****** Check Against Delivery ******

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

(AB-2010-1 / DS316)

Oral Statement of the United States at the First Oral Hearing

November 11, 2010

Table of Contents

Table of Reports. ii

Introduction. 1

A. Non-retroactivity. 2

B. The alleged extinction, extraction, or withdrawal of subsidies. 7

C. The benefit conferred by LA/MSF. 14

D. Export-contingent subsidies. 18

E. LA/MSF as a program. 25

F. Infrastructure. 31

G. Capital contributions to Aérospatiale. 33

H. Specificity of EU research and development programs. 35

Conclusion. 36

Table of Reports

Short Form	**Full Citation**
Panel Report	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, circulated on 30 June 2010
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
EC – Customs Matters (AB)	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
EC – Hormones (AB)	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines,* WT/DS231/AB/R, adopted 23 October 2002
US – Continued Zeroing (AB)	Appellate Body Report, *United States - Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Countervailing Measures (Panel)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, as modified by the Appellate Body Report, WT/DS212/AB/R
US – Countervailing Measures (AB)	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003

US – Lead and Bismuth II (AB)	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000

****** Check Against Delivery ******

Introduction

1. Mr. Chairman and members of the Division: Thank you for coming here today to help us resolve the issues raised in the appeals in this proceeding. Our oral statement today will focus on the issues that the Division has identified as the subject of this first hearing.

2. We are here today because the Panel in this dispute found that the European Union and certain member States – France, Germany, Spain, and the United Kingdom – gave massive subsidies for the development and production of Airbus large civil aircraft. The total amount involved is more than any WTO panel has found in any previous dispute. The subsidies took the form of:

- at least US $15 billion in Launch Aid (or Member State Financing), which the Panel called LA/MSF;
- at least 1.2 billion euros in research subsidies from the EU, France, Germany, Spain, and the UK;
- approximately FF 10 billion in equity infusions by the French government;
- DM 505 million in equity infusions by the German government;
- DM 751 million in non-general infrastructure by the government of Hamburg; and
- a variety of smaller amounts given by other authorities.

These payments together amounted to at least US $18 billion. The European Union has shown no error with the Panel's findings on these points.

3. The European Union has conceded that, if compared with benchmarks based on the market practice of commercial actors, the $15 billion in LA/MSF were specific subsidies within the meaning of Articles 1 and 2 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). On appeal, it directs its arguments to chipping away at the amount of that money that is attributed to Airbus aircraft, without even attempting to challenge the fact that they are subsidies. It asserts that the Panel should have disregarded these subsidies because some of

the funds were paid before entry into force of the SCM Agreement, or because reorganizations of the companies that built Airbus aircraft somehow extinguished, extracted, or withdrew subsidies, or that the massive subsidies somehow had no meaningful effect on aircraft produced in the United States. However, these arguments do not achieve the EU goal of making the subsidies disappear.

4. Nothing in the SCM Agreement creates the exemption that the EU seeks for all non-recurring subsidies granted prior to entry into force of the WTO Agreement. In fact, the text itself indicates that Members never agreed to create such a vast grandfather provision, which would be directly contrary to the object and purpose of the agreement. And the various steps of the Airbus corporate reorganization between 1989 and 2006 did nothing to change the benefit conferred by past and continued access to all of these subsidies.

5. The European Union deploys several other strategies to reduce or eliminate the benefit that the Panel correctly identified as conferred by LA/MSF. In particular, the European Union asserts that the terms of the 1992 U.S.-EU bilateral agreement on support for large civil aircraft supplant the subsidies disciplines in the SCM Agreement. The 1992 agreement has no relevance to this inquiry, as the agreement states that it does not affect the parties' rights under GATT 1947 or any successor agreements. The European Union also attacks various aspects of the Panel's evaluation of the interest rate benchmarks proposed by the parties, but in reality its arguments to reduce the benefit of LA/MSF do not raise legal issues at all. They boil down to a disagreement with the weight the Panel placed on different pieces of evidence, and demonstrate no legal inconsistency with the SCM Agreement, or any failure by the Panel to comply with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

A. Non-retroactivity

6. Before launching into a discussion of the EU's assertions regarding application of the non-retroactivity principle reflected in Article 28 of the Vienna Convention on the Law of Treaties, it is useful to take a step back and put those arguments in their historic perspective. The

SCM Agreement is one result of the Uruguay Round of trade negotiations. There is no denying that those negotiations sought to develop disciplines to address problems with subsidies that existed at that time. Negotiators refer to their existing concerns again and again in the negotiating history cited by both parties. The resulting text contains numerous provisions directed at solving existing problems.

7. There is also no denying that LA/MSF was one of those existing concerns. By the date of entry into force of the SCM Agreement, Airbus had received LA/MSF for all five of its existing models: the A300 (under a 1969 agreement), the A310 (starting in the late 1970s), the A320 (starting in 1983), and the A330 and A340 (starting in 1987). Most of the money conferred to Airbus through these subsidies remained outstanding in 1995, with any payments subject to lower-than-market terms. Airbus also received more traditional subsidies – equity infusions, infrastructure, and research and development funding. All of the aircraft developed with these funds remained in the market. And LA/MSF was plainly an active concern for the negotiators of the SCM Agreement, as witnessed by footnote 16 of the SCM Agreement, which addresses the treatment of "royalty-based financing for a civil aircraft program."

8. The European Union argues that customary international law prohibits the application of the SCM Agreement to the adverse effects caused on the date of entry into force, and afterward, by the use of subsidies granted before entry into force. To interpret the text in this way implies that the negotiators of the SCM Agreement developed a text to address their existing concerns, and then decided first to exempt all existing subsidies from that text and, second, to provide nothing explicit in the text to make this happen. There is no basis in the text of the SCM Agreement or its negotiating history to support this implausible outcome. Where WTO Members sought to grandfather existing measures or provide transition measures, they were explicit – as in the Annex to the *Agreement on Safeguards*. Elsewhere, the covered agreements applied immediately upon entry into force. The absence in the SCM Agreement of an explicit exclusion for pre-1995 subsidies should end the inquiry.

9. In its attempt to rebut this conclusion, the European Union advances two lines of argument. First, it asserts that the non-retroactivity rule in Article 28 of the Vienna Convention prevents application of the SCM Agreement to the effects of subsidies granted before 1995. Second, it argues that independent of Article 28, the SCM Agreement frames its obligations in a way that precludes their application when a subsidy granted before January 1, 1995, has effects afterward. Neither argument is correct.

10. We begin with Article 28 of the Vienna Convention, which both parties agree states the non-retroactivity rule relevant to interpretation of the covered agreements. It provides in full that:

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

As this standard addresses how a treaty may – or may not – "bind" a party, the first step is to identify how a proposed interpretation of the treaty would "bind" a party. This inquiry, by necessity, involves a consideration of how the relevant treaty provision operates. The second step is to identify whether what is bound is an act or fact that took place, or a situation that ceased to exist, prior to entry into force of the treaty.

11. The European Union argues that the Panel erred in taking the first step of analyzing the treaty provision in question. In fact, the European Union asserts that "the characterization of the obligations enshrined in such a treaty as acts, facts or situations is irrelevant."[1] In its view, Article 28 of the Vienna Convention instead "required the Panel 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 afterwards."[2] We will focus

---

[1] EU Appellant Submission, para. 32.
[2] EU Appellant Submission, para. 33.

today on this last statement, and in particular the phrase "relevant government conduct," because it encapsulates the two critical errors in the EU approach to Article 28.

12. First, consider "relevant." The United States does not object to the view that the non-retroactivity analysis should focus on what is "relevant." However, the EU makes its point about focusing on "relevant government conduct" after having argued that the Panel should not have considered the "obligations enshrined in the agreement." The United States does not see any way to reconcile these statements because the only way to determine what is "relevant" to the non-retroactivity analysis is to look at the treaty obligation in question. That is exactly what the Appellate Body itself has done in approaching retroactivity.[3]

13. In this case, the relevant obligation is Article 5 of the SCM Agreement, which states:

> 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 . . . .

The Article then continues to list potential categories of adverse effects, which include "injury to the domestic industry of another Member" and "serious prejudice to the interests of another Member." Article 6.3 subsequently specifies that "serious prejudice" includes lost sales, displacement or impedance of imports, and price suppression or depression.

14. The obligation here is not to cause adverse effects through the use of subsidies. Thus, the action affected by the obligation is "causing," and the object of the obligation is the adverse effects. The subsidy, as the Panel recognized, is the agent or mechanism "used" to yield the prohibited adverse effects. To go back to Article 28 of the Vienna Convention, Article 5 of the SCM Agreement "binds" the Member in relation to causing adverse effects, which is the "relevant" act, fact, or situation for the non-retroactivity analysis. The European Union asserts that the relevant act, fact, or situation is the granting of subsidies. However, Article 5 disciplines causing adverse effects through the "use" of subsidies, and not merely the act of granting them.

---

[3] *E.g., EC – Sardines (AB)*, paras. 201-215.

Therefore, the EU understanding of what is "relevant" to the analysis is clearly wrong.

15. The second fundamental error evident in the EU approach is its insistence that "government conduct" is the focus of the non-retroactivity analysis. Article 28 of the Vienna Convention frames the standard in terms of a treaty binding a party "in relation to" an act, fact, or situation. It is important here to recognize that while governments (including international bodies) are the parties to treaties, and subject to legal obligations under treaties, those obligations may be "in relation to" non-governmental acts, facts, or situations. In our appellee submission, we gave the examples of pollution, toxic waste, or persons fleeing justice as non-governmental acts, facts, or situations in relation to which a treaty might bind its parties. To address the issue on a more abstract level, at its most basic, a treaty obligation can be conceived of as a sentence containing a subject (the government party), a verb (the action that the government shall or shall not take), and an object (the thing with regard to which the government takes action). Just as it is clear that a government is always the subject of the legal obligation, it is clear that the object of that obligation – to use the terminology of Article 28, the act, fact, or situation "in relation to" which the government is bound – need not be government action.

16. In the case of Article 5 of the SCM Agreement, a WTO Member has an ongoing obligation not to cause adverse effects through the use – including the use by the non-government recipient – of a subsidy that the Member granted at an earlier time. The actions of a non-government actor – such as a recipient's particular use of a subsidy – may trigger an obligation for the government to take positive steps to comply with its obligation not to cause adverse effects. The European Union's mistake is in confusing the subject of the obligation – the government – with the conditions – the adverse effects caused through the use of subsidies – that may trigger an obligation to address those adverse effects. The Panel did not make that mistake and, accordingly, achieved the correct result.

17. The European Union also argues that the SCM Agreement itself indicates that subsidies granted before 1995 are not subject to its disciplines. The European Union does not contend that

there is an explicit statement to this effect, but rather argues that the existence of the exclusion can be inferred from various provisions of the agreement. It is difficult to imagine that the negotiators of the SCM Agreement would have sought to achieve such a significant narrowing of the scope of the agreement without an explicit statement to that effect.[4] Therefore, in our view, the absence of any explicit exclusion is compelling evidence that the SCM Agreement applies to subsidies, and the adverse effects of subsidies, without regard as to the date of the grant. Once again, that is precisely what Article 5 suggests in focusing on "adverse effects" as opposed to the granting of the subsidy.

B. The alleged extinction, extraction, or withdrawal of subsidies

18. The European Union's various arguments regarding extinction, extraction, withdrawal, and "pass-through" of subsidies reflect another avenue by which it seeks to artificially reduce the value of the subsidies granted to Airbus. To be sure, the Appellate Body has in the past found that the full privatization of a government-owned company can eliminate the benefit conferred on the company by past subsidies in certain circumstances. But none of the transactions at issue in this dispute was a full privatization, and most were not at arm's length. What the European Union seeks is a radical expansion of the Appellate Body's privatization reasoning to cover transactions to which that reasoning does not apply, and in a legal context where such an expansion makes no sense.

19. The U.S. appellee submission discusses how the extinction analysis that the European Union wishes to apply is really one that is relevant only in a countervailing duty, and not an Article 5 context. The United States will focus on three points in today's presentation. First, the Appellate Body really meant what it said when it found that the panel in *US – Countervailing*

[4] *EC – Sardines (AB)*, para. 208 ("we must conclude that, if the negotiators had wanted to exempt the very large group of existing technical regulations from the disciplines of a provision as important as Article 2.4 of the TBT Agreement, they would have said so explicitly."), *citing EC – Hormones (AB)*, para. 128, footnote 17.

Measures on Certain EC Products "went too far."[5] It meant that the legal principles developed for addressing full privatizations at arm's length and for fair market value do not extend to all transactions involving the sale of all or part of a subsidized company. The second, and related, point is that Articles 1 and 2 of the SCM Agreement do not support the EU view that an arm's length, fair market value transaction will extinguish past subsidies as long as it involves a "significant" block of shares. This is especially true given that the European Union views transactions involving as little as 0.93 percent of the shares of a subsidy recipient as "significant." The third point relates to the EU claim of "withdrawal" of subsidies. Article 7.8 of the SCM Agreement provides that a Member may "withdraw" a WTO-inconsistent subsidy as one way to remedy the WTO inconsistency. It does not suggest that transfers in the ownership of a company can "withdraw" a previously granted subsidy, or that the analysis of whether a subsidy exists in the first place must incorporate that possibility.

20. But before addressing these points, it is useful by way of background to discuss the past situations in which the Appellate Body has found that a transaction involving the ownership of a company extinguishes past subsidies, and the reasons that it reached this conclusion. The relevant findings appear in two reports – *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* – covering a total of five transactions. The Appellate Body noted in *US – Countervailing Duties on Certain EC Products* that "{b}oth participants agree that the changes in ownership relevant to this dispute concern only privatizations, that is, the change in ownership from government to private hands."[6] The same situation prevailed in *US – Lead and Bismuth II.*[7] In *US – Countervailing Measures on Certain EC Products*, the Appellate Body specified that "{a}ll the privatizations concerned in this dispute involved a full change in ownership in the sense that in all 12 cases, governments had sold all, or substantially all, their ownership interests and, clearly, no longer had any controlling interests in the privatized

[5] *US – Countervailing Measures on Certain EC Products (AB)*, para. 116.
[6] *US – Countervailing Measures on Certain EC Products (AB)*, para. 2.
[7] *US – Lead and Bismuth II*, para. 2.

producers."[8] Again, the same was true in *US – Lead and Bismuth II*.[9] The parties also agreed that each of the transactions was at arm's length and for fair market value.[10]

21. This dispute over large civil aircraft presents a critically different set of facts. The parties agree that the transactions in question were *not* full privatizations, and that most of them involved no transfer whatsoever between government and private parties. Only with regard to one of the transactions, the Aérospatiale public offering of 1999, does the European Union even claim that there was some element of privatization. In that instance, only 50 percent of shares were sold to private entities.[11] The European Union does not pretend that this represented "all, or substantially all" of the French State's ownership interest. Finally, the Panel specifically noted that none of the transactions in question (with the exception of the stock exchange value of EADS shares) was on arm's length terms.[12] The Panel also found that none of the transactions involved transfer of all or substantially all of a state-owned producer, or the relinquishment of control.[13]

22. It is also important to look at *why* the Appellate Body found that prior subsidy benefits did not survive the transactions considered in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products*. In *US – Lead and Bismuth II*, the Appellate Body explained that:

> In the present case, the Panel made factual findings that UES and BSplc/BSES paid fair market value for all the productive assets, goodwill, etc., they acquired from 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

---

[8] *US – Countervailing Measures on Certain EC Products (AB)*, para. 2.
[9] *US – Lead and Bismuth II*, para. 2.
[10] *US – Countervailing Measures on Certain EC Products (AB)*, para. 2; *US – Lead and Bismuth II*, para. 2.
[11] EU Appellant Submission, para. 147.
[12] Panel Report, para. 7.249.
[13] Panel Report, para. 7.249.

> contributions" bestowed on BSC between 1977 and 1986 could not be deemed to confer a "benefit" on UES and BSplc/BSES.[14]

In a conclusion that the Appellate Body endorsed, the panel in *US – Countervailing Measures on Certain EC Products* explained that:

> Privatization is a very particular and complex change in ownership. It involves a fundamental transformation of a government-owned and controlled entity into a privately-owned, market-oriented company. Following privatization and consistent with commercial principles, the owners of the privatized company should be profit-maximizers, set on obtaining a market return on the entirety of their investment in the privatized company. Ultimately, therefore, the owners' investment in the privatized company will be recouped through the privatized company providing its owners a market return on the full amount of their investment.[15]

The Panel concluded that a reevaluation of the subsidy benefit was necessary in the transactions at issue because:

> In the 12 cases before us the governments had severed their control over the state-owned producers upon privatization. The privatized producers could no longer rely on government financing for their operations and could no longer receive things for free. Indeed, it is reasonable to assume that the act of privatization has involved a payment for the assets and the shares of the state-owned producer. A payment for consideration necessarily implies that the privatized producer may not have received anything for free.[16]

23. It should be clear that none of this was true for the reorganization activities highlighted by the European Union. Six of them involved transfers between private parties, so there was no change from government ownership to "profit-maximizing" private ownership. Of the three transfers involving government entities, one was between two government entities, so it changed nothing with regard to control by the government. Another involved only three percent of EADS

---

[14] *US – Lead and Bismuth II*, para. 68.

[15] *US – Countervailing Measures on Certain EC Products (Panel)*, para. 7.60, *quoted in US – Countervailing Measures on Certain EC Products (AB)*, para. 103.

[16] *US – Countervailing Measures on Certain EC Products (Panel)*, para. 7.65.

shares, which was too minor to change anything. In the final transaction, the French State sold 50 percent of Aérospatiale's shares in 1999, but it remained the largest single shareholder and retained a golden share that prevented it from losing control.[17] It is also important to note that when the European Commission considered the overall effect of the reorganization activities that led to the creation of EADS, it concluded that "there was no indication that the operation 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."[18]

24. It should also be clear that the reorganization activities changed nothing about the financial options available to the Airbus companies. They continued to have access to LA/MSF, the unique form of financing available to European aeronautics sector companies. In fact, the largest ever grants of LA/MSF, which were for the A380, occurred immediately after the reorganization, ensuring that Airbus would continue to enjoy the benefits of LA/MSF for decades to come. They continued to receive research subsidies through Framework Programmes, and to benefit from infrastructure subsidies. Thus, unlike the transactions addressed in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products*, it could not be said that the new owners "could no longer rely on government financing and could no longer receive things for free."

25. It should also be clear that, because none of the transactions effected a full change in ownership, there can be no conclusion, as in *US – Lead and Bismuth II,* that the purchasers "paid fair market value for all the productive assets, goodwill, etc., they acquired." In a full privatization, since the purchasers pay for everything, this enables the conclusion that they also paid the fair value of any remaining subsidy benefit. The "purchasers" in the reorganization activities in this dispute did not buy everything. They merely bought a share of ownership in an entity that in turn owned productive assets. There is no basis to conclude that they paid for one

[17] US FNCOS, para. 118.

[18] Panel Report, para. 7.199, citing European Commission, Merger Procedure Article 6(2) Decision, Case No. COMP/M.1745 - EADS, para. 16 (11 May 2000) (Exhibit US-479).

particular element of value in the company over another, or that their share purchase somehow resulted in an effective repayment of subsidy value to the government.

26. In short, the transactions at issue in this dispute differ markedly from those in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products*. Those differences are so great that the reasons advanced by the Appellate Body for requiring a reevaluation of whether past subsidies continued to confer a benefit simply do not apply.

27. In addition to this overarching observation, the United States has four, more targeted points to make about the EU arguments on this issue. The first follows directly from our discussion of the transactions covered by the previous Appellate Body findings on the extinction of past subsidies, and the reasoning behind those findings. Those conclusions depend on the unique situation of an arm's length, fair-market-value privatization involving all or substantially all of the assets of a company. There is a transition from government control to private control, with corresponding changes in the types of financing available to the company and an imperative to devote any financing to profit-making activities. Because new owners purchased everything, there can be a conclusion that the price covered the benefit associated with past subsidies. In line with these facts, the Appellate Body stated with particular force in *US – Countervailing Measures on Certain EC Products* that:

> The Panel had to consider 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) and only one kind of benefit (that is, a benefit originating from a non-recurring financial contribution bestowed to the state-owned enterprise before privatization). The Panel should have confined its findings to those specific circumstances.[19]

Attempting to apply this reasoning outside the context of the particular type of privatization at issue in *US – Countervailing Measures on Certain EC Products* would accordingly conflict with

[19] *US – Countervailing Measures on Certain EC Products (AB)*, para. 117.

the Appellate Body's finding. The European Union attempts to give broader application to statements elsewhere in the report, but it never provides any legitimate reason to disregard the limitations so explicitly and forcefully laid out by the Appellate Body.

28. The second point is that the European Union has identified nothing in the SCM Agreement that supports its view that any arm's length, fair-market-value transaction involving a "significant" portion of the company's shares would partially extinguish past subsidies. It relies on Article 1.1 of the SCM Agreement, which provides that a subsidy is deemed to exist if there is a financial contribution and "a benefit is thereby conferred." The European Union views the use of the present tense as creating a "requirement to examine whether the subsidy, because of the passage of time, is still capable of causing present adverse effects."[20] It then asserts that the subsequent sale of a significant portion of a company's shares extinguishes a subsidy "because it by definition *includes the market value of the subsidy created by the original financial contribution*," it therefore "also removes the benefit of this subsidy."[21] These statements are wrong on a number of levels, all of them outlined in the U.S. Appellee Submission. However, we will focus today on the fact that it is not possible to assume that sales of a "significant" portion of a company's shares do not affect the benefit conferred by a past subsidy.

29. All parties agree that the evaluation of a financial contribution and benefit takes place at the time of the financial contribution, based on the market conditions prevailing at that time. Subsequent changes in market conditions do not affect that conclusion. For example, if a Member provides a market-rate government loan, that loan does not become a subsidy if the market rate subsequently rises while the government rate stays fixed. The converse is also true. If the government provides a loan for a below-market rate, and the market interest rate later falls, the original loan remains a subsidized loan. Therefore, a party seeking to show that a subsidy granted in the past has ceased to exist, including by extinguishment, has the burden to explain how.

---

[20] EU Appellant Submission, para. 208.
[21] EU Appellant Submission, para. 245 (emphasis in original).

30. The third point we will make today is that Article 7.8 of the SCM Agreement deals with remedies for subsidies inconsistent with Article 5. "Withdraw the subsidy" is one option that a Member, at its own choosing, may adopt as a remedy. Within this framework, withdrawal is one potential response to a finding that a subsidy is inconsistent with the SCM Agreement. It is not a separate criterion for establishing an inconsistency. Put differently, if there were a dispute in which it was impossible to withdraw a particular subsidy that is inconsistent with Article 5, that would not change the fact that it was a subsidy, or that it was inconsistent with Article 5.

31. The European Union takes the opposite position. It asserts that the option for a Member to "withdraw" a subsidy means that if some event following the grant of a subsidy affects the benefit it confers, the subsidy has been "withdrawn" and, according to the European Union, a Member cannot violate Article 5 of the SCM Agreement with respect to use of that subsidy. One problem with this argument is that it ignores the relationship between an inconsistency with the WTO Agreement and the remedy for that consistency. The presence or absence of a viable remedy in any given dispute does not affect the substantive consideration as to whether a Member has acted inconsistently with a WTO obligation. In the most common example, the fact that a Member removes or modifies a measure subject to a WTO dispute after the establishment of a panel does not affect the analysis of the consistency of the measure as it existed on the date of panel establishment.[22]

32. In short, the EU arguments do nothing to demonstrate that the Airbus reorganization activities between 1997 and 2006 "extinguished" past subsidies, "withdrew" past subsidies, "extracted" past subsidies, or prevented them from "passing through" to the current incarnation of the Airbus business, Airbus SAS.

C. The benefit conferred by LA/MSF

33. The European Union also fails to demonstrate any error in the Panel's conclusion as to

---

[22] *See EC – Customs (AB)*, paras. 189, 254 (Panel's task "to determine whether the measures at issue [were inconsistent] *at the time the Panel was established*") (italics in original).

the benefit conferred by LA/MSF. Both the parties and the Panel cited the Appellate Body's guidance that a benefit exists for purposes of Article 1.1(b) of the SCM Agreement when "the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[23] The Panel also agreed with the parties that applying this standard involves a comparison of the terms for each grant of LA/MSF with a "benchmark" reflecting the terms Airbus would have paid in the market for similar financing. It accordingly devoted the bulk of its analysis to evaluating the three benchmarks proposed by the parties.

34. The Panel correctly disposed of the EU proposal that the terms of the 1992 Agreement were the benchmark for provision of LA/MSF, and the Appellate Body should do the same. In the first place, the European Union never explains how the 1992 Agreement could be relevant when it expressly notes the parties' "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."[24] Equally telling, the European Union never explains how the terms established in an inter-governmental agreement would indicate terms "available to the recipient in the marketplace". In fact, the European Union cites no evidence whatsoever that any non-governmental actor ever granted such large amounts of money on terms comparable to LA/MSF. The European Union also fails to provide any convincing reason that the provisions of the 1992 Agreement would dictate what constitutes a "benefit" – a term that appears nowhere in the 1992 Agreement – for purposes of the SCM Agreement.

35. The Panel conducted an exhaustive analysis of the two remaining benchmarks. The United States considered that the risk premium that the market would demand for LA/MSF was analogous to that for a diversified portfolio of venture capital investments, and proposed that the benchmark consist of the normal commercial lending rate applicable to Airbus plus a risk premium reflecting the difference between the return on a mixed portfolio of venture capital

---

[23] *Canada – Aircraft (AB)*, para. 157.
[24] 1992 Agreement, 5th recital.

financing and the commercial cost of capital. The European Union argued that LA/MSF granted by the member States was most analogous to financing provided to Airbus by "risk-sharing suppliers," companies that sell Airbus component parts and also give it financing. The European Union proposed a benchmark based on the difference between financing such suppliers provided for the A380 project and those companies' internal rates of return.

36. The Panel raised concerns with both parties' proposals. In particular, it concluded that although the United States and the European Union both proposed a single premium applicable to all Airbus aircraft, it would be more accurate to chooses a premium specific to each individual product. The Panel concluded that for most grants of LA/MSF – the A320, A330/340, and A340-500/600 – the comparable commercial interest rate was higher than the EU figure but lower than the U.S. figure. For LA/MSF for the A300 and A310, the Panel found that the comparable commercial rate was greater than or equal to the U.S. benchmark. For LA/MSF for the A380, the Panel found that comparable commercial financing was greater than the EU figure, but less than or equal to the U.S. figure.

37. To be clear, the United States thinks that its benchmark proposal was the correct approach for all grants of LA/MSF, as it was conservatively based on the low end of a range of potential returns on a mixed portfolio of venture capital financing. (In other words, it was not a return on venture capital, as the European Union suggests.) However, we cannot say that the Panel's conclusions resulted from an incorrect application of Article 1.1(b) of the SCM Agreement, or that any errors in its findings of fact call into question the objectivity of its assessment of the facts under Article 11 of the DSU.

38. The European Union's appeal fails for just these reasons. While it identifies areas of disagreement with the Panel, it does not demonstrate any way in which the Panel's conclusions were inconsistent with Article 1.1 of the SCM Agreement. It also fails to establish any instance in which the Panel failed to provide the objective assessment of the facts required under Article 11 of the DSU.

39. The European Union directs most of its criticisms at the Panel's identification of the benchmark as a range of interest rates that encompass the commercial rates comparable to groups of launch aid contracts. The European Union argues that the Panel failed to address factors that it identified as relevant, and grouped aircraft together even though it found that a project-specific analysis of the benchmark was appropriate. Neither assertion is correct. The list of factors in the Panel's explanation *describes* the evidence that the Panel actually considered in its individualized analyses of financing for particular aircraft. It is not a legal check-list of criteria that must be considered and addressed in every instance. With regard to the Panel presenting its findings for each group of aircraft that fell into a particular range of interest rates, the Panel was merely reducing verbiage in an already enormous document by grouping non-identical, but similar, situations. In theory, it could have presented separate but identical explanations on an aircraft-by-aircraft basis, but that would have increased the Panel's work with no concomitant increase in accuracy.

40. The European Union also asserts that the Panel contradicted itself on certain findings. In these instances, the real problem is that the European Union has not understood the findings. For example, the European Union views the Panel's concerns regarding use of the U.S. interest rate premium *in all* situations as a conclusion that the benchmark was *never* valid. The Panel, however, was clear that its concerns related to the comparability of a venture-capital-based risk premium to projects of a mature company. These concerns were, of course, irrelevant to the use of the U.S. risk premium for Airbus's initial aircraft when it was a risky start-up company, or as the upper limit for the A380, which the Panel concluded was highly risky.

41. Most of the EU challenges under Article 11 of the DSU arise from assertions that the Panel failed to ask for the information necessary to perform its analysis. However, any shortcomings in this area are also the European Union's fault because, as proponent of the use of A380 supplier financing as a benchmark, it had an obligation to support its arguments with evidence, and failed to do so. The Panel carefully reviewed the evidence before it, asked numerous questions and, where necessary, drew reasonable inferences from the evidence before

it, which is perfectly consistent with Article 11. It had no obligation to ask the EU to provide additional evidence to support the EU position.

42. The European Union also argues that the Panel failed to provide a sufficient explanation of certain findings. The Panel's reasoning is, in fact, thorough. To the extent that it lacks any level of detail, that is because the Panel's findings relied on Highly Sensitive Business Information ("HSBI"), which the European Union had insisted be excluded from all versions of the Panel report. Having advocated this rule in the Panel's BCI/HSBI procedures, the European Union cannot now criticize the Panel for complying with it.

D. Export-contingent subsidies

43. Before the Panel, the United States presented evidence and arguments to demonstrate that seven individual provisions of launch aid[25] constituted prohibited export subsidies: the French, German, Spanish and UK launch aid for the A380, the French and Spanish launch aid for the A340-500/600, and the French launch aid for the A330-200. The Panel found that three of these – the German, Spanish, and UK A380 launch aid – were contingent "in fact" on exports and, therefore, prohibited under the SCM Agreement.

44. The Panel correctly articulated the legal standard for finding a prohibited export subsidy based on an "in fact" contingency on "anticipated" exports.[26] As indicated in the U.S. Other Appellant Submission, and as we will discuss later, however, the Panel erroneously applied an additional "subjective motivation" requirement, leading it to erroneously find that four of the seven instances of launch aid were not contingent "in fact" on anticipated exportation.[27]

45. In beginning its analysis, the Panel found that Article 3.1 of the SCM Agreement prohibits subsidies that are contingent upon export performance. That prohibition extends not

[25] Also referred to in the Panel Report as "launch aid/member state financing" or "LA/MSF."

[26] *See* Panel Report, para. 7.648.

[27] *See* U.S. Other Appellant Submission, paras. 7-24.

only to subsidies that are export contingent "in law", but also to subsidies that are export contingent "in fact." As set forth in footnote 4 of the SCM Agreement the "in fact" 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.

46. The Panel noted the Appellate Body's finding in *Canada – Aircraft* 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'."[28] The Panel then applied this three-pronged standard to the relevant facts. The Panel recognized, correctly, that a demonstration of "in fact" contingency may rely on evidence different than that necessary to find "in law" contingency.

47. In this regard, 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,"[29] 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."[30] The ordinary meaning of Article 3.1(a) and footnote 4 of the SCM Agreement, confirm the Panel's approach, which is consistent with the Appellate Body's prior findings on this issue.

48. The Panel found that the evidence submitted by the United States demonstrated the first and third of these elements (the "granting of a subsidy," and "anticipated exportation," respectively) for each of the seven instances of launch aid challenged by the United States,[31] and

---

[28] Panel Report, para. 7.630, citing *Canada — Aircraft (AB)*, para. 169.
[29] Panel Report, para. 7.648, citing *Canada – Aircraft (AB)*, para. 167.
[30] Panel Report, para. 7.716.
[31] *See* Panel Report, paras. 7.650, 7.654, 7.657 and 7.660.

that all three elements (including contingency) were satisfied for three of the instances of the launch aid.[32]

49. With respect to the **"granting of a subsidy,"** the Panel stated: "We have already found that in entering into each of the challenged LA/MSF agreements with Airbus, the EC member State governments provided Airbus with a subsidy. The United States has therefore established the first of the three elements it must demonstrate in order to make out its case under Article 3.1(a)."[33]

50. In paragraphs 7.651 through 7.660, the Panel discussed the evidence concerning the "**anticipated exportation**" element. The Panel's findings are based on and consistent with a broad variety of evidence.

51. The Panel looked to Airbus Global Market Forecasts (GMFs) that demonstrated that the vast majority of sales were expected to be exports.[34] In this regard:

- The 1999 and 2000 GMFs show that Airbus was developing the A380 primarily for the export market. Asia-Pacific alone accounted for 55% and 57% of anticipated orders, for 1999 and 2000, respectively, while "Europe" would account for 23% and 20% respectively;[35]

- The 1997 and 1998 GMFs predicted that European airlines would represent 25 to 29 percent of Airbus' total orders during the period 1997 through 2016 and 25 to 28 percent during 1997 through 2017;[36]

- The 1995 GMF predicted that only 28 percent of Airbus' total order for the period 1995 - 2014 would be within Europe.[37]

---

[32] Panel Report, paras. 7.689 and 8.1(a)(ii).
[33] Panel Report, para. 7.650.
[34] Panel Report, para. 7.651, first bullet.
[35] Panel Report, para. 7.651, first bullet.
[36] Panel Report, para. 7.655, second bullet.
[37] Panel Report, para. 7.658, second bullet.

52. The Panel also looked to French and German "critical project appraisals," that directly reflected the governments' expectations of substantial exportation by Airbus, including with respect to the French A380, A340-500/600 and A330-200 launch aid.[38]

53. The Panel also reviewed additional evidence that included:

- The Airbus A380 Business Case (each of the A380 measures);[39]
- The Deutsche Airbus A380 launch aid Applications;[40]
- Evidence related to sales expectations and other information described in several of the launch aid contracts themselves (including those for the German A380, Spanish A380, Spanish A340-500/600 launch aid);[41]
- Several statements by European government officials specifically confirming export expectations, including those of the French Prime Minister Jospin, and UK Prime Minister Blair;[42]
- Orders that had already been received at the time launch aid contracts were signed and that were principally for export markets, with respect to the Spanish and French A340-500/600 launch aid and the French A330-200 launch aid;[43] and
- An EC State Aid decision noting that development of the A340-500/600 would allow Airbus to compete for sales throughout the world, and this was relevant for the French A340-500/600 launch aid.[44]

54. With respect to the **export contingency** element, in paragraphs 7.661 through 7.678, the Panel "discussed the exchange of commitments" that demonstrates that each of the seven challenged launch aid measures were "at least in part" "conditional" or "dependent for its

[38] Panel Report, paras. 7.651, first bullet, 7.655, first bullet, third bullet, 7.656, 7.658.
[39] Panel Report, para. 7.652.
[40] Panel Report, para. 7.652.
[41] Panel Report, para. 7.652.
[42] Panel Report, para. 7.651.
[43] Panel Report, para. 7.655, third bullet.
[44] Panel Report, para. 7.655, fourth bullet.

existence" on anticipated exportation.[45] The Panel based its findings on export contingency primarily on the contractual "exchange of commitments" that it found existed with respect to each of the seven LA/MSF measures.

55. To better understand this finding, we should be clear on what the Panel found constitutes this "exchange of commitments." On the part of the member States, they committed – on the basis of assurances made by Airbus in the relevant business cases, Global Market Forecasts, and critical project appraisals, and their anticipation of a specified number of sales to achieve full repayment – to providing Launch Aid in the amounts and for the particular aircraft models specified in the Launch Aid contracts. On the part of Airbus, it committed – in exchange for that Launch Aid – to develop and manufacture those aircraft models, and to repay the member States in accordance with the terms set out in those contracts.

56. It is important to recognize that this "exchange of commitments" is not an invention of the United States or the Panel, but rather reflects the basic notion of bargain and exchange inherent in any contractual relationship, and the "exchange of commitments" found by the Panel was at the core of the Launch Aid contracts. As the Panel stated: "while it is true that the contracts impose no obligation on Airbus to make any sales at all, the European Communities has explained that the EC member States expected their LA/MSF contributions would be fully repaid and achieve their target rate of return."[46] Moreover, the Panel also noted that the EC itself had argued before the Panel that the relevant contractual rates of return should be calculated over the "number of LCA sales predicted in the Airbus business cases."[47]

57. The EU goes to great lengths to suggest that this commitment undertaken by Airbus – and counted on by the Airbus governments – to repay Launch Aid is of no consequence because "there is no 'performance' commitment by Airbus to export."[48] The Panel correctly saw through

---

[45] Panel Report, para. 7.678.
[46] Panel Report, para. 7.678.
[47] Panel Report, para. 7.678.
[48] EU Appellant Submission, para. 1394.

this transparent attempt to elevate form over the reality of the how the terms would function, and the fact that this would read the reference to "anticipated" exports out of the Agreement. As the Panel made clear, the repayment terms were tied to the number of sales specified under the terms of the Launch Aid contracts and those sales dependent terms necessarily would require a large volume of exports.

58. The Panel stated:

> Turning to the exchange of commitments themselves, we note 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. Although 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.[49]

59. In other words, meeting that substantial number of anticipated exports was effectively a key contractual condition extracted by the member States in return for their promise to provide Launch Aid.

60. It was this "exchange of commitments" that was reflected in the terms of the launch aid contracts and corroborated by other evidence outside of the four corners of the contracts that led the Panel to find, for each of the seven challenged instances of launch aid:

> In our view, 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.**[50]

[49] Panel Report, para. 7.678.
[50] Panel Report, para. 7.678 (emphasis added).

61. At this point, the Panel's findings for each of the seven instances of challenged launch aid satisfied the three-prong legal standard. The Panel found the granting of a subsidy, anticipated exportation, and an "exchange of commitments." On the exchange of commitments, the Panel found that this suggested that the provision of launch aid was, "at least in part, 'conditional' or 'dependent for its existence' upon the EC member States' anticipated exportation or export earnings."[51] While the EU challenges a range of Panel findings, it does not challenge the Panel's fundamental findings of fact on which this assessment was based. There is no basis, moreover, for the EU's argument that the Appellate Body cannot "complete the analysis." As the overview we just provided demonstrates, the Panel made factual findings for each of the three requisite elements for establishing a prohibited subsidy based on "in fact" contingency.

62. Beyond this point in its analysis, as the United States has noted and which forms the basis of the U.S. appeal, the Panel's **review of "additional corroborating evidence" was unnecessary and it was legal error for the Panel to establish a separate and additional requirement of "subjective motivation" on top of the three requisite elements.**

63. Although the Panel was not required to look to this additional evidence, such evidence further confirms the export contingency of each of the seven provisions of launch aid. At the same time, a finding that there may be an even greater quantum of evidence for certain of the measures when compared to others can in no way undermine the Panel's prior finding of an "exchange of commitments" in connection with each of the challenged launch aid measures, which as we have discussed establishes the relationship of "contingency" or "tie" between each member State's granting of the subsidy and the anticipated exports by Airbus.

64. As the U.S. Other Appellant's Submission demonstrates, however, by engaging in this additional analysis, the Panel in fact imposed an additional requirement as to the subjective motivation behind the LA/MSF, over and above the three specific requirements for export contingency set out in Articles 3.1(a) and footnote 4 of the SCM Agreement. Moreover, the

---

[51] Panel Report, para. 7.678.

Panel found that the additional or corroborating evidence even satisfied this additional requirement (again, erroneously imposed by the Panel), as it demonstrated subjective motivation for three of the seven instances of Launch Aid.

65. Finally, the United States observes that with respect to the Panel's prohibited subsidy findings, the European Union does not dispute that European governments in fact *expected* (i.e., "anticipated") substantial exportation. Nor does the EU argue that repayment of LA/MSF was possible without such anticipated exports actually taking place or that there was no exchange of commitments. Instead, the EU argues, as it did before the Panel, that "anticipated" means "future" (as opposed to "expected") and that a relationship of "contingency" can take only one particular form (dependency on exports *actually* occurring or what the European Union calls "if-then" conditionality).[52] These arguments, and the others advanced by the EU, are without merit and have been fully rebutted by the U.S. Appellee Submission.

E. LA/MSF as a program

66. We will now move on to another issue raised in the U.S. Other Appellant Submission and address the Panel's error in finding that the ongoing grant of launch aid was not a measure.

67. The United States demonstrated in its submissions to the Panel that France, Germany, Spain, and the United Kingdom repeatedly gave LA/MSF with the same core terms each successive time that Airbus requested aid. The Panel agreed. The United States demonstrated that this constituted a measure that can be challenged under the SCM Agreement. Here, the Panel disagreed, finding that to establish the existence of an unwritten measure under Articles 1 and 2 of the SCM Agreement, a complaining Member must demonstrate that the measure is of "general and prospective application." The Panel found that the United States failed to satisfy this requirement.

---

[52] EU Appellant Submission, para. 1311.

68. The U.S. appeal posed three legal questions. First, did the Panel identify the proper *legal* standard for evaluating whether a collection of facts demonstrates the existence of a measure subject to WTO challenge. The answer is that it did not. In particular, the Panel erroneously referred to the U.S. claim as one against a "measure with normative value." Although it stated in the interim review findings that it understood this point, the Panel proceeded to erroneously apply an "as such" framework to a U.S. claim that was not brought on that basis. Second, the U.S. appeal asks whether, if the Panel applied the wrong standard, it eliminated that error in its alternative conclusion. The answer is that the Panel's alternative analysis simply repeats the erroneous initial analysis and, accordingly, suffers from the same flaws. Third, the U.S. appeal asks whether application of the proper analysis would lead to a conclusion in favor of the United States. The answer here is "yes." In *US – Continued Zeroing*, the Appellate Body found that a complaining party establishes the existence of a measure subject to challenge under the Antidumping Agreement if the facts provide evidence of the precise content of the measure and its repeated use in successive proceedings. The Panel found those very facts in this dispute. Indeed, in its review of the adverse effects caused by the Launch Aid and other measures at issue, the Panel repeatedly refers precisely to the extent to which each of the provisions of Launch Aid worked together and systematically provided an advantage to Airbus in the market.

69. The Panel's error is basic, and it took only 42 paragraphs for the United States to explain the problem and the solution. The European Union responded with 167 paragraphs. All of it is wrong, but the time available today requires us to focus on the most important errors with regard to each of the three legal questions presented by this issue.

70. First, with regard to the standard applicable to unwritten measures, the European Union is mistaken in asserting that *US – Continued Zeroing* made "general and prospective application" a prerequisite for finding that an unwritten measure exists. A full quotation of the Appellate Body's analysis demonstrates this point:

> We have found that the measures at issue subject to the European Communities' claims are the continued use of the zeroing methodology in successive

> proceedings, in each of the 18 cases, by which the duties are maintained. This, however, does not establish whether the use of the zeroing methodology, as an ongoing conduct, exists with respect to duties resulting from each of the 18 antidumping duty orders subject to the European Communities' claims. In order to complete the analysis in this respect, we must ascertain whether the factual findings made by the Panel and undisputed facts in the record show that the zeroing methodology has been used repeatedly in successive proceedings, in each of the 18 cases, by which the duties are maintained.[53]

The Appellate Body does state, *after finding that four factual situations meet this standard*, that "{the density of factual findings in these cases, regarding the continued use of the zeroing methodology in a string of successive proceedings pertaining to the same anti-dumping duty order, provides a sufficient basis for us to conclude that the zeroing methodology would likely continue to be applied in successive proceedings whereby the duties in these four cases are maintained."[54] However, it is clear that the statement that the methodology "would likely continue to be applied" is the *conclusion drawn* from the analysis, and not a criterion *in the analysis*, as the European Union would have the Appellate Body believe. Indeed, if the EU argument were correct, then it would never be possible to challenge ongoing practice unless it had to be repeated in the future.

71. The European Union also attempts to distinguish *US – Continued Zeroing* because "there was clearly an intermediate level between the zeroing methodology and the individual administrative review. This intermediate level was variously referred to as the duty, or the order, or the methodology . . . ."[55] In a similar vein, the European Union also argues that the US claims regarding LA/MSF as a program are duplicative of the claims regarding the individual grants of LA/MSF.[56] In fact, these arguments merely serve to highlight the point that the United States sought to make – that the LA/MSF program operates at a different level than the individual grants of LA/MSF, with distinct – or perhaps more precisely, even greater – effects. For

---

[53] *US – Continued Zeroing (AB)*, para. 189.
[54] *US – Continued Zeroing (AB)*, para. 189.
[55] EU Appellee Submission, para. 211.
[56] EU Appellee Submission, para. 323.

example, the Panel found that LA/MSF taken as a whole had a positive effect on Airbus's creditworthiness, as well as levels of cash flow and debt.[57] The Panel also relied specifically on the fact that "we are not concerned here with a one-off grant of a single subsidy" to come to its adverse effects findings.[58] The sum, in other words, is greater than its parts.

72. Thus, a proper understanding of the Appellate Body's reasoning in *US – Continued Zeroing* demonstrates that the Panel was wrong to require a demonstration of the Launch Aid program's "general and prospective application."

73. The EU arguments do not justify the Panel's reliance on *US – Zeroing (EC)* to lay out the proper standard. The European Union attempts to counter the U.S. point that the Appellate Body addressed only the situation of an "as such" challenge to an unwritten measure, by arguing that the report "goes to the more fundamental question of whether a measure exists."[59] However, the segment of the report that it cites – paragraphs 190-198 of the Appellate Body report[60] – simply does not support the EU argument. To begin, the Appellate Body begins its analysis with the statement "{h}aving recalled the previous findings of the Appellate Body regarding the types of measures that can be subject to an 'as such' challenge, we now turn to examine whether the zeroing methodology, as framed by the European Communities in this dispute, constitutes such a measure."[61] The Appellate Body then states again and again – in paragraphs 192, 193, 194, 195, 197, and 198 (which the EU cites six times) – that it is addressing "as such" claims. Thus, taking the Appellate Body's words to heart, the report cannot be read as addressing anything more "fundamental" than the narrow issue before the Appellate Body in that dispute – "as such" claims against unwritten measures.

[57] Panel Report, para. 7.2022.
[58] Panel Report, para. 7.1975.
[59] EC Appellant Submission, para. 237.
[60] EU Appellee Submission paras. 234-241 (citing *US – Continued Zeroing (AB)*, paras. 188, 194, 196, 197, 198, 203).
[61] *US – Continued Zeroing (AB)*, para. 190.

74. On the second question, whether the Panel's alternative analysis in paragraph 7.580 remedies the flaws with its initial analysis, the European Union argues that the United States misunderstood the purpose of the exercise. In the EU's view, the Panel's alternative analysis was limited in scope, seeking only "to weigh the facts without requiring the United States to demonstrate its own assertions that the alleged measure had 'general and prospective' applicability."[62] Whatever this assertion means, it does not address the legal problem that the alternative analysis is self-contradictory. The Panel stated that it sought to determine whether the outcome would change if "general and prospective application" were not a factor. It then decided the question based on the perceived absence of proof of "general and prospective application."[63] This is essentially the same reasoning as in the initial analysis, and accordingly cannot remedy any flaw in that analysis.

75. Third, with regard to completing the analysis, the European Union argues that if the Appellate Body reverses the Panel's findings and decides to "complete the analysis," it must consider three factors, including whether there is "conduct that evidences prospective applicability, or at least likely prospective conduct."[64] As did the Panel's alternative analysis, this standard merely duplicates the error committed by the Panel, of finding that an unwritten measure cannot exist unless it has prospective application. Rather, if the Appellate Body reverses the Panel's findings, it should apply the standard set out in *US – Continued Zeroing*, that "to complete the analysis in this respect, we must ascertain whether the factual findings made by the Panel and undisputed facts in the record show that the zeroing methodology has been used repeatedly in successive proceedings, in each of the 18 cases, by which the duties are maintained."[65] In this situation, that would mean looking at whether LA/MSF, as represented by the four core elements, has been used repeatedly in successive financing of the development of large civil aircraft. Clearly, the evidence and the Panel's findings confirm that it has.

---

[62] EU Appellee Submission, para. 254 (emphasis omitted).
[63] Panel Report, para. 7.580.
[64] EU Appellee Submission, para. 280.
[65] *US – Continued Zeroing (AB)*, para. 189.

76. On a final point, the European Union also seeks to avoid the issue entirely by arguing that the United States failed to properly raise this issue in its notice of appeal, and that the EU has been prejudiced. There is no merit to these assertions.

77. The European Union begins by arguing that the U.S. appeal is invalid because whether a measure exists is a finding of fact, and the United States did not cite Article 11 of the DSU in its notice of appeal. The European Union here confuses two separate concepts – the interpretation of a Member's domestic law, which the United States and the European Union regard as an issue of fact, and the question whether something is a measure that can be challenged under one of the covered agreements, which is a matter of law under the relevant covered agreement. On this issue, the United States is not appealing the Panel's factual findings on the meaning of the law of the European Union, France, Germany, Spain, or the United Kingdom. We are appealing the conclusion that the facts, as found to exist by the Panel, do not establish the existence of a measure within the scope of Articles 1 and 2 of the SCM Agreement.

78. The European Union attempts to turn this issue into a question of fact by arguing that whether a measure is properly subject to challenge under the SCM Agreement is a two-step analysis, of first identifying as a matter of fact whether a "measure" exists, and then determining whether that measure can be challenged under the SCM Agreement. The EU distinction does not work because "measure" is a term of art under the covered agreements, and evaluating whether a set of facts establishes the existence of an unwritten "measure" in WTO terms is a legal question of applying WTO law to those facts. Put differently, it is impossible to make a purely factual conclusion as to whether evidence demonstrates the existence of an unwritten "measure" because it is the legal requirements of the covered agreements that give that term meaning for purposes of WTO dispute settlement.

79. The European Union also argues that the U.S. notice of appeal fails to identify the provisions of the covered agreements under which it appeals the Panel's findings regarding LA/MSF as a program. In fact, the notice of appeal indicates clearly that "{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," and references paragraphs 7.579-7.580 and 8.3(a)(iv) of the Panel Report. These make clear that the Panel made this particular finding under Articles 1 and 2 of the SCM Agreement. These articles accordingly form the basis of the U.S. appeal.

80. The European Union also argues that the U.S. notice of appeal is deficient because it did not reference Article 3.3 of the DSU, which the United States mentioned in its other appellant submission. However, the issue the United States is appealing is the Panel's failure to properly apply Articles 1 and 2 of the SCM Agreement to the question of when a set of facts demonstrates the existence of a measure subject to the SCM Agreement. The United States cites Article 3.3 of the DSU as context informing the breadth of the concept of "measure" under the covered agreements in general.

F. Infrastructure

81. Apart from its findings on LA/MSF, the Panel also found that authorities in Germany, France, and Spain subsidized Airbus through the provision of infrastructure that was not general. At this stage, the European Union does not dispute that the infrastructure in question was not general. However, with regard to the German and French infrastructure subsidies, it does disagree with the Panel's identification of the relevant financial contribution and with the benchmark used for evaluating the existence and magnitude of the benefit.

82. The U.S. first written submission described three situations in which government entities in EU member States designed and built infrastructure for the sole use of Airbus or companies in the aviation industry. These were the conversion of Mühlenberger Loch into an industrial site, the extension of the Bremen runway and assorted noise abatement measures, and the creation of the ZAC Aéroconstellation site. The main EU argument is that each of these government actions was in fact two separate and distinct actions – the creation of infrastructure, and then the transfer of that infrastructure on a non-general basis to Airbus. The European Union then contends that

only the second step of making that infrastructure available to Airbus through a lease is a financial contribution. In the EU view, the first step, of creating the infrastructure, is outside the scope of the SCM Agreement.

83. Our appellee submission contains a detailed explanation why, as a legal matter, "provision of goods . . . other than general infrastructure" encompasses the creation of the non-general infrastructure. It is equally important that the EU argument fails as a factual matter when applied to the provision of customized infrastructure. The analogy we drew in our submission to custom-tailored clothing points out the problem. A person buying a custom-tailored suit or dress gets not just a suit or dress, but the unique value of having one that perfectly fits their needs. The person also pays not just for the salesman "transferring" the suit to him, but also for the creation of the garment itself. As a factual and legal matter, they are inseparable.

84. The same is true of the infrastructure designed for the use of Airbus and the aeronautics industry. It was specifically created for Airbus and its specific needs. It is accordingly impossible to divide the process into stages of "creation" and "transfer," as the European Union seeks to do, and analyze them separately.

85. The European Union makes a similar error in arguing that the Panel erred in its conclusion that a benefit existed. It contends that the Panel impermissibly adopted a "cost-to-government" approach in concluding that a commercial developer providing the infrastructure would have charged a fee that recovered the cost of development, and using that figure as a benchmark to compare with the government fee. (This would, of course, be the approach taken by the tailor in the U.S. example.) In addition to the points made in our appellee submission, it is worth noting that Article 14 of the SCM Agreement states that a provision of goods confers a benefit to the extent that it "is made for less than adequate remuneration." The words "adequate" and "remuneration" would appear to direct the inquiry toward a consideration of what the government receives, and whether it is sufficient payment. That is exactly what the Panel did.

G. Capital contributions to Aérospatiale

86. Capital contributions to Aérospatiale were another significant element of the overall subsidy found by the Panel. The parties and the Panel agreed that several billion francs of these contributions were financial contributions within the meaning of Article 1.1(a), and that they conferred a benefit if they were "inconsistent with the usual investment practice of private investors." Where the parties disagreed was over whether the French State's six capital contributions in the 1987-1998 period met this standard.

87. The first five contributions were simple exchanges of money and shares. The European Union does not dispute that Aérospatiale's financial performance statistics were dreadful at the time of each contribution, and the Panel found no prospects for meaningful improvement. In these situations, no "usual" investor would contribute capital to a company. A usual investor certainly would not repeatedly sink billions of francs into such a company that consistently produced nothing except losses. The Panel considered the European Union's assertion that Aérospatiale had a bright future that would have caused private investors to disregard its dismal present condition, but found that this evidence ultimately was unconvincing and did not support the EU position.

88. The EU appeal provides no basis to disturb this conclusion. The European Union argues that because private investors continued to buy Boeing shares during this period, the French State's purchase of Aérospatiale shares was consistent with the usual investment practice of private investors. The attempted comparison is completely invalid – Boeing at that time was in much better financial condition than Aérospatiale, and had a product mix much more heavily weighted toward civil aircraft.[66] Moreover, U.S. investors' practices with regard to Boeing are irrelevant to the benefit standard enunciated in Article 14 of the SCM Agreement, which looks to the investment practices of investors in the subsidizing Member, which would be *France*, and not the United States.

---

[66] U.S. Appellee Submission, para. 419.

89. The final capital contribution, in 1998, was more complex, but the result was the same. At that point, the French State owned 100 percent of Aérospatiale, as well as a controlling interest in Dassault Aviation, a more profitable company involved in civil and military aeronautics. The French State hoped to make a public offering of shares in Aérospatiale, but considered that even after a decade of LA/MSF and subsidized capital contributions, the company was still too weak to attract private shareholders. To improve Aérospatiale's condition, the French State contributed its interest in Dassault Aviation to Aérospatiale. As a result of this transfer, the French State ceded control of Dassault Aviation to the next largest shareholder, the Dassault Family. It received no compensation for this act.

90. To describe the consequences most directly, before the transfer of the Dassault Aviation shares, the French State owned Aérospatiale, controlled Dassault Aviation, and had a right to any income generated by its shareholding in Dassault Aviation. After the transaction, the French State still owned Aérospatiale. Since Aérospatiale owned the State's former share of Dassault Aviation, and the State owned 100 percent of Aérospatiale, any income from the Dassault Aviation shares would accrue to the state, albeit indirectly. But the State no longer controlled Dassault Aviation. Thus, the French State had less at the end of the transaction than it had at the beginning, without any compensation. The only ones that benefitted were the Dassault family, who received control without having to pay for it, and Aérospatiale, which received another much-needed capital contribution, this time in the form of the Dassault Aviation shares.

91. The Panel faced the question whether this type of reorganization was consistent with the usual practice of private investors. In other words, would a usual private investor have given up control of Dassault Aviation without compensation simply to provide a capital injection to Aérospatiale? The Panel concluded – quite reasonably, in our view – that it was not.

92. The European Union argues on appeal that the Dassault Aviation transfer was consistent with the usual practice of private investors because conferring the Dassault Aviation shares to Aérospatiale generated higher returns than the French State had realized by owning Aérospatiale

and the shares separately. The Panel did not rule out this possibility, but found that the European Union had identified no evidence that would support it. That remains the case in this appeal. The European Union points out that a French government agency found that the two-for-one exchange of Aérospatiale and Dassault Aviation shares was consistent with market valuation. Be that as it may, that conclusion indicates nothing about whether surrender of control of Dassault Aviation, which the State worked out in a separate arrangement with the Dassault family, was consistent with usual investment practices or whether the decision to provide support to Aérospatiale in the first place was consistent. Finally, the European Union points out that several investment banks supported the terms of the public offering of Aérospatiale (after its merger with Matra Hautes Technologies). However, that later transaction indicates nothing about whether the earlier Dassault Aviation transfer was commercial in nature.

93. Once again, as in the case of LA/MSF, the European Union may disagree with the Panel's findings, but is has not pointed to anything that actually constitutes a legal error by the Panel. Thus, the European Union has not demonstrated any way in which the Panel's treatment of the capital contributions to Aérospatiale was inconsistent with the SCM Agreement or Article 11 of the DSU.

H. Specificity of EU research and development programs

94. Finally, the European Union also provided large sums of money to Airbus to conduct research and development under the Framework Programmes. There is no dispute that these were financial contributions, or that they conferred a benefit. The European Union does, however, assert that payments to Airbus were not specific.

95. This argument is implausible at best. The most recent grants available to Airbus under the Framework Programme were made under the heading of "aeronautics," with the following description: "Community aeronautical research activities including air transport systems will address research and technological development activities necessary in order to . . . increase the

competitiveness of the European industry with regard to civil aircraft, engines and equipment."[67] It is hard to imagine how funding could be more specifically targeted to the civil aircraft sector.

96. The European Union's defense is that specificity should be evaluated not based on the eligibility criteria for the funds in question, but on the "programme as a whole." In the EU view, this "program" is each "Framework Programme."

97. However, what the European Union forgets is that the Framework Programmes do not provide limitations "as a whole." They provide a list of separate objectives, each with its own dedicated funds and discrete criteria limiting eligibility. Some objectives target funds to specific industries, such as "aeronautics and space" or "food quality and safety" in the Sixth Framework, while other objectives, such as "horizontal research activities involving SMEs" in the Sixth Framework, do not. In other words, the Framework Programme is simply a collection of programs.

98. We have addressed these points in greater detail in our appellee submission. The only point I will make now is that any analysis of the Framework Programmes at the overarching level would elevate form over substance. If a Member could avoid specificity merely by publishing the criteria for a specific subsidy alongside those for non-specific subsidies, the SCM Agreement disciplines for actionable subsidies would rapidly become a nullity.

Conclusion

99. Thank you for your attention today. You have devoted a substantial amount of time to reading our submissions. Rather than subject you to an extended summary of everything you already have read, we have delved in depth into a limited number of the key issues that are subject of this hearing. We would, however, like to emphasize that this statement has addressed

[67] Decision No. 1513/2002/EC of the European Parliament and of the Council 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), p. 12 (Exhibit EC-204).

only those issues that we thought would most benefit from an oral explication. We do not mean to imply that any other issue is of lesser importance. We will be pleased to address any of the issues covered by this hearing in our discussion with you today and over the coming days.