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)

OTHER APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF REPORTS

Short Title	Full Case Title and Citation
EC – Large Civil Aircraft (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
EC – Large Civil Aircraft (21.5 – US) (Panel)	Panel Report, *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,* WT/DS316/RW and Add.1, circulated 22 September 2016
US – Upland Cotton (21.5 – Brazil) (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008

INTRODUCTION

1. The compliance Panel in this dispute issued a high-quality report, reflecting its careful consideration of the parties' voluminous argumentation and evidence. The United States agrees with the compliance Panel's findings in almost all respects. In this Other Appeal, the United States raises two limited issues for the Appellate Body's consideration – one on a conditional basis, and the other regarding a legal interpretive question that is also being considered in another ongoing dispute, *US – Conditional Tax Incentives for Large Civil Aircraft (DS487)*.

2. In its report, the Panel addressed the European Union's ("EU") compliance status with respect to the recommendations and rulings of the Dispute Settlement Body ("DSB") that billions of dollars in subsidies to Airbus were inconsistent with the EU's obligations under Articles 5 and 6 of the SCM Agreement. The Panel found that the EU had failed to bring its measures into compliance with virtually all of the DSB recommendations and rulings.[1] In fact, the Panel found that the EU took no action whatsoever to even attempt to bring its measures into compliance (except with respect to two measures that the United States had decided not to challenge). Moreover, the Panel found that the EU exacerbated its noncompliance by providing **[BCI]** in LA/MSF for the A350 XWB.[2]

3. In sum, not only did the EU fail to comply, but it did not even try to withdraw or remove the adverse effects of the vast majority of subsidies found to be inconsistent with its WTO obligations. These subsidies have had profoundly harmful effects on the U.S. large civil aircraft industry. Consistent with the findings of the panel and the Appellate Body in the original proceeding, the Panel found that, as of the expiry of the implementation period, Airbus and its large civil aircraft likely would not even exist.[3] As a result, the United States has continued to suffer massive adverse effects in the form of significant lost sales and displacement and/or impedance in certain EU and third country markets.[4]

4. The United States agrees with all of the compliance Panel's findings, except as explained below. In Section II, in light of the EU's appeal of November 3, 2016, the United States conditionally appeals the Panel's finding that the *ex ante* lives of certain LA/MSF subsidies had passively "expired" before December 1, 2011, as a result of the amortization of benefit.[5] In the United States' view, this finding is incorrect and does not comport with Article 1.1(b) of the SCM Agreement, nor with the Appellate Body's guidance that the "nature, amount, and projected use of the challenged subsidy may be relevant factors to consider in an assessment of

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[1] The only exceptions were two infrastructure grant subsidies that the United States declined to challenge in the compliance dispute, *i.e.*, the Mühlenberger Loch and Bremen Airport Runway Extension subsidies. *See EC – Large Civil Aircraft (Article 21.5 – US) (Panel)*, para. 6.3 & note 53.

[2] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.1625.

[3] Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.1774, 6.1778, 7.1(d)(xii), 7.1(d)(xiii).

[4] Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 7.1(d)(xiv) - (xvi).

[5] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.879, 7.1(d)(ii) and (iii).

the period over which the benefit from a financial contribution *might be expected* to flow."[6] The Appellate Body does not need to address the U.S. appeal of this issue at all if it rejects the EU's appeal as to the interpretation of Article 7.8 of the SCM Agreement and upholds the Panel's finding that passive "expiry" of the LA/MSF subsidies cannot be equated with "withdrawal" of the subsidy for purposes of that provision. However, if the Appellate Body were to reverse the Panel's finding as to the appropriate interpretation of Article 7.8 of the SCM Agreement, the United States asks that it also address the U.S. conditional appeal mentioned above and discussed in further detail in Section II of this Other Appellant Submission.

5. In addition, in Section III, the United States discusses the Panel's finding that the United States did not establish that French, German, Spanish, and UK LA/MSF for the A350 XWB are inconsistent with Article 3.1(b) of the SCM Agreement. This finding was based on a legal conclusion that Article 3.1(b) of the SCM Agreement does not prohibit subsidies conditioned on domestic production of inputs the recipient must use in downstream production. However, Article 3.1(b) can be given a different reading, and the competing interpretation is currently being considered in another dispute, *US – Conditional Tax Incentives for Large Civil Aircraft (DS487)*, in which the United States is the responding party. The United States does not consider that the competing position is the best interpretation of Article 3.1(b), but if the Appellate Body found that it was, then the Panel erred in finding that French, German, Spanish, and UK LA/MSF for the A350 XWB are not inconsistent with Article 3.1(b). The United States has an interest in the same interpretation of Article 3.1(b) being applied in both proceedings. Therefore, the United States appeals the Panel's legal interpretation and conclusion so that, if the Appellate Body were to agree with the competing interpretation, it may reverse the Panel's finding and instead conclude that French, German, Spanish, and UK LA/MSF for the A350 XWB are inconsistent with Article 3.1(b).

6. Again, apart from these two narrow issues, the United States finds no fault with the Panel's report. There is no merit in any of the EU's allegations of error in the Panel report, as the United States will explain in due course in its appellee submission.

CONDITIONAL APPEAL: THE PANEL ERRONEOUSLY FOUND THAT THE *EX ANTE* LIVES OF PRE-A380 LA/MSF SUBSIDIES HAVE EXPIRED.

7. The United States agrees with the Panel's finding that the passive "expiry" of pre-A380 LA/MSF subsidies alleged by the EU, as well as the capital contribution subsidies and two regional development grants, did not satisfy the obligation to "withdraw the subsidy" under

[6] Appellate Body Report, *EC – Large Civil Aircraft*, para. 707 (emphasis original).

Article 7.8.[7] The Panel's approach in this regard was based on the Appellate Body's guidance that "{a} Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own."[8] The Panel stated: "Logically, therefore, it will only be in circumstances that are not 'usual' or 'normal' that the 'withdrawal' of a subsidy may be achieved by leaving a subsidy to expire passively over the ordinary course of its expected life."[9] In addition, the Panel noted that the Appellate Body has found that "the effects of a subsidy may well persist beyond its expected life, and that ultimately, the extent to which this may be the case will be a fact-specific matter."[10] Accordingly, the Panel stated:

> {W}e cannot accept the European Union's reliance on the Appellate Body's statements to support its contention that the passive "expiry" events it relies upon mean that it has complied with the obligation to "withdraw the subsidy" because, as already noted, equating these events with the "withdrawal" of subsidies for the purpose of Article 7.8 would render any findings of adverse effects made against such expired subsidies in original proceedings purely declaratory, and to this extent render the effects-based disciplines of Article 5 of the SCM Agreement *inutile*.[11]

The Panel accordingly found that the fact that any subsidies may have "passively 'expired' before the end of the implementation period {*i.e.*, December 1, 2011} does not amount to the 'withdrawal' of those subsidies . . . for purposes of the Article 7.8 of the SCM Agreement."[12] The United States agrees with these findings, but the EU has appealed them.[13] The United States believes that the Panel's findings are consistent with the ordinary meaning of the text, in context, and in light of the object and purpose of the SCM Agreement. The United States will respond to the EU's arguments in its appellee brief and explain why the EU is incorrect.

8. However, 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 to "withdraw" the subsidy 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

[7] Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.1093-6.1904; *ibid.*, para. 7.1(d)(ii), (iii), (iv), and (viii).

[8] Appellate Body Report, *US – Upland Cotton (21.5)*, para. 236, *quoted at* Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.1090.

[9] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.1091.

[10] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.1094.

[11] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.1094.

[12] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 7.1(d)(viii).

[13] *See* EU Appellant Submission, Section II.

1, 2011.[14] As explained in greater detail below, the Panel based these latter findings on an erroneous interpretation of Article 1.1(b) of the SCM Agreement that is inconsistent with the Appellate Body's guidance. Accordingly, the United States conditionally requests the Appellate Body to *reverse* the Panel's findings at paragraphs 6.879 and 7.1(d)(ii) and (iii), and *find* that LA/MSF for the A320, A330/A340 Basic, and A330-200 had not expired before December 1, 2011 and that, in light of their continued adverse effects, the EU has failed to come into compliance with respect to these subsidies.[15]

A. Article 1.1(b) of the SCM Agreement and the Appellate Body's guidance indicate that the life of a subsidy depends on the *ex ante* expectations of the grantor and recipient.

9. The Appellate Body has stated:

> The ordinary meaning of Article 1.1, read in the light of Article 14 of the *SCM Agreement*, confirms . . . that a benefit analysis under Article 1.1(b) is forward-looking and focuses on future projections. 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.[16]

Thus, 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.

10. Neither the SCM Agreement nor reasoning of the Appellate Body suggests that the *ex ante* life of a subsidy must always be a fixed number. On the contrary, if at the time of granting

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[14] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 7.1(d)(ii) and (iii). To the extent that any subsidies may have expired after the end of the implementation period and referral of the matter to the compliance Panel, the United States understands that they would be irrelevant to the EU's compliance status, even in the EU's own view. *See ibid.*, para. 6.794 (describing the EU's arguments).

[15] *See* US SWS, para. 183 (indicating that the A320, A330/A340 Basic, and A330-200 continue to be marketed, and that the A340-500/600 program was terminated in 2011; these facts were not contested); *see also* PwC Amortization Report, Exhibit EU-5(BCI/HSBI), Annex 2 (also indicating that the A320, A330/A340 Basic, and A330-200 continue to be marketed, and that the A340-500/600 program was terminated in December 2011). In addition, if the Appellate Body were to find that the passive "expiry" of LA/MSF for the A340-500/600 **[BCI]** constitutes "withdrawal" for purposes of Article 7.8 of the SCM Agreement, the United States conditionally appeals the Panel's finding that that tranche of LA/MSF expired in **[BCI]**. Panel Report, *EC – Large Civil Aircraft (21.5)*, Table 11; *ibid.*, para. 7.1(d)(iii).

[16] Appellate Body Report, *EC – Large Civil Aircraft*, para. 707 (emphasis original).

a subsidy, the nature, amount, and projected use of the subsidy indicate that the grantor expects the benefit to flow over a period whose length is defined to be contingent on some other variable event, such as a large civil aircraft program selling a particular number of aircraft, that triggers an obligation to repay the principal and accrued interest, then logically the life of the subsidy should be measured accordingly.[17] Again, these would be *ex ante* assessments of the life of the subsidy, consistent with the specific nature and intrinsic conditions of a particular subsidy, and which reflect the fact that the grantor and grantee left certain parameters undefined or unfixed at the time of grant.

B. The Panel erroneously based the life of the subsidy on a fixed number of years, and not on the expectations as to the recipient's continued enjoyment of a benefit from the financial contribution over a variable period of time.

11. To measure the *ex ante* lives of the subsidies, the Panel considered two approaches proposed by the EU and its accounting consultants, PwC: (1) the so-called "loan life" approach, according to which the LA/MSF subsidies are considered to expire on the expected date of the final delivery of the subsidized Airbus aircraft to which a repayment obligation is attached; and (2) the so-called "marketing life" approach, according to which the LA/MSF subsidies are considered to expire on the expected date of the last order of the subsidized aircraft.[18] To be clear, for 14 out of 25 instances of LA/MSF, PwC acknowledged that the end-dates for the "loan life" and "marketing life" approaches cannot be deduced from **[BCI]** in the LA/MSF contracts themselves. Rather, PwC generated the end-dates on the basis of what it considered to be **[BCI]**.[19] Furthermore, even for some of the remaining 11 instances, PwC had to construct the end-dates on the basis of assumptions that are not in the text of the contracts or other information available at the time of grant.[20]

12. The Panel found that one of these two approaches must be correct, although it declined to "express any definitive views" as to which one.[21] Evidently, this was because the Panel assumed that the *ex ante* life of the subsidies must be expressed as a fixed number.[22] Under either the "loan life" or "marketing life" approach advocated by the EU, the pre-A380 LA/MSF subsidies

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[17] Likewise, if at the time of grant, the nature, amount, and projected use of a subsidy indicate that the benefit is expected to convert to loan forgiveness upon the satisfaction of a particular condition (*e.g.*, the premature failure of an aircraft program), then the life of the subsidy should be measured accordingly.

[18] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.872-6.873, Table 11 & fn. 1534.

[19] PwC Amortization Report, Exhibit EU-5(BCI/HSBI), Annex 2.

[20] For example, **[BCI]**. Supplemental PwC Report (Exhibit EU-423), Tables 3, 5. In addition, for Spanish LA/MSF for the A330/A340, PwC states that **[BCI]**. *Ibid.*, Table 5.

[21] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.879.

[22] *See* US SWS, paras. 175-183.

had expired prior to June 1, 2011.[23] The Panel did not assess an alternate methodology proposed by the United States, which was based on the fact that LA/MSF repayments were contingent, and that repayments would continue until Airbus repaid principal and accrued interest.[24] Rather, the Panel focused on one element of the U.S. argument, a discussion of the expectations of a hypothetical commercial financier.[25] The Panel did not engage with the central legal point of the U.S. argument – that for contingent financing, the grantor and recipient would expect the benefit to continue as long as payments were due, or for the life of any forgiveness if the program failed prior to full repayment.

13. In taking this approach, however, the Panel erred by focusing on the wrong expectations. It sought to retrospectively project an expected life – expressed as a specific length of time – to each aircraft program, an exercise that was always inherently speculative, and one that the parties themselves did not undertake. In fact, PwC had to construct the dates based on a range of assumptions that are not in the contracts or corresponding business cases themselves.[26] 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 such as the timing of the delivery that triggered the final payment, which would only occur if there was sufficient commercial acceptance and demand for the subsidized aircraft.

14. The factors that the Appellate Body identified as informing the determination of the life of a subsidy confirm this conclusion. The "nature" of LA/MSF is best defined by the four "core terms" that the Panel recognized – that it is success-dependent, back-loaded, levy-based, and unsecured.[27] When the governments and Airbus agreed on each tranche of LA/MSF, they recognized that the program's success was uncertain and failure was a real possibility. That, indeed, was the entire point of success-dependency – to protect Airbus from the negative consequences of a failed program. The back-loaded nature of LA/MSF further puts the focus on the later stages of an aircraft program, when the governments expected to get the bulk of their repayment. Because repayments are back-loaded, a significant proportion of expected repayments are postponed until late in the life of the subsidized commercial airplane program.[28] By the terms of the LA/MSF contracts, repayment takes the form of per-aircraft levies (and in

[23] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.879; *see also ibid.*, paras. 6.872-6.873 & Table 11.

[24] US SWS, paras. 175-183.

[25] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.876.

[26] Footnote 20 provides examples.

[27] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.116.

[28] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.273.

some cases, per-aircraft royalties).[29] In other words, the timing of repayment is flexible, and *ex ante* there is no fixed time period over which the loans must be repaid.

15. The use of the funds further supports the conclusion that a fixed-year "expected marketing life" did not inform the parties' expectations as to the life of the subsidy. As the original panel noted: "{t}he design, testing certification, production, marketing and after-delivery support of LCA is an enormously complex and expensive undertaking, which requires huge up-front investments over a period of three to five years before any revenues are obtained from customers."[30] LA/MSF shifts the risk associated with these R&D-related, product-creating investments from Airbus to the EU and its member States.[31] For each tranche of LA/MSF, the amount of principal correspondeds to a specific proportion of the development costs of a particular model of Airbus aircraft.[32] This use of the funds suggests that the parties expected the benefit of LA/MSF to last throughout the life of the subsidized aircraft programs.

16. Moreover, there is no basis to suppose that the life of LA/MSF subsidies to Airbus was expected *ex ante* to last for a fixed number of years. Such a methodology would perhaps be appropriate in cases where the subsidy is used to purchase assets with a fixed life,[33] but it does not suit the nature, amount, or projected use of LA/MSF to Airbus. The United States therefore asks the Appellate Body to find that the Panel erred in its interpretation and application of Article 1.1(b) to the LA/MSF subsidies that the Panel's "loan life" and "marketing life" approaches do not define the life of the LA/MSF subsidies.

C. A Proper Evaluation Indicates that the A320 and A330/340 LA/MSF Subsidies had not Expired as of December 1, 2011.

17. If the condition referenced in the introduction to Section II.A is triggered, and the Appellate Body reverses the Panel's separate findings that the *ex ante* lives of the pre-A380 LA/MSF subsidies passively "expired" prior to December 1, 2011,[34] the United States requests

[29] Panel Report, *EC – Large Civil Aircraft*, para. 7.374.

[30] Panel Report, *EC – Large Civil Aircraft*, para. 7.1981

[31] Panel Report, *EC – Large Civil Aircraft*, para. 7.1865.

[32] Panel Report, *EC – Large Civil Aircraft*, para. 7.369; Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.121 & note 247.

[33] *See* Appellate Body Report, *EC – Large Civil Aircraft*, para. 707 ("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.").

[34] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 7.1(d)(ii) and (iii). To the extent that any subsidies may have expired after the end of the implementation period and referral of the matter to the compliance

the Appellate Body to complete the Panel's analysis. The Panel made relevant findings as to the nature, amount, and use of the subsidies. The only remaining step is to apply the proper legal analysis to those findings. Accordingly, the United States conditionally requests the Appellate Body to *reverse* the Panel's findings at paragraphs 6.879 and 7.1(d)(ii) and (iii), and *find* that LA/MSF for the A320, A330/A340 Basic, and A330-200 had not expired before December 1, 2011 and that, in light of their continued adverse effects, the EU has failed to come into compliance with respect to these subsidies.[35]

18. LA/MSF for the A320, A330-200, and A330/A340 Basic had not expired as of December 1, 2011, given that the corresponding large civil aircraft production programs were still active at that time (and still are).[36] The United States therefore conditionally requests the Appellate Body to *reverse* the Panel's findings at paragraphs 6.879 and 7.1(d)(ii), and *find* that LA/MSF for the A320, A330/A340 Basic, A330-200 had not expired. Further, the United States requests the Appellate Body to find that, in light of their continued adverse effects, the EU has failed to come into compliance with respect to these subsidies.

UNDER A COMPETING INTERPRETATION OF ARTICLE 3.1(B) ALSO UNDER CONSIDERATION IN *US – CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT,* THE DS316 PANEL ERRED IN FINDING THAT FRENCH, GERMAN, SPANISH, AND UK LA/MSF FOR THE A350 XWB DO NOT CONSTITUTE PROHIBITED IMPORT SUBSTITUTION SUBSIDIES.

19. The United States demonstrated, and the EU did not contest, that French, German, Spanish, and UK LA/MSF – which were all found to be subsidies[37] – is each conditioned on the production in France, Germany, Spain, and the UK, respectively, of goods to be used by Airbus in the manufacture of the A350 XWB. The EU argued that such subsidies reflect the legitimate objective of subsidizing a domestic producer and that "{a} corollary of that legitimate objective is to give some reasonable substantive meaning to the concept of domestic producer."[38]

Panel, the United States understands that they would be irrelevant to the EU's compliance status, even in the EU's own view. *See ibid.*, para. 6.794 (describing the EU's arguments).

[35] *See* US SWS, para. 183 (indicating that the A320, A330/A340 Basic, and A330-200 continue to be marketed, and that the A340-500/600 program was terminated in 2011; these facts were not contested); *see also* PwC Amortization Report, Exhibit EU-5(BCI/HSBI), Annex 2 (also indicating that the A320, A330/A340 Basic, and A330-200 continue to be marketed, and that the A340-500/600 program was terminated in December 2011). In addition, if the Appellate Body were to find that the passive "expiry" of LA/MSF for the A340-500/600 **[BCI]** constitutes "withdrawal" for purposes of Article 7.8 of the SCM Agreement, the United States conditionally appeals the Panel's finding that that tranche of LA/MSF expired in **[BCI]**. Panel Report, *EC – Large Civil Aircraft (21.5)*, Table 11; *ibid.*, para. 7.1(d)(iii).

[36] *See* US SWS, para. 183; PwC Amortization Report, Exhibit EU-5(BCI/HSBI), Annex 2.

[37] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.656, 7.1(c)(i).

[38] *See* EU SWS, paras. 495-496,

According to the EU, these legitimate concerns fall within the ambit of Article III:8(b) of the GATT 1994 (subsidies exclusively to domestic producers), and therefore the LA/MSF is not in breach of Article 3.1(b) of the SCM Agreement.

20. The Panel agreed, finding 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) of the SCM Agreement.[39] 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."[40]

21. However, Article 3.1(b) can be given a different reading, as the United States argued before the Panel.[41] Specifically, under a competing interpretation of Article 3.1(b), where a subsidy is contingent on domestic production of a good that is an input into a manufacturing process, and substituting an imported version for the domestic version of that input would result in the loss of an entitlement to the subsidy, the subsidy is contingent on the use of domestic over imported goods in breach of Article 3.1(b). In particular, the United States argued that, where in order to receive a subsidy a manufacturer must use goods that are produced in the grantor's territory (and therefore domestic), the subsidy is contingent on the use of domestic over imported goods in breach of Article 3.1(b). The United States argued that this was the case for LA/MSF for the A350 XWB.

22. To be clear, after litigating this issue before the Panel, considering the Panel's reasoning, and litigating the same interpretive issue in a separate dispute (*US – Conditional Tax Incentives for Large Civil Aircraft (DS487))* still pending before a different panel, the United States considers this is not the best interpretation of Article 3.1(b). However, the United States has an interest in ensuring that the same legal approach is applied in this proceeding and in *US – Conditional Tax Incentives for Large Civil Aircraft*, a dispute in which the United States is the responding party.

23. Moreover, should the Appellate Body determine that this competing interpretation of Article 3.1(b) is indeed correct, then there is no question that the Panel here erred in finding that the French, German, Spanish, and UK LA/MSF for the A350 XWB do not constitute import substitution subsidies prohibited by 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 are contingent on the use of domestic over imported goods. Therefore, to the extent that the

[39] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.790.

[40] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.788.

[41] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.745.

Appellate Body considers that the competing interpretation of Article 3.1(b) is correct, and the Panel's interpretation of that provision is incorrect, the United States requests that the Appellate Body *reverse* the Panel's findings that French, German, Spanish, and UK LA/MSF for the A350 XWB are not inconsistent with Article 3.1(b),[42] complete the analysis, and *find* instead that they are in breach of Article 3.1(b).

24. Below, Section A further describes the contrast between the Panel's interpretation of Article 3.1(b) of the SCM Agreement and the competing interpretation of Article 3.1(b). Section B demonstrates that, assuming *arguendo* that the Appellate Body finds that the competing interpretation of Article 3.1(b) is correct, it can complete the analysis because the undisputed facts and Panel findings establish that all four instances of LA/MSF for the A350 XWB are contingent on the use of domestic over imported goods.

A. The Competing Interpretation of Article 3.1(b)

25. The competing interpretation of Article 3.1(b) – 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.

26. As the United States details further in Section B, there is no question that the subsidies at issue in this dispute are contingent upon a whole host of intermediate goods (and goods used as instrumentalities to produce other goods) being produced in the EU and then used to manufacture the A350 XWB. The logic is simple. 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.

27. 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.[43] The Panel found that a review of both provisions "suggests that the act of granting subsidies to firms so long as they engage in

[42] Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.790, 7.1(c)(ii).

[43] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.783.

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."[44] The Panel then observed that subsidies found in the past to be contingent on the use of domestic over imported goods have "contained elements requiring firms to use certain amounts of domestic goods as production inputs, i.e. to *discriminate* between upstream sources of domestic and imported goods in favour of the former."[45] The Panel then observed by contrast that it detected "no GATT or WTO dispute settlement report, however, in which it was found, or in which it was even seriously suggested, that a subsidy could be characterized as being contingent on the use of domestic over imported goods simply because the subsidy was only available to a firm so long as it engages in domestic production activities."[46]

28. 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.

29. 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. Furthermore, as the United States demonstrates in the ensuing section, if the Appellate Body confirms that this competing interpretation is correct, then it can complete the analysis based on undisputed facts and Panel findings in this dispute, which establish that all four instances of A350 XWB LA/MSF are contingent on the use of domestic over imported goods in breach of Article 3.1(b) of the SCM Agreement.

B. Under the Competing Interpretation of Article 3.1(b), Uncontested Facts and Panel Findings Establish that All Four Instances of LA/MSF for the A350 XWB are Contingent on the Use of Domestic Over Imported Goods to Manufacture the A350 XWB.

30. 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

[44] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.785.

[45] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.786 (emphasis original).

[46] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.786.

the entitlement to the LA/MSF. The Panel reviewed four different "types of contingencies" in the LA/MSF contracts and then assumed *arguendo* in the legal analysis that followed that all four contingencies, when satisfied, result in the manufacture of LCA-related goods in the territories of the respective grantors.[47] This underscores the point that the panel's ultimate conclusion relied on its legal interpretation of what Article 3.1(b) prohibits, which the United States has contrasted above with a competing theory that is also under consideration in *US – Conditional Tax Incentives for Large Civil Aircraft*.

31. However, it is worth noting that the panel did still discuss the contingencies, observing in particular that "certain contracts appear to enumerate specific A350XWB components to be produced in the grantor's territory."[48] Nevertheless, the United States reviews below the undisputed facts from each of the LA/MSF contracts containing the contingencies, as well as other relevant evidence.

1. France

32. France granted LA/MSF for the A350 XWB – which was found to be a subsidy[49] – contingent on Airbus fulfilling certain requirements contained in the French A350XWB *Protocole*. Pursuant to Article 9.1 of the French A350 XWB *Protocole*, **[BCI]**.[50]

33. As the United States discusses below, the requirements in the French A350 XWB *Protocole* upon which the subsidy is contingent necessitate the use of domestic goods to manufacture the A350 XWB.[51] Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts contained in the French A350 XWB *Protocole* establish that the subsidy is contingent on the use of domestic over imported

[47] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.776.

[48] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.776.

[49] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.656, 7.1(c)(i).

[50] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 9.1.

[51] There is some question as to whether every object that results from each production step is a "good" that is "used" in the next production step. The Appellate Body may consider that some objects are not goods that are used within the meaning of Article 3.1(b), while other more distinct inputs are. For example, an auto manufacturer likely "uses" as "goods" bolts that are traditionally purchased from a supplier. It is less clear, however, that every time a manufacturer assembling an auto alters the object at all – perhaps by screwing on one additional bolt – it is creating a new domestic good that it will then "use" in the next production step, however minimal (perhaps screwing on yet another bolt). The United States notes that, if the Division considers that it is necessary to distinguish between these two examples, the fact that Airbus is transporting these objects long distances to be fed into a separate downstream production process at a different facility is evidence in favor of finding that they are indeed goods that are used within the meaning of Article 3.1(b).

goods in breach of Article 3.1(b), and the Appellate Body can and should complete the analysis and make findings to this effect.

34. The A350 XWB requires **[BCI]**.[52] Because under the competing interpretation of Article 3.1(b), any good completed in a domestic territory is considered domestic without the need to analyze the relative significance of the manufacturing steps performed in the domestic territory, the proportion of foreign content contained in the good, rules of origin, or other considerations, the **[BCI]** would be domestic for purposes of Article 3.1(b). And because **[BCI]**, it would be theoretically possible to import this good instead of using a domestic version, meaning it would meet the requirement in Article 3.1(b) that the use of domestic goods be "over imported goods."[53] Furthermore, the LA/MSF agreements address the comprehensive program undertaken by Airbus to develop and produce the A350 XWB, including inputs and tooling developed specifically for that model as well as the finished LCA.[54] There is no question that, in manufacturing finished A350 XWBs, Airbus must use the **[BCI]**.

35. In light of Article 9.1 of the French A350 XWB *Protocole*, if **[BCI]**, Airbus would **[BCI]** French A350 XWB LA/MSF. Accordingly, under the competing interpretation of Article 3.1(b), the subsidy is contingent on the use of domestic over imported **[BCI]** in breach of Article 3.1(b), and the United States respectfully requests a finding to this effect.

36. French LA/MSF for the A350 XWB also requires Airbus **[BCI]**.[55] Indeed, Airbus constructed a new factory at **[BCI]**[56] Again, there is no question that, in manufacturing finished

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[52] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-03) (BCI); Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.757.

[53] The United States also notes that transporting a component, assembly, or other good long distances is evidence of a division or stopping point in the current production process. This evidence would be useful if the Appellate Body considers it relevant to distinguish between an integrated producer's "use" of a distinct input it could source from non-domestic entities and the resulting object from one production step in a series of production steps that form a largely continuous manufacturing process that is usually or always performed by a single producer in the marketplace, which may not constitute "use" within the meaning of Article 3.1(b). The United States notes that the EU argued before the Panel that the divisoin of A350 XWB production between France, Germany, Spain, and the UK was simply to reflect geographical division, within the EU, of responsibility for an "integrated production process." EU SWS, para. 496.

[54] Indeed, the uncontested facts, consisting of statements from Airbus personnel, make clear how specialized the A350 XWB production process is and the significant extent to which it differs from even previous Airbus programs. *See, e.g.*, A350 XWB Production Statement (Exhibit EU-129) (BCI/HSBI).

[55] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-03) (BCI); Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.757.

[56] A350 XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 12 & accompanying graphic; *see also ibid.*, para. 14 (indicating the associated investment). In addition, France stipulated that **[BCI]**. French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 2.1; *see* Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.757. This corroborates that the production of these inputs must be done in France.

A350 XWBs, Airbus must use the **[BCI]**. Once produced, the **[BCI]** is transported to Toulouse, where the final assembly line for the A350 XWB is located.[57] Therefore, it would be theoretically possible to import this good instead of using a domestic version, meaning it would meet the requirement in Article 3.1(b) that the use of domestic goods be "over imported goods."

37. In light of Article 9.1 of the French A350 XWB *Protocole*, if **[BCI]**, Airbus would **[BCI]** French A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), French A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, French A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.

38. Moreover, the United States considers that "use" in Article 3.1(b) includes the use of goods to produce other goods (*i.e.*, instrumentalities of production). For example, a subsidy to wheat farmers contingent on the use of domestic tractors would breach Article 3.1(b).

39. French A350 XWB LA/MSF requires **[BCI**[58]**]**.[59] It also requires that the **[BCI]**.[60]

40. Because the **[BCI]**, it is domestic for purposes of Article 3.1(b) under the competing interpretation of that provision. In addition, the **[BCI]** is produced specifically for the manufacture of the A350 XWB and as part of a comprehensive integrated production process. There is no question that, in manufacturing finished A350 XWBs, Airbus must use the **[BCI]**.

41. In light of Article 9.1 of the French A350 XWB *Protocole*, if **[BCI]**, Airbus would **[BCI]** French A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), French A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, French A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.

42. Because the **[BCI]**, it is domestic for purposes of Article 3.1(b) under the competing interpretation of that provision. In addition, the **[BCI]** is produced specifically for the manufacture of the A350 XWB and as part of a comprehensive integrated production process. There is no question that, in manufacturing finished A350 XWBs, Airbus must use the **[BCI]**.

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[57] A350 XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 12 & accompanying graphic.

[58] **[BCI]**.

[59] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-03) (BCI); Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.757.

[60] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-03) (BCI); Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.757.

43. In light of Article 9.1 of the French A350 XWB *Protocole*, if **[BCI]**, Airbus would **[BCI]** French A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), French A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, French A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.

44. Because the **[BCI]**, it is domestic for purposes of Article 3.1(b) under the competing interpretation of that provision. In addition, the **[BCI]** is produced specifically for the manufacture of the A350 XWB and as part of a comprehensive integrated production process. There is no question that, in manufacturing finished A350 XWBs, Airbus must use the **[BCI]**.

45. In light of Article 9.1 of the French A350 XWB *Protocole*, if Airbus used imported **[BCI]**, Airbus would **[BCI]** French A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), French A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, French A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.

46. Because the **[BCI]**, it is domestic for purposes of Article 3.1(b) under the competing interpretation of that provision. In addition, the **[BCI]** is produced specifically for the manufacture of the A350 XWB and as part of a comprehensive integrated production process. There is no question that, in manufacturing finished A350 XWBs, Airbus must use the **[BCI]**.

47. In light of Article 9.1 of the French A350 XWB *Protocole*, if **[BCI]**, Airbus would **[BCI]** French A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), French A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, French A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.

48. Because the **[BCI]**, it is domestic for purposes of Article 3.1(b) under the competing interpretation of that provision. In addition, the **[BCI]** is produced specifically for the manufacture of the A350 XWB and as part of a comprehensive integrated production process. There is no question that, in manufacturing finished A350 XWBs, Airbus must use the **[BCI]**.

49. In light of Article 9.1 of the French A350 XWB *Protocole*, if **[BCI]**, Airbus would **[BCI]** French A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), French A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, French A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.

50. Because the **[BCI]**, it is domestic for purposes of Article 3.1(b) under the competing interpretation of that provision. In addition, the **[BCI]** is produced specifically for the

manufacture of the A350 XWB and as part of a comprehensive integrated production process. There is no question that, in manufacturing finished A350 XWBs, Airbus must use the **[BCI]**, Airbus must use it to manufacture the A350 XWB.

51. In light of Article 9.1 of the French A350 XWB *Protocole*, if **[BCI]**, Airbus would **[BCI]** French A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), French A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, French A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.

52. Because the **[BCI]**, it is domestic for purposes of Article 3.1(b) under the competing interpretation of that provision. In addition, the **[BCI]** is produced specifically for the manufacture of the A350 XWB and as part of a comprehensive integrated production process. There is no question that, in manufacturing finished A350 XWBs, Airbus must use the **[BCI]**.

53. In light of Article 9.1 of the French A350 XWB *Protocole*, if **[BCI]**, Airbus would **[BCI]** French A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), French A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, French A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.

54. Because the **[BCI]**, it is domestic for purposes of Article 3.1(b) under the competing interpretation of that provision. In addition, the **[BCI]** is produced specifically for the manufacture of the A350 XWB and as part of a comprehensive integrated production process. There is no question that, in manufacturing finished A350 XWBs, Airbus must use the **[BCI]**.

55. In light of Article 9.1 of the French A350 XWB *Protocole*, if **[BCI]**, Airbus would **[BCI]** French A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), French A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, French A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.

2. Germany

56. Germany granted LA/MSF for the A350 XWB – which was found to be a subsidy[61] – contingent on Airbus fulfilling certain requirements contained in the German KfW A350XWB Loan Agreement. **[BCI]**. In turn, **[BCI]**.[62]

57. As the United States discusses below, the requirements in the German KfW A350XWB Loan Agreement upon which the subsidy is contingent necessitate the use of domestic goods to manufacture the A350 XWB.[63] Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts contained in the German KfW A350XWB Loan Agreement and annexes establish that the subsidy is contingent on the use of domestic over imported goods in breach of Article 3.1(b), and the Appellate Body can and should complete the analysis and make findings to this effect.

58. Germany granted LA/MSF contingent on Airbus's **[BCI]** "certain A350XWB components in Germany."[64] **[BCI]** provides as follows:

[[HSBI]]

59. Because each of these A350 XWB components must be produced in **[[HSBI]]**, all of which are in Germany, each of these components is a domestic good under the competing interpretation of Article 3.1(b). Moreover, each of these A350 XWB components is either transported to Toulouse for final assembly, or incorporated into larger subassemblies that are transported to Toulouse for final assembly.[65] Therefore, it would be theoretically possible to import each of these goods instead of using a domestic version, meaning it would meet the requirement in Article 3.1(b) that the use of domestic goods be "over imported goods." Furthermore, each of these goods is specially designed as a component of the A350 XWB and is part of an "integrated production process" to manufacture the A350 XWB addressed by the

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[61] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.656, 7.1(c)(i).

[62] German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI).

[63] *See supra*, note 51.

[64] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.760. The **[BCI]** LA/MSF contracts contain **[BCI]** that are consistent with and corroborate the requirements to produce goods in the grantor's territory that Airbus must use to manufacture the A350XWB. *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.776; German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), sections 15.4-15.5.

[65] *See* A350 XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 12 & accompanying graphic; *ibid.*, para. 20 (discussing the purposes of the new facilities in Stade and **[BCI]**); *see also ibid.*, para. 14 (indicating the associated investment).

LA/MSF agreements.[66] There is no question that, in manufacturing finished A350 XWBs, Airbus must use these goods that are required to be produced in Germany.[67]

60. In light of **[BCI]**:

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** to German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

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[66] EU SWS, para. 496. Indeed, Airbus constructed a new factory in Broughton for A350 XWB wing assembly, and another new factory in Filton for the Airbus supplier GKN to produce the wing fixed trailing edge. *See* A350 XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 12 & accompanying graphic; *see also ibid.*, para. 14 (indicating the associated investment).

[67] This is reinforced by the fact that the LA/MSF agreements are for the A350 XWB and, as the EU acknowledges, divide between France, Germany, Spain, and the UK responsibility for the A350 XWB production process. *See* EU SWS, para. 496.

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]**German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article

3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article

3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[[HSBI]]** instead of the domestic **[[HSBI]]**, Airbus would **[BCI]** German A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), German A350 XWB LA/MSF is contingent on the use of domestic over imported **[[HSBI]]**. Accordingly, German A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.

3. Spain

61. Spain granted LA/MSF for the A350 XWB – which was found to be a subsidy[68] – contingent on Airbus fulfilling certain requirements contained in the Spanish A350XWB *Convenio*. Section 11 of the Spanish A350XWB *Convenio* states: **[BCI]**.[69]

62. As the United States discusses below, the requirements in the Spanish A350XWB *Convenio* upon which the subsidy is contingent necessitate the use of domestic goods to manufacture the A350 XWB..[70] Therefore, if the Appellate Body determines that the competing interpretation of Article 3.1(b) is correct, the undisputed facts contained in the Spanish A350XWB *Convenio*[71] establish that the subsidy is contingent on the use of domestic over imported goods in breach of Article 3.1(b), and the Appellate Body can and should complete the analysis and make findings to this effect.

63. Spain granted LA/MSF for the A350 XWB contingent on Airbus's commitment to produce in Spain the lower wing cover, horizontal stabilizer, belly fairing, Section 19 (*i.e.*, the aft fuselage barrel), and Section 19.1 (*i.e.*, the tail cone).[72] The Spanish A350XWB *Convenio* states that these goods are to be supplied to the final assembly line in Toulouse, meaning they are capable of being transported over long distances.[73] Therefore, it would be theoretically possible to import each of these goods instead of using a domestic version, meaning it would meet the requirement in Article 3.1(b) that the use of domestic goods be "over imported goods." Furthermore, each of these goods is specially designed as a component of the A350 XWB and is part of an "integrated production process" to manufacture the A350 XWB addressed by the

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[68] *See* Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.656, 7.1(c)(i).

[69] Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29) (BCI/HSBI), p. 7.

[70] *See supra*, note 51.

[71] As the Panel notes, "{t}he prior *Real Decreto* indicated the governments's commitment to provide the sums and, broadly, some conditions of LA/MSF." Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.764.

[72] Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29) (BCI/HSBI), p. 2; Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.766-6.767. The Spanish *Convenio* states that Airbus's Spanish affiliate "has responsibility for certain non-specific design activities such as the development and serial final production of certain subassemblies of the A350 XWB aircraft, such as the lower wing cover as well as the integration and supply to the final assembly line of the aircraft in Toulouse (France) of the aircraft's horizontal stabilizer, the belly fairing, and sections 19 and 19.1 {*i.e.*, the aft fuselage barrel and tail cone}." Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29) (BCI/HSBI), p. 2.

[73] Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29) (BCI/HSBI), p. 2; Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 6.767.

LA/MSF agreements.[74] There is no question that, in manufacturing finished A350 XWBs, Airbus must use these goods that are required to be produced in Spain.[75]

64. In light of Section 11 of the Spanish A350XWB *Convenio*:

- if Airbus used imported lower wing covers instead of the domestic lower wing covers produced in Spain, Airbus would **[BCI]** Spanish A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), Spanish A350 XWB LA/MSF is contingent on the use of domestic over imported lower wing covers. Accordingly, Spanish A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported horizontal stabilizers instead of the domestic horizontal stabilizers produced in Spain, Airbus would **[BCI]** Spanish A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), Spanish A350 XWB LA/MSF is contingent on the use of domestic over imported horizontal stabilizers. Accordingly, Spanish A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported belly fairings instead of the domestic belly fairings produced in Spain, Airbus would **[BCI]** Spanish A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), Spanish A350 XWB LA/MSF is contingent on the use of domestic over imported belly fairings. Accordingly, Spanish A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported Section 19s instead of the domestic Section 19s produced in Spain, Airbus would **[BCI]** Spanish A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), Spanish A350 XWB LA/MSF is contingent on the use of domestic over imported Section 19s. Accordingly, Spanish A350 XWB

[74] EU SWS, para. 496. Indeed, Airbus extended an existing factory in Getafe, Spain to allow for the production of "horizontal tailplane assembly/equipping," and a factory in Illescas, Spain for "composite wing cover manufacture." A350 XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 12 & accompanying graphic; *see also ibid.*, para. 14 (indicating the associated investment). The Illescas facility "spans over 80,000m^2, and integrates numerous new production processes for producing the lower wing cover." A350 XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 20

[75] This is reinforced by the fact that the LA/MSF agreements are for the A350 XWB and, as the EU acknowledges, divide between France, Germany, Spain, and the UK responsibility for the A350 XWB production process. *See* EU SWS, para. 496.

LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported Section 19.1s instead of the domestic Section 19.1s produced in Spain, Airbus would **[BCI]** Spanish A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), Spanish A350 XWB LA/MSF is contingent on the use of domestic over imported Section 19.1s. Accordingly, Spanish A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.

4. UK

65. The UK granted LA/MSF for the A350 XWB – which was found to be a subsidy[76] – contingent on Airbus fulfilling certain requirements contained in the UK A350XWB Repayable Investment Agreement.[77] Pursuant to Section 21.14 of the UK A350XWB Repayable Investment Agreement, **[BCI]**.[78]

66. As the United States discusses below, the requirements in the UK A350XWB Repayable Investment Agreement upon which the subsidy is contingent necessitate the use of domestic goods to manufacture the A350 XWB.[79] 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 goods in breach of Article 3.1(b), and the Appellate Body can and should complete the analysis and make findings to this effect.

67. The UK granted LA/MSF for the A350 XWB contingent on **[BCI]**.[80] In particular, Section 20.2(a) states:

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[76] Panel Report, *EC – Large Civil Aircraft (21.5)*, para. 7.1(c)(i).

[77] Exhibit EU-(Article 13)-30) (BCI/HSBI).

[78] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI). Section 21.14 of the UK A350XWB Repayable Investment Agreement states: **[BCI]**. In turn, **[BCI]**.

[79] *See supra*, note 51. In addition, Section 20.3 of the UK A350XWB Repayable Investment Agreement requires Airbus to **[BCI]**. UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), Section 20.3(a); *see also* Panel Report, *EC – Large Civil Aircraft (21.5)*, para.6.774, fourth bullet. The UK A350XWB Repayable Investment Agreement also contains a similar provision with respect to **[BCI]**. UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), Section 20.2(a)(iii) (requiring Airbus to **[BCI]**.

[80] **[BCI]**.

[BCI][81]

68. Because each of these A350 XWB components must be produced in the UK, each of these components is a domestic good under the competing interpretation of Article 3.1(b). Moreover, each of these A350 XWB components is transported a long distance to Toulouse under Airbus's current production process. Therefore, it would be theoretically possible to import each of these goods instead of using a domestic version, meaning it would meet the requirement in Article 3.1(b) that the use of domestic goods be "over imported goods." Furthermore, each of these goods is specially designed as a component of the A350 XWB and is part of an "integrated production process" to manufacture the A350 XWB addressed by the LA/MSF agreements.[82] There is no question that, in manufacturing finished A350 XWBs, Airbus must use these goods that are required to be produced in the UK.

69. In light of Section 21.14 of the UK A350XWB Repayable Investment Agreement:

- if Airbus used imported **[BCI]** instead of the domestic **[BCI]**, Airbus would **[BCI]** UK A350 XWB LA/MSF.[83] Therefore, under the competing interpretation of Article 3.1(b), UK A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, UK A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[BCI]** instead of the domestic **[BCI]**, Airbus would **[BCI]** UK A350 XWB LA/MSF. Therefore, under the competing interpretation of Article 3.1(b), UK A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, UK A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect;

- if Airbus used imported **[BCI]** instead of the domestic **[BCI]**, Airbus would **[BCI]** UK A350 XWB LA/MSF. Therefore, under the competing interpretation of

[81] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), Section 20.

[82] EU SWS, para. 496. Indeed, Airbus constructed a new factory in Broughton for A350 XWB wing assembly, and another new factory in Filton for the Airbus supplier GKN to produce the wing fixed trailing edge. *See* A350 XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 12 & accompanying graphic; *see also ibid.*, para. 14 (indicating the associated investment).

[83] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI). UK A350XWB Repayable Investment Agreement **[BCI]**. *See* UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), Section 20.2. This, combined with the requirement **[BCI]** is tantamount to a prohibition on transferring the production elsewhere. This is corroborated by the requirmrement that **[BCI]**. *See* UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), Section 20.1; Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.773, 6.774.

Article 3.1(b), UK A350 XWB LA/MSF is contingent on the use of domestic over imported **[BCI]**. Accordingly, UK A350 XWB LA/MSF would be in breach of Article 3.1(b) of the SCM Agreement, and the United States respectfully requests a finding to this effect.