

**CONTAINS NO BUSINESS CONFIDENTIAL INFORMATION (“BCI”)  
OR HIGHLY SENSITIVE BUSINESS INFORMATION (“HSBI”)**

*European Communities and Certain Member States –  
Measures Affecting Trade in Large Civil Aircraft:  
Recourse to Article 21.5 of the DSU by the United States*

**(AB-2016-6 / DS316)**

**EXECUTIVE SUMMARY OF THE  
OTHER APPELLANT SUBMISSION  
OF THE UNITED STATES OF AMERICA**

November 10, 2016

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1. If the Appellate Body were to reverse the Panel and find that the passive expiry of LA/MSF subsidies could satisfy the obligation under Article 7.8 in at least some cases, then the United States conditionally appeals the Panel’s separate findings that the *ex ante* lives of the pre-A380 LA/MSF subsidies passively “expired” prior to December 1, 2011.
2. In line with the Appellate Body’s guidance in *EC – Large Civil Aircraft*, the period in which a benefit exists should be based on an *ex ante* assessment of factors such as the nature, amount, and projected use of the challenged subsidy. If at the time of grant, the evidence indicates that the grantor expects the benefit to flow over a period whose length is defined to be contingent on some other variable event, then logically the life of the subsidy should be measured accordingly.
3. Evidently, the Panel assumed that the *ex ante* life of the subsidies must be expressed as a fixed number. It erred by focusing on the wrong expectations. It sought to retrospectively project an expected life to each aircraft program. The Panel failed to recognize that, when Airbus accepted a contingent liability and the governments agreed to make payments contingent, they expected the benefit of below-market repayments to last for a variable period defined by external factors.
4. In addition, the United States raises an appeal regarding a legal interpretive question with respect to Article 3.1(b). The United States demonstrated, and the EU did not contest, that French, German, Spanish, and UK LA/MSF is each conditioned on the production of goods in the grantor’s territory to be used by Airbus in the manufacture of the A350 XWB. The Panel found that subsidies conditioned on the domestic production of inputs to be used in the manufacture of the A350 XWB are not prohibited under Article 3.1(b). The Panel determined that the contingencies in the A350 XWB LA/MSF contracts “ensure that the member States are subsidizing a domestic producer. Article 3.1(b), therefore, does not discipline them.”
5. Under a competing interpretation also under consideration in a separate dispute, where a subsidy is contingent on domestic production of a good that is an input into a manufacturing process, and substituting an imported version result in the loss of an entitlement to the subsidy, the subsidy is contingent on the use of domestic over imported goods. To be clear, the United States considers this is not the best interpretation. However, the United States has an interest in ensuring that the same legal approach is applied in both proceedings.
6. Moreover, should the Appellate Body determine that this competing interpretation is indeed correct, there is no question that the Panel erred in not finding a violation of Article 3.1(b). Further, applying the competing interpretation to the undisputed facts and findings of this proceeding, the Appellate Body would be able to complete the analysis and conclude that all four instances of A350 XWB LA/MSF breach Article 3.1(b).

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7. The competing interpretation – in contradiction to the interpretation adopted by the Panel – is as follows: if (i) a subsidy is granted to a domestic producer conditional on the domestic siting of production activities to produce a domestic input in an industrial process, and (ii) a substitution of imported goods for these inputs would result in the producer’s loss of the entitlement to the subsidy, then the subsidy is contingent on the use of domestic over imported goods, and therefore is inconsistent with Article 3.1(b). In addition, the competing interpretation of Article 3.1(b) assumes that any good completed in a domestic territory is “domestic” for purposes of Article 3.1(b), without the need to examine the significance of the operations undertaken in the domestic territory, the proportion of foreign content contained in the good, rules of origin, or any other considerations.

8. If the goods that Airbus must use to manufacture the A350 XWB are required to be produced in the EU, then the goods are “domestic goods” and therefore Airbus is required to use domestic over imported goods to receive the subsidy.

9. The Panel, however, found that this logic reflected an improper interpretation of Article 3.1(b). Critical to the Panel’s finding was the need to interpret Article III of the GATT 1994 and Article 3.1(b) of the SCM Agreement consistently. The Panel found that a review of both provisions “suggests that the act of granting subsidies to firms so long as they engage in domestic production activities, without more, should not be equated to making those subsidies contingent on the use of domestic over imported goods and hence prohibited.”

10. This raises a threshold interpretive question that the Appellate Body has yet to consider. Where a subsidy is contingent not only on the production of a finished good, but is also contingent on the production, in the grantor’s territory, of intermediate goods for use as inputs (or goods used to produce other goods, *i.e.*, instrumentalities of production) – which are then presumed to be “domestic” – in manufacturing the downstream good, is the subsidy in breach of Article 3.1(b)? Arguably, the subsidy could be viewed as contingent on the use of a domestic good because using an imported good in place of the domestic good would result in a loss of the entitlement to the subsidy.

11. If the Appellate Body considers that this “competing interpretation” of Article 3.1(b) – which is also under consideration in *US – Conditional Tax Incentives for Large Civil Aircraft* – is correct, then the Panel erred.

12. Each instance of LA/MSF for the A350 XWB is conditioned on the domestic siting of production activities for goods to be used by Airbus in the manufacture of the A350 XWB, and a counterfactual substitution of imported versions of these goods would result in Airbus’s loss of the entitlement to the LA/MSF. The United States reviews below the undisputed facts from each of the LA/MSF contracts containing the contingencies and other relevant evidence.

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13. France granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the French A350XWB *Protocole* that necessitate the use of domestic goods to manufacture the A350 XWB. If the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.

14. Germany granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.

15. Spain granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the Spanish A350XWB *Convenio* that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts establish that the subsidy is contingent on the use of domestic over imported goods.

16. The UK granted LA/MSF for the A350 XWB contingent on Airbus fulfilling certain requirements contained in the UK A350XWB Repayable Investment Agreement that necessitate the use of domestic goods to manufacture the A350 XWB. Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts contained in the UK A350XWB Repayable Investment Agreement establish that the subsidy is contingent on the use of domestic over imported.