproportionate utilization rate by some companies at some point in time."<sup>1371</sup>

### III. Issues Raised in This Appeal

571. The following issues are raised on appeal by the European Union:

- (a) Whether the Panel erred in finding that measures consisting of R&TD grants by the French Government, and R&TD loans by the Spanish Government under the PROFIT programme, had been properly identified in the United States' panel request in accordance with Article 6.2 of the DSU;
- (b) Whether the Panel erred in its interpretation and application of Article 5 of the *SCM Agreement* by rejecting the European Communities' request to exclude all alleged actionable subsidies granted prior to 1 January 1995 from the temporal scope of the dispute;
- (c) Whether the Panel erred in its interpretation of Articles 1, 4.7, 5, 6, and 7.8 of the *SCM Agreement* and their application to a number of transactions involving certain Airbus companies. In particular:
  - (i) whether the Panel erred in finding that Articles 5 and 6 do not require that a complainant demonstrate that a benefit "continues" or is "present" during the reference period for purposes of an adverse effects analysis;

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<sup>1369</sup> Korea's third participant's submission, para. 18.

<sup>1370</sup> Korea's third participant's submission, para. 20.

<sup>1371</sup> Korea's third participant's submission, para. 22.

- (ii) whether the Panel erred by failing to take into account and find that a number of transactions involving certain Airbus companies resulted in the "extinction" and/or "extraction" of subsidies; and
  - (iii) whether the Panel erred in failing to find that, as a result of these transactions, subsidies were "withdrawn" within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*;
  - (iv) whether, in its treatment of the European Communities' arguments concerning the "extinction", "extraction", and "withdrawal" of subsidies, the Panel failed to make an objective assessment and thereby acted inconsistently with Article 11 of the DSU; and
  - (v) whether the Panel erred in finding that the United States was not required to demonstrate, as part of its *prima facie* case under Article 5 of the *SCM Agreement*, that subsidies provided to the Airbus Industrie consortium "passed through" to the current producer of Airbus LCA;
- (d) Whether the Panel erred in assessing if LA/MSF support provided a "benefit" under Article 1.1(b) of the *SCM Agreement*. More specifically:
- (i) whether, in interpreting and applying the notion of "benefit" under Article 1.1(b) of the *SCM Agreement*, the Panel erred by failing to take into account Article 4 of the 1992 Agreement as 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*, or as part of the facts in establishing the relevant market benchmark; or, in the alternative
  - (ii) whether the Panel erred by improperly applying Article 1.1(b) of the *SCM Agreement*, and failed to make an objective assessment of the matter under Article 11 of the DSU, in its assessment of the project-specific risk premium proposed by the United States for purposes of constructing the market benchmark used to compare against the rates of return obtained by the member States under the challenged LA/MSF measures;

- (iii) whether the Panel erred by incorrectly interpreting and applying Article 1.1(b) of the *SCM Agreement*, and failed to make an objective assessment of the matter under Article 11 of the DSU, in its assessment of the project-specific risk premium proposed by the European Communities for purposes of constructing the market benchmark used to compare against the rates of return obtained by the member States under the challenged LA/MSF measures; and
  - (iv) whether the Panel erred under Article 1.1(b) of the *SCM Agreement* in stating, in paragraph 7.397 of the Panel Report, that "the number of sales over which full repayment is expected says little, if anything, about the appropriateness of the rate of return that will be achieved by that lender";
- (e) Whether the Panel erred in its interpretation and application of Article 2.1 of the *SCM Agreement* in finding that R&TD funding granted to Airbus under the EC Framework Programmes constituted "specific" subsidies within the meaning of Article 2.1(a) of the *SCM Agreement*;
- (f) Whether the Panel erred in its interpretation and application of Article 1 of the *SCM Agreement* in finding that infrastructure measures concerning the Mühlenberger Loch industrial site in Hamburg, the airport runway extension in Bremen, and the Aéroconstellation industrial site in Toulouse, constitute financial contributions within the meaning of Article 1.1(a)(1)(iii), and conferred a benefit within the meaning of Article 1.1(b), of the *SCM Agreement*;
- (g) Whether the Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement*, and failed to make an objective assessment of the matter under Article 11 of the DSU, in finding that a benefit was conferred by each of four capital investments by the French Government in Aérospatiale between 1987 and 1994;
- (h) Whether the Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement*, and failed to make an objective assessment of the matter under Article 11 of the DSU, in finding that a benefit was conferred by the 1998 transfer by the French Government to Aérospatiale of its shares in Dassault Aviation;



- (i) Whether the Panel erred in finding that the United States had demonstrated that the German, Spanish, and UK A380 contracts amount to prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*. More specifically:
- (i) whether the Panel erred in the interpretation of Article 3.1(a) and footnote 4 of the *SCM Agreement*, in particular the terms "contingent", "tied to", "actual or anticipated", and "export performance", in finding that, in order to qualify as a prohibited export subsidy, a subsidy must be granted *because* of actual or anticipated export performance;
  - (ii) whether the Panel erred in the application of Article 3.1(a) and footnote 4 of the *SCM Agreement* in finding that, together with the evidence the United States advanced concerning the exchange of commitments between Airbus and the German, Spanish, and UK Governments, the additional evidence submitted by the United States demonstrated that the German, Spanish, and UK A380 contracts were in fact concluded, at least in part, on the *condition* or *because* of the three LA/MSF governments' anticipation of exportation; and
  - (iii) whether the Panel acted inconsistently with Articles 7.2, 11, and 12.7 of the DSU in making the above findings by (1) failing to address the relevant provisions cited by the parties, (2) failing to make an objective assessment of the matter before it, and (3) failing to state the basic rationale for its findings;
- (j) Whether the Panel erred in its interpretation and application of Articles 5(c) and 6.3(a) and (b) of the *SCM Agreement*, in particular the term "market" read in the context of the terms "subsidized" and "like product", and acted inconsistently with its obligations under Article 11 of the DSU, when it found that it did not need independently and objectively to make a determination regarding the "subsidized product"; and consequently in assessing "displacement" on the basis of a single subsidized product and a single market for LCA;
- (k) Whether the Panel erred in finding, under the first step of its two-step approach pursuant to Article 6.3(a) of the *SCM Agreement*, that Boeing LCA were displaced from the European Communities market;

- (l) Whether the Panel erred in finding, under the first step of its two-step approach pursuant to Article 6.3(b) of the *SCM Agreement*, that Boeing LCA were displaced from the markets of Australia, Brazil, China, Korea, Mexico, Singapore, and Chinese Taipei, and acted inconsistently with its obligations under Article 11 of the DSU in finding that Boeing LCA were displaced from the markets of Brazil and Mexico;
- (m) Whether the Panel erred in finding, under the first step of its two-step approach pursuant to Article 6.3(b) of the *SCM Agreement*, that there was a threat of displacement of Boeing LCA from the market of India;
- (n) Whether the Panel erred in finding, under the first step of its two-step approach pursuant to Article 6.3(c) of the *SCM Agreement*, that the sale to Emirates Airlines of A380 aircraft constituted a "lost sale", and failed to make an objective assessment of the matter under Article 11 of the DSU in reaching this finding<sup>1372</sup>;
- (o) Whether the Panel erred in finding, pursuant to Article 6.3 of the *SCM Agreement*, that the following market phenomena were "the effect" of the subsidies provided to Airbus and thus gave rise to "serious prejudice" to the interests of the United States within the meaning of Article 5(c) of the *SCM Agreement*:
  - (i) "displacement" of Boeing LCA from the markets of the European Communities, Australia, Brazil, China, Korea, Mexico, Singapore, and Chinese Taipei, and threat of displacement from the market of India;
  - (ii) significant "lost sales" in the A320 sales to Air Asia, Air Berlin, Czech Airlines, and easyJet;
  - (iii) significant "lost sales" in the A380 sales to Emirates Airlines, Qantas, and Singapore Airlines; and
  - (iv) whether, in reaching these findings, the Panel failed to make an objective assessment of the matter under Article 11 of the DSU;

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<sup>1372</sup> Although the European Union alleges an inconsistency under Article 12.7 of the DSU in its Notice of Appeal in respect of subparagraphs (j) through (p) above, it has not pursued these claims in its appellant's submission.

- (p) Whether the Panel erred in its interpretation and application of Articles 5 and 6.3(a), (b), and (c) of the *SCM Agreement*, and failed to make an objective assessment of the matter under Article 11 of the DSU, in failing to distinguish the effects of the subsidies other than LA/MSF from the LA/MSF measures in assessing adverse effects, and in failing to provide a reasoned and adequate explanation as to how the non-LA/MSF measures could cause or contribute to causing adverse effects; and
- (q) Whether the Panel erred in its interpretation and application of Article 5(c) of the *SCM Agreement*, and acted inconsistently with Articles 12.7 and 11 of the DSU, in failing to take into account the 1992 Agreement in its adverse effects analysis.

572. The following issues are raised by the United States in its other appeal:

- (a) Whether the Panel erred in finding that the United States has not established the existence of an unwritten LA/MSF "Programme" that constitutes a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*; and
- (b) Whether the Panel erred in finding that the United States had not shown that the granting of the French LA/MSF for the A380 and A330-200, and the French and Spanish LA/MSF for the A340-500/600, were contingent in fact upon anticipated exportation, within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*, including whether the Panel effectively required evidence of specific motivation in order to find a tie between the subsidies and anticipated exports.

#### IV. Overview of the Measures at Issue

##### A. Introduction

573. This dispute concerns a challenge brought by the United States against numerous alleged instances of subsidization to Airbus companies<sup>1373</sup> over the course of four decades by the European Communities<sup>1374</sup> and four of its member States—France, Germany, Spain, and the United Kingdom (herein the "member States")—with respect to large civil aircraft ("LCA").<sup>1375</sup>

574. The measures that were the subject of the United States' complaint may be grouped into five general categories: (a) "launch aid" or "member State financing" ("LA/MSF") for the development of various Airbus LCA, consisting of the A300, A310, A320, A330/A340 (including the A330-200 and A340-500/600 variants), A350, and A380; (b) loans from the European Investment Bank ("EIB") to

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<sup>1373</sup>By this term, we mean the Airbus companies described by the United States in its panel request, namely:

Airbus SAS, its predecessor Airbus GIE and current and predecessor affiliated companies, including each person or entity that directly, or indirectly through one or more intermediaries or relationships, controls or controlled, or is or was controlled by, or is or was under common control with Airbus SAS or Airbus GIE, such as parent companies, sibling companies and subsidiaries, including Airbus Deutschland GmbH, Airbus España SL, Airbus France S.A.S., Airbus UK Limited, European Defence and Space Company ("EADS"), and BAE Systems.

(Request for the Establishment of a Panel by the United States, WT/DS316/2, footnote 1)

<sup>1374</sup>This dispute began before the entry into force of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) on 1 December 2009. On 29 November 2009, the World Trade Organization received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the "European Union" replaces and succeeds the "European Community". On 13 July 2010, the World Trade Organization received a second Verbal Note (WT/Let/679) from the Council of the European Union confirming that, with effect from 1 December 2009, the European Union replaced the European Community and assumed all the rights and obligations of the European Community in respect of all Agreements for which the Director-General of the World Trade Organization is the depositary and to which the European Community is a signatory or a contracting party. We understand the reference in the Verbal Notes to the "European Community" to be a reference to the "European Communities". Thus, although the European Communities was a party in the Panel proceedings, and the Panel referred to the European Communities in its Report, it is the European Union that filed a Notice of Appeal in this dispute after the entry into force of the *Treaty of Lisbon*, and we will thus refer to the European Union in this Report in its capacity as appellant (and as appellee). However, when referring to events that took place during the Panel proceedings, or quoting from the Panel Report, we refer to the European Communities.

<sup>1375</sup>In paragraph 2.1 of its Report, the Panel defined "large civil aircraft" ("LCA") as follows:

{L}arge (weighing over 15,000 kilograms) "tube and wing" aircraft, with turbofan engines carried under low-set wings, designed for subsonic flight. LCA are designed for transporting 100 or more passengers and/or a proportionate amount of cargo across a range of distances serviced by airlines and air freight carriers. LCA are covered by tariff classification heading 8802.40 of the Harmonized System ("Airplanes and other aircraft, of an unladen weight exceeding 15,000 kg").

Airbus companies; (c) research and technological development ("R&TD") funding granted to Airbus companies by the European Communities and the member State governments at central and regional levels; (d) infrastructure and infrastructure-related grants by the member State governments; and (e) corporate restructuring measures undertaken by the French and German Governments.

575. The United States claimed before the Panel that each challenged measure is a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*, and that the European Communities and the member States, through the use of these subsidies, caused adverse effects to the United States' interests within the meaning of Articles 5 and 6 of the *SCM Agreement*. In addition, the United States claimed that certain LA/MSF measures are prohibited export subsidies within the meaning of Article 3 of the *SCM Agreement*.

576. The Panel's findings that are subject to appeal are identified in Part III of this Report. Because of the large number of claims made and measures challenged, and in order to provide some background to and context for our findings, we consider it useful first to explain the corporate evolution of the Airbus companies to form Airbus SAS, the company that today develops and manufactures Airbus LCA. We then set out an overview of the measures at issue in this dispute. We note that the following overview places specific emphasis on those findings of the Panel that are relevant to this appeal. For a complete account of the background to the evolution of the Airbus companies as well as the measures at issue and the Panel's reasoning and findings, direct reference should be had to the Panel Report.

#### B. *Background to the Creation of Airbus SAS*

577. Prior to 2001, Airbus LCA were produced by a consortium of French, German, Spanish, and UK aerospace companies (the Airbus partners), operating in a partnership arrangement through the French entity, Airbus GIE.<sup>1376</sup> We use the term "Airbus Industrie" to refer to the Airbus consortium as it operated between 1970 and 2001; that is, each of the four Airbus partners and Airbus GIE *collectively*. In contrast, reference to Airbus GIE as an entity distinct from the Airbus partners will be made through use of the term "Airbus GIE".<sup>1377</sup>

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<sup>1376</sup> Airbus Industrie GIE was registered under French law as a "*groupement d'intérêt économique*" ("GIE"), which is a French legal framework that allows its members to carry out collectively certain economic activities while maintaining their separate legal identities, and which does not have as its goal the retaining of profits. A GIE has a separate legal personality from its members, although, in other respects, it resembles a partnership. (Panel Report, footnote 2053 to paragraph 7.183)

<sup>1377</sup> See, similarly, Panel Report, para. 7.184.

578. Airbus Industrie was founded in 1970. At the time, it included the French aerospace manufacturer, Aérospatiale Société Nationale Industrielle ("Aérospatiale")<sup>1378</sup> and the German aerospace manufacturer, Deutsche Airbus GmbH.<sup>1379</sup> The Spanish aerospace manufacturer, Construcciones Aeronáuticas SA ("CASA")—which was 99% owned by a Spanish Government holding company, Sociedad Estatal de Participaciones Industriales ("SEPI")—became a member of the consortium in 1971<sup>1380</sup>; and British Aerospace Corporation, a UK aerospace manufacturer, subsequently joined the consortium in 1979.<sup>1381</sup> Between 1979 and 2000, there were a number of corporate restructurings involving three of the four Airbus partners: in 1998, Aérospatiale merged with Matra Hautes Technologies ("MHT") to form Aérospatiale-Matra SA<sup>1382</sup>; in 1992, pursuant to a restructuring plan by the German Government, Deutsche Airbus became a wholly owned subsidiary of Deutsche Aerospace AG ("Dasa"), which was in turn owned by Daimler-Benz Aerospace AG ("Daimler-Benz")<sup>1383</sup>; and in 1999, British Aerospace Corporation, through a series of transactions, became BAE Systems PLC.<sup>1384</sup> In spite of these changes to the Airbus partners, their membership

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<sup>1378</sup>Aérospatiale was founded in 1970 through the merger of three French aerospace companies: Sud Aviation, Nord Aviation, and Société d'études et de réalisation d'engins balistiques. Aérospatiale was owned directly and indirectly by the French Government until 1998. (Panel Report, footnote 2054 to para. 7.183)

<sup>1379</sup>60% of the interest in Deutsche Airbus was held by Messerschmitt-Bölkow-Blohm GmbH ("MBB"), a merger of three German companies, and the remaining 40% was held equally by two other German companies, Dornier and Vereinigte Flugtechnische Werke ("VFW"). MBB took over VFW in 1981. (See Panel Report, footnote 2055 to para. 7.183)

<sup>1380</sup>CASA was founded in 1923 and was Spain's largest aerospace and defence manufacturer. SEPI was entrusted with the management and privatization of certain Spanish Government-controlled companies. (Panel Report, para. 7.183 and footnote 2056 thereto)

<sup>1381</sup>British Aerospace Corporation was formed in 1977 as a Crown corporation without shares, wholly owned by the UK Government. It was formed as a result of the merger of the UK aerospace companies, Hawker Siddeley Aviation Ltd, Hawker Siddeley Dynamics Ltd, Scottish Aviation Ltd, and British Aircraft Corporation (Holdings) Ltd. (Panel Report, footnote 2057 to para. 7.183)

<sup>1382</sup>The French Government sold a portion of its shares in Aérospatiale-Matra in a public offering in 1999. As a result, 48% of Aérospatiale-Matra was owned by the French Government and 2% by employees. The rest was acquired by a private company (33%) and the public (17%). (European Union's appellant's submission, paras. 131-133 (referring to, *inter alia*, Aérospatiale-Matra, Offering Memorandum (25 May 1999) (Panel Exhibit EC-53), pp. 3, 13-14, and 30)). See also Panel Report, para. 4.20 and footnote 2054 to para. 7.183.

<sup>1383</sup>See Panel Report, footnote 2055 to para. 7.183. The Panel explained that "Deutsche Airbus AG was a subsidiary of MBB until MBB's merger with Daimler Benz's subsidiary Deutsche Aerospace AG (Dasa) in 1992, after which it was an indirect subsidiary of Daimler-Benz. Although Dasa was originally founded as Deutsche Aerospace AG in 1989, its name was changed to Daimler-Benz Aerospace AG in 1995, and then to DaimlerChrysler Aerospace AG in 1998 (following the merger of Daimler-Benz AG with Chrysler Corporation). We refer to this entity as 'Dasa' throughout this report." (Panel Report, footnote 2061 to paragraph 7.184; see also footnote 2055 to para. 7.183) Similarly, our references to Dasa in this Report are to this entity.

<sup>1384</sup>Panel Report, footnote 2057 to para. 7.183. In 1981, the assets and business of the British Aerospace Corporation were transferred to the newly incorporated British Aerospace PLC, a UK public limited company. The UK Government sold 51.57% of its shares in British Aerospace in a public offering in 1981 and, subject to retaining a share to ensure that the company remained under UK control, sold the remainder of its shares in 1985. In 1999, British Aerospace PLC merged with Marconi Electronic Systems to become BAE Systems PLC. (*Ibid.* (referring to European Communities' first written submission to the Panel, paras. 59-61))

interests in Airbus GIE between 1979-2000 remained as follows: Aérospatiale (subsequently Aérospatiale-Matra) (37.9%); Deutsche Airbus (37.9%); CASA (4.2%); and British Aerospace (subsequently BAE Systems) (20%).<sup>1385</sup>

579. The Airbus partners in France, Germany, Spain, and the United Kingdom produced specific parts of Airbus LCA, which were then assembled in France by Aérospatiale.<sup>1386</sup> Airbus GIE did not carry out any production activities; rather, it coordinated the production efforts of the Airbus partners, allocated revenues and profits to each of the partners, and assumed responsibility for areas such as marketing, sales, aircraft delivery, and customer service.<sup>1387</sup>

580. In July 2000, the French, German, and Spanish Airbus partners merged their activities in the aeronautics, space, and defence sectors by contributing all of the shares of the subsidiaries of Aérospatiale-Matra and Dasa, and all of the shares of CASA<sup>1388</sup>, to the newly formed European Aeronautic Defence and Space Company NV ("EADS"), a public limited liability company (*naamloze vennootschap*) organized under the laws of the Netherlands.<sup>1389</sup> Prior to these contributions, Aérospatiale-Matra and Dasa had each conducted internal reorganizations of the subsidiaries in which they held the assets and liabilities related to their Airbus-related and non-Airbus-related activities.<sup>1390</sup> The contributions were made in exchange for shares in EADS issued in

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<sup>1385</sup>See Panel Report, section VII.E.1 (attachment), para. 3, p. 361. The Panel noted that two other European aerospace companies, Fokker and Belairbus, participated in certain Airbus programmes as associated manufacturers, although they did not become partners in Airbus GIE. (*Ibid.*, footnote 2238 to para. 3, p. 361).

<sup>1386</sup>For a description of the activities of each of the Airbus GIE partners, see Panel Report, footnote 2058 to para. 7.183.

<sup>1387</sup>Panel Report, para. 7.183.

<sup>1388</sup>Panel Report, section VII.E.1 (attachment), para. 4, p. 362, and footnote 2214 to para. 7.274.

<sup>1389</sup>Panel Report, section VII.E.1 (attachment), para. 4, p. 362.

<sup>1390</sup>Panel Report, section VII.E.1 (attachment), para. 4, p. 362 and footnote 2241 thereto, which states:

Aérospatiale Matra Airbus was the Aérospatiale-Matra subsidiary which held Aérospatiale Matra's Airbus-related assets and liabilities, including its 37.9 percent membership interest in Airbus GIE. Other Aérospatiale-Matra subsidiaries held assets that were not related to Aérospatiale-Matra's LCA activities, such as Aérospatiale-Matra's helicopter, defence, space transport, satellite and telecommunications businesses. Dasa's Airbus-related activities had been grouped into a subsidiary called DaimlerChrysler Aerospace Airbus Beteiligungs GmbH, which held a 99.99 percent of the shares of DaimlerChrysler Aerospace Airbus GmbH, which in turn held a 37.9 percent membership interest in Airbus GIE. Dasa separately held a direct 0.71 percent interest in CASA, which it also contributed to EADS pursuant to the combination transactions. Assets and liabilities relating to activities other than the Airbus-related activities were grouped into other Dasa subsidiaries, with the exception of (i) liabilities relating to Dornier aircraft; (ii) all claims and liabilities relating to the Fokker group; (iii) Dasa AG's participating interests in MTU, Temic Telefunken microelectronic GmbH and debis AirFinance B.V.; and (iv) a cash amount of Euro 3,133 million; EADS Offering Memorandum, 9 July 2000, Exhibit EC-24, pp. 140-144.

proportion to the relative values of the respective contributions of Aérospatiale-Matra<sup>1391</sup>, Dasa, and SEPI.<sup>1392</sup> EADS thereafter owned all of the subsidiaries of Aérospatiale-Matra and Dasa that had previously conducted the Airbus-related design, engineering, manufacturing, and production activities located in France and Germany, and all of the shares of former Spanish Airbus partner, CASA. EADS also held the membership interests in Airbus GIE that had previously been held by Aérospatiale-Matra, Dasa, and CASA.<sup>1393</sup> BAE Systems continued to hold its 20% interest in Airbus GIE.<sup>1394</sup>

581. Following these transactions, DaimlerChrysler<sup>1395</sup> and Société de gestion de l'aéronautique, de la défense et de l'espace ("SOGEADE")—a French partnership limited by shares to which the French Government and other French companies belong<sup>1396</sup>—each held approximately 30% of the share capital of EADS, while SEPI held 5.48% of EADS shares.<sup>1397</sup> DaimlerChrysler, SOGEADE, and SEPI entered into a contractual partnership under Dutch law (the "Contractual Partnership") in which they agreed that a Dutch company, EADS Participations BV<sup>1398</sup>, would exercise the voting rights attached to the 65.48% shares held among them.<sup>1399</sup>

582. In 2001, EADS and BAE Systems placed their Airbus-related assets and operations and their membership rights in Airbus GIE under the common control of a newly created holding company,

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<sup>1391</sup>Aérospatiale-Matra was subsequently wound up, so that the EADS shares issued to Aérospatiale-Matra were distributed by Aérospatiale-Matra to its own shareholders simultaneously with the liquidation of Aérospatiale-Matra on the basis of one EADS share for every one Aérospatiale-Matra share. Simultaneously with these transactions, EADS issued shares and the French Government, Lagardère, and the French financial institutions, BNP PARIBAS and AXA, sold EADS shares in a public offering. (Panel Report, section VII.E.1 (attachment), footnote 2242 to para. 4, p. 362 (referring to EADS' Offering Memorandum, *supra*, footnote 163, pp. 140-144))

<sup>1392</sup>Panel Report, section VII.E.1 (attachment), para. 4, p. 362. See EADS' Offering Memorandum, *supra*, footnote 163, pp. 140-144.

<sup>1393</sup>Panel Report, section VII.E.1 (attachment), para. 5, p. 362.

<sup>1394</sup>Panel Report, section VII.E.1 (attachment), para. 4, p. 362.

<sup>1395</sup>DaimlerChrysler Aerospace AG ("DaimlerChrysler") was formed in 1998 following the merger of Daimler-Benz with the Chrysler Corporation. (See Panel Report, footnote 2061 to para. 7.184)

<sup>1396</sup>SOGEADE (Société de gestion de l'aéronautique, de la défense et de l'espace) is a French partnership limited by shares (*société en commandite par actions*). SOGEADE is 50% owned by the French Government (through a French Government-owned holding company, Société de gestion de participations aéronautique (SOGEPA)) and 50% owned by Désirade, which comprises Lagardère as well as the French financial institutions, BNP PARIBAS and AXA. (Panel Report, section VII.E.1 (attachment), footnotes 2242 and 2243 to para. 4, p. 362, and para. 6, p. 363 (referring to EADS' Offering Memorandum, *supra*, footnote 163, pp. 38, 65, 74, 132, 137-138, and 141-142))

<sup>1397</sup>Panel Report, section VII.E.1 (attachment), para. 4, p. 362, and para. 6, p. 363.

<sup>1398</sup>EADS Participations BV is a Dutch private company with limited liability and is the managing partner of the Contractual Partnership. (EADS' Offering Memorandum, *supra*, footnote 163, p. 133)

<sup>1399</sup>See EADS' Offering Memorandum, *supra*, footnote 163, pp. 132-133. With the "indirect shares" pledged to it, EADS Participations BV was granted the exclusive power to exercise the voting rights attaching to these shares (including the right to attend and speak at shareholders' meetings) in accordance with a Contractual Partnership agreement. (*Ibid.*, p. 132)



Airbus SAS, a *société par actions simplifiée* under French law.<sup>1400</sup> The LCA-related assets located in France, Germany, Spain, and the United Kingdom were transferred to Airbus SAS subsidiaries: those previously held by Aérospatiale-Matra were transferred to Airbus France SAS; those previously held by Dasa were transferred to Airbus Deutschland GmbH; and those previously held by CASA were transferred to Airbus España. BAE Systems transferred its LCA-related assets to Airbus SAS in exchange for a 20% stake in Airbus SAS, assets which were later transferred to Airbus UK Ltd.<sup>1401</sup> EADS held an 80% interest in Airbus SAS (and had effective control over its operations), while BAE Systems, with the remaining 20% interest, enjoyed specific minority rights.<sup>1402</sup> In 2006, EADS purchased BAE Systems' 20% interest in Airbus SAS, so that Airbus SAS became a wholly owned subsidiary of EADS.<sup>1403</sup>

### C. *Launch Aid/Member State Financing*

583. A significant part of the United States' case concerns a form of financing for LCA design and development provided by France, Germany, Spain, and the United Kingdom to Airbus over a period of approximately 40 years beginning in 1969. The United States refers to all such financing as "launch aid". The European Union uses different terms to describe such financing, including "MSF" (member State financing), "member State loans", and "launch investment".<sup>1404</sup> In this Report, we refer to these measures as "LA/MSF".<sup>1405</sup>

584. Before the Panel, the United States argued that the Governments of France, Germany, Spain, and the United Kingdom provided LA/MSF to Airbus for each new model and variant<sup>1406</sup> of Airbus LCA—in particular the A300, A310, A320, A330/A340<sup>1407</sup>, A330-200, A340-500/600<sup>1408</sup>, A350, and

<sup>1400</sup>Panel Report, section VII.E.1 (attachment), para. 7, p. 364.

<sup>1401</sup>European Union's response to questioning at the oral hearing; Panel Report, section VII.E.1 (attachment), para. 7, p. 364.

<sup>1402</sup>Panel Report, section VII.E.1 (attachment), para. 7, p. 364.

<sup>1403</sup>Panel Report, section VII.E.1 (attachment), para. 7, p. 364.

<sup>1404</sup>The European Union also refers to *avances remboursables* (repayable advances), *rückzahlbare Zuwendungen* (repayable aid), *Entwicklungsbeihilfen* (development aid), *Zuschüsse zur Entwicklung von zivilen Flugzeugen* (contributions for the development of civil aircraft), *anticipo reembolsable* (repayable advance), and *prestamo reembolsable* (repayable loan). The United States refers to all such types of financing as "launch aid", regardless of the specific term or terms used by the entity providing the financing. (See Panel Report, para. 4.87)

<sup>1405</sup>See also Panel Report, para. 7.291.

<sup>1406</sup>The Panel and the parties used the terms "variant" and "derivative" interchangeably and we should be understood to do the same.

<sup>1407</sup>The European Communities explained that, notwithstanding the different characteristics and market profile of the A330 and A340, the basic versions of these LCA models are sometimes referred to collectively as the "A330/A340 basic", reflecting the fact that they were launched at the same time. (See European Communities' first written submission to the Panel, footnote 53 to para. 84)

<sup>1408</sup>The A340-500 and A340-600 are two different variants of the A340. However, because of their similarities, they are often referred to collectively as the "A340-500/600". (See European Communities' first written submission to the Panel, footnote 53 to para. 84)

A380.<sup>1409</sup> According to the United States, each one of the challenged grants of LA/MSF evidences a "financial contribution" that conferred a "benefit" on Airbus, and therefore amounted to a subsidy within the meaning of Article 1.1 of the *SCM Agreement*.<sup>1410</sup>

585. The European Communities contested the United States' claim that each of the disputed LA/MSF measures amounted to a subsidy within the meaning of Article 1 of the *SCM Agreement*. However, in doing so, it did not contest the United States' allegations in respect of LA/MSF being a "financial contribution" within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*. Instead, the European Communities focused on arguing that the challenged LA/MSF measures did not confer a "benefit" upon their recipient within the meaning of Article 1.1(b) of the *SCM Agreement*.<sup>1411</sup> The European Communities did not contest the United States' submission that the LA/MSF measures were "specific" within the meaning of Article 2 of the *SCM Agreement*.<sup>1412</sup>

586. We identify below each of the specific instances of LA/MSF financing at issue in this appeal, describe the contractual framework for LA/MSF, and examine key features of LA/MSF based on the contracts submitted by the parties to the Panel.

#### 1. The Individual LA/MSF Measures

587. Before the Panel, the United States challenged multiple instances of development funding provided by the four member States to Airbus. In addition, the United States challenged what it referred to as the LA/MSF "Programme" as a measure distinct from individual LA/MSF measures.

588. We begin by describing the specific LA/MSF measures challenged by the United States. We understand that no LA/MSF was sought from any of the member States for the A318, A319, and A321 models.<sup>1413</sup> We further understand that: (i) the UK Government did not provide LA/MSF for

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<sup>1409</sup>The Airbus LCA variants that are not the subject of the United States' complaint against LA/MSF are the A318, A319, and A321. (Panel Report, footnote 2430 to para. 7.369) We understand that no LA/MSF was provided for the development of these variants. (*Ibid.*, para. 7.526; see also footnote 2430 to para. 7.369) Further details regarding LA/MSF, including alleged amounts of funding per model, is provided below in subsection C.3 at page 257 of this Report.

<sup>1410</sup>Further detail is provided below at paragraph 589 of this Report. The United States also argued that the French, German, Spanish, and UK Governments had each individually agreed to support the development of the A350 by lending Airbus "at least" US\$1.7 billion in the form of LA/MSF. The Panel rejected this claim, finding that the United States had failed to demonstrate that the A350 LA/MSF measure existed at the time of the establishment of the Panel. (See Panel Report, paras. 7.297 and 7.314) The United States has not challenged this finding on appeal.

<sup>1411</sup>Panel Report, para. 7.335.

<sup>1412</sup>Panel Report, para. 7.497.

<sup>1413</sup>Panel Report, para. 7.526; see also footnote 2430 to para. 7.369.

the A300 or the A310<sup>1414</sup>; (ii) no German, Spanish, or UK Government LA/MSF was requested for the A330-200<sup>1415</sup>; (iii) no German Government LA/MSF was requested to develop the A340-500/600<sup>1416</sup>; and (iv) the UK Government did not conclude a LA/MSF contract with British Aerospace for the purpose of developing the A340-500/600, even though British Aerospace had initially requested LA/MSF from the UK Government.<sup>1417</sup>

589. The challenged LA/MSF measures, as well as approximate amounts, are set out in Table 1.

**Table 1. Alleged LA/MSF**

Aircraft model	Alleged amount (millions)			
	France	Germany	Spain	United Kingdom
A300	FF 3,012	DM 2,400	Ptas 3,829	-
A310	FF 3,180		Ptas 7,808	-
A320	FF 4,133	DM 1,330	Ptas 10,800	£250
A330/A340	FF 7,800	DM 2,930	Ptas 29,400	£447
A330-200	FF 330	-	-	-
A340-500/600	FF 2,110	-	Ptas 11,348	-
A380	[***]	[***]	[***]	[***]

Source: Panel Report, para. 7.380.

## 2. The Contractual Framework for LA/MSF

590. The contractual framework of each of the challenged LA/MSF measures usually takes one of two forms: (i) general agreements between participating member State governments, implemented at the national level through separate contracts between each participating member State government and the Airbus entity located within its territory; or (ii) individual contracts between each relevant member State government and the Airbus entity located in its territory.

591. Participating member State governments contracted funding for Airbus' first LCA models (the A300 and A310) through a series of agreements at the intergovernmental level.<sup>1418</sup> These agreements expressed the relevant member State's commitment to fund the development of the A300 and A310; they also set out, to varying degrees, some of the key terms and conditions attached to the provision of

<sup>1414</sup>See Panel Report, para. 7.369 and footnote 2431 thereto; see also para. 7.1975 and footnote 2810 to para. 7.526.

<sup>1415</sup>Panel Report, para. 7.526.

<sup>1416</sup>Panel Report, para. 7.526.

<sup>1417</sup>Panel Report, para. 7.527.

<sup>1418</sup>These are the "1969 A300 Agreement" (Panel Exhibit US-11), *infra*, footnote 1421; the "1971 A300 Agreement" (Panel Exhibit EC-992 (BCI)), *infra*, footnote 1427; and the "1981 A310 Agreement" (Panel Exhibit EC-942 (BCI)), *infra*, footnote 1429.

financing, such as the schedules for specific amounts of funds to be disbursed and the mode of repayment.<sup>1419</sup> Separate contracts implementing the intergovernmental agreements, in the context of one or more different aspects or phases of the first two Airbus LCA projects, were entered into at the national level between each financing member State government and the Airbus entity located within its territory.<sup>1420</sup>

592. The "1969 A300 Agreement"<sup>1421</sup> envisaged in general terms that the French and German Governments would provide a specified amount of funding for the development of the A300 in the form of loans to be repaid through a series of graduated levies on the sale of each aircraft, the value of which was expressly identified.<sup>1422</sup> Both the development and production of the A300 were to be divided between the two "Associated Manufacturers"<sup>1423</sup> involved, in proportion to each government's respective contribution to development costs of that model.<sup>1424</sup> However, the costs of production of the A300 series were not financed under the 1969 A300 Agreement, which explicitly provided that these costs would be the responsibility of each of the Associated Manufacturers.<sup>1425</sup>

593. The 1969 A300 Agreement was extended to the Government of the Netherlands on 28 December 1970 (the "1970 A300 Agreement"<sup>1426</sup>), and to the Government of Spain on 23 December 1971 (the "1971 A300 Agreement"<sup>1427</sup>). In terms of substance, the 1971 A300 Agreement declared, *inter alia*, CASA to be an Associated Manufacturer, and conferred upon it a portion of A300 series production.<sup>1428</sup>

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<sup>1419</sup>Panel Report, para. 7.370.

<sup>1420</sup>Panel Report, para. 7.370.

<sup>1421</sup>*Agreement (of 29 May 1969) between the Government of the Republic of France and the Government of the Federal Republic of Germany regarding the realization of the Airbus A-300-B* (Panel Exhibit US-11).

<sup>1422</sup>Panel Report, para. 7.534 (referring to 1969 A300 Agreement, Articles 6 and 7). The total amount of funding identified in the Agreement was set on the basis of *conditions de prix* (price conditions) existing on 1 January 1968, and was subject to revision in the light of any evolution in the *conditions économiques générales* (general economic conditions) since 1 January 1968. (*Ibid.* (referring to 1969 A300 Agreement, Article 6))

<sup>1423</sup>The two "Associated Manufacturers" were Sud-Aviation and Deutsche Airbus GmbH. (Panel Report, para. 7.534; 1969 A300 Agreement, preamble)

<sup>1424</sup>Panel Report, para. 7.534 (referring to 1969 A300 Agreement, Articles 3.1 and 4.2).

<sup>1425</sup>Panel Report, para. 7.534 (referring to 1969 A300 Agreement, Article 9).

<sup>1426</sup>*Agreement between the Governments of the Kingdom of the Netherlands, the Federal Republic of Germany, and the French Republic concerning the realization of the Airbus A-300 B (1970)*. The parties did not submit a copy of this Agreement to the Panel.

<sup>1427</sup>*Agreement (of 23 December 1971) between the Governments of the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands and the Spanish State regarding the realization of the Airbus A-300 B* (Panel Exhibit EC-992 (BCI)).

<sup>1428</sup>Panel Report, para. 7.537.

594. By virtue of the "1981 A310 Agreement"<sup>1429</sup>, the Governments of France, Germany, Spain, and the United Kingdom extended some key principles of the 1969, 1970, and 1971 A300 Agreements to the development of the A310.<sup>1430</sup> The 1981 A310 Agreement addressed matters similar to those contained in the 1969 A300 Agreement. As with the financing provided for the development of the A300, the 1981 A310 Agreement envisaged that certain specified amounts of funding would be made available for the development of the A310 in the form of loans to be repaid through a series of graduated levies on sales of each aircraft, the value of which was expressly identified.<sup>1431</sup> It also provided that a specified amount of the development costs of the A310 would be assumed by the Governments of Belgium and the Netherlands (for development work to be carried out respectively by Belairbus and Fokker), and that an agreement would be signed with the two governments in due course.<sup>1432</sup> An agreement was concluded with the Governments of Belgium and the Netherlands in 1982.<sup>1433</sup>

595. Development work was divided in proportion to each government's respective contribution to development costs through *avances remboursables* (repayable advances).<sup>1434</sup> The Associated Manufacturers (which now included British Aerospace<sup>1435</sup>) were given responsibility for series production of the elements of the A310 each had developed.<sup>1436</sup> However, again, the costs of production of the A310 series were not financed under the Agreement, which explicitly provided that these costs would be the responsibility of each of the Associated Manufacturers.<sup>1437</sup>

596. The contractual framework for the A320 and A330/A340 projects contained elements similar to those of the A300 and A310 projects: funding was agreed between the participating member State governments, and implemented at the national level through specific contracts between each relevant member State government and the Airbus entity located within its territory. However, compared to the intergovernmental agreements for the A300 and A310, the intergovernmental agreements for the

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<sup>1429</sup>Agreement (of 28 September 1981) between the Governments of the Federal Republic of Germany, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and Spain concerning the Airbus programme (Panel Exhibit EC-942 (BCI)).

<sup>1430</sup>Panel Report, para. 7.538.

<sup>1431</sup>Panel Report, para. 7.538 (referring to 1981 A310 Agreement, Articles 8-10).

<sup>1432</sup>Panel Report, para. 7.538 (referring to 1981 A310 Agreement, Article 8.6).

<sup>1433</sup>Agreement between the Governments of the Kingdom of Belgium, the Federal Republic of Germany, Spain, the French Republic, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland concerning the programme Airbus (1982)). See Panel Report, para. 7.538. The parties have not submitted a copy of this agreement.

<sup>1434</sup>Panel Report, para. 7.539 (referring to 1981 A310 Agreement, Article 8.2).

<sup>1435</sup>Panel Report, para. 7.539 (referring to 1981 A310 Agreement, preamble).

<sup>1436</sup>Panel Report, para. 7.539 (referring to 1981 A310 Agreement, Article 5.1).

<sup>1437</sup>Panel Report, para. 7.539 (referring to 1981 A310 Agreement, Article 10.1).

A320 and A330/A340 were less precise. For instance, they did not specify the repayment terms, leaving these to be determined through the individual contracts negotiated at the national level.<sup>1438</sup>

597. The "1991 A320 Agreement"<sup>1439</sup> was concluded between the Governments of France, Germany, Spain, the United Kingdom, and Belgium. Each government's expected financial contribution to the Associated Manufacturers (which now included Belairbus<sup>1440</sup>) for the purpose of developing the A320 was identified, and it was prescribed that repayments would be made from aircraft sales revenues.<sup>1441</sup> However, unlike the previous agreements, the 1991 A320 Agreement did not specify the form or value of such repayments.

598. Development work and production was divided between the five national actors, in proportion with the work undertaken in each territory and each government's respective contribution to development costs.<sup>1442</sup> However, again, the costs of production of the A320 were not financed under the agreement, but left to the Associated Manufacturers.<sup>1443</sup>

599. The Belgian, French, German, Spanish, and UK Governments subsequently concluded the "1994 A330/A340 Agreement"<sup>1444</sup> concerning the development, production, and sales financing of the A330/A340 LCA models. It stipulated that repayments of the amounts advanced by the governments would be made from aircraft sales revenues.<sup>1445</sup> However, it did not specify the form, value, or timing of such repayments.

600. Production was divided between the five national industries, to the extent possible, in proportion with each government's respective contribution to development costs.<sup>1446</sup> However, as in the case of the other agreements, the costs of production of the A330/A340 were not financed under the agreement, but left to the Associated Manufacturers.<sup>1447</sup> The 1994 A330/A340 Agreement also

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<sup>1438</sup>Panel Report, para. 7.370.

<sup>1439</sup>*Agreement (of 6 February 1991) between the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Kingdom of Belgium, concerning the Airbus A320 programme* (Panel Exhibit US-16). See Panel Report, footnote 2867 to para. 7.542.

<sup>1440</sup>Panel Report, para. 7.542 (referring to 1991 A320 Agreement, preamble).

<sup>1441</sup>Panel Report, para. 7.542 (referring to 1991 A320 Agreement, Article 8).

<sup>1442</sup>Panel Report, para. 7.543 (referring to 1991 A320 Agreement, Article 5.2, 5.3, and 11).

<sup>1443</sup>Panel Report, para. 7.543 (referring to 1991 A320 Agreement, Article 12).

<sup>1444</sup>*Agreement (of 25/26 April 1994) between the Governments of the French Republic, the Federal Republic of Germany, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Spain and the Kingdom of Belgium concerning the Airbus A330/A340 programme* (Panel Exhibit US-28)). See Panel Report, para. 7.546.

<sup>1445</sup>1994 A330/A340 Agreement, Article 8: "The respective national contributions to development costs shall be reimbursed by Airbus Industrie from aircraft sales revenues". (Panel Report, footnote 2888 to para. 7.546)

<sup>1446</sup>Panel Report, para. 7.547 (referring to 1994 A330/A340 Agreement, Article 10).

<sup>1447</sup>Panel Report, para. 7.547 (referring to 1994 A330/A340 Agreement, Article 11).

provided that the Governments of France, Germany, Spain, and the United Kingdom would support A330/A340 export financing (the Spanish Government's obligation being limited to purchases made by Spanish airlines).<sup>1448</sup> The Agreement explained that consultations would be undertaken to decide the modalities for extending its provisions to variants of the A330/A340.<sup>1449</sup>

601. In June 2003, the Governments of France, Germany, Spain, and the United Kingdom entered into the "2003 Agreement"<sup>1450</sup> with Airbus SAS setting out certain principles and obligations applicable to the four governments' continued support for Airbus LCA programmes. The 2003 Agreement does not concern any particular Airbus LCA development project.<sup>1451</sup> Its main focus is the A380, but other unspecified projects launched on or after the date of the agreement and their derivatives are also covered.<sup>1452</sup>

602. No intergovernmental agreements were concluded with regard to the LA/MSF provided by the Governments of France and Spain for the A330-200 and A340-500/600 projects. Nor was any such agreement (expressing a commitment to provide funding) concluded with respect to the A380. Instead, for these projects, the member State governments entered into separate national-level contracts, setting forth various relevant terms and conditions, with the French aerospace manufacturer, Aérospatiale, and the Spanish aerospace manufacturer, CASA (in respect of the A330-200 and A340-500/600 projects), and with Airbus France, Airbus Deutschland GmbH, EADS Airbus SL (Spain), BAE Systems (Operations) Ltd, and British Aerospace PLC (in respect of the A380).<sup>1453</sup>

603. The legal instruments making up the contractual framework of the challenged LA/MSF measures are described in Table 2.<sup>1454</sup>

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<sup>1448</sup>Panel Report, para. 7.547 (referring to 1994 A330/A340 Agreement, Article 12).

<sup>1449</sup>Panel Report, para. 7.547 (referring to 1994 A330/A340 Agreement, Article 13).

<sup>1450</sup>*Agreement (of 16 June 2003) signed at Paris-Le Bourget between the Ministers of the Four Principal Airbus Countries and Airbus* (Panel Exhibit US-122 (BCI)). See Panel Report, para. 7.549.

<sup>1451</sup>Panel Report, para. 7.551.

<sup>1452</sup>Panel Report, para. 7.551.

<sup>1453</sup>Panel Report, para. 7.371.

<sup>1454</sup>See also Panel Report, paras. 7.549-7.551.

**Table 2. Contracts for LA/MSF**

Aircraft model	Contractual Framework			
	France	Germany	Spain	United Kingdom
A300 launched in 1969	1969 and 1971 A300 Agreements			None
	29 separate agreements, protocols and conventions between the French Government and Aérospatiale*	"Model contract" representing LA/MSF contracts between the German Government and Deutsche Airbus for the A300*	16 separate contracts and amendments thereto, between the Spanish Government and CASA*	
A310 launched in 1978	1981 Airbus A310 Agreement			
	10 separate protocols and conventions between the French Government and Aérospatiale**	"Model contract" representing German LA/MSF contracts for the A300**	8 separate contracts and amendments thereto, between the Spanish Government and CASA**	None
A320 launched in 1984	1991 A320 Agreement			
	French A320 contract	German A320 contract	Spanish 1992 A320 contract***	UK A320 contract
A330/A340 launched in 1987	1995 A330/A340 Agreement			
	French A330/A340 contract	German A330/A340 contract <sup>+</sup>	Spanish 1988 A330/A340 contract <sup>++</sup>	UK A330/A340 contract
A330-200 launched in 1995	French A330-200 contract <sup>◇</sup>	None	None	None
A340-500/600 launched in 1997	French A340-500/600 convention <sup>◇◇</sup>	None	Spanish A340-500/600 contract	None
A380 launched in 2000	French A380 contract	German A380 contract	Spanish A380 contract	UK A380 contract

\* See Panel Report, footnote 2247 to para. 7.290.

\*\* See Panel Report, footnote 2248 to para. 7.290.

\*\*\* *Final contract (of 1 September 1992) for the termination and liquidation of the cooperation agreements between the Ministry of Industry, Trade and Tourism and Construcciones Aeronáuticas SA relating to the provision of repayable funds for the financing of development costs for the Airbus A320.* One of several earlier contracts entered into for the same purpose was the Spanish 1984 A320 contract. (See Panel Report, footnote 2249 to para. 7.290)

<sup>+</sup> The Panel noted that, although asked to provide a copy of the German LA/MSF contract for the A330/A340, the European Communities did not do so. The European Communities instead referred the Panel to another document, Panel Exhibit EC-887 (HSBI), which it asserted incorporated the same "repayment provisions" as the requested contract. Thus, for the Panel, the European Communities did "not contest" that the German Government entered into a LA/MSF contract with Deutsche Airbus GmbH for the A330/A340. (See Panel Report, footnote 2257 to para. 7.290)

<sup>++</sup> *Cooperation Agreement (of 1 June 1988) between the Ministry of Industry and Construcciones Aeronáuticas SA, relating to the provision of a repayable, interest-free advance for the financing of development costs for the Airbus A330/A340.* This contract was supplemented by the Spanish 1990 A330/A340 contract, *Agreement (of 30 July 1990) between the Ministry of Industry and Energy and Construcciones Aeronáuticas SA, for the provision of a refundable deposit without interest, intended to finance development costs for the Airbus A330/A340.* (See Panel Report, footnote 2254 to para. 7.290)

<sup>◇</sup> The Panel also noted the existence of the *Memorandum of Understanding (of 23 December 1996) between the State and Aérospatiale relating to the Airbus A330-200 programme* (Panel Exhibit EC-90). (See Panel Report, footnote 2258 to para. 7.290)

<sup>◇◇</sup> The Panel also noted the existence of the *Agreement (of 29 December 1998) between the signatory authority of the agreement on behalf and for the account of the State, on the one hand, and Aérospatiale, on the other hand, concerning the development of the Airbus A340-500 and A340-600 (the "French A340-500/600 contract")* (Panel Exhibit US-36 (BCI)). (See Panel Report, footnote 2259 to para. 7.290) See also *supra*, footnote 1112.



### 3. The Features of Individual LA/MSF Contracts

604. The Panel noted that the terms and conditions of each of the legal instruments making up the contractual framework of the challenged LA/MSF measures could "vary significantly".<sup>1455</sup> Nonetheless, the Panel considered that "numerous similarities"<sup>1456</sup> in the type and form of financing could be found. The Panel referred to the United States' characterization of the challenged LA/MSF contracts "as unsecured loans granted to Airbus on back-loaded and success-dependent repayment terms, at below-market interest rates, for the purpose of developing various new models of LCA."<sup>1457</sup> We set out below certain elements of individual LA/MSF contracts, which exemplify key features of these contracts. After highlighting the relative proportion of development costs associated with particular aircraft projects, and the manner of disbursement of LA/MSF funds, we identify key features of the repayment terms (including payment structure, conditions of repayment, royalties, interest rates, guarantees, etc.).

605. The proportion of development costs financed through LA/MSF contracts has diminished over time. For the earlier projects (the A300 and A310), close to 100% of the development costs were financed through LA/MSF.<sup>1458</sup> More specifically, the French and Spanish Governments funded approximately 100%, and the German Government 90%, of the development costs of the A300 and A310 (basic versions).<sup>1459</sup> The same three governments funded between 64% and 85% of the development costs of the derivatives of the basic versions of the A300/A310.<sup>1460</sup> For LCA projects financed after the entry into force of the "1992 Agreement"<sup>1461</sup> (the A330-200, A340-500/600, and A380), the proportion of LA/MSF has represented a maximum of 33% of total development costs.<sup>1462</sup>

606. In terms of the disbursement of funds, some LA/MSF contracts provide for a disbursement mechanism whereby funds are transferred in advance of actual development costs being incurred, usually on the basis of projected expenditure. Subsequently, when costs are actually incurred, they are reviewed by the governments, and the funding amounts adjusted to ensure that total borrowing

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<sup>1455</sup>Panel Report, para. 7.372.

<sup>1456</sup>Panel Report, para. 7.372.

<sup>1457</sup>Panel Report, para. 7.525.

<sup>1458</sup>See Panel Report, footnote 2432 to para. 7.369 (referring to French A330-200 contract, Article 3; French A340-500/600 contract, Article 3; French A380 contract, Article 3; German A380 contract, Article 5.3; Spanish A340-500/600 contract, preamble, recital 9, clause 2; Spanish A380 contract, preamble, recital 4, clause 2; and UK A380 contract, Article 5.6).

<sup>1459</sup>Panel Report, footnote 2431 to para. 7.369.

<sup>1460</sup>Panel Report, footnote 2431 to para. 7.369.

<sup>1461</sup>*Supra*, footnote 28.

<sup>1462</sup>Panel Report, para. 7.369.

does not exceed the level of development costs it was agreed would be financed.<sup>1463</sup> Other LA/MSF contracts provide for a somewhat different disbursement mechanism whereby payments up to the agreed amounts are made only after actual costs have been incurred.<sup>1464</sup> In at least one case, it would seem that funding was provided to Airbus for work before the relevant model was actually launched and prior to the conclusion of the relevant intergovernmental agreement.<sup>1465</sup>

607. In terms of repayment, most LA/MSF contracts require that Airbus reimburse all funding contributions, plus any interest at the agreed rate, exclusively from revenues generated by deliveries of the LCA model that is financed.<sup>1466</sup> Such repayments are made in the form of per-aircraft levies and follow a pre-established repayment schedule. Repayments may start with the delivery of the first aircraft. In other instances, repayment begins only after Airbus has made a specified number of aircraft deliveries. Once repayment begins, it is generally graduated on varying ascending scales, meaning that repayments on the first aircraft deliveries are lower than repayments on later deliveries.<sup>1467</sup> Accelerated repayment provisions are expressly provided for under the German, Spanish, and UK A380 LA/MSF contracts and the Spanish A340-500/600 LA/MSF contract.<sup>1468</sup> While most of the LA/MSF contracts require the payment of royalties on revenues generated from LCA deliveries made in excess of the number needed to secure repayment, some do not. When royalties are called for, they are envisaged in different forms and over varying periods of time. For example, one LA/MSF contract calls for gradually increasing royalty payments on deliveries made

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<sup>1463</sup>See Panel Report, para. 7.373 and footnote 2445 thereto. The Panel refers, in particular, to the French A380 contract, Article 3 and Annex 4; German A380 contract, Articles 4.2, 4.3, and 5.3; Spanish A380 contract, 3rd and 4th clauses; French A340-500/600 contract, Article 4 and Annex 4; Spanish A340-500/600 contract, 2nd and 3rd clauses; French A330-200 contract, Article 4 and Annex 4; French A330/A340 contract, Article 4; Spanish 1988 A330/A340 contract, clause 4; French A320 contract, Article 3; and Spanish 1992 A320 contract, 1st clause. The Panel further noted the European Communities' assertion that the same disbursement mechanism was applied in respect of the French A300 and A310 contracts; German A330/A340, A320, A310, and A300 contracts; and Spanish A300 and A310 contracts.

<sup>1464</sup>See Panel Report, para. 7.373 and footnote 2446 thereto. The Panel referred to the UK A380 contract, Article 5; UK A330/A340 contract, Article 2.2; and UK A320 contract, Article 2.2.

<sup>1465</sup>Panel Report, footnote 2439 to para. 7.370 (referring to French LA/MSF for the A320).

<sup>1466</sup>Panel Report, para. 7.374 and footnote 2448 thereto. The Panel also referred to the French A380 contract, Annex 2, Article 6; Spanish A380 contract, 7th clause; UK A380 contract, Article 8, Schedule 3; French A340-500/600 contract, Article 6; Spanish A340-500/600 contract, 5th clause; French A330-200 contract, Article 6; 1994 A330/A340 Agreement, Article 8; 1991 A320 Agreement, Article 8; 1981 A310 Agreement, Article 9; and 1969 A300 Agreement, Article 7.

<sup>1467</sup>See Panel Report, para. 7.374 and footnote 2451 thereto. The Panel referred to the French A380 contract, Annex 2, Article 6; Spanish A380 contract, 7th clause; UK A380 contract, Schedule 3; French A340-500/600 contract, Article 6; French A330-200 contract, Article 6; French A330/A340 contract, Article 6; UK A330/A340 contract, Article 2.4; French A320 contract, Article 5; German A320 contract, Article 18; 1981 A310 Agreement, Article 9; and 1969 A300 Agreement, Article 7. The European Communities asserted that a similar graduated repayment structure was applied in respect of the Spanish A340-500/600, A330/A340, and A320 LA/MSF contracts.

<sup>1468</sup>Panel Report, para. 7.667 (referring to German A380 contract (Panel Exhibit US-72 (BCI)), section 8; Spanish A380 contract (Panel Exhibit US-73 (BCI)), 7th clause; UK A380 contract (Panel Exhibit US-79 (BCI)), Article 5.9; and Spanish A340-500/600 contract (Panel Exhibit US-37 (BCI)), 5th clause).

after a certain number of sales. Another contract calls for royalty payments of a specified percentage of the price of the aircraft sold on deliveries after a certain number.

608. Some LA/MSF contributions were provided to Airbus at no interest cost. In other cases, LA/MSF contracts required the payment of interest. These were set at different levels, at times through the application of different formulas.<sup>1469</sup>

#### 4. The Alleged LA/MSF Programme

609. Before the Panel, the United States also challenged what it referred to as a "Launch Aid Programme" as a "measure" distinct from individual grants of LA/MSF. The United States described the content of the alleged LA/MSF Programme as consisting of "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 through loans that are (a) unsecured, (b) repayable on a success-dependent basis (i.e., through per sale levies), (c) with the levy amounts greater for later sales than earlier sales (i.e., back-loaded), and (d) with interest accruing at rates below what the market would demand for the assumption of similar risk."<sup>1470</sup> For the United States, differences in the elements contained in one LA/MSF contract from another do not prevent the "Launch Aid Programme" from being sufficiently precise to constitute a measure in its own right.<sup>1471</sup>

#### D. *The EIB Loans*

610. The United States challenged 12 loans provided by the EIB. These measures consisted of: (i) a 2002 loan to EADS for research and development activities related to the A380; (ii) three loans to Aérospatiale for the production of the Super Transporteurs (1993), and for facilities and equipment related to the A330/A340 (1988 and 1992); (iii) four loans to British Aerospace and/or BAE Systems for the design, development, and manufacture of wing boxes for the A330/A340 (1990 and 1991), and for the design and development of wings for the A320 (1988 and 1989); (iv) three loans to CASA for the design and productions of various parts of the A320 and A330/A340 (one in 1989, and two in 1990); and (v) a 1990 loan to Airbus GIE for research, design, and development of the A321.<sup>1472</sup>

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<sup>1469</sup>Panel Report, para. 7.525.

<sup>1470</sup>Panel Report, para. 7.501 (referring to United States' response to Panel Question 3).

<sup>1471</sup>Panel Report, para. 7.501.

<sup>1472</sup>Panel Report, para. 7.717.

E. *Research and Technological Development Funding*

611. The United States challenged numerous instances of research and technological development ("R&TD") funding provided or committed to Airbus by: the European Communities (under the Second, Third, Fourth, Fifth, and Sixth EC Framework Programmes); the French Government (between 1986 and 2005); the German Government (under the *Luftfahrtforschungsprogramm* (Aviation Research Programme) ("LuFo programme")); the Spanish Government (under the *Plan Tecnológico Aeronáutico* (Technological Plan for Aviation) ("PTA programme") and the *Programa de Fomento de la Investigación Técnica* (Funding Programme for Technological Research) ("PROFIT programme")); the UK Government (under the Civil Aircraft Research and Development Program ("CARAD programme"), which was later renamed the Aeronautics Research Programme ("ARP programme"), and subsequently the Technology Programme); and three programmes run by the Bavarian, Bremen, and Hamburg authorities. In most cases, the challenged funding measures took the form of grants. However, in respect of the funding provided by the Spanish Government, the challenged measures consisted of loans.<sup>1473</sup>

1. The EC Framework Programmes

612. The relevant measures challenged by the United States consist of grants issued under five successive programmes for R&TD funding by the European Communities, covering specific four-year periods as follows: the Second EC Framework Programme (1987-1991); the Third EC Framework Programme (1990-1994); the Fourth EC Framework Programme (1994-1998); the Fifth EC Framework Programme (1998-2002); and the Sixth EC Framework Programme (2002-2006). In respect of these Framework Programmes, the Panel reviewed a series of Decisions of the European Parliament and/or the Council of the European Union (previously, the Council of the European Communities) ("EC Decisions"). The EC Decision establishing each Framework Programme set out the programme's objectives but did not indicate how funds authorized under the programme could be accessed by individual applicants. Instead, for each EC Framework Programme, the detailed rules and methodologies for the distribution of funds were left to the "specific programmes" that were to be adopted for the purpose of implementation. The "specific programmes" under each Framework Programme were established through separate EC Decisions.<sup>1474</sup>

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<sup>1473</sup>Panel Report, para. 7.1415.

<sup>1474</sup>Panel Report, paras. 7.1517-7.1519, 7.1526-7.1528, 7.1536-7.1538, 7.1546-7.1548, and 7.1557-7.1559.

613. The Second EC Framework Programme was established by the Council of the European Communities through EC Decision 87/516/Euratom EEC, dated 28 September 1987.<sup>1475</sup> The "specific programme" at issue—the BRITE/EURAM programme—was established by the Council of the European Communities through EC Decision 89/237/EEC of 14 March 1989.<sup>1476</sup> This EC Decision sets out in Annex IV an "indicative internal allocation" of nearly ECU 500 million across five "Areas" of research, 7% of which was allocated for the research area entitled "Specific activities relating to aeronautics". Annex I stipulates that the type of research that would fall under this heading consists of "pre-competitive research in technological areas which are of primary relevance to aeronautics (in particular aeroplanes and helicopters) and are not yet covered in other programme areas". Annex I also identifies the following four fields of focus in respect of aeronautics research: "Aerodynamics"; "Acoustics"; "Airborne systems and equipment"; and "Propulsion systems".<sup>1477</sup>

614. The Third EC Framework Programme was established by the Council of the European Communities through EC Decision 90/221/Euratom EEC, dated 23 April 1990.<sup>1478</sup> The "specific programme" at issue—the specific programme for Research and Technological Development in the Field of Industrial and Materials Technologies (the "IMT 1991 programme")—was established by the Council of the European Communities through EC Decision 91/506/EEC of 9 September 1991.<sup>1479</sup> This EC Decision sets out in Annex II an "indicative allocation" of over ECU 663 million across three "Areas" of research, one of which is entitled "Aeronautics research" (for which ECU 53 million is allocated). Annex I identifies six fields of focus: "Environment related technologies"; "Technologies of aircraft operation"; "Aerodynamics and aerothermodynamics"; "Aeronautical structures and manufacturing technologies"; "Avionic system technologies"; and "Mechanical, utility and actuation technologies". Annex I also explains that "the aeronautical technologies research that began with the BRITE/EURAM programme will be continued taking account of harmonization, standardization, safety and environmental aspects". Additionally, the

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<sup>1475</sup>Council Decision 87/516/Euratom EEC of 28 September 1987 concerning the framework programme for Community activities in the field of research and technological development (1987 to 1991), *Official Journal of the European Communities*, L Series, No. 302 (24 October 1987) 1 (Panel Exhibit EC-200).

<sup>1476</sup>Council Decision 89/237/EEC of 14 March 1989 on a specific research and technological development programme in the field of industrial manufacturing technologies and advanced materials applications (Brite/Euram) (1989 to 1992), *Official Journal of the European Communities*, L Series, No. 98 (11 April 1989) 18 (Panel Exhibit EC-195).

<sup>1477</sup>Panel Report, paras. 7.1518 and 7.1519.

<sup>1478</sup>Council Decision 90/221/Euratom EEC of 23 April 1990 concerning the framework programme for Community activities in the field of research and technological development (1990 to 1994), *Official Journal of the European Communities*, L Series, No. 117 (8 May 1990) 28 (Panel Exhibit EC-201).

<sup>1479</sup>Council Decision 91/506/EEC of 9 September 1991 adopting a specific programme of research and technological development in the field of industrial and materials technologies (1990 to 1994), *Official Journal of the European Communities*, L Series, No. 269 (25 September 1991) 30 (Panel Exhibit EC-196).

programme is intended to support only "specific aeronautical research and applications"; general aeronautics research will be covered by other research areas.<sup>1480</sup>

615. The Fourth EC Framework Programme was established by the European Parliament and the Council of the European Union through EC Decision 1110/94/EC, dated 26 April 1994.<sup>1481</sup> The "specific programme" at issue—the specific programme for Research and Technological Development, including Demonstration, in the Field of Industrial and Materials Technologies (the "IMT 1994 programme")—was established by the Council of the European Union through EC Decision 94/571/EC of 27 July 1994.<sup>1482</sup> This EC Decision sets out in Annex II an "indicative breakdown" of ECU 1.617 billion across three "Areas" of research, one of which is entitled "Technologies for transport means". Annex II also stipulates that 50% of the amount allocated to the "Technologies for transport means"—ECU 230.5 million—is for the aeronautics sector. This is the only sector to have been allocated a specific amount. Annex I explains that, "where the aircraft industry is concerned, research will concern advanced technologies, in particular for environmental protection, to reduce both noise and polluting emissions, and as regards design, to reduce overall energy consumption". Annex I also states that the activities aim to improve safety, increase capacity and cost-effectiveness of the air transport system, and facilitate production, operation, reliability, and maintenance of future generations of aircraft and equipment.<sup>1483</sup>

616. The Fifth EC Framework Programme was established by the European Parliament and the Council of the European Union through EC Decision 182/1999/EC, dated 22 December 1998.<sup>1484</sup> The "specific programme" at issue—the specific programme for Research, Technological Development and Demonstration on Competitive and Sustainable Growth (the "CSG programme")—was established by the Council of the European Union through EC Decision 1999/169/EC of 25 January 1999.<sup>1485</sup> This EC Decision sets out in Annex I an "indicative internal allocation" of

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<sup>1480</sup>Panel Report, paras. 7.1527-7.1529.

<sup>1481</sup>Council Decision 1110/94/EC of 26 April 1994 concerning the fourth framework programme of the European Community activities in the field of research and technological development and demonstration (1994-1998), *Official Journal of the European Communities*, L Series, No. 126 (18 May 1994) 1 (Panel Exhibit EC-202).

<sup>1482</sup>Council Decision 94/571/EC of 27 July 1994 adopting a specific programme for research and technological development, including demonstration, in the field of industrial and materials technologies (1994-1998), *Official Journal of the European Communities*, L Series, No. 222 (26 August 1994) 19 (Panel Exhibit EC-197).

<sup>1483</sup>Panel Report, paras. 7.1537-7.1539.

<sup>1484</sup>Council Decision 182/1999/EC of 22 December 1998 concerning the fifth framework programme of the European Community for research, technological development and demonstration activities (1998 to 2002), *Official Journal of the European Communities*, L Series, No. 26 (1 February 1999) 1 (Panel Exhibit EC-203).

<sup>1485</sup>Council Decision 1999/169/EC of 25 January 1999 adopting a specific programme for research, technological development and demonstration on competitive and sustainable growth (1998 to 2002), *Official Journal of the European Communities*, L Series, No. 64 (12 March 1999) 40 (Panel Exhibit EC-198).

ECU 2.705 billion across three "Areas" of research, one of which is entitled "Key actions". Annex II identifies four types of activities and associated budgets for the "Key actions" area, including ECU 700 million for "New perspectives for aeronautics", which in turn identifies three fields of focus: "Acquisition of critical technologies"; "Technology integration for new-generation aircraft"; and "Operational efficiency and safety". Annex II also explains that the overall goal of the "New perspectives for aeronautics" research activity is to facilitate the development of aircraft and their subsystems and components in order to foster the competitiveness of the European industry, including small and medium enterprises ("SMEs"), while assuring the sustainable growth of air transportation.<sup>1486</sup>

617. The Sixth EC Framework Programme was established by the European Parliament and the Council of the European Union through EC Decision 1513/2002/EC, dated 27 June 2002.<sup>1487</sup> Annex I describes a number of covered activities, most of which are of a general horizontal nature, but some of which concern particular economic sectors—for example, "Aeronautics and Space". Annex II provides that €1.075 billion is to be allocated to "Aeronautics and Space". Article 5 of the Decision specifies that the Sixth Framework Programme is to be implemented through "specific programmes" that "shall establish precise objectives and the detailed rules for implementation". The "specific programme" at issue—the specific programme for Integrating and Strengthening the European Research Area (the "ISERA programme")—was established by the Council of the European Union through EC Decision 2002/834/EC of 30 September 2002.<sup>1488</sup> Annex I provides an explanation of four research priorities that may qualify for funding through the "Aeronautics" element of the "Aeronautics and Space" activity: "Strengthening Competitiveness"; "Improving Environmental Impact with regard to Emissions"; "Improving Aircraft Safety"; and "Increasing Operational Capacity and Safety of the Air Transport System". Annex II of the ISERA programme also allocates as part of the "indicative breakdown" an amount of €1.075 billion for projects falling within the scope of the "Aeronautics and Space" activity.<sup>1489</sup>

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<sup>1486</sup>Panel Report, paras. 7.1547-7.1549.

<sup>1487</sup>Council Decision 1513/2002/EC of 27 June 2002 concerning the sixth framework programme of the European Community for research, technological development and demonstration activities, contributing to the creation of the European Research Area and to innovation (2002 to 2006), *Official Journal of the European Communities*, L Series, No. 232 (29 August 2002) 1 (Panel Exhibit EC-204).

<sup>1488</sup>Council Decision 2002/834/EC of 30 September 2002 adopting a specific programme for research, technological development and demonstration: "Integrating and strengthening the European Research Area" (2002-2006) *Official Journal of the European Communities*, L Series, No. 294 (29 October 2002) 1 (Panel Exhibit EC-199).

<sup>1489</sup>Panel Report, paras. 7.1558 and 7.1559.

2. R&TD Funding by the French Government

618. The United States challenged over €1.2 billion of grants budgeted by the French Government between 1986 and 2005 for civil aeronautics R&TD activities. Relying on extracts of seven French Senate reports, the United States contended that French authorities budgeted €391 million in R&TD funding to the French civil aeronautics sectors for the period 1986 to 1993, and €809 million for the period 1994 to 2005. In evaluating these figures, the Panel relied in part on a document by the Direction des Programmes Aéronautiques et de la Coopération (the "DPAC")—the authority that administered the French Government funding programmes—and which provided a project-by-project breakdown of French Government R&TD funding to all recipients during this period.<sup>1490</sup> The European Communities explained that the challenged R&TD programmes were financed by the Ministry of Transport, and administered by the DPAC.<sup>1491</sup>

3. R&TD Funding by German Authorities

619. The United States presented claims against R&TD measures of both federal and sub-federal authorities in Germany. In respect of German federal authorities, the United States claimed that the German Government provided €217 million to Airbus for civil aeronautics research under the LuFo I (1995-1998), LuFo II (1998-2002), and LuFo III (2003-2007) programmes.<sup>1492</sup> The United States also challenged grants from three German sub-federal authorities for LCA-related R&TD projects in which Airbus participated. The Bavarian Government has, since 1990, provided Airbus with R&TD grants under various civil aeronautics programmes, including the *Offensive Zukunft Bayern I* (Offensive Future Bavaria I) (established in 1995), the *Offensive Zukunft Bayern II* (Offensive Future Bavaria II) (established in 1996), and the *Bayerisches Luftfahrtforschungsprogramm* (Bavarian Aviation Research Programme) (established in 2000).<sup>1493</sup> In Bremen, the regional government provided a total of €1 million in grants to Airbus for aeronautics-specific research under the Airbus Materials and System Technology I and II Programmes.<sup>1494</sup> The government of Hamburg provided Airbus with aeronautics-specific R&TD grants under the *Hamburger Luftfahrtforschungsprogramm* (Aviation Research Programme).<sup>1495</sup>

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<sup>1490</sup>Panel Report, paras. 7.1467-7.1473.

<sup>1491</sup>European Communities' first written submission to the Panel, para. 1277.

<sup>1492</sup>Panel Report, para. 7.1457; see also para. 7.1415 and Panel Exhibit US-327.

<sup>1493</sup>Panel Report, para. 7.1459.

<sup>1494</sup>Panel Report, para. 7.1461.

<sup>1495</sup>Panel Report, para. 7.1465.



#### 4. R&TD Funding by the Spanish Government

620. The United States challenged R&TD funding under two Spanish Government loan programmes. The United States asserted that, between 1993 and 2003, the Spanish Government provided Airbus with R&TD loans under two phases of the PTA programme: covering the period 1993 to 1998 (PTA I); and the period 1999 to 2003 (PTA II).<sup>1496</sup> The United States also asserted that the Spanish Government provided Airbus with R&TD loans amounting to over €60 million under two phases of the PROFIT programme, first established in 2000.<sup>1497</sup> The European Communities explained that the PROFIT programme was managed by the Ministry for Education and Science and the Ministry for Industry, Tourism and Trade, and is implemented under an umbrella programme, known as the *Plan Nacional de Investigación Científica, Desarrollo e Innovación Tecnológica*.<sup>1498</sup>

#### 5. R&TD Funding by the UK Government

621. The United States also challenged LCA-related research grants that, between 1992 and 2005, the UK Department of Trade and Industry agreed to provide to Airbus under the CARAD programme, and subsequently the ARP and Technology programmes.<sup>1499</sup>

#### F. *Infrastructure and Infrastructure-Related Grants*

622. The United States challenged infrastructure and infrastructure-related grants provided by the Governments of France, Germany, Spain, and the United Kingdom. The United States brought claims against the provision of certain infrastructure, consisting of: the Mühlenberger Loch industrial site near Hamburg; the lengthened runway at the Bremen airport and related noise-reduction measures; and the provision of the Aéroconstellation industrial site in Toulouse and associated facilities and road improvements related to the site. The United States also challenged a series of infrastructure-related regional grants in Germany, Spain, and Wales.

##### 1. The Mühlenberger Loch Industrial Site

623. In 2000, the City of Hamburg, Germany, undertook to turn wetlands in the Mühlenberger Loch and Rüschanal, adjacent to Airbus' existing facilities in Finkenwerder, into usable land. Work on draining and filling the land began in February 2001, and was carried out in stages. The City of Hamburg built new dykes and upgraded the height of dykes around the existing Airbus facility to

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<sup>1496</sup>Panel Report, para. 7.1474.

<sup>1497</sup>Panel Report, para. 7.1476.

<sup>1498</sup>European Communities' first written submission to the Panel, paras. 1317 and 1319.

<sup>1499</sup>Panel Report, para. 7.1481.

provide flood protection for the reclaimed land. Hamburg also constructed special purpose facilities on the reclaimed land, consisting of: (i) a quay facility; (ii) a sluice and pump building; (iii) a drainage ditch; (iv) a roll-on-roll-off facility; and (v) a sternfender. The United States submitted, on the basis of publicly available information, that the Hamburg authorities invested €751 million in the creation and development of the site, including the land reclamation, dykes, and special purpose facilities. The European Communities argued that the aggregate cost of these measures was approximately €694 million, asserting that the figure cited by the United States for this work was an outdated estimate.<sup>1500</sup>

624. The City of Hamburg—through Projektierungsgesellschaft Finkenwerder GmbH & Co. KG ("ProFi")<sup>1501</sup>—leases the reclaimed land and special purpose facilities to Airbus Germany. The lease agreement established an annual rent of €3.60 per square meter, to be adjusted annually on the basis of changes in the German consumer price index. As the reclaimed land was subject to settling, and thus was not immediately fully usable by Airbus Germany, an initial reduction in the rent was agreed, with the rent to be increased to the full amount of €5,156,588 per annum once the land fully settled.<sup>1502</sup> The City of Hamburg—again through ProFi—and Airbus Germany also concluded four lease agreements for the special purpose facilities with a term of 20 years. According to the European Communities, the amount of rent was set to provide the City of Hamburg with a return of 6.5% on its investment in each of the facilities. The annual rent over the 20-year period for the special purpose facilities was €5,619,200, also to be adjusted in line with inflation.<sup>1503</sup>

## 2. The Bremen Airport Runway Extension

625. The European Communities maintained that German authorities require a safety margin of 300 meters at both ends of commercial runways. At the Bremen airport, this requirement was implemented by shortening the usable length of the runway. In May 1988, the City of Bremen authorized an extension of the runway by 300 meters at either end. Between 1989 and 1990, the City of Bremen extended the airport runway as authorized—from its then existing length of 2,034 meters, to 2,634 meters—such that only 2,034 meters of the runway is available for general aviation use. The City of Bremen also undertook certain noise-reduction measures. With the exception of emergencies,

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<sup>1500</sup>Panel Report, para. 7.1051.

<sup>1501</sup>The City of Hamburg set up a company, Realisierungsgesellschaft GmbH, for the management of the land reclamation project and the special purpose facilities. On completion of the project, Hamburg transferred ownership of the land and facilities to ProFi, a government-owned entity and titleholder of the properties. ProFi and Airbus Germany entered into a series of lease agreements for the land and the special purpose facilities. (Panel Report, para. 7.1049)

<sup>1502</sup>Panel Report, para. 7.1052.

<sup>1503</sup>Panel Report, para. 7.1053.

use of the entire length of the airport runway, including the 600 meters by which the runway was extended, is permitted only for flights transporting Airbus wings from Bremen.<sup>1504</sup> The cost of the runway extension and noise-reduction measures was borne by the City of Bremen. The United States asserted that the City of Bremen paid DM 40 million to extend the runway and a further DM 10 million for noise-reduction measures, both figures of which were disputed by the European Communities.<sup>1505</sup>

### 3. The Aéroconstellation Industrial Site

626. In 1999, French Government authorities authorized the development of an industrial site adjacent to the Toulouse-Blagnac airport dedicated to aeronautical activities. This site, known as the Aéroconstellation industrial site, was established as a "*zone d'aménagement concertée*" ("ZAC"), a zoning designation under French law pursuant to which public authorities buy, improve, and sell land for economic development. The development of the Aéroconstellation site required the conversion of agricultural land to industrial use, consisting of the creation of drainage, sewage, and water circulation systems, along with fencing, fire protection, landscaping, and lighting. In addition, certain specialized facilities—known as "*équipement d'intérêt général*" ("EIG") facilities—particularly suited for aeronautical activities were created, consisting of taxiways and roads on the site, aircraft parking areas, underground technical galleries, and service areas.<sup>1506</sup>

627. After the Aéroconstellation site was prepared, the government-established company charged with implementing the project—the Société d'équipement Toulouse Midi Pyrénées ("SETOMIP")—sold all but 11 hectares of the land to different companies involved in the aeronautical industry, including those involved with the development and production of the A380 aircraft. Purchasers of the land included Airbus France, Air France Industries, Société industrielle aéronautique du Midi ("SIDMI"), CUS-Elyo, Exxon Mobil, and STTS. All the purchasers are involved with different aspects of the construction, assembly, testing, and maintenance of aircraft, and all paid the same price per square meter for the differently sized plots purchased. In addition, an association of users was created—the Association foncière urbaine libre ("AFUL")—comprising all the companies that bought land at the Aéroconstellation site. The EIG facilities were leased by Toulouse authorities to the AFUL. Only AFUL members have access to the EIG facilities, and each member of the AFUL pays rent for the EIG facilities on the basis of its use thereof. During this time, French authorities also undertook the improvement of several roads around the Aéroconstellation site that link the site to the

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<sup>1504</sup> Panel Report, para. 7.1100.

<sup>1505</sup> Panel Report, para. 7.1101.

<sup>1506</sup> Panel Report, paras. 7.1137 and 7.1138.

*itinéraire à grand gabarit* ("IGG"), an extra-wide highway that enables Airbus to transport A380 components manufactured elsewhere from the French coast to Toulouse.<sup>1507</sup>

#### 4. Regional Infrastructure-Related Grants

628. The United States also challenged a series of regional infrastructure-related grants in Germany, Spain, and Wales. These consist of a grant by the German Land of Lower Saxony for the expansion of Airbus' Nordenham facility; a grant by the Welsh Government for Airbus' Broughton, Wales site; and grants by Spanish local and regional authorities for the expansion and modernization of the Airbus and EADS plants in Puerto de Santa Maria, Illescas, Puerto Real, Sevilla, and La Rinconada.<sup>1508</sup>

#### G. *German and French Restructuring Measures*

629. The United States challenged before the Panel certain restructuring measures by the German and French Governments. Concerning the restructuring of Deutsche Airbus, the United States challenged the acquisition by the German Government, through the government development bank Kreditanstalt für Wiederaufbau (Credit Agency for Reconstruction) ("KfW"), of the 20% equity interest in Deutsche Airbus in 1989, and the subsequent sale of that interest to Messerschmitt-Bölkow-Blohm GmbH ("MBB") in 1992. The United States also challenged a 1998 agreement in which the German Government agreed to accept a payment of DM 1.75 billion from Deutsche Airbus to settle certain outstanding claims following the restructuring of Deutsche Airbus. The United States argued that the total accumulated principal amount of debt that Deutsche Airbus owed the German Government at the time of the 1998 transaction was at least DM 9.4 billion, and that the 1998 transaction should therefore be characterized as "debt forgiveness" in the amount of DM 7.7 billion.<sup>1509</sup>

630. The United States also challenged certain equity infusions made by the French Government in Aérospatiale, including four capital investments between 1987 and 1994. In 1987, the French Government made a capital investment in the amount of FF 1.25 billion to Aérospatiale. The French Government made a further capital investment of FF 1.25 billion to Aérospatiale in 1988. In 1992, Crédit Lyonnais, which was at that time controlled by the French Government, acquired a 20% equity interest in Aérospatiale. Crédit Lyonnais subscribed to FF 1.4 billion in newly issued Aérospatiale shares, as well as acquired existing Aérospatiale shares from the French Government, in exchange for

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<sup>1507</sup> Panel Report, paras. 7.1139 and 7.1140.

<sup>1508</sup> Panel Report, para. 7.1010.

<sup>1509</sup> Panel Report, paras. 7.1304-7.1308.

the issuance to the French Government of approximately 2% of Crédit Lyonnais' share capital. In 1994, the French Government made a further capital investment of FF 2 billion to Aérospatiale.<sup>1510</sup>

631. In addition, the United States argued that the 1998 transfer by the French Government of its 45.76% equity interest in Dassault Aviation to Aérospatiale was a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*. In 1978, the French Government acquired a 45.76% equity interest in Dassault Aviation, a previously privately held manufacturer of military, regional, and business jets. The French Government also acquired the right to exercise 55% of the voting rights of the company by virtue of double voting rights that attached to certain of its shares. On 30 December 1998, the French Government transferred its 45.76% interest in Dassault Aviation to Aérospatiale in exchange for new shares of Aérospatiale to be issued at a later date following the fixing of an exchange ratio by a panel of independent experts. That panel delivered its report on 19 March 1999, approving the contribution of the Dassault Aviation shares to Aérospatiale at an amount equal to their net book value of FF 2.658 billion. On the basis of this report, on 6 May 1999, Aérospatiale issued 9,267,094 new shares to the French Government (based on an exchange ratio of two Aérospatiale shares for each Dassault Aviation share).<sup>1511</sup> When the French Government transferred its 45.76% interest in Dassault Aviation to Aérospatiale, it relinquished its double voting rights that had attached to certain of its shares in Dassault Aviation.<sup>1512</sup>

632. The French Government's transfer of its interest in Dassault Aviation to Aérospatiale was a preliminary step in the planned consolidation of the French aeronautical, defence, and space industries through the combination of Aérospatiale and MHT. Following the creation of the newly combined entity, Aérospatiale-Matra, the French Government sold a portion of its shares in this entity in a public offering such that, following the offering, it held approximately 48% of the shares in Aérospatiale-Matra.<sup>1513</sup> A private company, Lagardère SCA, held 33% of Aérospatiale-Matra and exercised control over Aérospatiale-Matra jointly with the French Government. The remaining shares were held by the public and Aérospatiale-Matra employees.<sup>1514</sup>

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<sup>1510</sup>Panel Report, para. 7.1324.

<sup>1511</sup>Panel Report, para. 7.1382.

<sup>1512</sup>Panel Report, para. 7.1384.

<sup>1513</sup>Panel Report, para. 7.1383.

<sup>1514</sup>Panel Report, footnote 4551 to para. 7.1383.

## V. Preliminary Issues

### A. *The Panel's Terms of Reference*

633. We begin by examining the European Union's appeal of the Panel's findings that two sets of R&TD measures were within the Panel's terms of reference.<sup>1515</sup> The European Union objects to the United States' claim that it had challenged, in section (6)(d) of its request for the establishment of a panel<sup>1516</sup>, certain loans provided pursuant to a programme of the Spanish Government running between 2000 and 2007, known as the PROFIT programme. Section (6)(d) expressly refers to "loans and other financial support provided under the Plan Tecnológico Aeronáutico I and the Plan Tecnológico Aeronáutico II" (together, the "PTA programme"), but does not refer to the PROFIT programme by name. The European Union also objects to the United States' claim that it had challenged, in section (6)(e) of its panel request, certain R&TD grants provided by the French Government between 1986 and 2005.

#### 1. The Panel's Findings

634. In a request for preliminary rulings from the Panel, the European Communities maintained that the United States' challenge to certain French R&TD grants was outside the Panel's terms of reference because the measures were not adequately identified in the United States' panel request, in accordance with Article 6.2 of the DSU.<sup>1517</sup> The European Communities argued that the reference, in section 6(e) of the United States' panel request, to funding since 1986 could relate to any funding provided by French authorities over a 20-year period, and that the reference to the "French government, including regional and local authorities", could cover any of the hundreds, if not thousands, of authorities in France.<sup>1518</sup>

635. The Panel considered that the language of the United States' panel request could not be construed as broadly as the European Communities claimed, especially when considered in the light of certain circumstances raised by the United States. The Panel thus concluded that section (6)(e) "considered as a whole and in light of attendant circumstances, identifies the measures at issue in a

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<sup>1515</sup>The United States challenged a series of what it termed "research, development, and demonstration" or "R&D" measures. (Request for the Establishment of a Panel by the United States, WT/DS316/2, section (6)) The Panel employed the term "research and technological development" or "R&TD" measures. We also use the latter term in this Report.

<sup>1516</sup>WT/DS316/2.

<sup>1517</sup>Panel Report, para. 7.138.

<sup>1518</sup>Panel Report, para. 7.147.

manner sufficient to present the problem clearly"<sup>1519</sup>, and accordingly rejected the European Communities' request for a preliminary ruling in respect of this issue.<sup>1520</sup>

636. In its first written submission to the Panel, the European Communities submitted that the United States' challenge against the Spanish Government loans provided pursuant to the PROFIT programme was also outside the Panel's terms of reference because the measures at issue were not adequately identified in the United States' panel request, in accordance with Article 6.2 of the DSU.<sup>1521</sup> The Panel considered that section (6)(d) of the United States' panel request indicated "the provider ('the Spanish government, including regional and local authorities'); the timing ('since 1993'); the purpose ('for civil aeronautics-related R&D projects'); and the subject ('in which Airbus participated'), of the funding at issue."<sup>1522</sup> The Panel remarked that the focus of section (6)(d) of the United States' complaint was therefore not all Spanish Government funding to Airbus for LCA-related activities, but rather only that funding which was provided "since 1993" and "for civil aeronautics-related R&D projects". The Panel also considered it clear from the use of the word "including" that the United States' challenge was not limited to loans under the programmes referred to in section (6)(d) of its panel request.<sup>1523</sup>

637. The Panel also took note of events that transpired after the United States' panel request. The Panel noted that the European Communities had received questions from the United States in respect of loans under the PROFIT programme during the Annex V process. The Panel further noted that, when the European Communities submitted its request for preliminary rulings, the European Communities did not object to the United States' challenge against the PROFIT programme measures. The Panel found that, "when considered as a whole and in light of the attendant circumstances, ... Section (6)(d) of the United States panel request presents the United States' claim against the PROFIT loans in a manner that is sufficiently clear to meet the standards of Article 6.2 of the DSU."<sup>1524</sup>

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<sup>1519</sup>Panel Report, para. 7.150.

<sup>1520</sup>Panel Report, para. 7.158.

<sup>1521</sup>Panel Report, para. 7.1418.

<sup>1522</sup>Panel Report, para. 7.1420.

<sup>1523</sup>Panel Report, para. 7.1420.

<sup>1524</sup>Panel Report, para. 7.1422.

2. The Panel's Assessment of the Panel Request

638. Article 6.2 of the DSU provides, in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

639. Two requirements under Article 6.2 are central to establishing a panel's jurisdiction—namely the identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Together these elements comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.<sup>1525</sup> The Appellate Body has previously noted that the panel request serves two essential purposes. First, it defines the scope of the dispute. Second, it serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case.<sup>1526</sup>

640. In our view, the requirement that a complainant identify in its panel request the specific measures at issue thus assists in determining the scope of the dispute in respect of those measures, and, consequently, establishes and delimits the jurisdiction of the panel. In so doing, the panel request fulfils the objective of providing notice to the respondent and the third parties regarding the nature of the dispute. This due process objective is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction. The principal task of the adjudicator is therefore to assess what the panel's terms of reference encompass, and whether a particular measure or claim falls within the panel's remit.

641. As the Appellate Body has stated, determining whether a panel request is "sufficiently precise"<sup>1527</sup> so as to conform to Article 6.2 requires a panel to scrutinize carefully the panel request, read as a whole, and on the basis of the language used.<sup>1528</sup> An assessment of whether a complaining party has identified the specific measures at issue may depend on the particular context in which those

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<sup>1525</sup>See Appellate Body Report, *Guatemala – Cement I*, paras. 72 and 73; Appellate Body Report, *US – Carbon Steel*, para. 125; Appellate Body Report, *US – Continued Zeroing*, para. 160; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and Appellate Body Report, *Australia – Apples*, para. 416.

<sup>1526</sup>See Appellate Body Report, *US – Carbon Steel*, para. 126 (referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167, at 186). See also Appellate Body Report, *EC – Chicken Cuts*, para. 155; and Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>1527</sup>Appellate Body Report, *EC – Bananas III*, para. 142; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>1528</sup>Appellate Body Report, *US – Carbon Steel*, para. 127; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; Appellate Body Report, *US – Continued Zeroing*, para. 161; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.



measures exist and operate. Such an exercise involves, by necessity, a case-by-case analysis since it may require examining the extent to which those measures are capable of being precisely identified.

642. The Appellate Body has also stated that a party's submissions during panel proceedings cannot cure a defect in a panel request.<sup>1529</sup> We consider this principle paramount in the assessment of a panel's jurisdiction. Although subsequent events in panel proceedings, including submissions by a party, may be of some assistance in confirming the meaning of the words used in the panel request, those events cannot have the effect of curing the failings of a deficient panel request. In every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing.

643. Bearing this in mind, we turn to examine the participants' arguments concerning the Panel's terms of reference in this dispute. Section (6) of the United States' panel request, in its entirety, reads as follows:

The provision by the EC and the member States of financial contributions for aeronautics-related research, development, and demonstration ("R&D"), undertaken by Airbus, whether alone or with others, or in any other way to the benefit of Airbus, including:

(a) EC funding for civil aeronautics-related R&D projects under the Second (1987-1991), Third (1990-1994), Fourth (1994-1998), Fifth (1998-2002) and Sixth (2002-2006) EC Framework Programs in which Airbus participated.

(b) Funding from the German federal government and sub-federal entities for civil aeronautics-related R&D projects in which Airbus participated, including:

(i) federal government funding as set forth in the most updated version of the government's Förderkatalog database, including funding under the federal aeronautics research programs Luftfahrtforschungsprogramm 1 (1995-1998), Luftfahrtforschungsprogramm 2 (1998-2002), and Luftfahrtforschungsprogramm 3 (2003-2007);

(ii) the regional Bremen Airbus Materials & System Technology Centre Bremen (AMST) (2000-2002) and the Airbus Materials & System Technology Centre Bremen II (AMST) (2002-2006);

(iii) the regional Bavaria "Hightechoffensive Bayern" program (1999-2003); and

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<sup>1529</sup> Appellate Body Report, *EC – Bananas III*, para. 143; Appellate Body Report, *US – Carbon Steel*, para. 127.

(iv) the regional Hamburg Luftfahrtforschungsprogramm (2001-2005).

(c) Funding from the government of the United Kingdom since 1992 for civil aeronautics-related R&D projects in which Airbus participated, including funding under the Civil Aircraft Research and Development Program (CARAD) and the Technology & Strategy Program.

(d) Funding from the Spanish government, including regional and local authorities, since 1993 for civil aeronautics-related R&D projects in which Airbus participated, including loans and other financial support provided under the Plan Tecnológico Aeronáutico I and the Plan Tecnológico Aeronáutico II.

(e) Funding from the French government, including regional and local authorities, since 1986 for civil aeronautics-related R&D projects in which Airbus participated.

(f) The provision by government-controlled and financed research institutions of civil aeronautics R&D-related goods or services to Airbus and/or funding for civil aeronautics-related R&D projects in which Airbus participated, including by the German Deutsches Zentrum für Luft- und Raumfahrt ("DLR"), by the UK Defence Evaluation and Research Agency ("DERA") and its successor Qinetiq, and by the French Office National des Études et des Recherches Aérospatiales ("ONERA"), the Centre National de la Recherche Scientifique ("CNRS"), and the Centre National de la Recherche Technologique ("CNRT").

644. At the oral hearing, the participants expressed their agreement that the challenged Spanish and French R&TD measures fall within the general descriptions set out in sections (6)(d) and (6)(e), respectively, but differed as to whether the description in each of these subparagraphs is sufficiently precise to identify the specific measures at issue, as required by Article 6.2 of the DSU. Sections (6)(b) through (6)(e) describe R&TD funding that was provided by each of the member States involved in this dispute—France, Germany, Spain, and the United Kingdom.<sup>1530</sup> In each subparagraph, the United States set out a general description of the R&TD funding it sought to challenge by identifying the member State and level(s) of authority, the relevant time periods over which the challenged funding was provided, and that the funding was for "civil aeronautics-related R&D projects in which Airbus participated". We also note that, for three of these subparagraphs, the general description of funding provided by each member State is accompanied by names of the

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<sup>1530</sup>We note that section (6)(a) refers to R&TD funding provided pursuant to the European Communities-wide EC Framework Programmes. The European Union's appeal in respect of these measures is addressed in Part VII.A of this Report. Section (6)(f) identifies R&TD funding from research institutions that are government controlled and financed, but a claim in respect of that funding was not pursued by the United States before the Panel in this dispute.

particular programmes pursuant to which the challenged R&TD was provided. Thus, for example, section (6)(b) states that the general description for German R&TD funding includes funding granted pursuant to three successive programmes of the federal *Luftfahrtforschungsprogramm*, as well as named programmes by regional authorities in Bavaria, Bremen, and Hamburg. Section (6)(c) identifies that the general description for UK R&TD funding includes funding under the Civil Aircraft Research and Development Program and the Technology & Strategy Program. As we have already noted above, section (6)(d) expressly indicates that the general description of Spanish R&TD funding includes loans provided under the PTA programme. Section (6)(e), relating to the French R&TD measures, does not list any names of particular funding programmes.

645. As we have noted, the question of whether a panel request is "sufficiently precise" in identifying the specific measures at issue is to be objectively determined through careful scrutiny of the panel request and consideration of the particular context in which such measures exist. We note that, in the circumstances of this case, we are presented with the particular question of whether a more general description of measures in the United States' panel request is nevertheless sufficiently precise as to the particular measures the United States sought to challenge. Ordinarily, a general description akin to that set out in sections (6)(d) and (6)(e) would suggest a lack of specificity in identifying the measures subject to challenge (apart from the R&TD loans provided pursuant to the PTA programme). In these circumstances, however, we must give further consideration to the context in which the United States specified, and was capable of specifying, information identifying these measures. Reading together the subparagraphs of section (6) set out above, we understand the terms of the panel request to indicate that, where a particular programme could be identified pursuant to which the challenged R&TD funding was granted, that information was included in the United States' panel request. We therefore consider that, in the circumstances of this case, where the United States framed its panel request by describing in general terms certain R&TD funding and by naming the particular programmes under which R&TD grants or loans by particular member States were provided, scrutiny of the United States' panel request must take into account the extent to which the relevant funding programmes were capable of being identified by name or by other specifying information.

646. We do not consider that the United States' panel request can be understood as having identified loans provided pursuant to the Spanish PROFIT programme. Section (6)(d) contains a description of R&TD funding from the Spanish Government since 1993 for civil aeronautics-related projects in which Airbus participated, coupled with the identification of a specific funding programme in the form of the PTA programme. Like the PTA programme, the PROFIT programme was

authorized through official decrees of the Spanish Government.<sup>1531</sup> The PROFIT programme was first established in 2000 by a Spanish Government decree, which identified the PROFIT programme in its title and expressly referred in the text of the decree to funding for aeronautics research.<sup>1532</sup> However, although information concerning the PROFIT programme was readily available in the public domain at the time of the panel request, the United States made no mention of the programme in its request. We do not consider that subsequent reference by the United States to the PROFIT programme during the Annex V process, or in its written submissions before the Panel, cures the lack of specification in the panel request. It follows also that, by reason of the lack of specification of the PROFIT programme by name, the European Communities and the third parties were consequently not on notice that the programme was part of the complainant's case. On the basis of the above, we determine that the PROFIT programme was outside the Panel's terms of reference.

647. With respect to the French R&TD funding measures, we note that section (6)(e) identified R&TD funding from the French Government, including regional and local authorities, since 1986 for civil aeronautics-related R&TD projects in which Airbus participated. In other words, these funding measures are identified by references to the funding authority, time period, and area of support. Given the specific circumstances of these measures, we do not consider that the United States could have provided additional specifying information concerning the name of the funding programme, as it had in sections (6)(b), (6)(c), and (6)(d) of its panel request. Both participants refer on appeal to the public information contained in a series of French Senate reports summarizing R&TD funding provided to aeronautics research between 1986 and 2005—reports that were listed in the Statement of Available Evidence attached to the United States' request for consultations<sup>1533</sup>, and to which the Panel referred to establish the existence and amounts of the French R&TD funding challenged by the United States.<sup>1534</sup> Although these reports indicate an allocation of funding to aeronautics research pursuant to France's budgetary process, both participants acknowledge that they do not identify the name of a particular funding programme.<sup>1535</sup> At the oral hearing, the European Union referred to

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<sup>1531</sup>Panel Report, para. 7.1479.

<sup>1532</sup>See Ministerio de Industria y Energía, *Orden de 7 de marzo de 2000 por la que se regulan las bases, el régimen de ayudas y la gestión del Programa de Fomento de la Investigación Técnica (PROFIT), incluido en el Plan Nacional de Investigación Científica, Desarrollo e Innovación Tecnológica (2000-2003)*, *Boletín Oficial del Estado*, No. 59 (9 March 2000) 9855 (Panel Exhibit US-349). See also United States' first written submission to the Panel, para. 697.

<sup>1533</sup>WT/DS316/1.

<sup>1534</sup>Panel Report, para. 7.1471.

<sup>1535</sup>European Union's appellant's submission, para. 1230: "The listed documents are budgetary reports by the French Senate, which do not specify measures either by reference to a programme or to an entity providing funding"; United States' appellee's submission, para. 481: The French Senate reports "established that the French government subsidized Airbus research ... {but} did not indicate how, under what program, or by whom".

several documents containing general information about French funding for civil aviation research, but it was not able to identify in these or other documents the name of the funding programme.<sup>1536</sup>

648. Whether a measure can be identified in conformity with the requirements of Article 6.2 may, as is the case here, depend on the extent to which that measure is specified in the public domain. We do not understand Article 6.2 to impose a standard that renders it more difficult to challenge a measure simply because information in the public domain concerning that measure is of a general character. Additionally, the lack of specification in the public domain should not shield this particular measure from challenge simply because greater detail in the form of, for example, an identifiable programme name was publicly available in respect of the other measures specified in sections (6)(b), (6)(c), and (6)(d). We note that, even after reviewing the Panel record in this case, and questioning the participants at the oral hearing, it is still not clear to us what additional degree of specificity could reasonably have been expected regarding the identification of R&TD funding allocated through the French Government's budgetary process. Taking into account the public information that existed regarding the French R&TD funding at the time of the United States' panel request, we consider that the description set out in section (6)(e) was sufficiently precise to establish that the French R&TD funding challenged by the United States was within the Panel's terms of reference.

649. For the foregoing reasons, we *reverse* the Panel's finding, in paragraph 7.1422 of the Panel Report, that the R&TD loans provided pursuant to the Spanish PROFIT programme were within the Panel's terms of reference, and we *uphold* the Panel's finding, in paragraph 7.158 of the Panel Report, that the French R&TD grants were within the Panel's terms of reference.

#### B. *The Temporal Scope of Article 5 of the SCM Agreement*

650. Before the Panel, the European Communities argued that the temporal scope of the *SCM Agreement* must be determined in accordance with Article 28 of the *Vienna Convention*, which sets out the general rule that treaty provisions do not apply retroactively.<sup>1537</sup> According to the European Communities, consistent with the principle of non-retroactivity embodied in Article 28 of the *Vienna Convention*, Article 5 of the *SCM Agreement* applies to subsidies that were granted *after* 1 January 1995, while subsidies granted *prior* to 1 January 1995 fall outside the temporal scope of

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<sup>1536</sup>The European Union provided, for example, a 2003 WTO notification submitted by the European Communities pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the *SCM Agreement* (G/SCM/N/95/EEC/Add.5, 15 December 2003). That document listed France's Annual Finance Law, and the Arrangement approved by the European Commission (No. 53/96), but did not identify a name for the funding programme or the French agency or agencies that administered the programme.

<sup>1537</sup>Panel Report, para. 7.19 (referring to European Communities' updated Request for Preliminary Rulings, paras. 10-13).

Article 5.<sup>1538</sup> On this basis, the European Communities requested that the Panel find that "all ... actionable subsidies granted by the European Communities before 1 January 1995 are excluded from the temporal scope of the proceedings".<sup>1539</sup>

651. In a communication to the parties and the third parties dated 22 December 2006, the Panel explained that it was "not convinced" that "subsidies granted" or "brought into existence" prior to 1 January 1995 cannot fall within the scope of Article 5 of the *SCM Agreement*.<sup>1540</sup> Therefore, the Panel requested the parties and third parties "to proceed on the understanding that all of the alleged measures challenged by the United States continue to fall within the scope of {the Panel} proceeding."<sup>1541</sup> Subsequently, on 11 July 2007, the Panel issued a preliminary ruling in which it rejected the European Communities' request.<sup>1542</sup> The Panel explained that, *inter alia*, "Article 5 imposes an obligation on Members not to cause adverse effects to the interests of other Members through the use of subsidies as defined in Article 1"<sup>1543</sup>, and characterized this as "an obligation not to cause certain results through a specific causal pathway, rather than an obligation not to engage in certain conduct."<sup>1544</sup> According to the Panel, it was the obligation not to cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members that was to be interpreted consistently with the principle of non-retroactivity reflected in Article 28 of the *Vienna Convention*.<sup>1545</sup> Based on its review of dictionary definitions for the terms "act" and "situation", and noting that the Appellate Body has described the concept of "situation" in Article 28 as suggesting "something that subsists and continues over time"<sup>1546</sup>, the Panel considered that "Article 5 addresses a set of circumstances or state of affairs (i.e., a 'situation') rather than specific acts of a Member."<sup>1547</sup> In addition, the Panel found that "there are significant contextual factors that

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<sup>1538</sup>Panel Report, para. 7.19. In particular, the European Communities argued that the following groups of measures fall outside the temporal scope of the *SCM Agreement*: (i) LA/MSF committed and paid prior to 1 January 1995; (ii) EIB loans to EADS and the Airbus companies that were provided in full prior to 1 January 1995; (iii) the extension of the runway at the Bremen Airport, which occurred in 1988 and 1989; and (iv) share transfers and equity infusions that took place before 1 January 1995. In addition, in relation to R&TD funding, the European Communities argued "that grants or disbursements made after 1 January 1995 pursuant to programmes established prior to 1 January 1995 are within the temporal scope of Article 5, while grants or disbursements made prior to 1 January 1995 are outside the temporal scope of Article 5 and should be excluded from these proceedings." (*Ibid.*, footnote 1776 to para. 7.19 (original underlining))

<sup>1539</sup>Panel Report, para. 7.15(a).

<sup>1540</sup>Panel Report, para. 7.16 (quoting communication from the Panel to the parties dated 22 December 2006).

<sup>1541</sup>Panel Report, para. 7.16 (quoting communication from the Panel to the parties dated 22 December 2006).

<sup>1542</sup>Panel Report, para. 1.11. The content of the Panel's preliminary ruling is set out in section VII.C of the Panel Report, paras. 7.9-7.65.

<sup>1543</sup>Panel Report, para. 7.46.

<sup>1544</sup>Panel Report, para. 7.46.

<sup>1545</sup>Panel Report, para. 7.46.

<sup>1546</sup>Panel Report, para. 7.50 (quoting Appellate Body Report, *Canada – Patent Term*, para. 72).

<sup>1547</sup>Panel Report, para. 7.52.

militate against the interpretation of Article 5 advocated by the European Communities."<sup>1548</sup> In particular, the Panel considered that "paragraph 7 of Annex IV to the SCM Agreement indicates that the drafters did not regard the temporal scope of Part III of the SCM Agreement as confined to financial contributions made, or subsidies otherwise brought into existence, after 1 January 1995."<sup>1549</sup> For purposes of the application of Article 28 of the *Vienna Convention*, the Panel described Article 5 "as addressing a 'situation'; namely, causing adverse effects through the use of subsidies."<sup>1550</sup> The Panel further found that "Article 5 applies to any such 'situation' which exists as of the effective date of the SCM Agreement, even if that situation arose as a result of the granting of a subsidy prior to that date."<sup>1551</sup> Therefore, the Panel rejected the European Communities' request for a preliminary ruling "that all alleged prohibited and actionable subsidies granted by the European Communities prior to 1 January 1995 be excluded from the temporal scope of {the Panel} proceedings."<sup>1552</sup>

652. The European Union challenges these findings on appeal. The European Union argues that, since the pre-1995 subsidies challenged by the United States were "fully granted, disbursed or brought into existence and ended before 1995", they amount to "completed acts" or "completed situations" and, thus, are outside the temporal scope of application of the *SCM Agreement*, even if the "effects" of such subsidies may continue to be felt subsequently.<sup>1553</sup> The European Union further argues that the Panel erred in its examination of the text, context, and object and purpose of the *SCM Agreement* when characterizing the obligation contained in Article 5 as referring to "continuing situations", including pre-1995 measures with post-1995 effects. According to the European Union, there was no intention to cover subsidies granted before 1995 whose effects are felt after 1995 in Article 5 of the *SCM Agreement*.<sup>1554</sup>

653. The United States counters that the approach by the European Union is inconsistent with both the text of Article 5 of the *SCM Agreement* itself, and the international legal principle of non-retroactivity on which the European Union purports to rely. The United States emphasizes that the obligation contained in Article 5 is not limited to the act of providing actionable subsidies. Rather, the causing of adverse effects through the use of subsidies, as the Panel found, falls within the ordinary meaning of "situation" as used in Article 28 of the *Vienna Convention*, and is thus among the types of conditions that a treaty may address without making special provision for retroactivity.

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<sup>1548</sup>Panel Report, para. 7.57.

<sup>1549</sup>Panel Report, para. 7.57.

<sup>1550</sup>Panel Report, para. 7.64.

<sup>1551</sup>Panel Report, para. 7.64.

<sup>1552</sup>Panel Report, para. 7.65.

<sup>1553</sup>European Union's appellant's submission, paras. 77 and 122.

<sup>1554</sup>European Union's appellant's submission, paras. 78 and 79.

654. We begin our analysis by reviewing the principle of non-retroactivity of treaties as reflected in Article 28 of the *Vienna Convention*.

1. Article 28 of the *Vienna Convention*

655. Article 28 of the *Vienna Convention* establishes a presumption against the retroactive effect of treaties in the following terms:

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.

656. In order to determine the temporal scope of a particular treaty provision, regard must be had to the text of the treaty at issue, the subject matter of the treaty in question, and to the nature of the treaty obligations undertaken. We therefore turn to consider the text of Article 5 of the *SCM Agreement*, read in its context, in order to determine whether it indicates the intention of WTO Members with respect to its temporal scope.

2. Whether Article 5 of the *SCM Agreement* Applies to Pre-1995 Measures

657. Article 5 provides, in relevant part:

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members ... .

658. By its terms, Article 5 of the *SCM Agreement* addresses the causing of adverse effects through the use of subsidies. In particular, it stipulates that Members should not "cause" adverse effects to the interests of other Members "through the use of" subsidies as defined in Article 1 of the *SCM Agreement*. The dictionary meaning of the noun "use" is the "act of using, fact of being used; the action of using something; the fact or state of being used; application or conversion to some purpose".<sup>1555</sup> The word "through" is defined in the dictionary as "by means of, via".<sup>1556</sup> In the specific context of Article 5, we understand the subordinate clause "through the use of any subsidy" to describe the *manner* in which a Member should not cause adverse effects. As we see it, this language clarifies that Article 5 is addressed to the causing of certain results in a particular manner—that is, by

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<sup>1555</sup> *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 3489.

<sup>1556</sup> *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 3255.



means of the use of any subsidy. The positioning of the phrase "through the use of any subsidy" following the verb "cause" accords with the focus of Article 5, which is the causing of adverse effects.

659. WTO Members undertook the obligation contained in Article 5 of the *SCM Agreement* as of 1 January 1995. In other words, as of that date, WTO Members have been under an obligation not to "cause, through the use of any subsidy", adverse effects to the interests of other Members.

660. The European Union argues that, "when examining the *SCM Agreement* as a whole, it becomes evident that there was no intention to include subsidies which were granted before 1995 with effects after 1995", and, thus, the Panel erred in its interpretation of Article 5 of the *SCM Agreement*.<sup>1557</sup> In support of its arguments, the European Union refers to various provisions of the *SCM Agreement*, which we examine below.

661. The European Union contends, in particular, that "the formulation of the obligation in Articles 3 and 5 and the scope of the remedy indicate that both provisions refer to the same government conduct: granting or maintaining subsidies."<sup>1558</sup> Regarding actionable subsidies, the European Union submits that Article 7 also confirms that the relevant government conduct for the purpose of Article 5 is "granting or maintaining a subsidy".<sup>1559</sup> The European Union also points to the grammatical structure of Article 5 itself to illustrate that the phrase "through the use of {a} subsidy" refers to the government conduct of granting or maintaining subsidies.<sup>1560</sup>

662. The text of Article 5 does not provide an agent for the noun "use", suggesting that it may address the "use of any subsidy" by either the government granting the subsidy, or the recipient of the subsidy.<sup>1561</sup> We recognize that a government could "use" subsidies, in the sense that it employs

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<sup>1557</sup>European Union's appellant's submission, para. 79.

<sup>1558</sup>European Union's appellant's submission, para. 84.

<sup>1559</sup>European Union's appellant's submission, paras. 84 and 88.

<sup>1560</sup>European Union's appellant's submission, paras. 94 and 95.

<sup>1561</sup>The French and Spanish versions of Article 5 do not limit the "use of any subsidy" to use by a government. Nor do they indicate clearly that the "use of" subsidies includes use by private firms. Although the French version might suggest that the using is by the Member, the Spanish version fails—like the English version—to specify the subject of the use. The French version reads: "*Aucun Membre ne devrait causer, en recourant à l'une quelconque des subventions visées aux paragraphes 1 et 2 de l'Article premier, d'effets défavorables pour les intérêts d'autres Membres ...*." The Spanish version does not specify who the use is by: "*Ningún Miembro deberá causar, mediante el empleo de cualquiera de las subvenciones a que se refieren los párrafos 1 y 2 del artículo 1, efectos desfavorables para los intereses de otros Miembros ...*."

subsidies for a stated purpose.<sup>1562</sup> However, contrary to what the European Union suggests, the reference to the "use of any subsidy" in Article 5 refers to more than merely the "granting" or "maintaining" of a subsidy by a government.<sup>1563</sup> In particular, we note that Article 6.3 defines serious prejudice to which Article 5 refers, *inter alia*, in terms of "significant price undercutting", "lost sales", "price depression", and "price suppression". Sales and the pricing of goods, in a market economy, are activities usually engaged in by the recipient of a subsidy rather than by the grantor. Such actions of a recipient of a subsidy are clearly relevant for purposes of assessing whether a WTO Member, as the grantor, has complied with its obligation "not to cause, through the use of any subsidy, adverse effects to the interests of other Members."

663. Article 3 provides that a Member "shall neither grant nor maintain" prohibited subsidies, focusing on the act of granting or maintaining export subsidies. By contrast, Article 5 is concerned with the adverse effects caused by the use of subsidies by a Member and does not prohibit the granting or maintaining of subsidies *per se*.<sup>1564</sup> It is true that the granting of a subsidy by a government may cause, through the use of the subsidy, adverse effects and may, as a consequence, trigger the obligation under Article 7.8 for the subsidizing Member to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy". This does not mean, however, that the conduct covered by Article 5 is limited to subsidies granted by a government after the date of entry into force of the *SCM Agreement*.

664. The European Union considers that the Panel erred in finding that Article 28.1 "was not of contextual assistance in deciding whether subsidies granted prior to 1 January 1995 may be subject to the obligations of Article 5."<sup>1565</sup> Specifically, the European Union contends that Article 28.1 "addresses subsidy *programmes*, as opposed to *individual* subsidies", and that "{t}he fact that the Part

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<sup>1562</sup>The "use" by governments is referred to often in the *Tokyo Round Subsidies Code*, the precursor to the *SCM Agreement*. In the Preamble, the signatory Contracting Parties recognized that "subsidies *are used by governments* to promote important objectives of national policy". (emphasis added) Article 8.1 provides further that "signatories recognize that subsidies *are used by governments* to promote important objectives of social and economic policy." (emphasis added) Article 11.1 states that "signatories recognize that subsidies other than export subsidies are widely *used* as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories *to use* such subsidies to achieve these and other important policy objectives which they consider desirable." (emphasis added)

<sup>1563</sup>It would appear that the "grant" and/or "maintenance" of a subsidy by a *Member*, as used in the *SCM Agreement*, is distinct from the "use" of a subsidy. See, for instance, Articles 2.1(c), 3.1, 4.3, 7.1, 7.3, and 7.8 of the *SCM Agreement*, each of which refer to granting and/or maintaining subsidies.

<sup>1564</sup>See Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47. As the Appellate Body stated in that case, "the granting of a subsidy is not, in and of itself, prohibited under the *SCM Agreement*. Nor does granting a 'subsidy', without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the *SCM Agreement*."

<sup>1565</sup>European Union's appellant's submission, para. 101.

dealing with 'Transitional Arrangements' refers only to subsidy programmes indicates the intention to exclude prior individual acts of subsidisation" from the temporal scope of Article 5.<sup>1566</sup>

665. Article 28 indicates that "subsidy programmes" continuing in force or maintained after 1 January 1995 were generally intended to fall within the temporal scope of Part II of the *SCM Agreement* (which prohibits the granting or maintaining of *export and import substitution subsidies*). By its terms, Article 28 does not refer to individual acts of subsidization, nor does it refer to obligations arising under Part III of the *SCM Agreement*. We do not read Article 28 to indicate that Article 5 was intended to apply only to subsidies brought into existence subsequent to 1 January 1995.

666. Our interpretation is also consistent with paragraph 7 of Annex IV to the *SCM Agreement*. Annex IV sets forth the method for calculating the total *ad valorem* subsidization of a product for purposes of the presumption of serious prejudice in Article 6.1(a) (an expired provision) of the *SCM Agreement*. Paragraph 7 of Annex IV stipulates that "{s}ubsidies 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." This suggests that "adverse effects" within the meaning of Article 5 can be caused by subsidies granted prior to 1 January 1995. We agree with the Panel that, although Article 6.1 and Annex IV have expired, they formed part of the original framework for determining when a Member could be considered to have caused adverse effects, and thus provide an important indication of the intended scope of Article 5.<sup>1567</sup>

667. The European Union argues that paragraph 7 of Annex IV merely sets out "a *method* to estimate the amount of subsidies granted to a particular product in a given year."<sup>1568</sup> We fail to see why the fact that paragraph 7 of Annex IV describes a "method" would mean that it cannot provide context for purposes of interpreting Article 5. Instead, as we see it, the inclusion of pre-1995 subsidies in the calculation of the amount of subsidies suggests that negotiators contemplated that subsidies granted before the entry into force of the *SCM Agreement* are, as a conceptual matter, capable of causing adverse effects.

668. The European Union further argues that paragraph 7 of Annex IV authorizes the "exceptional inclusion of a benefit from a pre-1995 subsidy in the calculation of the overall amount of subsidisation post-1995".<sup>1569</sup> According to the European Union, this "indicates the intention that WTO Members should not be allowed to shield post-WTO subsidies of less than 5% from WTO

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<sup>1566</sup>European Union's appellant's submission, para. 102. (original emphasis)

<sup>1567</sup>Panel Report, para. 7.57.

<sup>1568</sup>European Union's appellant's submission, para. 106. (original emphasis)

<sup>1569</sup>European Union's appellant's submission, para. 108.

scrutiny, although the total amount of subsidies benefiting current production exceeds 5%."<sup>1570</sup> The European Union emphasizes that "this does not mean that the benefit of every pre-1995 subsidy is deemed to 'continue' after 1995 for the purpose of Article 5 of the *SCM Agreement* or in general."<sup>1571</sup> We agree with the European Union that the benefit of every subsidy granted before the entry into force of the *SCM Agreement* should not be "deemed" to continue thereafter. However, as the Panel found, "{p}aragraph 7 of Annex IV recognises that a subsidy granted prior 1 January 1995 may, in certain circumstances (i.e., where its benefits are allocated to future production) be relevant to the serious prejudice determination in Article 5(c) and thus, may give rise to adverse effects under Article 5."<sup>1572</sup> Paragraph 7 of Annex IV therefore supports the proposition that subsidies granted prior to 1 January 1995 are subject to the obligation contained in Article 5 of the *SCM Agreement*.

669. The European Union further argues that Article 32.3 supports the proposition that "actions taken by Members before 1995, in the sense of bringing a subsidy into existence, insofar as they are 'completed', should be examined in view of the contemporaneous obligation at that time (i.e., the 1979 Tokyo Round Subsidies Code) and thus do not fall within the scope of Article 5 of the *SCM Agreement*."<sup>1573</sup> Article 32.3 provides in relevant part that "the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." We find it of little relevance to our analysis and do not consider that it sheds light on the temporal scope of Article 5.

670. The European Union submits, moreover, that Article 32.5 of the *SCM Agreement* applies to "'continuing situations' in the form of 'laws, regulations and administrative procedures'" and "does not refer to completed 'acts' or 'situations' such as individual subsidies granted before 1995".<sup>1574</sup> It is true that, by its terms, Article 32.5 obligates WTO Members to take all necessary steps to ensure the conformity of its laws, regulations, and administrative procedures with the provisions of this Agreement. We do not consider, however, that the lack of a reference in Article 32.5 to individual instances of subsidization supports the proposition that no obligation arising out of Article 5 is to be imposed on a Member in respect of subsidies granted or brought into existence prior to the entry into force of the *SCM Agreement*.

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<sup>1570</sup>European Union's appellant's submission, para. 108.

<sup>1571</sup>European Union's appellant's submission, para. 108.

<sup>1572</sup>Panel Report, para. 7.59.

<sup>1573</sup>European Union's appellant's submission, para. 104.

<sup>1574</sup>European Union's appellant's submission, para. 105.

671. Our reading of Article 5 does not lead to a "retroactive" application of that provision. The application of Article 5 to subsidies granted prior to 1995 is justified by virtue of the obligation, under that provision, not to cause, through the use of any subsidy, adverse effects to the interests of other Members. We see no indication in the text of Article 5 to suggest that the obligation set out in that provision is limited to subsidies granted after the date of entry into force of the *SCM Agreement*.

3. The Interpretation of Article 5 of the *SCM Agreement* in the Light of the Principle of Non-Retroactivity Reflected in Article 28 of the *Vienna Convention*

672. The Appellate Body has previously confirmed that the principle of non-retroactivity under Article 28 of the *Vienna Convention* is a general principle of law, which is relevant to the interpretation of the WTO covered agreements.<sup>1575</sup> The Appellate Body has described the application of Article 28 in the following way:

Article 28 of the *Vienna Convention* covers not only any "act", but also any "fact" or "situation which ceased to exist". Article 28 establishes that, in the absence of a contrary intention, treaty provisions do *not* apply to 'any situation which ceased to exist' before the treaty's entry into force for a party to the treaty. Logically, it seems to us that Article 28 also necessarily implies that, absent a contrary intention, treaty obligations *do* apply to any 'situation' which has *not* ceased to exist—that is, to any situation that arose in the past, but continues to exist under the new treaty.<sup>1576</sup> (original emphasis)

673. The European Union contends that the Panel erred in its application of the principle of non-retroactivity of treaties reflected in Article 28 of the *Vienna Convention* by wrongly focusing on the nature of the obligation contained in Article 5 of the *SCM Agreement* rather than on the nature of the measures challenged by the United States. For the European Union, the relevant question before the Panel was instead whether the pre-1995 measures challenged by the United States can be characterized as "acts" or "facts" that took place before the entry into force of the *SCM Agreement*, or as "completed situations".<sup>1577</sup>

674. The United States counters that the Panel correctly applied the principle of non-retroactivity of treaties reflected in Article 28 of the *Vienna Convention* by focusing on the nature of the obligation contained in Article 5 of the *SCM Agreement*. The United States disagrees with the European Union's assertion "that the proper approach was 'to identify the relevant government conduct in the first place, characterise it as 'act' or 'situation' and examine whether such an 'act' or 'situation' was completed

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<sup>1575</sup> See, for example, Appellate Body Report, *EC – Sardines*, para. 200.

<sup>1576</sup> Appellate Body Report, *Canada – Patent Term*, para. 72.

<sup>1577</sup> European Union's appellant's submission, para. 38. (original emphasis omitted)

before 1995 or continued afterwards'.<sup>1578</sup> The United States considers that the European Union's proposed approach "would have the Appellate Body start with the *assumption* that the grant of subsidies is the relevant act, fact, or situation in relation to which Article 5 of the SCM Agreement binds the Members."<sup>1579</sup> According to the United States, this approach "is essentially circular", because "starting with the assumption that the only relevant activity is something that occurred in the past ... foreordains the conclusion that the provision applies to acts, facts, or situations that have already ceased to exist."<sup>1580</sup> The United States further argues that "Article 28 of the Vienna Convention frames the retroactivity analysis in terms of the acts, facts, or situations with respect to which a treaty binds its parties", and argues that nothing in the text of Article 28 "limits those acts, facts, or situations to governmental 'conduct' as opposed to a government obligation that continues after particular conduct has occurred".<sup>1581</sup>

675. As a general proposition, a treaty does not apply to acts or facts that took place, or situations that ceased to exist, before the date of its entry into force. As we have noted above, in order to determine the temporal scope of Article 5 of the *SCM Agreement*, regard must be had to the *text of the treaty at issue* and, importantly, to the subject matter of the treaty in question and to the nature of the *treaty obligations* undertaken. We therefore disagree with the European Union to the extent that it suggests that it is the pre-1995 *measures* that are to be interpreted consistently with the principle of non-retroactivity reflected in Article 28 of the *Vienna Convention*. Rather, as the Panel found, it is, as set out in Article 5, the causing through the use of any subsidy of adverse effects to the interests of other Members that is the subject of that provision. Thus, even assuming that the European Union was correct in its assertion that the pre-1995 *measures* challenged by the United States could be properly characterized as "completed acts", this would not mean that such measures are precluded from challenge under Article 5 of the *SCM Agreement*, as the European Union suggests.

676. As noted above, the European Union argues that, since the pre-1995 subsidies challenged by the United States were "fully granted, disbursed or brought into existence and ended before 1995", they amount to completed "acts" or "situations" and, thus, are outside the temporal scope of application of the *SCM Agreement*, even if the "economic effects" of such subsidies may continue to be felt subsequently.<sup>1582</sup> In reply, the United States submits that the temporal scope of Article 5 is not limited to the act of providing actionable subsidies.

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<sup>1578</sup>United States' appellee's submission, para. 20 (referring to European Union's appellant's submission, para. 33).

<sup>1579</sup>United States' appellee's submission, para. 20. (original emphasis)

<sup>1580</sup>United States' appellee's submission, para. 20.

<sup>1581</sup>United States' appellee's submission, para. 22.

<sup>1582</sup>European Union's appellant's submission, paras. 77 and 122.

677. In practice, it is often difficult to distinguish between, on the one hand, an act or fact that was "completed" before the entry into force of the new treaty and, on the other hand, an act, fact, or situation that "continues" or has "continuing effect".<sup>1583</sup> In order to draw the line between these concepts, we turn to the text of Article 28 of the *Vienna Convention*.

678. Article 28 refers to "acts or facts which took place", as well as to "situations which ceased to exist". The Appellate Body has previously described the word "act" within the meaning of Article 28 as "something that is 'done'".<sup>1584</sup> In assessing the temporal scope of a treaty provision that is directed at "acts" or "facts", the relevant question is whether the act or fact "occurred" or "took place" prior to the entry into force of the treaty. By contrast, with regard to treaty provisions that are directed at a "situation", Article 28 does not ask whether the "situation" "took place", but rather whether it "ceased to exist" prior to the entry into force of the treaty. As the Appellate Body found in *Canada – Patent Term*, the use of the word "situation" in Article 28 "suggests something that subsists and continues over time".<sup>1585</sup> The reference to "ceased to exist" supports the notion that a "situation" may continue to exist over a period of time, rather than simply occur at a particular instant in time, after which the "situation" may "cease{ } to exist".

679. In response to questioning at the oral hearing, the participants agreed that, as a general proposition, there is a certain degree of overlap between the concepts of "act", "fact", and "situation". To us, it would appear that almost any "situation" can be said to have arisen from one or more past "acts" or "facts", including ones that have been "completed". Moreover, it would seem that a "situation" may consist of more than a distinct set of repeated acts, such as the use of subsidies under a scheme.

680. The Panel expressed the view that Part III of the *SCM Agreement* generally is concerned with a situation that subsists and continues over time, rather than with specific acts performed by Members. According to the Panel:

while "cause" is used as a verb in Article 5, it does not connote specific action on the part of a Member. Rather, it describes a particular relationship between the antecedent conduct of a Member

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<sup>1583</sup>P. Reuter, *Introduction to the Law of Treaties* (Kegan Paul International, 1995), p. 100.

<sup>1584</sup>Appellate Body Report, *Canada – Patent Term*, para. 58.

<sup>1585</sup>Appellate Body Report, *Canada – Patent Term*, para. 72. The panel in that dispute characterized the protection accorded to inventions by patents granted under a pre-1989 Canadian patent regime as a "situation which has not ceased to exist" at the date of the application of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.

and subsequent events which ultimately are attributed to that Member.<sup>1586</sup>

681. We see no reason to disagree with the Panel. Article 5 reflects the notion that it is the causing, through the use of any subsidy, of adverse effects, rather than the granting of the subsidy that is the situation that is addressed by that provision. As we have noted above, Article 5 does not prohibit the granting or the use of a subsidy *per se*. Rather, Members are permitted to grant or maintain specific subsidies to the extent that they do not cause adverse effects within the meaning of Articles 5 and 6 of the *SCM Agreement*. The context of Article 5 also supports the notion that Part III generally is concerned with a situation that continues over time, rather than with specific acts.<sup>1587</sup> For instance, Article 6.4 contemplates that the displacement or impeding of exports, for purposes of Article 6.3(b), shall be demonstrated based on evidence relating to "*an appropriately representative period* sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year."<sup>1588</sup> In addition, Article 6.3(d) suggests that an increase in the world market share of the subsidizing Member is to be determined on the basis of "*a consistent trend over a period when subsidies have been granted.*"<sup>1589</sup>

682. The European Union argues that, under general public international law, the question of whether treaty obligations apply to certain government conduct depends on the nature of the government conduct and its timing.<sup>1590</sup> For the European Union, the fact that certain effects may continue as a result of the government conduct is "entirely irrelevant".<sup>1591</sup> To support its position, the European Union refers to the Commentaries<sup>1592</sup> of the International Law Commission (the "ILC") on Article 28 of the *Vienna Convention* and on the ILC Articles on *Responsibility of States for Internationally Wrongful Acts*<sup>1593</sup> (the "ILC Articles"). In particular, the European Union refers to Article 14 of the ILC Articles to argue that "{a} completed act occurs 'at the moment when the act is performed', even though its effects or consequences may continue".<sup>1594</sup> The European Union also

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<sup>1586</sup>Panel Report, para. 7.52.

<sup>1587</sup>Panel Report, para. 7.52.

<sup>1588</sup>Emphasis added.

<sup>1589</sup>Emphasis added.

<sup>1590</sup>European Union's appellant's submission, para. 43.

<sup>1591</sup>European Union's appellant's submission, para. 43.

<sup>1592</sup>*Draft Articles on the Law of Treaties with commentaries, supra*, footnote 105; *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, supra*, footnote 105.

<sup>1593</sup>ILC Articles on *Responsibility of States for Internationally Wrongful Acts, supra*, footnote 106.

<sup>1594</sup>European Union's appellant's submission, paras. 41 and 42 (quoting Commentary on Article 14 of the ILC Articles, *supra*, footnote 105, pp. 59-60).



refers to several rulings of the European Court of Human Rights (the "ECtHR") and the International Court of Justice (the "ICJ") to support its argument.<sup>1595</sup>

683. The United States counters that the ILC Articles, which the European Union cites in support of its argument, "are not only irrelevant to the interpretation of the {non-}retroactivity rules reflected in Article 28 of the Vienna Convention, they also do not support the proposition for which the European Union cites them".<sup>1596</sup> Where, as in the case of Article 5 of the *SCM Agreement*, "the primary obligations of a treaty are concerned with causing effects through prior government action, causing those effects itself is the 'wrongful act', and the conclusion as to retroactivity will 'depend' on whether it is 'completed' or 'has a continuing character'".<sup>1597</sup> The United States points in this regard to Article 14(3) of the ILC Articles, which "deals with 'an international obligation requiring a State to prevent a given event'—analogous to the obligation in Article 5 of the *SCM Agreement* not to cause adverse effects ... {and} provides specifically, that a breach of such an obligation 'occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with the obligation'".<sup>1598</sup> The United States further argues that the decisions by the ICJ and the ECtHR cited by the European Union do not support the European Union's view that "government conduct alone, and not the effects of government conduct, is relevant to an analysis of retroactivity, depending on the actual text of the treaty that is being interpreted".<sup>1599</sup>

684. As we have noted above, Article 5 of the *SCM Agreement* sets out an obligation not to cause, through the use of any subsidy, adverse effects to the interests of other Members. It is the "causing" of such effects that is relevant for purposes of Article 5, and the conclusion as to retroactivity will hinge on whether that situation continues or has been completed, rather than on when the act of granting a subsidy occurred.

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<sup>1595</sup>European Union's appellant's submission, para. 44 (referring to ECtHR, Grand Chamber, *Malhous v. The Czech Republic*, Application No. 33071/96, p. 16). The European Union also refers to ECtHR, *Mayer, Weidlich, Fullbrecht Hasenkamp, Golf, Klausner v. Germany*, Application Nos. 19048/91, 19049/91, 19342/92, 18890/92, Decision and Reports 85-A, p. 5; ECtHR, Grand Chamber, *Von Maltzan and others v. Germany*, Decision to the Admissibility of Applications Nos. 71916/01, 71917/01, and 10260/02 (2 March 2005) ("land reform" 1945-49 in the Soviet sector of Germany), paras. 82 and 83; and ICJ, Judgment on preliminary objections, *Case Concerning Certain Property (Liechtenstein v. Germany)*, ICJ Reports (2005), para. 52. (*Ibid.*, paras. 44 and 45)

<sup>1596</sup>United States' appellee's submission, para. 24. (footnote omitted) The United States adds that the ILC Articles themselves are not "covered agreements" set forth in Appendix I to the DSU, nor do they set forth "customary rules of interpretation of public international law". The United States adds that the ILC Articles themselves do not purport merely to set out customary international law, but rather "to *formulate*, by way of codification and *progressive development*, the basic rules of international law concerning the responsibility of states for their internationally wrongful acts." (*Ibid.*, para. 25 (referring to Commentaries on the ILC Articles, *supra*, footnote 105, p. 31) (emphasis added by the United States))

<sup>1597</sup>United States' appellee's submission, para. 27.

<sup>1598</sup>United States' appellee's submission, para. 28.

<sup>1599</sup>United States' appellee's submission, para. 30.

685. Article 14(1) of the ILC Articles stipulates that "{t}he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue." In other words, Article 14(1) distinguishes between *acts* and the *effects* of such acts. Referring to the ILC's Commentary on this provision, the European Union observes that "{a} completed act occurs 'at the moment when the act is performed', even though its effects or consequences may continue."<sup>1600</sup> We agree with the European Union that it is important to distinguish between an act and its effects. Article 5 of the *SCM Agreement* is concerned, however, with a "situation" that continues over time, rather than with specific "acts". Thus, although the act of granting a subsidy may have been completed prior to 1 January 1995, the situation of causing adverse effects may continue.

686. In sum, we agree with the Panel that Article 5 addresses a "situation" that consists of causing, through the use of any subsidy, adverse effects to the interests of another Member. It is this "situation", which is subject to the requirements of Article 5 of the *SCM Agreement*, that is to be construed consistently with the non-retroactivity principle reflected in Article 28 of the *Vienna Convention*. The relevant question for purposes of determining the temporal scope of Article 5 is whether the causing of adverse effects has "ceased to exist" or continues as a "situation". We consequently disagree with the European Union that, by virtue of Article 28 of the *Vienna Convention*, no obligation arising out of Article 5 of the *SCM Agreement* is to be imposed on a Member in respect of subsidies granted or brought into existence prior to the entry into force of the *SCM Agreement*. This may mean that a subsidy granted prior to 1 January 1995 falls within the scope of Article 5 of the *SCM Agreement*, but this is only because of its possible nexus to the continuing situation of causing, through the use of this subsidy, adverse effects to which Article 5 applies.<sup>1601</sup> In reaching this conclusion, we are *not* saying that the causing of adverse effects, through the use of pre-1995 subsidies, can necessarily be characterized as a "continuing" situation in this case. Rather, we simply find that a challenge to pre-1995 subsidies is not *precluded* under the terms of the *SCM Agreement*.

#### 4. The Tokyo Round Subsidies Code

687. The European Union also contends that the Panel erred in concluding that the *Tokyo Round Subsidies Code* was not relevant in the present dispute. According to the European Union, the rules on inter-temporal application of international law, the specific transitional rules between the *Tokyo*

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<sup>1600</sup>European Union's appellant's submission, paras. 41 and 42 (quoting Commentary on Article 14 of the ILC Articles, *supra*, footnote 105, pp. 59-60).

<sup>1601</sup>See Sir Humphrey Waldock, Special Rapporteur, Sixth Report on the Law of Treaties, UN Document A/CN.4/186 and Add.1-7, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 63.

*Round Subsidies Code* and the *SCM Agreement*, and the rules on termination of international treaties, together with the absence of any transitional period with respect to pre-1995 subsidies, indicate that the pre-1995 subsidies should be assessed in the light of the *Tokyo Round Subsidies Code*, and not the *SCM Agreement*. The United States therefore had until 1997 to challenge those subsidies. A failure to do so, in the European Union's view, cannot lead to expanding the temporal scope of Article 5 of the *SCM Agreement*.<sup>1602</sup>

688. The United States counters that the European Union's arguments provide "no legitimate basis" to conclude that the former applicability of the *Tokyo Round Subsidies Code* to the act of granting pre-1995 subsidies precludes application of the *SCM Agreement* to the post-1995 adverse effects of those subsidies.<sup>1603</sup> The United States concludes that the Appellate Body should therefore uphold the Panel's finding.<sup>1604</sup>

689. As we see it, the European Union's argument is based on the assumption that subsidies that were granted or brought into existence before 1 January 1995 amount to completed "acts" or "situations" and, thus, are outside the temporal scope of application of the *SCM Agreement*. We have disagreed with that proposition above, and do not consider our approach to lead to a retroactive application of Article 5 of the *SCM Agreement*. As the ILC has explained, "{t}he non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, *even if they first began at an earlier date*."<sup>1605</sup>

## 5. Conclusion

690. For all these reasons, we *modify* the Panel's interpretation of Article 5 of the *SCM Agreement* and consider that the "causing, through the use of any subsidy, of adverse effects" is covered by Article 5 even if it arises out of subsidies granted or brought into existence prior to 1 January 1995, and that a challenge to such subsidies is not *precluded* under the terms of the *SCM Agreement*. Accordingly, we *uphold* the Panel's conclusion, in paragraph 7.65 of the Panel Report, rejecting the European Communities' request to exclude all subsidies granted prior to 1 January 1995 from the temporal scope of the dispute.

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<sup>1602</sup>European Union's appellant's submission, para. 121.

<sup>1603</sup>United States' appellee's submission, para. 77.

<sup>1604</sup>United States' appellee's submission, para. 15.

<sup>1605</sup>*Yearbook of the International Law Commission, 1966, Vol. II, p. 212, para. 3. (emphasis added)*

C. *The Life of a Subsidy and Intervening Events*

691. In this section, we address the European Union's appeal of a number of the Panel's findings concerning the interpretation and application of Articles 1, 4.7, 5, 6, and 7.8 of the *SCM Agreement*. In essence, the European Union submits that these provisions reflect an overarching principle that when the "benefit" arising from prior subsidies diminishes over time, or is removed, there is a change that must be taken into account in the application of the *SCM Agreement* and, in particular, under an adverse effects analysis. Moreover, the European Union contends, these provisions require a demonstration of a "continuing" or "present" benefit during the reference period chosen for a serious prejudice analysis.

692. In this dispute, the European Union refers to a number of transactions involving certain Airbus companies<sup>1606</sup> that it alleges had the effect of removing or, in the European Union's words, "extinguishing" and "extracting" all or part of the subsidies provided to these companies. In addition, the European Union submits that the circumstances surrounding the corporate restructuring and legal reorganization of a number of Airbus companies, as they evolved from a consortium of European companies into the single corporate entity that today manufactures Airbus LCA, namely Airbus SAS, required the United States affirmatively to demonstrate that subsidies provided to the Airbus Industrie consortium<sup>1607</sup> "passed through" to Airbus SAS.

693. Our analysis proceeds as follows. First, in subsection 1, we focus on the Panel's interpretation of Articles 1, 5, and 6 of the *SCM Agreement*, including its finding that these provisions do not require a complaining party to demonstrate the existence of a "present" benefit, or a "benefit that continues" during the reference period. In subsection 2, we apply our interpretation of Articles 1, 5, and 6 to transactions involving certain Airbus companies that the European Union alleges resulted in the "extinction" and "extraction", and consequently the "withdrawal", of subsidies within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*. In this subsection, we also consider whether, in its treatment of the European Communities' arguments on "extinction", "extraction", and "withdrawal", the Panel failed to make an objective assessment of the facts before it, and thereby violated Article 11 of the DSU. Finally, in subsection 3, we turn to the European Union's appeal of the Panel's finding that the United States was not required to demonstrate that subsidies provided to the Airbus Industrie consortium "passed through" to Airbus SAS, the current producer of Airbus LCA.

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<sup>1606</sup>See the definition of Airbus companies at section IV.B of this Report.

<sup>1607</sup>See *supra*, para. 577. See also Panel Report, para. 7.184.

1. Continuity of Benefit – The Panel's Interpretation of Articles 1, 5, and 6 of the *SCM Agreement*

(a) The Panel's findings

694. The Panel began its interpretation of Articles 1, 5, and 6 of the *SCM Agreement* by recalling the European Communities' argument that, as a result of a series of transactions involving Airbus predecessor companies that had allegedly received subsidies, Airbus SAS—the current producer of Airbus LCA—"does not *currently* enjoy subsidies that could cause the adverse effects alleged by the United States."<sup>1608</sup> For the Panel, this argument raised a "threshold question" as to "whether a subsidy which is found to exist must additionally be found to confer a present, or continuing, benefit on the recipient firm producing the subsidized product in order for that subsidy to be potentially capable of causing adverse effects for purposes of Article 5 of the *SCM Agreement*."<sup>1609</sup>

695. The Panel rejected the proposition that a subsidy "can only cause adverse effects pursuant to Article 5 if it can be shown to *presently* confer a 'benefit' on a recipient."<sup>1610</sup> The Panel noted that one element of a complaining Member's adverse effects claim under Article 5 will be to establish the existence of a "subsidy referred to in paragraphs 1 and 2 of Article 1" of the *SCM Agreement*.<sup>1611</sup> The Panel found that the grammatical construction of Article 1.1 and the use of "thereby" in Article 1.1(b) suggest that the financial contribution and the benefit "come into existence at the same time".<sup>1612</sup> The Panel further recalled the Appellate Body's finding in *Canada – Aircraft* that the focus of the inquiry into the existence of a "benefit" pursuant to Article 1.1(b) is whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution. On this basis, the Panel found it difficult to understand the "coherence of a concept such as 'continuing benefit' within the legal framework of Article 1 of the *SCM Agreement*."<sup>1613</sup> Instead, to the extent that such a concept relates to how the *effect* of a subsidy is to be analyzed over time, the Panel considered this to be an aspect of the causation analysis to be undertaken pursuant to Articles 5 and 6 of the *SCM Agreement* and part of the assessment of the "effects" of a subsidy under those provisions.<sup>1614</sup> The Panel further considered that the European Communities' concept of "continuing

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<sup>1608</sup>Panel Report, para. 7.214 (quoting European Communities' second written submission to the Panel, para. 90). (emphasis added by the Panel)

<sup>1609</sup>Panel Report, para. 7.214.

<sup>1610</sup>Panel Report, paras. 7.216 and 7.217. (original emphasis)

<sup>1611</sup>Panel Report, para. 7.217.

<sup>1612</sup>Panel Report, para. 7.218. The Panel substantiated this argument by noting that the ordinary meaning of the adverb "thereby" is "by that means" (*Ibid.*, and footnote 2128 thereto (referring to *The New Shorter Oxford English Dictionary* (Oxford University Press, 1999), Vol. 2, p. 3275; and *Black's Law Dictionary*, 6th edn (West Publishing Co., 1990), p. 1478)).

<sup>1613</sup>Panel Report, para. 7.218.

<sup>1614</sup>Panel Report, para. 7.218.

benefit" appeared to "conflate the concepts of 'benefit', which relates to the terms on which a financial contribution was provided compared with a market benchmark, and 'effects', which relate to the impact of the subsidy in the marketplace at a point in time which is typically subsequent to the time when the subsidy was granted."<sup>1615</sup> The Panel emphasized that it was not suggesting that, under Article 5 of the *SCM Agreement*, "it is unnecessary to link a subsidy provided to a recipient to a particular product or products in order to demonstrate that a Member has caused, through the use of that subsidy, the asserted adverse effects to the interests of the complaining Member."<sup>1616</sup> The Panel explained, however, that "this does not mean that a complaining Member is required to establish that the 'benefit' to the recipient is 'current' or 'continuing' in order to establish that link and demonstrate that use of that subsidy has caused adverse effects to the complaining Member's interests."<sup>1617</sup> The Panel noted that "{t}here may well be circumstances where, given the nature of the subsidy, the passage of time between its receipt and the alleged adverse effects, the recipient's position in the market and exogenous market considerations, it is difficult to demonstrate more than a tenuous causal link between the subsidy and the alleged adverse effects."<sup>1618</sup> For the Panel, however, this was "an inherent part of the causation analysis to be undertaken pursuant to Articles 5 and 6, and {did} not entail an obligation to demonstrate the 'continuity of benefit' of a previously granted subsidy."<sup>1619</sup>

696. For these reasons, the Panel concluded that:

... provided the United States, as the complaining Member, establishes (i) the provision of a financial contribution in accordance with Article 1.1(a)(1); (ii) which thereby confers a benefit, within the meaning of Article 1.1(b) and (iii) specificity, in accordance with Article 2, a subsidy that is actionable under Part III of the *SCM Agreement* will be "deemed to exist", and the United States will successfully make out a claim under Article 5; provided it is able to demonstrate that the European Communities and certain member States have caused, through the use of that subsidy, adverse effects to the interests of the United States.<sup>1620</sup>

697. On the basis of this reasoning, the Panel dismissed as "unfounded" the European Communities' argument that particular subsidies had been "extinguished" through a series of arm's-length, fair market value transactions, with the result that Airbus SAS does not currently enjoy subsidies that could cause the adverse effects alleged by the United States.<sup>1621</sup> On the same

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<sup>1615</sup>Panel Report, para. 7.219. The Panel referred, in support, to Panel Report, *US – Upland Cotton*, para. 7.1179.

<sup>1616</sup>Panel Report, para. 7.221.

<sup>1617</sup>Panel Report, para. 7.221.

<sup>1618</sup>Panel Report, para. 7.221.

<sup>1619</sup>Panel Report, para. 7.221.

<sup>1620</sup>Panel Report, para. 7.222.

<sup>1621</sup>Panel Report, para. 7.223.

basis, the Panel also rejected the European Communities' argument that the removal of cash—referred to as "cash extractions"—from two Airbus companies had the effect of extinguishing a portion of benefits to them.<sup>1622</sup> The Panel explained that these arguments rested on the European Communities' "flawed interpretation" of Article 5 of the *SCM Agreement*, including its assumption that, in order for a subsidy to be potentially capable of causing adverse effects within the meaning of that provision, a complainant must demonstrate that a subsidy that is found to exist additionally confers a "present" or "continuing" benefit on a recipient.<sup>1623</sup>

- (b) Do Articles 1, 5, and 6 of the *SCM Agreement* require the demonstration of a "continuing benefit"?

698. The European Union requests the Appellate Body to find that the Panel erred in the interpretation and application of Articles 1, 5, and 6 of the *SCM Agreement*.<sup>1624</sup> According to the European Union, the Panel ignored the "legal principle" reflected in these provisions that, when a benefit to a recipient arising from prior subsidies diminishes over time or is removed or is taken away, there is a "significant change" that must be taken into account in the application of the *SCM Agreement* and, in particular, in the examination of the causal link between the granting of the subsidy and the alleged adverse effects.<sup>1625</sup> According to the European Union, the determination that a subsidy exists or has been granted does not preclude the possibility of using amortization rules to allocate the amount of benefit over time to determine whether such subsidy still confers, or no longer confers, a benefit. In the European Union's view, this is particularly relevant in the causation analysis, since a subsidy that can be considered fully amortized before the reference period cannot be found to cause present adverse effects.<sup>1626</sup>

699. The European Union argues that the text of Articles 1, 5, and 6 of the *SCM Agreement* support the notion of a "continuing benefit". First, Article 1 defines the conditions under which a subsidy "shall be deemed to exist". The use of the word "exist", in the present tense, demonstrates that the *SCM Agreement* is not concerned with subsidies that no longer exist and that are not capable of causing adverse effects.<sup>1627</sup> Further, once a financial contribution is granted, the only element under Article 1 that can "cease to exist" or be discontinued over time if there is a significant change, either through the passage of time or any other "intervening event" or action, is the "benefit".<sup>1628</sup> Second,

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<sup>1622</sup>See Panel Report, para. 7.266.

<sup>1623</sup>See Panel Report, paras. 7.222, 7.223, and 7.266.

<sup>1624</sup>European Union's appellant's submission, para. 198.

<sup>1625</sup>European Union's appellant's submission, para. 221; see also para. 199.

<sup>1626</sup>European Union's appellant's submission, para. 223.

<sup>1627</sup>European Union's appellant's submission, para. 204.

<sup>1628</sup>European Union's appellant's submission, para. 205.

the European Union submits that the wording of Articles 5 and 6, and particularly the use of the present tense in these provisions, supports the view that subsidies that have been withdrawn, have ceased to exist, or whose effects have diminished with the passage of time, cannot currently "cause" present adverse effects.<sup>1629</sup>

700. The United States requests the Appellate Body to uphold the Panel's finding that, on a proper interpretation of Articles 1, 5, and 6 of the *SCM Agreement*, there is no requirement to demonstrate a "continuing benefit" for purposes of an adverse effects analysis. The United States contends that the phrase "shall be deemed to exist" in Article 1 of the *SCM Agreement* indicates that anyone applying the definition must consider a subsidy to exist, at the time of analysis, if it meets the listed criteria in Article 1—namely that "there is" a financial contribution and a benefit "is" thereby conferred.<sup>1630</sup> The United States supports the Panel's finding that the use of the present tense with respect to the "financial contribution" and "benefit", and the use of the term "thereby" to indicate the relationship between them, indicate that they exist at the same time.<sup>1631</sup> Finally, the United States does not agree that the text of Articles 5 and 6 indicates anything about the time at which the causing of adverse effects must occur; nor do they support a requirement to demonstrate a "continuing benefit".<sup>1632</sup> While the United States recognizes that a complaining party may have more trouble establishing a causal link between subsidies and alleged current adverse effects where an extended period of time has passed or market conditions have changed, the United States considers that this "is a question for the adverse effects analysis, and not a matter to resolve through a presumption as to what a subsidy with a diminished benefit can do."<sup>1633</sup>

701. As the participants disagree on whether and, if so, how an assessment of the benefit conferred under Article 1.1(b) of the *SCM Agreement* relates to the adverse effects analysis that must be conducted by a panel pursuant to Articles 5 and 6, we begin by setting out our interpretation of these provisions. Thereafter, we address the European Union's specific argument that Articles 5 and 6 impose an obligation on a complaining party to demonstrate the existence of a "present" or "continuing" benefit at the time when adverse effects are alleged to occur.

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<sup>1629</sup>European Union's appellant's submission, paras. 207 and 208.

<sup>1630</sup>United States' appellee's submission, para. 89.

<sup>1631</sup>United States' appellee's submission, para. 89 (referring to Panel Report, para. 7.218).

<sup>1632</sup>United States' appellee's submission, paras. 99 and 100.

<sup>1633</sup>United States' appellee's submission, para. 101.



702. Article 1.1 of the *SCM Agreement* provides that a subsidy "shall be deemed to exist" where two elements are demonstrated: (i) there is a "financial contribution by a government or any public body within the territory of a Member"; and (ii) "a benefit is thereby conferred".<sup>1634</sup> The Appellate Body has clarified the dual elements inherent in the definition of a "subsidy" in Article 1.1 in *Canada – Aircraft*:

The first element of this definition is concerned with whether the government made a "financial contribution", as that term is defined in Article 1.1(a). The focus of the first element is on the action of the government in making the "financial contribution". That being so, it seems to us logical that the second element in Article 1.1 is concerned with the "benefit... conferred" on the recipient by that governmental action. Thus, subparagraphs (a) and (b) of Article 1.1 define a "subsidy" by reference, first, to the action of the granting authority and, second, to what was conferred on the recipient.<sup>1635</sup>

The definition of a subsidy is therefore met when a "financial contribution" and the "benefit ... conferred" by the financial contribution co-exist.<sup>1636</sup>

703. Article 1.1(a)(1)(i)-(iv) lists the types of government action that qualify as "financial contribution{s}". The *SCM Agreement* does not define what constitutes a "benefit" for purposes of Article 1.1(b), and the meaning of that term has instead been elucidated through panel and Appellate Body jurisprudence. In its interpretation of Article 1.1(b), the Appellate Body has derived important contextual support from Article 14 of the *SCM Agreement*, even though the opening clause of Article 14 limits the scope of application of that provision to Part V of the *SCM Agreement*, which is concerned with countervailing measures.<sup>1637</sup>

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<sup>1634</sup>We note that, pursuant to Articles 1.1(a)(2) and 1.1(b), a subsidy shall also be deemed to exist if "there is any form of income or price support in the sense of Article XVI of the GATT 1994" and "a benefit is thereby conferred".

<sup>1635</sup>Appellate Body Report, *Canada – Aircraft*, para. 156.

<sup>1636</sup>Both the European Union and the United States seem to interpret Article 1.1 of the *SCM Agreement* to mean that the financial contribution and benefit come into existence simultaneously. (See European Union's appellant's submission, para. 223; and United States' appellee's submission, paras. 89 and 90)

<sup>1637</sup>In *Canada – Aircraft*, the Appellate Body noted that:

{a}lthough the opening words of Article 14 state that the guidelines it establishes apply "{f}or the purposes of Part V" of the *SCM Agreement*, which relates to "countervailing measures", our view is that Article 14, nonetheless, constitutes relevant context for the interpretation of 'benefit' in Article 1.1(b).

(Appellate Body Report, *Canada – Aircraft*, para. 155)

704. In *Canada – Aircraft*, the Appellate Body clarified what must be demonstrated in order to establish that a "benefit is ... conferred" within the meaning of Article 1.1(b). First, a benefit must be shown to have been conferred on a "recipient".<sup>1638</sup> In support, the Appellate Body referred to Article 14, which requires the calculation of a subsidy in terms of the "benefit to the recipient".<sup>1639</sup> As the Appellate Body explained:

A "benefit" does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a "benefit" can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something.<sup>1640</sup>

705. Second, whether a "benefit" has been "conferred" requires a panel to determine whether the recipient has been made "better off" than it would have been absent the financial contribution. In *Canada – Aircraft*, the Appellate Body stated that the "marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."<sup>1641</sup>

706. The context provided by Article 14 of the *SCM Agreement* confirms that the marketplace is the appropriate basis for comparison. Article 14(a)-(d) sets out various guidelines and benchmarks for determining whether a "benefit" arises from a government's provision of equity capital, loans, loan guarantees, goods or services, and its purchase of goods. Under a "benefit" analysis, a comparison is made between the terms and conditions of the financial contribution when it is granted with the terms and conditions that would have been offered on the market *at that time*. For instance, Article 14(a), which deals with the provision of equity capital, focuses on whether the investment decision comports with "the usual investment practice ... of private investors". Article 14(b) calls for a comparison of the "amount that the firm receiving the loan pays on the government loan" with "the amount the firm would pay on a comparable commercial loan which the firm could actually obtain in the market". Article 14(c) requires a comparison between "the amount that the firm receiving the guarantee pays on a loan guaranteed by the government" with "the amount the firm would pay on a comparable commercial loan absent the government guarantee". These provisions support the view that a panel's

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<sup>1638</sup> See Appellate Body Report, *Canada – Aircraft*, paras. 155 and 156. The Appellate Body has stated that the *SCM Agreement* does not provide a specific definition of a "recipient" of a benefit, but uses several terms throughout the *SCM Agreement* to refer to a "recipient". (See Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 112)

<sup>1639</sup> Appellate Body Report, *Canada – Aircraft*, para. 155. (original emphasis)

<sup>1640</sup> Appellate Body Report, *Canada – Aircraft*, para. 154.

<sup>1641</sup> Appellate Body Report, *Canada – Aircraft*, para. 157.

assessment of benefit should focus on the relevant market benchmark at the time the financial contribution is granted to the recipient. That benchmark entails a consideration of what a market participant would have been able to secure on the market at that time. The market benchmark is predicated upon a projection as to the anticipated flow of returns that are expected to accrue as a result of the financial contribution. Consequently, the determination of benefit under Article 1.1(b) of the *SCM Agreement* is an *ex ante* analysis that does not depend on how the particular financial contribution actually performed after it was granted.

707. The ordinary meaning of Article 1.1, read in the light of Article 14 of the *SCM Agreement*, confirms, therefore, that a benefit analysis under Article 1.1(b) is forward-looking and focuses on future projections.<sup>1642</sup> The nature, amount, and projected use of the challenged subsidy may be relevant factors to consider in an assessment of the period over which the benefit from a financial contribution *might be expected* to flow. A panel may consider, for example, as part of its *ex ante* analysis of benefit, whether the subsidy is allocated to purchase inputs or fixed assets; the useful life of these inputs or assets; whether the subsidy is large or small; and the period of time over which the subsidy is expected to be used for future production.

708. As we have explained above, "a subsidy shall be deemed to exist" for purposes of Article 1.1 of the *SCM Agreement* if there is a "financial contribution by a government" and "a benefit is thereby conferred." The word "thereby" indicates that it is the financial contribution that confers the benefit. A subsidy therefore comes into existence when a government provides a financial contribution that confers a benefit. However, the fact that a subsidy is "deemed to exist" under Article 1.1 once there is a financial contribution that confers a benefit does not mean that a subsidy does not continue to exist after the act of granting the financial contribution. This is confirmed, for example, by the text of Articles 4.7 and 7.8 of the *SCM Agreement*. The reference in those provisions to "withdrawing" the subsidy would be rendered meaningless if a subsidy did not continue to exist after its conferral on a recipient.<sup>1643</sup>

709. We understand the participants to agree with the basic proposition that a subsidy has a life, which may come to an end, either through the removal of the financial contribution and/or the expiration of the benefit. In the particular context of Part III of the *SCM Agreement*, a panel is called upon to determine whether the complainant has demonstrated that the responding party is causing,

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<sup>1642</sup>We discuss this issue in more detail in section VI.B of this Report.

<sup>1643</sup>We also note that, in a Part V context, the Appellate Body has found that an investigating authority may presume, for purposes of an administrative review under Article 21.2 of the *SCM Agreement*, "that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution'", although this presumption is not irrebuttable. (Appellate Body Report, *US – Lead and Bismuth II*, para. 62; see also Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 84)

through the use of any subsidy, adverse effects. The fact that Article 5 of the *SCM Agreement* speaks of "any subsidy referred to in paragraphs 1 and 2 of Article 1", which in turn sets out the conditions under which a subsidy is "deemed to exist", does not mean that the subsidy remains unchanged over time. At the time of the grant of a subsidy, the subsidy will necessarily be projected to have a finite life and to be utilized over that finite period. In order properly to assess a complaint under Article 5 that a subsidy causes adverse effects, a panel must take into account that a subsidy provided accrues and diminishes over time, and will have a finite life. The adverse effects analysis under Article 5 is distinct from the "benefit" analysis under Article 1.1(b) of the *SCM Agreement* and there is consequently no need to re-evaluate under Article 5 the amount of the benefit conferred pursuant to Article 1.1(b). Rather, an adverse effects analysis under Article 5 must consider the trajectory of the subsidy as it was projected to materialize over a certain period at the time of the grant. Separately, where it is so argued, a panel must assess whether there are "intervening events" that occurred after the grant of the subsidy that may affect the projected value of the subsidy as determined under the *ex ante* analysis. Such events may be relevant to an adverse effects analysis because they may affect the link that a complaining party is seeking to establish between the subsidy and its alleged effects.

710. In sum, a panel's analysis of the adverse effects must take into account how the subsidy has materialized over time. As part of this analysis, a panel must assess how the subsidy is affected, both by the depreciation of the subsidy that was projected *ex ante* and the "intervening events" referred to by a party that may have occurred following its grant.<sup>1644</sup>

711. With these considerations in mind, we turn now to the European Union's contention that a complaining party must demonstrate the existence of a "continuing benefit" during the reference period in order to show that a subsidy is capable of causing present adverse effects. The European Union supports its argument by referring to the text of Articles 5 and 6.3 of the *SCM Agreement*. In its view, the use of the present tense in Article 5 (no Member should "cause" adverse effects) illustrates that subsidies that have been withdrawn or have ceased to exist cannot "currently cause" adverse effects. Moreover, the use of the present tense in subparagraphs (a)-(d) of Article 6.3, each of which refer to what the "effect of the subsidy is"<sup>1645</sup>, also suggests that subsidies that have been withdrawn or have ceased to exist cannot trigger the types of effects enumerated in

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<sup>1644</sup>For this reason, we disagree with the Panel, at paragraphs 7.224, 7.225, and 7.266 of the Panel Report, insofar as it suggests that a consideration of "intervening events", such as the "extinction" and "extraction" of subsidies, are not relevant under an adverse effects analysis. See paras. 725 and 745 of this Report.

<sup>1645</sup>European Union's appellant's submission, para. 208. (emphasis added)

Article 6.3.<sup>1646</sup> In the European Union's view, "{i}t is not conceivable how a Member through granting or maintaining a subsidy that is later on withdrawn or otherwise discontinued or diminished to a negligible amount can cause present adverse effects."<sup>1647</sup> Moreover, "{i}ndirect effects resulting from subsidies that have ceased to exist cannot be sufficient. If such a historic subsidy 'caused' something to happen many years ago, the continuing existence of what was caused and the fact that that effect may have continuing effects today cannot be considered to satisfy the test of Article 5 of the *SCM Agreement*."<sup>1648</sup> In the European Union's view, "{s}uch an interpretation would overstretch the concept of adverse effects caused by a subsidy and, thereby, make it meaningless."<sup>1649</sup>

712. The text of Articles 5 and 6 of the *SCM Agreement*, and in particular the use of the present tense in these provisions, does not support the proposition that there must be "present benefit" during the reference period. In its argumentation, the European Union conflates present adverse *effects*, which must be demonstrated under Article 6.3, with present *subsidization*, which need not. It is not disputed that Article 6.3 is concerned with present adverse effects.<sup>1650</sup> However, the requirement that the effects of subsidies be felt in the reference period, does not mean that the subsidies, and in particular the benefit conferred, must also be present during that period. In focusing on the causing of adverse effects through the use of any subsidy, Article 5 envisages that the use of the subsidy and the adverse effects may not be contemporaneous. This is supported by the Appellate Body's finding in *US – Upland Cotton*, that the provision of subsidies and their effects need not coincide temporally and that there may be a time lag.<sup>1651</sup> There, the Appellate Body referred to Article 6.2 of the *SCM Agreement*, which precludes a finding of serious prejudice if the subsidizing Member demonstrates that "the subsidy in question has not resulted in any of the effects enumerated in

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<sup>1646</sup>European Union's appellant's submission, para. 208. At the oral hearing, the European Union argued that the reference in Article 6.3(c) and (d) to a "subsidized" product reinforces its view that the product at issue must be "currently subsidized" at the time that adverse effects are alleged to be present.

<sup>1647</sup>European Union's appellant's submission, para. 207.

<sup>1648</sup>European Union's appellant's submission, para. 207.

<sup>1649</sup>European Union's appellant's submission, para. 207.

<sup>1650</sup>Elsewhere in its Report, the Panel explained why adverse effects had to be shown to be "present". The Panel noted, for instance, that subparagraphs (a), (b), and (c) of Article 6.3 are plainly drafted with reference to the present, as each begins "the effect of the subsidy **is** ...". (Panel Report, footnote 5140 to para. 7.1694 (original boldface))

<sup>1651</sup>One of the issues in *US – Upland Cotton* was whether the subsidy benefit had to be allocated to the year when it was paid or whether that could be done over a longer period. Specifically, the Appellate Body explored whether in the context of a significant price suppression analysis under Article 6.3(c) of the *SCM Agreement* the effect of a subsidy could be found to continue beyond the year in which it is paid. In distinguishing between the grant of a subsidy and its effects, the Appellate Body explained that whether the effect of a subsidy begins and expires in the year in which it is paid, or in subsequent years, are fact-specific questions, and would depend on the nature of the subsidy and the product at issue. The Appellate Body found that nothing in that provision *a priori* excluded that the effect of the "recurring" subsidy at issue in that case could continue after the year in which it was paid. (Appellate Body Report, *US – Upland Cotton*, paras. 476, 482, and 484)

{Article 6.3} ".<sup>1652</sup> Moreover, Article 7.8 of the *SCM Agreement* refers to a subsidy that "has resulted" in the adverse effects referred to in Article 5. By its terms, Article 5 of the *SCM Agreement* imposes an obligation on Members not to cause adverse effects to the interests of other Members through the use of any subsidy as defined in Article 1. We disagree with the proposition that this obligation does not arise in respect of subsidies that have come to an end by the time of the reference period. In fact, we do not exclude that, under certain circumstances, a past subsidy that no longer exists may be found to cause or have caused adverse effects that continue to be present during the reference period.

713. For these reasons, we agree with the Panel that the United States was not required, under Article 5 of the *SCM Agreement*, to establish "that all or part of the 'benefit' found to have been conferred by the provision of a financial contribution continues to exist, or presently exists"<sup>1653</sup> during the reference period. We wish to emphasize, however, that effects of a subsidy will ordinarily dissipate over time and will end at some point after the subsidy has expired. Indeed, as with a subsidy that has a finite life and materializes over time, so too do the effects of a subsidy accrue and diminish over time.

714. The Panel was of the view that the concept of "continuing benefit" may be relevant for purposes of assessing how the *effect* of a subsidy is to be analyzed over time, and considered this to be an aspect of the causation analysis to be undertaken pursuant to Articles 5 and 6 of the *SCM Agreement* and part of an assessment of the "effects" of a subsidy under these provisions.<sup>1654</sup> It is relevant, in our view, to examine the trajectory of the life of a subsidy in order to determine whether a Member is causing, through the use of any subsidy, adverse effects to the interests of another Member within the meaning of Article 5 of the *SCM Agreement*. Moreover, a panel should consider, where relevant for the adverse effects analysis, that the effects of a subsidy will ordinarily dissipate over time and will come to an end.

715. In sum, therefore, we *modify* the Panel's interpretation, but *uphold* the Panel's ultimate finding, in paragraphs 7.222 and 7.287 of the Panel Report, that Articles 5 and 6 of the *SCM Agreement* do not require that a complainant demonstrate that a benefit "continues" or is "present" during the reference period for purposes of an adverse effects analysis.

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<sup>1652</sup>Appellate Body Report, *US – Upland Cotton*, para. 477. According to the Appellate Body, the word "resulted" in this sentence highlights the temporal relationship between the subsidy and the effect, in that one might expect a time lag between the provision of the subsidy and the resulting effect. In addition, the Appellate Body has considered that the use of the present perfect tense in this provision implies that some time may have passed between the granting of the subsidy and the demonstration of the absence of its effects. (*Ibid.*)

<sup>1653</sup>Panel Report, para. 7.222.

<sup>1654</sup>Panel Report, para. 7.218.

## 2. Analysis of "Extinction", "Extraction", and "Pass-Through" of Subsidies

716. We have found in the previous section that a subsidy materializes over time and has a finite life and that this may be relevant to a panel's adverse effects analysis under Part III of the *SCM Agreement*. As we have also mentioned, quite apart from the passage of time, there may be events occurring after the grant of the subsidy that diminish it or bring it to an end. In this dispute, the European Union refers to a number of "intervening events" that it submits reduce, or bring to an end, all or part of the subsidies provided to Airbus companies and therefore should have been taken into account by the Panel as part of its adverse effects analysis.<sup>1655</sup> The European Union identifies the following "intervening events":

- (a) shares in an enterprise that has previously received subsidies are subsequently bought by new private owners in sales transactions conducted at arm's length and for fair market value, resulting in the "extinction" of subsidies;
- (b) a parent company removes cash or cash equivalents from a wholly owned subsidiary that has previously received subsidies, resulting in the "extraction" of subsidies; and
- (c) a company that has previously received subsidies is restructured and legally reorganized to form a new company, resulting in a situation in which the subsidies do not "pass through" to the new company.<sup>1656</sup>

717. In the subsections that follow, we apply our interpretation of Articles 1, 5, and 6, first, to the European Union's arguments on "extinction" and "extraction" of subsidies, and then to its argument on the "pass-through" of subsidies. As these arguments are premised on factual events concerning Airbus companies, we refer to section IV.B of this Report, where we have traced the evolution of Airbus companies and, in particular, the development of the European aircraft industry from its origins as a partnership among four individual European companies to the current single corporate

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<sup>1655</sup>We recall that the Panel considered the European Communities' arguments on "extinction" and "extraction" on an *alternative* basis, that is, in the event that the Appellate Body reversed its finding that Article 5 does not require a showing, by the complainant, of a "continuing benefit" during the reference period. Although, for the reasons provided above, we have upheld the Panel's finding that Articles 5 and 6 do not require such a showing, in the light of our finding in paragraphs 709 and 710 that "intervening events" are relevant under an adverse effects analysis, we proceed to consider the European Union's arguments on "extinction" and "extraction" of subsidies.

<sup>1656</sup>Unlike the two previous situations concerning the "extinction" and "extraction" of subsidies that the European Union alleges resulted in the diminution of past subsidies, the European Union argues that this situation requires that a complaining party demonstrate the "pass-through" of the subsidy to the current producer of the alleged subsidized product.

entity, Airbus SAS. Where necessary, we provide further details below with respect to the specific Airbus companies and transactions implicated in the European Union's arguments.

(a) Extinction of subsidies

718. The European Union argues that certain transactions involving sales of shares in Aérospatiale-Matra, EADS, and Airbus SAS<sup>1657</sup> were conducted at "arm's length" and for "fair market value" and therefore "extinguished", in full or in part, alleged subsidies remaining in those companies. These transactions consist of the following: (i) the French Government's sale of shares in Aérospatiale-Matra in 2000; (ii) the combination of the LCA-related assets and activities of the Airbus partners to form EADS and the public offering of EADS shares in 2000; (iii) sales of EADS shares by various shareholders between 2001 and 2006, including sales by the French Government and Lagardère in 2001 (0.93% and 2.07%, respectively), a sale by DaimlerChrysler in 2004 (2.75%), and sales by DaimlerChrysler and Lagardère in 2006 (totalling 15%); and (iv) the exercise of a "put option" and sale by BAE Systems of its 20% interest in Airbus SAS to EADS in 2006.<sup>1658</sup>

719. We recall that, having found that Article 5 of the *SCM Agreement* did not require the United States to demonstrate the existence of a "continuing benefit", the Panel proceeded to consider, *in the alternative*, whether, as the European Communities had argued, "in the context of a claim under Part III of the *SCM Agreement*, the existence of a benefit conferred by a financial contribution provided to a recipient is presumptively extinguished by the subsequent sale of the recipient to an arm's-length purchaser for fair market value."<sup>1659</sup> In support of its position, the European Communities referred to the reasonings and findings of the panels and the Appellate Body in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* (the "privatization cases"), arguing that they established the existence of a "principle" that "the sale of a producer at arm's-length and for fair market value presumptively extinguishes the 'benefit' conferred by any financial contributions previously provided to that producer."<sup>1660</sup> Noting, *inter alia*, that the Appellate Body indicated in *US – Countervailing Measures on Certain EC Products* that the findings of the panel in that dispute should be confined to the "very precise set of facts and circumstances" of

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<sup>1657</sup>For a fuller description of these Airbus companies, see *supra*, paras. 578-582.

<sup>1658</sup>See Panel Report, para. 7.204 and accompanying table compiled on the basis of information provided by the European Communities in its response to Panel Question 111, para. 316.

<sup>1659</sup>Panel Report, para. 7.224.

<sup>1660</sup>Panel Report, para. 7.239.



that case, the Panel did not consider that it would be appropriate to recognize a "principle" of extinction as argued by the European Communities.<sup>1661</sup> The Panel concluded that:

... to the extent that prior reports of the Appellate Body support the conclusion that, in a dispute under Part III of the SCM Agreement, changes in the ownership of a subsidized producer give rise to a rebuttable presumption that the benefit conferred by prior subsidies is extinguished ... this would only be where (i) benefits resulting from a prior nonrecurring financial contribution, (ii) are bestowed on a state-owned enterprise, and (iii) following a privatization at arm's length and for fair market value, (iv) the government transfers all or substantially all the property and retains no controlling interest in the privatized producer.<sup>1662</sup>

For the Panel, however, the European Communities had not demonstrated that the sales transactions at issue in this case "fulfil[ed] all of the above criteria".<sup>1663</sup>

720. The European Union challenges the Panel's findings on appeal, arguing, as it did before the Panel, that the Appellate Body in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* established a "principle" that the sale of a subsidized company at arm's length and for fair market value removes or "extinguishes" the benefit of prior subsidies to the buyer. Such a "principle", the European Union submits, is equally applicable to full and partial privatizations, as well as to sales between private entities.<sup>1664</sup> The United States counters that the Panel properly relied on the Appellate Body's reasoning in *US – Countervailing Measures on Certain EC Products* to reject the European Communities' attempt to extend the ruling in that case to partial privatizations and sales between private entities. For the United States, therefore, any "principle" of extinction is applicable exclusively to situations involving full privatizations accompanied by full relinquishment of control by the government.<sup>1665</sup>

721. It is clear that the participants draw divergent inferences from the Appellate Body's conclusions in its privatization case law and disagree as to the circumstances that give rise to a presumption of the "extinction" of benefits. Therefore, we find it useful to begin by restating the core findings of the Appellate Body in the privatization cases.

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<sup>1661</sup>Panel Report, para. 7.239 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 117).

<sup>1662</sup>Panel Report, para. 7.248.

<sup>1663</sup>Panel Report, para. 7.249.

<sup>1664</sup>European Union's appellant's submission, para. 226.

<sup>1665</sup>United States' appellee's submission, para. 105.

722. The disputes in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* arose in the context of Part V of the *SCM Agreement*.<sup>1666</sup> In particular, they involved an examination of USDOC methodologies for levying countervailing duties on imports of firms whose ownership had changed through privatization, and the application of these methodologies.<sup>1667</sup> In both privatization cases, former state-owned companies were privatized through transactions at arm's length and for fair market value resulting in the complete transfer of ownership and control of the state-owned firms from the government to new private owners.<sup>1668</sup>

723. The Appellate Body found in both cases that an investigating authority could treat benefits provided to the state-owned firm as having been "extinguished", and therefore not passed to the new private owners, following the privatization of the firm through transactions conducted at arm's length and for fair market value.<sup>1669</sup> In *US – Countervailing Measures on Certain EC Products*, the Appellate Body stated that "{p}rivatizations at arm's length and for fair market value *may* result in extinguishing the benefit" and that "there is a rebuttable presumption that a benefit ceases to exist after such a privatization."<sup>1670</sup> Significantly, however, the Appellate Body emphasized that there is "no inflexible rule *requiring* that investigating authorities, in future cases, *automatically* determine

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<sup>1666</sup>We recall that, in a Part V context, countervailing duties are "specific to individual companies" and require a more precise quantification of subsidization, as opposed to a Part III context, where the remedy "targets the effects of the subsidy more generally". (Appellate Body Report, *US – Upland Cotton*, para. 464)

<sup>1667</sup>In *US – Lead and Bismuth II*, the European Communities brought a complaint against the United States for levying countervailing duties on imports of certain leaded bars from privatized UK companies following administrative reviews in 1995, 1996, and 1997. Between 1977 and 1986, the companies were state-owned and received subsidies that were used to develop capacity for producing leaded bars. In *US – Countervailing Measures on Certain EC Products*, the European Communities challenged 12 countervailing duty determinations by the USDOC on imports of certain steel products originating in the European Communities. The European Communities challenged the application by the USDOC of the "gamma" method and the "same person" method to determine whether non-recurring subsidies granted to state-owned recipients prior to their full privatization at arm's length and for fair market value where government sold all, or substantially all, their ownership interests and no longer had any controlling interests in the privatized producers, remained countervailable.

<sup>1668</sup>Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 2; Appellate Body Report, *US – Lead and Bismuth II*, para. 2.

<sup>1669</sup>In *US – Lead and Bismuth II*, the Appellate Body found that:

{t}he question whether a "financial contribution" confers a "benefit" depends ... on whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market. In the present case, the Panel made factual findings that {the new producers of imported leaded bars} UES and BSplc/BSES paid fair market value for all the productive assets, goodwill, etc., they acquired from {the state-owned} BSC and subsequently used in the production of leaded bars imported into the United States in 1994, 1995 and 1996. We, therefore, see no error in the Panel's conclusion that, in the specific circumstances of this case, the "financial contributions" bestowed on BSC between 1977 and 1986 could not be deemed to confer a "benefit" on UES and BSplc/BSES.

(Appellate Body Report, *US – Lead and Bismuth II*, para. 68)

<sup>1670</sup>Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 127. (original emphasis)

that a 'benefit' derived from pre-privatization financial contributions expires following privatization at arm's length and for fair-market value."<sup>1671</sup> Rather, as the Appellate Body stated, "{i}t depends on the facts of each case."<sup>1672</sup>

724. In the present case, we are not in a Part V context where the question arises as to the rate of subsidization present in the product that is being countervailed. Nor do any of the sales transactions in this dispute amount to a full privatization of a previously state-owned company. Instead, the issue is whether, as alleged by the European Union, sales of shares between private entities, and sales conducted in the context of partial privatizations, eliminate all or part of past subsidies, and whether this, in turn, results in a change that should be taken into account in assessing whether past subsidies are causing present adverse effects under Article 5 of the *SCM Agreement*.

725. Neither of the participants question that the past rulings in the privatization cases stand for the proposition that a presumption of extinction arises where there is a full privatization. We recall that, in both cases, the full privatizations involved sales at fair market value and at arm's length, and that there was a complete transfer of ownership and control. In a partial privatization as well as in private-to-private sales, not all of the elements of a full privatization are present. Therefore, consistent with the Appellate Body's guidance, a fact-intensive inquiry into the circumstances surrounding the changes in ownership would be required in order to determine the extent to which there are sales at fair market value and at arm's length, accompanied by transfers of ownership and control, and whether a prior subsidy could be deemed to have come to an end. Moreover, a panel assessing claims under Part III of the *SCM Agreement* would have to examine whether the transactions are of a nature, kind, and amount so as to affect an adverse effects analysis and attenuate the link sought to be established by the complaining party under Articles 5 and 6 of the *SCM Agreement* between the alleged subsidies and their alleged effects.

726. Although the Members of this Division discussed at length the issue of extinction of subsidies in the context of partial privatizations and private-to-private sales, no common view emerged. Without prejudice to the further considerations and findings set out below, each Member of the Division wishes to set out separate views on this issue:

- (a) Noting that the Appellate Body has previously ruled in privatization cases that a full privatization, conducted at arm's length and for fair market value involving a complete or substantial transfer of ownership and control, "extinguishes" prior

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<sup>1671</sup>Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 127. (original emphasis)

<sup>1672</sup>Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 127.

subsidies, one Member is of the view that this rule does not apply to partial privatizations or to private-to-private sales.

- (b) One Member noted that, as discussed above, the Appellate Body ruled in *US – Countervailing Measures on Certain EC Products* that, in the context of Part V of the *SCM Agreement*, full privatization at arm's length and for fair market value *may* result in extinguishing the benefit received from the non-recurring financial contribution bestowed upon a state-owned firm.<sup>1673</sup> In response to an argument made by the United States in that case, the Appellate Body observed that privatization at arm's length and for fair market value does not remove the equipment that a state-owned enterprise may have acquired with the financial contribution and that, consequently, the same firm may continue to make the same products with the same equipment. The Appellate Body agreed with the United States that the *utility value* of equipment acquired as a result of the financial contribution is not extinguished as a result of a privatization at arm's length and for fair market value. However, as the Appellate Body explained, the utility value of such equipment to the newly privatized firm is legally irrelevant for purposes of determining the continued existence of a "benefit" under the *SCM Agreement*.<sup>1674</sup> The Appellate Body recalled that it had found in *Canada – Aircraft* that the value of the benefit under the *SCM Agreement* is to be assessed using the marketplace as the basis for comparison. It follows, therefore, that once a fair market price is paid for the equipment, or more broadly the assets of a company, their market value is redeemed, regardless of the utility value a firm may derive therefrom. In response to the argument by the United States that nothing about the company changes as a result of the privatization, the Appellate Body agreed with the panel in *US – Countervailing Measures on Certain EC Products* that the new private owners are "profit-maximizers" who will seek to "recoup{} through the privatized company ... a market return on the full amount of their investment."<sup>1675</sup> Therefore, the new private owners may no longer benefit from any subsidies received by the company before its privatization. This Member considers the *rationale* underlying the Appellate Body's case law on full privatization in the context of Part V of the *SCM Agreement* equally to apply in situations of partial privatization and private-to-private transactions and in the context of Part III of the *SCM Agreement*.

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<sup>1673</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 127.

<sup>1674</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 102.

<sup>1675</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 103 (referring to Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.60).

However, this Member also notes that, as the Appellate Body emphasized in *US – Countervailing Measures on Certain EC Products*, there is "no inflexible rule" that a "benefit" derived from pre-privatization financial contributions expires following privatization at arm's length and for fair-market value.<sup>1676</sup> Rather, as the Appellate Body stated, "{i}t depends on the facts of each case."<sup>1677</sup> An important question in this context is to what extent the partial privatization or private-to-private transactions resulted in a transfer of control to new owners who paid fair market value for shares in the company.

- (c) One Member of the Division, though affirming the general test that an extinction of benefit is to be determined upon a consideration of all relevant facts, entertains no small measure of doubt that an acquisition of shares, concluded at arm's length and for fair market value, constitutes relevant circumstances warranting the conclusion that an extinction of benefit has taken place. A subsidy granted to a recipient company contributes to the net asset value of that company. The value of that asset permits the recipient to enjoy an enhanced stream of future earnings over the life of the asset. The asset is the property of the recipient. The recipient's shareholders enjoy the right to the dividends that may be declared by the recipient and to any capital gains that arise from the enhanced earnings attributable to the recipient. When shares change hands on an arm's-length basis and for fair market value, the buyer pays a price that, in the estimation of the buyer, places a proper value on the future earnings of the recipient. Those earnings derive from all the assets of the recipient, including the benefit of any subsidy paid to the recipient. One shareholder may not accurately value or properly manage the assets of the recipient. Precisely for this reason, sales of shares take place: the buyer believes that the assets, properly managed, will be worth more over time than the price paid, and the seller believes the opposite. Time will tell who is correct. The central point is that a sale of shares, whether or not it conveys control, transfers rights in the shares to a new owner. The assets of the company, to which the shares attach, do not change at all. Nor could it be otherwise, because the buyer would then not acquire the full benefit of the bargain: the buyer would pay for an asset (the subsidy) that had in the very sales transaction been "extinguished". Shares in listed companies are traded on stock exchanges with great frequency and without any fear that sales on the market diminish the underlying

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<sup>1676</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 127.

<sup>1677</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 127.

value of the assets owned by these companies. The changing price of listed securities reflects the different valuations that buyers and sellers place upon companies and their underlying assets. However, nothing about these trades extracts the value of any asset, including the benefit of any subsidy granted. That subsidy continues to benefit the recipient, even if the ownership of the recipient's shares changes from one day to another. Given that the Appellate Body in this case does not need to come to any final view on the issue of extinction in the context of a partial privatization or private-to-private sales, these matters do not require more definitive determination.

727. To support its position that an extinction "principle" applies equally to partial privatizations, and that "a partial change of ownership leads to a partial removal of the subsidy and a partial discontinuation of benefit"<sup>1678</sup>, the European Union refers to the compliance panel's ruling in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*. In particular, the European Union argues that the panel in those proceedings was required to determine the WTO-consistency of the USDOC's revised privatization methodology and its application to three sunset review re-determinations. One of the privatizations at issue was the French Government's privatization of Usinor, which occurred in incremental stages over a three-year period through four types of share offerings to four different classes of purchasers. Rather than considering the company as a whole, the USDOC had separately considered the sales transactions pertaining to the four different categories of share offerings and applied its revised privatization methodology to each of the four categories of share offerings in order to evaluate whether the sales transactions in each share offering occurred at arm's length and for fair market value.<sup>1679</sup> The compliance panel found that, "given the complexity of the privatization process, ... the USDOC's segmented analysis of the conditions of Usinor's privatization {was} not unreasonable and was applied in a transparent manner."<sup>1680</sup> As the European Union points out, the compliance panel thereby upheld an approach in which the sale at fair market value and at arm's length of three of the four share offerings (that is, all, save for the 5.16% share offerings to current and qualifying former employees) were deemed to "extinguish" pre-privatization subsidies.<sup>1681</sup> However, as the United States also notes, "{e}ven if the employee share purchases led to the conclusion that the privatization did not cover 100 percent of the

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<sup>1678</sup>European Union's appellant's submission, para. 260.

<sup>1679</sup>The compliance panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* found that there was nothing in the original panel report in that dispute that would require an investigating authority to examine the conditions of a privatization by looking at the *company as a whole*. (See Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.117 and 7.118)

<sup>1680</sup>Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.122.

<sup>1681</sup>See, for instance, Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.93 and 7.108.

shares, the sale of the remaining 94.84 percent of shares, in the context of transfer to the public of 100 percent of the shares and complete surrender of government control, would meet the criterion of transferring 'substantially all of the property'.<sup>1682</sup>

728. The European Union also supports its argument that the subsidies can be "extinguished" through "private-to-private" sales by referring to the Appellate Body's statement in *US – Countervailing Measures on Certain EC Products* that "{t}he ... absolute rule {by the panel in *US – Countervailing Measures on Certain EC Products*} of 'no benefit' may be defensible in the context of transactions between private parties taking place in reasonably competitive markets".<sup>1683</sup> The Appellate Body made this observation in seeking to distinguish sales between private entities, which might be presumed to be at "fair market value", from those in which governments were involved, including privatizations, which might not.<sup>1684</sup> Although the Appellate Body thereby suggested that sales between private entities in the marketplace would more likely be at fair market value, a comprehensive assessment would nonetheless be required in order to determine to what extent a change in ownership and control would result from the private-to-private sales transactions in question.

729. The Panel's approach to the European Communities' arguments concerning "extinction" consisted essentially of examining whether the transactions at issue involved changes in ownership where (i) benefits resulting from a prior non-recurring financial contribution (ii) are bestowed on a state-owned enterprise (iii) following a privatization at arm's length and for fair market value, and (iv) the government transfers all or substantially all the property and retains no controlling interest in the privatized producer.<sup>1685</sup> Since the Panel was of the view that none of the transactions identified by the European Communities met all of these criteria for full privatization, it did not find that the sales transactions at issue "extinguished" prior benefits. Specifically, the Panel stated that:

{t}he European Communities does not argue that the transactions that it alleges have resulted in the "extinction" of subsidies bestowed on Airbus SAS fulfil all of the above criteria. For example, the European Communities does not argue, much less demonstrate, that the transactions in question (with the exception of the stock exchange sales of EADS shares) were on arm's length terms.\*} More significantly, none of the transactions in question involved transfers by a government of all or substantially all of a state-owned producer,

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<sup>1682</sup>United States' appellee's submission, footnote 202 to para. 128.

<sup>1683</sup>European Union's appellant's submission, para. 253 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 124).

<sup>1684</sup>As the Appellate Body explained, "governments have the ability, by designing economic and other policies, to influence the circumstances and the conditions of the sale so as to obtain a certain market valuation of the enterprise." (Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 124)

<sup>1685</sup>Panel Report, para. 7.248.

including a complete relinquishment of control. It is clear that the public offerings of shares in Aérospatiale-Matra and EADS were not transactions in which the governments in question retained "no controlling interest in the privatized producer." {\*\*} <sup>1686</sup>

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{\*original footnote 2175}The concept of "arm's length" is not defined in the SCM Agreement. However, the compliance panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* considered various dictionary definitions of the term, all of which highlighted the independence of parties in arm's length transactions; paras. 7.133-7.134. We are not persuaded, on the basis of the evidence presented to us, that any of the transactions to which the European Communities refers in paragraph 7.204 (other than the stock exchange sales of EADS shares) were "arm's length" transactions.

{\*\*original footnote 2176}Although the French government sold a portion of its shares in Aérospatiale-Matra to the public in 1999, it retained (directly or indirectly) a shareholding of approximately 48 percent. Moreover, the French government exercised control over Aérospatiale-Matra through a shareholders' agreement with Lagardère (which held 33 percent of the shares of Aérospatiale-Matra immediately after the public offering) in addition to holding a so-called "Golden Share" (*action spécifique*) giving it special veto rights. Similarly, the French government and DaimlerChrysler continued to control the operations of Airbus Industrie following the public offering of shares in the newly formed EADS in 2000. Immediately following the public offering of shares in EADS, 60 percent of the share capital of EADS was held in equal proportions by SOGEADE (in which the French state held a 50 percent interest) and DaimlerChrysler, which jointly controlled EADS through a contractual partnership, in which the Spanish government (through SEPI) also exercised voting rights; EADS Offering Memorandum, Exhibit EC-24, p. 132.

730. We have a number of concerns about the manner in which the Panel approached this issue. First, and contrary to the statement by the Panel, the European Communities did in fact argue that each of the transactions at issue were on arm's-length terms.<sup>1687</sup> The European Communities also argued that some of the transactions were for "fair market value", a fact not mentioned by the Panel in its findings.<sup>1688</sup> Second, in concluding that some of the transactions—that is, "the stock exchange sales of EADS shares"—were indeed at arm's length, the Panel failed to explain or provide any citations as to precisely which of the sales transactions were on the stock exchange. Therefore, we consider that the Panel failed sufficiently to explore these issues, with the consequence that there is

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<sup>1686</sup>Panel Report, para. 7.249 and footnotes 2175 and 2176 thereto.

<sup>1687</sup>Even though it may not have used these exact words, the European Communities did make arguments before the Panel that a number of the sales had been conducted through transactions that were at arm's length. (See, for instance, European Communities' first written submission to the Panel, paras. 232-242, 248-257, 262, 270, and 278) The European Union argues separately that the Panel's statement that it did not make arguments that the sales transactions were at arm's length constitutes a violation of Article 11 of the DSU. (See European Union's appellant's submission, para. 279) We consider the European Union's claims of error under Article 11 of the DSU below at paragraphs 760-762.

<sup>1688</sup>See European Communities' first written submission to the Panel, paras. 232-242, 248-257, 262, 270, and 278.



considerable uncertainty as to which of the sales transactions were at arm's length *and* whether any of the sales transactions were for fair market value.

731. On the issue of change of control, we recall that the Panel found that the public offerings of shares in Aérospatiale-Matra and EADS were not transactions in which the *governments* in question retained "no controlling interest in the privatized producer."<sup>1689</sup> The Panel therefore confined its findings to the sales transactions involving transfers of control by a *government* to private owners and did not even consider the sales between private entities. Although, with respect to the transactions involving Aérospatiale-Matra and EADS, the Panel concluded that governments retained controlling interests in the privatized owners, it recognized nevertheless that there was some transfer of ownership to new private owners. Yet the Panel does not appear to have sufficiently explored what legal implications, if any, arose with respect to the control of Aérospatiale-Matra and EADS as a result of these changes in the ownership.

732. The participants canvass different arguments as to how control might be relevant to the analysis of extinction. For instance, the European Union argues that the degree of common control of buyer and seller is an important factor in an extinction analysis and should be taken into account in deciding whether "the benefit of a subsidy could still be used for its original purpose".<sup>1690</sup> The United States submits that the size of the ownership interest transferred as well as the ability to control assets of the firm are important factors to be taken into account in determining whether a firm and its owners are to be treated as distinct.<sup>1691</sup> In its analysis, the Panel failed to provide reasoning as to why and how a transfer of control might have been relevant for its analysis of extinction.

733. For these reasons, we do not consider the Panel to have sufficiently examined the circumstances surrounding the partial privatizations and private-to-private sales transactions at issue. In order properly to address the relevance of these transactions for purposes of the United States' claims of adverse effects under Article 5, the Panel should have assessed whether each of the sales was on arm's-length terms and for fair market value, and to what extent they involved a transfer in ownership and control to new owners. Accordingly, we *reverse* the Panel's reasoning and findings concerning this issue.<sup>1692</sup>

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<sup>1689</sup>Panel Report, para. 7.249.

<sup>1690</sup>European Union's oral statement at the first session of the oral hearing, para. 20.

<sup>1691</sup>United States' appellee's submission, para. 115.

<sup>1692</sup>Panel Report, paras. 7.248, 7.255, and 7.288.

734. We note finally that, as it did before the Panel, the European Union has clarified that it was not alleging that every sale of shares in Airbus companies conducted for fair market value and at arm's length extinguished the residual value of benefits to these companies. Rather, the European Union has explained that it had limited its claims of extinction to transactions involving "significant" sales by government, industry, or institutional shareholders.<sup>1693</sup> The European Union describes these as transactions "in the assets of an enterprise by strategic shareholders rather than sales of shares held as investments", and argued that they "realise for the seller the underlying enterprise value rather than the investment value of the shares."<sup>1694</sup> In the United States' view, however, the European Union does not explain how the "enterprise value" differs from "investment value" or why one triggers extinction under the *SCM Agreement* and the other does not.<sup>1695</sup> While the European Union alleges that the nature of the transactions at issue in this dispute were "significant" enough to "extinguish" past subsidies—and were therefore distinct from the daily trading of shares on the stock exchange—it does not explain the basis of this distinction.<sup>1696</sup>

735. In concluding, we recall that the Panel failed to make sufficient factual findings with respect to whether all the sales transactions at issue referred to by the European Communities were at arm's length and for fair market value, and that where it addressed the issue, it did not precisely clarify the transactions to which it was referring. Moreover, the Panel did not make sufficient findings on the extent to which the change in ownership transferred the control in the companies concerned. In these circumstances, and noting the complexities underlying the partial privatizations and private-to-private sales referred to by the European Union, we are not in a position to assess further whether, and to what extent, the sales transactions referred to by the European Union eliminated a portion of past subsidies to the relevant Airbus companies and how this would be relevant for purposes of an adverse effects analysis under Part III of the *SCM Agreement*.

736. For the above reasons, we *reverse* the Panel's finding, at paragraphs 7.248, 7.255, and 7.288 of the Panel Report, that these sales transaction did not "extinguish" a portion of past subsidies, but *find* that there are insufficient factual findings by the Panel or undisputed facts on the Panel record to

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<sup>1693</sup>See also European Union's appellant's submission, para. 263.

<sup>1694</sup>European Union's appellant's submission, para. 263.

<sup>1695</sup>United States' appellee's submission, para. 130.

<sup>1696</sup>We note that, in rejecting a similar argument by the European Communities, the Panel found that there was "no meaningful basis for distinguishing" those sales that the European Communities alleged to have "resulted in the extinction of a portion of the benefit conferred by financial contributions provided to the various Airbus-related entities in this dispute, on the one hand, from daily trading in shares of a subsidized producer, on the other." For the Panel, the European Communities' approach would "potentially eviscerate the subsidies disciplines" of the *SCM Agreement*, especially where the subsidized producer is a corporation whose shares are publicly traded. (Panel Report, para. 7.246)

complete the legal analysis and determine whether these sales transactions "extinguished" a portion of past subsidies.

(b) Extraction of subsidies

737. The second category of "intervening events" that the European Union submits should have been taken into account by the Panel under its adverse effects analysis concern the removal of cash from two Airbus GIE partners—Dasa and CASA—prior to their contribution to EADS in 2000. As it did before the Panel, the European Union argues that these transactions—which it refers to as "cash extractions"—had the effect of "extracting" or taking away all or part of the "incremental value" created by prior subsidies provided to Dasa and CASA.

738. We recall that, consistent with its approach to the European Communities' arguments on "extinction", the Panel considered the European Communities' arguments on "cash extractions" on an *alternative* basis since it had already found that Article 5 did not require a complaining party to establish that a financial contribution confers a "continuing" or "present" benefit.<sup>1697</sup> By way of explanation, the Panel noted that the specific transactions referred to as "cash extractions" comprised (i) the retention by DaimlerChrysler, as shareholder of Dasa, of cash and cash equivalents immediately prior to the transfer by Dasa of its LCA-related assets and activities to EADS; and (ii) the retention by SEPI (as the shareholder of CASA) of cash and cash equivalents immediately prior to CASA's contribution to EADS.<sup>1698</sup> The transactions formed part of a series of events leading to the combination of Aérospatiale-Matra, Dasa, and CASA in 2000 to form EADS and were a consequence of the Airbus partners' agreement that the activities of Aérospatiale-Matra, Dasa, and CASA in the aeronautics, space, and defence sectors would be contributed to EADS in return for shares representing agreed proportions of interests in EADS.<sup>1699</sup> The transactions occurred because the "value" of Dasa's LCA-related assets and activities, and of CASA, each as contributed to EADS, needed to reflect the corresponding percentage interests that DaimlerChrysler and the Spanish Government were to hold in EADS.<sup>1700</sup> As a result, DaimlerChrysler (as the shareholder of Dasa) and SEPI (as the shareholder of CASA) retained cash and cash equivalents of Dasa and CASA, respectively, so that the adjusted values of the Dasa and CASA contributions to EADS reflected the

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<sup>1697</sup>Panel Report, paras. 7.266 and 7.267.

<sup>1698</sup>Panel Report, para. 7.258.

<sup>1699</sup>Panel Report, para. 7.258 and footnote 2187 thereto (referring to Panel Report, section VII.E.1 (attachment)).

<sup>1700</sup>Panel Report, para. 7.258 (referring to European Communities' first written submission to the Panel, paras. 253 and 254).

respective proportionate interests of DaimlerChrysler and the Spanish Government in EADS (that is, 37.3% and 6.2%) that had been agreed upon by the Airbus partners.<sup>1701</sup>

739. Although the parties contested the exact amount of cash or cash equivalents "extracted" by DaimlerChrysler from Dasa's LCA-related assets prior to their contribution to EADS, the Panel did not make factual findings on this issue. The European Communities referred to a sum of €3.133 billion that remained on the books of DaimlerChrysler as part of the "excluded assets" not transferred to EADS.<sup>1702</sup> Although the United States did not contest that cash and cash equivalents had been retained by DaimlerChrysler following the contribution of Dasa's LCA-related assets to EADS, it estimated the cash value at €1.749 billion.<sup>1703</sup> With respect to CASA, it was uncontested between the parties that approximately €342 million was removed from CASA, of which €340 million was retained by SEPI "by way of distribution of reserves and reduction of capital". The remaining €2.45 million was distributed to Dasa, which at the time retained a shareholding of 0.71% in CASA.<sup>1704</sup>

740. In addressing the European Communities' arguments that the "cash extractions" removed or took away the value of subsidies to Dasa and CASA, the Panel noted that the European Communities had *not* claimed that, "every time" cash leaves a company for reasons other than expenditure on production, it would be appropriate to consider the benefit of prior financial contributions to that company to have been correspondingly reduced.<sup>1705</sup> Rather, the Panel understood the European Communities to argue that, in order for a cash disbursement to be capable of removing or reducing the benefit of prior financial contributions to a company, two requirements would have to be met: "(i) there must be a causal relationship of some sort between the cash 'extraction' and the

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<sup>1701</sup>Panel Report, para. 7.258.

<sup>1702</sup>The Panel noted the reference made in EADS' Offering Memorandum to one group of excluded assets (that is, assets retained by Dasa) was a "cash amount of {€}3.133 million". (Panel Report, footnote 2185 to para. 7.258 (referring to EADS' Offering Memorandum, *supra*, footnote 163, p. 142))

<sup>1703</sup>See United States' comments on the European Communities' responses to the second set of Panel Questions, para. 207. The United States' amount is based on a statement appended to the combined financial statements from December 1997 to December 1999 in EADS' Offering Memorandum where it was stated that "Dasa cash and cash equivalents of €1,749 million shall be retained by DaimlerChrysler". (EADS' Offering Memorandum, *supra*, footnote 163, p. F-79) Pursuant to the agreement to transfer Dasa's LCA-related assets to EADS, in addition to the €1.749 billion, a further €280 million of DaimlerChrysler's liability was to be assumed by EADS. (*Ibid.*, p. F-12, section G) However, it is not clear from EADS' Offering Memorandum whether and how this amount relates to the cash "extracted" from Dasa's LCA-related assets.

<sup>1704</sup>See Panel Report, footnote 2186 to para. 7.258 (referring to EADS' Offering Memorandum, *supra*, footnote 163, p. 143). See also EADS' Offering Memorandum, *supra*, footnote 163, p. 142.

<sup>1705</sup>Panel Report, para. 7.269. The European Communities accepted that there are circumstances in which a cash disbursement would *not* remove the benefit of a subsidy: for instance, where the cash distribution would have occurred in the absence of the subsidy (for example, through payments of dividends to shareholders), or where the distribution constitutes nothing more than a transfer of resources between a company and its sole owner, forming an economic entity. (*Ibid.* (referring to European Communities' response to Panel Question 198, para. 236))

subsidy and (ii) the 'extraction' must effectively move the money beyond the reach of the 'company-shareholder unit'.<sup>1706</sup>

741. Although the Panel had "difficulty accepting the proposition that a cash disbursement by a company reduces the benefit conferred by prior financial contributions to that company in the circumstances described by the European Communities"<sup>1707</sup>, it nonetheless proceeded to consider the specific arguments of the European Communities on an "*arguendo*" basis. Even on this basis, the Panel did not consider that the European Communities had succeeded in meeting either of the two criteria it had itself proposed. With respect to the first, that is, the establishment of a causal relationship between the cash extracted and the subsidy, the Panel found that the European Communities had not "provided any evidence to substantiate its assertion that the incremental value of Dasa and CASA could not have been extracted in the absence of the alleged subsidies."<sup>1708</sup> The Panel was unconvinced that the payments necessarily removed any value from the company that it would have otherwise enjoyed since, as the United States had observed, that reasoning assumed that the "extracted" cash represented subsidies provided to Dasa and CASA.<sup>1709</sup>

742. With respect to the second criterion, the Panel also rejected, as a factual matter, that the "cash extractions" by DaimlerChrysler and the Spanish Government moved the extracted cash out of the "company-shareholder unit".<sup>1710</sup> The Panel engaged with the European Communities' contention that, as "minority shareholders" of the newly created EADS to which the LCA-related assets of Dasa and CASA were contributed, both DaimlerChrysler and SEPI (with their respective 30% and 5.5% EADS' shareholdings) had a "strong disincentive to re-inject the extracted cash into EADS".<sup>1711</sup> The Panel noted that, although the legal ownership of the aeronautics-related assets and activities belonging to

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<sup>1706</sup>Panel Report, para. 7.271 (referring to European Communities' response to Panel Question 199, para. 241). Applied to the facts of the case, the Panel noted that:

... in accordance with the two requirements {the European Communities} posits as relevant to determining when subsidy benefits will be extinguished by cash "extractions" that: (i) the incremental value of Dasa and CASA depended on the alleged subsidies (and could not have been extracted in the absence of those alleged subsidies); and (ii) the cash was removed from the company-shareholder unit in both cases because the interests of both DaimlerChrysler and the Spanish government in EADS following the combination were as minority shareholders in a larger entity (in which they could be presumed to have a "strong disincentive" to re-inject the extracted cash).

(*Ibid.*, para. 7.272)

<sup>1707</sup>Panel Report, para. 7.271.

<sup>1708</sup>Panel Report, para. 7.273.

<sup>1709</sup>Panel Report, para. 7.273 (referring to United States' second written submission to the Panel, para. 542).

<sup>1710</sup>Panel Report, para. 7.275.

<sup>1711</sup>Panel Report, para. 7.274 (referring to European Communities' response to Panel Question 199, para. 243).

Dasa and CASA had changed, EADS had been structured to "maintain the overall interests of DaimlerChrysler and the Spanish government *in Airbus Industrie as a whole*."<sup>1712</sup> The Panel explained that, instead of holding and exercising their membership interests in Airbus Industrie directly through Dasa and CASA, DaimlerChrysler and the Spanish Government (through SEPI) were members of a Contractual Partnership that exercised voting rights in respect of 65.48% of the outstanding shares of EADS. In practice, the Panel found, the nature of control that DaimlerChrysler and the Spanish Government exercised over the LCA activities of Airbus through EADS was substantially the same as the control that they had previously exercised over the LCA activities of Airbus as members of the Airbus Industrie consortium.<sup>1713</sup>

743. Having found that the European Communities failed to meet either requirement under its own two-part "extraction" test, the Panel did not find it necessary to decide the issue of whether, and on what basis, prior financial contributions provided to a subsidized producer could be reduced or eliminated by "extracting" cash from that producer.<sup>1714</sup>

744. Unlike the Panel, we do not *a priori* exclude the possibility that all or part of a subsidy may be removed from a firm by the removal of cash or cash equivalents. Indeed, the United States does not preclude that "there are circumstances in which a Member may remove cash from a subsidized company in a way that 'withdraws' the subsidy."<sup>1715</sup> This does not amount to saying, as the European Communities acknowledged before the Panel, that every time cash leaves a company the benefit of prior financial contributions would be correspondingly diminished.<sup>1716</sup> Rather, a consideration of whether the cash removed from a company eliminates past subsidies is a fact-specific inquiry that must be assessed based on the circumstances of the case. That inquiry would consider matters such as whether the cash "extracted" was in the form of dividends representing the profits of a company, which both participants accept would not normally amount to an "extraction" of past subsidies.

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<sup>1712</sup>Panel Report, para. 7.275. (original emphasis)

<sup>1713</sup>Panel Report, footnote 2218 to para. 7.275.

<sup>1714</sup>Panel Report, para. 7.277. In any event, the Panel found it "difficult to see how a firm could eliminate a subsidy simply by transferring funds to its owners" given the finding by the Appellate Body in *US – Countervailing Measures on Certain EC Products* that a financial contribution to the owners of a firm could confer a benefit upon the manufacture, production, or export of any merchandise, as provided for in Article VI:3 of the GATT 1994. (Panel Report, para. 7.277 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 115))

<sup>1715</sup>United States' appellee's submission, para. 137; United States' response to questioning at the oral hearing.

<sup>1716</sup>Panel Report, para. 7.269. Before the Panel, the European Communities itself was against laying down "universal rules on extraction" and argued that establishing any extractions would require an examination of the facts of each case. (European Communities' response to Panel Question 198, para. 238)

745. As noted above, an adverse effects analysis under Article 5 requires a panel to take into account "intervening events" that may bring a subsidy to an end. The Panel in this case was therefore required to ascertain whether the "cash extractions" referred to by the European Communities were of such a nature, kind, and amount as to be relevant to its adverse effects analysis. In this regard, we find the two requirements of the "extraction" test proposed by the European Communities to the Panel to be a useful point of departure in examining the European Union's arguments on "extraction". With respect to the first criterion, we note that on appeal the European Union argues, as it did before the Panel, that there must be a relationship between the subsidy and the cash "extracted". For the European Union, any alleged "benefits" from prior subsidies granted by the Spanish and German Governments would have enhanced CASA's and Dasa's balance sheets and therefore their value<sup>1717</sup> and, consequently, the removal of cash had the effect of reducing these companies' value and extracting any "incremental value" created by prior subsidies.<sup>1718</sup> According to the European Union, the "value of the reduction is fixed, immutable and certain, since the extractions were made in cash, a perfect measure of wealth not subject to the types of estimates often made in discounted cash flow analyses."<sup>1719</sup> The United States responds that a number of factors can cause an "incremental" increase or decrease in a company's value, and there is no reason to believe that any cash transferred from a company to one of its owners (whether a government entity or a private entity) amounts to a reduction of benefit rather than a reduction in one of the other elements that adds value to the company.<sup>1720</sup>

746. We are not persuaded by the arguments advanced by the European Union under the first ground of its "extraction" theory. The European Union seems to suggest that, because a subsidy would be reflected in a company's balance sheet, and cash is fungible, once cash is removed there is an adequate link established between the subsidies provided and the cash extracted. Beyond its general assertions, the European Union provides no persuasive evidence as to how the specific subsidies provided to Dasa and CASA increased the "incremental value" of those companies, and therefore how the cash "removed" could be deemed to remove that value. Although we do not mean to suggest that a "euro-for-euro" link between the subsidies and the cash extracted is necessary to prevail on an argument on "extraction", we do consider that, at a *minimum*, the European Communities was required to explain how the specific subsidies received by Dasa and CASA were reflected in the balance sheets of those companies, and how the cash removed or "extracted" represented the remaining or unused value of these subsidies. The mere assertion by the

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<sup>1717</sup>European Union's appellant's submission, para. 172.

<sup>1718</sup>European Union's appellant's submission, para. 173.

<sup>1719</sup>European Union's appellant's submission, para. 173.

<sup>1720</sup>United States' appellee's submission, para. 136.

European Communities, without more, that subsidies to Dasa and CASA increased the value of those companies and that *therefore* any cash taken out represents the subsidy or its "incremental value", does not in our view satisfy the requirement of establishing a "causal relationship" between the "cash extraction" and the subsidy, as argued by the European Communities before the Panel.

747. With respect to the second criterion—that is, whether it had been demonstrated that the extracted cash permanently left or moved beyond the reach of the "company-shareholder unit"—the European Union rejects the Panel's finding that the cash extracted from CASA and Dasa was not truly removed because the Spanish Government and DaimlerChrysler, in combination with the French Government and Lagardère, collectively "control{led}" EADS<sup>1721</sup> and therefore they did not have a disincentive to re-inject the extracted cash in EADS and LCA operations.<sup>1722</sup> According to the European Union, the Contractual Partnership had no impact on whether cash could be considered to be permanently "withdrawn" from CASA, Dasa, or their successors, since that partnership affects the exercise of voting rights but does "*nothing whatsoever*" to reduce the economic disincentive for the Spanish Government and DaimlerChrysler against re-injection of the cash given their limited claim to EADS' earnings and net assets.<sup>1723</sup> In response, the United States counters that, with respect to the DaimlerChrysler-Dasa "cash extraction", the European Union's argument focuses on the wrong corporate relationship, because DaimlerChrysler's incentives to return money to Dasa following the transaction were unchanged as it still owned 100% of Dasa.<sup>1724</sup> In any event, the United States supports that Panel's finding that the Airbus creation process "was structured so as to maintain the overall interests of DaimlerChrysler and the Spanish government *in Airbus Industrie as a whole*."<sup>1725</sup> In the United States' view, evidence as to ongoing control is important to an inquiry into whether the "cash extractions" "removed the incremental contribution of alleged prior subsidies" and whether "anything had in fact left the recipient".<sup>1726</sup>

748. Given that the link between the subsidies and the cash "extracted" has not been sufficiently demonstrated by the European Union, we need not consider the European Union's further argument that the Panel improperly relied on the "joint control" exercised through the Contractual Partnership to which both DaimlerChrysler and SEPI belonged in rejecting the European Communities' argument

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<sup>1721</sup>European Union's appellant's submission, para. 185 (referring to Panel Report, paras. 7.283, 7.285, 7.275 and footnote 2218 thereto).

<sup>1722</sup>European Union's appellant's submission, para. 185.

<sup>1723</sup>European Union's appellant's submission, paras. 186 and 189. (original emphasis)

<sup>1724</sup>United States' appellee's submission, para. 143 (referring to Panel Report, section VII.E.1 (attachment), footnote 2241 to para. 4).

<sup>1725</sup>United States' appellee's submission, para. 143 (quoting Panel Report, para. 7.275 (original emphasis)).

<sup>1726</sup>United States' appellee's submission, para. 144 (referring to Panel Report, para. 7.268).



that there was a strong disincentive to reinvest the extracted cash into EADS and that, therefore, the cash left the "company-shareholder unit".<sup>1727</sup>

749. In the light of the foregoing, although we do not *a priori* exclude the possibility that all or part of a subsidy may be "extracted" by the removal of cash or cash equivalents, we *uphold* the ultimate finding by the Panel, in paragraphs 7.276 and 7.288 of the Panel Report, that the "cash extractions" from Dasa and CASA did not remove a portion of past subsidies.

(c) "Withdrawal" of subsidies within the Meaning of Articles 4.7 and 7.8 of the *SCM Agreement*

750. We turn next to consider whether, as argued by the European Union, the "cash extractions" from Dasa and CASA, as well as the sales transactions referred to above in paragraph 718, constitute "withdrawals" of subsidies within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*.

751. We recall that the Panel engaged in a separate and brief examination of whether the "cash extractions" could be characterized as "withdrawals" under Articles 4.7 and 7.8 of the *SCM Agreement*. As the European Union points out on appeal, the Panel did not consider its arguments that the sales transactions also resulted in the "withdrawal" of subsidies within the meaning of these provisions.<sup>1728</sup>

752. The Panel began its assessment by noting that "withdrawal" of a subsidy is the remedy envisaged by Article 4.7 (for prohibited subsidies) and an alternative remedy in the context of Article 7.8 (for actionable subsidies). It highlighted that the compliance panel in *Australia – Automotive Leather II (Article 21.5 – US)* had found that the recommendation to "withdraw the subsidy" provided for in Article 4.7 of the *SCM Agreement* is not limited to prospective action, and may encompass repayment of the prohibited subsidy.<sup>1729</sup> The Panel however, rejected the

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<sup>1727</sup>For the same reason, we need not address the European Union's argument that the Panel erred in finding that the value of prior subsidies had not been "withdrawn" or removed because "something of equal value" was provided by the Spanish Government (through SEPI) in exchange for the cash from CASA, namely the reduction of capital in its subsidiary CASA. (European Union's appellant's submission, paras. 183 and 184 (referring to Panel Report, para. 7.285)) The Panel made this finding when addressing the European Communities' argument that the "cash extraction" from CASA resulted in the "withdrawal" of subsidies, within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*. The Panel did not discuss this issue and made no such finding with respect to Dasa. (See Panel Report, paras. 7.284 and 7.285)

<sup>1728</sup>The European Union alleges that such a failure by the Panel constitutes a denial of its claim, and should be reversed both as "legal error" under Articles 4.7 and 7.8 of the *SCM Agreement* and as a failure to fulfil its obligation under Article 11 of the DSU. (See European Union's appellant's submission, paras. 193 and 278 respectively) For the reasons explained below, we do not consider it necessary to make separate findings on this argument of the European Union.

<sup>1729</sup>Panel Report, para. 7.281 (referring to Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.39).

European Communities' arguments regarding "withdrawal" and merely repeated its earlier findings with respect to the "cash extractions", namely that neither the CASA nor Dasa transactions had removed the value of prior subsidies.<sup>1730</sup> In response to specific arguments made by the European Communities, the Panel also found that the "cash extraction" of €340 million by SEPI did not result in "withdrawal" because it was made in return for a reduction in the equity or capital in CASA, and that therefore CASA had "provided something of equal value" to SEPI.<sup>1731</sup>

753. In this appeal, the European Union argues that the Panel erred in its interpretation and application of the term "withdraw" in Articles 4.7 and 7.8 of the *SCM Agreement*. The European Union submits that both the "cash extractions" and the sales transactions meet the definition of "withdrawal" of subsidies espoused by the Appellate Body in *Brazil – Aircraft (Article 21.5 – Canada)* and should have been treated as such by the Panel.<sup>1732</sup> Moreover, the European Union argues that, to the extent that it has already "withdraw{n}" the subsidies by virtue of these transactions, the Panel erred in recommending that it do so.<sup>1733</sup> By contrast, the United States submits that Articles 4.7 and 7.8 of the *SCM Agreement* do not create a "separate and independent" requirement to evaluate, for each transaction, whether the subsidizing Member has "withdrawn" or "extracted" a subsidy.<sup>1734</sup> Moreover, the United States observes, these provisions create an obligation on the Member, or in the case of Article 7.8 give the Member an option, to withdraw the subsidy.<sup>1735</sup> According to the United States, it is the *Member* that must do something affirmative to "remove" or "take away" the subsidy.<sup>1736</sup> The United States does not consider a transfer of funds or other assets by the subsidy recipient to an entity other than the government to be action by the "Member" to remove or take away the subsidies, as required under Articles 4.7 and 7.8 of the *SCM Agreement*.

754. We note that both Article 4.7 and Article 7.8 of the *SCM Agreement* provide a remedy of "withdrawal" following a panel's determination that a subsidy is "prohibited" or "actionable". In *Brazil – Aircraft (Article 21.5 – Canada)*, the Appellate Body defined the term "withdraw" as to

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<sup>1730</sup>Panel Report, paras. 7.283-7.285.

<sup>1731</sup>Panel Report, para. 7.285.

<sup>1732</sup>European Union's appellant's submission, paras. 170 and 171 (quoting Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45).

<sup>1733</sup>European Union's appellant's submission, para. 171.

<sup>1734</sup>United States' appellee's submission, Part III.C.1.

<sup>1735</sup>United States' appellee's submission, para. 135.

<sup>1736</sup>United States' appellee's submission, para. 135 (referring to Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 226 and 227; and Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.27). (original emphasis)

"remove" or "take away" and "to take away what has been enjoyed; to take from."<sup>1737</sup> As the Appellate Body highlighted in that dispute, the "withdrawal" of a subsidy, under Article 4.7, refers to the "removal" or "taking away" of that subsidy.<sup>1738</sup> Based on this definition, the European Union submits that the sales transactions and the "cash extractions" from Dasa and CASA qualify as "withdrawals" within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*.<sup>1739</sup> As we have not made affirmative findings that the sales transactions and "cash extractions" resulted respectively in the "extinction" or "extraction" of subsidies, we need not decide whether the subsidies alleged by the European Union to have been extinguished or extracted were thereby also "withdrawn".

755. Even if the European Union had been successful in its arguments on "extinction" and "extraction", we do not consider that the sales transactions and "cash extractions" resulted in the "withdrawal" of subsidies within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*.

756. First, we recall that the drafters of Articles 4.7 and 7.8 contemplated that the remedy of "withdrawal" would be available only *after* a panel and the Appellate Body have determined, in original proceedings, that subsidies are prohibited and/or actionable and causing adverse effects. Article 4.7 provides that, "{i}f the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay." Likewise, Article 7.8 reads that, "{w}here a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy."<sup>1740</sup> Therefore, a recommendation to "withdraw" subsidies pursuant to Article 4.7 is directed at subsidies that have been found to be prohibited; under Article 7.8, a recommendation to "withdraw" subsidies or remove their adverse effects is directed at actionable subsidies that have been found to cause adverse effects. We recall that, in this dispute, at the time the sales transactions and "cash extractions" took place, there had been no findings by a panel or the Appellate Body that alleged subsidies were either prohibited subsidies or actionable subsidies causing adverse effects. Therefore, we do not consider that the sales transactions and "cash extractions" resulted in the "withdrawal" of subsidies, within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*.

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<sup>1737</sup> Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45 (referring respectively to *Concise Oxford English Dictionary* (Clarendon Press, 1995), p. 1609; and *Black's Law Dictionary*, 6th edn (West Publishing, 1990), p. 1602).

<sup>1738</sup> Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45.

<sup>1739</sup> See European Union's appellant's submission, paras. 171 and 194 respectively.

<sup>1740</sup> Although there is no specific provision in the *SCM Agreement* requiring a panel to make a recommendation of withdrawal with respect to actionable subsidies, a panel may do so pursuant to the general rule in Article 19.1 of the DSU.

757. Moreover, we understand the recommendations made by the Panel to be collective, in the sense that they concern all those subsidies ultimately found to be prohibited subsidies or actionable subsidies causing adverse effects. They do not concern subsidies that have been "extinguished" or "extracted". Such recommendations request the European Union to withdraw those subsidies and/or remove adverse effects; panels or the Appellate Body are not required to make recommendations pursuant to Articles 4.7 and 7.8 with respect to subsidy measures that are found to be "extinguished" or "extracted".

758. Finally, a determination as to whether any action taken to implement the recommendations made has actually resulted in the "withdrawal" of subsidies and has brought about a Member's compliance with the *SCM Agreement*, is, if contested, best left to a compliance panel whose principal task is to assess whether a Member's implementation measures bring it into compliance with its obligations under the *SCM Agreement*.

759. Accordingly, we *uphold* the Panel's ultimate finding, in paragraphs 7.283, 7.284, and 7.289 of the Panel Report, that the "cash extractions" did not result in the "withdrawal" of subsidies, within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*. With respect to the sales transactions at issue, we have no basis to make a finding that they resulted in "withdrawal" of subsidies as we have not completed the analysis to determine whether they "extinguished" prior subsidies. Moreover, we do not consider that the Panel erred in making a collective recommendation to the European Communities to withdraw subsidies that have resulted in adverse effects or to take appropriate steps to remove these effects.<sup>1741</sup>

(d) Claims under Article 11 of the DSU

760. The European Union submits that, in addition to committing errors in its interpretation and application of Articles 1, 4.7, 5, 6, and 7.8 of the *SCM Agreement*, the Panel failed to make an objective assessment of the matter before it, and thereby acted inconsistently with Article 11 of the DSU, when considering the European Communities' arguments regarding the "extinction", "extraction", and "withdrawal" of subsidies. In particular, the European Union claims that the Panel acted inconsistently with Article 11 of the DSU by failing to: (i) provide a reasoned and adequate explanation for its finding that the Spanish Government "provided something of equal value" for the "cash extraction" from CASA, namely a "reduction of capital or equity in CASA"; (ii) provide a reasoned and adequate explanation and have a sufficient evidentiary basis for its finding that the

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<sup>1741</sup>Panel Report, paras. 8.6 and 8.7. We note, however, that in this Report, we reverse the Panel's recommendation, at paragraph 8.6 of the Panel Report, that the subsidies found by the Panel to be prohibited be withdrawn. (See footnote 2437 of this Report)

Contractual Partnership assigning the voting rights to DaimlerChrysler and the Spanish Government meant that these entities had no "disincentive to reinvest" the "extracted" cash and therefore had not "withdrawn" subsidies; (iii) make "internally consistent" findings as between its finding that the Spanish Government's "cash extraction" from CASA did not constitute a "withdrawal" within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement* and its conclusion elsewhere that the French Government's contributions to Aérospatiale constituted "financial contributions"; (iv) assess and provide a reasoned and adequate explanation as to why the sales transactions did not result in the "withdrawal" of subsidies within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*; and finally, (v) properly reflect the European Communities' arguments that each of the sales transactions was at "arm's length", and provide a reasoned and adequate explanation for its finding that they were not.<sup>1742</sup>

761. In alleging that the Panel acted inconsistently with Article 11 of the DSU, the European Union relies on many of the arguments that it made in respect of its appeal of the Panel's interpretation and application of Articles 1, 4.7, 5, 6, and 7.8 of the *SCM Agreement*. As the Appellate Body has previously found, a claim under Article 11 of the DSU "must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements".<sup>1743</sup> Even where the European Union's arguments differ, in the light of our findings regarding the proper interpretation and application of Articles 1, 4.7, 5, 6, and 7.8 of the *SCM Agreement*, we need not address the European Union's claims under Article 11 of the DSU. At the oral hearing, the European Union confirmed that where its claims under Article 11 of the DSU were dealt with by virtue of our findings regarding the proper interpretation and application of Articles 1, 4.7, 5, 6, and 7.8 of the *SCM Agreement*, we need not make separate findings under Article 11 of the DSU.

762. Accordingly, we decline to make additional findings as to whether the Panel acted inconsistently with Article 11 of the DSU in its treatment of the European Communities' arguments concerning the "extinction", "extraction", and "withdrawal" of subsidies.

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<sup>1742</sup>See European Union's appellant's submission, paras. 273-281.

<sup>1743</sup>Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 498). See also, Appellate Body Report, *China – Publications and Audiovisual Products*, para. 189.

3. The "Pass-Through" of Subsidies

763. In this final subsection, we address the European Union's request for reversal of the Panel's finding that the United States was *not* required, in order to make a *prima facie* case under Articles 5 and 6 of the *SCM Agreement*, to demonstrate that the benefits of subsidies provided to the Airbus Industrie consortium<sup>1744</sup> "passed through" to Airbus SAS, the current producer of Airbus LCA. In this regard, we refer once more to the factual overview of the evolution of Airbus SAS from Airbus predecessor companies.<sup>1745</sup>

764. The European Communities argued before the Panel that the United States had failed to show that alleged subsidies provided to the Airbus LCA operations of certain Airbus partners or to Airbus GIE prior to 2001, "passed through" to Airbus SAS when the Airbus partners restructured their internal relationships and created Airbus SAS in 2001.<sup>1746</sup> According to the European Communities, since Airbus SAS came into existence only in 2001, any subsidies granted prior to that date cannot possibly have been granted to Airbus SAS.<sup>1747</sup> Therefore, the United States had the burden of establishing that the alleged subsidies "currently benefit Airbus SAS or have {a} causal connection to the adverse effects alleged by the United States."<sup>1748</sup>

765. The Panel began its analysis by focusing on the identity of the "producer" and the "subsidized product" raised in the United States' claims. Based on the language used by the United States in its panel request and in its written submissions to the Panel, the Panel observed that the United States' challenge in this dispute related to specific measures provided "to the Airbus companies", comprising "not only Airbus SAS, but also 'its predecessor Airbus GIE and current and predecessor affiliated

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<sup>1744</sup>We note that the European Communities listed the companies to which its claims of "pass-through" applied. (See Panel Report, para. 7.185) In its discussion of the "pass-through" claims, however, the Panel made generic references to Airbus "predecessor" companies, Airbus "affiliated" companies, Airbus "related" companies, and/or the Airbus Industrie consortium. (See for instance, *ibid.*, paras. 7.185, 7.191-7.193, 7.199, 7.200, and 7.286) We note that, in its ultimate conclusion as to whether the United States was required to demonstrate the "pass-through" of subsidies to Airbus SAS, the Panel's findings were directed at Airbus Industrie, which it defined as including Airbus partners and Airbus GIE as well as their "affiliates". (*Ibid.*, para. 7.286) This description is slightly at variance with the Panel's earlier explanation that the Airbus Industrie consortium, as it operated between 1970 and 2001, included the four Airbus partners and Airbus GIE. (*Ibid.*, para. 7.184)

<sup>1745</sup>See section IV.B of this Report.

<sup>1746</sup>Panel Report, para. 7.185.

<sup>1747</sup>Panel Report, para. 7.185.

<sup>1748</sup>Panel Report, para. 7.186 (referring to European Communities' first written submission to the Panel, para. 194; and European Communities' second written submission to the Panel, para. 89).

companies' of both Airbus SAS and Airbus GIE."<sup>1749</sup> Next, the Panel noted that the United States had presented its claims on the basis that the "subsidized product" at issue is the entire family of Airbus LCA.<sup>1750</sup> The Panel considered that the "producer" of Airbus LCA, the subsidized product, in the pre-2001 period was "the consortium Airbus Industrie; i.e., *each of* the Airbus partners and their respective affiliates, *and* Airbus GIE".<sup>1751</sup> Consequently, the Panel concluded that, for purposes of its analysis of the United States' claims in this dispute, "a financial contribution provided to any Airbus partner or affiliated entity, or to Airbus GIE, in relation to the development and/or production of an Airbus LCA, potentially confers a benefit on the Airbus Industrie consortium, as the 'producer' of Airbus LCA."<sup>1752</sup>

766. The Panel then considered whether, as contended by the European Communities, the facts of the present dispute required the United States to demonstrate the "pass-through" of the benefit. The Panel observed that the question of whether it is necessary to conduct a "pass-through" analysis in WTO law had previously arisen in the context of Part V of the *SCM Agreement* in situations where a financial contribution was provided to an entity in respect of a product but the "benefit" was alleged to be conferred on an unrelated entity producing a different product.<sup>1753</sup> On the question of whether the "pass-through" concept is applicable in a Part III context, the Panel noted that the Appellate Body in *US – Upland Cotton* had found that a "pass-through" analysis is "not critical for an assessment of significant price suppression under Article 6.3(c) in Part III of the *SCM Agreement*", but that, nevertheless, "the 'subsidized product' must be properly identified for purposes of significant price suppression under Article 6.3(c) of the *SCM Agreement*."<sup>1754</sup> The Panel understood the Appellate Body to mean that a showing of causation under Article 6.3(c) of the *SCM Agreement* requires only that a link be demonstrated between the subsidy and the product alleged to be involved in causing serious prejudice.<sup>1755</sup>

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<sup>1749</sup>Panel Report, para. 7.191 (quoting, in relevant part, Request for the Establishment of a Panel by the United States, WT/DS316/2). We recall that, in its panel request, the United States stated that the "Airbus companies" included "Airbus SAS, its predecessor Airbus GIE and current and predecessor affiliated companies, including each person or entity that is or was under common control with Airbus SAS or Airbus GIE, such as parent companies, sibling companies and subsidiaries, including Airbus Deutschland GmbH, Airbus España SL, Airbus France S.A.S., Airbus UK Limited, European Defence and Space Company ('EADS'), and BAE Systems."

<sup>1750</sup>Panel Report, para. 7.192.

<sup>1751</sup>Panel Report, para. 7.192. (original emphasis)

<sup>1752</sup>Panel Report, para. 7.192.

<sup>1753</sup>Panel Report, paras. 7.194 and 7.195 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 167; and Panel Report, *Mexico – Olive Oil*, para. 7.143).

<sup>1754</sup>Panel Report, para. 7.196 (quoting Appellate Body Report, *US – Upland Cotton*, para. 472).

<sup>1755</sup>Panel Report, para. 7.197.

767. Finally, the Panel found that, although as a matter of corporate law there had been a legal reorganization of the producer of Airbus LCA, from a *groupeement d'intérêt économique* (GIE) to a *société par actions simplifiée* (SAS), the "economic realities" of production of Airbus LCA illustrated that the Airbus Industrie consortium (that is, each of the Airbus partners, their respective affiliates, and Airbus GIE) was the same producer of Airbus LCA as Airbus SAS.<sup>1756</sup> Moreover, the Panel noted that the European Commission had itself expressed the view that there was no indication that the combination of the Airbus partners Aérospatiale-Matra, Dasa, and CASA to form EADS would affect the quality or nature of control of Airbus Industrie, nor would it have any impact on the work share distribution between the Airbus partners.<sup>1757</sup>

768. For these reasons, the Panel considered that, for purposes of assessing the United States' claims under Articles 5 and 6 of the *SCM Agreement*, the changes to the corporate structure of the producer of Airbus LCA did not require that the United States demonstrate, as part of its *prima facie* case, the "pass-through" to the entity Airbus SAS of benefits conferred by financial contributions that had been provided to the Airbus Industrie consortium.<sup>1758</sup>

(i) Was a "pass-through" analysis required?

769. The European Union argues in this appeal that the Panel erred in finding that the United States was not required to demonstrate the "pass-through" of subsidies, and that this error is premised on a flawed interpretation and application of Articles 1, 5, and 6 of the *SCM Agreement*, which require a showing of "continuing benefit".<sup>1759</sup> The European Union rejects the Panel's finding that a "pass-through" analysis should be confined to a Part V context and is inapplicable to Part III of the *SCM Agreement*. The European Union notes that there is a common definition of subsidy under Article 1, which applies to both Parts III and V.<sup>1760</sup> In this regard, the European Union refers to the finding by the Appellate Body in *Canada – Aircraft* that a benefit arises only if a person, natural or legal, or a group of persons has, in fact, received something.<sup>1761</sup> According to the European Union, this suggests that the United States had the burden of proving that alleged subsidies to recipients other than the current producer of LCA, Airbus SAS, currently benefit Airbus SAS. The adverse effects under Articles 5 and 6 of the *SCM Agreement* are defined as particular types of competitive harm that

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<sup>1756</sup>Panel Report, para. 7.199.

<sup>1757</sup>Panel Report, para. 7.199 and footnote 2097 thereto (referring to European Commission, Merger Procedure Article 6(2) Decision, Case No. COMP/M.1745 – EADS (11 May 2000) (Panel Exhibit US-479), para. 16).

<sup>1758</sup>Panel Report, para. 7.200.

<sup>1759</sup>European Union's appellant's submission, para. 269.

<sup>1760</sup>European Union's appellant's submission, para. 270.

<sup>1761</sup>European Union's appellant's submission, para. 271 (referring to Appellate Body Report, *Canada – Aircraft*, para. 154).



are the "effect of the subsidy", which are transmitted through a recipient company's products. The European Union recalls that the Appellate Body in *US – Upland Cotton* found that a prerequisite to a finding of causation is that the challenged subsidy does in fact benefit the subsidized product.<sup>1762</sup>

770. The United States responds that, as the complaining party, its only burden was to establish that the subsidies at issue caused adverse effects to the United States' interests, which it did by demonstrating that the member States made financial contributions, that each conferred a benefit on producers of LCA, and that these subsidies caused adverse effects to the United States. To the extent that the Appellate Body considers that the United States bore some further burden, the United States argues that it satisfied that burden by establishing that the corporate predecessors were all producers of LCA and that, as the Panel found, there was no indication that the reorganization among the Airbus entities to create Airbus SAS had any impact on the "quality or nature of control" of Airbus Industrie or the work share distribution between the Airbus partners.<sup>1763</sup>

771. We begin by noting that the European Union's arguments are premised on its earlier arguments that, for purposes of a serious prejudice analysis under Article 5 of the *SCM Agreement*, a complainant must demonstrate the existence of a "continuing benefit" that is enjoyed by the recipient *during the reference period*. For the reasons given in paragraph 712 above, we disagree with the proposition that subsidies are capable of causing adverse effects during the reference period only to the extent that the complaining party has demonstrated the existence of a continuing benefit during that period. Accordingly, we disagree with the European Union that the United States was required in this case to demonstrate the existence of a "continuing benefit" to Airbus SAS during the reference period.

772. In addition, like the Panel, we note that the United States' claims were not limited to adverse effects caused by subsidies provided to the *current* producer of LCA or to the current LCA models produced by Airbus SAS.<sup>1764</sup> Rather, the United States also challenged subsidies provided to "predecessor Airbus GIE companies" and "predecessor affiliated companies" of both Airbus GIE and Airbus SAS.<sup>1765</sup> As we explained above, and as the Appellate Body has previously found, subsidies

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<sup>1762</sup>European Union's appellant's submission, para. 271 (referring to Appellate Body Report, *US – Upland Cotton*, para. 472).

<sup>1763</sup>United States' appellee's submission, para. 161 (referring to Panel Report, para. 7.199).

<sup>1764</sup>Panel Report, paras. 7.190-7.192.

<sup>1765</sup>See Panel Report, para. 7.191.

provided in the past can continue to have adverse effects at a later point in time.<sup>1766</sup> We therefore fail to see why, as the European Union argues, the United States would have been required also to demonstrate that past subsidies "passed through" from one *company* to another, in addition to showing that the European Union was in breach of its obligation not to cause, through the use of any subsidy, adverse effects to the interests of the United States.

773. The European Communities argued before the Panel that, to the extent that subsidies provided to Airbus predecessor companies and their related companies were alleged to continue to benefit Airbus SAS, this would have to be affirmatively demonstrated by the United States because "Airbus partners restructured their relationship" to one another when they formed Airbus SAS in 2001.<sup>1767</sup> Before addressing this argument, we recall, as the Panel did, the specific circumstances in which a "pass-through" analysis has been required in WTO disputes under the *SCM Agreement*. We recall that the Appellate Body pronounced on the requirements for a "pass-through" analysis in *US – Softwood Lumber IV*. That dispute concerned countervailing duties levied by the United States on imports of softwood lumber, including remanufactured lumber, from Canada to offset subsidies granted to timber harvesters in relation to the harvesting of timber (that is, the input into the production of softwood lumber). The Appellate Body upheld the panel's findings that Article 10 of the *SCM Agreement* and Article VI:3 of the GATT 1994 required the USDOC to conduct a "pass-through" analysis in circumstances where a subsidy is received by the producer of an input product and the imported product subject to the countervailing duty investigation is a different, downstream product manufactured by an unrelated producer operating at arm's length from the recipient of the subsidy.

774. The issue of "pass-through" also arose in *US – Upland Cotton* in legally and factually different circumstances than in *US – Softwood Lumber IV*. Similar to this dispute, *US – Upland Cotton* involved claims of serious prejudice under Part III of the *SCM Agreement*. In that case, the Appellate Body found that a "pass-through" analysis was "not critical" for an assessment of price suppression under Article 6.3(c) of the *SCM Agreement*, in part due to the differing contexts and

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<sup>1766</sup>The Appellate Body in *US – Upland Cotton* explained that:

Whether the effect of a subsidy begins and expires in the year in which it is paid or begins in one year and continues in any subsequent year, and how long a subsidy can be regarded as having effects, are fact-specific questions. The answers to these questions may depend on the nature of the subsidy and the product in question. We see nothing in the text of Article 6.3(c) that excludes *a priori* the possibility that the effect of a "recurring" subsidy may continue after the year in which it is paid. Article 6.3(c) deals with the "effect" of a subsidy, and not with the financial accounting of the amount of the subsidy.

(Appellate Body Report, *US – Upland Cotton*, para. 476)

<sup>1767</sup>Panel Report, para. 7.185.

rationales of Part III and Part V of the *SCM Agreement*.<sup>1768</sup> As the Appellate Body explained, Part III of the *SCM Agreement* requires only proof that the subsidy causes "adverse effects" and does not require a precise quantification of the subsidies since, *inter alia*, the remedy for a finding of adverse effects "targets the effects of the subsidy ... generally".<sup>1769</sup>

775. Based on these considerations, we do not consider that, as alleged by the European Union, the facts of this case give rise to a requirement to conduct an analysis of whether the benefit of subsidies provided to the Airbus Industrie consortium "passed through" to Airbus SAS. First, there is no suggestion here that subsidies were provided to a different "input product" that was separate or distinct from a downstream "subsidized product", as was the case in *US – Softwood Lumber IV*. Second, although we do not exclude that there may be other circumstances, including ones involving the restructuring of companies in which the receipt of a subsidy by a predecessor company may not mean that it is enjoyed by a successor company, we recall the Panel's finding that, despite the changes to their "legal organization", the "economic realities" of production of Airbus LCA demonstrated that the Airbus Industrie consortium (that is, each of the Airbus partners, their respective affiliates and Airbus GIE) and Airbus SAS were the "same producer" of LCA.<sup>1770</sup> The Panel explained that "all of the LCA operating assets and all of the LCA design, manufacturing and marketing activities of the

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<sup>1768</sup>The Appellate Body has stated:

{T}he requirement in Article VI:3 of the GATT 1994 and Article 19.4 of the *SCM Agreement* that countervailing duties on a product be limited to the amount of the subsidy accruing to that product finds no parallel in the provisions on actionable subsidies and pertinent remedies under Part III of the *SCM Agreement*. Therefore, the need for a "pass-through" analysis under Part V of the *SCM Agreement* is not critical for an assessment of significant price suppression under Article 6.3(c) in Part III of the *SCM Agreement*. Nevertheless, we acknowledge that the "subsidized product" must be properly identified for purposes of significant price suppression under Article 6.3(c) of the *SCM Agreement*. And if the challenged payments do not, in fact, subsidize that product, this may undermine the conclusion that the effect of the subsidy is significant suppression of prices of that product in the relevant market.

(Appellate Body Report, *US – Upland Cotton*, para. 472)

<sup>1769</sup>The Appellate Body explained the differing rationales of Parts III and V of the *SCM Agreement* as follows:

We note that the apparent rationale for Part III differs from that for Part V of the *SCM Agreement*. Under Part V, the amount of the subsidy must be calculated because, under Article 19.4 of the *SCM Agreement* and Article VI:3 of the GATT 1994, countervailing duties cannot be levied in excess of that amount. In contrast, under Part III, the remedy envisaged under Article 7.8 of the *SCM Agreement* is the withdrawal of the subsidy or the removal of the adverse effects. This remedy is not specific to individual companies. Rather, it targets the effects of the subsidy more generally. Article 6.3(c) thus goes in the same vein and does not require a precise quantification of the subsidies at issue.

(Appellate Body Report, *US – Upland Cotton*, para. 464)

<sup>1770</sup>Panel Report, para. 7.199. (emphasis omitted)

former Airbus partners and Airbus GIE were grouped in Airbus SAS and its subsidiaries" and, as the European Commission had stated in a document granting merger clearance for the creation of EADS, "there was no indication" that as a result of the formation of EADS "the *quality or nature of control* of Airbus Industrie" or the "impact on the work share distribution between the Airbus partners" would be affected.<sup>1771</sup> At the oral hearing, we engaged the participants in some discussion as to whether the restructuring of predecessor companies to form EADS, and thereafter Airbus SAS, involved a change in LCA productive activities and corporate contractual relationships. The European Union did not contest the United States' assertion that Airbus' operations or production activities did not change as a result of the restructuring.

776. Finally, we do not consider that the relationship between the predecessor companies and Airbus SAS is one that can be characterized as a relationship between unrelated companies operating at "arm's length". Instead, the companies and Airbus SAS were related, at least to some extent, through common ownership. We conclude, therefore, that we are not faced with a situation where predecessor and successor companies are unrelated and operate at arm's length and where a "pass-through" analysis might therefore be required.

777. For the foregoing reasons, we *uphold* the Panel's finding, in paragraphs 7.200 and 7.286 of the Panel Report, that the United States was not required to demonstrate, as part of its *prima facie* case under Article 5 of the *SCM Agreement*, that subsidies provided to the Airbus Industrie consortium "passed through" to the current producer of Airbus LCA, Airbus SAS.

## **VI. Launch Aid/Member State Financing**

### **A. The LA/MSF "Programme"**

778. Before the Panel, the United States alleged that the Governments of France, Germany, Spain, and the United Kingdom have maintained a "formal and institutionalized industrial policy" towards Airbus and that a "central part" of this policy has been the "systematic and coordinated" provision of LA/MSF subsidies to assist Airbus in developing a family of LCA.<sup>1772</sup> This record of support, the United States argued, "evidences the existence of a LA/MSF Programme ... as a distinct measure, separate from the individual grants of LA/MSF".<sup>1773</sup> In reply, the European Communities contested the existence of an LA/MSF "Programme", arguing that "{n}o overarching measure" stipulates the

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<sup>1771</sup>Panel Report, para. 7.199. (original emphasis)

<sup>1772</sup>Panel Report, para. 7.498 (referring to United States' first written submission to the Panel, paras. 85-89).

<sup>1773</sup>Panel Report, para. 7.498 (referring to United States' oral statement at the second Panel meeting, paras. 34 and 36).

provision of LA/MSF to Airbus and that "the United States can point to no rule or norm that would transform a series of separate financing measures made for separate aircraft programmes by separate countries into an all-encompassing measure."<sup>1774</sup>

779. The Panel found that "individually, no piece or category of evidence relied upon by the United States positively demonstrates the existence of the alleged unwritten LA/MSF Programme."<sup>1775</sup> The Panel noted, for instance, that, "while the facts surrounding the development of Airbus LCA show a history and general policy to support Airbus through LA/MSF, this support has not always been expressed by the same four EC member States or for the same LCA projects."<sup>1776</sup> Moreover, "the institutions created under the first inter-governmental agreements to manage the different Members' participation in various Airbus LCA projects have at different times involved fewer or more countries than the four EC member States the United States asserts systematically operated the unwritten LA/MSF Programme."<sup>1777</sup> The Panel added that "the functions of these institutions evolved over the years, becoming more limited by the time of the A380", and that "apparently the institutions were not used at all to manage LA/MSF provided for the A330-200 and A340-500/600 projects."<sup>1778</sup> The Panel also recalled its earlier finding that the evidence and arguments advanced by the parties did not lead it "to conclude that LA/MSF, by definition, involves below-market financing" and that, therefore, "any LA/MSF granted in the future will involve non-commercial interest rates."<sup>1779</sup> For all these reasons, the Panel concluded that the United States had failed to demonstrate the existence of the alleged unwritten LA/MSF Programme.<sup>1780</sup> The Panel added that its conclusion would be the same even if it had found that the United States did not have to establish the general and prospective application of the alleged unwritten LA/MSF Programme. The Panel explained that, "in general terms, a 'programme' may be described as a planned series of events."<sup>1781</sup> The Panel queried "whether a 'programme' of any kind can exist without having general and prospective application."<sup>1782</sup> For the Panel, it was "not entirely clear" what the United States meant when it argued that "the evidence it has adduced supports the existence of an unwritten LA/MSF Programme that is not of

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<sup>1774</sup>European Communities' first written submission to the Panel, para. 342.

<sup>1775</sup>Panel Report, para. 7.577.

<sup>1776</sup>Panel Report, para. 7.577.

<sup>1777</sup>Panel Report, para. 7.577.

<sup>1778</sup>Panel Report, para. 7.577.

<sup>1779</sup>Panel Report, para. 7.578.

<sup>1780</sup>Panel Report, para. 7.579.

<sup>1781</sup>Panel Report, para. 7.580.

<sup>1782</sup>Panel Report, para. 7.580.

general and prospective application."<sup>1783</sup> To the extent that the focus of the United States' position was the "repetition of the same government action over a limited period of time"—that is, provision by the member States of LA/MSF to Airbus "whenever sought, on the same four core terms between 1969 and 2002"—the Panel recalled its view that "mere repetition of the same government action over time does not necessarily demonstrate that the government acted pursuant to a rule that applied generally over that same period."<sup>1784</sup> Moreover, the Panel considered that there was evidence pointing to "the non-existence of any such unwritten LA/MSF Programme, including: the fact that between 1969 and 2002 the same four member States did not always participate, or participated with other EC member States, in Airbus LCA projects funded through LA/MSF; the evolving role and function of the inter-governmental institutions; and the fact that the latter were not apparently used for the purpose of the LA/MSF provided for the A330-200 and A340-500/600."<sup>1785</sup>

1. Arguments on Appeal

780. On appeal, the United States argues that the Panel erred in finding that the United States had failed to demonstrate the existence of the alleged unwritten LA/MSF Programme. The United States requests the Appellate Body to reverse the Panel's finding and find that the alleged LA/MSF Programme "constitutes a specific subsidy, provided by France, Germany, Spain and the United Kingdom to Airbus, that causes adverse effects to the interests of the United States."<sup>1786</sup>

781. The United States describes the alleged LA/MSF Programme as "ongoing conduct" or "repeated provision of {LA/MSF} to each and every major Airbus model, under the same four core conditions and benefiting the same subsidized product".<sup>1787</sup> The United States further explains that its challenge before the Panel "was based on a demonstration that over the past four decades (since 1969), the Airbus governments have consistently subsidized Airbus, in the form of {LA/MSF}, by underwriting the costs of developing each and every single model through long-term unsecured loans at zero or below-market rates of interest, with back-loaded repayment schedules that allow Airbus to repay the loans through a levy on each delivery of the financed aircraft."<sup>1788</sup> According to the

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<sup>1783</sup>Panel Report, para. 7.580. The United States described the "precise content" of the alleged LA/MSF Programme as consisting of "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 through loans that are: (a) unsecured; (b) repayable on a success-dependent basis (i.e., through per sale levies); (c) with the levy amounts greater for later sales than earlier sales (i.e., back-loaded); and (d) with interest accruing at rates below what the market would demand for the assumption of similar risk." According to the United States, "each and every LA/MSF contract has featured these core characteristics". (*Ibid.*, para. 7.501)

<sup>1784</sup>Panel Report, para. 7.580.

<sup>1785</sup>Panel Report, para. 7.580.

<sup>1786</sup>United States' other appellant's submission, paras. 82 and 83(e).

<sup>1787</sup>United States' other appellant's submission, para. 61.

<sup>1788</sup>United States' other appellant's submission, para. 60.

United States, the Panel's factual findings, viewed in the light of the Appellate Body's analysis in *US – Continued Zeroing*, demonstrate the existence of the LA/MSF Programme "as a measure subject to challenge in WTO dispute settlement proceedings".<sup>1789</sup> The United States further contends that the Panel's findings and analysis, regarding the cumulative effect of each individual instance of LA/MSF, provide the factual and legal basis for the Appellate Body to find that the LA/MSF Programme "caused serious prejudice to the interests of the United States in the form of displacement of United States' LCA from the EC and certain third country markets and the significant lost sales during the period 2001-2006 found by the Panel with respect to individual instances of {LA/MSF}".<sup>1790</sup>

782. By contrast, the European Union supports the Panel's finding that the United States failed to establish the existence of the alleged LA/MSF Programme. The European Union argues that, *inter alia*, the United States has now changed the description of the measure it challenges on appeal, simply combining into a single measure all instances of past LA/MSF loans. Under the United States' approach, the European Union argues, "the whole is *not* greater than the sum of its constituent parts."<sup>1791</sup> The European Union adds that, while it asserts that the alleged LA/MSF Programme is a "broader scheme" than, and "separate from", the individual instances of LA/MSF loans, "the United States fails to cite to any evidence other than that relating to the individual MSF loans for the proposition that the alleged programme constitutes a subsidy and causes adverse effects."<sup>1792</sup> The European Union also emphasizes that the present challenge against the alleged LA/MSF Programme is "markedly different than a challenge that the United States could have attempted to lodge, but did not—i.e., an 'as such' challenge to an MSF programme, as a whole, where the programme was demonstrated to satisfy the characteristics of an ongoing programme."<sup>1793</sup>

783. Even if the Appellate Body were to complete the analysis pursuant to the legal framework set out in *US – Continued Zeroing*, the European Union argues that the alleged LA/MSF Programme does not involve conduct that can be attributed to France, Germany, Spain, and the United Kingdom. Nor is there a clear definition of what the conduct entails. In this regard, the European Union refers to the Panel's finding, that the "vast majority of terms and conditions" in each LA/MSF contract are "different", to argue that the "four core terms" that the United States alludes to "are neither very specific, nor well defined, nor monolithic or automatic as was the zeroing methodology at issue in *US – Continued Zeroing*."<sup>1794</sup> Rather, according to the European Union, such "core terms" "constitute

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<sup>1789</sup>United States' other appellant's submission, para. 64.

<sup>1790</sup>United States' other appellant's submission, para. 81.

<sup>1791</sup>European Union's appellee's submission, para. 209. (original emphasis)

<sup>1792</sup>European Union's appellee's submission, footnote 233 to para. 209.

<sup>1793</sup>European Union's appellee's submission, para. 210.

<sup>1794</sup>European Union's appellee's submission, para. 303 (referring to Panel Report, para. 7.525).

generic descriptions of features in a financing agreement, and mask the significant differences between the various, individually negotiated MSF loans that the Panel pointed out in its factual findings".<sup>1795</sup>

## 2. Analysis

784. Before turning to the specific issues raised on appeal, we review, briefly, the applicable rules governing a panel's terms of reference.

785. Article 6.2 of the DSU provides, in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

786. As discussed above, two requirements under Article 6.2 of the DSU are central to establishing a panel's jurisdiction—namely the identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint. Together, specific measures and claims comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.<sup>1796</sup> The panel request thus functions to establish and delimit the jurisdiction of the panel in a dispute and it serves the due process objective of notifying the respondent and third parties of the nature of the dispute. The clear identification of the specific measures in the panel request is therefore central to define the scope of the dispute to be addressed by a panel.

787. In considering whether the United States' request for the establishment of a panel identified an LA/MSF Programme as a "specific measure at issue", we first recall that the requirements of Article 6.2 must be established on the basis of the language in the panel request, read "as a whole".<sup>1797</sup> A party's subsequent submissions during the panel proceedings cannot cure a defect in a panel request.<sup>1798</sup> Rather, the panel's terms of reference must be objectively determined on the basis of the

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<sup>1795</sup>European Union's appellee's submission, para. 303.

<sup>1796</sup>See Appellate Body Report, *Guatemala – Cement I*, paras. 72 and 73; Appellate Body Report, *US – Carbon Steel*, para. 125; Appellate Body Report, *US – Continued Zeroing*, para. 160; and Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107.

<sup>1797</sup>See Appellate Body Report, *US – Carbon Steel*, para. 127; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; Appellate Body Report, *US – Continued Zeroing*, para. 161; and Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>1798</sup>See Appellate Body Report, *EC – Bananas III*, para. 143; and Appellate Body Report, *US – Carbon Steel*, para. 127.



panel request as it existed at the time of the filing. With these principles in mind, we turn to review the United States' panel request.<sup>1799</sup>

788. With respect to the measures at issue, the panel request reads, in relevant part:

(1) The provision by the member States of financing for large civil aircraft design and development to the Airbus companies<sup>1</sup> (hereinafter "launch aid").<sup>2</sup> This financing provides benefits to the recipient companies including financing for projects that would otherwise not be commercially feasible. The non-commercial terms of the financing may include no interest or interest at below-market rates and a repayment obligation that is tied to sales. If the aircraft is not successful, some or all of the financing need not be repaid. Specific examples of the financing at issue include:

(a) French financing for the Airbus A300, A310, A320, A330/340, A330-200, A340-500/600, A380, and A350;

(b) German financing for the Airbus A300, A310, A320, A330/340, A380, and A350;

(c) United Kingdom financing for the Airbus A300, A310, A320, A330/340, A340-500/600, A380, and A350; and

(d) Spanish financing for the Airbus A300, A310, A320, A330/340, A340-500/600, A380, and A350.

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<sup>1</sup>The Airbus companies, as referenced throughout this request, include Airbus SAS, its predecessor Airbus GIE and current and predecessor affiliated companies, including each person or entity that directly, or indirectly through one or more intermediaries or relationships, controls or controlled, is or was controlled by, or is or was under common control with Airbus SAS or Airbus GIE, such as parent companies, sibling companies and subsidiaries, including Airbus Deutschland GmbH, Airbus España SL, Airbus France S.A.S., Airbus UK Limited, European Defence and Space Company ("EADS"), and BAE Systems.

<sup>2</sup>The EC and the member States use different terms to describe the type of financing at issue, such as launch aid, launch investment, avances remboursables, Rückzahlbare Zuwendungen, Entwicklungsbeihilfen, Zuschüsse zur Entwicklung von zivilen Flugzeugen, anticipo reembolsable, and prestamo reembolsable. Although the United States will hereinafter refer to the financing as "launch aid," the U.S. request is with respect to all such types of financing, regardless of the specific term or terms that the entity providing the financing uses.

789. The United States' panel request expressly refers to the "provision by the member States of financing for large civil aircraft design and development to the Airbus companies" and describes this financing as "launch aid". In addition, it states that the "EC and the member States use different terms to describe the type of financing at issue", and specifies that the United States' complaint is "with

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<sup>1799</sup>WT/DS316/2.

respect to all such types of financing, regardless of the specific term or terms that the entity providing the financing uses." The request goes on to list specific "examples of the financing at issue".

790. It is uncontested that these references in the United States' panel request can be read to refer to individual provisions of LA/MSF. However, we do not believe the same references can be read simultaneously to refer to a *distinct* measure, consisting of an unwritten LA/MSF Programme or indeed "a concerted and coherent approach ... designed to contribute to the long-term competitiveness of Airbus".<sup>1800</sup> It is well established that, where a panel request fails to identify a particular measure or fails to specify a particular claim, such a measure or claim will not form part of the matter covered by the panel's terms of reference.<sup>1801</sup> Moreover, as noted above, a complainant's submission during the panel proceedings cannot cure a defect in a panel request.<sup>1802</sup>

791. Although the European Union did not raise procedural objections, under Article 6.2 of the DSU, against the United States' challenge to an unwritten LA/MSF Programme before the Panel or in its appellee's submission, "certain issues going to the *jurisdiction* of a panel are so fundamental that they may be considered at any stage in a proceeding."<sup>1803</sup> In this case, we have deemed it necessary to consider these issues on our own motion.

792. When a challenge is brought against an *unwritten measure*, the very existence and the precise contours of the alleged measure may be uncertain. We would therefore expect complaining parties to identify such measures in their panel requests as clearly as possible. We would also expect that complaining parties state unambiguously the legal basis for the allegation that those measures are not consistent with particular provisions of the covered agreements. Panel requests should give respondents and third parties sufficient notice of the specific measures that the complainant intends to challenge in WTO dispute settlement proceedings.

793. The United States' failure to identify clearly the alleged unwritten LA/MSF Programme in its panel request appears to have had implications on the Panel's ability properly to understand the substance of the United States' challenge. As the Panel found, the United States initially argued that "the evidence before the Panel clearly demonstrated that the unwritten measure it was challenging unavoidably necessitated certain future conduct"<sup>1804</sup> and characterized the alleged LA/MSF

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<sup>1800</sup>United States' other appellant's submission, para. 70.

<sup>1801</sup>See Appellate Body Report, *Australia – Apples*, para. 416.

<sup>1802</sup>See Appellate Body Report, *EC – Bananas III*, para. 143; and Appellate Body Report, *US – Carbon Steel*, para. 127.

<sup>1803</sup>See Appellate Body Report, *US – Carbon Steel*, para. 123. (original emphasis)

<sup>1804</sup>Panel Report, para. 6.95.

Programme as a measure that has "normative value".<sup>1805</sup> Subsequently, the United States clarified that it was not challenging the alleged LA/MSF Programme "as such", explaining that the focus of its claim was not "on something about a measure that mandates or necessarily results in a breach each time the measure is applied, which is the essence of an 'as such' claim".<sup>1806</sup> In the United States' view, it is not necessary to show that the challenged measure possessed "normative value" in order to show it existed as a "measure".<sup>1807</sup> On appeal, the United States argues that the provision of LA/MSF "reflected a concerted and coherent approach—that is, a 'program' or 'ongoing conduct'—designed to contribute to the long-term competitiveness of Airbus in the only way possible: through the production of a *range* of aircraft covering the varying needs of LCA customers and with commonality of features to retain those customers."<sup>1808</sup> According to the United States, "each individual grant of {LA/MSF} effectuated the broader scheme that the Airbus governments maintain to ensure that at least one of the world's LCA producers will be European."<sup>1809</sup> The United States further describes the measure it was challenging as "a repeated course of action by responding Members".<sup>1810</sup> At the oral hearing, the United States added that there could be different implementation actions that might have to be taken by the European Union in respect of a recommendation directed at such a measure.

794. The Appellate Body has addressed, in several cases, the scope of "measures" that may properly form the subject of WTO dispute settlement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body found that, "in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."<sup>1811</sup> The scope of measures that can be challenged in WTO dispute settlement is therefore broad. As a general proposition, we do not exclude the possibility that concerted action or practice could be susceptible to challenge in WTO dispute settlement. Nor do we consider that a complainant would necessarily be required to demonstrate the existence of a rule or norm of general and prospective application in order to show that such a measure exists. In the present case, however, we are unable to discern in the United States' panel request a challenge to an alleged LA/MSF Programme as a specific measure

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<sup>1805</sup>Panel Report, para. 6.95.

<sup>1806</sup>Panel Report, para. 7.513 (quoting United States' oral statement at the second Panel meeting, para. 37).

<sup>1807</sup>Panel Report, para. 6.95.

<sup>1808</sup>United States' other appellant's submission, para. 70. (original emphasis)

<sup>1809</sup>United States' other appellant's submission, para. 71.

<sup>1810</sup>United States' other appellant's submission, para. 71.

<sup>1811</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81. See also Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67.

"separate from the individual instances of {LA/MSF}"<sup>1812</sup>, and, as noted, a complainant's subsequent submissions during panel proceedings cannot cure such a defect in a panel request.<sup>1813</sup>

795. In the light of the above, we *find* that the alleged LA/MSF Programme was not within the Panel's terms of reference because it was not identified in the request for the establishment of a panel, as required by Article 6.2 of the DSU.

796. Having found that the alleged unwritten LA/MSF Programme was not within the Panel's terms of reference, we have no basis further to consider the arguments raised by the participants regarding the alleged LA/MSF Programme. Nor do we have a basis further to examine the Panel's finding that no such scheme or programme exists.<sup>1814</sup> Accordingly, we declare moot and of no legal effect the Panel's finding, in paragraphs 7.579, 7.580, and 8.3(a)(iv) of the Panel Report, that the United States failed to establish the existence of an unwritten LA/MSF Programme measure constituting a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*.

#### B. *LA/MSF Benefit*

797. We turn now to the European Union's appeal of the Panel's findings concerning the assessment of whether the challenged LA/MSF measures confer a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*. The Panel's findings are summarized in subsection 1. This is followed in subsection 2 by a brief description of the LA/MSF measures before we proceed, in subsection 3, to review the Panel's assessment of whether those measures confer a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*. Finally, subsection 4 deals with a residual issue concerning the Panel's statement that "the number of sales over which full repayment is expected says little, if anything, about the appropriateness of the rate of return that will be achieved by that lender".<sup>1815</sup>

##### 1. The Panel's Findings

798. Before the Panel, the United States argued that "each of the 'financial contributions' made available through the challenged LA/MSF measures confers a 'benefit' on Airbus, within the meaning of Article 1.1(b) of the *SCM Agreement*, because each was provided on interest rate terms that are

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<sup>1812</sup>United States' other appellant's submission, para. 71.

<sup>1813</sup>Appellate Body Report, *EC – Bananas III*, para. 143; Appellate Body Report, *US – Carbon Steel*, para. 127.

<sup>1814</sup>Panel Report, paras. 7.576-7.580.

<sup>1815</sup>Panel Report, para. 7.397.

more advantageous than would otherwise be the case if financing on the same or similar terms and conditions had been sought by Airbus from a market lender."<sup>1816</sup>

799. The European Communities made several arguments in response. First, the European Communities asserted that Article 4 of the 1992 Agreement sets out the appropriate benchmark to determine whether LA/MSF granted after 1992 conferred a "benefit" to Airbus. The Panel noted that, "{a}lthough the European Communities argues that Article 4 serves as relevant context for the *interpretation* of the notion of 'benefit', it has not explained exactly how it informs the *meaning* that must be given to this term."<sup>1817</sup> The Panel further explained that Article 4 of the 1992 Agreement "contains no definition of a 'subsidy' nor does it make any reference to the notion of 'benefit'" and, consequently, the Panel did not see anything "in the language of Article 4 to suggest that it informs the meaning of Article 1.1(b) of the SCM Agreement."<sup>1818</sup> Therefore, the Panel concluded that "even assuming that the 1992 Agreement were an instrument containing relevant rules of international law applicable between the parties, within the meaning of Article 31(3)(c) of the {*Vienna Convention*} (... we emphasize that on this question, we express no view), we are not convinced that Article 4 of that Agreement provides any guidance on how to interpret the concept of 'benefit' under Article 1.1(b) of the SCM Agreement."<sup>1819</sup>

800. Next, the Panel addressed the European Communities' argument that "the 'decisive factor' for determining whether LA/MSF measures ... confer a benefit is the reasonableness of the repayment forecasts."<sup>1820</sup> The Panel first considered the relevance of footnote 16 of the *SCM Agreement*. Footnote 16 is attached to subparagraph (d) of Article 6.1, which states that serious prejudice shall be deemed to exist in the case of direct forgiveness of debt, that is, forgiveness of government-held debt, and grants to cover debt repayment. Footnote 16 clarifies that "Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph."

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<sup>1816</sup>Panel Report, para. 7.383.

<sup>1817</sup>Panel Report, para. 7.388. (original emphasis)

<sup>1818</sup>Panel Report, para. 7.389.

<sup>1819</sup>Panel Report, para. 7.389. (footnote omitted)

<sup>1820</sup>Panel Report, para. 7.390. The European Communities had initially advanced this argument in respect of only the LA/MSF measures for the A330-200, A340-500/600, and the A380, but subsequently declared that it could be of equal relevance to certain pre-1995 LA/MSF measures (specifically, the A320 and A330/A340 contracts) if the Panel were to reject its specific defences advanced in relation to these measures based on the temporal scope of the *SCM Agreement* and the relevance of the *Tokyo Round Subsidies Code*. Because the Panel had dismissed these two defences, the Panel said that its evaluation should be understood as addressing the European Communities' arguments as they relate to all of these measures, namely LA/MSF for the A320, A330/A340, A330-200, A340-500/600, and the A380. (*Ibid.*)

801. The Panel observed that, "[t]o the extent that the effect of footnote 16 is expressly limited to the purposes of Article 6.1(d)—that is, determining whether direct debt forgiveness can be deemed to cause serious prejudice—it is clear that it was not intended to inform the meaning of 'benefit' under Article 1.1(b)."<sup>1821</sup> The Panel then analyzed whether a reasonableness benchmark would be appropriate irrespective of the legal relevance of footnote 16. In this regard, the Panel stated:

In our view, a reasonable repayment forecast, in the terms advanced by the European Communities—i.e., a reasonable number of sales over which a market lender could expect full repayment of loaned principal plus interest—cannot alone be determinative of whether a royalty-based financing instrument (in this case LA/MSF) confers a benefit for the purpose of the SCM Agreement. While we can accept that an *unreasonable* repayment forecast may signal that a loan confers a benefit, we do not believe the opposite will necessarily be the case when LA/MSF is grounded on a reasonable repayment forecast. This is because the number of sales over which full repayment is expected says little, if anything, about the appropriateness of the rate of return that will be achieved by the lender.<sup>1822</sup> (original emphasis; footnotes omitted)

802. Having rejected the "reasonableness" benchmark proposed by the European Communities, the Panel laid out its own views as to what it considered to be the proper benchmark under Article 1.1(b) of the *SCM Agreement*:

Bearing in mind that it is now well established that the question of benefit under Article 1.1(b) of the SCM Agreement should be resolved by comparing the situation of the recipient of a financial contribution with and without that contribution, we believe that it makes sense to focus the assessment of whether LA/MSF confers a benefit on whether the rate of return of the challenged measures is lower than the rate of return that would be sought by a market lender for financing on the same or similar terms and conditions, taking into account a comparable schedule of repayment.<sup>1823</sup> (footnote omitted)

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<sup>1821</sup>Panel Report, para. 7.396.

<sup>1822</sup>Panel Report, para. 7.397. We note that the Panel used the term "royalties" in two different ways. In the broader sense, it refers generally to payments to the member State governments under the LA/MSF measures. This is the way the term is used in the 1992 Agreement. However, the Panel here seems to be using it in a narrower sense to refer to payments made to the member State governments after the LA/MSF has been fully repaid.

<sup>1823</sup>Panel Report, para. 7.398.

803. Before proceeding to make the comparison, the Panel addressed the European Communities' argument that "reliance on a 'perfect market' benchmark ... would be inappropriate because of the heavy government intervention and international regulation it alleges is found in the LCA industry".<sup>1824</sup> The Panel rejected the European Communities' argument because the European Communities "provided no evidence or explanation of how alleged government intervention in the LCA industry distorts the behaviour of market lenders such that it renders the rate of return they would ask for financing comparable to LA/MSF an inappropriate benchmark upon which to base a benefit analysis."<sup>1825</sup> The Panel further explained:

While we recognize that the LCA industry has particular features that set it apart from many other industrial sectors, in the absence of clear arguments and evidence of government action distorting non-governmental loan markets, we cannot accept the European Communities' assertion that the "reasonableness of repayment forecasts" used to construct LA/MSF contracts is the "decisive factor" for determining whether a LA/MSF contract confers a benefit and constitutes a subsidy under the SCM Agreement.<sup>1826</sup> (footnotes omitted)

804. The Panel turned to the first element of the comparison, that is, the calculation of the LA/MSF rates of return. The United States and the European Communities submitted their own calculations of the rates of return of the LA/MSF measures. The Panel opted to proceed on the basis of the methodology used by the European Communities, because the United States did not seem to contest this methodology in general:

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<sup>1824</sup>Panel Report, para. 7.399. (footnote omitted) The European Communities submitted that its position was supported by certain observations made by the Appellate Body in *US – Countervailing Measures on Certain EC Products*, which the European Communities argued stands for the proposition that "fair" market transactions may not always be the most appropriate benchmarks for the purpose of establishing the existence of subsidies under the *SCM Agreement*, particularly where the market for those transactions has been distorted by government action. The Panel observed that the "core legal question" before the panel in *US – Countervailing Measures on Certain EC Products* was whether the benefit resulting from a prior non-recurring financial contribution bestowed on a state-owned enterprise continued to exist following its privatization at arm's length and at fair market value, the government having transferred all or substantially all property and controlling interest. In the light of this "very narrow set of facts and circumstances", the Panel did not consider it apparent that the guidance of the Appellate Body, upon which the European Communities relied, "is as directly relevant to the question we are faced with under the present set of arguments (i.e., whether the rate of return for comparable market financing is an appropriate benchmark for determining whether LA/MSF confers a benefit) as the European Communities contends". (*Ibid.*, para. 7.399 and footnote 2513 thereto (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 117, 123, and 124))

<sup>1825</sup>Panel Report, para. 7.400.

<sup>1826</sup>Panel Report, para. 7.400.

Although the United States contests the European Communities' view that the rates of return by member States from each of the challenged LA/MSF measures must be determined taking into account the IRR{—internal rate of return—<sup>1827</sup>} for each LA/MSF contract, we do not understand the United States to contest the general NPV{—net present value—} of cash-flows methodology applied by the European Communities to determine these IRRs. Indeed, where it had access to information on LA/MSF disbursements and repayments, the United States appears to have relied upon a similar methodology to derive the values of the interest rates it submits were actually charged by the EC member States for LA/MSF.<sup>1828</sup> (original footnotes omitted)

The Panel noted, however, that the United States contested two aspects of the European Communities' calculation: (i) the reliance on projected aircraft deliveries, as opposed to actual deliveries, in order to establish the amount and timing of LA/MSF repayments; and (ii) the inclusion of royalty payments in the calculation.<sup>1829</sup>

805. Regarding the use of projections, the Panel observed:

To the extent that the IRRs determined by the European Communities are based on the number, timing and (for some contracts) the forecast prices of deliveries projected in the relevant Airbus business case, they are entirely dependent upon the credibility of the Airbus business plan, and therefore inherently contain an element of speculation. Thus, as the United States appears to note, the IRRs calculated by the European Communities do not result from an absolute legal obligation on Airbus to make repayments over a set period of time at a given interest rate. Rather, they are based on a repayment obligation that is conditional upon Airbus' business plan actually being met.<sup>1830</sup> (footnote omitted)

806. Turning to the issue of royalties, the Panel stated that "the fact that such payments were expressly provided for in these contracts indicates that the EC member State governments to some degree anticipated they could enhance the rate of return that would otherwise be achieved on their LA/MSF investment."<sup>1831</sup> At the same time, the Panel noted that "exactly how much the EC member State governments expected their returns to improve depends upon the number and timing of aircraft

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<sup>1827</sup>The "internal rate of return" ("IRR") is the "rate of interest which you would have to use in discounting the flow over time of net revenue generated by an investment such that the present value of the net revenue flows is equal to the capital sum invested. The internal rate of return, therefore, is the discount rate at which the net present value of a project is zero." (*Dictionary of Economics*, G. Bannock, R.E. Baxter, E. Davis (eds) (Profile Books Ltd, 1999), p. 214)

<sup>1828</sup>Panel Report, para. 7.407.

<sup>1829</sup>Panel Report, para. 7.407. (footnote omitted)

<sup>1830</sup>Panel Report, para. 7.408.

<sup>1831</sup>Panel Report, para. 7.410.



deliveries they anticipated would attract the specified royalty payments."<sup>1832</sup> Therefore, the Panel concluded that "the IRRs established by the European Communities, taking royalty payments into account, could only represent, at most, the outer limit of what the EC member State governments could have reasonably expected at the time of concluding the contracts."<sup>1833</sup>

807. The Panel, however, rejected the internal rates of return ("IRR"s) calculated by the European Communities for the French A330/A340 contract and the Spanish A340-500/600 contract. The Panel rejected the European Communities' IRR for the French A330/A340 contract because it had been calculated on the basis of provisional repayment terms.<sup>1834</sup> In particular, the Panel noted that the "schedule of repayment that was finally agreed involved an initial repayment levy that was about 50% lower than the one used by the European Communities in its calculations."<sup>1835</sup> As for the Spanish A340-500/600 contract, the Panel rejected the IRR submitted by the European Communities because it had not been calculated "by identifying the IRR that set the NPV of anticipated LA/MSF inflows and outflows at zero, but rather it was calculated on the basis of an interest rate formula which the European Communities asserts was applied in the contract".<sup>1836</sup>

808. The European Communities also argued that the effects of taxation on LA/MSF contributions and repayments should be taken into account in calculating the IRR of the measures preceding the A380, because the member States classified LA/MSF as taxable income.<sup>1837</sup> The Panel declined to consider the effects of taxation for three reasons. First, it noted that "there is little, if any, evidence" demonstrating that "the EC member State governments (and Airbus) knew at the time they entered into the LA/MSF contracts that part of the disbursed principal would be returned to the governments through taxation, thereby effectively diminishing the amount of funds available to Airbus."<sup>1838</sup> Second, the Panel did not consider that the European Communities "substantiated its assertion that the relevant tax rates were applied directly to the *amounts of LA/MSF at issue*, and that Airbus made a corresponding tax payment."<sup>1839</sup> Third, the Panel stated that "there is no basis in the SCM Agreement

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<sup>1832</sup>Panel Report, para. 7.410. The Panel explained that, "although ostensibly required by the terms of the LA/MSF agreements, royalty payments may never be made if attached to a number of aircraft sales, which although identified in the business plan that formed the basis of the parties' expectations on concluding the LA/MSF contracts, cannot realistically ever be achieved." (*Ibid.*, para. 7.412 (footnote omitted))

<sup>1833</sup>Panel Report, para. 7.414.

<sup>1834</sup>Panel Report, para. 7.422.

<sup>1835</sup>Panel Report, para. 7.422.

<sup>1836</sup>Panel Report, para. 7.423.

<sup>1837</sup>Panel Report, para. 7.425.

<sup>1838</sup>Panel Report, para. 7.427.

<sup>1839</sup>Panel Report, para. 7.428. (original emphasis) The European Communities provided the taxation rates allegedly applied in the relevant member States at the time of the relevant contracts and a statement from an Airbus executive responsible for taxation matters confirming that Airbus paid all corporate taxes "that were due" in the relevant tax periods. (*Ibid.*)

to support the view that the amount of a financial contribution may be reduced for any tax payments made to the government on income generated from economic activity that is facilitated by that financial contribution."<sup>1840</sup> Consequently, the Panel rejected the "tax-adjusted 'implicit rates of return' determined by the European Communities".<sup>1841</sup>

809. In Table 5 at paragraph 7.431 of the Panel Report, the Panel set out the LA/MSF rates it would consider in the remainder of its analysis and which it believed could serve as "reasonable proxies for the *maximum* rates of return that the EC member State governments could have reasonably anticipated when entering into the LA/MSF agreements".<sup>1842</sup>

810. Having determined the rates of return of the LA/MSF measures, the Panel turned to the other element of the comparison, that is, the rates of return of comparable market-based financing. The Panel noted that both parties had submitted their own estimates of the rates of return they considered that a market lender would have required. The United States submitted that comparable rate of return could be constructed on the basis of the following three elements: "(i) ten-year long-term government borrowing rates (representing the general risk-free cost of capital); (ii) ten-year company-specific general borrowing rates (representing the general level of risk associated with lending to Airbus); and (iii) a project-specific risk premium (representing the risk profile of LCA development and the features of LA/MSF)".<sup>1843</sup>

811. The European Communities put forward its own project-specific risk premium. According to the Panel, the European Communities did not reject the United States' "construction of the proposed interest rate benchmarks" and applied "the same general government and corporate borrowing rates used in the United States' calculations when deriving its own proposed market-based rates of return."<sup>1844</sup> However, the European Communities disagreed with the project-specific risk premium proposed by the United States, arguing that "it is overstated because ... it is based on the returns that would be expected from equity-based financing".<sup>1845</sup> As an alternative, the European Communities proposed that the project-specific risk premium be based on the returns expected by risk-sharing suppliers participating in the A380 project, which it considered more appropriate because "it more closely reflects the debt-like characteristics of LA/MSF".<sup>1846</sup>

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<sup>1840</sup>Panel Report, para. 7.429.

<sup>1841</sup>Panel Report, para. 7.430.

<sup>1842</sup>Panel Report, para. 7.431. (original emphasis)

<sup>1843</sup>Panel Report, para. 7.432. (footnote omitted)

<sup>1844</sup>Panel Report, para. 7.433. (footnote omitted)

<sup>1845</sup>Panel Report, para. 7.433.

<sup>1846</sup>Panel Report, para. 7.433.

812. After analyzing the calculations made by the United States and the European Communities, and the opinions given by their respective experts, the Panel found that the United States "probably overstates the appropriate level of project-specific risk that may be reasonably associated with LA/MSF provided for at least a number of the challenged Airbus LCA projects".<sup>1847</sup> The Panel gave the following reasons for considering that the project-specific risk premium proposed by the United States overestimates the level of risk: (i) while LA/MSF is unsecured and success-dependent, the level of risk associated with venture capital financing is typically higher; (ii) venture capital is usually provided to firms that are typically "small and young, plagued with high levels of uncertainty", while Airbus has developed into a "relatively large firm with over 30 years experience, substantial capital assets and revenue and a track record of successful LCA development"; (iii) it was unclear that the figure of 700 basis points "captures only the risk associated with venture capital"; and (iv) it was not persuaded that the same risk premium should apply to all models of LCA developed by Airbus.<sup>1848</sup>

813. At the same time, the Panel found that the European Communities "under-estimates the appropriate level of project-specific risk that may be reasonably associated with LA/MSF for all of the challenged measures."<sup>1849</sup> The reasons given by the Panel for finding that the project-specific risk premium proposed by the European Communities underestimated the level of risk were: (i) the risk premium was calculated using a small sample of risk-sharing suppliers; (ii) the European Communities did not provide sufficient information; (iii) one risk-sharing supplier contract showed major difference in repayment terms compared to LA/MSF contracts; (iv) the risk-sharing suppliers had incentives to lower their expected rates of return; (v) LA/MSF reduced the level of risk associated with risk-sharing supplier financing; and (vi) risk-sharing suppliers may have themselves been subsidized.

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<sup>1847</sup> Panel Report, para. 7.461.

<sup>1848</sup> Panel Report, paras. 7.463 and 7.464.

<sup>1849</sup> Panel Report, para. 7.479.

814. As regards the A300 and A310, the Panel summarized its findings as follows:

{A}s far as the cost of market financing comparable to LA/MSF is concerned, we have found that neither of the proposals made by the parties on the appropriate project-specific risk premium can be reasonably applied as the perfect standard against which to measure whether all of the challenged LA/MSF contracts confer a benefit. Starting with LA/MSF provided for the A300 and A310, we have found that the project-specific risk premium advanced by the United States represents a reasonable proxy for the *minimum* project-specific risk premium that it would be appropriate to associate with market financing comparable to LA/MSF. We recall that the European Communities has not advanced any alternative project-specific risk premium for these Airbus LCA models. It follows that the appropriate market interest rate for determining whether the French, German and Spanish government LA/MSF contracts for these Airbus LCA models confer a benefit is the market interest rate benchmark advanced by the United States, which we view as representing a reasonable estimate of the lowest interest rate that a commercial lender would have demanded in return for financing the same LCA projects on comparable terms and conditions to LA/MSF.<sup>1850</sup> (original emphasis)

815. In connection with the A320, A330/A340, A330-200, and A340-500/600 LCA projects, the Panel found:

In terms of the models of LCA developed between the A310 and the A380, our findings on the appropriate project-specific risk premium lead us to conclude that the most appropriate market interest rate benchmarks against which to measure whether the challenged LA/MSF measures conferred a benefit lie in the range of interest rates advanced by both of the parties—that is, above the interest rate benchmarks proposed by the European Communities but below the benchmark levels submitted by the United States.<sup>1851</sup>

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<sup>1850</sup>Panel Report, para. 7.485.

<sup>1851</sup>Panel Report, para. 7.486.

816. And with respect to the A380, the Panel concluded:

Finally, we recall that we have found the United States' project-specific risk premium for the A380 could be reasonably accepted to represent the outer limit of the risk premium that a market lender would ask Airbus to pay for financing comparable with LA/MSF; whereas, we consider the project-specific risk premium advanced by the European Communities to understate the appropriate level of risk associated with financing such a project on terms and conditions comparable with LA/MSF. Accordingly, we find that the most appropriate market interest rate benchmarks against which to measure whether the challenged A380 LA/MSF contracts conferred a benefit lie in the range of interest rates above those submitted by the European Communities and up to the values advanced by the United States.<sup>1852</sup>

More detailed information about the project-specific risk premia proposed by the United States and the European Communities, and the Panel's assessment of them, is provided in subsections 3(d) and 3(e) below.

817. The Panel's findings concerning the rates of return of each LA/MSF measure, the comparable market rates of return, and any difference between the two, are summarized in Table 7 (and footnotes 2719-2726 thereto) of the Panel Report, which is reproduced below. The Panel noted that some of the LA/MSF was provided at no interest cost, while the same financing could have been obtained from the market only at positive rates of interest.<sup>1853</sup> Accordingly, the Panel found that that "the financial contributions made available through the A300 and A310 agreements, and the Spanish A320 and A330/A340 contracts, conferred a benefit upon Airbus and therefore constitute subsidies within the meaning of Article 1.1 of the SCM Agreement."<sup>1854</sup> The Panel arrived at the same conclusion with respect to the other LA/MSF measures<sup>1855</sup>, explaining that "even relying on the European Communities' own estimates of the rates of return and market interest rate benchmarks, it is clear that the financial contributions provided in the form of LA/MSF conferred a benefit on Airbus."<sup>1856</sup>

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<sup>1852</sup>Panel Report, para. 7.487.

<sup>1853</sup>Panel Report, para. 7.489. The Panel did not consider it necessary to decide whether the United States was correct in arguing that a contribution at a zero rate of interest necessarily confers a benefit. The Panel did state that a situation where market-based financing would be provided at zero interest would be "extraordinary" and "highly unlikely". (*Ibid.*, footnote 2728)

<sup>1854</sup>Panel Report, para. 7.489.

<sup>1855</sup>The measures are: the French LA/MSF for the A330/A340, A330-200, A340-500/600, and A380; the German LA/MSF for the A320, A330/A340, and A380; the Spanish LA/MSF for the A340-500/600 and A380; and the UK LA/MSF for the A320, A330/A340, and A380.

<sup>1856</sup>Panel Report, para. 7.490. (footnote omitted) The Panel added that the same result would have been obtained had it not rejected the taxation-adjusted LA/MSF rates of return advanced by the European Communities, with the exception of the French A330-200 contract.

**Panel Table 7 – LA/MSF Rates of Return Compared with Market Rates of Return**

	LA/MSF Contract	LA/MSF Rate of Return <sup>2719</sup>	Market Rate of Return <sup>2720</sup>	Differential
FRANCE	A300	0%	at least 16.52%	at least 16.52%
	A310	0%	at least 18.88%	at least 18.88%
	A320	[***%]	above 13.49% <sup>2721</sup> but less than 20.49%	more than [***%] + [[HSBI]] <sup>2722</sup> but less than [***%]
	A330/A340	[[HSBI]]	above 10.86% <sup>2722</sup> but less than 17.86%	more than [[HSBI]] <sup>2723</sup> but less than [[HSBI]] <sup>2724</sup>
	A330-200	[***%]	above 9.2% <sup>2722</sup> but less than 17.22%	more than [[HSBI]] <sup>2725</sup> but less than [***%]
	A340-500/600	[***%]	above 7.47% <sup>2722</sup> but less than 14.47%	more than [***%] + [[HSBI]] <sup>2723</sup> but less than [***%]
	A380	[***%]	more than 6.89% <sup>2722</sup> and up to 13.89%	from ([***] + [[HSBI]] <sup>2723</sup> ) to [***%]
GERMANY	A300	0%	at least 15.18%	at least 15.18%
	A310	0%	at least 13.99%	at least 13.99%
	A320	[***%]	more than 8.95% <sup>2722</sup> but less than 15.95%	more than ([***%] + [[HSBI]] <sup>2723</sup> ) but less than [***%]
	A330/A340	[***%]	more than 7.52% <sup>2722</sup> but less than 14.52%	more than ([***%] + [[HSBI]] <sup>2723</sup> ) but less than [***%]
	A380	[***%]	more than 6.75% <sup>2722</sup> and up to 13.75%	from ([***] + [[HSBI]] <sup>2723</sup> ) to [***%]
SPAIN	A300	0%	at least 16.60%	at least 16.60%
	A310	0%	at least 18.88%	at least 18.88%
	A320	[***%]	more than 17.52% <sup>2722</sup> but less than 24.52%	more than ([***%] + [[HSBI]] <sup>2723</sup> ) but less than [***%]
	A330/A340	[***%]	more than 14.19% <sup>2722</sup> but less than 21.19%	more than ([***%] + [[HSBI]] <sup>2723</sup> ) but less than [***%]
	A340-500/600	[***%]	more than 8.29% <sup>2722</sup> but less than 15.29%	more than ([***%] + [[HSBI]] <sup>2723</sup> ) but less than [***%]
	A380	[***%]	more than 7.07% <sup>2722</sup> and up to 14.07%	from ([***%] + [[HSBI]] <sup>2723</sup> ) to [***%]
UK	A320	[***%]	more than 12.59% <sup>2722</sup> but less than 19.59%	more than ([***%] + [[HSBI]] <sup>2723</sup> ) but less than [***%]
	A330/A340	[***%]	more than 10.97% <sup>2722</sup> but less than 17.97%	more than ([***%] + [[HSBI]] <sup>2723</sup> ) but less than [***%]
	A380	[***%]	more than 6.54% <sup>2722</sup> and up to 13.54%	from [[HSBI]] <sup>2726</sup> to [***%]

<sup>2719</sup> See above, Table 5.

<sup>2720</sup> All figures that are not marked with a footnote in this column are sourced from Table 6.

<sup>2721</sup> This figure is intended to represent the market interest rate benchmark proposed by the European Communities. However, because the European Communities has designated its market interest rate benchmarks HSBI, they cannot be revealed in the text of our Report. In order to disclose an approximate measure of the relevant range of market interest rate benchmarks, we have substituted the EC market interest rate benchmark based on HSBI with the "Market based General Corporate Borrowing Rates for the Airbus Companies" identified in Exhibit 6 of the Ellis Report (which we note were relied upon by the European Communities in establishing its benchmarks). See, e.g., Whitelaw Report, Exhibit EC-11 (BCI), para. 40. In all cases, the actual market interest rate benchmark advanced by the European Communities is less than [\*\*\*] of 700 basis points greater than the relevant value taken from the "Market based General Corporate Borrowing Rates for the Airbus Companies" identified in Exhibit 6 of the Ellis Report.

<sup>2722</sup> This HSBI figure is the project-specific risk premium calculated by the European Communities, which can be found in Exhibits 2 and 3 of the Whitelaw Report, Exhibit EC-11 (HSBI).

<sup>2723</sup> 10.86% plus the European Communities' proposed project-specific risk premium, minus the [[HSBI]] rate of return shown in the second column.

<sup>2724</sup> 17.86% minus the [[HSBI]] rate of return shown in the second column.

<sup>2725</sup> 9.2% plus the European Communities' proposed project-specific risk premium, minus [\*\*\*%].

<sup>2726</sup> 6.54% plus the European Communities' proposed project-specific risk premium, minus [\*\*\*%].

818. The Panel next addressed the European Communities' arguments that "the fact that the interest rates associated with the challenged LA/MSF measures might be less than those that would be attached to comparable market-based financing instruments does not automatically imply that they confer a benefit", because "the public policy obligations attached to 'most' of the relevant contracts must also be taken into account."<sup>1857</sup> The Panel dismissed the European Communities' argument.<sup>1858</sup>

First, the Panel found that the European Communities had failed to substantiate its argument:

{E}ven assuming that we were to accept the premise that any public policy obligations contained in the challenged LA/MSF contracts should be taken into account when considering the question of benefit (a premise upon which we make no ruling), we find that the European Communities has failed to adduce sufficient factual arguments to persuade us that it has reasonably substantiated its assertion.<sup>1859</sup> (footnote omitted)

819. Second, the Panel questioned the continued relevance of this argument given that the Panel had already rejected the European Communities' reliance on taxation-adjusted rates of return:

In any case, we note that the European Communities raises the costs of public policy obligations as a factor that may alter the benefit analysis solely in the context of the (tax adjusted) LA/MSF rates of return it has relied upon. Because we have rejected these rates, we question the continued relevance of the European Communities' argument.<sup>1860</sup>

820. Finally, the Panel agreed with the United States that "if our benefit analysis were to take the costs associated with public policy obligations into account, we would also need to consider whether to factor costs that are unique to market-based financing into our determination."<sup>1861</sup>

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<sup>1857</sup> Panel Report, para. 7.491. (footnote omitted)

<sup>1858</sup> Panel Report, para. 7.496.

<sup>1859</sup> Panel Report, para. 7.494. See also United States' first written submission to the Panel, paras. 186-188, 206-210, 229-233, 251, 258, 271, 280, 288, and 297.

<sup>1860</sup> Panel Report, para. 7.495.

<sup>1861</sup> Panel Report, para. 7.495. The United States was referring to bank fees, regulatory and credit agency fees, and costs associated with employees engaged on an ongoing basis in financing-related activities. (See Panel Report, para. 7.492 (referring to United States' response to Panel Question 140; and United States' comments on European Communities' response to Panel Question 170))

2. The Measures at Issue

821. The European Union's appeal concerns the individual instances in which France, Germany, Spain, and the United Kingdom provided LA/MSF for the development of specific types of aircraft by Airbus. These measures are identified in Table 7 of the Panel Report (which was reproduced above), with an indication of the member State providing the LA/MSF and the LCA project for which it was provided.

822. The LA/MSF measures are described in more detail in section IV.C of this Report. For convenience, we recall that the contractual framework of each of the challenged LA/MSF measures usually took one of two forms: (i) general agreements between participating member State governments, implemented at the national level through separate contracts between each participating member State government and the Airbus entity located within its territory; or (ii) individual contracts between each relevant member State government and the Airbus entity located in its territory. Funding for Airbus' first LCA projects (the A300 and A310) was contracted at the intergovernmental level through a series of agreements between participating member State governments.<sup>1862</sup> These agreements expressed the relevant member State's commitment to fund the development of the A300 and A310; they also set out to varying degrees some of the key terms and conditions attached to the provision of financing, such as the schedules for specific amounts of funds to be disbursed and the mode of repayment.<sup>1863</sup> Separate contracts implementing the intergovernmental agreements, in the context of one or more different aspects or phases of the first two Airbus LCA projects, were entered into at the national level between each financing member State government and the Airbus entity located within its territory.<sup>1864</sup> The contractual framework for the A320 and A330/A340 projects contained elements similar to those of the A300 and A310 projects: funding was agreed between the participating governments, and implemented at the national level through specific contracts between each relevant member State government and the Airbus entity located within its territory. No intergovernmental agreements were concluded in the context of the LA/MSF provided by the Governments of France and Spain for the A330-200 and A340-500/600 projects. Nor was such an agreement (expressing a commitment to provide funding) concluded with respect to the A380. Instead, for these projects, the member State governments entered into separate national-level contracts, setting forth various relevant terms and conditions, with the French aerospace manufacturer, Aérospatiale, and the Spanish aerospace manufacturer, CASA (in respect of the A330-200 and A340-500/600 projects) and with Airbus France, Airbus Deutschland GmbH, EADS

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<sup>1862</sup>1969 A300 Agreement (Panel Exhibit US-11); 1971 A300 Agreement (Panel Exhibit EC-992 (BCI)); 1981 A310 Agreement (Panel Exhibit EC-942 (BCI)).

<sup>1863</sup>Panel Report, para. 7.370.

<sup>1864</sup>Panel Report, para. 7.370.



Airbus SL (Spain), BAE Systems (Operations) Ltd, and British Aerospace PLC (in respect of the A380).<sup>1865</sup>

823. The funds provided under the LA/MSF measures are "in many cases ... transferred in advance of actual development costs being incurred, usually on the basis of projected expenditure", in which case the "costs actually incurred may be subsequently audited or reviewed by the governments and the funding amounts adjusted to ensure that total borrowing does not exceed the level of development costs it was agreed would be financed."<sup>1866</sup> In other cases, "disbursements up to the agreed amounts may be made after actual costs have been incurred."<sup>1867</sup>

824. Regarding repayment, the Panel explained that "{i}n almost all cases, Airbus is required to reimburse all funding contributions, plus any interest at the agreed rate, exclusively from revenues generated by deliveries of the LCA model that is financed."<sup>1868</sup> Repayment takes place through "per-aircraft levies and follow a pre-established repayment schedule".<sup>1869</sup> The Panel noted that repayments "{u}sually ... start with the delivery of the first aircraft", but "in some instances, repayment begins only after Airbus has made a specified number of aircraft deliveries."<sup>1870</sup> The Panel further observed that repayment "appears in all cases to be graduated, such that repayment amounts at the beginning of the repayment period are lower than at the end."<sup>1871</sup> It additionally pointed out that in some of the contracts, "royalty payments on a per-aircraft basis are called for on deliveries made in excess of the number needed to secure repayment of the disbursed principal plus any interest."<sup>1872</sup>

825. The Panel described the LA/MSF measures as "unsecured", because "LA/MSF is provided without any guarantee of repayment in the event that Airbus fails to make the number of deliveries needed to reimburse the full amount of financing obtained from the EC member States."<sup>1873</sup> According to the Panel, "the scheduled repayments are not secured by any lien on Airbus assets nor are they guaranteed by any third party."<sup>1874</sup> The Panel observed that the European Communities had asserted "that the governments' claims on revenues generated from the delivery of LCA are, in some cases, guaranteed by one of the companies forming part of the Airbus economic entity."<sup>1875</sup> The

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<sup>1865</sup>Panel Report, paras. 7.370 and 7.371.

<sup>1866</sup>Panel Report, para. 7.373. (footnote omitted)

<sup>1867</sup>Panel Report, para. 7.373. (footnote omitted)

<sup>1868</sup>Panel Report, para. 7.374. (footnote omitted)

<sup>1869</sup>Panel Report, para. 7.374. (footnote omitted)

<sup>1870</sup>Panel Report, para. 7.374. (footnote omitted)

<sup>1871</sup>Panel Report, para. 7.374. (footnote omitted)

<sup>1872</sup>Panel Report, para. 7.374. (footnote omitted)

<sup>1873</sup>Panel Report, para. 7.375. "Unsecured debt" is "{a} debt not supported by collateral or other security". (*Black's Law Dictionary*, 7th edn, B.A. Garner (ed.) (West Group, 1999), p. 411)

<sup>1874</sup>Panel Report, para. 7.375.

<sup>1875</sup>Panel Report, para. 7.375. (footnote omitted)

Panel, however, was not persuaded that this guarantee changed the "unsecured" nature of the measures, observing that "there is no obligation on Airbus (or any company forming part of the Airbus economic entity) to fully (and sometimes even partially) repay LA/MSF in the event that the delivery targets stipulated in the contractual repayment schedules are not achieved."<sup>1876</sup> Consequently, the Panel agreed with the United States "that Airbus' obligation to fully repay the loans provided under the challenged LA/MSF measures is entirely dependent upon the success of the particular LCA project."<sup>1877</sup> The Panel added that "{t}he fact that it is possible, under certain contracts, for Airbus to make voluntary repayments notwithstanding the number of sales achieved, does not, in our view, alter this conclusion."<sup>1878</sup>

826. In laying out its initial complaint, the United States repeatedly characterized the LA/MSF measures as "loans". For example, the United States asserted in its first written submission to the Panel: "All of the Launch Aid that the Airbus governments have provided to Airbus has taken the same form: long-term unsecured *loans* at zero or below-market rates of interest, with back-loaded repayment schedules that allow Airbus to repay the *loans* through a levy on each delivery of the financed aircraft."<sup>1879</sup> Dr. Ellis, the United States' expert, also described the LA/MSF measures as loans in the report in which he developed the benchmark proposed by the United States to determine whether the LA/MSF measures confer a benefit.<sup>1880</sup> The United States, however, departed from this initial characterization after the European Communities' expert criticized the benchmark developed by Dr. Ellis because it was based on returns of equity, and particularly venture capital.<sup>1881</sup> In its second written submission to the Panel, the United States argued that LA/MSF is a "hybrid form of financing" and explained that it "has a number of features that would make it inappropriate to treat it as pure debt."<sup>1882</sup>

827. The Panel acknowledged that "LA/MSF may be considered to have some equity-like qualities, such as the fact that lender governments have no recourse in the event of non-repayment", but observed that "LA/MSF contracts are generally conceived as amortizing loans repaid out of project revenue."<sup>1883</sup> We share the Panel's view that the LA/MSF measures have particular features that distinguish them from a conventional loan. The extent to which risk is transferred from Airbus to

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<sup>1876</sup>Panel Report, para. 7.375. (footnote omitted)

<sup>1877</sup>Panel Report, para. 7.375.

<sup>1878</sup>Panel Report, para. 7.375. (footnote omitted)

<sup>1879</sup>United States' first written submission to the Panel, para. 87. (footnote omitted; emphasis added)

<sup>1880</sup>See, for example, Ellis Report, *supra*, footnote 760, p. 3: "Launch aid loans only have to be repaid if the specific projects for which they are made are successful".

<sup>1881</sup>See Robert Whitelaw, Economic Assessment of Member State Financing (3 February 2007) (Panel Exhibit EC-11 (BCI/HSBI) (hereinafter the "Whitelaw Report")), para. 11.

<sup>1882</sup>United States' second written submission to the Panel, subtitle before para. 83, and para. 84.

<sup>1883</sup>Panel Report, para. 7.462.

the member State governments suggests an arrangement approaching what one finds in some equity instruments. Nonetheless, we are not called upon here to review this aspect of the Panel's analysis as the United States has not appealed the Panel's characterization of LA/MSF measures as "loans". We will thus treat the LA/MSF measures as loans in our review of the Panel's assessment of benefit.

3. Did the Panel Err in Concluding that the Challenged LA/MSF Measures Confer a Benefit?

(a) The determination of benefit under Article 1.1(b) of the *SCM Agreement*

828. Article 1.1 of the *SCM Agreement* defines what a "subsidy" is for purposes of that Agreement. It reads:

For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred. (footnote omitted)

829. The first requirement of the definition of "subsidy" is the existence of a "financial contribution". The United States argued before the Panel that "each of the challenged LA/MSF

measures involves a 'financial contribution' in the form of either a direct transfer of funds or both direct and potential direct transfers of funds, within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement".<sup>1884</sup> The Panel agreed with the United States' characterization of the LA/MSF with respect to the measures for which the funds had already been fully disbursed. The Panel found that the funds had been fully disbursed under all the LA/MSF measures except for the French, German, and Spanish A380 contracts.<sup>1885</sup> The Panel concluded:

To this extent, we believe there is no doubt that, as the United States argues, these measures involved *direct* transfers of funds, and therefore, the provision of a "financial contribution by a government or any public body", within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.<sup>1886</sup> (original emphasis)

830. As regards the three A380 LA/MSF contracts for which the funds had not been fully disbursed, the Panel disagreed with the United States' characterization of the undisbursed amounts as involving "potential direct transfers of funds".<sup>1887</sup> Instead, the Panel considered that it was more appropriate to characterize these measures as "loans" within the meaning of Article 1.1(a)(1)(i)".<sup>1888</sup> The Panel thus found that:

... irrespective of whether all of the funds committed under the French, German and Spanish A380 contracts have been paid out, it is in our view clear from the particular facts that are before us that each of the LA/MSF contracts evidences the existence of a "government practice {that} involves a direct transfer of funds" in amounts and at moments agreed and planned at the conclusion of each contract. Therefore, we find that the French, German and Spanish A380 contracts are "financial contributions", within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.<sup>1889</sup> (footnote omitted)

831. The European Union has not challenged on appeal the Panel's finding that the LA/MSF measures constitute "financial contributions".

832. Under Article 1.1(b) of the *SCM Agreement*, the financial contribution must confer a "benefit" in order to constitute a subsidy. The term "benefit" is not defined in the *SCM Agreement*. In *Canada – Aircraft*, the Appellate Body interpreted the term as follows:

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<sup>1884</sup>Panel Report, para. 7.376.

<sup>1885</sup>Panel Report, para. 7.378.

<sup>1886</sup>Panel Report, para. 7.377.

<sup>1887</sup>Panel Report, para. 7.379. (emphasis omitted)

<sup>1888</sup>Panel Report, para. 7.379.

<sup>1889</sup>Panel Report, para. 7.379.

We also believe that the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.<sup>1890</sup>

833. Article 1.1(b) of the *SCM Agreement* does not set out a particular methodology to be used to determine whether a financial contribution has conferred a benefit. The calculation of benefit is addressed in Article 14 of the *SCM Agreement*, which provides in relevant part:

*Article 14*  
*Calculation of the Amount of a Subsidy in Terms*  
*of the Benefit to the Recipient*

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines: ... .

The opening clause of Article 14 limits the scope of application of this provision to Part V of the *SCM Agreement*, which is about countervailing measures. Nevertheless, we consider that Article 14 provides useful context in the interpretation of the "benefit" requirement in Article 1.1(b) of the *SCM Agreement*.<sup>1891</sup>

834. We noted earlier that the Panel characterized the LA/MSF measures as "unsecured loans"<sup>1892</sup> and that neither participant has challenged this characterization on appeal. Accordingly, the most relevant "guideline" of Article 14 of the *SCM Agreement* is that provided in subparagraph (b):

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<sup>1890</sup> Appellate Body Report, *Canada – Aircraft*, para. 157. The Appellate Body also explained that: {a} "benefit" does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a "benefit" can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term "benefit", therefore, implies that there must be a recipient.

(*Ibid.*, para. 154)

<sup>1891</sup> Appellate Body Report, *Canada – Aircraft*, para. 155.

<sup>1892</sup> Panel Report, para. 7.525.

{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. In this case the benefit shall be the difference between these two amounts{.}

A panel relying on Article 14(b) would thus examine whether there is a difference between the amount that the recipient pays on the government loan and the amount the recipient would pay on a comparable commercial loan, which the recipient could have actually obtained on the market.<sup>1893</sup> There is a benefit—and therefore a subsidy—where the amount that the recipient pays on the government loan is less than what the recipient would have paid on a comparable commercial loan that the recipient could have obtained on the market. There is no benefit—and therefore no subsidy—if what the recipient pays on the government loan is equal to or higher than what it would have paid on a comparable commercial loan. The amount the recipient would have paid on a commercial loan is a function of the size of the loan, the interest rate, the duration, and other relevant terms of the transaction. The participants agreed at the oral hearing that Article 14(b) of the *SCM Agreement* provides useful guidance for purposes of the assessment of whether the LA/MSF measures confer a benefit.

835. Article 14(b) of the *SCM Agreement* calls for a comparison of the "amount the firm receiving the loan pays on the government loan" with "the amount the firm would pay on a comparable commercial loan which the firm could actually obtain in the market". As we have already discussed in general terms above, we read this as suggesting that the comparison is to be performed as though the loans were obtained at the same time. In other words, the comparable commercial loan is one that would have been available to the recipient firm at the time it received the government loan.

836. Because the assessment focuses on the moment in time when the lender and borrower commit to the transaction, it must look at how the loan is structured and how risk is factored in, rather than

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<sup>1893</sup> Article 14(b) of the *SCM Agreement* says that the comparison should be to a comparable commercial loan that the recipient "could actually obtain on the market." This suggests that where the recipient could not have obtained a commercial loan, then the granting of a loan by the government would be deemed to confer a benefit irrespective of the terms of that loan. As the European Union underscored at the oral hearing, the United States did not argue before the Panel that Airbus would have been unable to obtain a commercial loan. Instead, the United States premised its case on Airbus having to pay less for the LA/MSF than it would have paid for a commercial loan.

looking at how the loan actually performs over time.<sup>1894</sup> Such *ex ante* analysis of financial transactions is commonly used and appropriate financial models have been developed for these purposes. The analysis from a financial perspective proceeds as follows. The investor commits resources to an investment in the expectation of a future stream of earnings that will provide a positive return on the investment made. In deciding whether to commit resources to a particular investment, the investor will consider alternative investment opportunities. The investor will make its decision to invest on the basis of information available at the time the decision is made about market conditions and projections about how those economic conditions are likely to develop (future demand and price for the product, future costs, etc.). The information available will be, in most cases, imperfect. The investor does not have perfect foresight and thus there is always some likelihood, in some instances a sizeable one, that the investor's projections will deviate significantly from what actually transpires. Hence, determining whether the investment was commercially rational is to be ascertained based on the information that was available to the investor at the time the decision to invest was made.<sup>1895</sup> The commercial rationality of an investment cannot be ascertained on the basis of how the investment in fact performed because such an analysis has nothing useful to say about the basis upon which the investment was made. The investment could have earned a rate of return that exceeded, or was less than, the going market rate, but it was not predetermined to do so.

837. We note, moreover, that from a practical perspective, a requirement to look at the actual performance of a loan would mean that such measures could not be challenged until performance is fully completed. In the case of long-term loans, this would mean that any challenge of such measures would have to be deferred for years. Requiring a WTO Member to wait so long to mount a challenge would limit the effectiveness of Part II and Part III of the *SCM Agreement* also in the light of the prospective nature of WTO remedies.<sup>1896</sup>

838. Therefore, in our view, the assessment of benefit must examine the terms and conditions of a loan at the time it is made and compare them to the terms and conditions that would have been offered

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<sup>1894</sup>We recognize that, in *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body said that an assessment of whether guarantees under an export credit guarantee programme constituted export subsidies, under item (j) of the Illustrative List of Export Subsidies in Annex I to the *SCM Agreement*, could "examine both retrospective data relating to a programme's historical performance and projections of its future performance". (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 278) That particular dispute concerned item (j) of the Illustrative List of Export Subsidies pursuant to which export credit guarantees will be deemed to be subsidies if they are provided at premium rates which are "inadequate to cover the long-term operating costs and losses" of the programmes.

<sup>1895</sup>Such an *ex ante* approach is wholly consistent with the manner in which financial methods have been developed to test projections through sensitivity analysis and scenario building.

<sup>1896</sup>It may also affect the ability of Members to apply countervailing measures under Part V of the *SCM Agreement*.

by the market at that time. The European Union and the United States agreed at the oral hearing with this approach.

(b) The relevance of the 1992 Agreement

839. On appeal, the European Union asserts that Article 4 of 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*, which should be taken into account in determining whether "benefits" were conferred, within the meaning of Article 1.1(b) of the *SCM Agreement*, through the provision of LA/MSF to the A330-200, A340-500/600, and A380.<sup>1897</sup> According to the European Union, Article 4 of the 1992 Agreement is relevant to the interpretation of "benefit" under Article 1.1(b) of the *SCM Agreement* in two main ways: (i) it is concerned with development "support" for LCA and establishes two "thresholds" for the provision of that support, namely a maximum ceiling in terms of the amount of support that may be provided and a minimum interest rate at which it may be provided<sup>1898</sup>; and (ii) it is the "understood benchmark" between the United States and the European Communities for purposes of determining whether the LA/MSF measures at issue confer a "benefit".<sup>1899</sup> Alternatively, the European Union submits that the Panel should have taken into account the existence and operation of Article 4 of the 1992 Agreement "as part of the facts" to establish the relevant market benchmark at the time the LA/MSF measures were granted.<sup>1900</sup>

840. The United States responds that the 1992 Agreement does not qualify under Article 31(3)(c) of the *Vienna Convention* because the reference to "the parties" is to all the parties to the treaty being interpreted<sup>1901</sup>, meaning all WTO Members. The United States disagrees that Article 4 of the 1992 Agreement is relevant to an interpretation of "benefit" under Article 1.1(b) of the *SCM Agreement*. According to the United States, the references to "support" and the thresholds in Article 4 of the 1992 Agreement, as well as in the *SCM Agreement*, do not create a link that is relevant to the interpretation of the *SCM Agreement*.<sup>1902</sup> For the United States, the 1992 Agreement was aimed at placing constraints on the amount and terms of LA/MSF and not, as the European Union suggests, at putting in place a new "benchmark" for what would constitute a "benefit" under the *SCM Agreement*.<sup>1903</sup> The

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<sup>1897</sup>See European Union's appellant's submission, paras. 696 and 701-718. The European Union also raises the 1992 Agreement in the context of its claims of error with respect to the Panel's findings on export subsidies and adverse effects.

<sup>1898</sup>European Union's appellant's submission, paras. 719-723.

<sup>1899</sup>European Union's appellant's submission, paras. 724-729.

<sup>1900</sup>European Union's appellant's submission, paras. 730-732.

<sup>1901</sup>United States' appellee's submission, para. 244. See generally, United States' appellee's submission, paras. 242-261.

<sup>1902</sup>United States' appellee's submission, para. 235.

<sup>1903</sup>United States' appellee's submission, para. 230.



United States also disagrees that Article 4 of the 1992 Agreement is a "fact" that the Panel was required to "take into account" in establishing the benchmark for LA/MSF.<sup>1904</sup> Finally, the United States refers to the fifth recital of the preamble of the 1992 Agreement that states that the parties to the Agreement were acting "without prejudice to their rights and obligations under the GATT and under other multilateral agreements negotiated under the auspices of the GATT". The United States refers to the Panel's finding elsewhere in its Report that the "other multilateral agreements negotiated under the auspices of the GATT" referred to in the fifth recital would include the *SCM Agreement*.<sup>1905</sup>

841. Turning first to the preliminary issue of whether the 1992 Agreement qualifies under Article 31(3)(c), we note that Article 31 of the *Vienna Convention* is entitled "General rule of interpretation".<sup>1906</sup> Article 31(3)(c) provides that, when interpreting a treaty:

{t}here shall be taken into account, together with the context:

...

(c) any relevant rules of international law applicable in the relations between the parties.

To qualify under Article 31(3)(c), the 1992 Agreement would therefore have to be a "rule{ } of international law", which is "relevant" and "applicable in the relations between the parties". Moreover, even assuming the 1992 Agreement were to fulfil these conditions, the chapeau to Article 31(3)(c) specifies the normative weight to be ascribed to the 1992 Agreement, namely that it is to be "taken into account" in interpreting the *SCM Agreement*.

842. In this appeal, the European Union and the United States have focused their arguments on the proper meaning to be ascribed to the term "the parties" in Article 31(3)(c). They disagree as to whether the reference is to all the parties to the treaty being interpreted, or a smaller sub-set of parties including, for instance, the parties to the dispute in which the interpretative issue arises. The European Union argues that the definition of "party" in Article 2(1)(g) of the *Vienna Convention* as referring to "a State which has consented to be bound by the treaty and for which the treaty is in force" is neutral and could "apply equally to the parties to the *SCM Agreement* or to the parties to the

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<sup>1904</sup>United States' appellee's submission, para. 238.

<sup>1905</sup>United States' appellee's submission, para. 239 (referring to Panel Report, para. 7.95).

<sup>1906</sup>Pursuant to Article 3.2 of the DSU, WTO adjudicating bodies must interpret the WTO agreements "in accordance with customary rules of interpretation of public international law". Previous Appellate Body case law has established that the principles codified in Articles 31 and 32 of the *Vienna Convention* are such customary rules. (See, for instance, Appellate Body Report, *US – Carbon Steel*, para. 61)

*1992 Agreement*".<sup>1907</sup> According to the European Union, the context provided by Articles 31(2) and 31(3)(a) and (b), as well as the object and purpose of Article 31(3)(c), support its view that the reference to "the parties" in Article 31(3)(c) is not to "all the parties" to the treaty being interpreted.<sup>1908</sup> Moreover, the European Union refers to a WTO panel report, which it argues suggests that a relevant rule of international law within the meaning of Article 31(3)(c) need only be binding on the parties to the dispute.<sup>1909</sup>

843. In contrast, the United States argues that, taking account of the definition of "party" in Article 2(1)(g) of the *Vienna Convention*, as well as the context of Article 31(3)(c), the term "the parties" as used in Article 31(3)(c) refers to "States which have consented to be bound by the treaty *subject to interpretation* and for which that treaty is in force".<sup>1910</sup> The United States considers that Article 31(2)(a) and (b), as well as Article 31(3)(a) and (b) of the *Vienna Convention*, provide contextual support for its interpretation of "the parties" to mean "all the parties" to the treaty being interpreted.<sup>1911</sup> In support, the United States refers to an unappealed report of a WTO panel that interpreted Article 31(3)(c) to mean that the rules of international law to be taken into account in interpreting the WTO agreements at issue in that dispute were those applicable between all WTO Members.<sup>1912</sup>

844. We note that the meaning of the term "the parties" in Article 31(3)(c) of the *Vienna Convention* has in recent years been the subject of much academic debate and has been addressed by the ILC.<sup>1913</sup> While the participants refer to WTO panels that have addressed its meaning<sup>1914</sup>, the Appellate Body has made no statement as to whether the term "the parties" in Article 31(3)(c) refers to *all* WTO Members, or rather to a subset of Members, such as the parties *to the dispute*.

845. An interpretation of "the parties" in Article 31(3)(c) should be guided by the Appellate Body's statement that "the purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty."<sup>1915</sup> This suggests that one must exercise caution in drawing from an international

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<sup>1907</sup>European Union's appellant's submission, para. 703.

<sup>1908</sup>European Union's appellant's submission, paras. 704-709.

<sup>1909</sup>European Union's appellant's submission, para. 710 (referring to Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 5.57).

<sup>1910</sup>Emphasis added. See United States' appellee's submission, paras. 244 and 245.

<sup>1911</sup>United States' appellee's submission, paras. 247 and 248.

<sup>1912</sup>United States' appellee's submission, para. 253 (referring to Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.68).

<sup>1913</sup>See ILC Report on Fragmentation, *supra*, footnote 205, paras. 410-480.

<sup>1914</sup>See Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.65-7.89; and Panel Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 5.57.

<sup>1915</sup>Appellate Body Report, *EC – Computer Equipment*, para. 93. (original emphasis)

agreement to which not all WTO Members are party.<sup>1916</sup> At the same time, we recognize that a proper interpretation of the term "the parties" must also take account of the fact that Article 31(3)(c) of the *Vienna Convention* is considered an expression of the "principle of systemic integration"<sup>1917</sup> which, in the words of the ILC, seeks to ensure that "international obligations are interpreted by reference to their normative environment"<sup>1918</sup> in a manner that gives "coherence and meaningfulness"<sup>1919</sup> to the process of legal interpretation. In a multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.

846. In this dispute, the resolution of the European Union's arguments regarding the 1992 Agreement need not turn on the proper meaning to be ascribed to the term "the parties". Even accepting the European Union's argument that the 1992 Agreement is "applicable in the relations between *the parties*", we recall that for the 1992 Agreement to qualify under Article 31(3)(c) of the *Vienna Convention*, it must be shown to be "relevant". A rule is "relevant" if it concerns the subject matter of the provision at issue.<sup>1920</sup> In this dispute, the essence of the European Union's claim is that Article 4 of the 1992 Agreement is relevant to the interpretation of the term "benefit" in Article 1.1(b) of the *SCM Agreement*.

847. We observe that the subject matter of the 1992 Agreement relates closely to issues germane to this dispute and, in particular, the measures taken by the European Communities in the area of civil aircraft that the United States challenges under the *SCM Agreement*. Prior to the negotiation of the 1992 Agreement, a plurilateral *Agreement on Trade in Civil Aircraft* concluded in 1979 under the

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<sup>1916</sup>We note that Article 31(3)(b) requires a treaty interpreter to take into account, together with context, "any subsequent practice in the application of the treaty which establishes the agreement of *the parties* regarding its interpretation". (emphasis added) According to the Appellate Body in *EC – Chicken Cuts*, Article 31(3)(b) requires the agreement, whether express or tacit, of all WTO Members for a practice to qualify under that provision. The Appellate Body recognized that the agreement of the parties regarding a treaty's interpretation may be deduced, not only from the actions of those actually engaged in the relevant practice, but also from the acceptance of other parties to the treaty through their affirmative reactions, or depending on the attendant circumstances, their silence. (See Appellate Body Report, *EC – Chicken Cuts*, paras. 255-273)

<sup>1917</sup>ILC Report on Fragmentation, *supra*, footnote 205, para. 413, and footnote 569 thereto (referring to J. Combacau and S. Sur, "Principe d'intégration", in *Droit international public* (Paris: Montchrestien 2004), p. 175; and C. McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 *International and Comparative Law Quarterly* 279)

<sup>1918</sup>See ILC Report on Fragmentation, *supra*, footnote 205, para. 413.

<sup>1919</sup>See ILC Report on Fragmentation, *supra*, footnote 205, para. 419.

<sup>1920</sup>See, for instance, M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009), p. 433.

aegis of the GATT (the "1979 Agreement")<sup>1921</sup> established rules on trade in civil aircraft. The 1992 Agreement, which was signed in July 1992 between the then European Economic Community and the United States in furtherance of the 1979 Agreement, was negotiated against a background of differences between these two parties over support measures to their respective large civil aircraft industries.<sup>1922</sup> One area which the parties sought to regulate was the provision of government support to the large civil aircraft sector, as reflected in two of the recitals in the Agreement's preamble<sup>1923</sup>, as well as in Article 3 (Production support), Article 4 (Development support), and Article 5 (Indirect government support).<sup>1924</sup>

848. Article 4 of the 1992 Agreement is the provision identified by the European Union as being relevant to our interpretation of Article 1.1(b) of the *SCM Agreement*. Article 4 of the 1992 Agreement reads in full:

*Article 4*  
*Development support*

4.1. Governments shall provide support for the development of a new large civil aircraft programme only where a critical project appraisal, based on conservative assumptions, has established that there is a reasonable expectation of recoupment, within 17 years from the date of first disbursement of such support, of all costs as defined in Article 6(2) of the Aircraft Agreement, including repayment of government supports on the terms and conditions specified below.

4.2. As of entry into force of this Agreement, direct government support committed by a Party for the development of a new large civil aircraft programme or derivative shall not exceed:

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<sup>1921</sup> *Agreement on Trade in Civil Aircraft*, done at Geneva on 12 April 1979 (BISD 26S/162), as subsequently modified, rectified, or amended (attached as Annex 4(a) to the *WTO Agreement*). The original parties to the 1979 Agreement were: Austria; Canada; the member States of the European Economic Community (at the time Belgium, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom); the European Economic Community; Japan; Norway; Sweden; Switzerland; and the United States. (See GATT, Multilateral Trade Negotiations, Status of Acceptances of Protocols, Agreements and Arrangements, L/4914/Rev.1 (1 April 1980), pp. 8-9)

<sup>1922</sup> Panel Report, para. 7.67.

<sup>1923</sup> Recitals two and four of the 1992 Agreement state:

RECOGNIZING that the disciplines in the GATT Agreement on Trade in Civil Aircraft should be strengthened with a view to progressively reducing the role of government support,

...

IN PURSUIT OF their common goal of preventing trade distortions resulting from direct or indirect government support for the development and production of large civil aircraft and of introducing greater disciplines on such support and of encouraging the adoption of such disciplines multilaterally within the GATT{.}

<sup>1924</sup> Article 2 of the 1992 Agreement excludes from these disciplines government support that was committed prior to the date the Agreement entered into force.

(a) 25% of that programme's total development cost as estimated at the time of commitment (or of actual development costs, whichever is lower); royalty payments on this tranche shall be set at the time of commitment of the development support so as to repay this support at an interest rate no less than the cost of borrowing to the government within no more than 17 years from first disbursement; plus

(b) 8% of that programme's total development cost as estimated at the time of commitment (or of actual development costs, whichever is lower); royalty payments on this tranche shall be set at the time of commitment of the development support so as to repay such support at an interest rate no less than the cost of borrowing to the government plus 1% within no more than 17 years from first disbursement.

These calculations shall be made on the basis of the forecast of aircraft deliveries in the critical project appraisal.

4.3. Royalty payments per aircraft shall be calculated at the time of commitment of the development support to be repaid on the following basis:

(a) 20% of aggregate payments calculated in accordance with Article 4.2 is payable on the basis of the delivery of a number of aircraft corresponding to 40% of forecast deliveries;

(b) 70% of aggregate payments calculated in accordance with Article 4.2 is payable on the basis of the delivery of a number of aircraft corresponding to 85% of forecast deliveries.

The LA/MSF measures at issue in this dispute consist of government support for the development of LCA projects. In other words, the LA/MSF measures fall within the category of government support to which Article 4 is addressed. The European Union has pointed out that the repayment provisions of many of the LA/MSF contracts at issue in this dispute reflect the terms set out in Article 4.<sup>1925</sup>

849. While the 1992 Agreement obviously relates to support for the development of LCA, the specific question raised by the European Union's appeal is whether Article 4 is "relevant" to the determination of "benefit" under Article 1.1(b) of the *SCM Agreement*. In *Canada – Aircraft*, the Appellate Body explained that the determination of "benefit" requires an assessment of whether the financial contribution gives the recipient an advantage as compared to what could have been obtained in the market.<sup>1926</sup> The notion of "benefit" as defined by the Appellate Body therefore encompasses a comparison with the marketplace, measured from the perspective of a recipient.

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<sup>1925</sup> European Union's appellant's submission, para. 733 and footnote 909 thereto.

<sup>1926</sup> Appellate Body Report, *Canada – Aircraft*, para. 157.

850. We note that the European Union is not arguing that the 1992 Agreement modifies the general standard for the assessment of benefit that was set out by the Appellate Body in *Canada – Aircraft*. Instead, the European Union argues that "the reference to 'support' and the thresholds ('shall not exceed' and 'no less than') in Article 4 of the 1992 Agreement ... speak to the existence of 'benefit' and thus to the existence of a subsidy and the obligation for the government conduct (i.e. not to exceed such a ceiling when providing development support)."<sup>1927</sup> The European Union further submits that "{i}n this sense, Article 4 of the 1992 Agreement informs the meaning of the term 'benefit' in Article 1.1(b) of the *SCM Agreement* as well as the benefit analysis under that provision".<sup>1928</sup>

851. The limitation imposed by Article 4 of the 1992 Agreement on the amount of government support that may be provided by the parties for the development of new LCA programmes is concerned with the financial contribution component of the definition of subsidy in Article 1.1 of the *SCM Agreement*. The *SCM Agreement* does not limit the amount of financial contribution that a government may provide. Instead, by imposing the requirement that the financial contribution confer a benefit, the *SCM Agreement* qualifies as subsidies only those contributions that make the recipient "better off". Article 4 of the 1992 Agreement also sets out a minimum interest rate and a maximum term for repayment of this government support. However, Article 4 does not distinguish between government support that places the recipient in a more advantageous position and government support that is neutral in the sense that the recipient could have obtained similar terms on the market. Therefore, the maximum ceiling on the development support that may be provided, the minimum interest rate, and the maximum term for repayment set out in Article 4 of the 1992 Agreement cannot be said to speak to the market-based concept of "benefit" as reflected in Article 1.1(b) of the *SCM Agreement* and the market-based benchmark reflected in Article 14(b).<sup>1929</sup> For this reason, we do not consider Article 4 of the 1992 Agreement to be relevant to the specific question that must be examined under Article 1.1(b) of the *SCM Agreement*, that is, whether the amount to be paid by the recipient of the government loan is lower than the amount that would be paid for a comparable commercial loan.

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<sup>1927</sup>European Union's appellant's submission, para. 723. The European Union refers to a number of provisions of the WTO agreements that contain references to "support", including Article 1.1(a)(2) of the *SCM Agreement*, Article XVI of the GATT 1994, and Article 3.2 of the *Agreement on Agriculture*. The European Union refers to other provisions of the *SCM Agreement* that it says were "drafted having in mind the idea of a threshold". Specifically, the European Union refers to footnote 1, Article 14(d) and items (g), (h), (i), and (k) of the Illustrative List of Export Subsidies in Annex I to the *SCM Agreement*. (*Ibid.*, paras. 721 and 722)

<sup>1928</sup>European Union's appellant's submission, para. 723.

<sup>1929</sup>As the United States notes, the fact that both the *SCM Agreement* and Article 4 of the 1992 Agreement may use "thresholds" "does not make the individual thresholds applicable from one ... agreement to another". (United States' appellee's submission, para. 234)

852. In the alternative, the European Union argues that the "existence and operation of Article 4 ... {are} part of the facts to establish the relevant market benchmark at the time the {LA/}MSF was granted".<sup>1930</sup> The European Union emphasizes, in this regard, that "the existence of benefit requires an examination of the specific market conditions existing at the time the financial contribution is granted."<sup>1931</sup>

853. The Appellate Body has noted that "one accepted definition of 'market' is 'the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices'".<sup>1932</sup> We do not see how Article 4 of the 1992 Agreement is a "fact" that affected the market benchmark for assessing benefit at the time the LA/MSF was granted. Article 4 of the 1992 Agreement may have influenced the relationship between the member States and Airbus, because it determined how much support was provided by the member States and how Airbus was expected to pay it back. However, Article 4 has no direct bearing on the financial market that is meant to be used as the benchmark to determine benefit. This financial market is defined by the interaction between the economic agents that are willing to provide funds and those that seek to obtain funds. We do not see how this interaction would have been affected by the existence and operation of Article 4 of the 1992 Agreement. Consequently, we are not persuaded that the "existence and operation" of Article 4 is relevant "as part of the facts to establish the relevant market benchmark at the time {LA/}MSF was granted".<sup>1933</sup>

854. Finally, the United States refers to the fifth recital of the Preamble of the 1992 Agreement, which states that, upon entering into the 1992 Agreement, the European Economic Community and the United States intended to act "without prejudice to their rights and obligations under the GATT and under other multilateral agreements negotiated under the auspices of the GATT". This recital reflects an understanding that neither party intended the 1992 Agreement to modify or impair their rights and obligations under the GATT or under the agreements negotiated under the "auspices of the GATT". As we have explained above, the 1992 Agreement was negotiated against a background of differences on how to discipline subsidies to the aircraft sector. Accounts of the state of play of the Uruguay Round negotiations around 1992 suggest that the issue of disciplining such subsidies was one of the more difficult subjects dividing the European Communities and the United States, and that the relationship between the new *SCM Agreement* and the 1992 Agreement was contentious and

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<sup>1930</sup>European Union's appellant's submission, para. 730.

<sup>1931</sup>European Union's appellant's submission, para. 731.

<sup>1932</sup>Appellate Body Report, *US – Upland Cotton*, para. 408 (quoting Panel Report, *US – Upland Cotton*, para. 7.1236, in turn quoting *Merriam-Webster Dictionary* online, available at <<http://www.merriam-webster.com>>).

<sup>1933</sup>European Union's appellant's submission, para. 730.

ultimately remained unresolved.<sup>1934</sup> It was agreed in Article 12 of the 1992 Agreement to negotiate a multilateral agreement on trade in civil aircraft.<sup>1935</sup> The *SCM Agreement* itself reflects that, at the time of its conclusion, negotiations on multilateral rules on trade in the civil aircraft sector were anticipated.<sup>1936</sup> However, we note that no such multilateral rules were ever agreed, except for the incorporation of the 1979 Agreement as a plurilateral agreement in Annex 4 to the *WTO Agreement*. The fifth recital of the preamble of the 1992 Agreement expresses the intention of the European Economic Community and the United States that this Agreement be "without prejudice" to their rights and obligations under the GATT and other multilateral agreements negotiated under its auspices. This indicates that they did not intend that their rights and obligations under Article 1.1(b) of the *SCM Agreement* would be affected or modified by the 1992 Agreement.

855. For the foregoing reasons, we *find* that Article 4 of the 1992 Agreement is not 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*, that informs the meaning of "benefit" under Article 1.1(b) of the *SCM Agreement*, and that Article does not form "part of the facts to establish the relevant market benchmark".

(c) The Panel's approach to the determination of benefit

856. Having disposed of the European Union's claims relating to Article 4 of the 1992 Agreement, we turn our attention next to the Panel's assessment of benefit. Although the Panel did not refer expressly to Article 14(b) of the *SCM Agreement*, the approach of the Panel generally reflects the guideline in that provision. At the outset of its analysis, the Panel quoted the Appellate Body's interpretation of benefit in *Canada – Aircraft*, which was reproduced above.<sup>1937</sup> It later elaborated on how it would approach the question of benefit, explaining:

{W}e believe that it is appropriate to resolve the question whether LA/MSF confers a benefit by examining whether the cost of the challenged LA/MSF contracts to Airbus is less than the cost that

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<sup>1934</sup>See, for instance, Minutes of the GATT Committee on Trade in Civil Aircraft meeting held on 16 July 1992, AIR/M/32, and meeting held on 8 October 1992, AIR/M/33.

<sup>1935</sup>Article 12.2 of the 1992 Agreement provides that "{t}he Parties shall make their utmost efforts to ensure that these or similar disciplines are incorporated into the Aircraft Agreement or adopted by key signatories at the earliest possible date". Article 12.3 anticipates that "{i}f multilateralization has not been achieved in one year, the Parties shall review the question of the continued application of this bilateral Agreement."

<sup>1936</sup>Footnote 15 to (now expired) Article 6.1(a) of the *SCM Agreement* states that, "{s}ince it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft." Moreover, footnote 24 to (now expired) Article 8.2(a) of the *SCM Agreement* provides that "{s}ince it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product."

<sup>1937</sup>Panel Report, para. 7.382.



Airbus would be faced with if it sought financing on the same or similar terms and conditions as LA/MSF from the market. We therefore begin our benefit analysis by examining whether the rate of return obtained by the relevant EC member State governments when providing LA/MSF is less than the rate of return that would be asked by a market-based lender for financing on the same or similar terms and conditions as each provision of LA/MSF.<sup>1938</sup>

857. The first sentence quoted above correctly reflects the focus of the requirement in Article 1.1(b), as interpreted by the Appellate Body, on the recipient of the benefit. It is also consistent with the guideline set out in Article 14(b) of the *SCM Agreement*, which calls for a comparison of what the recipient pays for the government loan with what it would have paid for a commercial loan. As discussed in section VII.B.3 below, the calculation of benefit in relation to prevailing market conditions demands an examination of behaviour on both sides of a transaction, and in particular of the conditions of supply and demand as they apply to that market. The market rate of return on a commercial loan results from the discipline enforced by the market, which is reflective of the supply and demand of borrowers and lenders. In the second sentence of the excerpt quoted above, the Panel shifts focus from the recipient (Airbus) to the member State governments. At first sight, this seems incompatible with the Appellate Body's interpretation that benefit must be assessed from the perspective of the recipient.<sup>1939</sup> Nonetheless, in this case there is no substantive error in the Panel's approach.<sup>1940</sup> When referring to the rate of return of the member State governments, the Panel was referring to how much Airbus would pay on each LA/MSF measure and hence how much the member States would receive from Airbus.<sup>1941</sup> Thus, the Panel is actually considering how much Airbus had to pay for the LA/MSF financing. We further note that neither participant has asserted on appeal that the Panel's general approach departed from the guideline in Article 14(b) or is inconsistent with Article 1.1(b) of the *SCM Agreement*.<sup>1942</sup>

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<sup>1938</sup> Panel Report, para. 7.401.

<sup>1939</sup> Appellate Body Report, *Canada – Aircraft*, para. 156.

<sup>1940</sup> The European Union has not raised an allegation of error in this respect. In fact, in challenging other findings of the Panel, the European Union states:

The return to a government is a relevant measure for assessing "benefit" only where a financial contribution under Article 1.1(a)(1)(i) is involved. ... Articles 14(a)-(c) provide specific guidance for assessing against a market benchmark the government return involved in an equity infusion, a loan and a loan guarantee, respectively.

(European Union's appellant's submission, para. 1067)

<sup>1941</sup> In the analysis of an earlier issue, for example, the Panel observed that "the rate of return earned on each LA/MSF contract represents not only the envisaged financial gain for the lender (the EC member State governments), but also the apparent financial cost for Airbus." (Panel Report, para. 7.398)

<sup>1942</sup> European Union's and United States' responses to questioning at the oral hearing.

858. In order to make the comparison required by Article 1.1(b), the Panel first determined the IRR of each of the LA/MSF measures.<sup>1943</sup> As already noted above, neither the European Union nor the United States has questioned on appeal the Panel's determination of the maximum returns obtained by the member States on the LA/MSF, which are set out in Table 5 of the Panel Report.

859. Also as already noted above, the European Union's appeal focuses exclusively on the second element of the Panel's comparison, that is, the rates of return that a market lender would have required to provide financing to Airbus. As we explain further below, both the United States and the European Communities sought to develop a proxy that, in their view, most accurately reflected the rate of return that would have been demanded by a market lender. This proxy, and particularly one of its components, is at the heart of the European Union's appeal. We discuss the alternative proxies developed by the United States and the European Communities in the subsection that follows.

(d) Alternative market benchmarks developed by the United States and the European Communities

860. The United States put forward a proxy developed by its expert, Dr. Ellis, which was calculated by adding three components. The first component stood for the government borrowing rate for each member State that provided LA/MSF.<sup>1944</sup> The second component was intended to reflect the general corporate risk of Airbus, which was understood as "the risk of default of the Airbus company carrying the launch aid repayment obligation".<sup>1945</sup> Finally, the third variable was intended to reflect the project-specific risk.<sup>1946</sup> This was defined as the "risk that the particular project will fail to perform as originally forecast and, therefore, that repayments, if any, will be insufficient to cover the full investment and interest".<sup>1947</sup> The calculation performed by Dr. Ellis can be illustrated as follows:

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<sup>1943</sup>We note that there are limitations to the IRR method and there may be reasons to prefer a method that focuses on the net present value ("NPV") of a project. Nonetheless, this aspect of the Panel's analysis has not been challenged on appeal by either participant.

<sup>1944</sup>These government borrowing rates are sometimes referred to as "risk-free" rates. See, for example, Panel Report, para. 7.432; and Ellis Report, *supra*, footnote 760, p. 1.

<sup>1945</sup>Ellis Report, *supra*, footnote 760, p. 6.

<sup>1946</sup>Ellis Report, *supra*, footnote 760, p. 6.

<sup>1947</sup>Ellis Report, *supra*, footnote 760, p. 6.

$$\text{mrr} = \text{gr} + \text{cr} + \text{pr}$$

where:

mrr is the rate of return that would be demanded by a market lender;

gr is the government borrowing rate;

cr is the general corporate risk premium, i.e., the difference between the rate of return on a corporate bond and the government borrowing rate; and

pr is the project-specific risk premium.

861. Dr. Ellis derived the project-specific risk premium from the results of a 2004 empirical study of venture capital investments undertaken by Kerins, Smith, and Smith (the "KSS Study").<sup>1948</sup> Dr. Ellis explained before the Panel that "the KSS Study found returns on venture capital investments to range from 16.7% to 57.5%, depending on the diversification of the investor."<sup>1949</sup> He indicated that he arrived at a project-specific risk premium of 700 basis points (or 7%) from the lowest return in this range (that is, 16.7%), which was said to represent the return obtained by a "well diversified investor in both venture capital projects and other, less risky, equity investments represented by a stock market index".<sup>1950</sup> Before the Panel, the United States characterized this project-specific risk premium "as the opportunity cost of capital for a well-diversified portfolio of venture capital investments including both debt and equity instruments."<sup>1951</sup>

862. The European Communities put forward an alternative proxy calculated by its own expert, Professor Whitelaw. In constructing this alternative proxy, Professor Whitelaw accepted the general framework developed by Dr. Ellis. He also accepted Dr. Ellis' determinations as to the first two components of the calculation, that is, the government borrowing rate and the general corporate risk. However, Professor Whitelaw contested the manner in which Dr. Ellis calculated the third component: the *project-specific* risk premium. Professor Whitelaw put forward an alternative project-specific risk premium calculated "based on the anticipated returns of risk-sharing suppliers that contributed to the development of the A380 on terms similar to those agreed to by the participating member States".<sup>1952</sup> However, Professor Whitelaw did not question the appropriateness of adding a premium for project-specific risk.

<sup>1948</sup>F. Kerins, J.K. Smith, and R. Smith, "Opportunity Cost of Capital for Venture Capital Investors and Entrepreneurs" (June 2004) 39(2) *Journal of Financial and Quantitative Analysis* 385 (Panel Exhibit US-470 (BCI)).

<sup>1949</sup>Panel Report, para. 7.437.

<sup>1950</sup>Panel Report, para. 7.437 (referring to Response to Whitelaw Report, *supra*, footnote 787, p. 7).

<sup>1951</sup>United States' responses to Panel Questions 8 and 9.

<sup>1952</sup>Whitelaw Report, *supra*, footnote 1881, p. 10.

863. To derive the project-specific risk premium, Professor Whitelaw first calculated the return anticipated by each supplier as an IRR using the forecast component delivery schedule for the supplier, the agreed reimbursable cost, and the agreed repayment per aircraft. He then calculated the weighted average return of the suppliers arriving at "a single benchmark for the A380".<sup>1953</sup> Next, Professor Whitelaw took this "single benchmark" and deducted from it the government borrowing rate and general corporate risk premium calculated by Dr. Ellis for 2001. At this point, Professor Whitelaw arrived at what he described as the "corrected project-specific risk premium".<sup>1954</sup> Finally, Professor Whitelaw added this corrected project-specific risk premium to the government borrowing rates and general corporate risk premia calculated by Dr. Ellis for the launch years of the LCA projects in question. Professor Whitelaw explained that the "only difference between the {European Communities'} benchmark and the Ellis benchmark is the use of a defensible project-specific risk premium that reflects the risk of the aircraft programmes in excess of general corporate risk".<sup>1955</sup>

864. Dr. Ellis applied a constant project-specific risk premium of 7% to all of the LCA projects challenged by the United States. He nevertheless recognized that the risk could vary between LCA projects, noting that "a 40% risk premium or something of that order of magnitude would probably be quite appropriate for the earlier years of Airbus' existence given the high-risk of launch aid and the project-specific repayment during the early life of the company."<sup>1956</sup> Professor Whitelaw derived a constant project risk premium from the risk-sharing suppliers of the A380, and applied this constant project risk premium also to the A320, A330/A340, A330-200, and the A340-500/600 programmes.<sup>1957</sup> The European Communities explained that it did so for "administrative convenience" and that, "{b}ecause the A320, A330/A340, A330-200, and A340-500/600 programmes carried less risk than the A380, this assumption actually overstates the risk premium that would have applied to these earlier programmes, and illustrates the conservative nature of the {European Communities'} methodology."<sup>1958</sup>

(e) Overview of the Panel's assessment of the Ellis and Whitelaw project-specific risk premia

865. The Panel examined the project-specific risk premia put forward by both parties and had misgivings about both. As regards the project-specific risk premium put forward by the United States,

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<sup>1953</sup>Whitelaw Report, *supra*, footnote 1881, p. 11.

<sup>1954</sup>Whitelaw Report, *supra*, footnote 1881, p. 11.

<sup>1955</sup>Whitelaw Report, *supra*, footnote 1881, p. 11.

<sup>1956</sup>Ellis Report, *supra*, footnote 760, footnote 28, p. 20.

<sup>1957</sup>European Communities' response to Panel Question 64, footnote 40 to para. 71.

<sup>1958</sup>European Communities' response to Panel Question 64, footnote 40 to para. 71.

the Panel considered that it had "a number of deficiencies" which, in its view, "imply that it probably overstates the appropriate level of project-specific risk that may be reasonably associated with LA/MSF provided for at least a number of the challenged Airbus LCA projects."<sup>1959</sup> As will be explained further below, the Panel also found that the benchmark proposed by the European Communities "under-estimate[d] the appropriate level of project-specific risk that may be reasonably associated with LA/MSF for all of the challenged measures."<sup>1960</sup>

866. The Panel described the United States' proposed risk premium as being "in essence ... based on the alleged risk associated with holding a diversified portfolio of venture capital investments."<sup>1961</sup> It went on to explain that "while it would not be inaccurate to characterize LA/MSF, because of its unsecured, success-dependent and graduated repayment terms, as a form of financing that is inherently speculative", it did "not consider [that] this renders it *entirely* comparable with venture capital investments."<sup>1962</sup> According to the Panel, "there are several reasons to believe that the level of risk associated with venture capital financing is typically higher than the risk associated with LA/MSF."<sup>1963</sup> Referring to economic literature, the Panel further reasoned that "venture capital organizations finance these high-risk, potentially high-reward projects, purchasing equity or equity-linked stakes while the firms are still privately held".<sup>1964</sup> The Panel also noted that the economic literature described firms that receive venture capital as "typically small and young, plagued by high levels of uncertainty and large differences between what entrepreneurs and investors know" and as firms that "typically possess few tangible assets and operate in markets that change very rapidly".<sup>1965</sup> The Panel contrasted this with the fact that "by the time of the launch of the A380, Airbus had developed into a relatively large firm with over 30 years experience, substantial capital assets and revenues, and a track record of successful LCA development, sometimes even exceeding expectations (although it is equally apparent that it is not entirely clear yet whether several of the Airbus LCA models developed immediately prior to the A380 will be as successful as initially expected)."<sup>1966</sup> In response to the United States' argument that its project-specific risk premium was "conservative" because it reflected the "the risk associated with holding a well-diversified venture capital portfolio as opposed to the risk associated with financing individual venture capital projects", the Panel reiterated

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<sup>1959</sup>Panel Report, para. 7.461.

<sup>1960</sup>Panel Report, para. 7.479.

<sup>1961</sup>Panel Report, para. 7.462.

<sup>1962</sup>Panel Report, para. 7.462. (original emphasis)

<sup>1963</sup>Panel Report, para. 7.462.

<sup>1964</sup>Panel Report, para. 7.463 (referring to P. Gompers and J. Lerner, "The Venture Capital Revolution" (2001) 15(2) *Journal of Economic Perspectives* 145 (Panel Exhibit EC-677), quoted in Robert Whitelaw Rebuttal Report (24 May 2007) (Panel Exhibit EC-656 (BCI)), para. 18).

<sup>1965</sup>Panel Report, para. 7.463 (quoting Gompers and Lerner, *supra*, footnote 1964, quoted in Whitelaw Rebuttal Report, *supra*, footnote 1964, para. 18).

<sup>1966</sup>Panel Report, para. 7.463. (footnotes omitted)

its view that "there are reasons to believe that venture capital financing is inherently more risky than LA/MSF, even when considered in the form of a portfolio."<sup>1967</sup>

867. Another concern that the Panel expressed was that the United States sought "to apply one and the same project-specific risk premium to construct the market interest rate benchmarks associated with all models of LCA developed by Airbus."<sup>1968</sup> The Panel acknowledged that the European Communities had not disputed "this aspect of the Ellis Report project-specific risk premia".<sup>1969</sup> Nevertheless, the Panel said it was "not convinced that it is the best approach to identifying the most appropriate project-specific risk premium for *each* of the challenged LA/MSF contracts."<sup>1970</sup> The Panel explained:

Various pieces of evidence and arguments presented by the parties indicate that the risk associated with LCA development will vary over time depending upon a variety of factors. These factors include the conditions of competition in the aircraft industry and differences in the levels of technology associated with developing different models of LCA. In our view, a project-specific risk premium may even vary over time because of the levels of risk that the finance industry is willing to accept at different moments in its own economic cycle. Moreover, if the project-specific risk premium is intended to relate to the risk of default attached to LA/MSF for a particular LCA development project, it would seem to follow that, all things being equal, it should be greater for earlier LCA development projects, when Airbus had relatively less experience—or conversely, the risk premium associated with development of a later model of LCA should be lower in the light of successful prior experience.<sup>1971</sup>  
(footnote omitted)

The Panel observed that the Ellis Report appeared to recognize that the risk premium could vary by project.<sup>1972</sup> The Panel concluded:

All of the above considerations lead us to conclude that the United States' proposed project-specific risk premium may not be an appropriate proxy for the project-specific risk premium that a market lender would ask Airbus to pay in return for financing on the same or similar terms and conditions as LA/MSF for *all* of the challenged LA/MSF contracts. In our view, in order to evaluate the suitability of the United States' proposed project-specific risk premium, it is important to bear in mind the nature of and circumstances surrounding each of the different LCA development projects financed under the challenged LA/MSF measures. Thus, in respect of the

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<sup>1967</sup>Panel Report, para. 7.464.

<sup>1968</sup>Panel Report, para. 7.468.

<sup>1969</sup>Panel Report, para. 7.468.

<sup>1970</sup>Panel Report, para. 7.468. (original emphasis)

<sup>1971</sup>Panel Report, para. 7.468.

<sup>1972</sup>Panel Report, para. 7.469 (referring to Ellis Report, *supra*, footnote 760, footnote 28, p. 20).

earliest models of Airbus LCA, namely, the A300 and A310, when Airbus was in its very early stages of existence, a project-specific risk premium derived from the risk associated with investing in a well-diversified portfolio of venture capital investments, appeals to us as a reasonable proxy for the *minimum* project-specific risk premium that it would be appropriate to associate with market financing comparable with LA/MSF. However, for subsequent models of Airbus LCA, and in particular, the A320, A330/A340, A330-200 and A340-500/600, the project-specific risk premium proposed by the United States' probably overstates the *maximum* that we believe the evidence before us suggests would be appropriate; whereas, because of the acknowledged technological challenges associated with the A380 project, our sense is that the United States' project-specific risk premium could be reasonably accepted to represent the *outer limit* of the risk premium that a market lender would ask Airbus to pay for financing on the same or similar terms and conditions as the A380 LA/MSF contracts.<sup>1973</sup> (original emphasis)

868. Having assessed the project-specific risk premium put forward by the United States, the Panel turned to the alternative risk premium advanced by the European Communities. Initially, the Panel expressed some sympathy for the approach of the European Communities, noting that "in principle, we agree with the view that the returns associated with market financing actually provided to Airbus for the same project as LA/MSF would serve as an appropriate basis from which to derive the relevant project-specific risk premium."<sup>1974</sup> The Panel added that "such an approach would be preferable to the one used by the United States to calculate its own proposed project-specific risk premium."<sup>1975</sup> Yet, ultimately, the Panel was "not persuaded that the project-specific risk premium advanced by the European Communities is derived from data having these characteristics."<sup>1976</sup> Presumably, the "characteristics" that the Panel was referring to were those of "market financing actually provided to Airbus for the same project as LA/MSF". The Panel gave the following reasons for its view:

In the first instance, we note that Professor Whitelaw used information from only a sample of the risk-sharing supplier contracts to construct the proposed project-specific risk premium. Although Professor Whitelaw asserts that the contracts used amounted to 100% of those for which an {IRR} could be calculated, we have no way of verifying this assertion because the European Communities has submitted little if any of the underlying data used in Professor Whitelaw's calculations. Specifically, the European Communities has provided a table summarizing various pieces of information that appear to be taken and derived from the sampled risk-sharing supplier contracts, and five pages of one of those contracts. Even on the basis of only the number of risk-sharing supplier contracts

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<sup>1973</sup>Panel Report, para. 7.469.

<sup>1974</sup>Panel Report, para. 7.480.

<sup>1975</sup>Panel Report, para. 7.480.

<sup>1976</sup>Panel Report, para. 7.480.

actually sampled we find this to be clearly insufficient to substantiate the European Communities' assertions in respect of the appropriate project-specific risk premium. Moreover, we note that the one contract that the European Communities has submitted shows that there is at least one major difference between the repayment terms under this contract and LA/MSF which we believe reduces its relative level of risk. We are also of the view that there is some logical merit to the United States' arguments suggesting that the risk-sharing suppliers had incentives to lower their expected rates of return. We furthermore agree with the view expressed by Brazil and the United States that government support for the A380 in the form of LA/MSF reduces the level of risk associated with risk-sharing supplier financing, thereby limiting its comparability with LA/MSF. Moreover, there is information contained in the Airbus A380 business case which suggests that the risk-sharing participants' involvement in the A380 project may not have been on strictly market terms for all participants.<sup>1977</sup> (footnotes omitted)

869. The Panel concluded that "notwithstanding its potential, the shortcomings in the evidence relied upon by Professor Whitelaw to derive the European Communities proposed project-specific risk premium and the notable differences between the risks assumed by the risk-sharing suppliers compared with the EC member State governments, lead us to conclude that the European Communities' project-specific risk premium for the A380 is unreliable and understates the risk premium that a market operator would have reasonably demanded Airbus pay for financing on the same or similar terms as LA/MSF for this particular model of LCA".<sup>1978</sup> The Panel additionally noted that "as with the United States, the European Communities seeks to apply one and the same project-specific risk premium to construct the market interest rate benchmarks associated with all models of LCA developed by Airbus".<sup>1979</sup> Recalling its earlier views, the Panel said it was "not convinced that this is the best approach to identifying the most appropriate project-specific risk premium for each of the challenged LA/MSF contracts". It explained that, "in order to assess the suitability of a project-specific risk premium for market financing comparable to LA/MSF, it is important to bear in mind the nature of and circumstances surrounding each of the different LCA development projects financed under the challenged LA/MSF measures."<sup>1980</sup> The Panel found that the project-specific risk premium advanced by the European Communities for the A320, A330/A340, A330-200 and A340-500/600 "underestimates the reasonable project-specific risk premium that a market lender would have asked Airbus to pay for financing on the same or similar terms and conditions as LA/MSF for all of these models of LCA, as well as the A380."<sup>1981</sup>

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<sup>1977</sup> Panel Report, para. 7.480.

<sup>1978</sup> Panel Report, para. 7.481.

<sup>1979</sup> Panel Report, para. 7.481.

<sup>1980</sup> Panel Report, para. 7.481. (footnote omitted)

<sup>1981</sup> Panel Report, para. 7.481.



870. It is evident from the discussion summarized above that the Panel was not satisfied with either alternative put forward by the parties. The Panel had two major concerns with respect to both proxies. First, the Panel criticized both the United States and the European Communities for applying a constant risk premium to all LCA projects and instead expressed a preference for a variable risk premium that took into account the particularities of the specific LCA projects. Second, the Panel considered that the project-specific risk premia proposed by the United States and the European Communities did not accurately reflect the risk of the LCA project because the former generally overstated the level of risk, while the latter underestimated it.

- (f) Do the European Union's allegations concern errors of application or errors under Article 11 of the DSU?

871. For each aspect of the Panel's assessment that it challenges, the European Union has made parallel claims under Article 1.1(b) of the *SCM Agreement*, alleging an error of application, and under Article 11 of the DSU, alleging a failure by the Panel to make an objective assessment of the facts. At the oral hearing, the European Union suggested that an appellant was entitled to make parallel claims and that it would be for the Appellate Body to determine which was the proper characterization of those claims.

872. The Appellate Body has noted that "an appellant is free to determine how to characterize its claims on appeal".<sup>1982</sup> Furthermore, we recognize that it is often difficult to distinguish clearly between issues that are purely legal or purely factual, or are mixed issues of law and fact. We also recognize that a failure to make a claim under Article 11 of the DSU on an issue that the Appellate Body determines to concern a factual assessment may have serious consequences for the appellant.<sup>1983</sup> An appellant may thus feel safer putting forward both a claim that the Panel erred in the application of a legal provision *and* a claim that the Panel failed to make an objective assessment of the facts under Article 11 of the DSU. In most cases, however, an issue will *either* be one of application of the law to the facts *or* an issue of the objective assessment of facts, and not both.

873. In order to determine whether the issues raised by the European Union are more properly characterized as one of application of law to facts or one of objective assessment of the facts, it is first necessary to recall the requirements of Article 1.1(b) of the *SCM Agreement* before we explain our reasoning. Article 1.1(b) requires that a financial contribution confer a "benefit" in order for such financial contribution to constitute a subsidy. Article 1.1(b) does not provide a particular

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<sup>1982</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 177 (referring to Appellate Body Report, *Japan – Apples*, para. 136).

<sup>1983</sup> See Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 274.

methodology to determine whether a benefit is conferred. The Appellate Body has determined that the assessment of benefit involves a comparison with the marketplace and that such assessment is intended to identify whether the recipient of the financial contribution is "better off" than it would otherwise have been, absent the financial contribution.<sup>1984</sup> Article 14 of the *SCM Agreement* provides certain guidelines applicable to the calculation of benefit in countervailing duty investigations, but which may also be of contextual assistance to WTO panels confronted with subsidy claims. The most relevant guideline in this particular case, given the Panel's characterization of the LA/MSF as loans, is Article 14(b), which provides 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".

874. In its appeal, the European Union is not alleging that the Panel incorrectly interpreted Articles 1.1(b) or 14(b) of the *SCM Agreement*. On the contrary, the European Union accepts that the assessment of benefit in this case called for a comparison of the rates of return of the LA/MSF measures with the rates of return that would have been demanded by a market lender. Furthermore, the European Union does not challenge the fact that the Panel relied on a constructed proxy to determine those rates of return.<sup>1985</sup> The European Union also accepts, in principle, the formula used by the Panel and acknowledges that this formula is capable of yielding a market proxy that can properly be used to make an assessment of benefit that is consistent with Article 1.1(b) of the *SCM Agreement*.<sup>1986</sup> The European Union even accepts the amounts determined by the Panel for two of the three components of the formula. The distinctive target of the European Union's appeal is the third component of the Panel's formula, that is, the project-specific risk premium. The European Union accepts that it was appropriate for the Panel to have included a project-specific risk premium as part of the formula for constructing the proxy. It disagrees, however, with the quantification made by the Panel of the project risk specific to each LCA project, with the manner in which the Panel chose relevant factors and applied them in making this quantitative assessment, and with the reasons given by the Panel to justify applying a particular level of project risk to the various LCA projects.

875. The European Union first complains that "although the Panel finds that the project-specific risk premium should vary from product to product, it considered jointly, and made findings collectively, for (i) the A300 and the A310 projects, and (ii) the A320, A330/A340, A330-200 and

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<sup>1984</sup> Appellate Body Report, *Canada – Aircraft*, para. 157.

<sup>1985</sup> European Union's response to questioning at the oral hearing.

<sup>1986</sup> European Union's response to questioning at the oral hearing.

A340-500/600 projects."<sup>1987</sup> On appeal, the European Union does not question the Panel's use of a variable project risk premium.<sup>1988</sup> Instead, the European Union challenges the Panel's reasoning as internally inconsistent because, having opted for a variable project risk premium, the Panel then applied the same project risk premium within the two groupings of LCA projects mentioned above. Implicit in the European Union's argument is the proposition that the quantum of risk of the LCA projects within each grouping is different.

876. Second, the European Union criticizes the Panel for failing to take into account two factors that the Panel had "found to affect the level of project risk"<sup>1989</sup>, namely (i) changes in the "conditions of competition in the aircraft industry" and (ii) changes in "the level of risk that the finance industry is willing to accept at different moments of its own economic cycle".<sup>1990</sup> The European Union does not call into question that the Panel was permitted to examine these two factors as relevant to an assessment of benefit under Article 1.1(b) of the *SCM Agreement*.<sup>1991</sup> Rather, the European Union is again identifying an apparent incoherence and a lack of explanation in the Panel's reasoning. It argues that the Panel identified the two factors as relevant to the assessment of the level of risk, but nevertheless failed to examine those factors in respect of certain models or groupings. The implication is that consideration of the two factors would have influenced the quantum of project risk.

877. Third, the European Union makes several allegations concerning the manner in which the Panel applied the relative experience of Airbus and the technological challenges of the LCA projects as factors relevant to the assessment of the level of risk. The European Union argues that the Panel applied relative experience only to the A300 and A310 and the technological challenges factor only to the A380.<sup>1992</sup> It complains that the Panel did not take into account the relative experience of Airbus when it assessed the level of risk of the A380.<sup>1993</sup> These allegations also concern an apparent contradiction in the Panel's reasoning that affects the quantum of risk assigned by the Panel to the projects. They also concern an alleged lack of even-handedness by the Panel in the application of

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<sup>1987</sup>European Union's appellant's submission, para. 760. (footnote omitted)

<sup>1988</sup>European Union's appellant's submission, footnote 969 to para. 759.

<sup>1989</sup>European Union's appellant's submission, para. 761.

<sup>1990</sup>European Union's appellant's submission, para. 761.

<sup>1991</sup>We note that the situation concerning the relevant risk factors for the quantification of risk differs from the examination of the criteria set out in GATT and WTO case law for determining likeness under Article III of the GATT 1994. The Appellate Body has noted that the "determination of whether imported and domestic products are 'like products' is a process by which legal rules have to be applied to facts". (Appellate Body Report, *Canada – Periodicals*, p. 22, DSR 1997:I, 449, at 468) "Like products" is a legal category established under the GATT 1994. By contrast, as we explained earlier, calculation of the project-specific risk premium is not expressly required under Articles 1.1(b) or 14(b) of the *SCM Agreement*, but is rather a function of the particular methodology chosen by the parties in this case to calculate the amount that Airbus would have paid for a comparable commercial loan.

<sup>1992</sup>European Union's appellant's submission, para. 763.

<sup>1993</sup>European Union's appellant's submission, para. 770.

certain factors when making this quantitative assessment because they were relied upon only when they led to an increase in the level of risk, and not when their application would have resulted in a decrease in the risk.

878. Fourth, the European Union alleges that the Panel erred in applying the same level of risk to the A320 and A330/A340 LCA projects, on the one hand, and to the A330-200 and A340-500/600, on the other hand, despite the latter being derivatives with lower developments costs.<sup>1994</sup>

879. Finally, the European Union complains that the Panel applied the project-specific risk premium proposed by the United States to the A300 and A310 and to the A380, even though the Panel had said that that the premium proposed by the United States was based on venture capital financing that is "inherently more risky than LA/MSF, even when considered in the form of a portfolio".<sup>1995</sup> Like the others, these claims concern an alleged contradiction, lack of even-handedness, and the absence of sufficient explanation in the Panel's reasoning<sup>1996</sup> and, therefore, the failure to consider in an internally consistent manner the relevant factors in the quantification of the risk of particular LCA projects.

880. In sum, we view the European Union's challenge of the quantification of the level of project risk, the choice of relevant factors for quantification, and the reasoning of the Panel as relating to the objectivity of the Panel's assessment of factual determinations within the meaning Article 11 of the DSU.<sup>1997</sup> The European Union's allegations concern how the Panel reasoned over disputed facts. These allegations appear to us to be claims about the objectivity of the Panel's assessment of the facts and thus are more in the nature of claims made under Article 11 of the DSU.

881. Pursuant to Article 11 of the DSU, "a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings".<sup>1998</sup> The Appellate Body has repeatedly stated that it will not "interfere lightly" with the panel's fact-finding authority<sup>1999</sup>, and has also emphasized that it "cannot base a finding of inconsistency under Article 11 simply on the conclusion that {it} might have

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<sup>1994</sup>European Union's appellant's submission, para. 766-769.

<sup>1995</sup>European Union's appellant's submission, paras. 772-775.

<sup>1996</sup>See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 292 and. 294.

<sup>1997</sup>Our conclusion applies also to the European Union's appeal in relation to the French LA/MSF for the A330-200. We recall that the European Union requests us "to reverse each of the Panel's findings on the project-specific risk premium", yet concedes that "{o}ther than {the French LA/MSF} for the A330-200, such reversal would not, however, constitute a reversal of the Panel's finding that the {LA/}MSF loans at issue confer a benefit, within the meaning of Article 1.1(b) of the *SCM Agreement*, and thus constitute subsidies". (European Union's appellant's submission, paras. 788 and 790 (referring to Panel Report, paras. 7.489 and 7.490))

<sup>1998</sup>Appellate Body Report, *Korea – Dairy*, para. 137.

<sup>1999</sup>See, for example, Appellate Body Report, *US – Wheat Gluten*, para. 151; Appellate Body Report, *EC – Sardines*, para.. 299; and Appellate Body Report, *US – Carbon Steel*, para. 142.

reached a different factual finding from the one the panel reached".<sup>2000</sup> Instead, for a claim under Article 11 to succeed, we must be satisfied that the panel has exceeded its authority as the trier of facts.<sup>2001</sup> As an initial trier of facts, a panel must provide a "reasoned and adequate" explanation for its findings<sup>2002</sup> and coherent reasoning.<sup>2003</sup> It has to base its findings on a sufficient evidentiary basis on the record<sup>2004</sup>, may not apply a double standard of proof<sup>2005</sup>, and a panel's treatment of the evidence must not lack "even-handedness".<sup>2006</sup>

- (g) The Panel's assessment of the project-specific risk premium proposed by the United States

882. As noted earlier, the Panel divided the LCA projects into three groups, each of which comprised the following LCA projects: (i) the A300 and A310; (ii) the A320, A330/A340, A330-200, and A340-500/600; and (iii) the A380.<sup>2007</sup> The Panel determined ranges for the risk premium applicable to each group of LCA projects that it had identified.<sup>2008</sup> These ranges can be summarized as follows, where "pr" is the project-specific risk premium, 7% is the project-specific risk premium put forward by the United States, and "W" is the project-specific risk premium put forward by the European Communities, the exact figure being HSBI:

Group	Range
A300 and A310	$7\% \leq pr$
A320, A330/A340, A330-200, and A340-500/600	$W < pr < 7\%$
A380	$W < pr \leq 7\%$

883. Before turning to the Panel's assessment of the project-specific risk premium proposed by the United States, we note that we do not consider that it was inappropriate *per se* for the Panel to have arranged the LCA projects into groups and to have determined a range for the project-specific risk premium applicable to the LCA projects within each group. As we explained earlier, under Article 1.1(b) of the *SCM Agreement*, panels have a degree of discretion in selecting the appropriate

<sup>2000</sup> Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>2001</sup> Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>2002</sup> See Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

<sup>2003</sup> See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 293 and footnote 618 thereto, and para. 294.

<sup>2004</sup> See Appellate Body Report, *US – Continued Zeroing*, para. 338.

<sup>2005</sup> See Appellate Body Report, *Korea – Dairy*, para. 137.

<sup>2006</sup> See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292.

<sup>2007</sup> See, for example, Panel Report, paras. 7.469, 7.481, and 7.485-7.487.

<sup>2008</sup> Panel Report, para. 7.488, Table 7.

methodology to determine "benefit" provided the methodology is not inconsistent with the guideline in Article 14(b). Pursuant to Article 11 of the DSU, the Panel had a duty to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case". This means that the Panel was not under an obligation to accept the parties' approach of calculating a constant risk premium for all LCA projects. On the contrary, it was the Panel's duty to assess, based on the evidence on record, whether the application of a constant project risk premium was the most appropriate approach and, to the extent that it was not, to consider alternative approaches. Thus, it was not impermissible for the Panel to have attempted to assemble the various LCA projects into various groupings according to the projects' level of risk.<sup>2009</sup>

884. However, we have serious concerns about the Panel's assessment of the project-specific risk premium proposed by the United States. Our main concern is that the Panel relied on the project-specific risk premium proposed by the United States as a boundary for the range that it established for the risk premium of each of the three groupings, despite having expressed strong reservations about the extent to which it reflected the level of risk of the LCA projects that received LA/MSF.

885. The Panel identified several aspects of the project-specific risk premium proposed by the United States that, in the Panel's view, limited its suitability as a proxy reflecting the level of risk of the LCA projects financed with LA/MSF. First, the Panel highlighted differences between the features of the LA/MSF and those of venture capital financing—the type of financing from which Dr. Ellis derived the project-specific risk premium proposed by the United States—that impact on the level of risk of each type of financing. The Panel noted that "{w}hile it would not be inaccurate to characterize LA/MSF, because of its unsecured, success-dependent and graduated repayment terms, as a form of financing that is inherently speculative, we do not consider this renders it *entirely* comparable with venture capital investments."<sup>2010</sup> The Panel further observed that "{t}here are several reasons to believe that the level of risk associated with venture capital financing is typically higher than the risk associated with LA/MSF."<sup>2011</sup> The Panel also explained that, "while LA/MSF may be considered to have some equity-like qualities, such as the fact that lender governments have no recourse in the event of non-repayment, LA/MSF contracts are generally conceived as amortizing loans repaid out of project revenue."<sup>2012</sup> Second, the Panel referred to a journal article that described firms that receive venture capital as "typically small and young, plagued by high levels of uncertainty and large differences between what entrepreneurs and investors know"

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<sup>2009</sup>Panel Report, para. 7.468.

<sup>2010</sup>Panel Report, para. 7.462. (original emphasis)

<sup>2011</sup>Panel Report, para. 7.462.

<sup>2012</sup>Panel Report, para. 7.462.

and as firms that "typically possess few tangible assets and operate in markets that change very rapidly".<sup>2013</sup> Third, the Panel was not persuaded by the United States' assertion that the project-specific risk premium that it proposed was "conservative" because it reflected "the risk associated with holding a well-diversified venture capital portfolio as opposed to the risk associated with financing individual venture capital projects."<sup>2014</sup> The Panel responded to this assertion stating that "there are reasons to believe that venture capital financing is inherently more risky than LA/MSF, even when considered in the form of a portfolio."<sup>2015</sup> Finally, the Panel expressed concerns that the 700 basis points figure that the United States had put forward as the project-specific risk premium could also improperly include management fees.<sup>2016</sup>

886. Notwithstanding these reservations, which call into question the appropriateness of using the rates of return of venture capital financing as a proxy to derive the risk premium of the projects financed by LA/MSF, the Panel used the project-specific risk premium proposed by the United States as a boundary in each of the ranges it established for the three groupings of LCA projects.

887. We recognize that some of the Panel's statements leave some room for the application of the United States' proposed project-specific risk premium. For example, the Panel said that the United States' proposed project-specific risk premium "probably overstates the appropriate level of project-specific risk that may be reasonably associated with LA/MSF provided for at least a number of the challenged Airbus LCA projects".<sup>2017</sup> It concluded that the "United States' proposed project-specific risk premium may not be an appropriate proxy for the project-specific risk premium that a market lender would ask Airbus to pay in return for financing on the same or similar terms and conditions as LA/MSF for all of the challenged LA/MSF contracts".<sup>2018</sup> The Panel specifically found that "in respect of the earliest models of Airbus LCA, namely, the A300 and A310, when Airbus was in its very early stages of existence, a project-specific risk premium derived from the risk associated with investing in a well-diversified portfolio of venture capital investments, appeals to us as a reasonable proxy for the *minimum* project-specific risk premium that it would be appropriate to associate with market financing comparable with LA/MSF."<sup>2019</sup>

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<sup>2013</sup>Gompers and Lerner, *supra*, footnote 1964, quoted in Whitelaw Rebuttal Report, *supra*, footnote 1964, para. 18.

<sup>2014</sup>Panel Report, para. 7.464.

<sup>2015</sup>Panel Report, para. 7.464.

<sup>2016</sup>Panel Report, para. 7.464.

<sup>2017</sup>Panel Report; para. 7.461.

<sup>2018</sup>Panel Report, para. 7.469. (original italics; underlining added) Additional examples include the statements "we do not consider this renders it *entirely* comparable with venture capital investments" and "the level of risk associated with venture capital financing is typically higher than the risk associated with LA/MSF." (Panel Report, para. 7.462 (original italics; underlining added))

<sup>2019</sup>Panel Report, para. 7.469.

888. Arguably, at the time Airbus launched the A300, its first LCA project, Airbus would have been most similar to the "small and young" firms that are "plagued by high levels of uncertainty" that the Panel noted were the type of firms that typically obtain venture capital financing. The European Communities raised the issue of the previous experience of the firms that formed the Airbus consortium, an issue that the Panel did not explicitly address in its Report. Yet, ultimately, the Panel's use of the United States' proposed project-specific risk premium as the minimum boundary of the range established for the A300 project cannot be reconciled with statements by the Panel that generally call into question the suitability of venture capital financing as a source from which the risk of the projects financed by LA/MSF could be derived. In particular, we see a clear inconsistency between the Panel's reliance on the project-specific risk premium proposed by the United States and the Panel's statement that "venture capital financing is inherently more risky than LA/MSF, even when considered in the form of a portfolio".<sup>2020</sup> The latter statement can only be understood as a rejection of venture capital financing as a basis from which to derive a proxy for the risk of the projects that received LA/MSF. The inconsistency also applies to the Panel's assessment of the risk of the A310 project. Airbus was less inexperienced at the time it launched the A310 in 1978, given that this project followed the launch of the A300. Moreover, the A310 was a derivative of the A300<sup>2021</sup>, and the Panel found that launching derivative models was less risky than developing a new aircraft.<sup>2022</sup> Thus, the Panel's use of the United States' proposed project-specific risk premium, which was based on venture capital financing, as a minimum risk premium for the A300 and A310 cannot be reconciled with its view that venture capital financing is inherently riskier than LA/MSF.

889. There is a further difficulty with the range for the project-specific risk premium that the Panel established for the A300 and A310 LCA projects. We recall that this range was composed of the United States' proposed project-specific risk premium as a lower boundary, while the Panel left the maximum level of risk unbound. The absence of an upper limit means that the risk premium for the A300 and A310 projects could potentially be very high. It could even be higher than the rates of return for venture capital financing indicated in the KSS Study on which Dr. Ellis relied to derive the project-specific risk premium proposed by the United States. The fact that, under the range

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<sup>2020</sup>Panel Report, para. 7.464.

<sup>2021</sup>Panel Report, footnote 5657 to para. 7.1940.

<sup>2022</sup>In footnote 5657 to paragraph 7.1940 of its Report, the Panel quotes a study by G. Klepper "Entry into the Market for Large Transport Aircraft" (1990) 34 *European Economic Review* 775 (Panel Exhibit US-377), submitted by the United States, which states:

{S}ome production stages are not specific to a particular type of aircraft, such that learning effects which are realized in the production of a generic aircraft can influence marginal cost of producing another generic aircraft.

Referring to this study, the Panel explained that "{t}he fact that such cross effects are strong for updated versions of an aircraft, the so-called derivatives, is illustrated for the Airbus A300 and its derivative the A310 in Klepper, Exhibit US-377, p. 778."



established by the Panel, the risk premium for the A300 and A310 projects can exceed the level of return of venture capital financing is clearly at odds with the Panel's statement that venture capital financing is "inherently more risky than LA/MSF".

890. The use of the project-specific risk premium proposed by the United States as a boundary for the range established for the second grouping is also problematic. As with the A300 and A310, there is a contradiction between the Panel's statement that venture capital is "inherently more risky than LA/MSF" and its use of the project-specific risk premium proposed by the United States as a maximum boundary, even if it was an external one. Also, the differences between Airbus and firms that typically receive venture capital financing become sharper with respect to the LCA projects launched subsequent to the A310. There is a 13-year difference between the launch of the A320 and the launch of the A340-500/600. When Airbus launched the A320 in 1984 it had previously developed two LCA projects (A300 and A310), while when it launched the A340-500/600 it had developed five LCA projects (A300, A310, A320, A330/A340, and A330-200). There is no explanation in the Panel Report as to how the Panel accounted for the experience acquired by Airbus with each successive launch. Moreover, as the European Union emphasizes, the second grouping includes both projects that involved the development of new aircraft and projects that involved derivative models, which the Panel recognized were less risky. The Panel stated in this regard that the A330-200 and the A340-500/600 "were derivative aircraft which entailed much smaller development costs and a much lower level of risk to Airbus' overall operations."<sup>2023</sup> There is an inconsistency between the Panel's recognition that the project risk is reduced as a firm gains experience and its acknowledgement that derivative LCA projects have a lower risk, on the one hand, and its use of the project-specific risk premium derived from venture capital financing as the upper boundary for the range it established for the second grouping.

891. There are inconsistencies in the Panel's reasoning with respect to the project-specific risk premium for the A380 as well. The Panel included the project-specific risk premium proposed by the United States as the internal upper limit of the range for the risk premium that it determined for the A380 project. The Panel did so despite having said earlier that "the level of risk associated with

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<sup>2023</sup>Panel Report, para. 7.1947; see also paras. 7.1940 and 7.1941. In paragraph 7.1940, the Panel stated:

... LCA have a complex production technology which results in strong learning effects. Knowledge and experience gained in the development and production of one model of aircraft will lower the costs of development and production of subsequent aircraft launches. This is particularly true for derivative aircraft, where the subsequently launched model is a variant of an existing model, as is the case with these LCA models. (footnote omitted)

venture capital financing is typically higher than the risk associated with LA/MSF".<sup>2024</sup> The inconsistencies in the Panel's reasoning are particularly stark in the case of the A380 because the Panel made a point of contrasting the situation of a typical firm that receives venture capital and the situation of Airbus at the time it launched the A380. Quoting from an article in an economic journal, the Panel said—as already noted above—that "venture capital is provided to firms that are 'typically small and young, plagued by high levels of uncertainty and large differences between what entrepreneurs and investors know. ... {T}hese firms typically possess few tangible assets and operate in markets that change very rapidly.'"<sup>2025</sup> The Panel then contrasted this with the situation of Airbus at the time it launched the A380, noting that Airbus had by then "developed into a relatively large firm with over 30 years experience, substantial capital assets and revenues, and a track record of successful LCA development, sometimes even exceeding expectations".<sup>2026</sup> Having identified the differences in the levels of risk of venture capital financing and LA/MSF, and between a typical firm that receives venture capital financing and Airbus at the time it launched the A380 project, it is difficult to see on what basis the Panel could rely, without further explanation, on the project-specific risk premium proposed by the United States as the internal upper boundary of the range for the risk premium that it determined for the A380 project.

892. The Panel treated the A380 differently to how it treated the LCA projects in the second grouping because of the "acknowledged technological challenges associated with the A380 project".<sup>2027</sup> Yet, the Panel did not explain or provide evidentiary support for its statement about the "acknowledged technological challenges associated with the A380 project".<sup>2028</sup> Admittedly, the A380 project was a very large project, and there is some support on the Panel record for the Panel's statement that it was technologically challenging.<sup>2029</sup> However, there are also statements on the record contradicting the notion that the A380 project was more technologically advanced than some

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<sup>2024</sup>Panel Report, para. 7.462.

<sup>2025</sup>Panel Report, para. 7.463 (quoting from P. Gompers and J. Lerner, "The venture capital revolution", (2001) 15(2) *Journal of Economic Perspectives* 145 (Panel Exhibit EC-677), quoted in Whitelaw Rebuttal Report, *supra*, footnote 1964, para. 18).

<sup>2026</sup>Panel Report, para. 7.463.

<sup>2027</sup>Panel Report, para. 7.469.

<sup>2028</sup>Panel Report, para. 7.469.

<sup>2029</sup>For example, in a press article submitted to the Panel by the European Union, an executive of Airbus is quoted as saying: "The A380 is the first fundamentally new Airbus to be developed since the A320". The press article goes on to describe the A380 as the "biggest technology leap" in the history of Airbus. (Airbus, Aircraft Families/Product Viewer, A340-300, A340-500, A340-600 (Panel Exhibit EC-372), p. 12) A report by Morgan Stanley refers to the "wake vortex" problem, which has to do with the distance required between airplanes and which some feared would affect the attractiveness of using the A380 in certain airports. (Morgan Stanley, "EADS, The A380 Debate" (5 September 2006) (Panel Exhibit EC-409), p. 15) The critical project appraisal of the A380 performed by the UK Department of Trade and Industry refers to two technological challenges. This information, however, is HSBI.

of the prior LCA projects.<sup>2030</sup> We presume the Panel gave more weight to some of the statements than to others. This was within the Panel's authority as the trier of facts.<sup>2031</sup> However, the Panel could have provided more explanation and identified the evidence on the Panel record that supported its statement.

893. Finally, there is an inconsistency between the project-specific risk premium proposed by the United States—and used by the Panel as a boundary for the ranges for the project-specific risk premia that it determined—and the discount rate used by Dr. Gary Dorman in a report submitted by the United States for purposes of its claims of serious prejudice. As described more fully in section IX.D.1 of this Report, Dr. Dorman conducted a simulation of "the cash flows generated by a high-volume wide-body airplane program under a variety of circumstances".<sup>2032</sup> In this simulation, Dr. Dorman used an annual discount rate of 10%.<sup>2033</sup> The European Communities had alerted the Panel to the fact that the project-specific risk premium proposed by the United States was higher than that reflected in the discount rate used by Dr. Dorman. This was because deducting the government borrowing rate and corporate risk premium used by Dr. Ellis for 2000—the year used by Dr. Dorman as his temporal baseline—from the 10% discount rate applied by Dr. Dorman yielded a project-specific risk premium lower than the 7% proposed by the United States. As the European Union points out<sup>2034</sup>, the Panel noted the European Communities' argument in the section of the Panel Report that summarizes the parties' arguments, but did not address it in the assessment of project-specific risk premium proposed by the United States. Although panels are not required to address every argument made by a party, given the centrality of the project-specific risk premium for the disposition of the benefit issue before it, we believe it was important in this case for the Panel to have addressed the apparent contradiction between the figure calculated by Dr. Ellis and the figure used by Dr. Dorman.<sup>2035</sup>

894. In sum, the Panel's reasoning in relation to the United States' proposed project-specific risk premium is internally inconsistent. The Panel dismissed venture capital financing as a source from which to derive the project risk of the projects financed with LA/MSF because it considered venture capital financing to be "inherently more risky than LA/MSF". At the same time, the Panel used the

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<sup>2030</sup>The same Morgan Stanley report explains that the A380 is not as technologically innovative in the use of materials, being constructed mostly of traditional metal and not using as much composites as the Boeing 787 and the planned A350XWB. (Panel Exhibit EC-409, *supra*, footnote 2029, p. 24)

<sup>2031</sup>See, for example, Appellate Body Report, *EC – Hormones*, para. 132; and Appellate Body Report, *Korea – Alcoholic Beverages*, para. 161.

<sup>2032</sup>Dorman Report, *supra*, footnote 1042, p. 3. (footnote omitted)

<sup>2033</sup>The discount rate is the rate of interest used to determine the present value of future cash flows or revenues, that is, the interest rate that makes future cash flows or revenues comparable to today's values.

<sup>2034</sup>European Union's additional memorandum following the first session of the oral hearing, para. 72.

<sup>2035</sup>Appellate Body Report, *Dominican Republic – Import and Sales of Cigarettes*, para. 125.

project-specific risk premium proposed by the United States—which had been derived by Dr. Ellis from the returns of venture capital financing—as a boundary for the ranges of project-specific risk premia that it established for the three groupings of LCA projects. The Panel's error is compounded in the case of the A300 and A310 because it left the upper limit of the range of the project-specific risk premium unbounded, thus potentially going beyond the level of the risk premium associated with venture capital financing. In the case of the second grouping, the Panel determined the same upper boundary for a diverse set of LCA projects, some of which were new aircraft, while others were derivatives. It also included projects launched in a time span of 13 years, during which Airbus had different levels of experience. And for the A380, the Panel used the United States' proposed project-specific risk premium as an inner boundary despite recognizing that, by the time the A380 was launched, Airbus was a very different company from the typical firm that receives venture capital. There are thus clear inconsistencies in the Panel's reasoning. This type of internally inconsistent reasoning cannot be reconciled with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU.<sup>2036</sup> The Panel also failed to comply with its duties under Article 11 of the DSU by not engaging with the European Communities' argument as to the inconsistency between the project-specific risk premium proposed by the United States and the discount rate used in the Dorman Report.

895. Consequently, we *reverse* the Panel's findings, in paragraphs 7.481 and 7.488 of the Panel Report, that the United States' proposed project-risk premium constituted the minimum project risk for the A300 and A310, the exterior upper boundary of the range of project risk for the A320, A330/A340, A330-200, and A340-500/600, and the internal upper boundary of the range of project risk for the A380.

- (h) The Panel's assessment of the project-specific risk premium proposed by the European Communities

896. The European Union also requests us to review the Panel's finding that "the European Communities' project-specific risk premium for the A380 is unreliable and understates the risk premium that a market operator would have reasonably demanded Airbus pay for financing on the same or similar terms as LA/MSF for this particular model of LCA".<sup>2037</sup> The European Union challenges each of the reasons given by the Panel in support of its finding.

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<sup>2036</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 292 and 295.

<sup>2037</sup> Panel Report, para. 7.481.

897. We recall that the European Communities proposed a project-specific risk premium "constructed by Professor Whitelaw on the basis of the returns the Airbus 'risk-sharing suppliers' expected to achieve on the financing they provided for the purpose of developing the A380."<sup>2038</sup> The term "risk-sharing suppliers" refers to certain suppliers of Airbus that "agreed to perform development work on the A380, with repayment of development costs upon delivery of the component for inclusion in an A380 aircraft".<sup>2039</sup>

898. With the exception of two narrow issues in which it alleges the Panel erred in the interpretation and application of Article 1.1(b) of the *SCM Agreement*, the European Union's appeal of the Panel's assessment of the European Communities' proposed project-specific risk premium is premised on Article 11 of the DSU. As noted earlier, under Article 11 of the DSU, the Appellate Body will not interfere lightly with a panel's assessment of the facts.

899. We begin with the Panel's finding "that government support for the A380 in the form of LA/MSF reduces the level of risk associated with risk-sharing supplier financing, thereby limiting its comparability with LA/MSF."<sup>2040</sup> We understand the Panel to have been concerned about how the LA/MSF influences the perception of risk of Airbus' suppliers. From an economic perspective, the problem can be explained as follows. Risk sharing suppliers are rational, that is, profit-maximizing, entities.<sup>2041</sup> The terms that these suppliers negotiate with Airbus depend on how risky they perceive the specific project being undertaken to be—this is why they are called "risk-sharing" suppliers in the first place. LA/MSF reduces the risk that the project will fail (by, for example, reducing the risk that it will run into financial difficulties) and that it will not generate the revenues necessary to pay suppliers.<sup>2042</sup> Thus, it was reasonable from an economic perspective to consider that, all things being

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<sup>2038</sup>Panel Report, para. 7.470.

<sup>2039</sup>Whitelaw Report, *supra*, footnote 787, para. 36. Professor Whitelaw explained that, while member States are repaid on delivery of an aircraft, the risk-sharing suppliers are repaid on delivery of a part, system or component. He asserted that, "although there is a small difference in timing of repayment, there is no difference in risk as both the member States' and the risk suppliers' repayment is contingent on the ultimate sale of an aircraft". (*Ibid.*, footnote 29)

<sup>2040</sup>Panel Report, para. 7.480.

<sup>2041</sup>For purposes of this illustration, we are assuming that the risk-sharing suppliers have not themselves received LA/MSF.

<sup>2042</sup>The European Communities explained that risk-sharing suppliers will not be repaid for any non-recurring costs if Airbus fails to meet its delivery forecast. Risk-sharing suppliers "cannot institute 'default' proceedings if a shortfall in deliveries precludes full recovery of principal and interest". (European Communities' response to Panel Question 171, para. 15)

equal, the risk sharing suppliers will require a lower rate of return to participate in a project that receives LA/MSF compared to a project that does not receive LA/MSF.<sup>2043</sup>

900. The Appellate Body has said that the conferral of a "benefit", within the meaning of Article 1.1(b) of the *SCM Agreement*, means that "the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent the contribution".<sup>2044</sup> For such a comparison to be meaningful, the benchmark that is used to determine whether the recipient is "better off" must not itself be distorted by the financial contribution. Rather, the benchmark must reflect conditions in the market "absent the contribution". Otherwise, it would not be possible to determine whether the financial contribution placed the recipient in an advantageous position, because the benchmark used in the comparison itself reflects the financial contribution. Given that the LA/MSF affects the terms on which the suppliers participate in the Airbus project, the suppliers' rate of return cannot be used to determine whether Airbus is "better off" than it would have been absent the financial contribution as required under the *SCM Agreement*.

901. The European Union asserts that "neither the United States and Brazil nor the Panel explain the linkage between the receipt of {LA/}MSF for the A380 and an alleged reduction in the risk that risk-sharing suppliers actually faced for the A380, or that such reduction, in fact, affected returns".<sup>2045</sup> Thus the European Union complains that the Panel provided "*no analysis* of {Brazil's and the United States'} arguments, and *no explanation*, whether reasoned and adequate or otherwise, of its evidentiary basis."<sup>2046</sup>

902. Since the project-specific risk premium derived from risk-sharing suppliers was put forward by the European Communities, the latter had some burden to persuade the Panel about its appropriateness. Moreover, as we explained above, it was reasonable for the Panel to consider that the risk equation of Airbus' suppliers is likely to be affected by the LA/MSF. While the Panel expressed its agreement with Brazil and the United States very succinctly, we understand the Panel to

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<sup>2043</sup>The United States provides a similar explanation in its appellee's submission:

... the Panel's finding in this regard is reasonable and uncontroversial—it found elsewhere that LA/MSF reduced the risk associated with development of large civil aircraft, and that risk would obviously affect the company's ability to pay other debt, including risk-sharing supplier financing. Thus, the risk faced by risk-sharing suppliers financing Airbus would differ substantially from the risk faced by the governments providing LA/MSF to Airbus, preventing the use of one as a valid benchmark for the other.

(United States' appellee's submission, para. 222)

<sup>2044</sup>Appellate Body Report, *Canada – Aircraft*, para. 157.

<sup>2045</sup>European Union's appellant's submission, para. 825.

<sup>2046</sup>European Union's appellant's submission, para. 826. (original emphasis; footnote omitted)

have made its assessment on that basis.<sup>2047</sup> The United States made a similar point before the Panel, arguing that:

{t}his is a logical proposition which the Panel should take into account in its consideration of the RSS{—risk sharing suppliers—} benchmark. Contrary to the {European Communities'} suggestion, the strength of that proposition does not depend on evidence of the internal decision-making processes of particular suppliers.<sup>2048</sup>

903. The European Union points out that Professor Whitelaw responded to Brazil's and the United States' allegations by pointing out that suppliers "do not know whether or on what terms" Airbus will receive the LA/MSF.<sup>2049</sup> In addition, the European Union argued that "to the extent that {risk-sharing suppliers} relied on publicly-available evidence, these suppliers probably shared the commonly-held view that the subsidy associated with {LA/}MSF loans is *de minimis* or zero."<sup>2050</sup> We do not consider that this provides a sufficient basis to disturb the Panel's finding. It is implausible that risk-sharing suppliers were not aware of the possibility that Airbus would receive LA/MSF given the publicity surrounding the launch of the A380 project, and considering the evidence on record that some of the risk-sharing suppliers may have themselves received LA/MSF.<sup>2051</sup> Furthermore, it is not necessary for the risk-sharing suppliers to have known the exact terms of the LA/MSF or to have considered the subsidy component of the LA/MSF to be significant. How much of the details the suppliers knew could be relevant if one wanted to calculate the exact amount by which the LA/MSF altered the suppliers' risk perception of the A380 project. However, the general expectation that Airbus would receive LA/MSF for the A380 would have meant that the risk-sharing suppliers considered the project less risky than it would have been without the LA/MSF.

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<sup>2047</sup>Panel Report, para. 7.480.

<sup>2048</sup>United States' comments on the European Communities' response to Panel Question 174, para. 45.

<sup>2049</sup>European Union's appellant's submission, para. 824 (quoting Professor Whitelaw in European Communities' oral statement at the second Panel meeting (BCI), para. 92).

<sup>2050</sup>European Communities' response Panel Question 174, para. 67. To support its contention that this was a "commonly-held view", the European Communities pointed to a single document, a Citigroup report that speculated about the United States' WTO complaint and observed that "we find it hard to see launch aid as a significant subsidy". The Citigroup report also said some companies had made little use of launch aid in recent years because of its costs and described German launch aid as not being "generous". ("EADS – Off we go to the WTO", *Citigroup Report* (6 October 2004) (Panel Exhibit EC-875), p. 3)

<sup>2051</sup>Panel Report, para. 7.480.

904. At the oral hearing, the European Union emphasized that LA/MSF operates to shift risk from Airbus to the member State governments, but does not affect the level of overall risk of the project. As a consequence, the European Union asserts that LA/MSF cannot have altered the risk perception of risk-sharing suppliers.<sup>2052</sup>

905. We are not persuaded by the European Union's argument. First, we note that the premise of the European Union's argument is that LA/MSF does not affect the development and marketing risks of the LCA project.<sup>2053</sup> Yet, the very purpose of LA/MSF is to provide funding for the development of an LCA model.<sup>2054</sup> The European Communities pointed out before the Panel that one of the "outstanding features" of the LCA industry is its "enormous start-up costs for new LCA models" and emphasized that "{t}he development costs are high and have to be invested a long time before revenue is generated."<sup>2055</sup> LA/MSF provided the financial means to undertake the development of an LCA project. By providing funding for a significant share of the development costs, LA/MSF makes it more likely that the project will be developed, and the successful development of a project means that there will be an LCA to sell, thereby reducing the marketing risk of the project. Indeed, the European Communities expressly acknowledged before the Panel that the nature of LA/MSF is to reduce development and marketing risk.<sup>2056</sup>

906. Moreover, contrary to what the European Union argues, LA/MSF does more than "{a}meliorat{e} the pain of failure for any single participant".<sup>2057</sup> In its argumentation, the European Union appears to be assuming that development costs funded by the LA/MSF could be financed by Airbus and thus it is merely a question of whether the additional financial burden is on Airbus or on the member State governments. However, this assumption is contradicted by factual findings of the Panel. The Panel found that "because of the significant amount of debt that developing its previous models of LCA would have generated, we consider Airbus would not have been in a

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<sup>2052</sup>See also European Union's additional memorandum following the first session of the oral hearing, paras. 91 ff.

<sup>2053</sup>European Union's additional memorandum following the first session of the oral hearing, para. 91.

<sup>2054</sup>See Panel Report, paras. 7.367 and 7.369.

<sup>2055</sup>European Communities' first written submission to the Panel, para. 27.

<sup>2056</sup>European Communities' comments to the United States' response to Panel Question 162, para. 222: "Nature: Although {LA/}MSF loans reduce development and market risk, the amount of this risk is limited."

<sup>2057</sup>European Union's additional memorandum following the first session of the oral hearing, para. 96.



position to obtain market financing for the A380, had it not financed the development of its earlier model LCA in significant part through LA/MSF."<sup>2058</sup>

907. Therefore, we consider that the Panel had a proper basis to conclude that the rate of return demanded by the risk-sharing suppliers for the A380 was not an appropriate benchmark for purposes of determining benefit in this case. We agree with the Panel that LA/MSF provided to Airbus results in a rate of return of the risk-sharing suppliers that understates the level of risk that would be factored in by a market lender in the absence of LA/MSF.

908. Another reason that the Panel gave for rejecting the European Communities' proposed project-specific risk premium concerned the sampling technique used by Professor Whitelaw to derive it. The European Union criticizes the Panel for having "failed to consider Professor Whitelaw's evidence that the sample met the standard statistical tests for adequacy".<sup>2059</sup> We note that the Panel explained that it was unable to verify Professor Whitelaw's assertion concerning the sample used "because the European Communities has submitted little if any of the underlying data used in Professor Whitelaw's calculations."<sup>2060</sup> On appeal, the European Union did not refute this, although it also appears that the Panel did not specifically ask for the data. Yet, the European Union seems to have expected the Panel to have taken Professor Whitelaw's testimony at face value. In our view, the Panel's expressed preference for verifying the sample was consistent with its duty under Article 11 of the DSU to make an objective assessment of the facts.

909. Nevertheless, there are other aspects of the Panel's analysis that are troubling. The Panel gives no indication as to why it considered that the sample size for calculating the rate of return of the risk sharing suppliers was too small. The size of a sample does not necessarily disqualify it, provided that the data used in the sample are well chosen. Moreover, as the European Union underscores, Professor Whitelaw provided explanations to the Panel on the robustness of the sample. He specified the number of suppliers included in the sample, and explained that the rate of return could not be calculated for the rest of the risk-sharing suppliers. Professor Whitelaw added that the sample represented 42.09% of the value of non-recurring costs of all A380 risk-sharing supplier contracts.

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<sup>2058</sup>Panel Report, para. 7.1948. The European Union also distinguishes between the launch of an LCA project and its subsequent development. Based on this distinction, the European Union argues that the LA/MSF affects the decision to launch an LCA, but does not alter the risks at the development stage. (European Union's additional memorandum following the first session of the oral hearing, paras. 91 and 99) However, before the Panel, the European Communities asserted that through the provision of LA/MSF the member State governments "agree to fund a portion of the development cost of an aircraft that has been launched and is being actively marketed." It further stated that "{g}overnments generally do not provide this financing until *after* the commercial launch of a new aircraft." (European Communities' first written submission to the Panel, paras. 302 and 305 (original emphasis))

<sup>2059</sup>European Union's appellant's submission, para. 798.

<sup>2060</sup>Panel Report, para. 7.480.

He further stated that the standard error was 0.87% for a 90% confidence interval.<sup>2061</sup> The Panel should have, at the very least, provided reasons why it was not persuaded by Professor Whitelaw's explanations. After questioning the appropriateness of the size of the sample, the Panel went on to say that "{e}ven on the basis of only the number of risk-sharing supplier contracts actually sampled we find this to be clearly insufficient to substantiate the European Communities' assertions in respect of the appropriate project-specific risk premium."<sup>2062</sup> The Panel provides no explanation for its conclusion.

910. An additional reason given by the Panel to reject the European Communities' project-specific risk premium was that it saw "some logical merit to the United States' arguments suggesting that the risk-sharing suppliers had incentives to lower their expected rates of return".<sup>2063</sup> The European Union submits that the Panel's statement about suppliers having an incentive to lower their expected rates of return "appears to be premised on a suggestion that the actions of a market actor that has an existing business relationship with a company that is allegedly subsidised cannot serve as a benchmark because they would somehow be tainted."<sup>2064</sup> Referring to the Appellate Body report in *Japan – DRAMs (Korea)*<sup>2065</sup>, the European Union contends that, for "risk-sharing supplier agreements negotiated at arm's length, there is simply no justification to conclude that the agreed rates do not reflect the market."<sup>2066</sup> Thus, the European Union alleges that the "Panel's criticism amounts to an error in the interpretation and application of Article 1.1(b) of the *SCM Agreement*."<sup>2067</sup>

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<sup>2061</sup>See European Communities' oral statement at the second Panel meeting (BCI), paras. 84-88.

<sup>2062</sup>Panel Report, para. 7.480.

<sup>2063</sup>Panel Report, para. 7.480.

<sup>2064</sup>European Union's appellant's submission, para. 811.

<sup>2065</sup>In particular, the European Union refers to the Appellate Body's statement that: "{w}e also do not consider that there are different standards applicable to inside and to outside investors. There is but one standard—the market standard—according to which rational investors act". (Appellate Body Report, *Japan – DRAMs (Korea)*, para. 172)

<sup>2066</sup>European Union's appellant's submission, para. 811 (referring to Whitelaw Rebuttal Report, *supra*, footnote 1964, para. 34; and European Communities' second written submission to the Panel (HSBI Appendix), paras. 23-25).

<sup>2067</sup>European Union's appellant's submission, para. 811.

911. In addressing the question of whether the risk-sharing suppliers had incentives to lower their expected rates of return, the Panel summarized the United States' argument as follows:

The Ellis Report also argues that for various reasons, the {IRRs} on the supplier contracts are typically lower than the true expected rates of return to the suppliers. The Ellis Report bases this view on the assertion that the expected return on a manufacturing project typically includes a number of potential sources of return, such as future business opportunities that increase the expected return of the project above the calculated {IRR} and reduce its risk. Firms also engage in bidding strategies such that the price bid for a particular contract may reflect other opportunities with the same customer. Also, unlike the capital provided by banks or financial institutions, a supplier's capital is tied up to the input that the supplier is manufacturing. Because suppliers have a narrower range of choices than investors, their required rate of return will be lower than that of investors.<sup>2068</sup> (footnote omitted)

912. We do not agree with the European Union that the Panel based its conclusion on a distinction between inside and outside investors, contrary to the Appellate Body's statement in *Japan – DRAMs (Korea)* that such distinction was not "helpful".<sup>2069</sup> Rather, we understand the Panel to have referred to broader aspects of the relationship between the risk-sharing suppliers and Airbus and strategic considerations that could influence the rate of return of the risk-sharing suppliers. Having said that, we agree with the European Union that the Panel's analysis of this particular issue is lacking. The Panel summarized the United States' argument and offers a conclusory statement agreeing with the United States' position. The Panel, however, provides no explanation for its conclusion and no indication that it independently assessed the evidence submitted by the United States.<sup>2070</sup> Nor does the Panel Report indicate that the Panel considered the rebuttal of the European Communities or how the Panel reconciled its conclusion with that evidence. We observe, in this regard, that before the Panel, the European Communities rejected the proposition that "risk-sharing suppliers are not fully-fledged market actors". The European Communities also rejected the relevance of whether risk-sharing suppliers "have fewer options for their investment capital than investors such as banks

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<sup>2068</sup>Panel Report, para. 7.476. In a footnote to the Panel statement challenged by the European Union, the Panel referred to the United States' comments on the European Communities' response to Panel Question 174. (*Ibid.*, footnote 2712 to para. 7.480) The Panel may have inadvertently placed this footnote at the end of the wrong sentence. The United States' comments referred to the argument that the risk of suppliers was altered by the LA/MSF given to Airbus.

<sup>2069</sup>Appellate Body Report, *Japan – DRAMs (Korea)*, para. 172.

<sup>2070</sup>According to the European Union, "the United States offered *no evidence* that the sampled risk-sharing suppliers had actually lowered their returns; it merely asserted that there were reasons why risk-sharing suppliers *might* have reduced their required returns". (European Union's appellant's submission, para. 812. (original emphasis))

and pension funds"<sup>2071</sup> It further argued that there is no "reason to believe that the prospect of obtaining future contracts with Airbus would have affected the terms of the supply agreements".<sup>2072</sup>

913. The United States suggests that the Panel may have found it difficult to explain its assessment because "most of the relevant information in this respect" was HSBI and "most of the more detailed discussions between the parties took the form of HSBI".<sup>2073</sup> We have sympathy for the challenges posed by the HSBI. Yet, the fact that some of the information was designated as HSBI did not prevent the Panel from summarizing the arguments of the parties. Thus, we are not persuaded that the HSBI character of the information precluded the Panel from providing an explanation of its assessment of the arguments and evidence submitted by the parties.

914. A further reason given by the Panel for rejecting the European Communities' proposed benchmark was that "there is information contained in the Airbus A380 business case which suggests that the risk-sharing participants' involvement in the A380 project may not have been on strictly market terms for all participants."<sup>2074</sup> In a footnote, the Panel refers to Exhibit EC-362, which is HSBI, and to Dr. Ellis' assertion that "a number of the suppliers used in the Whitelaw analysis

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<sup>2071</sup>Panel Report, para. 7.478.

<sup>2072</sup>Panel Report, para. 7.478. The European Communities explained to the Panel that "Airbus SAS conducts a separate bidding and evaluation process for each {risk-sharing supplier} contract; there are no 'package deals'". It further alleged that risk-sharing suppliers have two additional sources of uncertainty: (i) no guarantee of being selected for that work package and (ii) no guarantee of obtaining work on future LCA programmes. Thus, the European Communities asserted that "{t}he notion that a supplier would accept a below-market return on a long-term contract, in the faint hope of obtaining work on future contracts (for which it has no guarantee of selection), is unsupported and speculative." (European Communities' comments on the United States' response to Panel Question 215, para. 356) Professor Whitelaw, the European Communities' expert, also testified before the Panel that "*there is no aftermarket* for the aerostructures developed by the risk-sharing suppliers whose returns inform the {European Communities'} benchmark. ... {T}hese suppliers develop products ... that are rarely, if ever, replaced. The risk-sharing suppliers ... are not producing consumables such as tires and engines, which regularly wear out and generate substantial aftermarket sales over the life of an aircraft." He added that "Airbus risk-sharing suppliers do not have an incentive to reduce their {non-recurring costs} returns to gain recurring cost ... work or aftermarket sales. To the contrary, .... suppliers have an incentive to *increase* their return on {non-recurring costs} at the expense of recurring cost work or aftermarket sales". (European Communities' oral statement at the second Panel meeting (BCI), para. 97 (original emphasis))

<sup>2073</sup>United States' appellee's submission, para. 219. The United States also argues that its own "ability to offer any additional evidence demonstrating reduced risk was of course a result of the European {Communities'} failure to provide the full information necessary for it to do so" and asserts that "{n}either the Panel nor the United States can be faulted for that". (*Ibid.*, para. 220) We agree with the United States that neither the Panel nor the United States should be blamed for any failure by the European Communities to provide information. That is not, however, our concern with the Panel's assessment. Our concern is that there is no indication that the Panel independently engaged with the information that was submitted by the European Communities.

<sup>2074</sup>Panel Report, para. 7.480.

received 'launch aid-like financing or other government subsidies which reduces their cost of capital and therefore the returns required on contracts with Airbus'."<sup>2075</sup>

915. On appeal, the European Union asserts that "there was no evidence that any {LA/}MSF, to the extent it was, in fact, received {by the risk-sharing suppliers}, was provided on terms that constitute subsidies".<sup>2076</sup> It further argues that "even if risk-sharing suppliers received {LA/}MSF on subsidised terms, they had little or no incentive to share any benefit with Airbus".<sup>2077</sup> Referring to the testimony of Professor Whitelaw, the European Union adds that "even if the *entirety* of any benefit to risk-sharing suppliers would be passed through to Airbus, the effect on the expected return was small" and "below the US project-specific risk premium".<sup>2078</sup> The actual estimate calculated by Professor Whitelaw is HSBI.

916. The European Union does not contest that some risk-sharing suppliers received LA/MSF. Instead, the European Union challenges the Panel's conclusion as to the impact that the LA/MSF provided to risk-sharing suppliers has on the rate of return those suppliers demanded to participate in the A380 project. The European Union is correct that, from an economic perspective, any subsidies that the risk-sharing suppliers may have received need not have been necessarily passed on to Airbus in the form of a lower rate of return. Whether any subsidy given to the risk-sharing suppliers passed through to Airbus would have depended on Airbus' market power or negotiating leverage. The European Communities' expert, Professor Whitelaw, raised this issue before the Panel and asserted that the risk-sharing suppliers had considerable negotiating power because of their proprietary technologies and limited number.<sup>2079</sup> Furthermore, Professor Whitelaw provided calculations that sought to show that any subsidy passed through to Airbus would be very small. There is no indication that the Panel engaged with this evidence. The Panel summarized the testimony of Professor Whitelaw, but then agreed with the United States without explaining why it was not persuaded by Professor Whitelaw's testimony. In our view, the Panel had a duty to explain why it was not persuaded or how it otherwise reconciled its conclusion with the rebuttal argumentation submitted by the European Communities.

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<sup>2075</sup>Panel Report, footnote 2713 to para. 7.480 (quoting Response to Whitelaw Report, *supra*, footnote 787, p. 24).

<sup>2076</sup>European Union's appellant's submission, para. 831.

<sup>2077</sup>European Union's appellant's submission, para. 831.

<sup>2078</sup>European Union's appellant's submission, para. 831. (original emphasis)

<sup>2079</sup>At the first meeting with the Panel, the European Communities observed that "the bargaining power could well lie with the suppliers—not Airbus" and that "many of these suppliers possess unique technology that makes them the only viable source for certain contracts". (European Communities' closing statement at the first Panel meeting (BCI), para. 17)

917. Finally, the European Union questions the Panel's statement that the "one contract that the European Communities has submitted shows that there is at least one major difference between the repayment terms under this contract and LA/MSF which we believe reduces its relative level of risk."<sup>2080</sup> The Panel was referring to the Risk-Sharing Supplier Contract Re A380, Exhibit EC-117, which is HSBI. The main point made by the European Union on appeal is that it provided testimony by Professor Whitelaw rebutting the notion that any difference in the terms of the contracts would have resulted in a lower risk for the risk-sharing suppliers. Like it did for other evidence provided by the European Communities, the Panel summarized Professor Whitelaw's testimony, but never engaged with it. We recognize that the HSBI nature of the evidence would have made it difficult for the Panel to have provided a full exposition of its reasoning on this point. However, we note that the Panel also had an obligation to do more than to simply summarize Professor Whitelaw's testimony and refer to the contract in a footnote. The Panel was under an obligation to engage with the evidence provided by Professor Whitelaw, which was clearly of central importance, and explain why it did not consider that evidence persuasive, even if it only referred to this evidence in abstract terms.

918. We have identified several flaws in the Panel's analysis of the project-specific risk premium proposed by the European Communities. These flaws concern all but one of the Panel's criticisms of the European Communities' proposed proxy, namely, the finding that "government support for the A380 in the form of LA/MSF reduces the level of risk associated with risk-sharing supplier financing, thereby limiting its comparability with LA/MSF".<sup>2081</sup> The Panel's other criticisms—that is, the sampling technique used by Professor Whitelaw, the contract submitted by the European Communities, the risk-sharing suppliers' incentives to lower their expected rates of return, and the impact of any LA/MSF given to the risk-sharing suppliers themselves—do not indicate that the Panel made an objective assessment of the arguments and evidence submitted by the European Communities. The Panel summarized the European Communities' rebuttal arguments and evidence, but did not engage with them. Nor did the Panel explain how it reconciled its conclusion with the rebuttal arguments and evidence. This type of reasoning is not consistent with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU.<sup>2082</sup>

919. The United States has noted that "a panel is under no obligation—under Article 11 of the DSU or anywhere else—to discuss in its report each and every argument presented by the parties or, for that matter, each and every fact to which the parties refer, whether relevant or not".<sup>2083</sup> To support

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<sup>2080</sup>Panel Report, para. 7.480. (footnote omitted)

<sup>2081</sup>Panel Report, para. 7.480.

<sup>2082</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292.

<sup>2083</sup>United States' appellee's submission, para. 211.

its argument, the United States referred to the following ruling by the Appellate Body in *EC – Poultry*:

Just as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim. So long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is not specifically addressed in the "Findings" section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the "objective assessment of the matter before it" required by Article 11 of the DSU.<sup>2084</sup> (original emphasis)

920. The problem in this case is that the Panel simply summarized the rebuttal testimony submitted by the European Communities and did not engage with it. The Panel reached conclusions without explaining how it had taken into account the rebuttal testimony submitted by the European Communities. There is therefore no indication of how the Panel reconciled its conclusion with the submissions made by the European Communities. Thus, the situation in this case is different from the situation examined by the Appellate Body in *EC – Poultry*.

921. The errors that we have identified, however, do not invalidate the Panel's overall conclusion about the reliability of the project-specific risk premium proposed by the European Communities. It was reasonable for the Panel to conclude that LA/MSF reduces the level of risk of an LCA project perceived by the risk-sharing suppliers. As a result, risk-sharing suppliers would be expected to demand a lower rate of return on their participation in an LCA project than they would have demanded in the absence of LA/MSF. Therefore, in our view, deriving the project risk from the rate of return of the risk-sharing suppliers will underestimate the project risk premium that would be demanded by a market lender in the absence of LA/MSF. Under Article 1.1(b), interpreted in the light of Article 14(b) of the *SCM Agreement*, a benefit is conferred where the amount paid by the recipient for the government loan is less than what the recipient would have paid on a comparable commercial loan that it could have actually obtained on the market. Because the rate of return of the risk-sharing suppliers is distorted by the LA/MSF received by Airbus, it cannot be used to derive a benchmark that reflects the terms of a comparable commercial loan that Airbus could have actually obtained on the market. The rate of return of the risk-sharing suppliers, and thus the project risk derived from it, will be lower than that demanded by a market lender in the absence of LA/MSF.

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<sup>2084</sup> Appellate Body Report, *EC – Poultry*, para. 135.

922. Accordingly, we reject this aspect of the European Union's appeal and we do not consider that our concerns with certain aspects of the Panel's reasoning warrant disturbing the Panel's finding that the project-specific risk premium proposed by the European Union underestimates the appropriate level of project-specific risk associated with the challenged LA/MSF measures.<sup>2085</sup>

(i) Conclusion on the Panel's finding of benefit

923. In subsection (g) above, we have found that the Panel did not make an objective assessment of the facts under Article 11 of the DSU when it determined that the project-specific risk premium proposed by the United States constituted the minimum project-specific risk premium for the A300 and A310 projects, the external upper boundary of the range for the project-specific risk premium for the A320, A330/A340, A330-200, and A340-500/600 projects, and the internal upper boundary of the range for the project-specific risk premium determined for the A380 project. We have also found, in subsection (h), aspects of the Panel's reasoning concerning the project-specific risk premium proposed by the European Communities to be inconsistent with Article 11 of the DSU. However, we upheld the Panel's conclusion that the European Communities' proposed project-specific risk premium understates the risk premium that a market operator would have reasonably demanded Airbus pay for financing on the same or similar terms as LA/MSF for the A380.<sup>2086</sup> The question that arises is: how do our findings affect the Panel's ultimate conclusion that the LA/MSF measures confer a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*?

924. As described earlier, the European Communities did not contest before the Panel the first two components of the formula used by Dr. Ellis to calculate the proxy put forward by the United States—that is, the government borrowing rate and the general corporate risk premium. We note that, even leaving aside the project-specific risk premium, the rates of return obtained by the member States on all but two of the challenged LA/MSF measures are below a benchmark composed of only these two components.<sup>2087</sup> In other words, there is a positive spread, and consequently a benefit, with respect to all but two of the challenged LA/MSF measures even if the project-specific risk premium is set at zero. This is illustrated in Table 3, which shows the rates of return of each of the challenged LA/MSF measures as determined by the Panel (column 1), the market benchmark that would result by adding the corporate risk premium to the government borrowing rates (column 2), and the difference between

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<sup>2085</sup>Panel Report, para. 7.479.

<sup>2086</sup>Panel Report, paras. 7.479 and 7.481.

<sup>2087</sup>We also recall the Panel's finding that, "even relying on the European Communities' own estimates of the rates of return and market interest rate benchmarks, it is clear that the financial contributions provided in the form of LA/MSF conferred a benefit on Airbus." (Panel Report, para. 7.490 (footnote omitted)) Furthermore, we note that the European Union did not submit an alternative project risk premium for the A300 and A310 projects during the Panel proceedings. (*Ibid.*, para. 7.485)



the two figures (column 3 = column 2 – column 1). With two exceptions, column 3 shows that the market benchmark (even excluding the project-specific risk premium) would have been higher than the rates of return obtained by the member State governments.

**Table 3. LA/MSF rates of return**

	LA/MSF contract	1	2	3
		LA/MSF rate of return	Market benchmark (gr + cr) pr = 0	Spread (positive = benefit)
FRANCE	A300	0%	n/a	> 0
	A310	0%	n/a	> 0
	A320	[***%]	[***%]	[***%]
	A330/A340	[[HSBI]]	[***%]	> 0
	A330-200	[***%]	[***%]	[***%]
	A340-500/600	[***%]	[***%]	[***%]
	A380	[***%]	[***%]	[***%]
GERMANY	A300	0%	n/a	> 0
	A310	0%	n/a	> 0
	A320	[***%]	[***%]	[***%]
	A330/A340	[***%]	[***%]	[***%]
	A380	[***%]	[***%]	[***%]
SPAIN	A300	0%	n/a	> 0
	A310	0%	n/a	> 0
	A320	[***%]	[***%]	[***%]
	A330/A340	[***%]	[***%]	[***%]
	A340-500/600	[***%]	[***%]	[***%]
	A380	[***%]	[***%]	[***%]
UK	A320	[***%]	[***%]	[***%]
	A330/A340	[***%]	[***%]	[***%]
	A380	[***%]	[***%]	[***%]

Source: Panel Report (BCI), para. 7.488, Table 7; Panel Exhibit EC-597 (HSBI) "Measurement of Internal Rates of Return on MSF Agreements" (chart); Panel Exhibit EC-11 (HSBI/BCI) "Economic Assessment of Member State Financing" Expert statement of Robert Whitelaw, NYU-STERN.

925. As for the two LA/MSF measures for which the rates of return obtained by the Member state governments are higher than the government borrowing rate plus the general corporate risk (namely the French LA/MSF for the A330-200 and the UK LA/MSF for the A380), they yield a positive spread<sup>2088</sup> once the project-specific risk premium proposed by the European Communities is

<sup>2088</sup>By "spread", we refer to the difference between the market benchmark and the rate of return of the member State governments.

considered. Put differently, the rates of return obtained on these two LA/MSF measures are lower than a benchmark calculated using the project-specific risk premium derived by Professor Whitelaw and submitted by the European Communities to the Panel as an appropriate proxy for the project-specific risk premium for the A320, A330/A340, A330-200, A340-500/600, and A380 projects. We further note that the Panel made the alternative finding that "even relying on the European Communities' own estimates of the rates of return and market interest rate benchmarks, it is clear that the financial contributions provided in the form of LA/MSF conferred a benefit on Airbus."<sup>2089</sup>

926. At the oral hearing, the European Union seemed to step back from its position taken before the Panel<sup>2090</sup> that the project-specific risk premium derived by its expert, Professor Whitelaw, applied not only to the A380 project, but also to the A320, A330/A340, A330-200, and A340-500/600 LCA projects.<sup>2091</sup> The European Union suggested that the risk premium for these LCA projects could be lower than the risk premium calculated by Professor Whitelaw. This also represented a departure from the European Union's position in its appellant's submission, which only called into question the benefit finding for the French LA/MSF for the A330-200.<sup>2092</sup> A claim under Article 11 is concerned with a panel's reasoning based on the record as it stands. The Appellate Body examines the issues of law raised by an appellant in the light of the evidentiary record of the panel proceedings and the factual findings of the Panel. New assertions of fact or expert opinion cannot be introduced at the appellate stage. Even if it were permissible to raise new facts, we do not see on what basis the prior factual statements by the European Communities would no longer hold true. The evidentiary record in this case indicates that the European Communities agreed that a market lender would have demanded a rate of return for the A320, A330/A340, A330-200, and A340-500/600 LCA projects that was not lower than the rate calculated by Professor Whitelaw on the basis of the risk-sharing suppliers. We reiterate that the Panel found that the rate of return expected by the member State governments under the LA/MSF measures provided to the A320, A330/A340, A330-200, and A340-500/600 LCA projects are in all cases lower than the benchmark calculated by Professor Whitelaw.<sup>2093</sup>

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<sup>2089</sup>Panel Report, para. 7.490.

<sup>2090</sup>In Whitelaw Report, *supra*, footnote 1881, paras. 39 and 40 and Exhibit 3 thereto.

<sup>2091</sup>The European Union stood by the project-specific risk premium calculated by Professor Whitelaw in relation to the assessment of benefit for the LA/MSF provided to the A380.

<sup>2092</sup>European Union's appellant's submission, para. 790 (referring to Panel Report, paras. 7.489 and 7.490).

<sup>2093</sup>We further note that Table 7 of the Panel Report shows that, except for two of the LA/MSF measures, the rate of return obtained by the member State governments was lower than the rate of return that would have been demanded by a market lender even with the project-specific risk set at zero.

927. In addition, we recall that, although we have found several flaws in the Panel's analysis of Professor Whitelaw's project-specific risk premium, we have upheld the Panel's conclusion that this risk premium underestimates the level of risk. Thus, the appropriate level of risk premium for these projects is somewhere above the level calculated by Professor Whitelaw. Since the appropriate project-specific risk premia—and consequently the rate of return that would have been demanded by a market lender—are higher than the level calculated by Professor Whitelaw and submitted by the European Communities, it necessarily follows that the LA/MSF measures were provided at a rate of return that was below the market benchmark and, consequently, conferred a benefit.

928. Finally, we note that in its appellant's submission, the European Union conceded that other than the French LA/MSF for the A330-200, reversal of the Panel's assessment "would not, however, constitute a reversal of the Panel's finding that the {LA/}MSF loans at issue confer a benefit, within the meaning of Article 1.1(b) of the *SCM Agreement*, and thus constitute subsidies".<sup>2094</sup> As indicated above, the Panel found with regard to the French LA/MSF for the A330-200 that the rate of return obtained by the French government is below a benchmark calculated using the project-specific risk premium derived by Professor Whitelaw and which the European Communities argued before the Panel was appropriate for purposes of the assessment of benefit of that LCA project. We have explained above why it would be improper for us to undertake our assessment on a different basis.<sup>2095</sup> Consequently, there is no reason for us to interfere with the Panel's finding that the French LA/MSF provided to the A330-200 conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*.

929. For these reasons, we *uphold* the Panel's findings, in paragraphs 7.489 and 7.490 of the Panel Report, that the challenged LA/MSF measures confer a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*. As the European Union has not challenged on appeal the Panel's findings that these measures constitute financial contributions under Article 1.1(a) or the Panel's analysis of specificity under Article 2, the Panel's conclusion that "each of the challenged LA/MSF measures constitutes a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*" stands.<sup>2096</sup>

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<sup>2094</sup>European Union's appellant's submission, para. 790 (referring to Panel Report, paras. 7.489 and 7.490).

<sup>2095</sup>See *supra*, para. 926.

<sup>2096</sup>Panel Report, para. 8.1(a)(i).

4. The Panel's Statement about the Relevance of the Number of Sales over which Full Repayment is Expected

930. The Panel stated, in paragraph 7.397 of its Report, that "the number of sales over which full repayment is expected says little, if anything, about the appropriateness of the rate of return that will be achieved by the lender".<sup>2097</sup> To the extent that the Appellate Body considers this statement a finding, the European Union seeks its review by the Appellate Body. The European Union submits that the Panel's statement "flies in the face of economic logic" because "it is inconceivable that the number of sales for repayment does not affect the risk of non-repayment of the {LA/}MSF loan in question."<sup>2098</sup> In addition, the European Union asserts that the Panel's statement "is in contradiction with the Panel's earlier conclusion ... when it accepts that an *unreasonable* repayment forecast may signal that a loan confers a benefit."<sup>2099</sup> The European Union further argues that the Panel's approach is "contradicted by its approach to other arguments concerning {LA/}MSF".<sup>2100</sup> Moreover, the European Union notes that the Panel accepted "that many sorts of circumstances *external* to the provisions of an {LA/}MSF contract will have an impact on the appropriateness of the rate of return", yet as regards the level of the sales forecast for repayment, which the European Union describes as "one of the *key elements of the terms and condition{s} of the {LA/}MSF contract itself* for determining the level of risk", the Panel concluded that it "will have little, if any, impact on the appropriateness of the rate of return".<sup>2101</sup>

931. The United States does not consider that the Panel erred in making the statement challenged by the European Union. According to the United States, the Panel was "correct in finding that a reasonable payment forecast sheds little light on the appropriate rate of return".<sup>2102</sup> The United States explains that "a reasonable forecast in no way eliminates the risk implicit in long-term, extraordinarily costly financing".<sup>2103</sup>

932. The statement that the European Union is challenging was made by the Panel in the context of examining the European Communities' argument that the "reasonableness of the repayment forecasts"

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<sup>2097</sup>European Union's appellant's submission, para. 842. The European Union "acknowledges that the Panel's consideration of this issue did not affect the Panel's conclusion since it aimed to compare {LA/}MSF with loans having the same or similar conditions, including a comparable schedule of repayment". (*Ibid.*, para. 841)

<sup>2098</sup>European Union's appellant's submission, para. 843.

<sup>2099</sup>European Union's appellant's submission, para. 844. (original emphasis)

<sup>2100</sup>European Union's appellant's submission, para. 845.

<sup>2101</sup>European Union's appellant's submission, para. 846. (original emphasis)

<sup>2102</sup>United States' appellee's submission, para. 225.

<sup>2103</sup>United States' appellee's submission, para. 225. (emphasis omitted)

is the "decisive factor" for determining whether certain LA/MSF measures conferred a benefit.<sup>2104</sup> The European Communities had argued before the Panel that footnote 16, which is attached to Article 6.1(d) of the *SCM Agreement*, supports the view that "the drafters of the *SCM Agreement* looked at the level of forecast sales as the decisive factor of royalty-based financing."<sup>2105</sup> Article 6.1(d) and footnote 16 provide:

Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of: ...

(d) direct forgiveness of debt, i.e. forgiveness of government-held debt, and grants to cover debt repayment.<sup>16</sup>

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<sup>16</sup>Members recognize that where royalty-based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

933. The full paragraph of the Panel Report which includes the statement with which the European Union takes issue is reproduced below:

At most, we consider that the language of footnote 16 may be read to imply that when actual aircraft sales do not fall below the level of forecast sales under a royalty-based financing instrument (i.e., the situation the European Communities suggests evidences the existence of a "reasonable repayment forecast"), it would be inaccurate to characterise that instrument as providing for direct forgiveness of debt. However, this is not the same as saying that all instances of royalty-based financing granted on the basis of a "reasonable repayment forecast" do not confer a benefit within the meaning of

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<sup>2104</sup>Panel Report, para. 7.390. The European Communities explained the logic of its position as follows:

Reasonable forecasts inform the analysis whether the repayment provisions confer a benefit on the recipient or not. If repayment provisions are based on reasonable forecasts, they ensure a high probability that {LA/}MSF loans are fully paid back, thereby reducing the element of risk to be factored into the terms and conditions of the contract, including the rate of return.

(European Communities' response to Panel Question 62, para. 45)

The "reasonableness" standard put forward by the European Communities is tied to the 1992 Agreement, which states in Article 4(1):

Governments shall provide support for the development of a new large civil aircraft programme only where a critical project appraisal, based on conservative assumptions, has established that there is a reasonable expectation of recoupment, within 17 years from the date of first disbursement of such support, of all costs as defined in Article 6(2) of the Aircraft Agreement, including repayment of government supports on the terms and conditions specified below.

<sup>2105</sup>European Communities' first written submission to the Panel, para. 455. The European Communities acknowledged that footnote 16 "is not directly linked to the determination of a subsidy under Article 1" but considered that it nevertheless "indirectly supports the view that the forecast and repayment mechanism of this instrument is at the heart of any legal assessment under the *SCM Agreement*". (European Communities' response to Panel Question 63, para. 55 (original underlining))

Article 1.1(b) of the SCM Agreement. In our view, a reasonable repayment forecast, in the terms advanced by the European Communities—i.e., a reasonable number of sales over which a market lender could expect full repayment of loaned principal plus interest – cannot alone be determinative of whether a royalty-based financing instrument (in this case LA/MSF) confers a benefit for the purpose of the SCM Agreement. While we can accept that an *unreasonable* repayment forecast may signal that a loan confers a benefit, we do not believe the opposite will necessarily be the case when LA/MSF is grounded on a reasonable repayment forecast. This is because the number of sales over which full repayment is expected says little, if anything, about the appropriateness of the rate of return that will be achieved by the lender.<sup>2106</sup> (original emphasis; footnote omitted)

934. The European Union has not appealed the Panel's findings concerning the relevance of footnote 16, nor does it seek review of the Panel's rejection of the reasonableness of the forecast as the "decisive factor" for the determination of benefit. The European Union's request is focused exclusively on the last sentence in the paragraph reproduced above.

935. In subsection 3(a) above, we observed that the assessment of benefit under Article 1.1(b) of the *SCM Agreement* calls for a comparison of the terms and conditions of the LA/MSF measures with the terms and conditions that would have been offered on the market at that time the challenged LA/MSF measures were granted.<sup>2107</sup> Where, as in the case of the LA/MSF measures, the re-payment of a loan depends on the number of sales, the *expected* number of sales will be a fundamental element in the computation of the rate of return of the loan. This is because the rate of return is a function of the number of sales that are forecast. Although the Panel's reasoning is not altogether clear, we understand the Panel to have taken an *ex ante* approach to the calculation of the rates of return of the member State governments, that is, the Panel calculated the rates of return expected at the time the LA/MSF measures were provided. The European Union and the United States confirmed at the oral hearing that they too understand the Panel as having taken an *ex ante* approach.

936. The Panel did not explain why it considered that "the number of sales over which full repayment is expected says little, if anything, about the appropriateness of the rate of return that will be achieved by the lender". It may be that what the Panel meant is that the number of sales over which repayment is expected is not dispositive of the question of whether the rate of return demonstrates that the loan confers a benefit. Understood in this way, the statement would be correct given that the assessment of benefit would require a comparison with the rate of return that would

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<sup>2106</sup>Panel Report, para. 7.397.

<sup>2107</sup>The European Union and the United States agreed with this approach at the first session of the substantive oral hearing.

have been demanded by a market lender.<sup>2108</sup> The Panel's statement, however, can also be understood to suggest that the number of sales is irrelevant to the calculation of the rate of return of the member State governments. As we explained above, this would be incorrect. Given the potential that the Panel's statement could be misused in the future, we *reverse* this statement.

## VII. Non-LA/MSF Measures

### A. *The EC Framework Programmes*

937. We now turn to the European Union's appeal of the Panel's finding that certain R&TD grants provided to Airbus pursuant to the Second (1987-1991), Third (1990-1994), Fourth (1994-1998), Fifth (1998-2002), and Sixth (2002-2006) EC Framework Programmes were "specific" within the meaning of Article 2.1(a) of the *SCM Agreement*. We first provide a summary of the Panel's findings in respect of these measures before assessing the European Union's claims on appeal.<sup>2109</sup>

#### 1. The Panel's Findings

938. The Panel explained at the outset that it was focusing its evaluation on the United States' claims that the challenged grants were specific within the meaning of subparagraph (a) of Article 2.1 of the *SCM Agreement*. According to the Panel, a finding of specificity under Article 2.1(a) "requires the establishment of the existence of a limitation that expressly and unambiguously restricts the availability of a subsidy to 'certain enterprises', and thereby does not make the subsidy 'sufficiently

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<sup>2108</sup>The European Communities acknowledged before the Panel that "reasonable forecasts alone do not make an {LA}/MSF loan subsidy-free". Instead, the European Communities explained the relevance of the forecasts as follows:

However—and this is our point—where forecasts are reasonable, the risk for a government not to recoup its capital is significantly lower. That again reduces the need to ask for a high risk-premium. If they get this element of an {LA}/MSF loan right, governments will eliminate a good deal of risk at the outset and be well on the way to ensuring full repayment of {LA}/MSF. Let me explain this point in more detail.

The European Communities has never pretended that the fact that the repayment target for sales is set at a conservative level is *by itself* sufficient demonstration of the absence of a subsidy. Clearly, there has to be an **adequate return** for the government which covers the cost of raising the money plus a reasonable premium for the risk of non-repayment. ...

However, the European Communities insists that if the repayment target is set for a sufficiently low number of sales, thus removing most of the risk of non-repayment, then the government, as a responsible investor, is entitled to **take its own view** of the remaining risk and to set the interest rate accordingly.

(European Communities' oral statement at the second Panel meeting, paras. 83-85 (original italics and boldface))

<sup>2109</sup>Although relevant details concerning the EC Framework Programmes are set out in this section of our Report, we note that Part IV contains a more detailed description of the challenged measures.

broadly available throughout an economy'.<sup>2110</sup> The Panel examined the EC Decisions that established each of the EC Framework Programmes and each of the "specific programmes"<sup>2111</sup> adopted for the purposes of implementation. The Panel found that these EC Decisions constituted the "legal regime" for the granting of R&TD funding under the EC Framework Programmes.<sup>2112</sup> The Panel observed that the EC Decision establishing each EC Framework Programme set out overall guidelines, but did not indicate how funds authorized under the programme could be accessed by individual applicants; rather, the Panel found that the detailed rules and methodologies for the distribution of funds were set out in the EC Decisions concerning the "specific programmes".<sup>2113</sup> Thus, although the Panel found that the overall aims of each EC Framework Programme "were expressed in terms of advancing EC R&TD activities in general", the Panel considered that "the legal regimes giving effect to these objectives did so, at least partly, by channelling dedicated amounts of funding to sector-specific research areas that were implemented in accordance with specific work programmes".<sup>2114</sup>

939. In respect of the challenged grants, the Panel noted that an amount of funding dedicated to research for "aeronautics" or "aeronautics and space" was provided for under each of the relevant EC Framework Programmes.<sup>2115</sup> The Panel stated that the effect of creating such allocations was "equivalent to setting aside a portion of a budget that is ostensibly intended to fund research activities in all sectors of the economy for the sole purpose of the research efforts of enterprises or industries active in the aeronautics sector".<sup>2116</sup> In doing so, the Panel added, "the legal regimes under which the European Commission operated, explicitly limited access to a dedicated portion of the subsidy grants made available under the Framework Programmes to only those enterprises or industries undertaking research in the field of aeronautics."<sup>2117</sup> This, the Panel maintained, created "a closed system of subsidization that focused on 'aeronautics' or 'aeronautics and space'".<sup>2118</sup>

940. The Panel considered that "the allocation of funds to certain exclusive research activities under an umbrella subsidy programme is not incompatible with Article 2.1(a), provided that the availability of those funds is not explicitly limited to certain enterprises."<sup>2119</sup> The Panel concluded, however, that the evidence before it indicated that "amounts of subsidization were

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<sup>2110</sup>Panel Report, para. 7.1512. (footnote omitted)

<sup>2111</sup>Panel Report, paras. 7.1517, 7.1526, 7.1536, 7.1546, 7.1547, and 7.1557.

<sup>2112</sup>Panel Report, para. 7.1562.

<sup>2113</sup>Panel Report, paras. 7.1517, 7.1526, 7.1536, 7.1546, 7.1547, and 7.1557.

<sup>2114</sup>Panel Report, para. 7.1563 (referring to paras. 7.1518, 7.1527, 7.1537, 7.1547, and 7.1558).

<sup>2115</sup>Panel Report, para. 7.1563 (referring to paras. 7.1519, 7.1528, 7.1538, 7.1548, and 7.1559).

<sup>2116</sup>Panel Report, para. 7.1563.

<sup>2117</sup>Panel Report, para. 7.1563.

<sup>2118</sup>Panel Report, para. 7.1563.

<sup>2119</sup>Panel Report, para. 7.1566. (emphasis omitted)



explicitly set aside under each of the relevant Framework Programmes for the research efforts of 'certain enterprises'."<sup>2120</sup> The Panel therefore found that R&TD subsidies granted to Airbus under each of the Framework Programmes were specific within the meaning of Article 2.1(a) of the *SCM Agreement*.

## 2. The Interpretation of Specificity under Article 2.1 of the *SCM Agreement*

941. We begin our analysis by examining Article 2.1 of the *SCM Agreement*, which sets out the core requirements for specificity:

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions<sup>2</sup> governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.<sup>3</sup> In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

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<sup>2</sup>Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

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<sup>2120</sup>Panel Report, para. 7.1566.

<sup>3</sup>In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

942. The Appellate Body recently addressed certain relevant issues regarding the interpretation of Article 2.1 of the *SCM Agreement in US – Anti-Dumping and Countervailing Duties (China)*. It noted that the chapeau of Article 2.1 frames the central inquiry as a determination as to whether a subsidy is specific to "certain enterprises" within the jurisdiction of the granting authority, and that "certain enterprises" refers to a single enterprise or industry or a class of enterprises or industries that are known and particularized.<sup>2121</sup> The Appellate Body further noted that the use of the term "principles" in the chapeau—instead of, for instance, "rules"—suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle. As a result, the application of one of the subparagraphs of Article 2.1 may not by itself be determinative in arriving at a conclusion that a particular subsidy is or is not specific.<sup>2122</sup>

943. The Appellate Body also observed that subparagraphs (a) and (b) of Article 2.1 set out indicators as to whether the conduct or instruments of the granting authority discriminate or not. Subparagraph (a) identifies circumstances in which a subsidy is specific because it describes limitations on eligibility that favour certain enterprises; whereas subparagraph (b) establishes circumstances in which a subsidy shall be regarded as non-specific because it describes criteria or conditions that guard against selective eligibility.<sup>2123</sup> At the same time, subparagraphs (a) and (b) identify certain common elements in the analysis of the specificity of a subsidy. For instance, the reference in both provisions to "the granting authority, or the legislation pursuant to which the granting authority operates" was viewed as critical because it situates the analysis for assessing any limitations on eligibility in the particular legal instrument or government conduct effecting such limitations. This also suggests a focus on whether certain enterprises are eligible for the subsidy, not on whether they in fact receive it.<sup>2124</sup> In addition, because both provisions turn on indicators of *eligibility* for a subsidy, there may be situations in which assessing the eligibility for a subsidy will give rise to indications of specificity and non-specificity as a result of the application of Article 2.1(a) and (b).<sup>2125</sup>

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<sup>2121</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 366 and 373.

<sup>2122</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366.

<sup>2123</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 367.

<sup>2124</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 368.

<sup>2125</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 369.

944. As the Appellate Body further noted, subparagraph (c) of Article 2.1 provides that, "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)", other factors may be considered if there are reasons to believe that a subsidy may, in fact, be specific in a particular case. The reference in Article 2.1(c) to "any appearance of non-specificity" supports the view that the conduct or instruments of a granting authority may not clearly satisfy the eligibility requirements of Article 2.1(a) or (b), but may nevertheless give rise to specificity in fact. Since an "appearance of non-specificity" under Article 2.1(a) and (b) may still result in specificity in fact under Article 2.1(c), this reinforces the view that the principles in Article 2.1 are to be interpreted together.<sup>2126</sup>

945. The Appellate Body concluded in *US – Anti-Dumping and Countervailing Duties (China)* that a proper understanding of specificity under Article 2.1 must allow for the concurrent application of the principles set out in that Article to the various legal and factual aspects of a subsidy in any given case. While there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity under one of the subparagraphs of Article 2.1, the Appellate Body cautioned against examining specificity on the basis of the application of a particular subparagraph of Article 2.1, when the potential for application of other subparagraphs is warranted in the light of the nature and content of measures challenged in a particular case.<sup>2127</sup>

### 3. The Panel's Assessment under Article 2.1 of the SCM Agreement

946. The European Union maintains on appeal that, because the reference to "subsidy" in Article 2.1(a) must mean the subsidy programme as a whole, the Panel was required to rely on each EC Framework Programme as a whole as the benchmark for determining the existence of

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<sup>2126</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 370.

<sup>2127</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371. We consider that a failure properly to interpret Article 2.1 creates the potential for aberrant results. The European Union warns that the term "subsidy" in Article 2.1(a) must refer to the entire programme pursuant to which a subsidy is granted, and that conducting the specificity analysis "below the level of the subsidy programme as a whole will, at a certain level, inevitably indicate specificity". (European Union's appellant's submission, para. 1188) The European Union adds that it is pointless to refer to the individual subsidy transaction as a benchmark since each individual grant is, by definition, limited to a single recipient. The European Union also posits the scenario in which a subsidy programme would escape a finding of specificity if it allocated funding to generic research "even if the granting government decided (but did not make public) that 100% of the funding of such an apparent generic research would benefit aeronautics and space, and this turns out to be the case". (*Ibid.*, para. 1192) We do not consider that either result follows from a proper understanding of Article 2.1. Any grant, even at the level of the individual subsidy transaction, may be found not to be specific if administered in accordance with objective criteria or conditions within the meaning of Article 2.1(b). Likewise, even where there is an appearance of non-specificity, subsidies benefiting certain enterprises by means of non-transparent government conduct could still properly be found to be specific in fact by virtue of the "other factors" prescribed by Article 2.1(c).

specificity.<sup>2128</sup> The European Union thus considers that specificity does not result from the allocation of funding to aeronautics-related research because each EC Framework Programme as a whole establishes "a broad-based allocation that ensures equal access to a wide range of sectors and enterprises".<sup>2129</sup> As the European Union explains:

While it is true that the funding amounts so allocated could not be accessed by entities seeking support for types of R&TD projects other than those concerning aeronautics, it is equally true that entities involved in aeronautics-related R&TD projects could not access funds under the remainder (and therefore the great majority) of the Framework Programme budgets.<sup>2130</sup>

947. The United States disagrees with the European Union's contention that, because support to Airbus is organized under the EC Framework Programmes, the analysis of specificity must occur at that level. The United States argues that, under such an approach, "the bureaucratic organization of subsidy programs, rather than the substance of how they limit funding, dictates whether they are specific."<sup>2131</sup> The United States further maintains that the facts do not support, and the Panel findings contradict, the European Union's contention "that the Framework Programmes were non-specific because companies in all sectors, including the aerospace sector, faced the same situation of access to sector-specific funds but exclusion from other funds".<sup>2132</sup>

948. We do not consider that the European Union's characterization of the EC Framework Programmes is supported by the Panel's findings. As the Panel stated, each of the EC Framework Programmes appears to divide up funding into those research areas that are sector-specific—such as the allocations to "aeronautics" and "aeronautics and space"—and those that are "of a general horizontal nature, potentially cutting across a variety of business segments".<sup>2133</sup> Thus, each EC Framework Programme targets funding to economic activities "at both horizontal and sector-specific levels".<sup>2134</sup> In the light of these findings, we do not find support for the contention that entities involved in aeronautics-related R&TD could not access funding under the remainder of the EC Framework Programme budgets, and therefore do not consider that the EC Framework Programmes ensured "equal access" to funding.<sup>2135</sup>

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<sup>2128</sup>European Union's appellant's submission, paras. 1185-1187.

<sup>2129</sup>European Union's appellant's submission, para. 1189.

<sup>2130</sup>European Union's appellant's submission, para. 1189.

<sup>2131</sup>United States' appellee's submission, para. 446.

<sup>2132</sup>United States' appellee's submission, para. 457.

<sup>2133</sup>Panel Report, paras. 7.1515, 7.1524, 7.1534, 7.1544, and 7.1554.

<sup>2134</sup>Panel Report, paras. 7.1517, 7.1526, 7.1536, 7.1546, and 7.1557.

<sup>2135</sup>European Union's appellant's submission, para. 1189.

949. Moreover, we do not consider that explicit limitations on access to a subsidy to entities active in one sector of the economy will produce a different result under Article 2.1(a) by virtue of the fact that separate groupings of entities have access to other pools of funding under that programme. Certainly, if access to the same subsidy is limited to some grouping of enterprises or industries, an investigating authority or panel would be required to assess whether the eligible recipients can be collectively defined as "certain enterprises". Where access to certain funding under a subsidy programme is explicitly limited to a grouping of enterprises or industries that qualify as "certain enterprises", this in our view leads to a provisional indication of specificity within the meaning of Article 2.1(a), irrespective of how other funding under that programme is distributed. The European Union does not challenge the Panel's conclusion that the entities eligible for R&TD grants in the aeronautics sector may be considered to constitute "certain enterprises".<sup>2136</sup> We also consider that, on the basis of the evidence before it, the Panel could properly have concluded that those eligible to receive funding allocated to research in the aeronautics sector qualified as "certain enterprises".<sup>2137</sup> For these reasons, we see no grounds to disturb the Panel's conclusion that the evidence before it "indicate{d} that amounts of subsidization were explicitly set aside under each of the relevant Framework Programmes for the research efforts of 'certain enterprises'".<sup>2138</sup>

950. It may be that a provisional indication in respect of specificity within the meaning of Article 2.1(a) will require further analysis under Article 2.1(b). As the Appellate Body stated in *US – Anti-Dumping and Countervailing Duties (China)*, "an initial indication of specificity under Article 2.1(a) may need to be considered further if additional evidence demonstrates that the subsidy in question is available on the basis of objective criteria or conditions within the meaning of Article 2.1(b)".<sup>2139</sup> We note that, in this case, neither party advanced arguments before the Panel concerning the applicability of Article 2.1(b) to the EC Framework Programmes.<sup>2140</sup>

951. We do not consider that the Panel record calls for a review of objective criteria or conditions within the meaning of Article 2.1(b). The funding at issue in this dispute was granted pursuant to a

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<sup>2136</sup>At the oral hearing, the European Union acknowledged its argument before the Panel that some of the funding for aeronautics-related research activities went to research institutes and universities. (See Panel Report, para. 7.1511) The European Union did not, however, provide a basis for distinguishing between those recipients and aeronautics companies, or identify other recipients that were not aeronautics companies, in a manner that would support the argument that those eligible for such research funding did not qualify as "certain enterprises".

<sup>2137</sup>This finding of the Panel is to be contrasted with its assessment of loans provided by the EIB, where the Panel found that "the wide array of economic sectors covered by the EIB's explicit lending objectives means that its operations are expressly intended to benefit recipients well beyond a particular enterprise or industry or group of enterprises or industries." (Panel Report, para. 7.931)

<sup>2138</sup>Panel Report, para. 7.1566.

<sup>2139</sup>Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 369.

<sup>2140</sup>Panel Report, paras. 7.1505-7.1511.

legal regime consisting of at least four layers of authorizing documents. As the Panel explained, for each EC Framework Programme there is an EC Decision setting out the overall guidelines for the programme, as well as separate EC Decisions establishing the "specific programmes" that implement each EC Framework Programme. In addition, the Panel noted that funding allocated to aeronautics research is also implemented in accordance with specific "work programmes", and that certain work programmes were administered through project-specific "calls for proposals".<sup>2141</sup> During the oral hearing, the participants confirmed that the Panel record did not contain any documents setting out criteria and conditions for eligibility for aeronautics research funding. In the absence of arguments or evidence reflecting the existence of objective criteria or conditions in respect of R&TD grants for aeronautics research, we do not see that application of Article 2.1(b) to the challenged measures alters the analysis in respect of specificity. Finally, because the foregoing analysis does not give rise to an "appearance of non-specificity", we do not consider that further analysis under Article 2.1(c) is warranted.

952. For these reasons, we do not consider that the Panel erred in applying the principle under Article 2.1(a) to determine that the allocation of R&TD subsidies to the aeronautics sector was specific. Accordingly, we *uphold* the Panel's finding, in paragraph 7.1566 of the Panel Report, that the R&TD subsidies granted to Airbus under each of the EC Framework Programmes were "specific" within the meaning of Article 2.1(a) of the *SCM Agreement*.

#### B. *Infrastructure Measures*

953. We now turn to the European Union's appeal of the Panel's finding that certain infrastructure measures constituted subsidies within the meaning of Article 1 of the *SCM Agreement*. These measures related to the Mühlenberger Loch industrial site in Hamburg, the extension of the airport runway in Bremen, and the Aéroconstellation industrial site in Toulouse. Below we summarize the findings of the Panel in respect of each set of infrastructure measures before assessing the European Union's claims on appeal.<sup>2142</sup>

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<sup>2141</sup>Panel Report, paras. 7.1520, 7.1530, 7.1540, 7.1550, 7.1560, and 7.1563. However, the only such evidence before the Panel consisted of examples of the work programmes for the Fifth and Sixth EC Framework Programmes. (*Ibid.*, footnote 4891 to para. 7.1563)

<sup>2142</sup>Although relevant details concerning the infrastructure measures are set out in this section of our Report, we note that Part IV contains a more detailed description of the challenged measures.

1. The Panel's Findings

(a) The Mühlenberger Loch industrial site

954. In evaluating whether the infrastructure at the Mühlenberger Loch industrial site constitutes a financial contribution, the Panel considered the European Communities' argument that the project consisted of three distinct elements: (i) the conversion of wetlands into usable land; (ii) the construction of certain flood protection measures; and (iii) the building of special purpose facilities. The Panel stated that there was no requirement that it separate these elements in its analysis, and found that the land reclamation was "part of an integrated project to provide a site adjacent to Airbus' existing Finkenwerder site for expansion of its facilities".<sup>2143</sup> The Panel therefore proceeded to analyze the entire project as a single measure. In doing so, the Panel further found that "the reclamation of the wetlands adjacent to the existing Airbus facility in Finkenwerder was undertaken not merely in the awareness that Airbus would be the 'first user', as argued by the European Communities, but specifically in order to enable Airbus to expand its existing facilities in a way it could not do without the creation of the new land."<sup>2144</sup> The Panel added that there was "simply no evidence to suggest that any of this development would have been undertaken at the time were it not necessary in order to enable Airbus to expand its existing facilities to allow for assembly of the A380 at that site".<sup>2145</sup> In the Panel's view, the Mühlenberger Loch industrial site "was tailor-made for Airbus"<sup>2146</sup>, and the Panel therefore found that the creation and provision of that site was not a provision of general infrastructure, but rather constituted a financial contribution, under Article 1.1(a)(1)(iii) of the *SCM Agreement*, in the form of the provision of goods or services other than general infrastructure.

955. The Panel recalled that a "benefit" will be considered to have been conferred pursuant to Article 1.1(b) of the *SCM Agreement* "whenever a financial contribution is granted to a recipient on terms more favourable than those available to the recipient in the market".<sup>2147</sup> In determining whether a financial contribution in the form of goods or services other than general infrastructure had conferred a benefit, the Panel considered that the appropriate question was "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>2148</sup> The Panel maintained that the parties agreed that no commercial investor would have undertaken the project, and that they were in general agreement

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<sup>2143</sup>Panel Report, para. 7.1078.

<sup>2144</sup>Panel Report, para. 7.1080. (footnote omitted)

<sup>2145</sup>Panel Report, para. 7.1080.

<sup>2146</sup>Panel Report, para. 7.1084.

<sup>2147</sup>Panel Report, para. 7.1091.

<sup>2148</sup>Panel Report, para. 7.1091.

regarding the market value of industrial land in Hamburg and the value of the Mühlenberger Loch land. The Panel considered that a market-based rental of industrial land in Hamburg was "necessarily far less than would be a market based rental on an investment in land worth {€}750 million".<sup>2149</sup> In the Panel's view, "a market actor who invested {€}750 million in land, whether by purchasing it or by creating it through reclamation, would, in renting the property, seek a return on that investment."<sup>2150</sup>

956. The Panel regarded as irrelevant the European Communities' contention that Airbus pays market rates for the land and special purpose facilities. The Panel stated that it was clear that the rent paid by Airbus did not provide a market rate of return on the investment by the Hamburg authorities to create the Mühlenberger Loch site. Accordingly, the Panel considered that the Mühlenberger Loch site conferred a benefit on Airbus "in 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>2151</sup> The Panel concluded that the investment by Hamburg authorities "was many times greater" than the value of the site reflected in the rental amounts paid by Airbus, and that the provision of the Mühlenberger Loch site thus "conferred a very large benefit to Airbus".<sup>2152</sup>

(b) The Bremen airport runway extension

957. In evaluating whether the extension of the Bremen airport runway was a financial contribution, the Panel first addressed the European Communities' argument that the extension of the runway and the noise-reduction measures had to be considered separately in determining whether they constitute general infrastructure. The Panel found that "the noise reduction measures were considered only as a result of the decision to extend the runway, and even in that context were not considered necessary, but were undertaken as a matter of choice in connection with the runway project"<sup>2153</sup>, and therefore considered the runway extension and associated noise-reduction measures together in its analysis. The Panel further found that these measures "were undertaken by the Bremen city authorities specifically for Airbus' needs", and that "use of the full length of the extended runway is limited to Airbus by regulation".<sup>2154</sup> The Panel therefore concluded, on the basis of "the specific limitations on access to, i.e., use of the extended runway, and the clear evidence demonstrating that the runway extension was undertaken for the use of Airbus", that the runway extension and associated

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<sup>2149</sup>Panel Report, para. 7.1094.

<sup>2150</sup>Panel Report, para. 7.1094.

<sup>2151</sup>Panel Report, para. 7.1096.

<sup>2152</sup>Panel Report, para. 7.1096.

<sup>2153</sup>Panel Report, para. 7.1114. (footnote omitted)

<sup>2154</sup>Panel Report, paras. 7.1116 and 7.1118. (footnote omitted)



noise reduction measures constituted a financial contribution, under Article 1.1(a)(1)(iii) of the *SCM Agreement*, in the form of the provision of goods or services other than general infrastructure.<sup>2155</sup>

958. In its analysis of "benefit", the Panel addressed the European Communities' argument that Airbus paid for runway use in accordance with the general fee schedule applicable at the Bremen airport, and that Airbus' right to use the extended runway was not on more favourable terms than those in the market. Because the Panel considered that the financial contribution at issue was not limited to the use of the extended runway, but rather encompassed the entire investment by the City of Bremen in extending the runway and the associated noise-reduction measures, the Panel stated that it did not consider that an evaluation of the fees paid by Airbus for runway use at the Bremen airport affected its assessment of benefit. The Panel nevertheless found that it was "undisputed that Airbus pays runway fees in accordance with the regular fee schedule, applicable to all users of the airport, with no additional charges for the use of the runway extensions, which only Airbus is permitted to use, and only for certain flights".<sup>2156</sup> The Panel thus concluded that "there is no return to the City of Bremen on its investment in the runway extension and noise reduction measures", and that a benefit was thereby conferred on Airbus.<sup>2157</sup>

(c) The Aéroconstellation industrial site

959. In evaluating whether the infrastructure at the Aéroconstellation industrial site constituted a financial contribution, the Panel first addressed the European Communities' argument that certain facilities—known as "*équipement d'intérêt général*" (EIG) facilities—should be considered separately from the land provided at the Aéroconstellation site. Noting that the European Communities' own arguments indicated that the EIG facilities were a necessary part of the development of the industrial site, the Panel found that "the EIG facilities constitute an integral part of the Aéroconstellation site", and therefore considered them together in its analysis.<sup>2158</sup> The Panel further found, on the basis of the evidence before it, that development of the site "was undertaken specifically to enable Airbus to situate an A380 final assembly line in an advantageous location, in France", and that the site was "from the outset, uniquely adapted to Airbus' needs, from its situation next to and connection to the Toulouse-Blagnac airport, to the highly specific EIG facilities".<sup>2159</sup> The Panel accordingly found that the creation and provision of the ZAC Aéroconstellation site, including the EIG facilities, constituted

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<sup>2155</sup>Panel Report, para. 7.1121.

<sup>2156</sup>Panel Report, para. 7.1133.

<sup>2157</sup>Panel Report, para. 7.1133.

<sup>2158</sup>Panel Report, para. 7.1175.

<sup>2159</sup>Panel Report, para. 7.1177. (footnote omitted)

a financial contribution, under Article 1.1(a)(1)(iii) of the *SCM Agreement*, in the form of the provision of goods or services other than general infrastructure.<sup>2160</sup>

960. In respect of whether a benefit was conferred, the Panel considered that the sales price for land at the Aéroconstellation site would not have provided an adequate return to cover the investment in developing the land for industrial use, and thus "a commercial land developer would not have undertaken the project".<sup>2161</sup> The Panel stated that it was clear, and uncontested by the European Communities, that the price paid by Airbus did not provide a market rate of return on the investment by French authorities to develop the site, including the EIG facilities. The Panel concluded that, even if the lease for the EIG facilities is commensurate with a market benchmark, this would not "save the provision of the site, including the EIG facilities, from conferring a substantial benefit on Airbus".<sup>2162</sup>

## 2. The Panel's Assessment under Article 1.1(a)(1)(iii) of the *SCM Agreement*

961. The Panel stated that the disagreement between the parties focused on the "central question" of whether the challenged infrastructure constitutes the provision of "other than general infrastructure" within the meaning of Article 1.1(a)(1)(iii) of the *SCM Agreement*.<sup>2163</sup> On appeal, however, the European Union directs its challenge to a different issue. Stating that the Panel posed the "wrong question"<sup>2164</sup> by asking whether the challenged infrastructure measures constituted the provision of "other than general infrastructure", the European Union maintains that the Panel ignored its argument "that a distinction must be made between, on the one hand, the creation of infrastructure and, on the other hand, the provision of infrastructure to the recipient."<sup>2165</sup> The European Union thus submits that the Panel erred in its interpretation and application of Article 1.1(a)(1)(iii) by failing to recognize that the relevant transaction for purposes of its analysis under Article 1.1(a)(1)(iii) was the *provision* of goods or services in the form of infrastructure to Airbus Deutschland and Airbus France, not the *creation* of that infrastructure.<sup>2166</sup>

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<sup>2160</sup>Panel Report, para. 7.1179.

<sup>2161</sup>Panel Report, para. 7.1188.

<sup>2162</sup>Panel Report, para. 7.1190.

<sup>2163</sup>Panel Report, para. 7.1035.

<sup>2164</sup>European Union's appellant's submission, para. 1025.

<sup>2165</sup>European Union's appellant's submission, para. 1026.

<sup>2166</sup>European Union's appellant's submission, para. 1007.

962. Article 1.1(a)(1)(iii) of the *SCM Agreement* provides as follows:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

...

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

963. Article 1.1(a)(1)(iii) thus stipulates that a financial contribution exists where a government provides goods or services other than general infrastructure. The ordinary meaning of the verb "provide" is to "{s}upply or furnish for use; make available".<sup>2167</sup> The reference to "goods or services other than general infrastructure" indicates that the term "goods or services" encompasses certain types of infrastructure. Infrastructure that is "other than general" is covered by the definition of a financial contribution in Article 1.1(a)(1)(iii), whereas infrastructure that is "general" is not.

964. The European Union submits that government conduct in creating infrastructure is not disciplined by the *SCM Agreement*. Specifically, the European Union contends that government 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, land"—does not qualify as a "financial contribution".<sup>2168</sup> The *creation* of infrastructure, the European Union explains, benefits society as a whole and therefore reflects legitimate economic development policies with which, so long as the infrastructure is not *provided* to a recipient, the *SCM Agreement* does not interfere. In the European Union's view, "{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>2169</sup> We agree that, when a good or service has not been *provided* by a government, there cannot be a financial contribution cognizable under Article 1.1(a)(1)(iii).

965. This proposition, however, differs in our view from the European Union's corollary argument that focusing on a government's *provision* of goods or services necessarily excludes considerations in respect of their *creation*. As the European Union argues, "actions taken by the government *prior* to

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<sup>2167</sup> *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2383.

<sup>2168</sup> European Union's appellant's submission, para. 1029.

<sup>2169</sup> European Union's appellant's submission, para. 1030. (original emphasis)

the provision of the good or service in question are not relevant for the notion of 'financial contribution' in Article 1.1(a)(1)(iii)."<sup>2170</sup> While government action concerning the creation of a good or service may not be relevant if that good or service is not ultimately provided to a recipient, we do not understand on what basis such actions would necessarily be excluded in assessing what has been provided. Recalling the meaning of the term "provide" set out above—supply or furnish for use; make available—we consider that this term permits taking into account what was involved in supplying or furnishing that infrastructure. The creation of infrastructure is a precondition, and thus necessary, for the provision of that infrastructure. We therefore do not view the use of the term "provision" in Article 1.1(a)(1)(iii) as excluding the possibility that circumstances of the creation of infrastructure may be relevant to a proper characterization of what it is that is provided.

966. On the basis of this understanding of Article 1.1(a)(1)(iii), we do not agree with the Panel's characterization of the financial contributions at issue. We note, for instance, that the Panel described the financial contribution in Hamburg as consisting of "the creation and provision of the Mühlenberger Loch industrial site".<sup>2171</sup> Airbus was provided the Mühlenberger Loch site by means of a leasing arrangement.<sup>2172</sup> Although circumstances in respect of the creation of the Mühlenberger Loch site may be relevant to a proper understanding of the lease provided to Airbus, we consider it inconsistent with Article 1.1(a)(1)(iii) to characterize what was provided as consisting of the "creation" of the Mühlenberger Loch site. For this reason, we deem similarly over-inclusive the Panel's characterization of the financial contribution in Toulouse as consisting of "the creation and provision of the ZAC Aéroconstellation site and EIG facilities".<sup>2173</sup> There, Airbus was provided land at the Aéroconstellation site and a lease of the EIG facilities.<sup>2174</sup> It is therefore similarly inconsistent with Article 1.1(a)(1)(iii) to characterize the financial contribution that was provided as consisting of the "creation" of that infrastructure. Regarding the measures at the Bremen airport, the Panel concluded that the financial contribution consisted of "the entire project, extending the runway, the

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<sup>2170</sup>European Union's appellant's submission, para. 1031. (original emphasis)

<sup>2171</sup>Panel Report, para. 7.1084. In paragraph 8.1(b)(i) of its Report, the Panel concluded that "the provision of the Mühlenberger Loch site constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement". We understand this conclusion in the light of the Panel's analysis and findings in paragraphs 7.1072-7.1097 of its Report.

<sup>2172</sup>Panel Report, para. 7.1049.

<sup>2173</sup>Panel Report, para. 7.1179. In paragraph 8.1(b)(iii) of its Report, the Panel concluded that "the provision of the ZAC Aéroconstellation site and associated EIG facilities constitutes a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement". We understand this conclusion in the light of the Panel's analysis and findings in paragraphs 7.1172-7.1191 of its Report.

<sup>2174</sup>Panel Report, para. 7.1139.

associated noise reduction measures, and the right of exclusive use".<sup>2175</sup> What was actually provided to Airbus, however, consisted of the right to exclusive use of the extended runway in exchange for certain fees.<sup>2176</sup> However, because the Panel's description identifies features of the infrastructure that were not provided to Airbus—for instance, the creation of the runway extension and related noise reduction measures—we also consider that this description is inconsistent with the focus of Article 1.1(a)(1)(iii) on what a government actually provides.

967. For these reasons, we *modify* the Panel's characterization, in paragraphs 7.1084, 7.1121, and 7.1179 of the Panel Report, of the infrastructure measures constituting a financial contribution under Article 1.1(a)(1)(iii) of the *SCM Agreement*. On the basis of our review of the Panel record, we consider that a proper characterization of the financial contributions provided to Airbus consists of the following: (i) the lease of land and special purpose facilities at the Mühlenberger Loch industrial site; (ii) the right to exclusive use of the extended runway at the Bremen airport; and (iii) the sale of land and the lease of facilities at the Aéroconstellation industrial site.

968. The European Union requests, if we were to reverse the Panel's findings that the challenged infrastructure as characterized by the Panel constituted financial contributions within the meaning of Article 1.1(a)(1)(iii) of the *SCM Agreement*, that we also reverse, and declare moot and of no legal effect, the reasoning set out in paragraphs 7.1034 to 7.1044 of the Panel Report.<sup>2177</sup> Because we have decided only to modify the Panel's findings, we express no view on the reasoning contained in the referenced paragraphs.

### 3. The Panel's Assessment under Article 1.1(b) of the *SCM Agreement*

969. The Panel found that the provision of infrastructure relating to the Mühlenberger Loch industrial site in Hamburg, the airport runway in Bremen, and the Aéroconstellation industrial site in Toulouse, conferred a benefit on Airbus because each government's investment in that infrastructure exceeded its return on that investment.<sup>2178</sup>

970. The European Union argues on appeal that the Panel erred in its interpretation and application of the term "benefit", within the meaning of Article 1.1(b) of the *SCM Agreement*, because it assessed the existence of a benefit on the basis of whether costs incurred by the government were in excess of

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<sup>2175</sup>Panel Report, para. 7.1121. In paragraph 8.1(b)(ii) of its Report, the Panel concluded that "the provision of the lengthened Bremen Airport Runway constitutes a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*". We understand this conclusion in the light of the Panel's analysis and findings in paragraphs 7.1113 to 7.1134 of its Report.

<sup>2176</sup>Panel Report, paras. 7.1100 and 7.1133.

<sup>2177</sup>European Union's appellant's submission, para. 1037.

<sup>2178</sup>Panel Report, paras. 7.1096, 7.1133, and 7.1190.

the returns generated by Airbus' purchase and/or lease payments.<sup>2179</sup> Specifically, the European Union contends, the Panel asked "whether the returns enjoyed by the granting governments were sufficient, relative not to the market value of the land or facilities sold or leased or the exclusive right of use provided, but to the returns a market investor creating that land or facilities would have sought."<sup>2180</sup> Thus, central to the European Union's appeal is its contention that the Panel erred in relying on a "return-to-government" standard, which the European Union considers to be equivalent to the "cost-to-government" standard rejected by the Appellate Body in *Canada – Aircraft*. As the European Union explains, "{w}hether that standard is characterised as a 'cost' or, instead, a 'return' to the government is immaterial. A cost to the government is simply a negative return."<sup>2181</sup> The European Union additionally maintains that this error apparently resulted from the Panel's consideration of the government as an investor, instead of, as required by Article 1.1(a)(1)(iii), as a provider of a good or service. The European Union argues that the use of the term "provides" in Article 1.1(a)(1)(iii) requires that any benefit "be measured against the market value of that good or service provided, not the cost of creating it".<sup>2182</sup> Moreover, where the financial contribution consists of a government-provided good or service, the European Union adds that Article 14(d) of the *SCM Agreement* supports assessing the "benefit" based on market value and price, rather than the return earned.<sup>2183</sup>

971. The United States contends that the Panel did not apply a "cost-to-government" standard. In the United States' view, the Panel "simply ask{ed} what 'price' a commercial real estate developer, under the same circumstances would have demanded to provide a tailor-made site, a runway extension, or facilities exclusively for a certain company or companies."<sup>2184</sup> The United States adds that the best proxy for that market price is what a commercial investor would have sought as a return on that investment, namely recovery of its cost plus a certain profit. The United States thus maintains that the cost to the government of developing the infrastructure involved "was a *factor* in determining whether Airbus would have had to pay more on the market to receive the same thing it actually received from the governments. It was not itself the *standard* against which the Panel determined the existence of a benefit."<sup>2185</sup> The United States also considers that the standard under Article 14(d) is not generalized market value, but the adequacy of the remuneration received by the government that

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<sup>2179</sup>European Union's appellant's submission, para. 1063.

<sup>2180</sup>European Union's appellant's submission, para. 1067.

<sup>2181</sup>European Union's appellant's submission, footnote 1426 to para. 1063.

<sup>2182</sup>European Union's appellant's submission, para. 1067.

<sup>2183</sup>European Union's appellant's submission, para. 1067.

<sup>2184</sup>United States' appellee's submission, para. 383.

<sup>2185</sup>United States' appellee's submission, para. 383. (original emphasis; footnote omitted)

provided the infrastructure. The United States adds that, "{b}y examining what a commercial investor would expect, the Panel satisfied that standard."<sup>2186</sup>

972. We begin by considering the issue of "benefit" under Article 1.1(b) of the *SCM Agreement*, and the guidance offered by Article 14(d) of the *SCM Agreement* concerning the provision of goods or services by a government. In order for a subsidy to be found to exist, Article 1.1(b) requires the conferral of a "benefit". We recall that, although Article 14 relates to the calculation of benefit for purposes of Part V of the *SCM Agreement*, it nevertheless provides relevant context for the interpretation of "benefit" in Article 1.1(b).<sup>2187</sup> Article 14(d), which concerns the calculation of benefit in respect of government-provided goods or services, states as follows:

{T}he provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

973. In *Canada – Aircraft*, the Appellate Body addressed Canada's contention that a "benefit" cannot exist unless the granting of a financial contribution imposes a net cost on the government. Examining Articles 1.1(b) and 14, the Appellate Body considered that the inquiry should be focused on the benefit to the recipient, and not on the cost to government.<sup>2188</sup> The Appellate Body further considered that the term "benefit" implies a comparison. As the Appellate Body explained, the question of whether a benefit has been conferred is thus a comparative exercise requiring a panel to determine whether the recipient of the financial contribution has been advantaged or made "better off" than it would otherwise have been absent that contribution. The Appellate Body considered that "the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred'".<sup>2189</sup> The Appellate Body also found relevant context for its view in Article 14, noting that a "benefit" arises under each of the guidelines set out in that provision if the recipient has received a financial contribution on terms more favourable than those available to the recipient on the market.<sup>2190</sup>

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<sup>2186</sup>United States' appellee's submission, para. 387.

<sup>2187</sup>Appellate Body Report, *Canada – Aircraft*, para. 155.

<sup>2188</sup>Appellate Body Report, *Canada – Aircraft*, paras. 154-156.

<sup>2189</sup>Appellate Body Report, *Canada – Aircraft*, para. 157.

<sup>2190</sup>Appellate Body Report, *Canada – Aircraft*, para. 158.

974. The Appellate Body Report in *Canada – Aircraft* thus stands for the proposition that a "benefit" is to be determined, not by reference to whether the transaction imposes a net cost on the government, but rather by reference to whether the terms of the financial contribution are more favourable to what is available to the recipient on the market. The manner in which an investigating authority or panel evaluates market evidence will be a function of the particular context of each case, and of what information is adduced by the parties to a dispute. In every instance, however, that analysis remains focused on locating a proper comparator in the market. In *Japan – DRAMs (Korea)*, the Appellate Body stated the following in assessing whether a challenged government investment conferred a benefit under Articles 1.1(b) and 14 of the *SCM Agreement*:

The terms of a financial transaction must be assessed against the terms that would result from unconstrained exchange in the relevant market. The relevant market may be more or less developed; it may be made up of many or few participants. ... In some instances, the market may be more rudimentary. In other instances, it may be difficult to establish the relevant market and its results. But these informational constraints do not alter the basic framework from which the analysis should proceed. ... There is but one standard—the market standard—according to which rational investors act.<sup>2191</sup>

975. We find instructive the Appellate Body's consideration of Articles 1.1(b) and 14 because it underscores that every benefit determination requires a comparison of the terms of a financial contribution to a market benchmark. Article 14(d) stipulates that a benefit is not conferred so long as the good or service is provided for "adequate remuneration". It moreover provides that the adequacy of remuneration is to be determined "in relation to prevailing market conditions", and lists a number of such market conditions, including "price, quality, availability, marketability, transportation and other conditions of purchase or sale". This language highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods or services at issue would, under market conditions, be exchanged.

976. There is no disagreement between the participants that the market is the appropriate benchmark in determining benefit within the meaning of Article 1.1(b), and that Article 14(d) confirms the importance of examining the value of the financial contribution in relation to "prevailing market conditions". The principal question is whether, having nominally endorsed a market standard, the Panel nevertheless erred in failing to determine benefit in conformity with that standard.

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<sup>2191</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, para. 172.



977. In respect of each of the three infrastructure measures at issue on appeal, the Panel found that the costs of the government in providing the infrastructure exceeded the amounts the government received in return for that investment. For the Mühlenberger Loch site, the Panel thus found that a benefit was conferred in an amount equal to "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>2192</sup> For the Bremen airport runway extension, the Panel found that a benefit was conferred because "there is no return to the City of Bremen on its investment in the runway extension and noise reduction measures".<sup>2193</sup> And for the Aéroconstellation site, the Panel found that a benefit was conferred because the amounts paid by Airbus "{did} not provide a market rate of return on the investment by the French authorities to develop the site, including the EIG facilities".<sup>2194</sup>

978. In arriving at its findings, the Panel rejected the European Communities' arguments that it was resorting to a "cost-to-government" standard. Referring to the Mühlenberger Loch site, for instance, the Panel asserted that the investment by Hamburg in the project was relevant in the Panel's assessment of whether a benefit was conferred. The Panel maintained that this therefore did not constitute, as the European Communities argued, a determination of the amount of benefit on the basis of the cost to government. Rather, the Panel explained, it simply reflected "the basis on which a market actor would determine the amount of rent to be charged for that particular parcel of land, and thus the appropriate 'market' benchmark".<sup>2195</sup> The Panel made a similar assertion in respect of the Aéroconstellation site.<sup>2196</sup>

979. We consider that the Panel's assertions that it was not relying on the costs to the government to determine benefit are belied by its analysis. The Panel stated that, in respect of the Mühlenberger Loch site, the benefit was equivalent to the difference between the amount Airbus paid for the land and facilities and a reasonable return on the investment of the Hamburg authorities in creating that land and those facilities.<sup>2197</sup> For the Panel, the investment by Hamburg authorities consisted of the

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<sup>2192</sup>Panel Report, para. 7.1096.

<sup>2193</sup>Panel Report, para. 7.1133.

<sup>2194</sup>Panel Report, para. 7.1190.

<sup>2195</sup>Panel Report, para. 7.1093.

<sup>2196</sup>In respect of the Aéroconstellation site, the Panel made the following statement at paragraph 7.1188 of its Report:

As previously discussed, this does not constitute, as argued by the European Communities, a determination of the amount of benefit on the basis of cost to the government. Rather, it is simply a reflection, in the particular circumstances of this case, 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>2197</sup>Panel Report, para. 7.1096.

costs of the development of the Mühlenberger Loch site in the amount of approximately €750 million.<sup>2198</sup> As the Panel explained, "a market actor who invested {€}750 million in land, whether by purchasing it or by creating it through reclamation, would, in renting the property, seek a return on that investment."<sup>2199</sup> In respect of the Bremen airport runway extension, the task was somewhat simpler under the Panel's logic because it found that, notwithstanding Airbus' right to exclusive use of the extended runway, Airbus did not pay higher airport fees for use of the extended runway. Accordingly, the Panel found that there was "no return to the City of Bremen on its investment in the runway extension and noise reduction measures".<sup>2200</sup> In respect of the Aéroconstellation site, the Panel noted the United States' assertion that French authorities invested €158 million in the preparation of the site.<sup>2201</sup> Although the Panel did not make a finding as to the amount of the investment by French authorities, it found that the amount paid by Airbus for the land and facilities "{did} not provide a market rate of return on the investment by the French authorities to develop the site, including the EIG facilities".<sup>2202</sup>

980. We acknowledge that, in certain circumstances, a seller's costs may be a relevant factor to consider in assessing whether goods or services were provided for less than adequate remuneration.<sup>2203</sup> As we see it, however, the difficulty with the Panel's analysis is not that it referred to these costs as a factor in its analysis, but rather as the sole basis for its findings. Indeed, the Panel stated that a government's investment costs are the basis on which a market actor would determine the price, or the amount of rent, to be charged.<sup>2204</sup> We see no indication that the Panel relied on any considerations other than investment costs, and the Panel points to none, in arriving at its determination of a market benchmark. We therefore consider that, in its analysis, the Panel equated the government's investment costs with market value. We moreover consider that the Panel's conclusion that the relevant authorities did not recoup their investment is equivalent to stating that those investments conferred a benefit because they resulted in a net cost to the government. We reject this reasoning for the reasons expressed by the Appellate Body in *Canada – Aircraft*.<sup>2205</sup>

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<sup>2198</sup>Panel Report, para. 7.1089.

<sup>2199</sup>Panel Report, para. 7.1094.

<sup>2200</sup>Panel Report, para. 7.1133.

<sup>2201</sup>Panel Report, para. 7.1186.

<sup>2202</sup>Panel Report, para. 7.1190.

<sup>2203</sup>In *US – Softwood Lumber IV*, the Appellate Body explained that "alternative methods for determining the adequacy of remuneration could include ... proxies constructed on the basis of production costs". (Appellate Body Report, *US – Softwood Lumber IV*, para. 106)

<sup>2204</sup>Panel Report, paras. 7.1093 and 7.1188.

<sup>2205</sup>Appellate Body Report, *Canada – Aircraft*, paras. 149-161. See *supra*, paras. 973 and 974.

981. Moreover, we are concerned that the Panel's determination of the value of the infrastructure measures on the market was made wholly in reference to, in this case, the perspective of the government as a seller or lessor. The marketplace to which the Appellate Body referred in *Canada – Aircraft* reflects a sphere in which goods and services are exchanged between willing buyers and sellers. A calculation of benefit in relation to prevailing market conditions thus demands an examination of behaviour on both sides of a transaction, and in particular in relation to the conditions of supply and demand as they apply to that market. A market price is not determined solely by reference to either supply-side or demand-side considerations without reference to the other. Even where a market is limited for a particular good or service, that market price is not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay. Rather, the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market. The costs to the government of an investment in creating a particular good or service cannot itself determine the market price because actual expenditures by the government may not necessarily be redeemed, or be redeemable, on the market.

982. The Panel's analysis does not adhere to this market logic. For example, the Panel stated in respect of the Mühlenberger Loch site that, "in {its} view, a market actor who invested {€}750 million in land, whether by purchasing it or by creating it through reclamation, would, in renting the property, *seek a return on that investment*".<sup>2206</sup> The fact that a market actor would *seek* a return on its investment does not mean that it could necessarily obtain that return on the market. Indeed, the rent a market actor can charge will be constrained by market conditions *even if* the rent does not cover its costs. Accordingly, we do not consider that it is consistent with Articles 1.1(b) and 14(d) to establish a market benchmark for a good or service by referring to the demands or expectations only of a seller or lessor, or, alternatively, only of a buyer or lessee. The price of a good or service must reflect the interaction between the supply-side and demand-side considerations under prevailing market conditions.

983. For the foregoing reasons, we consider that the investment costs borne by the relevant authorities in these circumstances are an insufficient basis upon which to establish the market value of the sale or lease of the infrastructure at issue, and that the Panel committed error in relying exclusively on those costs to establish the existence and amount of benefit. Whether characterized as a "return to government" or a "cost to government", the Panel established that a benefit had been conferred because the government did not recover its costs in providing the infrastructure in question.

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<sup>2206</sup>Panel Report, para. 7.1094. (emphasis added)

This approach fails to comport with the requirement that a "benefit" be determined by reference to whether a financial contribution has been provided on terms more favourable than those available on the market. Accordingly, we *reverse* the Panel's findings, in paragraphs 7.1096, 7.1133, and 7.1190 of the Panel Report, that the infrastructure measures at issue conferred a benefit on Airbus within the meaning of Article 1.1(b) of the *SCM Agreement*.

#### 4. Completion of the Analysis

984. Having reversed the Panel's findings in respect of benefit, we turn to consider whether we can complete the analysis and find that the infrastructure measures at issue conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*. In previous disputes, the Appellate Body has emphasized that it can complete the analysis "only if the factual findings by the panel, or the undisputed facts in the panel record" provide a sufficient basis for the Appellate Body to do so.<sup>2207</sup> Where this has not been the case, the Appellate Body has declined to complete the analysis.<sup>2208</sup>

985. Regarding the Mühlenberger Loch industrial site, the Panel determined that "the City of Hamburg undertook to turn 20 percent of the wetlands in the Mühlenberger Loch and Rüschanal, adjacent to Airbus' existing facilities in Finkenwerder, into usable land."<sup>2209</sup> The Panel further considered it "clear" from the evidence that the land reclamation "was undertaken in order to make possible the expansion of Airbus' existing facilities, and not for any independent purpose. Thus, it is part of an integrated project to provide a site adjacent to Airbus' existing Finkenwerder site for expansion of its facilities."<sup>2210</sup> These statements support the Panel's finding that the Mühlenberger Loch industrial site was "tailor-made for Airbus"<sup>2211</sup>, and that it was provided adjacent to Airbus' facility in Finkenwerder and for the purpose of expanding those existing facilities. We consider these critical elements in assessing the market value of the lease of the relevant infrastructure. As we understand it, Airbus was not leasing a tract of land available anywhere in Hamburg, but was seeking the lease of the very site contiguous to its existing facilities that would enable it to engage in the

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<sup>2207</sup>Appellate Body Report, *US – Hot-Rolled Steel*, para. 235. See also Appellate Body Report, *EC – Hormones*, paras. 222 ff; Appellate Body Report, *EC – Poultry*, paras. 156 ff; Appellate Body Report, *Australia – Salmon*, paras. 117 ff and 193 ff; Appellate Body Report, *US – Shrimp*, paras. 123 ff; Appellate Body Report, *Japan – Agricultural Products II*, paras. 112 ff; and Appellate Body Report, *EC – Asbestos*, paras. 133 ff.

<sup>2208</sup>See Appellate Body Report, *Australia – Salmon*, paras. 209 ff, 241 ff, and 255; Appellate Body Report, *Korea – Dairy*, paras. 91 ff and 102 ff; Appellate Body Report, *Canada – Autos*, paras. 133 ff and 144 ff; Appellate Body Report, *Korea – Various Measures on Beef*, paras. 128 ff; Appellate Body Report, *EC – Asbestos*, paras. 78 ff; and Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 98 ff.

<sup>2209</sup>Panel Report, para. 7.1049.

<sup>2210</sup>Panel Report, para. 7.1078.

<sup>2211</sup>Panel Report, para. 7.1084.

production of the A380 aircraft. We consider that the lease of infrastructure that is prepared to meet the demands of a particular customer, and built adjacent to that customer's existing operations, would command a certain premium in the market.

986. In respect of the value of the Mühlenberger Loch land, the Panel stated:

The parties are in general agreement as to the market value of industrial land in Hamburg, and the value of the Mühlenberger Loch land—between {€}71,600,000 and {€}85,900,000, according to the United States, or approximately [\*\*\*], according to the EC.<sup>2212</sup> (footnotes omitted)

987. The United States' figure is based on a report by a German real estate surveyor that determined the market value of land in the vicinity of the Hamburg site.<sup>2213</sup> On the basis of benchmark land values in the Finkenwerder district of Hamburg, the report stated that "the City of Hamburg could have expected to raise approximately €50 to €60 per square meter had it sold the site created in the Mühlenberger Loch to a third party as industrial ... or other commercial ... land at fair market value in 2000."<sup>2214</sup> For its part, the figure advanced by the European Communities reflected a valuation set out in a report by the Committee of Experts for Property Values in Hamburg for comparable industrial land in the vicinity of the Mühlenberger Loch site.<sup>2215</sup> It was on the basis of this valuation that the report established that the contractually agreed lease payments made by Airbus were consistent with the market rent.<sup>2216</sup>

988. The difficulty with these valuations, as we see it, is that they are based on the value of generally available industrial land in Hamburg. An appropriate benchmark for the Mühlenberger Loch site, however, is not the value of a lease for industrial land situated anywhere in Hamburg or in the vicinity of the Mühlenberger Loch site, but the market lease value for land adjacent to existing property of a particular commercial user that is prepared for the particular needs of that user. Airbus did not seek *any* industrial land in Hamburg, because such land would not have enabled it to expand

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<sup>2212</sup>Panel Report, para. 7.1094.

<sup>2213</sup>United States' first written submission to the Panel, para. 432.

<sup>2214</sup>Dr.-Ing. Keunecke and Dipl.-Ing. Stoehr, Expert Opinion No. 27649/06, "Benchmarks for Land Values concerning Hamburg Airbus Site 'Mühlenberger Loch', Kreetslag 10, 21129 Hamburg-Finkenwerder" (9 October 2006) (Panel Exhibit US-189), p. 5.

<sup>2215</sup>Committee of Experts for Property Values in Hamburg, Expert Opinion No. G 03.0058 M21, "Report relating to the Mühlenberger Loch and Rüschen Peninsula Airbus extension land, located at Kreetslag 79, Hamburg-Finkenwerder" (Panel Exhibit EC-563 (BCI)), pp. 4-5. See also European Communities' first written submission to the Panel, para. 801. Although we do not identify the precise amounts of the valuations set out in the Panel record, which have been designated BCI, we note that the Panel considered the United States and the European Communities to be in "general agreement" regarding the land valuations. (Panel Report, para. 7.1094)

<sup>2216</sup>Report of the Committee of Experts for Property Values, *supra*, footnote 2215, pp. 6-7. The Panel determined that the full rent paid by Airbus for the land at the Mühlenberger Loch site was €5,619,588 per year. (Panel Report, para. 7.1089)

its existing facilities as was necessary for the production of the A380. Rather, it sought a particular piece of land contiguous to its existing facilities that was prepared to its specifications. The lease of land that is suited to the particular needs of a particular commercial customer will, under prevailing market conditions, be worth more to that user than the value that attaches to the lease of industrial land that is generally available in that area. We do not see in the property valuations on the Panel record that account was taken of any premium in the lease price associated with these features.

989. We consider that the findings of the Panel establish a sufficient foundation for us to complete the analysis and determine that a benefit was conferred, even though we are not in a position to quantify that benefit. As noted, in order for the infrastructure associated with the Mühlenberger Loch site to have been provided for adequate remuneration, the value of a lease of that site to Airbus should have reflected the market value of the rental of comparable industrial land in Hamburg, plus a premium due to the contiguity and customization of that land for Airbus. However, because the Panel erroneously sought to assess the value of industrial land in Hamburg based on the amount the City of Hamburg invested in the development of the Mühlenberger Loch site, the Panel did not quantify that premium. We nevertheless conclude, on the basis of the Panel's findings regarding the value of generally available industrial land in Hamburg and the location and customized features of the Mühlenberger Loch industrial site, that there was a certain premium that was not included in the rent that Airbus actually paid to lease industrial land at that site.

990. The European Union argues that, even if the market would have dictated a higher value for the lease of the land at the Mühlenberger Loch site, such a transaction would never have taken place because Airbus would instead have consolidated the entire A380 final assembly line in Toulouse.<sup>2217</sup> However, we note that the Panel's factual findings do not support the European Union's argument, and we therefore do not consider that this alters our analysis.<sup>2218</sup> Accordingly, we *find* that the provision of the lease of the land at the Mühlenberger Loch industrial site conferred a benefit on Airbus within the meaning of Article 1.1(b) of the *SCM Agreement*. Because there is not a sufficient basis on the

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<sup>2217</sup>European Union's appellant's submission, para. 1078.

<sup>2218</sup>The Panel stated that the fact that Airbus had other options but chose to expand its existing facilities in Hamburg supported its view "that the financial contribution of the Hamburg authorities in reclaiming the land and building special purpose facilities for Airbus' use conferred a benefit on Airbus". (Panel Report, para. 7.1095) The Panel added in footnote 4008 thereto:

Moreover, not only did the Hamburg authorities have incentive to keep Airbus active at its existing facility, which might not have been the case had the expansion for purposes of the A380 project not been possible, but Airbus had incentive to site A380 production operations at the site, in order to ensure that it obtained LA/MSF from the German government.

In the light of the Panel's finding that Airbus had certain incentives to expand its facilities in Hamburg unrelated to the price of the lease of the land, we are not convinced by the European Union's assertion that Airbus would not have leased the Mühlenberger Loch site had the price of that lease been higher.

Panel record for us properly to compare the market value of the special purpose facilities with the amounts paid for those facilities, we are unable to complete the analysis in respect of whether the lease of those facilities conferred a benefit on Airbus.

991. In respect of Airbus' right to use the extended runway at the Bremen airport, the Panel considered the European Communities' arguments that Airbus paid higher runway fees commensurate with its use of the extended runway, and therefore did not receive a benefit. The Panel stated that, based on the arguments and evidence advanced by the European Communities, there was "no factual basis on which {it} could conclude that Airbus pa{id} a higher fee for use of the extended runway than other users pa{id} for the use of the non-extended runway".<sup>2219</sup> The Panel stated:

It is undisputed that Airbus pays runway fees in accordance with the regular fee schedule, applicable to all users of the airport, with no additional charges for the use of the runway extensions, which only Airbus is permitted to use, and only for certain flights. Airbus pays no other fees or charges in connection with the extended runway. Thus, it is clear that there is no return to the City of Bremen on its investment in the runway extension and noise reduction measures, and a benefit to Airbus conferred by the provision of that extension and noise reduction measures.<sup>2220</sup>

992. Although the Panel did not consider that Airbus' payment of airport runway fees was relevant to its benefit analysis<sup>2221</sup>, it nevertheless concluded that Airbus paid no additional charges for its use of the extended runway, and that Airbus was therefore provided the right to exclusive use of the runway extension for no additional remuneration. As was the case in respect of the infrastructure at the Mühlenberger Loch site, the Panel did not consider it necessary to quantify the amount by which the market value for the use of the runway extension exceeded the fees paid by Airbus for that use. We nevertheless conclude, on the basis of the Panel's finding that Airbus did not pay additional fees for its use of the extended runway, that Airbus was provided the right to exclusive use of the extended runway for which it paid no additional remuneration. Accordingly, we *find* that the provision of the right to exclusive use of the extended runway at the Bremen airport conferred a benefit on Airbus within the meaning of Article 1.1(b) of the *SCM Agreement*.

993. In respect of the Aéroconstellation industrial site, the Panel concluded that it was "clear" that the amounts paid by Airbus for the purchase of land and the lease of the EIG facilities did not "provide a market rate of return on the investment by the French authorities to develop the site,

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<sup>2219</sup>Panel Report, para. 7.1132.

<sup>2220</sup>Panel Report, para. 7.1133.

<sup>2221</sup>See *supra*, para. 958.

including the EIG facilities".<sup>2222</sup> However, because the European Communities did not contest that the amounts paid by Airbus did not enable French authorities to recover their investment in the development of the site, the Panel did not make findings in respect of the amounts paid.<sup>2223</sup> We have rejected above the Panel's reliance on the government's costs and return on investment to determine the existence of a benefit. Moreover, we do not find that there is a sufficient basis on the Panel record to make an assessment of the market value of the land at the Aéroconstellation site, and the lease of the EIG facilities, in relation to prevailing market conditions for the infrastructure provided to Airbus. Accordingly, without a proper basis to compare Airbus' payments with the market value for the purchased land and leased facilities, we are unable to complete the analysis in respect of the infrastructure provided to Airbus at the Aéroconstellation industrial site.

### C. *Equity Infusions*

994. We now turn to the European Union's appeal of the Panel's finding that certain equity infusions in Aérospatiale by the French Government—consisting of four capital investments in Aérospatiale between 1987 and 1994, and a 1998 transfer by the French Government of its stake in Dassault Aviation to Aérospatiale—confer a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*.<sup>2224</sup>

#### 1. Capital Investments

995. We begin by evaluating the European Union's appeal that the Panel committed legal error in finding that four capital investments conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*. These capital investments consist of three investments in Aérospatiale by the French Government in 1987 (FF 1.25 billion), 1988 (FF 1.25 billion), and 1994 (FF 2 billion), and one investment in Aérospatiale of FF 1.4 billion in 1992 by Crédit Lyonnais, which at the time was controlled by the French Government.<sup>2225</sup> We first provide a summary of the Panel's findings in respect of these measures before assessing the European Union's claims on appeal.

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<sup>2222</sup>Panel Report, para. 7.1190.

<sup>2223</sup>Panel Report, para. 7.1190.

<sup>2224</sup>Although relevant details concerning the equity infusions are set out in this section of our Report, we note that Part IV contains a more detailed description of the challenged measures.

<sup>2225</sup>The Panel noted that Crédit Lyonnais acquired a 20% equity interest in Aérospatiale—consisting of FF 1.4 billion in newly issued Aérospatiale shares as well as existing Aérospatiale shares from the French Government—in exchange for the issuance to the French Government of approximately 2% of Crédit Lyonnais' share capital. (Panel Report, para. 7.1324)



## (a) The Panel's findings

996. The Panel considered that, in order to determine whether the capital investments made by the French Government conferred a benefit on Aérospatiale, it had to "evaluate whether the terms on which those capital contributions were provided to Aérospatiale were more favourable than those that would have been available to Aérospatiale on the market at the relevant times."<sup>2226</sup> The Panel stated that its approach to the issue of benefit was "to ask whether the United States ha{d} demonstrated that a private investor would not have made the capital investments in question based on the information available at that time".<sup>2227</sup> The Panel evaluated the evidence produced by the parties in support of their arguments. The Panel noted that the United States had submitted evidence of Aérospatiale's financial performance, in the form of financial ratios during the relevant periods, compared to the financial performance of certain peer group companies in France over the same periods. For the Panel, this evidence indicated that, between 1985 and 1994, Aérospatiale's financial ratios "were uniformly and, in many cases, significantly inferior to the corresponding average ratios of its peer group of companies".<sup>2228</sup> The Panel acknowledged that investors employ a variety of methodologies to estimate the expected rate of return from a potential investment, and that there are many different ways of measuring a firm's financial performance. The Panel stated that it was "reluctant to place undue reliance on a single measure of financial performance in isolation".<sup>2229</sup> The Panel noted, however, that the European Communities had not challenged the relevance, accuracy, or appropriateness of evaluating Aérospatiale's financial performance on the basis of the financial ratios selected by the United States, nor had it suggested any alternative basis for evaluating Aérospatiale's financial performance in comparison to its peer group of companies. On this basis, the Panel stated that it regarded indicators of Aérospatiale's financial performance in relation to the performance of other firms operating in the same industries as "particularly probative of the question whether a private investor would have chosen to make the capital investments in Aérospatiale at issue in this dispute".<sup>2230</sup>

997. The Panel also examined the European Communities' evidence that, at the time the capital investments were made, "Aérospatiale had positive future prospects which, when coupled with the company's commitment to invest in product development, justified the commitment of expansion capital".<sup>2231</sup> The European Communities' evidence consisted of: (i) statements in various

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<sup>2226</sup>Panel Report, para. 7.1354.

<sup>2227</sup>Panel Report, para. 7.1358.

<sup>2228</sup>Panel Report, para. 7.1360.

<sup>2229</sup>Panel Report, para. 7.1360.

<sup>2230</sup>Panel Report, para. 7.1360.

<sup>2231</sup>Panel Report, para. 7.1361.

Aérospatiale annual reports as to the status of aircraft deliveries, orders and backlog, revenue, profits and turnover; (ii) market and business forecast reports prepared by Airbus GIE predicting increases in demand for LCA and increases in Airbus GIE's market share; and (iii) Boeing market forecasts and a US Government publication predicting increased long-term growth for the LCA industry. The Panel considered that the evidence in the latter two categories "generally relate{d} to overall market conditions and contain{ed} very little explanation of the basis for the assumptions and forecasts", and that it was not indicative of the range of prospects for all of Aérospatiale's business divisions, which would also have been "relevant to an investor contemplating an investment in the company as a whole".<sup>2232</sup> The Panel stated that it attributed "relatively less weight" to this evidence because it did not regard it as "particularly probative of the question whether a private investor contemplating a capital investment in Aérospatiale at the relevant time could have expected to achieve a reasonable rate of return on its investment".<sup>2233</sup>

(b) The Panel's assessment under Article 1.1(b) of the *SCM Agreement*

998. We have set out in section V.C of this Report the concept and standard for assessing "benefit" under Article 1.1(b) of the *SCM Agreement* as elaborated in jurisprudence by panels and the Appellate Body. That standard requires that the assessment of whether a benefit has been conferred is to be made by reference to whether the terms of the financial investment by a government are more favourable than those available on the market. We have also discussed in that section of our Report the guidance offered by Article 14 of the *SCM Agreement*. Article 14(a), which relates to the provision of equity capital, provides:

{G}overnment provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member.

999. Article 14(a) states that equity capital provided by a government shall not be considered to confer a benefit unless it is inconsistent with what is termed the "usual investment practice" of private investors in the territory of that Member. The two words "usual" and "practice" are in a sense reinforcing, with the former signifying "{c}ommonly or customarily observed or practised"<sup>2234</sup> and the latter "usual or customary action or performance".<sup>2235</sup> Thus, we understand the term "usual

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<sup>2232</sup>Panel Report, paras. 7.1366 and 7.1370 (footnote omitted); see also para. 7.1374.

<sup>2233</sup>Panel Report, paras. 7.1366, 7.1370, and 7.1374.

<sup>2234</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 3485.

<sup>2235</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2311.

practice" to describe common or customary conduct of private investors in respect of equity investment. We also observe that Article 14(a) focuses the inquiry on the "investment decision". This reflects an *ex ante* approach to assessing the equity investment by comparing the decision, based on the costs and expected returns of the transaction, to the usual investment practice of private investors at the moment the decision to invest is undertaken.<sup>2236</sup> The focus in Article 14(a) on the "investment decision" is thus critical, in our view, because it identifies *what* is to be compared to a market benchmark, and *when* that comparison is to be situated. With this understanding in mind, we turn to consider whether the Panel set out the proper standard under Article 1.1(b) of the *SCM Agreement*.

1000. The European Union submits that the Panel correctly noted that the question posed by Article 1.1(b) of the *SCM Agreement* is whether the terms of the investment are more favourable than those that would have been available on the market.<sup>2237</sup> The European Union also does not take issue with the Panel's statement that, in the context of the French Government's capital investments in Aérospatiale, the United States was required to demonstrate "that a private investor would not have made the capital investments in question based on the information available at that time."<sup>2238</sup> The European Union argues, however, that "immediately following this statement" the Panel reframed the standard to pose the question of whether the French Government "could have expected to achieve a reasonable rate of return on its investment".<sup>2239</sup> The European Union contends that this amounts to the "wrong legal standard" under Article 1.1(b) of the *SCM Agreement*.<sup>2240</sup>

1001. The Panel first referred to a "reasonable rate of return" in the following passage:

Our approach to the issue of benefit in the context of the French government's capital investments in Aérospatiale is to ask whether the United States has demonstrated that a private investor would not have made the capital investments in question based on the information available at that time. In this regard, we note that a private investor evaluating an equity investment in an enterprise will be seeking to achieve a *reasonable rate of return* on its investment. Information relevant to such an evaluation would include current and past indicators of an enterprise's financial performance (including rates of return on equity) calculated from the enterprise's financial statements and accounts, information as to the future financial prospects of the enterprise, including market studies, economic

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<sup>2236</sup>See Part VI.B of this Report, where we have similarly emphasized the importance of an *ex ante* perspective in assessing the conferral of a benefit through government loans.

<sup>2237</sup>European Union's appellant's submission, para. 1101 (referring to Panel Report, para. 7.1354).

<sup>2238</sup>Panel Report, para. 7.1358; European Union's appellant's submission, para. 1103.

<sup>2239</sup>European Union's appellant's submission, para. 1104 (quoting Panel Report, paras. 7.1364, 7.1366, 7.1370, and 7.1374). (emphasis added by the European Union)

<sup>2240</sup>European Union's appellant's submission, para. 1105.

forecasts and project appraisals, equity investment in the enterprise by other private investors, and marketplace prospects for the products produced by the enterprise.<sup>2241</sup> (emphasis added)

1002. This language does not support the view that the Panel set out a distinct standard requiring the establishment of a "reasonable rate of return". The first sentence is uncontested as a proper articulation of the benefit inquiry, focusing on whether it was consistent with the usual investment practice to undertake the challenged investments. The second sentence begins with the phrase "in this regard", which indicates that it is intended as an expression of what precedes it. What follows in the final sentence is an illustrative list of information that the Panel considered relevant to such an inquiry, including the type of information relating to financial performance and future prospects of Aérospatiale that the Panel considered in its analysis. We read the reference to a "reasonable rate of return" as a reflection of what a private investor contemplating an investment would customarily take into account, and we do not see any indication in subsequent paragraphs of the Panel Report referring to a reasonable rate of return that suggests otherwise.<sup>2242</sup> We take note of the European Union's concern that the Panel did not provide further clarification as to what it meant in saying that a private investor would be seeking to achieve a reasonable rate of return on its investment. We agree that additional explanation by the Panel may have been helpful in clarifying its reasoning to the parties. However, after reviewing these statements by the Panel in the context of its analysis, we do not consider that the Panel viewed a "reasonable rate of return" as connoting a different test than the "usual investment practice" standard. We therefore dismiss the European Union's claim of error regarding the Panel's interpretation of "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement*.

1003. The European Union also alleges that the Panel's failure "to *identify*, much less *assess*, any evidence concerning what a private investor would have considered to be a 'reasonable rate of return'" constitutes legal error in the application of Article 1.1(b), and under Article 11 of the DSU.<sup>2243</sup> The European Union states that these claims arise "to the extent that the Panel based its conclusion ... on the French State's failure to seek a 'reasonable rate of return'."<sup>2244</sup> Given that we do not believe that the Panel's statements regarding a reasonable rate of return reflected a legal standard different from the usual investment practice standard the Panel sought to apply, our disposition of the question of the relevance of a "reasonable rate of return" to the interpretation of Article 1.1(b) also disposes of these derivative claims. Accordingly, we also dismiss the European Union's claims that the Panel erred in

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<sup>2241</sup>Panel Report, para. 7.1358.

<sup>2242</sup>See Panel Report, paras. 7.1364, 7.1366, 7.1370, and 7.1374.

<sup>2243</sup>European Union's appellant's submission, paras. 1106 (original emphasis) and 1107.

<sup>2244</sup>European Union's appellant's submission, para. 1106.

the application of Article 1.1(b), or failed to provide an objective assessment under Article 11 of the DSU, by not properly applying a "reasonable rate of return" standard.

(c) The Panel's treatment of the Boeing evidence

1004. The European Union also contends that the Panel's failure to apply a market benchmark based on the behaviour of Boeing investors constitutes error in the application of the standard for assessing benefit under Article 1.1(b) of the *SCM Agreement*, and under Article 11 of the DSU. We have noted in Part VI.B of this Report, parallel arguments of the European Union regarding claims of error in the application of the "benefit" standard, and under Article 11 of the DSU. We have also noted that, when faced with such overlapping claims, we have to determine first whether to consider such claims as errors in legal application, or as errors under Article 11.

1005. Pivotal to the European Union's claim is its contention that the Panel failed to apply as a market benchmark certain evidence submitted by the European Communities relating to Boeing. For the European Union, this evidence demonstrates that private investors were willing to sustain and increase investment in LCA product development, "even during periods of weak demand and poor financial performance, in light of positive future prospects".<sup>2245</sup> Accordingly, the European Union argues, the evidence shows "that investments in product development by Aérospatiale's principal investor, the French State, were consistent with the usual investment practice of private investors".<sup>2246</sup> We consider the European Union's arguments to reflect its view that the Panel attributed too little weight to, or disregarded altogether, the Boeing evidence it adduced before the Panel. This goes to the Panel's weighing and appreciation of the evidence, rather than to an error in the application of the legal standard of "benefit" under Article 1.1(b) of the *SCM Agreement*. We therefore consider it appropriate to assess the European Union's arguments under Article 11 of the DSU.

1006. In Part VI.B of this Report, we have discussed the standard of review under Article 11 of the DSU. The Appellate Body has repeatedly stated that it will not "interfere lightly" with the panel's fact-finding authority<sup>2247</sup>, and has also emphasized that it "cannot base a finding of inconsistency under Article 11 simply on the conclusion that {it} might have reached a different factual finding

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<sup>2245</sup>European Union's appellant's submission, para. 1114.

<sup>2246</sup>European Union's appellant's submission, para. 1114.

<sup>2247</sup>See, for example, Appellate Body Report, *US – Wheat Gluten*, para. 151; Appellate Body Report, *EC – Sardines*, para. 299; and Appellate Body Report, *US – Carbon Steel*, para. 142.

from the one the panel reached".<sup>2248</sup> Instead, for a claim under Article 11 to succeed, we must be satisfied that the panel has exceeded its authority as the trier of facts.<sup>2249</sup>

1007. We begin by examining the European Union's contention that the Panel failed to apply as a market benchmark certain evidence submitted by the European Communities relating to Boeing. As we noted, the Panel considered a range of evidence consisting of information relating to the financial performance of Aérospatiale and a group of companies in the French defence and aerospace industries, as well as the future prospects of Aérospatiale, Airbus GIE, and Boeing. In addressing evidence offered by the European Communities consisting of Boeing market outlook forecasts, the Panel stated that it was "inclined to accord the evidence ... relatively less weight" than evidence of Aérospatiale's past financial performance in comparison to that of its peers, together with management statements as to expectations and prospects contained in Aérospatiale's annual reports.<sup>2250</sup> Similarly, when undertaking its analysis of the individual capital investments, the Panel repeated that in its assessment it would "attribute relatively less weight to the evidence contained in ... market outlook forecasts for Boeing".<sup>2251</sup> This indicates that the Panel found it appropriate to consider this Boeing evidence as part of its assessment of usual investment practice, but decided to ascribe it less evidentiary value than that given to the indicators of the financial performance of the peer companies, coupled with evidence from Aérospatiale annual reports regarding the company's future prospects. We also take note of, and consider important, the Panel's repeated statements that it evaluated "all of the evidence in its totality".<sup>2252</sup>

1008. The European Union may well consider that the Panel should have attached greater significance to the Boeing evidence that was before it. However, we see no indication that the Panel disregarded this evidence altogether. Rather, it attributed to that evidence "relatively less weight". In considering the evidence of Airbus GIE and Boeing market outlook forecasts, for instance, the Panel identified two concerns supporting its decision to accord such evidence "relatively less weight".<sup>2253</sup> First, the Panel explained that this evidence generally relates to overall market conditions, and contains very little explanation of the basis for the assumptions and forecasts. Second, the Panel considered that these forecasts were potentially relevant to the prospects of Aérospatiale's aircraft division, but not indicative of the prospects reflected by the range of Aérospatiale's other divisions not involved in LCA production. Although the European Union contends that the failure to apply the

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<sup>2248</sup> Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>2249</sup> See Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>2250</sup> Panel Report, para. 7.1361.

<sup>2251</sup> Panel Report, paras. 7.1366, 7.1370, and 7.1374.

<sup>2252</sup> Panel Report, paras. 7.1367, 7.1371, and 7.1375.

<sup>2253</sup> Panel Report, paras. 7.1366, 7.1370, and 7.1374.

Boeing evidence as a benchmark was not justified since Boeing was "Aérospatiale's *closest* peer"<sup>2254</sup>, we consider that the Panel identified plausible grounds on which to disagree. As the United States argues, "during the relevant time period Aérospatiale was, in much more substantial part, a European *defense* company".<sup>2255</sup> Statements by the European Union would also seem to call into question the contention that Boeing was Aérospatiale's closest peer. The European Union itself notes, for instance, that "Boeing was even more heavily invested in the LCA sector than Aérospatiale, which enjoyed greater diversification in the aerospace and defence sector than did Boeing, until its 1997 acquisition of McDonnell Douglas".<sup>2256</sup> Taking these considerations into account, we believe that the Panel had a reasonable basis to differentiate between the business profiles of Boeing and Aérospatiale, and to attribute relatively less weight to evidence of the future prospects of Boeing.

1009. The European Union stated at the oral hearing that its claim concerning the Panel's treatment of the Boeing evidence is not limited to the Panel's consideration of the Boeing market forecast information. The European Union referred in particular to other documents on the Panel record that purportedly demonstrate the commitment by Boeing and its investors during this period to continue to invest in LCA production despite poor financial performance.<sup>2257</sup> After reviewing the evidence referred to by the European Union, we note that market forecasts of growth in the LCA sector, and the reaction by Boeing or its investors to that prospective growth, would seem to relate to the same central proposition advanced by the European Communities before the Panel, and by the European Union on appeal, that Boeing's "positive prospects outweighed poor past performance".<sup>2258</sup> In our view, the rationale for according less weight to the evidence of future prospects of a company such as Boeing, because its business profile differs from that of Aérospatiale, could apply equally to purported evidence of Boeing investor behaviour, and we therefore do not consider that the Panel exceeded its margin of discretion as the trier of facts.

1010. Additionally, the European Union alleges that the Panel's analysis lacks coherence because it disregarded the Boeing evidence, while accepting evidence relating to Aérospatiale's peer companies in France. The European Union explains that the Panel's treatment of the Boeing evidence was "surprising"<sup>2259</sup> given that the Panel elsewhere considered that evidence concerning other firms operating in the same industries was "particularly probative of the question whether a private investor

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<sup>2254</sup>European Union's appellant's submission, para. 1113. (original emphasis)

<sup>2255</sup>United States' appellee's submission, para. 419. (original emphasis)

<sup>2256</sup>European Union's appellant's submission, para. 1113. The European Union also notes that Boeing's LCA revenue at the time accounted for approximately 80% of the company's overall revenue. (*Ibid.*, para. 1115)

<sup>2257</sup>See also European Union's appellant's submission, paras. 1115-1117.

<sup>2258</sup>European Union's appellant's submission, para. 1118.

<sup>2259</sup>European Union's appellant's submission, para. 1121.

would have chosen to make the capital investments in Aérospatiale at issue in this dispute".<sup>2260</sup> The European Union considers that the Panel's "variable treatment of the same class of evidence is internally incoherent, and contrary to its obligation to provide coherent reasoning, under Article 11 of the DSU".<sup>2261</sup> The Panel examined evidence introduced by the United States to show the financial performance of a peer group of French companies, including Aviation Latécoère, Dassault Aviation, SAFRAN, Thales, and Zodiac.<sup>2262</sup> These peer group companies, the United States maintains, consisted of French defence and aerospace companies.<sup>2263</sup> The Panel described these companies as "firms operating in the same industries, presumably subject to similar business risks and cycles as Aérospatiale".<sup>2264</sup> It is not clear whether the business profile of these companies could also be considered to reflect only a portion of Aérospatiale's business activities. When asked at the oral hearing whether this was the case, the European Union explained that it was not challenging the Panel's reliance on the French peer group companies *per se*, but rather pointing to the Panel's treatment of this evidence to highlight the incoherence in the Panel's analysis. The United States responded at the oral hearing that the Panel would have had good reasons to favour evidence in respect of companies that, like Aérospatiale, were located in France and operated in the defence and aerospace industries, as opposed to a company like Boeing that operated in a different country and was primarily oriented towards LCA production. The United States further argued that Boeing at the time was in much better financial health than Aérospatiale, and that, even if the Boeing evidence were attributed more weight, the European Union had not explained how this would have changed the outcome of the Panel's analysis.<sup>2265</sup>

1011. After reviewing the Panel record, and mindful of the standard of review applicable under Article 11 of the DSU, we consider that the Panel did not err in finding that, because the Boeing evidence did not reflect the same range of business activities as those of Aérospatiale, the Panel could attribute the Boeing evidence less weight than other evidence more indicative of Aérospatiale's future prospects. We take note of the European Union's concern that the Panel did not provide further clarification as to why it was according less weight to the Boeing evidence than evidence relating to the French companies with potentially similar business profiles. Additional explanation by the Panel may have been helpful in clarifying its reasoning to the parties. However, we consider that the Panel, in deciding to accord relatively more weight to evidence of the financial performance of a group of peer French companies in the defence and aerospace industries than to evidence of Boeing's prospects

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<sup>2260</sup>Panel Report, para. 7.1360.

<sup>2261</sup>European Union's appellant's submission, para. 1125. (footnote omitted)

<sup>2262</sup>Panel Report, footnote 4454 to para. 7.1330.

<sup>2263</sup>United States' appellee's submission, footnote 698 to para. 419.

<sup>2264</sup>Panel Report, para. 7.1360.

<sup>2265</sup>See United States' appellee's submission, paras. 416 and 422.



for future LCA production, did not exceed its margin of discretion under Article 11. We therefore dismiss the European Union's claim that the Panel's treatment of the evidence relating to Boeing violated Article 11 of the DSU.

1012. For the foregoing reasons, we *uphold* the Panel's findings, in paragraphs 7.1367, 7.1371, and 7.1375 of the Panel Report, that the four challenged capital investments were inconsistent with the usual investment practice of private investors in France and conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the *SCM Agreement*.

## 2. Share Transfer

1013. We now address the European Union's appeal of the Panel's finding that the 1998 transfer by the French Government of its 45.76% interest in Dassault Aviation to Aérospatiale conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*. In December 1998, the French Government transferred its 45.76% interest in Dassault Aviation to Aérospatiale in exchange for new shares of Aérospatiale that were to be issued at a later date following a report by a panel of independent experts, the *Commissaires aux apports* (the "*Commissaires'* report").<sup>2266</sup> In March 1999, the *Commissaires'* report set a net book value for the Dassault Aviation shares and, in May 1999, Aérospatiale issued new shares to the French Government on the basis of an exchange ratio of two Aérospatiale shares for each Dassault Aviation share.<sup>2267</sup> Prior to the transfer of its 45.76% interest in Dassault Aviation to Aérospatiale, the French Government held control rights in Dassault Aviation by virtue of certain double voting shares. Upon the transfer of the French Government's interest, these double voting rights were cancelled.<sup>2268</sup> The French Government's transfer of its holdings in Dassault Aviation was a preliminary step in the planned consolidation of the French aeronautic, defence, and space industries through the combination of Aérospatiale and MHT, and the subsequent partial public offering of shares in the combined Aérospatiale-Matra entity.<sup>2269</sup> Below we summarize the findings of the Panel concerning the share transfer before assessing the European Union's claims on appeal.

### (a) The Panel's findings

1014. The Panel stated that its approach to the issue of benefit was "to ask whether the United States ha{d} demonstrated that a private investor would not have made the equity investment in question based on the information available at the time."<sup>2270</sup> The United States argued that a private investor

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<sup>2266</sup>*Supra*, footnote 445.

<sup>2267</sup>Panel Report, para. 7.1382.

<sup>2268</sup>Panel Report, para. 7.1384.

<sup>2269</sup>Panel Report, para. 7.1383.

<sup>2270</sup>Panel Report, para. 7.1407.

would not have made an equity infusion because Aérospatiale was in dire financial circumstances at the time, the transaction involved considerable costs associated with ceding control of Dassault Aviation, and there was nothing to suggest that those costs were outweighed by gains that could have been expected from the subsequent sale of shares of Aérospatiale-Matra.<sup>2271</sup> The Panel did not regard the fact that Aérospatiale was undercapitalized by the French Government, as its sole shareholder, necessarily to mean that a private investor would not have provided capital to the company.<sup>2272</sup> The Panel further found that, although Aérospatiale's debt-to-equity ratios and debt coverage ratios continued to be inferior to the average ratios of its peer group of companies, Aérospatiale's return on equity in 1996 and 1997 exceeded the average return on equity for its peer group of companies. The Panel concluded that the evidence demonstrated "that Aérospatiale's financial condition and prospects in 1996 and 1997 had improved over prior periods".<sup>2273</sup> The Panel went on to observe, however, that, despite this improvement, Aérospatiale's capitalization brought about by the share transfer was necessary in order to increase the chances that the planned privatization of Aérospatiale could occur as soon as possible, and that this "was regarded as necessary to improve the French government's position in its negotiations with other Airbus governments over the terms of the consolidation of the European aerospace industry".<sup>2274</sup> For these reasons, the Panel considered that Aérospatiale's financial position and prospects immediately prior to the French Government's transfer of its 45.76% interest in Dassault Aviation, while improved, "were not improved to a degree that would have enabled Aérospatiale, absent the addition of the 45.76 percent interest in Dassault Aviation (representing a 20 percent increase in its total consolidated capital), to attract private capital."<sup>2275</sup>

1015. The Panel then turned to consider the European Communities' argument that, for this type of transaction, the proper question is whether it is consistent with the usual investment practice for a private owner of wholly owned investments to consolidate those assets in advance of their sale. The Panel considered that a party may successfully rebut a claim that an equity infusion conferred a benefit "by showing that the transaction in question was a preliminary step in, or otherwise part of, a restructuring or consolidation project and that, considered in the context of the overall returns expected to be generated from that restructuring or consolidation project, the equity investment was consistent with the usual investment practice of a private investor."<sup>2276</sup> The Panel considered, however, that the European Communities had presented no evidence to persuade it that, at the time of the share transfer, the French Government had a rational basis for believing that the overall returns

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<sup>2271</sup>Panel Report, para. 7.1407.

<sup>2272</sup>Panel Report, para. 7.1408.

<sup>2273</sup>Panel Report, para. 7.1408. (footnote omitted)

<sup>2274</sup>Panel Report, para. 7.1409. (footnote omitted)

<sup>2275</sup>Panel Report, para. 7.1409.

<sup>2276</sup>Panel Report, para. 7.1411.

from a public offering of shares in an entity that combined the French Government's interests in Dassault Aviation with Aérospatiale exceeded the returns it could expect from separately retaining its equity interests in Aérospatiale and Dassault Aviation.<sup>2277</sup>

1016. The European Communities submitted evidence showing that the Dassault Aviation stake received by Aérospatiale had been valued separately from Aérospatiale in the context of calculating a public offering price for Aérospatiale-Matra. The Panel observed, however, that the valuations put forward by the European Communities were all made after the French Government had decided to transfer its 45.76% interest in Dassault Aviation to Aérospatiale. Moreover, the Panel considered that these valuations did not include an assessment of the relative merits of retaining separate holdings of Dassault Aviation and Aérospatiale, versus combining those holdings and merging them with MHT with a view to conducting a public offering of the merged entity. Rather, they reflected valuations of Aérospatiale and MHT and estimates of the synergies that could be expected from the combination of these two entities.<sup>2278</sup>

1017. The Panel therefore concluded that the French Government's transfer of its 45.76% equity interest in Dassault Aviation in exchange for newly issued shares in Aérospatiale was inconsistent with the usual investment practice of a private investor in France, and that the transaction therefore conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the *SCM Agreement*.<sup>2279</sup>

(b) The Panel's assessment under Article 1.1(b) of the *SCM Agreement*

1018. The European Union argues that the Panel committed errors in both the interpretation and application of the "benefit" standard set out in Article 1.1(b) of the *SCM Agreement*. The European Union considers that the Panel's interpretative error is reflected in its rejection of the *Commissaires'* report as a benchmark in assessing benefit under Article 1.1(b).<sup>2280</sup> Alternatively, the European Union argues that the Panel improperly applied the legal standard under Article 1.1(b) by excluding the relevance of the *Commissaires'* report and certain investment bank valuations in its appraisal of whether a benefit was conferred.<sup>2281</sup> The European Union further maintains that the Panel did not identify "any affirmative evidence" demonstrating that the anticipated returns from consolidating the Aérospatiale and Dassault Aviation holdings were less than the returns expected

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<sup>2277</sup>Panel Report, para. 7.1411.

<sup>2278</sup>Panel Report, para. 7.1412.

<sup>2279</sup>Panel Report, para. 7.1412.

<sup>2280</sup>European Union's appellant's submission, para. 1144.

<sup>2281</sup>European Union's appellant's submission, paras. 1150 and 1151.

from maintaining those stakes separately.<sup>2282</sup> In our view, although the European Union styles its claims as distinct legal errors of interpretation and application, they address the same underlying contention that the Panel failed to recognize the value of evidence showing that the shares had been transferred on market terms. In the European Union's view, that error results from either a misapprehension of the legal standard, or a failure to apply that legal standard to the facts of the case. To address these claims of the European Union, we therefore turn to consider the Panel's analysis of the share transfer.

1019. As we have previously noted, Article 14(a) of the *SCM Agreement* focuses the inquiry on the "investment decision".<sup>2283</sup> This reflects an *ex ante* assessment of the equity investment, taking into account the costs and expected returns of the transaction as compared to the usual investment practice of private investors at the moment the decision to invest is undertaken. As we stated, the focus of Article 14(a) on the "investment decision" is a critical step in the analysis because it identifies *what* is to be compared to the market benchmark, and *when* that comparison is to be situated. Thus, in assessing the European Union's claims on appeal, we first seek to identify the "investment decision" that the Panel was to compare against the market benchmark consisting of the usual investment practice.

1020. The United States argued before the Panel that the proper question was whether a private investor would undertake an equity investment in a financially distressed Aérospatiale, with the knowledge that the transaction involved costs associated with ceding control of Dassault Aviation, and that there was no evidence that those costs would be outweighed by gains expected from the subsequent sale of shares of Aérospatiale-Matra.<sup>2284</sup> For its part, the European Communities characterized the question as whether a private investor would have consolidated its wholly owned investments in Aérospatiale and Dassault Aviation prior to the sale of those assets.<sup>2285</sup> Thus, both parties maintained before the Panel that the transaction was undertaken in the expectation of returns from a process of consolidation and subsequent public offering of shares. Regarding the costs and returns associated with relinquishing control in Dassault Aviation, the European Communities argued that the double voting shares had no market value because they could not legally be transferred, and

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<sup>2282</sup>European Union's appellant's submission, para. 1152. The European Union stated in a footnote that the Appellate Body could also consider this as an error under Article 11 of the DSU to the extent that the Panel lacked a sufficient evidentiary basis for its finding. (*Ibid.*, footnote 1575 to para. 1152 (referring to Appellate Body Report, *EC – Hormones*, para. 133))

<sup>2283</sup>See *supra*, para. 999.

<sup>2284</sup>Panel Report, para. 7.1407.

<sup>2285</sup>Panel Report, para. 7.1410.

that any purported loss would, in any event, have been outweighed by the synergies resulting from consolidating Aérospatiale and Dassault Aviation.<sup>2286</sup>

1021. We consider that there is basic agreement between the participants that the "investment decision" at issue was whether to transfer shares in Dassault Aviation to Aérospatiale in anticipation of returns from the consolidation and subsequent public offering of shares. As part of that transaction, neither participant disputes that the French Government relinquished control over Dassault Aviation by virtue of the share transfer that effected that consolidation. Rather, they disagree over the value to be associated with that loss of control, and the value of the returns generated as a result of the consolidation and eventual privatization.

1022. In its analysis of benefit, the Panel considered that the fact that Aérospatiale was undercapitalized did not necessarily mean that a private investor would not have provided capital to the company.<sup>2287</sup> The Panel proceeded to examine Aérospatiale's financial ratios during this period and concluded that, in the years leading up to the share transfer, Aérospatiale's financial condition had improved over prior periods.<sup>2288</sup> The Panel further considered that the share transfer was necessary in order to improve (i) the chances that the planned privatization would occur as soon as possible and (ii) the French Government's position in negotiations with other Airbus governments over the terms of the consolidation of the European aerospace industry.<sup>2289</sup> Following this reasoning, the Panel concluded that Aérospatiale's financial position and prospects immediately prior to the French Government's transfer of its 45.76% interest in Dassault Aviation, while improved, "were not improved to a degree that would have enabled Aérospatiale, absent the addition of the 45.76 percent interest in Dassault Aviation (representing a 20 percent increase in its total consolidated capital), to attract private capital."<sup>2290</sup>

1023. In our view, the Panel's analysis reveals a failure to identify the correct "investment decision" to be assessed in relation to the usual investment practice, and therefore an error in the Panel's application of the legal standard under Articles 1.1(b) and 14(a) to the facts of this case. As we have noted, both parties maintained before the Panel that the "investment decision" was made in anticipation of the returns from the transfer of shares in Dassault Aviation to Aérospatiale and the further consolidation and subsequent public offering of shares. In particular, the United States alleged not only that Aérospatiale continued to be in poor financial condition, but also that the costs

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<sup>2286</sup>Panel Report, paras. 7.1393 and 7.1394. See also European Union's appellant's submission, footnote 1567 to para. 1143 and footnote 1574 to para. 1152.

<sup>2287</sup>Panel Report, para. 7.1408.

<sup>2288</sup>Panel Report, para. 7.1408.

<sup>2289</sup>Panel Report, para. 7.1409.

<sup>2290</sup>Panel Report, para. 7.1409.

associated with the investment—including the relinquishing of control of Dassault Aviation—were not outweighed by the expected return from the eventual public offering of Aérospatiale-Matra shares. The Panel, however, does not appear to have made any affirmative findings either in respect of the costs of the transaction, including the value of the loss of control of Dassault Aviation, or in respect of the expected returns from the consolidation and subsequent public offering of shares. Rather, the Panel found simply that Aérospatiale was not able "to attract private capital".

1024. It was not sufficient for the Panel to examine whether a company is in a position to attract private capital without reference to the proper investment decision at issue, because the "attractiveness" of an investment will be determined by the particular costs and expected returns associated with that decision. A distressed company can be revived through a restructuring in the form of an equity infusion if the reconstituted company is expected to generate sufficient synergies or profits to secure a market return. The Panel, however, appears to have limited its conclusion to an assessment of the financial health of Aérospatiale immediately prior to the share transfer. As we have noted, although the Panel referred to the prospective consolidation and privatization of the French Government's holdings in Aérospatiale and Dassault Aviation, it did so only to conclude that there were strategic interests associated with accelerating the process of privatization to strengthen the French Government's position in the overall consolidation of the European aerospace industry. This, however, failed to engage the central question of whether the anticipated returns of the equity investment were sufficient to justify the costs, including the loss of control of Dassault Aviation, of transferring the French Government's stake in Dassault Aviation to Aérospatiale.

1025. The fact that the Panel failed to identify the correct "investment decision" is confirmed by its insistence that it was for the European Communities to demonstrate on rebuttal that the transaction in question was consistent with the usual investment practice because it was part of a restructuring or consolidation project that was expected to generate sufficient returns. As we have explained, in the light of the parties' arguments and evidence concerning the value of the loss of control over Dassault Aviation, and the extent of the expected returns created through consolidation and privatization, it was precisely this investment decision that the Panel was tasked with assessing for consistency with the usual investment practice. We do not see that the Panel ever reached an affirmative conclusion that the decision to combine the French Government's holdings in Aérospatiale and Dassault Aviation, given the investment costs and expected returns associated with that transaction, was inconsistent with the usual investment practice, and therefore conferred a benefit, within the meaning of Articles 1.1(b) and 14(a) of the *SCM Agreement*. Accordingly, we consider that the Panel erred in its application of the legal standard to the facts of this case.

1026. For the foregoing reasons, we *reverse* the Panel's finding, in paragraph 7.1412 of the Panel Report, that the French Government's transfer of shares of Dassault Aviation to Aérospatiale conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the *SCM Agreement*.

1027. As we have observed, the Panel did not make affirmative findings regarding either the costs of the transaction, including the value of the loss of control of Dassault Aviation, or the expected returns from the consolidation and subsequent public offering of shares. We further note that the evidence submitted by the parties to the Panel in respect of these valuations is contested. Accordingly, we are unable to complete the analysis to determine whether a benefit was conferred within the meaning of Article 1.1(b) of the *SCM Agreement*.

### **VIII. Export Subsidies**

#### **A. Introduction**

1028. The European Union alleges that the Panel erred in its interpretation and application of Article 3.1(a) and footnote 4 of the *SCM Agreement* in finding that the subsidies granted under the German, Spanish, and UK LA/MSF contracts for the A380 were "in fact tied to ... anticipated exportation" within the meaning of footnote 4, and were thus contingent in fact upon export performance.<sup>2291</sup> The United States submits that the Panel also misapplied the standard for *de facto* export contingency under Article 3.1(a) and footnote 4 of the *SCM Agreement* in finding that the United States had failed to show that the subsidies granted under the French LA/MSF contracts for the A380, A340-500/600, and A330-200, and the Spanish LA/MSF contract for the A340-500/600 were contingent in fact upon export performance.<sup>2292</sup> To address the issues raised by the European Union's and the United States' appeals, we begin with a brief summary of the Panel's findings regarding the alleged export-contingent subsidies. We then consider the proper interpretation of the legal standard for *de facto* export contingency under Article 3.1(a) and footnote 4 of the *SCM Agreement*. Finally, we examine whether the Panel misinterpreted or misapplied that standard in reaching its findings concerning the seven LA/MSF measures at issue.

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<sup>2291</sup>Panel Report, para. 7.689.

<sup>2292</sup>Panel Report, para. 7.689.

B. *The Panel's Findings*

1029. At the outset, the Panel noted that, although the United States made claims regarding both in law and in fact export contingency, it described its complaint as "principally a claim of *de facto* contingency".<sup>2293</sup> Therefore, the Panel began its evaluation with the United States' claim that the LA/MSF for the A380, A340-500/600, and A330-200 constituted subsidies that are contingent in fact upon export performance.

1030. The Panel observed that the ordinary meaning of the word "contingent" in Article 3.1(a) of the *SCM Agreement* is "conditional" or "dependent"<sup>2294</sup>, and, as held by the Appellate Body in previous disputes, contingency requires a demonstration of "a relationship of conditionality or dependence".<sup>2295</sup> The Panel also recalled the three elements identified by the Appellate Body in *Canada – Aircraft*, which must be shown in order to establish contingency in fact within the meaning of footnote 4 of the *SCM Agreement*<sup>2296</sup>, namely that (i) the granting of a subsidy (ii) is tied to (iii) actual or anticipated exportation or export earnings.<sup>2297</sup> The Panel found that "'anticipated' exportation may be understood to be exportation that a granting authority considers, expects or foresees will occur *after* it has granted a subsidy."<sup>2298</sup> According to the Panel, this does not mean that the contingency relationship between the granting of a subsidy and anticipated exportation could be demonstrated "by merely showing that a granting authority anticipated export performance."<sup>2299</sup> Rather, in the Panel's view:

... in order to qualify as a prohibited export subsidy, the grant of the subsidy must be *conditional* or *dependent upon* actual or anticipated export performance; or as we put it above, a subsidy must be granted *because* of actual or anticipated export performance.<sup>2300</sup> (original emphasis)

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<sup>2293</sup>Panel Report, para. 7.628 (quoting United States' response to Panel Question 10).

<sup>2294</sup>Panel Report, para. 7.634.

<sup>2295</sup>Panel Report, para. 7.640 (quoting Appellate Body Report, *Canada – Aircraft*, para. 171). Article 3.1(a) of the *SCM Agreement* prohibits "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I".

<sup>2296</sup>Footnote 4 of the *SCM Agreement*, which specifies certain requirements for contingency "in fact", states:

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.

<sup>2297</sup>Panel Report, para. 7.648 (referring to Appellate Body Report, *Canada – Aircraft*, para. 171).

<sup>2298</sup>Panel Report, para. 7.641. (original emphasis)

<sup>2299</sup>Panel Report, para. 7.644.

<sup>2300</sup>Panel Report, para. 7.648.



1031. The Panel also recalled the Appellate Body's finding that contingency in fact must be "*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".<sup>2301</sup> Thus, "the mere fact that an enterprise exports cannot, alone, be used to establish the required contingency."<sup>2302</sup>

1032. The Panel next turned to review the evidence in order to determine whether the United States had established that the LA/MSF subsidies at issue were contingent in fact upon anticipated export performance. The Panel found that the United States had submitted sufficient evidence to establish that, at the time the relevant member State governments concluded the LA/MSF contracts, they were fully aware that Airbus was a global company operating in a global market, and that the A380, A340-500/600, and A330-200 projects would involve Airbus selling most, if not all, of its production in export markets.<sup>2303</sup> The Panel then examined the evidence submitted by the United States on the contingent relationship between the subsidies at issue and anticipated export performance. In the Panel's view, it was clear from the repayment provisions of the contracts, the market forecasts, as well as certain HSBI (including Airbus' business case for the A380 and French and UK Governments' critical project appraisals)<sup>2304</sup>, that achieving the level of sales needed fully to repay each loan would require Airbus to make a substantial amount of exports.<sup>2305</sup> Moreover, the Panel noted that, as the European Communities had explained, the member States expected that the loans granted under the LA/MSF would be fully repaid.<sup>2306</sup> Thus, the Panel concluded that the governments of these member States, in granting the loans, must have counted on Airbus selling a sufficient number of LCA so as to repay the loans and that such sales necessarily included a substantial number of exports.<sup>2307</sup> On this basis, the Panel found that:

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<sup>2301</sup>Panel Report, para. 7.648 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167 (original emphasis)).

<sup>2302</sup>Panel Report, para. 7.648. The Panel noted, however, that the fact that a company is export-oriented "may be taken into account as *a* relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding" of export contingency. (*Ibid.* (quoting Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 48, in turn quoting Appellate Body Report, *Canada – Aircraft*, para. 173 (original emphasis) (underlining added by the Panel omitted))

<sup>2303</sup>Panel Report, paras. 7.652, 7.656, and 7.659.

<sup>2304</sup>Panel Report, para. 7.678 (referring to Airbus 2000 GMF (Panel Exhibit US-358); French A380 contract (Panel Exhibit US-365 (BCI)); German A380 contract (Panel Exhibit US-72 (BCI)); Spanish A380 contract (Panel Exhibit US-73 (BCI)); UK A380 contract (Panel Exhibit US-79 (BCI)); French A340-500/600 contract (Panel Exhibit US-36 (BCI)); Spanish A340-500/600 contract (Panel Exhibits US-37 (BCI)); French A330-200 contract (Panel Exhibit US-78 (BCI)); United States' first written submission to the Panel (HSBI), paras. 39-42, 50-53, and 57-60; United States' oral statement at the second Panel meeting (HSBI), paras. 2-7; and Panel Exhibit DS316-EC-HSBI-0001143)

<sup>2305</sup>Panel Report, para. 7.678.

<sup>2306</sup>Panel Report, para. 7.678 (referring to European Communities' first written submission to the Panel, para. 638).

<sup>2307</sup>Panel Report, para. 7.678.

... without being decisive, this evidence supports the view that the provision of LA/MSF on sales-dependent repayment terms was, at least in part, "conditional" or "dependent for its existence" upon the EC member States' anticipated exportation or export earnings.<sup>2308</sup>

1033. The Panel then turned to examine the additional evidence advanced by the United States in order to determine whether that evidence "corroborate{d}" the alleged tie between the granting of the subsidies and anticipated exportation.<sup>2309</sup> Such additional evidence included other provisions in the LA/MSF contracts, representations made by Airbus in its application for the German LA/MSF measure, statements by government officials of the United Kingdom and France, as well as information from the French Government's critical project appraisals. On this basis, the Panel found that, with respect to the LA/MSF contracts for the A380 by Germany, Spain, and the United Kingdom, the relevant evidence demonstrated that the granting of the subsidies under these contracts was contingent in fact upon anticipated export performance.<sup>2310</sup> In contrast, with respect to the French LA/MSF contracts for the A380, A340-500/600, and A330-200 and the Spanish LA/MSF contract for the A340-500/600, the Panel found that the additional evidence did not add any support to the United States' claim beyond what was already indicated by the repayment provisions.<sup>2311</sup> Thus, the Panel concluded that the United States failed to establish that the granting of subsidies pursuant to these LA/MSF contracts was contingent in fact upon anticipated export performance.<sup>2312</sup>

1034. Turning to the United States' claim that the same LA/MSF measures are subsidies contingent, in law, on export performance<sup>2313</sup>, the Panel noted the United States' argument that the terms and conditions of each of the challenged LA/MSF contracts, when considered in the light of the sales projection in Airbus' Global Market Forecast ("GMF") and project appraisals made by the member State governments, gave rise to the necessary implication that the provision of LA/MSF was contingent in law on anticipated export performance. In the Panel's view, "by relying upon such facts, the United States' claim stray{ed} from a complaint about what {could} be understood from the legal obligations written into the LA/MSF contracts, to a complaint about how those legal obligations

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<sup>2308</sup>Panel Report, para. 7.678.

<sup>2309</sup>Panel Report, para. 7.679.

<sup>2310</sup>Panel Report, paras. 7.679-7.683.

<sup>2311</sup>The Panel reviewed the Critical Project Appraisals by the French Government but did not discuss them in the Panel Report, as they were designated by the European Communities as HSBI.

<sup>2312</sup>Panel Report, paras. 7.684-7.688.

<sup>2313</sup>At the outset, the Panel addressed the "threshold question" of "whether Article 3.1(a) and footnote 4 envisage the possibility of bringing a claim of subsidization contingent in law upon *anticipated* export performance". (Panel Report, para. 7.695) The Panel considered it "appropriate to read footnote 4 as informing the meaning of 'export performance' for the purpose of in law contingency subsidy claims under Article 3.1(a)" and, consequently, the Panel saw "no obstacle to the United States" raising a complaint that the LA/MSF at issue was contingent, in law, upon anticipated export performance. (*Ibid.*, para. 7.701) The European Union and the United States have not appealed these Panel findings. Therefore, we need not explore the relevance of footnote 4 to the interpretation of Article 3.1(a) with respect to *de jure* export contingency.

{could} be understood *in the light of relevant facts and circumstances*."<sup>2314</sup> Accordingly, the Panel "agree{d} with the European Communities that the United States' claims of in law export contingency against the challenged LA/MSF measures {were} improperly constituted."<sup>2315</sup> For this reason, the Panel "dismiss{ed} the United States' claim that the provision of LA/MSF for the A380, A340-500/600 and A330-200 was contingent *in law* upon anticipated export performance, within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement."<sup>2316</sup>

1035. Having dismissed the United States' claim, the Panel nevertheless went on to consider whether it would have arrived at a different conclusion had it taken into account the evidence submitted by the United States extraneous to the LA/MSF contracts.<sup>2317</sup> The Panel found that, based on the evidence submitted by the United States, "as a matter of law, the EC member States provided the LA/MSF on the basis of their expectation (but not the condition) that Airbus would export."<sup>2318</sup> The Panel thus concluded that, even assuming that the United States could rely upon evidence extraneous to the LA/MSF, the United States would have failed to demonstrate that the LA/MSF was contingent, in law, upon anticipated export performance.<sup>2319</sup>

#### C. *The Interpretation of Article 3.1(a) and Footnote 4 of the SCM Agreement*

1036. Article 3.1(a) of the *SCM Agreement* prohibits "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I". Footnote 4 of that provision, which elaborates on the standard for export contingency "in fact", states:

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.

1037. The Appellate Body explained in *Canada – Aircraft* that the word "contingent" means "conditional" or "dependent for its existence on something else"<sup>2320</sup>, and that the legal standard for export contingency expressed in Article 3.1(a) is the same for both *de jure* and *de facto*

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<sup>2314</sup>Panel Report, para. 7.713. (original emphasis)

<sup>2315</sup>Panel Report, para. 7.713.

<sup>2316</sup>Panel Report, para. 7.713. (original emphasis)

<sup>2317</sup>Panel Report, para. 7.714.

<sup>2318</sup>Panel Report, para. 7.716.

<sup>2319</sup>Panel Report, para. 7.716.

<sup>2320</sup>Appellate Body Report, *Canada – Aircraft*, para. 166.

contingency.<sup>2321</sup> With regard to the standard for *de facto* export contingency set out in footnote 4, the Appellate Body noted that the ordinary meaning of the word "tie" in the first sentence of the footnote is to "limit or restrict as to ... conditions".<sup>2322</sup> The Appellate Body thus found that to satisfy the standard for *de facto* export contingency "a relationship of conditionality or dependence" must be demonstrated between the subsidy and "actual or anticipated exportation or export earnings".<sup>2323</sup> The Appellate Body further observed that the meaning of the word "anticipated" under footnote 4 is "expected", and that "{w}hether exports were anticipated or 'expected' is to be gleaned from an examination of objective evidence."<sup>2324</sup> The Appellate Body stressed, however, that the use of this word does *not* transform the standard for "contingent ... in fact" into a standard that is satisfied by merely ascertaining "expectations" of exports on the part of the granting authority.<sup>2325</sup> The Appellate Body explained that, although a subsidy "may well be granted in the knowledge, or with the anticipation, that exports will result", "that alone is not sufficient, because that alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation."<sup>2326</sup>

1038. The Appellate Body found that the evidence that may demonstrate *de jure* export contingency is different from evidence that may reveal *de facto* export contingency. *De jure* contingency "can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure."<sup>2327</sup> Nonetheless, *de jure* export contingency does not have to be set out expressly, but can also be derived by "necessary implication" from the wording of a legal instrument.<sup>2328</sup> By contrast, the evidence needed to establish *de facto* export contingency goes beyond a legal instrument and includes a variety of factual elements concerning the granting of the subsidy in a specific case. In this respect, the Appellate Body stated that:

{p}roving *de facto* export contingency is a much more difficult task. There is no single legal document which will demonstrate, on its face, that a subsidy is "contingent ... in fact ... upon export performance". Instead, 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

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<sup>2321</sup> Appellate Body Report, *Canada – Aircraft*, para. 167.

<sup>2322</sup> Appellate Body Report, *Canada – Aircraft*, para. 171.

<sup>2323</sup> Appellate Body Report, *Canada – Aircraft*, para. 171. Similarly, in *Canada – Autos*, the Appellate Body noted that footnote 4 to Article 3.1(a) uses the words "tied to" as a synonym for "contingent" or "conditional" and that, consequently, a "tie", amounting to the relationship of contingency, between the granting of the subsidy and actual or anticipated exportation meets the legal standard of "contingent" in Article 3.1(a) of the *SCM Agreement*. (Appellate Body Report, *Canada – Autos*, para. 107)

<sup>2324</sup> Appellate Body Report, *Canada – Aircraft*, para. 172.

<sup>2325</sup> Appellate Body Report, *Canada – Aircraft*, para. 172.

<sup>2326</sup> Appellate Body Report, *Canada – Aircraft*, para. 172.

<sup>2327</sup> Appellate Body Report, *Canada – Autos*, para. 100.

<sup>2328</sup> Appellate Body Report, *Canada – Autos*, para. 100.

surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.<sup>2329</sup> (original emphasis)

1039. Moreover, the Appellate Body emphasized that, under the second sentence of footnote 4, "merely knowing that a recipient's sales are export-oriented does not demonstrate, without more, that the granting of a subsidy is tied to actual or anticipated exports."<sup>2330</sup> Rather, "the export orientation of a recipient may be taken into account as *a* relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding."<sup>2331</sup>

1040. Having reviewed the relevant jurisprudence under Article 3.1(a) and footnote 4 of the *SCM Agreement*, we turn to examine the specific interpretative question before us. On appeal, the European Union submits that the Panel erroneously found that the standard for *de facto* export contingency could be met when it is demonstrated that "there is the anticipating of exports by the granting authority, and that *because* of such anticipating of exports a subsidy is granted".<sup>2332</sup> The European Union notes that the Panel expressed this standard in terms of a "*motivation*"<sup>2333</sup> upon which the granting of subsidy is "*dependent*".<sup>2334</sup> The European Union thus characterizes the legal standard set out by the Panel as the "dependent motivation" standard.<sup>2335</sup> In the European Union's view, the standard for *de facto* export contingency cannot be equated with motivation. Rather, in order to show that a subsidy is contingent upon export performance, the obligation to grant the subsidy and the right to receive it has to be limited by the condition of export.<sup>2336</sup>

1041. The United States responds that the Panel correctly concluded that "anticipated" exportation means exportation that a granting authority considers, expects or foresees will occur after it has granted a subsidy.<sup>2337</sup> Moreover, the United States maintains that the Panel properly found that the legal standard for *de facto* export contingency focuses on whether a relationship of conditionality

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<sup>2329</sup> Appellate Body Report, *Canada – Aircraft*, para. 167.

<sup>2330</sup> Appellate Body Report, *Canada – Aircraft*, para. 173. To recall, the second sentence provides that "{t}he 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 {Article 3.1 of the *SCM Agreement*}".

<sup>2331</sup> Appellate Body Report, *Canada – Aircraft*, para. 173. (original emphasis)

<sup>2332</sup> European Union's appellant's submission, para. 1282 (referring to Panel Report, paras. 7.636, second sentence; 7.644, fourth sentence; 7.648, third sentence; 7.680, final sentence; 7.681, final sentence; and 7.683, final sentence (original emphasis)).

<sup>2333</sup> European Union's appellant's submission, para. 1282 (quoting Panel Report, paras. 7.675, first and second sentences; 7.676, first sentence; 7.677, first sentence; and 7.690, final sentence). (emphasis added by the European Union)

<sup>2334</sup> European Union's appellant's submission, para. 1282 (quoting Panel Report, paras. 7.634, first sentence; 7.636, second sentence; 7.642, first sentence; 7.648, third sentence; 7.678; and 7.715, final sentence). (emphasis added by the European Union)

<sup>2335</sup> European Union's appellant's submission, para. 1278.

<sup>2336</sup> European Union's appellant's submission, para. 1311.

<sup>2337</sup> United States' appellee's submission, para. 286.

existed between anticipated exportation and the granting of the subsidy.<sup>2338</sup> In the United States' view, in reaching its finding that the subsidies granted under the German, Spanish, and UK LA/MSF contracts for the A380 were contingent in fact upon export performance, the Panel "accurately articulated the standard for 'in fact' contingency upon anticipated exportation or export earnings."<sup>2339</sup>

1042. Thus, while both the European Union and the United States agree that the legal standard of *de facto* export contingency requires a relationship of conditionality between the subsidies and exportation, they disagree as to the precise content of the legal standard for subsidies contingent in fact on anticipated exportation. The interpretative issue before us, therefore, is *what* must be demonstrated in order to establish that a subsidy is "*in fact tied to ... anticipated exportation*" within the meaning of footnote 4 of the *SCM Agreement*.

1043. We recall the Appellate Body's finding that the word "anticipated" means "expected".<sup>2340</sup> Therefore, whereas "actual exportation" in footnote 4 refers to exportation that has occurred at the time a subsidy is granted, "anticipated exportation" means exportation that is expected to occur in the future. We also note that, in contrast to the term "actual exportation", the term "anticipated exportation" inherently contains an element of uncertainty, in that an exportation expected to occur in the future may, or may not, actually occur. By referring to the "granting of a subsidy" that is tied to "anticipated" exportation, footnote 4 describes the situation that exists at the time a subsidy is granted, but does not require that the anticipated exportation be realized after the subsidy is granted. Moreover, the term "anticipated exportation", read in isolation, does not indicate by *whom* the exportation is anticipated. However, as the Appellate Body noted, by using the phrase "the granting of a subsidy", the inquiry under footnote 4 must focus on "whether the *granting authority* imposed a condition based on export performance in providing the subsidy."<sup>2341</sup> Consistent with this understanding, it is the granting authority that "anticipates" that exportation will occur after the granting of the subsidy, and that grants a subsidy *on the condition* of such anticipated exportation.

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<sup>2338</sup>United States' appellee's submission, para. 293. In its other appeal, the United States argues that the Panel erred in its application of the standard for *de facto* export contingency by "effectively" requiring evidence of the governments' motivation in granting the LA/MSF at issue. (United States' other appellant's submission, para. 12) Nonetheless, the United States argues that, "apart from its decision to mandate an *additional requirement* of 'subjective motivation'", the Panel articulated the correct legal standard. (United States' appellee's submission, para. 270 (original emphasis))

<sup>2339</sup>United States' appellee's submission, para. 270.

<sup>2340</sup>Appellate Body Report, *Canada – Aircraft*, para. 172.

<sup>2341</sup>Appellate Body Report, *Canada – Aircraft*, para. 170. (original emphasis) The Appellate Body therefore rejected the view that an analysis of "contingent ... in fact ... upon export performance" should focus on the reasonable knowledge of the recipient.

1044. Because anticipated exportation "alone is not proof that the granting of the subsidy is *linked* to the anticipation of exportation"<sup>2342</sup>, the legal standard for *de facto* export contingency under Article 3.1(a) and footnote 4 of the *SCM Agreement* further requires that there exists a relationship of conditionality between the granting of the subsidy and anticipated exportation. Where a subsidy is alleged to be "in fact tied to ... anticipated exportation", the relationship of conditionality is, unlike in the case of *de jure* export contingency, not expressly or by necessary implication provided in the terms of the relevant legal instrument granting the subsidy. Under such circumstances, we consider that the factual equivalent of such conditionality can be established by recourse to the following test: is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?

1045. In reaching this interpretation of the standard for *de facto* export contingency under Article 3.1(a) and footnote 4 of the *SCM Agreement*, we do *not* suggest that the standard is met merely because the granting of the subsidy is designed to increase a recipient's production, even if the increased production is exported in whole. We also do *not* suggest that the fact that the granting of the subsidy may, in addition to increasing exports, *also* increase the recipient's domestic sales would prevent a finding of *de facto* export contingency. Rather, we consider that the standard for *de facto* export contingency under Article 3.1(a) and footnote 4 of the *SCM Agreement* would be met when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy.

1046. The existence of *de facto* export contingency, as set out above, "must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy"<sup>2343</sup>, which may include the following factors: (i) the design and structure of the measure granting the subsidy; (ii) the modalities of operation set out in such a measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation.

1047. Moreover, where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of *anticipated* export and domestic sales of the subsidized product that would come about in consequence of the granting of the subsidy, and, on the other hand, the situation in the absence of the subsidy. The situation in the absence of the subsidy may be understood on the basis of historical sales of the same product by the recipient in the domestic and export markets

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<sup>2342</sup> Appellate Body Report, *Canada – Aircraft*, para. 172. (original emphasis)

<sup>2343</sup> Appellate Body Report, *Canada – Aircraft*, para. 167. (original emphasis)

before the subsidy was granted. In the event that there are no historical data untainted by the subsidy, or the subsidized product is a new product for which no historical data exists, the comparison could be made with the performance that a profit-maximizing firm would hypothetically be expected to achieve in the export and domestic markets in the absence of the subsidy. Where the evidence shows, all other things being equal, that the granting of the subsidy provides an incentive to skew anticipated sales towards exports, in comparison with the historical performance of the recipient or the hypothetical performance of a profit-maximizing firm in the absence of the subsidy, this would be an indication that the granting of the subsidy is in fact tied to anticipated exportation within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*.

1048. The following numerical examples illustrate when the granting of a subsidy may, or may not, be geared to induce promotion of future export performance by a recipient. Assume that a subsidy is designed to allow a recipient to increase its future production by five units. Assume further that the existing ratio of the recipient's export sales to domestic sales, at the time the subsidy is granted, is 2:3. The granting of the subsidy will *not* be tied to anticipated exportation if, all other things being equal, the anticipated ratio of export sales to domestic sales is not greater than the existing ratio. In other words, if, under the measure granting the subsidy, the recipient would not be expected to export more than two of the additional five units to be produced, then this is indicative of the absence of a tie. By contrast, the granting of the subsidy would be tied to anticipated exportation if, all other things equal, the recipient is expected to export at least three of the five additional units to be produced. In other words, the subsidy is designed in such a way that it is expected to skew the recipient's future sales in favour of export sales, even though the recipient may also be expected to increase its domestic sales.

1049. In setting out this test, we do not suggest that the issue as to whether the granting of a subsidy is in fact tied to anticipated exportation could be based on an assessment of the actual effects of that subsidy. Rather, we emphasize that it must be assessed on the basis of the information available to the granting authority at the time the subsidy is granted.

1050. The standard for determining whether the granting of a subsidy is "in fact tied to ... anticipated exportation" is an objective standard, to be established on the basis of the total configuration of facts constituting and surrounding the granting of the subsidy, including the design, structure, and modalities of operation of the measure granting the subsidy. Indeed, the conditional relationship between the granting of the subsidy and export performance must be objectively observable on the basis of such evidence in order for the subsidy to be geared to induce the promotion of future export performance by the recipient. The standard for *de facto* export contingency is therefore not satisfied by the subjective motivation of the granting government to promote the future



export performance of the recipient. In this respect, we note that the Appellate Body and panels have, on several occasions, cautioned against undue reliance on the intent of a government behind a measure to determine the WTO-consistency of that measure.<sup>2344</sup> The Appellate Body has found that "the intent, stated or otherwise, of the legislators *is not conclusive*" as to whether a measure is consistent with the covered agreement.<sup>2345</sup> In our view, the same understanding applies in the context of a determination on export contingency, where the requisite conditionality between the subsidy and anticipated exportation under Article 3.1(a) and footnote 4 of the *SCM Agreement* must be established on the basis of objective evidence, rather than subjective intent. We note, however, that while the standard for *de facto* export contingency cannot be satisfied by the subjective motivation of the granting government, objectively reviewable expressions of a government's policy objectives for granting a subsidy may, however, constitute relevant evidence in an inquiry into whether a subsidy is geared to induce the promotion of future export performance by the recipient.

1051. Similarly, the standard does not require a panel to ascertain a government's reason(s) for granting a subsidy. The government's reason for granting a subsidy only explains *why* the subsidy is granted. It does not necessarily answer the question as to *what* the government did, in terms of the design, structure, and modalities of operation of the subsidy, in order to induce the promotion of future export performance by the recipient.<sup>2346</sup> Indeed, whether the granting of a subsidy is conditional on future export performance must be determined by assessing *the subsidy itself*, in the light of the relevant factual circumstances, rather than by reference to the granting authority's reasons for the measure. This is not to say, however, that evidence regarding the policy reasons of a subsidy is necessarily excluded from the inquiry into whether a subsidy is geared to induce the promotion of future export performance by the recipient.

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<sup>2344</sup>For example, in the context of a discrimination claim under Article III of the GATT 1994, the Appellate Body found that "it is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent." (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 27, DSR 1996:I, 97, at 119) Moreover, "there may well be a certain degree of speculation in seeking to establish the intent of a government in the abstract." (Panel Report, *Japan – DRAMs (Korea)*, para. 7.104)

<sup>2345</sup>Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 259. (emphasis added) See also Appellate Body Report, *China – Auto Parts*, para. 178, where the Appellate Body found that the intent, stated or otherwise, of the legislators is not conclusive as to the characterization of a measure.

<sup>2346</sup>We recall that, for purposes of determining whether internal taxes or other internal charges are applied "so as to afford protection" under Article III:2, second sentence, of the GATT 1994, read in conjunction with Article III:1 thereof, the Appellate Body has found that an "examination of the design, architecture and structure of a tax measure" can "permit identification of a measure's objectives or purposes as revealed or objectified in the measure itself." (Appellate Body Report, *Chile – Alcoholic Beverages*, para. 71)

1052. Our interpretation of the terms "tied to ... anticipated exportation" is supported by the context provided by the second sentence of footnote 4. This sentence states that "{t}he 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 {Article 3.1(a) of the *SCM Agreement*}". As the Appellate Body found in *Canada – Aircraft*, "merely knowing that a recipient's sales are export-oriented does not demonstrate, without more, that the granting of a subsidy is tied to actual or anticipated exports."<sup>2347</sup> Moreover, "under the second sentence of footnote 4, the export orientation of a recipient may be taken into account as a relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding."<sup>2348</sup> The second sentence of footnote 4, as interpreted by the Appellate Body, thus precludes a finding of *de facto* export contingency for the sole reason that the sales of the recipient of a subsidy involve export sales. Rather, where a subsidy is granted to a recipient that is expected to export, this fact must be considered *together with* other relevant factors, including the design, structure, and modalities of operation of the subsidy, as well as other relevant factual circumstances surrounding the granting of the subsidy, in order to determine whether the granting of subsidy is, as explained above, geared to induce the promotion of future export performance by the recipient, and therefore "in fact tied to ... anticipated exportation".

1053. We further recall that Article 3.1(a) of the *SCM Agreement* states that subsidies contingent upon export performance "includ{e} those illustrated in Annex I". A common feature of the examples provided in items (b) to (l)<sup>2349</sup> of the Illustrative List of Export Subsidies in Annex I to the *SCM Agreement* is that the subsidy gives certain advantages to exported products and favours exported products over products destined for domestic consumption.<sup>2350</sup> Export-contingent subsidies will indeed favour a recipient's export sales over its domestic sales. Nonetheless, as discussed above, the fact that the granting of the subsidy may *also* increase the recipient's domestic sales would not

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<sup>2347</sup> Appellate Body Report, *Canada – Aircraft*, para. 173. In the subsequent Article 21.5 proceedings, the Appellate Body further found that "the fact that an industrial sector has a high export-orientation is not, by itself, sufficient to preclude that sector from being expressly identified as an eligible or privileged recipient of subsidies." (Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 49)

<sup>2348</sup> Appellate Body Report, *Canada – Aircraft*, para. 173. (original emphasis)

<sup>2349</sup> Item (a) of the Illustrative List of Export Subsidies in Annex I to the *SCM Agreement* refers to "{t}he provision by governments of direct subsidies to a firm or an industry contingent upon export performance."

<sup>2350</sup> For example, item (b) refers to currency retention schemes "which involve a bonus on exports". Items (c) and (d) list, respectively, internal transport and freight charges, and government provision of goods and services, for exported products "on terms or conditions more favourable than" those with respect to domestic products. Item (f) concerns allowance of special deductions related to exports "over and above those granted in respect to production for domestic consumption". Item (h) covers exemption, remission, or deferral of indirect taxes on goods and services used in the production of exported product "in excess of" the exemption, remission or deferral of indirect taxes on goods and services used in the production of like products when sold for domestic consumption. Other items, such as items (e), (j), and (k), concern subsidies provided exclusively to exports.

necessarily prevent a finding of *de facto* export contingency, so long as the measure is geared to induce a recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy.

1054. The above interpretation of Article 3.1(a) and footnote 4 of the *SCM Agreement* is also supported by the overall design and structure of that Agreement, which distinguishes between two kinds of subsidies: prohibited subsidies dealt with in Part II of the *SCM Agreement*, and actionable subsidies dealt with in Part III of the *SCM Agreement*. Only those subsidies that are conditioned on export performance or on import substitution are prohibited *per se* under Article 3 of Part II of the *SCM Agreement*. In contrast, all other subsidies are allowed under the *SCM Agreement*, albeit a Member granting such subsidies should not cause, through the use of the subsidies, adverse effects within the meaning of Article 5 of Part III, in which case it must remove the adverse effects or must withdraw the subsidies themselves. Among the latter category of subsidies—that is, the actionable subsidies—are those granted to an export-oriented recipient, without being contingent upon export performance. The mere fact that such subsidies may increase the company's production sold in the export market does not bring them under the discipline of Part II of the *SCM Agreement*. Otherwise, the line drawn by the Agreement between *prohibited* export subsidies and *actionable* production subsidies would be blurred, contrary to the overall design and structure of the Agreement. Although subsidies that are granted to an export-oriented company without being conditioned on export performance are not prohibited under Part II of the *SCM Agreement*, they can nonetheless be subject to challenge under Part III of the *SCM Agreement* if they cause adverse effects within the meaning of Article 5.<sup>2351</sup>

1055. Finally, the above interpretation is also consistent with the relevant jurisprudence under Article 3.1(a) and footnote 4 of the *SCM Agreement*. Specifically, in *Canada – Aircraft*, the panel examined several pieces of evidence before determining that the subsidies granted to certain companies in the Canadian aerospace sector under the measure at issue—the Technology Partnerships Canada ("TPC") programme—were in fact tied to anticipated exportation.<sup>2352</sup> For example, the Terms and Conditions of the programme required that funding decisions be based on, *inter alia*, whether the

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<sup>2351</sup>Moreover, both prohibited subsidies and subsidies causing adverse effects could of course be subject to countervailing duties imposed consistently with Part V of the *SCM Agreement*.

<sup>2352</sup>The evidence included: "TPC's statement of its overall objectives; types of information called for in applications for TPC funding; the considerations, or eligibility criteria, employed by TPC in deciding whether to grant assistance; factors to be identified by TPC officials in making recommendations about applications for funding; TPC's record of funding in the export field, generally, and in the aerospace and defence sector, in particular; the nearness-to-the-export-market of the projects funded; the importance of projected export sales by applicants to TPC's funding decisions; and the export orientation of the firms or the industry supported." (Appellate Body Report, *Canada – Aircraft*, para. 175)

funded projects would generate export sales and increase the international competitiveness of the funded companies. Moreover, applicants were required to indicate whether the project to be funded would increase exports, and to distinguish between domestic and export sales when reporting actual and future sales.<sup>2353</sup> In our view, the design and structure of the TPC programme, as evidenced by various documents relating to the TPC programme, as well as the high export potential of the funded projects, demonstrated that the granting of subsidies under the programme was geared to induce applicants for funding to increase exports and, consequently, to promote export performance by Canadian companies. In the subsequent Article 21.5 proceedings, the revised TPC programme, which removed the selection criteria relating to exportation as a basis for funding decisions, as well as the stated objectives of the programme to enhance exportation, was found not to constitute an export-contingent subsidy.<sup>2354</sup> In other words, the relevant evidence did not indicate that the revised measure was geared to induce the promotion of future export performance by the recipients.

1056. In sum, it is clear that a subsidy that is neutral on its face, or by necessary implication, and does not differentiate between a recipient's exports and domestic sales cannot be found to be contingent, in law, on export performance within the meaning of Article 3.1(a) of the *SCM Agreement*. Such a subsidy may nonetheless constitute a subsidy contingent in fact upon export performance within the meaning of the same provision if it is "in fact tied to actual or anticipated exportation or export earnings" in accordance with footnote 4 of the *SCM Agreement*. The interpretation set out above indicates that the granting of the subsidy may be tied to anticipated exportation, and thus contingent in fact upon export performance under Article 3.1 and footnote 4 of the *SCM Agreement* if it is geared to induce the promotion of future export performance by the recipient. The issue of whether this standard is met must be assessed on the basis of an examination of the measure granting the subsidy and the facts surrounding the granting of the subsidy, including the design, structure, and modalities of operation of the measure. Finally, the fact alone that the recipient of a subsidy exports is insufficient for a finding of *de facto* export contingency. Rather, this fact must be considered together with all other relevant evidence relating to the granting of the subsidy for purposes of determining whether the subsidy is contingent in fact upon export performance.

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<sup>2353</sup> See Panel Report, *Canada – Aircraft*, para. 9.340.

<sup>2354</sup> Panel Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 5.29, 5.33, and 5.34. In order to implement the DSB's recommendations and rulings, Canada also: (i) cancelled funding under five TPC transactions, (ii) withdrew approvals-in-principle for two new TPC funding projects; and (iii) closed all TPC files in the regional aircraft sector. (See *ibid.*, para. 5.3)

D. *Whether the Panel Erred in Its Interpretation of Article 3.1(a) and Footnote 4*

1057. We turn now to consider two questions concerning the Panel's interpretation of Article 3.1(a) and footnote 4 of the *SCM Agreement*. We begin first with the question of whether the Panel erred in its interpretation of "anticipated exportation" within the meaning of footnote 4. We then consider whether the Panel adopted a "reasons for" standard for assessing *de facto* export contingency and, if so, whether that is at variance with the required standard under Article 3.1(a) and footnote 4.

1. Whether the Panel Erred in Its Interpretation of "Anticipated Exportation"

1058. The European Union submits that the erroneous interpretation "underpin{ning}"<sup>2355</sup> the Panel's reasoning is the assumption that the term "actual exportation" refers to an export that "actually"<sup>2356</sup> takes place in the past or in the future. Consequently, the Panel erroneously understood the term "anticipated exportation" to mean "the notional state of mind of the granting authority."<sup>2357</sup> The European Union contends that, contrary to the Panel's findings, the word "actual" refers to "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", while the term "anticipated", which is "juxtaposed to the meaning of the term 'actual' ... means an export in the future."<sup>2358</sup>

1059. We recall the Appellate Body's finding, in *Canada – Aircraft*, that "{t}he dictionary meaning of the word 'anticipated' is 'expected'."<sup>2359</sup> In our discussion above, we find that "actual exportation" in footnote 4 refers to exportation that has occurred at the time a subsidy is granted, whereas "anticipated exportation" means exportation that is expected to occur in the future. We further recall the Panel's finding that "'anticipated' exportation may be understood to be exportation that a granting authority considers, expects or foresees will occur *after* it has granted a subsidy."<sup>2360</sup> We see no contradiction between the Panel's finding and the way in which the Appellate Body has interpreted the word "anticipated". In our view, therefore, the Panel's interpretation of the term "anticipated

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<sup>2355</sup>European Union's appellant's submission, para. 1325.

<sup>2356</sup>European Union's appellant's submission, para. 1352 (quoting Panel Report, para. 7.633).

<sup>2357</sup>European Union's appellant's submission, para. 1325.

<sup>2358</sup>European Union's appellant's submission, para. 1324.

<sup>2359</sup>Appellate Body Report, *Canada – Aircraft*, para. 172 (referring to *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 88; and *The Concise Oxford Dictionary*, 9th edn, D. Thompson (ed.) (Clarendon Press, 1995), p. 53).

<sup>2360</sup>Panel Report, para. 7.641. (original emphasis)

exportation" is consistent with the ordinary meaning of the term, as interpreted by the Appellate Body in previous disputes.<sup>2361</sup>

2. Whether the Panel Imposed a Correct Standard for *De Facto* Export Contingency

1060. The European Union contends that, "[b]y reasoning that the required condition is the 'anticipating of' exports[, ] the Panel finds that the requirement of contingency/conditionality that is at the heart of the provision can be replaced by mere 'dependent motivation'".<sup>2362</sup> To recall, the European Union uses the term "dependent motivation" to refer to the standard imposed by the Panel whereby export contingency could be established when it is demonstrated that "there is the anticipating of exports by the granting authority, and that, 'because' of such anticipating of exports a subsidy is granted."<sup>2363</sup>

1061. As set out above, "anticipated exportation", within the meaning of footnote 4, is to be demonstrated by way of objective evidence, such as the fact that a government is in possession of a company's sales forecasts showing significant export sales. It does not entail a determination of what the government's motivation is, but simply whether the prospect of future exports exists and whether the government is aware of that prospect. We do not consider, therefore, that the Panel's interpretation—that "anticipated exportation" is exportation that a granting authority expects will occur in the future—leads to a standard that replaces "contingency" with "dependent motivation".

1062. Nonetheless, we note that certain language used by the Panel shows that the standard it adopted deviates from what is required under Article 3.1(a) and footnote 4. Specifically, the Panel stated:

In concluding that the reference to "anticipated exportation or export earnings" in footnote 4 means to consider that exports will take place before they actually do, or to envisage that exports may take place in the future, we are not saying that the required *contingency* between the granting of a subsidy and anticipated exportation or export earnings may be demonstrated by merely showing that a granting authority anticipated export performance. Rather, we are saying that

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<sup>2361</sup>See Appellate Body Report, *Canada – Aircraft*, para. 172. Moreover, we are not convinced by the European Union's argument that the alleged error in the Panel's interpretation stems from the Panel's "assumption" regarding the meaning of "actual" in footnote 4. (European Union's appellant's submission, paras. 1325 and 1352) The sentence the European Union refers to, in which the Panel used the word "actually", merely contained the Panel's description of what it considered to be the European Communities' interpretation of footnote 4. (See Panel Report, para. 7.633)

<sup>2362</sup>European Union's appellant's submission, para. 1331.

<sup>2363</sup>European Union's appellant's submission, para. 1282 (quoting Panel Report, paras. 7.636, second sentence; 7.644, fourth sentence; 7.648, third sentence; 7.680, final sentence; 7.681, final sentence; and 7.683, final sentence (original emphasis)).

the required contingency may be demonstrated where the subsidy was granted *because* the granting authority anticipated export performance.<sup>2364</sup> (original italics; underlining added)

1063. By using the word "because", the Panel equated the standard of export contingency with the reason(s) for granting a subsidy. The Panel's findings indicate a standard that requires anticipated exportation to be the reason for the granting of a subsidy. We have explained above that the standard for finding that the granting of a subsidy is in fact tied to anticipated exportation is not met simply by showing that anticipated exportation is the reason for granting the subsidy. The test is whether the granting of the subsidy is geared to induce the promotion of future export performance by the recipient. The authority's reasons for the granting of the subsidy may provide some evidence to meet the correct standard, but it is not to be equated with that standard. The reason for granting the subsidy is not the same thing as whether the granting of the subsidy is geared to induce the promotion of future export performance by the recipient.

1064. We note that there might, or might not, be some overlap between the concept of the reasons for granting a subsidy and that of the motivation for granting a subsidy. As we find above, the standard for *de facto* export contingency is not met simply by showing that anticipated exportation is the reason for granting the subsidy. We also find that the standard for *de facto* export contingency is not satisfied by the subjective motivation of the granting government to promote the future export performance of the recipient. Having found that the Panel deviated from the correct standard under Article 3.1(a) and footnote 4 by equating the standard of export contingency with the reason(s) for granting a subsidy, we need not further address the issue of whether the Panel also erred in imposing a standard based on motivation.

1065. We note that the Panel quoted the Appellate Body's finding that the word "contingent" means "conditional" or "dependent for its existence on something else".<sup>2365</sup> It seems, therefore, that the Panel recognized that the standard under Article 3.1(a) and footnote 4 requires a demonstration of a conditional relationship between the subsidy and export performance. This recognition, however, is formulated at the highest level of generality. The manner in which the Panel sought to render more concrete the standard was to use the concept of "reasons". Thus, throughout its findings, the Panel referred to the words "because" and "reasons", in addition to the words "conditional on" and

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<sup>2364</sup>Panel Report, para. 7.644.

<sup>2365</sup>Panel Report, para. 7.634 (quoting Panel Report, *Canada – Aircraft*, para. 9.331; and Appellate Body Report, *Canada – Aircraft*, para. 166).

"conditions", when articulating the standard under Article 3.1(a) and footnote 4.<sup>2366</sup> For example, the Panel stated:

{I}n order to qualify as a prohibited export subsidy, the grant of the subsidy must be *conditional* or *dependent upon* actual or anticipated export performance; or as we have put it above, a subsidy must be granted *because* of actual or anticipated export performance.<sup>2367</sup> (original emphasis)

The Panel further stated:

{A} finding of export contingency ... 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>2368</sup> (emphasis added)

1066. Reading the Panel's findings in their entirety, we consider that the Panel equated the reasons for granting a subsidy with the notion of export contingency, and thus erroneously interpreted Article 3.1(a). The reasons for granting a subsidy may be evidence of *de facto* export contingency, but do not constitute such contingency.

### 3. Conclusion

1067. In sum, we do not consider that the Panel erred in its interpretation of "anticipated exportation" under footnote 4 of the *SCM Agreement*. We also do not consider that the Panel's interpretation of the term "anticipated exportation" led to the imposition of an erroneous "dependent motivation" standard. However, the Panel erroneously interpreted Article 3.1(a) and footnote 4 of the *SCM Agreement* by equating the standard for finding that the granting of a subsidy is in fact "tied to" anticipated exportation with a standard based on the reasons for granting a subsidy. As we set out above in section C, to determine whether the granting of a subsidy is in fact tied to anticipated exportation, recourse may be had to the following test: Is the granting of the subsidy geared to induce the promotion of future export performance by the recipient? The Panel's interpretation of the term "in fact tied to" under Article 3.1(a) and footnote 4 of the *SCM Agreement* is not consistent with this interpretation we set out above. We therefore *reverse* the Panel's interpretation that, in order to find that the granting of a subsidy is in fact tied to anticipated exportation, a subsidy must be granted *because* of anticipated export performance.<sup>2369</sup>

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<sup>2366</sup>See Panel Report, paras. 7.648, 7.677, 7.680, 7.681, 7.683, 7.685, and 7.688.

<sup>2367</sup>Panel Report, para. 7.648.

<sup>2368</sup>Panel Report, para. 7.677.

<sup>2369</sup>See Panel Report, para. 7.648. (original emphasis)



E. *The Application of the Standard for De Facto Export Contingency to the Facts*

1068. In section D above, we have found that the Panel correctly interpreted the term "anticipated exportation" in footnote 4 of the *SCM Agreement*. In this section, we turn to review whether the Panel properly applied its interpretation in finding that export performance by Airbus was anticipated when the French, German, Spanish, and UK Governments granted the LA/MSF subsidies at issue.

1069. In addition, in section D, we have found that the Panel erroneously interpreted the standard under Article 3.1(a) and footnote 4 of the *SCM Agreement* for determining whether the granting of a subsidy is "in fact tied to" anticipated exportation. In this section, we examine whether the Panel applied its erroneous standard in reaching its final conclusions and, if so, whether there are sufficient factual findings by the Panel or undisputed facts on the record that would allow us to determine whether the granting of the subsidies under the French, German, Spanish, and UK LA/MSF contracts for the A380, the French LA/MSF contracts for the A340-500/600 and A330-200, and the Spanish LA/MSF contract for the A340-500/600 was in fact tied to anticipated exportation within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*.

1. The Panel's Finding on "Anticipated Exportation"

1070. The European Union claims that, "{f}or the reasons already indicated, ... the Panel's findings that the Member States anticipated exports should be reversed."<sup>2370</sup> The European Union's claim rests primarily on its argument that the Panel erred in the interpretation of the term "anticipated exportation". Specifically, the European Union submits that "the concept of 'anticipation' assessed by the Panel is irrelevant to the single standard set out in Article 3.1(a) and footnote 4."<sup>2371</sup> In section D above, we have concluded that the Panel properly interpreted the concept of "anticipated exportation" as exportation that a granting authority expects to occur after the granting of a subsidy.

1071. The European Union further contends that "the evidence adduced by the United States at most speaks to the question of performance, not export performance."<sup>2372</sup> The European Union thus also challenges the Panel's application of the legal standard for "anticipated exportation" to the evidence submitted in this dispute.

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<sup>2370</sup>European Union's appellant's submission, para. 1492.

<sup>2371</sup>European Union's appellant's submission, para. 1492.

<sup>2372</sup>European Union's appellant's submission, para. 1492.

1072. We turn now to review the evidence submitted by the United States and relied on by the Panel regarding "anticipated exportation" in order to determine whether the Panel based its finding on "an examination of objective evidence"<sup>2373</sup>, and whether it properly found that, at the time the LA/MSF contracts were entered into, exportation by Airbus was "expected"<sup>2374</sup> to occur after the granting of the subsidies.

1073. With respect to the French, German, Spanish, and UK LA/MSF for the A380, the Panel examined the following evidence: (i) Airbus GMF<sup>2375</sup> issued in 1999 and 2000, predicting that demand in Europe for the A380 would account for 23% and 20%, respectively, of total demand<sup>2376</sup>; (ii) Airbus 1999 third quarter briefing on the A3XX<sup>2377</sup>, predicting that airlines in the Asia-Pacific region would represent more than 75% of demand; (iii) Critical Project Appraisals<sup>2378</sup> by France and the United Kingdom, and the A380 LA/MSF application by Deutsche Airbus<sup>2379</sup>; (iv) repayment provisions in the LA/MSF contracts, predicting sales that would greatly exceed demand in Europe<sup>2380</sup>; (v) evidence showing the governments' awareness of the global nature of the A380 project, including language to that effect in the Spanish LA/MSF contract, media reports concerning a press release by the UK Department of Trade and Industry, and a statement by British Prime Minister Tony Blair<sup>2381</sup>; (vi) media reports concerning Airbus Vice President Leahy's statement on export earnings made at the time when Airbus was seeking LA/MSF<sup>2382</sup>; and (vii) the fact that the A380 is an export-oriented

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<sup>2373</sup> Appellate Body Report, *Canada – Aircraft*, para. 172.

<sup>2374</sup> Appellate Body Report, *Canada – Aircraft*, para. 172.

<sup>2375</sup> According to the United States, each year, Airbus issues a "Global Market Forecast" that seeks to forecast the evolution of large civil aircraft fleets worldwide over the next 20 years, and the basic assumptions that Airbus uses in preparing the forecast "are both realistic and consistent with historical and currently foreseeable trends." (United States' first written submission to the Panel, footnote 393 to para. 346 (quoting Airbus GMF for 1999 (Panel Exhibit US-356), p. 8))

<sup>2376</sup> Panel Report, para. 7.651 (referring to Airbus 1999 GMF (Panel Exhibit US-356); and Airbus 2000 GMF (Panel Exhibit US-358)).

<sup>2377</sup> Panel Report, para. 7.651 (referring to Airbus Industrie, A3XX 3rd Quarter Briefing (1999) (Panel Exhibit US-359)). We note that Airbus originally designated the A380 as the A3XX; it changed the designation to A380 when it formally launched the project. (United States' first written submission to the Panel, footnote 399 to para. 346)

<sup>2378</sup> According to the European Communities, governments participating in the LA/MSF critically evaluate each aspect of a request to ensure that the governments will be able to recover their investment. (European Communities' first written submission to the Panel, para. 313) The European Communities designated all Critical Project Appraisals as HSBI.

<sup>2379</sup> Panel Report, para. 7.651 (referring to United States' first written submission to the Panel, paras. 34 and 36 (HSBI); and Appendix 1 to the German A380 contract (Panel Exhibit US-357 (BCI)). The European Communities designated the LA/MSF application as BCI.

<sup>2380</sup> Panel Report, para. 7.651 (referring to Spanish A380 contract (Panel Exhibit US-73 (BCI)); and Appendix 1 to the German A380 contract (Panel Exhibit US-357 (BCI)).

<sup>2381</sup> Panel Report, para. 7.651 (referring to Spanish A380 contract (Panel Exhibit US-73 (BCI)); Panel Exhibit US-360, *supra*, footnote 354; and Panel Exhibit US-361, *supra*, footnote 352).

<sup>2382</sup> Panel Report, para. 7.651 (referring to Aviation Now, "Airbus Launches A3XX Program, Sees Strong Demand in Asia" (available at <www.aviationnow.com>, 24 February 2000) (Panel Exhibit US-362); and "Airbus Bets the Company", *The Economist*, 16 March 2000 (Panel Exhibit US-363)).

project and that Airbus is an export-oriented company, with 84% of total sales between 1992 and 2005 being exports.<sup>2383</sup>

1074. With respect to the French and Spanish LA/MSF for the A340-500/600, the Panel reviewed the following evidence: (i) the LA/MSF contract between Airbus and the Government of Spain<sup>2384</sup>; (ii) Critical Project Appraisals by France<sup>2385</sup>; (iii) 1997 and 1998 GMFs showing European airlines accounting for, respectively, 25-29% of Airbus' total orders during the period 1997 to 2016, and 25-28% of Airbus' total orders during the period 1997 to 2017<sup>2386</sup>; (iv) the fact that, when the LA/MSF contracts were signed, almost half of the orders for the A340-500/600 were export sales<sup>2387</sup>; (v) a state aid decision by the European Commission regarding LA/MSF for the A340-500/600, which allegedly shows the French Government's expectation that the development of the A340-500/600 would allow Airbus to compete for sales throughout the world<sup>2388</sup>; and (vi) the fact that Airbus is an export-oriented company, with 86% of total sales between 1992 and 1997 (the period predating the LA/MSF for the A340-500/600) being exports.<sup>2389</sup>

1075. With respect to the French LA/MSF for the A330-200, the Panel reviewed the following evidence: (i) Critical Project Appraisals by France<sup>2390</sup>; (ii) 1995 GMF predicting that 28% of orders for all types of aircraft between 1995-2014 would come from European airlines<sup>2391</sup>; (iii) the fact that all orders that had been received when the LA/MSF contract was signed were export sales; and (iv) the fact that Airbus is an export-oriented company, with 84% of total sales between 1992 and 2005 being exports.<sup>2392</sup>

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<sup>2383</sup>Panel Report, para. 7.651 (referring to United States' first written submission to the Panel, para. 350, in turn referring to information derived from Airclaims CASE database).

<sup>2384</sup>Panel Report, para. 7.655 (referring to Spanish A340-500/600 contract (Panel Exhibit US-37 (BCI))).

<sup>2385</sup>Panel Report, para. 7.655 (referring to United States' first written submission to the Panel, para. 365, in turn referring to Panel Exhibit DS316-EC-HSBI-0001143).

<sup>2386</sup>Panel Report, para. 7.655 (referring to Airbus 1997-2016 GMF (Panel Exhibit US-366); and Airbus 1998-2017 GMF (Panel Exhibit US-367)).

<sup>2387</sup>Panel Report, para. 7.655 (referring to United States' first written submission to the Panel, para. 367, in turn referring to US-368; and United States' first written submission to the Panel, para. 48 (HSBI)).

<sup>2388</sup>Panel Report, para. 7.655 (referring to United States' first written submission to the Panel, para. 368, in turn referring to letter dated 26 January 1999 from Karel Van Miert to Hubert Vedrine, "Reimbursable Advance to Aérospatiale for the Airbus A340-500/600 Program", Aid No. N369/98 (Panel Exhibit US-3)).

<sup>2389</sup>Panel Report, para. 7.655 (referring to United States' first written submission to the Panel, para. 369, in turn referring to information derived from Airclaims CASE database).

<sup>2390</sup>Panel Report, para. 7.658 (referring to United States' first written submission to the Panel, paras. 55 and 56 (HSBI), and para. 379)).

<sup>2391</sup>Panel Report, para. 7.658 (referring to United States' first written submission to the Panel, para. 380, in turn referring to Airbus 1995-2014 GMF (Panel Exhibit US-369)).

<sup>2392</sup>Panel Report, para. 7.658 (referring to United States' first written submission to the Panel, para. 378, in turn referring to information derived from Airclaims CASE database).

1076. After reviewing the above evidence, the Panel found that the United States submitted sufficient evidence to establish that the governments of the above member States, when granting the LA/MSF, were fully aware that the A380 project would involve selling much if not most of the production in export markets.<sup>2393</sup> Similarly, the Panel found that the United States provided sufficient evidence showing that the governments of the above member States expected that export sales would result from the development of the A340-500/600 and A330-200.<sup>2394</sup>

1077. The European Communities noted that the A380 LA/MSF contracts contained no obligation on Airbus to make export sales, or any sales at all, and that it was impossible to infer from the evidence that the terms of the LA/MSF measures varied in any way as a function of whether a sale is destined for the European Communities or elsewhere. The Panel did not find this line of argument germane to whether the relevant member State governments "anticipated exportation", but rather to whether the subsidy granted under those contracts were *contingent* on that anticipation.<sup>2395</sup> The European Communities also argued that the United States had not shown that the number of deliveries required to repay fully LA/MSF loans exceeded projections of demand in the European Communities for the A340-500/600 and the A330-200. The Panel found that even though the United States had not advanced such information, the evidence submitted demonstrates that the member State governments "anticipated exportation or export earnings".<sup>2396</sup>

1078. The above review of the Panel's findings show that the Panel examined and relied on various pieces of objective evidence, including the LA/MSF contracts, market forecasts of Airbus' sales contained in publicly-available documents issued by Airbus, governments' appraisals of the financed projects, a state aid decision by the European Commission, as well as the orders received at the time certain contracts were entered into. The Panel therefore "gleaned" its findings regarding anticipated exportation "from an examination of objective evidence".<sup>2397</sup>

1079. Moreover, in our view, the evidence examined by the Panel shows that, at the time the seven LA/MSF subsidies at issue were granted, the relevant member State governments anticipated that a significant amount of export sales by Airbus would occur as a result of the projects financed by these

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<sup>2393</sup>Panel Report, paras. 7.652-7.654. Before the Panel, the European Communities argued that the Airbus GMF 2000 "carried no probative weight" because it was dated after conclusion of the UK A380 contract. (European Communities' first written submission to the Panel, para. 618; see also Panel Report, para. 7.654) Furthermore, the European Communities contested the accuracy of the media reports. (See Panel Report, para. 7.654) According to the Panel, however, the evidence submitted by the United States sufficiently supported its findings, even if the evidence contested by the European Communities were excluded from consideration. (*Ibid.*) The European Union does not contest these findings on appeal.

<sup>2394</sup>Panel Report, paras. 7.656-7.659.

<sup>2395</sup>Panel Report, para. 7.653.

<sup>2396</sup>Panel Report, paras. 7.657-7.660.

<sup>2397</sup>Appellate Body Report, *Canada – Aircraft*, para. 172.

measures. According to the GMFs for the years 1995 and 1997-2000, which are public documents available around the time that the LA/MSF contracts were negotiated, the demand for the A380, A340-500/600, and A330-200 in the following 10 to 20 years from European airlines would represent no more than 30% of the total demand. The market forecasts were specifically referenced in the French and UK Governments' Critical Project Appraisals and the A380 LA/MSF application by Deutsche Airbus. In addition, the fact that half of the orders for the A340-500/600 and all of the orders for the A330-200 received when the subsidies were granted, were export sales, confirms that the governments were aware of the prospect that a significant amount of the aircraft developed with LA/MSF subsidies would be sold to airlines based outside the European Union. Finally, the fact that more than 80% of Airbus' sales in the preceding decade were export sales further supports the view that future export sales were anticipated to occur.

1080. On this basis, we consider that the Panel properly found, with regard to "anticipated exportation", that at the time that Airbus and the LA/MSF governments concluded the LA/MSF contracts for the A380, the A340-500/600, and the A330-200, the latter were fully aware that Airbus was a global company operating in a global market, and that these projects would involve Airbus selling much if not most of its production in export markets.<sup>2398</sup> For these reasons, we concur with the Panel's conclusion that:

... at the time each of the {A380, A340-500/600, A330-200} LA/MSF contracts was entered into, each of the {relevant} EC member State{} governments "anticipated exportation or export earnings", within the meaning of footnote 4 of the SCM Agreement, in the sense that they expected or considered that exportation or export earnings would result from the development of the {A380, A340-500/600 and A330-200}.<sup>2399</sup>

2. Whether the Granting of the Seven LA/MSF Subsidies was In Fact Tied to Anticipated Exportation

1081. In our analysis in section D, we have found that the Panel equated the standard for *de facto* export contingency with a standard based on the reasons for granting a subsidy and that, in so doing, the Panel erroneously interpreted Article 3.1(a) and footnote 4 of the *SCM Agreement*. Moreover, as we have set out above in section C, the test for determining whether the granting of a subsidy is in fact tied to anticipated exportation is whether the granting of the subsidy is geared to induce the promotion of future export performance by the recipient. Because the Panel's interpretation of the term "in fact tied to" under Article 3.1(a) and footnote 4 of the *SCM Agreement* is not consistent with the correct

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<sup>2398</sup> Panel Report, paras. 7.652, 7.656, and 7.659.

<sup>2399</sup> Panel Report, paras. 7.654, 7.657, and 7.660.

interpretation we set out above, we have reversed the Panel's interpretation that, in order to find that the granting of a subsidy is in fact tied to anticipated exportation, a subsidy must be granted *because* of anticipated export performance.<sup>2400</sup>

1082. We note that the Panel applied its erroneous interpretation of Article 3.1(a) and footnote 4 in reaching its final conclusions regarding the United States' claims on the *de facto* export-contingent subsidies. Specifically, the Panel found that the evidence advanced by the United States concerning the exchange of commitments, together with the additional evidence submitted by the United States to corroborate the alleged "tie" between the granting of the subsidies and anticipated exportation, demonstrated that the granting of the German, Spanish, and UK A380 LA/MSF contracts "was, in fact, concluded at least in part on the *condition* or *because* of the {respective} government's anticipation of exportation".<sup>2401</sup> At the same time, the Panel found that the evidence submitted by the United States did *not* demonstrate that the granting of the French A380, A340-500/600 and A330-200 contracts and the Spanish A340-500/600 contract was "even in part, on the *condition* or *because* of the {respective government's} anticipation of exportation."<sup>2402</sup>

1083. Thus, because the Panel applied an interpretation that we found to be erroneous in reaching these findings, we *reverse* the Panel's consequent conclusions, in paragraph 7.689 of the Panel Report, that "the United States has demonstrated that the German, Spanish and UK A380 contracts amount to prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement"<sup>2403</sup>, and "that the United States has not shown that the granting of the other challenged LA/MSF subsidies {under the French A380, A340-500/600 and A330-200 contracts and the Spanish A340-500/600 contract} was contingent in fact upon anticipated export performance, within the meaning of the same provisions."

1084. We recall that, in its other appeal, the United States requests the Appellate Body to reverse the Panel's above conclusion regarding the French A380, A340-500/600 and A330-200 contracts and the Spanish A340-500/600 contract.<sup>2404</sup> The United States claims that the Panel, in reaching this conclusion, "effectively and erroneously applied a standard, not found in the text of the SCM Agreement, that *requires* evidence of specific member State 'motivation' to find export

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<sup>2400</sup>See Panel Report, para. 7.648. (original emphasis)

<sup>2401</sup>Panel Report, paras. 7.680, 7.681, and 7.683. (original emphasis)

<sup>2402</sup>Panel Report, paras. 7.685, 7.686, 7.687, and 7.688. (original emphasis)

<sup>2403</sup>Upon reversing this conclusion of the Panel, we find it unnecessary to further address the European Union's claims that, in reaching this conclusion, the Panel also erred under Articles 7.2, 11, and 12.7 of the DSU. In addition, we find it unnecessary to address the European Union's argument that the Panel erred in its application of Article 3.1(a) and footnote 4 of the *SCM Agreement* by failing to take into account the 1992 Agreement.

<sup>2404</sup>United States' other appellant's submission, para. 24.

subsidization."<sup>2405</sup> Because we reverse this conclusion of the Panel, on the basis that the Panel applied an erroneous legal interpretation, it is not necessary for us to further address the United States' arguments in support of its appeal.

1085. The United States also requests that the Appellate Body complete the analysis and find that the granting of the French A380, A340-500/600, and A330-200 contracts and the Spanish A340-500/600 contract was contingent in fact upon export performance within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*.<sup>2406</sup> In the light of the United States' request for reversal of the Panel's erroneous interpretation and application of Article 3.1(a) and footnote 4, as well as the legal interpretation we have set out in section C, we turn now to review whether there are "sufficient factual findings by the Panel and/or undisputed facts in the Panel record"<sup>2407</sup> that would allow us to complete the analysis with respect to all of the seven LA/MSF measures at issue pursuant to the legal interpretation we set out above.

1086. We recall that, as stated in section C, the factual equivalent of *de jure* conditionality between the granting of a subsidy and anticipated exportation can be established where the granting of the subsidy is geared to induce the promotion of future export performance by the recipient. The standard for *de facto* export contingency under Article 3.1(a) and footnote 4 of the *SCM Agreement* would be met when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy.

1087. The Panel reviewed various pieces of evidence submitted by the United States concerning the exchange of commitments between the granting authorities and Airbus under the LA/MSF contracts, including relevant global market forecasts, the repayment schedules under the LA/MSF contracts, and the French Government's Critical Project Appraisals. Specifically, the Panel noted that, in its GMF in 2000, Airbus forecast a market size of 247 aircraft "with more than 400 seats" in Europe, including the A380, the A340-600, and the Boeing 747 and 777-300.<sup>2408</sup> Turning to the repayment provisions under the LA/MSF contracts, the Panel noted that the Spanish A340-500/600 contract<sup>2409</sup> requires Airbus to make repayments of the loan through per-aircraft levies, and that the preamble of the contract refers to the number of potential sales that Airbus could achieve with respect to the

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<sup>2405</sup>United States' other appellant's submission, para. 12. (original emphasis)

<sup>2406</sup>United States' other appellant's submission, para. 34.

<sup>2407</sup>See Appellate Body Report, *Australia – Salmon*, para. 118.

<sup>2408</sup>Panel Report, para. 7.661.

<sup>2409</sup>We will first examine the Panel's finding relating to the repayment terms under the Spanish A340-500/600 contract and, subsequently, the Panel's findings relating to the repayment terms under the French, German, Spanish, and UK A380 contracts and the French A340-500/600 and A330-200 contracts.

A340-500/600.<sup>2410</sup> As the United States noted before the Panel, however, all of the numbers on aircraft deliveries in the repayment schedule were redacted.<sup>2411</sup> In the light of the missing information on repayment terms, the United States requested the Panel to either use its authority under Article 13 of the DSU to request the European Communities and Spain to provide the necessary information or else draw an adverse inference.<sup>2412</sup> The Panel did not state whether it requested the information or drew such an inference.<sup>2413</sup>

1088. With regard to the French, German, Spanish, and UK LA/MSF contracts for the A380, the Panel found that, under the repayment provisions, Airbus was required to repay the loans over a level of sales that exceeded the European sales projected for aircraft with more than 400 seats, and that, consequently, the numbers of sales contemplated to repay the loans under these contracts could not be achieved without substantial exports.<sup>2414</sup> Similarly, with regard to LA/MSF for the A340-500/600 and the A330-200, the Panel found that the repayment provisions under the French LA/MSF contracts require Airbus to make repayments of the loans through per-aircraft levies on a level which, as

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<sup>2410</sup>Panel Report, para. 7.661, at pp. 510-511 (referring to Spanish A340-500/600 contract (Panel Exhibits US-37 (BCI)). More specifically, the preamble states that [\*\*\*]. This paragraph also states that [\*\*\*]. (See Spanish A340-500/600 contract (Panel Exhibit US-37 (BCI), pp. 1 and 2)

<sup>2411</sup>See Panel Report, para. 7.661, pp. 510-511.

<sup>2412</sup>Panel Report, footnote 3180 to para. 7.661. Specifically, the United States requested the Panel to draw the adverse inference that Airbus must repay the loan over [\*\*\*] sales.

<sup>2413</sup>On appeal, the United States submits that, "in light of the European Union's refusal to provide the actual information from the repayment schedule, a reasonable inference that may be drawn is that Airbus repayment commitment is tied to [\*\*\*] sales." (United States' additional memorandum following the first session of the oral hearing, para. 70) The United States further submits that it discusses evidence of contingency in the HSBI appendix attached to that memorandum. (*Ibid.*) In the HSBI appendix, the United States describes the evidence the Panel relied on in finding that the repayment provisions under the French, German, Spanish, and UK A380 contracts and the French A340-500/600 and A330-200 contracts specify a level of sales exceeding domestic demand. No such information regarding the Spanish A340-500/600 contract is contained in the HSBI appendix.

<sup>2414</sup>See Panel Report, para. 7.678. For example, with respect to LA/MSF for the A380, the Panel noted the United States' submission that both the French and German contracts require Airbus to make repayments through per-aircraft levies on the [\*\*\*] sales. (See Panel Report, para. 7.661) See also *Memorandum of understanding between the French State and Airbus France relating to the Airbus A380 programme* (Panel Exhibit US-365 (BCI)) and *Loan Contract between the Federal Republic of Germany and Airbus Deutschland GmbH on the grant of an interest-bearing, conditionally repayable loan for the partial financing of the developments costs for the Airbus A380* (Panel Exhibit US-72 (BCI)). The Panel also noted that, as the evidence submitted by the United States showed, the UK contract requires Airbus to make repayments through per-aircraft levies on the [\*\*\*]. (See Panel Report, para. 7.661) See also *Agreement (of 12 March 2000) between UK Secretary of State for Trade and Industry, BAE Systems (Operations) Ltd, and British Aerospace PLC, concerning the development and financing of the Airbus A3XX* (Panel Exhibit US-79 (BCI)). Similarly, the Spanish contract requires Airbus to make repayments through per-aircraft levies on the [\*\*\*]. (See Panel Report, para. 7.661) See also *Agreement (of 27 December 2001) between the Ministry of Science and Technology (MCYT) and the company EADS Airbus SL, concerning the financing of the participation of said company in the development of the Airbus A-380 aircraft family programme* (Panel Exhibit US-73 (BCI)).



evidenced by the French Government's Critical Project Appraisals, cannot be achieved without export sales.<sup>2415</sup>

1089. The evidence reviewed by the Panel shows that, with regard to the Spanish A340-500/600 contract, even though Airbus undertook the obligation to repay the loan on a per-sale basis, the specific number of sales needed to repay fully the loan under this contract was redacted and thus not before the Panel. Moreover, the Panel did not state in its Report whether it used its authority under Article 13 of the DSU to seek information or whether it drew the adverse inference requested by the United States. Therefore, there is insufficient information on the record for us to decide whether the LA/MSF under the Spanish A340-500/600 contract was granted so as to provide an incentive to the Airbus to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy.

1090. With respect to the French, German, Spanish, and UK A380 contracts and the French A340-500/600 and A330-200 contracts, the evidence examined by the Panel, including the market forecasts and the repayment schedules under these LA/MSF contracts, indicates the following: (i) the financing under the LA/MSF contracts is provided in exchange for the condition that it be repaid; (ii) pursuant to the repayment terms under the contracts, Airbus undertook the obligation to repay the loans, on a per-sale basis, over a specified number of sales of the subsidized aircraft; and (iii) the number of sales contemplated under the repayment provisions of the contracts involves a significant amount of export sales. The Panel concluded that "it is clear from various pieces of information that achieving the level of sales needed to fully repay each loan would require Airbus to make a substantial number of exports."<sup>2416</sup> On this basis, as well as the relevant market forecasts, the Panel found that "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>2417</sup>

1091. The Panel's above findings thus establish that, at the time the LA/MSF subsidies were granted, the relevant member State governments anticipated a substantial number of export sales by Airbus in order to repay the LA/MSF subsidies granted under the French, German, Spanish, and UK A380 contracts and the French A340-500/600 and A330-200 contracts. These findings merely

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<sup>2415</sup>The Panel found that the French LA/MSF contracts for the A340-500/600 and the A330-200 required repayment over, respectively, the [\*\*\*] sales and the first [\*\*\*] sales. Moreover, the French Government's project appraisals for both types of aircraft make clear that [\*\*\*]. (Panel Report, para. 7.661) See also French A340-500/600 contract (Panel Exhibit US-36 (BCI)); French A330-200 contract (Panel Exhibit US-78 (BCI)); United States' first written submission to the Panel (HSBI), paras. 50-53 (referring to Panel Exhibit DS316-EC-HSBI-0001143), para. 384 (referring to French A330-200 contract (Panel Exhibit US-78 (BCI)), and paras. 57-60; and United States' oral statement at the second Panel meeting (BCI/HSBI), paras. 2-7)

<sup>2416</sup>Panel Report, para. 7.678.

<sup>2417</sup>Panel Report, para. 7.678.

establish "anticipated exportation" within the meaning of footnote 4 of the *SCM Agreement*. In order to demonstrate in addition that the granting of the subsidies under the LA/MSF contracts in question is "in fact tied", within the meaning of that footnote, to such anticipated exportation, it must also be shown that the granting of the LA/MSF subsidies is geared to induce the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of these subsidies. Yet the Panel's findings do not shed light on the question as to whether the fact that Airbus was anticipated to make a significant number of export sales under the LA/MSF contracts is not simply reflective of conditions of supply and demand undistorted by the granting of the subsidies.

1092. In this respect, we recall that, in Airbus' GMFs reviewed by the Panel, the market forecasts for aircraft deliveries were based on an estimate of fleet development of airlines around the world<sup>2418</sup>, or of the regional distribution of global aircraft demand.<sup>2419</sup> For example, the GMFs issued in 1999 and 2000 predict, respectively, that demand by European airlines would represent 23% of total demand by airlines worldwide by 2018<sup>2420</sup>, and that, by 2019, demand by European airlines for "aircraft with more than 400 seats" would be 247 aircraft, or 20% of the worldwide demand.<sup>2421</sup> Such evidence, therefore, relates to only the existing condition of worldwide demand by airlines that was forecast at a level of 1,235 "aircraft with more than 400 seats". The fact that demand by non-European airlines was projected at 988 aircraft and demand by European airlines at 247 aircraft simply shows that Airbus is an export-oriented company. However, pursuant to the second sentence of footnote 4, the fact that a company exports, *alone*, is not a sufficient basis for finding *de facto* export contingency. Moreover, the evidence does not clearly indicate the proportion of export and domestic sales Airbus would be expected to make under the LA/MSF contracts in question. Thus, the evidence does not give an indication as to the proportion of its production that Airbus would be expected to sell in the domestic and export markets undistorted by the granting of the LA/MSF subsidies at issue. The evidence therefore does not help to show whether the LA/MSF subsidies were granted so as to give Airbus an incentive to skew its future sales in favour of export sales. Thus, the evidence concerning global market forecasts does not provide a basis for determining whether the LA/MSF subsidies provide Airbus with an incentive to export in a way that is not reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of these subsidies.

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<sup>2418</sup>See Airbus 1997 GMF (Panel Exhibit US-366), p. 19; and Airbus 1998 GMF (Panel Exhibit US-367), p. 36.

<sup>2419</sup>See Airbus 2000 GMF (Panel Exhibit US-358), pp. 27-37; Airbus 1999 GMF (Panel Exhibit US-356), pp. 28-30 and 41-42; and Airbus 1995 GMF (Panel Exhibit US-369), p. 18.

<sup>2420</sup>Panel Report, para. 7.651. See also Airbus 1999 GMF (Panel Exhibit US-356), p. 41.

<sup>2421</sup>Panel Report, paras. 7.651 and 7.661. See also Airbus 2000 GMF (Panel Exhibit US-358), p. 37.

1093. Furthermore, the Panel relied on the repayment terms of the LA/MSF contracts—which require Airbus to repay the loans on a per-sale basis over a specified number of sales that cannot be fulfilled without exports—in reaching its finding that Airbus must export a significant number of its future production in order to repay the loans. Yet the evidence examined by the Panel does not make it clear whether, given the existing supply and demand conditions in the aircraft sector, Airbus would not *also* be expected to make a significant number of export sales, even in the absence of such repayment terms. The fact that a significant portion of the demand lies outside Europe suggests that a large part of the sales that Airbus has to make in order to repay the loans would necessarily be export sales. Thus, the evidence examined by the Panel suggests that the fact that Airbus must make a substantial number of export sales in order to repay the LA/MSF loans may be due to the global dimension of the LCA market and the global nature of demand for LCA; and it is not necessarily due to, or reflective of, the way in which LA/MSF subsidies are designed and structured.

1094. The United States points out that, if Airbus had been required to repay over a lower level of deliveries, for example, lower than the projected 247 aircraft with more than 400 seats demanded by European airlines, export sales might not be *necessary* in order to fully repay the loan.<sup>2422</sup> Yet, in our view, it is likely that, among the aircraft sales projected for the European market, Boeing would supply a portion of that demand.<sup>2423</sup> Moreover, as noted above, the GMF forecast of 1,235 sales globally and 247 sales in "Europe" is reflective of conditions of supply and demand in an industry that is highly export-oriented. Consequently, even under repayment terms that require Airbus to repay the LA/MSF over a considerably lower number of sales than 247 (because part of these sales will go to Boeing), Airbus would be expected to export a large part of its future production and would necessarily remain an export-oriented company. It is conceivable that existing conditions of supply and demand would lead to a higher proportion of domestic sales when production decreases or to a higher proportion of export sales when production increases. Yet nothing in the Panel's findings or undisputed facts on record show the level at which Airbus would be expected to sell in the domestic and export markets under a repayment term that requires it to repay the loans over a smaller number of sales. Thus, the Panel's factual findings and record evidence do not indicate to us whether the granting of LA/MSF subsidies is designed so as to give Airbus an incentive to skew its future sales in favour of export sales, thereby inducing the promotion of Airbus' future export performance.

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<sup>2422</sup>See United States' other appellant's submission, para. 31.

<sup>2423</sup>Indeed, we recall that Airbus GMF 2000 defines "aircraft with more than 400 seats" as including the A380, the A340-600, and the Boeing 747 and 777-300. (See Panel Report, para. 7.661)

1095. Furthermore, we recall that the Panel examined certain additional evidence submitted by the United States to corroborate the alleged tie between the granting of the subsidies and anticipated exportation. Specifically, with respect to the German<sup>2424</sup> and Spanish<sup>2425</sup> A380 contracts, the additional evidence examined by the Panel included preambles and other relevant provisions of the contracts, and a statement in the LA/MSF application by Deutsche Airbus. With regard to the UK A380 contract, the Panel reviewed a statement by British Prime Minister Tony Blair and a press release by the UK Department of Trade and Industry<sup>2426</sup>, as well as the representation and warranty made by BAE Systems in Article 3 of the contract.<sup>2427</sup> To the Panel, the above evidence, together with the evidence concerning the exchange of commitments, demonstrated that the granting of the LA/MSF subsidies under the German, Spanish, and UK A380 contracts was at least in part "on the condition or because of" the governments' anticipation of exportation.<sup>2428</sup>

1096. Concerning the Spanish A340-500/600 contract, the additional evidence examined by the Panel included preambles and other relevant provisions of the contract.<sup>2429</sup> As for the French A380 contract<sup>2430</sup>, the Panel reviewed other relevant provisions and a statement reportedly made by French Prime Minister Lionel Jospin.<sup>2431</sup> Finally, regarding the French A340-500/600 and A330-200 contracts, the Panel reviewed other relevant provisions of the contracts referred to by the

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<sup>2424</sup>With respect to the German A380 contract, the Panel began by noting that the preamble to the contract shows that the German Government was [\*\*\*]. The Panel further noted that section 2.5 of the A380 contract obligates Airbus Deutschland [\*\*\*]. In addition, the Panel found that section 12 of the LA/MSF contract provides that the German Government would be entitled to [\*\*\*], and that [\*\*\*]. Another provision referred to by the Panel was section 12 of the German A380 contract, which states that the German Government may [\*\*\*] (Panel Report, para. 7.680 (quoting Panel Exhibit US-72 (BCI), *supra*, footnote 2414 (emphasis added by the Panel)))

<sup>2425</sup>With regard to the Spanish A380 contract, the Panel noted two paragraphs from the preamble of the contract. Paragraph 6 of the preamble states that the Spanish Government's support for the A380 project is [\*\*\*]. Paragraph 7 states that the [\*\*\*]. (Panel Report, para. 7.681 (quoting Panel Exhibit US-73 (BCI), *supra*, footnote 2414))

<sup>2426</sup>See Panel Report, para. 7.682. Specifically, Prime Minister Blair stated, at the public unveiling of the A380, that "the export gains will run into the billions of pounds". (*Ibid.* (referring to Panel Exhibit US-361, *supra*, footnote 352)) The press release by the UK Department of Trade and Industry stated that "within 25 years Airbus has grown to take 55% of the civil aircraft production market and contributes GBP 1 billion to the UK's trade balance". (*Ibid.* (referring to Panel Exhibit US-360, *supra*, footnote 354))

<sup>2427</sup>Article 3 states that [\*\*\*]. (Panel Report, para. 7.683 (quoting Panel Exhibit US-79 (BCI), *supra*, footnote 2414))

<sup>2428</sup>Panel Report, paras. 7.680, 7.681, and 7.683. (original emphasis)

<sup>2429</sup>For the relevant content of the preamble, see *supra*, footnote 2410. See also Panel Report, para. 7.687. The Panel further found that Article 1 of the contract repeats Airbus' obligation [\*\*\*]. (*Ibid.*)

<sup>2430</sup>The Panel found that the relevant provisions in the French A380 contract [\*\*\*], require Airbus to [\*\*\*], [\*\*\*], and give the government the right to [\*\*\*] if Airbus breaches its obligations. (See Panel Report, para. 7.684)

<sup>2431</sup>See Panel Report, para. 7.685. According to the statement, "Jospin and his government and its European partners had made a commitment to build a strong European aerospace industry". (*Ibid.* (referring to "Jospin pledges to aid Airbus in fight against Boeing", *Reuters*, 8 March 2000 (Panel Exhibit US-1)))

United States.<sup>2432</sup> To the Panel, the additional evidence simply repeated the repayment obligations, and did not show the governments' "justification" for granting the subsidies.<sup>2433</sup>

1097. In sum, the Panel's findings on the basis of the additional evidence showed the reasons for the granting of the subsidies under the German, Spanish, and UK A380 contracts. However, as noted above, the standard for finding that the granting of a subsidy is in fact tied to anticipated exportation is not met simply by showing that anticipated exportation is the reason for granting the subsidy. As we have found above, the reason for granting the subsidy is not the same thing as whether the granting of the subsidy is geared to induce the promotion of future export performance by the recipient.

1098. Therefore, all of the above factual findings, taken together, still leave the following question unanswered: At what level would Airbus be anticipated to sell in the domestic and export markets *undistorted by the granting of the subsidies* under the LA/MSF contracts in question? Among the evidence examined by the Panel, the only piece that shows market conditions undistorted by the granting of the subsidies under the LA/MSF contracts at issue relates to the demand side, namely the projected demand for LCA by airlines worldwide. Such evidence gives no indications as to whether or how LA/MSF subsidies give an incentive to Airbus to skew its future sales towards exports. Although the evidence concerning repayment terms and relevant market forecasts gives some indication of the extent to which Airbus may be expected to export<sup>2434</sup>, it does not show the extent to which Airbus would be expected to export in the absence of the granting of these LA/MSF subsidies. Without such evidence, it is impossible to determine whether the LA/MSF subsidies were granted so as to induce Airbus to export a higher proportion of its production than it would otherwise, thereby giving Airbus an incentive to skew its future sales in favour of export sales. The Panel's factual findings and undisputed facts on the record, therefore, do not provide a sufficient basis for determining whether the LA/MSF subsidies under these contracts were granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of these subsidies.

1099. We recall our finding that, where such evidence exists, the assessment of whether the granting of a subsidy provides such an incentive could be made on the basis of a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product that would come about in consequence of the granting of the subsidy at issue, and, on the other hand, the situation in

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<sup>2432</sup>The Panel found that the relevant provisions in the French A340-500/600 and A330-200 contracts [\*\*\*], [\*\*\*], and give the government the right to [\*\*\*] if Airbus breaches its obligations. (See Panel Report, paras. 7.686 and 7.688)

<sup>2433</sup>Panel Report, para. 7.687. (emphasis omitted)

<sup>2434</sup>With the exception of the Spanish A340-500/600 contract.

the absence of the subsidy. The situation in the absence of the subsidy may be understood on the basis of historical sales of the same product by the recipient in the domestic and export markets untainted by the subsidy. In this dispute, however, the LA/MSF subsidies under the contracts at issue were granted specifically for launching certain types of LCA. Although each model of the aircraft built on Airbus' experience with a previous model<sup>2435</sup>, we note that each subsidized LCA model was nevertheless new, distinct and developed under a different project. Moreover, even if historical data regarding previous models of aircraft were relevant, we recall that LA/MSF subsidies have been granted to Airbus since the development of the first Airbus LCA model, the A300, in 1969.<sup>2436</sup> Therefore, no historical data of the same LCA model, in the absence of the granting of these particular types of LA/MSF subsidies, are available that could provide a basis for comparison.

1100. We also recall our finding that, in the absence of historical data, the comparison could be made with the performance that a profit-maximizing firm would hypothetically be expected to achieve in the export and domestic markets in the absence of the granting of the subsidy in question. Where the evidence shows, all other things being equal, that the granting of the subsidy provides an incentive to skew anticipated sales towards exports, in comparison with the hypothetical performance of a profit-maximizing firm in the absence of the granting of the subsidy, this would be an indication that the granting of the subsidy is in fact tied to anticipated exportation within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*.

1101. However, there is not a sufficient evidentiary basis on the record, nor are there relevant factual findings by the Panel, that would enable us to conduct an examination regarding the hypothetical performance of a profit-maximizing firm in the absence of the granting of the subsidy. Hence, in the absence of sufficient factual findings by the Panel and undisputed facts on the record, we are not in a position to apply the test enunciated in section C above and complete the analysis. Under such circumstances, it is not possible for us to determine whether the LA/MSF subsidies provide an incentive for Airbus to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the LA/MSF subsidies under the contracts at issue.

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<sup>2435</sup>This does not apply to the first model developed by Airbus, the A300.

<sup>2436</sup>See Panel Report, paras. 7.367-7.375.

F. *Conclusion*

1102. We find that the factual equivalent of *de jure* conditionality between the granting of a subsidy and anticipated exportation can be established where the granting of the subsidy is geared to induce the promotion of future export performance of the recipient. The standard for *de facto* export contingency under Article 3.1(a) and footnote 4 of the *SCM Agreement* would be met when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy.

1103. We further find that the Panel equated the standard for *de facto* export contingency with a standard based on the reasons for granting a subsidy and that, in so doing, the Panel erroneously interpreted Article 3.1(a) and footnote 4 of the *SCM Agreement*. Because the Panel applied this erroneous standard in reaching its final conclusions, we therefore also *reverse* the Panel's conclusion, in paragraph 7.689 of its Report, that "the United States has demonstrated that the German, Spanish and UK A380 contracts amount to prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*", and that "the United States has not shown that the granting of the ... LA/MSF subsidies" by France for the A380, A340-500/600, and A330-200, and by Spain for the A340-500/600 "was contingent in fact upon anticipated export performance", within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*.

1104. However, the Panel's factual findings and undisputed facts on the record do not provide a sufficient basis for us to determine whether the LA/MSF subsidies under the contracts at issue are granted so as to provide an incentive to Airbus to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of these subsidies. We are thus not able to complete the analysis and determine whether the LA/MSF subsidies under the contracts at issue are geared to induce the promotion of future export performance by Airbus. Therefore, we are unable to make a finding as to whether the granting of the LA/MSF subsidies under these contracts is in fact tied to anticipated exportation within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*. Consequently, the Panel's recommendation under Article 4.7 of the *SCM Agreement*, that "the subsidizing Member granting each subsidy found to be prohibited withdraw it ... within 90 days", must be reversed.<sup>2437</sup>

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<sup>2437</sup>See Panel Report, para. 8.6.

## IX. Serious Prejudice

### A. General Approach to the Assessment of Serious Prejudice

1105. We now turn to the European Union's appeal concerning the Panel's assessment of serious prejudice. We begin with some brief remarks about the Panel's general approach.

1106. The Panel in this dispute chose to analyze the United States' claims, that the effect of the challenged subsidies was displacement and lost sales, on the basis of a two-step approach that it described as follows:

{I}n evaluating the United States' claims, we will first consider whether the particular phenomena identified in Article 6.3(a), (b) and (c) of the SCM Agreement can be observed as a matter of fact.<sup>2438</sup>

{I}n undertaking this first step of the analysis, we will not be addressing the question whether any particular phenomenon that can be observed is actually caused by the subsidies we have found were provided to Airbus. This question of causation will be examined in the final section of our serious prejudice findings, where we will review the parties' theories of causation and related arguments and evidence.<sup>2439</sup>

1107. The Appellate Body has found that panels may undertake an analysis of serious prejudice under either a unitary or two-step approach.<sup>2440</sup> Under a unitary approach, the analysis of the particular market phenomena identified in the subparagraphs of Article 6.3 of the *SCM Agreement* is not conducted separately from the analysis of whether there is a causal relationship between those market phenomena and the challenged subsidies. By contrast, under a two-step approach like the one adopted by the Panel, the analysis first seeks to identify the market phenomena and then, as a second step, examines whether there is a causal relationship. The Appellate Body has indicated a preference for the unitary approach, observing that such approach "has a sound conceptual foundation"<sup>2441</sup> and

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<sup>2438</sup>Panel Report, para. 7.1731.

<sup>2439</sup>Panel Report, para. 7.1732.

<sup>2440</sup>See Appellate Body Report, *US – Upland Cotton*, para. 431; and Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 354.

<sup>2441</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 354.



explaining that it may be difficult to ascertain the existence of some of the market phenomena in Article 6.3 without considering the effect of the subsidy at issue.<sup>2442</sup>

1108. In this case, the Panel justified its choice of a two-step approach by stating that "the arguments and evidence advanced by the United States (including in respect of price suppression) renders a two-step approach entirely appropriate to assessing its claims under Articles 6.3(a), (b) and (c) in the present controversy."<sup>2443</sup> There is no further explanation by the Panel as to why such a two-step approach was "entirely appropriate".<sup>2444</sup> The Panel acknowledged the reservations concerning a two-step approach expressed by the Appellate Body in *US – Upland Cotton*, but the Panel did not indicate why it considered that those reservations were not relevant.<sup>2445</sup>

1109. Our view remains that a unitary approach that uses a counterfactual will generally be the more appropriate approach to undertaking the assessment required under Article 6.3 of the *SCM Agreement*. As we further explain in section C below, it is difficult to understand the market phenomena described in the various subparagraphs of Article 6.3 in isolation from the challenged subsidies. Rather, consideration of the effects of the challenged subsidies is intrinsic to the identification of those market phenomena. Any attempt to identify one of the market phenomena in Article 6.3 without considering the subsidies at issue can only be preliminary in nature since Article 6.3 requires that the market phenomenon be the effect of the challenged subsidy.<sup>2446</sup> This also means that a two-step approach simply defers the core of the analysis to the second step. In other cases, the problem might be the opposite. By artificially leaving aside the question of whether the market phenomenon is the effect of the subsidy, one could overlook market phenomena that are in fact occurring.

1110. The use of a counterfactual analysis provides an adjudicator with a useful analytical framework to isolate and properly identify the effects of the challenged subsidies. In general terms, the counterfactual analysis entails comparing the actual market situation that is before the adjudicator with the market situation that would have existed in the absence of the challenged subsidies. This

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<sup>2442</sup>The Appellate Body made that statement in a case involving a claim of price suppression under Article 6.3(c) of the *SCM Agreement*. The Appellate Body also suggested that the same difficulty could apply to claims of displacement or impedance under Articles 6.3(a) and (b) of the *SCM Agreement*:

Similarly, it might be difficult to ascertain whether imports or exports are "displace{d}" or "impede{d}" under paragraphs (a) or (b) of Article 6.3 of the *SCM Agreement* without considering the effect of the challenged subsidy.

(Appellate Body Report, *US – Upland Cotton*, footnote 521 to para. 433)

<sup>2443</sup>Panel Report, para. 7.1731.

<sup>2444</sup>Although the Panel suggested that this would "be explained in the sections that follow" (see Panel Report, para. 7.1731), we have been unable to locate this explanation in the Panel Report.

<sup>2445</sup>Panel Report, para. 7.1731.

<sup>2446</sup>The Panel recognized the preliminary nature of its findings of the "existence" of displacement and lost sales. (See Panel Report, paras. 7.1732, 7.1758, and 7.1792)

requires the adjudicator to undertake a modelling exercise as to what the market would look like in the absence of the subsidies. Such an exercise is a necessary part of the counterfactual approach. As with other factual assessments, panels clearly have a margin of discretion in conducting the counterfactual analysis.<sup>2447</sup>

1111. Having said that, we recall that it is permissible for a panel to undertake the assessment of serious prejudice on the basis of a two-step approach. Neither participant has challenged on appeal the Panel's choice of a two-step approach. Thus, we will proceed with our review of the Panel's analysis on the basis of the two-step approach adopted by the Panel and accepted by the participants.

B. *The Subsidized Product and Product Market*

1112. We turn next to address the European Union's appeal as it relates to the Panel's analysis of the United States' claims of displacement under Articles 6.3(a) and 6.3(b) of the *SCM Agreement*. In particular, we examine whether the Panel erred in its interpretation and application of the term "market" in Articles 6.3(a) and 6.3(b), and whether the Panel acted inconsistently with Article 11 of the DSU when assessing "displacement" on the basis of a single subsidized product and a single product market for LCA.

1. Whether the Panel Erred in Assessing Displacement on the Basis of a Single Subsidized Product and a Single Product Market

1113. On appeal, the European Union argues that the Panel erred in its interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement*, and in its application of this interpretation to the facts, by "finding that there is only a single product market in which all Boeing and Airbus LCA compete."<sup>2448</sup> According to the European Union, the "concepts of 'markets' and 'competition'—as well as 'subsidized' and 'like' products—are inseparable concepts that play a crucial role in assessing serious prejudice under Article 6.3 of the *SCM Agreement*."<sup>2449</sup> Referring to the report of the Appellate Body in *US – Upland Cotton*, the European Union maintains that "two products are in the same market if they are in 'actual or potential competition' and there exists 'homogeneity of the conditions of competition' in a market."<sup>2450</sup> According to the European Union, a panel must therefore "objectively assess whether the product market(s) asserted by the complaining Member exist and can serve as a proper basis for analysing the complaining Member's adverse effects claims."<sup>2451</sup> This

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<sup>2447</sup> See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 357.

<sup>2448</sup> European Union's appellant's submission, para. 340.

<sup>2449</sup> European Union's appellant's submission, para. 341.

<sup>2450</sup> European Union's appellant's submission, para. 343 (referring to Appellate Body Report, *US – Upland Cotton*, para. 408).

<sup>2451</sup> European Union's appellant's submission, para. 307.

analysis "must start with an assessment of the complaining Member's definition of the 'subsidized product'."<sup>2452</sup> Based on the nature and extent of actual or potential competition in the LCA market, the European Communities argued before the Panel that physically distinct Airbus LCA families should not "be combined into a single allegedly subsidized product"<sup>2453</sup> and that, instead, the Panel should find that there are, in fact, four separate allegedly subsidized Airbus LCA families and that, with respect to three of these Airbus LCA families, there are corresponding "like" families of Boeing LCA.<sup>2454</sup> According to the European Union, by failing to assess independently and objectively the scope of the product definition proposed by the United States, the Panel acted inconsistently with its obligations under Article 11 of the DSU.<sup>2455</sup>

1114. The United States counters that the European Union's attempt to use the notion of "product markets" as a means of "restructuring the displacement analysis" has no basis in, and is contradicted by, the *SCM Agreement* and the facts of this case.<sup>2456</sup> For the United States, "it is the definition of the subsidized product and the like product that sets the product framework for the displacement analysis, while the references to 'market' in Articles 6.3(a) and (b) define the geographic scope of that analysis."<sup>2457</sup> The United States submits that the Panel's decision, after evaluating all the facts presented, to assess the United States' claims of displacement on the basis of a single "subsidized product" rather than five separate "products" was "a reasonable one".<sup>2458</sup> The United States considers that, in declining to "reformulate" the United States' claim in the manner requested by the European Communities, the Panel acted consistently with its obligations under Article 11 of the DSU.<sup>2459</sup> The United States adds that, "even if the *SCM Agreement* called for a separate 'product market' analysis under Article 6.3(a)-(d), there is evidence of {a} 'product market' in which all Airbus LCA compete against all Boeing LCA under homogenous conditions of competition irrespective of the European {Communities'} proposed 'product markets,' and there is uncontested evidence of LCA competition outside the {European Communities'} proposed 'product markets'."<sup>2460</sup>

1115. This is the first time that the Appellate Body examines claims of displacement under subparagraphs (a) or (b) of Article 6.3 of the *SCM Agreement*. We begin by examining whether the Panel erred in its interpretation of the requirements set out in those provisions. Thereafter, we review

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<sup>2452</sup>European Union's appellant's submission, para. 307.

<sup>2453</sup>European Communities' first written submission to the Panel, para. 1565.

<sup>2454</sup>See Panel Report, paras. 7.1634 and 7.1638.

<sup>2455</sup>European Union's appellant's submission, paras. 301 and 302.

<sup>2456</sup>United States' appellee's submission, para. 540.

<sup>2457</sup>United States' appellee's submission, para. 541.

<sup>2458</sup>United States' appellee's submission, para. 547.

<sup>2459</sup>See United States' appellee's submission, para. 520.

<sup>2460</sup>United States' appellee's submission, para. 554 (referring to Panel Report, paras. 7.1725 and 7.1668).

the scope of a panel's adjudicatory powers and duties in assessing claims of serious prejudice under Articles 5 and 6 of the *SCM Agreement* that flow from the proper interpretation of those provisions. This will assist us in ascertaining whether the Panel complied with its obligations under Article 11 of the DSU. Before embarking on our analysis, we wish to emphasize that our discussion is limited to the United States' claims of displacement under Part III of the *SCM Agreement*, and that the Panel's findings on alleged injury to the United States' industry producing LCA within the meaning of Article 5(a) and Part V of the *SCM Agreement* are not before us in this appeal.<sup>2461</sup>

1116. Turning first to the text of the *SCM Agreement*, we observe that the chapeau of Article 6.3 provides that "{s}erious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply". Article 6.3 comprises four subparagraphs describing certain adverse effects.

1117. Subparagraph (a) of Article 6.3 refers to the situation where "the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member". Subparagraph (b) refers to the situation where "the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market". Subparagraphs (a) and (b) each concerns the effect of a subsidy in a particular "market". They refer respectively to: "the market of the subsidizing Member"; and "a third country market". A plain reading of Articles 6.3(a) and 6.3(b) therefore reveals that an analysis of displacement or impedance under those provisions is limited to the territory of the "subsidizing Member" or the territory of any third country at issue. The manner in which the geographic dimension of a market is determined will depend on a number of factors: in some cases, the geographic market may extend to cover the entire country concerned; in others, an analysis of the conditions of competition for sales of the product in question may provide an appropriate foundation for a finding that a geographic market exists *within* that area, for example, a region. There may also be cases where the geographic dimension of a particular market exceeds national boundaries or could be the world market, even though Articles 6.3(a) and 6.3(b) would focus the analysis of displacement and impedance on the territory of the subsidizing Member or third countries involved.<sup>2462</sup>

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<sup>2461</sup>Panel Report, paras. 7.2029 ff. We emphasize that, in assessing the existence of injury to the domestic industry under Article 5(a) of the *SCM Agreement*, the focus is on the impact of subsidized imports on the domestic industry of another Member, rather than on the effects in a "market". As we see it, this has implications on how to delineate the proper scope of the subsidized product when assessing such a claim, in particular, in cases where the domestic industry consists of only one manufacturer that produces a range of product types.

<sup>2462</sup>We note that, in terms of the geographic dimension of markets under Article 6.3(c) of the *SCM Agreement*, it may be appropriate to examine the "world market" and the conditions of competition as they exist in that market. By contrast, Article 6.3(d) requires an assessment of shares on the world market.

1118. The word "market" in Article 6.3 must be read together with the concept of "like product". Articles 6.3(a) and 6.3(b) both refer to imports and exports of a "like product". This reference indicates the need to identify a "subsidized product" that is "like" the product the importation or exportation of which is being displaced or impeded in a particular market.<sup>2463</sup> The term "like product" is defined in footnote 46 of the *SCM Agreement* to mean "a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." This suggests that identity or close resemblance of characteristics are one factor to consider in assessing whether products are in the same market.<sup>2464</sup>

1119. As we see it, displacement is a situation where imports or exports of a like product are replaced by the sales of the subsidized product. The mechanism by which displacement operates is, in our view, essentially an economic mechanism, the existence of which is to be assessed by reference to events that occur in the relevant product market. We construe the concept of displacement as relating to, and arising out of, competitive engagement between products in a market.<sup>2465</sup> Aggressive pricing of certain products may, for example, lead to displacement of exports or imports in a particular market. This, however, can only be the case if those products compete in the same market. An examination of the competitive relationship between products is therefore required so as to determine whether such products form part of the same market. We conclude therefore that a "market", within the meaning of Articles 6.3(a) and 6.3(b) of the *SCM Agreement*, is a set of products in a particular geographical area that are in actual or potential competition with each other. An assessment of the competitive relationship between products in the market is required in order to determine whether and to what extent one product may displace another. Thus, while a complaining Member may identify a subsidized product and the like product by reference to footnote 46, the products thereby identified must be analyzed under the discipline of the product market so as to be able to determine whether displacement is occurring. Ordinarily, the subsidized product and the like product will form part of a larger product market. But it may be the case that a complainant chooses to define the subsidized and like products so broadly that it is necessary to analyze these products in different product markets.

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<sup>2463</sup>Like the Panel, we consider this to be self-evident. (See Panel Report, para. 7.1653)

<sup>2464</sup>In *Indonesia – Autos*, the panel set out certain legal criteria for evaluating whether two products are "like" in the context of claims brought under Articles 5 and 6 of the *SCM Agreement*. (See Panel Report, *Indonesia – Autos*, paras. 14.172 and 14.173)

<sup>2465</sup>A similar argument can be made for the concept of impedance, which also presupposes the existence of an economic mechanism by which a subsidized product hinders, obstructs, or holds back sales of a like product in the relevant product market.

This will be necessary so as to analyze further the real competitive interactions that are taking place, and thereby determine whether displacement is occurring.<sup>2466</sup>

1120. Our interpretation is consistent with the fundamental economic proposition that a market comprises only those products that exercise competitive constraint on each other.<sup>2467</sup> This is the case when the relevant products are substitutable.<sup>2468</sup> Although physical characteristics, end-uses, and consumer preferences may assist in deciding whether two products are in the same market, they should *not* be treated as the exclusive factors to consider in deciding whether those products are sufficiently substitutable so as to create competitive constraints on each other. Indeed, whether two products compete in the same market is not determined simply by assessing whether they share particular physical characteristics or have the same general uses; it may also be relevant to consider whether customers demand a range of products or whether they are interested in only a particular product type. In the former case, when customers procure a range of products to satisfy their needs, this may give an indication that all such products could be competing in the same market.

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<sup>2466</sup>A similar argument can be made with respect to impedance.

<sup>2467</sup>The term "market" has been defined as "{g}enerally, any context in which the sale and purchase of goods and services takes place." (*Macmillan Dictionary of Modern Economics*, 4th edn, D.W. Pearce, J. Cairns, R. Elliot, I. McAvinchey, R. Shaw (eds) (Palgrave MacMillan, 1992), p. 266) Another definition of the term "market" is "{a} collection of homogenous transactions. A market is created whenever potential sellers of a product are brought into contact with potential buyers and a means of exchange." (*Dictionary of Economics*, 2nd edn, G. Bannock, R.E. Baxter, E. Davis (eds) (The Economist Books, 1999), p. 262) See also European Court of Justice, Judgment, Case 27/76, *United Brands Company and United Brands Continental BV v. Commission* [1978] ECR 207; and US Supreme Court, *Brown Shoe Co., Inc. v. United States*, 370 US 294 (1962). The recently revised merger guidelines issued by the US Department of Justice and the Federal Trade Commission also provide a useful reference for understanding the word "market". (See US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, 19 August 2010) The term "market" has also been defined for purposes of EU competition law. (See European Commission Notice on the definition of relevant market for the purposes of Community competition law, published in the *Official Journal of the European Communities*, C Series, No. 372 (9 December 1997)) One commentator submits that a market definition, both from a product and geographical point of view, "is not of interest by itself, but only as a preliminary step towards the objective of assessing the market power of the firms under analysis." (M. Motta, *Competition Policy: Theory and Practice*, p. 101) Thus, since a market definition "is instrumental only to the assessment of market power, the relevant market should not be a set of products, which 'resemble' each other on the basis of some characteristics, but rather the set of products (and geographical areas) that exercise some competitive constraint on each other." (*Ibid.*, p. 102)

<sup>2468</sup>Motta, *supra*, footnote 2467, p. 103. A test that is commonly used to ascertain whether two products exercise competitive constraint on each other, and thus "should guide the analysis of market definition in both the product and the geographic dimension", is the so-called "Small but Significant Non-Transitory Increase in Prices" test ("SSNIP", also described as the "hypothetical monopolist" test). (*Ibid.*, p. 102) Put simply, this test asks whether or not a hypothetical seller of a certain product would find it profitable to raise the price of that product by a certain amount. If the price increase is found to be profitable, this would generally indicate that the product does not face significant competitive constraint from other products, and that it should therefore be considered to be in a separate market. Conversely, if the increase in price is found not to be profitable, this indicates that the product should not be considered to be in a separate market, as there exist other products that exercise competitive constraint on the seller. The test should, in such cases, continue to consider a wider market until a profitable hypothetical price increase is found, thus indicating the scope of the relevant market. (*Ibid.*, p. 105)

1121. Demand-side substitutability—that is, when two products are considered substitutable by consumers—is an indispensable, but not the only relevant, criterion to consider when assessing whether two products are in a single market. Rather, a consideration of substitutability on the supply-side may also be required. For example, evidence on whether a supplier can switch its production at limited or prohibitive cost from one product to another in a short period of time may also inform the question of whether two products are in a single market.

1122. Our analysis is supported by Appellate Body jurisprudence. In *US – Upland Cotton*, the Appellate Body defined a "market" as "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices", and considered that "two products would be in the same market if they were engaged in actual or potential competition in that market".<sup>2469</sup> The Appellate Body also agreed with the panel in that case that "the scope of the 'market', for determining the area of competition between two products, may depend on several factors such as the nature of the product, the homogeneity of the conditions of competition, and transport costs."<sup>2470</sup> While the Appellate Body was, in that case, considering a claim of price suppression under Article 6.3(c) of the *SCM Agreement*, we believe that similar considerations would also be relevant in assessing claims of serious prejudice brought under the remainder of Article 6.3, including Articles 6.3(a) and 6.3(b). This is consistent with the fact that each of the subparagraphs of Article 6.3 is concerned with the effects of a subsidy in a market. In the absence of actual or potential competition between two products in the marketplace, we fail to see how the effect of a subsidy provided to one of those products could be found to be the displacement of the other product.

1123. In sum, we conclude, therefore, that the scope of the "market" to be examined for the purposes of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* is likely to vary from case to case depending upon the particular factual circumstances, including the nature of the products at issue, as well as demand-side and supply-side factors. It should be emphasized that the scope of the relevant product market in any given case will depend on the nature and degree of competition between the products of the complaining Member and the allegedly subsidized products of the responding Member. In some cases, the entire product range offered by the complainant may compete with the range of products of the respondent that is allegedly subsidized. In other cases, an assessment of the conditions of competition may reveal the existence of multiple product markets in which particular products of the complaining Member compete with particular subsidized products of the respondent. However, it is important to note that whether or not a broad or narrow range of products benefit from subsidization says little about whether all these products compete in the same market. Indeed,

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<sup>2469</sup> Appellate Body Report, *US – Upland Cotton*, para. 408.

<sup>2470</sup> Appellate Body Report, *US – Upland Cotton*, para. 408.

products benefiting from subsidies may compete in very different markets. A panel is therefore required to make an objective assessment of the competitive relationship between specific products in the marketplace and to define the relevant product market in order to determine whether particular products can be treated as forming part of a single product market or several product markets for purposes of an analysis of displacement under Articles 6.3(a) and 6.3(b).

1124. Turning to the specifics of this dispute, as we see it, the decision by the Panel to assess the existence of displacement on the basis of a "single product market" appears to have been a consequence of its earlier finding that it did not have the authority, and that it was therefore not required, to make an independent and objective assessment of the complaining Member's definition of the "subsidized product". Indeed, the Panel stated at the outset of its evaluation that "there is no legal requirement in the SCM Agreement for a panel to make a determination regarding the 'subsidized product' independent of the complaining Member's allegations."<sup>2471</sup>

1125. The Panel explained that it was for the complaining party to define the "subsidized product", and saw nothing in the *SCM Agreement* that required it "to make an independent determination of the 'subsidized product', as opposed to relying on the complaining Member's identification of that product."<sup>2472</sup> The Panel reasoned that the fact that "the effects of a subsidy must be evaluated with respect to market share and prices in particular markets does not entail that a panel must make an independent assessment of the subsidized product that is at issue."<sup>2473</sup> The Panel added that, if it were to "conclude that there are multiple subsidized products at issue in this case, and proceed to evaluate the United States' claims on {that} basis, {it} would, in effect, be reformulating the United States' complaint."<sup>2474</sup> For the Panel, there was "no basis in the text of the SCM Agreement that would allow {it}, much less require {it}, to reformulate the United States' claims based on what might be {its} own view of what should constitute the 'subsidized product' as opposed to that of the complaining Member, the United States."<sup>2475</sup> According to the Panel, "it is unlikely that the drafters of the SCM Agreement intended panels to make independent, fact-based determinations of the appropriate subsidized product", but chose to provide no criteria for such a determination.<sup>2476</sup> In the absence of any guidance in the text of the *SCM Agreement*, the Panel said it was "reluctant to undertake the task of developing relevant criteria and applying them to the facts of this case".<sup>2477</sup>

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<sup>2471</sup>Panel Report, para. 7.1650.

<sup>2472</sup>Panel Report, para. 7.1653.

<sup>2473</sup>Panel Report, para. 7.1653.

<sup>2474</sup>Panel Report, para. 7.1654.

<sup>2475</sup>Panel Report, para. 7.1654.

<sup>2476</sup>Panel Report, para. 7.1656.

<sup>2477</sup>Panel Report, para. 7.1656.



1126. On appeal, the European Union challenges these assertions by the Panel, arguing that they are based on an erroneous interpretation of Articles 5 and 6 of the *SCM Agreement*.<sup>2478</sup> The European Union submits that, contrary to what the Panel assumed, the text and context of Article 6.3 of the *SCM Agreement* provide guidance for an assessment of the term "subsidized product". The European Union also argues that the standard articulated by the Panel is inconsistent with the duty of a panel to make an objective assessment of the matter before it, as required under Article 11 of the DSU. The European Union explains, in particular, that nothing in the DSU justifies giving a complaining Member absolute "discretion to manipulate the manner in which a panel assesses a dispute—particularly where a manipulative selection of an unreasonable and incoherent 'subsidized product' might drive the outcome of a dispute."<sup>2479</sup>

1127. The United States counters that the Panel properly assessed the United States' adverse effects claims on the basis presented by the United States, including the United States' identification of "all Airbus LCA" as the subsidized product. The United States argues that the Panel correctly recognized that a complainant has the right to structure its own complaint as it chooses, and confirmed the reasonableness of the United States' subsidized product and like product definitions in the light of the evidence before it.<sup>2480</sup> The United States further rejects the European Union's contention that the Panel failed to comply with its obligations under Article 11 of the DSU.<sup>2481</sup>

1128. As we see it, the Panel committed legal error by failing to adjudicate properly the United States' subsidized product allegations and refusing to make its own independent assessment of whether all Airbus LCA compete in the same market or not. As noted above, the United States' claims of serious prejudice were premised on its assertion that there is only one subsidized product at issue in this dispute, consisting of all models of Airbus LCA. The European Communities objected to the United States' definition of the "subsidized product", arguing that the Panel was required to make its own assessment of whether the "identified universe of allegedly subsidized products should be treated as a *single* subsidized product, or *multiple* subsidized products."<sup>2482</sup> However, in its analysis, the Panel deferred to the United States' subsidized product allegations rather than making its own independent assessment of whether all Airbus LCA should be treated as a single subsidized product. In so doing, the Panel failed to make an objective assessment of the matter, including the "applicability of and conformity with the relevant covered agreements", as required under Article 11

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<sup>2478</sup>European Union's appellant's submission, paras. 298 and 301.

<sup>2479</sup>European Union's appellant's submission, para. 303. (footnote omitted)

<sup>2480</sup>See United States' appellee's submission, para. 491.

<sup>2481</sup>See United States' appellee's submission, paras. 499 and 503.

<sup>2482</sup>Panel Report, para. 7.1632 (referring to European Communities' first written submission to the Panel, para. 1512). (emphasis added)

of the DSU. We wish to emphasize that the Panel's failure to comply with its duties under Article 11 appears to flow directly from its erroneous interpretation of the requirements of Articles 6.3(a) and 6.3(b) of the *SCM Agreement*, which led it to believe that it lacked the power and was under no obligation to assess independently the "subsidized product" and the relevant product market. In the absence of such a determination, the Panel did not have a proper basis for assessing whether the alleged subsidized and like products compete in the same market or multiple markets, which is a prerequisite for assessing whether displacement within the meaning of Articles 6.3(a) and 6.3(b) could be found to exist as alleged by the United States.

1129. The Panel stated, correctly in our view, that, "if a complaining Member were to put forward a proposed 'subsidized product' that does not benefit from the alleged subsidies in dispute, a panel would have to address whether that product is, in fact, a relevant subsidized product."<sup>2483</sup> However, as explained above, an analysis of the nature and extent of actual or potential competition between different models of Airbus LCA is a prerequisite for determining whether they compete in the same product market or different product markets for purposes of a displacement analysis under Articles 5 and 6 of the *SCM Agreement*. We therefore consider that the Panel erred by deferring, first, to the United States' "subsidized product" definition and then determining a "like product" simply by reference to the previously identified "subsidized product". The identification of a subsidized product and a like product cannot determine whether such products compete in the same market. Rather, a careful scrutiny of the competitive conditions of the market is required in order to draw conclusions as to whether the effect of the subsidy is displacement of competing products in a particular market.

1130. We recognize that the United States challenges subsidies provided to all models of Airbus LCA claiming that they are causing adverse effects to its interests. In other words, the United States does not contend that subsidies provided to a single model of Airbus LCA are causing adverse effects only to the corresponding or most "closely resembling" model of Boeing LCA. We agree with the Panel that Members of the WTO have the sovereign right to structure their complaints as they choose. It is important, however, to bear in mind the difference between a WTO Member's freedom to formulate its complaint and the duty of a panel to scrutinize whether the complaint, so formulated, holds true and is a proper account of the phenomenon in question, be it displacement, impedance, or any other effect of a subsidy.

1131. Clearly, there is no inhibition on how a complainant may choose to formulate its claim as to the scope of the "subsidized product"; it can do so as it thinks best comports with the adverse effects it seeks to challenge. This does not mean, however, that a panel has no duty to review the

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<sup>2483</sup>Panel Report, 7.1655.

complainant's formulation of the scope of the "subsidized product". Rather, the panel has a duty to ascertain the relevant product market or markets in which the complainant's and respondent's products compete. The notion of "subsidized product" and "like product" is, in each case, to be analyzed as an integral part of a panel's duty objectively to assess a particular claim of serious prejudice and its obligation to assess the relevant market under Articles 6.3(a) and 6.3(b). In the present case, the Panel was therefore required to make an independent and objective assessment of the serious prejudice claims put forward by the United States, *including* whether it was appropriate to examine all Airbus LCA as a single "subsidized product" and all Boeing LCA as a single "like product" for purposes of its adverse effects inquiry. The Panel was also required to assess the European Communities' allegation that there are, in fact, five distinct product markets of Airbus and Boeing LCA, and should have reached a conclusion as to whether any of the parties' or a different "product market" definition was appropriate for purposes of its displacement analysis.

1132. To support its decision to defer to the United States' identification of all LCA as a single product, the Panel relied on, *inter alia*, two previous panel reports involving cases decided under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement")—that is, *EC – Salmon (Norway)* and *US – Softwood Lumber V*.<sup>2484</sup> In the former case, the European Communities' investigating authority had identified the product concerned as "farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen ... exclud{ing} other similar farmed fish products such as large (salmon) trout, biomass (live salmon) as well as wild salmon and further processed types such as smoked salmon".<sup>2485</sup> The panel rejected Norway's argument that the investigating authority was required to ensure that, where the product under consideration is made up of categories of products, all such categories of products must individually be "like" each other, thereby constituting a single homogenous "product under consideration".<sup>2486</sup> In the latter case, the panel rejected Canada's argument that, "rather than comparing the overall scope of the product under consideration with the overall scope of the like product", the investigating authority was required to ensure that "each individual item within the 'like product' must be 'like' each individual item within the 'product under consideration'".<sup>2487</sup> For the panel, this would have meant "in effect ... that there must be 'likeness' within both the product under consideration and within the like product."<sup>2488</sup>

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<sup>2484</sup>Panel Report, paras. 7.1657-7.1661.

<sup>2485</sup>Panel Report, *EC – Salmon (Norway)*, para. 2.1.

<sup>2486</sup>Panel Report, *EC – Salmon (Norway)*, paras. 7.47 and 7.68.

<sup>2487</sup>Panel Report, *US – Softwood Lumber V*, para. 7.157.

<sup>2488</sup>Panel Report, *US – Softwood Lumber V*, para. 7.157.

1133. We note first that the above-mentioned findings by the panels in *EC – Salmon (Norway)* and *US – Softwood Lumber V* were not appealed and therefore have not been reviewed by the Appellate Body. Moreover, both cases concern the imposition of anti-dumping duties under the *Anti-Dumping Agreement*. In this context, as in the context of Part V of the *SCM Agreement*, domestic investigating authorities are required to determine the existence of injury to the domestic industry that may consist of one or more manufacturers producing a broad or narrow range of products. Questions relating to the scope of dumped, subsidized, and like products only arise for a panel in a *review* of determinations already made by a domestic investigating authority. Indeed, domestic investigating authorities would already have undertaken a review of the product under investigation on a case-by-case basis and in the light of the product coverage proposed by the petitioners. Domestic authorities may have decided to assess injury to the domestic industry on the basis of an aggregated or disaggregated analysis. Significantly, in reviewing a determination of an investigating authority, a panel may not engage in a *de novo* review and may not substitute its views for those of the investigating authority. By contrast, a panel's mandate in assessing adverse effects claims brought under Part III of the *SCM Agreement* is different, in that a panel conducting an analysis under Article 6.3 of the *SCM Agreement* "is the first trier of facts, rather than a reviewer of factual determinations made by a domestic investigating authority."<sup>2489</sup> The reasons for applying some degree of deference to the product definition resulting from adjudication by a neutral and objective investigating authority in the context of the *Anti-Dumping Agreement* or Part V of the *SCM Agreement* do not, in our view, apply to the product and market definition that a complainant proposes before a panel examining claims brought under Part III of the *SCM Agreement*. We therefore do not consider these previous panel findings reviewing determinations of domestic investigating authorities to be instructive in this case where the Panel was tasked with making its own first-hand assessment of a serious prejudice claim by a complaining party including a determination of the relevant market.

1134. We also do not consider it was sufficient that the Panel proceeded, in the alternative, to assess whether the United States had made a "reasonable" allegation regarding the "subsidized product".<sup>2490</sup> As noted above, the range of products that benefit from subsidies says little about whether these products compete in a single product market or several product markets. On the contrary, for purposes of assessing the serious prejudice claims before it, the Panel had the duty to define, in the light of the United States' complaint, the relevant product market and the scope of the respondent's subsidized product that is in competition with the complainant's like product. It is not the scope of the product that allegedly benefits from subsidies that defines the degree of competition on the relevant

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<sup>2489</sup> Appellate Body Report, *US – Upland Cotton*, para. 458.

<sup>2490</sup> Panel Report, para. 7.1663.

product market or markets between the complainant's products and the allegedly subsidized products of the respondent. Although some of the factors mentioned by the Panel in its alternative reasoning may be relevant for purposes of understanding the relevant product market, the Panel did not engage in a full and objective assessment of the question of the relevant product market, and in particular whether all Airbus LCA should be treated as a single subsidized product competing in a single product market for purposes of the United States' claims of serious prejudice. For example, although certain findings made by the Panel suggest that there might be some supply-side substitutability in the LCA industry—for instance, the Panel observed that "the production and sales of one model of LCA support the development, production and sales of other LCA models"<sup>2491</sup>—an examination of this factor does not justify the Panel's failure to consider properly demand-side substitutability, which it barely alluded to in its "alternative" analysis. Factors such as product homogeneity, flight ranges, seating capacities, prices, fuel efficiency, and other performance characteristics could have been relevant to such an analysis. However, the Panel looked at such factors only to ascertain which "like" product competed with the subsidized product, as defined by the United States, and thus assumed—but did not establish—that all LCA models compete in the same market. We consider this to be particularly problematic given that a consideration of demand-side substitutability is critical in order to assess properly the scope of the relevant market and products that compete in that market. Specifically, if two products are not substitutable on the demand side, this suggests that the relevant products are likely to compete in two distinct markets, rather than in a single market. We note also that the Panel failed to test, in any way, the scope of the market in particular countries by, for example, analyzing cross-price elasticity.<sup>2492</sup> Such an analysis would have assisted the Panel in reaching more solid conclusions as to the extent of the relevant market in this case.

1135. Indeed, the Panel found, as a factual matter, that "it may well be true that direct head-to-head competition between aircraft models at the ends of the range of models offered by each manufacturer may be limited or non-existent".<sup>2493</sup> The Panel also recognized that a "differentiated analysis" of alleged effects of subsidies may be relevant, for instance, when conducting an examination of whether the effect of a subsidy is significant price undercutting, price suppression, price depression, or lost

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<sup>2491</sup>Panel Report, para. 7.1666.

<sup>2492</sup>The examination of cross-price elasticities can help one to understand the competitive constraints exercised by other products on the product (or group of products) under examination for market definition purposes. Motta states that "the cross-price elasticity between products A and B is defined as the percentage change in the demand for product B when there is a one-percent increase in the price of product A." (Motta, *supra*, footnote 2467, p. 107) This is one of the tools that can be of help when implementing the SSNIP test and attempting to identify exactly which product constitutes the closest substitute. Another often mentioned example of tools used to implement the SSNIP test are the price correlation tests favoured by Stigler and Sherwin. (G.J. Stigler and R.A. Sherwin, *The Extent of the Market* (1985) 28 *Journal of Law and Economics* 555)

<sup>2493</sup>Panel Report, para. 7.1668.

sales.<sup>2494</sup> This acknowledgement is difficult to reconcile with the fact that the Panel nevertheless conducted its assessment of displacement on the basis of aggregate data *alone* without assessing the nature and extent of competition in the LCA industry on the basis of data for particular LCA models.

1136. In cases where, as here, an analysis of the conditions of competition reveals that all products are not engaged in direct competition for the same sales or orders—or where the competitive relationship between such products is, at most, indirect or remote—this must be properly accounted for in order to reach a meaningful finding of displacement. An analysis of the specific circumstances and dynamics of competition occurring in the relevant geographic market and the demands of customers in that market is therefore required when assessing claims under Articles 6.3(a) and 6.3(b) of the *SCM Agreement*.

1137. In the light of the above, we *find* that the Panel erred in its interpretation of the term "market" in Articles 6.3(a) and 6.3(b) of the *SCM Agreement* and acted inconsistently with Article 11 of the DSU. It did so by failing to make an objective assessment of the "applicability of and conformity with the relevant covered agreements", in particular by concluding that it was not required "to make an independent determination of the 'subsidized product', as opposed to relying on the complainant's identification of the product."<sup>2495</sup> The Panel's failure to comply with its obligations under Article 11 of the DSU appears to flow directly from the Panel's erroneous interpretation of Articles 6.3(a) and 6.3(b) in this case. Consequently, the Panel erred when it stated that, "so long as the subsidized product {the United States} has identified, Airbus large civil aircraft, does in fact benefit from the subsidies in dispute, we will not intervene to alter its identification of the subsidized product."<sup>2496</sup> In the absence of an objective determination of the relevant product market by the Panel, its conclusion that "there is a single subsidized product and a single corresponding like product"<sup>2497</sup> cannot stand. Consequently, we *reverse* the Panel's finding of displacement on the basis of a single subsidized product and a single like product.

1138. As a separate matter, we note that the European Union has made an additional claim that the Panel failed to comply with its obligations under Article 11 of the DSU by disregarding certain evidence and by failing to provide adequate explanations, including coherent reasoning in addressing the evidence before it.<sup>2498</sup> Having found that the Panel failed to comply with its obligations under Article 11 of the DSU because it did not undertake an objective assessment of the relevant market in

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<sup>2494</sup>Panel Report, para. 7.1679.

<sup>2495</sup>Panel Report, para. 7.1653.

<sup>2496</sup>Panel Report, para. 7.1662.

<sup>2497</sup>Panel Report, para. 7.1679.

<sup>2498</sup>European Union's appellant's submission, paras. 340 and 359.

which the subsidized and like products compete, and having consequently reversed the Panel's conclusion that there is a single subsidized product and a single corresponding like product, we do not consider it necessary to rule on this additional claim.

2. Completing the Analysis

1139. As discussed above, the European Union argues that the Panel erred in assessing displacement on the basis of a single product market, and it requests that we reverse the Panel's "single product market" finding. On the basis of the reasons set out above, we have reversed the Panel's "single product market" finding.

1140. We note that the Appellate Body has exercised restraint in deciding whether to complete the legal analysis in past disputes. The Appellate Body has emphasized that it can complete the analysis only if the factual findings by the panel, or the undisputed facts on the panel record, provide a sufficient basis for the Appellate Body to do so. Where this has not been the case, the Appellate Body has declined to complete the analysis.<sup>2499</sup>

1141. In assessing the nature of competition in the LCA market, the Panel noted that a customer's decision as to which LCA to purchase depends on a number of factors:

Customers choose among the various LCA models available those they deem most suitable for their needs at the time of ordering. In making their purchase decisions, customers will consider such matters as the route structure to be served by the aircraft, the structure of the existing fleet, and operating costs, with a view to minimizing costs and maximizing revenues. Some airlines purchase a mix of LCA models to serve a variety of needs, while others may limit themselves to one LCA model because of the efficiencies generated by the operation of a single aircraft type. Once an airline orders any particular LCA model from a given manufacturer, efficiencies in operating a fleet of similar aircraft (including those related to spare parts, maintenance and training) favour follow-on orders of the same models, as well as orders of other aircraft models from the same manufacturer, in order to take advantage of commonalities across an LCA fleet.<sup>2500</sup>

1142. Thus, while certain customers may purchase only certain LCA models—such as single-aisle LCA—to meet their needs, others base their purchase decisions on the manufacturer's ability to offer a full range of LCA comprising various models to serve a variety of needs. The Panel found in this respect that both "Airbus and Boeing now produce a full range of different models of LCA and sell to

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<sup>2499</sup>See, for example, Appellate Body Report, *US – Continued Zeroing*, para. 349.

<sup>2500</sup>Panel Report, para. 7.1720.

the full range of customers"<sup>2501</sup>; and noted that the European Communities recognized the importance of offering a full range of LCA "whose commonality keep operating costs down for customer airlines across the fleet but which can perform the various missions dictated by an airline's route structure".<sup>2502</sup> Regarding elasticity of supply, the Panel further found, for example, that "{e}conomies of scale arising from the huge sunk development cost give incumbent firms a considerable competitive advantage"; "{e}conomies of scope make it difficult to enter one market segment only"; "{s}witching costs ... make it more difficult for new producers to enter ... {and} airlines prefer fleet commonality."<sup>2503</sup> We see each of these factors as relevant in assessing the conditions of competition in the LCA market. However, other than giving a narrative of general considerations relating to these factors, it is not apparent from its Report that the Panel engaged with relevant evidence in a thorough and meaningful manner. Nor did the Panel provide an independent and objective assessment of the factors in a way that would allow us to make conclusions as to the proper scope of the relevant product market.

1143. During the oral hearing, we engaged the participants in a discussion as to whether the Panel findings or uncontested evidence on the Panel record would enable us to find that there is a single LCA market, or that there is a separate single-aisle LCA market, and possibly multiple wide-body LCA markets, such as a twin-aisle LCA market and a Very Large Aircraft<sup>2504</sup> market.

1144. The United States argues that the evidence before the Panel showed "a number of *actual, 'head-to-head' campaigns* in which Boeing and Airbus offered LCA across every adjacent 'product market' identified by the European Union."<sup>2505</sup> Pointing to a table it compiled using information from Panel Exhibits EC-322 and EC-323, the United States argues that "*none* of the 'product markets' identified by the European Union is a self-contained segment, capturing the full scope of competition for the models within it" and that, "{i}n fact, LCA from each 'product market' have competed head-to-head against LCA from other 'product markets'."<sup>2506</sup> The United States submits, in particular, that "Exhibit EC-322 shows the Boeing 777 as having competed against the A330" and that there were a number of competitions between the Boeing 747 and the A380.<sup>2507</sup> For its part, the European Union argues that, in every sales campaign Airbus won with its single-aisle A320 family LCA, it competed

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<sup>2501</sup>Panel Report, para. 7.1718.

<sup>2502</sup>Panel Report, para. 7.1665.

<sup>2503</sup>Panel Report, para. 7.1981.

<sup>2504</sup>The European Union refers to "400-500 seat" LCA and "500+ seat" LCA together as "Very Large Aircraft". (See European Union's appellant's submission, Annex II (Product Markets Annex) (BCI); see also European Union's appellant's submission, para. 375 and footnote 431 thereto, and Annex III (Displacement Annex), paras. 2 and 5)

<sup>2505</sup>United States' appellee's submission, para. 557. (original emphasis)

<sup>2506</sup>United States' appellee's submission, para. 558. (original emphasis)

<sup>2507</sup>United States' appellee's submission, para. 559.



against the Boeing single-aisle family LCA<sup>2508</sup>; and there were also "no sales campaigns in which Boeing single-aisle LCA competed against Airbus A330, A340 or A380 family LCA."<sup>2509</sup>

1145. Although competition appears to be particularly intense between certain LCA models, the Panel record contains evidence suggesting that a number of large airlines base their purchase decisions on a consideration of the overall product offering of both Airbus and Boeing, rather than simply comparing physical and performance characteristics of similar specific LCA models of both manufacturers.<sup>2510</sup> Such airlines are likely to operate a full range of different LCA in their fleet to satisfy their route structures and customer demand. A consideration of data presented on a cumulative basis for all Airbus LCA may be particularly instructive when assessing the behaviour of *such* buyers in a particular geographic market and the specific conditions of the relevant market. By contrast, as the European Union observes, a considerable number of small airlines purchase and fly only LCA of one size. The ability of these airlines to fly multiple and different types of routes may be either non-existent or constrained.<sup>2511</sup> For such airlines, the ability of a manufacturer to offer a full range of LCA may be of limited relevance in the decision of whether to purchase a particular LCA or not.

1146. Before the Panel, the United States referred to evidence of sales campaigns in which multiple, different Airbus and Boeing LCA models were sold at the same time to the same customers. The United States refers to these as "bundled" sales or "package" deals<sup>2512</sup>, and argues that this evidence supports a finding as to the existence of a single product market comprising all LCA. We note, however, that only few sales campaigns appear to have involved sales of different LCA models sold together as part of a "package deal".<sup>2513</sup> Moreover, it is not clear to us whether the existence of such campaigns simply suggests that certain large airlines may have required multiple, different types of LCA at the same time, rather than suggesting that all types of LCA are in actual or potential competition in a single product market. We therefore do not consider this evidence to be particularly probative.

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<sup>2508</sup>European Union's appellant's submission, para. 363.

<sup>2509</sup>European Union's appellant's submission, para. 372. (original emphasis)

<sup>2510</sup>See Panel Report, para. 7.1665. See also European Communities' second written submission to the Panel, paras. 712-714; and Airclaims CASE database (Panel Exhibit EC-21).

<sup>2511</sup>European Union's response to questioning at the oral hearing (referring to the European Communities' second written submission to the Panel, para. 725).

<sup>2512</sup>Panel Report, para. 7.1655. The United States described "bundled" to mean instances in which airlines ordered multiple LCA models from the same manufacturer at the same time. (United States' response to Panel Question 131, paras. 422 and 423) See also United States' appellee's submission, para. 566.

<sup>2513</sup>The European Union argues that "{o}nly 30 of the 520 sales transactions made in the 2004-2006 period were 'bundled' orders for LCA across different LCA markets." (European Union's appellant's submission, footnote 409 to para. 366 (referring to European Communities' second written submission to the Panel, para. 721; and Airclaims CASE database (Panel Exhibit EC-642))

1147. With all these considerations in mind, we find that we are unable to complete the legal analysis to find that there are one or more LCA product markets.

C. *Displacement and Lost Sales*

1. Displacement

1148. We turn next to the Panel's assessment of displacement. The European Union asserts that the errors in the Panel's approach with regard to the product market "undermine" the Panel's findings of displacement.<sup>2514</sup> Nonetheless, the European Union states that it does not request us to "reverse the displacement findings in their entirety".<sup>2515</sup> The reason for this is that the European Union accepts that the uncontested data show displacement occurring in some of the country markets for some of the product markets. In its appellant's submission, the European Union "accepts that any displacement found under either of the two multiple product-market approaches would constitute properly observed displacement."<sup>2516</sup> The European Union submitted data for three product markets for each of the geographic markets at issue. These data are derived from data on the Panel record.<sup>2517</sup> While the United States maintains that there is a single LCA product market, it confirmed at the oral hearing that the disaggregated data submitted by the European Union are derived from data that was before the Panel and made it clear that it did not have any objections with respect to this data as such. Furthermore, the European Union accepts that there is competitive interaction between similar models of LCA manufactured by Airbus and Boeing. The United States agrees.<sup>2518</sup> The disagreement between the European Union and the United States is limited to the degree of competition across models and also as between the extremes of Boeing's and Airbus' product ranges. In these circumstances, we will assess below to what extent the United States' claims of displacement can be upheld on the basis of the uncontested evidence on the Panel record and the evidence of displacement in those country markets in which the European Union acknowledges that there is a competitive interaction between model types of Airbus and Boeing LCA.

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<sup>2514</sup>European Union's appellant's submission, para. 376.

<sup>2515</sup>European Union's appellant's submission, para. 376.

<sup>2516</sup>European Union's appellant's submission, Annex III (Displacement Annex), para. 6. We also note that the European Union expressly seeks completion of the analysis in respect of displacement in particular product markets. (*Ibid.*, para. 392) Specifically, in the event of a reversal of the Panel's single product market finding, the European Union requests the Appellate Body to complete the analysis and find that there is a separate single-aisle LCA market. With respect to the markets for wide-body LCA, the European Union recognized that "the evidence is less clear and might support the existence of four or two wide-body LCA product markets." Thus, in framing its request for reversal, the European Union accepts some displacement in these markets. (*Ibid.*, para. 392)

<sup>2517</sup>European Union's appellant's submission, Annex III (Displacement Annex), para. 4.

<sup>2518</sup>The United States contends that there is competition not only between similar models of LCA manufactured by Airbus and Boeing but between all models of LCA manufactured by Airbus and Boeing.

1149. One Member on the Division wishes to set out a separate view on the issue of whether the Appellate Body can complete the legal analysis on the United States' claims of displacement. While recognizing the particular circumstances in this case, this Member is of the opinion that the Appellate Body cannot complete the legal analysis on displacement. This Member recalls that we have found above that the Panel failed to comply with its obligations under Article 11 of the DSU because it did not undertake an objective assessment of the relevant market in which the subsidized and like products compete; and that, in the absence of an objective determination of the product market by the Panel, its conclusion that "there is a single subsidized product and a single corresponding like product" cannot stand. Consequently, we have reversed above the Panel's finding of displacement on the basis of a single subsidized product and a single like product. Moreover, after a review of the relevant factual findings of the Panel and the undisputed evidence on the Panel record, we have concluded above that we are unable to complete the analysis to find that there are one or more LCA product markets. As we have pointed out, our mandate under Article 17.6 of the DSU does not allow us to conduct the type of factual assessment that would be required properly to define the product market(s) in this case. We are thus unable to make our own determination of what is (or are) the relevant product market(s). This Member is of the view that a finding on displacement requires a determination of the relevant product market(s). Therefore, this Member considers that, in the absence of such a determination, the Appellate Body cannot complete the analysis on displacement. According to this Member, this is so even in the particular circumstances of this case set out above and explained in more detail below. While this Member disagrees with the completion of the analysis on displacement, this Member agrees with the interpretation of the concept of displacement in Article 6.3(a) and (b) of the *SCM Agreement*, as set out in subsection (b) below.

1150. The European Union's appeal challenges the Panel's findings of displacement under the first step of the Panel's two-step approach.<sup>2519</sup> The Panel's findings are summarized in subsection (a). In subsection (b) we examine the meaning of displacement under Article 6.3(a) and (b) of the *SCM Agreement*. We assess the European Union's allegations of error in subsection (c).

(a) The Panel's findings

1151. At the outset, the Panel addressed the appropriate reference period against which the United States' adverse effects claims under Article 5(a) and (c) and Article 6.3(a), (b), and (c) should be assessed. The United States originally presented data and arguments covering the period 2001

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<sup>2519</sup>The Panel's two-step approach is described in section IX.A of this Report.

through 2005, and subsequently presented additional data for the calendar year 2006.<sup>2520</sup> The European Communities argued that the appropriate reference period in which to examine whether the subsidies presently caused adverse effects should include data from 2004 to 2006 and, where available and reliable, 2007.<sup>2521</sup> The Panel observed that the provisions at issue did not provide any specific guidance as to the appropriate length of the reference period, and that Article 6.4 only established a minimum reference period of one year to be considered in normal circumstances. In the absence of any specific guidance on the appropriate reference period, the Panel found it "should avoid making an *a priori* choice of reference period."<sup>2522</sup> Rather, the Panel found that its duties under Article 11 of the DSU required it to examine the evidence put forward by the United States, and the rebuttal evidence presented by the European Communities, including recent information "where relevant and reliable".<sup>2523</sup>

1152. Turning to the United States' claims under Article 6.3(a) and (b) of the *SCM Agreement*, the Panel agreed with the panel in *Indonesia – Autos* that displacement "relates to a situation where sales volume has declined, while impedance relates to a situation where sales which otherwise would have occurred were impeded."<sup>2524</sup> Like the panel in *Indonesia – Autos*, the Panel in this case focused on market share data when analyzing the United States' displacement claims.<sup>2525</sup> However, the Panel emphasized that data showing a decline in Boeing's share of the markets at issue, while sufficient to demonstrate "displacement", would not be sufficient to establish "impedance". In order to conclude that imports or exports of Boeing LCA were impeded over the relevant reference period, the Panel said it would have to be satisfied that those sales would have "actually taken place".<sup>2526</sup>

1153. The Panel next recalled its earlier rejection of the European Communities' objections regarding the subsidized and like products, the appropriate reference period, and the use of delivery data rather than orders.<sup>2527</sup> The Panel then turned to the United States' claim of displacement from the market of the subsidizing Member under Article 6.3(a), focusing on the data submitted by the United States concerning LCA deliveries in the European Communities.<sup>2528</sup> After reviewing the data,

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<sup>2520</sup>Panel Report, para. 7.1681 (referring to United States' second written submission to the Panel, paras. 698, 701, 703, 731, and 734; Panel Exhibit US-616 (BCI), containing US LCA market information on the Boeing 737NG family; and United States' response to Panel Question 238).

<sup>2521</sup>Panel Report, para. 7.1686.

<sup>2522</sup>Panel Report, para. 7.1694.

<sup>2523</sup>Panel Report, para. 7.1694.

<sup>2524</sup>Panel Report, para. 7.1738 (quoting Panel Report, *Indonesia – Autos*, para. 14.218).

<sup>2525</sup>Panel Report, para. 7.1739.

<sup>2526</sup>Panel Report, para. 7.1739.

<sup>2527</sup>Panel Report, paras. 7.1742-7.1745, 7.1774, and 7.1777.

<sup>2528</sup>The Panel did "not consider the data presented by the European Communities on LCA deliveries to the EC market to be accurate or reliable for the purpose of evaluating the United States' claims of displacement and impedance under Article 6.3(a) of the *SCM Agreement*." (Panel Report, para. 7.1756)

the Panel concluded that it was "clear that Boeing's share of LCA deliveries to the EC market declined over the period, while Airbus' share of that market increased."<sup>2529</sup> The Panel added that, "{a}s the only other competitor in the market was Airbus, it follows that the evidence we have reviewed demonstrates that imports of United States' LCA into the EC market were displaced by Airbus LCA over the relevant period."<sup>2530</sup>

1154. As regards the claim of present displacement from certain third country markets raised by the United States under Article 6.3(b) of the *SCM Agreement*, the Panel began its evaluation with the Australian market.<sup>2531</sup> On the basis of the United States' data, the Panel observed that Airbus' market share in Australia increased 18% between 2001 and 2005, while Boeing's market share declined by the same amount.<sup>2532</sup> A similar pattern emerged from the United States' data for the LCA market in China, where Airbus' market share increased 25% between 2001 and 2006, while Boeing's market share declined by the same amount.<sup>2533</sup>

1155. With respect to the United States' claim alleging threat of displacement from the LCA market in India, the United States did not present data on deliveries, but the Panel considered that the United States' data on orders were an "indicator of likely future deliveries" and thus a relevant indicator of "threat of future displacement or impedance of exports" from that market.<sup>2534</sup> The Panel considered that order data for the 2001-2005 period suggested that Airbus won most of the orders in the Indian market. In particular, the Panel found that Airbus' 225 orders (compared to Boeing's 98) in 2005 represented a "massive increase"<sup>2535</sup> of Airbus orders in the Indian market. For the Panel, this indicated that, as deliveries for such LCA take place, it is likely that Airbus will have a "significantly greater share" of the Indian market than Boeing.<sup>2536</sup>

1156. In relation to the other individual third country markets, the Panel observed that the United States' annual delivery data for 2001 to 2005 showed increases in Airbus' market share in Brazil (from 50 to 86%), Korea (from 17 to 44%), Mexico (from 29 to 50%), Singapore (from 11 to

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<sup>2529</sup>Panel Report, para. 7.1758. The Panel also noted that, "{d}espite the different values reflected, the data presented by the European Communities, when aggregated, supports the same conclusion, although, as we have explained, the {European Communities'} data is not a reliable basis for our evaluation." (*Ibid.*)

<sup>2530</sup>Panel Report, para. 7.1758.

<sup>2531</sup>The Panel also noted that the European Communities' third country markets data could not be deemed to be "accurate or reliable". (Panel Report, para. 7.1779)

<sup>2532</sup>Panel Report, para. 7.1780. The Panel also noted that the European Communities' aggregated data, though inaccurate and unreliable, revealed a similar pattern. (*Ibid.*)

<sup>2533</sup>Panel Report, para. 7.1781. The Panel also noted that the European Communities' aggregated data, though inaccurate and unreliable, revealed a similar trend. (*Ibid.*)

<sup>2534</sup>Panel Report, para. 7.1783.

<sup>2535</sup>Panel Report, para. 7.1784.

<sup>2536</sup>The Panel found that a similar pattern emerged from the European Communities' aggregated data, though it did not consider these data "accurate" or "reliable". (Panel Report, para. 7.1784)

73%), and Chinese Taipei (from 38 to 56%).<sup>2537</sup> The European Communities submitted data on the number of LCA delivered to each relevant third country market between 2001 and 2006.

1157. The Panel concluded that the evidence demonstrated that Boeing exports of LCA were displaced from the markets of Australia and China by sales of Airbus LCA over the period examined, and that there was a likelihood of future displacement of Boeing LCA by Airbus LCA from the Indian market.<sup>2538</sup> The Panel regarded the evidence concerning the markets of Brazil, Korea, Mexico, Singapore, and Chinese Taipei "less compelling"<sup>2539</sup>, because sporadic sales and relatively small volumes in those markets made the identification of trends more difficult. Nevertheless, the Panel reasoned that, as Airbus was the only other competitor in these markets during the relevant period, any market share achieved by Airbus in those markets was at the expense of Boeing. On this basis, the Panel concluded that Boeing LCA exports were also displaced from these markets by sales of Airbus LCA over the period under review.<sup>2540</sup>

1158. The Panel further declined the United States' request to make a finding in relation to all third country markets "as a whole".<sup>2541</sup> The Panel reasoned that, insofar as Article 6.3(b) referred to "a third country market", it had "serious doubts" as to whether it would be permissible to assess displacement from all third country markets under Article 6.3(b), and in any event was not required to resolve that question in this case.<sup>2542</sup>

(b) The meaning of "displacement" under Article 6.3(a) and (b) of the *SCM Agreement*

1159. Subparagraphs (a) and (b) of Article 6.3 of the *SCM Agreement* provide:

Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

(a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;

(b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

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<sup>2537</sup>Panel Report, para. 7.1785.

<sup>2538</sup>Panel Report, para. 7.1790.

<sup>2539</sup>Panel Report, para. 7.1791.

<sup>2540</sup>Panel Report, para. 7.1791. Later in its analysis, the Panel found that the United States had failed to substantiate its claims of *impedance* of Boeing LCA exports from third country markets. (See *ibid.*, para. 7.2027)

<sup>2541</sup>Panel Report, para. 7.1789.

<sup>2542</sup>Panel Report, para. 7.1789.

1160. As noted above<sup>2543</sup>, this is the first time that the Appellate Body examines claims of displacement under subparagraphs (a) or (b) of Article 6.3 of the *SCM Agreement*.<sup>2544</sup> We have analyzed the concept of substitutability in the section "Subsidized Product and Product Market" above.<sup>2545</sup> For the reasons set out there, we understand the term displacement to connote that there is a substitution effect between the subsidized product and the like product of the complaining Member.<sup>2546</sup> This means that displacement arises under subparagraph (a) of Article 6.3 where the effect of the subsidy is that imports of a like product of the complaining Member are substituted by the subsidized product in the market of the subsidizing Member. Similarly, under subparagraph (b), displacement arises where exports of the like product of the complaining Member are substituted in a third country market by exports of the subsidized product.

1161. We are not called upon in this appeal to interpret the term "impede" in Article 6.3. Nevertheless, consideration of the term can provide context for a better understanding of displacement. The term connotes a broader array of situations than the term "displace".<sup>2547</sup> It refers to situations where the exports or imports of the like product of the complaining Member would have expanded had they not been "obstructed" or "hindered" by the subsidized product. It could also refer to a situation where the exports or imports of the like product of the complaining Member did not materialize at all because production was held back by the subsidized product.<sup>2548</sup>

1162. We recognize that it may be difficult to draw a clear demarcation between the concepts of displacement and impedance. One possibility is to draw a distinction similar to the one drawn by the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* between the concepts of "price

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<sup>2543</sup>See *supra*, para. 1115.

<sup>2544</sup>The focus of the European Union's appeal is on the term "displacement", as the Panel did not make any affirmative findings of "impedance". (See *supra*, footnote 2540)

<sup>2545</sup>Section IX.B, paras. 1119-1123.

<sup>2546</sup>The term "displace" is defined as to "remove; replace with something else; take the place of, supplant". (*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 698)

<sup>2547</sup>The term "impede" is defined as to "obstruct, hinder". (*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 1319)

<sup>2548</sup>There also could be situations where displacement and impedance overlap. However, in the light of the principle of effective treaty interpretation, a distinction needs to be made as to the concepts covered by each term. (See Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at 21; and Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1997:I, 97, at 106)

depression" and "price suppression" in Article 6.3(c) of the *SCM Agreement*.<sup>2549</sup> On this approach, evidence that actual sales have declined would be relevant for a determination of displacement, whereas evidence that sales would have increased more than they did, or would have declined less than they did, would be relevant to a claim of impedance.<sup>2550</sup> We do not need to resolve this issue in this appeal because the United States premised its allegations of displacement on there being an observable decline in Boeing's market share.<sup>2551</sup>

1163. As we have explained in section A above, we believe that the most appropriate approach to assess the effect of a subsidy under Article 6.3 of the *SCM Agreement* is through a unitary counterfactual analysis. In the case of displacement and impedance, the counterfactual analysis would involve estimating what the sales of the complaining Member would have been in the absence of the challenged subsidy. The counterfactual sales of the complaining Member would then be compared to its actual sales. Displacement or impedance would arise where the counterfactual analysis shows that the sales of the complaining Member would have declined less or would have been higher in the absence of the challenged subsidy.

1164. The Panel in this case, however, adopted a two-step approach in its assessment of whether displacement was the effect of the challenged subsidies. As set out above, we have reservations about this type of two-step approach because it may not gauge the particular phenomena described under Article 6.3(a) and (b) of the *SCM Agreement* as well as a unitary counterfactual analysis. We recognize, however, that a two-step approach is a permissible approach to assess the effects of the

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<sup>2549</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 351. In the original proceedings, the panel described "price suppression" as the situation where prices "either are prevented or inhibited from rising (i.e. they do not increase when they otherwise would have) or they do actually increase, but the increase is less than it otherwise would have been", and defined "price depression" as the situation where prices "are pressed down, or reduced." (Panel Report, *US – Upland Cotton*, para. 7.1277) The Appellate Body recognized that situations where prices are prevented or inhibited from rising and the situation where "prices" are pressed down, or reduced, could overlap, but it also pointed out that Article 6.3(c) mentioned price suppression and price depression as distinct concepts.

In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body noted that "price depression is a directly observable phenomenon, {whereas} price suppression is not so. Falling prices can be observed; by contrast, price suppression concerns whether prices are less than they would otherwise have been in consequence of various factors, in this case, the subsidies. The identification of price suppression, therefore, presupposes a comparison of an observable factual situation (prices) with a *counterfactual situation* (what prices would have been) where one has to determine whether, in the absence of the subsidies ..., prices would have increased or would have increased more than they actually did. (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 351 (emphasis added))

<sup>2550</sup>We note that there may be situations in which the imports or exports of the like product of the complaining Member are declining, but are declining by more than they otherwise would. To the extent that there is an observable decline in the imports or exports, it could be considered a situation of displacement. At the same time, there is an aspect of the decline that is not directly observable—the decline is sharper than it would otherwise have been. In this respect, this situation could be considered one of impedance. These issues, however, are not before us given the manner in which the United States framed its case.

<sup>2551</sup>United States' response to questioning at the oral hearing.



challenged subsidies under Article 6.3(a) and (b) of the *SCM Agreement*. Nevertheless, any conclusions under the first step of such a two-step approach are necessarily preliminary and of limited significance in coming to a conclusion under Article 6.3(a) or (b). This is so because it is only once the second step has been completed that it is possible to determine if the like product has been displaced by the subsidized product, as an effect of the challenged subsidies. This, as explained in our analysis of the subsidized product and product market in section IX.B of this Report, is a function of substitutability in the relevant product market. Therefore, any definitive determination of displacement under Article 6.3(a) and (b) must await consideration of the effect of the subsidy.<sup>2552</sup>

1165. In this case, the Panel examined trade<sup>2553</sup> volumes *and* market share data over a reference period.<sup>2554</sup> In the light of the manner in which the United States presented its case and the Panel's two-step approach, the focus on trade volumes *and* market shares was appropriate. This is so because it is not sufficient to examine trade volumes to determine whether the imports or exports of the like product are being substituted by the subsidized product, in particular when total consumption in the market increases or decreases. Therefore, it is necessary to consider the relative movement of the volumes of the subsidized and the like product, that is, their market shares. In a duopoly situation, as in the present case, a decrease in the market share of one competitor will be reflected in an increase in the market share of the other competitor. The analysis is made more difficult where there are more than two competitors in the market, as it will be necessary to analyze more fully the market share data of various competitors in order to determine whether the substitution effect is between the subsidized product and the like product of the complaining Member. Both participants agreed at the oral hearing that focusing on market shares is appropriate in this case in the light of how the United States presented its claims.<sup>2555</sup>

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<sup>2552</sup>The Panel recognized the preliminary nature of its findings of the "existence" of displacement and lost sales. (See Panel Report, paras. 7.1732, 7.1758, and 7.1792)

<sup>2553</sup>Article 6.3(a) of the *SCM Agreement* refers to the imports of a like product and Article 6.3(b) refers to the exports of a like product. In this sense, Article 6.3(a) and (b) can be said to be concerned with trade volumes. However, trade volumes are ultimately a function of sales. Thus, in the analysis that follows, we focus on sales volumes.

<sup>2554</sup>The Panel noted that "{a} market share approach is consistent with previous dispute settlement reports." (Panel Report, para. 7.1751 (referring to Panel Report, *Indonesia – Autos*, para. 14.211; and Panel Report, *Korea – Commercial Vessels*, para. 7.555))

<sup>2555</sup>As mentioned earlier, we note that such relative movements in market shares do not, by themselves, establish that a decline in market share is the effect of the challenged subsidies under the two-step approach followed by the United States to show displacement within the meaning of Article 6.3(a) and (b) of the *SCM Agreement*.

1166. We further note that Article 6.4 of the *SCM Agreement* provides that the change in relative market shares shall be demonstrated "over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned".<sup>2556</sup> This view was espoused by the Appellate Body in *US – Upland Cotton*, where it observed that Article 6.4 requires that "displacement or impeding of exports be demonstrated 'over an appropriately representative period' ... so that 'clear trends' in changes in market share can be demonstrated."<sup>2557</sup> For the Appellate Body, this suggested that the effect of a subsidy must be examined "over a sufficiently long period of time and is not limited to the year in which it was paid"<sup>2558</sup> because consideration of developments over a longer period "provides a more robust basis for a serious prejudice evaluation."<sup>2559</sup> We further note that, in *Argentina – Footwear (EC)*, the Appellate Body clarified, albeit in a safeguards context, that investigating authorities were required to consider "*trends* in imports over the period of investigation (rather than just comparing the end points)"<sup>2560</sup>, as this may mask trends developing in the intervening period. The Appellate Body concluded that "intervening trends" had not been considered adequately because of "the sensitivity of the analysis to the particular end points of the investigation period used."<sup>2561</sup> Similarly, a panel assessing a claim of displacement would have to look at clearly discernible trends during the reference period.

1167. The identification of a trend will be more accurate the larger the data set used in the analysis.<sup>2562</sup> At the same time, we recognize that too strict a requirement concerning the size of the data set could preclude a Member from timely challenging subsidies that cause adverse effects to its interests. While the United States initially submitted data relating to the period 2001-2005 it had proposed, the Panel decided to examine displacement over a reference period spanning six years, from 2001 up to and including 2006.<sup>2563</sup> We agree with the Panel that the most recent available data should not be excluded from consideration. However, we disagree with other aspects of the Panel's approach because the assessment of the claims of displacement put forward by the United States called for an examination of whether there were *trends* in the market shares during the reference period, rather than a mere comparison of market shares at the end points of that period.

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<sup>2556</sup>Similarly, Article 6.3(d) of the *SCM Agreement* requires a "consistent trend" of increase in the world market share of the subsidizing Member.

<sup>2557</sup>Appellate Body Report, *US – Upland Cotton*, para. 478.

<sup>2558</sup>Appellate Body Report, *US – Upland Cotton*, para. 478.

<sup>2559</sup>Appellate Body Report, *US – Upland Cotton*, para. 478 (quoting Panel Report, *US – Upland Cotton*, para. 7.1199).

<sup>2560</sup>Appellate Body Report, *Argentina – Footwear (EC)*, para. 129. (original emphasis)

<sup>2561</sup>Appellate Body Report, *Argentina – Footwear (EC)*, para. 129.

<sup>2562</sup>There are various statistical methods available that could be used to identify whether there are trends in the data, such as calculating weighted least squares.

<sup>2563</sup>These findings of the Panel are not appealed. (Panel Report, para. 7.1694)

1168. Article 6.3(a) of the *SCM Agreement* is concerned with displacement in "the market of the subsidizing Member", while Article 6.3(b) refers to displacement from "a third country market". As discussed in section B above, there is both a geographic and product market component to the assessment of displacement. In the case of Article 6.3(a), the geographic market is the market of the subsidizing Member. The reference to the "like product of another Member" in Article 6.3(b) indicates that the third country referred to in that provision is a market other than the market of the complaining Member.<sup>2564</sup>

1169. A further interpretative question that arises is whether subparagraphs (a) and (b) of Article 6.3 of the *SCM Agreement* contain a minimum threshold requirement for the establishment of displacement or impedance. The Panel concluded that Article 6.3(b) "does not contain any requirement that the displacement or impedance of exports from a third country market rise to any particular level or degree."<sup>2565</sup> We note that neither subparagraph (a) nor (b) expressly qualifies the level or degree of displacement or impedance required for a finding under those provisions. By contrast, subparagraph (c) of Article 6.3 requires that the phenomena described in that provision be "significant". While Article 6.3(a) and (b) does not expressly state that displacement must be significant, we agree with the European Union that the displacement must be discernible. Otherwise, we do not see how displacement could be clearly identified and amount to "serious prejudice" within the meaning of Articles 5(c) and 6.3 of the *SCM Agreement*.<sup>2566</sup>

1170. To summarize, where a complainant puts forward a case based on the existence of displacement as a directly observable phenomenon and the panel opts to examine it under a two-step approach, as was done in this dispute, displacement arises under Article 6.3(a) of the *SCM Agreement* where imports of a like product of the complaining Member are declining in the market of the subsidizing Member, and are being substituted by the subsidized product. Similarly, under Article 6.3(b), displacement arises where exports from the like product of the complaining Member are declining in the third country market concerned, and are being substituted by exports of the subsidized product. As noted above, displacement must be discernible. The identification of displacement under this approach should focus on trends in the markets, looking at both volumes and

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<sup>2564</sup>The third country market is also different from that of the subsidizing Member, which is specifically addressed by Article 6.3(a).

<sup>2565</sup>Panel Report, footnote 5322 to para. 7.1791. The Panel did not make a similar statement with respect to Article 6.3(a).

<sup>2566</sup>The introductory clause to Article 6.3 provides that "{s}erious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply". In *US – Upland Cotton*, the Appellate Body clarified that "serious prejudice" within the meaning of Article 5(c) will not arise where the "effect of the subsidy" is to cause small variations in the prices of the like product. (See Appellate Body Report, *US – Upland Cotton*, para. 426 (quoting Panel Report, *US – Upland Cotton*, para. 7.1326))

market shares. The trend has to be clearly identifiable and an assessment based on a static comparison of the situation of the subsidized product and the like product at the beginning and at the end of the reference period would be inadequate. Where a two-step approach is used under Article 6.3(a) and (b), and displacement has been shown on a preliminary basis, the complaining Member will have to establish, in addition, that such displacement is the effect of the challenged subsidies.

1171. The European Union's appeal includes the Panel's finding of threat of displacement in the Indian market. We note that neither subparagraph (a) nor (b) of Article 6.3 of the *SCM Agreement* expressly refers to "threat of displacement". Nevertheless, we recall that the introductory paragraph of Article 6.3 states that "{s}erious prejudice in the sense of paragraph (c) of Article 5 may arise" where there is one of the market phenomena described in the subparagraphs listed under that provision, including (a) and (b). Footnote 13 to Article 5(c), in turn, clarifies that "{t}he term 'serious prejudice to the interests of another Member' is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of {the} GATT 1994, and includes threat of serious prejudice". Although Article 15.7 of the *SCM Agreement* concerns threat of *material injury*, we believe that it also provides relevant guidance for understanding the concept of threat of *serious prejudice* under Article 5(c). Thus, as with a determination of threat of material injury, we consider that it is reasonable to require that the determination of threat of serious prejudice "be based on facts and not merely on allegation, conjecture or remote possibility" and that "{t}he change in circumstances" that would create a situation in which the subsidy would cause displacement "must be clearly foreseen and imminent."<sup>2567</sup>

1172. With these considerations in mind, we turn to the specific allegations of the European Union.

(c) The European Union's allegations of error

1173. The European Union challenges the Panel's finding of displacement under Article 6.3(a) and (b) of the *SCM Agreement*. The appeal against the finding under Article 6.3(a) concerns imports of Boeing LCA into the market of the European Union. This part of the European Union's appeal is premised on its claim that the Panel erred by assessing displacement on the basis of a single LCA product market. The same claim is made by the European Union against the Panel's findings of displacement under Article 6.3(b) of the *SCM Agreement* with respect to exports of Boeing LCA to Australia, Brazil, China, Korea, Mexico, Singapore, and Chinese Taipei.<sup>2568</sup> The European Union

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<sup>2567</sup> Article 15.7 of the *SCM Agreement*.

<sup>2568</sup> European Union's appellant's submission, para. 318.

makes two additional claims that are limited to a narrower group of geographic markets. Both of these claims are made under the assumption that the Panel did not err by assessing displacement on the basis of a single LCA product market. First, as regards Brazil, Korea, Mexico, Singapore, and Chinese Taipei, the European Union argues that the displacement finding is erroneous in the light of the absence of a trend, and the Panel's statement that "sales were sporadic and volumes were relatively small" such that "identification of any trend {was} more difficult."<sup>2569</sup> Second, the European Union submits that the Panel erred under Articles 5(c) and 6.3(b) of the *SCM Agreement* in finding displacement in Mexico and Brazil, because "in those markets there simply was not {a} drop in market share during the reference period."<sup>2570</sup> In addition, the European Union challenges the Panel's finding of threat of displacement in the Indian market.<sup>2571</sup> According to the European Union, "there was no overall threat of displacement for Boeing's market share, based on a flawed single LCA product market", and there is no "threat of displacement in any of the separate product markets".<sup>2572</sup>

1174. We recall that, in section B above, we have found that the Panel erred in its interpretation and application of the term "market" in Article 6.3(a) and (b) of the *SCM Agreement* and acted inconsistently with its obligations under Article 11 of the DSU by concluding that it was not required to "make an independent determination of the 'subsidized product', as opposed to relying on the complaining Member's identification of that product". We have also found that, in the absence of an objective determination of the relevant product market by the Panel, its conclusion that there is a single subsidized product and a single like product cannot stand, and consequently we have reversed the Panel's findings of displacement on that basis. We have explained above that we are unable to complete the analysis regarding the existence of a single or multiple product markets. As we noted earlier and explain more fully below, even though we are unable to complete the analysis on the relevant product market, the particular circumstances in this case are such that we are able to complete—at least to some extent—the analysis of the United States' claims of displacement.

1175. First, the European Union's appeal of the Panel's finding of displacement is limited. The European Union expressly states that it does not request us to "reverse the displacement findings in their entirety".<sup>2573</sup> Specifically, in the event of a reversal of the Panel's single product market finding, the European Union requests the Appellate Body to complete the analysis and find that there is a separate single-aisle LCA market. With respect to the markets for wide-body LCA, the

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<sup>2569</sup>European Union's appellant's submission, para. 320 (quoting Panel Report, para. 7.1791).

<sup>2570</sup>European Union's appellant's submission, para. 317.

<sup>2571</sup>European Union's appellant's submission, para. 386.

<sup>2572</sup>European Union's appellant's submission, para. 386 (referring to Annex III (Displacement Annex), section 2).

<sup>2573</sup>European Union's appellant's submission, para. 376.

European Union recognized that "the evidence is less clear and might support the existence of four or two wide-body LCA product markets."<sup>2574</sup> On this basis, the European Union further requested the Appellate Body to reverse the Panel's findings, in paragraphs 7.1791 and 8.2(b) of its Report, that there was displacement in the LCA markets of Brazil, Mexico, Singapore and Chinese Taipei; to reverse the Panel's finding, in paragraphs 7.1784, 7.1790, and 8.2(c) of its Report, that there is a threat of displacement in the LCA markets of India; to reverse the Panel's finding, in paragraphs 7.1780, 7.1790, and 8.2(b) of its Report, that there was displacement in the LCA markets of Australia, with the exception of the single-aisle LCA market; to reverse the Panel's findings, in paragraphs 7.1781, 7.1790, 7.1791, and 8.2(b) of its Report, that there was displacement in the LCA markets of China and Korea, with the exception of the single-aisle and 200-300 seat LCA (or twin-aisle) markets; and to reverse the Panel's finding, in paragraphs 7.1758 and 8.2(a) of its Report, that there was displacement in the LCA markets of the European Union, with the exception of the single-aisle, 200-300 seat and 300-400 LCA (or twin-aisle) markets.<sup>2575</sup> In other words, the European Union does not seek reversal of the findings of displacement (under the first step of the Panel's two-step approach to analyzing serious prejudice) in the single-aisle, 200-300 seat and 300-400 LCA (or twin-aisle) markets of China, Korea and European Union, and the single-aisle LCA market of Australia. Thus, in its appeal, and more particularly in framing its request for reversal, the European Union acknowledges that there is some displacement in these markets under the first step of the Panel's two-step approach.

1176. Second, the United States and the European Union agree that there is competition between similar models of LCA. Their disagreement is limited to the degree of competition across models and also as between the extremes of Boeing's and Airbus' product ranges. The European Union notes that the displacement could be assessed on the basis of either three or five product markets.<sup>2576</sup> In its appellant's submission, the European Union "accepts that any displacement found under either of the two multiple product-market approaches would constitute properly observed displacement."<sup>2577</sup>

1177. Third, we have before us uncontested evidence of Airbus' and Boeing's volume of sales and market shares for each of the geographic markets at issue. On appeal, the European Union focused on the aggregation of these data for three product markets for each of the geographic markets at issue.

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<sup>2574</sup>European Union's appellant's submission, para. 392.

<sup>2575</sup>European Union's appellant's submission, para. 392.

<sup>2576</sup>European Union's appellant's submission, paras. 371-375.

<sup>2577</sup>European Union's appellant's submission, Annex III (Displacement Annex), para. 6.

The data are derived from data on the Panel record.<sup>2578</sup> While the United States maintains that there is a single LCA product market, it confirmed at the oral hearing that the disaggregated data submitted by the European Union are derived from data that was before the Panel and made it clear that it did not have any objections with respect to the data.

1178. In these circumstances, we consider it possible and appropriate to complete the analysis and examine the claims of displacement on the basis of undisputed evidence regarding three product markets: the single-aisle LCA product market; the twin-aisle LCA product market; and the Very Large Aircraft product market. By proceeding in this manner, we are examining the data from a perspective proposed by the responding party and not rejected by the complaining party. While we are mindful of the scope of our jurisdiction under Article 17.6 of the DSU, we note that one of the functions of the WTO dispute settlement system is the "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member", as reflected in Article 3.3 of the DSU.

1179. We recall that the Panel entertained the United States' claim of displacement on the basis of an assessment of whether there was an observable decline in the sales of Boeing. Thus, we will limit our assessment to the question of whether a decline in the sales of Boeing during the reference period can be observed from the data. This means that there would be no displacement, under the approach put forward by the United States before the Panel, where Boeing's sales increased during the reference period in a particular product market, where Boeing made no sales in a product market throughout the reference period, or where Boeing was the sole supplier in a product market. The latter situation occurred in every geographic market in the Very Large Aircraft product market, because the Boeing 747 was the only product in that market during the reference period. Deliveries of the A380 started subsequent to the reference period.<sup>2579</sup> We also recall that a trend of declining sales must be

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<sup>2578</sup>The European Union explains that "{a}ll of the information set out in this Annex is found in the record, and is appropriately documented and cross-referenced. (European Union's appellant's submission, Annex III (Displacement Annex), para. 4) At the oral hearing, the United States agreed that the information in the Annex is based on evidence that was on the Panel record. The European Union added that "{t}he delivery and market share data are extracted from the Airclaims CASE database, as submitted to the panel as exhibit EC-21. The accuracy of the data source—Airclaims—has never been contested between the Parties. Indeed, both parties derived their market share data from Airclaims and the Panel relied on Airclaims data in its Report". (*Ibid.*)

The Appellate Body has previously found that it is not necessary that data be presented to it in precisely the same form in which it was presented to a panel. The Appellate Body has cautioned, however, that exhibits presenting evidence in a form that differs from the way in which the evidence was presented to the panel are admissible only if: (i) the data presented can be clearly traced to data on the panel record; and (ii) the way in which the data has been converted into the form in which it is presented on appeal can be readily understood. (Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 13)

<sup>2579</sup>The first delivery of the A380 occurred in 2007.

*discernable* from the data and that an end point-to-end point analysis is not sufficient to make out displacement.

(i) *European Union*

1180. The data presented for the three product markets in the European Union is summarized below.

**Table 4.1. Volumes and market shares for three LCA product markets in the European Union: 2001-2006**

	2001		2002		2003		2004		2005		2006	
	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s
<b>Single-aisle LCA</b>												
Airbus	93	62%	83	61%	84	61%	87	59%	84	66%	93	67%
Boeing	58	38%	52	39%	53	39%	60	41%	43	34%	46	33%
<b>Twin-aisle LCA</b>												
Airbus	21	60%	31	74%	14	61%	22	63%	19	79%	23	72%
Boeing	14	40%	11	26%	9	39%	13	36%	5	21%	9	28%
<b>Very Large Aircraft</b>												
Airbus	0	0%	0	0%	0	0%	0	0%	0	0%	0	0
Boeing	9	100%	6	100%	5	100%	4	100%	2	100%	1	100%

Source: European Union's appellant's submission, Annex III (Displacement Annex).

1181. The European Union accepts that there was displacement in the single-aisle and twin-aisle LCA market during the reference period.<sup>2580</sup> Looking at the data above, we note that Boeing's market share in the twin-aisle LCA product market declined between 2001 and 2006. In the single-aisle LCA product market, Boeing's market share remained relatively stable between 2001 and 2004, but declined in 2005 and 2006. Boeing was the sole supplier of Very Large Aircraft throughout the reference period.

1182. Consequently, we find that there was displacement over the reference period in the single-aisle and twin-aisle LCA product markets in the European Union.

<sup>2580</sup>European Union's appellant's submission, para. 383 and Annex III (Displacement Annex), para. 49.



(ii) *Australia***Table 4.2. Volumes and market shares for three LCA product markets in Australia: 2001-2006**

	2001		2002		2003		2004		2005		2006	
	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s
Single-aisle LCA												
Airbus	0	0%	0	0%	0	0%	6	33%	9	50%	6	43%
Boeing	7	100%	27	100%	16	100%	12	67%	9	50%	8	57%
Twin-aisle LCA												
Airbus	0	-	2	100%	4	100%	5	100%	3	100%	0	-
Boeing	0	-	0	0%	0	0%	0	0%	0	0%	0	-
Very Large Aircraft												
Airbus	0	-	0	0%	0	0%	0	-	0	-	0	-
Boeing	0	-	3	100%	3	100%	0	-	0	-	0	-

Source: European Union's appellant's submission, Annex III (Displacement Annex).

1183. We note that the European Union does not contest on appeal that there was displacement in the single-aisle LCA product market during the reference period.<sup>2581</sup> The data above show that Boeing's dominance of the single-aisle LCA product market was eroded by Airbus during the reference period. Although Boeing's market share increased slightly between 2005 and 2006 (from 50% to 57%), its market share remained far below the levels in 2001-2003. Boeing made no sales of twin-aisle aircraft in Australia during the reference period. The absence of any Boeing deliveries of twin-aisle LCA does not support the United States' case which was premised on an observable decline in sales. Boeing was the sole supplier of Very Large Aircraft throughout the reference period.

1184. Therefore, we find that there was displacement during the reference period in the single-aisle LCA product market in Australia.

<sup>2581</sup>European Union's appellant's submission, para. 383 and Annex III (Displacement Annex), para. 35.

(iii) *China*

**Table 4.3. Volumes and market shares for three LCA product markets in China: 2001-2006**

	2001		2002		2003		2004		2005		2006	
	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s
Single-aisle LCA												
Airbus	9	33%	7	21%	19	41%	33	63%	52	51%	60	50%
Boeing	18	67%	27	79%	27	59%	19	37%	49	49%	60	50%
Twin-aisle LCA												
Airbus	0	0%	0	0%	3	100%	2	67%	4	100%	16	89%
Boeing	4	100%	2	100%	0	0%	1	33%	0	0%	2	11%
Very Large Aircraft												
Airbus	0	-	0	0%	0	-	0	-	0	0%	0	0%
Boeing	0	-	2	100%	0	-	0	-	1	100%	4	100%

Source: European Union's appellant's submission, Annex III (Displacement Annex).

1185. The European Union accepts that the evidence shows displacement in the single-aisle and twin-aisle LCA product markets.<sup>2582</sup> Indeed, the data show Boeing losing market share to Airbus in the single-aisle and twin-aisle LCA markets. Boeing was the sole supplier of Very Large Aircraft throughout the reference period.

1186. Accordingly, we find that there was displacement during the reference period in the single-aisle and twin-aisle LCA product markets in China.

(iv) *Other third country markets – Brazil, Korea, Mexico, Singapore, and Chinese Taipei*

1187. The Panel observed that in the markets of Brazil, Korea, Mexico, Singapore, and Chinese Taipei, "sales were sporadic and volumes were relatively small, making identification of any trends more difficult."<sup>2583</sup> The Panel, however, stated that "as Airbus was the only other competitor in these markets over the period we are considering, it follows that any market share achieved by Airbus was at the expense of Boeing."<sup>2584</sup> On this basis, the Panel concluded "that the evidence demonstrates that United States' exports of LCA were displaced from these markets by sales of Airbus LCA over the period we examined as well."<sup>2585</sup>

1188. The flaws in the Panel's assessment of displacement in these geographic markets go beyond the errors that resulted from its failure to objectively determine the product market. In subsection 1(b), we have explained that, under the Panel's two-step approach, the analysis of

<sup>2582</sup>European Union's appellant's submission, para. 383 and Annex III (Displacement Annex), para. 42.

<sup>2583</sup>Panel Report, para. 7.1791. (footnote omitted)

<sup>2584</sup>Panel Report, para. 7.1791.

<sup>2585</sup>Panel Report, para. 7.1791.

displacement required an assessment of trends over the entire reference period. No such assessment of trends is evident from the Panel's analysis. In fact, we do not see how the Panel could have made an assessment of trends on the basis of only two data points, corresponding to the market share of Airbus in 2001 and 2005, the end-points of the reference period proposed by the United States, also in view of the Panel's determination that the reference period would end in 2006.<sup>2586</sup> For 2006, the Panel relied on the data submitted by the European Union disaggregated into product markets and used them in aggregated form. Moreover, having recognized in respect of the markets of Brazil, Korea, Mexico, Singapore, and Chinese Taipei that "sales were sporadic and volumes relatively small, making identification of any trends more difficult", the Panel went on to state that "as Airbus was the only other competitor in these markets over the period we are considering, it follows that any market share achieved by Airbus was at the expense of Boeing."<sup>2587</sup> Such a general statement that any sale to Airbus is at the expense of Boeing does not provide any analysis of market share developments, much less identify clear trends over the reference period in the relevant geographic market. With the same considerations that we outlined above<sup>2588</sup> in mind, we turn to examine the data for these geographic markets, proceeding on the undisputed basis that there is competition within three product markets.

#### Brazil

**Table 4.4. Volumes and market shares for three LCA product markets in Brazil: 2001-2006**

	2001		2002		2003		2004		2005		2006	
	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s
<b>Single-aisle LCA</b>												
Airbus	9	56%	16	67%	0	-	0	0%	5	100%	9	43%
Boeing	7	44%	8	33%	0	-	1	100%	0	0%	12	57%
<b>Twin-aisle LCA</b>												
Airbus	0	0%	4	100%	0	-	0	-	1	50%	0	-
Boeing	2	100%	0	0%	0	-	0	-	1	50%	0	-
<b>Very Large Aircraft</b>												
Airbus	0	-	0	-	0	-	0	-	0	-	0	-
Boeing	0	-	0	-	0	-	0	-	0	-	0	-

Source: European Union's appellant's submission, Annex III (Displacement Annex).

1189. We do not consider that the volume and market share data based on three product markets sufficiently establish that Boeing's exports were displaced from the Brazilian market. Boeing's market share in the single-aisle LCA product market decreased in 2002; there were no sales in 2003; Boeing took the entire single-aisle market in 2004, and Airbus did the same in 2005. In 2006, Boeing's sales

<sup>2586</sup>As we observed above, an examination of data at the end points of a reference period is insufficient for an assessment of displacement.

<sup>2587</sup>Panel Report, para. 7.1791.

<sup>2588</sup>See *supra*, paras. 1176 and 1179.

in single-aisle market increased again to 57%. The twin-aisle LCA product market shows Boeing and Airbus each taking 100% of the market in 2001 and 2002, respectively, and then splitting it 50%-50% in 2005, with no sales in 2003, 2004, and 2006. We do not believe that this data sufficiently show that there is a trend of Boeing losing market share to Airbus in Brazil for the twin-aisle LCA product market. There were no deliveries of Very Large Aircraft by either producer throughout the reference period.

1190. Thus, we find that the data do not establish that there was displacement in the Brazilian market during the reference period.

### Korea

**Table 4.5. Volumes and market shares for three LCA product markets in Korea: 2001-2006**

	2001		2002		2003		2004		2005		2006	
	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s
<b>Single-aisle LCA</b>												
Airbus	1	11%	3	33%	2	33%	4	50%	2	67%	3	60%
Boeing	8	89%	6	67%	4	67%	4	50%	1	33%	2	40%
<b>Twin-aisle LCA</b>												
Airbus	2	33%	2	33%	1	50%	1	50%	2	40%	2	50%
Boeing	4	66%	4	66%	1	50%	1	50%	3	60%	2	50%
<b>Very Large Aircraft</b>												
Airbus	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Boeing	3	100%	3	100%	3	100%	3	100%	1	100%	3	100%

Source: European Union's appellant's submission, Annex III (Displacement Annex).

1191. The European Union concedes that the data would support a finding of displacement for single-aisle and twin-aisle LCA product markets.<sup>2589</sup> The single-aisle LCA product market data show that Boeing lost market share to Airbus throughout the reference period. In the twin-aisle LCA product market, the two-third to one-third split of the Korean market in favour of Boeing in the initial two years becomes a 50%-50% split of the market in 2003, 2004, and 2006. Boeing was the sole supplier of Very Large Aircraft throughout the reference period.

1192. Therefore, we find that there was displacement during the reference period in the single-aisle and twin-aisle LCA product markets in Korea.

<sup>2589</sup> European Union's appellant's submission, para. 383 and Annex III (Displacement Annex), para. 46.

Mexico**Table 4.6. Volumes and market shares for three LCA product markets in Mexico: 2001-2006**

	2001		2002		2003		2004		2005		2006	
	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s
<b>Single-aisle LCA</b>												
Airbus	2	29%	4	100%	4	40%	4	31%	7	50%	3	25%
Boeing	5	71%	0	0%	6	60%	9	69%	7	50%	9	75%
<b>Twin-aisle LCA</b>												
Airbus	0	-	0	-	0	-	0	-	0	-	0	-
Boeing	0	-	0	-	0	-	0	-	0	-	2	100%
<b>Very Large Aircraft</b>												
Airbus	0	-	0	-	0	-	0	-	0	-	0	-
Boeing	0	-	0	-	0	-	0	-	0	-	0	-

Source: European Union's appellant's submission, Annex III (Displacement Annex).

1193. The data show deliveries by Airbus only in the single-aisle LCA product market. In that product market, however, Boeing's share remained relatively stable throughout the reference period and, therefore, the data do not support the United States' allegation of displacement, which was based on an observable decline in Boeing's market share. In 2006, Boeing made deliveries in the twin-aisle LCA product market. There are no deliveries by either producer of Very Large Aircraft throughout the reference period.

1194. In the light of the above, we find that the data do not establish that there was displacement in the Mexican market during the reference period.

Singapore**Table 4.7. Volumes and markets share for three LCA product markets in Singapore: 2001-2006**

	2001		2002		2003		2004		2005		2006	
	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s
<b>Single-aisle LCA</b>												
Airbus	2	100%	1	100%	1	100%	8	100%	11	100%	6	100%
Boeing	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
<b>Twin-aisle LCA</b>												
Airbus	0	0%	0	0%	4	31%	3	43%	0	0%	0	0%
Boeing	12	100%	12	100%	9	69%	4	57%	3	100%	6	100%
<b>Very Large Aircraft</b>												
Airbus	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Boeing	5	100%	1	100%	2	100%	2	100%	1	100%	1	100%

Source: European Union's appellant's submission, Annex III (Displacement Annex).

1195. The data show that there were no sales of Boeing in the single-aisle LCA product market during the reference period. Boeing was the sole supplier in the twin-aisle LCA product market in

2001 and 2002. Airbus made deliveries in 2003 and 2004, reducing Boeing's market share during those years to 69% and 57%. However, Boeing was again the sole supplier in 2005 and 2006 and retained its dominance in the twin-aisle LCA product market. Boeing was the sole supplier of Very Large Aircraft throughout the reference period. The data show that Airbus was dominant in the single-aisle LCA product market, that Boeing was dominant in the twin-aisle LCA and Very Large Aircraft product markets, and that their respective shares remained stable over the reference period.

1196. Consequently, we find that the data do not establish that there was displacement in the Singaporean market during the reference period.

#### Chinese Taipei

**Table 4.8. Volumes and market shares for three LCA product markets in Chinese Taipei: 2001-2006**

	2001		2002		2003		2004		2005		2006	
	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s
<b>Single-aisle LCA</b>												
Airbus	0	0%	0	0%	0	-	0	-	0	-	0	-
Boeing	3	100%	2	100%	0	-	0	-	0	-	0	-
<b>Twin-aisle LCA</b>												
Airbus	5	100%	0	-	3	100%	7	100%	9	82%	5	71%
Boeing	0	0%	0	-	0	0%	0	0%	2	18%	2	29%
<b>Very Large Aircraft</b>												
Airbus	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
Boeing	5	100%	4	100%	3	100%	4	100%	5	100%	2	100%

Source: European Union's appellant's submission, Annex III (Displacement Annex).

1197. Boeing was the sole supplier in the single-aisle LCA product market. Airbus dominated the twin-aisle LCA product market, making 100% of the deliveries between 2001 and 2004, when Boeing started to penetrate that market. Boeing made 18% of deliveries in 2005 and 29% in 2006, but Airbus retained more than two-thirds of the market in both years. Boeing was the sole supplier of Very Large Aircraft throughout the reference period. In these circumstances, the data do not support the United States' case of displacement, which was based on the allegation that Boeing's market share decreased during the reference period.

1198. Accordingly, we find that the data do not establish that there was displacement in the Chinese Taipei market during the reference period.

(v) *India*

1199. The United States made a claim of threat of displacement in relation to the Indian market. The Panel recalled its earlier observation that it did not consider orders data to be "persuasive evidence of current displacement", but added that "orders are an indicator of likely future deliveries, albeit imperfect".<sup>2590</sup> The Panel therefore decided it would "review the {orders} information presented as an indicator of threat of future displacement or impedance of exports from the Indian market"<sup>2591</sup> and found that the data on orders for the period 2001 to 2005 presented by the United States demonstrated that Airbus gained most of the orders for LCA in the Indian market during that period.<sup>2592</sup>

**Table 4.9. Volume and market share data based on quantity of LCA ordered for three LCA product markets in India: 2001-2006**

	2001		2002		2003		2004		2005		2006	
	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s	units	m/s
<b>Single-aisle LCA</b>												
Airbus	0	-	0	-	0	0%	2	100%	196	83%	56	74%
Boeing	0	-	0	-	1	100%	0	0%	39	17%	20	26%
<b>Twin-aisle LCA</b>												
Airbus	0	-	0	-	0	-	0	-	20	25%	5	33%
Boeing	0	-	0	-	0	-	0	-	60	75%	10	66%
<b>Very Large Aircraft</b>												
Airbus	0	-	0	0%	0	-	0	-	5	83%	0	0%
Boeing	0	-	2	100%	0	-	0	-	1	17%	4	100%

Source: European Union's appellant's submission, Annex III (Displacement Annex).

1200. Neither company won orders in the single-aisle LCA product market in 2001 and 2002. Boeing won 100% of the market in 2003, but this was with a single order. Airbus dominated that product market as of 2004, capturing the orders for two aircraft placed during the period. Nevertheless, the data do not provide a basis for the United States' case of threat of displacement based on Boeing's declining market share given that Boeing had one order for a single aircraft between 2001 and 2004. If anything, Boeing was gaining market share in 2005 and 2006 (from 0% in 2004 to 17% in 2005 and 26% in 2006). The twin-aisle LCA product market shows no orders between 2001 and 2004. Boeing captured a majority of the orders in 2005 and 2006, but its market share declined from 75% to 66%. This decline in market share in a period of only two years does not provide a sufficient basis for a finding of threat of displacement.

<sup>2590</sup>Panel Report, para. 7.1783. (footnote omitted)

<sup>2591</sup>Panel Report, para. 7.1783.

<sup>2592</sup>Panel Report, para. 7.1784.

1201. Because the data concern orders, the data include sales by Airbus in the Very Large Aircraft product market. Boeing had 100% of the two Very Large Aircraft ordered in 2002. The number of total aircraft ordered went up to six in 2005 and Airbus won 83% of these orders. However, Boeing won 100% of the four aircraft ordered in 2006, with the highest volume of aircraft ordered it achieved during the reference period. In these circumstances, the data do not support a finding of displacement in the Very Large Aircraft product market.

1202. Therefore, we find that the uncontested evidence does not establish that there was a threat of displacement in the Indian market during the reference period.<sup>2593</sup>

(vi) *Summary of conclusions*

1203. In respect of the first step of the Panel's two-step approach<sup>2594</sup>, we find, on the basis of uncontested evidence on the Panel record, that there was displacement under Article 6.3(a) and under Article 6.3(b) of the *SCM Agreement* during the reference period:

- (a) in the single-aisle and twin-aisle LCA product markets in the European Union;
- (b) in the single-aisle LCA product market in Australia;
- (c) in the single-aisle and twin-aisle LCA product markets in China; and
- (d) in the single-aisle and twin-aisle LCA product markets in Korea.

1204. We find that the uncontested evidence does not establish displacement over the reference period in Brazil, Mexico, Singapore, and Chinese Taipei. In addition, we find that the uncontested evidence does not establish threat of displacement over the reference period in India.

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<sup>2593</sup>In the light of our finding, we need not examine the European Union's claim that the Panel erred by failing to consider delivery data for the end of 2006 or the beginning of 2007. (European Union's appellant's submission, para. 389)

<sup>2594</sup>These findings are in paragraphs 7.1758, 7.1790, and 7.1791.



1205. As noted above, one Member on the Division takes the position that, in the absence of a determination of the relevant product market(s), the Appellate Body cannot complete the analysis on displacement. This Member, therefore, does not agree with the above findings on displacement. However, this Member agrees with the legal interpretation of the concept of displacement in Article 6.3(a) and (b) of the *SCM Agreement*, as set out above in paragraphs 1159 and following of this Report, and agrees that the analysis below regarding the question of whether the displacement is the effect of the challenged subsidies, as set out below in paragraphs 1229 and following of this Report, follows logically from the view of the other Members on the Division with respect to the existence of displacement.

1206. We review, in section IX.D below, the second step of the Panel's two-step analysis, that is, the Panel's finding that the displacement is the *effect* of the challenged subsidies, under Article 6.3(a) and (b) of the *SCM Agreement*.

## 2. Lost Sales

1207. We move now to the European Union's appeal of the Panel's finding of lost sales under the first step of the Panel's two-step approach. A summary of the Panel's findings is provided in subsection (a). We examine the European Union's allegations of error in subsection (b).

### (a) The Panel's findings

1208. The United States presented "anecdotal evidence"<sup>2595</sup> allegedly showing that Boeing had lost several sales campaigns to Airbus by virtue of Airbus' aggressive pricing practices.<sup>2596</sup> In particular, the United States argued that Airbus had captured sales to Air Asia, Air Berlin, Czech Airlines, easyJet, Emirates Airlines, Iberia, Qantas, Singapore Airlines, South African Airways, and Thai Airways.<sup>2597</sup> The evidence submitted by the United States to support this contention consisted

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<sup>2595</sup>Panel Report, para. 7.1800.

<sup>2596</sup>The United States also provided this evidence in support of its claim of significant price undercutting.

<sup>2597</sup>Panel Report, para. 7.1801.

primarily of media reports<sup>2598</sup>, press releases<sup>2599</sup>, and public disclosures by certain airlines<sup>2600</sup> allegedly suggesting that discounts offered by Airbus in competitive bids against Boeing were the main reason why Boeing had lost those sales campaigns.

1209. The European Communities did not dispute that in the sales campaigns identified by the United States, Boeing "lost" the sales in question, in the sense that it did not succeed in selling its LCA to the customer in question.<sup>2601</sup> However, the European Communities argued that non-price factors such as Boeing's mismanagement of customer relationships<sup>2602</sup>, political considerations<sup>2603</sup>, technical specifications<sup>2604</sup>, and fleet and route structure<sup>2605</sup> were responsible for Boeing's failure to

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<sup>2598</sup>For example, easyJet's CEO is quoted as saying that speculation about a 60% discount over list prices offered by Airbus "is 'a bit ambitious, but not far off.'" (Panel Report, para. 7.1803 (quoting C. Baker, "Easy does it", *Airline Business*, 1 December 2002 (Panel Exhibit US-408))) Media reports also suggested that Airbus had trumped Boeing for the Air Berlin campaign "by offering steep discounts and other financial guarantees that {Boeing} was unwilling to match." (*Ibid.*, para. 7.1807 (quoting "Airbus to Beat Boeing Once Again", *Wall Street Journal*, 8 November 2004 (Panel Exhibit US-412))) A Czech Airlines executive is quoted as noting that although both offers met the company's specifications, "Airbus offered the better price". (*Ibid.*, para. 7.1810 (quoting "Ceske Aeroline: Order for Jets Worth CZK10B-CZK12B", *Oster Dow Jones Commodity Wire*, 15 October 2004 (Panel Exhibit US-424))) For the Air Asia campaign, the United States produced a media report suggesting that Boeing was not prepared to match the price offered by Airbus. (See *ibid.*, para. 7.1814 (quoting "Airbus to Beat Boeing Once Again", *Wall Street Journal*, 8 November 2004 (Panel Exhibit US-412))) Similarly, the United States presented media reports suggesting Airbus had offered "special price concessions", "extra credits", and payments to "phase out" existing aircraft to win the Thai Airways bid. (*Ibid.*, para. 7.1825)

<sup>2599</sup>For the Iberia campaign, the United States produced a press release announcing that the company was "taking advantage of exceptional terms" offered by Airbus. (Panel Report, para. 7.1818 (quoting Iberia press release, "*Iberia opta por Airbus para la renovación de su flota B-747*", 30 January 2003 (Panel Exhibit US-415)))

<sup>2600</sup>The United States presented easyJet's 2005 annual report indicating a 56% discount over the A319 list prices. (See Panel Report, para. 7.1804) Similarly, the 2002 Group Audited Results of South African Airways described the LCA bought from Airbus as "aggressively priced". (*Ibid.*, para. 7.1822 (quoting South African Airways, "Group Audited Results, Year Ended 31 March 2002" (Panel Exhibit US-417)))

<sup>2601</sup>Panel Report, para. 7.1802.

<sup>2602</sup>The European Communities submitted that Air Berlin officials "were unhappy with Boeing's business and production practices". (Panel Report, para. 7.1809 (referring to European Communities' first written submission to the Panel, para. 1903)) Similarly, the European Communities argued that Boeing lost the Air Asia campaign due to its "arrogant" and "inflexible" negotiating positions. (*Ibid.*, para. 7.1815 (quoting "Platt: Boeing will do what it takes", *Seattle Post-Intelligencer Aerospace Reporter*, 15 June 2005 (Panel Exhibit EC-464)))

<sup>2603</sup>The European Communities argued that the Czech Airlines sale was won by Airbus due to a dispute between the Czech Government and Boeing over the state-owned company Aero Vodochody. (See Panel Report, para. 7.1811)

<sup>2604</sup>The European Communities posited that Emirates Airlines, Qantas, and Singapore Airlines each ordered the A380 not because of its price, but because it offered unique advantages in seating capacity, range, and operating economics that were not available from any competing Boeing LCA at that time. (See Panel Report, para. 7.1829)

<sup>2605</sup>The European Communities suggested that performance advantages of the Airbus A340 at hot, high-altitude airports were a distinct advantage in the Iberia and South African Airways campaigns. (Panel Report, para. 7.1819 (referring to European Communities' first written submission to the Panel, para. 2095) and para. 7.1823) The European Communities also suggested that "fleet commonality" was also perceived as an important factor by Iberia. (*Ibid.*, para. 7.1819 (referring to European Communities' first written submission to the Panel, para. 2096))

win those sales campaigns. It was the European Communities' contention that these factors demonstrate that the lost sales could not be considered to be an effect of the subsidies.<sup>2606</sup>

1210. In the Panel's view, the evidence before it suggested that price was: "the determining factor"<sup>2607</sup> in the easyJet campaign; "a crucial element"<sup>2608</sup> for Air Berlin; "a critical consideration"<sup>2609</sup> for Air Asia; and "an important element"<sup>2610</sup> in the Iberia campaign. The Panel also found that price played a "significant role" in the Emirates Airlines, Qantas, Singapore Airlines, and South African Airways campaigns.<sup>2611</sup> Although the Panel acknowledged that Czech Airlines "was not well inclined towards Boeing", it noted that the evidence indicated that Airbus did offer the better price.<sup>2612</sup> As regards the Thai Airways campaign, the Panel considered that, at the time of the sale, the Airbus A340-500/600 was the only LCA in production that could meet Thai Airways' operational needs.<sup>2613</sup>

1211. The Panel expressed reservations as to whether the "anecdotal evidence" before it provided an appropriate evidentiary basis to support a finding of significant price undercutting under Article 6.3(c) of the *SCM Agreement*.<sup>2614</sup> This is because such evidence consisted mostly of offer prices, rather than actual prices. Moreover, while recognizing that price—in the sense of the overall value of the offer to the customer's business—"remain{ed} one of the, if not the only, determinative factors in the customer's decision"<sup>2615</sup>, the Panel did not consider that public statements reflecting the calculation of the relative value of competing offers provided a sufficient basis for an actual comparison of prices.

1212. The Panel found that it could not, on the basis of the evidence before it, draw any conclusions with respect to significant price undercutting within the meaning of Article 6.3(c).<sup>2616</sup> However, the Panel observed that "this does not mean that there were not significant lost sales".<sup>2617</sup> The Panel went on to state its view that "it is clear that Boeing lost sales to Airbus involving purchases by easyJet, Air Berlin, Czech Airlines, Air Asia, Iberia, South African Airways, Thai Airways International, Singapore Airlines, Emirates Airlines, and Qantas."<sup>2618</sup> The Panel then turned to the issue of

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<sup>2606</sup>Panel Report, para. 7.1802.

<sup>2607</sup>Panel Report, para. 7.1806.

<sup>2608</sup>Panel Report, para. 7.1809.

<sup>2609</sup>Panel Report, para. 7.1817.

<sup>2610</sup>Panel Report, para. 7.1821.

<sup>2611</sup>Panel Report, paras. 7.1824 and 7.1832.

<sup>2612</sup>Panel Report, para. 7.1813.

<sup>2613</sup>Panel Report, para. 7.1827.

<sup>2614</sup>Panel Report, para. 7.1833.

<sup>2615</sup>Panel Report, para. 7.1839.

<sup>2616</sup>Panel Report, para. 7.1840.

<sup>2617</sup>Panel Report, para. 7.1845.

<sup>2618</sup>Panel Report, para. 7.1845.

significance and found that, in the light of the number of aircraft and the dollar amounts involved in the sales, their strategic importance, the learning effects and economies of scale they generate, and the advantages of incumbent supplier provided by the sales, these lost sales were significant.<sup>2619</sup>

(b) Did the Panel err in finding lost sales in relation to the sale of A380 LCA to Emirates Airlines?

(i) What are "lost sales"?

1213. Article 6.3(c) of the *SCM Agreement* establishes that serious prejudice within the meaning of Article 5(c) of the *SCM Agreement* may arise in any case where "the effect of the subsidy" is "a significant price undercutting ... or significant price suppression, price depression or lost sales in the same market." Similarly to displacement under Article 6.3(a) and (b), this is the first time that the Appellate Body will examine claims of "lost sales" under Article 6.3(c) of the *SCM Agreement*.

1214. We consider that a sale that is "lost" is one that a supplier "failed to obtain".<sup>2620</sup> We further understand lost sales to be a relational concept that includes consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales.<sup>2621</sup> In *US – Upland Cotton*, the Appellate Body held that the phrase "in the same market" applied to all four situations set forth in Article 6.3(c), including "lost sales".<sup>2622</sup> According to the Appellate Body, the subsidized product and the like product of the complaining Member will be in the same market "if they were engaged in actual or potential competition in that market."<sup>2623</sup> Thus, sales can be lost "in the same market" within the meaning of Article 6.3(c) if the subsidized product and the like product are competing products in the same product market.

1215. The term "significant" in the second clause of Article 6.3(c) appears before the terms "price suppression, price depression or lost sales".<sup>2624</sup> We read the term "significant" as qualifying all three

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<sup>2619</sup>Panel Report, para. 7.1845. (footnote omitted) The Panel had earlier concluded that the term "significant" applies "to each of the situations" described in Article 6.3(c) of the *SCM Agreement*, including lost sales. (*Ibid.*, para. 7.1796)

<sup>2620</sup>*The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 1632.

<sup>2621</sup>The United States asserted before the Panel that a "'lost' sale is any sale that is captured by the subsidized product instead of the product of the complaining Member." (Panel Report, para. 7.1797 (quoting United States' first written submission to the Panel, para. 776))

<sup>2622</sup>Appellate Body Report, *US – Upland Cotton*, para. 407.

<sup>2623</sup>Appellate Body Report, *US – Upland Cotton*, para. 408.

<sup>2624</sup>The term "significant" also appears in the first clause of Article 6.3(c), which describes "price undercutting".

situations. In other words, a complaining Member invoking Article 6.3(c) must show that the alleged "lost sales" are "significant".<sup>2625</sup>

1216. As with the other market phenomena referred to in Article 6.3 of the *SCM Agreement*, the lost sales must be the "effect" of the challenged subsidy. Thus, like the analysis of displacement under Article 6.3(a) and (b), we believe that a useful and appropriate approach to assessing whether lost sales are the effect of the challenged subsidy is through a counterfactual analysis. This would involve a comparison of the sales actually made by the competing firm(s) of the complaining Member with a counterfactual scenario in which the firm(s) of the respondent Member would not have received the challenged subsidies. There would be lost sales where the counterfactual scenario shows that sales won by the subsidized firm(s) of the respondent Member would have been made instead by the competing firm(s) of the complaining Member, thus revealing the effect of the challenged subsidies. It is not impermissible to assess lost sales under Article 6.3(c) of the *SCM Agreement* using a two-step approach like the one adopted by the Panel. However, as we have discussed above<sup>2626</sup>, any conclusions reached under the first step are preliminary because they will show only who lost and who made the sales. A definitive determination that the lost sales are the effect of the challenged subsidy within the meaning of Article 6.3(c) must await completion of the second step of the analysis.

1217. The United States directed its allegations of lost sales in this case against specific sales campaigns and the Panel focused its analysis on those sales campaigns. The European Union has not challenged the Panel's approach on appeal. We agree that an assessment of lost sales focused on an examination of specific sales campaigns may be appropriate given the particular characteristics of a market.<sup>2627</sup> At the same time, we note that Article 6.3(c) is concerned with lost sales "in the same market". It will sometimes be necessary to look beyond individual sales campaigns fully to understand the competitive dynamics that are at play in a particular market. Thus, an approach in which sales are aggregated by supplier or by customer, or on a country-wide or global basis, rather than examined individually, is also permissible.

1218. We acknowledge that when looked at from this broader, market-wide perspective, there could be some overlap between the concept of lost sales and the concepts of displacement and impedance in Article 6.3(a) and (b) of the *SCM Agreement*. Although the concepts of displacement and impedance

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<sup>2625</sup> At the oral hearing, both participants agreed that the lost sales, within the meaning of Article 6.3(c) of the *SCM Agreement*, must be "significant".

<sup>2626</sup> See section IX.A of this Report.

<sup>2627</sup> We recognize that Article 6.3(c) of the *SCM Agreement* refers to "lost sales" in the plural. While the United States' allegations of lost sales in this case related to individual sales campaigns, each of these campaigns involved the sale of a number of LCA. We are therefore in this case not faced with the question whether Article 6.3(c) can be invoked in relation to an allegedly lost sale of a single unit of a product.

are presented from the perspective of imports or exports under subparagraphs (a) and (b) of Article 6.3, those imports or exports are a function of the firms' sales. At the same time, we see some distinctions between the concepts. First, the assessment of displacement or impedance under subparagraphs (a) and (b) of Article 6.3 has a well-defined geographic focus. By contrast, the reference to the "same market" in subparagraph (c) allows more flexibility in defining the relevant market, which can include the world market.<sup>2628</sup> Second, the requirement in Article 6.3(c) that the lost sales be "significant" implies that the assessment can have quantitative and qualitative dimensions. The assessment of displacement and impedance under Article 6.3(a) and (b) is primarily quantitative in nature.

1219. The Panel in this case referred to several factors that it considered relevant to the question of whether the lost sales were significant:

In our view, it is clear that Boeing lost sales to Airbus involving purchases by easyJet, Air Berlin, Czech Airlines, Air Asia, Iberia, South African Airways, Thai Airways International, Singapore Airlines, Emirates Airlines, and Qantas. Moreover, it is apparent to us that if winning a particular sale is of "strategic importance" to Airbus, as the European Communities asserts with respect to the easyJet campaign discussed above, the loss of that sale to Boeing is similarly important, and can justifiably be considered a significant lost sale. In addition, lost sales are important to the extent that they delay a manufacturer's ability to benefit from the important learning effects and economies of scale in this industry, and thus have a significance beyond their direct revenue effects. Moreover, both parties recognize the advantages to being the incumbent supplier with a given customer with respect to subsequent purchases, which also adds to the significance of lost sales. While it is true that a manufacturer may be able to recoup some of these disadvantages by finding another customer to take advantage of delivery slots, this does not, in our view, detract from the significance of a lost sale. Given the number of aircraft and the dollar amounts involved in

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<sup>2628</sup> As the Appellate Body explained in *US – Upland Cotton*:

The only express qualification on the type of "market" referred to in Article 6.3(c) is that it must be "the same" market. Aside from this qualification ..., Article 6.3(c) imposes no explicit geographical limitation on the scope of the relevant market. This contrasts with the other paragraphs of Article 6.3... We agree with the Panel that this difference may indicate that the drafters did not intend to confine, *a priori*, the market examined under Article 6.3(c) to any particular area. Thus, the ordinary meaning of the word "market" in Article 6.3(c), when read in the context of the other paragraphs of Article 6.3, neither requires nor excludes the possibility of a national market or a world market.

(Appellate Body Report, *US – Upland Cotton*, para. 406 (footnotes omitted))

those sales, as well as the considerations just described, we conclude that these lost sales are significant.<sup>2629</sup> (footnotes omitted)

Neither participant has challenged the criteria articulated by the Panel in its assessment of significance or the way in which the Panel applied them.<sup>2630</sup>

1220. To summarize, we consider that, under Article 6.3(c), "lost sales" are sales that suppliers of the complaining Member "failed to obtain" and that instead were won by suppliers of the respondent Member. It is a relational concept and its assessment requires consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales. The assessment can focus on a specific sales campaign when such an approach is appropriate given the particular characteristics of the market or it may look more broadly at aggregate sales in the market. The complainant must show that the lost sales are significant to succeed in its claim. Where lost sales are assessed under a two-step approach such as the one adopted by the Panel in this case, the finding of lost sales in the first step is necessarily preliminary and of limited significance in coming to a conclusion under Article 6.3(c). Similarly to the phenomena of displacement under Article 6.3(a) and (b), a definitive determination under Article 6.3(c) must await consideration of whether such lost sales are the effect of the challenged subsidy. While a two-step approach to the assessment of lost sales is permissible, in our view, the most appropriate approach to assess whether lost sales are the *effect* of the challenged subsidy is through a unitary counterfactual analysis. This would involve a comparison of the sales actually made by the competing firm(s) of the complaining Member with a counterfactual scenario in which the firm(s) of the respondent Member would not have received the challenged subsidies. There would be lost sales where the counterfactual analysis shows that, in the absence of the challenged subsidy, sales won by the subsidized firm(s) of the respondent Member would have been made instead by the competing firm(s) of the complaining Member.

- (ii) *Do the sales of the A380 to Emirates Airlines constitute "lost sales"?*

1221. The European Union does not appeal the Panel's interpretation of lost sales under its two-step approach to assessing the United States' claim under Article 6.3(c) of the *SCM Agreement*. Instead, the European Union challenges the Panel's application of Article 6.3(c) and the Panel's assessment of the evidence under Article 11 of the DSU. We turn to the specific allegations raised by the European Union below. Our review proceeds on the basis of the two-step approach adopted by the

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<sup>2629</sup>Panel Report, para. 7.1845.

<sup>2630</sup>European Union's and United States' responses to questioning at the oral hearing.

Panel under Article 6.3(c) and, at this stage, is concerned exclusively with the Panel's finding of lost sales under the first step.

1222. According to the European Union, the Panel erred in the application of Article 6.3(c) of the *SCM Agreement* because it failed to "make explicit findings whether Emirates would have ordered *any* Boeing LCA if it had not ordered the A380 in 2000".<sup>2631</sup> The European Union does not contest that Airbus won this particular sales campaign involving the A380. The focus of the European Union's claim is on the alleged lack of findings as to whether Boeing would have secured the order from Emirates Airlines had the airline not purchased the A380. At the oral hearing, the European Union asserted that Boeing failed to "turn up" for the sales campaign and thus could not have lost the sales.

1223. We find it difficult to reconcile the European Union's argument with the Panel's findings as to the conditions of competition in the LCA industry. The Panel found that airlines consider the LCA of both Airbus and Boeing, even when an airline does not formally request offers from both manufacturers or where one of the two does not present an offer. It explained that:

Given the importance of LCA costs to the customers' successful operations, we cannot accept the implication that customers knowledgeable about the market would not consider the competitive products available from the two producers in most cases, even if formal offers are neither requested nor made in a particular instance.<sup>2632</sup>

This finding has not been appealed by the European Union. Given the conditions of competition in the LCA industry, it was not necessary for Boeing to have made a formal offer to Emirates Airlines—or "turn up" to use the European Union's expression—for the sales to qualify as sales that Boeing "failed to obtain". As the Panel explained, even in the absence of a formal offer from Boeing, Emirates could be expected to have considered the products manufactured by Boeing before making its purchase decision. We do not understand the European Union to have argued that Boeing would not have had the production capacity to fill the order and offer a 747.

1224. Turning to the European Union's allegation that the Panel acted inconsistently with Article 11 of the DSU, we note that the European Union faults the Panel for "failing to address and reasonably explain"<sup>2633</sup>: (i) evidence that Emirates Airlines would not have purchased competing Boeing aircraft;

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<sup>2631</sup>European Union's appellant's submission, para. 588. (original emphasis)

<sup>2632</sup>Panel Report, para. 7.1722.

<sup>2633</sup>European Union's appellant's submission, para. 597.



and (ii) evidence that Boeing was not interested in launching a competitor to the A380 at the time of the Emirates sales campaign.<sup>2634</sup>

1225. As noted elsewhere in this Report, Article 11 of the DSU requires a panel, in the discharge of its responsibilities under the DSU, to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case". The duty to make an "objective assessment" generally requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."<sup>2635</sup> Within these parameters, it is generally "within the discretion of the Panel to decide which evidence it chooses to utilize in making findings"<sup>2636</sup>, and panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties".<sup>2637</sup>

1226. The European Union's claim under Article 11 of the DSU focuses on the timing of Boeing's decision to market the 747-X. The underlying premise of the European Union's argument is that the A380 would only compete against the 747-X and not with other versions of the 747.<sup>2638</sup> In other words, the European Union's argument is predicated upon its position that five product markets exist and that the A380 is not "like" and does not compete with the other versions of the 747. As noted

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<sup>2634</sup>European Union's appellant's submission, para. 597.

<sup>2635</sup>Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185 (referring to Appellate Body Report, *EC – Hormones*, paras. 132 and 133). See also Appellate Body Report, *Japan – Apples*, para. 221; Appellate Body Report, *Australia – Salmon*, para. 266; Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *EC – Selected Customs Matters*, para. 258; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 125; Appellate Body Report, *Japan – Agricultural Products II*, paras. 141 and 142; Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 161 and 162; Appellate Body Report, *Korea – Dairy*, para. 138; Appellate Body Report, *US – Carbon Steel*, para. 142; Appellate Body Report, *US – Gambling*, para. 363; and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 313.

<sup>2636</sup>Appellate Body Report, *US – Carbon Steel*, para. 142 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

<sup>2637</sup>Appellate Body Report, *Australia – Salmon*, para. 267.

<sup>2638</sup>The United States argues that "{f}or the European Union's argument to be relevant, however, it would have had to demonstrate that the 747-X is the only aircraft that Emirates would have considered if the A380 were not available". It further notes that "the Panel found that airlines consider all available aircraft, and the evidence shows that Emirates itself purchased other Boeing aircraft to fulfil its needs for seats, thus demonstrat{ing} that the 747-X was not the only aircraft that Emirates would have considered if the A380 were not available to it". (United States' appellee's submission, paras. 646 and 647) The Panel referred to a press Article submitted by the United States that indicated that Emirates had turned to the Boeing 777 to replace the delayed A380. (Panel Report, para. 7.1831 (referring to "Singapore Airlines may buy more Boeing 777s", *International Herald Tribune*, 10 December 2006 (Panel Exhibit US-611))) The United States also argued before the Panel that "the European Communities acknowledge{d} that factors such as seating capacity are routinely 'monetized' in sales campaigns and, to the extent practicable, can be offset by price concessions, with the result that even if the A380 may be better suited to a particular airline's business plan than a smaller plane like the 777, the two aircraft can—and do—fly the same routes." (*Ibid.*, para. 7.1831 (referring to United States' second written submission to the Panel, para. 719, in turn referring to Expert statement of Christian Scherer, Head of Future Programmes, Airbus, "Commercial Aspects of the Aircraft Business from the Perspective of a Manufacturer" (Panel Exhibit EC-14 (BCI), para. 69))

above, however, although we have reversed the Panel's finding that there is a single LCA market, we also have not endorsed the five product market approach proposed by the European Communities. During these appellate proceedings, the European Union has accepted an approach based on three product markets, in which the Boeing 747 and the Airbus A380 form part of the same product market.<sup>2639</sup> This is also the position espoused in the Airbus A380 business case, which is HSBI. The A380 business case is an internal Airbus document, assessing the economic viability of the A380, including conditions of competition in the marketplace and particularly with certain Boeing models. That Airbus considered the 747 as a competitor to the A380 is also evident in the EADS Offering Memorandum, a public document which states:

Since the development of the 747 in the 1960s, Boeing has had a monopoly on the high end (in excess of 400 seats) of the large aircraft sector. To counter this and to meet the expected growth in air travel over the next 20 years, Airbus has studied a program for a family of ultra-large four-engine aircraft, designated the "A3XX"<sup>2640</sup>, to establish its commercial, technical and industrial feasibility. Such a program would allow Airbus not only to compete head-to-head with the 747 but also to develop a new market for aircraft larger than the 747.<sup>2641</sup>

1227. At the oral hearing, the European Union placed emphasis on the final clause of the quoted statement, which indicates that the A380 would allow Airbus "to develop a new market for aircraft larger than the 747". The Panel found that the A380 and the 747 competed with each other even if "the A380 offered unique characteristics" to Emirates Airlines, Qantas, and Singapore Airlines.<sup>2642</sup> Ultimately the European Union seems to be arguing that in the absence of the A380 and the unavailability of a larger 747 (such as the 747-X), Emirates would not have purchased any other LCA. We find this to be a somewhat unrealistic proposition in the light of Emirates Airlines' rapid expansion and ambitious growth strategy. A more likely scenario would have been that Emirates would have considered the 747, which was the largest LCA available, or smaller LCA manufactured by Airbus and Boeing.<sup>2643</sup> In the light of these considerations, we do not believe that the Panel failed to make an objective assessment of the matter and we see no reason to interfere in the Panel's findings and reasoning on this point.

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<sup>2639</sup>The European Union accepted this in the Displacement Annex to its appellant's submission. (European Union's appellant's submission, Annex III (Displacement Annex), para. 6) If the Boeing 747 and Airbus A380 are in the same product market for purposes of the assessment of displacement, we fail to see why they would not be in competition for purposes of an assessment of lost sales.

<sup>2640</sup>As noted *supra*, footnote 2377, the A3XX is an earlier denomination given to the A380.

<sup>2641</sup>EADS' Offering Memorandum, *supra*, footnote 163, p. 71.

<sup>2642</sup>Panel Report, para. 7.1832.

<sup>2643</sup>Although this has little evidentiary weight because of its *ex post* nature, the record indicates that Emirates leased Boeing 777 LCA after delivery of the A380s was delayed. (United States' and European Union's response to questioning at the oral hearing)

1228. For these reasons, we are not persuaded by the European Union's allegation that the Panel erred, under the first step of its two-step approach, in finding that the order of A380 by Emirates constitutes lost sales. In our view, the Panel's findings that there is competition between the Airbus A380 and the Boeing 747 and that Airbus and Boeing competed for the Emirates sale even though formal offers may not have been requested or made, provided a sufficient basis for the Panel's finding of lost sales. Therefore, we uphold the Panel's finding, under the first step of its two-step approach, that Boeing lost the Emirates Airlines sale to Airbus and that the lost sale is "significant".<sup>2644</sup> We examine the European Union's appeal of the Panel's finding, under the second step of its two-step approach, that the lost sales were the effect of the subsidies in subsection D.2(b) below.<sup>2645</sup>

#### D. *Causation*

##### 1. Causation – Displacement

1229. We turn next to the European Union's claims of error in relation to the second step of the Panel's two-step analysis, namely whether the subsidies provided to Airbus caused serious prejudice to the United States' interests within the meaning of Articles 5(c) and 6.3 of the *SCM Agreement*, in the form of displacement of Boeing LCA and lost sales.

- (a) Establishing a "causal link" between the subsidy and the market situations described in Article 6.3 of the *SCM Agreement*

1230. We recall that Article 6.3 of the *SCM Agreement*, provides in relevant part:

6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:

- (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;
- (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;
- (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market{.}

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<sup>2644</sup>Panel Report, para. 7.1845. (footnote omitted)

<sup>2645</sup>The Panel's findings on lost sales involved in addition purchases by Air Asia, Air Berlin, Czech Airlines, easyJet, Iberia, Qantas, Singapore Airlines, South African Airways, and Thai Airways International. The Panel's findings of lost sales in relation to these sales campaigns, under the first step of its two-step approach, were not appealed.

1231. The Appellate Body has found that Article 6.3(c) requires the establishment of a causal link between the subsidies and the particular market situations being claimed under that provision. The Appellate Body explained:

... Article 6.3(c) does not use the word "cause"; rather, it states that "the effect of the subsidy is ... significant price suppression". However, the ordinary meaning of the noun "effect" is "{s}omething ... caused or produced; a result, a consequence". The "something" in this context is significant price suppression, and thus the question is whether significant price suppression is "caused" by or is a "result" or "consequence" of the challenged subsidy. The Panel's conclusion that "{t}he text of the treaty requires the establishment of a causal link between the subsidy and the significant price suppression" is thus consistent with this ordinary meaning of the term "effect". This is also confirmed by the context provided by Article 5(c) of the *SCM Agreement* ...<sup>2646</sup> (footnote omitted)

1232. Moreover, the Appellate Body has observed that to satisfy the causation requirement under Articles 5(c) and 6.3(c), it must be shown that there is a "genuine and substantial relationship of cause and effect" between the subsidies and the alleged market phenomenon.<sup>2647</sup> In addition, the Appellate Body has stated that panels assessing claims under Articles 5(c) and 6.3(c) must ensure that the effects of other factors are not improperly attributed to the challenged subsidies.<sup>2648</sup> The Appellate Body's guidance concerning the assessment of causation was provided in the context of a dispute involving Article 6.3(c) of the *SCM Agreement*. The language of subparagraphs (a) and (b) of Article 6.3 of the *SCM Agreement* expresses the causation requirement in very similar terms to those used in subparagraph (c). Under subparagraphs (a) and (b), displacement or impedance must be shown to be "the effect of the subsidy". We see no reason why the standard for causation and non-attribution should be different under subparagraphs (a) and (b) than under subparagraph (c), and the participants and third participants have not suggested that a different standard applies.

1233. The Appellate Body has said furthermore that it may be possible to assess whether the particular market phenomena are the effect of the subsidies by recourse to a "but for" approach.<sup>2649</sup> Thus, one possible approach to the assessment of causation is an inquiry that seeks to identify what would have occurred "but for" the subsidies. In some circumstances, a determination that the market

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<sup>2646</sup> Appellate Body Report, *US – Upland Cotton*, para. 435.

<sup>2647</sup> Appellate Body Report, *US – Upland Cotton*, para. 438; Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374.

<sup>2648</sup> Appellate Body Report, *US – Upland Cotton*, para. 437.

<sup>2649</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 374 and 375. The Appellate Body explained that a "but for" test may be "too undemanding" if the subsidy is "necessary, but not sufficient, to bring about" a market phenomenon, and "too rigorous if it required the subsidy to be the only cause." Instead, the "but for" test should determine that there is a "genuine and substantial relationship of cause and effect". (*Ibid.*, para. 374)

phenomena captured by Article 6.3 of the *SCM Agreement* would not have occurred "but for" the challenged subsidies will suffice to establish causation. This is because, in some circumstances, the "but for" analysis will show that the subsidy is both a necessary cause of the market phenomenon *and* a substantial cause. It is not required that the "but for" analysis establish that the challenged subsidies are a sufficient cause of the market phenomenon provided that it shows a genuine and substantial relationship of cause and effect. However, there are circumstances in which a "but for" approach does not suffice. For example, where a necessary cause is too remote and other intervening causes substantially account for the market phenomenon. This example underscores the importance of carrying out a proper non-attribution analysis.<sup>2650</sup>

1234. At the outset of its causation analysis, the Panel described the task at hand as a determination of whether "the particular market phenomena observed over the period 2001 to 2006 were caused by the specific subsidies we have found were provided to Airbus."<sup>2651</sup> Then the Panel appears to have proceeded in its analysis on the basis of a "but for" test as evidenced by its frequent reference to this test in the Panel Report.<sup>2652</sup> This may have been, in part, a reflection of the United States' argument that "market distortion and adverse effects flow directly from Airbus' entry at a particular time with a particular aircraft, which in the United States' view would not have been possible *but for* the subsidies."<sup>2653</sup> The Panel's extensive reference to a "but for" test would suggest that this was the test that the Panel in fact applied in its analysis. As we noted above, a "but for" test is one possible approach to the assessment of causation. Nevertheless, in applying a "but for" test, a panel must ensure that the assessment demonstrates that the subsidies are a "genuine and substantial" cause of the particular market situation that is alleged. Thus, the Panel in this case should have clearly indicated that, in applying a "but for" standard, it would seek to establish whether there was a "genuine and substantial relationship of cause and effect"<sup>2654</sup> between the challenged subsidies and the displacement and lost sales. Furthermore, it should have indicated that, in doing so, it would also ensure that the

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<sup>2650</sup> At the oral hearing, Brazil referred to the situation where there are two concurring necessary causes, each of which could on its own have caused a particular event. (Brazil's oral statement at the oral hearing (referring to H.L.A Hart and T. Honoré, *Causation in the Law* (Oxford University Press, 1985))) We note that the situation described by Brazil is not common, nor has it been alleged that it is the situation before us in this appeal.

<sup>2651</sup> Panel Report, para. 7.1876.

<sup>2652</sup> See Panel Report, paras. 7.1906, 7.1910, 7.1920, 7.1939, 7.1940, 7.1948, 7.1956, 7.1976, 7.1979, 7.1985, 7.1986, 7.1989, and 7.1993.

<sup>2653</sup> Panel Report, para. 7.1879. (emphasis added) The Panel observed that "{t}he United States makes this central argument in a variety of ways throughout its submissions." (*Ibid.*, footnote 5533 to para. 7.1879 (referring to United States' first written submission to the Panel, paras. 78 and 810; United States' oral statement at the first Panel meeting, para. 131; and United States' second written submission to the Panel, para. 571))

<sup>2654</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374.

effects of other factors were not improperly attributed to the challenged subsidies.<sup>2655</sup> We review below the Panel's assessment of whether displacement and lost sales were the effects of the challenged subsidies. Before doing so, we discuss the issue of the age of a subsidy.

(b) The age of a subsidy

1235. The European Communities argued before the Panel that several of the LA/MSF "subsidies in this dispute are 'decades old' and cannot, for that reason, be causing present serious prejudice to the United States' interests."<sup>2656</sup> In a section entitled "The Age of the LA/MSF Subsidies", the Panel noted that:

{i}t is true that the first grant of LA/MSF, for the A300, was agreed by the governments of Germany and France in 1969 and by Spain in 1970. However, this was but the first of a series of grants of LA/MSF provided in respect of each subsequent model of Airbus LCA. Thus, LA/MSF was provided by those same governments with respect to the A310 in 1978. The governments of France, Germany, Spain and the United Kingdom provided LA/MSF with respect to the A320 in 1984, and with respect to the A330/A340 in 1987. LA/MSF was again provided by the government of France for the A330-200 in 1995, and by the governments of France and Spain for the A340-500/600 in 1997. The most recent grant of LA/MSF was in 2000, by the governments of France, Germany, Spain and the United Kingdom, with respect to the A380.<sup>2657</sup>

1236. In previous sections of this Report, we have found that a challenge to subsidies granted prior to 1 January 1995 is not precluded. We have also found, however, that, in order properly to assess a claim under Article 5 of the *SCM Agreement*, a panel must take into account in its *ex ante* analysis how a subsidy is expected to materialize over time. A panel is also required to consider whether the life of a subsidy has ended, for example, by reason of the amortization of the subsidy over the relevant period or because the subsidy was removed from the recipient. Moreover, we have emphasized that the effects of a subsidy will generally diminish and come to an end with the passage of time.

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<sup>2655</sup>There is another aspect of the Panel's approach that is difficult to understand. A "but for" test generally reflects a "unitary" approach to causation, that is, it contemplates the simultaneous assessment of both the existence of the particular market phenomenon—in this case, displacement or lost sales—and of whether the market situation is "the effect" of the challenged subsidy. Yet, the Panel clearly indicated at the outset of its analysis that it was pursuing a two-step approach, in which it would first determine the existence of the particular market phenomenon before proceeding to examine whether the market phenomenon was the effect of the subsidy.

<sup>2656</sup>Panel Report, para. 7.1973.

<sup>2657</sup>Panel Report, para. 7.1973.

1237. Regarding the effects of subsidies over time, the Panel found that:

{w}hile *the effect of a single subsidy may well dissipate over time, ..., the fact that the subsidies at issue in this dispute were repeatedly granted over the entire history of Airbus' LCA development with respect to that same product has had rather the opposite effect, through the learning and spillover effects, and production synergies that are inherent in this industry, which spread the effect of LA/MSF for the development of one model of LCA, and of other subsidies, to both subsequent and earlier models.*<sup>2658</sup>

1238. We do not agree that it is only the effect of a "single subsidy" that would dissipate over time, while multiple subsidies may have the "opposite effect". To the contrary, in general, the effects of *any subsidy* can be expected to diminish and eventually come to an end with the passage of time. This is true for single as well as multiple acts of subsidization. The question of whether there are residual effects is a fact-specific matter that may have to be considered.

1239. Regarding the effects of particular subsidies, we note that the A300 and A310 were launched more than 30 years ago, that is, in 1969 and 1978 respectively.<sup>2659</sup> The first delivery of an A300 to a customer took place in 1974, while the A310 was first delivered to a customer and put in service in 1985.<sup>2660</sup> According to the European Union, German LA/MSF for these LCA models was fully disbursed by the end of 1988<sup>2661</sup>; LA/MSF provided by France was disbursed by 1986<sup>2662</sup>; and Spanish LA/MSF for the A300 and A310 was fully provided to CASA by the end of 1992.<sup>2663</sup>

1240. In its additional memorandum following the first session of the substantive oral hearing, the European Union argued that, taking into account the marketing life of LCA—which according to the European Union is 17 years from the launch of the aircraft, and "less for derivatives such as the A310"—and applying amortization rules, no "continuing benefits" existed after 1 January 1995 for the A300 and the A310.<sup>2664</sup> In response, the United States recognized that "allocation is one tool that may

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<sup>2658</sup>Panel Report, para. 7.1976.

<sup>2659</sup>Panel Report, paras. 7.1933 and 7.1935.

<sup>2660</sup>Panel Report, footnote 5146 to para. 7.1704.

<sup>2661</sup>European Union's appellant's submission, para. 62 (referring to *Sondergutachten 18 der Monopolkommission, Zusammenschlußvorhaben der Daimler-Benz AG mit der Messerschmitt-Bölkow-Blohm GmbH* ("Special Opinion 18 of the Monopoly Commission, Merger Project of Daimler-Benz AG and Messerschmitt-Bölkow-Blohm GmbH") (Panel Exhibit US-30), p. 71, table 11).

<sup>2662</sup>European Union's appellant's submission, para. 63 (referring to *Rapport d'information 367 (1996/1997) du Sénat* ("Senate Report 367 (1996/1997)") (Panel Exhibit US-18), p. 67).

<sup>2663</sup>European Union's appellant's submission, para. 64 (referring to *Cuadernos CDTI (Centro para el Desarrollo Tecnológico Industrial)* ("Centre for Industrial Technological Development") (prepared by the State Secretariat of Industry, Ministry of Science and Technology), Report of July 1993, Section 8: Airbus (Panel Exhibit US-54), p. 91, table entry "*fondos recibidos del Estado*" for the A300 and A310).

<sup>2664</sup>European Union's additional memorandum following the first session of the oral hearing, para. 10.

be used" but emphasized that allocation was not required to "analyze the benefit of a subsidy."<sup>2665</sup> The United States further noted that "it was not part of the U.S. demonstration of the existence of the subsidies or the adverse effects they caused, or of the Panel's findings on these issues."<sup>2666</sup> The United States added that the European Union "has done nothing to show that allocation was required in this dispute" and "had not demonstrated that a 17-year period, rather than the period during which any financing is outstanding, was appropriate."<sup>2667</sup>

1241. The United States recognizes "allocation is one tool that may be used" in analyzing benefit.<sup>2668</sup> Although we neither endorse nor reject the specific amortization methodology proposed by the European Union in this case, we see no reason to disagree with the notion that allocation of a subsidy over the anticipated marketing life of an aircraft programme may be one way to assess the duration of a subsidy over time.<sup>2669</sup> As a matter of logic, it thus follows that LA/MSF for the A300 and A310 are likely to cause minimal, if any, adverse effects during the reference period 2001-2006.

(c) The Panel's assessment of causation

1242. In order properly to assess the European Union's appeal, we find it helpful to lay out first the key aspects of the Panel's analysis.

1243. The United States advanced two theories of causation, referred to by the Panel as the "product" and "pricing" theories of causation. We are concerned in this appeal only with the "product" theory of causation.<sup>2670</sup> Under this theory, the United States argued that the subsidies had an impact on "Airbus' ability to launch and bring to the market models of LCA that the United States submits would not otherwise have been possible at the time and in the way that it did without the support of those subsidies".<sup>2671</sup> The Panel explained:

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<sup>2665</sup>United States' comments on the European Union's additional memorandum following the first session of the oral hearing, para. 6.

<sup>2666</sup>United States' comments on the European Union's additional memorandum following the first session of the oral hearing, para. 6.

<sup>2667</sup>United States' comments on the European Union's additional memorandum following the first session of the oral hearing, para. 6.

<sup>2668</sup>United States' comments on the European Union's additional memorandum following the first session of the oral hearing, para. 6.

<sup>2669</sup>We further note in this regard that the 1992 Agreement refers to a "reasonable expectation of recoupment" of support for the development of a new LCA programme "within 17 years from the date of first disbursement of such support, of all costs ..., including repayment of government supports". (Article 4 of the 1992 Agreement (emphasis added))

<sup>2670</sup>The Panel rejected the United States' "pricing" theory of causation. (Panel Report, paras. 7.2010 and 7.2024) The United States has not appealed this aspect of the Panel's analysis.

<sup>2671</sup>Panel Report, para. 7.1877.



The United States does not consider that its arguments depend on finding that, in the absence of LA/MSF, Airbus would not exist. Rather, the United States argues that in the absence of LA/MSF Airbus would not have been in a position to develop the aircraft it did when it did. For the United States, market distortion and adverse effects flow directly from Airbus' entry at a particular time with a particular aircraft, which in the United States' view would not have been possible but for the subsidies.<sup>2672</sup>

1244. The Panel further explained that the United States relied on two types of evidence.<sup>2673</sup> First, the United States relied on a series of public statements and one state aid decision of the European Commission allegedly revealing the views held by various officials from Airbus and other relevant public bodies on the impact of LA/MSF on the ability of Airbus to launch LCA.<sup>2674</sup> Second, the United States submitted a report prepared by Dr. Gary Dorman, which purportedly demonstrated the impact of LA/MSF-type measures on the decision to launch an LCA.<sup>2675</sup>

1245. Dr. Dorman's report was the first item examined by the Panel. The report "simulates cash-flows generated by a hypothetical wide-body airplane programme under a variety of LA/MSF contribution, price, production and cost scenarios."<sup>2676</sup> Six different LA/MSF programmes were modelled after actual LA/MSF packages, and each of the six programmes was examined under three different repayment schedules.<sup>2677</sup> The impact of LA/MSF was assessed by calculating a base case scenario in which the NPV of the programme was calculated without LA/MSF. The Panel noted that the Dorman Report showed "positive returns in the base case (i.e., a NPV of USD 1.35 billion)."<sup>2678</sup> Yet, the Panel went on to observe that "relatively small variations to the forecasts give rise to uneconomic results".<sup>2679</sup> For the Panel, given the long-term nature of an aircraft programme, such variations in forecast parameters constituted "realistic scenarios"<sup>2680</sup> that a manufacturer would have to consider when making a launch decision. The Panel noted that the "Dorman Report does not explicitly conclude that each Airbus LCA model, or indeed any particular Airbus LCA model, would

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<sup>2672</sup>Panel Report, para. 7.1879 (referring to United States' first written submission to the Panel, paras. 78 and 810; United States' oral statement at the first Panel meeting, para. 131; and United States' second written submission to the Panel, para. 571).

<sup>2673</sup>Panel Report, para. 7.1880.

<sup>2674</sup>Panel Report, para. 7.1880.

<sup>2675</sup>Dorman Report, *supra*, footnote 1042.

<sup>2676</sup>Panel Report, para. 7.1882.

<sup>2677</sup>Panel Report, para. 7.1882. The three scenarios are: (i) level repayment (equal per-aircraft payments set on the basis of forecast deliveries); (ii) graduated repayment (increasing per-aircraft payment); and (iii) delayed level repayment (equal per-aircraft payments starting with the 60th airplane delivery). (*Ibid.*, footnote 5536 to para. 7.1882 (referring to Dorman Report, *supra*, footnote 1042, p. 5))

<sup>2678</sup>Panel Report, para. 7.1883.

<sup>2679</sup>Panel Report, para. 7.1883.

<sup>2680</sup>Panel Report, para. 7.1887.

not have been launched in the absence of LA/MSF." Nevertheless, it considered this "to be a clear implication of the conclusion it advances on the basis of the results it predicts."<sup>2681</sup>

1246. The European Communities submitted a critique of the Dorman Report prepared by Dr. Paul Wachtel (the "Wachtel Report")<sup>2682</sup>, which challenged the results of the Dorman Report simulation on the following three grounds. First, Dr. Wachtel criticized the Dorman Report because it was premised on Boeing retaining monopoly profits and market share in the absence of LA/MSF. Dr. Wachtel argued, instead, that the LCA market was a "natural duopoly".<sup>2683</sup> Second, Dr. Wachtel questioned some of the parameters used in the Dorman Report simulation, and assumptions of costs and demand.<sup>2684</sup> Dr. Wachtel also questioned the specific parameter values and Dr. Dorman's NPVs resulting from small variations of forecast parameters. Third, Dr. Wachtel criticized the Dorman Report simulation for failing to take account of the effective size of the subsidy (the interest rate differential) and the impact of the repayment structure of LA/MSF.<sup>2685</sup>

1247. The Panel disagreed with Dr. Wachtel's contention that the Dorman Report was premised on the view that Boeing would hold a monopoly position in the absence of a competitor subsidized through LA/MSF.<sup>2686</sup> The Panel referred to the Dorman Report's conclusion that LA/MSF "allows the recipient to undertake airplane development projects at a pace and scale that would be much more difficult—perhaps impossible—for a competitor that does not have access to launch aid."<sup>2687</sup> The Panel explained that "while a Boeing monopoly may be one way of understanding what the Dorman Report states about the implications of LA/MSF on the operations of the incumbent LCA manufacturer, it is also possible to understand those implications in the context of a world where the incumbent manufacturer would face competition from another player; a weaker entrant that entered without the assistance of LA/MSF."<sup>2688</sup> Additionally, the Panel stated that "the real significance for us of the simulation presented in the Dorman Report is not so much what it says about the impact of LA/MSF on the operations of the incumbent manufacturer, but rather what it tells us about whether a potential new entrant, or an existing manufacturer, will decide to launch a new model of LCA."<sup>2689</sup>

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<sup>2681</sup>Panel Report, para. 7.1887.

<sup>2682</sup>P. Wachtel, "Critique of 'The Effect of Launch Aid on the Economics of Commercial Airplane Programs' by Dr. Gary J. Dorman" (31 January 2007) (Panel Exhibit EC-12) and clarification (20 May 2007) (Panel Exhibit EC-659).

<sup>2683</sup>Panel Report, para. 7.1894.

<sup>2684</sup>Panel Report, para. 7.1888.

<sup>2685</sup>Panel Report, para. 7.1899.

<sup>2686</sup>Panel Report, para. 7.1893.

<sup>2687</sup>Panel Report, para. 7.1893 (referring to Dorman Report, *supra*, footnote 1042).

<sup>2688</sup>Panel Report, para. 7.1893.

<sup>2689</sup>Panel Report, para. 7.1893.

1248. Next, the Panel addressed Dr. Wachtel's second criticism, namely, that the Dorman Report derived "its conclusions about the effects of LA/MSF from sensitivity tests performed on a simulation that is constructed with unrealistic parameter values and assumptions of costs and demand".<sup>2690</sup> The Panel rejected this criticism and instead agreed with the United States that the simulation in the Dorman Report demonstrated that LA/MSF will have a significant impact on the NPV of any given aircraft project, irrespective of the specific parameters used to model costs and income streams, by increasing potential profits and limiting potential losses.<sup>2691</sup> The Panel noted that by limiting potential losses, LA/MSF transfers risk from Airbus to the governments supplying LA/MSF, thereby rendering it more likely, in any given case, that an LCA programme will be undertaken.<sup>2692</sup>

1249. The Panel then turned to Dr. Wachtel's third criticism, which concerned the Dorman Report's alleged failure "to take into account the full economic implications of the structure of LA/MSF repayments."<sup>2693</sup> The Panel was not persuaded by Dr. Wachtel's argument that LA/MSF repayments will tend to increase the price at which Airbus sells its LCA because the repayments are tied to LCA deliveries. The Panel observed, in this regard, that Dr. Wachtel did not consider that this alleged price effect would be certain to result from LA/MSF's sales-dependent repayment terms.<sup>2694</sup> The Panel also rejected Dr. Wachtel's allegation that the Dorman Report simulation does not take into account the amount of the subsidy associated with LA/MSF, as opposed to the principal amount actually loaned.<sup>2695</sup> The Panel found that the simulation in the Dorman Report did, in effect, take into account the amount of subsidization, as defined by the European Communities, but, unlike the European Communities, used a 10% discount rate.<sup>2696</sup> The Panel further found that this discount rate was within the range of market interest rates that it had concluded would be appropriate benchmarks for the relevant LA/MSF contracts.<sup>2697</sup>

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<sup>2690</sup>Panel Report, para. 7.1888 (referring to Wachtel Report and clarification, *supra*, footnote 2682).

<sup>2691</sup>Panel Report, para. 7.1898.

<sup>2692</sup>Panel Report, para. 7.1898.

<sup>2693</sup>Panel Report, para. 7.1888 (referring to Wachtel Report and clarification, *supra*, footnote 2682).

<sup>2694</sup>Panel Report, para. 7.1901.

<sup>2695</sup>Panel Report, para. 7.1902.

<sup>2696</sup>Panel Report, para. 7.1904.

<sup>2697</sup>Panel Report, para. 7.1905. The Panel noted that the 10% discount rate used in the Dorman Report was below the market interest rates determined for the A320 package.

1250. Having reviewed Dr. Wachtel's criticisms of the Dorman Report, the Panel concluded:

All else being equal, we consider that the provision of LA/MSF, which makes a project more profitable if successful and limits downside risk if unsuccessful, makes it more likely that any given aircraft will be launched. This does not, however, conclusively establish that, but for the grant of LA/MSF, any particular Airbus model would not have been launched when it actually was.<sup>2698</sup>

1251. The Panel then noted that the United States' acceptance that Boeing would face competition from at least some other entity in the absence of LA/MSF, and reasoned from this that:

If the United States concedes that Boeing would, in the absence of LA/MSF, face some competition it must, presumably, concede that at least some competing planes would have been launched (by Airbus or some other entity) over the period since Airbus launched its first LCA. The Dorman simulation does not provide a basis for assessing the circumstances of any competitive launches in the absence of LA/MSF. Insofar as its results suggest that there would be no entry, and insofar as it does not distinguish between the type of entry which is modelled and other forms of entry which might otherwise occur, we consider that it is not possible to conclude on the basis of the Dorman Report alone that, but for LA/MSF, any particular Airbus aircraft model would not have been launched.<sup>2699</sup>

1252. The Panel cautioned that this did not mean that "{it did} not consider that the Dorman Report supports the United States' argument regarding the impact of LA/MSF on Airbus' launch decisions."<sup>2700</sup> It then summarized the elements of the United States' case that were supported by the Dorman Report:

{T}he Dorman Report **does** in our view demonstrate that LA/MSF will have a significant impact on the NPV of any particular project, and that irrespective of the specific parameters used to model costs and income streams, LA/MSF will increase potential profits and act to limit potential downside losses. It also demonstrates that in some circumstances, the availability of LA/MSF makes the difference between a positive or negative NPV, or alters the risk profile of a project sufficiently to make an affirmative decision to launch a particular aircraft more likely.<sup>2701</sup> (original boldface)

1253. Before completing its assessment of the Dorman Report, the Panel referred to "a putative 'Boeing 787 business case'" submitted by the European Communities and which showed a NPV and IRR higher than those the European Communities asserted were generated by the Dorman

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<sup>2698</sup>Panel Report, para. 7.1906.

<sup>2699</sup>Panel Report, para. 7.1910.

<sup>2700</sup>Panel Report, para. 7.1911.

<sup>2701</sup>Panel Report, para. 7.1911.

simulation.<sup>2702</sup> The Panel did not consider "that the results of an *ex post facto* business case for a Boeing LCA constructed on the basis of public information for purposes of this dispute has any relevance to our assessment of the effect of LA/MSF subsidies on Airbus".<sup>2703</sup> It explained that, even assuming the correctness of the exercise, which the Panel considered to be "unclear", it did not see how the conclusion that the NPV and IRR of this Boeing 787 business case are higher than those of the Dorman Report simulation informed its assessment of the effect of LA/MSF on Airbus.<sup>2704</sup>

1254. The Panel concluded:

Thus, we conclude that the Dorman Report demonstrates that the provision of LA/MSF is likely to change the behaviour of the recipient with respect to a decision to launch a LCA by increasing the likelihood of an affirmative decision to go forward with the launch.<sup>2705</sup>

1255. Having completed its assessment of the Dorman Report, the Panel turned to other evidence adduced by the United States. The Panel engaged in a detailed analysis of the business cases of various Airbus LCA projects and the public statements relied upon by the United States.<sup>2706</sup> Recalling its earlier analysis of the Dorman Report, and relying also on certain public statements and its own understanding of the history and risks associated with development of LCA in general, and of the A300 in particular, the Panel said it was satisfied that "LA/MSF was necessary for Airbus to have launched the A300 as originally designed and at the time that it did."<sup>2707</sup> As regards the A310, the Panel considered that the Dorman Report similarly provided persuasive support for the conclusion that had Airbus not obtained LA/MSF for the A310, it "would not have been able to launch it as originally designed and at the time that it did."<sup>2708</sup> In respect of the A320, the Panel noted that "it would have been extremely difficult, if not impossible, to launch the A320 in 1984 as originally designed, without access to LA/MSF" and thus that LA/MSF was necessary for the launch of the A320 "at the time it did and as originally designed."<sup>2709</sup> Similarly, the Panel found that Airbus could

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<sup>2702</sup>Panel Report, para. 7.1912 and footnote 5587 thereto (referring to International Trade Resources, 787 Business Case (Panel Exhibit EC-662 (HSBI))). The Panel noted that the Dorman Report does not in fact calculate an IRR for its hypothetical launch programme and that the estimate of 11.92% referred to by the European Communities as generated by the Dorman Report simulation was actually inferred by Mr. Carballo, as described in the "Carballo Declaration" (Panel Exhibit EC-665 (HSBI))). The Carballo Declaration is a written statement by Francisco-Javier Rianza-Carballo, dated 25 May 2007. At the time he made the statement, Mr. Carballo was Vice-President at Airbus SAS. He had formerly been with the A380 Programme Directorate.

<sup>2703</sup>Panel Report, para. 7.1912.

<sup>2704</sup>Panel Report, para. 7.1912.

<sup>2705</sup>Panel Report, para. 7.1912.

<sup>2706</sup>See Panel Report, paras. 7.1913-7.1949.

<sup>2707</sup>Panel Report, para. 7.1934.

<sup>2708</sup>Panel Report, para. 7.1936.

<sup>2709</sup>Panel Report, para. 7.1938. (footnote omitted)

not have launched the A330/A340 project in 1987 as originally designed without access to LA/MSF, and concluded that LA/MSF was necessary for the launch of the A330/A340 "at the time when it did and as originally designed."<sup>2710</sup> With respect to the A330-200, the Panel observed that, "while the particular grant of LA/MSF specific to the A330-200 may not have been necessary to its launch", it concluded that on the whole LA/MSF was necessary to the launch of the A330-200 because "without the grant of LA/MSF for the development of the original model (and all models preceding that model), the A330-200 could not have been launched when it was without significantly higher costs."<sup>2711</sup> The Panel further considered that LA/MSF was "essential to the development of the A340-500/600" because it was derived from the A340, whose launch it had found depended upon the provision of LA/MSF.<sup>2712</sup>

1256. As regards the A380, the Panel noted that the Airbus A380 business case "clearly demonstrates that LA/MSF has a significant impact on the economics of the programme", but also recognized that the "A380 business case predicts a positive NPV for the programme even assuming no LA/MSF is provided, as well as a positive NPV in circumstances where a Realistic Worst Case scenario is contemplated in situations where the project is supported by LA/MSF."<sup>2713</sup> Ultimately, the Panel concluded that the A380 business case "suggests, but by no means demonstrates, that as a stand-alone proposition the project might have been economically viable even without LA/MSF".<sup>2714</sup> The Panel went on, however, to point out that "Airbus' technical capabilities derived in part from its experience in the development of its earlier model LCA funded in significant part by LA/MSF."<sup>2715</sup> It added that, in the light of the "significant amount of debt that developing its previous models of LCA would have generated", it considered that "Airbus would not have been in a position to obtain market financing for the A380, had it not financed the development of its earlier model LCA in significant part through LA/MSF."<sup>2716</sup> Therefore, the Panel found that "either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380."<sup>2717</sup>

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<sup>2710</sup>Panel Report, paras. 7.1938 and 7.1939.

<sup>2711</sup>Panel Report, para. 7.1940.

<sup>2712</sup>Panel Report, para. 7.1941.

<sup>2713</sup>Panel Report, para. 7.1943.

<sup>2714</sup>Panel Report, para. 7.1948.

<sup>2715</sup>Panel Report, para. 7.1948.

<sup>2716</sup>Panel Report, para. 7.1948.

<sup>2717</sup>Panel Report, para. 7.1948.

1257. The Panel concluded:

In summary, we conclude that the United States has demonstrated that LA/MSF shifts a significant portion of the risk of launching an aircraft from the manufacturer to the governments supplying the funding, which we recall is on non-commercial terms. Based on our review of the development of successive models of Airbus LCA, we conclude that Airbus' ability to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized LA/MSF.<sup>2718</sup>

1258. Next, the Panel turned to the effect of the other subsidies challenged by the United States. We discuss this issue in subsection 3 below. The Panel then discussed certain additional considerations raised by the European Communities, such as the magnitude of the subsidies, the age of the LA/MSF, and competition in the LCA industry in the absence of subsidies.<sup>2719</sup> The Panel's conclusions concerning competition in the LCA industry in the absence of subsidies are particularly relevant to the issues raised by the European Union's appeal and we consider it useful to reproduce them in full:

Thus, our evaluation of the arguments and evidence the parties have submitted leads us to conclude that there are multiple possibilities for the LCA industry in the counterfactual world that would exist in the absence of subsidies to Airbus. In one 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. In this scenario, the link between the subsidies that enabled Airbus to enter the LCA market and Boeing's loss of market share and sales is self-evident. Any market displacement and lost sales actually suffered by Boeing would be directly attributable to the subsidies granted to Airbus, which enabled it to launch and develop its own family of LCA. In a second plausible 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.\*} As both Boeing and McDonnell Douglas are (or were) US LCA manufacturers, there would once again be no question about the nexus between the subsidies which enabled the non-US company, 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). Finally, in a third and a fourth scenario, Airbus might have entered the LCA market without subsidies, either in competition with Boeing alone, or in competition with a United States' industry comprising Boeing and another US producer. In either case, Airbus could not conceivably have been present in the LCA market with the same aircraft and at the same times as it actually was, given our

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<sup>2718</sup>Panel Report, para. 7.1949.

<sup>2719</sup>See Panel Report, paras. 7.1962-7.1984.

conclusions concerning the cumulative effect of LA/MSF and the other subsidies in dispute on Airbus' ability to launch successive models of LCA as and when it did. In our view, it is simply not feasible that, without LA/MSF and the other subsidies, relying entirely on non-subsidized financing, Airbus could 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. It follows that even in the unlikely event that Airbus would have been able to enter the LCA market as a non-subsidized competitor, we are confident that it would not have achieved the market presence it did over the period 2001 to 2006 and that we have described in the previous sections of this Report.<sup>2720</sup> (footnote omitted)

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{\*original footnote 5754} We note in this regard the United States' assertion that competition from Airbus was a factor in McDonnell Douglas' exit from the LCA industry. {United States' oral statement at the first Panel meeting (BCI)}, para. 68. In addition, we note that Lockheed, the other competitor in the market at an earlier date, had already exited the market in 1981, and neither party has suggested that any other pre-existing entity was or would have been in a position to enter the LCA industry, or that any entity other than Boeing sought to purchase McDonnell Douglas.

1259. Finally, the Panel addressed certain "non-attribution" factors that had been raised by the European Communities, including alleged mismanagement of customer relations by Boeing, geopolitical considerations, and the role of engine manufacturers in the sales campaigns.<sup>2721</sup> The Panel's discussion here is also particularly relevant, and thus we reproduce the relevant parts below:

We noted that there are numerous factors involved in a customer's decision as to which LCA to purchase. However, one factor which is essential is the availability of a particular model or models of LCA suitable for a particular customer's needs at the time of the sale. We have concluded that, but for LA/MSF and the other subsidies in dispute, Airbus would not have been able to launch the particular LCA it did at the time it did. Thus, the presence of these subsidized LCA in the market is a fundamental cause of the lost sales observed. But for the subsidies, Airbus would not have been competing for these sales with the LCA it actually sold.{\*} Similarly, Airbus' market share is directly attributable to its ability to sell and deliver to the European Communities and relevant third country markets, LCA which it would not have had available but for the subsidies which supported the launch of every model of Airbus LCA.<sup>2722</sup>

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{\*original footnote 5758} Whether it might have been competing at all for those sales, for instance with a different LCA developed without subsidies, is questionable, as the lost sales all involved aircraft we have concluded would not have been developed by Airbus at the relevant times had earlier models not benefited from subsidies.

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<sup>2720</sup>Panel Report, para. 7.1984.

<sup>2721</sup>Panel Report, para. 7.1985.

<sup>2722</sup>Panel Report, para. 7.1985.



1260. The Panel brought its examination of the United States' "product" theory of causation to a close as follows:

It is in our view clear that Airbus would have been unable to bring to the market the LCA that it launched but for the specific subsidies it received from the European Communities and the governments of France, Germany, Spain and the United Kingdom. We reiterate that we do not conclude that Airbus necessarily would not exist at all but for the subsidies, but merely that it would, at a minimum, not have been able to launch and develop the LCA models it has actually succeeded in bringing to the market. Had Airbus successfully entered the LCA industry without subsidies, it would be a much different, and we believe, a much weaker LCA manufacturer during the period we examined, with at best a more limited offering of LCA models. Thus, under either scenario, Airbus would not have had the market presence and ability to win orders for LCA that it did have during the period 2001-2006, and 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. We consider that Airbus' market presence during the period 2001-2006, as reflected in its share of the EC and certain third country markets and the sales it won at Boeing's expense, is clearly an effect of the subsidies in this dispute. We therefore conclude that the displacement of United States' LCA from the EC and certain third country markets and lost sales we have found during the period 2001-2006 are an effect of the specific subsidies to Airbus that we have found.<sup>2723</sup>

1261. Thus, the Panel contemplated four distinct scenarios as to what the LCA industry would have looked like in the absence of the challenged subsidies. In scenarios 1 and 2, Airbus would not have entered the market without subsidies, and Boeing would have been a monopolist (scenario 1) or would have competed with another US LCA manufacturer (scenario 2). However, the Panel did not rule out entry into the market by a non-subsidized Airbus, either in competition only with Boeing (scenario 3) or with Boeing and another US LCA manufacturer (scenario 4). Yet, in order to fully understand the Panel's assessment, it is important to recognize that the Panel ascribed different probabilities to these scenarios. The Panel described the first two scenarios as "plausible".<sup>2724</sup> By contrast, the Panel described the third and fourth scenarios as being "unlikely".<sup>2725</sup> The Panel further explained that, in the unlikely event that Airbus would have entered the market without subsidies, it would have been a significantly different LCA manufacturer. According to the Panel, "Airbus could not conceivably have been present in the LCA market with the same aircraft and at the same times as

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<sup>2723</sup>Panel Report, para. 7.1993.

<sup>2724</sup>Panel Report, para. 7.1984. The Panel used the term "plausible" when setting out the second scenario. However, we understand the Panel's reference to "a second plausible scenario" as connoting that the Panel also considered the first scenario to be plausible.

<sup>2725</sup>Panel Report, para. 7.1984.

it actually was, given {its earlier} conclusions concerning the cumulative effect of LA/MSF and the other subsidies in dispute on Airbus' ability to launch successive models of LCA as and when it did."<sup>2726</sup> The Panel added that "it {was} simply not feasible that, without LA/MSF and the other subsidies, relying entirely on non-subsidized financing, Airbus could 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".<sup>2727</sup>

1262. The European Union emphasizes that the Panel's "focus" was on the third and fourth counterfactual scenarios in which a non-subsidized Airbus would have entered the market, albeit later and with different LCA.<sup>2728</sup> In support, the European Union refers to the Panel's statement that "{w}hether it might have been competing at all for those sales, for instance with a different LCA developed without subsidies, is questionable, as the lost sales all involved aircraft we have concluded would not have been developed by Airbus at the relevant times had earlier models not benefited from subsidies".<sup>2729</sup> According to the European Union, the Panel "did not resolve the issue it considered 'questionable'", and thus "left open whether, in the four single-aisle sales campaigns at issue, a non-subsidised Airbus could have offered 'different LCA developed without subsidies'".<sup>2730</sup> As the European Union sees it, the result of this is that the Panel was required to "complete the counterfactual"<sup>2731</sup> by conducting "a comparison of (i) Airbus' actual sales at issue in the 2001-2006 reference period with (ii) a non-subsidised Airbus' ability to secure these sales in a counterfactual scenario".<sup>2732</sup> The European Union appeals the Panel's failure to conduct this assessment and, more particularly, its failure to respond to the following five questions: (i) what particular aircraft a non-subsidized Airbus would have launched; (ii) what would have been their level of technology; (iii) what would have been the prices at which Airbus could have offered those aircraft; (iv) whether there would have been any commonality advantage or disadvantage; and (v) whether there were any non-attribution factors that would have prevented Boeing from securing some of the sales.<sup>2733</sup>

1263. An initial point to make about the European Union's appeal of the alleged non-completion of the counterfactual is that it is premised exclusively on scenarios 3 and 4, on which the European Union claims the Panel "focused". We do not agree that this is a proper characterization of the Panel's findings. In fact, the Panel found that scenarios 3 and 4, in which Airbus would have

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<sup>2726</sup>Panel Report, para. 7.1984.

<sup>2727</sup>Panel Report, para. 7.1984.

<sup>2728</sup>European Union's appellant's submission, para. 453.

<sup>2729</sup>Panel Report, footnote 5758 to para. 7.1985.

<sup>2730</sup>European Union's appellant's submission, para. 455.

<sup>2731</sup>European Union's appellant's submission, para. 489.

<sup>2732</sup>European Union's appellant's submission, para. 453.

<sup>2733</sup>European Union's appellant's submission, para. 489.

entered the market without subsidies, were "unlikely". Therefore, if one were to describe the Panel as having "focused" on particular scenarios, it would have to be scenarios 1 and 2—scenarios the Panel considered "plausible"—in which Airbus would not have entered the market without subsidies. Moreover, the issue is not one of "focus", but rather one of assigning probabilities to particular scenarios.

1264. Under scenarios 1 and 2, there was no need for the Panel to proceed further in its counterfactual analysis. Without the subsidies, Airbus would not have existed under these scenarios and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred. As Boeing (or the other US manufacturer envisaged by the Panel) would be the only supplier(s) of LCA, it (or they) would have made the sales instead. Thus, the conclusion under scenarios 1 and 2 satisfies, without more, the "genuine and substantial relationship" standard articulated by the Appellate Body in *US – Upland Cotton*. This chain of reasoning establishes that the subsidies are a sufficient cause of the lost sales and the displacement. The additional questions that the European Union asserts the Panel should have considered would be moot. It would be pointless to attempt delineating the features of something that would not have existed without the subsidies. It would be unnecessary to consider: (i) what particular aircraft Airbus would have launched; (ii) their level of technology; (iii) prices; (iv) any commonality advantage or disadvantage; or (v) any non-attribution factors.

1265. As regards the non-attribution factors in particular, we note that the effects of other factors can be assessed as part of a properly designed counterfactual that adjusts for the subsidies while maintaining everything else equal. This was recognized by the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)*.<sup>2734</sup> Moreover, we agree with the Panel that in the particular circumstances of this case the need to fully examine the particular non-attribution factors raised by the European Communities depended on whether a non-subsidized Airbus would have had any aircraft available to sell at the time the relevant sales were made.<sup>2735</sup> If Airbus had not existed without the subsidies, the airlines involved in the relevant sales campaigns would have had a limited choice: purchase aircraft from Boeing or possibly from the other US manufacturer envisaged in the Panel's counterfactual scenario 2. We have difficulty understanding how the non-attribution factors raised by the European Communities could have led an airline in those circumstances not to purchase the desired aircraft from Boeing or the other US manufacturer. For example, the European Union

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<sup>2734</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 375.

<sup>2735</sup> Panel Report, para. 7.1985: "We noted that there are numerous factors involved in a customer's decision as to which LCA to purchase. However, one factor which is essential is the availability of a particular model or models of LCA suitable for a particular customer's needs at the time of the sale."

underscores that Boeing had mishandled its relationships with some customers and that one government may have been unhappy with Boeing over a joint venture.<sup>2736</sup> However, the fact remains that, in the absence of Airbus, these airlines would have had no choice but to purchase aircraft from Boeing or the other US manufacturer. Thus, these non-attribution factors would not be relevant under scenarios 1 and 2 referred to above (under which a non-subsidized Airbus would not have entered the market). The European Communities also mentioned "the severe downturn in the market in 2001-2003" following the events of the 11 September 2001 attacks on the World Trade Center ("9/11"), and exacerbated by the start of the war in Iraq and the outbreak of SARS in Asia.<sup>2737</sup> Because Airbus LCA would not have been available in the absence of subsidies, those airlines that purchased LCA during the "downturn" could only have purchased them from Boeing or the other US manufacturer under scenarios 1 and 2.

1266. In its appellant's submission, the European Union accepts that, "had there been a basis to find that a non-subsidised Airbus would not exist, and could not have launched any LCA, *quod non*, then the Panel would have been correct to find that the specific sales at issue were lost by Boeing due to the subsidies."<sup>2738</sup> The fact is that the Panel found that scenarios 1 and 2, in which Airbus would not have entered the market, were the most likely scenarios in the absence of the challenged subsidies. We cannot ignore this. On the contrary, in our view, the Panel's findings that scenarios 1 and 2 were plausible, whereas scenarios 3 and 4 were unlikely, are important considerations in determining the extent to which the Panel was required to further pursue the counterfactual analysis.

1267. Having said that, we agree with the European Union that the Panel could have provided a fuller analysis under scenarios 3 and 4. In particular, the Panel could have more fully explored how a non-subsidized Airbus would have developed during the more than 35 years that elapsed between 1969, when Airbus launched the A300, and the end of the reference period. Nonetheless, looking at the Panel's analysis as a whole, we understand the Panel to have concluded that, under scenarios 3 and 4, a non-subsidized Airbus would have been significantly retarded in its efforts to develop LCA that were capable of competing in the market and that it would not have been able to overcome this competitive disadvantage by the end of the reference period.

1268. We recall that the Panel found, in this regard, that "Airbus could not conceivably have been present in the LCA market with the same aircraft and at the same times as it actually was, given {its earlier} conclusions concerning the cumulative effect of LA/MSF and the other subsidies in dispute

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<sup>2736</sup>European Union's appellant's submission, paras. 493-496.

<sup>2737</sup>Panel Report, para. 7.1987.

<sup>2738</sup>European Union's appellant's submission, para. 488.

on Airbus' ability to launch successive models of LCA as and when it did."<sup>2739</sup> For the Panel, "it {was} simply not feasible that, without LA/MSF and the other subsidies, relying entirely on non-subsidized financing, Airbus could 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".<sup>2740</sup> The Panel concluded that "even in the unlikely event that Airbus would have been able to enter the LCA market as a non-subsidized competitor, we are confident that it would not have achieved the market presence it did *over the period 2001 to 2006* and that we have described in the previous sections of this Report."<sup>2741</sup> The Panel reiterated later in its analysis that it did "not conclude that Airbus necessarily would not exist at all but for the subsidies, but merely that it would, at a minimum, not have been able to launch and develop the LCA models it has actually succeeded in bringing to the market."<sup>2742</sup> At this point, the Panel again referred to the market presence of a non-subsidized Airbus during the reference period. The Panel stated that, "at a minimum", a non-subsidized Airbus "would not have been able to launch and develop the LCA models it has actually succeeded in bringing to the market" and that Airbus "would be a much different, and we believe, a much weaker LCA manufacturer *during the period we examined*, with at best a more limited offering of LCA models."<sup>2743</sup>

1269. The Panel's findings that, during the reference period, a non-subsidized Airbus would be a "much weaker LCA manufacturer" and would have had "at best a more limited offering of LCA models" are consistent with the Panel's findings concerning the considerable barriers to entry into the LCA industry.<sup>2744</sup> The Panel found that entry into the LCA industry "requires huge up-front investments".<sup>2745</sup> It further observed that "{e}conomies of scale arising from the huge sunk development cost give incumbent firms a considerable competitive advantage."<sup>2746</sup> The incumbents' advantage is reinforced by learning effects, which induce dynamic economies of scale.<sup>2747</sup> Moreover,

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<sup>2739</sup>Panel Report, para. 7.1984.

<sup>2740</sup>Panel Report, para. 7.1984.

<sup>2741</sup>Panel Report, para. 7.1984. (emphasis added; footnote omitted)

<sup>2742</sup>Panel Report, para. 7.1993.

<sup>2743</sup>Panel Report, para. 7.1993. (emphasis added)

<sup>2744</sup>The Panel noted that its findings on the conditions of competition of the LCA industry "establish the background and context for {its} analysis of whether the subsidies {it had} found to exist cause{d}, or threaten{ed} to cause, adverse effects within the meaning of Articles 5(a) and (c) of the SCM Agreement." (Panel Report, para. 7.1716)

<sup>2745</sup>Panel Report, para. 7.1717. The Panel discussed the following additional barriers to entry: switching costs; airlines' preference for fleet commonality; the incentive for incumbent firms to adopt entry deterring price strategies; the fact that few airplane programmes have been financial successes; and the costs of exchange rate fluctuations to which non-United States manufacturers are exposed because aircraft are typically sold in United States dollars.

<sup>2746</sup>Panel Report, para. 7.1717.

<sup>2747</sup>Panel Report, para. 7.1717.

"{e}conomies of scope make it difficult to enter one market segment only."<sup>2748</sup> According to the Panel, it is difficult to obtain financing on capital markets to finance the "huge development costs" of LCA development because "{u}ncertainty is considerable".<sup>2749</sup> The Panel referred back to these considerations when it focused on the launch of the particular projects. When examining the launch of the A300, the Panel recalled that "the parties have described the development of LCA as an endeavour that requires 'huge up-front investments' and a commitment of 'tremendous resources' in the face of a business environment that is shaped by factors 'whose very foreseeability is impossible by definition'".<sup>2750</sup> Then, looking at the launch of the A310, the Panel recalled that "static and dynamic ('learning curve') economies of scope and scale achieved in the context of one model of LCA are an important part of the development and production of other LCA models has also been recognized by economists."<sup>2751</sup> In this respect, the Panel found that the evidence demonstrated that the A310 benefited from the earlier launch of the A300.<sup>2752</sup> The Panel was also persuaded that "the launch of the A320 in 1984, as originally designed, was to a very large degree made possible by Airbus' successful launches of the A300 and A310 over the previous decade with the assistance of LA/MSF."<sup>2753</sup> Likewise, as regards the A330/A340 project, the Panel found that "LA/MSF provided for the previous LCA models, the A300, A310 and A320, played a significant role in placing Airbus in a position to be able to launch the A330/A340 project in 1987".<sup>2754</sup> As for the A330-200 and A340-500/600, the Panel said that knowledge and experience acquired in the earlier projects has particular significance since they were derivatives of existing models.<sup>2755</sup> Finally, the Panel explained that the technical capabilities that made it possible for Airbus to embark on the A380 project were "derived in part from its experience in the development of its earlier model LCA funded in significant part by LA/MSF".<sup>2756</sup>

1270. As we see it, the Panel's conclusion that a non-subsidized Airbus would not have "achieved the market presence it did over the period 2001 to 2006", which followed from its views that a non-subsidized Airbus would be a "much weaker LCA manufacturer" with "at best a more limited

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<sup>2748</sup>Panel Report, para. 7.1717.

<sup>2749</sup>Panel Report, para. 7.1717.

<sup>2750</sup>Panel Report, para. 7.1933 (quoting European Communities' first written submission, paras. 30, 31, and 112).

<sup>2751</sup>Panel Report, para. 7.1936 (referring to D. Neven and P. Seabright, "European Industrial Policy: The Airbus Case" (1995) (Panel Exhibit US-382); and Airbus A380 business case (Panel Exhibit EC-362 (HSBI)), p. 36).

<sup>2752</sup>Panel Report, para. 7.1936.

<sup>2753</sup>Panel Report, para. 7.1938.

<sup>2754</sup>Panel Report, para. 7.1939. (footnote omitted)

<sup>2755</sup>Panel Report, para. 7.1940.

<sup>2756</sup>Panel Report, para. 7.1948.

offering of LCA models", provided enough of a basis to establish a "genuine and substantial relationship of cause and effect"<sup>2757</sup> in this case.

1271. In the case of displacement, the Panel's conclusion clearly implies that the sales of a non-subsidized Airbus would have been lower than those actually made by Airbus during the reference period. This is what the Panel concluded when it stated that the subsidies "enabled Airbus to bring to the market LCA that it would not otherwise have been able to develop and launch as and when it did, and thus caused displacement of United States' imports of LCA from the EC market and of United States' exports from the markets of certain third countries, as demonstrated in the data concerning market share before us."<sup>2758</sup> The Panel could have better explained how it saw the findings of displacement, in the first step of its analysis, and its findings on causation, in the second step, coming together. However, given that the Panel was satisfied that the sales of a non-subsidized Airbus would have been lower, we do not believe that it was necessary for the Panel to have made a precise quantification of the extent of the displacement caused by the LA/MSF subsidies.

1272. We reach a similar conclusion as regards lost sales. As noted earlier, the Panel found that "{w}hether {Airbus} might have been competing at all for those sales, for instance with a different LCA developed without subsidies, is questionable, as the lost sales all involved aircraft we have concluded would not have been developed by Airbus at the relevant times had earlier models not benefited from subsidies."<sup>2759</sup> The European Union understands the Panel's finding that Airbus would be "different" without subsidies to mean only that Airbus would have a smaller range of LCA.<sup>2760</sup> We read the Panel to have found not only that a non-subsidized Airbus would have had a smaller range of LCA, but also that any LCA that a non-subsidized Airbus could have offered during the reference period would be inferior to competing LCA. As a result, the Panel was not persuaded that a non-subsidized Airbus would have won the sales campaigns that the Panel concluded had been "lost" by Boeing. This reasoning is reflected in the Panel's conclusion that the "subsidies caused lost sales of United States' LCA because, but for the subsidies, Airbus would not have had available the LCA that it was able to sell to the customers at issue in the sales we have found were lost by Boeing

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<sup>2757</sup> Appellate Body Report, *US – Upland Cotton*, para. 438.

<sup>2758</sup> Panel Report, para. 7.2025. The Panel had earlier explained that, even if a non-subsidized Airbus had been able to enter the market, "Airbus would not have had the market presence and ability to win orders for LCA that it did have during the period 2001-2006, and 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." (*Ibid.*, para. 7.1993)

<sup>2759</sup> Panel Report, footnote 5758 to para. 7.1985.

<sup>2760</sup> See, for example, European Union's appellant's submission, paras. 399 and 461.

between the years 2001 and 2006."<sup>2761</sup> In coming to our views as to the sufficiency of the Panel's analysis, we have been mindful of the fact that the Panel found that scenarios 3 and 4 were "unlikely".

1273. We examine below whether a fuller consideration of the counterfactual scenarios 3 and 4 along the lines of the five questions that the European Union asserts the Panel was required to examine to "complete the counterfactual"<sup>2762</sup> would lead to a different conclusion based on the evidence on the record and in the light of the Panel's overall reasoning. Before doing so, we note that the European Union "accepts the Panel's finding that a non-subsidised Airbus would have had a smaller 'market presence' in 2001-2006 compared to the market share and sales that Airbus actually obtained."<sup>2763</sup> The European Union further accepts that a non-subsidized Airbus would not have been able to launch the A300, A310, and A340 LCA projects by the 2001-2006 reference period.<sup>2764</sup> However, the European Union considers that "there are significant findings by the Panel and substantial evidence in the record supporting the conclusion that a non-subsidised Airbus could have launched, sold and delivered by 2001-2006, a single-aisle LCA and a 200-300 seat twin-aisle LCA, and launched and sold a 500+ seat LCA by 2001".<sup>2765</sup> In the light of its position as to the LCA projects that could have been developed by a non-subsidized Airbus, the European Union limits its appeal to the Panel's causation findings with respect to seven lost sales involving the A320 and A380 and for the displacement the Panel observed.<sup>2766</sup> We address below the European Union's arguments as to the completion of the counterfactual analysis with respect to the claim of lost sales relating to four sales campaigns involving the A320 (Air Asia, Air Berlin, Czech Airlines, and easyJet) and to the observed displacement. The European Union's arguments concerning the lost sales involving the A380 are addressed in subsection 2 below.

1274. The first question that the European Union contends the Panel should have considered is whether the non-subsidized Airbus envisioned in the Panel's counterfactual scenarios 3 and 4 could have launched "different" LCA at a later date and sold the LCA, during the 2001-2006 reference period, to the relevant airlines and in the relevant country markets at issue.<sup>2767</sup> The European Union maintains that the evidence before the Panel would have enabled the Panel to complete its counterfactual analysis and find that, although a non-subsidized Airbus would not have launched the A300 and A310 in 1969 and 1978, respectively, it could have launched a single-aisle LCA with

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<sup>2761</sup>Panel Report, para. 7.2025.

<sup>2762</sup>European Union's appellant's submission, paras. 452 and 549.

<sup>2763</sup>European Union's appellant's submission, footnote 456 to para. 394.

<sup>2764</sup>European Union's appellant's submission, footnote 456 to para. 394.

<sup>2765</sup>European Union's appellant's submission, footnote 456 to para. 394.

<sup>2766</sup>European Union's appellant's submission, footnote 456 to para. 394.

<sup>2767</sup>European Union's appellant's submission, paras. 452, 530, and 549.



100-200 seats in or about 1987, and a twin-aisle LCA with 200-300 seats in or about 1991.<sup>2768</sup> In other words, a non-subsidized Airbus could have launched an A320-type LCA and an A330-type LCA, three years and four years after Airbus actually launched the A320 and A330, respectively. To support this proposition, the European Union refers to: (i) the prior technological experience of the Airbus companies in the regional aircraft sector; (ii) the growing demand for single-aisle LCA and twin-aisle LCA with 200-300 seats; and (iii) Boeing's outdated product offerings.<sup>2769</sup>

1275. We are not persuaded that the evidence on record should have led the Panel to conclude that a non-subsidized Airbus could have launched a single-aisle LCA with 100-200 seats in or about 1987, and a twin-aisle LCA with 200-300 seats in or about 1991. As noted earlier, the Panel found that LCA development is "enormously complex and expensive" and "requires huge up-front investments".<sup>2770</sup> The Panel further described the important economies of scope and scale, as well as learning effects, that are characteristic of the LCA industry.<sup>2771</sup> Moreover, Panel also found that LA/MSF covered 90-100% of the development costs of the A300 and A310 at zero interest, up to 90% of the development costs of the A320, and 60-90% of the development costs of the A330/A340<sup>2772</sup>, and that the cost of obtaining market financing for the A300 and A310 was significant compared to LA/MSF.<sup>2773</sup> Thus, an important question would be how Airbus could have obtained commercial financing to develop an A320-type LCA without subsidies.

1276. According to the European Union, the financial conditions for developing LCA would have been favourable in the light of the increased demand in the 1980s and 1990s and the "technological obsolescence of existing" Boeing aircraft.<sup>2774</sup> The European Union further maintains that "Boeing's contemporaneous massive investment in product launches and product development suggest that the financial markets viewed these as profitable."<sup>2775</sup> We note, however, that Boeing, as the incumbent producer, enjoyed many advantages that would not have been available to a non-subsidized Airbus attempting to enter the market in the 1980s. As the Panel found, "{e}conomies of scale arising from the huge sunk development cost give incumbent firms a considerable competitive advantage" and

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<sup>2768</sup>European Union's appellant's submission, paras. 499-504 and 542; and European Union's appellant's submission, Annex I (Counterfactual Annex) (BCI), paras. 59-64.

<sup>2769</sup>European Union's appellant's submission, Annex I (Counterfactual Annex) (BCI), paras. 12-57.

<sup>2770</sup>Panel Report, para. 7.1717 (referring to T.L. Boeder and G.J. Dorman, "The Boeing/McDonnell Douglas Merger: The Economics, Antitrust Law, and Politics of the Aerospace Industry" (Spring 2000) *Antitrust Bulletin* (Panel Exhibit US-373), pp. 132-133).

<sup>2771</sup>See *supra*, para. 1269.

<sup>2772</sup>Panel Report, paras. 7.1933, 7.1935, 7.1937, and 7.1939.

<sup>2773</sup>Panel Report, para. 7.1938. The Panel also drew attention to the "interest rate benefit" it had found in relation to LA/MSF provided for the A330/A340 project. (*Ibid.*, para. 7.1939)

<sup>2774</sup>European Union's appellant's submission, Annex I (Counterfactual Annex) (BCI), para. 68.

<sup>2775</sup>European Union's appellant's submission, Annex I (Counterfactual Annex) (BCI), para. 68.

"{l}earning effects induce dynamic economies of scale which reinforce incumbents' advantage."<sup>2776</sup> In the scenario advanced by the European Union, the A320-type aircraft would have been the first aircraft launched by a non-subsidized Airbus. As a new entrant to the market with less experience, it is not very plausible that a non-subsidized Airbus could find similar financing conditions as those that were available to Boeing as an incumbent LCA manufacturer. The scenario is also difficult to reconcile with the Panel's finding that "{u}ncertainty is considerable, making it very difficult to finance the huge development cost on capital markets."<sup>2777</sup>

1277. The European Union contends that, by the late 1980s, "the principal Airbus consortium members would have been well positioned to secure market financing" and that, "compared to the actual situation, ... the balance sheets of the consortium members would not have been burdened by the losses incurred from the A300/A310 projects".<sup>2778</sup> However, we recall the Panel's finding that LA/MSF covered 90 to 100% of the development costs of the A300 and A310 at zero interest.<sup>2779</sup> The European Union does not indicate in its appellant's submission to what extent the "losses incurred from the A300/A310 projects" went beyond the development costs, which, as noted above, were almost entirely covered by LA/MSF. Even assuming a non-subsidized Airbus would have suffered lower losses, it would also have had lower revenues, as it would not have sold any A300 and A310 LCA. The impact of this loss of revenue is not addressed by the European Union.

1278. With respect to the launch of a hypothetical A330-type LCA in 1991, the European Union maintains that a non-subsidized Airbus would have received significant "cash flow" generated by a single-aisle, A320-type LCA in 1987 and would have benefited from the "large number of single-aisle deliveries demanded by the market during the late 1980s and early 1990s".<sup>2780</sup> We note, first, that this assertion depends on a non-subsidized Airbus having launched an A320-type LCA in 1987. As discussed above, this proposition is difficult to reconcile with the Panel's findings on the complexities of developing LCA, economies of scope and scale, and learning effects. Second, as the Panel found, the majority of proceeds from the sale of an aircraft are received at the time of delivery<sup>2781</sup>, and "{i}n general, LCA are not purchased one at a time for immediate delivery, but rather tend to be ordered in large numbers with deliveries spread over a subsequent period of sometimes several years."<sup>2782</sup> The European Union does not explain how this would have impacted Airbus' ability to finance the launch

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<sup>2776</sup>Panel Report, para. 7.1717.

<sup>2777</sup>Panel Report, para. 7.1717.

<sup>2778</sup>European Union's appellant's submission, Annex I (Counterfactual Annex) (BCI), paras. 69 and 70.

<sup>2779</sup>Panel Report, paras. 7.1934 and 7.1935.

<sup>2780</sup>European Union's appellant's submission, Annex I (Counterfactual Annex) (BCI), para. 38.

<sup>2781</sup>Panel Report, paras. 7.1749 and 7.1750.

<sup>2782</sup>Panel Report, para. 7.1750.

in 1991 of an A330-type LCA from revenues generated from the A320-type LCA, which would have been launched only four years earlier in 1987.<sup>2783</sup>

1279. The second question raised by the European Union is whether the single-aisle and twin-aisle LCA offered by a non-subsidized Airbus would necessarily be technologically inferior and could not meet the size, range and operating performance requirements of the relevant airlines at issue.<sup>2784</sup> The European Union asserts that the Panel found that "LCA manufacturers generally will wait to launch new LCA until they can offer technical *advantages* over existing LCA".<sup>2785</sup> In the European Union's view, the Panel's finding means that more recently-launched LCA will incorporate technological advances, and hence suggests that if a non-subsidised Airbus launched a single-aisle LCA sometime after 1984, it was possible, and even likely, that the more recently launched LCA would have been technically *superior* to both the original A320 family, as well as the competing Boeing 737 family.<sup>2786</sup>

1280. The European Union further maintains that "every year a manufacturer can afford to defer the launch of an aircraft programme will allow it to integrate better and more cost-saving technologies, improving the quality of the aircraft for consumers".<sup>2787</sup> The European Union notes that the risk of a delayed launch is that a competitor is first to launch an aircraft, but submits that, "between 1984 and 1987, Boeing did not launch a new single-aisle LCA or significantly improve its existing Boeing 737 which would have competed against any Airbus A320-type LCA", and that, "between 1987 and 1991, Boeing did not make any significant improvements to its twin-aisle 200-300 seat 767 that would have competed with a non-subsidised Airbus A330-type LCA."<sup>2788</sup> Therefore, it argues, "the evidence would support a conclusion that a launch of an A320-type LCA delayed by three years and the launch of an A330-type LCA delayed by four years would have permitted a non-subsidised Airbus to make full use of the ongoing technological progress, and to improve the technological characteristics and operating performance of the LCA that it eventually would have launched."<sup>2789</sup>

1281. The Panel stated that "{t}he launch of a new model with improved performance characteristics can give an LCA manufacturer a competitive advantage".<sup>2790</sup> It does not automatically

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<sup>2783</sup>The gap between the launch and the first delivery of Airbus' first two LCA, the A300 and A310, was 5 and 7 years respectively. (Panel Report, footnote 5644 to para. 7.1936 and footnote 5650 to para. 7.1938)

<sup>2784</sup>European Union's appellant's submission, paras. 452, 530, and 549.

<sup>2785</sup>European Union's appellant's submission, para. 469 (referring to Panel Report, para. 7.1726). (original emphasis)

<sup>2786</sup>European Union's appellant's submission, para. 469.

<sup>2787</sup>European Union's appellant's submission, Annex I (Counterfactual Annex) (BCI), para. 45.

<sup>2788</sup>European Union's appellant's submission, Annex I (Counterfactual Annex) (BCI), para. 45.

<sup>2789</sup>European Union's appellant's submission, Annex I (Counterfactual Annex) (BCI), para. 46.

<sup>2790</sup>Panel Report, para. 7.1726.

follow, however, that a single-aisle LCA launched sometime after 1984 by a non-subsidized Airbus would *necessarily* have been technologically superior to the original A320, as well as the competing Boeing 737 family. Rather, these factual statements of the Panel, as well as the European Communities' arguments before the Panel, suggest otherwise. Specifically, the Panel found that "[l]earning effects, both with respect to development, and in production, are significant"<sup>2791</sup>, and that "static and dynamic ('learning curve') economies of scope and scale achieved in the context of one model of LCA are an important part of the development and production of other LCA models".<sup>2792</sup> The European Communities also acknowledged, before the Panel, the important knowledge gained on each of its LCA programmes.<sup>2793</sup> Indeed, the European Communities submitted before the Panel that "[t]he important role of R&D means that the learning curve is steep and even incremental technological innovation can translate into decisive competitive advantage in the market."<sup>2794</sup> Thus, without the "incremental technological innovation" from the launch of the A300 and A310, it is not plausible that a non-subsidized Airbus would have made the same technological progress, or would have had as much know-how as Airbus did in the early 1980s after having launched two LCA models. We also fail to see evidence on the record that should have led the Panel to find that the same kind of technological progress and experience gained through Airbus' development of two LCA models could have been gained by merely delaying the launch of an A320-type LCA by three years. Thus, we are not persuaded that the evidence on the record would have permitted the Panel to conclude that, had a non-subsidized Airbus been able to launch an aircraft in the late 1980s and/or 1990s, it would likely be technologically superior to the A320 and A330.

1282. The third question raised by the European Union is whether a non-subsidised Airbus' inability to offer LCA in all market segments would have resulted in its inability to meet the "commonality" requirement of the relevant airlines at issue.<sup>2795</sup> According to the Panel, "commonality" refers to the idea that, "[o]nce an airline orders any particular LCA model from a given manufacturer, efficiencies in operating a fleet of similar aircraft (including those related to spare parts, maintenance and training) favour follow-on orders of the same models, as well as orders of other aircraft models from the same manufacturer, in order to take advantage of commonalities across an LCA fleet."<sup>2796</sup> The Panel found

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<sup>2791</sup>Panel Report, para. 7.1623.

<sup>2792</sup>Panel Report, para. 7.1936 (referring to Neven and Seabright, *supra*, footnote 2751; and Airbus A380 business case (Panel Exhibit EC-362 (HSBI)), p. 36)

<sup>2793</sup>See, for example, UK Project Appraisal No. 1 (Panel Exhibit EC-98 (HSBI)), para. 1.2(f).

<sup>2794</sup>European Communities' first written submission to the Panel, para. 27.

<sup>2795</sup>European Union's appellant's submission, paras. 452, 530, and 549.

<sup>2796</sup>Panel Report, para. 7.1720.

that one of the "fundamental characteristics of the LCA market" is that most airlines prefer fleet commonality so as to reduce operating costs.<sup>2797</sup>

1283. The European Union alleges that undisputed evidence before the Panel demonstrated that Air Asia, Air Berlin, Czech Airlines, and easyJet purchased only LCA in the *single-aisle* market segment during 2001-2006, undermining any possibility that they were concerned about commonality.<sup>2798</sup> The European Union further contends that "the Panel failed to assess whether 'commonality'—i.e., the interest of an airline in securing all of its LCA from the same LCA manufacturer—was an issue for the airlines taking deliveries of Airbus LCA in the country markets at issue."<sup>2799</sup>

1284. We note that, before the Panel, the European Communities referred to fleet commonality as an important factor in an airline's decision to purchase aircraft.<sup>2800</sup> Indeed, the European Communities' arguments before the Panel argued that the ability of an LCA producer to offer a full range of LCA is important in an airline's decision to purchase aircraft. For example, the European Communities submitted that "the need to offer separate products whose commonality keep operating costs down for customer airlines across the fleet but which can perform the various missions dictated by an airline's route structure has historically meant that no manufacturer of a single product ... has survived in the LCA industry."<sup>2801</sup> Moreover, evidence on the Panel record indicates that Airbus' business strategy focused on an integrated family of LCA:

To achieve its market success, Airbus has pursued a consistent product strategy to offer competitive airliners across the market. *The family of aircraft concept has enabled a high degree of commonality* to be offered in all aspects of the aircraft operation from flight and cabin crew training to maintenance and spares.<sup>2802</sup>

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<sup>2797</sup>See Panel Report, paras. 7.1717 and 7.1981.

<sup>2798</sup>European Union's appellant's submission, para. 460 (referring to Airclaims CASE database, fleet summary, data query, 14 May 2007 (Panel Exhibit EC-768)).

<sup>2799</sup>European Union's appellant's submission, para. 539.

<sup>2800</sup>Panel Report, para. 7.1819 (referring to European Communities' first written submission to the Panel, para. 2096).

<sup>2801</sup>European Communities' first written submission to the Panel, para. 30.

<sup>2802</sup>Panel Report, para. 7.1665 (quoting BAE Systems, Annual Report 1999 (Panel Exhibit US-388), p. 15). (emphasis added) The Panel Report also quotes the following testimony of an Airbus official:

Since Airbus was established for the precise purpose of becoming a viable, profitable, long term enterprise, it was necessary to plan for a family of aircraft. As early as 1973, Airbus Industrie proposed the development over time of five related aircraft types. With the recent launch of the A330 and A340 programs, these five types are now in place.

(*Ibid.* (quoting statement of Alan S. Boyd, Chairman of the Board, Airbus Industrie of North America, Inc. to US House of Representatives Subcommittee on Commerce, Consumer Protection, and Competitiveness (23 June 1987) (Panel Exhibit US-386), p. 34))

1285. Furthermore, even accepting the European Union's contention that commonality would not have influenced the purchasing decisions of Air Asia, Air Berlin, Czech Airlines, and easyJet, we still do not see a basis to conclude that the evidence on the record should have led the Panel to conclude that Airbus could have developed a single-aisle LCA without subsidies, the aircraft purchased by these airlines. Thus, whether these airlines were interested or not in commonality, does not undermine the Panel's analysis. We recall, in this regard, that the Panel found that "Airbus' ability to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized LA/MSF".<sup>2803</sup> Thus, the Panel's analysis remains valid even if one were to agree with the European Union on this issue.

1286. The fourth question raised by the European Union is whether a non-subsidised Airbus could have offered its LCA at competitive prices.<sup>2804</sup> The European Union alleges that "{a} non-subsidised Airbus would have sold LCA at prices as low, or lower, than Airbus actually charged during the period 2001-2006".<sup>2805</sup> The European Union bases this assertion on the Panel's inference that "the resulting price levels", in the hypothetical scenario in which two US producers and a non-subsidized Airbus compete in the market, "could ... have been lower" than the price levels in the scenario where a subsidized new entrant (such as Airbus) competes with an incumbent producer (such as Boeing).<sup>2806</sup> In addition, according to the European Union, "the Panel found that a non-subsidised competitor's incentive to offer low prices meant that Boeing would not necessarily secure more sales."<sup>2807</sup>

1287. We note 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>2808</sup> Among these possibilities is a hypothetical scenario in which a non-subsidized Airbus would not have entered the market and the LCA industry only had two US producers (referred to above as scenario 2), or a hypothetical scenario in which a non-subsidized Airbus might have been able to enter the market and compete with a US industry comprising Boeing and another US producer (referred to above as scenario 4). It is with respect to these two scenarios that the Panel surmised that competition "could very well have been even more fierce" than competition between Boeing and a subsidized Airbus.<sup>2809</sup>

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<sup>2803</sup>Panel Report, para. 7.1949.

<sup>2804</sup>European Union's appellant's submission, paras. 452, 530, and 549.

<sup>2805</sup>European Union's appellant's submission, para. 471.

<sup>2806</sup>Panel Report, para. 7.1995.

<sup>2807</sup>European Union's appellant's submission, para. 540 (referring to Panel Report, para. 7.1979).

<sup>2808</sup>Panel Report, para. 7.1984.

<sup>2809</sup>Panel Report, para. 7.1995.

1288. The Panel had before it testimony regarding the effect of the subsidies on prices by Professors Joseph Stiglitz and Bruce Greenwald (the "Stiglitz/Greenwald statement"), which the Panel said "supports the view that prices in the aircraft market are lower than they would be in the Boeing monopoly counterfactual".<sup>2810</sup> As the Panel noted, "the Stiglitz/Greenwald statement does not help {the Panel} assess whether the prices that prevailed in 2001 to 2006 were higher or lower than those that would have resulted" had a non-subsidized Airbus entered the LCA market in the fourth counterfactual scenario.<sup>2811</sup> Thus, this statement does not support the assertion that a non-subsidized Airbus could offer similar LCA at competitive prices. Therefore, we do not see how the record would have allowed the Panel to conclude that a non-subsidized Airbus could have offered LCA at more competitive prices.

1289. The fifth question, according to the European Union, is whether there were any non-attribution factors relevant to the sales at issue that would suggest the absence of causation.<sup>2812</sup> The European Union maintains that "there are a variety of non-attribution factors that the Panel failed to look at and that explain, in part, why Airbus secured these orders".<sup>2813</sup> As regards the Panel's finding of lost sales involving A320 LCA, the European Union specifically refers to two factors. First, in relation to the sales to Air Asia, Air Berlin and easyJet, the European Union refers to the alleged mismanagement of these customers by Boeing.<sup>2814</sup> Second, with respect to the sale to Czech Airlines, the European Union refers to an alleged "dispute between Boeing and the Czech government with respect to a Boeing{ } investment in a partially state-owned company".<sup>2815</sup> Our own review of the Panel Report indicates that the Panel sufficiently addressed the two non-attribution factors that the European Union now alleges the Panel failed to consider. The Panel did so in its analysis of lost sales under the first-step of its two-step approach.<sup>2816</sup>

1290. With respect to the sale to easyJet, the focus of the European Communities' argument before the Panel was on certain "non-product related considerations" that supported Airbus' offer and that did not involve issues of customer mishandling, as well as on the date by which easyJet had "committed" to Airbus' offer.<sup>2817</sup> It was in this context that the European Communities initially referred to the

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<sup>2810</sup>Panel Report, para. 7.1995.

<sup>2811</sup>Panel Report, para. 7.1995.

<sup>2812</sup>European Union's appellant's submission, paras. 452, 530, and 549.

<sup>2813</sup>European Union's appellant's submission, para. 497.

<sup>2814</sup>European Union's appellant's submission, paras. 493-495.

<sup>2815</sup>European Union's appellant's submission, para. 496. The European Union observes that the impact of this alleged dispute was accentuated by the Czech Republic's entry into the European Union.

<sup>2816</sup>See Panel Report, paras. 7.1803 and 7.1817.

<sup>2817</sup>European Communities' first written submission to the Panel, paras. 1890-1893. These "non-product related considerations" are HSBI.

statement by the former CEO of easyJet which it quotes in its appellant's submission.<sup>2818</sup> The Panel addressed these "non-product related considerations", but concluded that pricing was the determinant factor in the sale and that the prices offered by Airbus already reflected the non-price considerations raised by the European Communities.<sup>2819</sup> The European Communities subsequently referred to the statement by the former CEO of easyJet among its other examples of alleged customer mishandling by Boeing.<sup>2820</sup> Although the Panel did not specifically refer to the allegation of customer mismanagement in connection with the easyJet sale, we do not believe this undermines the Panel's analysis. As we noted, the Panel addressed the European Communities' allegation concerning "non-product related considerations", which was the focus of the European Communities' argumentation and in which context it had first referred to the statement by the former CEO of easyJet. We note, moreover, that the statement of the former CEO of easyJet is rather vague as to how the alleged mismanagement of easyJet by Boeing contributed to Boeing losing the sale.

1291. As for the sales to Air Asia and Air Berlin, the Panel Report shows that the Panel considered the European Communities' allegations of customer mismanagement by Boeing. However, the Panel concluded that customer relationship issues played a secondary role and that in both instances the sales turned mainly on pricing.<sup>2821</sup> On appeal, the European Union repeats the public statements on which it based its allegations before the Panel, but does not develop reasons substantiating why the Panel's assessment of the limited relevance of customer relationship issues in these sales campaigns should be questioned.

1292. The Panel also addressed the alleged dispute between Boeing and the Czech government, which allegedly played a role in the sales campaign involving Czech Airlines. The Panel acknowledged that there was "evidence which suggests that {Czech Airlines} was not well inclined towards Boeing"<sup>2822</sup>, yet it would appear that the Panel considered this factor to be less important than pricing. On appeal, the European Union summarizes some of background concerning the alleged dispute between Boeing and the Czech government and asserts that the Panel should have made "further findings"<sup>2823</sup> given its recognition that Czech Airlines was not "well inclined" towards

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<sup>2818</sup>The European Union noted that former CEO of easyJet stated:

Before Christmas, the president of Boeing sat down and said "this is the deal of the century". Rubbish! He undercut himself again and again. Why should I believe them from now on?

(European Union's appellant's submission, para. 495 (quoting "EasyJet's Stelios Haji-Ioannou Comments on Airbus Plane Order", *Bloomberg News*, 14 October 2002 (Panel Exhibit EC-439))

<sup>2819</sup>Panel Report, para. 7.1806. The Panel's discussion of these issues was rather concise, which may be due to the fact that the European Communities had designated this evidence as HSBI.

<sup>2820</sup>European Communities' second written submission to the Panel, para. 1158.

<sup>2821</sup>Panel Report, paras. 7.1809 and 7.1817.

<sup>2822</sup>Panel Report, para. 7.1813.

<sup>2823</sup>European Union's appellant's submission, para. 496.



Boeing. Nonetheless, the European Union's argument fails to account for the Panel's conclusion as to the role of pricing in this sales campaign, nor does it explain what "further findings" the Panel should have made once it had considered the alleged dispute between the Czech government and Boeing in the light of other factors which were relevant in the sale, namely pricing.<sup>2824</sup> In sum, with respect to the A320 sales campaigns, we believe that the Panel sufficiently addressed the non-attribution factors raised by the European Communities. The European Union alleges that the Panel also failed to address country-specific non-attribution factors relevant to the question whether displacement in particular countries was the effect of the challenged subsidies.<sup>2825</sup> We note that the European Union does not mention any non-attribution factors with respect to the European Union market.

1293. As regards the Australian market, the European Union asserts that Boeing lost market share because Boeing's major customer in Australia, Virgin Blue, decided to lease Boeing LCA, instead of ordering new Boeing LCA.<sup>2826</sup> It further explains that Boeing's post 9/11 deliveries to Australia were exaggerated because Boeing's main customers Virgin Blue and Qantas urgently needed large numbers of aircraft to take advantage of the post-9/11 bankruptcy of their domestic competitor Ansett Australia.<sup>2827</sup> The European Union adds that, following the exceptionally large deliveries in 2002, Qantas' requirement for new LCA steadily decreased and Virgin Blue decided to lease used Boeing 737s, instead of taking delivery of new Boeing LCA.<sup>2828</sup> Even assuming the validity of these allegations, the two factors raised by the European Union focus exclusively on Boeing's absolute sales volumes. However, the two factors would not explain Boeing's loss of market share to Airbus, which was the basis of the finding of displacement. Indeed, the European Union's argument fails to consider that Boeing also would have competed for the sales that were made by a subsidized Airbus.

1294. With respect to the Chinese market, the European Union alleges that "airlines order (and, hence, take delivery) of LCA based on governmental political considerations".<sup>2829</sup> Even assuming that political considerations play a role in sales to the Chinese market, this does not demonstrate that political considerations were the cause of Boeing's loss of market share to Airbus in China. Furthermore, the basis for the European Union's allegation that Boeing lost market share due to

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<sup>2824</sup>The European Union observes that the Panel found that "Airbus' success in each of the four sales at issue revolved, in considerable part, around low prices". (European Union's appellant's submission, para. 468)

<sup>2825</sup>European Union's appellant's submission, para. 567.

<sup>2826</sup>European Union's appellant's submission, para. 567.

<sup>2827</sup>European Union's appellant's submission, para. 567.

<sup>2828</sup>European Union's appellant's submission, Annex III (Displacement Annex), para. 107.

<sup>2829</sup>European Union's appellant's submission, para. 567.

political considerations consists of excerpts from a single newspaper article.<sup>2830</sup> Moreover, as the European Union recognizes, Airbus made sales of A340 LCA in China during the reference period.<sup>2831</sup> The European Union has accepted that the A340 would not have been launched without subsidies. It further accepts that no further analysis is required for purposes of establishing causation with respect to the displacement involving sales of A340.<sup>2832</sup>

1295. As for the Korean market, the European Union submits that "Boeing lost market share in Korea over 2001-2006 because Korean Air's LCA requirements decreased significantly".<sup>2833</sup> As with the Australian market, even assuming the validity of the European Union's submission, it would only explain the absolute decline in Boeing's sales. The European Union's argument, however, does not account for the sales made by a subsidized Airbus that could have been made by Boeing in the absence of the subsidies. Even if Airbus' deliveries in the Korean market remained stable, as the European Union alleges<sup>2834</sup>, those deliveries could have been made by Boeing had Airbus not been subsidized, in which case Boeing's sales would not have declined.

1296. Given that we have reversed the Panel's findings of displacement in the Brazilian, Mexican, Singaporean and Chinese Taipei markets, and the finding of threat of displacement in the Indian market, we need not address the non-attribution factors raised by the European Union with respect to those markets.

1297. Finally, we note that the Panel found that, irrespective of other factors, the presence of the subsidized LCA in the market was a "fundamental cause" of the lost sales and displacement.<sup>2835</sup> The Panel concluded in this respect:

We noted that there are numerous factors involved in a customer's decision as to which LCA to purchase. However, one factor which is essential is *the availability of a particular model or models of LCA suitable for a particular customer's needs at the time of the sale*.<sup>2836</sup>

1298. In paragraph 1275 above, we have observed that we are not persuaded that the evidence on record should have led the Panel to find that a non-subsidized Airbus could have launched an A320-

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<sup>2830</sup>European Union's appellant's submission, Annex III (Displacement Annex), para. 116 (quoting "Boeing stumbles in race for China", *Seattle Times*, 5 June 2005 (Exhibit EC-916)). The other evidence referred to by the European Union generally describes the procedures that Chinese airlines allegedly must follow to acquire aircraft.

<sup>2831</sup>The A340 sales represented 100% of Airbus' deliveries of twin-aisle LCA in 2003 and 2004. (See European Union's appellant's submission, Annex III (Displacement Annex), paras. 119-122)

<sup>2832</sup>European Union's appellant's submission, Annex III (Displacement Annex), para. 62.

<sup>2833</sup>European Union's appellant's submission, para. 567.

<sup>2834</sup>European Union's appellant's submission, Annex III (Displacement Annex), para. 130.

<sup>2835</sup>Panel Report, para. 7.1985.

<sup>2836</sup>Panel Report, para. 7.1985. (emphasis added)

type LCA in 1987 and an A330-type LCA in 1991. This undercuts the contention that the non-attribution factors raised by the European Union could have diminished the effect of the subsidies.

1299. In sum, we do not believe that the Panel would have reached a different conclusion had it pursued its counterfactual analysis further along the lines of the five questions raised by the European Union.

1300. Therefore, we *reject* the European Union's claims that the Panel "presumed causation" and failed to establish the required "chain of causation" in its assessment of whether the displacement and lost sales were the effect of the LA/MSF subsidies within the meaning of Article 6.3(a), (b), and (c) of the *SCM Agreement*. For similar reasons, we *reject* the European Union's allegations that the Panel failed to make an objective assessment of the facts under Article 11 of the DSU. Instead, we *find* that the Panel's analysis sufficiently established a "genuine and substantial" causal link between the LA/MSF subsidies and the displacement and lost sales.

(d) The relevance of the 1992 Agreement

1301. The European Union also argues that the Panel erred by failing to consider the 1992 Agreement in evaluating the United States' claims of adverse effects. First, the European Union contends that, through the 1992 Agreement, the United States "agreed in its bilateral relations with the European Union to the acceptable level of government support that it now alleges constitute{s} subsidies" and thus the United States cannot "subsequently allege that those same measures are actionable, causing adverse effects to its interests."<sup>2837</sup>

1302. As we have noted in section VI.B.3(b), the LA/MSF measures fall within the category of government support to which Article 4 of the 1992 Agreement is addressed. The 1992 Agreement, however, does not address the remedies that each party could pursue at the multilateral level. While the 1992 Agreement provides that the parties "shall seek to avoid any trade conflict on matters covered" by it<sup>2838</sup>, the Agreement does not say that either party could not challenge support provided by the other party to its LCA industry if such support caused adverse effects.<sup>2839</sup> Indeed, the fifth recital of the 1992 Agreement states that it was the parties' "intention to act without prejudice to their

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<sup>2837</sup>European Union's appellant's submission, para. 689.

<sup>2838</sup>Article 10.1 of the 1992 Agreement.

<sup>2839</sup>By contrast, Article 10.2 provides that the parties "will not self-initiate action under their national trade laws with respect to government supports granted in conformity with this Agreement for as long as this Agreement is in force."

rights and obligations under the GATT and under other multilateral agreements negotiated under the auspices of the GATT".

1303. At the other oral hearing, the European Union suggested that the 1992 Agreement delineated the "interests" of the United States in the area of government measures relating to the LCA industry and thereby limited the ability of the United States to assert claims of adverse effects to its interests under the *SCM Agreement*. The European Union did not provide a basis for concluding that any "interests" reflected in the 1992 Agreement exhaust the "interests" of the United States under Article 5 of the *SCM Agreement*. Nor do we see a basis for the argument that a bilateral agreement serves to limit the interests of the parties under a subsequent multilateral agreement.<sup>2840</sup>

1304. The European Union also asserts that "the circumstance that these {challenged} measures were in conformity with an agreement between the parties is a fact that the Panel was required to take into consideration in assessing whether adverse effects exist."<sup>2841</sup> The European Union claims, in this regard, that "the Panel erred in its interpretation and application of Article 5(c) of the *SCM Agreement* and Articles 12.7 and 11 of the DSU in failing to set out the basic rationale for its findings and in failing to make an objective assessment of the law and the facts."<sup>2842</sup> The European Union does not explain how the Panel was meant to have considered the alleged conformity of the challenged measures with the 1992 Agreement as a "fact". Even assuming for the sake of argument that such a "fact" was indeed relevant, the European Union does not explain why such fact would preclude the United States from making a claim of adverse effects under the *SCM Agreement*.

1305. In these circumstances, we do not consider that there is a basis for the European Union's allegation that the Panel's failure to consider the 1992 Agreement in the context of the assessment of adverse effects constitutes an error in the interpretation and application of Article 5(c) of the *SCM Agreement* or a violation of the Panel's duties under Articles 12.7 and 11 of the DSU.

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<sup>2840</sup>At the oral hearing, the European Union also raised the following three questions in connection with the 1992 Agreement: (1) How could LA/MSF measures, to which the United States consented, plausibly cause effects adverse to the interests of the United States in Brazil and Mexico when Boeing's share of those markets actually rose during the reference period? (2) How could LA/MSF measures, to which the United States consented, plausibly cause displacement effects in various other markets adverse to the interest of the United States in the complete absence of any trend? and (3) How could LA/MSF measures, to which the United States consented, relating to products between which competition is "non-existent" or negligible, be plausibly lumped together to generate findings, even in the complete absence of any sales of the relevant aircraft (as, for example, in the case of Brazil)? We note that these questions turn on issues that go beyond the 1992 Agreement, such as, the existence of "trends", whether Boeing's market share increased or decreased, or what is the relevant product market, all of which were addressed earlier. None, however, provides support for the allegation that the United States is barred from raising a claim of adverse effects under Articles 5 and 6.3 of the *SCM Agreement*.

<sup>2841</sup>European Union's appellant's submission, para. 690.

<sup>2842</sup>European Union's appellant's submission, para. 691.

## 2. Causation – A380 Lost Sales

1306. We turn next to the European Union's appeal of the Panel's finding that a non-subsidized Airbus would not have been able to launch the A380 in 2000.<sup>2843</sup> In making this appeal, the European Union seeks to invalidate the Panel's consequential finding that the challenged subsidies caused Boeing to lose significant sales in the Emirates Airlines, Qantas, and Singapore Airlines sales campaigns. These sales campaigns were won by Airbus selling A380 aircraft.<sup>2844</sup> We begin our analysis with a summary of the Panel's findings in subsection (a), followed by our analysis of the European Union's claims of error in subsection (b), and our conclusions in subsection (c).

### (a) The Panel's findings

1307. We recall that the Panel found that the Dorman Report demonstrated that the provision of LA/MSF was "likely to change the behaviour of the recipient with respect to a decision to launch a LCA by increasing the likelihood of an affirmative decision to go forward with the launch."<sup>2845</sup> The Panel then reviewed a series of statements by government and Airbus officials, which allegedly suggested that the subsidies "facilitated and accelerated the introduction"<sup>2846</sup> of every major Airbus LCA model, including the A380.<sup>2847</sup> Although the Panel recognized that such statements might have involved a certain "degree of self interest"<sup>2848</sup>, it noted that they were uncontested by the European Communities, and found that they "generally support the inference that, but for the

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<sup>2843</sup>European Union's appellant's submission, para. 599 (referring to Panel Report, paras. 7.1947-7.1949).

<sup>2844</sup>European Union's appellant's submission, para. 628 (referring to Panel Report, paras. 7.1993, 7.2025, and 8.2(d)).

<sup>2845</sup>Panel Report, para. 7.1912.

<sup>2846</sup>United States' first written submission to the Panel, para. 829.

<sup>2847</sup>Panel Report, paras. 7.1913, 7.1917 and 7.1918. The Panel noted that the UK Secretary of State for Trade and Industry was quoted as stating that the launch of the A380 "would not have been possible if it had not been for the commitment of the British Government". (*Ibid.*, para. 7.1917 (quoting answer of Patricia Hewitt, Secretary of State for Trade and Industry, UK Parliament House of Commons Hansard Debates for 3 March 2005 (Panel Exhibit US-436), column 1088) In a similar vein, the UK Department of Trade and Industry website explained that "[t]he fundamental rationale of launch aid is to address the apparent unwillingness of capital markets to fund projects with such high product development costs, high technological and market risks and such long pay back periods". (*Ibid.* (quoting "Aerospace and Defense Industries Launch Investment", DTI website (Panel Exhibit US-106))) According to a 1997 French Senate Report, even if Aérospatiale would have been able to obtain outside financing to meet its requirements in respect of the A380, such financing would "add excessively to the financial expenses incurred by the firms and would throw their balance sheets out of equilibrium because of the low level of their equity capital". (*Ibid.*, para. 7.1918 (quoting Yvon Collin, Senator, Report No. 367 (1996-1997), *Mission de contrôle effectuée sur le soutien public à la construction aéronautique civile* (Panel Exhibit US-18)))

<sup>2848</sup>Panel Report, para. 7.1919.

provision of LA/MSF", Airbus would not have been able to launch its range of LCA, including the A380, as and when it did.<sup>2849</sup>

1308. The European Communities sought to rebut the United States' assertion that Airbus would not have been able to launch the A380 without LA/MSF by pointing to the Airbus A380 business case, which in its view demonstrated that LA/MSF did not have any impact on the decision to launch the A380.<sup>2850</sup> The Panel acknowledged that the A380 business case predicted a positive net present value ("NPV") both in the baseline scenario where there is no LA/MSF available, and in the baseline scenario where LA/MSF amounts to 33% of development costs.<sup>2851</sup> However, the Panel noted that the five different sensitivity assessments contained in the A380 business case, including a "Realistic Worst Case" scenario, were not tested against a base case in which Airbus did not receive LA/MSF.<sup>2852</sup> The Panel further explained that, although the *ex post* sensitivity analysis submitted by the European Communities applied the Realistic Worst Case scenario to a base case where no LA/MSF was provided, it did not undertake the sensitivity analysis with respect to all parameters used in the original A380 business case.<sup>2853</sup> Therefore, the Panel said it did not know whether the use of the same parameters contained in the business case would have resulted in a negative NPV in the Realistic Worst Case scenario.<sup>2854</sup>

1309. The Panel noted further that a "critical element of the credibility of the business case is the reasonableness of the demand predictions on which the sales and delivery projections are based."<sup>2855</sup> According to the Panel, because the business case also served as one of the bases for the government lenders to decide whether to support a programme, and given the "graduated levy-based and success-dependent nature of LA/MSF repayments", Airbus had "an economic incentive to be optimistic" in its sales forecasts.<sup>2856</sup> The Panel considered that the A380 business case reflected "consideration of a rather limited range of possibilities in terms of failure to achieve sales targets, particularly in view of the uncertainty of demand forecasts for the aircraft."<sup>2857</sup> For the Panel, actual delays in ramping up production and relatively limited sales and deliveries indicated that the Realistic Worst Case scenario did not capture what could reasonably have been envisioned to be the worst case scenario at the time the business case was developed.<sup>2858</sup> For these reasons, the Panel was "not persuaded that the A380

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<sup>2849</sup>Panel Report, para. 7.1920.

<sup>2850</sup>Airbus A380 business case (Panel Exhibit EC-362 (HSBI)).

<sup>2851</sup>Panel Report, para. 7.1922.

<sup>2852</sup>Panel Report, para. 7.1923.

<sup>2853</sup>Panel Report, para. 7.1925 (referring to the Carballo Declaration, *supra*, footnote 2702).

<sup>2854</sup>Panel Report, para. 7.1925.

<sup>2855</sup>Panel Report, para. 7.1927.

<sup>2856</sup>Panel Report, para. 7.1926.

<sup>2857</sup>Panel Report, para. 7.1927. (footnote omitted)

<sup>2858</sup>Panel Report, para. 7.1927.

business case alone demonstrates that Airbus would have launched the A380 even in the absence of LA/MSF".<sup>2859</sup>

1310. Furthermore, the Panel agreed with the United States that a French Senate Report<sup>2860</sup> and a statement made by the UK Secretary of State for Trade and Industry<sup>2861</sup> suggested that even if Airbus had been confident that the A380 project would have been viable without LA/MSF, it would not have been able to fund the project relying exclusively on its own resources and outside financing. The Panel rejected the European Communities' argument that the creation of EADS increased Airbus' financial flexibility. For the Panel, it was not clear how or to what degree the corporate restructuring of Airbus Industrie GIE, Aérospatiale, CASA, and Deutsche Airbus affected the ability of Airbus France (or Airbus SAS) to raise the very large amounts of capital needed for the A380 project.<sup>2862</sup> Moreover, the Panel observed that the European Communities had "submitted no evidence to support the contention that merely because, reportedly, Boeing was able to finance a significant portion of the non-recurring costs of development of the 787 through risk-sharing supplier arrangements, Airbus would necessarily have been able to do the same with respect to the A380."<sup>2863</sup>

1311. Finally, the Panel considered that "but for LA/MSF provided with respect to Airbus' launches of earlier models of LCA", it would not "have been possible for Airbus to be in a position to launch the A380 in 2000".<sup>2864</sup> The Panel opined that Airbus would not have been in a position to obtain market financing for the A380, had it not financed the development of its earlier models of LCA in significant part through LA/MSF, because "the increase in the level of debt Airbus would have accumulated over the years would have been massive".<sup>2865</sup> The Panel further noted that "Airbus' technical capabilities derived in part from its experience in the development of its earlier model LCA funded in significant part by LA/MSF".<sup>2866</sup> Thus, according to the Panel, "that Airbus could have

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<sup>2859</sup>Panel Report, para. 7.1944.

<sup>2860</sup>Panel Report, para. 7.1945 (referring to Panel Exhibit US-18, *supra*, footnote 2847).

<sup>2861</sup>Panel Report, para. 7.1945 (referring to Panel Exhibit US-436, *supra*, footnote 2847).

<sup>2862</sup>Panel Report, para. 7.1947.

<sup>2863</sup>Panel Report, para. 7.1947. The Panel acknowledged that Airbus used risk-sharing supplier arrangements, but said there was no indication that it could have increased its use of such arrangements so as to replace the entire amount of financing provided by LA/MSF, which was up to 33% of the development costs of the A380. Furthermore, the Panel did not consider the availability of risk-sharing supplier arrangements in respect of the A340-500/600 to be persuasive in this regard, because those were derivative aircraft which entailed much smaller development costs and a much lower level of risk to Airbus' overall operations. The willingness of suppliers to take on some of the risk of that much smaller programme did not demonstrate that any supplier or suppliers would be prepared to do so in respect of up to 33% of the much greater costs of the A380. Finally, the Panel noted that information in the Airbus A380 business case suggested that the risk-sharing participants' involvement in the A380 project may not have been on strictly market terms for all participants.

<sup>2864</sup>Panel Report, para. 7.1948.

<sup>2865</sup>Panel Report, para. 7.1948. (footnote omitted)

<sup>2866</sup>Panel Report, para. 7.1948.

launched the A380 as a stand-alone proposition is dependent upon Airbus having received LA/MSF to develop all of its previous models of LCA."<sup>2867</sup> Accordingly, the Panel concluded that "either directly or indirectly, LA/MSF was a necessary pre-condition for Airbus' launch in 2000 of the A380."<sup>2868</sup>

(b) Analysis

1312. On appeal, the European Union claims that the Panel erred in its evaluation of various elements which supported its finding that "either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380."<sup>2869</sup> In particular, the European Union argues that the Panel erred: (i) in its assessment of the A380 business case; (ii) in its evaluation of Airbus' ability to fund the A380 without access to LA/MSF; and (iii) in its analysis of Airbus' technological capabilities in the absence of LA/MSF.

1313. For each aspect of the Panel's assessment that it challenges, the European Union makes a claim under Articles 5(c) and 6.3(c) of the *SCM Agreement*, alleging an error of application, as well as a claim under Article 11 of the DSU, alleging a failure by the Panel to make an objective assessment of the facts.<sup>2870</sup> At the oral hearing, the European Union suggested that an appellant was entitled to make both claims and that it would be for the Appellate Body to determine which was the proper characterization of those claims.

1314. As noted earlier, the Appellate Body has stated that "an appellant is free to determine how to characterize its claims on appeal"<sup>2871</sup>, and it is often difficult to clearly distinguish between issues that are purely legal, purely factual, or are mixed issues of law and fact. We also recall that the characterization of a claim as one relating to the application of law to facts or as one relating to a failure to make an objective assessment of the facts under Article 11 of the DSU has consequences for the standard of review that the Appellate Body will apply because of the limitations on the scope of appellate review. In most cases, however, an issue will *either* be one of application of the law to the facts *or* an issue of the objective assessment of facts, and not both.

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<sup>2867</sup>Panel Report, para. 7.1948.

<sup>2868</sup>Panel Report, para. 7.1948.

<sup>2869</sup>Panel Report, para. 7.1948.

<sup>2870</sup>European Union's appellant's submission, para. 627.

<sup>2871</sup>Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 177 (referring to Appellate Body Report, *Japan – Apples*, para. 136).



1315. In order to determine whether the issues raised by the European Union are more properly characterized as relating to application of law to facts or to an objective assessment of the facts, it is first necessary to recall the requirements of Article 6.3(c) of the *SCM Agreement*, which establishes that "serious prejudice" in the sense of Article 5(c) "may arise" where "the effect of the subsidy" is, among others, "{significant} lost sales in the same market." In this part of its appeal, the European Union is not alleging that the Panel applied an incorrect legal standard in determining whether the "effect of" the subsidies was "significant lost sales" under Article 6.3(c) of the *SCM Agreement* in relation to the sales of the A380 to Emirates Airlines, Qantas, and Singapore Airlines. During the oral hearing, the European Union also clarified that it did not challenge the Panel's interpretation of the phrase "lost sales in the same market" in Article 6.3(c).<sup>2872</sup>

1316. The European Union's claim that the Panel erred in the application of Articles 5(c) and 6.3(c) of the *SCM Agreement* is directed at three particular aspects of the Panel's analysis. First, the European Union challenges the Panel's assessment of "the financial viability and credibility of Airbus' business case for the A380".<sup>2873</sup> In our view, the financial viability of Airbus is essentially a factual matter and the Appellate Body has held that the assessment of the weight and credibility of evidence, such as the A380 business case, falls in principle within the discretion of panels as triers of fact.<sup>2874</sup> Second, the European Union asserts that "the Panel erred in its assessment of the ability of a non-subsidised Airbus to raise the financing necessary to launch the A380".<sup>2875</sup> We do not see that this raises a legal issue; rather, the assessment of a company's ability to raise financing is a factual matter. Finally, the European Union argues that "the Panel erred in its assessment of a non-subsidised Airbus' technological experience to develop and produce the A380" if prior models had been launched without LA/MSF.<sup>2876</sup> We see the technological abilities of a company as being an issue that is primarily factual in nature. Thus, in our view, the European Union's challenges against these three aspects of the Panel's analysis are more properly characterized as claims under Article 11 of the DSU because they are directed at the alleged lack of objectivity of the Panel's assessment of the facts. Consequently, we will examine them under Article 11 of the DSU.

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<sup>2872</sup>European Union's response to questioning at the oral hearing.

<sup>2873</sup>European Union's appellant's submission, para. 600.

<sup>2874</sup>See Appellate Body Report, *EC – Hormones*, para. 132.

<sup>2875</sup>European Union's appellant's submission, para. 600.

<sup>2876</sup>European Union's appellant's submission, para. 600.

1317. The Appellate Body has repeatedly emphasized that Article 11 of the DSU requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."<sup>2877</sup> Within these parameters, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings"<sup>2878</sup>, and panels "are not required to accord to factual evidence of the parties the same meaning and weight as do the parties".<sup>2879</sup> In this regard, the Appellate Body has stated that it will not "interfere lightly" with a panel's fact-finding authority<sup>2880</sup>, and has also emphasized that it "cannot base a finding of inconsistency under Article 11 simply on the conclusion that {it} might have reached a different factual finding from the one the panel reached".<sup>2881</sup> Instead, for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel has exceeded its authority as the trier of facts.<sup>2882</sup> As an initial trier of facts, a panel must provide "reasoned and adequate explanations and coherent reasoning".<sup>2883</sup> It has to base its findings on a sufficient evidentiary basis on the record<sup>2884</sup>, may not apply a double standard of proof<sup>2885</sup>, and a panel's treatment of the evidence must not "lack even-handedness".<sup>2886</sup>

1318. We note that not every error in the appreciation of a particular piece of evidence will rise to the level of a failure by the Panel to comply with its duties under Article 11 of the DSU. In order for us to reverse the Panel's finding in respect of the A380 on the basis of Article 11 of the DSU, we would have to be satisfied that the Panel's errors, taken together or singly, undermine the objectivity of the Panel's assessment of whether Airbus would have been able to launch the A380 in 2000 without LA/MSF. Thus, the question before us is whether the Panel did commit the errors alleged by the European Union and, if so, whether they demonstrate that the Panel's conclusion that LA/MSF was a

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<sup>2877</sup>Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185 (referring to Appellate Body Report, *EC – Hormones*, paras. 132 and 133). See also Appellate Body Report, *Japan – Apples*, para. 221; Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *Australia – Salmon*, para. 266; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 125; Appellate Body Report, *Japan – Agricultural Products II*, paras. 141 and 142; Appellate Body Report, *Korea – Dairy*, para. 138; Appellate Body Report, *Korea – Alcoholic Beverages*, paras. 161 and 162; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; Appellate Body Report, *US – Gambling*, para. 363; Appellate Body Report, *EC – Selected Customs Matters*, para. 258; and Appellate Body Report, *US – Carbon Steel*, para. 142.

<sup>2878</sup>Appellate Body Report, *EC – Hormones*, para. 135.

<sup>2879</sup>Appellate Body Report, *Australia – Salmon*, para. 267.

<sup>2880</sup>See, for example, Appellate Body Report, *US – Wheat Gluten*, para. 151; Appellate Body Report, *EC – Sardines*, para. 299; and Appellate Body Report, *US – Carbon Steel*, para. 142.

<sup>2881</sup>Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>2882</sup>Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>2883</sup>See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, footnote 618 to para. 293.

<sup>2884</sup>See Appellate Body Report, *US – Carbon Steel*, para. 338.

<sup>2885</sup>See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 293.

<sup>2886</sup>See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 292.

"necessary precondition"<sup>2887</sup> for the launch of the A380 in 2000, no longer had a sufficient evidentiary and objective basis.

1319. The first error alleged by the European Union relates to the Panel's assessment of the A380 business case. Before the Panel, the A380 business case was produced by the European Communities in support of its allegation that LA/MSF did not have any impact on the decision to launch the A380 in 2000.<sup>2888</sup> According to the European Communities, the A380 business case demonstrated that the project provided "robust returns" in the absence of LA/MSF.<sup>2889</sup>

1320. The Panel noted that the A380 business case is dated December 2000. As described by the Panel, the A380 business case includes an NPV analysis of a "contemplated A380 family of aircraft" comprising a core aircraft, a freighter, and extended and stretch versions of the core aircraft.<sup>2890</sup> As with the Dorman Report, the A380 business case made certain assumptions in respect of non-recurring costs, recurring costs, the number of deliveries and pricing. The A380 business case calculated the NPV of two "baseline" scenarios, one of which assumed no provision of LA/MSF, and the other with LA/MSF covering 33% of development costs. The Panel observed that the A380 business case anticipated a positive NPV in the absence of LA/MSF, but like the Dorman Report simulation, it also indicated that LA/MSF positively impacted the NPV of the project.<sup>2891</sup>

1321. The Panel further noted that the A380 business case contained five different sensitivity assessments in respect of the baseline case, one of which is the Realistic Worst Case scenario, but emphasized that such Realistic Worst Case scenario was not tested against the baseline case in which Airbus would not receive LA/MSF. According to the Panel, this implied that Airbus never contemplated launching the A380 without LA/MSF.<sup>2892</sup> The Panel then referred to an *ex post facto* sensitivity analysis contained in the "Carballo Declaration"<sup>2893</sup>, which was submitted by the European Communities. The Panel expressed concerns about the analysis in the Carballo Declaration of the Realistic Worst Case scenario because it failed to conduct the sensitivity assessment with respect to all the parameters originally used in the A380 business case.<sup>2894</sup> Thus, although the sensitivity analysis of the Carballo Declaration still reflected a positive NPV in the absence of

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<sup>2887</sup>Panel Report, para. 7.1948.

<sup>2888</sup>Airbus A380 business case (Panel Exhibit EC-362 (HSBI)).

<sup>2889</sup>Panel Report, para. 7.1921.

<sup>2890</sup>Panel Report, para. 7.1922.

<sup>2891</sup>Panel Report, para. 7.1922 (referring to Airbus A380 business case (Panel Exhibit EC-362 (HSBI)), p. 29).

<sup>2892</sup>Panel Report, para. 7.1923.

<sup>2893</sup>*Supra*, footnote 2853.

<sup>2894</sup>Panel Report, paras. 7.1924 and 7.1925 (referring to Carballo Declaration *supra*, footnote 2702).

LA/MSF, the Panel could not conclude that the project's NPV would remain positive in all scenarios.<sup>2895</sup>

1322. Nonetheless, the Panel acknowledged that both the A380 business case and the *ex post* sensitivity analysis contained in the Carballo Declaration forecast that the A380 would have yielded positive returns in the absence of LA/MSF.<sup>2896</sup> However, the Panel qualified this conclusion with the following observation, which called into question the credibility of the forecasts used in the business case:

While the business case may serve as the basis for Airbus' decision whether the launch of a new LCA programme is a worthwhile investment, it also serves as at least one of the bases for the government lenders to decide whether to support a programme and how that support will be structured. Because of the graduated levy-based and success-dependent nature of LA/MSF repayments, Airbus has *an economic incentive to be optimistic in its forecasts of, inter alia, the number of aircraft likely to be sold and the pace of those sales, when preparing a business case in support of a programme for which LA/MSF is sought. The greater the number of sales over which principal repayments and royalties must be paid, the less likely it is that Airbus will have to make those payments if the business plan estimates prove to be optimistic.*<sup>2897</sup> (emphasis added; footnotes omitted)

1323. The Panel went on to observe that "the reasonableness of the demand predictions on which the sales and delivery projections are based" were a "critical element of the credibility of the business case."<sup>2898</sup> The Panel opined that, while it was "in no position to judge at this time whether the sales estimates in the A380 business case were, in fact, reasonable, we note that the A380 business case reflects consideration of a rather limited range of possibilities in terms of failure to achieve sales targets, particularly in view of the uncertainty of demand forecasts for the aircraft."<sup>2899</sup> The Panel added that:

{t}he A380 may yet succeed in reaching the sales levels predicted in the business case. However, the actual delays in ramping up production, and relatively limited sales and deliveries to date, make it clear that such success will, if it occurs, likely take a good deal longer than originally projected, thus delaying achievement of the break-even point of the programme. The financial consequences of the A380 production problems and resulting programme delays have been significant, with EADS reporting a consequent reduction in

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<sup>2895</sup>Panel Report, para. 7.1925.

<sup>2896</sup>Panel Report, para. 7.1943.

<sup>2897</sup>Panel Report, para. 7.1926.

<sup>2898</sup>Panel Report, para. 7.1927.

<sup>2899</sup>Panel Report, para. 7.1927. (footnote omitted)

Airbus' earnings before interest and taxes of {€}2.5 billion as of 2006. Thus, it is by no means apparent that the Realistic Worst Case Scenario actually captured what could reasonably have been envisioned to be the worst case scenario at the time the business case was developed.<sup>2900</sup> (footnotes omitted)

1324. For these reasons, although the Panel recognized that the A380 business case predicted positive returns in the absence of the LA/MSF, the Panel was not persuaded that the A380 business case alone demonstrated that Airbus would have launched the A380 in the absence of LA/MSF.<sup>2901</sup>

1325. On appeal, the European Union argues that the Panel erred in its assessment of the delivery forecasts in the Airbus A380 business case.<sup>2902</sup> First, the European Union asserts that the Panel improperly relied on the *ex post* fact that delays occurred in the development of the A380. According to the European Union, Article 6.3(c) required the Panel to assess the delivery forecasts of the A380 business case on the basis of the information available at the time of the launch of the A380 in 2000.<sup>2903</sup> Second, in its assessment, the Panel did not address "considerable evidence" that demonstrated that "sophisticated and well-informed" private investors based their investment decisions on those forecasts.<sup>2904</sup>

1326. The United States responds that the Panel's finding that Airbus could not have launched the A380 in the absence of LA/MSF was not based on its assessment of the credibility of the delivery forecasts contained in the A380 business case. Instead, the Panel specifically observed that the A380 business case did not examine the viability of a worst case scenario in the absence of LA/MSF, and that the *ex post* sensitivity analysis submitted by the European Union for this purpose failed to demonstrate that the launch would have been possible in the absence of LA/MSF.<sup>2905</sup> The United States adds that the Appellate Body does not need to consider this aspect of the European Union's appeal because, despite the Panel's concerns regarding the completeness and accuracy of the A380 business case, it assumed that "the {A380} business case ... demonstrate{s} a positive NPV in a no-LA/MSF and Realistic Worst Case Scenario."<sup>2906</sup>

1327. As we understand it, the A380 business case provided the main financial rationale for Airbus' decision to launch the programme in 2000. It sought to evaluate the profitability of the programme over the A380 life-cycle, by estimating the NPV of the cash flow generated from expected aircraft

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<sup>2900</sup>Panel Report, para. 7.1927.

<sup>2901</sup>Panel Report, para. 7.1944.

<sup>2902</sup>Panel Report, para. 7.1926. (footnote omitted)

<sup>2903</sup>European Union's appellant's submission, para. 605.

<sup>2904</sup>European Union's appellant's submission, para. 609.

<sup>2905</sup>United States' appellee's submission, para. 652 (referring to Panel Report, paras. 7.1922-7.1927).

<sup>2906</sup>United States' appellee's submission, para. 653 (quoting Panel Report, para. 7.1943).

sales over that period.<sup>2907</sup> The A380 business case rested on a number of assumptions concerning, *inter alia*, Airbus' anticipated development and production costs, the number of deliveries, and pricing of the aircraft. The programme's estimated profitability depended, to a large extent, on the number of sales and deliveries projected over the life of the programme.<sup>2908</sup> The business case also contained five sensitivity assessments, one of which is the Realistic Worst Case scenario, which evaluates the behaviour of the project's NPV in case of deviations from its major assumptions.<sup>2909</sup>

1328. The NPV estimates in the A380 business case were examined in the context of the Panel's analysis of whether Airbus would have launched the A380 in 2000 but for LA/MSF. This type of analysis necessarily requires an examination of Airbus' decisions at the time of the launch. For this reason, the analysis must be made on the basis of the information that was reasonably available to Airbus at the time it made the launch decision. This would include forecasts of sales and deliveries. It would be inappropriate to consider events that occurred after the launch decision was made and that had not been forecast, as Airbus did not have the benefit of hindsight when it had to decide whether or not to launch the A380 based on the information reasonably available at the time the decision was made.

1329. Therefore, we agree with the European Union that it was inappropriate for the Panel to have evaluated Airbus' decision to launch the A380 in the light of events that occurred after that decision was made. In particular, two statements by the Panel in relation to the reasonableness of the sales and delivery forecasts contained in the A380 business case reflect consideration of *ex post* events. First, the Panel dismissed the European Union's allegation that the delivery forecasts contained in Airbus' business cases had been "often met, and indeed exceeded"<sup>2910</sup> stating that "experience to date suggests that this may not be the case in respect of the A380."<sup>2911</sup> The Panel clarified in a footnote that it was referring to the "difficulties Airbus experienced with the A380, resulting in substantial delays in production and customer concerns".<sup>2912</sup> Second, the Panel called into question the reasonableness of the sales forecast contained in the business case by stating that:

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<sup>2907</sup> Airbus A380 business case (Panel Exhibit EC-362 (HSBI)).

<sup>2908</sup> The A380 business case makes assumptions in relation to both the minimum number of deliveries necessary to reach the break-even point of the programme and the total number of deliveries over the product's life-cycle. (Airbus A380 business case (Panel Exhibit EC-362 (HSBI)))

<sup>2909</sup> Panel Report, para. 7.1923.

<sup>2910</sup> Panel Report, para. 7.1926 (quoting European Communities' first written submission to the Panel para. 467).

<sup>2911</sup> Panel Report, para. 7.1926 (referring to EADS press release, "EADS 2006 results dominated by Airbus loss" (9 March 2007) (Panel Exhibit US-463)).

<sup>2912</sup> Panel Report, footnote 5616 to para. 7.1926 (referring to Panel Exhibit US-463, *supra*, footnote 2911).

{t}he A380 may yet succeed in reaching the sales levels predicted in the business case. However, the actual delays in ramping up production, and relatively limited sales and deliveries to date, make it clear that such success will, if it occurs, likely take a good deal longer than originally projected, thus delaying achievement of the break-even point of the programme. The financial consequences of the A380 production problems and resulting programme delays have been significant, with EADS reporting a consequent reduction in Airbus' earnings before interest and taxes of {€}2.5 billion as of 2006.<sup>2913</sup> (footnotes omitted)

1330. In our view, the Panel's reference to "*actual* delays in ramping up production, and relatively limited sales and deliveries *to date*"<sup>2914</sup> shows that the Panel assessed the credibility of the sales and delivery forecasts contained in the A380 business case on the basis of *ex post* considerations. The relevant question before the Panel was not whether subsequent events undermined the credibility of the sales and deliveries forecasts contained in the business case, but rather whether such forecasts were credible on the basis of the information reasonably available to Airbus at the time the launch decision was made. While we do not suggest that the credibility of production and delivery forecasts could not be reviewed by a Panel on the basis of information available at the time of the launch decision, the above statements show that the Panel failed to adopt such an *ex ante* approach. We therefore agree with the European Union that the Panel's reference to *ex post* events was not permissible.

1331. We further agree with the European Union that the Panel's statement that Airbus had "economic incentives"<sup>2915</sup> to overstate likely sales because the A380 business case also served as one of the bases for the lending governments' decisions to grant LA/MSF is somewhat speculative. We have reservations about the logic of the Panel's reasoning, because the fact that governments based their lending decisions on the business case does not for that reason alone undermine the credibility of the A380 business case. As the Panel itself acknowledged, the business case "may also have been used by Airbus to attract other investors."<sup>2916</sup> Thus, to the extent that the business case also served as a basis for the investment decisions of Airbus and its risk-sharing suppliers, it was unreasonable for the Panel to assume that these actors would have acted against their best economic interests by investing in a project whose economic viability depended on parameters which they did not consider realistic.

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<sup>2913</sup>Panel Report, para. 7.1927.

<sup>2914</sup>Panel Report, para. 7.1927. (emphasis added)

<sup>2915</sup>Panel Report, para. 7.1926.

<sup>2916</sup>Panel Report, footnote 5611 to para. 7.1926.

1332. Despite our reservations about aspects of the Panel's reasoning, we note that the Panel did not disregard the A380 business case. Indeed, the Panel discussed and evaluated the various elements of the business case, but added that concerns in relation to the credibility of the forecasts contained in the business case "inform{ed} {its} consideration of the European Communities' contention that the A380 business case demonstrates that Airbus would have gone forward with the launch even in the absence of LA/MSF".<sup>2917</sup> As pointed out by the United States, the Panel accepted that the business case and the Carballo Declaration demonstrated a positive NPV in a non-LA/MSF scenario:

Assuming that the business case, or rather the numbers underlying the business case as applied in the Carballo Declaration, demonstrate a positive NPV in a no-LA/MSF and a Realistic Worst Case scenario, the relevant question for us is whether the United States has demonstrated that the A380 would not have been launched in the absence of LA/MSF.<sup>2918</sup> (footnote omitted)

1333. In the above passage, it is clear that the Panel proceeded on the assumption that the A380 business case and the Carballo Declaration predicted a positive NPV in a non-LA/MSF scenario. The Panel, therefore, duly took into account the rebuttal evidence adduced by the European Communities in the A380 business case. The Panel, however, attributed to the A380 business case a probative value that is different to that suggested by the European Communities, in stating that "we have concerns about the A380 business case ... and we are thus not persuaded that the A380 business case *alone* demonstrates that Airbus would have launched the A380 even in the absence of LA/MSF."<sup>2919</sup> The Panel then proceeded to review other pieces of evidence.

1334. In addition to the reservations expressed in relation to the demand forecasts contained in the A380 business case, the Panel considered that the Realistic Worst Case scenario forecast in the business case was not entirely credible, viewed from the perspective of the time when the launch decision was made. Consistent with its earlier statement that "the A380 business case reflects consideration of a rather limited range of possibilities in terms of failure to achieve sales targets", the Panel stated that "{i}t is by no means apparent that the Realistic Worst Case Scenario actually captured *what could reasonably have been envisioned* to be the worst case scenario at the time the business case was developed."<sup>2920</sup> Leaving aside its observation that the Realistic Worst Case scenario had not been tested against a base case in which Airbus did not receive LA/MSF, the Panel also considered that the Realistic Worst Case scenario was not "the worst with respect to all

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<sup>2917</sup>Panel Report, para. 7.1927.

<sup>2918</sup>Panel Report, para. 7.1943.

<sup>2919</sup>Panel Report, para. 7.1944. (emphasis added)

<sup>2920</sup>Panel Report, para. 7.1927. (emphasis added)



parameters considered in the sensitivity testing."<sup>2921</sup> Thus, the Panel expressed concern that the sensitivity analysis of the A380 business case did not contemplate what could reasonably have been envisioned as the worst case scenario at the time the business case was developed.

1335. Therefore, despite the Panel's impermissible assessment of the A380 business case with reference to *ex post* events and its speculation concerning economic incentives to overstate likely sales, we do not consider that this invalidates the Panel's overall analysis. We reach this conclusion because the Panel did take into account the A380 business case, and proceeded on the basis that it predicted a positive NPV for the project in a non-LA/MSF scenario. However, the Panel decided to attribute to the A380 business case a probative weight that is different to that suggested by the European Communities because of other factors such as the parameters considered in the sensitivity analysis. In doing so, the Panel acted within the bounds of its discretion as initial trier of facts, and we do not see a basis for disturbing the Panel's factual finding.

1336. Second, the European Union argues that the Panel erred in its evaluation of the evidence concerning Airbus' ability to finance the A380 relying exclusively on its own resources and outside financing. Before the Panel, the United States argued that even if the A380 business case was understood to show that the A380 project would have been economically viable without LA/MSF, it did not follow that Airbus would have been able to fund the project from its own resources and outside financing. In support of this argument, the United States submitted a Report produced by the French Senate<sup>2922</sup>, which considered the provision of LA/MSF to Aérospatiale for the development of a very large LCA programme that later became the A380 project. The French Senate Report concluded that in the unlikely event that Aérospatiale could find outside funding for its share of the development costs of the A380, "such external financing would apparently add excessively to the financial expenses incurred by the firms and would throw their balance sheets out of equilibrium because of the low level of their equity capital."<sup>2923</sup> The United States also produced a statement made by the UK Secretary of State for Trade and Industry suggesting that the launch of the A380 "would not have been possible if it had not been for the commitment of the British government to launch an extremely successful programme".<sup>2924</sup>

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<sup>2921</sup>Panel Report, para. 7.1927 (referring to Airbus A380 business case (Panel Exhibit EC-362 (HSBI)), pp. 34 and 36).

<sup>2922</sup>Panel Exhibit US-18, *supra*, footnote 2847.

<sup>2923</sup>Panel Report, para. 7.1945 (quoting Panel Exhibit US-18, *supra*, footnote 2847, p. 72).

<sup>2924</sup>Panel Report, para. 7.1945 (quoting Panel Exhibit US-436, *supra*, footnote 2847).

1337. The European Communities sought to rebut the United States' argument concerning Airbus' ability to finance the A380 in the absence of LA/MSF by questioning the relevance of the French Senate Report. The European Communities argued that the Report addressed the role of Aérospatiale only, and had been prepared in 1996-1997 prior to the creation of EADS, which, according to the European Communities, "increased Airbus' financial flexibility."<sup>2925</sup>

1338. The Panel responded to the European Communities' arguments as follows:

While the financial situation of Airbus France in 2000 would have clearly been different from the position of Aérospatiale in 1997 (when the French Senate Report was released) the European Communities has submitted no persuasive evidence to suggest that Airbus France was in a better position than Aérospatiale to fund its part of the A380 project without LA/MSF. Although it is evident from the EADS offering memorandum that the corporate restructuring of Airbus Industrie GIE, Aérospatiale, CASA and Deutsche Airbus was intended to improve the companies' operations by rationalizing resources, eliminating duplication and consolidating overall management under a more integrated corporate structure, it is not so clear precisely how, or indeed if or to what degree, this move affected the ability of Airbus France (or Airbus SAS) to raise the very large amounts of capital needed for the A380 project.<sup>2926</sup>

1339. On appeal, the European Union argues that the Panel erred in assessing the financial situation of Airbus France in 2000 based on a French Senate Report concerning the financial situation of Aérospatiale in 1997. The European Union adds that the Panel erroneously focused on the ability of Airbus France and Airbus SAS to finance the A380, and ignored the totality of the evidence allegedly demonstrating that Airbus SAS' parent companies, EADS and BAE Systems, had the financial resources necessary to fund the project in the absence of LA/MSF. Such evidence consisted primarily of EADS' Offering Memorandum<sup>2927</sup>; a report filed by EADS before the French securities regulator, *Commission des opérations de bourse* ("EADS' Reference Document")<sup>2928</sup>; and BAE Systems' Annual Report 1999.<sup>2929</sup>

1340. The United States responds that the Panel objectively assessed and correctly rejected evidence concerning the availability of financing from EADS and BAE for the development of the A380. For the United States, the Panel correctly found that EADS' Offering Memorandum did not demonstrate how the corporate restructuring of EADS would have enabled the company to raise the funds that its

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<sup>2925</sup>Panel Report, para. 7.1946.

<sup>2926</sup>Panel Report, para. 7.1947.

<sup>2927</sup>EADS' Offering Memorandum, *supra*, footnote 163.

<sup>2928</sup>EADS' Reference Document, *supra*, footnote 608.

<sup>2929</sup>BAE Systems, *Annual Report 1999* (Panel Exhibit EC-28).

constituent companies were unable to raise a few years earlier.<sup>2930</sup> Similarly, the United States argues that the European Union's reference to BAE Systems' 1999 annual balance sheet does not sufficiently establish that the company would have committed additional funds to the A380 project. The United States adds that a statement by the UK's Department of Trade and Industry specifically contradicts this assertion. The statement explains that "the fundamental rationale of launch aid is to address the apparent unwillingness of the capital markets to fund projects with such high product development costs, high technological and market risks and such long pay back periods."<sup>2931</sup>

1341. In our view, a careful review of the Panel's analysis does not support the European Union's argument that the Panel assessed "Airbus France's financial condition at the time of the launch of the A380 in 2000, based on Aérospatiale's financial position three years prior".<sup>2932</sup> On the contrary, the Panel expressly recognized that "the financial situation of Airbus France in 2000 would have clearly been different from the position of Aérospatiale in 1997 (when the French Senate Report was released)".<sup>2933</sup> However, the Panel made the additional point that the European Union had "submitted no persuasive evidence to suggest that Airbus France was in a better position than Aérospatiale to fund its part of the A380 project without LA/MSF."<sup>2934</sup>

1342. We are also not persuaded that the Panel failed to assess the totality of the evidence in relation to the question of whether Airbus SAS' parent companies, EADS and BAE Systems, had the financial resources necessary to fund the A380 project in the absence of LA/MSF. Contrary to the European Union's submission, the Panel did address EADS' Offering Memorandum in evaluating the European Communities' rebuttal that the creation of EADS "increased Airbus' financial flexibility."<sup>2935</sup> Indeed, the Panel expressly referred to EADS' Offering Memorandum in its analysis, and recognized that it was "evident" from that piece of evidence that "the corporate restructuring of Airbus Industrie GIE, Aérospatiale, CASA, and Deutsche Airbus was intended to improve the companies' operations by rationalizing resources, eliminating duplication and consolidating overall management under a more integrated corporate structure."<sup>2936</sup> However, the Panel opined that EADS' Offering Memorandum did not conclusively establish the European Communities' allegations concerning the increased financial flexibility of Airbus because it was "not so clear precisely how, or indeed if or to what degree {the corporate restructuring of the Airbus companies and the creation of

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<sup>2930</sup>United States' appellee's submission, para. 655 (referring to Panel Report, para. 7.1947).

<sup>2931</sup>United States' appellee's submission, para. 656 (quoting Panel Exhibit US-106, *supra*, footnote 2847).

<sup>2932</sup>European Union's appellant's submission, para. 614.

<sup>2933</sup>Panel Report, para. 7.1947.

<sup>2934</sup>Panel Report, para. 7.1947.

<sup>2935</sup>Panel Report, para. 7.1946.

<sup>2936</sup>Panel Report, para. 7.1947.

EADS} affected the ability of Airbus France (or Airbus SAS) to raise the very large amounts of capital needed for the A380 project."<sup>2937</sup>

1343. The evidence on which the European Union bases its claim—EADS' Offering Memorandum, EADS' Reference Document, and the BAE Systems' Annual Report 1999—are documents that describe the general financial situation of BAE Systems and of EADS after its creation.<sup>2938</sup> The documents do not specifically address the issue of whether these companies had sufficient financial resources to cover the financing gap for the A380 project that would have resulted in the absence of LA/MSF. Even if the documents show that EADS and BAE Systems had financial resources available, it does not necessarily follow that those resources would have been directed to the A380 project. Both EADS and BAE Systems were large companies with several business units beyond aircraft production, all of which would have competed for internal financial resources. We are reluctant to disturb the Panel's analysis on the basis of general statements about the overall financial situation of BAE Systems and EADS. In order for us to interfere with the Panel's assessment of the facts, we would have to be satisfied that the European Communities had not only submitted documents describing the overall financial situation of these companies but also provided explanations as to why it was reasonable to expect that EADS and BAE Systems would have directed substantial additional funds to the A380 to self-finance the project in the absence of LA/MSF.<sup>2939</sup>

1344. The European Union further argues that the Panel failed to address or adequately explain evidence which in its view demonstrated that risk-sharing supplier arrangements provided a viable alternative to finance the A380 in the absence of LA/MSF. Like the alleged financial flexibility resulting from the creation of EADS, the availability of financing from risk-sharing suppliers was part of the European Communities' rebuttal of the United States' argument, based on the French Senate Report, that Airbus could not have financed the A380 with its own resources and outside financing, even if it were confident that the project was economically viable without LA/MSF. In particular, the

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<sup>2937</sup>Panel Report, para. 7.1947.

<sup>2938</sup>See section IV.B of this Report for the evolution of EADS.

<sup>2939</sup>The European Union's submissions on appeal do not show that the European Communities provided such explanations to the Panel, nor have we been able to ascertain, from our review of the Panel record, that the European Communities provided such explanations. The only evidence that the European Union provides in support of its contention that capital of EADS would be directed to the A380 project is the general statement, in the "Use of Proceeds" section of EADS' Offering Memorandum, that "{a} stronger financial position would also enable EADS to timely adapt its development and investment programs, notably in new aircraft". (European Union's appellant's submission, footnote 775 to para. 616 (quoting EADS' Offering Memorandum, *supra*, footnote 163, p. 23))

The same section of the EADS Offering Memorandum mentions that "EADS expects this strengthened capital structure will allow it to respond swiftly as global acquisition and alliance opportunities arise in the consolidating aerospace and defence industries" and that "{a} stronger financial position would also enable EADS to timely adapt ... its manufacturing operations as market conditions dictate". (EADS' Offering Memorandum, *supra*, footnote 163, p. 23)

European Communities argued that the French Senate Report only considered "on balance sheet debt financing" and did not consider "off balance sheet financing" such as risk sharing arrangements with suppliers.<sup>2940</sup> The European Communities argued that Airbus could have increased its use of risk-sharing suppliers to secure the necessary financing for the A380, and sought to support this assertion by noting that: the A380 business plan already included off-balance sheet financing through suppliers; that Boeing has reportedly financed 60% of the non-recurring costs of the 787 through risk-sharing suppliers; and that Alenia had provided risk-sharing supplier financing in respect of the Deutsche Airbus share of the development of the A340-500/600.<sup>2941</sup>

1345. The Panel addressed these arguments by the European Communities in the following passage:

Likewise, the European Communities has submitted no evidence to support the contention that merely because, reportedly, Boeing was able to finance a significant portion of the non-recurring costs of development of the 787 through risk-sharing supplier arrangements, Airbus would necessarily have been able to do the same with respect to the A380. Airbus does use risk-sharing supplier arrangements, but there is no indication that it could have increased its use of such arrangements so as to replace the entire amount of financing provided by LA/MSF, which, we recall, was up to 33 percent of the development costs of the A380. We do not consider the availability of risk-sharing supplier arrangements in respect of the A340-500/600 to be persuasive in this regard. Those were derivative aircraft which entailed much smaller development costs and a much lower level of risk to Airbus' overall operations. The willingness of suppliers to take on some of the risk of that much smaller programme does not demonstrate that any supplier or suppliers would be prepared to do so in respect of up to 33 percent of the much greater costs of the A380. Moreover, as we have previously noted, information in the Airbus A380 business case suggests that the risk-sharing participants' involvement in the A380 project may not have been on strictly market terms for all participants.<sup>2942</sup> (footnote omitted)

1346. On appeal, the European Union argues that the Panel "failed to adequately explain or address"<sup>2943</sup> three pieces of evidence demonstrating the potential for increased use of risk-sharing supplier financing for the A380. First, the European Union refers to evidence allegedly demonstrating that aerospace suppliers such as Honeywell, Rockwell Collins, Alenia Aeronáutica, SAAB, Ruag, and GKN were convinced of the A380 business case and agreed to participate as risk-sharing suppliers.<sup>2944</sup> Second, it points to evidence suggesting that some of these same companies, and other risk-sharing

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<sup>2940</sup>Panel Report, para. 7.1946.

<sup>2941</sup>Panel Report, para. 7.1946.

<sup>2942</sup>Panel Report, para. 7.1947.

<sup>2943</sup>European Union's appellant's submission, para. 618.

<sup>2944</sup>European Union's appellant's submission, para. 619 (referring to Whitelaw Report, *supra*, footnote 1881; and Morgan Stanley, "EADS, the A380 Debate" (5 September 2006) (Panel Exhibit EC-409)).

suppliers, were willing to cover 60% of the development cost of the "technologically more challenging, composite-based" Boeing 787 in 2004.<sup>2945</sup> Third, the European Union asserts that the Panel ignored the fact that the consolidation of EADS and BAE Systems showed that Airbus had access to forms and levels of finance similar to those of Boeing.<sup>2946</sup>

1347. The United States responds that the Panel explicitly considered—and rejected—the European Communities' argument that risk-sharing suppliers would have been willing to put additional capital into the development of the A380 because they were also willing to fund part of the development costs of the 787 a few years later.<sup>2947</sup> According to the United States, the fact that the Panel reached a different conclusion than the European Communities in this respect does not provide a basis for reversal of this finding.

1348. We are not persuaded that in its evaluation of the alleged availability of risk-sharing supplier financing the Panel failed to adequately address the totality of the evidence before it. The Panel examined the A380 business case and was not persuaded that this evidence sufficiently demonstrated that Airbus "could have increased its use of {risk-sharing supplier} arrangements so as to replace the entire amount of financing provided by LA/MSF."<sup>2948</sup> The Panel reasoned that this was particularly so because "the Airbus A380 business case suggests that the risk-sharing participants' involvement in the A380 project may not have been on strictly market terms for all participants."<sup>2949</sup> Nor was the Panel persuaded that risk-sharing suppliers' participation in the funding of the A340-500/600 was probative in this respect, considering the significant distinctions in the funding needs and risk profiles of the A340-500/600 and the A380 projects.<sup>2950</sup> For this reason, the Panel concluded that "{t}he willingness of suppliers to take on some of the risk of that much smaller {A340-500/600} programme does not demonstrate that any supplier or suppliers would be prepared to do so in respect of up to 33 percent of the much greater costs of the A380."<sup>2951</sup>

1349. The Panel also addressed evidence allegedly suggesting that Boeing financed 60% of the non-recurring costs of its 787 through risk-sharing suppliers, but found that this evidence did not establish that the risk-sharing suppliers of Airbus would have been necessarily willing to finance a similarly

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<sup>2945</sup>European Union's appellant's submission, para. 619 (referring to Deutsche Bank, "Is there Life after Launch Aid?" (5 November 2004) (Panel Exhibit EC-76); "Airbus to Spend \$12 Billion on New A350, People Say (Update 1)", *Bloomberg.com*, 3 November 2006 (Panel Exhibit EC-511); and European Communities' response to Panel Question 76, para. 121).

<sup>2946</sup>European Union's appellant's submission, para. 619.

<sup>2947</sup>United States' appellee's submission, para. 657.

<sup>2948</sup>Panel Report, para. 7.1947.

<sup>2949</sup>Panel Report, para. 7.1947 (referring to Airbus A380 business case (Panel Exhibit EC-362 (HSBI)), p. 29).

<sup>2950</sup>Panel Report, para. 7.1947.

<sup>2951</sup>Panel Report, para. 7.1947.

large share of the development costs of the A380 in the absence of LA/MSF. Given the significant distinctions between the A380 and 787 projects, and the potentially different risk profiles of Airbus and Boeing, we see no reason to disturb the Panel's assessment of the probative value of the evidence concerning Boeing's use of risk-sharing supplier funding.

1350. The European Union argues further that the Panel erred in finding that "because of the significant amount of debt that developing its previous models of LCA would have generated"<sup>2952</sup>, Airbus would not have been able to launch the A380 but for LA/MSF provided in respect of its earlier models of LCA. The European Union's challenge in this respect is directed at the following statement by the Panel:

Given the amount of funding transferred to Airbus under the individual LA/MSF contracts, and in the light of the formidable risks associated with the LCA business and the learning curve effects that are necessary to successfully participate in this sector, we have found that it would not have been possible for Airbus to have launched all of these models, as originally designed and at the times it did, without LA/MSF. Even assuming this were a possibility, and that Airbus had actually been able to launch these aircraft relying on only market financing, the increase in the level of debt Airbus would have accumulated over the years would have been massive. (...) {B}ecause of the significant amount of debt that developing its previous models of LCA would have generated, we consider Airbus would not have been in a position to obtain market financing for the A380, had it not financed the development of its earlier model LCA in significant part through LA/MSF. It follows that the view that Airbus could have launched the A380 as a stand-alone proposition is dependent upon Airbus having received LA/MSF to develop all of its previous models of LCA.<sup>2953</sup> (footnote omitted)

1351. According to the European Union, this statement is in error because the Panel ignored its own counterfactual that a non-subsidized Airbus would have launched fewer aircraft than it actually did, which implies that a non-subsidized Airbus would have a significantly reduced debt.<sup>2954</sup> In addition, the European Union maintains that the Panel erred by failing to consider evidence demonstrating that a non-subsidized Airbus could have launched a single-aisle LCA by 1987, and a twin-aisle 200-300 seat LCA in or around 1991. For the European Union, this evidence suggests that a non-subsidized Airbus would have had nine years to recover portions of its investment and to build up a cash flow

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<sup>2952</sup>Panel Report, para. 7.1948.

<sup>2953</sup>Panel Report, para. 7.1948.

<sup>2954</sup>European Union's appellant's submission, para. 623.

stream that could have supported the development of the A380 by 2000, along with risk-sharing suppliers and other market financing.<sup>2955</sup>

1352. In our view, the Panel's conclusion that Airbus would not have been able to launch the A380 in 2000 relying exclusively on market financing but for LA/MSF provided in relation to earlier models of LCA would hold even in the counterfactual scenario posited by the European Union, in which Airbus would have been able to launch a single-aisle LCA in 1987 and a twin-aisle LCA in 1991. While in this scenario Airbus' debt load would have been smaller in absolute terms, Airbus' revenues would also be smaller as a result of a narrower counterfactual product offering. As a result, in the counterfactual scenario posited by the European Union, Airbus would not necessarily have been in a stronger financial position to launch the A380 in 2000 relying exclusively on market financing. Thus, even if the Panel would have accepted the counterfactual posited by the European Union, this would not have invalidated its ultimate conclusion that but for LA/MSF provided with respect to Airbus' earlier models of LCA, it would not have been possible for Airbus to launch the A380 in 2000 relying exclusively on market financing.

1353. Third and finally, the European Union argues that the Panel erred in finding that Airbus could not have launched the A380 in the absence of LA/MSF because its "technical capabilities derived in part from the experience in the development of its earlier model{s of} LCA funded in significant part by LA/MSF."<sup>2956</sup> The European Union does not dispute that the launch of the A380 was in part facilitated by knowledge gained from earlier product launches.<sup>2957</sup> However, the European Union posits that, having accepted the counterfactual that a non-subsidized Airbus would be present in the market, the Panel was required to determine whether a non-subsidized Airbus with a more limited product offering could not have similarly accumulated the required technological experience.

1354. The United States responds that the Panel considered a counterfactual in which Airbus could have achieved its market position and sales without the subsidies to be "unlikely and ... contradicted by other record evidence."<sup>2958</sup> The United States suggests that Airbus itself recognized the critical importance of the technical experience gained from each of its LCA.<sup>2959</sup> For the United States, the European Union's argument is erroneously premised on a "wholly speculative counterfactual under

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<sup>2955</sup>European Union's appellant's submission, para. 624.

<sup>2956</sup>Panel Report, para. 7.1948.

<sup>2957</sup>European Union's appellant's submission, para. 625.

<sup>2958</sup>United States' appellee's submission, para. 660 (referring to Panel Report, paras. 7.1984 and 7.1993).

<sup>2959</sup>United States' appellee's submission, para. 660 (referring to UK Project Appraisal No. 1 (Panel Exhibit EC-98 (HSBI)), para. 1.2(f)).



which an entirely unsubsidized Airbus could have launched fewer and different LCA at different times" and still have been able to launch the A380 in 2000.<sup>2960</sup>

1355. In our view, the counterfactual scenario posited by the European Union does not invalidate the Panel's ultimate conclusion that Airbus' technical capabilities were derived in large part from its experience in the development of earlier models of LCA. Given the Panel's earlier factual finding concerning the importance of learning curve effects in the LCA industry<sup>2961</sup>, it can only follow that a counterfactual Airbus with a narrower product offering would have accumulated less technical experience than Airbus actually did in the development of its full range of LCA. Following this logic, a non-subsidized Airbus that had developed fewer LCA models would have accumulated less technical experience than the subsidized Airbus actually did, which in our view supports the Panel's conclusion that the launch of the A380 would not have occurred in 2000 without LA/MSF.

(c) Conclusion

1356. Based on all of the above, we do not find that the Panel acted inconsistently with Article 11 of the DSU in finding that "either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380."<sup>2962</sup> Although we consider the Panel to have fallen into error in speculating about an alleged "economic incentive" to overstate sales and in referring to *ex post* events in its assessment of the Airbus A380 business case, we do not consider that these deficiencies invalidate the Panel's conclusions in relation to Airbus' ability to launch the A380 in 2000 in the absence of LA/MSF. The Panel's ultimate conclusion that LA/MSF was a "necessary precondition"<sup>2963</sup> for Airbus' launch of the A380 in 2000 was based on multiple considerations, such as the A380 business case itself, evidence on Airbus' ability to fund the A380 in the absence of LA/MSF, and the financial and technological impact of LA/MSF provided in relation to previous models of Airbus LCA. In assessing the credibility and determining the probative value of the evidence concerning each of these elements, the Panel acted within the bounds of its discretion as trier of facts under Article 11 of the DSU, and did not act inconsistently with its duty to conduct an objective assessment of the facts simply by according to that evidence a lesser weight than that posited by the European Communities. Thus, based on these multiple considerations, the Panel had a sufficiently objective basis for its ultimate finding that LA/MSF was a "necessary precondition" for

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<sup>2960</sup>United States' appellee's submission, para. 660.

<sup>2961</sup>Panel Report, paras. 7.1623, 7.1717, and 7.1726.

<sup>2962</sup>Panel Report, para. 7.1948.

<sup>2963</sup>Panel Report, para. 7.1948.

the launch of the A380 in 2000. Accordingly, we uphold the Panel's finding that "either directly or indirectly, LA/MSF was a necessary precondition for the launch of the A380 in 2000."<sup>2964</sup>

3. Causation for non-LA/MSF Subsidies

1357. Finally, we turn to the European Union's appeal of the Panel's finding that the effect of non-LA/MSF subsidies was to cause displacement of Boeing LCA from the EC and certain third country markets within the meaning of subparagraphs (a) and (b), and significant lost sales within the meaning of subparagraph (c), of Article 6.3 of the *SCM Agreement*. We begin our analysis with a summary of the Panel's findings in subsection (a). We then analyze in subsection (b) the specific issues raised in the European Union's appeal against the Panel's analysis of causation for non-LA/MSF subsidies. Finally, in subsection (c), we set out our conclusions.

(a) The Panel's findings

1358. Having concluded that Airbus' ability to launch, develop, and introduce into the market each of its LCA models was "dependent on"<sup>2965</sup> LA/MSF, the Panel sought to determine whether the other subsidies challenged by the United States had similar effects. The United States argued that equity infusions, infrastructure subsidies, and R&TD subsidies had economic effects similar to those of LA/MSF, in that they reduced the costs and shifted the risk of LCA development from Airbus to the governments (thus making a launch more likely) and alleviated the financial strain of product launches (thus affording pricing flexibility). The United States therefore maintained that these measures should be considered together with LA/MSF for purposes of the causation analysis.<sup>2966</sup>

1359. The European Communities contended that the nature of non-LA/MSF subsidies, in terms of their structure, operation, and design, precluded an aggregate consideration of their effects. The European Communities underscored that each instance of LA/MSF was tied to a specific LCA, and that each was granted at a different time. In contrast, the equity infusions, infrastructure subsidies, and R&TD grants were non-recurring measures that were provided at different times than LA/MSF, and were not tied to any particular model of Airbus LCA.<sup>2967</sup>

1360. The Panel found that differences in the structure, operation, and design of the subsidies did not preclude an aggregated consideration of their effects for the purposes of examining the United States' serious prejudice claims. Recalling its earlier conclusion that LA/MSF was necessary

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<sup>2964</sup>Panel Report, para. 7.1948.

<sup>2965</sup>Panel Report, para. 7.1949.

<sup>2966</sup>Panel Report, para. 7.1954.

<sup>2967</sup>Panel Report, para. 7.1955.

to the launch of each successive model of Airbus LCA, the Panel reasoned that the "product" effect of LA/MSF was "complemented and supplemented" by the other specific subsidies at issue in this dispute.<sup>2968</sup> For the Panel, LA/MSF as well as non-LA/MSF measures were all provided in connection with the subsidized product—Airbus LCA—and they all had the same effect on Airbus' ability to launch the LCA it launched at the time that it did.<sup>2969</sup>

1361. More specifically, the Panel reasoned that the equity infusions ensured the "continued existence and financial stability" of the Airbus national entities, which were a "necessary element" for Airbus to have developed, launched, and produced its full range of LCA.<sup>2970</sup> To the extent that equity infusions by the French Government allowed Aérospatiale to undertake investments in fixed assets, inventory, and advances to suppliers in connection with the development of new aircraft, they "supported the development of LCA in a manner that was as direct as LA/MSF."<sup>2971</sup>

1362. With respect to infrastructure measures, the Panel reasoned that they provided "essential support" to the development and production of Airbus LCA, relieving Airbus of significant expenses in relation to the development of facilities for the production of, most particularly, the A380, thus enabling Airbus to continue the development of successive models of LCA.<sup>2972</sup> The Panel further observed that the infrastructure that was provided for the establishment of the final A380 assembly line in Hamburg was necessary to enable Airbus to launch the A380.

1363. Turning to R&TD subsidies, the Panel opined that such subsidies enabled Airbus to develop "features and aspects" of its LCA on a schedule that it otherwise would not have been able to accomplish.<sup>2973</sup> Although the Panel recognized that the impact of "pre-competitive" R&TD subsidies on Airbus' market presence was "perhaps more attenuated" in comparison with the other subsidies at issue or with R&TD that funded technology actually used on Airbus LCA, the Panel concluded that R&TD subsidies, combined with the other subsidies at issue, "complemented and supplemented" the impact of LA/MSF.<sup>2974</sup>

1364. Finally, referring to the panel report in *US – Upland Cotton*, the Panel found that the subsidies at issue all had a "sufficient nexus {to} the subsidized product"—Airbus LCA—and a sufficient nexus to "the particular effects-related variable{s} under examination", since all of the

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<sup>2968</sup>Panel Report, para. 7.1956.

<sup>2969</sup>Panel Report, para. 7.1956.

<sup>2970</sup>Panel Report, para. 7.1957.

<sup>2971</sup>Panel Report, para. 7.1957.

<sup>2972</sup>Panel Report, para. 7.1958.

<sup>2973</sup>Panel Report, para. 7.1959.

<sup>2974</sup>Panel Report, para. 7.1959.

United States' serious prejudice claims depended on the presence of a given Airbus LCA on the market at a particular time.<sup>2975</sup> On this basis, the Panel considered it "appropriate to undertake {its} analysis of the effects of the subsidies on an aggregated basis in this dispute."<sup>2976</sup>

(b) Analysis

1365. On appeal, the European Union claims that the Panel erred in finding that the effect of non-LA/MSF subsidies was the displacement of Boeing LCA from the EC and certain third country markets under subparagraphs (a) and (b), and significant lost sales under subparagraph (c), of Article 6.3 of the *SCM Agreement*. The European Union further claims that the Panel acted inconsistently with Article 11 of the DSU in failing to provide a sufficient evidentiary basis and a reasoned and adequate explanation for this finding.

1366. The European Union argues that the Panel erred in aggregating non-LA/MSF subsidies under its "product launch" theory of causation, despite an absence of factual findings that each of those measures impacted the launch of particular models of Airbus LCA.<sup>2977</sup> According to the European Union, the Panel's conclusion that the non-LA/MSF subsidies "complemented and supplemented"<sup>2978</sup> the product effect of LA/MSF does not provide a sufficient basis for establishing causation under Article 6.3 of the *SCM Agreement*, because there was no evidence to suggest that the launch of a particular Airbus LCA was contingent on the non-LA/MSF.<sup>2979</sup> In the context of the United States' "product theory" of causation, the European Union argues that the Panel did not have a sufficient basis to conclude that non-LA/MSF subsidies had the same effect as LA/MSF, unless it could be demonstrated that each of the non-LA/MSF subsidies was necessary to enable the launch of particular models of Airbus LCA.<sup>2980</sup>

1367. The United States responds that the Panel correctly held that non-LA/MSF subsidies also caused displacement and lost sales within the meaning of Article 6.3(a), (b), and (c) of the *SCM Agreement*. According to the United States, the Panel's aggregated causation analysis was based on its finding that the nature and operation of each of the challenged subsidies enhanced Airbus' ability to develop and bring to the market its LCA family, consequently allowing Airbus to gain market share and significant sales at Boeing's expense.<sup>2981</sup> The European Union's argument that each

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<sup>2975</sup>Panel Report, paras. 7.1960 (quoting Panel Report, *US – Upland Cotton*, para. 7.1192) and 7.1961.

<sup>2976</sup>Panel Report, para. 7.1961.

<sup>2977</sup>European Union's appellant's submission, para. 638.

<sup>2978</sup>European Union's appellant's submission, para. 644 (quoting Panel Report, para. 7.1956).

<sup>2979</sup>European Union's appellant's submission, para. 643.

<sup>2980</sup>European Union's appellant's submission, paras. 646 and 648.

<sup>2981</sup>United States' appellee's submission, paras. 668 and 673.

of the non-LA/MSF subsidies had to be "necessary" to enable a particular product launch implies too high of a standard for an aggregated analysis of causation, which would permit circumvention of the disciplines of Article 6.3 in the case of smaller measures that individually would not have caused adverse effects, but which collectively would affect competition in a manner inconsistent with Articles 5 and 6.3.<sup>2982</sup> Thus, the United States maintains that the Panel's decision to assess cumulatively the effects of subsidies that "complemented and supplemented" each other was sufficient to establish causation, even if certain of these measures, individually, would not be of a sufficient magnitude to cause adverse effects.<sup>2983</sup>

1368. In discerning the effect of the subsidies challenged by the United States in this dispute, the Panel first sought to determine separately the effect of LA/MSF, which, according to the United States, was the "primary" subsidy benefiting Airbus LCA.<sup>2984</sup> The Panel came to the conclusion that LA/MSF was "necessary to the launch of each successive model of Airbus LCA, and that the individual and cumulative effect of those measures was fundamental to Airbus' ability to launch the particular LCA models it launched at the time that it did."<sup>2985</sup> The Panel then turned to the United States' argument that the non-LA/MSF measures, namely equity infusions, infrastructure measures, and R&TD subsidies, had effects similar to LA/MSF because they "shift{ed} costs of LCA development from Airbus to the governments, giving Airbus an edge, and allowing it to enter the LCA market with new LCA models at a pace that would otherwise not have been possible."<sup>2986</sup>

1369. The Panel opined that the equity infusions "ensured the continued existence and financial stability of the respective national entities engaged in the Airbus enterprise", without which "Airbus would not have been able to continue to develop, launch and produce LCA in fulfilment of the goal of developing a full range of LCA for the market."<sup>2987</sup> In relation to infrastructure measures, the Panel found that they "provided essential support to the development and production of Airbus LCA, relieving Airbus of significant expenses in connection with the development of facilities for the production of, most particularly, the A380 and thus enabling it to continue with the launch of successive models of LCA."<sup>2988</sup> The Panel further found that R&TD subsidies "enabled Airbus to

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<sup>2982</sup>United States' appellee's submission, para. 672 (referring to European Union's appellant's submission, para. 646).

<sup>2983</sup>United States' appellee's submission, para. 672.

<sup>2984</sup>Panel Report, para. 7.1950 (referring to United States' first written submission to the Panel, para. 819).

<sup>2985</sup>Panel Report, para. 7.1956.

<sup>2986</sup>Panel Report, para. 7.1950.

<sup>2987</sup>Panel Report, para. 7.1957.

<sup>2988</sup>Panel Report, para. 7.1958.

develop features and aspects of its LCA on a schedule that it would otherwise have been unable to accomplish."<sup>2989</sup>

1370. On this basis, the Panel came to the conclusion that non-LA/MSF subsidies "complemented and supplemented" the "product effect" of LA/MSF and, therefore, "had the same effect on Airbus' ability to launch the LCA it launched at the time that it did."<sup>2990</sup>

1371. We note that the Panel made the following statement after coming to the conclusion that non-LA/MSF subsidies "complemented and supplemented"<sup>2991</sup> the "product effect" of LA/MSF subsidies:

In our view, based on the facts and circumstances outlined above, the subsidies at issue in this dispute all have a "sufficient nexus {to} the subsidized product". Moreover, inasmuch as those subsidies enabled Airbus to launch successive models of LCA when it did, they also have a sufficient nexus {to} "the particular effects-related variable{s} under examination", since the United States claims of serious prejudice that we are examining are based, at least in part, on the presence of a given Airbus LCA available on the market at a particular time. Therefore, we conclude that it is appropriate to undertake our analysis of the effects of the subsidies on an aggregated basis in this dispute.<sup>2992</sup>

1372. Despite its statement that "it is appropriate to undertake our analysis of the effects of the subsidies on an aggregated basis in this dispute"<sup>2993</sup>, in our view, the Panel did not actually conduct an aggregated assessment of the effects of LA/MSF and non-LA/MSF subsidies. Had it done so, the Panel would have sought to determine from the outset whether the collective effect of LA/MSF and non-LA/MSF subsidies was to enable the launch of particular models of Airbus LCA.

1373. Instead, the Panel conducted a separate analysis of the effects of LA/MSF on Airbus' ability to launch and bring to the market particular models of LCA, and then sought to determine whether non-LA/MSF subsidies had similar effects. On the basis of a separate—and more abbreviated—assessment of the collective effect of measures comprised under each group of non-LA/MSF subsidies, the Panel came to the conclusion that the "'product' effect of LA/MSF is ... complemented and supplemented by the other specific subsidies we have found to exist in this dispute."<sup>2994</sup>

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<sup>2989</sup>Panel Report, para. 7.1959.

<sup>2990</sup>Panel Report, para. 7.1956.

<sup>2991</sup>Panel Report, para. 7.1956.

<sup>2992</sup>Panel Report, para. 7.1961.

<sup>2993</sup>Panel Report, para. 7.1961.

<sup>2994</sup>Panel Report, para. 7.1956.

1374. Insofar as the Panel separately assessed the effect of LA/MSF, and then came to the conclusion, on the basis of an individual assessment, that each set of non-LA/MSF subsidies had effects similar to LA/MSF, the Panel did *not* aggregate the challenged subsidies with a view to discerning their effects under Article 6.3 of the *SCM Agreement*. Thus, the Panel's statement that it was "appropriate to undertake {its} analysis of the effects of the subsidies on an aggregated basis in this dispute"<sup>2995</sup> does not accurately reflect the approach actually taken by the Panel to establish causation with respect to non-LA/MSF subsidies.

1375. This brings us to the question of whether it was appropriate for the Panel to do what it actually did, namely to focus its causation analysis on whether the non-LA/MSF subsidies at issue—equity infusions, infrastructure measures, and R&TD subsidies—"complemented and supplemented"<sup>2996</sup> the effects of LA/MSF.

1376. As noted earlier, the Appellate Body has interpreted Article 6.3 of the *SCM Agreement* as requiring the establishment of a "genuine and substantial relationship of cause and effect"<sup>2997</sup> between the subsidies and the alleged market phenomena under that provision, and that such relationship is not diluted by the effects of other factors.<sup>2998</sup> The Appellate Body has further explained that the particular market phenomena alleged under Article 6.3(c) must "result from a chain of causation that is linked to the impugned subsidy"<sup>2999</sup> and the effects of other factors must not be attributed to the challenged subsidies.<sup>3000</sup> We have explained earlier in this Report that the interpretative guidance provided by the Appellate Body under Article 6.3(c) is equally relevant to the causation analysis under subparagraphs (a) and (b) of that provision.<sup>3001</sup> We also recall the Appellate Body's view that "a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the 'effect' of a subsidy is significant price suppression under Article 6.3(c)."<sup>3002</sup> The appropriateness of a particular method may have to be determined on a case-specific basis, depending on a number of factors and factual circumstances such as the nature, design, and operation of the subsidies at issue, the alleged market phenomena, and the extent to which the subsidies are provided in relation to a particular product or products, among others.<sup>3003</sup> However, a panel's methodological discretion does not absolve it from having to establish a "genuine and substantial relationship of cause and effect"

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<sup>2995</sup>Panel Report, para. 7.1961.

<sup>2996</sup>Panel Report, para. 7.1956.

<sup>2997</sup>Appellate Body Report, *US – Upland Cotton*, para. 438.

<sup>2998</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 375.

<sup>2999</sup>Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 372.

<sup>3000</sup>Appellate Body Report, *US – Upland Cotton*, para. 437.

<sup>3001</sup>See *supra*, para. 1232.

<sup>3002</sup>Appellate Body Report, *US – Upland Cotton*, para. 436.

<sup>3003</sup>See Panel Report, *US – Upland Cotton*, para. 7.1194; Panel Report, *Korea – Commercial Vessels*, para. 7.560.

between the impugned subsidies and the alleged market phenomena under Article 6.3, and from ensuring that such causal link is not diluted by the effects of other factors.<sup>3004</sup>

1377. In the particular circumstances of this dispute, the Panel chose first to discern the effects of each of the LA/MSF measures, which according to the United States were the primary subsidies benefiting Airbus.<sup>3005</sup> The Panel came to the conclusion that each of the LA/MSF measures enabled Airbus to launch and bring to the market each of its models of LCA as and when it did, thus resulting in the displacement and significant lost sales of Boeing LCA under Article 6.3(a), (b), and (c) of the *SCM Agreement*.<sup>3006</sup> In other words, a "genuine and substantial relationship of cause and effect" had been established between the LA/MSF measures and the displacement and lost sales of Boeing LCA during the reference period. The Panel then sought to determine whether the non-LA/MSF subsidies at issue had similar effects by "shift{ing} costs of LCA development from Airbus to the governments, giving Airbus an edge and allowing it to enter the LCA market with new LCA models at a pace that would otherwise not have been possible."<sup>3007</sup> The Panel concluded that, insofar as the three sets of non-LA/MSF subsidies "complemented and supplemented" the "product effect" of LA/MSF, these subsidies "had the same effect on Airbus' ability to launch the LCA it launched at the time that it did."<sup>3008</sup>

1378. We consider that the approach used by the Panel is permissible under Article 6.3 of the *SCM Agreement*, provided that a genuine causal link between the non-LA/MSF subsidies and the market phenomena alleged under Article 6.3 is established. Having determined that each of the LA/MSF measures enabled launches of particular Airbus LCA models and therefore were a substantial cause of the displacement and significant lost sales of Boeing LCA, the Panel sought to determine whether non-LA/MSF subsidies "complemented and supplemented" the effects of LA/MSF measures, even if each of the non-LA/MSF subsidies, taken individually, would not have enabled launches of particular Airbus LCA models, and therefore would not have been a substantial cause of the displacement and significant lost sales. Once the Panel determined that LA/MSF subsidies were a substantial cause of the observed displacement and lost sales, it was not necessary to establish that non-LA/MSF subsidies were also substantial causes of the same phenomena. Moreover, the fact that LA/MSF subsidies were the substantial cause of adverse effects does not exclude that non-LA/MSF subsidies had similar effects. Rather, it was conceivable that non-LA/MSF subsidies complemented

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<sup>3004</sup>See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 375.

<sup>3005</sup>Panel Report, para. 7.1950 (referring to United States' first written submission to the Panel, para. 819).

<sup>3006</sup>Panel Report, para. 7.1949.

<sup>3007</sup>Panel Report, para. 7.1950.

<sup>3008</sup>Panel Report, para. 7.1956.



or supplemented the effects of LA/MSF subsidies. For these reasons, we do not agree with the European Union that Articles 5(c) and 6.3 of the *SCM Agreement* preclude an affirmative finding that non-LA/MSF subsidies cause adverse effects where they "complement and supplement" the effects of LA/MSF subsidies that have been found to be a substantial and genuine cause of adverse effects.<sup>3009</sup> Given that the Panel had determined that LA/MSF subsidies were a substantial cause of the alleged market phenomena, it was permissible and sufficient for the Panel to assess whether a genuine causal connection between non-LA/MSF subsidies and the same market phenomena existed such that these non-LA/MSF subsidies complemented or supplemented the effects of LA/MSF. Contrary to the European Union's submission<sup>3010</sup>, the Panel was not required, in those circumstances, to establish that non-LA/MSF subsidies were themselves a substantial cause or "necessary to enable a launch decision at a particular point in time."<sup>3011</sup>

1379. As we observed above, the Panel's approach to the analysis of causation did not absolve it from establishing a genuine causal link between the different categories of non-LA/MSF subsidies and Airbus' ability to launch and bring to the market its LCA models, thereby similarly causing the displacement and significant lost sales of Boeing LCA during the reference period. The fact that LA/MSF measures enabled certain product launches, and therefore were a genuine and substantial cause of displacement and lost sales during the reference period, does not in and of itself establish that non-LA/MSF subsidies had similar effects. Instead, the Panel had to establish that non-LA/MSF subsidies had a genuine causal connection with Airbus' ability to launch and bring to the market its models of LCA, thus contributing to the adverse effects of LA/MSF measures.

1380. In the sections that follow, we examine whether the Panel had a sufficient basis for concluding that each set of the non-LA/MSF subsidies at issue, namely equity infusions, infrastructure subsidies, and R&TD subsidies, "complemented and supplemented" the "product effect" of LA/MSF, in that they similarly contributed to Airbus' ability to bring to the market its models of LCA, thereby causing displacement of Boeing LCA from the European Union and third country markets, and significant lost sales, under Article 6.3(a), (b), and (c) of the *SCM Agreement*.

(i) *Equity infusions*

1381. We begin with the equity infusions by the Governments of France and Germany in connection with the corporate restructuring of the national companies that at that time were part of the Airbus consortium, namely Aérospatiale and Deutsche Airbus. The Panel found that the capital

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<sup>3009</sup>European Union's appellant's submission, para. 645.

<sup>3010</sup>See European Union's appellant's submission, paras. 646 and 648.

<sup>3011</sup>European Union's appellant's submission, para. 648.

contributions to Aérospatiale made by the French Government in 1987, 1988, and 1994, the capital contribution to Aérospatiale made by Crédit Lyonnais in 1992<sup>3012</sup>, the French Government's 1998 transfer of its 45.76% equity interest in Dassault Aviation to Aérospatiale<sup>3013</sup>, and the 1989 acquisition by KfW of a 20% equity interest in Deutsche Airbus and the 1992 transfer of that equity interest to MBB<sup>3014</sup>, were specific subsidies that caused serious prejudice to the United States' interests under Article 5(c) of the *SCM Agreement*.

1382. The Panel found that the equity infusions and share transfer measures "complemented and supplemented" the "product effect" of LA/MSF and, therefore, had "the same effect on Airbus' ability to launch the LCA it launched at the time that it did"<sup>3015</sup> for the following reasons:

The equity investments and share transfer measures of the French and German governments ensured the continued existence and financial stability of the respective national entities engaged in the Airbus enterprise. Those entities were a necessary element of the overall Airbus effort, as it is clear to us that without their participation in the overall effort, Airbus would not have been able to continue to develop, launch and produce LCA in fulfilment of the goal of developing a full range of LCA for the market. Moreover, as noted above, Aérospatiale required the additional equity to fund investments in fixed assets and inventory, and advances to suppliers, in connection with the development of new aircraft. As the European Communities acknowledges that Aérospatiale could not have undertaken these investments without the government's assistance through equity infusions, it seems clear to us that these equity investments directly supported the development of LCA in a manner that was as direct as LA/MSF.<sup>3016</sup> (footnote omitted)

1383. On appeal, the European Union argues that there are "simply no underlying factual findings to support the Panel's ultimate conclusion that but for the equity investments and share transfers, individual Airbus LCA would not have been launched."<sup>3017</sup> In particular, the European Union maintains that the Panel failed to explain adequately how the transfer of KfW's 20% equity interest in Deutsche Airbus to MBB enabled a product launch.<sup>3018</sup> The European Union argues that the Panel's

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<sup>3012</sup>Panel Report, para. 7.1380.

<sup>3013</sup>Panel Report, para. 7.1414.

<sup>3014</sup>Panel Report, para. 7.1302.

<sup>3015</sup>Panel Report, para. 7.1956.

<sup>3016</sup>Panel Report, para. 7.1957.

<sup>3017</sup>European Union's appellant's submission, para. 652.

<sup>3018</sup>See European Union's appellant's submission, paras. 653 and 654. The European Union advances similar arguments in relation to the transfer by the French Government of its 45.76% stake in Dassault Aviation to Aérospatiale. We do not address this measure further because we have reversed above the Panel's finding that this measure conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*.

failure to provide an evidentiary basis and a reasoned and adequate explanation for its causation finding constitutes a violation of Article 11 of the DSU.<sup>3019</sup>

1384. The United States responds that the Panel was correct in finding that the equity infusions "complemented and supplemented" the "product effect" of LA/MSF, in that they ensured the continued existence and financial stability of Airbus national entities, thus enabling Airbus to continue to develop and launch a full range of LCA.<sup>3020</sup> The United States adds that an EC State Aid Memorandum demonstrated that Airbus could not have undertaken investments in fixed assets and inventory, and advances to suppliers, in connection with the development of new aircraft without the government's assistance through equity infusions.<sup>3021</sup>

1385. We recall that we have reversed the Panel's finding that the 1998 transfer by the French Government of its 45.76% interest in Dassault Aviation to Aérospatiale conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement* and that we were unable to complete the analysis.<sup>3022</sup> Accordingly, because there is no basis to assess the adverse effects of measures that have not been found to constitute specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*, we declare moot and of no legal effect the Panel's causation finding, in paragraph 8.2 of the Panel Report, to the extent that it relates to the 1998 share transfer.

1386. Turning to the other equity infusions at issue, we note that they were capital investments that were not necessarily tied to the development of any particular model of Airbus LCA. However, the equity infusions at issue were corporate restructuring measures undertaken with the specific purpose

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<sup>3019</sup>European Union's appellant's submission, paras. 661 to 664.

<sup>3020</sup>United States' appellee's submission, para. 668. The United States also referred to the European Union's statement:

The United States challenged four capital contributions made by the French State to Aérospatiale, a French company wholly-owned by the French State, in the years 1987, 1988, 1992 and 1994. The purpose of the new capital was to fund expansion in LCA product development, in light of robust prospects for substantial future growth in the demand for LCA. From the mid-1980s, among other projects and product lines, Aérospatiale began to ramp-up for the manufacture of the A320, with the first delivery due in 1988. In addition, the company was contemplating a new long-haul programme that was eventually launched in 1987 as the A330/A340, with the first delivery in 1993. This ambitious investment programme required additional equity capital as a base for further borrowing capacity; in addition to the initial design cost, the production of a new aircraft requires significant capital investment in specialised facilities and equipment.

(*Ibid.*, para. 669 (quoting European Union's appellant's submission, para. 1094, in turn referring to European Communities' first written submission to the Panel, paras. 1134 and 1135))

<sup>3021</sup>United States' appellee's submission, para. 668 (referring to Panel Report, para. 7.1957).

<sup>3022</sup>See *supra*, para. 1026.

of addressing the undercapitalization of both Aérospatiale<sup>3023</sup> and Deutsche Airbus<sup>3024</sup>, which, during the 1990s, threatened the investment capacity—and indeed the very existence—of both companies. As the Panel correctly noted, these equity infusions "ensured the continued existence and financial stability"<sup>3025</sup> of Aérospatiale and Deutsche Airbus. Given the nature and structure of the Airbus

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<sup>3023</sup>In respect of the capital contributions made between 1987 and 1994, the European Communities argued that, in producing the A320 (which entered commercial service in March 1988), Aérospatiale had made significant investments in capital, in addition to investing in increasing levels of work-in-process inventory as production ramped up. (Panel Report, para. 7.1345 (referring to European Communities' first written submission to the Panel, para. 1134; European Communities' second written submission to the Panel, para. 524; and Aérospatiale, *Annual Report 1990* (Panel Exhibit EC-177), p. 4)) According to the European Communities, "a strong order book in the late 1980s, and robust forecasts for the new A320 and for the A330/A340 programme then under development, meant that management and the company's shareholder had ample evidence that the company's performance would improve significantly." (*Ibid.*, para. 7.1346 (quoting European Communities' first written submission to the Panel, para. 1117)) The European Communities also argued that the significant indebtedness of Aérospatiale during the late 1980s can be explained by reference to the financial demands of developing and manufacturing the A320. (*Ibid.* para. 7.1349 (referring to European Communities' second written submission to the Panel, para. 525)) The Panel noted that the European Communities had explained that Aérospatiale required additional equity capital in 1987 and 1988 in order to fund new investments, such as the ramp-up for manufacture of the A320 (with first delivery due in 1988) and the launch of the A330/A340 in 1987 (with first delivery due in 1993). (*Ibid.*, para. 7.1364 (referring to European Communities' first written submission to the Panel, paras. 1134 and 1135)) The Panel also noted the European Communities' reference to statements by a Crédit Lyonnais executive following the announcement of the capital investment in August 1992 to the effect that the investment was justified by the good prospects for the A330/A340 programme, which would start generating substantial revenue in 1994. (*Ibid.*, para. 7.1369 (referring to "Crédit Lyonnais to Buy 20% Stake in Aérospatiale from French Government", *Aviation Week & Space Technology*, 3 August 1992 (Panel Exhibit US-284))

<sup>3024</sup>Deutsche Airbus was the German partner in the Airbus GIE consortium, founded in 1967 to assume work for the development of a European wide-body aircraft. By 1989, it had become the wholly owned subsidiary of MBB, which was itself the largest aerospace company in West Germany, and which, together with another German firm, Dornier, performed the German share of the Airbus Industrie consortium's development and series production work. (Panel Report, para. 7.1246) Deutsche Airbus, however, had been undercapitalized by MBB and was largely dependent on financial aid from the German Government. (*Ibid.*) In the years prior to 1989, the German Government had been encouraging MBB to obtain additional private capital for Deutsche Airbus, but attempts had been unsuccessful. The German Government itself had committed LA/MSF as well as other financial aid for sales and series production. In addition, as the Panel noted, by 1989, "Deutsche Airbus also anticipated that it would require additional financing for the A320 programme, and the start-up of the A330/A340 programme". (*Ibid.*, para. 7.1247) Elsewhere, the Panel also referred to a 1988 statement by the German Ministry of Economics that the German Government, at that time, bore all of Deutsche Airbus' risk through its provision of guarantees for the costs of the A300/A310 programmes. (*Ibid.*, para. 7.1277 (referring to Handelsblatt No. 212, 3 November 1988, p. 24 "Daimler-Benz-MBB / Statement of the German Federal Ministry of Economics on the Restructuring of the Aviation Industry" (Panel Exhibit US-259))) Against this background, the German Government undertook to restructure Deutsche Airbus and "gradually shift the risks associated with the participation in Airbus GIE to the private sector". The restructuring plan involved the industrial group, Daimler-Benz, acquiring control of MBB (and therefore Deutsche Airbus) through a newly created subsidiary "Dasa". One element of the restructuring plan was a 1989 acquisition by a German development bank *Kreditanstalt für Wiederaufbau* (KfW) of a 20% equity interest in Deutsche Airbus, and the 1992 transfer of that 20% equity interest to MBB (the parent company of Deutsche Airbus). (See Panel Report, para. 7.1248) With respect to the transfer of the 20% equity interest in Deutsche Airbus back to MBB in 1992, the Panel noted that MBB was "inherently linked with Deutsche Airbus' ability to continue to operate in LCA business" and that, in the absence of proof to the contrary by the European Communities, MBB, along with Deutsche Airbus, could be considered a producer of Airbus LCA for purposes of its subsidy analysis. (*Ibid.*, para. 7.1294)

<sup>3025</sup>Panel Report, para. 7.1957.

consortium, it would have been unlikely that Airbus could have continued to develop and bring to the market its successive models of LCA without the participation of each of the national companies engaged in the Airbus enterprise. As the Panel noted:

The development and production of Airbus LCA was divided among the national companies participating in the Airbus consortium. Thus ... the French company, Aérospatiale, was responsible for flight control systems, cockpits, power plant integration, ground flight testing, complex structural sections, equipped subassemblies and technical publications. The German company, DASA, produced the major fuselage sections containing hydraulic equipment, secondary flight control systems, wing assemblies and commercial furnishing, as well as equipping the wings furnished by BAE Systems. DASA also carried out final assembly of A321 and A319 aircraft, as well as some cabin outfitting and customization of the cabins of the A300/A310 and the A320 family.<sup>3026</sup>

1387. The above factual finding by the Panel, in our view, sufficiently demonstrates that Aérospatiale and Dasa were responsible for fundamental portions of the assembly of certain models of Airbus LCA, in particular the A300, A310, A319, A320, and A321. The Panel further observed that the evidence suggested that "this division of labour continued with subsequent models of Airbus LCA."<sup>3027</sup> This, in our view, supports the Panel's conclusion that Aérospatiale and Dasa "were a necessary element of the overall Airbus effort", and that without their participation "Airbus would not have been able to continue to develop, launch and produce LCA in fulfilment of the goal of developing a full range of LCA for the market."<sup>3028</sup>

1388. Furthermore, by the European Communities' own admission, Aérospatiale "required additional equity capital in 1987 and 1988 in order to fund new investments, such as the ramp-up for manufacture of the A320 (with first delivery due in 1988) and the launch of the A330/A340 in 1987 (with first delivery due in 1993)."<sup>3029</sup> In this context, the European Communities further explained that:

{i}n addition to the initial design cost, the production of a new aircraft requires significant capital investment in specialized facilities and equipment. Furthermore, as the number of planes produced increases, so does the need to finance an increasing investment both in work-in-process inventory and advances to suppliers. From 1986 to 1992, Aérospatiale increased its investment in net fixed assets from FF 3.6 billion to FF 5.6 billion. In addition, its investment in

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<sup>3026</sup>Panel Report, footnote 5695 to para. 7.1957 (referring to footnote 5649 to para. 7.1937).

<sup>3027</sup>Panel Report, footnote 5695 to para. 7.1957 (referring to footnote 5649 to para. 7.1937).

<sup>3028</sup>Panel Report, para. 7.1957.

<sup>3029</sup>Panel Report, para. 7.1364 (referring to European Communities' first written submission to the Panel, paras. 1134 and 1135).

inventory increased, from FF 11.4 billion in 1986 to a peak of FF 15.4 billion in 1990; similarly, advances to suppliers doubled, from FF 2 billion in 1986 to FF 4 billion in 1992. It is not surprising that Aérospatiale required additional equity capital to fund the new investments. Internally generated cash flow was not sufficient, and a prudent debt-to-equity ratio placed limits on the amount of new debt that could be borne.<sup>3030</sup> (footnotes omitted)

1389. Therefore, we agree with the Panel that "Aérospatiale required the additional equity to fund investments in fixed assets and inventory, and advances to suppliers, in connection with the development of new aircraft."<sup>3031</sup> The European Communities acknowledged that "{i}nternally generated cash flow was not sufficient" and that "a prudent debt-to-equity ratio placed limits on the amount of new debt that could be borne".<sup>3032</sup> Therefore, the Panel considered that Aérospatiale could not have undertaken further investment in LCA development had it not obtained the equity infusions by the French Government.<sup>3033</sup> This, in our view, supports the Panel's conclusion that "these equity investments directly supported the development of LCA in a manner as direct as LA/MSF."<sup>3034</sup>

1390. Based on the above, we consider that the Panel had a sufficient basis to conclude that the French and German equity infusions into Aérospatiale had a genuine connection to Airbus' ability to develop and bring to the market particular models of LCA, both by guaranteeing the continued existence and financial stability of Aérospatiale and Dasa, and by enhancing those companies' borrowing capacity in the wake of further investments in the production and development of particular models of LA/MSF-financed Airbus LCA. We consider that these equity infusions provided support to Airbus' efforts in developing and bringing to the market those models of Airbus LCA, with corresponding effects on Boeing's LCA sales.

1391. Accordingly, we conclude that the Panel did not err in its application of Articles 5(c) and 6.3(a), (b), and (c) of the *SCM Agreement* in finding that the equity infusions constituting specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement* "complemented and supplemented" the effects of LA/MSF on Airbus' ability to launch and bring to the market its models of LCA. We further conclude, for the reasons stated above, that the Panel had a sufficient evidentiary basis and provided a sufficiently reasoned and adequate explanation for this finding, and therefore acted consistently with its duty to conduct an objective assessment of the matter under Article 11 of the DSU.

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<sup>3030</sup>European Communities' first written submission to the Panel, para. 1135.

<sup>3031</sup>Panel Report, para. 7.1957.

<sup>3032</sup>European Communities' first written submission to the Panel, para. 1135).

<sup>3033</sup>Panel Report, para. 7.1957.

<sup>3034</sup>Panel Report, para. 7.1957.

(ii) *Infrastructure measures*

1392. The Panel found that the provision of the Mühlenberger Loch industrial site, the provision of the extended runway at the Bremen airport, the provision of the Aéroconstellation industrial site and associated EIG facilities, as well as regional grants by German authorities in Nordenham and Spanish authorities in Sevilla, La Rinconada, Toledo, Puerto de Santa Maria, and Puerto Real<sup>3035</sup>, constituted specific subsidies that caused serious prejudice to the United States' interests under Articles 5(c) and 6.3(a), (b), and (c) of the *SCM Agreement*.

1393. In coming to the conclusion that the infrastructure measures "complemented and supplemented" the "product effect" of LA/MSF insofar as they all had "the same effect on Airbus' ability to launch the LCA it launched at the time that it did"<sup>3036</sup>, the Panel reasoned that:

{t}he infrastructure subsidies similarly provided essential support to the development and production of Airbus LCA, relieving Airbus of significant expenses in connection with the development of facilities for the production of, most particularly, the A380, and thus enabling it to continue with the launch of successive models of LCA. Even assuming, as the European Communities contends, that the establishment of an A380 final assembly line in Hamburg [\*\*\*], the establishment of that line was necessary in order to ensure [\*\*\*], which we consider to have been necessary to the ability of Airbus to launch the A380.<sup>3037</sup> (footnote omitted)

1394. On appeal, the European Union argues that the Panel provided no evidentiary support for its conclusion that, but for the infrastructure subsidies, Airbus would not have been able to launch its LCA and consequently would not have caused displacement and lost sales of Boeing LCA.<sup>3038</sup> The European Union maintains that the Panel failed to take into account the nature and effect of the infrastructure subsidies, particularly in the light of its recognition that the Mühlenberger Loch project in Hamburg made it [\*\*\*] to launch the A380.<sup>3039</sup> The European Union further notes that the Panel ignored evidence that demonstrated that regional aid measures in Germany and Spain were designed to offset the additional burden of investing in less-developed regions, and thus could not have "reliev{ed} Airbus from significant expenses in connection with the development of facilities for the production of" LCA.<sup>3040</sup> The European Union argues that the Panel's failure to provide an evidentiary

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<sup>3035</sup>Panel Report, paras. 7.1235, 7.1236, 7.1244, and 8.1(b)(iv).

<sup>3036</sup>Panel Report, para. 7.1956.

<sup>3037</sup>Panel Report, para. 7.1958.

<sup>3038</sup>European Union's appellant's submission, para. 655.

<sup>3039</sup>European Union's appellant's submission, para. 656.

<sup>3040</sup>European Union's appellant's submission, para. 658 (quoting Panel Report, para. 7.1958).

basis and a reasoned and adequate explanation for its causation finding constitutes a violation of Article 11 of the DSU.<sup>3041</sup>

1395. The United States responds that the Panel correctly held that infrastructure measures were granted during the period when each succeeding model of Airbus LCA was being developed and brought to the market. The United States further submits that the Panel did not err in finding that the infrastructure measures "complemented and supplemented" the "product effect" of LA/MSF by "relieving Airbus of significant expenses in connection with the development of facilities for the production of, most particularly, the A380, and thus enabling it to continue with the launch of successive models of LCA".<sup>3042</sup>

1396. In section VII.B, we have reversed the Panel's finding regarding the financial contribution and the benefit conferred by the provision of the Mühlenberger Loch industrial site. However, we have completed the legal analysis and found that the lease of the land at that site constituted a financial contribution that conferred a benefit on Airbus within the meaning of Article 1.1(b) of the *SCM Agreement*.<sup>3043</sup> We have also reversed the Panel's finding regarding the financial contribution and the benefit conferred on Airbus by the provision of the lengthened Bremen airport runway, but completed the legal analysis and found that the right to exclusive use of the extended runway at the Bremen airport constituted a financial contribution that conferred a benefit on Airbus.<sup>3044</sup> Similarly, we have reversed the Panel's finding regarding the Aéroconstellation industrial site and associated EIG facilities. However, we were unable to complete the analysis in relation to infrastructure measures regarding the Aéroconstellation industrial site and associated EIG facilities.<sup>3045</sup> Accordingly, because there is no basis to assess the adverse effects of measures that have not been found to constitute specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*, we declare moot and of no legal effect the Panel's causation finding, in paragraph 8.2 of the Panel Report, to the extent that it relates to infrastructure measures regarding the Aéroconstellation industrial site and associated EIG facilities.<sup>3046</sup>

1397. As regards the other infrastructure measures, we agree with the European Union that differences in the nature and operation of LA/MSF and infrastructure measures may suggest that these measures had distinct effects. While infrastructure measures were grants aimed at expanding Airbus'

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<sup>3041</sup>European Union's appellant's submission, paras. 661-664.

<sup>3042</sup>United States' appellee's submission, para. 668 (quoting Panel Report, para. 7.1958).

<sup>3043</sup>See *supra*, para. 990.

<sup>3044</sup>See *supra*, para. 992.

<sup>3045</sup>See *supra*, para. 993.

<sup>3046</sup>This applies as well to the special purpose facilities at the Mühlenberger Loch industrial site, for which we were also unable to complete the analysis.



production facilities, LA/MSF were loans aimed at covering the development costs of specific models of Airbus LCA. However, the infrastructure measures at issue in this dispute all have a genuine causal link with the creation or expansion of production facilities for various models of Airbus LCA. Therefore, we consider that these infrastructure measures complemented or supplemented LA/MSF in contributing to Airbus' ability to introduce its models of LCA into the market.

1398. In particular, the provision of the lease of the land at the Mühlenberger Loch industrial site adjacent to Airbus' facilities in Hamburg to Airbus had the specific purpose of facilitating the final assembly of the A380 at that site.<sup>3047</sup> Similarly, the right to exclusive use of the Bremen airport runway extension was granted to Airbus with the specific purpose of enabling Airbus to transport wings from Bremen that were connected with the launch and production of the A330/A340.<sup>3048</sup>

1399. The situation is less clear with respect to the regional grants that were used to expand Airbus' or EADS' LCA-manufacturing facilities. As the European Union correctly notes, the Panel did not specifically refer to such regional grants<sup>3049</sup> in its causation analysis, thus making it difficult to discern on what basis it inferred that such regional grants complemented or supplemented LA/MSF and contributed to Airbus' ability to launch and bring to the market its models of LCA. However, we understand the Panel to have used the generic reference to infrastructure subsidies as a shorthand way of referring to the entire class of infrastructure measures that it had examined in previous parts of its analysis of the United States' claims. Earlier in its analysis, the Panel found that "each of the challenged regional grants" constituted subsidies "in connection with the production of LCA."<sup>3050</sup> The Panel also made several specific findings in respect of these grants. The Panel made a factual finding, for instance, that a grant by the German Land of Lower Saxony to Airbus was used "for the extension of Airbus Germany's existing manufacturing site in Nordenham."<sup>3051</sup> The Panel further made factual findings that grants by the Spanish Government and regional government authorities benefited Airbus Spain's facilities in Toledo and Puerto Real, and EADS-CASA's facilities in Sevilla, La Rinconada,

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<sup>3047</sup>See Panel Report, paras. 7.1075-7.1080.

<sup>3048</sup>The United States referred to a 2001 judgment by the Bremen Administrative Court, which confirmed that the use of the extended runway was limited to Airbus, and only for the transport of wings for the A330/A340 or future models. (Panel Report, paras. 7.1105-7.1107, and footnotes 4058 and 4081 to paras. 7.1118 and 7.1130 respectively)

<sup>3049</sup>The Panel's finding that the regional grants are specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement* was not appealed.

<sup>3050</sup>Panel Report, para. 7.1218.

<sup>3051</sup>Panel Report, para. 7.1206 (referring to European Communities' first written submission to the Panel, para. 881). We also note that the United States asserted that grants to this facility were for the specific purpose of expanding its A380 component production facility. (United States' first written submission to the Panel, para. 488 (referring to Niedersächsischer Landtag, Drucksache 14/3447, Entschliessungsantrag der SPD Fraktion (5 June 2002) (Panel Exhibit US-225)))

and Puerto Santa Maria.<sup>3052</sup> Finally, although the European Communities contested that one of the grants—an October 2004 grant to EADS-CASA's facilities in Sevilla—did not confer a benefit on LCA production, the Panel found that the grants benefited Airbus Spain's LCA-related activities.<sup>3053</sup> It would have been useful had the Panel elaborated in its analysis how these infrastructure measures supplemented and complemented the effects of LA/MSF. However, in our view, these factual findings by the Panel provide a sufficient basis for concluding that such regional grants were used to expand Airbus' manufacturing sites or EADS-CASA's LCA-related activities, thus supporting the Panel's inference that such regional grants "provided essential support to the development and production of Airbus LCA, relieving Airbus of significant expenses in connection with the development of facilities for the production" and enabling it to continue with the launch of successive models of LCA.<sup>3054</sup>

1400. Therefore, we conclude that the Panel did not err in its application of Articles 5(c) and 6.3(a), (b), and (c) of the *SCM Agreement* in finding that the infrastructure measures constituting specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement* "complemented and supplemented" the "product effect" of LA/MSF by contributing to Airbus' ability to launch and bring to the market its models of LCA as and when it did. We further conclude, for the reasons stated above, that the Panel had a sufficient evidentiary basis and provided a sufficiently reasoned and adequate explanation for this finding consistently with its duty to conduct an objective assessment of the matter, including an objective assessment of the facts, under Article 11 of the DSU.

(iii) *R&TD subsidies*

1401. Finally, we examine the Panel's finding relating to the R&TD subsidies at issue.

1402. The Panel found that the following R&TD measures constituted specific subsidies that caused serious prejudice to the United States' interests under Articles 5(c) and 6.3(a), (b), and (c) of the *SCM Agreement*: the grants to Airbus provided under the Second, Third, Fourth, Fifth, and Sixth EC Framework Programmes; the loans to Airbus provided under the Spanish PROFIT programme;

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<sup>3052</sup>Panel Report, paras. 7.1207 to 7.1211. The Panel considered that the United States' challenge against certain grants to facilities in Sevilla or Sevilla/La Rinconada concerned grants the European Communities had argued were granted to a facility in Sevilla, not La Rinconada. (Panel Report, footnote 4241 to para. 7.1209, and para. 7.1211 and footnote 4246 thereto)

<sup>3053</sup>Panel Report, paras. 7.1214 to 7.1217. Although the European Communities asserted that this grant was used for non-civil aircraft-related activities, the Panel concluded that both the Tablada and San Pablo facilities in Sevilla were partly engaged in LCA-related activities. The Panel considered that information contained in Panel Exhibit EC-139 (BCI) indicates that work at the Tablada plant is done for Airbus' A320 and A380 models (*ibid.*, footnote 4250 to para. 7.1217), and that information contained in Panel Exhibit EC-138 (BCI) indicates that work at the San Pablo facility involves [\*\*\*] (*ibid.*, footnote 4253 to para. 7.1217).

<sup>3054</sup>Panel Report, para. 7.1958.

the grants to Airbus provided by the French Government; the grants to Airbus provided by the German Federal Government; the grants to Airbus provided by certain German sub-federal governments; the loans to Airbus provided under the Spanish PTA programme; and the grants to Airbus provided under the UK CARAD programme.<sup>3055</sup>

1403. The Panel found that R&TD subsidies "had the same effect {as LA/MSF} on Airbus' ability to launch the LCA it launched at the time that it did"<sup>3056</sup> for the following reasons:

{T}he R&TD subsidies enabled Airbus to develop features and aspects of its LCA on a schedule that it would otherwise have been unable to accomplish. Even in the case of those R&TD subsidies directed to pre-competitive research, the ability to fund such efforts at a time when it would likely have been unable to do so in light of other demands on its resources was, in our view, significant in ensuring the launch of successive models of Airbus LCA. While we recognize that the impact of pre-competitive R&TD subsidies on Airbus' market presence was perhaps more attenuated, compared with the other subsidies at issue, or with R&TD subsidies that funded research and technology actually used on LCA that were launched, we believe that combined with the others, the R&TD subsidies complemented and supplemented the impact of LA/MSF.<sup>3057</sup>

1404. On appeal, the European Union argues that the Panel failed to establish that any of the "features and aspects" of its LCA that were developed with funding from R&TD subsidies impacted Airbus' product launch decisions.<sup>3058</sup> The European Union further charges the Panel with establishing "causation through association"<sup>3059</sup> with LA/MSF, despite its recognition that the impact of "pre-competitive" R&TD subsidies on Airbus' market presence was "more attenuated".<sup>3060</sup> The European Union further argues that the Panel's failure to provide an evidentiary basis and a reasoned and adequate explanation for its causation finding constitutes a violation of Article 11 of the DSU.<sup>3061</sup>

1405. The United States counters that the Panel correctly found that R&TD subsidies "complemented and supplemented" the "product effect" of LA/MSF, because they enabled Airbus to "develop features and aspects of its LCA on a schedule that it would otherwise have been unable to accomplish".<sup>3062</sup>

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<sup>3055</sup>Panel Report, para. 7.1608.

<sup>3056</sup>Panel Report, para. 7.1956.

<sup>3057</sup>Panel Report, para. 7.1959.

<sup>3058</sup>European Union's appellant's submission, para. 659.

<sup>3059</sup>European Union's appellant's submission, para. 660.

<sup>3060</sup>European Union's appellant's submission, para. 659 (referring to Panel Report, para. 7.1959).

<sup>3061</sup>European Union's appellant's submission, paras. 661-664.

<sup>3062</sup>United States' appellee's submission, para. 668 (quoting Panel Report, para. 7.1959).

1406. As we have reversed the Panel's finding that loans under the Spanish PROFIT programme were within the Panel's terms of reference under Article 6.2 of the DSU, we declare moot and of no legal effect the Panel's causation finding, in paragraph 8.2 of the Panel Report, to the extent that it relates to loans under the Spanish PROFIT programme.

1407. With respect to the other R&TD subsidies, we agree with the European Union that a general finding that they enabled Airbus to develop "features and aspects" of its LCA on a schedule that otherwise it would have been unable to accomplish does not provide a sufficient basis to determine that R&TD subsidies "complemented and supplemented" the "product effect" of LA/MSF in enabling Airbus to launch particular models of LCA. As the Panel seemed to have recognized in relation to "pre-competitive" R&TD subsidies, whose impact on Airbus' market presence it considered more "attenuated"<sup>3063</sup>, R&TD subsidies will not have any impact on Airbus' (and consequently on Boeing's) sales unless they provide Airbus LCA with a competitive advantage in relation to Boeing LCA. Such competitive advantage, in our view, must be reflected either in technologies incorporated in models of LCA actually launched by Airbus, or in technologies that make the production process of those LCA more efficient. Without specific findings that technology or production processes funded by R&TD subsidies contributed to Airbus' ability to launch and bring to the market particular models of LCA, the Panel did not have a sufficient basis to conclude that those subsidies "complemented and supplemented" the "product effect" of LA/MSF.

1408. For these reasons, we find that the Panel erred under Articles 5(c) and 6.3(a), (b), and (c) of the *SCM Agreement* when it found that the R&TD subsidies "complemented and supplemented" the "product effect" of LA/MSF without establishing a genuine causal link between those R&TD subsidies and Airbus' ability to launch and bring to the market its models of LCA. In failing to provide a sufficient evidentiary basis for its finding that the effect of non-LA/MSF subsidies was the displacement of Boeing LCA from the EC and relevant third country markets and significant lost sales under Article 6.3(a), (b), and (c) of the *SCM Agreement*, the Panel failed to conduct an objective assessment of the matter, including an objective assessment of the facts, as required by Article 11 of the DSU.

1409. Accordingly, we *reverse* the Panel's finding that the effect of R&TD subsidies was the displacement of Boeing LCA from the EC and relevant third country markets, and significant lost sales, within the meaning of Article 6.3(a), (b), and (c) of the *SCM Agreement*.

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<sup>3063</sup>Panel Report, para. 7.1959.

## (c) Conclusions

1410. Based on all of the foregoing, we agree with the Panel that the equity infusions and infrastructure measures at issue, except for those that have not been found to constitute specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*<sup>3064</sup>, "complemented and supplemented" the "product effect" of LA/MSF in that they positively impacted Airbus' ability to launch and bring to the market its models of LCA.<sup>3065</sup>

1411. However, we consider that the Panel erred under Articles 5(c) and 6.3(a), (b), and (c) of the *SCM Agreement* when it found that R&TD subsidies "complemented and supplemented" the "product effect" of LA/MSF without establishing a genuine causal link between R&TD subsidies and Airbus' ability to launch and bring to the market its models of LCA.<sup>3066</sup>

1412. Based on all of the foregoing, we *uphold* the Panel's finding, in paragraph 8.2 of the Panel Report, that the effect of specific subsidies in the form of LA/MSF, as well as the equity infusions and infrastructure measures identified above, was the displacement of Boeing LCA from the EC and relevant third country markets, and significant lost sales, within the meaning of Article 6.3(a), (b), and (c), which constitutes serious prejudice to the United States' interests under Article 5(c), of the *SCM Agreement*.<sup>3067</sup>

1413. However, we *reverse* the Panel's finding, in paragraph 8.2 of the Panel Report, that the effect of R&TD subsidies was the displacement of Boeing LCA from the EC and relevant third country markets, and significant lost sales, within the meaning of Article 6.3(a), (b), and (c), which constitutes serious prejudice to the United States' interests under Article 5(c), of the *SCM Agreement*.

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<sup>3064</sup>We have declared moot and of no legal effect the Panel's finding, in paragraph 8.2 of the Panel Report, to the extent that it relates to the equity infusion by the French Government of its 45.76% interest in Dassault Aviation into Aérospatiale, and the infrastructure measures regarding the Aéroconstellation industrial site and associated EIG facilities.

<sup>3065</sup>Panel Report, paras. 7.1956-7.1958.

<sup>3066</sup>Panel Report, para. 8.2.

<sup>3067</sup>The European Union did not appeal the Panel's analysis of causation in relation to the lost sales involving A340 sales to Iberia, South African Airways, and Thai Airways International. Therefore, this aspect of the Panel's analysis stands.

## **X. Findings and Conclusions**

1414. For the reasons set out in this Report, in relation to the issues raised on appeal by the European Union, the Appellate Body:

- (a) reverses the Panel's finding, in paragraph 7.1422 of the Panel Report, that the R&TD loans provided pursuant to the Spanish PROFIT programme were within the Panel's terms of reference;
- (b) upholds the Panel's finding, in paragraph 7.158 of the Panel Report, that the French R&TD grants were within the Panel's terms of reference;
- (c) modifies the Panel's interpretation of Article 5 of the *SCM Agreement*, but upholds the Panel's conclusion, in paragraph 7.65 of the Panel Report, rejecting the European Communities' request to exclude all alleged prohibited and actionable subsidies granted prior to 1 January 1995 from the temporal scope of the dispute;
- (d) with respect to the Panel's interpretation of Articles 1, 4.7, 5, 6, and 7.8 of the *SCM Agreement* and their application to transactions involving certain Airbus companies:
  - (i) modifies the Panel's interpretation, but upholds the Panel's ultimate finding, in paragraphs 7.222 and 7.287 of the Panel Report, that Articles 5 and 6 of the *SCM Agreement* do not require that a complainant demonstrate that a benefit "continues" or is "present" during the reference period for purposes of an adverse effects analysis;
  - (ii) reverses the Panel's finding, in paragraphs 7.248, 7.255, and 7.288 of the Panel Report, that the sales transactions at issue did not "extinguish" a portion of past subsidies, because the Panel failed to assess whether the partial privatizations and private-to-private sales transactions were at arm's-length terms and for fair market value, and to what extent they involved a transfer in ownership and control to new owners; but finds that there are insufficient factual findings by the Panel or undisputed facts on the Panel record to complete the legal analysis and determine whether these transactions "extinguished" a portion of past subsidies;

- (iii) does not *a priori* exclude the possibility that all or part of a subsidy may be "extracted" by the removal of cash or cash equivalents; but upholds the Panel's ultimate finding, in paragraphs 7.276 and 7.288 of the Panel Report, that the "cash extractions" from Dasa and CASA did not remove a portion of past subsidies;
  - (iv) upholds the Panel's ultimate finding, in paragraphs 7.283, 7.284, and 7.289 of the Panel Report, that the "cash extractions" did not result in the "withdrawal" of subsidies within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*; and has no basis on which to make a finding that the sales transactions at issue resulted in the "withdrawal" of subsidies within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*;
  - (v) declines to make additional findings as to whether the Panel failed to make an objective assessment of the matter and thereby acted inconsistently with Article 11 of the DSU in its treatment of the European Communities' arguments concerning the "extinction", "extraction", and "withdrawal" of subsidies; and
  - (vi) upholds the Panel's finding, in paragraphs 7.200 and 7.286 of the Panel Report, that the United States was not required to demonstrate, as part of its *prima facie* case under Article 5 of the *SCM Agreement*, that subsidies provided to the Airbus Industrie consortium "passed through" to the current producer of Airbus LCA, Airbus SAS;
- (e) regarding the issue of whether the challenged LA/MSF measures conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*:
- (i) finds that Article 4 of the 1992 Agreement is not 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*, that informs the meaning of "benefit" under Article 1.1(b) of the *SCM Agreement*, and that Article does not form "part of the facts to establish the relevant market benchmark";
  - (ii) finds that the Panel's reasoning relating to its use of the project-specific risk premium proposed by the United States was internally inconsistent, and that

the Panel thereby failed to comply with its duty to make an objective assessment of the facts as required under Article 11 of the DSU; and consequently reverses the Panel's findings, in paragraphs 7.481 and 7.488 of the Panel Report, that the United States' proposed project-risk premium constituted the minimum project risk for the A300 and A310, the exterior upper boundary of the range of project risk for the A320, A330/A340, A330-200, and A340-500/600, and the internal upper boundary of the range of project risk for the A380;

- (iii) finds that several aspects of the Panel's assessment of the project-specific risk premium proposed by the European Communities were not consistent with the requirement in Article 11 of the DSU to make an objective assessment of the facts; but nevertheless upholds the Panel's conclusion, in paragraph 7.479 of the Panel Report, that the European Communities' proposed project-specific risk premium underestimated the risk premium that a market operator would have reasonably demanded Airbus pay for financing on the same or similar terms as the challenged LA/MSF;
- (iv) because the uncontested evidence indicates that, even leaving aside the project-specific risk premium, the rates of return obtained by the member States on all but two of the challenged LA/MSF measures are below a market benchmark that does not include a project-specific risk premium, and the rate of return obtained by the member States under the other two LA/MSF measures is below a market benchmark that includes the project-specific risk premium proposed by the European Communities, upholds the Panel's findings, in paragraphs 7.489 and 7.490 of the Panel Report, that the challenged LA/MSF measures conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*; and
- (v) reverses the Panel's finding, in paragraph 7.397 of the Panel Report, that "the number of sales over which full repayment is expected says little, if anything, about the appropriateness of the rate of return that will be achieved by the lender";
- (f) upholds the Panel's finding, in paragraph 7.1566 of the Panel Report, that the R&TD subsidies granted to Airbus under each of the EC Framework Programmes were "specific" within the meaning of Article 2.1(a) of the *SCM Agreement*;



- (g) modifies the Panel's characterization, in paragraphs 7.1084, 7.1121, and 7.1179 of the Panel Report, of the financial contribution, under Article 1.1(a)(1)(iii) of the *SCM Agreement*, provided by virtue of the infrastructure measures in Hamburg, Bremen, and Toulouse; reverses the Panel's findings, in paragraphs 7.1096, 7.1133, and 7.1190 of the Panel Report, that these financial contributions conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*; and finds, instead, that the provision of the lease of the land at the Mühlenberger Loch industrial site in Hamburg and the provision of the right to exclusive use of the extended runway at the Bremen airport conferred a benefit on Airbus within the meaning of Article 1.1(b) of the *SCM Agreement*; but finds that there are insufficient factual findings by the Panel or undisputed facts on the Panel record to complete the legal analysis and determine whether a benefit was conferred with respect to the Aéroconstellation industrial site in Toulouse;
- (h) upholds the Panel's findings, in paragraphs 7.1367, 7.1371, and 7.1375 of the Panel Report, that the four challenged capital investments in Aérospatiale conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the *SCM Agreement*;
- (i) reverses the Panel's finding, in paragraph 7.1412<sup>3068</sup> of the Panel Report, that the French Government's transfer of shares of Dassault Aviation to Aérospatiale conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the *SCM Agreement*; but finds that there are insufficient factual findings by the Panel or undisputed facts on the Panel record to complete the legal analysis and determine whether a benefit was conferred;
- (j) finds, as regards the alleged export subsidies granted under the German, Spanish, and UK A380 contracts, that the Panel erred in the interpretation of Article 3.1(a) and footnote 4 of the *SCM Agreement*, in paragraph 7.648 of the Panel Report, that, in order to find that the granting of a subsidy is in fact tied to anticipated exportation, a subsidy must be granted *because* of anticipated export performance; and consequently reverses the Panel's finding, in paragraph 7.689 of the Panel Report, that the United States had demonstrated that the German, Spanish, and UK A380 contracts amounted to prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*; finds that a subsidy is *de facto* export contingent within the meaning of Article 3.1(a) and footnote 4 of the

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<sup>3068</sup>See also Panel Report, para. 7.1414.

*SCM Agreement* if the granting of the subsidy is geared to induce the promotion of future export performance by the recipient; but finds there are insufficient factual findings by the Panel or undisputed facts on the Panel record to complete the legal analysis;

- (k) finds that, in analyzing "displacement" on the basis of a single subsidized product and a single market for LCA determined by the complaining Member, the Panel erred in its interpretation and application of the term "market" in Article 6.3(a) and (b) of the *SCM Agreement*, and acted inconsistently with its obligations under Article 11 of the DSU by concluding that it was not required to "make an independent determination of the 'subsidized product', as opposed to relying on the complaining Member's identification of that product"; finds that, in the absence of an objective determination of the relevant product market by the Panel, its conclusion that there is a single subsidized product and a single like product cannot stand, and consequently reverses the Panel's findings on displacement;
- (l) completes the analysis on the basis of the uncontested evidence on the Panel record and finds, in respect of the first step of the Panel's two-step approach to its assessment under Article 6.3(a) of the *SCM Agreement*, that there was displacement during the reference period 2001-2006 in the single-aisle and twin-aisle LCA product markets in the European Communities;
- (m) completes the analysis on the basis of the uncontested evidence on the Panel record and finds, in respect of the first step of the Panel's two-step approach to its assessment under Article 6.3(b) of the *SCM Agreement*, that there was displacement during the reference period 2001-2006:
  - (i) in the single-aisle LCA product market in Australia;
  - (ii) in the single-aisle and twin-aisle LCA product markets in China; and
  - (iii) in the single-aisle and twin-aisle LCA product markets in Korea;
- (n) completes the analysis and finds that the uncontested evidence on the Panel record does not establish displacement over the reference period in Brazil, Mexico, Singapore, and Chinese Taipei, or threat of displacement in India;

- (o) upholds the Panel's finding, in paragraph 7.1845 of the Panel Report, under the first step of its two-step approach to its assessment under Article 6.3(c) of the *SCM Agreement*, that the sale to Emirates Airlines of A380 LCA constituted "significant lost sales";
- (p) upholds the Panel's ultimate finding under the second step of its two-step approach, in paragraph 7.2025 of the Panel Report, that the displacement and lost sales were the effect of the challenged LA/MSF measures, to the extent it refers to the displacement in the single-aisle LCA product market in Australia and in the single-aisle and twin-aisle LCA product markets in the European Communities, China, and Korea, and lost sales in the Air Asia, Air Berlin, Czech Airlines, easyJet, Emirates Airlines, Qantas, and Singapore Airlines sales campaigns;
- (q) upholds the Panel's finding, in paragraph 7.1948 of the Panel Report, that "either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380";
- (r) upholds the Panel's finding, in paragraphs 7.1956, 7.1957, 7.1958, and 8.2 of the Panel Report, that the "product effect" of the LA/MSF measures was "complemented and supplemented" by the equity infusions, referred to in paragraph 1379 above, and infrastructure measures, referred to in paragraph 1388 above, except those that have been found not to constitute specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*; and
- (s) reverses the Panel's finding, in paragraphs 7.1956, 7.1959, and 8.2 of the Panel Report, that the "product effect" of the LA/MSF was "complemented and supplemented" by the R&TD subsidies at issue.

1415. For the reasons set out in this Report, in relation to the issues raised by the United States in its other appeal, the Appellate Body:

- (a) finds that the alleged LA/MSF "Programme" was not within the Panel's terms of reference because it was not identified in the request for the establishment of a panel, as required by Article 6.2 of the DSU;
- (b) as a consequence of the Panel's errors in interpreting and applying Article 3.1(a) and footnote 4 of the *SCM Agreement*, reverses the Panel's finding, in paragraph 7.689 of the Panel Report, that the United States had not shown that the granting of the French

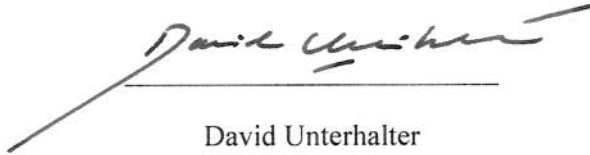
LA/MSF for the A380 and A330-200, and the French and Spanish LA/MSF for the A340-500/600, were contingent in fact upon anticipated exportation, within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*; but finds that there are insufficient factual findings by the Panel or undisputed facts on the Panel record to complete the legal analysis.

1416. The Appellate Body notes that, having reversed the Panel finding, in paragraph 7.689 of the Panel Report, that certain A380 LA/MSF contracts amounted to prohibited export subsidies, the Panel's recommendation pursuant to Article 4.7 of the *SCM Agreement*, in paragraph 8.6 of the Panel Report, consequently must be reversed; however, to the extent we have upheld the Panel's findings with respect to actionable subsidies that caused adverse effects, as set out in paragraph 8.2 of the Panel Report, or such findings have not been appealed, the Panel's recommendation pursuant to Article 7.8 of the *SCM Agreement*, in paragraph 8.7 of the Panel Report, that "the Member granting each subsidy found to have resulted in such adverse effects, 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy'", stands.

1417. We realize that, after five years of panel proceedings and almost ten months of appellate review, there are a number of issues that remain unresolved in this dispute. Some may consider that this is not an entirely satisfactory outcome. Our mandate under Article 17 of the DSU does not permit us to engage in fact-finding. However, wherever we have found that there are sufficient factual findings by the Panel or undisputed facts to complete the legal analysis, we have done so with a view to achieving a "prompt settlement" of the dispute in accordance with Article 3.3 of the DSU.

1418. The Appellate Body recommends that the DSB request the European Union to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *SCM Agreement*, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 9th day of May 2011 by:

A handwritten signature in dark ink, appearing to read "David Unterhalter", written over a horizontal line.

David Unterhalter  
Presiding Member

A handwritten signature in dark ink, appearing to read "Lilia R. Bautista", written over a horizontal line.

Lilia R. Bautista  
Member

A handwritten signature in dark ink, appearing to read "P. Van den Bossche", written over a horizontal line.

Peter Van den Bossche  
Member



ANNEX I**WORLD TRADE  
ORGANIZATION****WT/DS316/12/Rev.1**  
17 August 2010  
(10-4353)

Original: English

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

Revision to the  
Notification of an Appeal by the European Union  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 20(1) of the Working Procedures for Appellate Review

Communication from the Appellate Body  
to the Chairman of the Dispute Settlement Body

The following communication, dated 12 August 2010, from the Chairman of the Appellate Body addressed to the Chairman of the Dispute Settlement Body, is being circulated to Members.

I am writing to advise you that, by letter of 5 August 2010, the European Union requested authorization from the Appellate Body, pursuant to Rule 23bis of the *Working Procedures for Appellate Review* (the "*Working Procedures*"), to amend its Notice of Appeal dated 21 July 2010. The Division hearing the appeal provided the United States and all third participants with an opportunity to comment in writing on the request. No objections to the European Union's request were received. On 11 August 2010, the Division authorized the European Union to amend its Notice of Appeal.

The amended Notice of Appeal is attached.

\* \* \* \* \*

Pursuant to Article 16.4 and Article 17.1 of the *DSU* the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

The European Union is restricting its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith. The European Union also believes that it may not be necessary for the Appellate Body to decide all the issues raised in this notice of appeal since some may become moot as a result of decisions on other issues.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report<sup>1</sup>:

## **I. Preliminary Issues**

### *A. Legal irrelevance of pre-1995 subsidies (Section VII.C.2 of the Report)*

1. The Panel erred in its interpretation and application of Article 5 of the *SCM Agreement* when concluding that all alleged actionable subsidies granted by the European Union prior to 1 January 1995 were included in the temporal scope of these proceedings.<sup>2</sup>

### *B. Identity of recipient, pass through, extinction, extraction and withdrawal of subsidy (Section VII E.1 of the Report)*

2. The Panel erred in its interpretation and application of the *SCM Agreement*, in particular Articles 1, 4.7, 7.8, 5 and 6.3, by failing to distinguish the recipients of the alleged subsidies over time, and by failing to properly account for sales, transfers and changes in ownership of assets and companies and the extinction, extraction, removal or withdrawal of the alleged subsidies.<sup>3</sup>

3. In this respect the Panel also failed to make an objective assessment of the law and facts contrary to Article 11 of the *DSU* in a number of ways. In particular, the Panel failed to offer reasoned and adequate explanations for its findings that the European Union "did not argue" that the transactions were at arm's length,<sup>4</sup> that certain of the transactions were in fact not at arm's length,<sup>5</sup> that the SEPI and Daimler extractions did not remove the funds from use for LCA development and manufacture<sup>6</sup> and that cash was not truly "withdrawn" from CASA.<sup>7</sup> The Panel also lacked a sufficient evidentiary basis for these findings. The Panel's findings concerning the provision and removal of money to a state-owned entity by its government shareholder are also internally inconsistent and incoherent.<sup>8</sup>

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<sup>1</sup>Paragraph numbers provided in footnotes to the following description of the errors of the Panel are intended to indicate the primary instance of the errors. Of course these errors have consequences throughout the report and the European Union also appeals all findings and conclusions deriving from or relying on the appealed errors, and in particular the relevant findings and conclusions in Sections 8.1 and 8.2 of the Panel Report, and also in particular all the recommendations of the Panel in Sections 8.6 and 8.7 of the Panel Report.

<sup>2</sup>Panel Report, para. 7.65 and the findings in paras. 7.44 to 7.64; and para. 7.325 and the findings in paras. 7.321 to 7.324.

<sup>3</sup>Panel Report, para. 7.200 and the findings in paras. 7.286 to 7.289 and 7.190 to 7.199 (pass-through); para. 7.255 and the findings in paras. 7.286 to 7.289 and 7.214 to 7.254 (extinction); paras. 7.286 to 7.289 and 7.266 to 7.285 (extraction and withdrawal); paras. 7.726 to 7.729 (para. 7.729, in particular).

<sup>4</sup>Panel Report, para. 7.249.

<sup>5</sup>Panel Report, para. 7.249 and footnote 2175.

<sup>6</sup>Panel Report, paras. 7.275 to 7.276 and 7.283 to 7.285.

<sup>7</sup>Panel Report, paras. 7.284 to 7.285.

<sup>8</sup>Panel Report, paras. 7.1400 to 7.1403, 7.284 to 7.285 and 7.289.



4. The Panel erred in its interpretation and application of Articles 4.7 and 7.8 of the *SCM Agreement* in recommending that the European Union "withdraw the subsidy" and "remove the adverse effects or ... withdraw the subsidy", to the extent that the European Union had already done so.<sup>9</sup>

## **II. MSF Issues (Section VII E.2 of the Report)**

5. The Panel erred in failing to take account of Article 4 of the *1992 Agreement* in interpreting and applying the notion of "benefit" under Article 1.1(b) of the *SCM Agreement*.<sup>10</sup>

6. The Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement* and under Article 11 of the *DSU* in making findings regarding project-specific risk premia for various Airbus LCA programmes that fail to apply the Panel's own standard and are made without a sufficient evidentiary basis for these findings and without adequately explaining these findings.<sup>11</sup>

7. The Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement* and under Article 11 of the *DSU* in finding short-comings of the European Union's risk-sharing supplier benchmark for LA/MSF without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation.<sup>12</sup>

8. To the extent that the Panel has made findings with respect to the relevance of the number of sales over which full repayment is expected to the appropriateness of the market rate of return,<sup>13</sup> the Panel made an error under Article 1.1(b) of the *SCM Agreement*.

## **III. Export Subsidy Findings (Section VII E.4 of the Report)**

9. The Panel erred in its interpretation and application of Article 3.1(a) and footnote 4 of the *SCM Agreement*, including but not limited to the terms "subsidies", "contingent/condition", "tied-to", "actual or anticipated" and "export performance".<sup>14</sup>

10. In reaching those findings the Panel also erred under Article 7.2 of the *DSU* in failing to address the relevant provisions cited by the parties, Article 12.7 of the *DSU* in failing to set out or to set out adequately the basic rationale behind its findings and recommendations and under Article 11 of the *DSU* in failing to make an objective assessment of the matter before it, including an objective assessment of the law and the facts.

## **IV. EIB Measures (Section VII E.5 of the Report)**

11. If the United States appeals the Panel's findings on the lack of specificity of the EIB measures, then the European Union appeals the Panel's findings that such measures confer a benefit and requests the Appellate Body to rule that the Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement* and failed to make an objective assessment of the law and the

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<sup>9</sup>Panel Report, paras. 8.6 and 8.7.

<sup>10</sup>Panel Report, paras. 7.388 to 7.389.

<sup>11</sup>Panel Report, paras. 7.469, 7.481 and 7.483 to 7.490, including Table 7, and para. 8.1(a).

<sup>12</sup>Panel Report, paras. 7.480 and 7.481.

<sup>13</sup>Panel Report, para. 7.397.

<sup>14</sup>Panel Report, para. 8.1(a)(ii) and the "findings" in light of which such conclusion is reached, including para. 7.689 (conclusion on export subsidies), para. 7.680 (A380 Germany), para. 7.681 (A380 Spain), para. 7.683 (A380 United Kingdom), para. 7.678, and the other findings in paras. 7.612 to 7.716 of the Panel Report.

facts as required by Article 11 of the *DSU* in its findings that the challenged EIB measures confer a benefit.<sup>15</sup>

#### **V. Infrastructure (Section VII E.6 of the Report)**

12. The Panel erred in its interpretation and application of Article 1.1(a)(1)(iii) of the *SCM Agreement* in finding that the Mühlenberger Loch measures, the Bremen runway extension and the ZAC Aéroconstellation measures constitute financial contributions.<sup>16</sup>

13. The Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement* in finding that the Mühlenberger Loch measures, the Bremen runway extension and the ZAC Aéroconstellation measures confer a benefit on Airbus Deutschland and Airbus France.<sup>17</sup>

#### **VI. Aérospatiale Equity Contributions (Section VII E.9 of the Report)**

14. The Panel erred in finding that a "benefit" was conferred by virtue of capital contributions within the meaning of under Article 1.1(b) of the *SCM Agreement* by the French State to a state-owned company, Aérospatiale<sup>18</sup> and in its interpretation of the term "benefit" in Article 1.1(b).<sup>19</sup>

15. The Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement* and Article 11 of the *DSU* in making findings without a sufficient evidentiary basis concerning reasonable market-based rates of return, and in the absence of coherent reasoning in its assessment of evidence concerning the performance of Aérospatiale's peers.<sup>20</sup>

16. The Panel erred in finding that a "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement* was conferred by virtue of the transfer by the French State to a state-owned company, Aérospatiale, of the French State's shares in Dassault Aviation and erred under Article 11 of the *DSU* in finding such a "benefit", without a sufficient evidentiary basis to support that finding.<sup>21</sup>

#### **VII. RT&D Issues (Section VII E.10 of the Report)**

17. The Panel erred in its interpretation and application of Article 2.1(a) of the *SCM Agreement* when concluding that R&TD support granted under each of the Framework Programmes constituted specific subsidies.<sup>22</sup>

18. The Panel erred in its interpretation and application of Article 6.2 of the *DSU* in concluding that the Spanish PROFIT programme<sup>23</sup> and French R&TD funding<sup>24</sup> had been properly identified in the US panel request.

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<sup>15</sup>Panel Report, para. 7.885 and the other findings in paras. 7.717 to 7.881 of the Panel Report on which these findings are based or "in light of" which these findings are made.

<sup>16</sup>Panel Report, paras. 7.1084, 7.1121, 7.1179, and 8.1(b)(i) to (iii).

<sup>17</sup>Panel Report, paras. 7.1097, 7.1134, 7.1190 and 8.1(b)(i) to (iii).

<sup>18</sup>Panel Report, paras. 7.1367, 7.1371, 7.1375, 7.1380 and 8.1(d)(i).

<sup>19</sup>Panel Report, paras. 7.1364, 7.1366, 7.1370, 7.1374 and 8.1(d)(i).

<sup>20</sup>Panel Report, paras. 7.1360, 7.1367, 7.1371, 7.1375, 7.1380 and 8.1(d)(i).

<sup>21</sup>Panel Report, paras. 7.1409, 7.1411, 7.1412, 7.1414 and 8.1(d)(ii).

<sup>22</sup>Panel Report, paras. 7.1566 and paras. 7.1562 to 7.1565; para. 8.1(e).

<sup>23</sup>Panel Report, paras. 7.1422 and paras. 7.1420 to 7.1421; para. 8.1(e).

<sup>24</sup>Panel Report, paras. 7.150 and 7.148 to 7.149; para. 8.1(e).

### VIII. Adverse Effects (Section VII F of the Report)

19. The Panel erred in its interpretation and application of Articles 5(c), 6.3(a), 6.3(b) and 6.3(c) of the *SCM Agreement* in finding that the effect of the subsidies constitutes serious prejudice to the interests of the United States, including displacement of imports from the European Union, displacement of exports from certain third country markets or threat thereof and significant lost sales in the same market.<sup>25</sup>

20. In reaching those findings the Panel also erred under Article 12.7 of the *DSU* in failing to set out or to set out adequately the basic rationale behind its findings and recommendations and under Article 11 of the *DSU* in failing to make an objective assessment of the matter before it, including an objective assessment of the law and the facts.

#### A. 1992 Agreement

21. The Panel erred in its interpretation and application of Article 5(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* in failing to take account of the fact that the United States had expressly consented to all subsidies covered by the *1992 Agreement* and could therefore not suffer serious prejudice as a result of such subsidies.<sup>26</sup>

#### B. Subsidized product

22. The Panel erred in its interpretation and application of Articles 5(c), 6.3(a), 6.3(b) and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that it did not need to independently and objectively make a determination regarding the subsidized product.<sup>27</sup>

#### C. Displacement or threat thereof

23. The Panel erred in its interpretation and application of Articles 5(c), 6.3(a) and 6.3(b) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that there is only one, rather than several distinct product markets, and by finding that it could therefore assess displacement, significant price suppression and price depression on the basis of a single product market, thereby exaggerating the extent of the displacement and price suppression and depression it found.<sup>28</sup>

24. The Panel erred in its interpretation and application of Articles 5(c) and 6.3(b) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that there was displacement in the markets of Mexico and Brazil, although the United States did not lose market share in those markets.<sup>29</sup>

25. The Panel erred in its interpretation and application of Articles 5(c) and 6.3(a) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that the subsidies caused displacement in the EU market.<sup>30</sup>

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<sup>25</sup>Panel Report, paras. 8.2(a), (b), (c) and (d) and the "findings" in light of which such conclusions are reached, including the findings set out in the following paragraphs of this notice of appeal and the other findings in paras. 7.1610 to 7.2186 of the Panel Report.

<sup>26</sup>Panel Report, para. 8.2 and any findings that may be considered to support this conclusion.

<sup>27</sup>Panel Report, paras. 7.1650, 7.1652, 7.1653, 7.1654, 7.1656, 7.1662 and 8.2.

<sup>28</sup>Panel Report, paras. 7.1742, 7.1751, 7.1755, 7.1756, 7.1757, 7.1758, 7.1777, 7.1779, 7.1780, 7.1781, 7.1782, 7.1786, 7.1788 to 89 and 7.1790 to 7.1791 and 8.2(a), 8.2(b) and 8.2(c), as well as any other paragraphs that rely on such finding.

<sup>29</sup>Panel Report, paras. 7.1785, 7.1786, 7.1791, 7.1993, 7.2025 and 8.2(b).

<sup>30</sup>Panel Report, paras. 7.1985, 7.1986, 7.1993, 7.2025 and 8.2(a).

26. The Panel erred in its interpretation and application of Articles 5(c) and 6.3(b) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that the subsidies caused displacement in the third country markets of Australia, Brazil, China, Chinese Taipei, Korea, Mexico and Singapore.<sup>31</sup>

27. The Panel erred in its interpretation and application of Articles 5(c) and 6.3(b) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found, that the subsidies caused a threat of displacement in the third country market of India.<sup>32</sup>

D. *Lost sales*

28. The Panel erred in its interpretation and application of Articles 5 and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU*, when it found that the A380 Emirates Airlines order constituted a significant lost sale.<sup>33</sup>

29. The Panel erred in its interpretation and application of Articles 5 and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that the subsidies caused significant lost sales in the easyJet, Air Berlin, Czech Airlines, Air Asia, Singapore Airlines, Emirates and Qantas sales campaigns.<sup>34</sup>

E. *Serious prejudice*

30. The Panel erred in its interpretation and application of Articles 5 and 6.3 of the *SCM Agreement* when it found that it need not make a further finding that the displacement, threat of displacement and lost sales it found were caused by the subsidies each amount to serious prejudice to the interests of the United States.<sup>35</sup>

F. *Price suppression/depression*

31. The Panel erred in its interpretation and application of Articles 5 and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* in finding that it need not assess price suppression on the basis of the individual product markets.<sup>36</sup>

32. The Panel erred in its interpretation and application of Articles 5 and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* in finding that there exists price suppression and price depression for the 777.<sup>37</sup>

G. *Causation with respect to subsidies other than MSF*

33. The Panel erred in its interpretation and application of Articles 5 and 6.3(a), 6.3(b) and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* in failing to distinguish the effects of non-MSF alleged subsidy measures from MSF measures in assessing adverse effects and in failing to provide a reasoned and adequate explanation as to how the following measures could cause or contribute to causing adverse effects:

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<sup>31</sup>Panel Report, paras. 7.1985, 7.1986, 7.1993, 7.2025 and 8.2(b).

<sup>32</sup>Panel Report, paras. 7.1985, 7.1986, 7.1993, 7.2025 and 8.2(c).

<sup>33</sup>Panel Report, para. 7.1832, and 8.2(d).

<sup>34</sup>Panel Report, paras. 7.1985, 7.1986, 7.1993, 7.2025 and 8.2(d).

<sup>35</sup>Panel Report, paras. 7.1736 and 8.2.

<sup>36</sup>Panel Report, paras. 7.1854 to 7.1855 and 7.1860 to 7.1861.

<sup>37</sup>Panel Report, paras. 7.1854 to 7.1855 and 7.1860 to 7.1861.

- the Mühlenberger Loch measures; the Bremen airport runway extension; the ZAC Aéroconstellation measures; the grants provided by Germany and Spain for construction of facilities in Nordenham, Germany, and Sevilla, La Rinconada, Toledo, Puerto de Santa Maria and Puerto Real, Spain; and the grants provided by the governments of Andalusia and Castilla-La Mancha in Puerto Real, Sevilla, and Illescas (Toledo);<sup>38</sup>
- the capital contributions by the French State and Crédit Lyonnais to Aérospatiale and the transfer by the French State of its shares in Dassault Aviation to Aérospatiale;<sup>39</sup>
- the acquisition by Kreditanstalt für Wiederaufbau (KfW) of a 20 percent equity interest in Deutsche Airbus in 1989, and the 1992 transfer by KfW of its 20 percent equity interest in Deutsche Airbus to Messerschmitt-Bölkow-Blohm GmbH (MBB);<sup>40</sup> and
- the provision of R&TD funding pursuant to: the Second, Third, Fourth, Fifth, and Sixth EC Framework Programmes; the French government grants between 1994-2005; the German Federal government grants under the LuFo I, II and III programmes; the German sub-Federal government grants from the Bavarian authorities under the OZB and Bayerisches Luftfahrtforschungsprogramm, from the Bremen authorities under the AMST programmes, and from the Hamburg authorities under the Luftfahrtforschungsprogramm; Spanish government loans from the PROFIT and PTA programmes; and UK government grants under the CARAD and ARP programmes.<sup>41</sup>

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<sup>38</sup>Panel Report, paras. 7.1958, 8.1(b), and 8.2.

<sup>39</sup>Panel Report, paras. 7.1957, 8.1(d), and 8.2.

<sup>40</sup>Panel Report, paras. 7.1957, 8.1(c), and 8.2.

<sup>41</sup>Panel Report, paras. 7.1959, 8.1(e), and 8.2.



ANNEX II**WORLD TRADE  
ORGANIZATION**

**WT/DS316/13**  
20 August 2010  
(10-4401)

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Original: English

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

Notification of an Other Appeal by the United States  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 19 August 2010, from the Delegation of the United States, is being circulated to Members.

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Pursuant to Rule 23 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316/R) ("Panel Report") and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the United States failed to establish that the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid constituted prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").<sup>1</sup> These conclusions are in error and are based on erroneous findings on issues of law and legal interpretations, including an erroneous interpretation and application of Article 3.1(a) and footnote 4 of the *SCM Agreement*.<sup>2</sup> To the extent that the Panel's recommendation, pursuant to Article 4.7 of the *SCM Agreement*, that the subsidies found to be prohibited be withdrawn within 90 days, does not include the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid, the United States also requests that the Appellate Body review that recommendation.<sup>3</sup>

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the United States failed to demonstrate the existence of the Launch Aid Program.<sup>4</sup> This conclusion is in

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<sup>1</sup>See, e.g., Panel Report, paras. 7.689 and 8.3(a)(ii).

<sup>2</sup>See, e.g., Panel Report, paras. 7.675-7.688.

<sup>3</sup>See Panel Report, para. 8.6.

<sup>4</sup>See, e.g., Panel Report, paras. 7.579-7.580, 8.3(a)(iv).

error and is based on erroneous findings on issues of law and legal interpretations, including the failure to examine properly whether the Launch Aid Program is a "measure" subject to challenge in WTO dispute settlement proceedings.<sup>5</sup>

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<sup>5</sup>See, e.g., Panel Report, paras. 7.518-7.520, 7.531-7.532, 7.575, 7.580.



ANNEX IIIProcedural Ruling and Additional Procedures to Protect Sensitive Information

10 August 2010

*European Communities and Certain Member States – Measures Affecting  
Trade in Large Civil Aircraft*

AB-2010-1

Procedural Ruling

1. On Wednesday, 21 July 2010, the Appellate Body Division hearing this appeal received a joint request from the European Union and the United States to adopt additional procedures to protect certain information that they consider to be sensitive. This includes information received as a result of the information-gathering process under Annex V of the *Agreement on Subsidies and Countervailing Measures*, during the Panel proceedings, and, to the extent relevant, during the Appellate Body proceedings. The participants classify this information in two categories according to its sensitivity. The first category is described as "business confidential information" or "BCI". The second category is referred to as "highly sensitive business information" or "HSBI" and includes the information that the participants consider to be most sensitive. The participants argue that disclosure of this information could be "severely prejudicial" to the originators of the information, that is, to the large civil aircraft manufacturers that are at the heart of this dispute, and possibly to the manufacturers' customers and suppliers.

2. On Thursday, 22 July 2010, the Division invited the third participants to comment in writing on the participants' request. In particular, we asked the third participants to provide their views on the permissibility of additional protection for BCI and HSBI under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and the *Working Procedures for Appellate Review* (the "Working Procedures"), and, if they so wished, on the specific arrangements proposed in the request, including access by the third participants to the confidential version of the Panel Report and to the written submissions to be filed by the participants and third participants in this appeal, as well as the arrangements proposed by the European Union and the United States relating to the organization of the substantive oral hearing. The Division declined the participants' request that it ask the Panel to delay the transmittal to the Appellate Body of any information classified as BCI or HSBI on the Panel record.

3. Pending a final decision on the participants' request for the protection of BCI and HSBI, the Division decided to provide additional protection to all BCI and HSBI on the Panel record transmitted to the Appellate Body in this dispute on the terms set out below.

- (a) Only Appellate Body Members, and Appellate Body Secretariat staff assigned to work on this appeal, may have access to the BCI and HSBI contained on the Panel record pending a final decision on the participants' request. Appellate Body Members and Appellate Body Secretariat staff shall not disclose BCI or HSBI, or allow either to be disclosed, to any person other than those identified in the preceding sentence.
- (b) BCI shall be stored in locked cabinets when not in use. When in use by Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal, all necessary precautions will be taken to protect the confidentiality of the BCI.

- (c) All HSBI shall be stored in a combination safe in a designated secure location in the offices of the Appellate Body Secretariat. Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may view HSBI only in the designated secure location in the offices of the Appellate Body Secretariat. HSBI shall not be removed from this location.
- (d) Pending a decision on the participants' request for the protection of BCI/HSBI in these proceedings, neither BCI nor HSBI shall be transmitted electronically, whether by e-mail, facsimile, or otherwise.

4. On Wednesday, 28 July 2010, we received written comments from Australia, Brazil, Canada, and Japan. These third participants expressed their general support for the request of the participants. Australia, Canada, and Japan argued that the adoption of additional procedures for the protection of confidential information is not inconsistent with the DSU or the *Working Procedures*. Brazil also considered additional protection of BCI and HSBI to be permissible under the DSU and the *Working Procedures* provided that the rights of third participants are not unduly diminished as a result of such procedures. Australia, Brazil, Canada, and Japan each suggested certain modifications to the procedures proposed by the participants in order to ensure that the right of third participants to participate meaningfully in these appellate proceedings is fully protected. The other third participants in this dispute, China and Korea, did not submit written comments.

5. An oral hearing with the participants and all of the third participants was held on Tuesday, 3 August 2010, to explore the issues raised by the request of the participants and the comments of the third participants.

6. We consider it necessary that a ruling is made by us on the request of the participants without delay. Accordingly, we make the following ruling with concise reasons having carefully considered the arguments made by the participants in support of their request, the comments received from the third participants, and the submissions and replies to our questions at the oral hearing. These reasons may be further elaborated in the Appellate Body report in this appeal.

7. The first question that we must consider is whether we have the authority to adopt special arrangements to provide additional protection for certain information in this case that the participants deem to be particularly sensitive. The participants have referred both to the authority that derives from our inherent jurisdiction and to Rule 16(1) of the *Working Procedures*. The analysis of this question should begin with the DSU, which provides the primary rules governing WTO dispute settlement, and in particular with Article 17.1 of the DSU, which provides for the establishment of the Appellate Body and confers jurisdiction upon it. Article 17.1 of the DSU states, in relevant part, that "{t}he Appellate Body shall hear appeals from panel cases".<sup>1</sup> A necessary incident of this authority is the power to determine procedures for the conduct of appeals. These procedures must, amongst other things, guarantee that the participants and third participants can properly exercise their rights under the DSU under conditions of fairness and impartiality. The Appellate Body's authority to draw up procedures for the conduct of appeals is specifically reflected in Article 17.9 of the DSU, pursuant to which the Appellate Body adopted its *Working Procedures*. Rule 16(1) of the *Working Procedures* gives a Division hearing an appeal the authority to adopt an "appropriate procedure" in the "interests of fairness and orderly procedure" where a procedural question arises that is not covered by the *Working Procedures*, provided that it is not inconsistent with the DSU, the other covered agreements, and the *Working Procedures* themselves.

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<sup>1</sup>This jurisdiction to hear appeals is further elaborated in Articles 17.6 and 17.13 of the DSU.

8. Turning to the specific question before us, we note that the DSU provides for a regime of confidentiality for appellate proceedings and for submissions of the participants and third participants. Article 17.10 of the DSU states that "{t}he proceedings of the Appellate Body shall be confidential." Article 18.2 of the DSU provides that "{w}ritten submissions to ... the Appellate Body shall be treated as confidential".<sup>2</sup> Also paragraph VII:1 of the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*Rules of Conduct*")<sup>3</sup> addresses the protection of confidentiality. The confidentiality requirements set out in these provisions are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect adequately the confidentiality of that information. The adoption of such arrangements falls within the authority of the Appellate Body to hear the appeal and to regulate its procedures in a manner that ensures that the proceedings are conducted with fairness and in an orderly manner. In particular, a regime to protect confidential information may be necessary to allow a participant to ventilate its case without undue risk of detrimental disclosure. To the extent that the arrangements elaborate on the confidentiality requirements of the DSU, the adoption of such arrangements in an "appropriate procedure" needs to conform to the requirement in Rule 16(1) of the *Working Procedures*, that any additional "appropriate procedure" not be inconsistent with the DSU, the other covered agreements, and the *Working Procedures* themselves.

9. The next step in our analysis is to consider the proper analytical framework within which to determine whether any particular arrangements are required in this case. In our view, the determination of whether particular arrangements are appropriate in a given case essentially involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU, the other covered agreements, or the *Working Procedures*. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. The measures should go no further than required to guard against a determined risk of harm (actual or potential) that could result from disclosure.

10. As noted earlier, the DSU and the *Rules of Conduct*, which are part of the *Working Procedures*, establish a general confidentiality regime that covers appellate proceedings. Participants requesting particularized arrangements have the burden of justifying that such arrangements are *necessary* in a given case adequately to protect certain information, taking into account the rights and duties recognized in the DSU, the other covered agreements, and the *Working Procedures*. The participants agreed, at the oral hearing, that the burden of justifying the need for particularized protective arrangements falls on them. This burden of justification will increase the more the proposed arrangements affect the exercise by the Appellate Body of its adjudicative duties, the exercise by the participants of their rights to due process and to have the dispute adjudicated, the exercise by the third participants of their participatory rights, and the rights and systemic interests of the WTO membership at large.

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<sup>2</sup>Article 18.2 of the DSU further provides that "{n}othing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public." Referring to Articles 17.10 and 18.2 of the DSU, the Appellate Body has previously held that it may authorize participants to forego confidentiality protection for their submissions at the oral hearing. (See paragraph 4 of the Procedural Ruling of 10 July 2008 issued in *Canada – Continued Suspension* and *United States – Continued Suspension*.)

<sup>3</sup>The *Rules of Conduct*, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are incorporated into the *Working Procedures for Appellate Review* (WT/AB/WP/5), as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

11. In setting out our analytical framework, we identify the rights and duties that are implicated where additional protection is under consideration. First, there is the overarching authority of the Appellate Body pursuant to Article 17 of the DSU to ensure proper adjudication of the dispute. Secondly, there are the rights of the participants to ventilate their case, have their dispute adjudicated, and to enjoy due process throughout the proceedings. Thirdly, there are the rights of the third participants who, in accordance with Article 17.4 of the DSU, "may make written submissions to, and be given an opportunity to be heard by, the Appellate Body." As reflected in the *Working Procedures*, in particular, in Rules 18, 24, and 27, the Appellate Body has fostered the active participation of third participants in the appellate process. At the same time, the Appellate Body has observed that the third participants are not the main parties to the dispute.<sup>4</sup> There is a systemic interest in the correct legal interpretation of the provisions of the covered agreements that may be at issue in an appeal. Finally, there are the rights and interests of the WTO membership at large.

12. As to the rights and interest of the WTO membership at large, Article 3.2 of the DSU provides that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements". To preserve the rights and obligations of Members, the WTO dispute settlement system must also be available to adjudicate disputes that involve sensitive information. In certain instances, WTO Members may not be in a position to provide sensitive information to panels unless adequate arrangements are in place to protect the information. The absence of such arrangements could compromise a WTO Member's ability to pursue and defend its rights and interests in WTO dispute settlement and could have an impact on a panel's ability to make a complete and objective assessment of the matter. To continue to enjoy the confidence of Members, the WTO dispute settlement system must provide appropriate safeguards to ensure that sensitive information will be adequately protected if it is submitted in the context of a dispute.

13. As set out above, Article 3.2 of the DSU also provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements. WTO Members therefore have the right to receive an Appellate Body report that clarifies the existing provisions of the covered agreements in accordance with Article 3.2 of the DSU. The Appellate Body would not assist the membership if its report failed to set out reasoning and findings with sufficient detail to enable Members to appreciate fully its content before they adopt the report and make it legally binding. As the Appellate Body has explained, "WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports".<sup>5</sup> The legal interpretations embodied in adopted panel and Appellate Body reports clarify the existing WTO provisions and become part of the *acquis* of WTO law.<sup>6</sup> A report that provides a full exposition of the Appellate Body's reasoning is also important for the proper implementation of the recommendations and rulings of the WTO Dispute Settlement Body (the "DSB"). As Article 21.1 of the DSU states, "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." The Appellate Body has said that panels should make efforts to ensure that the public version of their reports, which are circulated to all WTO Members, are "understandable".<sup>7</sup> The same applies to Appellate Body reports.

14. Having determined that we have the authority to adopt particular procedures to protect confidential information, the limitations under the DSU, the other covered agreements, and the *Working Procedures*, and the proper analytical framework, we turn now to assess the specific arrangements that have been proposed by the participants in this case.

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<sup>4</sup>See paragraph 9 of the Procedural Ruling issued in *Canada – Continued Suspension* and *United States – Continued Suspension*, *supra*, footnote 2.

<sup>5</sup>Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

<sup>6</sup>*Ibid.*

<sup>7</sup>Appellate Body Report, *Japan – DRAMs (Korea)*, para. 279.

15. We recognize that the content of some of the information submitted by the participants is claimed to be such that disclosure could be significantly prejudicial to the commercial interests of Airbus and Boeing. Having said that, we are concerned that there did not appear to have been a meaningful effort during the Panel process to set out objective criteria as to the attributes of the information that may require additional protection so as to guide the determination of whether the particular information that was submitted deserved additional protection and the particular degree of such protection. Such objective criteria could include, for example: whether the information is proprietary; whether it is in the public domain or protected; whether it has a high commercial value for the originator of the information, its competitors, customers, or suppliers; the degree of potential harm in the event of disclosure; the probability of such disclosure; the age of the information and the duration of the industry's business cycle; and the structure of the market. As noted above, the DSU and the *Rules of Conduct* already provide for confidentiality, and any additional protection must be justified. It is not for the parties to determine whether additional protection is called for. It is for the panel, and now the Appellate Body, to do so. Indeed, it is for the adjudicator to decide whether the information concerned calls for additional protection. Likewise, it is for the adjudicator to decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection.

16. While we express concern with regard to the manner in which the parties designated and the Panel treated the sensitive information, we note that neither participant has appealed the Panel's decisions on the protection of this information. There are also issues of practicality to consider. At this stage of the dispute, given the decisions on this matter adopted by the Panel and applied by the participants to date, it would be difficult for us to review all of the information on record that was given additional protection by the Panel. We will therefore proceed on the basis of how the information was treated before the Panel. We do not exclude, however, revisiting whether a particular piece of information meets the objective criteria justifying additional protection, or the particular degree thereof, should a dispute on the classification of that information arise before us, or should we consider that we need to refer to that information in our report if this is necessary to give a sufficient exposition of our reasoning and findings.

17. In their proposed procedures, the participants have suggested certain limitations on how Appellate Body Members access information that has been classified as requiring additional protection. In our view, any additional arrangements to protect sensitive information, beyond the general confidentiality protection provided in the DSU and the *Rules of Conduct*, cannot interfere with the adjudicative duties of the Appellate Body and the collegiality among its Members. Members of the Appellate Body must have access to the entirety of the Panel Report, the submissions, and the record of the dispute. Access to information must be practical and unimpeded, and it must recognize that Appellate Body Members carry out their duties in Geneva as well as at their places of domicile. Appellate Body Members also must be able to exchange information between themselves and to refer to sensitive information in their internal deliberations. The additional procedures that we adopt below ensure that all Appellate Body Members have access to the entirety of the appellate record while they are in Geneva. The additional procedures further provide that Members of the Division shall have access to all but the most sensitive information from their places of residence outside of Geneva. Members of the Appellate Body who are not on the Division shall have access to selected information that they require to discharge their duties of collegiality under Rule 4 of the *Working Procedures* and to participate meaningfully in any exchanges of views. For their part, Appellate Body Secretariat staff will consult sensitive information only on the premises of the Appellate Body Secretariat and the most sensitive information only in the designated secure location. We recall, in this regard, that Appellate Body Members and Appellate Body Secretariat staff are subject to the *Rules of Conduct*. Paragraph VII:1 of the *Rules of Conduct* provides that "{e}ach covered person shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential." If participants were to have any concerns regarding

the protection of confidentiality by Appellate Body Members and Appellate Body Secretariat staff, they may raise them under the *Rules of Conduct* and the Appellate Body will decide.<sup>8</sup> We do not consider that more is required.

18. The arrangements proposed by the participants provide for the possibility that representatives of the participants and certain outside legal advisors have access to the most sensitive information on the premises of the Appellate Body Secretariat. In our view, this raises important legal and practical concerns. The adoption of such an arrangement could mean that representatives of the participants or their outside legal advisors would be present on the premises of the Appellate Body Secretariat while Appellate Body Members are engaged in deliberations concerning this case. It would require the implementation of additional security arrangements while representatives are present and would exclude simultaneous access to the information by Appellate Body Members and Appellate Body Secretariat staff. Each participant has access to all of the sensitive information submitted by the other participant at other secure locations. The participants' representatives and outside legal advisors thus have alternative means of viewing this information. Therefore, we see no need to permit viewing of the most sensitive information at the Appellate Body Secretariat's premises by representatives of the participants and their outside legal advisors. To do so would unwarrantably trespass upon the privacy with which the Appellate Body and its Secretariat do their work.

19. There are also certain arrangements that the participants have jointly imposed on themselves and that do not appear to affect the Appellate Body's ability to adjudicate the dispute, the rights of the third participants, or the rights and interests of the WTO membership at large. This includes, for example, the arrangements mentioned earlier allowing each participant to have access to the most sensitive information provided by the other participant. Such arrangements, in principle, are not exempt from our scrutiny to verify that they do not impair our adjudicative function and the rights and interests of third participants and other Members. Nevertheless, at this stage of the proceedings, we are disinclined to make an exhaustive review of these arrangements given that on their face they do not seem to have adverse implications for the rights or interests of others that we identified earlier. Furthermore, none of the third participants has raised concerns in relation to this aspect of the matter.

20. Some of the other arrangements proposed by the participants impinge, i.e., encroach, upon the rights of the third participants that are guaranteed under Article 17.4 of the DSU and Rules 18, 24, and 27 of the *Working Procedures*. For instance, the participants' proposal provides for access to sensitive information for a very limited number of representatives of the third participants. In fact, the number of approved persons proposed is smaller than it was before the Panel. Several of the third participants have expressed concern over the limited number of their representatives that would be allowed access to sensitive information. We share their concerns and thus have allowed in the additional procedures for a higher number of third participant approved persons.

21. The third participants have also expressed concern over the participants' proposal that third participants access the sensitive information in a designated reading room located at the WTO. We would have preferred that mechanisms be explored further that would have permitted providing the third participants with copies of the Panel Report containing sensitive information and of non-redacted versions of the submissions to keep at their Geneva Missions and to share these with their capital-based officials working on this appeal, while safeguarding the participants' interest in minimizing the risks of disclosure. Another option would have been to provide access to the sensitive information at the diplomatic Missions of the participants in Geneva and/or in the capitals of the third participants. However, it would have been quite challenging, for all of those involved, to design and implement any such regime without delay and there is a need to proceed expeditiously with the appellate process.

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<sup>8</sup>See paragraph VIII:16 of the *Rules of Conduct*.

22. Thus, the additional procedures that we adopt below provide for third participants to view the Panel Report version containing sensitive information and the non-redacted versions of the submissions in a designated reading room located at the WTO. Approved persons of third participants shall also be allowed to have access, in the reading room, to an individually watermarked, colour copy of the redacted version of the Panel Report as circulated to Members and to an individually watermarked, colour copy of each of the redacted submissions filed in the appellate proceedings, and shall be allowed to use them to take handwritten notes. They may take these copies with them, but may only share them with other approved persons. These copies of the Panel Report and the submissions, as well as any handwritten notes taken by the approved person in the designated reading room, must be returned to the Appellate Body Secretariat after the final oral hearing in this appeal. The content of any handwritten notes shall not be incorporated into any other copy of the Panel Report or of the submissions. We consider that this regime offers the participants substantially the same level of protection of their sensitive information as the regime provided in their proposal, but is less burdensome on the third participants.

23. The participants have further proposed that third participants be excluded from having access to the information that is treated as most sensitive, that is, the information that the participants have labelled as "HSBI". We recall that, under Article 17.4 of the DSU and Rule 24 of the *Working Procedures*, third participants may make written submissions to, and be given an opportunity to be heard by, the Appellate Body. Rule 18(2) of the *Working Procedures* further provides that, "{e}xcept as otherwise provided in these Rules, every document filed by ... a participant ... or a third participant shall be served on each of the ... third participants in the appeal". At the same time, the Appellate Body has recognized that the rights of third participants are more limited than those of the participants, and that the third participants' interests lie mainly in the correct legal interpretation of the provisions of the WTO agreements.<sup>9</sup> We also note that participation as a third participant is elective and that, in the present case, none of the third participants have expressed specific concerns in their written comments or at the special oral hearing about not having access to the most sensitive information. On the contrary, several third participants did voice support, in principle, for the limitation on access to the most sensitive information.

24. The arrangements proposed by the participants may also impinge on the rights of the WTO membership at large. As discussed above, WTO Members have a right to obtain an Appellate Body report that gives a sufficient exposition of our reasoning and findings in a manner that is understandable. Adopted Appellate Body reports clarify the provisions of the covered agreements, in accordance with Article 3.2 of the DSU, and become part of the *acquis* of WTO law.<sup>10</sup> Moreover, the DSB will be responsible for the surveillance of the implementation of its recommendations and rulings should this be necessary. The participants have requested an opportunity to ask for the removal of sensitive information that may, inadvertently or not, be included in our report. We are open to this request. We will make every effort to draft our report without including information that the participants consider to be sensitive by limiting ourselves to making statements or drawing conclusions that are based on the sensitive information. Yet, whether this is possible will only become clear once we have drafted our report. The additional procedures that we adopt below provide that, if we were to consider it necessary to include sensitive information in the reasoning in our report, the participants shall be given an opportunity to comment. In coming to a decision on the need to include sensitive information to ensure that the report rendered is understandable, we will strike an appropriate balance between the rights of the WTO membership at large to obtain a report that gives a sufficient exposition of our reasoning and findings, on the one hand, and the legitimate concerns of participants to protect sensitive information, on the other. The more prejudicial disclosure is proven to be, the more we would be inclined to accept that the information is not disclosed.

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<sup>9</sup>See *supra*, footnote 4.

<sup>10</sup>See *supra*, para. 13.

25. The European Union has requested that we explicitly provide that the participants shall have the option of withdrawing information that they consider most sensitive instead of seeing it included in the Appellate Body report (should the Appellate Body decide it must be included). The European Union explains that, since a party usually provides evidence that it considers supportive of its case, it should be allowed to withdraw this evidence. The Appellate Body could then draw an inference that is adverse to the party withdrawing the evidence. While it is conceivable that a party may choose not to rely on certain evidence on record, we believe that the issues raised by this request are more complex than the European Union considers them to be and may have consequences not only for the party that seeks withdrawal. Evidence on record may be probative of the case of a party other than the party that seeks withdrawal. Moreover, the Appellate Body may have to decide claims under Article 11 of the DSU on the basis of the entire record before the panel. Further, in situations in which the Appellate Body is considering whether to complete the legal analysis, adverse inferences may not necessarily be of assistance. The European Union's request raises a number of complex questions that are difficult to resolve in the abstract and at this preliminary stage of the appellate proceedings. We prefer to explore these questions at the appropriate time after hearing the participants' views on specific issues, and only if the extreme situation on which they are premised arises.

26. Finally, we recognize that, in *Brazil – Aircraft* and *Canada – Aircraft*, the Appellate Body did not consider it necessary, in the circumstances of those appeals, to adopt additional procedures to protect information deemed sensitive by the participants.<sup>11</sup> In doing so, however, the Appellate Body did not suggest that the DSU, the other covered agreements, or the *Working Procedures* precluded the adoption of procedures providing additional protection; rather, the Appellate Body did not consider that such additional protection was necessary in the particular circumstances of those appeals.

27. In deciding to adopt additional procedures in this appeal, we make our determination in the light of the particular circumstances of this dispute, as the Appellate Body did in the *Brazil – Aircraft* and *Canada – Aircraft* disputes. While the *Brazil – Aircraft* and *Canada – Aircraft* disputes only involved claims that certain measures were export subsidies, this dispute involves not only export subsidy claims, but also numerous claims that certain measures are specific subsidies that have various forms of adverse effects. This means that the evidentiary record in this dispute is more extensive and includes more detailed information that is company-specific, such as data concerning productivity, cost efficiencies and inefficiencies, prices for specific aircraft currently in production and marketed, recurring and non-recurring cost structures per unit, price calculations and pricing practices—in particular sales campaigns and more generally, arrangements with developers and manufacturers of outsourced components, privileged advice by investment advisors on pricing and other terms of financial instruments, as well as other information pertaining to customers and suppliers that allegedly is not in the public domain. Furthermore, the particular market structure within which these companies operate does not allow for the aggregation of data in a way that would expose specific companies to a more limited risk of disclosure vis-à-vis potential competitors. Given its nature, disclosure of the sensitive information on the record of this dispute may pose particular risks and give rise to potential harm that justifies more detailed procedures for its protection. We are also mindful that more than ten years have elapsed since the Appellate Body made its rulings in the *Brazil – Aircraft* and *Canada – Aircraft* disputes, and since then several WTO panels have provided for additional protection of sensitive information.<sup>12</sup>

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<sup>11</sup>Ruling of 11 June 1999 (quoted in relevant part in Appellate Body Report, *Brazil – Aircraft*, para. 119 and Appellate Body Report, *Canada – Aircraft*, para. 141).

<sup>12</sup>Procedures governing the treatment of sensitive information were adopted by the panels in, for example, the *Brazil – Aircraft* and *Canada – Aircraft* disputes, and by subsequent panels in *Canada – Wheat Exports and Grain Imports*; *EC – Salmon (Norway)*; *EC – Approval and Marketing of Biotech Products*; *Egypt – Steel Rebar*; *Korea – Commercial Vessels*; *Mexico – Steel Pipes and Tubes*; and *US – Wheat Gluten*.



28. For the reasons set out above, we have decided to provide additional confidentiality protection on the terms set out below. Accordingly, we adopt the following additional procedures for the purposes of this appeal:

Additional Procedures to Protect Sensitive Information

General

- (i) These additional procedures shall apply to information that was treated as business confidential information ("BCI") or as highly sensitive business information ("HSBI") in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. The additional procedures apply to written and oral submissions made in the appellate proceedings only to the extent that they incorporate information that was treated as BCI or HSBI in the Panel proceedings.
- (ii) To the extent that information on the record is submitted to the Appellate Body in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants on the proper treatment of this information, the Appellate Body shall decide after hearing their views.<sup>13</sup>
- (iii) Each participant may at any time request that information that it has submitted and that was previously treated as BCI or HSBI no longer be treated as such.
- (iv) The participants and third participants shall file their written submissions with the Appellate Body Secretariat in accordance with the Working Schedule drawn up by the Division for this appeal. Where a written submission contains BCI or HSBI, a redacted version of the submission (that is, a version without BCI and HSBI) shall be filed simultaneously with the Appellate Body Secretariat. The redacted version shall be sufficient to permit a reasonable understanding of its substance. The Division may take appropriate action to ensure that this obligation is satisfied. The participants and third participants shall also provide the Appellate Body Secretariat with an electronic version of all submissions, including the redacted versions. The transmittal of participants' submissions to each other and to the third participants, and the transmittal of third participants' submissions to the participants and to the other third participants, are further regulated below.

Appellate Body Members and Appellate Body Secretariat Staff

- (v) Only Appellate Body Members, and staff of the Appellate Body Secretariat who have been assigned by the Appellate Body to work on this appeal, may have access to the BCI and HSBI on the Panel record and in the written and oral submissions made in these appellate proceedings. Appellate Body Members and assigned Appellate Body Secretariat staff shall not disclose BCI or HSBI, or allow either to be disclosed, to any person other than those identified in the preceding sentence or to approved persons of the participants and third participants in the context of the oral hearings. Appellate Body Members and assigned Appellate Body Secretariat staff are covered by the *Rules of Conduct*. As provided for in the *Rules of Conduct*, evidence of breach of these Rules may be submitted to the Appellate Body, which will take appropriate action.

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<sup>13</sup>See Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 13.

- (vi) BCI shall be stored in locked cabinets when not in use. Except as provided in paragraphs (vii) and (x) below, BCI shall not be removed from the premises of the Appellate Body Secretariat.
- (vii) Appellate Body Members who are serving on the Division hearing this appeal may maintain a copy of all relevant documents containing BCI at their places of residence outside Geneva. Appellate Body Members who are not serving on the Division may maintain at their places of residence outside Geneva a copy of the BCI version of the Panel Report, a copy of the BCI version of the written submissions made in these appellate proceedings, a BCI version of the transcripts of any oral hearings, any internal documents containing BCI, and, where necessary, selected BCI exhibits from the Panel record. The documents and materials containing BCI kept by Appellate Body Members at their places of residence outside of Geneva shall be stored in locked cabinets when not in use. Documents and materials containing BCI shall only be sent to Appellate Body Members by secure e-mail or courier.
- (viii) Participants shall provide printed copies of their submissions and other documents containing BCI that are intended for use by Appellate Body Members or assigned Appellate Body Secretariat staff on coloured paper and individually watermarked with "Appellate Body" and numbered consecutively ("Appellate Body No. 1", "Appellate Body No. 2", etc.).
- (ix) All HSBI shall be stored in a combination safe in a designated secure location on the premises of the Appellate Body Secretariat. Any computer in that room shall be a stand-alone computer, that is, not connected to a network. Appellate Body Members and assigned Appellate Body Secretariat staff may view HSBI only in the designated secure location referred to above. HSBI shall not be removed from this location, except as provided in paragraph (x) or in the form of handwritten notes that may be used only on the Appellate Body Secretariat's premises and shall be destroyed once no longer in use.
- (x) Subject to appropriate precautions, BCI and HSBI may be taken outside of the premises of the Appellate Body Secretariat, in hard copy and electronic form, for purposes of any oral hearings that may be held in connection with this appeal.
- (xi) Except as provided in paragraph (xii), all documents and electronic files containing BCI and HSBI shall be destroyed or deleted when the Appellate Body report in this dispute has been adopted by the DSB.
- (xii) The Appellate Body shall retain one hard copy and one electronic version of all documents containing BCI and HSBI as part of the appellate record. Documents and electronic media containing BCI shall be kept in sealed boxes within locked cabinets on the Appellate Body Secretariat's premises. Documents and electronic media containing HSBI shall be placed in a sealed container that will be kept in a combination safe on the premises referred to above.

#### Appellate Body Report

- (xiii) The Division will make every effort to draft an Appellate Body report that does not disclose BCI or HSBI by limiting itself to making statements or drawing conclusions that are based on BCI and HSBI. A copy of the Appellate Body report intended for circulation to WTO Members will be provided in advance to the participants, at a date to be specified by the Division. Participants will be provided with an opportunity to request the removal of any BCI or HSBI that is inadvertently included in the report. The Division will also indicate to the participants if it has found it necessary to include in the Appellate Body report information that was treated by the Panel as BCI or HSBI and will provide participants with an opportunity to comment. Comments on the inclusion of information previously treated as

BCI or HSBI and requests for removal of BCI or HSBI inadvertently included in the report shall be filed with the Appellate Body Secretariat within a time period to be specified by the Division. No other comments or submissions shall be accepted. In coming to a decision on the need to include BCI or HSBI to ensure that a report is rendered that is understandable, the Division will strike an appropriate balance between the rights of the WTO membership at large to obtain a report that gives a sufficient exposition of its reasoning and findings, on the one hand, and the legitimate concerns of the participants to protect sensitive information, on the other.

#### Participants

- (xiv) The participants shall provide a list of persons that are "BCI-Approved Persons" and that are "HSBI-Approved Persons". These lists shall be provided to the Appellate Body Secretariat by 12 August 2010 and shall be served on the other participant and the third participants. Any objections to the designation of an outside advisor as a BCI-Approved Person or HSBI-Approved Person must be filed with the Appellate Body Secretariat and served on the other participant by 13 August 2010. The Division will only reject a request for designation of an outside advisor as a BCI-Approved Person or an HSBI-Approved Person upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles reflected in the *Rules of Conduct* and the illustrative list in Annex 2 thereto. BCI-Approved Persons and HSBI-Approved Persons shall not disclose BCI or HSBI, or allow either to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, other BCI-Approved Persons and HSBI-Approved Persons, and Third Participant BCI-Approved Persons.
- (xv) Any participant referring in its written submissions to any BCI or HSBI shall clearly identify the information as such in those submissions. Submissions containing BCI shall be transmitted only to BCI-Approved Persons. If the submissions contain HSBI, the HSBI shall be included in an Appendix. In that case, the version of the submission that includes the HSBI Appendix shall be transmitted only to HSBI-Approved Persons. The HSBI Appendix shall not be transmitted via e-mail. Each participant shall simultaneously provide a redacted version of its submissions to the other participant, which shall have two days to object to the inclusion of any BCI. If there are objections, the Division shall resolve the matter, and transmit the correctly redacted version to the other participant and the third participants, unless the participant making the submission agrees to remove the information that was subject to the objection. If there are no objections, the redacted version shall be transmitted the following day to the third participants.

#### Third Participants

- (xvi) Third participants may designate up to six individuals as "Third Participant BCI-Approved Persons". For this purpose, each third participant shall provide a list of Third Participant BCI-Approved Persons to the Appellate Body Secretariat by 12 August 2010. A copy of the list of Third Participant BCI-Approved Persons shall be served on each participant and on each other third participant. The participants may object to the designation of an outside advisor as a Third Participant BCI-Approved Person. Objections must be filed with the Appellate Body Secretariat by 13 August 2010. The Division will only reject the designation of an outside advisor as a Third Participant BCI-Approved Person upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles in the *Rules of Conduct* and the illustrative list in Annex 2 thereto. Third Participants BCI-Approved Persons shall not disclose BCI, or allow it to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, BCI-Approved Persons, and other Third Participant BCI-Approved Persons.

- (xvii) The BCI version of all participants' submissions shall be transmitted to the third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room located on the premises of the WTO. Third Participant BCI-Approved Persons shall be allowed to view in the designated reading room the BCI version of the Panel Report and the BCI version of the submissions filed in these appellate proceedings. Third Participant BCI-Approved Persons shall not bring into that room any electronic recording or transmitting devices, nor shall they remove copies of the BCI version of the Panel Report or the BCI version of the submissions from that room. Each third participant shall be provided with one copy of the Panel Report as circulated to WTO Members and of the redacted version of the submissions for use in the reading room. Third Participant BCI-Approved Persons may take handwritten notes on the provided copies of the circulated Panel Report and redacted version of the submissions and they may take these copies with them. These documents shall be printed on coloured watermarked paper; shall bear the names of the Third Participant BCI-Approved Persons; state that "This document is not to be copied"; and the cover page of each of the documents shall state that any handwritten BCI added to the document shall only be discussed or shared with other Third Participant BCI-Approved Persons. The content of any handwritten notes shall not be incorporated, electronically or in handwritten form, into any other copy of the Panel Report or of the submissions. These documents and any other handwritten notes taken by the Third Participant BCI-Approved Persons in the reading room shall be locked in a secure container when not in use. These documents and those handwritten notes must be returned to the Appellate Body Secretariat after the final oral hearing held in this appeal.
- (xviii) Each Third Participant BCI-Approved Person viewing the BCI version of the Panel Report and submissions in the designated reading room shall complete and sign a log. The Appellate Body Secretariat shall keep such log as part of the record of the appeal.
- (xix) If a third participant wishes to refer in its third participant's submission to any BCI, it shall clearly identify such information, and the submission shall be transmitted to the participants, and to the other third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room referred to in paragraph (xvii) above. The third participant shall also simultaneously provide the participants with a redacted version of their submissions. The participants shall have two days to object to the inclusion of any BCI in the redacted version of the third participant's submission. If there are objections, the Division shall resolve the matter, and transmit the correctly redacted version to the participants and the other third participants, unless the third participant making the submission agrees to remove the information that was subject to the objection. If there are no objections, the redacted submission shall be transmitted the following day to the participants and the other third participants.

#### Oral Hearing

- (xx) Appropriate procedures shall be adopted to protect BCI and HSBI from unauthorized disclosure at any oral hearing held in this appeal.

ANNEX IVProcedural Ruling and Additional Procedures on the Conduct of the Oral Hearings

27 October 2010

*European Communities and Certain Member States – Measures Affecting  
Trade in Large Civil Aircraft*

AB-2010-1

Procedural RulingIntroduction

1. On 21 July 2010, the Appellate Body Division hearing the above appeal received a joint request from the European Union and the United States to adopt additional procedures to protect certain sensitive information submitted in this dispute. In their joint letter, the European Union and the United States also requested that the oral hearings in this appeal be opened to public observation to the extent that this is possible given the existence of sensitive information.

2. After receiving comments from the third participants and holding a special oral hearing on this subject, the Division issued a Procedural Ruling on 10 August 2010 adopting additional procedures to protect sensitive information on the record of this appeal. Paragraph 28(xx) of the Procedural Ruling on 10 August 2010 states that appropriate procedures shall be adopted to protect sensitive information from unauthorized disclosure during any oral hearings held in this appeal.

3. On 24 September 2010, the Division invited the European Union and the United States to clarify the extent to which they request the oral hearings in this appeal to be open to public observation, and to propose specific modalities in this respect. The third participants were also invited to comment, if they so wished, on the European Union's and the United States' request for public observation and on the specific modalities proposed.<sup>1</sup>

4. We received a joint letter from the European Union and the United States on 5 October 2010 with their clarifications and proposals concerning modalities for the oral hearings. In their joint letter, the participants suggested that the Division adopt a further Procedural Ruling pursuant to Rule 16(1) of the applicable *Working Procedures for Appellate Review* (the "*Working Procedures*")<sup>2</sup> to regulate the conduct of the oral hearings in the light of the request for public observation and the existence of sensitive information. According to the participants, this "will involve striking a balance between the systemic interest in protecting sensitive information and the systemic interest in transparency similar to that struck in the Procedural Ruling dated 10 August 2010."<sup>3</sup> In particular, the participants indicated that, with respect to the protection of business confidential information ("BCI"), "each of them is precluded from disclosing information designated BCI by the other to non-BCI approved persons" and that "third participants are precluded from disclosing BCI to non-BCI approved persons." As regards the protection of highly sensitive business information ("HSBI"), the participants proposed two options. Under the first option, "if, during the hearing, one of the

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<sup>1</sup>At the request of the participants, the deadline for the submission of their clarifications and proposals concerning the oral hearings was extended by four days. The deadline for the third participants to file comments was also extended by four days.

<sup>2</sup>WT/AB/WP/5, 4 January 2005.

<sup>3</sup>Joint letter from the European Union and the United States, dated 5 October 2010.

participants or a Member of the Division wishes to refer to HSBI, the hearing is temporarily suspended and third participants, as well as members of the participants' delegations who are not HSBI approved, are asked to temporarily leave the room". Under the second option, the hearings would be divided into two parts. The first part of the oral hearings "would deal with all matters to the greatest extent possible, and without uttering HSBI." The second part of the oral hearings would be devoted to discussing HSBI. The participants acknowledge that "{n}either of these options is ideal in all respects" and add that, "on balance", they would prefer the second option as it would limit unnecessary disruption during the oral hearings.

5. As regards observation of the oral hearings by the public, the participants have some common views and some differences of opinion as to the extent to which the oral hearings should be open to observation. Both participants are of the view that sensitive information should not be disclosed to the public. The participants submit that, "in principle, it would be desirable that as much of the hearing as possible should be open to the public", but "recognize that in light of the volume of BCI in this dispute, and its centrality to many of the issues, it may not be feasible to separate the Appellate Body questions and participant answers into public and BCI sessions". While the United States indicates that it "remains open to any suggestions that the Appellate Body may have to advance the systemic interest in transparency in a manner consistent with the systemic interest in protecting BCI", the European Union "does not agree to open any part of the question and answer session of the hearing to the public." The participants propose to deliver opening statements that do not contain BCI or HSBI. They further propose that the third participants would also agree to exclude any BCI from their opening statements. Furthermore, the participants propose that the opening statements be videotaped, reviewed if necessary by the participants for confirmation that neither BCI nor HSBI has been uttered (with any disagreements to be settled by the Appellate Body), and then be shown to the public in a separate room soon thereafter. The participants also propose that such an approach could be used for the closing statements, or at least that part of them that does not refer to BCI or HSBI. The participants attached to their joint letter draft additional procedures for the conduct of the oral hearings.

6. Comments on the request of the participants were submitted by Australia, Brazil, Canada, and Japan. Australia reiterates its support for the transparency of WTO dispute settlement proceedings as a means of enhancing the credibility of the dispute settlement system. Australia indicated that it "has no objection to making a statement or answering questions in an open hearing as a third participant".<sup>4</sup> In addition, Australia suggests that the question and answer part of the oral hearings could be divided in a way that would facilitate transparency. Australia notes that delayed transmission of the proceedings to the public could ensure that sensitive information is not disclosed inadvertently. Canada too reiterates its support for increased transparency in the WTO dispute settlement process as a means to reinforce the legitimacy of this process. With respect to the protection of sensitive information during the oral hearings, Canada requests that any procedures adopted by the Appellate Body for the conduct of the oral hearings provide that a single copy of the BCI version of the submissions filed in the appellate proceedings and a single copy of the BCI version of the Panel Report be made available to the third participants during any BCI sessions of the oral hearings. For its part, Brazil recalls that Article 17.10 of the DSU provides that the "proceedings of the Appellate Body shall be confidential", and reiterates its view that these "proceedings" include the oral hearing and thus the DSU does not allow for public observation. Brazil agrees with Canada's proposal that third participants be allowed to view the BCI version of the submissions filed in this appeal and the BCI version of the Panel Report during any BCI sessions of the oral hearings. Finally, Japan supports the participants' request to allow public observation of the oral hearings. Japan indicates its readiness to make its opening and closing statements, and to answer questions, in a public session. No comments in writing were received from China and Korea.

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<sup>4</sup> Australia's comments dated 8 October 2010.

7. Two issues are before us in relation to the conduct of the oral hearings in this appeal.<sup>5</sup> First, we need to consider the implications for the conduct of the oral hearings of our Procedural Ruling of 10 August 2010 concerning the protection of sensitive information. Second, we must decide whether to authorize public observation of the oral hearings. In deciding this second issue, we must keep in mind any arrangements that we adopt to protect sensitive information during the oral hearings.

8. In our Procedural Ruling of 10 August 2010, we noted that the confidentiality requirements set out in Articles 17.10 and 18.2 of the DSU, and in paragraph VII:1 of the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*<sup>6</sup>, are stated at a level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect adequately the confidentiality of that information. We further observed that the adoption of such arrangements falls within the authority of the Appellate Body to hear the appeal and to regulate its procedures in a manner that ensures that the proceedings are conducted with fairness and in an orderly manner. In addition, we stated that the determination of whether particular arrangements are appropriate in a given case essentially involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU, the other covered agreements, or the *Working Procedures*. Participants requesting particularized arrangements have the burden of justifying that such arrangements are necessary in a given case to protect adequately certain information, taking into account the rights and duties recognized in the DSU, the other covered agreements, and the *Working Procedures*.

9. Our Procedural Ruling of 10 August 2010 also identified the rights and duties that are implicated where additional protection is under consideration. First, there is the overarching authority of the Appellate Body pursuant to Article 17 of the DSU to ensure proper adjudication of the dispute. Second, there are the rights of the participants to present their case, have their dispute adjudicated, and to enjoy due process throughout the proceedings. Third, there are the rights of the third participants who, in accordance with Article 17.4 of the DSU, "may make written submissions to, and be given an opportunity to be heard by, the Appellate Body." Finally, we referred to the rights and interests of the WTO membership at large.

10. We believe that the considerations that we set out in our Procedural Ruling of 10 August 2010 also apply to our decision concerning the conduct of the oral hearings in this appeal.

#### Protection of Sensitive Information during the Oral Hearings

11. Given the amount of information that was treated as BCI or HSBI during the Panel proceedings in this appeal, it is difficult to conceive of how the oral hearings in these appellate proceedings can be conducted without referring to such information. Even if the participants and third participants abstain from referring to BCI or HSBI in their opening and closing statements, it will be necessary to address BCI and HSBI in our questions and in the responses to these questions. Thus, in carrying out our adjudicative function, it will be necessary to conduct the oral hearings in a manner that allows us to explore issues that involve sensitive information, while ensuring that this sensitive information is not improperly disclosed.

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<sup>5</sup>We recall that we anticipate holding two oral hearings in this appeal as was indicated in our letter to the participants and third participants of 2 September 2010.

<sup>6</sup>The *Rules of Conduct*, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), were directly incorporated into the *Working Procedures for Appellate Review* (WT/AB/WP/5), as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

12. Oral hearings in appellate proceedings are conducted in the presence of the participants and third participants in accordance with the *Working Procedures*. It has not been our practice to interfere with the composition of the delegations of the participants and third participants attending the oral hearings. On the contrary, the Appellate Body has said that it could "find nothing in the *Marrakesh Agreement Establishing the World Trade Organization* ..., the *DSU* or the *Working Procedures*, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings".<sup>7</sup> Nevertheless, some limits may be required in this appeal to protect sensitive information.

13. The participants have indicated that they do not intend to refer to BCI or HSBI in their opening statements. None of the third participants has indicated that it intends to refer to BCI in its opening statement. Given that it is unlikely that sensitive information will be uttered in this segment of the oral hearings, we see no reason why all members of delegations of the participants and third participants could not attend this segment of the oral hearings. The participants have tentatively suggested that they will not refer to sensitive information in their closing statements, but are less definitive in this respect. To the extent that it is confirmed by the participants—and also the third participants indicate—that no sensitive information will be referred to in the closing statements, all members of the participants' and third participants' delegations may attend this final stage of the oral hearings.

14. We noted earlier that it will be necessary to address BCI and HSBI in our questions at the oral hearings. Pursuant to paragraph 28(xiv) of our Procedural Ruling of 10 August 2010, the participants have provided a list of persons who are authorized to have access to BCI and a list with a more limited number of persons who are authorized to have access to HSBI.<sup>8</sup> These limitations on the participants' representatives who would be authorized to discuss BCI and HSBI during the oral hearings are incidental to the participants' request for additional protection for sensitive information. Therefore, only members of the participants' delegations who have been authorized to have access to BCI are invited to attend the sessions of the oral hearings in which BCI will be discussed, and only members of their delegations who are authorized to have access to HSBI are invited to attend segments of the oral hearings where HSBI will be discussed.

15. Under paragraph 28(xvi) of the Procedural Ruling of 10 August 2010, the third participants have been allowed to designate up to six individuals as "Third Participant BCI-Approved Persons". This provides for a higher number of designated individuals compared to what was proposed by the participants. We note that none of the third participants has indicated that the number of individuals who could be designated as Third Participant BCI-Approved Persons was inadequate for them to be represented properly at the oral hearings. In view of the need to provide additional protection to BCI, only Third Participant BCI-Approved Persons are invited to attend segments of the oral hearings where BCI may be discussed, including the question and answer sessions. For the reasons stated above, we do not consider that this will unduly impinge upon the rights of the third participants in this case.

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<sup>7</sup>Ruling of 15 July 1997, quoted in Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 10.

<sup>8</sup>In a letter dated 27 October 2010, the Division authorized certain changes to the European Union's list of BCI- and HSBI-Approved Persons, and a change to Canada's list of Third Participant BCI-Approved Persons.



16. Canada has requested that third participants have access to the BCI version of the submissions filed in this appeal and the BCI version of the Panel Report during any segments of the oral hearings in which BCI is discussed. Brazil has indicated its support for Canada's request. Pursuant to our Procedural Ruling of 10 August 2010, Third Participant BCI-Approved Persons have had access to the BCI version of the submissions filed in this appeal and the BCI version of the Panel Report in a designated reading room. We agree that access to these documents at the oral hearings will facilitate the participation of the third participants during the discussions involving BCI. At the same time, we do not consider that giving Third Participant BCI-Approved Persons' access to these documents at the oral hearings will bring an increased risk of unauthorized disclosure. Hence, we will provide the third participants the BCI version of the submissions filed in this appeal and the BCI version of the Panel Report in the hearing room during the BCI sessions. Third participants will be provided with a single copy of these documents, individually watermarked. Access to these documents will be limited to Third Participant BCI-Approved Persons.

17. Third participants do not have access to HSBI under our Procedural Ruling of 10 August 2010.<sup>9</sup> We also observe that, in the present case, none of the third participants had expressed specific concerns in their written comments or at the special oral hearing about not having access to the most sensitive information. On the contrary, several third participants expressed support, in principle, for the limitation on access to the most sensitive information. None of the third participants has expressed a different view concerning access to HSBI during the oral hearings. In the light of the above, only HSBI-Approved Persons of the participants are invited to attend segments of the oral hearings in which HSBI will be discussed.

18. The participants have proposed two options for addressing HSBI during the oral hearings. The first involves interrupting the oral hearing each time reference will be made to HSBI, the second option involves having dedicated sessions to discuss HSBI. We think it is important that any additional procedures to protect sensitive information should interfere as little as possible with the regular conduct of the oral hearings and allow the Division to organize its questions logically by topics. Therefore, to the extent possible, we prefer to focus on HSBI in dedicated sessions in order to avoid interrupting the regular flow of the oral hearings. It may be, however, that the full exploration of an issue will not allow for deferral of the discussion of HSBI. If such circumstances arise, we do not exclude the possibility of interrupting the oral hearings to discuss the HSBI with the persons approved to have access to it.

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<sup>9</sup>We recognized at the time that, under Article 17.4 of the DSU and Rule 24 of the *Working Procedures*, third participants may make written submissions to, and be given an opportunity to be heard by, the Appellate Body. Rule 18(2) of the *Working Procedures* furthermore provides that, "except as otherwise provided in these Rules, every document filed by ... a participant ... or a third participant shall be served on each of the ... third participants in the appeal". However, we noted that the rights of third participants are more limited than those of the participants, and that the third participants' interests lie mainly in the correct legal interpretation of the provisions of the WTO agreements. See paragraph 9 of the Procedural Ruling issued in *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* and *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, attached as Annex IV to the Appellate Body Reports, WT/DS320AB/R and WT/DS321/AB/R, respectively.

Request for Public Observation of the Oral Hearings

19. Turning to the participants' request to authorize observation of the oral hearings by the public, we recall that requests to allow public observation of the oral hearing have been made, and have been authorized, in six appellate proceedings.<sup>10</sup> In its rulings, the Appellate Body has held that it has the power to authorize such requests by the participants, provided that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process.

20. The Appellate Body has also noted that public observation in previous cases operated smoothly, and that the rights of third participants who did not wish to have their oral statements made subject to public observation were fully protected.

21. Particular issues arise in this appeal in relation to the public observation of the oral hearings because of the need to provide additional protection to certain sensitive information. More specifically, neither participant wishes to see any BCI or HSBI disclosed to the public. The participants have proposed that the public be allowed to observe the opening statements and, to the extent that they do not include any sensitive information, the closing statements. The European Union has asserted that it "does not agree to open any part of the question and answer session of the hearing to the public." For its part, the United States has indicated that it "remains open to any suggestions that the Appellate Body may have to advance the systemic interest in transparency in a manner consistent with the systemic interest in protecting BCI."

22. We note that the European Union's and the United States' request for authorization of public observation of the oral hearings is a joint request only with respect to the opening statements and, with a caveat, the closing statements. Although we have some reservations about an overly segmented approach to public observation because it risks providing an incomplete picture of the Appellate Body hearings, we also recall that the need to protect sensitive information in this case raises particular concerns with respect to the observation of the oral hearings by the public. In the light of the above, we authorize the public observation of only the opening statements. We will authorize public observation of the closing statements of participants upon indication from them that they will not include any references to sensitive information in them.

23. Some of the third participants have stated that they do not intend to refer to sensitive information in their opening statements and they have no objection to allowing public observation of these statements. Accordingly, we authorize the observation by the public of the opening statements of those third participants who have not indicated any objection to doing so. We will also authorize public observation of the closing statements of a third participant provided that the third participant indicates that it will not include any reference to sensitive information in such statements. The confidentiality of closing statements by third participants who do not wish to make their statements public will be preserved.

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<sup>10</sup>These proceedings are: *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS320/AB/R) and *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS321/AB/R); *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador* (WT/DS27/AB/RW2/ECU) and *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States* (WT/DS27/AB/RW/USA); *United States – Continued Existence and Application of Zeroing Methodology* (WT/DS350/AB/R); *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS294/AB/RW); *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan* (WT/DS322/AB/RW); and *Australia – Measures Affecting the Importation of Apples from New Zealand* {WT/DS367/AB/R}.

24. In previous appeals in which we have authorized public observation of the oral hearing, this has been done by simultaneous transmission to the public in a separate room via closed-circuit television broadcast. In this appeal, the participants have proposed that public observation take place by making a videotape of the relevant segments of the oral hearings and showing it to the public soon thereafter, after the participants have had an opportunity to check for any inadvertent utterance of sensitive information. We agree with the participants that deferred transmission to the public by videotape would minimize the risk of inadvertent disclosure of sensitive information and we will give the participants an opportunity to review the videotape for this purpose before it is shown to the public. In case of disagreement between the participants regarding the sensitive nature of certain information referred to during the opening or closing statements, that information will not be subject to public observation.

25. For the reasons set out above, we have decided to provide additional confidentiality protection for certain sensitive information during the oral hearings to be held in this appeal on the terms set out below. We also authorize the public observation of certain segments of the oral hearings as further indicated below. Accordingly, we adopt the following additional procedures for the purposes of this appeal:

#### Additional Procedures on the Conduct of the Oral Hearings

##### Protection of Sensitive Information During the Oral Hearings

- (i) These additional procedures shall apply to the oral hearings to be held in this appeal and, in particular, to any information that is referred to in the oral hearings that was treated as business confidential information ("BCI") or as highly sensitive business information ("HSBI") in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. These additional procedures complement the additional procedures for the protection of sensitive information that we adopted as part of our Procedural Ruling of 10 August 2010.
- (ii) To the extent that information on the record is presented at the oral hearings in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants on the proper treatment of the degree of confidentiality of this information, the Appellate Body shall decide the matter after hearing the views of the participants.<sup>11</sup>
- (iii) Appellate Body Members, Secretariat staff assigned by the Appellate Body to work on this appeal, and interpreters and court reporters retained for this appeal, may be present throughout the oral hearings, including segments dedicated to the discussion of BCI and HSBI.
- (iv) In addition to the persons indicated in subparagraph (iii) above, BCI shall be disclosed during the oral hearings only to BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons.<sup>12</sup>

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<sup>11</sup>See Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045, para. 13.

<sup>12</sup>BCI-Approved Persons and Third Participant BCI-Approved Persons are those persons designated as such under paragraphs 28(xiv) and 28(xvi) of our Procedural Ruling of 10 August 2010.

- (v) In addition to the persons indicated in subparagraph (iii) above, HSBI shall be disclosed during the oral hearings only to HSBI-Approved Persons of the participants.<sup>13</sup>
- (vi) The oral hearing session dedicated to the opening statements of the participants and third participants shall be open to all members of the delegations of participants and third participants. The participants and third participants shall abstain from referring to BCI or HSBI in their opening statements.
- (vii) In order to protect BCI from unauthorized disclosure, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons are invited to attend the question and answer sessions.
- (viii) Segments of the oral hearing may be reserved for questioning on issues that may require making reference to HSBI. In order to protect HSBI from unauthorized disclosure, only HSBI-Approved Persons of the participants are invited to attend these sessions.
- (ix) To the extent that any participant or third participant indicates that it will make reference to BCI in its closing statement, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons will be invited to attend the closing sessions.
- (x) If necessary, the Division hearing this appeal may interrupt a BCI session and hold a session dedicated to HSBI.
- (xi) During the sessions of the oral hearings that address BCI, each third participant shall be provided with a copy of the BCI version of the Panel Report and a BCI version of the submissions filed in this appeal, which have been printed and individually watermarked pursuant to paragraph 28(xvii) of our Procedural Ruling of 10 August 2010. Only Third Participant BCI-Approved Persons shall be allowed to consult these documents. The documents shall not be removed from the hearing room and shall be returned to the Appellate Body Secretariat at the end of each session addressing BCI.
- (xii) The version of the transcript of the oral hearings containing BCI and HSBI shall become part of the appellate record and shall be kept in accordance with the additional procedures for the protection of sensitive information set out in subparagraphs 28(vi), (vii), and (ix)-(xii) of our Procedural Ruling of 10 August 2010.

#### Public Observation of the Oral Hearings

- (xiii) The first session of the oral hearings, which will consist of the opening statements by participants and third participants, shall be open to public observation. The final session of the oral hearings, which will be reserved for closing statements, shall be open to public observation to the extent that the participants and third participants indicate that such closing statements will not refer to any sensitive information on record.
- (xiv) The sessions open to public observation shall be videotaped. The participants shall be allowed to review the videotapes to verify that BCI or HSBI has not been included inadvertently or otherwise. Staff of the Appellate Body Secretariat shall be present while the participants review the videotape. If the videotape contains BCI or HSBI, a redacted version of the videotape shall be produced in which the BCI or HSBI has been deleted. In case of disagreement between the participants regarding the sensitive nature of certain information

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<sup>13</sup>HSBI-Approved Persons are those persons designated as such under paragraph 28(xiv) of our Procedural Ruling of 10 August 2010.

referred to during the opening or closing statements, the relevant segment(s) will not be subject to public observation.

- (xv) The opening and closing statements of third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation. Any third participant who has not already done so may request that its oral statements remain confidential and not be subject to public observation. Such requests must be received by the Appellate Body Secretariat no later than 5 p.m. Geneva time on Monday, 8 November 2010.
  - (xvi) Notice of the oral hearings will be provided to the general public through the WTO website. Members of the general public wishing to observe the oral hearings will be required to register in advance with the WTO Secretariat. Once the review process referred to in subparagraph (xiv) above has been completed, the redacted version of the videotape shall be screened to WTO delegates and members of the public who have registered to observe the oral hearings. The time and location of the videotape screening shall be announced in due course. WTO Delegates are invited to indicate to the Appellate Body Secretariat, no later than 5 p.m. Geneva time on Monday, 8 November 2010, whether they wish to have a reserved seat in the room where the videotape will be screened.
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