NON-BCI VERSION

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

(AB-2010-1/DS316)

APPELLEE SUBMISSION OF THE UNITED STATES

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SERVICE LIST

Parties to the Dispute

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Third Parties

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H.E. Mr. Roberto Azevedo, Permanent Mission of Brazil
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I. INTRODUCTION

1. This dispute came before the Panel, and is now before the Appellate Body, because the European Union, France, Germany, Spain, and the United Kingdom have for many years used subsidies to create a family of large civil aircraft ("LCA") that could take market share and sales away from the U.S. civil aircraft industry. They were not reticent about their objective. As French Prime Minister Lionel Jospin pledged before the French Parliament, "{w}e will give Airbus the means to win the battle against Boeing."[1] As the Panel found, those subsidies did in fact give Airbus the means to displace Boeing in key markets around the world and capture significant sales from Boeing.[2]

2. In 2001, Airbus held a 38 percent share of the world LCA market.[3] By 2006, the end of the period covered by this dispute, Airbus' market share had grown to 53 percent and Boeing, the sole remaining U.S. LCA producer, has seen its market share fall by 15 percentage points.[4] And beyond the market share and significant sales lost by Boeing to Airbus, the prospect of a continuing stream of subsidies that confers on Airbus, now the worlds' largest LCA producer, a major structural advantage in its continuing competition with the U.S. LCA industry, presents precisely the sort of prejudice that the SCM Agreement was designed to remedy.

3. The primary subsidy tool used by the European governments is a form of financing that they once, forthrightly, called "Launch Aid". They have since renamed it "Member State Financing." (The Panel avoided terminological confusion by referring to these measures as "LA/MSF", and in this submission, the United States will do the same.) Whatever the name, LA/MSF provided funds to Airbus in exchange for a commitment to repay a fixed amount per aircraft delivered, with most of the repayment backloaded, at interest rates that have been systematically less than the market would charge.[5] As important, LA/MSF has shifted much of the risk of Airbus' LCA launches from Airbus to its subsidizing governments, because Airbus' obligation to repay the aid is entirely dependent on the success of the financed aircraft.[6] As the Panel found, Airbus could not possibly have brought its family of LCA to market when and as it did without LA/MSF.[7]

4. Support for Airbus went beyond LA/MSF. France and Germany invested billions of Euros of equity in the companies that produced Airbus aircraft in order to give Airbus the means

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[1] French Prime Minister Lionel Jospin in a speech before the French Parliament, quoted in Jospin pledges to aid Airbus in fight against Boeing, Reuters (Mar. 8, 2000) (Exhibit US-1).

[2] Panel Report, para. 7.1993.

[3] Source: Airclaims Database (data query as of August 14, 2006, as cited in US First Written Submission, para. 705 & Table 1).

[4] Source: Airclaims Database (data query as of April 27, 2007, as cited in US First Written Submission, para. 705 & Table 1; US Response to Panel Question 49, para. 286; US Second Written Submission, para. 663).

[5] Panel Report, paras. 7.462, 7.489-490.

[6] Panel Report, paras. 7.1934, 7.1949.

[7] Panel Report, para. 7.1993.

to continue its product development efforts and achieve their industrial policy goals.[8] The European Union and many of the national and regional governments gave grants to fund the specific research and development Airbus needed to develop its aircraft, and they provided goods to Airbus in the form of infrastructure and facilities, tailored to the company's needs, for less than adequate remuneration.[9] The Panel found almost all of these to constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.[10]

5. The Panel examined the U.S. complaint over a period of five years and, in the course of its examination, conducted extensive substantive meetings with the United States and the European Communities and reviewed thousands of pages of documentary evidence provided by the parties. It found that each of the LA/MSF measures challenged by the United States constituted an actionable subsidy within the meaning of Parts I and III of the SCM Agreement and that several of the more recent LA/MSF measures constituted prohibited subsidies within the meaning of Part II. The Panel also found that almost all of the other subsidies to Airbus that were part of the U.S. complaint were specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement. The Panel's findings extend to more than US$15 billion in LA/MSF alone including individual LA/MSF provisions for each and every major Airbus model to date: the A300/A310, A320, A330/A340, A330-200, A340-500/600 and the A380.

6. The European Union in this appeal has challenged several, but by no means all, of the Panel's core findings. Regarding the Panel's findings of subsidies, the European Union does not in fact argue that LA/MSF was not a subsidy *under the terms of the SCM Agreement.* Instead, it tries to shift attention away from the SCM Agreement and the clear breaches of that agreement that the Panel found. It does so based on what it calls its 'temporal scope', 'identity of the subsidy recipient' and 1992 Agreement arguments.[11] It challenges the Panel's findings on the basis of an agreement (the 1992 Agreement) that is not a 'covered Agreement', as well as a range of more technical claims concerning the Panel's assessment of the EU and U.S. expert reports and the question of "benchmark".[12] None of these arguments succeeds.

7. Regarding 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 it argue that repayment of LA/MSF was possible without such anticipated exports actually taking place or that there was no exchange of commitments[13]. Instead, it argues that

[8] Panel Report, paras. 7.1245 through 7.1414 and 7.1957.

[9] Panel Reports, paras. 7.1415 through 7.1609 and 7.1959, 7.1958.

[10] Panel Report, para. 8.1.

[11] EU Appellant Submission, Parts Three and Four, and paras. 686 through 691, 696 through 734, and 1373 through 1377.

[12] EU Appellant Submission, Part Six.

[13] Panel Report, para. 7.678.

"anticipated" means "future" (as opposed to "expected")[14] 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").[15] The European Union argues that the Panel erred by considering the "motivation" of the four subsidizing governments.[16] None of these arguments succeeds, either.

8. The European Union's approach to serious prejudice and causation is similar. It does not dispute that the successive grants of LA/MSF given to Airbus were designed to, and in fact, did build on one another over time and across Airbus' full LCA family to allow Airbus to develop and bring to market its full LCA family in a way that would otherwise have been impossible.[17] The European Union does not challenge the Panel's conclusions that, in some instances, the effect of the subsidies was serious prejudice in the form of significant lost sales.[18] The European Union concedes that, under the SCM Agreement, the Panel "need not have accepted the European Union's argument that there were five different LCA markets."[19] Two themes pervade the claims of error in the European Union's adverse effects appeal.

9. First, the European Union argues that that the Panel should have conducted a segmented analysis of the U.S. adverse effects claim on the basis of discreet "product markets" identified by the European Union, rather than on the basis of the U.S. definitions of "all Airbus LCA" as the "subsidized product" and "all Boeing LCA" as the "like product". The European Union's "product market" theory is predicated on both an incorrect interpretation of key terms (*i.e.*, "subsidized product", "like product" and "market") and a flawed analytical approach for assessing serious prejudice analysis. Not only is the analytical approach suggested by the EU inconsistent with the SCM Agreement, but the Panel also found that extensive evidence supported the U.S. identification of "all Airbus LCA" as the "subsidized product" and "all Boeing LCA" as the "like product" and that it was reasonable to conduct the analysis of the U.S. adverse effects claims on that basis..

10. Second, several aspects of the European Union's appeal are premised on the notion, which is contrary to the text and purpose of the SCM Agreement, that the Panel should have gone beyond its analysis of the actual use Airbus made of the subsidies and the actual adverse

[14] EU Appellant Submission, para. 1311.

[15] EU Appellant Submission, para. 1311.

[16] EU Appellant Submission, paras. 1353 through 1354. The Panel's decision to impose an additional requirement on the United States to demonstrate such "motivation", which raises the threshold for establishing export contingency, in fact forms the basis for one of the two appeals in the U.S. Other Appellant Submission.

[17] EU Appellant Submission, para. 412 ("the European Union does not generally appeal a central aspect of the Panel's 'product-launch' causation findings – namely that, but for the MSF, Airbus would not have launched each of its LCA *at the time and the form that it did*.") (emphasis in original).

[18] EU Appellant Submission, para. 394 n. 456.

[19] EU Appellant Submission, para. 370.

effects caused by those subsidies, and engaged in detailed speculation about what an unsubsidized Airbus *might have been able to* in the event that it could have entered and remained in the market without subsidies. However, once the Panel concluded that, over the period 2001-2006, the effects of the subsidies were to allow Airbus to bring its LCA supply to market in a way that displaced imports of Boeing LCA into Europe, displaced Boeing's exports to third country markets, and captured significant sales from Boeing, it had found serious prejudice within the meaning of Articles 6.3(a), 6.3(b) and 6.3(c), irrespective of speculation as to what else might have happened had Airbus not been subsidized. The possibility that a different competitor might have emerged in the place of a subsidized Airbus cannot and does not negate the actual effects of the subsidies given to Airbus. Thus, the inquiry sought by the EU is unnecessary and unwarranted and, in any event, the Panel found that this was "unlikely"[20].

11. Below, the United States addresses each of the European Union's claims of error. The discussion follows the logical order in which the Panel addressed issues, rather than the order of appeals in the EU Appellant Submission. For the reasons set forth below, the Appellate Body should reject each of the claims of error contained in the European Union's Appellant Submission and uphold the relevant findings of the Panel Report instead.

[20] Panel Report, para. 7.1984.

II. THE PANEL CORRECTLY FOUND THAT CAUSING ADVERSE EFFECTS IN 2001-2006 THROUGH THE USE OF SUBSIDIES GRANTED TO AIRBUS BEFORE 1995 IS COVERED BY ARTICLE 5 OF THE SCM AGREEMENT

12. This dispute concerns the uninterrupted, consistent, and massive subsidization of Airbus large civil aircraft by the European Union and European governments over a period of more than four decades. In particular, as we {will set out / have set out} in other parts of this submission, this includes massive amounts of LA/MSF for each and every individual model of Airbus LCA; the provision of non-general infrastructure in Hamburg, Toulouse, Bremen and elsewhere; equity infusions, in the form of either cash injections or share transfers in France; and substantial R&D subsidies at both European Union and EU member State level. The United States claimed, and the Panel found, that these EU subsidies, granted between 1969 and 2006, caused adverse effects to U.S. interests during the 2001-2006 reference period. In particular, the Panel recognized the ongoing and cumulative effect of Airbus subsidies, the way in which repeated grants of subsidies benefited the product over a period of decades, and the way in which "LA/MSF and the other subsidies played a vital role in permitting Airbus to not only launch and develop the model of LCA actually funded by each grant of LA/MSF, but also each of the subsequent models."[21]

13. The Panel also found that the SCM Agreement applies to causing adverse effects through the use of subsidies after 1995, even if some of the subsidies that are causing those adverse effects were granted before the 1995 entry into force of the SCM Agreement. The European Union protested that this approach applied Article 5 of the SCM Agreement to the act of granting subsidies before 1995 and, therefore, contravened customary international law with regard to the retroactive application of treaties, as reflected in Article 28 of the Vienna Convention.[22] The Panel found that Article 5 disciplines currently causing adverse effects by the use of subsidies. It does not retroactively prohibit the granting of the subsidies themselves prior to 1995. Therefore, the Panel's finding that Airbus subsidies as a whole caused adverse effects did not raise retroactivity concerns because it applied only to the continuing situation of causing those adverse effects, all of them well after 1995, and not to the original grants of the subsidies themselves.

14. The European Union now asks the Appellate Body to reverse the Panel's findings regarding pre-1995 subsidies on the ground that the application of Article 5 of the SCM Agreement to the causing of adverse effects in reality applies the Agreement retroactively to the underlying subsidies themselves.[23] The European Union concedes that under Article 28 of the Vienna Convention, there are no retroactivity concerns in applying a treaty to situations that exist at its entry into force or arise afterward.[24] It attempts to avoid the implications of this rule by arguing that only government "conduct" can be a "situation" within the meaning of Article 28.

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[21] Panel Report, para 7.1975.

[22] EU Appellant Submission, paras. 18 and 27-46.

[23] EU Appellant Submission, paras. 28-48.

[24] EU Appellant Submission, paras. 31-36.

Consequently, under the EU approach, the causing of adverse effects is not a "situation," but an "effect" of government conduct. For the European Union, the "conduct" of granting the some of the subsidies ended before 1995, meaning that there is no continuing "situation." The European Union argues that applying a treaty to causing adverse effects through the use of these subsidies is retroactive since the government conduct that caused them ended prior to entry into force of the treaty.[25]

15. The EU approach is inconsistent with both the text of Article 5 of the SCM Agreement itself, and the international legal principle of non-retroactivity on which the EU purports to rely. Critically, in considering what is a "situation" within the meaning of Article 28, it is important to consider the obligation at issue. Contrary to what the EU suggests, Article 5 of the SCM Agreement – which the Panel correctly found should be the main focus of any analysis of the "temporal scope" of the SCM Agreement – imposes an obligation on Members not to cause adverse effects to the interests of other Members through the use of subsidies as defined in Article 1. It is not limited to the act of providing actionable subsidies, as the EU arguments imply. The causing of adverse effects through the use of subsidies, as the Panel found, falls within the ordinary meaning of "situation" as used in the Vienna Convention, and is thus among the types of conditions that a treaty may address without making special provisions for retroactivity. Therefore, the Appellate Body should uphold the Panel's finding.

A. The Panel correctly focused its analysis of retroactivity on the interpretation of Article 5 of the SCM Agreement

16. The Appellate Body has found that the rule on non-retroactivity of treaties set out in Article 28 of the Vienna Convention is a general principle of international law.[26] The Panel correctly referred to Article 28 in evaluating arguments regarding retroactivity. The European Union does not object.[27] The Panel also correctly realized that an evaluation of whether a provision of a treaty is being applied retroactively begins with the terms of the treaty itself, and carefully considered the meaning and operation of the relevant provisions of the SCM Agreement. The European Union challenges this part of the analysis, arguing that the Panel "wrongly focused . . . on the nature of the obligation contained in Article 5 of the SCM Agreement" when it should have first examined the nature of the pre-1995 subsidy measures to determine if they were an "act," "fact," or "situation."[28] As a practical matter, it is difficult to understand how the Panel could evaluate the retroactivity of a treaty provision without first

[25] EU Appellant Submission, paras. 32-36.

[26] *Brazil – Desiccated Coconut*, p. 14; *EC – Hormones*, para. 128; *EC – Sardines*, para. 200. The Panel noted that Article 28 of the Vienna Convention is not, in and of itself, binding on the United States, which is not a party to the Convention. However, Article 28 accurately states customary international law on retroactivity that, via Article 3.2 of the DSU, is applicable to interpretation of the covered agreements.

[27] EU Appellant Submission, para. 29.

[28] EU Appellant Submission, para. 28.

analyzing the provision itself. Moreover, the EU's approach to retroactivity misses entirely the point of Article 28 of the Vienna Convention.

17. The legal standard set out in Article 28 of the Vienna Convention, provides 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.

The Article contains two elements. It states a general rule that essentially defines the concept of retroactivity as the application of a treaty to bind a party in relation to acts or facts that took place, or situations that ceased to exist, before the date of entry into force of the treaty. It also recognizes an exception – that the rule does not apply if a different intention appears from the treaty or is otherwise established.

18. Article 28 of the Vienna Convention focuses the inquiry on the acts, facts, or situations in relation to which the treaty's provisions "bind" or "do not bind" the parties. A treaty does not "bind" a party in relation to an act or fact that took place, or a situation that ceased to exist, before entry into force of the treaty. However, if the parties intended otherwise, that rule does not apply. The logical way to apply this principle is to examine whether a proposed application of a treaty is retroactive within the meaning of the rule set out in Article 28, and if so, to determine whether the exception applies. This is precisely what the Panel did. [29]

19. In its analysis, the Panel noted the Appellate Body's finding in *Canada – Patent Term* that "{l}ogically, it seems to us that Article 28 also necessarily implies that, absent a contrary intention, treaty obligations *do* apply to any 'situation' which has *not* ceased to exist – that is, to any situation that arose in the past but continues to exist under the new treaty."[30] The Panel considered the dictionary definitions of "act" ("a thing done; a deed"[31]) and "situation" ("a set of circumstances; a state of affairs"[32]). It also noted the Appellate Body's conclusions that "act" means "something that is 'done'" as opposed to "situation" meaning "something that subsists and continues over time"[33]. The Panel then examined the text of Article 5 of the SCM Agreement to identify the acts, facts or situations with respect to which it binds the signatories.

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[29] The Panel began its analysis with the statement that "{t}here is nothing in the text of Article 5 of the SCM Agreement to indicate that the obligation it sets forth should operate in a retroactive matter." Panel Report, para. 7.45. However, as the Panel found that the application of Article 5 of the SCM Agreement did not meet the definition of retroactive application in Article 28 of the Vienna Convention, the Panel's finding with regard to the exception is *obiter dicta*.

[30] Panel Report, para. 7.48, *quoting Canada – Patent Term*, para. 72.

[31] Panel Report, para. 7.49, *quoting Shorter Oxford English Dictionary*, p. 21.

[32] Panel Report, para. 7.49, *quoting Shorter Oxford English Dictionary*, p. 2852.

[33] Panel Report, para. 7.49, *quoting Canada – Patent Term*, para. 72.

It concluded that the Agreement binds the parties with respect to the "situation" of causing adverse effects. It then found that, for subsidies granted before 1995, the situation was "continuing" after the entry into force of the SCM Agreement.[34] Therefore, the situation of causing adverse effects through the use of subsidies had not "ceased to exist" within the meaning of Article 28 of the Vienna Convention, and the application of Article 5 of the SCM Agreement to causing those adverse effects did not raise retroactivity concerns.

20. The European Union criticizes the Panel repeatedly for "focus{ing} on the nature of the obligation contained in Article 5 of the SCM Agreement."[35] Given that Article 28 frames the retroactivity rule in terms of the acts, facts, or situations with respect to which a treaty "binds" the parties, it is difficult to see how a panel could evaluate retroactivity without carefully examining the operation of the treaty provisions at issue and understanding how they "bind" the parties. The European Union argues that the proper approach was "to identify the relevant government conduct in the first place, characterise it as 'act' or 'situation' and examine whether such an 'act' or 'situation' was completed before 1995 or continued afterward."[36] By arguing that the analysis should begin by identifying the dates on which the EU granted particular subsidies, however, the European Union would have the Appellate Body start with the *assumption* that the grant of subsidies is the relevant act, fact, or situation in relation to which Article 5 of the SCM Agreement binds the Members. In fact, and this is key, the approach advocated by the European Union is essentially circular. By starting with the assumption that the only relevant activity is something that occurred in the past, the European Union foreordains the conclusion that the provision applies to acts, facts, or situations that have already ceased to exist. Instead, any analysis should plainly start with the ordinary meaning of the relevant treaty provisions – in this instance, Article 5 of the SCM Agreement – in its context and in light of the treaty's object purpose. This interpretation of the treaty provision will then help determine what obligation it imposes on Members, rather than the other way around.

21. Therefore, the Panel was correct to start by identifying the act, fact, or situation in relation to which Article 5 of the SCM Agreement binds the Members.

B. The Panel correctly interpreted the principle of non-retroactivity to focus on the relevant act, fact, or situation covered by the treaty, and not on whether government action was somehow involved

22. As the United States explained in section II.A, Article 28 of the Vienna Convention frames the retroactivity analysis in terms of the acts, facts, or situations with respect to which a treaty binds its parties. Nothing in its text limits those acts, facts, or situations to governmental

[34] Panel Report, para. 7.52.

[35] EU Appellant Submission, paras. 27, 33, and 122.

[36] EU Appellant Submission, para. 33.

"conduct" as opposed to a government obligation that continues after particular conduct has occurred.

23. Some examples illustrate how this principle works. Suppose an international environmental treaty binds parties to clean up certain forms of toxic waste. Application of that provision to particular waste would not become retroactive within the meaning of Article 28 of the Vienna Convention because a government-owned factory created the waste prior to entry into force of the treaty. Similarly, an extradition treaty might provide for the return of fugitives to the jurisdiction within which the crime occurred. That obligation would not become retroactive within the meaning of Article 28 because the government convicted the criminal prior to entry into force of the treaty. In short, if a treaty binds a party with respect to a current condition (or "situation") nothing in Article 28 suggests that the interpreter should inquire whether the condition involved government conduct, or that the timing of any related government conduct would influence the analysis of whether the situation had ceased to exist prior to entry into force of the treaty. Of course, a treaty could explicitly exempt existing conditions caused by past action, but the point is that absent such a specific indication, there is no reason to conclude that an existing condition covered by the terms of the agreement is exempt because of the date on which certain government conduct related to or causing that condition occurred.

24. The European Union, however, argues that "under general international law, the question of whether treaty obligations apply is associated with the *government conduct and its timing*."[37] It does not claim to derive this conclusion from the Vienna Convention, nor even from commentary on the Vienna Convention. Instead, it cites two quotations from two excerpts from the commentary on the *ILC Articles on State Responsibility*. These commentaries are not only irrelevant to the interpretation of the retroactivity rules reflected in Article 28 of the Vienna Convention, they also do not support the proposition for which the European Union cites them.

25. At the outset, the ILC Articles themselves are not "covered agreements" set forth in Appendix I to the DSU, nor do they set forth "customary rules of interpretation of public international law". The same is true for the commentaries to the Articles. The EU has cited no Appellate Body or panel report finding that the ILC Articles reflect customary international law relevant to the concept of retroactivity in the interpretation of the covered agreements, and the United States is not aware of any. In fact, the ILC Articles themselves do not purport merely to set out customary international law, but rather "to *formulate*, by way of codification and *progressive development*, the basic rules of international law concerning the responsibility of states for their internationally wrongful acts."[38] Thus, the rules and their commentary often leave unclear whether they are attempting to *state* customary law, to *create* (in the sense of "formulating" or "developing") new law or, in the case of the commentary, to "comment on" the

[37] EU Appellant Submission, para. 43 (emphasis in original).

[38] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, General commentary (1), p. 31 (emphasis added).

law. To the extent they create law or merely comment on it, they do not reflect customary international law.

26. In any event, the commentaries do not support the proposition that the EU seeks to derive from them. The passage it quotes at length states:

> {A} continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period. Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation or part of the territory of another State or stationing armed forces in another State without its consent. (…) Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue.[39]

27. If the Appellate Body does consider the ILC Draft Articles relevant, the commentary contained in the ellipsis in the EU quotation (*i.e.*, that the European Union specifically left out) exposes the error in the EU conclusions, stating "{w}hether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case."[40] Article 5 of the SCM Agreement specifically obligates Members not to "cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members." Where the primary obligations of a treaty are concerned with causing effects through prior government action, causing those effects itself is the "wrongful act," and the conclusion as to retroactivity will "depend" on whether it is "completed" or "has a continuing character." The ILC commentary also exposes the fallacy of the EU's insistence that the Panel was wrong to examine the nature of the obligation in Article 5.[41] Under the ILC's approach, state responsibility, like retroactivity under Article 28 of the Vienna Convention, can only be understood by the treaty obligations that create it.

28. Elsewhere, the ILC Draft Articles are even clearer. Specifically, Article 14(1) of the Articles, to which the EU cites, applies only to "an act of a State not having a continuous

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[39] EU Appellant Submission, para. 42 (ellipsis in EU quotation), *quoting* International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Art. 14, para. (3), p. 60.

[40] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Art. 14, para. (4), p. 60.

[41] EU Appellant Submission, para. 33.

character." Article 14(3), by contrast, deals with "an international obligation requiring a State to prevent a given event" – analogous to the obligation in Article 5 of the SCM Agreement not to cause adverse effects. It provides specifically, that a breach of such an obligation "occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with the obligation."

29. The same point is confirmed by the ILC's Commentary to the Vienna Convention (a document that is more to the point than the State Responsibility Articles to which the EU refers, as it actually relates to the Vienna Convention provision at issue as opposed to non-treaty based State Responsibility). Specifically, the ILC stated:

> If, however, an act or fact or situation which took place or arose prior to the entry into force of a treaty continues to occur or exist after the treaty has come into force, it will be caught by the provisions of the treaty. The non-retroactivity principle cannot be infringed by applying a treaty to matters that occur or exist when the treaty is in force, even if they first began at an earlier date.[42]

30. The European Union attempts to bolster its position to the contrary by citing decisions by the ICJ and European Court of Human Rights. However, these decisions do not support its view that government conduct alone, and not the effects of government conduct, is relevant to an analysis of retroactivity, depending on the actual text of the treaty that is being interpreted. In the *Liechtenstein v. Germany* decision, the ICJ decided that the "real cause of the dispute" was a 1955 convention regarding the seizure of German external assets as a result of World War II rather than a series of German court cases in the 1990s interpreting that convention.[43] The treaty under which the ICJ heard the case excluded "disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute," which occurred in 1980.[44] The court held that the entry into force of the 1955 treaty was the fact or situation that gave rise to the dispute and, therefore, it did not have temporal jurisdiction.[45] Thus, the ICJ at no point reached the issue posed by the European Union – whether the economic effects of government action are relevant to the analysis of retroactivity. Instead, the ICJ addressed which of two government acts – entering into a convention or the rendering of judicial decisions regarding that convention – was relevant. It is also significant that the treaty under which the ICJ heard the case covered "situations prior to entry into force," and was silent as to situations that began but did not "cease to exist" prior to that time. Article 28 of the Vienna Convention frames its retroactivity rule differently.

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[42] ILC Commentary (ILC Yearbook 1966 II), at 212, paras. 3, 4.

[43] *Liechtenstein v. Germany*, paras. 41 and 51.

[44] *Liechtenstein v. Germany*, paras. 1 and 18.

[45] *Liechtenstein v. Germany*, paras. 29 and 52.

31. Decisions of the European Court of Human Rights do not support the EU position either. The *Malhous* and *Mayer et al.* decisions cited by the European Union reflect a line of case law dating back to 1976 in the court and its predecessor, the European Commission of Human Rights, that "deprivation of ownership or of another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of 'deprivation of a right'."[46] Those decisions (and the previous decisions they cite) never explain *why* they reach the conclusion they do, or connect this outcome to the Vienna Convention or any other customary international law. They simply state the proposition that deprivation of an *in rem* right is instantaneous rather than continuous.[47] Therefore, these decisions do nothing more than provide examples of how one court handles one class of claims. They give no general guidance to the Appellate Body in understanding the retroactivity rule reflected in Article 28 of the Vienna Convention, or how that rule would apply to the specific legal obligation contained in Article 5 of the SCM Agreement. Furthermore, these decisions apply only in those fora, and do not even pretend to purport to apply to the covered agreements. The EU does not assert otherwise.

32. To the extent they provide any guidance, moreover, the European Court of Human Rights decisions cited by the European Union do not indicate that the "economic effects of government conduct are irrelevant for a legal discussion about the principle of retroactivity"[48] The court and the commission never purport to address all government actions or all economic effects, but rather the limited category of "deprivation of ownership or of another right *in rem*" and resulting effects.

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[46] *Malhous v. Czech Republic*, p. 16.

[47] *Malhous v. Czech Republic*, p. 16 ("the Court refers to and confirms the Commission's established case-law"), *citing Mayer and Others v. Germany* (decision), applications no. 18890/91, 19048/91, 19342/92 and 19549/92 (Eur. Comm'n Human Rts. 4 March 1996) ("the Commission recalls its constant case-law") and *Brežny & Brežny v. Slovakia* (decision), application no. 23131/93 (Eur. Comm'n Human Rts. 4 March 1996) ("the Commission refers to its established case-law according to which deprivation of ownership or another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of 'deprivation of a right.'"). The *Mayer and Others* and *Brežny & Brežny* decisions in turn refer to Case 7742/76, which provides a similarly cursory explanation: "as follows from {the Commission's} Decision No. 7379/76 (DR 8, p. 211) deprivation of ownership or another right *in rem* is in principle an instantaneous act and does not produce a continuing situation of 'deprivation of right'." *A., B. and Company A.S. v. the Federal Republic of Germany*, application 7742/76, p. 168 (Eur. Comm'n Human Rts. 4 July 1978). Decision No. 7379/76 does not explain anything, but merely contrasts the situation before it with the situation in an earlier case:

> The situation is not the same as that considered by the Commission in the *De Becker* case where the applicant complained of a continuing restriction on his freedom of expression contrary to Art. 10 and, as the Commission observed, "the alleged violation was being repeated daily. . . ." . . . The applicant in the present case experiences rather what the Commission then described as the "enduring effects" of an "act occurring at a given point in time."

X. v. the United Kingdom, application 7379/76, para. 7 (Eur. Comm'n Human Rts. 10 December 1976).

[48] EU Appellant Submission, para. 46.

33. Thus, the EU argument that the Panel was required to base its retroactivity analysis on the government conduct of granting individual subsidies, rather than the causing of adverse effects through the use of those subsidies, finds no support in Article 28 of the Vienna Convention, in the ILC Draft Articles, or in the cited decisions of the ICJ, European Court of Human Rights, or European Commission of Human Rights. It ignores entirely Article 5 of the SCM Agreement, which the Panel correctly took as the basis for its interpretation.

C. The acts, facts, or situations in relation to which Article 5 of the SCM Agreement binds the EU are the causing of adverse effects through the use of specific subsidies

34. Article 5 of the SCM Agreement, by its terms, addresses the causing of adverse effects through the use of subsidies. Therefore, the Panel properly focused its retroactivity analysis on whether applying Article 5 to the causing of adverse effects through the use of subsidies granted before 1995 was inconsistent with Article 28 of the Vienna Convention. It found that the existence of the adverse effects of those subsidies was a "situation" that continued to exist on and after the entry into force of the SCM Agreement, even though it began before that time. The Panel thus found that application of Article 5 of the SCM Agreement to the causing of adverse effects through the use of subsidies was consistent with the non-retroactivity principle reflected in Article 28 of the Vienna Convention.[49]

35. However, before the Panel and now in this appeal, the European Union has asserted that the act, fact, or situation covered by Article 5 of the SCM Agreement is not the causing of adverse effects through the use of subsidies or the benefit of the subsidy, but the "act of granting or maintaining a subsidy."[50] It accordingly argues that applying Article 5 to the adverse effects of a subsidy granted before entry into force of the SCM Agreement would be contrary to Article 28 of the Vienna Convention. This argument ignores the fact that Article 5 of the SCM Agreement specifically allows Members to maintain subsidies that have no adverse effects. Even if subsidies have adverse effects, Members may retain them unchanged if they can otherwise remove the adverse effects. Thus, the focus of Article 5 of the SCM Agreement – and of the non-retroactivity analysis – should be on the adverse effects, rather than the subsidy.

1. The Panel based its analysis firmly in the text and context of Article 5 of the SCM Agreement

36. The Panel based its findings on the text and context of Article 5 of the SCM Agreement. The Article itself states:

> No Member should cause, through the use of any subsidy referred to in paragraph 1 and 2 of Article 1, adverse effects to the interests of other Members. . . ."

[49] Panel Report, para. 7.64.

[50] EU Appellant Submission, para. 85.

Although the SCM Agreement frames this text as an admonition rather than an obligation, Article 7.8 of the SCM Agreement further provides that:

> Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

Thus, Article 5 sets out the substantive considerations for determining whether Article 7.8 imposes an obligation to remove a subsidy or eliminate its adverse effects.

37. The Panel explained that:

> the predicate of the sentence in Article 5 is to "cause adverse effects to the interests of other Members", while the phrase "through the use of" is an adverbial phrase that describes the manner in which the Member should not cause the adverse effects. Article 5 thus comprises an obligation not to cause certain results through a specific causal pathway, rather than an obligation not to engage in certain conduct.[51]

The Panel cited in support of this conclusion the fact that Article 7 of the SCM Agreement allows Members found to cause adverse effects to choose between withdrawing the subsidy or taking appropriate steps to remove the adverse effects.[52] The Panel also found that, with the focus on the causing of adverse effects through the use of subsidies, Article 5 of the SCM Agreement addresses "a set of circumstances; a state of affairs," which comports with one definition for the term "situation" in Article 28 of the Vienna Convention.[53] The Panel concluded that the provisions of Part III of the SCM Agreement, such as Articles 6.3(d) and 6.4, calling for examination of a representative period, support its finding that Article 5 addresses a "situation that subsists and continues over time" rather than "specific acts performed by Members."[54]

38. It is worth noting that the EU has in the past advocated a result similar to the one reached by the Panel. As a third participant in the *US – Upland Cotton* appeal, the EU argued before the Appellate Body that:

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[51] Panel Report, para. 7.46.

[52] Panel Report, para. 7.46.

[53] Panel Report, paras. 7.49 and 7.52.

[54] Panel Report, para. 7.52.

> In applying the Vienna Convention approach to subsidies, one must distinguish the two elements of a subsidy. First, a financial contribution (which is an act) and second, a benefit (which is an effect). Consequently, the existence of a subsidy is a situation that exists over a period of time. Pre-WTO subsidies are covered by the SCM Agreement so long as the "situation" – i.e., the effect of the subsidy in form of a benefit has not ceased to exist{} as of 1 January 1995.[55]

2. Comparison of Articles 3 and 5 of the SCM Agreement and their remedies supports the Panel's conclusion that Article 5 addresses the situation of causing adverse effects through use of a subsidy rather than the government action of granting a subsidy

39. The Panel's approach is also confirmed by a comparison of Articles 3 and 5 of the SCM Agreement and their respective remedies. Article 3 of the SCM Agreement "prohibits" export subsidies and import-substitution subsidies, and Article 4.7 instructs the subsidizing Member to "withdraw the {prohibited} subsidy without delay." Article 5 of the SCM Agreement embodies a presumption that subsidies that are not prohibited are acceptable unless they cause adverse effects, in which case Article 7.8 requires the subsidizing Member to "take appropriate steps to remove the adverse effects" *or* "withdraw the subsidy" over a less expedited time period. As noted above, the Panel found that as removal of the subsidy is one of two options to address an actionable subsidy, but mandatory for a prohibited subsidy, Article 5 creates an obligation not to cause adverse effects, rather than an obligation not to engage in the conduct of granting subsidies.

40. The European Union argues that "the formulation of the obligation in Articles 3 and 5 and the scope of the remedy indicate that both provisions *refer* to the same government conduct: granting or maintaining subsidies."[56] The observation is correct, but irrelevant. Under Article 28 of the Vienna Convention, what matters is whether the provisions of a treaty "bind" or "do not bind" a party in relation to an act, fact, or situation. That is, the "act, fact or situation" with respect to which the treaty provision creates a right or obligation is determinative for the non-retroactivity analysis.

41. By contrast, that a provision "refers" to an act, fact, or situation does not make it binding on that act, fact, or situation. Here, Article 5 clearly "binds" a Member with respect to the causing of adverse effects through the use of subsidies – it is not limited to causing adverse effects only through the use of subsidies granted after 1995. Article 5, and the remedy provisions in Article 7, "refer" to the subsidy only as the instrumentality through which the subsidizing Member causes adverse effects to another Member, and specify that the subsidizing Member may, if it declines to remove the adverse effects, withdraw the subsidy. They do not "bind" the Member in relation to the subsidy because the Member remains free to keep the

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[55] *US – Upland Cotton (AB)*, Third Participant's Submission by the European Communities, para. 49.

[56] EU Appellant Submission, para. 84 (emphasis added).

subsidy in place as long as it eliminates the adverse effects. In contrast, Article 3 and the remedy provisions in Article 4 "refer" to the subsidy to make clear that it is "prohibited" and that the Member must "withdraw the subsidy." Thus, Article 3 does "bind" the Member in relation to the subsidy.

3. The Panel's analysis is consistent with the object and purpose of the SCM Agreement

42. The Appellate Body has found that the object and purpose of the SCM Agreement "is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions."[57] The Panel's analysis achieves this objective by allowing Members to grant or maintain subsidies, but ensuring that when they cause adverse effects, the subsidizing Member must withdraw them or eliminate the adverse effects. The EU's approach would have the opposite effect.

43. The European Union disregards the Appellate Body's statement of the object and purpose of the SCM Agreement, citing instead the *US – Export Restraints* panel report for the proposition that "{t}he object and purpose of the *SCM Agreement* is disciplining certain forms of government *action* which may distort international trade: the action of granting or maintaining a subsidy."[58] The European Union fails to note that the panel report also quoted and "agree{d} with" the broader statement that "'the object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies which distort international trade.'"[59] Furthermore, the European Union appears to accord to the "object and purpose" a role that it does not play. The EU would appear to want to parse the words used to express the object and purpose of the SCM Agreement as though those terms are treaty text. This is incorrect. Furthermore, the "object and purpose" of an agreement can help to understand the meaning of a term – it does not serve to replace the terms of an agreement or impose limitations on the obligations in that agreement.

44. In any event, while the SCM Agreement does discipline certain government actions, that does not mean that the only thing it "disciplines" or the only "trigger" of any of the rights and obligations it sets forth is government action. In other words, the European Union is wrong to view the "act, fact or situation" under Article 5 of the SCM Agreement to be, for purposes of Article 28 of the Vienna Convention, limited to government "conduct" that is defined essentially as the "act" of granting a subsidy. The disciplines imposed by the SCM Agreement may be triggered by things other than government actions. For example, whether there is serious prejudice may depend on how a private actor uses a subsidy. The indicia of serious prejudice laid out in Article 6.3 of the SCM Agreement are largely independent of government action.

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[57] *US – Softwood Lumber CVDs (AB)*, para. 64, *citing US – Carbon Steel (AB)*, paras. 73-74.

[58] EU Appellant Submission, para. 47, *citing US – Export Restraints*, para. 8.62.

[59] *US – Export Restraints*, paras. 8.61-8.62.

Lost sales, lost market share, price suppression, etc. all depend to a large extent more on how the recipient uses its subsidies. Thus, the European Union is wrong in arguing that the object and purpose of the SCM Agreement require the conclusion that the "act, fact or situation" at issue under Article 5 is only the government act of granting a subsidy, rather than the causing of adverse effects through the use of that subsidy.[60]

4. The Panel correctly looked to the causing of adverse effects through the use of subsidies as the relevant "situation"

45. In its analysis, the Panel explicitly distinguished between the granting of a subsidy and the causing of adverse effects through the use of the subsidies, stating that "{w}e consider that Article 5 addresses a set of circumstances or state of affairs (*i.e.* a 'situation') rather than specific acts of a Member."[61] The European Union asserts that the Panel "wrongfully identified the relevant government conduct contained in Article 5 of the *SCM Agreement* as relating to the 'use of the subsidy'" and treated "the effects caused by the granting of the subsidy as *part of the government conduct*."[62] This only matters because the European Union has attempted to limit the inquiry to the government act of granting a subsidy when the European Union coins the term "government conduct" and defines it to be the granting of a subsidy.

46. The European Union simply asserts without reasoning or explanation that "the terms 'through the use of {a} subsidy' refer to the government conduct of granting subsidies."[63] In fact, Article 5 itself provides no grammatical agent for the noun "use," indicating that the obligation applies whenever a Member causes adverse affects through the "use" of a subsidy by anyone – whether the subsidy recipient, the government, or some other entity. As part of its discussion of the meaning of "through the use of any subsidy," moreover, the European Union analyzes the phrase's grammatical function within Article 5 and the dictionary definitions of its terms. The United States does not dispute the EU conclusion that the phrase has "an instrumental meaning"[64] or the reference to dictionary definitions.[65] However, the European

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[60] The EU also cites the notification provisions in Article 25.2 of the SCM Agreement to "confirm" its assertion "{t}hat the government conduct regulated by the *SCM Agreement* is the act of granting or maintaining the subsidy." EU Appellant Submission, para. 85. However, the observation that some, or even most, of the provisions of the SCM Agreement apply to government conduct does not mean that *all* of the provisions regulate *only* government conduct.

[61] Panel Report, para. 7.52.

[62] EU Appellant Submission, para. 88 (emphasis in original).

[63] EU Appellant Submission, para. 94.

[64] EU Appellant Submission, para. 94. The recognition that the subsidy is the instrumentality for achieving something else (adverse effects) supports the Panel's conclusion that the act of granting the subsidy is not the subject of the disciplines in Article 5.

[65] EU Appellant Submission, para. 94. The United States notes that the EU uses the 2002 edition of the New Shorter Oxford English Dictionary. The United States views contemporaneous definitions as a more

Union errs in attempting to restate the meaning of "through the use of the subsidy" as a different phrase – "because of the act of employing a subsidy for a purpose,"[66] – cobbled together from pieces of the definitions. To begin, the phrase's instrumental function is better reflected not by "because," but by a definition of "through" that the EU disregards: "{b}y means of, via; by the agency or (arch.) the action of."[67] In addition, although dictionary definitions of the noun "use" and the related verb "use" reflect the "employment" of a "thing" for a "purpose" or "end," [68] the EU reformulation of the treaty text suggests a new legal test in which the purpose of or intention behind the "use" of the subsidy is somehow relevant. Nothing in the SCM Agreement suggests such an inquiry.

5. The SCM Agreement and its preparatory materials show no indication of an intent to exclude the adverse effects of subsidies granted before entry into force

47. The Panel found that the context provided by other provisions of the SCM Agreement supported its conclusion, and did not support the EU views. It examined paragraph 7 of Annex IV to the SCM Agreement, which authorizes allocation of the benefit of pre-1995 subsidies to the post-1995 period, and found that the EU was wrong to view that as an exception proving the existence of a general rule otherwise excluding those subsidies. Instead, the Panel concluded that, in setting allocation rules applicable to pre-1995 subsidies in certain situations, this rule evinced an understanding that that those subsidies generally are subject to the SCM Agreement. The Panel also examined and rejected the EU's arguments that the grace period under Article 28.1 for bringing pre-1995 subsidy *programs* into compliance with the SCM Agreement signaled that *individual* pre-1995 subsidies were excluded entirely. The Panel found that Article 28.1 was silent as to treatment of individual subsidies and, therefore, provided no contextual assistance for interpreting Article 5.[69]

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trustworthy source for elucidating the ordinary meaning of treaty terms. However, there does not appear to be a substantive difference between the 1993 definitions discussed below and 2002 definitions used by the EU.

[66] EU Appellant Submission, para. 94.

[67] New Shorter Oxford English Dictionary, p. 3295.

[68] The 1993 edition of the New Shorter Oxford English Dictionary defines the noun "use" as "{t}he action of using something; the fact or state of being used; application or conversion to some purpose." It defines the verb "use" as "{m}ake use of (a thing), esp. for a particular end or purpose; utilize, turn to account" and "Cause (an implement, instrument, etc.) to work, esp. for a particular purpose; manipulate, operate." New Shorter Oxford English Dictionary, p. 3531.

The United States also does not agree with the EU's argument that the use of the word "use" in various parts of the Tokyo Round Subsides Code informs the meaning of that same word in the SCM Agreement. However, as the reference is part of the EU effort to support a proposition that the United States and the Panel never disputed – that the granting of a subsidy is different from the effects of the subsidy – there is no need for the Appellate Body to reach this issue.

[69] Panel Report, para. 7.63.

48. The Appellate Body's findings in *EC – Hormones* with regard to the application of retroactivity principles to the *Agreement on the Application of Sanitary and Phytosanitary Procedures* provide relevant guidance in this area. The Appellate Body found that

> If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly. Articles 5.1 and 5.5 do not distinguish between SPS measures adopted before 1 January 1995 and measures adopted since; the relevant implication is that they are intended to be applicable to both.[70]

The same logic applies with respect to subsidies that the Airbus governments have provided to Airbus and the adverse effects they caused to U.S. interests. Like the SPS measures, neither the subsidy measures nor the adverse effects ceased to exist on January 1, 1995. And, like the SPS Agreement, nothing in the SCM Agreement reveals an intention on the part of the negotiators to exclude all subsidy measures granted before entry into force from WTO dispute settlement.

49. However, the European Union appellant submission contests the Panel's findings, and argues that the Panel improperly failed to consider other SCM Agreement provisions that allegedly support the EU position. The European Union is wrong. The Panel reached sound conclusions, and the provisions that it did not explicitly address do nothing to advance the EU claim.

50. Article 6.1(a) of the SCM Agreement provided a mechanism, now expired, under which a Member could establish the existence of serious prejudice if the value of total subsidization exceeded a certain percentage of a recipient's sales. Annex IV contains instructions on how to make that calculation. Paragraph 7 provides that "{s}ubsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization." The Panel found that this statement is "an express textual recognition that the 'adverse effects' that are the subject of Article 5 can be 'caused' through the use of subsidies granted prior to 11 January 1995."[71] The drafting of the paragraph supports this conclusion. It does not say that pre-1995 subsidies "may" or "shall" be allocated to the post-1995 period. It creates a rule applicable when "the benefits {of subsidies granted before 1995} are allocated to future production," indicating that this situation is the ordinary course of events.

51. The European Union advances three arguments against the Panel's finding, all of them spurious. It first asserts that paragraph 7 of Annex IV merely sets out "a *method* to estimate the amount of subsidies granted to a particular product in a given year."[72] However, the European

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[70] *EC – Hormones (AB)*, para. 128.

[71] Panel Report, para. 7.57.

[72] EU Appellant Submission, para. 106.

Union fails to recognize that methods often reveal underlying legal assumptions about a provision. In this case, Article 6.1(a) of the SCM Agreement sought to define certain situations in which serious prejudice would be deemed to exist, which would constitute adverse effects to the interests of another Member within the meaning of Article 5. The inclusion of pre-1995 subsidies in the calculation of the amount of subsidies reflects an understanding that subsidies granted before entry into force of the Agreement are, as a legal matter, capable of causing adverse effects. In short, the fact that paragraph 7 of Annex IV describes a method does not change its role as context for interpreting Article 5.

52. The European Union's second argument is that paragraph 7 addresses a "transitional issue" of preventing circumvention of Article 6(a) of the SCM Agreement by Members seeking to "shield post-WTO subsidies of less than 5% from WTO scrutiny, although the total amount of subsidies benefiting current production exceeds 5%."[73] These assertions are wrong. Article 31 of the SCM Agreement describes Article 6.1(a), which Annex IV elaborates, as subject to "provisional application" rather than as a transitional measure. The SCM Agreement otherwise uses the term "provisional" to describe a countervailing duty measure applied on a temporary basis pending a determination that conditions support a definitive measure.[74] Article 31 adopts just such an approach for Article 6.1(a) and Annex IV, providing the possibility of extended application after a five-year trial period. Thus, the negotiators envisaged potential long-term application for this provision.

53. This provision cannot accurately be characterized as an anti-circumvention measure, either. The European Union theorizes that negotiators included pre-1995 subsidies because they were worried that post-1995 subsidies would elude coverage of Article 6.1(a) even when they were worth more than 5 percent *ad valorem* when combined with pre-1995 subsidies. This attempted explanation highlights the implausibility of the EU's overall position. The European Union recognizes that negotiators wanted to capture pre-1995 subsidies that would push post-1995 subsidies over the 5 percent threshold. However, it argues that they intended to exclude pre-1995 subsidies from every other discipline under the Agreement, even if taken alone their benefit amounted to far greater than 5 percent. Nothing in the SCM Agreement suggests such mutually inconsistent objectives. Thus, the EU arguments provide no basis to consider that paragraph 7 of Annex IV is an exceptional provision establishing a "different intention" from the rule of nonretroactivity under Article 28 of the Vienna Convention. Rather, it reflects the understanding that applying Article 5 of the SCM Agreement to the causing of adverse effects through the use of pre-1995 subsidies addresses a current problem, and not the earlier act of granting the subsidy in the first place.

54. The European Union's third argument is that "if all pre-1995 subsidies are covered by Article 5, the requirement to allocate 'existing benefits' to future production arising from pre-

[73] EU Appellant Submission , paras. 106-107.

[74] *E.g.*, SCM Agreement, Article 15.

1995 subsidies would already be covered by that rule," contrary to the principle that a provision of the covered agreements "cannot be interpreted in a way that would render it redundant."[75] This argument fails to recognize that Article IV created a special mechanism for calculating *ad valorem* subsidies different in some respects from other provisions of the SCM Agreement, but identical in other respects. Therefore, for purposes of clarity, the Annex states explicitly some rules that might otherwise be considered obvious – that all subsidies are included in the calculation (paragraph 6) and that non-actionable subsidies are excluded (paragraph 8). In this context, the statement that the calculation includes subsidies granted prior to entry into force of the Agreement (paragraph 7) is not redundant. It reflects the negotiators' understanding that those subsidies are generally covered by the SCM Agreement, and clarifies that this general rule, along with other general rules, applies in the calculation of the 5 percent threshold under Article 6.1(a).

55. Thus, none of the EU arguments regarding paragraph 7 of Annex 4 undermines the Panel's conclusion that the provision demonstrates that the SCM Agreement applies generally to the causing of adverse effects through use of subsidies granted prior to the entry into force of the Agreement.

56. The European Union also criticizes the Panel's conclusion that Article 28.1 of the SCM Agreement provides no contextual guidance for determining whether Article 5 applies to pre-1995 subsidies. Article 28.1 provides that:

> Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be . . . brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.

The Panel found that this passage indicated that "WTO-inconsistent *programmes*, established prior to 1 January 1995 and continuing in effect after that date, were generally intended to fall within the temporal scope of Part II, subject to the three-year grace period granted by Article 28.1."[76] The Panel further concluded that the exemption of pre-1995 subsidy programs from Part II indicated that those same programs "would likewise fall within the temporal scope of Part III of the SCM Agreement."[77] The Panel observed, however, that this reasoning applied only to subsidy *programs*, and found that Article 28.1's silence as to individual pre-1995 grants of subsidies prevented any conclusion with regard to those subsidies. It accordingly found that Article 28.1 provided no contextual assistance for interpreting whether Article 5 of the SCM

[75] EU Appellant Submission, para. 109, *quoting US – Continued Zeroing*, para. 272.

[76] Panel Report, para. 7.63 (emphasis added).

[77] Panel Report, para. 7.63.

Agreement applies to individual subsidies granted before 1995 that did not cease to exist before entry into force.

57. The European Union disagrees. It first notes that Article 28 appears in the part of the SCM dealing with "transitional arrangements," and argues that the absence of any mention of individual subsidies (as opposed to programs) reflects an intention to exclude individual subsidies from the Agreement as "completed 'acts' or 'situations."[78] The European Union provides no basis for this assumption. It is more logical to assume that the negotiators made no "transitional arrangement" for individual subsidies because they saw no need. The application of Article 5 to the causing of adverse effects through the use of subsidies as of January 1, 1995, and the nonapplication where there were no such effects is clear, and has no need for a phase-in. In fact, such an arrangement is typical of the covered agreements. For example, the *General Agreement on Trade in Services* did not provide transitional arrangements for the large number of measures affecting trade in services that previously had been free from multilateral disciplines

58. The European Union also attempts to rebut this argument by asserting that Article 28.1 acts as a sort of negative pregnant – the explicit reference to pre-1995 subsidy programs implies the complete exclusion of individual pre-1995 subsidies from the SCM Agreement. To reiterate, the only conclusion to draw from Article 28.1's silence is that *Article 28* does not apply to pre-1995 subsidies. The European Union gives no reason to conclude that this silence signals the exclusion of such subsidies from other provisions of the SCM Agreement.[79]

59. The European Union also argues that the negotiating history of Article 28 of the SCM Agreement demonstrates that Members "focused" on transitional arrangements for subsidy programs because "subsidy regimes and policies of various signatory countries may not initially be in total conformity with the new rules and disciplines."[80] This history cited by the European Union is, in fact, quite thin. It consists of statements in two documents reflecting the view of five countries that there ought to be a transition period for countries to bring "subsidy programs" (Australia) or "regimes and policies" (Finland, Iceland, Norway, Sweden) into compliance with SCM Agreement obligations.[81] Neither document advocates exclusion of individual subsidies. In fact, both express concern that inadequate disciplines on existing "subsidies," as opposed to

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[78] EU Appellant Submission, para. 102.

[79] The EU notes, as it does at other points of its submission, that under the SCM Agreement, "{n}o obligation is imposed to revise all prior subsidies." This observation is correct. After all, the SCM Agreement does not require revision of all subsidies – only those that are prohibited. But it is unclear why the EU considers the point significant. The fact that Members need not revise some pre-1995 subsidies, including actionable subsidies for which the Member has removed the adverse effects, does not imply that all individual pre-1995 WTO-inconsistent subsidies can remain in use without change.

[80] EU Appellant Submission, para. 102.

[81] Elements of the Framework for Negotiations: Submission by the Nordic Countries, MTN.GNG/NG10/W/30, section 13; Elements of the Framework for Negotiations: Submission by Australia, MTN.GNG/NG10/W/32, section II, para. 7.

subsidy programs, posed a serious problem.[82] Therefore, there is no reason to read proposed transitional arrangements for "programs" or "regimes and policies" as entailing the grandfathering of all existing individual subsidies. It is worth noting that the European Union came away from these negotiations convinced that "{p}re-WTO subsidies are covered by the SCM Agreement so long as the 'situation' – *i.e.*, the effect of the subsidy in form of a benefit has not ceased to exist{} as of 1 January 1995."[83] Although it has since had a change of heart, its earlier views provide valid evidence of one Member's more contemporaneous understanding of the negotiating history.

60. Article 29 of the SCM Agreement provides special transitional arrangements for Members in the process of transformation from a centrally planned into a market economy. The European Union argues that because this provision contains "no indication of any express intention to include pre-1995 subsidies with post-1995 effects" and exempts some subsidies from of Article 5 for seven years, it evinces "the intention to exclude individual subsidies brought into existence before 1995."[84] The Panel's observations regarding Article 28.1 apply equally in this situation – Article 29's silence as to whether pre-1995 subsidies are included in the SCM Agreement or excluded does not allow a conclusion either way. In any event, its status as an exceptional provision for a limited number of Members for a limited period make Article 29 a problematic basis for generalizing about the entire SCM Agreement. Therefore, it provides no contextual support for the EU views.

61. The European Union notes that yet another provision of the SCM Agreement, Article 32.3, applies the disciplines on countervailing duties to investigations initiated after entry into force. The EU argues that other rules in the Agreement should accordingly apply only to subsidies granted after that date.[85] However, the omission of any transitional provision for individual pre-1995 subsidies signifies only one thing – that the negotiators saw no need for a transitional arrangement. It does not indicate whether this is because they wanted the new Agreement to apply immediately to existing subsidies, or whether they intended to exclude existing subsidies completely.

62. The European Union also attempts to find support for the complete exclusion of pre-1995 subsidies in the fact that Article 32.5 of the SCM Agreement obligates each Member to "take all necessary steps . . . to ensure . . . the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement," but does not refer to "completed acts or

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[82] MTN.GNG/NG10/W/32 ("The unfettered use of subsidies has in many areas nullified or impaired contracting parties' rights and obligations under the GATT."); MFN.GNG/NG10/W/30, section 1 ("Practical subsidization situations have appeared where the SCM Agreement does not contain relevant and effective provisions. The Nordic countries propose to clarify, to supplement and to amend the rules of the SCM Agreement in order to eliminate the causes of the disagreements and to provide rules for the unsolved situations.").

[83] *US – Upland Cotton (AB)*, Third Participant's Submission by the European Communities, para. 49.

[84] EU Appellant Submission, para. 103.

[85] EU Appellant Submission, para. 104.

situations" like individual pre-1995 subsidies.[86] However, an explicit obligation to bring named classes of measures into compliance with international obligations does not imply that other measures are free from the obligations. Indeed, the absence in Article 32.5 of an explicit reference to "subsidy programs" did not prevent the European Union from recognizing that the Agreement applies to them. Therefore, the EU references to Article 32 of the SCM Agreement do not support its argument.

63. In sum, the European Union fails in all of its efforts to find contextual support for its position that the SCM Agreement does not apply to individual pre-1995 subsidies. The one provision that references such subsidies, paragraph 7 of Annex IV, indicates that the SCM Agreement does apply. As we have noted above, moreover, and as the Panel recognized as well, the text of Article 5 as well as that of Articles 7.8, 3 and 6.3/6.4 confirm this reading. The other provisions cited by the EU do not even mention individual pre-1995 subsidies. Although the European Union takes this silence to mean that the Agreement does not cover these subsidies, it provides no credible support for its view. Instead, as the Panel found with regard to Article 28.1, the omission of references to pre-1995 subsidies means simply that the provisions are not relevant to the analysis of whether Article 5 applies to those subsidies.

D. If the Appellate Body finds that the EU subsidies themselves are the relevant act, fact, or situation for purposes of Article 28 of the Vienna Convention, it should complete the Panel's analysis and find that pre-1995 subsidies are a "situation" that did not cease to exist prior to entry into force of the SCM Agreement

64. If the Appellate Body upholds the Panel's finding that the causing of adverse effects through the use of subsidies is the relevant situation for purposes of evaluating retroactivity, it need not address the EU arguments that the grant of a subsidy is a completed act or situation.[87] If the Appellate Body finds that the granting of the subsidy itself is the focus of Article 5 of the SCM Agreement and thus the relevant act, fact, or situation under Article 28 of the Vienna Convention, it should still reject the EU arguments. The SCM Agreement and the undisputed facts before the Panel support the conclusion that subsidies granted before 1995 are a situation that did not cease to exist before entry into force of the SCM Agreement. Therefore, application of Article 5 of the SCM Agreement to those subsidies does not raise retroactivity concerns.

65. Article 1.1 of the SCM Agreement provides that "a subsidy shall be deemed to exist if . . . there is a financial contribution by a government or any public body . . . and . . . a benefit is thereby conferred." By its terms, Article 1.1 indicates when a subsidy begins to "exist," but not when it ends.[88] The remainder of the SCM Agreement makes clear that the subsidy continues to

[86] EU Appellant Submission, para. 105.

[87] EU Appellant Submission, para. 47.

[88] *US – Lead and Bismuth II (AB)*, para. 60 ("Article 1.1 sets out the definition of a subsidy for the purposes of the SCM Agreement. However, Article 1.1 does not address the time at which the 'financial contribution' and/or the 'benefit' must be shown to exist.").

exist after the act of conferring the financial contribution. The requirement under Article 4.7 and the option under Article 7.8 to "withdraw" the subsidy would be meaningless if the subsidy did not continue to exist. The same holds true for Article 21.1, which provides that "{a} countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." The Appellate Body itself has found that "an investigating authority may presume, in the context of an administrative review under Article 21.2, that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution'."[89] It has confirmed that it is consistent with the SCM Agreement for Members to treat subsidies as having a "duration" and to allocate the benefit over that period.[90]

66. An example illustrates this point. Suppose a Member provides $4 billion in LA/MSF to a large civil aircraft producer in 1994. Like all LA/MSF, it tied repayment to sales and the expectation that the producer would repay the aid – if the expected sales materialize – through per-plane levies over a period of 20 or more years. The terms of payment (as the Panel found to be true of all LA/MSF) are more advantageous than the producer could have obtained on the market. The recipient has use of that money in exchange for a commitment to repay it at a less-than-market rate for as long as the LA/MSF remains outstanding – until 2014 in this example. Thus, the subsidy, in terms of the benefit conferred by a financial contribution, remains in existence long after the initial government act granting it. It exists independent of any adverse effects it might cause in terms of lost sales, price suppression, or the other conditions referenced in Article 6.3 of the SCM Agreement.

67. The European Union argues with regard to the benefit and the government action of granting the financial contribution that "{t}he moment these two elements are present a subsidy is granted or brought into existence."[91] The United States does not dispute that a subsidy begins at this point. However, the European Union then moves on to assert that "{a}bsent any further active government conduct, it can be concluded that the subsidy was brought into existence and has ended."[92] The European Union cites no authority for this assertion, and there is none. Rather, it is confusing the act of granting the subsidy – that is, conferring a financial contribution – with the subsidy itself. The government act of giving the subsidy may end upon final transfer of the funds. But, under Article 1.1 of the SCM Agreement, a subsidy is deemed to "exist" if there is a financial contribution and a benefit is thereby conferred. A subsidy exists once a complaining party establishes these conditions. A responding party is free to show that the subsidy subsequently ends at some point thereafter because it is a recurring subsidy or because of a full privatization, end of the allocation, or operation of some other mechanism that rebuts the evidence that the benefit exists. There is no legal basis, however, to assume as the European Union does that the subsidy ends upon completion of the financial contribution. This legal

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[89] *US – Lead and Bismuth (AB)*, para. 62; *Countervailing Measures on Certain EC Products*, para. 84.

[90] *Japan – DRAMs (Korea) (AB)*, para. 210F.

[91] EU Appellant Submission, para. 47.

[92] EU Appellant Submission, para. 47.

conclusion reflects the economic reality that the benefit of a subsidy may continue long beyond actual receipt of the funds.

68. Paragraphs 53-57 of the EU appellant submission describe various types of government conduct and indicate the EU views of how Article 28 of the Vienna Convention would affect the analysis of those subsidies. As the European Union bases its conclusions on the faulty premise that a subsidy "ends" as soon as the government makes its financial contribution, its analysis in these paragraphs proceeds from a faulty premise. In the event that the Appellate Body finds that the granting of the subsidy is the relevant act, fact, or situation for purposes of Article 28, it should apply the law and uncontested facts to complete the Panel's analysis.

69. In a finding that the European Union has not contested, the Panel observed that "situation" as used in Article 28 of the Vienna Convention means "a set of circumstances; a state of affairs" or "something that subsists and continues over time."[93] As a subsidy "exists" for a "duration" of time starting with its granting and ending at some later date, it falls within this definition.

70. Other than its retroactivity arguments, which this section has shown to be incorrect, and its extinction, extraction, and withdrawal arguments, which section III of this submission shows to be incorrect, the European Union has not disputed that subsidies granted to Airbus before 1995 existed at the time of entry into force of the SCM Agreement. Therefore, if the Appellate Body finds that the granting of a subsidy itself is a "situation" for purposes of Article 28 of the SCM Agreement and upholds the Panel's findings regarding extinction, extraction, and withdrawal of subsidies, it should complete the analysis and uphold the application of Article 5 of the SCM Agreement to the subsidies granted by the EU and member States before 1995 on the ground that the subsidies did not "cease to exist" before entry into force of the SCM Agreement.

E. The Tokyo Round Subsidies Code is irrelevant to the analysis of retroactivity in this dispute

71. The Panel rejected the possibility that the principle of intertemporal application of international law operated to make the Tokyo Round Subsidies Code the exclusive legal authority with regard to subsidies granted before 1995. The European Union had argued that application of the SCM Agreement would be inconsistent with that principle, which provides that an act should be judged in light of the law contemporary with its creation. For the acts granting LA/MSF to early Airbus models, the 1979 Tokyo Round Subsidies Code was the primary contemporary legal authority at the time. However, the Panel explained that, "because Article 5 of the SCM Agreement applies to pre-1995 subsidies that cause adverse effects after entry into force of the WTO Agreement, the doctrine of inter-temporal application of international law cannot operate to preclude the application of the SCM Agreement to such subsidies."[94] In short,

[93] Panel Report, para. 7.50.

[94] Panel Report, para. 7.323.

if the SCM Agreement does apply, the fact that the Tokyo Round Subsidies Code might have applied at the time, becomes irrelevant to a Panel under the DSU examining consistency with the SCM Agreement.

72. The general rule of interpretation reflected in Article 31 of the Vienna Convention also places limits on the intertemporal application of international law. If the ordinary meaning of the terms of a treaty in their context and in light of the treaty's object and purpose creates a change in the legal regime applicable to existing measures, that is the legal regime that applies. Thus, no party has argued, and no adopted report has found that preexisting agreements preclude the application of new covered agreements to existing measures, even though preexisting agreements would be the law contemporary with the creation of the act for purposes of the intertemporal application principle.

73. The EU arguments do not support the result it seeks. It first observes that the SCM Agreement resulted in "dramatic changes" to the legal regime applicable under the GATT 1947 and the Tokyo Round Subsidies Code. Members, especially developing countries, took on new and rigorous subsidies disciplines that previously had not applied to them. The European Union notes that under the Panel's reasoning, these new rules would apply to subsidies that had been in existence for as much as 15 years completely free of multilateral disciplines, and opines that "this cannot be the intention of the negotiators under Article 27.9 or, for the same matter, under Article 5."[95] It adds that "{s}uch an outcome would also be at odds with the principles of legal certainty and predictability that lie at the heart of the WTO system."[96] In fact, developing country Members of the WTO, many of whom were not contracting parties to the GATT 1947 or signatories to the Tokyo Round codes, assumed a multitude of new disciplines applicable to measures that had previously been subject to no such limitations. These disciplines added to legal certainty and predictability by providing greater specificity than under the GATT 1947, and the recourse to more robust dispute settlement. There is simply no reason to assume, as the EU asks the Appellate Body to do, that WTO Members that were willing to adopt new obligations with respect to existing measures, including MFN for existing measures affecting trade in services, limitations on existing emergency actions under GATT 1947 Article XIX, or risk assessment procedures for existing SPS measures were unwilling to apply new SCM Agreement obligations to existing subsidies.

74. It is also worth noting that, contrary to the EU assumption, the whole point of the SCM Agreement was to make "dramatic changes" to existing disciplines, including the Tokyo Round Subsidies Code. The Punta del Este Declaration stated that the objective of negotiations on subsidies and countervailing measures was "improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade." The EU provides no basis for the Panel to conclude that the negotiators, after spending years fixing disciplines that all agreed were

[95] EU Appellant Submission, para. 115.

[96] EU Appellant Submission, para. 115.

broken, would not apply the new rules to the very subsidies that had motivated their concern in the first place.

75. Finally, the EU also fails to provide any support for its description of the intertemporal application principle. The only legal authority it cites is the ICJ decision in the *Ambatielos Case*, which found that the entry-into-force clause of a 1926 treaty of friendship, commerce, and navigation ("1926 Treaty") precluded application of its obligations to acts occurring in 1922 and 1923, when an earlier treaty was in force. The EU fails to recognize the significance of the fact that the ICJ in that case did not apply Article 28 of the Vienna Convention, or the principle of intertemporal application of international law. It instead interpreted Article 32 of the 1926 treaty, which it characterized (without quoting in full) as "stat{ing} that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification."[97] The EU contends that this conclusion is relevant to the interpretation of Article XIV:1 of the *Marrakesh Agreement*, which states that the covered agreements "shall enter into force on the date determined by the Ministers." However, the Appellate Body has found, and the EU does not contest, that Article 28 of the Vienna Convention sets out the retroactivity rule applicable to the covered agreements. Interpreted in this context, as it must be, Article XIV:1 of the *Marrakesh Agreement* does not establish a different rule. The ICJ's brief discussion of Article 32 of the 1926 Treaty is also irrelevant to the interpretation of Article 28 of the Vienna Convention, as it does not address what the EU itself recognizes as the central legal issue in the Panel's analysis – whether the object of the dispute was a "situation that ceased to exist."[98]

76. The question here, moreover, is not when the obligations contained in the SCM Agreement came into force – there is no dispute between the parties about that. Rather, the question is what are the acts, facts or situations that came into existence or continued to exist past 1995 that are relevant for purposes of Article 5 and Part III of the SCM Agreement.

77. Thus, the EU arguments provide no legitimate basis to conclude that the former applicability of the Tokyo Round Subsidies Code to the act of granting pre-1995 subsidies precludes application of the SCM Agreement to the post-1995 adverse effects of those subsidies.

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[97] *Ambatielos Case* (jursidiction), *ICJ Rep.* 1952, p. 28 (40) (ICJ July 1, 1952).

[98] EU Appellant Submission, para. 38.

III. THE PANEL CORRECTLY FOUND THAT UNDER ARTICLE 5 OF THE SCM AGREEMENT AN ANALYSIS OF WHETHER THE VARIOUS AIRBUS CORPORATE REORGANIZATION ACTIVITIES "WITHDREW" OR "EXTRACTED" SUBSIDIES IS NOT NECESSARY

78. In 1998, Airbus aircraft were produced by a group of companies owned by the French State, a French private company, the Spanish State, DaimlerChrysler, and BAE Systems.[99] In 2006, the end of the period covered by the U.S. claims, Airbus aircraft were produced by a group of companies owned by the French State, a French private company, the Spanish State, DaimlerChrysler, BAE Systems, and private investors.[100] The Panel found that prior to 1999 and continuing through 2006, the various companies involved in the production of Airbus LCA received a number of financial contributions from the EU member States and the European Union, and that each conferred a benefit. The Panel correctly found that, while the Airbus operation underwent a corporate reorganization during the 1999-2006 period, none of the steps in this process required a change in the conclusion that each of the previous financial contributions conferred a subsidy subject to Article 5 of the SCM Agreement. The Panel accordingly found that it did not need to analyze whether any subsidies had been "extinguished," "extracted," or "withdrawn."[101]

79. The Panel found that two separate analyses led independently to this conclusion. It first noted that Article 5 requires an evaluation of whether a Member causes adverse effects through the use of a subsidy referred to in paragraphs 1 and 2 of Article 1. Article 1.1 of the SCM Agreement states that "a subsidy is deemed to exist" if there is a financial contribution and a benefit is conferred thereby. The Panel concluded that a finding that both of these conditions "came into existence" establishes that there is a "subsidy referred to in paragraphs 1 and 2" for purposes of Article 5, which contains no requirement for a second showing that the financial contribution continues to confer a benefit at some later point in time.[102]

80. The Panel conducted a second analysis that assumed, *arguendo*, that it might be necessary in some circumstances to evaluate whether an old subsidy continues to confer a benefit. The Panel addressed two sets of transactions that, in the EU view, either "extinguished"

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[99] Panel Report, Section VII.E.1 Attachment, para. 3.

[100] Panel Report, Section VII.E.1 Attachment, para. 6.

[101] The EU arguments in this area address eight steps in the reorganization of Airbus during the 1999-2006 period. Six of these involved sales of an ownership interest in one of the Airbus companies. The United States will call these "share transactions." Two other reorganization steps involved the transfer of funds between one of the Airbus companies and its owner. The United States will call these "cash transfers." In its appeal, the EU argues variously that these steps "extinguished" subsidies for purposes of Articles 1, 5, and 6 of the SCM Agreement, or "withdrew" them for purposes of Articles 4.7 and 7.8. Before the Panel, the EU did not always use terminology consistently, which led to some confusion on the part of the Panel. For clarity, the United States will refer to the EU's claims under Articles 1, 5, and 6 as relating to subsidy "extinction," and the claims under Article 4 and 7 as relating to "withdrawal" of subsidies.

[102] Panel Report, para. 7.218.

or "withdrew" prior subsidy benefits, meaning that it was impossible that they could cause adverse effects within the meaning of Article 5 of the SCM Agreement. The Panel concluded that the European Union had not established that either set of transactions affected the benefit conferred by the subsidy in a way that changed the finding as to the existence of a "subsidy referred to paragraphs 1 and 2 of Article 1" with regard to any of the pre-1995 Airbus subsidies. Therefore, any adverse effects of those subsidies would be inconsistent with Article 5.

81. The Panel found with regard to "extinction" that the EU argument required an overly broad application of an analysis that the Appellate Body explicitly limited to a defined class of transactions, none of which existed in this case. The Panel disagreed with the EU definition of the type of transaction that would "withdraw" subsidies from a recipient, but found that the European Union had in any event failed to satisfy its own test.

82. The European Union asks the Appellate Body to overturn the Panel's findings. Its arguments on appeal merely repeat the errors it made before the Panel. The European Union seeks to transpose legal findings regarding the calculation of countervailing duty margins for subsidization of fully privatized companies to the question of adverse effects caused by subsidization of companies that were not privatized. However, the reasoning that led it to find that privatization necessitates a reevaluation of the continuing benefit of past subsidies under Part V of the SCM Agreement does not apply to adverse effects claims under Part III of the Agreement.[103] The European Union further argues that particular transactions "withdrew" subsidies when in fact they changed nothing relevant to the analysis of subsidies or the benefit they confer. Finally, the European Union argues that the Panel failed to provide a "reasoned and adequate explanation" for its extinction and extraction findings and thereby violated Article 11 of the DSU. In fact, the Panel complied with Article 11 by conducting an "objective assessment." The European Union has provided no basis to consider the Panel's explanations unreasoned or inadequate, and no valid legal argument to replace the standard set out in Article 11 with a "reasoned and adequate" test, which in any event appears to relate more to Article 12.7 of the DSU.

83. Therefore, the Panel should reject the EU appeal regarding "extinction" or "withdrawal" of subsidies to Airbus.

A. The Panel correctly found that the application of an adverse effects analysis under Article 5 of the SCM Agreement to a "subsidy referred to in paragraphs 1 and 2 of Article 1" does not require an inquiry into whether that subsidy has been "extinguished"

84. The Panel based its rejection of a requirement to analyze subsidy extinction in the circumstances of this dispute on several considerations. It noted that the use of the present tense in Article 1.1 of the SCM Agreement indicates that the "financial contribution" and "benefit" of

[103] *US – Upland Cotton (AB)*, paras. 464 and 472.

a subsidy come into existence at the same time. It observed that the Appellate Body in *Canada – Aircraft (AB)* stated that the focus of the benefit inquiry is on "whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution."[104] Although the Panel recognized the relevance of a subsidy extinction analysis in determining the amount of a countervailing duty at a particular point in time,[105] it did not see how that issue could play a role in the analysis under Article 1.1 as to whether there was a financial contribution and a benefit was conferred thereby.[106]

85. The Panel considered that the issues raised by the European Union regarding the continued existence of the benefit conferred by Airbus subsidies in reality related to whether those subsidies caused adverse effects, and should be addressed as part of that inquiry.[107] The EU effectively concedes this point in its appeal when it describes the "continuing benefit" requirement as necessary to identify "whether the subsidy, because of the passage of time, is still capable of causing adverse effects."[108] That was exactly the point the Panel sought to make. Whether a subsidy is "capable" of causing adverse effects is part of the adverse effects analysis, and inserting that consideration into the evaluation of the benefit impermissibly mixes two separate inquiries.

86. The Panel noted that the theory that Article 5 of the SCM Agreement requires a finding that the benefit of past subsidies is still continuing at the time of the alleged adverse effects was a necessary predicate to the EU arguments regarding both the "extinction" and "withdrawal" of subsidies. It considered the failure of that theory to be fatal to both arguments.[109] In its appeal, the European Union attempts to combat the Panel's findings by asserting that they were inconsistent with an "overarching principle" that "{w}hen the benefit to the recipient arising from prior subsidies diminishes over time, or is removed or taken away, there is a significant change that must be taken into account in the application of the *SCM Agreement*."[110] The EU criticism is wrong. The Panel did not refuse to "take into account" the "changes" identified by the European Union, including the possibility that the benefit of subsidies "diminishes over

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[104] Panel Report, para. 7.218.

[105] Panel Report, para. 7.216 and 7.220.

[106] Panel Report, para. 7.218.

[107] Panel Report, paras. 7.219 and 22.1.

[108] EU Appellant Submission, para. 208.

[109] Panel Report, paras. 7.223 and 7.266.

[110] EU Appellant Submission, para. 126. *See also* EU Appellant Submission, paras. 202 and 221. In para. 221 the Panel states that "{i}f following, for example, the application of amortisation rules, the benefit no longer exists, or has been removed or taken away, a conclusion that the original subsidy causes present adverse effects cannot be reached." Amortization is *one* way that many Members find acceptable to allocate the benefit of a subsidy over multiple years. *E.g.*, *Japan – DRAMS (Korea) (AB)*, paras. 193-194. It is not the only way, and the United State is not aware of any panel or Appellate Body report that has used an amortization formula, as the EU proposes to do, to cap the benefit calculated by an investigating authority that did not use an amortization formula.

time." The Panel merely found that this issue "is an inherent part of the causation analysis to be undertaken pursuant to Articles 5 and 6."[111] The Panel did, in fact, consider carefully how the subsidies granted to Airbus over the course of years did, and in some cases did not, cause adverse effects to U.S. interests in the reference period covered by its analysis.[112]

87. The European Union asserts a number of arguments against the Panel's reasoning. All of them fail, either because the SCM Agreement and related jurisprudence do not state what the European Union says they state, or because the Panel did not do what the European Union says it did. Therefore, the Appellate Body should uphold the Panel's finding.

1. The grammatical construction of Article 1 of the SCM Agreement does not imply an obligation to evaluate the benefit conferred by a subsidy at any point after the grant of the relevant financial contribution

88. The European Union argues that the fact that the term "exist" is in the present tense in Article 1 of the SCM Agreement signifies that "{t}he SCM Agreement does not concern subsidies that no longer exist and which are not capable of causing adverse effects."[113] This simple grammatical observation does not justify the conclusion the European Union seeks to reach. In fact, a more detailed analysis of ordinary meaning and the grammatical context of the terms supports the Panel's conclusion that Article 1 does not require a finding as to a "continuing benefit."

89. The segment of Article 1 quoted by the European Union provides:

> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government") . . . and;
>
> (b) a benefit is thereby conferred . . . .

In this passage, "exist" is not in the past tense. It is an infinitive, a verb form that in English grammar lacks tense without an auxiliary verb or other modifier.[114] It is the object of the verb "deem," which means "{b}elieve, consider, judge, or count to be or *to be*; believe etc. *that*, (a person or thing) *to do*, *to have done*"[115] "Deem" itself is preceded by "shall," indicating that it

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[111] Panel Report, para. 7.221.

[112] Panel Report, paras. 7.1921-7.1949.

[113] EU Appellant Submission, para. 204.

[114] Oxford English Grammar, p. 252.

[115] New Shorter Oxford English Dictionary, p. 613 (italicization in original).

creates an obligation,[116] and is in the passive voice without any grammatical agent (the person performing the act), indicating that "identification of the agent is irrelevant or intended to appear so."[117] Thus, the obligation to "deem" a financial contribution to exist applies to everyone, without regard to who is doing the deeming. Thus, the phrase "shall be deemed to exist" indicates that anyone applying the definition must consider a subsidy to exist at the time of analysis if it meets the listed criteria. Those are that "there is" a financial contribution and a benefit "is" thereby conferred. The Panel found that the use of the present tense with regard to the financial contribution and benefit, and particularly the use of the terms "thereby" to indicate the relationship between them, indicates that they exist at the same point in time.[118]

90. It has never been suggested that the use of the present tense with regard to the financial contribution indicates that it must occur at the time of the alleged adverse effects under Part III of the SCM Agreement or material injury under Part V. The Appellate Body, panels, and parties to disputes have accepted without comment that "there is" a financial contribution for purposes of Article 1.1 of the SCM Agreement even if it occurred many years before the injury or adverse effects that the subsidy is alleged to have caused. [119] Thus, for purposes of Article 1.1, a subsidy shall be deemed to exist (in the present) if there is a financial contribution (at some point in the past) and a benefit is thereby conferred (contemporaneous with the financial contribution). As that is all that the terms in Article 1 require, they do not support the EU's argument that the grammatical usage of "exist" creates a requirement to determine whether the benefit continues to exist at some point after the financial contribution.

91. It is true, as the European Union observes, that the Appellate Body has found that a Member must demonstrate the existence of a benefit at the time it first applies a countervailing duty, and must also make a finding as to whether the benefit continues to exist if presented with evidence in a review proceeding that some intervening change[120] has affected the level of the benefit. The Appellate Body, however, has grounded this obligation in the SCM Agreement obligations applicable of those proceedings, in particular the obligation under Article 19.4 that "{n}o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist" and under Article 21.1 to apply a countervailing duty "only as long as

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[116] The relevant definitions of "shall" are "**2** Ought to as the right or suitable thing. . . . **3** Must of necessity, have to. . . . **b** Must as a necessary condition, will have to, is to. . . . Must according to a command or instruction. In the 3rd person (chiefly in statutes, regulations, etc.), in the 2nd person (chiefly *biblical*), equivalent to an imper." New Shorter Oxford English Dictionary, p. 2808. "Imper." is the abbreviation for "imperative." *Ibid*., p. vi.

[117] Oxford English Grammar, p. 37.

[118] Panel Report, para. 7.218.

[119] *E.g., Lead and Bismuth II (AB)*, para. 60; *US – Countervailing Measures on Certain EC Products (AB)*, para. 84.

[120] Such as a full privatization for fair market value in which the government no longer retains control.

and to the extent necessary to counteract subsidization which is causing injury."[121] It has used the definition of a subsidy in Article 1 to understand how the obligations in Articles 19.4 and 21.1 operate.[122] That does not mean that the definition operating by itself, or applied in the context of another part of the SCM Agreement, would necessitate the same result. As the Appellate Body found in *US – Upland Cotton (AB)*,

> The provisions of the *SCM Agreement* regarding quantification of subsidies reveal that the methodological approaches to quantification may be quite different, depending on the context and purpose of quantification. The absence of any indication in Article 6.3(c) as to whether one of these methods, or any other method, should be used suggests to us that no such precise quantification was envisaged as a necessary prerequisite for a panel's analysis under Article 6.3(c).[123]

Similarly, the absence in Articles 4.7 and 7.8 of the SCM Agreement of any requirement to apply the remedy only "as long as is necessary to counteract subsidization," such as appears in Article 21.1, suggests that the "continuing benefit" requirement derived from Article 21 is not necessary in the application of Articles 4.7 and 7.8.

92. The European Union also argues that although the financial contribution and benefit exist contemporaneously at the time the subsidy begins, this fact has no relevance to the question of whether there must *also* be a continuing benefit for a subsidy to cause adverse effects.[124] It attempts to support this argument by observing that the Appellate Body has treated the calculation of the amount of the benefit and its allocation over multiple years as separate issues.[125] The point that the calculations are different does not, however, mean that either or both calculations are necessary to find the existence of a subsidy under Article 1. In fact, they are not.[126] The calculations in question respond to the requirements of Article 14 of the SCM Agreement, and ensure a Member's compliance with Articles 19.4 and 21.1. The relevance of the concepts of the amount of the subsidy and its allocation over a period of years in these contexts does not mean that a determination of a continuing benefit is necessary for Article 1.

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[121] *US – Countervailing Measures on Certain EC Products (AB)*, para.139.

[122] For example, in *US – Lead and Bismuth II*, the Appellate Body first noted the obligation under Article 21.1 of the SCM Agreement that "{a} countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." It then turned to Article 1.1 of the SCM Agreement to identify when subsidization exists for purposes of Article 21.1. *US – Lead and Bismuth II*, paras. 53-55. Thus, the need to identify how long the benefit exists came from Article 21.1 and not, as the EU asserts, from Article 1.1.

[123] *US – Upland Cotton (AB)*, para. 465.

[124] EU Appellant Submission, para. 223.

[125] EU Appellant Submission, para. 223, *citing Japan – DRAMS (Korea) (AB)*, para. 199.

[126] The Panel did not calculate a value of the benefit as part of its determination as to whether the subsidy exists for purposes of Article 1, and the EU has not appealed this aspect of the Panel's reasoning.

93. Thus, the structure of Article 1.1 of the SCM Agreement indicates that it does not, acting alone, require a subsidy extinction analysis. The Appellate Body's findings regarding privatization confirm that this is not the case.

2. Article 4.7 and 7.8 of the SCM Agreement provide remedies for WTO-inconsistent subsidies, and do not contain substantive requirements for the evaluation of whether a subsidy exists

94. The European Union argues that the availability of "withdrawal" as a remedy for prohibited and actionable subsidies provides contextual support for its view that Articles 1, 5, and 6 of the SCM Agreement require a finding that any prior subsidies have not been extinguished before analyzing whether they cause adverse effects.[127] The EU has the analysis backwards. Withdrawal of a subsidy is one remedy for a violation of the SCM Agreement – mandatory in the case of a prohibited subsidy, optional in the case of adverse effects caused by an actionable subsidy. The existence of a specified remedy is not a prerequisite for finding a violation, especially when there are multiple forms of remedy available, as is the case in the event of a finding of adverse effects caused by an actionable subsidy.[128] Identifying a remedy and deciding whether it meets the relevant legal standard is, rather, a matter for remedial proceedings.

95. The texts of Articles 4.7 and 7.8 of the SCM Agreement do not support the EU conclusion, either. Article 4.7 provides that "if the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay." Article 7.8 provides that where "it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy." In either case, if the Member has already withdrawn the subsidy (because the subsidy in question no longer exists in the sense of continuing to provide a benefit at the point of the deadline for withdrawal), then the Member will have complied. This is no different from a range of other situations in which compliance could have occurred prior to the DSB adopting its recommendations and rulings.

96. The European Union attempts to bolster its argument by asserting that Articles 4.7 and 7.8 of the SCM Agreement are "{t}he equivalent of" Article 21.2 and 21.3 of the SCM

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[127] EU Appellant Submission, para. 200. In another section of its submission, the EU contends that withdrawal of a subsidy includes "diminution" or "allocation" of its benefit over time, and that Articles 4.7 and 7.8 of the SCM Agreement independently create an obligation to exclude past subsidies "withdrawn" in this fashion from the adverse effects analysis. EU Appellant Submission, paras. 170-197. The United States addresses the withdrawal arguments separately in Section III.C, which demonstrates that these types of supposed change in the level of the benefit do not constitute "withdrawal" of a subsidy.

[128] To give an example, if it were a crime to commit a robbery with a gun, and one possible punishment was confiscation of the gun, the fact that the robber had disposed of the gun would not mean that the crime no longer existed.

Agreement, and that the Appellate Body recognized that those provision "require the termination of remedial action against subsidies once those subsidies have been removed in some way."[129] This assertion is wrong in several respects. The European Union does not cite the paragraphs in which the Appellate Body supposedly made this finding, but in both of the cited reports, *US – Countervailing Measures on Certain EC Products* and *US – Lead and Bismuth II*, the Appellate Body actually refers to Articles *21.1* and 21.2 together. The analysis places particular emphasis on the obligation under Article 21.1 that "{a} countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury."[130] The Appellate Body does not couch its reasoning in terms of "remedies" generally, but specifically in terms of the permissible level of application of countervailing duties.

97. The European Union is also wrong to characterize Articles 4.7 and 7.8 as "equivalent to" Articles 21.2 and 21.3 (or 21.1). Articles 4.7 and 7.8 apply to the subsidizing Member, and state that it "shall", or in the case of adverse effects "may", withdraw the subsidy. In contrast, Articles 21.1, 21.2, and 21.3 apply to the Member whose industry is injured by subsidized imports, and provide:

- "A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury." (Article 21.1)
- "Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization." (Article 21.2)
- "{T}he investigating authority must determine whether there is a continuing need for the application of countervailing duties." (Article 21.2)
- "If as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately." (Article 21.2)
- A countervailing duty must be terminated within five years after its imposition unless "expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury." (Article 21.3)

The Appellate Body in *US – Countervailing Measures on Certain EC Products(AB)* focused on the obligation under Article 21.2 as to the "continuing need for the application of countervailing duties" in finding that there is an obligation "to determine whether a 'benefit' continues to exist

[129] EU Appellant Submission, para. 200.

[130] *US – Countervailing Measures on Certain EC Products*, paras. 81 and 139-141; *US – Lead and Bismuth II*, paras. 53 and 61. *US – Countervailing Measures on Certain EC Products* is the only one that refers to Article 21.3, and only once, tangentially. *US – Countervailing Measures on Certain EC Products*, para. 81.

when information suggesting that a benefit no longer exists is presented . . . ."[131] Articles 4.7 and 7.8 of the SCM Agreement contain nothing remotely like this obligation.

98. Therefore, Articles 4.7 and 7.8 of the SCM Agreement acting alone do not provide contextual support for the view that an inquiry into whether the benefit of a subsidy continues to exist is necessary at any point after its conferral. Since Articles 21.1, 21.2, and 21.3 of the SCM Agreement are framed in terms entirely different from Articles 4.7 and 7.8, the Appellate Body's reasoning that Articles 21.1 and 21.2 impose an obligation to establish a continuing benefit does not apply to an analysis of Articles 4.7 and 7.8.

3. The use of verb tenses in Articles 5 and 6.3 of the SCM Agreement does not support the EU view that there must be a finding of a continuing benefit

99. The European Union argues that the terms "cause" in Article 5 and "is" in Article 6.3 are both in the present tense and, therefore, that "subsidies that have been withdrawn or ceased to exist cannot "cause" adverse effects or trigger the examples of such effects set out in Article 6.3 that have ceased to exist. [132] As used in Article 6.3 ("the effect of the subsidy is . . .") the present tense indicates only that the "effect" is in the present, in the form of one of the four market situations that indicate, in the present, the existence of serious prejudice. It indicates nothing about whether the source of that "effect" is in the present or in the past.[133]

100. The European Union is wrong about the usage of "cause" in Article 5 of the SCM Agreement. It is in fact an infinitive paired with the auxiliary verb "should,"[134] and is rendered mandatory through the operation of the remedies in Article 7.8 of the SCM Agreement. In grammatical usage, "should" is the past tense form of "shall," a modal verb indicating prediction, volition, or regulation.[135] However, past tense modal verbs may also refer to action in the present or future,[136] so the usage in Article 5 conveys no indication as to whether the "causing" occurs in the past or present. In any event, the EU's effort to link a continuing benefit requirement to this usage is particularly strained because the subject of the verb "cause" is "{n}o Member." The word "subsidy," which the EU argues is governed by the tense of the word "cause," appears in an adverbial clause ("through the use of any subsidy") showing instrumentality – the means used to accomplish the action.[137] Nothing in that clause or in the

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[131] *US – Countervailing Measures on Certain EC Products*, para. 141

[132] EU Appellant Submission, paras. 207-208.

[133] To give an example, one might say that "one effect of Hurricane Katrina is that the population of New Orleans is lower now than in 2000." The "effect" is current, but does not suggest that the cause, a hurricane, is still going on.

[134] Oxford English Grammar, pp. 153-154.

[135] Oxford English Grammar, pp. 262-263.

[136] Oxford English Grammar, p. 154.

[137] EU Appellant Submission, para. 94.

tense of the word "cause" indicates whether that instrumentality occurred at the same time as the resulting "adverse effects" or before.[138]

101. As part of its argument, the European Union asserts that "it is not conceivable how a Member t{h}rough granting or maintaining a subsidy that is later on withdrawn or otherwise discontinued or diminished to a negligible amount can cause present adverse effects." It adds that "{i}ndirect effects . . . cannot be sufficient."[139] The European Union provides no legal support for these assertions, and there is none. Article 5 of the SCM Agreement does not differentiate between direct or indirect effects, or present subsidies, past subsidies, or subsidies that have ceased to confer a benefit. It requires only a conclusion as to whether, "through the use of any subsidy," a Member caused adverse effects. As the Panel observed, a complaining party attempting to link a subsidy with a current adverse effect, as Article 5 requires, might have trouble doing so if an extended period of time had passed or market conditions changed. Additional difficulties might attach to an effort to link an indirect effect to the original subsidy. However, contrary to the EU assertion, whether such a causal link is "conceivable" is a question for the adverse effects analysis, and not a matter to resolve through a presumption as to what a subsidy with a diminished benefit can do.

102. The European Union argues that addressing the effects of the subsidy over time in the adverse effects analysis does not sufficiently address the possibility that the benefit may have diminished or been eliminated entirely because adverse effects and benefits are different issues.[140] That is true, and is yet another reason why it is not permissible to assume, as the EU does in advancing this argument, that if a subsidy "has been withdrawn or otherwise discontinued" or "the amount of benefit left is non-existent or negligible" then "it simply cannot cause any present adverse effects."[141] What the European Union is suggesting is a *de minimis* requirement, like in Article 11.9 of the SCM Agreement, which requires termination of a countervailing duty investigation if the subsidy margin is less than 1 percent *ad valorem*. Of course, Article 5 of the SCM Agreement contains no such provision, indicating that the negotiators did not intend to use a *de minimis* concept to preclude action under Article 5. Thus, in Part III of the SCM Agreement, unlike Part V, a Panel addresses the possibility that a subsidy is too small to cause adverse effects through the causation analysis. If it is indeed too small, the conclusion of that analysis will be negative.

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[138] To illustrate, if a law stated that "no person shall cause, through use of poison, the death of another person," that would not suggest that the use of poison had to be contemporaneous with the death. This example underscores exactly how much the EU argument that the subsidy must exist contemporaneously with the adverse effect is at odds with the normal understanding of causality, which is that the cause would precede the effect by at least some amount of time.

[139] EU Appellant Submission, para. 207.

[140] EU Appellant Submission, para. 224.

[141] EU Appellant Submission, para. 224.

103. The European Union also asserts that the Panel did not actually address the effect of the subsidy over time in its adverse effects analysis. This is not the case. The Panel carefully considered how the subsidies affected Airbus and Boeing over the passage of time.[142] In any event, this particular argument does not suggest any inadequacy in the Panel's findings as to extinction or extraction.

4. The EU provides no basis to question the Panel's conclusion that past Appellate Body findings requiring a subsidy extinction analysis apply only to countervailing duty proceedings under Part V of the SCM Agreement

104. The European Union argues that the Panel was "not convincing" in explaining its conclusion that panel and Appellate Body findings requiring a subsidy extinction analysis were relevant only to Part V of the SCM Agreement, and not Part III. The European Union asserts that those findings apply to the entirety of the SCM Agreement because they supposedly arise from Article 1, but provides no support or citations for this assertion.[143] The European Union made similar points in other parts of its extinction/withdrawal argument, and the United States addressed them in that context.[144]

B. The Panel correctly found that the reasoning in the Appellate Body's privatization appeals does not apply to Airbus reorganization activities between 1999 and 2006

105. The Appellate Body in *US – Countervailing Measures on Certain EC Products* specifically rejected application of the legal reasoning leading to the conclusion that certain types of privatization presumptively extinguish past subsidies outside of the context of very particular types of privatization. The Appellate Body rebuked the panel in that dispute, which had applied its reasoning to all sales of any type of company, because:

> {t}he 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*.[145]

The Panel in this dispute quoted that finding, and properly relied upon it. Nevertheless, the European Union persists in making arguments to the effect that the Appellate Body's report

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[142] Panel Report, 7.1921-7.1949.

[143] EU Appellant Submission, para. 225.

[144] See section III.A.3.

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

establishes "the 'principle' that 'the sale of a company at arm's length and for fair market value removes any benefit of prior subsidies to the buyer'. This principle applied to private-to-private sales and partial sales."[146] This statement is completely at odds with the Appellate Body's specific finding, and should be rejected.

106. The European Union makes numerous unconvincing efforts to establish that the panel and Appellate Body reports in the *US – Countervailing Measures on Certain EC Products* dispute support its views. It argues that the Appellate Body announced an irrebuttable presumption that all changes of ownership involving private parties are subject to the rules relating to privatizations[147] – the same finding that the Appellate Body had criticized the *US – Countervailing Measures on Certain EC Products* panel for making.[148] The European Union also contends that the criticism by the Panel in this dispute of the reasoning by the original panel in *US – Countervailing Measures on Certain EC Products* contradicts the Appellate Body's reasoning in the appeal of that report.[149] In fact, the Appellate Body itself criticized the *US – Countervailing Measures on Certain EC Products* panel's reasoning, and the findings of Panel in this dispute accords entirely with the Appellate Body's reasoning. Finally the European Union asserts that the Article 21.5 panel in *US – Countervailing Measures on Certain EC Products (21.5)* made findings applicable beyond the limited field of full privatizations.[150] It would be surprising if the compliance panel ignored the Appellate Body's criticism of the original panel by rendering such an expansive finding. In fact, the compliance panel did not. The findings cited by the EU related exclusively to the situation of full privatization, which is not at issue in this dispute.

107. Therefore, the Appellate Body should uphold the Panel's conclusion that the reasoning in the various *US – Countervailing Measures on Certain EC Products* reports does not, as the EU asserts, create a general "principle" that "the sale of a company at arm's length and for fair market value removes any benefit of prior subsidies to the buyer." Nor, as the EU contends, does "{t}his principle appl{y} to private-to-private sales and partial sales."[151]

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[146] EU Appellant Submission, para. 226.

[147] EU Appellant Submission, para. 253.

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

[149] EU Appellant Submission, para. 249.

[150] EU Appellant Submission, para. 257.

[151] EU Appellant Submission, para. 226.

1. The Panel correctly found that the Appellate Body's reasoning in the privatization appeals does not apply to the activities in the 1999-2006 Airbus reorganizations

a. The Appellate Body found that the reasoning in US – Countervailing Measures on Certain EC Products regarding full privatization did not apply to other types of transactions

108. The Appellate Body explicitly limited the reach of its findings in *US – Countervailing Measures on Certain EC Products* to one specific type of transaction – 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."[152] The EU does not dispute that none of the Airbus reorganization activities between 1999 and 2006 met these criteria. Nonetheless, it contends that the Appellate Body's findings in that dispute apply to the reorganization activities.

109. The Panel rejected the EU view, finding that "the Appellate Body explicitly confined its analysis and findings (as well as those of the panel) to the specific facts and circumstances before it."[153] The European Union asserts that the Panel erred and based its conclusion on "selective, out-of-context, quotes from the Appellate Body's report."[154] In fact, the Appellate Body discussed this point at length, devoting four paragraphs to rebuking the original panel for reaching the conclusion now advocated by the European Union.[155] The Appellate Body summed up its views with the following finding quoted by the Panel:

> As we explained, the "core legal question" before the Panel was to determine whether a "benefit", within the meaning of the *SCM Agreement*, continues to exist following privatization at arm's length and for fair market value. In considering this core legal question, the Panel examined a very precise set of facts, and circumstances, namely, a benefit resulting from a prior non-recurring financial contribution bestowed on a state-owned enterprise where, following a privatization at arm's length and for fair market value, the government transfers all or substantially all the property and retains no "controlling interest in the privatized producer." The Panel did not examine other situations, for instance, situations where a "benefit" is conferred through recurring financial contributions, or where the seller retains a controlling interest in the firm following its change in ownership. 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

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

[153] Panel Report, para. 7.237.

[154] EU Appellant Submission, para. 247.

[155] *US – Countervailing Measures on Certain EC Products (AB)*, paras. 116-119.

> 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.[156]

Thus, the Panel in this dispute did not reach its finding based on a selective reading. The Panel carefully considered the position advanced by the European Union – that all changes in ownership "extinguish" the benefits of prior subsidies – and rejected it.

110. Nor did the Panel in this dispute take the Appellate Body's point out of context. In the paragraph preceding the one quoted by the Panel, the Appellate Body states that "the Panel went too far."[157] In the following paragraph, the Appellate Body refers to the Panel's finding as "overly broad" and explained that "it does not seem to us that the very narrow set of facts and circumstances analyzed by the Panel" supports its conclusion.[158]

111. The Appellate Body also noted the narrowness of the facts subject to the Panel's finding elsewhere in its report, stating that

> {w}e observe, in particular, that the Panel has not examined whether a "benefit", within the meaning of the *SCM Agreement*, would be extinguished following a change in ownership under circumstances different from those in the 12 cases under consideration. {*US – Countervailing Measures on Certain EC Products (Panel)*, para. 7.62.) Hence, our analysis will be circumscribed to determine whether, in the light of the circumstances of this case, the findings and conclusions of the Panel are in conformity with the *SCM Agreement*.[159]

Thus, the Appellate Body stated unequivocally that the panel was wrong to make a broad finding regarding forms of transaction other than the ones before it, and that the Appellate Body would also restrict its own analysis to the transactions before the panel. Therefore, there is no basis in the Appellate Body's reasoning to support the EU assertion that the report establishes a "principle" applicable to "private-to-private sales and partial sales, as well as full privatisations" to the effect that "the sale of a company at arm's length and for fair market value removes any benefit of prior subsidies to the buyer."[160]

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

[157] *US – Countervailing Measures on Certain EC Products (AB)*, para. 116.

[158] *US – Countervailing Measures on Certain EC Products (AB)*, para. 118.

[159] *US – Countervailing Measures on Certain EC Products (AB)*, para. 86, note 177.

[160] EU Appellant Submission, para. 226.

b. The Appellate Body's reasoning in US – Countervailing Measures on Certain EC Products does not create presumptions, rebuttable or otherwise, relevant to this dispute

112. The European Union attempts to avoid the implications of the Appellate Body's finding that the analysis of privatization does not apply outside the specific contexts of those disputes by arguing that the reasoning creates generalized presumptions related to tracing the existence and recipient of a benefit. Each of the EU arguments in that respect fails.

113. The European Union first argues that the Appellate Body's reasoning in *US – Countervailing Measures on Certain EC Products* "effectively established a *rebuttable presumption* that there is no distinction between a firm and its owners for the purpose of the SCM Agreement."[161] This is impossible to square with the Appellate Body's reasoning. The rebuttable presumption advocated by the European Union is the same as the irrebuttable presumption, made by the *US – Countervailing Measures on Certain EC Products* panel, that the Appellate Body criticized so thoroughly. It would also apply to all transactions, which the Appellate Body stated that it had no intent to do.[162] Furthermore, the Appellate Body found that the distinction between a firm and its owners was "certainly not conclusive," and "is not necessarily relevant," for determining whether a benefit exists,[163] indicating an openness to consideration of that factor, where relevant, as part of an overall evaluation of a transaction. Moreover, where the Appellate Body recognizes the existence of a presumption (that certain types of privatizations may extinguish subsidies) in that report, it says so unambiguously.[164] It is, therefore, unlikely that it created another presumption, especially one so at odds with the panel finding that it rejected, by implication.

114. In light of the Appellate Body's rejection of approaches that treated a firm and its owners as always the same or always distinct, there is no basis for creating a presumption, rebuttable or otherwise, that they are the same. A better characterization would seem to be that the sameness of a firm and its owners is an analytical construct, warranted in some instances, as the Appellate Body indicated in paragraph 118 of the *US – Countervailing Measures on Certain EC Products* report, and not warranted in others, as indicated in paragraphs 113 and 115 of that report.

115. The European Union attempts to defend its presumption as "rooted in economic common sense" by hypothesizing sales of 75, 50, and 25 percent of a firm's shares, and asking why the finding that a fully privatized firm and its new owners are the same should not apply for such

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[161] EU Appellant Submission, para. 240 (emphasis in original).

[162] *US – Countervailing Measures on Certain EC Products (AB)*, para. 86, note 177.

[163] *US – Countervailing Measures on Certain EC Products (AB)*, para. 116.

[164] *E.g.*, *US – Countervailing Measures on Certain EC Products (AB)*, para. 127 (we find that there is a rebuttable presumption that a benefit ceases to exist after such a privatization).

sales of lesser portions of the firm.[165] However, the European Union's argument takes an erroneously narrow view of "economic common sense" in the analysis of whether a firm and its owners should be regarded as distinct. Depending on the facts of any particular case, there may be many other factors that should be analyzed, but it is "economic common sense" (as well as Appellate Body jurisprudence) that one factor to be analyzed is whether the owners have the ability to control the assets of the firm. The Appellate Body has made it clear that the size of the ownership interest and ability to control the assets of the firm are important factors in the analysis of whether a firm and its owners are distinct. In *US – Countervailing Measures on Certain EC Products (AB)*, the Appellate Body specifically disagreed "with the Panel's overreaching conclusion that 'for the purpose of the benefit determination under the SCM Agreement, {investigating authorities should make} no distinction . . . between a company and its shareholders,"[166] noting that the panel "should have confined its findings to the specific circumstances" of "a privatization at arm's length and for fair market value where the government transfers all or substantially all the property and retains no controlling interest in the firm."[167] Faithfully reflecting the Appellate Body's report, the Panel in this case acknowledged the importance of control in an analysis of the distinctness between a firm and its owners.[168] The EU allegation that the Panel committed a legal error in not adopting its alleged presumption fails.[169]

116. The European Union later argues that the Appellate Body "reasoned" that there was a presumption that "would appear to be *irrebuttable* in private-to-private sales" that an arm's-length, fair market value sale "precludes the pass-through of benefit from seller to buyer."[170] The only support the European Union provides for this presumption is the Appellate Body's statement that "{t}he Panel's absolute rule of 'no benefit' may be defensible in the context of transactions between private parties taking place in reasonably competitive markets."[171] However, the Appellate Body "circumscribed" its own analysis "in light of the circumstances of this case"[172] and criticized the Panel for going "beyond the factual circumstances examined in this case." There is accordingly no reason to interpret this statement as announcing a rule applicable to private-to-private transactions, which were decidedly not within the "factual circumstances" of that dispute. In any event, by prefacing the conclusion cited by the EU with

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[165] EU Appellant Submission, para. 241.

[166] *US – Countervailing Measures on Certain EC Products (AB)* at para. 119.

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

[168] E.g., Panel Report at 7.237, 7.248

[169] Nor does the issue of a transfer of control arise in this appeal. The Panel specifically found that "none of the transactions in question involved transfers by a government of all or substantially all of a state-owned producer, including a complete relinquishment of control." Panel Report at 7.249.

[170] EU Appellant Submission, para. 253.

[171] *US – Countervailing Measures on Certain EC Products (AB)*, para. 124.

[172] *US – Countervailing Measures on Certain EC Products (AB)*, paras. 86, note 177, and 119.

the caveat that it "may be defensible" the Appellate Body itself signaled lack of confidence – scarcely a sound basis for an irrebuttable presumption.

117. The European Union also attempts to find support for its view by asserting that "U.S. countervailing regulations now establish a presumption of extinguishment of subsidy in such private-to-private transactions."[173] The treatment in question appears in a U.S. Department of Commerce ("Commerce") methodology memorandum, allowing a subsidy recipient to rebut the presumption that its benefits continue if it can establish that "a change in ownership occurred in which the former owner sold all or substantially all of a company or its assets, retaining no control of the company or its assets, and that the sale was an arm's-length transaction for fair market value."[174] As these criteria demonstrate, the presumption applies only to full privatizations. It is also rebuttable if "parties can demonstrate that the broader market conditions were severely distorted by the government and that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action."[175] Thus, the Commerce methodology would not result in a finding of subsidy extinction for any of the 1999-2006 Airbus transactions, which were not sales of all or substantially all of a company or its assets. And, as Commerce specifically allows for rebuttal of its "baseline presumption," its methodology provides no support for the "irrebuttable" presumption sought by the EU.

118. In short, the European Union has provided no reason to question the Panel's conclusion that the "Appellate Body explicitly confined its analysis and findings (as well as those of the panel) to the specific facts and circumstances before it."[176] Nor has the European Union provided any plausible reason to derive from the Appellate Body's reasoning "presumptions" applicable to this dispute.

2. The Panel correctly criticized the reasoning of the panel in US – Countervailing Measures on Certain EC Products, which the Appellate Body found should have been limited to the facts of that particular situation

119. The Panel found itself "unable to agree" with the reasoning underlying the findings of the Panel in *US – Countervailing Measures on Certain EC Products*, and thoroughly explained the basis for its objections. At the same time, the Panel made clear that it did not question the Appellate Body's finding that a rebuttable presumption of subsidy extinction arises upon an arm's length privatization for fair market value where the government transfers all or substantially all the property and retains no controlling interest. The Panel also emphasized that

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[173] EU Appellant Submission, para. 254.

[174] Issues and Decision Memorandum for the Final Results of the 2002 Administrative Review of the Countervailing Duty Order on Certain Pasta from Italy, p. 2 (U.S. Dep't Commerce, Dec. 7, 2004); *available at* http://ia.ita.doc.gov/frn/summary/italy/E4-3476-1.pdf.

[175] Issues and Decision Memorandum for the Final Results of the 2002 Administrative Review of the Countervailing Duty Order on Certain Pasta from Italy, p.e2 (U.S. Dep't Commerce, Dec. 7, 2004).

[176] Panel Report, para. 7.238.

it was questioning only aspects of the *US – Countervailing Measures on Certain EC Products* panel's findings that the Appellate Body had not explicitly supported.[177] Nonetheless, the EU now accuses the Panel of "contradicting the Appellate Body's findings in *US – Countervailing Measures on Certain EC Products.*"[178] There is no basis for the EU criticism, as the Panel made a point of conforming to the Appellate Body's conclusions.

120. It is useful to begin with exactly what the Panel did. It found that the *US – Countervailing Measures on Certain EC Products* panel made two erroneous core legal considerations. The first was that a company and its owners must necessarily both be considered the subsidy recipient when examining the effect of change of ownership of a firm.[179] This conclusion is the one that the Appellate Body rejected as too broad, and the European Union does not assert that the Panel's analysis diverged from the Appellate Body's in this regard. The second erroneous consideration that the Panel in this dispute identified is the uses by the *US – Countervailing Measures on Certain EC Products* panel of the price of the subsequent sale of the recipient to measure the benefit of a past subsidy, even though that benefit reflected a financial contribution of a different nature, assessed by reference to a benchmark in a different market.[180] The European Union does object to this criticism, arguing that it conflicts directly with the Appellate Body's finding that, absent proof to the contrary, "the fact of the arm's length, fair market value privatization is sufficient to compel a conclusion that the 'benefit' no longer exists for the privatized firm."[181]

121. The specific reasoning to which the Panel in this dispute objected was the *US – Countervailing Measures on Certain EC Products* panel's statement in paragraph 7.72 of its report that:

> When a state-owned company/producer receives subsidies from the government, the advantage conferred by the subsidy should be reflected in the fair market value (sale price) of the state-owned enterprise to be privatized. Thus, if upon privatization, fair market value is paid for all productive assets, goodwill, etc. employed by the state-owned producer, the Panel fails to see how the subsidies bestowed to the state-owned producer could subsequently be considered to still confer a "benefit" on the privatised producer (in the sense of the company

[177] Panel Report, para. 7.240.

[178] EU Appellant Submission, para. 249.

[179] Panel Report, para. 7.241.

[180] Panel Report, paras. 7.242-7.243.

[181] EU Appellant Submission, para. 250, *quoting US – Countervailing Measures on Certain EC Products (AB)*, para. 244.

> together with its owners) who has paid fair market value for all the shares and assets, reflecting, we must assume, the value of past subsidization.[182]

This finding was the first step in the *US – Countervailing Measures on EC Products* panel's inquiry entitled "Did the privatized producer get any 'benefit' from the prior financial contribution." The reasoning is essentially identical to that panel's finding, as part of its inquiry into "{w}ho is the recipient of the benefit in the case of a change in ownership,"[183] that

> In fact, in a market-based economy, the value of a company depends on its ability to generate returns for its shareholders. Where this ability has been improved by the subsidization, the value of the benefit conferred by a financial contribution should be reflected in the overall market value of the company which received it. When someone purchases a company for fair market value, the purchase price includes the value of the benefit conferred to that company. For the purpose of benefit determination based on market criteria (an element which we develop further below), there should be no distinction between the advantage or benefit conferred by the financial contribution to the company or to the shareholders, i.e. the owners of the company.[184]

This reasoning in paragraph 7.51 of the *US – Countervailing Measures on Certain EC Products (Panel)* report led directly to the conclusion in paragraph 7.54 that in all cases, "{w}hen the SCM Agreement refers to the recipient of a benefit, it means the company and its shareholders."[185] This is the "overreaching conclusion" that the Appellate Body found "went beyond the factual circumstances examined in this case."[186] Thus, the reasoning that the Panel in this dispute criticized is essentially the same as the reasoning that led the *US – Countervailing Measures on EC Products* panel astray.

122. It is worth noting that while the Appellate Body rejected a generalized conclusion, it "agreed{d} with the Panel's conclusion in paragraph 7.54 as it relates to the facts of this case,"[187] namely that "{a}ny artificial distinction between owners (shareholders) and company ignores the relationship between a company and its owners, and it is this relationship that changes upon privatization."[188] That relationship changes because, as the Appellate Body recognized, private

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[182] Panel Report, para. 7.242, *quoting US – Countervailing Measures on Certain EC Products (Panel)*, para. 7.72.

[183] *US – Countervailing Measures on Certain EC Products (Panel)*, para. 7.48, title.

[184] *US – Countervailing Measures on Certain EC Products (Panel)*, para. 7.51.

[185] *US – Countervailing Measures on Certain EC Products (Panel)*, para. 7.54,

[186] *US – Countervailing Measures on Certain EC Products (AB)*, para. 119.

[187] *US – Countervailing Measures on Certain EC Products (AB)*, para. 119.

[188] *US – Countervailing Measures on Certain EC Products (Panel)*, para. 7.54.

owners are "profit maximizers,[189]" while the government is not. Another important change, although one to which the Appellate Body did not allude, is that through a full privatization the subsidizing government receives a payment from the new owners equal to the market value of any subsidized and non-subsidized contributions to the company. These changes in the owner-company relationship and the company-government relationship in a privatization context do not occur in a transaction between two private parties.

123. It is also important to note that paragraph 7.72 of the *US – Countervailing Measures on Certain EC Products (AB)* panel report formed part of the panel's specific evaluation of whether "a privatized producer get{s} any 'benefit' from the prior financial contribution."[190] The Appellate Body did not refer to this reasoning, or adopt it, in its evaluation of the same question.[191]

124. Thus, contrary to the EU assertions, the Panel in this dispute did not "contradict"[192] the Appellate Body when it rejected the reasoning of the panel report in *US – Countervailing Measures on Certain EC Products* panel in paragraph 7.72. It provided its own conclusions as to how that panel erred in reaching a conclusion rejected by the Appellate Body. At the very end of its analysis, the Panel emphasized how it comported with prior findings:

> What arguably distinguishes privatizations from private-to-private sales, however, is the implications of a change from state to private ownership. As the panel in *US – Countervailing Measures on Certain EC Products* observed, a privatization is a very particular and complex change in ownership, which involves a fundamental transformation of a government-owned and controlled entity into a privately-owned, market-oriented company. Following a privatization, there is no longer an identity (in a legal or economic sense) between the authority bestowing the subsidy on the producer, the owner of the subsidized producer and the subsidized producer itself.[193]

125. The European Union also asserts that, aside from the question of consistency with the Appellate Body's finding, "the Panel's argument does not make sense" because "the two financial contributions" – the original subsidy and the sale of the company to private owners – "are not comparable."[194] That, of course, was exactly the Panel's point. The two transactions involve different financial contributions, measured according to different benchmarks.[195] The

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[189] *US – Countervailing Measures on Certain EC Products (AB)*, para. 103.

[190] *US – Countervailing Measures on Certain EC Products (Panel)*, para. 7.72, title.

[191] *US – Countervailing Measures on Certain EC Products (AB)*, paras. 120-151.

[192] EU Appellant Submission, para. 249.

[193] Panel Report, para. 7.253 (citations omitted).

[194] EU Appellant Submission, para. 245.

[195] Panel Report, para. 7.243.

EU argues that the difference is significant because the original subsidy "*increases* the value of the firm" while the sale price "*includes the market value of the subsidy created by the original financial contribution*" and therefore "removes the benefit of the subsidy."[196] But this argument fails to recognize that the increase in the value of the firm is not the *benefit* of the subsidy, but the *effect* of the subsidy – a consideration that all parties agree should not affect the evaluation of the benefit.[197]

3. The report of the compliance panel in US – Countervailing Measures on Certain EC Products (21.5) does not support the EU's view that partial sales extinguish subsidies

126. The compliance panel in *US – Countervailing Measures on Certain EC Products (21.5)* upheld a U.S. Department of Commerce ("Commerce") finding that a four-stage privatization of French steel producer Usinor over three years extinguished the benefits of past subsidies. The European Union argues that this finding signifies that "a partial change of ownership leads to a partial removal of the subsidy and a partial discontinuation of benefit."[198] The European Union is wrong. The Usinor transaction was not a partial change in ownership. It was full privatization involving the sale of shares to multiple types of shareholders, and the compliance panel found that it accordingly extinguished past subsidies. However, the French government let one group of purchasers, consisting of Usinor employees, pay less than the fair market value for their shares. The compliance panel found that Commerce acted consistently with the SCM Agreement in determining that the prices paid for these shares alone did not extinguish past subsidies.[199]

127. Specifically, the French government owned 100 percent of the shares of Usinor in 1995, when it undertook to privatize the company through sales to four different classes of purchasers, one of which consisted of Usinor employees. The government sold most of its shares in the first year of the privatization, and had sold 100 percent by the end of the three-year process.[200] Usinor employees, who purchased 5.16 percent of the company's shares, paid a "substantial discount" that the panel found did not represent fair market value for the shares.[201] Thus, the privatization was not partial – the French government planned from the outset to divest 100

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[196] EU Appellant Submission, para. 245 (emphasis in original).

[197] The EU also asserts, without explanation, that "the panel's theory cannot apply to private-to-private sales." EU Appellant Submission, para. 245. This is incorrect. If anything, the Panel's concerns apply with greater force in a private-to-private sales, in which the *US – Countervailing Measures on Certain EC Products* panel's reasoning would revalue the benefit of a financial contribution based on a transaction that did not involve a financial contribution.

[198] EU Appellant Submission, para. 260.

[199] *US – Countervailing Measures on Certain EC Products (21.5)*, para. 7.176.

[200] *US – Countervailing Measures on Certain EC Products (21.5)*, paras. 7.90-7.91.

[201] *US – Countervailing Measures on Certain EC Products (21.5)*, paras. 7.92, 7.145, 7.154, and 7.156.

percent of its shares, and succeeded in doing so by the end of the process. Nor was there any indication that the government nevertheless retained control of the privatized company.

128. Thus, with the exception of the 5.16 percent of shares sold to Usinor employees, the transaction was exactly the "one kind of change in ownership" covered by in *US – Countervailing Measures on Certain EC Products*, namely "privatization at arm's length and for fair market value where the government transfers all of substantially all the property and retains no controlling interest in the firm."[202] The shares sold to Usinor employees also met all of the criteria, save for sale at fair market value. Accordingly, the compliance panel's endorsement of Commerce's determination that this transaction did not "extinguish" the subsidy is in line with the Panel's finding in this dispute that "the Appellate Body explicitly confined its analysis and findings (as well as those of the panel) to the specific facts and circumstances before it."[203] And, as there was no "partial sale," there is no basis to assert, as the EU does, that the compliance panel's reasoning requires a finding of a "continuing benefit" following a partial sale of a company.

4. The Panel was correct in observing that the EU's approach would potentially eviscerate the SCM Agreement

129. The Panel observed that to adopt a principle that "changes in the underlying ownership of a subsidized producer automatically or presumptively eliminate the benefit conferred by prior financial contributions" would "potentially eviscerate the SCM Agreement."[204] This is because "there is no meaningful basis for distinguishing the transactions which the EU alleges have resulted in the extinction of a portion of the benefit conferred by financial contributions provided to the various Airbus-related entities in this dispute, on the one hand, from daily trading in shares of a subsidized producer on the other."[205] Therefore, the principle advocated by the European Union would mean that any exchange of shares in a publicly held company would eliminate a corresponding share of the benefit of subsidies, even though it changed nothing about the company's operations, and nothing meaningful about the company's ownership.

130. The European Union calls this observation a "straw man." It asserts that its subsidy extinction rule does not apply to daily trading of shares, but only to "significant sales by government, industry or institutional shareholders" that, in the EU view, "realise for the sellers the underlying enterprise value rather than the investment value of the shares."[206] The European

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[202] *US – Countervailing Measures on Certain EC Products (AB)*, para. 117. Even if the employee share purchases led to the conclusion that the privatization did not cover 100 percent of the shares, the sale of the remaining 94.84 percent of shares, in the context of transfer to the public of 100 percent of the shares and complete surrender of government control, would meet the criterion of transferring "substantially all of the property."

[203] Panel Report, para. 7.238.

[204] Panel Report, paras. 7.246 and 7.252.

[205] Panel Report, para. 7.246.

[206] EU Appellant Submission, para. 263.

Union never explains how "enterprise value" differs from "investment value," or why one should trigger extinction under the SCM Agreement and the other does not. It merely cites to paragraph 225 of its response to Question 197 from the Panel.[207]

131. This cursory description relies on distinctions that the European Union never explains and cites disciplines of the SCM Agreement with no explanation. It accordingly provides no reason for the Appellate Body to doubt that the Panel correctly concluded that the EU theory would eviscerate the SCM Agreement. Should the Appellate Body wish to consider the issue further, the United States directs it to the U.S. Comment on the EU response to Panel Question 197, which makes the points that:

- The EU never explains what makes a transaction "significant" enough to trigger extinction of the benefit of a prior subsidy;[208]
- The EU never explains why the transactions in question, some of them involving shareholdings as small as 0.93 percent of the shares in Airbus' parent company, EADS, are "significant";[209] and
- Several of the transactions that the EU cites as having extinguished subsidies occurred after establishment of the Panel, which means they are not relevant to a consideration of the U.S. claim that the underlying financial contributions were subsidies.[210]

C. The Panel correctly found that none of the 1996-2000 Airbus reorganization activities "withdrew" the benefit conferred by past subsidies for purposes of Articles 4.7 and 7.8 of the SCM Agreement

132. The Panel found that its rejection of the EU arguments regarding extinction of subsidies also applied to EU arguments that the "extraction" of cash from Dasa and CASA extinguished a portion of the benefit of past subsidies because they "rest on the same approach to Article 5 of the SCM Agreement."[211] The Panel moved on to make alternative findings assuming that the EU's approach to Article 5 was correct. It stated that "we are not persuaded by the European Communities' contention that a 'withdrawal' of a subsidy could arise where a previously subsidized firm distributes cash to its owners *provided* the transfer results in the removal of the 'incremental value contributed to the recipient by the subsidy."[212] It also concluded that the EU

[207] EU Appellant Submission, para. 263, note 259.

[208] US Comments on EC RPQ 197, paras. 181-182.

[209] US Comments on EC RPQ 197, para. 184.

[210] US Comments on EC RPQ 197, para. 183.

[211] Panel Report, para. 7.266.

[212] Panel Report, para. 7.283 (emphasis in original).

failed to meet its own criteria for establishing the existence of a cash extraction that would reduce the benefit conferred by past subsidies.[213]

133. The European Union asserts that Articles 4.7 and 7.8 provide support for its view that Articles 1, 5, and 6 of the SCM Agreement collectively create a "larger legal principle" requiring reevaluation after any "significant change" of whether a subsidy continues to provide a benefit.[214] In section III.A.2, the United States explained why this view is incorrect. The EU also asserts that Articles 4.7 and 7.8 of the SCM Agreement act independently to require any Panel examining a claim under Article 5 to examine whether, after grant of the subsidy, a "significant" development resulted in "withdrawal" of the subsidy. It asserts that the Panel failed to perform such an analysis, that its failure constitutes a "denial of the European Union's claim," resulted in an incorrect application of the term "withdrawn," and resulted in an erroneous recommendation by the Panel to withdraw subsidies that the European Union already withdrew.[215] None of these assertions has any merit, because just as Articles 4.7 and 7.8 of the SCM Agreement do not support the argument that other provisions in the SCM Agreement require a subsidy extinction analysis for purposes of Article 5, they do not create such an obligation independently in the guise of considering whether the subsidy was withdrawn. Moreover, the Panel considered the possibility that transactions identified by the European Union "extracted" or "withdrew" Airbus' prior subsidies, and found correctly that the European Union had not established that the transactions had such effects.

1. Articles 4.7 and 7.8 of the SCM agreement do not provide a separate and independent requirement to evaluate, for each post-subsidy transaction, whether the subsidizing Member has "withdrawn" or "extracted" the subsidy

134. The United States explained in section III.A.2 that Articles 4.7 and 7.8 of the SCM Agreement do not contain substantive requirements for determining whether a prohibited subsidy exists or an actionable subsidy causes adverse effects. They set out the remedies once those other conditions are found to exist. The European Union's section on the independent application of these articles asserts as a separate grounds for appeal that a "withdrawal" for purposes of Articles 4.7 and 7.8 occurs any time there is a "removal" or "taking away" of funds from the company through any transaction, whether the government is involved or not.[216] The EU is never clear as to exactly what conditions result in such an extraction or withdrawal.

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[213] Panel Report, paras. 7.283-7.285.

[214] EU Appellant Submission, paras. 200 and 202.

[215] EU Appellant Submission, para. 171.

[216] EU Appellant Submission, para. 171. The EU refers to "{t}he cash extractions and sales described above," which the United States understands as a reference to paragraph 147, which lists several transactions among private parties.

However, its fact-specific explanation of why it considers that the 1996-2006 transactions extracted or withdrew subsidy benefits finds no support in the SCM Agreement.

135. To begin, the European Union misinterprets Articles 4.7 and 7.8 of the SCM Agreement. As the United States noted in section III.A.2, they specify the remedies following a finding that subsidies are prohibited or cause adverse effects. They do not contain or imply substantive rules as to when subsidies exist for purposes of Article 5. Moreover, they are not a generalized obligation drafted in the passive voice or applicable to general definitions or scope provisions. They create an obligation on the Member, or in the case of Article 7.8 give the Member an option, to withdraw the subsidy. Specifically, Article 4.7 provides for a recommendation "that the subsidizing *Member* withdraw the subsidy without delay," while Article 7.8 provides that "the *Member* granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy."[217] Accordingly, the *Member* must do something affirmative to "remove" or "take away" the subsidy.[218] A transfer of funds or other assets by the subsidy recipient to an entity other than the government is not action by the Member to remove or take away the subsidies, so it does not satisfy the obligation under Article 4.7 that the "subsidizing Member withdraw the subsidy" or the option under Article 7.8 that "the Member granting or maintaining the subsidy . . . shall withdraw the subsidy."

136. The theory underlying the EU "extraction" or "withdrawal" argument also lacks any support. The EU contends that "benefits from subsidies existed as enhancements to CASA's and DASA's balance sheets," and that "but for the provision of the subsidies, CASA and DASA would have been of lesser value."[219] It then reasons that "when the Spanish State and DaimlerChrysler extracted cash from CASA's and DASA's balance sheets, they reduced the companies' value, removing incremental value created by the subsidies."[220] Whatever the effect on the value of the company, that effect is not the benefit, nor does it measure the benefit of a subsidy. Moreover, a number of other factors may increase (or decrease) the incremental value of a company. Therefore, there is no basis in the SCM Agreement to consider that any incremental increase in a company's value represents the benefit from a subsidy. Nor is there any reason to assume that any cash transferred from a company to one of its owners (whether the government or a private entity) is a reduction of the benefit of the subsidy rather than a reduction in one of the other elements that adds value to the company. Therefore, the EU theory provides no basis to conclude that any particular subtraction of cash from a company consists either partly or entirely of a reduction of a subsidy benefit.

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[217] Emphasis added.

[218] *Brazil – Aircraft (21.5) (AB)*, para. 45; *US – FSC (21.5) (AB)*, paras. 226-227; *see also Australia – Automotive Leather (21.5)*, para. 6.27.

[219] EU Appellant Submission, para. 172.

[220] EU Appellant Submission, para. 173.

137. The United States does not dispute that there are circumstances in which a Member may remove cash from a subsidized company in a way that "withdraws" the subsidy for purposes of Articles 4.7 and 7.8. In line with the ordinary meaning of those articles, if a Member takes back the value of the subsidy and gives nothing in return, the subsidy has been withdrawn. In *Australia – Automotive Leather (21.5)*, the panel found that the subsidized entity made cash payments to the government, which could constitute withdrawal of the subsidy.[221] Paying a third party, in contrast, carries no such implication, and nothing in the *Australia – Automotive Leather (21.5)* panel report suggests otherwise. It is also clear that the government must give the recipient nothing in return for its repayment. This was essentially what happened in the *Australia – Automotive Leather* compliance dispute. Although the Australian government took cash payments from the subsidized company, it provided a new loan on non-commercial terms to the company's corporate parent on the same day. The Panel accordingly found that there had been no withdrawal of the subsidy.[222]

138. The standards that the European Union has proposed for determining when an "extraction" or "withdrawal" occurs are also problematic. During the process before the Panel, the EU stated that "it is dangerous to lay down universal rules on extractions,"[223] and resisted laying out conditions under which an extraction would occur. The Panel considered that the EU's arguments laid out two criteria: "(i) there must be a causal relationship of some sort between the cash 'extraction' and the subsidy and (ii) the 'extraction' must effectively move the money beyond the reach of the 'company-shareholder unit'."[224] In its appellant submission, the EU continues to avoid listing legal conditions for establishing that an "extraction" or "withdrawal" has occurred. It does state that the value of Dasa and CASA was "enhanced by subsidies," there were transactions that "reduced the companies' value, removing incremental value created by the subsidies," and that "the extracted cash . . . is fairly characterized as *permanently* withdrawn.[225] However, these conditions are not sufficient to establish that a Member has withdrawn its subsidy for purposes of Article 7.8. The first EU condition is simply irrelevant – whether the subsidies enhanced the value of the company or had some different effect does not affect the obligation to withdraw the subsidy. The second condition does not address the relevant question, which is whether *the government* takes something of value from the subsidy recipient. If the value of the company falls for some other reason, such as a payment to a third party, it would not establish the withdrawal of the subsidy. The third condition does have some relevance, because if the payment to the government is not permanent, the government will give something in return, which signifies that it has not genuinely withdrawn

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[221] *Australia – Automotive Leather (21.5)*, para. 6.28.

[222] *Australia – Automotive Leather (21.5)*, paras.6.50-6.51 and 7.1. The EU concedes that a subsidy withdrawal does not occur if the government provides the recipient something of equal value in exchange. EU Response to Panel Question 222, para. 559.

[223] EC RPQ 198, para. 238.

[224] Panel Report, para. 7.270; EC RPQ 198, para. 236.

[225] EU Appellant Submission, paras. 173, 177, and 181.

the subsidy. However, it is not sufficient because it does not make clear that there must be no other *quid pro quo* in return for the payment to the government.

139. The Panel did not make findings as to the proper standard for withdrawal of a subsidy. It did state that it was "not persuaded by the European Communities' contention that a 'withdrawal' of a subsidy could arise where a previously subsidized firm distributes cash to its owners *provided* the transfer results in the removal of the 'incremental value contributed to the recipient by the subsidy'."[226] The Panel saw no need to go further because it found that the EU had not established that the Dasa and CASA transactions met its own standards for withdrawal of a subsidy.[227]

2. The Panel correctly found that the transfer of funds from Dasa to DaimlerChrysler did not "withdraw" prior subsidies to Airbus

140. In light of the continuing and largely unchanged relationships among the relevant corporate entities that produce Airbus aircraft and their owners, the Panel found that a transfer of cash and cash equivalents between Dasa and its owner Daimler Chrysler did not "withdraw" or "extract" subsidies. The transfer occurred immediately preceding Dasa's contribution of its LCA-related assets to EADS, where they became part of Airbus. DaimlerChrysler retained the cash and cash equivalents, and did not transfer them to the German government.[228] This transaction was one of the steps in the creation of EADS and integration of the LCA production operations into Airbus SAS. The European Commission examined this process and 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."[229] In particular, DaimlerChrysler remained the owner of Dasa, which became one of the major owners of EADS.[230]

141. Based on all of this information, the Panel found that

> given the circumstances surrounding the contribution of the LCA-related assets and activities of Dasa to EADS, and more particularly, the relationship between DaimlerChrysler, Dasa and Airbus Industrie prior to the "extraction", and DaimlerChrysler, Dasa, and EADS, immediately following the "extraction" and

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[226] Panel Report, para. 7.283.

[227] Should the Appellate Body reverse the finding with regard to either or both companies, the United States asks that it complete the Panel's analysis, and find that the proper criteria for withdrawal of a subsidy are those set out by the United States and that the EU did not establish that either transaction met these criteria.

[228] Panel Report, para. 7.279.

[229] 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).

[230] Panel Report, para. 7.258, note 2187,

> EADS contributions, we can see no basis for concluding that the "incremental value" of any subsidy granted to Dasa and therefore Airbus Industrie was removed by the cash "extraction".

In short, because DaimlerChrysler remained the 100 percent owner of Dasa, and nothing else about the "quality or nature of control of Airbus Industrie" changed, the payment changed nothing. As the Panel observed in its analysis of SEPI, discussed below, the European Union agreed that if "the granting authority owns the subsidized entity and has not "left the company-shareholder unit," a transfer of funds from the company to the government would not extract subsidies.[231] Thus, even under the analysis advanced by the EU, the transaction did not constitute a withdrawal of subsidies by the government for purposes of Article 7.8 of the SCM Agreement.

142. The European Union does not disagree with the facts as laid out by the Panel. Instead, it argues that the creation of EADS, in which Dasa and the other Airbus partners combined their independently held LCA assets in exchange for shares in EADS, resulted in the dilution of each participant's share in the resulting company. In the EU's view, because DaimlerChrysler held a much smaller share of EADS than it had previously held of Dasa, any return of the money would be spread over a larger shareholder base, and change the value of DaimlerChrysler's investment to a relatively small degree. For these reasons, the European Union argues that the transfer had to be considered permanent.[232]

143. There are numerous problems with this theory. Permanent or not, the transaction did not involve a payment to the German government so there is no basis to conclude that "the Member granting or maintaining such subsidy . . . withdr{e}w the subsidy" for purposes of Article 7.8. Moreover, the EU focuses on the wrong corporate relationship. DaimlerChrysler owned Dasa, and extracted the money from Dasa. Its incentives to return the money to Dasa were unchanged after the transaction because it still owned 100 percent of Dasa.[233] Thus, if DaimlerChrysler were to return the money to Dasa, that company's value would become equal to the value of its existing assets plus the value of the money, with a concomitant increase in the value of DaimlerChrysler ownership interest. And finally, as the Panel itself pointed out, the Airbus creation process "was structured so as to maintain the overall interests of DaimlerChrysler and the Spanish government *in Airbus Industrie as a whole*."[234] This emphasis on maintaining the status quo belies the EU view that the transaction changed DaimlerChrysler's incentives so radically as to preclude any reinvestment of funds in Dasa (or EADS).

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[231] Panel Report, para. 7.284, *citing* EC RPQ 222, para. 560.

[232] EU Appellant Submission, para. 190.

[233] Panel Report, Section VII.E.1 Attachment, para. 4, note 2241.

[234] Panel Report, para.7.275.

144. The European Union argues that the Panel erred by putting too much emphasis on the finding that DaimlerChrysler retained the same level of control over Airbus' operations as it did before the creation of EADS. In the EU's view, it is the amount of ownership in EADS, rather than control of EADS, which would drive any incentives for DaimlerChrysler to return the money it had removed from Dasa.[235] But as the United States noted above, Dasa's level of ownership of EADS does not affect DaimlerChrysler's level of ownership in Dasa, and so is irrelevant to an evaluation of the incentives facing DaimlerChrysler. Moreover, the EU's criticism of the Panel's discussion of Dasa's control of EADS is misplaced. The EU itself asserted that the transfers resulted in "extraction" or "withdrawal" of subsidies because they "removed the incremental contribution of alleged prior subsidies."[236] Questions of whether a transfer "removed" anything would depend on whether anything had in fact left the recipient. Evidence as to ongoing control of the recipient by Dasa, and by DaimlerChrysler through Dasa is important to that inquiry.

145. Finally, it is also important to recognize that DaimlerChrysler conferred something to Dasa in exchange for the funds transferred to it. The transfer took place because, based on the valuation of Dasa, DaimlerChrysler would be entitled to a larger number of shares than it had agreed with the other Airbus partners. The transfer reduced the value of Dasa's assets to a level where it was equivalent to the correct number of EADS shares.[237] Dasa received those shares, and DaimlerChrysler got the money. This result is no different than if Dasa had contributed its assets to EADS without the cash transfer, received a higher number of shares than it was entitled to, and Daimler Chrysler had sold the excess back to EADS in exchange for cash. No one would argue that this transaction "extracted" or "withdrew" subsidies because all it did was shuffle shares and cash among related entities. The equivalent transaction in which DaimlerChryser transferred funds to itself *before* the exchange of Dasa's assets for shares achieved the same result. As a value-for-value exchange, it would not qualify as a "withdrawal" for purposes of Articles 4.7 and 7.8 of the SCM Agreement.

3. The Panel correctly found that the transfer of funds from CASA to the Spanish State did not "withdraw" prior subsidies to Airbus

146. In light of the continuing and largely unchanged relationships among the relevant corporate entities that produce Airbus aircraft and their owners, the Panel found that a transfer of cash and cash equivalents between CASA and its owner SEPI did not "withdraw" or "extract" subsidies. The transfer occurred immediately preceding CASA's contribution of its LCA-related assets to EADS, where they became part of Airbus. The Spanish government deposited most of the money in the Spanish Treasury, but transferred some funds to CASA's other shareholders,

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[235] EU Appellant Submission, para. 186.

[236] Panel Report, para. 7.268; EC RPQ 200, para. 247.

[237] EU Appellant Submission, paras. 326-328.

including Dasa.[238] This transaction was one of the steps in the creation of EADS and integration of the LCA production operations into Airbus SAS. The European Commission examined this process, and 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."[239] In particular, SEPI remained the owner of CASA, which became one of the owners of EADS.[240]

147. In light of the involvement of a Spanish government entity in the transfer, the Panel reached its conclusion through a somewhat different route than it used for the Dasa-DaimlerChrysler transfer. The Panel noted that the EU had indicated two situations in which a payment to the government would *not* withdraw subsidies:

> First, where a granting authority provides something of equal value in exchange for cash or other assets from the recipient of a subsidy, no "repayment" or other "withdrawal" of the subsidy has occurred. Second, . . . a distribution to a granting authority that owns the subsidised company does not qualify as withdrawal of prior subsidies if it has not left the company-shareholder unit.[241]

The Panel found that under both of these criteria, advanced by the EU, the CASA-SEPI transfer would not be a cash extraction.

148. First, the Panel found that that SEPI had provided "something of equal value" in return for the transfer, namely, the reduction of capital in CASA. The European Union claims not to understand the significance of the Panel's statement.[242] However, the Panel's statement reflects its observation that "the transactions occurred because the 'value' of Dasa's LCA-related assets and activities, and of CASA, each as contributed to EADS, needed to reflect the corresponding percentage interests that DaimlerChrysler and the Spanish government were to hold in EADS."[243] Thus, the capital reduction reflected the fact that the Spanish government, through CASA, gave up its right to additional shares in EADS in exchange for cash. This mechanism achieved the same result as if CASA had merged unchanged with EADS, received the greater-than-agreed portion of EADS shares, and SEPI had sold the excess to EADS for money. No one would consider this value-for-value transaction to extract anything, and the same conclusion holds true for the equivalent transaction in which SEPI received the money in advance and

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[238] Panel Report, para. 7.258, note 2186.

[239] 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).

[240] Panel Report, Section VII.E.1 Attachment, para. 6.

[241] EC RPQ 222, para. 559.

[242] EU Appellant Submission, para. 184.

[243] Panel Report, para. 258.

forewent its right to additional EDS shares. As a value-for-value exchange, it would not qualify as a "withdrawal" for purposes of Articles 4.7 and 7.8 of the SCM Agreement.

149. Second, the Panel found that because the Spanish government exercised the same degree of ownership and control over Airbus before and after the creation of EADS, the funds had not left the company-shareholder unit.[244] This was another reason given by the EU that a transfer would not result in "extraction" or "withdrawal" of subsidies. The EU raises the same arguments as it raised against the Panel's similar finding with regard to the DASA-DaimlerChrysler transfer. Those arguments fail with regard to the CASA-SEPI transfer for the same reasons the United States advanced in section III.C.2.

150. Finally, the European Union notes that the Spanish State received the funds transferred from CASA, and argues that if this is not an "extraction" or "withdrawal" of subsidies, it would be impossible to extract subsidies from a state-owned company.[245] This is not the case. As the United States has observed, and the Panel did not deny, a transfer from government-owned company to the government for nothing in return might indicate that the relevant Member withdrew the subsidy to the extent of the transfer. The CASA-SEPI transfer does not satisfy these criteria, so it was not a "withdrawal."

4. The EU did not make specific arguments that the share transactions from 1999 to 2006 resulted in the withdrawal of prior subsidies, and there is no evidence that they did

151. The European Union argued before the Panel that all of the 1999-2006 Airbus reorganization events "extinguished" prior subsidies for purposes of Articles 1, 5, and 6 of the SCM Agreement. The Panel rejected those arguments in the findings discussed in sections III.A and III.B. The European Union also argued that the Dasa and CASA transfers "extracted" or "withdrew" subsidies pursuant to Articles 4.7 and 7.8 of the SCM Agreement. The Panel rejected those arguments in the findings discussed above in this section. The European Union never made arguments that the remaining 1999-2006 reorganization events were "extractions" or "withdrawals." It now asserts that it made such arguments, and asks the Appellate Body to reverse the Panel, either for rejecting the EU extraction arguments regarding these transactions, or for improperly failing to consider them.[246] There is no merit to the EU assertions.

152. The European Union raised the issue of "extraction" or "withdrawal" frequently. In its first written submission, it occasionally used the term interchangeably with "extinction,"[247] but

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[244] Panel Report, para. 285.

[245] EU Appellant Submission, para. 191. The EU also asserts that the Panel's finding "appears to suggest" that the government is about to grant a new subsidy to replace the withdrawn subsidy. The Panel made no such finding, and the findings it did make do not imply such a finding.

[246] EU Appellant Submission, paras. 193 and 197.

[247] *E.g.*, EC FWS paras. 263, 271, and 282.

in subsequent submissions its discussions of "extraction" address only the specific facts of the Dasa and CASA transfers.[248] In these submissions, the EU describes "extinction" of subsidies as occurring upon the sale of shares[249] and "extraction" as a distribution of cash without something of equal value in return.[250] The Panel accordingly addressed "extinction" of subsidies for all of the 1999-2006 reorganization activities, and "extraction" of subsidies with regard to the Dasa-DaimlerChrysler and CASA-SEPI transfers.

153. The European Union now asserts that it argued that *all* of the 1999-2006 reorganization activities "resulted in the withdrawal of subsidies," but that the Panel "failed, however, to make any findings."[251] In support of this assertion, the European Union references footnote 146 to paragraph 150, which in turn cites to four segments from EU submissions,[252] none of which contains specific arguments about anything other than the Dasa and CASA transfers. One of the passages does not reference any specific transaction at all, but lays out the European Union's general theories about the affects of Articles 4.7 and 7.8 of the SCM on the Panel's authority to make findings and recommendations with regard to prohibited subsidies and subsidies that cause adverse effects.[253] Two of the passages discuss the EU theory that any sale for fair market value extinguishes subsidies, but end by asserting, without any supporting explanation, that the effect of the 1999-2006 reorganization activities was the withdrawal subsidies for purposes of Articles 4.7 and 7.8.[254] The last contains a detailed description of why, in the EU's view, the Dasa and CASA transfers "extracted" subsidies, but ends with a statement that "{s}eparately, the European Communities also considers that those sales and extractions constitute 'withdrawal' of prior subsidies."[255]

154. These passages cited by the European Union do not contain separate arguments that the share transactions (the 1986-1999 transactions other than the CASA-SEPI and Dasa-Daimler-Chrysler transfers) "withdrew" prior subsidies for purposes of Articles 4.7 and 7.8 of the SCM Agreement. Rather, they reflect the EU view that subsidies that have been "extinguished" for purposes of Articles 1, 5, and 6 of the SCM Agreement are also "withdrawn" for purposes of Articles 4.7 and 7.8. As the Panel recognized, this argument "rests on the same approach to Article 5 of the SCM Agreement as the European Communities' extinction argument." The

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[248] EC FNCOS, para. 32; EC RPQ 80, pra. 152; EC RPQ 81, para. 161; EC RPQ 112, paras. 313 and 315; EC FNCOS, para. 61; EC SWS, para. 990; EC RPQ 198-201, paras. 235-254; EC RPQ 222, paras. 557-559; EC Comment on US RPQ 222, paras. 392, 397-401.

[249] EC RPQ 197, paras. 225 and 229.

[250] EC RPQ 222, paras. 557 and 559.

[251] EU Appellant Submission, para. 192.

[252] EU Appellant Submission, para. 192, note 191, *citing* EU Appellant Submission, note 146.

[253] EC RPQ 123, paras 384-392.

[254] EC FWS, paras. 285-288; EC SNCOS, para. 76.

[255] EU Comment on US RPQ 222, para. 402.

European Union appellant submission makes this point clear. The only argument it presents in support of its views that the share transactions "withdrew" subsidies simply summarizes its argument that any sale transaction can extinguish the effect of prior subsidies.[256] Thus, if the EU arguments regarding subsidy "extinction" fail for the share transactions, its argument with regard to Articles 4.7 and 7.8 also fails.[257]

155. The passages cited by the European Union also lack any explanation *why* a subsidy that is "extinguished" should also be considered as "withdrawn' for purposes of Articles 4.7 and 7.8 of the SCM Agreement. In fact, such a result is inconsistent with the EU arguments. The EU extinction argument rests on the proposition that a new buyer extinguishes a subsidy by paying the owners money that reflects the value added to the company by past subsidies. In other words, there is an exchange of value for value. In contrast, the European Union views a subsidy as withdrawn when the recipient pays money *without* getting something in return. As laid out by the EU, the two concepts are mutually exclusive. Indeed, no transaction for fair market value could ever withdraw a subsidy because, by definition, the parties would be exchanging equal values.

156. The EU argument with regard to most of the remaining 1999-2006 reorganization activities is also inconsistent with the ordinary meaning of Articles 4.7 and 7.8, which provide that the withdrawal of a subsidy occurs only when *the government* removes money from the subsidy recipient. Most of those activities involved transactions between privately held entities – sales of EADS shares by EADS itself, Daimler Chrysler, Lagardère, and BAE Systems.[258] There was thus no reason for the Panel to consider that the EU arguments concerning "extraction" or "withdrawal" of subsidies extended to those transactions.

157. If the Panel had decided to make findings on those issues, it would have found itself in a problematic situation. As the European Union never provided specific explanations as to how the share transactions "withdrew" subsidies, the Panel would have had to devise its own explanations to support any conclusion. That would have put it in the position of making the case for the EU, which is not a permissible role for panels under the DSU.[259]

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[256] EU Appellant Submission, para. 194.

[257] Panel Report, para. 7.266.

[258] EU Appellant Submission, para. 147.

[259] *Japan – Varietals (AB)*, para. 130 ("The Panel erred, however, when it used that expert information and advice as the basis for a finding of inconsistency with Article 5.6, since the United States did not establish a prima facie case of inconsistency with Article 5.6 based on claims relating to the 'determination of sorption levels'. The United States did not even argue that the 'determination of sorption levels' is an alternative measure which meets the three elements under Article 5.6. . . . We, therefore, reverse the Panel's finding that it can be presumed that the 'determination of sorption levels' is an alternative SPS measure which meets the three elements under Article 5.6, because this finding was reached in a manner inconsistent with the rules on burden of proof.")

158. In sum, the European Union only presented arguments applying the law to the facts of the Dasa and CASA transfers. It did not make any specific arguments with regard to the facts of any of the other 1999-2006 reorganization activities. Its legal argument that transactions extinguishing subsidies through a fair market value purchase of shares also withdraw subsidies is self-contradictory, and fails if the extinction argument fails. Therefore, the Appellate Body should reject the EU's appeal of the Panel's findings that the transactions listed in paragraph 192 of the EU appellant submission "withdrew" subsidies for purposes of Articles 4.7 and 7.8 of the SCM Agreement. If the Appellate Body concludes that the EU did raise arguments that the share transactions "withdrew" subsidies, the United States asks the Appellate Body to complete the Panel's analysis and, for the reasons set out in this section, find that those transactions did not withdraw subsidies.

D. The European Union fails to rebut the Panel's findings regarding pass-through of subsidies among companies that produce the subsidized product and are merged during the course of subsidization

159. The Panel found that the changes between 1999 and 2006 to the corporate structure through which Airbus produces large civil aircraft did not require the United States to demonstrate, as part of its *prima facie* case, that subsidies to Airbus' corporate predecessors "pass through" to Airbus.[260] The legal basis for the Panel's finding came from the Appellate Body's reasoning in *US – Upland Cotton* that:

> As we have already noted, the requirement in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement that countervailing duties on a product be limited to the amount of the subsidy accruing to that product finds no parallel in the provisions on actionable subsidies and pertinent remedies under Part III of the SCM Agreement. Therefore, the need for a "pass-through" analysis under Part V of the SCM Agreement is not critical for an assessment of significant price suppression under Article 6.3(c) in Part III of the SCM Agreement.[261]

The Panel derived factual support from the observation by the European Commission regarding the 1999 creation of EADS 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 Airbus partners."[262] In short, the Appellate Body's reasoning indicates that the SCM Agreement created no legal obligation to perform a pass-through analysis, and the facts contained no indication that the reorganization of the Airbus corporate structure changed its operations enough to require a reevaluation of the benefit conferred by past subsidies.

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[260] Panel Report, para. 7.200.

[261] Panel Report, para. 7.196, *quoting US – Upland Cotton (AB)*, para. 472.

[262] Panel Report, para. 7.199.

160. The European Union in its appeal does not address the Panel's reasoning or the Appellate Body reports cited in support of that reasoning. It begins instead by asserting that "the analysis of subsidies does not differ between Parts III and V of the *SCM Agreement*."[263] As demonstrated by the findings from *US – Upland Cotton (AB)* that the Panel quoted, this view is incorrect. That is not an isolated finding. The Appellate Body also found that:

> Part V of the SCM Agreement, which relates to the imposition of countervailing duties, requires, *inter alia*, an examination of "any known factors other than the subsidized imports which at the same time are injuring the domestic industry". However, such causation requirements have not been expressly prescribed for an examination of serious prejudice under Articles 5(c) and Article 6.3(c) in Part III of the SCM Agreement. This suggests that a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the "effect" of a subsidy is significant price suppression under Article 6.3(c).[264]

In short, the analysis of subsidies does differ between a serious prejudice claim under Part III and a countervailing duty measure under Part V because Part V addresses a Member's remedy against subsidized imports causing material injury to a domestic industry, while Part III provides a multilateral remedy against a more general category of adverse effects of subsidies themselves. Part V has different substantive and procedural requirements than Part III, including a requirement to quantify the subsidy that is absent from Part III.

161. The European Union also asserts that the United States has the burden of establishing that subsidies granted to aircraft producers that merged to form the current large civil aircraft producer, Airbus SAS, currently benefit Airbus SAS. The European Union is wrong. The United States as complaining party bore the burden to establish a *prima facie* case that EU subsidies caused adverse effect to U.S. interests. It did this by establishing that European governments made financial contributions that each conferred a benefit on producers of large civil aircraft, and that the subsidies caused adverse effects to the U.S. producer of large civil aircraft. Once a complaining party has established those facts, it is then up to the responding party to demonstrate that the benefit no longer exists.[265] The European Union failed to meet that burden. Moreover, to the extent the Appellate Body considers that the United States bore some burden of proof, the United States satisfied that burden by establishing that Airbus SAS and its

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[263] EU Appellant Submission, para. 270.

[264] *US – Upland Cotton (AB)*, para. 436.

[265] The United States does not consider that findings regarding obligations under Part V are relevant to the evaluation whether Part III requires a subsidy extinction analysis after any change in ownership. However, to the extent the Appellate Body considers those findings useful, it found in *US – Lead and Bismuth II* that "while an investigating authority may presume, in the context of an administrative review under Article 21.2, that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution', this presumption can never be 'irrebuttable'." In short, a Member's demonstration that a subsidy exists can create a presumption that the subsidy continues to exist, shifting the burden to the responding party to rebut that presumption.

corporate predecessors were all producers of large civil aircraft, and that "there was no indication that the {reorganizations that resulted in the creation of Airbus SAS} 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."[266] Therefore, the Panel did not err in finding that "the Airbus Industrie consortium (*i.e.*, each of the Airbus partners, their respective affiliates and Airbus GIE) {is} the *same producer* of Airbus LCA as Airbus GIE."[267]

162. As the European Union has not even addressed the Panel's legal reasoning, let alone provided any basis to consider it incorrect, its appeal of the findings on pass through should fail.

E. The European Union has failed to establish that the Panel's extinction/withdrawal findings violated Article 11 of the DSU

163. In its analysis of the EU extinction and extraction arguments, the Panel correctly applied the relevant provisions of the covered agreements, and presented a thorough and well reasoned explanation of its findings. It fully complied with its obligation under Article 11 of the DSU "to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of the covered agreements." The EU arguments to the contrary consist primarily of a repetition of EU arguments that the Panel improperly understood the substantive provisions of the SCM Agreement. The United States has shown that those arguments are unfounded. But, assuming *arguendo* that the European Union had correctly identified some error of law, that does not, by itself, provide sufficient basis for an Article 11 claim.

164. As the Appellate Body explained in *US – Steel Safeguard Measures*:

> An Article 11 claim is not to be made lightly, or merely as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement. A claim under Article 11 of the DSU must stand by itself and be substantiated, as such, and not as subsidiary to another alleged violation.[268]

That is exactly what the European Union does for many of its appeals under Article 11 of the DSU. It simply restates its arguments that the Panel reached the wrong legal conclusion under Article 1, 4, 5, or 7, and then asserts that the Panel violated Article 11 by failing to reach the conclusion favored by the EU. This error occurs in the Article 11 claims in paragraphs 273, 275

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[266] 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).

[267] Panel Report, para. 7.199.

[268] *US – Steel Safeguard Measures (AB)*, para. 498; *accord Chile – Price Band System (21.5) (AB)*, para. 238; *Japan – DRAMs (Korea)*, para. 184

(both bullets), and 278 of the EU appellant submission. Therefore, the EU has failed to provide a basis to reverse the Panel findings described in those paragraphs.

165. The European Union makes another legal error in its assertions that the Panel violated Article 11 of the DSU by supposedly failing to provide a "reasoned and adequate explanation" of its findings. In essence, the European Union in these claims seeks application of a new standard of review, based not on whether the Panel provides "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements," as required by Article 11, but on whether the explanation of Panel's finding is sufficiently robust. The only support the European Union cites for this standard is footnote 618 to paragraph 293 of the Appellate Body's report in *US – Upland Cotton (21.5)*. The European Union offers no explanation of why this footnote would constitute a finding that Article 11 contains an obligation to provide a reasoned and adequate explanation. In fact, the footnote does no such thing.

166. The footnote, along with its dependent text, states:

> The Appellate Body has explained that, under Article 11 of the DSU, "a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it"[617], and may not "disregard" evidence or "appl{y} a double standard of proof".[618]

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[618]Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164. In cases concerning a panel's examination of determinations by domestic investigating authorities, the Appellate Body has also held that a panel must assess "whether the explanations provided by the authority are 'reasoned and adequate' ... and {assess} the coherence of its reasoning." (Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97) In cases where a panel operates as the initial trier of facts, such as this one, it would similarly be expected to provide reasoned and adequate explanations and coherent reasoning.[269]

The Appellate Body's reasoning refers to well established ways in which a panel can violate Article 11 of the DSU – disregarding evidence and applying a double standard of proof. It does not mention failure to provide a "reasoned and adequate explanation". The first sentence of the footnote observes that a *panel* reviewing the antidumping or countervailing duty determination of a *domestic investigating authority* must inquire as to whether the authority provided a such an explanation. The European Union then states that when a Panel acts as the initial trier of fact, it "would similarly be expected" to provide reasoned and adequate explanations and coherent reasoning. It is noteworthy that the Appellate Body instruction to provide a reasoned and adequate explanation and coherent reasoning does not use the mandatory "shall," but the

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[269] *US – Upland Cotton (21.5)*, para. 293.

permissive "should."[270] Thus, there is no reason to read the Appellate Body's words as a finding that a panel violates Article 11 of the DSU if the explanation of its findings is somehow not "reasoned and adequate."

167. It is also noteworthy that the Appellate Body found that the *US – Upland Cotton* compliance panel violated Article 11 of the DSU because it "effectively disregarded the re-estimates data" and used "internally inconsistent reasoning"[271] – both grounds for past findings of Article 11 inconsistencies.[272] The Appellate Body's reference to the panel's "lack of explanation and coherent reasoning" was one consideration that led it to find that these established grounds for reversal existed. However, the Appellate Body did not put forward lack of a "reasoned and adequate explanation" as a new and independent basis for over reversing a panel's findings.[273] Therefore, the EU assertions in paragraphs 273, 275 (first bullet), and 278 that the Panel failed to provide a "reasoned and adequate explanation" of its findings do not establish a violation of Article 11 of the DSU.

168. In addition to these overarching legal flaws, the United States notes that each of the five individual allegations of inconsistency with Article 11 of the DSU lodged by the EU is invalid.

169. *First*, in paragraph 273, the European Union asserts that the Panel failed to explain the significance of its finding that the reduction in CASA's capital represented something of value received from SEPI in exchange for the CASA-SEPI transfer. The United States explained in section III.C.3 that the significance of the Panel's finding was clear. Paragraph 7.285 of the Panel Report demonstrates that the Panel provided a reasoned and adequate explanation.

170. *Second*, in paragraphs 274-275, the European Union argues that the Panel did not provide a reasoned and adequate explanation of, and had insufficient evidence for, its finding the agreement to pool voting rights gave SEPI and DaimlerChrysler a greater claim to the earnings of any funds returned to EADS. However, the Panel made no finding that the agreement affected claims on earnings. It found that the agreement affected control of the company, a finding that was one of several reasons cited by the Panel for its conclusion that the CASA-SEPI and Dasa-DaimlerChrysler cash transfers did not move cash out of the company-shareholder unit.[274] The

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[270] The United States notes that in some instances, the word "should" in one of the covered agreements has been understood to convey a mandatory meaning. As the Appellate Body is aware of the potential confusion that arises from the use of "should" in this way, the United States does not believe that the Appellate Body would describe something it considered mandatory in terms of what a Member "should" do.

[271] *US – Upland Cotton (21.5)*, paras. 294-295.

[272] *Korea – Alcoholic Beverages*, para. 164; *US – Wheat Gluten*, para. 161 ("We consider that the Panel's conclusion is at odds with its treatment and description of the evidence supporting that conclusion.").

[273] Therefore, the expectation expressed in footnote 618 that panels would "be expected to provide reasoned and adequate explanations and coherent reasoning" was not necessary to resolution of the issue before the Appellate Body, and is best understood as *obiter dicta*.

[274] Panel Report, para. 7.257.

Panel explained its findings in this respect carefully and in some detail in the paragraphs cited by the EU.[275]

171. *Third*, in paragraph 276, the European Union argues that the Panel contradicted itself by finding that "the *provision* of money to a state owned entity by its government shareholder qualifies as a 'financial contribution' cognizable under the *SCM Agreement*" in the case of the French State's contribution of Dassault shares to Aérospatiale, while finding that "the *removal* of money from a state-owned entity by its government shareholder does not qualify as 'withdrawal' of those payments."[276] The conflict is, in fact, a misperception by the European Union. The Panel never disputed that in certain conditions, removal of money from a state-owned entity by the state *could* qualify as withdrawal of a subsidy.[277] It found, however, that the European Union conceded that under certain conditions such a transfer could not be treated as a withdrawal, and that those conditions were present in the case in the one instance in this dispute in which a government removed funds from a government-owned company.[278] Thus, there is no conflict.

172. *Fourth*, in paragraph 278, the European Union asserts that the Panel violated Article 11 of the DSU by not addressing the EU's arguments that the so-called "sales transactions" (the 1999-2006 reorganization activities other than the Dasa-DaimlerChrysler and CASA-SEPI transfers) "withdrew" past subsidies for purposes of Articles 3.7 and 4.8 of the SCM Agreement. As the United States explained in section III.C.4, the EU explicitly and forcefully raised the withdrawal argument with regard to the Dasa-DaimlerChrysler and CASA-SEPI transfers. But it never pursued that argument with any clarity when it came to the other transactions. The Panel accordingly understood that the only argument the EU made regarding the sale transactions was that they "extinguished" prior subsidies. In any event, the Appellate Body should reject the EU argument that sales of shares in the Airbus companies "withdrew" subsidies as fundamentally self-contradictory. The European Union does not dispute that each of the transactions involved an exchange of ownership in one or more of the Airbus companies in exchange for compensation of equal value. That is, in fact, the foundation of the EU argument that such transactions extinguished past subsidies. But, as the European Union has recognized, taking something of value from a company in exchange for something of equal or greater value does not "withdraw" anything – it merely substitutes one thing for another. Therefore, even if the European Union had raised the withdrawal argument with respect to the sale transactions, it was entitled to no credence from the Panel.

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[275] Panel Report, paras. 7.275, 7.283, and 7.285, *cited in* EU Appellant Submission, para. 274, note 270.

[276] Emphasis in original.

[277] Panel Report, para. 7.283 ("We do not consider it necessary to address in detail the United States' arguments as to situations that would constitute the 'withdrawal' of a subsidy for purposes of Articles 4.7 and 7.8 of the SCM Agreement.").

[278] Panel Report, para. 7.284.

173. *Fifth*, in paragraph 279, the EU asserts that the Panel erred in stating that the European Union "did not argue" that each of the 1996-2006 reorganization activities was an arm's length transaction, and attempts to support its assertion with citations to segments of EU submissions to the Panel. The passage cited on the sales by Lagardère and DaimlerChrysler does not even mention the words "arm's length."[279] The passages cited European Union on the formation of EADS and BAE Systems' sale of its interest in Airbus simply assert that the transaction was at arm's length without providing legal analysis or citation to evidence and, therefore, can scarcely be considered "arguments". The European Union is correct that it made arguments that the ASM transaction and 2006 transactions involving Lagardère and Daimler Chrysler were at arm's length, but a panel is under no obligation to address in its final report every argument raised by a party.[280]

174. However, the larger point is that the Panel's statement appears in the analysis of whether the "continuing benefit" requirement applies beyond the factual situation addressed in *US – Countervailing Measures on Certain EC Products*, namely:

> (i) benefits resulting from a prior non-recurring financial contribution, (ii) are bestowed on a state owned enterprise, and (iii) following a privatization at arm's length and for fair market value, (iv) the government transfers all or substantially all the property and retains no controlling interest in the privatized producer.[281]

The Panel stated the EU "does not argue that the transactions that it alleges have resulted in the 'extinction' of subsidies bestowed on Airbus SAS fulfil all of the above criteria."[282] However, to the extent that this statement is incorrect, any error did not affect the Panel's ultimate conclusion. None of the transactions involved transfer of all or substantially all of the property, or surrender of *all* of the controlling interest by the relevant government. Therefore, regardless of whether the transactions were at arm's length, they would still not have created a situation in which a subsidy extinction analysis was necessary or appropriate.

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[279] EU Appellant Submission, para. 279, third bullet.

[280] *US – Steel CVDs (AB)*, *quoting EC – Poultry (AB)*, para 135) ("So long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the 'objective assessment of the matter before it' required by Article 11 of the DSU.").

[281] Panel Report, para. 248.

[282] Panel Report, para. 249.

IV. THE PANEL DID NOT ERR IN FINDING THAT LAUNCH AID CONFERRED A BENEFIT WITHIN THE MEANING OF ARTICLE 1.1(B) OF THE SCM AGREEMENT

175. The Panel found that the terms under which EU member State governments granted LA/MSF were more favorable than those available to Airbus in the market, often by substantial margins. It reached this conclusion after critically examining each of the principal arguments advanced by the parties. It scrutinized key pieces of evidence, with particular regard to the expert economic analyses presented by both parties. The Panel did not take any argument or evidence at face value, but probed each one and weighed it against other evidence and arguments. And finally, the Panel carefully explained its reasons for accepting and rejecting each principal argument and piece of evidence.

176. It is important to note that *every single grant of LA/MSF was at terms more favorable than were available in the market, even using the commercial benchmarks proposed by the EU.* The Panel noted this point when it found that "even relying on the European Communities' own estimates of the rates of return and market interest rate benchmarks, it is clear that the financial contributions provided in the form of LA/MSF conferred a benefit on Airbus."[283] Thus, there is no dispute at this point as to whether launch aid conferred a benefit. The only question is what the market would have demanded for comparable financing.

177. The European Union appeals the Panel's findings in this respect. It contends that the Panel erred under Article 1.1(b) of the SCM Agreement and Article 11 of the DSU in applying its "variable" project-specific risk premium approach to the facts. In particular, the European Union accuses the Panel of "not apply{ing} its own criteria" to establish a "benefit" correctly, inadequately assessing certain information (that the European Union did not provide), and failing to ask the European Union specifically to provide that information.[284] It is the EU that errs. The Panel applied the standard that numerous panels and the Appellate Body have identified as correct under Article 1.1(b) of the SCM Agreement, and objectively assessed the facts and conformity with the covered agreements, as required by Article 11 of the DSU. The United States therefore requests the Appellate Body to reject the EU appeal in this regard.

A. The European Union understates the substantial risk the governments undertook in providing Launch Aid

178. During the Panel proceedings, there was agreement between the parties that the development of a large civil aircraft is an extremely risky proposition. The Panel accordingly made findings, which the European Union does not dispute, that in large civil aircraft

[283] Panel Report, para. 7.490. The Panel noted that "had we not rejected the taxation-adjusted LA/MSF rates of return advanced by the European Communities, the same would also be true for all but the French A330-200 LA/MSF contract." Panel Report, para. 7.490. As the EU has not appealed the Panel's finding regarding its taxation-adjusted benchmarks, it has conceded that all grants of launch aid conferred a benefit.

[284] EU Appellant Submission, paras. 735–838.

development projects "the eventual success of the project remains subject to a high degree of uncertainty"[285] and "is shaped by factors 'whose very foreseeability is impossible by definition'."[286] Now, the European Union attempts to minimize the risk of developing a new large civil aircraft, for example, by asserting with regard to its launch of the largest civil aircraft ever, "just because the A380 is big, it does not mean that it poses technological risk calling for a heightened risk premium."[287] Therefore, it is useful to refer back to the facts that led the United States, the Panel, and (formerly) the European Union, to recognize that *all* civil aircraft development projects are risky, even if some are riskier than others. This understanding illuminates the way in which LA/MSF operates to absorb development costs and effectively transfer the risk of large civil aircraft development from the company (Airbus) to the governments that underwrite it.

1. The development of large civil aircraft is highly risky and massively expensive

179. To understand the benefit that Airbus receives from LA/MSF, it is necessary to appreciate the particular risks inherent in developing large civil aircraft, which LA/MSF is specifically designed to offset. In particular, developing new models of large civil aircraft is both extremely risky and extraordinarily expensive.[288] The programs require huge up-front investments (as much as $10 billion or more per new LCA model) to fund development work that must be completed before deliveries can even begin.[289] The decision to launch the program and incur these non-recurring costs must be made years before any aircraft are produced, at a time when the success of the program is uncertain.[290] Once this investment has been made, very little can be recovered in the event the program fails to perform as expected for technical or commercial reasons, or if it is substantially delayed.

180. In addition to an uncertain revenue stream, manufacturing costs can be difficult to predict years in advance of actual production. These costs may be higher than anticipated if unexpected difficulties arise in the production process, suppliers are less capable than expected, or labor and

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[285] Panel Report, para. 7.367.

[286] Panel Report, para. 7.367, *quoting* EC FWS, para. 30.

[287] EU Appellant Submission, para. 770.

[288] As found by the Panel, "{b}y limiting potential losses, LA/MSF transfers risk from Airbus to the governments supplying LA/MSF, thereby rendering it more likely, in any given case, that an LCA programme will be undertaken." Panel Report, para. 7.1898. *See also* Gary J. Dorman, The Effect of Launch Aid on the Economics of Commercial Airplane Programs (Nov. 6, 2006) ("Dorman Report") (Exhibit US-70 BCI), US, FWS, para 112.

[289] EC FWS para. 27 (noting that the LCA "development costs are high and have to be invested a long time before revenue is generated.").

[290] For example, Airbus launched the $15 billion A380 program on December 19, 2000. It did not make its first delivery of the A380 until the fourth quarter of 2007; Panel Report para. 7.367 ("Both parties agree that an outstanding feature of LCA development is that significant start-up costs must be incurred a long time before the projects associated with those costs are generated.").

material costs change.[291] Reduced sales volumes can also contribute to higher unit costs, as well as lower revenues, due to limited economies of scale and delays in learning curve cost improvements.

181. Since the initial development investment is essentially a sunk cost incurred well before revenues are received, the size of these one-time costs is a key element affecting an aircraft program's risk and expected profitability.[292] If a program is successful, the up-front investment is eventually recovered with margins earned on each aircraft delivered.[293] Given the typical magnitude of each program's one-time costs, however, hundreds of sales are usually required before a program reaches its break-even point. If a program fails to reach break-even sales, the remainder of the non-recurring costs must instead be written off as a loss.

2. Launch aid is a highly preferential form of financing with unique terms that absorb the extraordinary cost and offset the massive risk of new large civil aircraft development

182. LA/MSF, as the Panel found, is a form of highly preferential financing that the Airbus governments designed and used specifically to offset the enormous costs and extraordinarily high risks that characterize large civil aircraft development. Although the European Union contends that the terms of LA/MSF "varied considerably," it has identified no error with the Panel's finding that all LA/MSF has taken "essentially the same form"[294]: long-term unsecured loans at zero or below-market rates of interest, with back-loaded repayment schedules that allow Airbus to repay the loans through a levy on each delivery of the financed aircraft.[295] The EU does not

[291] EC FWS paras. 29–30 (noting that large civil aircraft projects are "quite sensitive to external events," including "economic slowdowns and exogenous price increases of complementary goods (like fuel) {and} political events, terrorist attacks, wars and other security issues, and even human health developments, such as SARS," that "the LCA industry has an exaggerated business cycle which is particularly sensitive to external events," and that "{a}ll of these factors translate into elements that require participants in the industry to engage in very long-term preparation and planning to meet the demand of the market, even as the market may be influenced by factors whose very foreseeability is impossible by definition.").

[292] EC FWS para. 27 ("The first outstanding feature is that this is an industry with enormous start-up costs for new LCA models."); Panel Report, para. 7.367 ("the development of LCA is an endeavor that requires huge up-front investments" (internal quotation marks omitted)).

[293] Panel Report, para. 7.375 ("we agree with the United States that Airbus' obligation to fully repay the loans provided under the challenged LA/MSF measures is entirely dependent upon the success of the particular LCA project.").

[294] *E.g.*,Panel Report, para 7.374.

[295] In its appellant submission, the European Union suggests the Panel made certain findings regarding the United States' proposed benchmark rate and the nature of LA/MSF where, in fact, the Panel was merely recounting the arguments made by the European Union. EU Appellant Submission , paras. 742; Panel Report, paras. 7.442–7.453, 7.459. As set out in further detail below, the Panel did not reject the venture capital-based risk premium proposed by the United States but accepted that for some models it was, in fact, a reasonable premium or even a reasonable proxy for the minimum premium that a market investor would apply.

dispute one key point – if Airbus fails to sell a sufficient number of the aircraft to repay the loan, the outstanding balances are indefinitely extended or forgiven.[296]

183. LA/MSF is a highly unusual, highly risky form of financing provided by the Airbus governments in very substantial amounts. By providing LA/MSF on a back-loaded and success-dependent basis, the Airbus governments assume a substantial portion of the commercial and financial risks of developing new models of large civil aircraft. Unlike commercial lenders, however, the governments do not charge Airbus for assuming these substantial risks. Instead, they provide funds either interest-free or at interest rates well below the rates commercial lenders would demand for financing with similarly advantageous characteristics. As the Panel found, "there is no doubt that all of the challenged LA/MSF contracts may be characterized as unsecured loans granted to Airbus on back-loaded and success-dependent repayment terms,"[297] and "{e}ach of the challenged LA/MSF contracts involves a unique transfer of funds at below-market interest rates to one particular company, Airbus."[298] The Panel further concluded that "the European Communities and the governments of France, Germany, Spain, and the United Kingdom have, through the use of specific subsidies, caused serious prejudice to the United States' interests."[299] Specifically, the Panel found that "{b}y limiting potential losses, LA/MSF transfers risk from Airbus to the governments supplying LA/MSF, thereby rendering it more likely, in any given case, that an LCA programme will be undertaken."[300]

B. The Panel correctly identified and applied the legal standard under Article 1.1(b) of the SCM Agreement and did not fail to meet its obligations under Article 11 of the DSU in making its findings regarding the applicable project-specific risk premium

184. The Panel properly concluded that in order to determine whether the financial contributions made under LA/MSF confer a benefit on Airbus, within the meaning of Article 1.1(b) of the SCM Agreement, the critical question is whether LA/MSF places Airbus "in a more advantageous position than would otherwise be the case if it were left to find financing on the same or similar terms and conditions on the market."[301] The Panel noted that the parties'

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[296] EADS Offering Memorandum, p. 56 (US, FWS Exhibit US-LAUNCH AID-131); EU Appellant Submission, para. 737.

[297] Panel Report, para. 7.525.

[298] Panel Report, para. 7.497.

[299] Panel Report, para. 7.2025.

[300] Panel Report, para. 7.1898; Panel Report, para. 7.484 ("we have found nothing in the relevant agreements that undermines the argument that the EC member State governments did not expect to obtain any particular return on the full repayment of their LA/MSF contributions for the A300 and A310 at the time they concluded the respective contracts.").

[301] Panel Report, para. 7.482. This is precisely the approach previously endorsed by the Appellate Body. *Canada – Aircraft (AB)*, para. 149 ("In order to determine whether a financial contribution (in the sense of Article 1.1(a)(i)) confers a 'benefit', i.e., an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution. In

disagreement in terms of the overall levels of the relevant market interest rate benchmark focused on the value of the project-specific risk premium and therefore devoted its attention to this issue.[302] The Panel recounted the arguments and counter-arguments of the EU and the United States in detail and found certain faults in both parties' arguments. It provided specific critiques of the arguments of both parties before finding that the appropriate risk premium varied over time with different models.[303] After examining in detail "whether the cost of the challenged LA/MSF contracts to Airbus is less than the cost that Airbus would be faced with if it sought financing on the same or similar terms and conditions as LA/MSF from market lenders," the Panel found that (1) the appropriate project-specific risk premium varied with the aircraft at issue;[304] (2) the appropriate market interest rate against which to measure the government-provided terms lies in the range of benchmarks presented by both parties;[305] and (3) all the challenged LA/MSF measures do in fact confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement.[306]

185. The Panel concluded, more specifically, that "for the LA/MSF provided for the A300 and A310, we have found that the project-specific risk premium advanced by the United States represents a reasonable proxy for the minimum project-specific risk premium that it would be appropriate to associate with market financing"; that "{i}n terms of the models of LCA developed between the A310 and the A380, our findings on the appropriate project-specific risk premium lead us to conclude that the most appropriate market interest rate benchmarks … lie in the range of interest rates advanced by both parties"; and that "the United States risk premium for the A380 could be reasonably accepted to represent the outer limit of the risk premium that a market lender would ask Airbus to pay".[307]

186. The European Union's first and primary claim is that the Panel erred in its application of Article 1.1(b) of the SCM Agreement and Article 11 of the DSU in making its findings regarding the applicable project-specific risk premium. Specifically, according to the European Union, the Panel (i) considered jointly and made findings collectively for several Airbus large civil aircraft models where it should have done so on a model-specific basis; (ii) failed to address some of the individual "factors" it had established for assessing the appropriate project-specific risk

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our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the market. Accordingly, a financial contribution will only confer a 'benefit', i.e., an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market."), *et seq*.

[302] Panel Report, paras. 7.434; 7.435–7.481.

[303] Panel Report, paras. 7.435–7.479; 7.479–7.490, Table 7.

[304] Panel Report, paras. 7.482–7.490.

[305] Panel Report, paras. 7.485–7.488.

[306] Panel Report, paras. 7.482–7.496.

[307] Panel Report, paras. 7.484 – 486/

premium; (iii) failed to apply those individual factors to each aircraft project; (iv) failed to perform its own independent analysis; (v) rejected the use of a risk premium based on venture capital, but then used that premium anyway; and (vi) acted inconsistently with Article 11 of the DSU by failing to provide a "reasoned and adequate explanation of its findings, as well as a reasoning that is coherent."

187. Each of the European Union's arguments fails. First, a comparison of the EU arguments with the corresponding parts of the Panel Report or the U.S. submissions demonstrates that many of the European Union's complaints arise out of a misunderstanding of the Panel reasoning or the U.S. argument. In other words, the European Union is challenging findings the Panel did not make, or arguments the United States did not proffer. Second, the European Union's claim under Article 1.1(b) of the SCM Agreement *also* fails, as it is merely a thinly-veiled critique of the Panel's careful weighing and balancing of the facts – not a proper legal challenge to the actual application of the Article 1.1(b) 'benefit' standard.[308] Finally, the European Union's Article 11 DSU arguments equally fail because the Panel in fact performed a careful, thorough and internally consistent assessment of the totality of the facts involved. Thus, each of the European Union's arguments fail both on their own merits and on the basis of the actual legal provisions pursuant to which those arguments were made. In addition, the Panel provided a "reasoned and adequate explanation of its findings."

1. The European Union's arguments with regard to Article 1.1 of the SCM Agreement fail because the alleged flaws are in findings the Panel never made and arguments the United States never raised

188. As we will discuss in more detail below, both the European Union's Article 1.1(b) SCM and Article 11 DSU arguments fail for a number of specific legal reasons. Additionally, however, each of the European Union's arguments also fails when taken on its own terms. That is, each of the European Union's arguments *in fact* either mischaracterizes the arguments of the United States or the findings of the Panel, or fails because the relevant supported section of the Panel Report is well supported.

189. *First*, the European Union contends with respect to its claim under Article 1.1(b) of the SCM Agreement that, despite finding that the project-specific risk premium should "vary from

[308] Under Article 17.6 of the DSU, "appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel." *EC – Hormones (AB)*, para. 132. In contrast, findings of fact are not subject to review by the Appellate Body, and the "{d}etermination of the credibility and weight properly ascribed to . . . a given piece of evidence is part and parcel of the fact finding process and is . . . left to the discretion of a panel as the trier of facts." *Ibid.* Although the European Union suggests that each of its arguments relate to the Panel's application of the DSU Article 1.1(b) benefit standard to the facts, it is apparent from a close review that the thrust of the EU argument goes to Panel's weighing and balancing of the facts. *See* EU Appellant Submission, paras. 763–774. Indeed, the Appellate Body has previously found that a panel's assessment of economic reports (analogous to the Ellis and Whitelaw reports) falls squarely within its authority as the trier of fact. *US – Upland Cotton (Art. 21.5)*, para. 435.

product to product," the Panel in fact considered jointly and made findings collectively for several aircraft.[309] The EU misunderstands. The Panel did not find that it needed to calculate a distinct risk premium for each product. It found that the inquiry must "identify{} the most appropriate project-specific risk premium for *each* of the challenged contracts."[310] It did not attempt to pinpoint a specific value, and was not required to do so.[311] Instead, the Panel identified ranges in which it considered the appropriate premium was likely to fall. The Panel then found that certain groups of large civil aircraft entail levels of risk that, though not necessarily identical, fall in the same range. The finding that premiums for multiple aircraft may fall in the same range is fully consistent with the Panel's criticism of a one-size-fits-all premium and finding that the "most appropriate" premium should be ascribed to each model of aircraft.

190. The European Union also contends that both it and the United States "agreed in the course of the Panel's proceedings that it would be appropriate to apply a constant project-specific risk premium to all MSF loans."[312] The European Union again misunderstands the U.S. position. The Ellis Report, included as an exhibit to the U.S. first written submission before the Panel, compares the "potential returns" on Launch Aid with the actual returns the commercial market would demand for financing with similarly advantageous characteristics.[313] Dr. Ellis proposes a single premium of 700 basis points as a conservative estimate applicable to all transactions, but recognizes that "a *model-based* benchmark rate must reflect, in addition to the company's general level of riskiness (as reflected in the general corporate borrowing rate), *project-specific risk* resulting from the particular risk profile of large civil aircraft development and other project- or launch aid-specific features."[314] He recognized that the actual premium might be higher, for example, noting that "a 40 percent risk premium or something of that order of magnitude would

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[309] EU Appellant Submission, para. 760.

[310] Panel Report, para. 7.468 (emphasis in original). The Panel elaborated further that "it is important to bear in mind the nature and circumstances surrounding each of the different LCA development projects financed under the challenged LA/MSF measures." Panel Report, para. 7.481.

[311] *US – Upland Cotton (AB)*, paras. 460–467 ("A precise, definitive quantification of the subsidy is not required.").

[312] EU Appellant Submission, fn. 969.

[313] Ellis Report, Panel Exhibit 3, Exhibit US-80 (BCI) (concluding that Launch Aid borrowing rates are substantially below the rates that commercial investors would demand for comparable project-specific and success-dependent loans) (emphasis added).

[314] Ellis Report, Panel Exhibit 3, Exhibit US-80 (BCI) (emphasis added); *see also* US FWS para. 138 ("In the case of loans whose repayment is tied to the success of a particular project, project-specific risk will also be factored into the overall "risk premium" that a commercial investor will apply to the loan") (citing Brealy & Myers, *Principles of Corporate Finance*, McGraw-Hill/Irwin, 7th ed., at 222 ("It is clearly silly to suggest that {the investor} should demand the same rate of return from a very safe project than {sic} from a very risky one.")); US SWS para. 82 ("With respect to the calculation of a benchmark, the EC accepts the U.S. approach of beginning with a risk-free interest rate and adding to it a general corporate borrowing rate and then a project-specific risk premium.").

probably be quite appropriate for the earlier years of Airbus' existence given the high-risk of LA/MSF and the project-specific repayment during the early life of the company."[315]

191. *Second*, the European Union contends that the Panel, in paragraph 7.468 of its report, identified a number of "factors" for assessing a project-specific risk premium and then ignored most of those factors.[316] The European Union misunderstands the Panel's analysis. The "factors" listed in paragraph 7.468 were simply the categories of facts that the Panel considered in concluding that different projects might warrant different premiums, and in identifying the range in which to put each project. As the Panel itself noted, these are some of the "{v}arious pieces of evidence and arguments provided by the parties indicat{ing} that the risk associated with LCA development will vary over time depending on a variety of factors."[317] Paragraph 7.468, in other words, does not lay out a roadmap that the Panel then failed to follow, as the European Union argues. Rather, it is the Panel's description of the detailed factual analysis that it *did* perform and which led to its conclusions.[318]

192. *Third*, in a similar vein, the European Union argues that the Panel did consider two of the paragraph 7.468 "factors," but erred in failing to apply *each* of these two factors to *each* of the aircraft projects.[319] That argument, again, fails because the "factors" were not part of a checklist, but a description of the analysis the Panel performed for all the aircraft models. In particular, contrary to what the European Union argues, the Panel did not "appl{y} the 'relative experience' factor *solely* to the A300 and A310, but not to other projects, and the 'level of technology' factor *solely* to the A380."[320] Rather, the Panel's placement of the different Airbus models into three different ranges of risk premiums reflects its appreciation of all of the factors. We recall in this regard that under Article 1.1(b) the Panel was required to find *that* a benefit was conferred but not quantify the exact benefit conferred. Beyond that, it is of course unsurprising that the Panel found that the 'relative experience' factor played a particularly noteworthy role with respect to some of the first models that Airbus developed, and that 'technological challenges' played a noteworthy role for the A380. However, the specific mention of these considerations for these aircraft does not signal that other aircraft had no technical challenges, or were not influenced by relative experience.

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[315] Panel Report, para 7.468 (citing Ellis Report, Exhibit US-80 (BCI), footnote 28).

[316] EU Appellant Submission, para. 760, note 970.

[317] Panel Report, para. 7.468.

[318] Indeed, the Panel specifically refers to some of the evidence on which it relied, which includes some of the European Union's own submissions. *See* Panel Report para. 7.468, note 2678 (noting EC FWS paras. 305 and 484, identifying "development risk" – "the risk that Airbus will fail to design and build the aircraft" and "market risk" – "the risk that Airbus will not deliver enough completed aircraft to repay {LA/MSF} principal and interest") and EC SWS paras. 195–198 (discussing risk factors that allegedly affected the European regional aircraft industry between 1991 and 1993).

[319] EU Appellant Submission, paras. 763–770.

[320] EU Appellant Submission, para 763.

193. *Fourth*, the European Union also argues that the Panel erred by not evaluating the possibility that the project-specific risk premium for the A330-200 and the A340-500/600 might be even lower than the figure proposed by the EU.[321] The EU appears to be suggesting that the Panel was required to decide the issue based on an argument that the EU did not make, which is not the function of a Panel.[322] In any event, it is clear from the Panel's description of its analysis that it reviewed the totality of the facts before it and concluded that the A330-200 and A340-500/600 benchmarks "lie in the range of interest rates advanced by both of the parties – that is, above the interest rate benchmarks proposed by the European Communities but below the benchmark levels submitted by the United States."[323]There is no evidence that the Panel ruled out the possibility that the project-specific benchmark might be lower than the EU's generalized, all-aircraft risk premium.

194. *Finally*, the European Union argues that the Panel's reliance on the U.S. risk premium with respect to the A300, the A310, and the A380 constitutes error because the Panel applied a risk premium based on venture capital financing, which the Panel had previously rejected as inherently more risky than LA/MSF.[324] It is true that the Panel observed that "there are reasons to believe that venture capital financing is inherently more risky than LA/MSF," but it did so in the context of evaluating application of the U.S. expert's venture capital-based risk premium generally to all instances of LA/MSF. However, the Panel concluded that with respect to the A300 and A310, the earliest Airbus models, the premium proposed by the United States *was* a reasonable proxy for the *minimum* project-specific risk premium.[325] Similarly, it found specifically that for the A380, the premium proposed by the United States "could be reasonably accepted to represent the outer limit of the risk premium that a market lender would ask".[326] The Panel indicated that these aircraft presented greater risks ("Airbus was in its very early stages of existence"; "acknowledged technological challenges associated with the A380 project"[327]) than the other Airbus models. In other words, the Panel found that the venture capital-based risk premium proposed by the United States "may not be an appropriate proxy … for *all* of the challenged LA/MSF contracts."[328] The emphasis on "all," placed there by the Panel, confirms

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[321] EU Appellant Submission, para. 767.

[322] *US – Continued Zeroing (AB)*, para 343; *see also US – Wool Shirts and Blouses (AB)*, paras. 323, 335.

[323] Panel Report, para 7.486 (emphasis added). We also note in this context, that not only was the Panel not obliged to make the European Union's case for it (indeed, it was barred from doing so), but it cannot now ask the Appellate Body to second-guess both the Panel and the European Union's own expert's statements before the Panel on this point of fact.

[324] EU Appellant Submission, para. 771.

[325] Panel Report, para 7.485.

[326] Panel Report, para 7.487.

[327] Panel Report, para. 7.469.

[328] Panel Report, para 7.469 ("All of the above considerations lead us to conclude that the United States' proposed project-specific risk premium may not be an appropriate proxy for the project-specific risk premium that a

that for *some* contracts, the U.S. premium was "an appropriate proxy." There is nothing incoherent or internally inconsistent about that. It simply derives from the careful factual assessment that the Panel undertook.

195. In fact, the contradiction the European Union perceives grows out of its misperception of the risk premium proposed by the United States. Importantly, the United States did not suggest, and the Panel did not apply, a pure individual venture capital premium. Rather, the United States proposed a premium that reflected a diversified portfolio of venture capital investments. The Ellis Report noted that the risk premium for individual venture capital projects can be as high as 40%, while the risk premium "for a well-diversified venture capital portfolio is 6-7% (600-700 basis points) above the commercial cost of capital."[329] By using the premium from a venture capital *portfolio*, the United States avoided the extremely risky types of projects that may have motivated the Panel's concerns. Moreover, the Panel's observation dealt not with risk premiums, but with overall levels of risk in venture capital as opposed to LA/MSF, which would normally dictate a higher rate for venture capital. The "risk premium" that the Panel applied, moreover, is only an addition to the company-specific "general corporate borrowing rate." In the case of Airbus, a large company benefiting from massive subsidies and a correspondingly good credit rating, this "general corporate borrowing rate" would have been different than for a typical venture capital investment – a small start-up company with a corresponding risk profile. The overall rate of return required on a typical venture capital investment, in other words, would be higher than that resulting from the calculation the Panel applied to Airbus.

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market lender would ask Airbus to pay in return for financing on the same or similar terms and conditions as LA/MSF for *all* of the challenged LA/MSF contracts." (emphasis in original)).

[329] Ellis Report, Panel Exhibit 3, Exhibit US-80 (BCI), p. 20; US RPQ 143 ("'The U.S. benchmark does not rely on returns to *individual* venture capital projects. Rather, it relies on the much lower returns – on average about 16.7 percent – to well-diversified portfolios that contain venture capital investments.' This point bears emphasis, given the EC's caricature of the U.S. benchmark and the confusion created by the EC's reference to high average return of almost 700 percent to individual venture capital projects that culminate in public offerings. The U.S. benchmark bears no resemblance to financing with such returns."). The Panel acknowledged with regard to the project-specific risk premium that "{t}he US argues that the EC also mischaracterizes its benchmark, which relies not on returns on *individual* venture capital projects, but on much lower returns to well-diversified portfolios that contain venture capital investments." Panel Report, para. 4.103 (emphasis in original), *citing* US, SNCOS, Executive Summary, para. 6; US comments on EC, SNCOS, Executive Summary, para. 12). Further, as explained in the Ellis Report, the 700 basis point premium actually understates the price of the risk. The number on which it is based, drawn from a report by Kerins, Smith and Smith (2004), is a premium over the cost of capital of a company. The United States, however, proposed to add that figure to the general corporate borrowing rate, which reflects the cost of debt. That is normally lower than the overall cost of capital, which includes debt and equity, which is normally more expensive than debt. Ellis Report, Panel Exhibit 3, Exhibit US-80 (BCI), pp. 20–21. Finally, it is worth noting that Philippe Delmas, at the time Airbus' Executive Vice President of Strategy, Government Relations and External Affairs, when asked specifically if the loans must be repaid even if Airbus fails to sell many planes, is quoted as responding: "{g}overnment support for the A3XX should be thought of as 'venture capital'. . . . Like any venture capitalists, they are taking a risk." Airbus Gets Risk-Free Loans; European Plane Maker Doesn't Have to Pay Government Back if A3XX Superjumbo Fails, *Seattle Post-Intelligencer*, July 25, 2000 (Exhibit 7 to Ellis Report, Exhibit US-80).

2. The Panel's findings regarding project-specific interest rate premiums provided a thorough, well-reasoned explanation of its findings and fully complied with Article 11 of the DSU

196. The EU arguments related to Article 11 of the DSU to a large extent repeat the arguments made with regard to Article 1.1(b) of the SCM Agreement, which the United States rebutted in section IV.B.1. In particular, the European Union again relies on the notion that (i) the Panel considered jointly and made findings collectively for several Airbus LCA models; (ii) failed to address the individual "factors" it had established for assessing the appropriate project-specific risk premium; (iii) did not apply those individual factors to each aircraft project; (iv) failed to perform its own independent analysis; and (v) rejected yet applied the use of a risk premium based on venture capital. As the United States explained, each of these arguments relies on an incorrect reading of what the Panel actually did and the findings reflected in the Panel Report. They do not establish an inconsistency with Article 11 of the DSU any more than they did with Article 1.1(b) of the SCM Agreement.

197. Apart from that, however, a review of the Panel Report also shows that the Panel in fact *did* make an objective assessment of the facts, and arrived at a well-supported finding regarding the appropriate benchmark rate. Its analysis was "coherent" and the Panel carefully explained how it arrived at its conclusions. The Panel conducted three years of extensive briefing of the issues, conducted lengthy substantive meetings with the parties, and asked hundreds of questions to clarify matters. It directed many questions specifically to the issue of the benefit conferred by LA/MSF.[330] The Panel devoted 51 pages and 115 paragraphs to evaluating whether LA/MSF conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement.[331] The Panel dedicated 24 pages (65 paragraphs) to the issue of the appropriate rate of return of comparable market-based financing, with six pages and 15 paragraphs spent explaining why it arrived at its particular conclusion with regard to the benchmark rate.[332]

198. *First*, the Panel's analysis was more than lengthy. It was thorough, and explained *how* it arrived at its finding that the benchmark proposed by the European Union was not valid. For example, the Panel noted that "it would not be inaccurate to characterize LA/MSF, because of its unsecured, success-dependent and graduated repayments terms, as a form of financing that is inherently speculative."[333] It found that

> in respect of the earliest models of Airbus LCA, namely, the A300 and A310, when Airbus was in its very early stages of existence, a project-specific risk

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[330] *E.g.*, Panel Questions 7–9, 62–75, 142–143 and 170–171, and responses and comments to those questions.

[331] Panel Report, paras. 7.382–7.497.

[332] Panel Report, paras. 7.433–7.497; 7.482–7.497.

[333] Panel Report, para. 7.462.

> premium derived from the risk associated with investing in a well-diversified portfolio of venture capital investments, appeals to us as a reasonable proxy for the minimum project-specific risk premium that it would be appropriate to associate with market financing comparable with LA/MSF. . . . whereas, because of the acknowledged technological challenges associated with the A380 project, our sense is that the United States' project-specific risk premium could be reasonably accepted to represent the outer limit of the risk premium that a market lender would ask Airbus to pay for financing on the same or similar terms and conditions as the A380 LA/MSF contracts.[334]

199. By contrast, the Panel found "some logical merit" to the U.S. view that the financing provided to Airbus by its risk-sharing suppliers was not a proper benchmark because "the risk-sharing suppliers had incentives to lower their expected rates of return."[335] The Panel identified a further flaw in that "government support for the A380 in the form of LA/MSF reduces the level of risk associated with risk-sharing supplier financing, thereby limiting its comparability with LA/MSF."[336] The Panel also cited information in the Airbus A380 business case (and HSBI document) that "suggests that the risk-sharing participants' involvement in the A380 project may not have been on strictly market terms for all participants."[337]

200. Even if the Appellate Body were to disagree with these more general points, however, each of the EU's individual points, which largely mirror its arguments made under Article 1.1(b) of the SCM Agreement, also fails. First, the European Union contends that, given the absence of "directly applicable arguments and evidence from the Parties," the Panel's findings cannot constitute an objective assessment of the facts under Article 11 of the DSU.[338] But the Panel did have before it substantial evidence concerning the relative riskiness of the Airbus projects at issue.[339] As a consequence, the European Union cannot contend the Panel lacked the purportedly required "positive evidence" to make its finding.

201. *Second*, the European Union contends the Panel found the project-specific risk premium should be determined specifically for each product, but then grouped certain projects together

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[334] Panel Report, para. 7.469.

[335] Panel Report, para. 7.480.

[336] Panel Report, para. 7.480.

[337] Panel Report, para. 7.480.

[338] EU Appellant Submission, para. 778.

[339] Panel Report, para. 7.468, fn. 2679 (*citing* Ellis Report, Exhibit US-80 (BCI), fn. 28); US FWS, footnote 113 and evidence cited there (concerning the A380); US FWS, paras 142-145 (also concerning the A380); US FWS, footnote 185 (concerning the A300/A310); US FWS, para 260 – 262 (citing a former head of Deutsche Airbus and DASA board member as stating that "everybody knows that {the A380} is extremely high risk from every point of view: technically, airframewise, enginewise, moneywise, certificationwise" and describing the A380 as "extremely risky").

and thus failed to adhere to its own conclusion.[340] Here the European Union again recycles the same argument it made in the context of Article 1.1(b) of the SCM, but does so with the addition of a number of details regarding the purported differences among the aircraft. Again, the Panel was not obligated to, and did not attempt to, provide a precise explanation of the risk applicable to each aircraft model. The Panel instead grouped slightly different models with similar risk characteristics together for purposes of a risk premium determination. This approach in no way betrays "incoherent reasoning" on the part of the Panel – the Panel's findings simply reflect that slight, potential differences in risk of the individual projects did not prevent the conclusion that they fell into a single range.

202. *Third*, the EU contends the Panel failed to explain why the "acknowledged technological challenges" in the A380 indicate the A380 was a more risky project.[341] But the Panel did recognize that "the eventual success of the {LCA} project remains subject to a high degree of uncertainty," [342] and technological challenges are a critical component of this uncertainty. Indeed, the evidence before the Panel spoke to this issue in significant detail.[343]

203. Finally, the EU contends the Panel's findings with regard to applicable project-specific risk premiums were internally inconsistent.[344] Specifically, the EU takes issue with the Panel's finding that the benchmark return proffered by the United States was a suitable minimum return a market investor would demand for investment in the A300 and A310 and the maximum return an investor would demand to invest in the A380. However, the EU's inconsistency argument rests on the flawed assumption that the Panel fully accepted the EU's arguments with regard to the project-specific risk premium while rejecting the United States' venture capital-based premium. As we explained above, the Panel largely agreed that a venture capital construct was appropriate, stating that "it would not be inaccurate to characterize LA/MSF, because of its unsecured, success-dependent and graduated repayment terms, as a form of financing that is inherently speculative."[345] The Panel found that, despite these characteristics, LA/MSF is not "*entirely* comparable" with venture capital investments, but did not reject the use of a venture capital risk premium as a suitable analogue where warranted. As a consequence, there is nothing "irreconcilable" about the Panel's conclusion that the United States' project-specific risk premium was a suitable maximum premium for the A380.

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[340] EU Appellant Submission, para. 779.

[341] EU Appellant Submission, para. 785.

[342] Panel Report, para. 7.367.

[343] US FWS, footnote 113 and evidence cited there; US FWS, para 260 – 262 (citing a former head of Deutsche Airbus and DASA board member as stating that "everybody knows that {the A380} is extremely high risk from every point of view: technically, airframewise, enginewise, moneywise, certificationwise" and describing the A380 as "extremely risky").

[344] EU Appellant Submission, para. 786.

[345] Panel Report, para. 7.462.

204. Thus, contrary to the European Union's argument that the Panel somehow failed to provide a "reasoned and adequate explanation of its findings" or that its "reasoning {was} {in}coherent", the Panel in fact explained in great detail and on the basis of the two parties' own detailed analyses of the facts,[346] how it arrived at its market benchmark conclusions.[347] The Panel's reasoning, moreover, was "coherent" and in no way internally inconsistent.[348]

C. The Panel made an objective assessment of the facts as required by Article 11 of the DSU in criticizing and rejecting the EU's proposed benchmark

205. In addition to its challenge under Article 11 of the DSU to the Panel's findings regarding the appropriate project- specific risk premium, the European Union brings a separate challenge to the Panel's finding that the EU proposed LA/MSF benchmark understated the level of risk involved in LA/MSF. The European Union once again fails to present a valid basis for appeal because the Panel performed an objective assessment of the facts and of conformity with the covered agreements, as required under Article 11 of the DSU. The extensive written submissions on this subject show the error of the EU argument that the Panel should have more vigorously gathered information and argument. The European Union's criticism of individual findings that the Panel made, or allegedly did not make, identify no flaw with the Panel's reasoning, and do nothing to lessen the weight of the evidence taken as a whole.

1. The Panel made an objective assessment of the facts relating to the EU's proposed benchmark and provided the European Union full opportunity to rebut the U.S. prima facie case

206. The Panel began its analysis of the European Union's proposed benchmark by reviewing its proposed project-specific risk premium.[349] The Panel explained how that benchmark was based on the returns the Airbus risk-sharing suppliers expected to achieve on the financing they

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[346] The United States notes that the issue of the sufficiency of the Panel's explanation of its reasoning is a matter under Article 12.7 of the DSU.

[347] We also recall in this respect that, under Article 11 of the DSU, a Panel is not required to respond in its Report to *every* argument made by the parties to a dispute or, for that matter, the experts addressing a benchmark interest rate. (In a dispute as comprehensive as this one, moreover, this would be an impossible burden even if it were to apply.) *See EC – Hormones (AB)*, para. 138 ("The Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly."); *see also EC – Hormones (AB)*, para. 141 ("not every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts as required by Article 11 of the DSU"). Indeed, panels are not obligated to "expound at length on the reasons for their findings and recommendations." *Mexico – Corn Syrup (21.5) (AB)*, para. 109; *see also Mexico – Corn Syrup (21.5) (AB)*, para. 117 ("while {the relevant} part of the Panel Report might not reflect an exemplary degree of clarity in all respects, it can be fairly read as setting out the Panel's 'basic' explanations and reasons.").

[348] The United States refers again, in particular, to our detailed rebuttal of each of the European Union's arguments in this respect in section IV.B.1.

[349] Panel Report, paras. 7.470–7.481.

provided for the purpose of developing the A380. It described in detail the EU argument that reliance on the Airbus A380 risk-sharing supplier contracts was appropriate because they contain similar terms and conditions and involved comparable risk.[350] The Panel also outlined the methodology laid down in the EU's expert report and noted that the European Union advanced three alternative cross-checks that purportedly support its proposed project-specific risk premium.[351] Finally, the Panel recounted the counter-arguments and critiques submitted by both parties, including the specific U.S. arguments that the European Union failed to provide supporting evidence for its proposed benchmark rates. The Panel then provided detailed findings and explained how it arrived at those findings.[352]

207. This result followed from a comprehensive exchange of information and argument by the parties regarding the appropriate benchmark over the course of many years. The European Union had ample opportunity to brief and comment on the risk premium issue, and it did. In addition to the briefing and argument opportunities presented by the parties' first and second written submissions and their first and second hearing oral statements, the Panel posed several questions regarding the benchmark and project-specific risk premium following its first substantive meeting[353] and second substantive meeting.[354] Accordingly, the Panel gave the European Union many chances, over an extended period, to address the project-specific risk premium and provide the necessary evidence to support its arguments.

2. The EU arguments relate to the Panel's conclusions as to the credibility of evidence and its selection of particular arguments to address, and do not identify any inconsistency with Article 11 of the DSU

208. The European Union does not dispute the accuracy of the Panel's critical findings that the EU expert based his conclusions on a sample of risk-sharing supplier contracts; made undocumented assertions concerning the representative nature of that sample; and submitted almost none of the underlying data used in his report.[355] In fact, most of the European Union's arguments relate to the Panel's weighing and balancing of the facts, and its description of that factual assessment in its final Report. This argumentation describes exactly how and why the EU would reach a different conclusion than the Panel did; however, it does nothing to show that the Panel's assessment of the facts was less than completely objective. Therefore, the EU has failed to establish any inconsistency with Article 11 of the DSU.

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[350] Panel Report, paras. 7.470–7.474.

[351] Panel Report, paras. 7.472–7.473.

[352] Panel Report, paras. 7.475–7.479; 7.479–7.481.

[353] Questions for the Parties, Nos. 8, 9, 66, 67, 73, 74, 75 (March 30, 2007).

[354] Questions for the Parties, Nos. 143, 170 (July 31, 2007).

[355] Panel Report, para 7.480.

209. The heart of the EU argument is the Panel's assessment of economic analyses performed by experts on behalf of the two parties to the dispute. In particular, the Panel assesses the appropriate benchmark rate against which to measure LA/MSF, based on detailed economic expert reports from the United States' expert (David M. Ellis, Ph.D.) and the European Communities' expert (Robert F. Whitelaw, Ph.D.), as well as the full range of facts on which the experts based their analyses. The Panel ultimately found that the appropriate rate was somewhere between the rates proposed by both parties' experts. The Panel did not arrive at this conclusion hastily, but after the lengthy and thorough analysis described in section IV.B.2 of this submission.[356]

210. The Appellate Body addressed a similar challenge, and found that a well-considered analysis of economic evidence and modeling falls within a panel's discretion as trier of fact. In *US – Upland Cotton (Art. 21.5)*, the United States asserted that the Panel "failed to make an objective assessment of the matter, as required by Article 11 of the DSU, because it overlooked flaws in Brazil's economic simulation model and it misrepresented and distorted the results of the simulation conducted by the United States."[357] The Appellate Body disagreed, finding that "the Panel's assessment of the economic simulations falls within its authority as the trier of facts and we have not been persuaded that the Panel exceeded the bounds of its authority."[358] The complaining party asserted that the panel had failed to acknowledge the significance of the results of its own economic modeling. The Appellate Body dismissed this critique, noting that "{t}he Panel simply did not take a view on the significance of th{ose} results."[359]

211. In this situation, the Panel actually made extensive findings on the EU expert's report, and found that the overall record did not support the expert's conclusions. The EU argument is that the Panel violated Article 11 of the DSU because it did not address *some* of the EU arguments and did not prompt the European Union to provide further arguments and information. Likewise, here the Panel was not required to espouse a view on every argument made in the parties' respective expert reports. The United States notes that a panel is under no obligation – under Article 11 of the DSU or anywhere else – to discuss in its report each and every argument presented by the parties or, for that matter, each and every fact to which the parties refer, whether relevant or not.

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[356] Panel Report paras. 7.432–7.497. The Panel made clear that it had conducted a thorough analysis of both parties' arguments with regard to the appropriate project-specific premium and benchmark rate. *E.g.*, Panel Report para. 7.461 ("Having closely considered the parties' detailed arguments, counter-arguments, and the various expert economic studies and opinions that have been submitted, we believe there are a number of deficiencies with the project-specific risk premium advanced by the United States which, in our view, imply that it probably overstates the appropriate level of project-specific risk that may be reasonably associated with LA/MSF provided for at least a number of the challenged Airbus LCA projects.").

[357] *US – Upland Cotton (21.5) (AB)*, para. 435 (noting that "{t}he Panel simply did not take a view on the significance of the results").

[358] *US – Upland Cotton (21.5) (AB)*, para. 435.

[359] *US – Upland Cotton (21.5) (AB)*, para. 435.

212. As the Appellate Body has previously found, "nothing in Article 11 … *requires* a panel to examine *all* legal claims made by the complaining party."[360] Nor does it require a panel to address specifically all arguments and facts in its report. As emphasized by the Appellate Body in *EC – Poultry (AB)*:

> A panel need only address those *claims* which must be addressed in order to resolve the matter in issue in the dispute. Just as a panel has the discretion to address only those claims which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary resolve a particular claim. So long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is not specifically addressed in the "Findings" section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the "objective assessment of the matter before it" required by Article 11 of the DSU.[361]

Likewise, in this instance, the Panel had the discretion to address the arguments it found necessary to the resolution of the claims before it. That the Panel's findings did not specifically address every single argument and fact raised over the course of three years and hundreds of pages of submissions has no significance, provided the Panel otherwise conducted an objective assessment of the matter before it, which it certainly did in this case.

3. The European Union's arguments are in error because they address isolated findings, and ignore the broad weight of the evidence on which the Panel relies

213. The Panel Report makes clear that its conclusions rest on a review of the totality of the evidence before it. The Panel outlined several deficiencies indicating that the European Union's proposed benchmark rate underestimated the appropriate level of project-specific risk appropriately associated with LA/MSF for each of the challenged measures.[362] Thus, the Panel based its ultimate conclusion on a number of errors, rather than on any one single fault in the European Union's proposed approach. The European Union's arguments under Article 11 of the DSU address individual factual elements of the Panel's analysis. Section IV.C.4 of this submission explains why the European Union is wrong on each point. However, the European Union fails at the overall level because it never explains why, assuming *arguendo* that these

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[360] *EC – Poultry (AB)*, para. 135 (internal quotation marks omitted; italics in original) (noting that "Brazil's appeal under Article 11 of the DSU relates, in effect, to the judicial economy exercised by the Panel in its consideration of a number of arguments in support of the various claims that Brazil submitted to the Panel.").

[361] *EC – Poultry (AB)*, para. 135 (internal quotation marks omitted; italics in original); *see also United States – Wool Shirts and Blouses*, para. 18–19 (May 23, 1997).

[362] Panel Report, paras. 7.479–7.481.

individual criticisms were valid, they would change the Panel's conclusion based on the totality of the evidence that the EU benchmark was not valid.

214. This approach is specifically contrary to the Appellate Body's finding in *US – Continued Zeroing* that "{a} particular piece of evidence, even if not sufficient by itself to establish an asserted fact or claim, may contribute to establishing that fact or claim when considered in conjunction with other pieces of evidence", and even if "no single piece of evidence demonstrated an asserted fact at issue, it was not proper for {a panel} to {…} foreclose{ } the possibility that the consideration of all the evidence taken together might be sufficient proof of that fact."[363]

215. The European Union's arguments under Article 11 of the DSU ignores these principles and instead seeks to isolate various elements of the Panel's analysis and findings with regard to the appropriate benchmark rate, specifically from paragraph 7.480 of the Panel Report.[364] In so doing, the European Union never relates these facts to the totality of the evidence supporting the Panel's conclusion and, therefore, fails to meet the legal standard for asserting a claim under Article 11 of the DSU.

4. The European Union has provided no reason to overturn individual findings that led the Panel to conclude that the EU proposed benchmark was invalid

216. The European Union advances a number of different explicit arguments for the Appellate Body to find that the Panel violated Article 11 of the DSU. They serve only to demonstrate that after proceedings as long, with a record as huge, as in this dispute, it is possible to string together facts that, taken in isolation would arguably support almost any proposition. The United States could doubtlessly have done the same to support arguments that the Panel's benchmarks were too low, and the benefit even greater than the Panel found. However, the existence of evidence contrary to the Panel's findings, and of arguments different from the Panel's interpretation of the covered agreements, does not mean that the Panel failed to perform the objective assessment required by Article 11 of the DSU. None of the EU's alternative readings of the record do

[363] *US – Continued Zeroing (AB)*, para. 331 (further noting that "{a} particular piece of evidence, even if not sufficient by itself to establish an asserted fact or claim, may contribute to establishing that fact or claim when considered in conjunction with other pieces of evidence"). The Appellate Body in *US – Continued Zeroing* went on to find that "the Panel's reasoning reflects that it segregated and analyzed individual pieces of evidence in order to determine whether any of the pieces, by itself, proved the existence of simple zeroing. Even if the Panel were correct in assessing the value of individual pieces of evidence, and in concluding that no single piece of evidence demonstrated an asserted fact at issue, it was not proper for it to have foreclosed the possibility that the consideration of all the evidence taken together might be sufficient proof of that fact." *US – Continued Zeroing (AB)*, para. 337. Likewise, the European Union's segregation of independent elements of the Panel's findings – which could, *arguendo*, indicate the Panel failed to conduct an "objective assessment" – improperly distorts the Panel's holistic analysis of the totality of the evidence.

[364] EU Appellant Submission, paras. 791–834.

anything to suggest that the Panel's reasoning and findings were less than an objective assessment of the facts and of conformity with the covered agreements. Therefore, the EU's challenge of the Panel's individual findings of fact should fail.

217. *First*, the European Union contends that the Panel's finding that it had "no way of verifying" the value of the European Union's proposed project-specific risk premium was in error because the Panel "failed to ask for evidence it considered necessary."[365] Any error lies with the European Union. As the Appellate Body found in *US – Wool Shirts and Blouses*, "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof."[366] The Panel's findings reflect that the European Union did not live up to this responsibility. As the Panel noted, the EU expert, Professor Whitelaw used information from only a sample of the risk-sharing supplier contracts to construct the European Union's proposed project-specific risk premium.[367] The European Union never provided the relevant underlying data (other than an excerpt from a single contract) that would have allowed the Panel, and the United States, to verify the European Union's contentions and to rebut them. These flaws in the EU presentation were not secret – the European Union itself acknowledges that the United States raised the issue of the inadequate data and the sample contract in its first confidential oral statement.[368] Thus, the European Union had every reason to consider that the lack of support for its benchmark could become an issue, and ample opportunity to provide further support. That is chose not to do so is not an error chargeable to the Panel.

218. *Second*, the European Union disputes the Panel's finding that "the one contract that the European Communities has submitted shows that there is at least one major difference" compared to MSF loans that reduces the relative level of risk.[369] The Panel was perfectly clear in explaining that this "major difference" lay in the "repayment provisions" in the Risk-Sharing Supplier Contract Re A380 (Exhibit EC-117 (HSB1)) and "e.g., UK A380 LA/MSF contract, Schedule 3, para 3 (Exhibit US-79 (BCI)").[370] This was enough to identify the difference and document its existence. In fact, the Panel could not say more detail in its report because the specific repayment provisions of the risk-sharing supplier contract to which it refers were

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[365] Panel Report, para. 7.480; EU Appellant Submission, paras. 794–800.

[366] *US – Wool Shirts and Blouses (AB)*, p. 14.

[367] Panel Report, para. 7.480.

[368] US FCOS, para. 22 (HSBI). In another submission, the United States pointed out that the European Communities "provided only five pages from a single contract between one supplier and Airbus. . . . As it is the EC that is asserting that the {risk-sharing supplier} benchmark is more appropriate than the U.S.-proposed benchmark for purposes of a benefit analysis, it is for the EC to substantiate that assertion, which it has not done." U.S. Comments on EC RPQ 174, para. 44.

[369] EU Appellant Submission, paras. 801–808; Panel Report para. 7.480, fn. 2711 (comparing repayment provisions of the Risk-Sharing Supplier Contract Re A380, Exhibit EC-117 (HSBI), with *e.g.*, UK A380 LA/MSF contract, Schedule 3, para. 3, Exhibit US-79 (BCI)).

[370] Panel Report, para. 7.480, note 2711.

designated by the EU as HSBI. Having elicited a heightened level of protection for this information, including a requirement that "{t}he Panel shall not disclose HSBI in its report, but may make statements or draw conclusions that are based on the information drawn from the HSBI,"[371] the EU cannot now assert that the Panel's provision of that protection renders its assessment of the facts inconsistent with Article 11 of the DSU.[372]

219. *Third*, the European Union finds fault with the Panel's statement that there is "logical merit to the United States' argument suggesting that risk-sharing suppliers had an incentive to lower their expected rates of return."[373] According to the European Union, the Panel failed to "assess{ }" the EU evidence.[374] To begin, the Panel's finding with regard to the "incentive" facing risk-sharing suppliers is a finding of fact, and so is outside the scope of appellate review. It is also clear that the parties comprehensively briefed the appropriateness of the European Union's risk-sharing supplier benchmark, and the Panel asked specific questions on the issue. It is apparent from a review of the Report that the Panel reviewed the totality of the evidence before it.[375] That the Panel did not discuss each of the specific arguments proffered by the European Union is not, in itself, inconsistent with Article 11 of the DSU.[376] Moreover, as a result of the European Union's own designations, most of the relevant information in this respect was "Highly Sensitive Business Information" ("HSBI"), and most of the more detailed discussions between the parties took the form of HSBI exchanges. The Panel, even if it had wanted to, was not able to reflect these in any detail in its final Report. Once again, having elicited a heightened level of protection for this information, the EU cannot now assert that the Panel's provision of that protection renders its assessment of the facts inconsistent with Article 11 of the DSU.

220. It is also worth noting that a principal EU theme is that the United States' did not present sufficient evidence to substantiate its argument with regard to suppliers' expected rate of return.[377] As is the case with the Panel's findings, the U.S. ability to offer any additional

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[371] *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, (WT/DS316), Additional Working Procedures for DS316– Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information, para. 53 (9 November 2007) (Panel Report, Annex E).

[372] The United States also notes that the U.S. expert, Dr. Ellis, specifically rebutted the EU argument reflected in paras 805 *ff* of its Appellant Submission. The Panel refers to this argument in paragraphs 7.475-476 of its report, footnotes 2694, 2695 (Ellis Answer to Whitelaw Report, Exhibit US-534a), pp. 23-25. The Panel specifically reviewed and considered these arguments. The EU argument that the Panel failed to provide an objective assessment of these facts accordingly fails. (The United States refers the Appellate Body to the analysis of Dr. Ellis which contains EC-HSBI information.)

[373] EU Appellant Submission, paras. 809–821.

[374] EU Appellant Submission, para. 820.

[375] Panel Report, paras. 7.470–7.481.

[376] *EC – Poultry (AB)*, para. 135.

[377] EU Appellant Submission, paras. 812–814.

evidence demonstrating reduced risk was of course a result of the European Union's failure to provide the full information necessary for it do so.[378] Neither the Panel nor the United States can be faulted for that.

221. With regard to the limited evidence available, the United States pointed out that it demonstrated that the supplier relationships *do* involve significantly lower risk than LA/MSF contracts. As explained by Dr. Ellis, per-unit, or "ship-set," deliveries from suppliers are delivered during the production process prior to aircraft deliveries.[379] Consequently, the suppliers bear less risk of delayed repayment or non-payment due to aircraft deliveries falling behind schedule and therefore have an improved chance of earning the projected return than do LA/MSF investors should the aircraft program experience delivery problems, or if it is only marginally successful.[380] Further, beyond the variations in the observable repayment terms, other features reduced the risk in Airbus supplier contracts as compared to LA/MSF. For example, publicly available evidence indicates that many of the Airbus suppliers are shielded from risk by contractual commitments under which Airbus seeks to take minimum supplies, thus assuming some degree of the risk of delay or project failure.[381] In contrast, in the case of LA/MSF, the subsidizing governments bear the full risk of non-payment. Thus, despite the limitations caused by the extremely limited and selective information provided by the European Union, it is clear that supplier contracts hold significantly lower risk than LA/MSF contracts, thus resulting in a sharp downward bias in the European Union's proposed benchmark.[382]

222. *Fourth*, the European Union contends that the Panel violated Article 11 of the DSU by engaging in "speculation" when it agreed with the view expressed by Brazil and the United States that LA/MSF to Airbus lowers the risk imparted to risk-sharing suppliers.[383] But the

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[378] Ellis Answer to Whitelaw Report, Exhibit US-534a (BCI), pp. 23–24 (noting that the supplier contract information provided by the European Union was "spare and highly selective."). *See also* US, SCOS, para. 31; US, Comments on EC Answer to Panel Question 171; Ellis Answer to Whitelaw Report, Exhibit US-534a (BCI), p.22.

[379] Ellis Answer to Whitelaw Report, Exhibit US-534a (BCI), p. 22.

[380] Ellis Answer to Whitelaw Report, Exhibit US-534a (BCI), pp. 22–23.

[381] The European Union critiques the United States' reliance on a Fitch Report in its analysis of the risk-sharing supplier contracts. *See* EU Appellant Submission, para. 814. But, again, it is the European Union's own refusal to provide Airbus supplier contracts that prevents analysis of all risk-mitigating features and forces reliance on secondary materials for comparative analysis.

[382] Contrary to the European Union's contention, the Panel's findings on this issue do not rely on the premise that "the actions of a market actor that has an existing business relationship with a company that is allegedly subsidised cannot serve as a benchmark because they would somehow be tainted." EU Appellant Submission, para. 810 (citing *Japan – DRAMS (Korea)*, para. 172). Instead, the Panel found that *in this particular scenario* the risk-sharing suppliers did not in fact have been at strictly market terms and that they may have had incentives to lower their expected rates of return. Panel Report, para. 7.480.

[383] EU Appellant Submission, paras. 826. As Brazil noted, an additional reason why contracts with risk-sharing suppliers are an inappropriate basis for a benchmark is that "the terms and conditions for risk-sharing suppliers are substantially distorted by the government subsidies for the underlying projects and would not reflect

Panel's finding in this regard is reasonable and uncontroversial – it found elsewhere that LA/MSF reduced the risk associated with development of large civil aircraft, and that risk would obviously affect the company's ability to pay other debt, including risk-sharing supplier financing. Thus, the risk faced by risk-sharing suppliers financing Airbus would differ substantially from the risk faced by the governments providing LA/MSF to Airbus, preventing the use of one as a valid benchmark for the other.

223. The European Union also argues that the Panel failed "to provide a reasoned and adequate explanation of its finding" that available information "suggests that risk-sharing participants' involvement in the A380 project may not have been on strictly market terms for all the participants."[384] The Panel here refers to the information cited by U.S. expert Dr. Ellis demonstrating that a number of suppliers used in the Whitelaw analysis *themselves* received financing like LA/MSF or other government subsidies that reduced their cost of capital and would therefore reduce the returns they required on contracts with Airbus.[385] The European Union did not dispute that governments provided LA/MSF to Airbus suppliers, but contends that there is no finding that supplier LA/MSF is a subsidy, that the effect of the benefit on the ultimate project-specific risk premium would be small, that suppliers would be unlikely to pass any benefit to Airbus,[386] and that the Panel failed to provide an adequate explanation of its finding.[387] What the EU fails to realize is that the Panel did not advance this finding as an independent reason for concluding that the EU benchmark was invalid, but as one of a number of considerations supporting that conclusion. Thus, there was no need to show that supplier LA/MSF *by itself* explained the differential between LA/MSF terms and the terms for risk-sharing supplier financing. Rather, suppliers' receipt of LA/MSF – a highly atypical form of financing – was one among many factors indicating that they were not an appropriate, market-based comparison for LA/MSF offered to Airbus by the governments.

D. The Panel did not err in finding that the reasonableness of repayment forecasts says little, if anything, about the appropriateness of the rate of return

224. Finally, the European Union contends that the Panel erred under Article 1.1(b) of the SCM Agreement in finding that the number of sales over which full repayment is expected reflects little regarding the appropriateness of the rate of return.[388] The Panel observed that

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the situation without government intervention." U.S., SNCOS para. 40 (July 26, 2007); Brazil, Third Party Oral Statement, para. 11 (July 24, 2007).

[384] EU Appellant Submission, paras. 829–834.

[385] Ellis Response to the Whitelaw Report, Exhibit US-534 (HSBI), p. 24.

[386] EU Appellant Submission, para. 831.

[387] EU Appellant Submission, para. 832.

[388] EU Appellant Submission, paras. 839–847. The EU "acknowledges that the Panel's consideration of this issue did not affect the Panel's conclusion," but contends that *if* the Appellate Body considers this statement a finding, it was in error. EU Appellant Submission, para. 841.

"{w}hile we can accept that an *unreasonable* repayment forecast may signal that a loan confers a benefit, we do not believe the opposite will necessarily be the case when LA/MSF is grounded on a reasonable repayment forecast. This is because the number of sales over which full repayment is expected says little, if anything, about the appropriateness of the rate of return that will be achieved by the lender."[389]

225. The Panel correctly found that an *unreasonable* repayment forecast necessarily leads to the conclusion that a loan confers a benefit – the EU conceded as much.[390] But the opposite is not true: a *reasonable* forecast in no way eliminates the risk implicit in long-term, extraordinarily costly financing. Launching a new aircraft model requires a huge up-front investment (billions of dollars) to be made early in a project's life-cycle, when uncertainty about key variables is high, and with the prospect of those investments being lost if the project fails. The long timeframes involved in large civil aircraft projects require a multitude of assumptions in every forecast, and the sheer cost of these endeavors result in a great deal of risk.[391] As the European Union itself acknowledged, the fortune of a new large civil aircraft project is "quite sensitive to external events," including "economic slowdowns and exogenous price increases of complementary goods (like fuel) {and} political events, terrorist attacks, wars and other security issues, and even human health developments, such as SARS."[392] The European Union characterized the long-term market planning as influenced "by factors whose very foreseeability is impossible by definition."[393] In light of this implicit uncertainty in long-term forecasts, in addition to the massive investments required for large civil aircraft projects, even if the programs at issue could be expected to be profitable and the return expectations "reasonable", it does not follow that a manufacturer or investor bearing the full commercial risk of the launch would "bet the company" by investing $10 billion on the simple expectation that certain forecast sales, however reasonable, may be achieved over a 20-year period of time. Accordingly, the Panel was correct in finding that a reasonable payment forecast sheds little light on the appropriate rate of return.

226. There is, however, another error to the EU argument. It contends that the Panel was wrong in rejecting the alleged "reasonableness of repayment forecasts" as the benefit benchmark. That is something different from arguing, as the European Union does, that repayment over a

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[389] Panel Report, para. 7.397 (emphasis in original).

[390] EC FWS para. 455 (noting the "common sense" differentiation between when a State concludes a MSF for a project with a forecast of 900 sales to cover a loan when another State, on the basis of its own appraisal, has required repayment of a similar loan for the same project on the basis of a forecast for 300 sales, and that this circumstance indicates that a benefit was conferred in the former scenario).

[391] As found by the Panel, "bringing a new LCA model to market requires long-term planning and advance assessment of a wide variety of factors, including future manufacturing needs, market trends, customer demand and prices. This means that at the time a decision is taken to develop a new LCA model and to incur start-up costs, the eventual success of the project remains subject to a high degree of uncertainty." Panel Report, para. 7.367.

[392] Panel Report, para. 7.367; EC FWS para. 28.

[393] EC FWS para. 30.

smaller number of planes is less risky than over a larger number of planes. While the latter may be true, the reasonableness of repayment forecasts has little to do with this. That is, a subsidy based on repayment over a large number of planes (say, many hundreds of them over a 20-year period of time) is still highly risky even if that number of planes was established based on reasonable forecasts. That is precisely the situation at issue here and that the Panel was asked to review. As Airbus' parent company EADS notes in its financial statements: "{t}here can be no assurances that the commercial, technical and market assumptions underlying {Airbus'} business plans will be met, and consequently, the payback period or returns contemplated therein achieved."[394]

E. The Panel correctly found that Article 4 of the 1992 Agreement does not constitute a relevant benchmark for a determination of "benefit" under Article 1.1(b) of the SCM Agreement

227. The Panel correctly observed that the 1992 Agreement "contains no definition of a 'subsidy' nor does it make any reference to the notion of 'benefit'." It then correctly concluded that "we see nothing in the language of Article 4 to suggest that it informs the meaning of Article 1.1(b) of the SCM Agreement."[395] The Panel also observed that provisions of the 1992 Agreement "suggest{} that the parties in fact intended to preserve their right to challenge pre-1992 measures for inconsistency with the GATT/WTO subsidies disciplines."[396] The Panel noted in particular "that the fifth preambular paragraph of the recitals indicated that the 1992 Agreement was intended to operate *without prejudice* to the parties' rights and obligations under the GATT and other multilateral Agreements negotiated under the auspices of the GATT."[397] In light of that Agreement's irrelevance to the particular issues of this dispute, the Panel saw no need to address the broader question of whether that Agreement could, as a matter of law, be used in the interpretation of the SCM Agreement.

228. The European Union argues that this finding was an error that warrants reversing the Panel's determination that LA/MSF was a subsidy. It first attempts to establish that the 1992 Agreement, a bilateral agreement between the United States and the European Union, is a binding authority for interpretation of the SCM Agreement. It then asserts a number of theories under which the definition of "support" in Article 4 of the 1992 Agreement would determine what financial contributions confer a benefit for purposes of Article 1.1(b) of the SCM Agreement. The European Union puts forward Article 4 of the 1992 Agreement variously as a "threshold" above which financing cannot confer a benefit, or as a market benchmark for comparison with the rate of a government loan, or as a "relevant fact" in identifying a

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[394] US FWS, footnote 133, *citing* EADS Financial Statements and Corporate Governance (2005), Registration Document – Part 1, at 12 (Exhibit US-77).

[395] Panel Report, para. 7.389

[396] Panel Report, para. 7.95.

[397] Panel Report, para. 7.95 (emphasis added).

benchmark. But Article 4 of the 1992 Agreement is none of these things. It simply represents a bilateral agreement between the United States and the EU that interest rates for government financing of Airbus product launches will not go below a certain level. It says nothing about whether other disciplines – like the SCM Agreement – might require still higher interest levels. Indeed, the 1992 Agreement explicitly states that it is "without prejudice" to the parties' rights and obligations under the GATT 1947 or multilateral agreements negotiated under the auspices of the GATT 1947, which would include the SCM Agreement.[398] Thus, the EU's argument that Article 4 of the 1992 Agreement is relevant to the interpretation of Article 1.1 of the SCM Agreement has no support.

229. The European Union attempts, as it did in its arguments regarding temporal scope, to rebut the Panel's findings not by arguing that LA/MSF is consistent with the SCM Agreement, but by arguing that other agreements should apply. The Appellate Body should reject the EU arguments and uphold the Panel's findings.

1. The Panel correctly found that the 1992 Agreement by its own terms has no bearing on the Parties' rights and obligations under the SCM Agreement

230. The 1992 Agreement is a bilateral agreement that was in force between the United States and the European Union until 2004. It was not aimed, as the European Union suggests, at putting in place a new "benchmark" for what would constitute a subsidy and a benefit under the SCM Agreement. Rather, it was an attempt to place some constraints on the amount and terms of LA/MSF, without prejudice to the parties' different views as to the consistency of the measures under the GATT 1947 or any successor agreement.

231. Article 4 of the 1992 Agreement set out a number of obligations with regard to "development support" for large civil aircraft programs or derivatives. The Panel found that these disciplines did not provide any guidance on how to interpret "benefit" because Article 4:

> establishes a set of qualitative and quantitative parameters for the provision of support for the development of new LCA or derivative programmes. It identifies the dividing line that was agreed between the United States and the European Communities for acceptable and prohibited "development support" under that Agreement. It contains no definition of a "subsidy" nor does it make any reference to the notion of "benefit". Thus, we see nothing in the language of Article 4 to suggest that it informs the meaning of Article 1.1(b) of the SCM Agreement. Moreover, we cannot simply assume, on the basis of the arguments presented by the European Communities, that "development support" measures taken in compliance with Article 4 of the 1992 Agreement do not have the

[398] 1992 Agreement, fifth recital.

> characteristics of "financial contributions" that confer a "benefit", within the meaning of Article 1.1 of the SCM Agreement.[399]

Therefore, the Panel found that it did not need to reach the question of whether the 1992 Agreement was a legally acceptable basis for interpreting the SCM Agreement because, "we are not convinced that Article 4 of that Agreement provides any guidance on how to interpret the concept of "benefit . . . ."[400]

232. The European Union never directly addresses the Panel's reasoning. Instead, it posits three ways in which it considers the 1992 Agreement applicable to the SCM Agreement: to create a numerical test to evaluate the benefit of a subsidy, to establish a market benchmark against which a subsidy is measured, or to provide information relevant to calculation of the benchmark. However, the 1992 Agreement is not relevant in any of these ways.

233. The European Union first notes that Article 4 of the 1992 Agreement set a minimum level for the interest rate on "development support" for large civil aircraft of the government rate of borrowing (for 25 percent of the cost of development) and the government rate plus 1 percent (for 8 percent of the cost of development). It then argues that these rates are relevant to the evaluation of a "benefit" under Article 1.1(b) of the SCM Agreement because certain other disciplines in the covered agreements use the term "support"[401] or "hav{e} in mind the idea of a threshold."[402] The linkage the EU seeks to create between the 1992 Agreement and the SCM Agreement based on the use of "support" is superficial in the extreme. Article 1.1(a)(2) refers to "support" only to define income and price "supports" as a financial contribution. However, these mechanisms are entirely different from the "development support" laid out in Article 4 of the 1992 Agreement, and are relevant only to define "financial contribution". Nothing in the Agreement connects them to the separate inquiry into a "benefit." The reference of the term "support" in Article 3.2 of the Agreement on Agriculture does not suggest, as the EU argues, that "support" is a synonym for "subsidy." Rather, the use of "support" as opposed to "subsidy", which appears elsewhere in the covered agreements, indicates that the two have *different* meanings in the covered agreements.

234. The fact that both the SCM Agreement and Article 4 of the 1992 Agreement use thresholds to trigger discipline is of no significance. Many different types of obligations in different agreements or laws use thresholds as a mechanism. That does not make the individual thresholds applicable from one law or agreement to another.

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[399] Panel Report, para 7.389 (emphasis added; original footnotes omitted).

[400] Panel Report, para. 7.389.

[401] EU Appellant Submission, paras. 720-721.

[402] EU Appellant Submission, para. 722.

235. Thus, the use of the term "support" in Article 4 of the 1992 Agreement and in various parts of the SCM Agreement, or the use in both agreements of thresholds as a mechanism to trigger obligations does not create a link relevant to interpretation of the SCM Agreement.

236. The European Union next argues that Article 4 of the 1992 Agreement serves as "context" for the benefit analysis under Article 1.1(b) of the SCM Agreement by creating "market" conditions that serve as the benchmark for the interest rates charged for LA/MSF. The EU explains that "the existence of a subsidy has to be established on the basis of market conditions" and "{t}he market as it existed at that time of the signing of the MSF contracts was determined by and encompassed in Article 4 of the 1992 Agreement which set out terms and conditions for MSF, with which the EU Member States complied."[403] These theories lead the EU to argue that the Panel should have found that LA/MSF did not confer a benefit as long it was consistent with Article 4 – that is, the principle was less than 33 percent of total cost of development, and the interest rate was the government cost of borrowing plus 0.2424 percent.[404] As an initial matter, the 1992 Agreement cannot be "context" within the meaning of the Vienna Convention. It is not part of the covered agreements. Nor, as explained below, is it to be taken into account together with the context for purposes of Article 31(3) of the Vienna Convention.

237. The European Union confuses government lending conditions with the broader "market" for financing. The terms listed in Article 4 of the 1992 Agreement did not "determine" or "encompass" the market. Private financiers remained free to offer whatever terms the commercial market would bear. Therefore, while the 1992 Agreement may have put one constraint on state lenders, its terms did not in any way reflect the market in a way relevant for determining the existence of a benefit for purposes of Article 1.1(b) of the SCM Agreement. Therefore, it cannot serve as a "benchmark," as the EU argues.

238. The European Union's final attempt to inject Article 4 of the 1992 Agreement into the analysis of "benefit" under the SCM Agreement is an argument that the Agreement is a "fact" that the Panel should have "taken into account" in establishing a benchmark for LA/MSF.[405] However, treating the 1992 Agreement as a "fact" does not change the outcome. While it may be a "fact" that the 1992 Agreement exists and has certain terms, the Panel never found as a fact that the agreement influenced the market in the way alleged by the EU. Thus, there were no relevant facts for the Panel to "take into account." In short, as the Panel found, there is "nothing in the language of Article 4 to suggest that it informs the meaning of Article 1.1(b) of the SCM Agreement."[406]

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[403] EU Appellant Submission, para. 727.

[404] EU Appellant Submission, para. 727.

[405] EU Appellant Submission, para. 730.

[406] Panel Report, para 7.389 (emphasis added; original footnotes omitted).

239. Finally, it is important to note that even if the 1992 Agreement contained some provision that related to the terms "financial contribution" or "benefit," it would still not affect interpretation of the SCM Agreement or the EU's obligations under it. As the fifth recital of the 1992 Agreement's preamble states, the parties were acting "without prejudice to their rights and obligations under the GATT and under other multilateral agreements negotiated under the auspices of the GATT."[407] Thus, established the Panel:

> the context of Article 2 suggests that the parties in fact intended to preserve their rights to challenge pre-1992 measures for inconsistency with the GATT/WTO subsidies disciplines. We note in particular that the fifth preambular paragraph of the recitals indicated that the 1992 Agreement was intended to operate without prejudice to the parties' rights and obligations under the GATT and other multilateral Agreements negotiated under the auspices of the GATT, which would include the SCM Agreement.[408]

The EU has no response to this argument.

240. The European Union has not put forward any scenario under which the 1992 Agreement is relevant to this dispute. Its argument that the Panel erred in not relying on that Agreement should accordingly fail. Therefore, there is no need to address the EU's arguments that the 1992 Agreement is, in theory, a legitimate tool for interpreting the SCM Agreement. However, for the sake of completeness, the next section will demonstrate the errors in the EU's argument that the 1992 Agreement is a "relevant rule of international law" applicable or otherwise relevant to the SCM Agreement.

2. The 1992 Agreement is not a "relevant rule of international law applicable between the Parties."

241. The European Union's argument, stripped to its essentials, is that a bilateral agreement between two Members supersedes the covered agreements for purposes of WTO dispute settlement. Specifically, a deal struck between those Members could negate the market-based principles for identifying a "benefit" for purposes of Article 1.1(b) of the SCM Agreement and replace it with a standard based on government fiat. This outcome is inconsistent with customary rules of public international law regarding the interpretation of treaties and with the 1992 Agreement itself. Furthermore, prior panels that have considered the EU's position have rejected it.

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[407] The agreements negotiated in the Uruguay Round of Multilateral Trade Negotiations – including the SCM Agreement – are encompassed by the phrase "multilateral agreements negotiated under the auspices of the GATT." Thus, the Ministerial Declaration launching the Uruguay Round stated that the Contracting Parties to the GATT 1947 "DECIDE to enter into Multilateral Trade Negotiations on trade in goods within the framework and under the aegis of the General Agreement on Tariffs and Trade."[407] Accordingly, the fifth recital to the 1992 agreement confirms that the agreement does not prejudice the rights of the United States under the SCM Agreement.

[408] Panel Report, para 7.95.

a. The EU's approach is inconsistent with the rules reflected in Article 31 of the Vienna Convention.

242. The European Union argues that Article 4 of the 1992 Agreement is a "relevant rule of international law" applicable to the SCM Agreement by operation of the customary international law reflected in Article 31(3)(c) of the Vienna Convention. In fact, Article 31 requires the opposite result.

243. Article 31(3)(c) of the Vienna Convention provides that "{t}here shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties." Thus, for a rule of international law to be "taken into account," it must be both "relevant" and "applicable in relations between the parties." Section IV.E.1 demonstrated that Article 4 of the 1992 Agreement is not relevant to interpretation of the SCM Agreement. However, for purposes of this section, the United States assumes *arguendo* that Article 4 is relevant. The remaining question is whether the 1992 Agreement is "applicable in relations between the parties." The answer is that it is not.

244. Article 2.1(g) of the Vienna Convention defines "party" as "a State which has consented to be bound by *the treaty* and for which *the treaty* is in force."[409] The context of Article 31(3)(c) makes clear that, as used in that Article, the term "parties" means parties to the treaty that is subject to interpretation. Article 31 states in full that:

SECTION 3. INTERPRETATION OF **TREATIES**

Article 31
General rule of interpretation

1. A **treaty** shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the **treaty** in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a **treaty** shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the **treaty** which was made between all the parties in connection with the conclusion of the **treaty**;

(b) any instrument which was made by one or more parties in connection with the conclusion of the **treaty** and accepted by the other parties as an instrument related to the **treaty**.

3. There shall be taken into account, together with the context:

[409] Emphasis added.

> (a) any subsequent agreement between the parties regarding the interpretation of the **treaty** or the application of its provisions;
>
> (b) any subsequent practice in the application of the **treaty** which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

245. As the title of section 3 indicates, Article 31 of the Vienna Convention deals with the "Interpretation of *Treaties*." The text of that Article refers repeatedly to the "treaty" or a "treaty," each time in a way that makes clear that it refers to the treaty that is subject to "interpretation." Given that Article 2.1(g) defines "party" as "a State which has consented to be bound by the treaty and for which the treaty is in force," the word "parties" as used in Article 31.3(c) can only mean "States which have consented to be bound by the treaty subject to interpretation and for which that treaty is in force."

246. The framing of Article 31.2 provides further guidance by defining the "context" of a treaty as including agreements made "between all the parties" and any instrument made "by one or more parties . . . and accepted by the other parties." Although they are worded differently, both subparagraphs require that *all* the parties endorse an instrument in some fashion before it can become one of the interpretive tools to which Article 31 refers. When Article 31.3 provides for another set of tools for interpreting a treaty (things that "shall be taken into account, together with the context") in terms of what "the parties" have done, the context of Article 31.2 indicates that it means "all the parties."

247. The EU seeks to reverse Article 31.3(c) by arguing that "the parties" in effect means "some or all of the parties." In that case, "the parties" in subparagraphs (b) and (c) would also mean "some or all of the parties." An interpreter applying the rules reflected in Article 31 of the Vienna Convention would be *required* to take into account

- any subsequent agreement between *two or more* of the parties regarding the interpretation of the treaty or the application of its provisions;
- any subsequent practice in the application of the treaty which establishes the agreement of *two or more* of the parties regarding its interpretation; and
- any relevant rules of international law applicable in the relations between *two or more* of the parties.

The legal support it proffers for this result is unconvincing.

248. The European Union first argues that the reference to "all the parties" in Article 31.2(a) of the Vienna convention means that the phrase "the parties" in Article 31.3(c) must mean less than all of the parties. However, the European Union fails to realize that the reference to agreements "made between all the parties" in Article 31.2(a) is paired with a contrasting reference to "any instrument which was made by one or more parties" in Article 31.2(b). In other words, the structure of paragraph 2 explains why the word "all" appears in subparagraph (a), and thus, the reference to "all the parties" in Article 31.2(a) should not be read to indicate that "the parties" used elsewhere means "some of the parties." Indeed, the use in Article 31.2(a) of two different phrases – "all the parties" and "one or more parties . . . and . . . the other parties" – to describe "all of the parties" – indicates that the negotiators of the Vienna Convention recognized multiple ways to capture this concept.

249. The European Union also cites to the preamble of the Vienna Convention, focusing on the statements "{r}ecognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems;" and "{a}ffirming that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law."[410] It argues that these preambular statements "should be understood as a principle of 'systemic integration'."[411] This view is irrelevant. The preambular provisions do not provide any basis for altering the meaning of Article 31, and in particular provide no basis for supporting an interpretation of Article 31 that would require – as the EU interpretation would do – that an agreement between only two parties to the SCM Agreement (and never accepted by other WTO Members as relating to the SCM Agreement) should become a tool for interpretation of the SCM Agreement – and thus affect the meaning of the SCM Agreement – for all those other WTO Members who did not accept the bilateral agreement. Indeed, it is difficult to see how any of the EU's argument can be used to support the use of one treaty to negate the terms of a later treaty, particularly where the first one expressly rejects that possibility.[412]

250. It is at this point critical to recall that the DSU does not establish jurisdiction over all disputes among the Members with regard to all treaties to which they are parties. Article 3.2 of the DSU provides that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the *covered Agreements*, and to clarify the existing provisions of *those Agreements*" and explicitly prohibits panels and the Appellate Body to "add to or diminish the rights and obligations provided in the covered agreements".[413] Article 11 provides that "{t}he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the *covered agreements*." The "covered agreements" at issue in this dispute

[410] EU Appellant Submission, para. 707.

[411] EU Appellant Submission, para. 708.

[412] *E.g.*, Article 30 of the Vienna Convention.

[413] Emphasis added. *See also* Panel Report para 7.88.

are the DSU, the GATT 1994 and the SCM Agreement.[414] They do not include the 1992 Agreement. These provisions reflect jurisdictional and substantive limitations on the scope of WTO dispute settlement to which the WTO Members have expressly agreed. They must be given appropriate weight.

251. Finally, as the United States noted in section IV.E.1, in the fifth recital of the preamble to the 1992 Agreement, the parties themselves state that the disciplines are "without prejudice to their rights and obligations under the GATT and under other multilateral agreements negotiated under the auspices of the GATT." Thus, in the case of any doubt, the 1992 Agreement itself rejects any applicability to the covered agreements, including the SCM Agreement.

b. Prior panel reports specifically contradict the European Union's proposed approach.

252. The EU attempts to find support in past panel reports for its view that agreements among some, but not all, Members are valid tools for interpreting the covered agreements. That issue was squarely presented only in the *EC – Biotech* dispute, in which the panel found that "it makes sense to interpret Article 31(3)(c) as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted."[415] In other disputes cited by the EU, other international agreements were used not to interpret the legal requirements of a covered agreement, as the EU seeks here, but to elucidate ordinary or special meanings of terms. As such, they do not support the proposition advanced by the EU.

253. The *EC – Biotech* panel report considered this question, and specifically rejected the EC's attempt to rely on Article 31(3)(c) to justify citation to two international agreements that had not been accepted by all of the WTO Members.[416] The *EC – Biotech* panel explained:

> Article 31(3)(c) indicates that it is only those rules of international law which are "applicable in the relations between the parties" that are to be taken into account in interpreting a treaty. This limitation gives rise to the question of what is meant by the term "the parties". In considering this issue, we note that Article 31(3)(c) does not refer to "one or more parties". Nor does it refer to "the parties to a dispute". We further note that Article 2.1(g) of the *Vienna Convention* defines the meaning of the term "party" for the purposes of the *Vienna Convention*. Thus, "party" means "a State which has consented to be bound by the treaty and for which the treaty is in force". It may be inferred from these elements that the rules

[414] Panel Report para 7.89; DSU Article 1.1 ("{t}he rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements')").

[415] *EC – Biotech*, para. 7.70.

[416] *EC – Biotech*, paras. 7.74-7.75

> of international law applicable in the relations between "the parties" are the rules of international law applicable in the relations between the States which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force. This understanding of the term "the parties" leads logically to the view that the rules of international law to be taken into account in interpreting the WTO agreements at issue in this dispute are those which are applicable in the relations between the WTO Members.[417]

That finding, as the EU notes, was never appealed but was adopted by the DSB,[418] and remains as a persuasive explanation of why Article 31.3(c) does not operate as the EU believes.

254. The EU argues that there is, in fact, dissention on this issue among WTO panels. It first cites the panel report in *US – Shrimp (21.5)* and that Panel's reference to Article 31(3)(c) of the Vienna Convention and certain international instruments that, the Panel said, both Malaysia and the United States had accepted or had committed to comply with.[419] The EU also refers to the *US – Shrimp* Appellate Body report, which it argues is an "example of the Appellate Body's acceptance of systemic integration of non-WTO agreements".[420] There is, in fact, no disagreement. The other reports address different issues, and do not support the position taken by the European Union .

255. What the European Union fails to note, however, is that neither that panel nor the Appellate Body accepted those instruments under Article 31(3)(c) of the Vienna Convention. The Appellate Body referred to the Convention on the Law of the Sea in support of the proposition that the term "natural resources" could include both living and non-living resources. It referred to Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") to confirm the "exhaustible" nature of sea-turtles. Although it did not cite a particular provision of the Vienna Convention for its analysis, it appeared to be analyzing the ordinary meaning of terms used in the WTO covered agreements in accordance with Article 31(1). The Appellate Body did not rely on the provisions as "relevant rules of international law applicable in relations between the parties".

256. The EU references to the Appellate Body findings in *EC – Poultry* and *US – FSC (21.5)* are equally inapposite. In *EC – Poultry*, the Appellate Body expressly rejected the suggestion that the rules relevant to resolution of the dispute were to be found in the so-called Oilseeds Agreement between the EC and Brazil, which was negotiated pursuant to Article XXVIII of the

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[417] *EC – Biotech*, para. 7.68

[418] The United States notes that the report by the ILC Study Group to which the EU refers in paragraph 711 of its Appellant Submission has not been 'adopted' by the ILC nor agreed to by governments. The 'concerns' cited by the EU in particular are simply those of a small group of academics and cannot be considered to reflect any broader consensus between states.

[419] EU Appellant Submission, para 710.

[420] EU Appellant Submission, para 714.

GATT 1947.[421] The Appellate Body did not even entertain the possibility of the Oilseeds Agreement being relevant as a "rule{} of international law applicable in the relations between the parties," within the meaning of Article 31.3(c) of the Vienna Convention.

257. At issue was the relationship between the Oilseeds Agreement and the EC's Uruguay Round tariff schedule (Schedule LXXX). It was undisputed that the EC had incorporated the substantive content of the Oilseeds Agreement, an agreement establishing compensation for the EC's modification of its Schedule with respect to other goods, into Schedule LXXX.[422] Therefore, it was not a "rule of international law applicable in the relations between the parties". Rather, it had been made applicable to all WTO Members *as part of* the GATT 1994.[423] To the extent the Oilseeds Agreement itself, as opposed to its substance as incorporated into Schedule LXXX, might have been relevant at all, the Appellate Body found that this would be only "as a *supplementary means* of interpretation of Schedule LXXX pursuant to Article 32 of the *Vienna Convention*, as it is part of the historical background of the concessions of the European Communities for frozen poultry meat."[424] In other words, the Appellate Body did not accept the possibility of the Oilseeds Agreement being relevant as a "rule{} of international law applicable in the relations between the parties," within the meaning of Article 31(3)(c) of the Vienna Convention.

258. We also note in that context that in *India – Autos*, the EU itself argued that

> {a} 1997 Agreement between the European Communities and India was not a "covered agreement" within the meaning of Articles 1 and 2 DSU. Therefore, India could not invoke that Agreement in order to justify the violation of its obligations under the GATT and the TRIMs Agreement.[425]

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[421] *EC – Poultry (AB)*, para. 81 ("It is Schedule LXXX, rather than the Oilseeds Agreement, which contains the relevant obligations of the European Communities under the *WTO Agreement*. Therefore, it is Schedule LXXX, rather than the Oilseeds Agreement, which forms the legal basis for this dispute and which must be interpreted in accordance with 'customary rules of interpretation of public international law' under Article 3.2 of the DSU.").

[422] *EC –Poultry (Panel)*, para. 201. Moreover, the *EC – Poultry* panel found that "the EC 'multilateralized' the result of the oilseeds compensation negotiations (including the Oilseeds Agreement between Brazil and the EC) through a communication to the TNC Chairman and that no GATT contracting party or any other participant of the Uruguay Round raised an objection to this communication at the time." *Ibid.*, para. 204.

[423] Unlike the 1992 agreement, which was undertaken "without prejudice to {the parties} rights and obligations under the GATT," the Oilseeds Agreement had been undertaken under the auspices of the GATT through a process expressly authorized by the Contracting Parties. *See* GATT 1947, art. XXVIII(4).

[424] *EC – Poultry (AB)*, para. 83 (emphasis in original).

[425] *India – Autos*, footnote 71.

Interestingly, in support of the quoted proposition, the EC cited the Appellate Body report in *EC – Poultry*, the report it now cites in support of the opposite proposition.[426]

259. The EU's reference to the Appellate Body's findings in *US – FSC (21.5 – EC)* is equally inapposite. The Appellate Body's approach in *US – FSC (21.5 – EC)* was in fact similar to that in *US – Shrimp*. It did not, as the EU argues, "appl{y} another rule of international law for interpretative purposes to which not all WTO members subject to" {sic}.[427] Rather, the Appellate Body simply "observe{d} that many States have adopted bilateral or multilateral treaties to address double taxation" and, in trying to determine the extent of the exception in footnote 59 of the SCM Agreement, it reviewed the meaning of the term "foreign source income" based on the approach taken in a broad range of bilateral and multilateral treaties to avoid double taxation.[428] It then attached a footnote to this observation citing not only these international treaties, but also a U.S. Department of Treasury publication describing U.S. tax treaties addressing double taxation.

260. Although the Appellate Body did not cite a particular provision of the Vienna Convention with regard to this analysis, it appears to have been evaluating either the ordinary meaning of the term "foreign source income" under Article 31.1 or evaluating whether there was a special meaning for that term under Article 31.4.[429] Thus, the Appellate Body's reasoning does not suggest that it was applying these provisions as "relevant international law applicable in the relations between the parties." In fact, the Appellate Body noted that "detailed rules on taxation of non-residents differ considerably from State-to-State. . . . However, despite the differences, there seems to us to be a widely accepted common element to these rules, with some States applying rules which may be more likely to tax the income of non-residents than the rules applied by other States."[430] This statement indicates that the isolated practice of one or two countries would be of little relevance in interpreting the covered agreements.

261. Thus, the adopted reports of panels and the Appellate Body do not support the EU proposal to use bilateral agreements among two Members to interpret the covered agreements.

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[426] *Compare India – Autos*, footnote 71, with EC FWS, para. 137. *India – Autos*, paras. 4.38 (summarizing EC argument that because the 1997 Agreement was not a "covered agreement" "the rights and obligations of the parties under the 1997 Agreement were not enforceable under the DSU"), 4.40 (same), 4.42 (same).

[427] EU Appellant Submission, para 715.

[428] *US – FSC (21.5) (AB)*, para 141.

[429] *US – FSC (21.5)(AB)*, para. 142 ("In seeking to give meaning to the term "foreign-source income" in footnote 59 to the SCM Agreement, which is a tax-related provision in an international trade treaty, we believe that it is appropriate for us to derive assistance from these widely recognized principles which many States generally apply in the field of taxation.").

[430] *US – FSC (21.5)(AB)*, para. 143.

c. The European Union's proposed approach would, in fact, apply the terms of the 1992 Agreement instead of the SCM Agreement

262. Finally, it is important to note the far-reaching implications that the European Union's proposed approach would have. Specifically, it would effectively replace the Article 1.1(b) SCM benefit standard with an alternative framework that has no basis in the SCM or any other covered agreement. The European Union is unclear whether this new standard would apply *only* between the European Union and the United States or to all Members. However, in either case, accepting the argument raised by the European Union would require the Appellate Body, and any panel applying that standard in the future, to replace the agreed text of a covered agreement with provisions from a non-covered agreement.

263. We note in this regard also the express concerns that several third parties raised with regard to the approach proposed by the European Union.[431] Brazil in particular made an important point by noting the error in the EC's assertion that it would be appropriate for the Panel to interpret the SCM Agreement in light of the 1992 Agreement because "'{t}he European Communities and the United States are the only WTO members whose interests are affected by an application of the SCM Agreement in the field of large civil aircraft.'"[432] As Brazil observed, this is not the case. "The Panel's findings in this dispute will have a direct and significant impact on other WTO Members whose producers of aircraft and other products are facing the market distorting effects of subsidies."[433]

F. Conclusion

264. Panels enjoy considerable discretion under Article 11 of the DSU in assessing the facts before them and, for that reason, the Appellate Body has explained that it will "not interfere lightly" with a panel's exercise of that discretion.[434] Here, the Panel provided a detailed analysis and explanation of the shortcomings it found in the European Union's proposed benchmark. Its analysis and explanation were comprehensive and reflect no deficiencies that would suggest a

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[431] Australia Third Party Submission, paras. 9 ("It is not the function of panels to seek to clarify the provisions of non-covered agreements. … The 1992 Agreement also falls into the latter category."), 14 ("If all parties are required to have accepted a subsequent practice for Article 31(3)(b) {of the VCLT} to apply, it seems unlikely that the drafters of Article 31 would have intended, by the use of the identical term 'the parties' in Article 31(3)(c), that rules of international law which are only applicable in relations between a subset of the parties to a treaty could be taken into account under Article 31(3)(c) in interpreting that treaty."); Brazil Third Party Submission, para. 4

[432] Brazil Third Party Submission, para. 8 (quoting EC FWS, para. 148).

[433] Brazil Third Party Submission, para. 8.

[434] *E.g.*, *US – Continued Zeroing*, para. 331; *EC – Hormones*, para. 132; *EC – Sardines*, para. 299; *US – Carbon Steel*, para. 142.

failure to conduct an objective assessment under Article 11 of the DSU. The Panel performed a thorough analysis and reflected that analysis in great detail in its 1000-page report. The Panel's analysis, moreover, is entirely consistent with the legal standard that it set out under Article 1.1(b) of the SCM Agreement (and that the European Union does not dispute).

265. The United States, consequently, asks the Appellate Body to uphold the Panel's finding that Launch Aid conferred a "benefit" to Airbus within the meaning of Article 1.1(b) of the SCM Agreement and each of the other, related findings listed in paragraph 848 of the European Union's submission.

V. THE PANEL CORRECTLY FOUND THAT GERMAN, SPANISH AND UK A380 LA/MSF CONSTITUTED PROHIBITED EXPORT SUBSIDIES

A. Introduction and overview

266. The United States argued and the Panel found that certain provisions of LA/MSF, in addition to constituting 'actionable subsidies' under Parts I and III of the SCM Agreement, also constituted prohibited export subsidies under Part II. The U.S. claim covered seven individual provisions of LA/MSF: French, German, Spanish and UK LA/MSF for the A380, French and Spanish LA/MSF for the A340-500/600, and French LA/MSF for the A330-200. The Panel found that three of these – the German, Spanish and UK A380 LA/MSF – were contingent "in fact" on exports and, therefore, prohibited.

267. Under Article 3 of the SCM Agreement, an export subsidy finding requires proof of three distinct elements: (i) the granting of a subsidy; (ii) that is tied to; (iii) actual or anticipated exportation or export earnings. The Panel found that the evidence submitted by the United States demonstrated the first and third of these elements for each of the seven instances of LA/MSF challenged by the United States.[435] The Panel found with respect to each of the seven provisions of LA/MSF at issue that "the evidence advanced by the United States clearly establishes that at the time each of the … contracts were entered into, each of the EC member State governments 'anticipated exportation or export earnings', within the meaning of footnote 4 of the SCM Agreement, in the sense that they expected or considered that exportation or export earnings would result from the development {of that particular LCA model}."[436]

268. As to the second element, the requisite "tie" between the subsidies and anticipated exports, the Panel found that each of the seven LA/MSF contracts established repayment terms that required Airbus to make a substantial number of exports and that this, together with certain other factual elements, was part of an "exchange of commitments".[437] With respect to each of the LA/MSF provisions, Airbus (as the 'applicant'), or the governments (deciding to provide LA/MSF) referred specifically to the anticipation of substantial exports, be it in their LA/MSF "applications", project appraisals, or the LA/MSF contracts pursuant to which LA/MSF was agreed. The anticipation of exports was an essential predicate for the governments' decisions to provide LA/MSF. Those decisions, in other words, were "dependent" or "contingent" on this anticipation. That tie was reinforced through provisions in the LA/MSF contracts themselves, including warranties by Airbus as to the accuracy of the forecasts and, most notably, the establishment of delivery-based repayment schedules under which full repayment is to a very substantial extent contingent on exports (full repayment, which the EU has acknowledged was

[435] Panel Report, paras. 7.650, 7.654, 7.657 and 7.660.

[436] *E.g.*, Panel Report, para 7.654.

[437] Panel Report, para. 7.678.

expected, is fundamentally impossible without **[***]** of exported planes[438]). It is this contractual tie or exchange of commitments, resulting from the full range of factors described above, as well as others described in more detail in the Panel Report, that led the Panel to find, for each of the seven challenged instances of LA/MSF, "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."[439] 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.

269. The Panel did not stop there. It went on to review certain additional or "corroborating" evidence to determine if a further requirement of "subjective motivation" was met. It concluded, based on the "additional" "corroborating" evidence, that three of the seven provisions of LA/MSF that it had found to be "at least in part, 'conditional' or 'dependent for {their} existence" on anticipated exportation, met an additional requirement as well – that there was sufficient evidence of the subjective motivation of the authorities.[440] The United States has appealed the Panel's rejection of the other four claims, as set forth in its Other Appellant submission. In particular, the Panel, by engaging in this additional analysis, mandated 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. In doing so, it erred.

270. For purposes of this Appellee Submission, however, that is not directly relevant. Even applying its *additional* motivation-based requirement, the Panel *did* find that LA/MSF constituted a prohibited subsidy for *three* of the seven grants – the German A380 LA/MSF, the Spanish A380 LA/MSF, and the UK A380 LA/MSF. It is that finding that the EU appeals. Thus, apart from its decision to mandate an *additional requirement* of "subjective motivation", the Panel accurately articulated the standard for "in fact" contingency upon anticipated exportation or export earnings. The Panel reviewed, carefully and in significant detail, the evidence submitted, and found evidence supporting the view that each of the *seven* LA/MSF measures at issue met the three prongs of the export subsidy standard.[441] With respect to the *three* LA/MSF measures to which the EU appeal relates, it found, moreover, that an *additional requirement* of "subjective motivation" was met.

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[438] With respect to the A380, for example, repayment of LA/MSF was to take place over **[*******]** deliveries, in the case of Germany, **[***]** deliveries in the case of the UK, **[***]** in the case of Spain, and **[***]** in the case of France. Panel Report, para. 7.651; US FWS, para. 353; Panel Report, para. 651 (second bullet). As said, only 247 deliveries were forecast for the European market alone. Panel Report, para. 7.651.

[439] Panel Report, para. 7.678.

[440] Panel Report, para. 7.678.

[441] Panel Report, para. 7.678.

271. Therefore, the three LA/MSF measures to which the EU appeal relates met not only the three-pronged export contingency standard articulated and applied by the Appellate Body and panels in the past, but also met an *additional requirement* of "subjective motivation" that the Panel imposed. Each of the EU's appeals against this finding accordingly fails.

B. The Panel correctly interpreted the terms "contingent", "tied to" and "actual or anticipated" and correctly applied the standard for "in fact" contingency

272. In its report, the Panel carefully reviewed the specific legal meaning of each of the relevant terms in Article 3.1(a) and footnote 4 of the SCM Agreement. It examined the ordinary meaning of the terms "contingent", "tied to", "actual or anticipated," in their context and in light of the object and purpose of the SCM Agreement, in particular relating them to the concept of an "in fact" as opposed to "in law" export contingency. The Panel's ultimate findings in respect of each are fully consistent with the Agreement and prior Appellate Body and panel findings.

273. The EU nonetheless argues that the Panel replaced the standard contained in Article 3.1(a) and footnote 4 with "a double standard of 'dependent motivation'."[442] The EU also purports that the Panel erred by applying the same standard to "in fact" and "in law" export contingency claims. According to the EU, "{a} panel 'must not lightly assume'" the existence of "in fact" contingency and should apply a particularly "high threshold". Each of the EU's arguments fails.

274. In responding to these arguments, the United States addresses (i) the legal standard for determining whether a subsidy is contingent upon exports; (ii) the standard for "in fact" versus that for "in law" contingency, and the evidence for both; (iii) the Panel's determinations of "anticipated" exportation and (iv) a "tie" to such anticipated exportation, and the EU's arguments with respect to each; (v) the Panel's consistent reliance on prior Appellate Body and panel reports, and the EU's arguments with respect to each; and (vi) the EU's alleged "{o}ther legal errors", to the extent not already discussed. This analysis shows that none of the EU's arguments is consistent with the text of the SCM Agreement.

1. A subsidy is contingent "in fact" or "in law" upon export performance if it is conditional or dependent for its existence on export performance

275. Article 3.1(a) of the SCM Agreement prohibits subsidies that are contingent upon export performance . It reads:

> 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

[442] EU Appellant Submission, para. 1243.

> (a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5]
> . . .
>
> [4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.
> [5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

276. The "in fact" contingency provision of Article 3.1(a) has been applied by panels in *Canada – Aircraft* and *Australia – Automotive Leather* and by the Appellate Body in *Canada – Aircraft*. The Appellate Body also considered *de facto* export contingency in the context of its analysis of *de jure* contingency in *Canada – Autos.* The reasoning in the *Canada – Aircraft* Appellate Body report continues to offer the primary guidance on the meaning of Article 3.1(a), having found that an "in fact" subsidy determination involves proving three elements: (i) the "granting" of a subsidy; (ii) that is "tied to"; (iii) "actual or anticipated exportation or export earnings".[443] The Appellate Body further stated that "in fact" contingency must be "inferred from the total configuration of facts constituting and surrounding the granting of the subsidy, none of which is likely to be decisive in any given case".[444] A relationship of "conditionality" or "dependence" between the subsidy and exports demonstrates the existence of a "tie" between the granting of a subsidy and export performance.[445] Moreover, when examining whether the grant of a subsidy is "tied to" export performance, either "in law" or "in fact", it is necessary to assess whether it is "conditional" on export performance or "dependent for its existence" on export performance. The Appellate Body noted that the type of evidence that may be employed to demonstrate the two types of contingency will be different, [446] but that the standard is the same.[447] Indeed, it found that

> footnote 4 to Article 3.1(a) uses the words "tied to" as a synonym for "contingent" or "conditional". As the legal standard is the same for *de facto* and *de jure* export contingency, we believe that a "tie", amounting to a relationship of contingency, between the granting of the subsidy and actual or anticipated

[443] *Canada – Aircraft (AB)*, para. 169.

[444] *Canada – Aircraft (AB)*, para. 167.

[445] *Canada – Aircraft (AB)*, paras. 170-171.

[446] *Canada – Aircraft (AB)*, para. 167.

[447] *Canada – Autos (AB)*, para. 107.

exportation meets the legal standard of "contingent" in Article 3.1(a) of the SCM Agreement."[448]

2. The Panel correctly discerned that the legal standard for finding an "in fact" export contingency is not higher than the standard for an "in law" contingency

277. The Panel in its analysis applies the same standard for "in fact" and "in law" export subsidy claims. It merely looks at a different, broader set of factual evidence in its assessment of the former, as compared to the latter. That approach is entirely consistent with prior Appellate Body and panel findings and reasoning.

278. The European Union, in paragraphs 1304-1306 of its Appellant Submission, initially endorses a single standard for "in fact" and "in law" export contingency.[449] Specifically, it states that "{t}he difference between an *in law* claim and an *in fact* claim is not the standard, but the evidence."[450] A few paragraphs later, however, the EU reverses course and strongly suggests that there is a higher threshold for "in fact" as compared to "in law" contingency that, in this dispute, is "insurmountable."[451] The European Union's efforts to imply a higher standard are without support and contrary to both the ordinary meaning of Article 3.1 of the SCM Agreement and prior panel and Appellate Body reports.

279. As the United States has described in more detail in its Other Appellant Submission, the Panel correctly articulated the standard for finding a prohibited export subsidy based on an "in fact" contingency on "anticipated" exports as opposed to "in law" contingency, apart from its inclusion of an additional "subjective motivation" requirement.[452] The Panel found that Article 3.1 of the SCM Agreement prohibits subsidies that are contingent upon export performance ("export subsidies"). That prohibition extends not only to subsidies that are export contingent "in law", but also to subsidies that are export contingent "in fact". According to footnote 4, 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.

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[448] *Canada – Autos (AB)*, para. 107.

[449] Panel Report, paras. 1304-1306.

[450] Panel Report, para. 1305

[451] EU Appellant Submission, paras. 1308-1310.

[452] U.S. Other Appellant Submission, paras. 7-24.

280. 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'."[453] It then applied this three-pronged standard to the relevant facts. In doing so, it applied the same standard to export contingency "in fact" and "in law" but considered that the former may rely on different evidence, as compared to the latter. In particular, the Panel found that "in fact" contingency must be "inferred from the total configuration of facts constituting and surrounding the granting of the subsidy, none of which is likely to be decisive in any given case"[454], 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".[455] The ordinary meaning of Article 3.1(a) and footnote 4, as well as the Appellate Body's own prior findings, confirm the Panel's approach.

281. Article 3.1(a) makes clear that "in fact" and "in law" contingency are not materially different. Article 3.1(a) prohibits "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I."[456] On its face, this prohibition applies equally to "in law" and "in fact" export contingencies. Footnote 4 serves to provide further guidance in finding an "in fact" contingency, but it does not change the underlying standard.[457]

282. The Appellate Body has directly addressed this precise question, finding in *Canada – Aircraft* and later in *Canada – Autos* that the standard for each is the same. While the means for demonstrating "in fact" and "in law" contingency will, by *definition*, be different, the legal standard is identical:

> Article 3.1(a) prohibits any subsidy that is contingent upon export performance, whether that subsidy is contingent "in law or in fact". The Uruguay Round negotiators have, through the prohibition against export subsidies that are contingent in fact upon export performance, sought to prevent circumvention of the prohibition against subsidies contingent in law upon export performance. <u>In our view, the legal standard expressed by the word "contingent" is the same for both de jure or de facto contingency.</u>[458]

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[453] Panel Report, para. 7.631, citing *Canada — Aircraft (AB)*, para. 169.

[454] Panel Report, para. 7.648, citing *Canada – Aircraft (AB)*, para 167.

[455] Panel Report, para. 7.716.

[456] Article 3.1(a).

[457] *Canada – Autos (AB), para. 108.*

[458] *Canada – Aircraft (AB),* para. 167 (emphasis added)

283. Finally, the EU attempts to draw support for a higher "in fact" standard from a report that did not address the subject of "in fact" export contingency at all: *US – Zeroing (EC)*.[459] Quoting from the *Zeroing* panel report discussing the standard for determining whether a "rule or norm" constitutes a measure of general and prospective application, the European Union states that a Panel must determine the "precise content" of a subsidy before it can be found to be "in fact" contingent.[460] This "precise content" test is repeated a number of times throughout the EU submission.[461] Yet neither the Appellate Body nor any panel has articulated such a standard for "in fact" contingency.[462] Indeed, the Appellate Body itself made clear in *US – Zeroing (EC)* that it referred to the "precise content" criterion in the specific context of a question about the legal standard for an "as such" challenge based on an "unwritten rule or norm."[463] What is more, even if a "precise content" test would apply, it is clear from the detailed and thorough assessment that the Panel made of the structure, meaning and context of the LA/MSF agreements and the surrounding facts, that its analysis by any measure met the "precise content" test that the EU argues should apply.[464]

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[459] EU Appellant Submission, para. 1308.

[460] Nine time in its Appellant Submission, the EU articulates this "precise content" standard as if it were a clearly enunciated rule. EU Appellant Submission, paras. 1278, 1305, 1307, 1308, 1323, 1332, 1353 and 1358 (twice). The EU cites the phrase "precise content" to paragraph 198 of the *US – Zeroing* panel report, which states:

> We realize that "as such" challenges are "serious challenges" in that they "seek to prevent Members *ex ante* from engaging in certain conduct". In this regard, we consider that a finding that a norm is as such WTO-inconsistent must rest on solid evidence that enables a panel to determine the *precise content* of that norm and the conduct to which that norm will necessarily give rise in future. We are cognizant that norms are not always susceptible of such a clear definition. In the case of the SPB, the necessary precision and predictability resulted from the availability of an official policy statement that set out with a considerable degree of detail the methodology the USDOC intended to apply in certain situations. There are, however, other types of evidence that can be used to establish with the necessary degree of precision the content of a norm and the future conduct it will generate.

U.S. – Zeroing (EC)(Panel), para. 7.102 (emphasis added).

[461] The EU justifies this reference to *Zeroing* by noting that the Panel cited *Zeroing* in its report. EU Appellant Submission, para. 1308. The Panel's only reference to the *Zeroing* language was in reference to a totally different issue – determining whether the LA/MSF program exists. Panel Report, para. 7.517. There is, accordingly, no basis to view *US – Zeroing* as relevant in this context.

[462] Panel Report, para. 7.713. Contrary to what the EU alleges, however, this does not mean that the Panel applied what it calls a "double standard" for "in fact" contingency and "in law" contingency. Rather, it logically concluded that a broader set of evidence (the totality of the evidence) may be relied upon to establish the existence of "in fact" contingency, as opposed to "in law" contingency which begins with the measure and extends to sources that help to understand the meaning of the measure.

[463] *US – Zeroing (EC) (Panel)*, para. 7.319.

[464] More generally, it is important to note that imposing a higher burden on "in fact" claims as compared to "in law" claims would fundamentally undermine the rights and obligations of Members and open the door for circumvention. The United States notes in this regard that the "in fact" contingency standard was precisely intended to avoid such circumvention. Indeed, the European Union itself cautioned against the risk of circumvention of *de*

3. The Panel correctly concluded that "anticipated" exportation means exportation that is expected, but may not necessarily occur

284. Having already found that LA/MSF constitutes a subsidy, the Panel proceeded to consider the meaning of the term "anticipated exportation or export earnings". The Panel focused on the ordinary meaning of the term and its interpretation by prior panels and the Appellate Body. The "anticipation" standard, the Panel found, essentially requires that exports are "{t}ake{n} into consideration before due time", "{o}bserve{d} ... before due time"[465] or "expect{ed}".[466] "Anticipated" exportation, found the Panel, "may be understood to be exportation that a granting authority, expects or foresees will occur *after* it has granted a subsidy."[467]

285. The EU argues that the Panel's approach was in error because

> the correct interpretation of footnote 4 is that the term "actual" means an export that exists (that is, has already taken place) at the moment when the measure is enacted and a subsidy is deemed to exist within the meaning of Article 1; whilst the term "anticipated" (juxtaposed to the meaning of the term "actual") means an export in the future.[468]

Elsewhere, the EU simplifies this juxtaposition further and argues that "actual" simply means "current" and that "anticipated" equals "future".[469] (The EU calls this the "temporal connotation" that it argues is inherent in the term "anticipated".)

286. This is precisely the argument that the EU relied on before the Panel and that the Panel – correctly – rejected. The Panel concluded that the Appellate Body in *Canada – Aircraft* examined the ordinary meaning of the term "anticipated" or "to anticipate" and found that it meant "expected."[470] The Appellate Body also referred to this "expectation" as "the anticipation, that exports will result,"[471] and validated this definition based on a further in-depth review of the

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jure standards in the absence of a strong *de facto* export subsidy test during the Uruguay Round negotiations. *See* Negotiating Group on Subsidies and Countervailing Measures, "Submission by the European Community," MTN.GNG/NG10/W/31 (27 Nov. 1989), p. 2 (observing that "it is apparent that a prohibition only of those subsidies which are *de jure* (that is, expressly) made contingent upon export performance is open to circumvention").

[465] Panel Report, para. 7.641, *quoting* New Shorter Oxford English Dictionary, p. 88.

[466] Panel Report, para. 7.641, referring to *Canada – Aircraft (AB)*, para. 172.

[467] Panel Report, para. 7.641.

[468] EU Appellant Submission, para. 1324.

[469] EU Appellant Submission, paras. 1311, 1314, 1328, and 1332.

[470] Panel Report, para. 7.640.

[471] *Canada – Aircraft (AB)*, para. 172.

ordinary meaning of the term. Building on the findings of the Appellate Body in *Canada – Aircraft*, the Panel noted that the ordinary meaning of the verb "anticipate" is "{t}ake into consideration before due time", "{o}bserve ... before due time", "look forward to",[472] "be aware of (a thing) in advance and act accordingly" and "expect, foresee, regard as probable".[473] (The EU itself cites several of these same definitions.) Thus, the Panel concluded that the term "anticipated" does not impose a relationship between the granting of a subsidy and the *realization* of anticipated export performance, as is implicit in the EU's argument that "anticipated" exports are "future" exports. Instead, "anticipated" exportation "may be understood to be exportation that a granting authority considers, expects or foresees will occur *after* it has granted a subsidy."[474] In other words, it represents an anticipation "that exportation or export earnings would result."[475]

287. Contrary to what the EU argues, the fact that the Panel based its analysis of the ordinary meaning of the verb "to anticipate", as opposed to the adjective "anticipated", does not change this conclusion.[476] In particular, the fact that a word is used in its past participial form does not change its fundamental meaning. Rather, it is a question of syntax or grammar. As a participle, "anticipated" simply acts as an adjective describing the nature or attribute of "being anticipated". "Anticipated exports", in other words, are exports that "are anticipated", just as a "brown dog" is "a dog which is brown". The use of the term "anticipated", moreover, implies that someone is "anticipating". It is worth noting that the EU itself, in an earlier part of its analysis, relies on the dictionary definitions of the verb "anticipate" and the noun "anticipation" and acknowledges that these may be relevant in the absence of a specific dictionary entry for the word's adjective form.[477] The EU's own argument, in other words, is internally inconsistent.[478]

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[472] Panel Report, para. 7.641, *quoting* New Shorter Oxford English Dictionary, p. 88.

[473] Panel Report, para. 7.641, *quoting* Concise Oxford Dictionary, (Clarendon Press 1995), p. 53.

[474] Panel Report, para. 7.641

[475] *E.g.*, Panel Report, para. 7.654, 7.657, and 7.660; Panel Report, para. 7.641 ("in the specific context of footnote 4 of the SCM Agreement, 'anticipated' exportation may in understood to be exportation that a granting authority considers, expects, or foresees will occur *after* it has granted a subsidy" (emphasis in original).

[476] EU Appellant Submission, para. 1352.

[477] EU Appellant Submission, para. 1327.

[478] A comparison with the French and Spanish versions of footnote 4 and the context for the use of the term "anticipated" confirms the Panel's conclusion. The Spanish and French versions of the SCM Agreement render the word "anticipated" as "previstos" and "prévues," respectively. "Previsto" is the past participle of "prever," which means "Ver con anticipación. 2. Conocer, conjeturar por algunas señales o indicios lo que ha de suceder. 3. Disponer o preparar medios contra futuras contingencias." Diccionario de la Lengua Española, p. 1831. The French "prévue" is the past participle of "prévoir", which means "1. Considérer comme probable; imaginer (un événement futur). anticiper, pressentir …. pronostiquer. … 2. Envisager (des possibilités). … 3. Organiser d'avance, décider pour l'avenir." Le Nouveau Petit Robert, Dictionnaire de la Langue Française, P. Varrod (ed.) (Dictionnaires Le Robert, 2004), p. 2067. The Spanish definition, referring to "conjeturar" and "futuras contingencias," drives home the point that the reference in footnote 4 to anticipated/previstos/prévues exports is

288. Finally, and contrary again to what the EU argues, the juxtaposition of "anticipated" and "actual" confirms the Panel's approach.[479] "Actual", by its ordinary meaning, means "real" rather than, as the EU suggests, "existing".[480] "Actual" exports, in other words, may be either current or future "real" exports. If "anticipated" exports simply meant future exports, then it is unclear why that term was needed at all, as "actual" exports would already include both current and *future* "actual" exports. An event that is "anticipated" or "expected", in other words, is one that we currently "anticipate" or "expect" will occur in the future, but that need not necessarily occur.[481] It is, as the Panel says, an "expectation" of the person granting the subsidy that something will occur.[482] As one of the Third Parties noted during the Panel proceedings, the EU's interpretation of the term "anticipated" would simply render meaningless the reference to "anticipated" as juxtaposed with the term "actual".[483]

4. The Panel correctly recognized that a "tie" to actual or anticipated exportation exists when there is a relationship of "conditionality or dependence" between the granting of a subsidy and those expectations

289. The final step in the Panel's analysis is its interpretation of the terms "contingent on" or a "tie to" exportation or export earnings. The Panel observed that "{t}he ordinary meaning of the word 'contingent' has been held in previous dispute settlement proceedings to be 'conditional' or 'dependent for its existence on something else.' Likewise, the expression 'tied to' has been interpreted as connoting to 'limit or restrict' as to . . . conditions."[484] That is precisely the

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dealing with exports that are expected to occur, but may not. As such, it is not the future nature or "realization" of events that is the focus of the term "anticipate", but rather the current expectation that such future "realization" will occur. The same is true for the French "considérer comme probable", "imaginer", "pronostiquer" and "envisager (des possibilités)".

[479] The EU arguments focusing on the term "or" in "actual or anticipated" exportation do not change any of this either. In fact, they depend entirely on the primary EU argument that "actual" means "current" or "past" and "anticipated" means "future. *See*, in particular, EU Appellant Submission, para. 1328.

[480] The EU fails in its suggestion that its interpretation of "anticipated" does not conflate that term with the term "actual" – to which it is juxtaposed – because "actual" means "existing" rather than "real". Apart from the ordinary meaning of the terms in English, the Spanish and French versions of the SCM Agreement clarify the word used beyond any doubt. The Spanish text uses "reales," and the French text uses "effective." *See Diccionario de la Lingua Espanola* (defining "real" to mean "tiene existencia verdadera y efectiva".); Le Petit Robert, Dictionnaire de la Langue Francaise, p. 838 (revised ed., 2004) (defining "effectif, ive" as "qui se traduit par un effet, par des actes réels. => concret, 1. positif, réel, tangible").

[481] *E.g.*, U.S. SNCOS, paras. 14-17; Australia Third Party Oral Statement, paras. 18-19/

[482] Panel Report, paras. 7.641-7.643.

[483] Australia Third Party Submission, para. 33.

[484] *Canada – Aircraft (AB)*, paras. 170-171.

definition the Panel articulated.[485] The EU nonetheless challenges the Panel's findings and argues that the Panel erred.

290. The European Union begins by arguing with regard to Article 3.1(a) of the SCM Agreement that, "in logical terms, this is an if-then construct."[486] The EU illustrates this concept in a number of ways:

- "{I}n the construct 'if A then B', A is a condition that must be fulfilled in order for B to be the case. B is contingent upon A. In Article 3.1(a) and footnote 4 'A' is export, whether actual (existing) or anticipated (future) and 'B' is subsidy."[487]

- The "essence of contingency/conditionality" is when "{t}he text of the measure provides that a subsidy is granted contingent/conditional upon export. In other words, the text of the measure provides that if there is export, then a subsidy is granted."[488]

- "An export contingent/conditional measure *favours* exports and creates an *incentive* for a company to prefer exports over domestic sales, because an export sale attracts a payment, or the right to retain funds, which a domestic sale does not."[489]

291. The EU's position regarding the nature of the relationship between the anticipation of exports and the subsidy is contrary to the ordinary meaning of the terms "contingency" and a "tie to," as explained in past Appellate Body reports. The Appellate Body in *Canada – Aircraft* found that "contingency" means "conditional" or "dependent for its existence on something else".[490] Likewise, the Panel noted the finding that the term "tied to" connotes to "limit or restrict as to . . . conditions".[491] There is no indication that either of these terms limits the notions of a "contingency" or "tie" to "if-then" relationships where subsidies lead inexorably to exports, or "favour{}exports" or "create an incentive for a company to prefer exports over domestic sales."[492] The Panel concluded with regard to footnote 4 that "{o}ne way of describing the standard may well be in terms of an 'if-then' relationship."[493] However, the Panel cautioned

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[485] Panel Report, para. 7.634.

[486] EU Appellant Submission, para. 1311.

[487] EU Appellant Submission, para. 1311.

[488] EU Appellant Submission, para. 1314.

[489] EU Appellant Submission, para. 1318.

[490] *Canada – Aircraft (AB)*, para. 166.

[491] Panel Report, para. 7.634, *quoting Canada – Aircraft (AB)*, para. 170.

[492] EU Appellant Submission, para. 1318.

[493] Panel Report, para. 7.640.

that "it would be wrong to conclude that this means that the contingency standard focuses on a relationship between the *realization* of anticipated export performance and the granting of a subsidy."[494] Thus, while the EU may have identified one way to satisfy Article 3.1(a) of the SCM Agreement, there is nothing to indicate that it is the only way, or that the Panel's approach is wrong.

292. The EU also relies on the notion that exports must have materialized or "realized" for a relationship of contingency to exist. That approach, however, would effectively read the possibility of a contingency on "anticipated exports" out of the agreement. The Panel rejected this possibility because

> the relationship of "conditionality or dependence" that must be established is not a relationship between the granting of a subsidy and *the realization of* anticipated export performance, but rather a relationship of "conditionality or dependence" between the granting of a subsidy and those expectations themselves … {I}t is not necessary to show that expected exportation or export earnings have *actually materialized* in order to establish a relationship of contingency in fact.[495]

In other words, Article 3.1 and footnote 4 do not require that a subsidy follow "as a consequence of" exports actually being "realized" (that is, if there <u>*is*</u> export, then you get a subsidy). They require instead that the granting of a subsidy is "contingent on" or "tied to", in the sense of being dependent or conditional upon, actual or anticipated exportation. The Appellate Body's findings in *Canada – Aircraft* confirm that the relationship that must be established is one of "conditionality" or "dependence" on *anticipated* export performance, not one focused on the actual *realization* of anticipated export performance.

293. In finding as it did, in other words, the Panel did not "equate" the contingency standard with "motivation". Instead, it simply recognized that one of the possible forms of "contingency" or a "tie to" exportation is a contingency on or tie to "anticipated exportation". It also did not make a "logical" error. Rather, it focused on whether a relationship of "conditionality" or "dependency" existed between the *anticipation* of exports and the granting of the subsidy, just as the Appellate Body had previously considered it should do.

5. Appellate Body and panel reports confirm the Panel's approach

294. In finding as it did, the Panel relied heavily on prior Appellate Body and panel reports, and its findings were entirely consistent with them. The Panel referred, in particular, to the *Canada – Aircraft* and *Australia – Automotive Leather* reports, which confirm that a finding of export contingency is not dependent on whether "a subsidy recipient is *required* to satisfy a

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[494] Panel Report, para. 7.640.

[495] Panel Report, para. 7.642.

performance obligation that cannot be achieved without exports."[496] "Contingency" does not only refer to situations where the granting of the subsidy "ensues" from or is a "consequence" of exportations, which is the EU's position. It exists whenever a "contingency" or "tie" between the granting of a subsidy and "actual or anticipated" exports exists.[497]

295. Pursuant to the TPC program at issue in *Canada – Aircraft*, Canada gave up-front funds to regional aircraft producer Bombardier to underwrite the costs of developing a new aircraft model, with repayment to be made from levies on sales.[498] In analyzing whether TPC financing was export-contingent, the panel explained that "had there been no expectation of *export sales ... 'ensuing' from the subsidy*, the subsidy would not have been granted."[499] In other words, it was export sales "ensuing" from (that is, following as a consequence of) the subsidy rather than the subsidy following as a consequence of export sales that supported a finding of export contingency. As has the EU in this dispute, Canada argued that, for this reason, the subsidy at issue in *Canada – Aircraft* was "not conditional on exports taking place." In response, the panel stated: "While this argument may be relevant in determining whether a subsidy would not have been granted but for *actual* exportation or export earnings, we find this argument insufficient to rebut a *prima facie* case that a subsidy would not have been granted but for *anticipated* exportation or export earnings."[500] The *Canada – Aircraft* panel's findings, in other words, confirm precisely the approach that the Panel took in this dispute.

296. *Australia – Automotive Leather* also supports the Panel's conclusions. In that case, the panel found Australia's cash grant to the Howe company was export contingent on the basis of its tie to anticipated export performance.[501] The grant contract provided for the government to make two payments upon receipt of reports from Howe describing its progress toward attaining certain performance targets. The engagement was on a "best endeavours" basis[502] – no *actual* exportation was *required*. The *first* payment was made upon Howe *signing* the grant contract *before* any of the anticipated export performance had occurred or any of the progress reports were delivered. In other words, the basis for the *Australia – Automotive Leather* panel's finding of contingency on *anticipated* exports was *not*, as the EU asserted before the Panel, that the "*consequence* required by Article 3.1(a) and footnote 4 (grant of a subsidy) was

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[496] Panel Report, para. 7.634.

[497] Panel Report, para. 7.648.

[498] *Canada – Aircraft (Panel)*, paras. 6.180-6.186 (Brazil's explanation of the measure); paras. 9.340-9341 (Panel's findings).

[499] *Canada – Aircraft (Panel)*, para. 9.339 (emphasis original).

[500] *Canada – Aircraft (Panel)*, para. 9.343 (emphasis in original).

[501] *Australia – Automotive Leather*, para. 9.67.

[502] *Australia – Automotive Leather*, para. 9.62.

demonstrated,"[503] but that the grant contract was tied to "anticipated" export performance in a broader, more literal sense of that term.

297. None of the EU's arguments are convincing. Contrary to the European Union's view, the existence of "in fact" export contingency is not determined by whether a subsidy is organized as a program. The fundamental analysis remains the same, proving that (i) the grant of a subsidy; (ii) is tied to; (iii) actual or anticipated exportation or export earnings.[504] The fact that the TPC program required applicants to state their actual exports as they occurred, moreover, does not change the conclusion that the subsidies were found to be contingent "in fact" upon "anticipated" exportation and that no "requirement" to export existed. In the *Australia – Automotive Leather* situation, the performance targets applied on a "best endeavours" basis only. Under several of the LA/MSF contracts, Airbus was also required to provide periodic progress reports.[505]

298. The European Union has not challenged the Panel's reliance on *Australia – Automotive Leather* in this respect.

6. The "other legal errors" alleged by the European Union are equally unfounded

299. Finally, and somewhat separately from the primary arguments rebutted above, the European Union proposes a series of additional arguments that it characterizes as "{o}ther legal errors that are also constituent elements of the Panel's fundamental legal error". Many of these arguments overlap with the European Union's primary arguments.[506] To the extent that they do not, they should be dismissed for the reasons set out below.

300. First, the European Union argues that the Panel should have assessed "in law" export contingency claims first. It provides no legal support for that position.[507] The Panel explained that, because the United States claim was "principally a claim of *de facto* contingency", it began

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[503] *Cf* EC FWS para. 669 (emphasis added).

[504] *Canada – Aircraft (AB)*,para. 169.

[505] *E.g.*, UK A380 LA/MSF contract, Art. 7.1(a), which requires the company to **[***]** (Exhibit US-79(BCI); US SWS, para. 174. *Cf* Appenix 14 to German A380 LA/MSF Contract, which includes a **[***]** German A380 Launch Aid contract, Appendix 14 (Exhibit US-125(BCI)); Article 1.3 of the contract protocol for the French A380 LA/MSF (**[***]** (French A380 LA/MSF Protocole, Art. 1.3 (Exhibit US-75(BCI)); and Article 8.2 of the same protocol, **[** *** **]**.

[506] This includes: EU Appellant Submission, paras. 1351-52 (on the Panel's interpretation of the terms "actual or anticipated"); para. 1344 (on how the Panel "paid lip service to the concept of a single standard, but created a double standard"); and paras. 1345-1350 (on how the EU is not arguing that the only way to demonstrate contingency is based on a requirement to export or based on the realization of exports).

[507] EU Appellant Submission, paras. 1338 – 1341.

its evaluation by addressing the issue of "in fact" contingency.[508] In the same context the Panel decided to forego an analysis of contingency upon "actual" exports, as opposed to "anticipated" exports, because the United States had decided not to pursue an actual exports claim.[509] This approach is the same as that taken by the panel in *Australia – Automotive Leather* where, because the United States had not pursued "in law" contingency arguments, the Panel initially addressed "in fact" contingency.

> However, as the United States has not pressed its arguments in this regard, we consider that it has abandoned them. We therefore do not reach any conclusions on this issue, and, turn now to the question whether the subsidies in question are contingent in fact upon export performance.[510]

301. The Panel's approach, moreover, in no way affected the outcome of its analysis. Indeed, as the Panel stated and the European Union at times acknowledges (and at times disputes[511]), there is a single standard for "in fact" and "in law" contingency. What differs is simply the type of evidence that may be considered. In particular, a claim of "in fact" contingency may rely on a broader range of facts surrounding a legal or regulatory instrument on which a claim of contingency is based than would be the case for a claim of contingency "in law". It is, against that background, entirely logical for a panel to begin its analysis with a party's claims of contingency "in fact", if that party itself has indicated that it believes the evidence to be primarily supportive of such a claim. There is nothing in the DSU or elsewhere that prevents it from doing so and it is difficult to see how the order of analysis would affect the outcome.

302. *Second*, the EU contends that the Panel erred by finding, *based on the same documents*, that the EU had provided subsidies that were contingent on export performance "in fact", but not "in law".[512] It is entirely possible that some of the evidence considered in a Panel's analysis of "in fact" contingency standard would overlap with evidence relevant for a finding of "in law" contingency. An "in fact" claim can rely on a broader set of evidence than an "in law" claim, namely both legal *and* factual. The Panel, in other words, did not *find* and *not find* contingency based on the same set of documents as the EU argues. It simply found that certain legal documents *alone* were not sufficient to establish contingency "in law", whereas those documents

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[508] Panel Report, para. 7.628.

[509] Panel Report, para. 7.628.

[510] *Australia – Automotive Leather*, para. 9.49.

[511] See section V.B.2.

[512] EU Appellant Submission, paras. 1342-1343.

in combination with additional surrounding *facts* were sufficient for a finding of contingency "in fact".[513]

303. *Third*, the European Union asserts that it "is not arguing that the only way to demonstrate *in fact* export contingency/conditionality is an instrument legally *requiring* performance of an obligation necessitating exports."[514] Before the Panel, the European Union did just that, specifically arguing that the challenged measures were not contingent upon exports because "none of the provisions that the United States relie{d} upon as evidence of a commitment to export oblige Airbus to make any sales at all, let alone export sales."[515] Even at this stage, the European Union continues to argue that the absence of a legal "condition requiring the company to export" is dispositive as to export contingency.[516] The EU argument is also legally irrelevant because, even if one assumes, *arguendo*, that the Panel rejected an argument the European Union did not make, that would not invalidate the Panel's findings. The same is true for the EU argument that it "is not arguing that an inconsistency only arises when an export "is realised".[517] That is precisely what the European Union does argue when it asserts that only current or future *actual* exports can give rise to the anticipation that serves as the basis for a "tie" that establishes export contingency.

304. *Fourth*, the United States agrees with the EU that the Panel imposed an unsupported and subjective *additional requirement* of "subjective motivation". As described in the U.S. Other Appellant Submission, the Panel imposed a higher "standard" on the United States by requiring evidence of motivation as a prerequisite for a finding of export contingency.[518] The Panel thus erred by finding, on that basis, that only three of the seven LA/MSF measures that the United States challenged as "in fact" export contingent actually were.

305. The United States does not agree, however, with the EU's apparent position that such evidence of "motivation" or "intent" cannot be a relevant factor in a panel's analysis of the total configuration of the facts.[519] Such evidence can be part of an analysis of export contingency "in

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[513] The United States does not understand the EU to be appealing the Panel's rejection of the U.S. claim of export contingency "in law", although it notes the EU's statement that it considers the Panel's "in law" assessment to be "incomplete".

[514] EU Appellant Submission, paras. 1345-1347.

[515] Panel Report, para. 7.591 and sources cited therein.

[516] EU Appellant Submission, para. 1309.

[517] As a matter of logic, the fact that the Panel rejected arguments that the European Union claims it did not make does not invalidate the findings that the Panel did make.

[518] EU Appellant Submission, paras. 1353-1355.

[519] Contrary to the EU's contention, the Panel's approach does not result in an "effects based approach". EU Appellant Submission, para. 1371. The Panel's approach simply asks whether there is additional evidence of the "motivation" or "intent" of the subsidizing government. That is an entirely different question from the one covered by Part III of the SCM Agreement, namely what "effects" such subsidies have.

fact". To put it slightly differently, the motivation or intent behind a measure may well be probative evidence of its export contingency, but is not in and of itself an additional requirement beyond the three export subsidy criteria – granting of a subsidy, that is tied to, actual or anticipated exportation. When a measure is structured, as were the seven grants of LA/MSF at issue, in such a way as to be dependent on anticipated exports, evidence that the contingency on exports was the "intent" or "motivation" behind the measures provides a further level of confirmation that they were export contingent. To show "motivation" or "intent", however, is not a separate requirement.[520]

306. *Fifth*, the Panel's interpretation does not render the second sentence of footnote 4 of the SCM Agreement ineffective, as argued by the European Union.[521] The Panel followed the Appellate Body's guidance in *Canada – Aircraft*, that "under the second sentence of footnote 4, the export orientation of a recipient may be taken into account as a relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding."[522] The Panel appropriately considered the export orientation of Airbus, but based its ultimate findings of export contingency on a range of factors, the most important of which were the sales-based repayment structure of LA/MSF and the exchange of commitments between Airbus and the Airbus governments.

307. The Panel also did not ignore, as the European Union claims, some relevant aspect of the term "actual" as used in footnote 4. The EU is not clear in its explanation, stating its arguments in terms like "{t}here may be other ways … might logically demonstrate … The European Union does not have the purpose, ability or obligation to describe them exhaustively in this submission"[523]. However, as this submission notes and the Panel observes, the EU's interpretations of the term "actual" as "past or present", and "anticipated" as "future", and each of the conclusions it draws from this, are contrary to the ordinary meaning and context of those terms, as explained in past Appellate Body findings.[524] The Panel's findings, by contrast, are fully supported.

308. Finally, the Panel's approach does not "discriminate" against certain types of subsidies or against certain countries. The European Union argues that the Panel's findings would favor grants over loans[525] and large-economy countries over small-economy countries.[526] The Panel

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[520] The United States does not agree with the position implied by the EU argument that a finding that a subsidy was "at least in part, 'conditional' or 'dependent for its existence'" upon exportation is insufficient for a finding of "in fact" export contingency. As the EU states elsewhere in its Appellant Submission, there is no such thing as being only "in part" export contingent. EU Appellant Submission, para. 1393.

[521] EU Appellant Submission, para. 1361.

[522] Panel Report, para. 7.648; *Canada – Aircraft (AB)*, para. 173.

[523] EU Appellant Submission, para. 1333.

[524] Panel Report, paras. 7.640-7.644.

[525] EU Appellant Submission, para. 1355.

addressed these same arguments, finding that "the European Communities is confusing the question of what contingency means with the question of what the subsidy is contingent upon."[527] Thus, even if an anticipation of exportation may arise more easily in a small economy than it does in a larger one, the requirement to show a "tie" or "contingency" between any such anticipation of exportation and the granting of the subsidy means that anticipation alone is not enough. The subsidizing Member can structure the subsidy in different ways, and only if it does so in a way that "ties" it to the "anticipated exports" is a finding of "export contingency" justified. The same is true with respect to loans – a normal "loan" or corporate bond, repayable on the basis of regular monthly or quarterly amounts is not the same as sales-repayable LA/MSF.[528] Thus, the Panel did not "fail{ } to deal with th{ese} point{s}"[529], as argued by the European Union. It specifically addressed them and specifically rejected the EU arguments.

C. The Panel correctly applied the legal standard to the facts; the only error the panel made was to impose too high an "in fact" contingency standard

309. The EU's second and third set of grounds of appeal are closely related. The EU's "second set of grounds of appeal" is that the Panel erroneously applied the legal standard for export contingency that it established, and also acted inconsistently with Article 11 of the DSU.[530] The EU's "third set of grounds of appeal" is that, if the Appellate Body were to find that the Panel in fact did apply an "if-then" based standard for export contingency, "the evidence, including the "additional" "corroborating" evidence," according to the EU, "is incapable of supporting a finding of export contingency/conditionality".[531] The EU states that "it will not repeat what it has already outlined above in its 'second set of grounds of appeal', but incorporates all the identified legal errors and arguments in this third set of grounds of appeal *mutatis mutandis*."[532] On that basis, the EU argues that the Panel erred in its interpretation and application of Articles 3.1(a) and footnote 4 of the SCM Agreement, and Article 7.2 (failure to address the relevant provisions), Article 11 (failure to make an objective assessment of the law and the facts) and Article 12.7 (failure to state the basic rationale) of the DSU.

310. Each of the EU's arguments fails. The Panel did not err in its application of the legal standard to the facts, other than to impose on the United States the *additional requirement* of "subjective motivation" for demonstrating "in fact" contingency. The Panel also performed a

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[526] EU Appellant Submission, para. 1358.

[527] Panel Report, para. 7.644.

[528] Panel Report, para. 7.665.

[529] EU Appellant Submission, paras. 1357 and 1360.

[530] EU Appellant Submission, para. 1372.

[531] EU Appellant Submission, para. 1461.

[532] EU Appellant Submission, para. 1464.

thorough and complete assessment of the facts and carefully applied each of the elements of the legal standard.[533]

311. The United States addresses below: (i) the EU's arguments that the Panel erred in its application to the facts of the standard for "in fact" contingency on anticipated exportation; (ii) the EU's Article 11 DSU arguments alleging a lack of "objective assessment" by the Panel; (iii) the EU's argument that the Panel improperly distinguished German, Spanish and UK A380 LA/MSF (which the United States assumes is also an Article 11 DSU claim, although the EU does not make this clear); (iv) the EU's argument that the Panel failed to address the applicability of the 1992 Agreement; and (v) the EU's argument that the Panel failed to meet its obligations under Articles 12.7 and 7.2 of the DSU.

1. The Panel correctly found that the German, Spanish and UK A380 LA/MSF measures constituted prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement

312. The EU appears to have based its claim that the Panel did not properly apply the legal standard for "in fact" contingency on three arguments: (i) that "{r}oyalty-based financing" and "{e}xchange of commitments" do not "support" the Panel's findings of export contingency/conditionality; (ii) that "{m}otivation" and the "additional" "corroborating" evidence "do{ } not 'support' the findings of export contingency / conditionality"; and (iii) that, in any event, the Panel never explained what the connection between the various elements and its overall findings "was supposed to be."[534] Each of these arguments fails.

313. *First*, the Panel based its application to LA/MSF of the legal standard for "in fact" contingency on its finding that an exchange of commitments underlies each of the seven LA/MSF measures at issue. Specifically, the Panel found that the extensive evidence submitted by the United States demonstrated the granting of a subsidy (LA/MSF) and the Airbus' governments' anticipation of exports in respect of each of the seven instances of LA/MSF challenged by the United States.[535] As to the requisite "tie", the Panel found that each of the seven LA/MSF contracts established repayment terms that generally required Airbus to make a substantial number of exports.[536] This led the Panel to conclude with respect to each of the seven challenged instances of LA/MSF "that achieving the level of sales needed to fully repay each loan would require Airbus to make a substantial number of exports". The Panel also found that "{e}xports were therefore not merely incidental to the full repayment of the loans"; and that

[533] As discussed below, the EU's objective in making its Article 7.2 DSU claim (failure to address the relevant provisions) is unclear. The United States submits that the Panel, by addressing the United States' claims under Article 3.1 and footnote 4, as well as Articles 1 and 2 of the SCM Agreement, addressed all of the relevant provisions relating to the United States' export subsidy claim.

[534] Sections E.3 through E.6 of the EU Appellant Submission.

[535] Panel Report, paras. 7.650, 7.654, 7.657, 7.660.

[536] Panel Report, para. 7.678.

"the EC member States must have been counting on Airbus to make LCA sales that necessarily included a substantial number of exports when concluding the LA/MSF contracts" and, "fully expecting to be repaid, must have held a high degree of certainty that the provision of LA/MSF would result in Airbus making those export sales."[537]

314. The Panel concluded that "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."[538] The Panel referred to this 'conditionality' or 'dependency' as the "exchange of commitments" that took place between the governments and Airbus and on which the provision of LA/MSF was based.[539] "Turning to *the exchange of commitments* themselves," concluded the Panel, "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*".[540] Thus, contrary to the EU's arguments, it is clear that the Panel considered that "the use of royalty-based financing in the three {LA/MSF} measures" and the "'exchange of commitments'" that it found to exist supported a finding that the provision of LA/MSF was "at least in part, 'conditional' or 'dependent for its existence'" upon exportation.[541]

315. *Second*, the EU argues in paragraphs 1393 and 1395 that it is "irrational and illogical" for the Panel to have found that the sales-dependent nature of LA/MSF repayment terms and the exchange of commitments that characterizes each of the seven LA/MSF measures at issue "somehow move{d} one closer to a finding of contingency/conditionality." This is "irrational and illogical" the EU asserts, because a "subsidy is either export contingent/conditional or it is not."

316. While the United States disagrees with some of the EU's other statements in this context (for example, that "royalty-based financing has got nothing to do with export contingency / conditionality"), the United States agrees with the EU's statement that a subsidy is either export contingent or it is not. Indeed, it is well established that even partial export contingency (that is, where exports or anticipated exports are only one among several conditions) constitutes export contingency within the meaning of Article 3.1(a).[542] Thus, the Panel's finding that each of the seven measures challenged is "at least in part" contingent or "dependent for its existence" on

[537] Panel Report, para. 7.678.

[538] Panel Report, para. 7.678.

[539] Panel Report, para. 7.678.

[540] Panel Report, para. 7.678.

[541] Panel Report, paras. 8/678, 7.1392 and 7.1394.

[542] Article 3.1(a) of the SCM Agreement provides that prohibited subsidies include "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance." *See also Canada – Aircraft (AB)*, para. 166.

anticipated exports is sufficient for a finding of contingency under Article 3.1(a) SCM. The Panel should have ended its analysis there.

317. The Panel, however, went on to review whether, for each of the seven provisions of LA/MSF at issue, *in addition to* a relationship of "contingency" based on the "exchange of commitments" that it had found, there was also evidence of the respective governments' "motivation for entering into each contract."[543] The United States has explained in detail in its Other Appellant Submission that, in doing so, the Panel effectively applied a standard not found in the text of the SCM Agreement that would *require* evidence of specific member State "motivation" to support a finding of export subsidization. By doing so, the Panel introduced a subjective requirement where none exists in Article 3.1(a) and footnote 4. While the subjective motivation of a granting authority may be one factor in a panel's analysis of export contingency, it is not in and of itself, a prerequisite for a finding of contingency.

318. As explained above, to find "export contingency" a Panel must find evidence of only three elements: (i) the granting of a subsidy that is (ii) tied to (iii) actual or anticipated exportation. It is not required to make an additional finding that the government's subjective motivation was provide an export contingent subsidy. That is not to say, as the European Union does, that motivation is completely irrelevant. That motivation may well play a role in the analysis of the total configuration of the facts that a panel must undertake. To put it differently, the Panel appropriately considered the Airbus governments' motivation in providing LA/MSF as a relevant "fact", though it erred to the extent that it considered it a necessary *requirement*, particularly in light of its finding that each of the seven LA/MSF measures challenged was "at least in part" contingent or "dependent for its existence" on exports.[544]

2. The Panel performed a comprehensive and careful assessment of the facts; the EU Article 11 DSU arguments should be rejected

319. The second set of arguments in the EU "second" and "third set{s} of grounds of appeal" is based on Article 11 of the DSU.[545] The European Union's argument appears[546] to be focused on the Panel's treatment of the additional "corroborating" evidence in the export-contingent subsidy section of its report.[547] The European Union challenges almost all of the factual

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[543] Panel Report, para. 7.690 (emphasis added).

[544] As the Appellate Body noted in *Canada – Aircraft*, "the facts which should be taken into account in a particular case will depend on the circumstances of that case {and} there can be no general rule as to what facts or what kinds of facts *must* be taken into account." *Canada – Aircraft (AB)*, para. 169 (original emphasis).

[545] EU Appellant Submission, para. 1372; EU Notice of Appeal, para. 10.

[546] The EU is not clear as to which elements of the Panel's export subsidy analysis its Article 11 arguments apply. Its claims should be rejected for that reason alone. The United States notes that each of the arguments discussed in this section applies *mutatis mutandis* to any other Article 11 claims the EU may be interpreted to have raised.

[547] Panel Report, paras. 7.679-7.684.

evidence on which the Panel relied and, in effect, asks the Appellate Body to re-do the factual analysis on which the Panel based its findings of "subjective motivation" and to re-weigh the evidence.

320. As discussed in section V.C.1, because the Panel found that each of the seven challenged LA/MSF measures was "at least in part" contingent or "dependent for its existence on" exports, it was not required to consider the "additional" or "corroborating" evidence to which the European Union's Article 11 DSU claims pertain. The United States submitted this evidence only to provide further confirmation of the "anticipated exports" and "contingency" that it had already demonstrated with its primary evidence. Moreover, as discussed in section V.A and in further detail in the U.S. Other Appellant Submission,[548] the Panel agreed with this conclusion but applied, in addition to the three-pronged test contained in Article 3.1(a) and footnote 4, an *additional requirement* for which there is no legal basis in the SCM Agreement. It was only in analyzing this additional requirement that the Panel turned to the additional "corroborating" evidence to which the EU Article 11 DSU claims pertain. Accordingly, should the Appellate Body agree with the United States that no *additional requirement* of "subjective motivation" exists or must be met, then the Appellate Body need not address these Article 11 DSU arguments. If the Appellate Body does consider these arguments, the United States submits that they are unsupported.

321. *First*, it is clear from the Panel report that the Panel performed an objective assessment of the matter before it. It carefully took into account all evidence and arguments by the parties, carefully reviewed the evidence and drew its own conclusions as to the meaning and significance of the evidence, and provided a reasoned and adequate explanation for all of its conclusions in light of plausible alternative explanations. Its analysis of export contingency is preceded by an extensive discussion of the arguments made and evidence presented by the United States, as well as the responses offered by the European Union. The Panel's assessment refers in specific terms to an enormous volume of evidence. Paragraphs 7.651 through 7.688 of the Panel Report include a detailed review of the most important arguments and facts that the Panel reviewed. The Panel makes clear in several places that it has arrived at its legal findings following a thorough review of all the facts and circumstances involved.[549] Paragraphs 7.652, 7.656 and 7.659 (on anticipation), and 7.675 through 7.678 and 7.689 (on "tied to") confirm the thoroughness of the Panel's assessment.

322. The EU has pointed to no evidence that would justify a finding to the contrary, namely that the Panel failed to conduct the type of "objective assessment of the matter before it" required by Article 11 of the DSU. As the Appellate Body has previously found, an Article 11 claim "is a *very serious allegation*"[550], and requires a demonstration of 'egregious error'."[551] The EU's

[548] U.S. Other Appellant Submission, paras. 7-24.

[549] *E.g.*, paras. 7.652, 7.656 and 7.659.

[550] *US – Zeroing (AB)*, para. 253.

frequent use of terms such as "intolerable"[552], "irrational", and "illogical"[553] to describe its feelings about the Panel's findings do not transform those findings into an "egregious error" that would create an inconsistency with Article 11 of the DSU.

323. *Second*, the Panel also performed an objective assessment of the applicability and conformity of the facts with the covered agreements, in this case the SCM Agreement. As discussed above, the Panel reviewed in detail the numerous facts it considered relevant. Its key findings provide clear reasoning and explanation of the specific facts on which they are based and are fully consistent with the legal standard that the Panel articulated.

324. In paragraph 7.678, in particular, where the Panel found that "th{e} 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 member States' anticipated exportation or export earnings", it did so following a detailed recital of the various facts on which it based this legal conclusion. As discussed in section V.C.1, this support included the fact 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. This support included the fact that various pieces of information confirmed that achieving the level of sales needed to fully repay each loan would require Airbus to make a substantial number of exports – a factual reference coupled with a footnote that refers, in detail, to the specific evidence involved; that such exports could not be replaced with domestic sales; and that the EU member States expected their LA/MSF contributions to be fully repaid and to achieve their target rate of return. The Panel undertook a similarly detailed assessment of the requisite "anticipation" of exports[554] and the existence of a subsidy.[555] This detailed recitation of facts confirmed the Panel's legal findings and analysis.

325. *Third*, the European Union's approach of segregating the individual elements of fact on which the Panel relied is at odds with the requirement for the Panel to base its findings of export contingency on the *total* configuration of the facts.[556] The Panel explicitly referred to its analysis of "all of the facts and circumstances" surrounding the granting of the relevant provisions of LA/MSF.[557] For each of its key findings, the Panel stated that it relied on the totality of the facts involved and not, as the European Union suggests, on individual elements. The EU arguments do not describe "egregious errors" in the Panel's analysis of the total configuration of the facts.

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[551] *US – Wheat Gluten (AB)*, para. 186; *Japan – Apples (AB)*, para. 224.

[552] EU Appellant Submission, para. 1414.

[553] EU Appellant Submission, paras. 1393, 1395.

[554] Panel Report, para. 7.651-7.678.

[555] Panel Report, paras. 7.651-7.660.

[556] *Canada – Aircraft (AB)*, para. 167.

[557] *E.g.*, Panel Report, footnote 3248.

Instead, the European Union would require the Appellate Body to engage in a detailed (re-)assessment of certain specific, individual facts on which the Panel's findings are based, including specific factual counter arguments that the EU considers should have been given more weight.

326. *Fourth*, even *if* the Appellate Body were to review each of the European Union's individual arguments, it would find that none have proper support. The Panel was correct to accord them little or no weight, or to reject them outright. For example, the European Union argues that the first piece of "additional evidence" considered by the Panel relates to a document that was "authored by Airbus".[558] The European Union provides no evidence that this it was authored by Airbus. In any event, the EU argument is irrelevant because the Panel relied, not on this particular document, but on a specific provision in the A380 LA/MSF contract between Airbus and the German Government that refers to this document and demonstrates the government's reliance on it.[559] In a similar vein, the European Union asserts that the phrase "very attractive market segment," used in a different document, refers to a product market, not a geographic market. This argument ignores that the sentence relied on by the Panel also refers to "extension of the trade surplus", thus clearly referring to exports.[560]

327. Finally, the European Union notes that the Panel cited both evidence of the exchange of performance commitments and motivation in support of its overall conclusion of export contingency, and asserts that this is an "intolerable" change in arguments "in the middle of its assessment".[561] The Panel's consideration of all of the facts that may bear on the issue of export contingency is a strength of its analysis, not an "intolerable" weakness. The Panel first found evidence of the "exchange of commitments" that "supports the view" that the seven grants of LA/MSF at issue were conditional on export performance. It then looked to "additional" and "corroborating" evidence to confirm the "tie" or relationship of "contingency".[562] Nothing requires that confirming evidence be of the same nature as the initial evidence. Thus, the consideration of multiple sources of evidence further strengthens the Panel's primary (and in the U.S. view, sufficient) finding that each of the LA/MSF measures challenged was at least in part contingent or "dependent for its existence" on exports.

3. The Panel did not improperly distinguish the German, Spanish and UK A380 LA/MSF

328. The EU argues that there are "fundamental and irreconcilable internal conflicts between the Panel's initial analysis of the MSF measures, the Panel's findings of export

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[558] EU Appellant Submission, para. 1402.

[559] Panel Report, para. 7.680.

[560] EU Appellant Submission, para. 1402.

[561] *E.g.*, EU Appellant Submission, paras. 1414 and 1446.

[562] Panel Report, paras. 7.678 and 7.679-7.689.

contingency/conditionality, and the Panel's subsequent findings of serious prejudice."[563] In truth, there is only one "fundamental internal conflict" and that is between the Panel's findings that *all* of the challenged LA/MSF measures are at least in part contingent upon anticipated exportation, and its subsequent finding that, nonetheless, four of the measures are *not* contingent on exportation within the meaning of Article 3.1 and footnote 4 of the SCM Agreement.

329. *First*, the European Union argues that there is an inconsistency between the Panel's emphasis on the unguaranteed, success-dependent nature of LA/MSF when considering whether it was contingent on anticipated exports, and references in the subsidy and adverse effects sections of the Panel Report to the unsecured and success-dependent nature of such LA/MSF.[564] In fact, the two sets of findings are completely consistent. In the case of the subsidy and adverse effects findings, the Panel considered the fact that LA/MSF is "unsecured" (the governments have no recourse to any of Airbus' assets if the company fails to repay the LA/MSF provided or fails to repay on "schedule") and success-dependent (repayment is sales-dependent and back-loaded). And the Panel concluded that these are relevant factors in assessing the risk the governments undertook in providing LA/MSF, the "risk premium" that pertains to this risk, and the substantial benefit accorded to Airbus as a result of the governments' failure to demand a market rate of return.

330. In the findings on export contingency, the Panel refers to contractual warranties relating to the "accuracy" of certain sales forecasts and other representations. Such warranties, as discussed above, served to further reinforce the contractual tie between the provision of LA/MSF and anticipated exports. In particular, the warranties constitute contractual confirmation that the grant of the subsidies was contingent on anticipated exports.

331. Thus, there is no basis for the EU's argument that the Panel's "statement in its assessment of {LA/MSF} are in direct conflict with its subsequent statements in its assessment of export contingency" and that this "conflict cannot be resolved". Nor is there any basis for the EU argument that "the Panel . . . changed its prior factual findings to suit its immediate purpose" and that "{o}ne set of findings must be wrong".[565]

332. *Second*, the European Union argues that the LA/MSF contracts contain sales-dependent repayment provisions for two legitimate commercial reasons: aircraft deliveries are the most reliable indication that sufficient cash-flow will be on hand to make repayment, and sales-based repayment reflects the allocation of risk that Airbus and the EC member State governments agreed to accept.[566] It argues that these ostensibly commercial objectives (along with industrial

[563] EU Appellate Submission, para. 1378.

[564] EU Appellant Submission, paras. 1379-1383.

[565] EU Appellant Submission, para. 1382.

[566] EU Appellant Submission, para. 1384.

and economic policy objectives) indicate that exports cannot have been a motivating factor.[567] The Panel considered these arguments and was not convinced: "we do not consider the European Communities to have done enough to substantiate that the two 'countervailing explanations' it has advanced actually explain why the EC member States required each of the challenged LA/MSF contracts to be repaid with revenue generated from LCA sales."[568]

333. *Third* and most importantly, the only actual inconsistency or "fundamental internal conflict" is one that the European Union does not raise, namely, between the Panel's findings that all of the challenged LA/MSF measures are at least in part contingent upon anticipated exportation, and its subsequent finding that, nonetheless, four of them are not contingent on exportation, within the meaning of Article 3.1 and footnote 4 of the SCM Agreement. As set forth in detail in the U.S. Other Appellant Submission, the Panel found that the evidence submitted by the United States demonstrated both the granting of a subsidy (LA/MSF) and the Airbus governments' anticipation of exports with respect to each of the seven instances of LA/MSF challenged by the United States.[569] The Panel also found that it was clear "from various pieces of information" that each of the seven (LA/MSF) contracts at issue in fact established repayment terms that required Airbus to make a substantial number of exports.[570]

334. This led the Panel to conclude with respect to each of the seven challenged instances of LA/MSF that, "{the} evidence support{ed} 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."[571] The Panel's correct recognition of "conditionality" or "dependence" at this point in its analysis, in other words, was sufficient to determine that the provision of all seven instances of LA/MSF contracts was tied to anticipated exports. The Panel's findings were internally inconsistent only insofar as they concluded that this determination was "{not} decisive" and, following a review of "additional" "corroborating" evidence, that only three out of these seven measures were "in fact" tied to anticipated exportation.[572]

4. The Panel specifically rejected the EU's 1992 Agreement arguments

335. In its arguments concerning the Panel's export contingency findings, the European Union again raises the 1992 Agreement as a defense, arguing that the existence and operation of the

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[567] EU Appellant Submission, para. 1389.

[568] Panel Report, para. 7.676.

[569] U.S. Other Appellant Submission, para. 13.

[570] U.S. Other Appellant Submission, para. 13.

[571] U.S. Other Appellant Submission, para. 13.

[572] The U.S. Other Appellant Submission provides a more detailed review of this point in light of the evidence and specific factual and legal findings of the Panel. U.S. Other Appellant Submission, paras. 25-35.

1992 Agreement is one of the facts surrounding the claim of "in fact" contingency that the Panel must consider.[573]

336. According to the European Union, the 1992 Agreement provides relevant context as a factual matter and expressly sets out the agreed and permitted content of LA/MSF. It asserts that "the United States maintained with the European Union for almost a decade, an agreement permitting measures that the United States knew to be prohibited subsidies".[574] Under this view, "the United States was complicit in permitting such {LA/MSF} measures and willingly acquiesced in their continued existence."[575] The European Union argues that the Panel erred because "{i}n its assessment of the US claims of export contingency/conditionality {it} fail{ed} to address this EU argument at all."[576]

337. The Panel explicitly rejected each of the arguments on which the European Union relies. As described in the U.S. response to the parallel argument with respect to the "adverse effects" findings, the Panel specifically rejected the European Union's claim that the United States "acquiesced" to the LA/MSF subsidies.[577] Moreover, the Panel specifically rejected that argument as a matter of law and noted that the 1992 Agreement, by its own terms, was "without prejudice to the rights and obligations of the parties under the GATT and any agreement negotiated under its auspices".[578] The EU argument, moreover, would have required the Panel to determine the consistency of LA/MSF with the terms of an agreement that is not a 'covered Agreement' which, as explained in section IV.E.1, is simply not within the competence of the Panel.

5. The Panel did not fail to meet its obligations under Articles 12.7 or 7.2 of the DSU

338. The European Union at various points argues that the Panel failed to fully address or make proper findings with respect to certain EU arguments,[579] or failed to explain in sufficient detail why it rejected or accorded relatively less weight to those arguments.[580] These appear to be Article 12.7 DSU claims. The European Union also refers to Article 7.2 of the DSU at several places in its analysis, apparently arguing that the Panel failed to address certain relevant provisions of the covered agreements cited by the parties. Each of these arguments fails.

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[573] EU Appellant Submission, paras. 1373 – 1377.

[574] EU Appellant Submission, para. 1375.

[575] EU Appellant Submission, para. 1375.

[576] EU Appellant Submission, para. 1377.

[577] Panel Report, paras. 7.99-7.100.

[578] Panel Report, para. 7.95.

[579] *E.g.*, EU Appellant Submission, paras. 1456-1458,

[580] *E.g.*, EU Appellant Submission, paras. 1459-1460,

339. With respect to the EU Article 12.7 DSU arguments, each appears to raise one fundamental legal issue, namely whether the Panel is required not just to set out "the basic rationale behind any findings and recommendations that it makes", but also the specific arguments and reasoning with respect to its assessment of each individual piece of factual evidence that the parties have submitted and on which it has or has not relied, or to which it has or has not accorded significant evidentiary weight. There is no basis for such a requirement in Article 12.7 or elsewhere in the DSU. The Appellate Body has previously found that panels are under no obligation to address every argument a party makes.[581] The same reasoning, *a fortiori*, would be true for every specific sub-argument that a party makes to support its main arguments, or any factual assessment that a panel makes to determine the applicability of a particular argument raised by one of the parties.[582]

340. The EU Article 7.2 DSU arguments never explain *how* the Panel's findings would have resulted in a failure to meet its obligations under that provision or, for that matter, which of the Panel's findings fail to comply with Article 7.2 DSU. Indeed, Article 7.2 of the DSU imposes an obligation on panels to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." The Panel clearly did so as it addressed each of the specific provisions identified in the United States' panel request and its submissions, and the EU did not invoke any particular provisions of any covered agreement or agreements of its own.

D. Each of the European Union "further" grounds of appeal are equally without merit

341. The European Union, finally, relies on a number of what it calls "further" grounds of appeal. Each of these fails as well.

1. The Panel did not accept an untimely U.S. submission

342. The European Union asserts that the Panel should have disregarded certain arguments made by the United States in its second written submission and its answer to Panel Question 144 because they included references to specific provisions of the LA/MSF measures that had not

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[581] *EC – Poultry (AB)*, para. 135.

[582] To the extent the European Union specifies its Article 12.7 DSU arguments or suggests that the Panel failed to provide sufficient reasoning or adequate explanation, it is clear from the record that such arguments fail. The Panel Report is thorough and careful in explaining its reasons for accepting and rejecting each principal argument and piece of evidence, and thus in no way failed to meet its obligations under Article 12.7 DSU. As the Panel Report, as well as the EU's own arguments demonstrate, the Panel in fact clearly and adequately explained why it rejected or accorded relatively less weight to the arguments that the European Union refers to in these paragraphs. In particular, it explained that the option of "prepayment", in those instances where it existed, was optional and that it was doubtful that the existence of such a provision influenced the Member States' decisions to provide LA/MSF (Panel Report, paras. 7.666 - 7.668; EU Appellant Submission, para. 1457); and it explained that the guarantees by other group companies to which the European Union now refers were "clearly of a different kind" than the guarantees considered in *Australia – Automotive Leather* (Panel Report, paras. 7.669 to 7.670; EU Appellant Submission, paras. 1459-1460). These issues were briefed in detail before the Panel.

been referenced in earlier U.S. submissions.[583] The Panel considered this argument at length and rejected it on multiple grounds, stating that there was no basis in the Working Procedures of the Panel to support the EU's contention that the United States "was required to present all of its arguments by the time of the first substantive meeting of the parties."[584]

343. *First*, the Panel determined that the U.S. arguments "expand and explain certain arguments first presented by the United States in its first written submission by discussing various aspects of evidence already submitted with its first written submission" and thus serve as an "elaboration of arguments in the light of different aspects of evidence already submitted."[585] The Panel continued by explaining the "indispensable" role that such give and take plays in the panel process:

> In our view, the process of highlighting, examining and testing different aspects of duly submitted evidence by either party for the purpose of supporting or rebutting each other's claims and arguments is a central and indispensable element of the panel process. We can see no reason why parties should be precluded from developing their arguments over the course of a panel proceeding on the basis of different aspects of evidence submitted in good time.[586]

344. *Second*, the Panel found that, even assuming *arguendo* that it were incorrect to conclude that the U.S. submissions did not refer to evidence already submitted in the proceeding, the U.S. still would have acted appropriately "because it was entitled to introduce factual evidence after the first substantive meeting of the parties 'with respect to evidence necessary for purposes of rebuttals'."[587] this matter is neither a finding of law nor legal interpretation, so is not subject review on appeal

2. The Panel did not make the case for the United States

345. The European Union accuses the Panel of "engineering a 'dependent motivation' case on behalf of the United States" in a manner that breaches the EU's due process rights.[588] The Panel, however, has a legal obligation to make an objective assessment of the matter before it, including the applicability of and conformity with the covered agreements. It acted entirely within its discretion. The United States notes, moreover, that there is no basis for the EU's argument that the Panel made the case for the United States by "transposing all the evidence relating to anticipation into the assessment of contingency." It is the specific obligation of the Panel to

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[583] EU Appellant Submission, para. 1470.

[584] Panel Report, para. 7.622.

[585] Panel Report, para. 7.624.

[586] Panel Report, para. 7.624.

[587] Panel Report, para. 7.625.

[588] EU Appellant Submission, paras. 1472, 1473.

consider the totality of the facts, and the United States cited those facts in support of its export contingency claim.[589]

346. The United States certainly did not "benefit" from the Panel's approach. As the European Union volunteers, the "United States expressly and repeatedly rejected the approach that the EU argues was adopted by the Panel to benefit the United States – {that is, a "dependent motivation" approach}".[590] As the U.S. appeal and this submission make clear, rather than benefitting from an argument supposedly made by the Panel on the U.S. behalf, the United States has challenged the Panel's application of a higher motivation-based standard than provided for in the SCM. The Panel, in other words, in no way "made the case for the United States" any more than it made the case for the European Union.

3. The Panel did not equate performance with export performance

347. The European Union argues that the Panel equated sales performance with export performance, and thus "the Panel's conclusions on export contingency are unsafe and should be reversed."[591] The European Union characterizes this argument as raising a "further" ground for appeal and states that the Panel "simply ignored it." Both assertions are untrue. This argument is simply a restatement of one of the fundamental issues addressed by the Panel: were LA/MSF subsidies granted contingent upon export performance? This question was briefed extensively before the Panel and discussed extensively in its report.[592]

4. The Panel did not equate financial contribution with subsidy

348. The European Union contends also that the Panel equated financial contribution with subsidy.[593] The United States notes that the Panel responded to this charge as follows:

> In the first section of our Report, we concluded that the United States has demonstrated that each of the challenged LA/MSF measures constitute a subsidy

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[589] *Canada – Aircraft (AB)*, para. 167 ("the existence of this relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts"); *e.g.*, US FSW, paras. 345-360; US SWS, paras. 137-147 and 168-209.

[590] EU Appellant Submission, para. 1471.

[591] EU Appellant Submission, paras. 1474, 1487.

[592] US SWS, paras. 235-244; EC FWS, paras. 615-629; Panel Question US RPQ 79 ("The EC argues with respect to LA / MSF that there is no export contingency because the granting of the loans was not tied to anticipated exportation or export earnings, but just performance. Yet the EC also argues that at the time that the LA / MSF was provided, the Member States expected to be repaid in full at market rates of return, which we understand the EC acknowledges could not happen without export sales. In other words, the EC Member States knew that the expected performance could not be achieved but for exports. Is there an inherent contradiction in these positions? Please clarify.").

[593] EU Appellant Submission, para. 1488.

> within the meaning of Article 1.1. In other words, we have already found that by entering into the LA/MSF agreements with Airbus, the EC member State governments provided Airbus with *a subsidy*.[594]

The reference to the entirety of Article 1.1 of the SCM Agreement and not simply Articles 1.1(a) makes it clear that the Panel considered both benefit and financial contribution in reaching its conclusion that the measures were subsidies. If anything, the European Union argument upon appeal that any export contingency has to relate specifically to the "decision to fix the terms of the MSF measures at below market rate"[595] equates "benefit" with "subsidy".

5. The Panel did not fail to assess the meaning of "export" or "Europe"

349. The European Union argues that the United States did not explain what it meant by the terms "export", "exported", and "Europe."[596] The European Union fails to provide examples or to offer any explanation as to how the use of these terms has impacted the Panel's consideration. As discussed above, a panel is under no obligation to address every fact or argument that a party presents, so long as it addresses every claim.[597]

6. The Panel appropriately found that the member States anticipated exports

350. Finally, the European Union submits that the Panel's finding that the member States anticipated exports should be reversed."[598] In support, the European Union repeats, in very general terms, two arguments it made elsewhere in its submission but offers no additional support. The United States has addressed the subject of anticipated exports throughout this submission, particularly in sections 2.b., 2.c., and 3.c.

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[594] Panel Report, para. 7.646 (emphasis added).

[595] EU Appellant Submission, para. 1488.

[596] EU Appellant Submission, para. 1491.

[597] The United States also notes that if the word "Europe" was used imprecisely before the Panel, any lack of precision generally would benefit the EU in its arguments by *over*stating the size of the EU LCA market (Europe is larger than the EU), thereby reducing somewhat the relative importance of exports to Airbus.

[598] EU Appellant Submission, para. 1492.

VI. THE PANEL CORRECTLY FOUND THAT AIRBUS PAID LESS THAN ADEQUATE REMUNERATION FOR INFRASTRUCTURE SPECIALLY BUILT FOR IT IN HAMBURG, BREMEN, AND TOULOUSE

351. The Panel recognized that EU member State and local governments provided a subsidy in the form of several infrastructure projects designed especially for Airbus and made available to it for less remuneration than a market-based supplier would have charged. With respect to the infrastructure located in the city of Hamburg, city of Bremen, and the region of Toulouse, the Panel found a 'financial contribution' in the form of a "provision of goods or services *other than general infrastructure*" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. Specifically, the Panel concluded in each case that the authorities built the infrastructure specifically to address the needs of one company (Airbus) or group of companies (the aerospace industry). In each case, specific limitations existed on the use of and access to the infrastructure, either *de facto* (*e.g.*, no possibility to access except from Airbus-owned land) or *de jure*.[599] The Panel also established that the infrastructure was provided to Airbus on terms that were better than those that would have been available in the market and, therefore, conferred a "benefit" within the full meaning of Article 1.1(b) of the SCM Agreement. For Hamburg and Toulouse, this was essentially based on a finding that a commercial investor (i.e., the market), if it had made a similar investment in new infrastructure or facilities, would have demanded a higher price. With respect to Bremen, Airbus had exclusive use of an extended runway, but paid nothing beyond the fees it already paid for use of the regular runway.

352. The biggest project was the creation of industrial land in Hamburg. When Airbus launched the A380, it decided to establish two A380 assembly facilities – one at Hamburg-Finkenwerder, and the other in Toulouse. At the time, the existing Airbus facilities in Hamburg occupied a peninsula bounded on three sides by the river Elbe and wetlands, leaving no space for the A380 facility. Hamburg authorities solved this problem by transforming one of the wetlands – the internationally protected "Mühlenberger Loch" – into an industrial site for Airbus, at a cost of approximately €751 million.[600] The project included the initial landfill and the creation of several specific industrial and quay facilities, as well as the extension of Airbus' existing runway. The Panel found that Hamburg undertook this project for Airbus[601] to support its A380 assembly operations.

353. The Panel found that another jurisdiction in Germany, the City of Bremen, expended about DM 50 million to extend the runway at Bremen airport and put in place certain noise

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[599] *E.g.*, Panel Report, para 7.1043. The Panel also referenced the EU's argument earlier, in para 7.1019.

[600] Panel Report, paras 7.1046-53, 7.1089.

[601] Panel Report, paras 7.1097.

reduction measures for the specific benefit of Airbus. Regular use of the runway extension was limited both in fact and in law to Airbus.[602]

354. The Toulouse project began in 1999, when French government authorities signed a protocol on the development of a site located near Toulouse, adjacent to Toulouse Blagnac airport, to be known as the Aéroconstellation site, and to be dedicated to aeronautical activities. The project involved the preparation of the land for industrial use, including the development of taxiways and roads on the site, aircraft parking areas, underground technical galleries and service areas to make the site suitable for aeronautical activities in particular.[603] These specialized facilities are collectively known as "*équipement d'intéret general*" ("EIG") facilities.[604] The land was sold to several companies that the Panel found are all involved, in various ways, with different aspects of the construction, assembly, testing, maintenance, etc. of aircraft.[605] According to the Panel, there was "no evidence before us to suggest that the French authorities would have undertaken the development of the site and the construction of the EIG facilities but for the fact that it was desirable in order to provide a suitable site for Airbus' A380 final assembly line, adjacent to the Toulouse-Blagnac airport."[606] The Panel found further that "the development of the ZAC Aéroconstellation site and the construction of the EIG facilities was undertaken specifically to enable Airbus to situate an A380 final assembly line in an advantageous location, in France."[607]

355. The EU argues that the Panel erred with regard to the findings both of a financial contribution and of a benefit for each of these projects. In determining whether a "financial contribution" existed, the EU asserts, the Panel should have distinguished between the initial "creation" of the infrastructure, and its subsequent "provision" – in the form of a lease agreement or terms of use. According to the EU, the "creation" of infrastructure is exempt from coverage by the SCM Agreement because Article 1.1(a)(1)(iii) relates only to the "provision" of infrastructure. With regard to the benefit, the EU asserts that the Panel should have simply compared the terms of the lease or sale of any infrastructure to those for facilities or infrastructure in the same geographic area that were not tailored to the specific needs of a particular company and were not built specifically for that company or those companies. The EU argues that the Panel impermissibly imposed a "cost-to-government" standard when it took into account the cost of the initial "creation" of the infrastructure. Each of the EU's arguments in this respect fails.

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[602] Panel Report, paras 7.1098 -7.1101, 7.1115 -1116.

[603] *E.g.*, Panel Report, para 7.1138, 7.1175.

[604] Panel Report, para 7.1139.

[605] Panel Report, para 7.1139.

[606] Panel Report, para 7.1177.

[607] Panel Report, para 7.1177.

A. The Panel correctly found that the Hamburg, Toulouse and Bremen projects were not general infrastructure and, therefore, constituted financial contributions within the meaning of Article 1.1(a)(iii) of the SCM Agreement

356. In evaluating whether the Mühlenberger Loch project, Bremen runway extension, and ZAC Aéroconstellation site were general infrastructure, the Panel focused on exactly what the relevant governments provided, and to whom. The Panel concluded that the analysis of whether government provision of a good or service is general infrastructure "cannot be answered in the abstract, but rather must take into account the existence or absence of *de jure* or *de facto* limitations on access or use, and any other factors that tend to demonstrate that the infrastructure was or was not provided to or for the use of only a single entity or a limited group of entities."[608] It considered a number of factors, including:

- "factors relating to the circumstances surrounding the creation of the infrastructure in question",
- "consideration of the type of infrastructure",
- "the conditions and circumstances of the provision of the infrastructure",
- "the recipients or beneficiaries of the infrastructure", and
- "the legal regime applicable to such infrastructure, including the terms and conditions of access to and/or limitations on use of the infrastructure".[609]

In doing so, the Panel complied fully with the requirements of the SCM Agreement.

1. The SCM Agreement confirms the Panel's approach and does not "carve out" or "exclude" the creation of non-general infrastructure from its scope

357. To evaluate whether "a government provides goods or services other than general infrastructure, or purchases goods" for purposes of Article 1.1(a)(1)(iii) of the SCM Agreement, the Panel identified what each government provided, and examined whether, in light of all the facts, it was general infrastructure. It found that the determination "must be made on a case-by-case basis, based on all the facts and circumstances concerning relevant factors."[610] In addition, the Panel concluded that "if an evaluation of the circumstances surrounding the creation of the infrastructure demonstrates that it was provided to a single entity or a limited group of entities, this supports the conclusion that the infrastructure created is not properly considered general;"[611]

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[608] Panel Report, para. 7.1073.

[609] Panel Report, para. 7.1073.

[610] Panel Report, e.g., para 7.1041.

[611] Panel Report, para 7.1043. The Panel also referenced the EU's argument earlier, in para 7.1019.

and that this is "particularly the case where the infrastructure in question was created for the particular needs of the entity or group which has the right to access or use of that infrastructure."[612]

358. The European Union argues that the Panel's analysis impermissibly failed to distinguish the "provision of infrastructure," which the European Union concedes is covered by the SCM Agreement, from the "creation of infrastructure," which the European Union argues is "carved out" of the Agreement.[613] Its only legal support for this theory comes from the observation that "provides" is in the present tense in Article 1.1(a)(1)(iii) In the EU view, the tense signifies that any pre-provision activity – such as "creation" of infrastructure – is outside the scope of the Agreement. The EU attempts to bolster this argument with unsupported generalizations about the "type of actions which qualify as 'financial contributions'" and the "evident" reason that negotiators supposedly carved creation of infrastructure out of the SCM Agreement.[614] These arguments have no basis

359. Although the EU ascribes great significance to the word "provides", it fails to consider the meaning of that word properly when applied to the facts in this dispute. This neglect is telling. The relevant dictionary definitions include "2. take appropriate measures in view of a possible event; make adequate preparation . . . 5. equip or fit out with what is necessary for a certain purpose; furnish or supply with something 6 supply or furnish for sue; make available; yield, afford."[615] These definitions confirm that the act of "providing" a thing includes "making available", "equipping", "preparing"[616] and, therefore, can involve or coincide with the act of "creating" that thing. This would especially be the case when the totality of the facts demonstrates – as it does for each of the three provisions of infrastructure covered by the EU's

[612] Panel Report, para 7.1043. The Panel also referenced the EU's argument earlier, in para 7.1019.

[613] EU Appellant Submission, paras. 1026 and 1030.

[614] EU Appellant Submission, para. 1029-1030.

[615] New Shorter Oxford English Dictionary, p. 2393.

[616] Prior WTO panel reports have come to the same conclusion. Thus, the Panel in *US – FSC* noted that "{i}n our view, the ordinary meaning of the term' provide' includes the notion of making something available, as well as that of actually granting or paying that thing (in the present case export subsidies listed in Article 9.1 of the Agreement on Agriculture). Moreover, the following definition in the *New Shorter Oxford English Dictionary* confirms that the term 'provide' is not restricted in its ordinary, current usage to actually granting or paying such subsidies: '6 v.t. Supply or furnish for use; make available . . . ?" *US – FSC (Panel)*, para 7.170. The Panel in *Canada – Dairy* went even further and found that "{t}he ordinary meaning of the word 'provide' is not restricted to a financial contribution. The dictionary meaning of the word 'provide' is rather: '1. foresee. 2. take appropriate measures in view of a possible event; make adequate preparation . . . 4. prepare, get ready, or arrange (something beforehand) 5. equip or fit out with what is necessary for a certain purpose; furnish or supply with something 6. . . . make available; yield, afford'." *Canada – Dairy* (*Panel)*, para 7.65. While the term "provides" in Article 1.1(a)(1)(iii) of course cannot be read to be broader than the term "financial contribution", in the context of which it must be interpreted, this latter finding does confirm that the term "provides" can have a relatively broad meaning.

appeal – that the creation of the thing and its subsequent delivery to someone else are, as a factual matter, two interrelated parts of one and the same activity.[617]

360. The context of "provides" is also significant in that each of its three grammatical objects – "goods," "services," and "general infrastructure" – serve to inform its meaning because they are "provided" in different ways. Loose goods may be manufactured (or "created") far in advance of delivery to a customer, while a service like free-to-air broadcasting is provided instantaneously and continuously. Thus, "provides" as applied to goods will differ greatly from "provides" as applied to services. Infrastructure, which is typically constructed in place and made available upon completion, is "provided" in a manner intimately linked with its creation.

361. Contrary to the EU's assertions,[618] the placement of "provides" in the present tense does not change this conclusion. All of Article 1 is drafted in the present tense because it sets out the definition of what a subsidy is and does not address the question *when* that subsidy exists or is provided.[619] If the EU's reasoning were correct, then events occurring before "a direct transfer of funds" under Article 1.1(a)(1)(i) or before "government revenue that is otherwise due is foregone" under Article 1.1(a)(1)(ii) would be excluded from the analysis. Of course, that is unworkable. Often, events proceeding the actual act of delivering a subsidy are critical to understanding the subsidy.[620] The totality of the facts, as it did in this situation, may indicate that an assessment of the measure as a whole should take into account the broader set of circumstances. In many instances, even the European Union's own defense of certain subsidies relies on events occurring before the date of the financial contribution. Thus, the EU is wrong to assert that the present tense of "provides" indicates that "actions taken by the government *prior* to the provision of the good or service in question are not relevant for the notion of 'financial contribution' in Article 1.1(a)(1)(iii)."[621]

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[617] Panel Report, para 7.1043.

[618] EU Appellant Submission, para 1038.

[619] The United States does not disagree that the "proper point of reference in determining whether a provision of goods or services is "other than general infrastructure" is the time when the act of provision that is alleged to constitute a subsidy takes place". That act of provision, however, can take a number of forms, including - the creation of a site exclusively for a particular user or category of users. Such a transfer could also be found, based on the total configuration of the facts, to be part of a multi-step transaction that includes the creation of various elements of infrastructure and their subsequent lease to a certain company or group of companies (as was the case here). Everything, however, will eventually depend on the specific facts. That is exactly the approach taken by the Panel, in this dispute.

[620] *E.g.*, *Korea – Commercial Vessels*, paras. 7.383-393, 398-401 (panel discusses events leading up to restructuring to determine whether the government entrusted or directed private parties to make financial contributions); *Japan – DRAMs (Korea) (AB)*, para. 125 ("The Panel's review of this issue focused on the JIA's treatment of a restructuring plan prepared by Deutsche Bank that was made available to Hynix's creditors at the time they undertook the December 2002 Restructuring (the 'Deutsche Bank Report'.").

[621] EU Appellant Submission, para. 1031.

362. It is also significant that neither Article 1.1 nor any other provision of the SCM Agreement refers to the "creation" of infrastructure. The specific exception for "general infrastructure" suggests strongly that if the negotiators of the SCM wanted to completely exclude creation of infrastructure from the SCM Agreement, they would have done so explicitly, and not through the obscure mechanism posited by the EU. There is certainly nothing in Article 1.1 to indicate that it "carve{s} out" the creation of infrastructure, as the European Union suggests.[622]

363. The 'context' of Article 1.1(a)(1)(iii) supports the Panel's interpretation. Specifically, the other subparagraphs of Article 1.1(a)(l) all refer to different types of "financial contribution". Article 1.1(a)(1)(i), for example, refers to a "direct transfer of funds" or "potential direct transfer of funds"; Article 1.1(a)(1)(ii) refers to the "forego{ing}" or "not collect{ing}" of government revenue; and Article 1.1(a)(1)(iv) refers to "a government mak{ing} payments to a funding mechanism" or "entrust{ing} or direct{ing}". Each of these other subparagraphs, in other words, uses terms that are much more specific and narrow than "to provide" as used in Article 1.1(a)(1)(iii), and none of them provide any support for the EU's argument that "to provide" should be read narrowly as referring only to the actual "in-kind *transfer*" of goods or services.[623] Indeed, if the drafters of the Agreement had intended that only the actual "transfer" of goods or services be covered by Article 1.1(a)(1)(iii) (as the EU argument implies[624]), they could have used the term "to transfer" – as they did in Article 1.1(a)(1)(i). Instead, they used the more general term, ''to provide".

364. The 'context' of Article 1.1(a)(1)(iii) is relevant in a second way as well. As the Panel noted, Articles 1.1(a)(1)(i) and (ii) each illustrate instances of financial contributions by examples. "The absence of any examples" in Article 1.1(a)(1)(iii), as the Panel found, "suggests that the negotiators of the SCM Agreement did not consider that the concept {of a "provision of goods or services other than general infrastructure} could be illustrated with concrete examples".[625] Instead, therefore, a careful analysis of the total configuration of the facts is called for; and this is precisely what the Panel did.

365. In addition to its arguments based on the word "provides," the EU also quotes the statement from the panel in *US – Softwood Lumber III* that "{t}he negotiating history confirms that items (i)-(iii) of {Article 1.1(a)(1)} limit these kinds of measures to the transfer of economic resources from a government to a private entity."[626] The EU argues on this basis that the act of transferring money or other resources from the government to a recipient, and only that act, is a financial contribution. Anything else, such as "government actions of public authority, and in particular those involving the creation of infrastructure" is not a financial contribution "until

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[622] EU Appellant Submission, paras. 1026 and 1030.

[623] EU Appellant Submission, para 1028.

[624] EU Appellant Submission, para 1028.

[625] Panel Report, para 7.1041.

[626] EU Appellant Submission, para. 1027, *quoting US – Softwood Lumber III (Panel)*, para. 7.24.

provided to a particular recipient."[627] The EU attempts to build support for this conclusion on the Appellate Body's finding in *US – Countervailing Measures on Certain EC Products* that when evaluating the existence of a subsidy following privatization of a government-owned company, the sale to private owners is the relevant transaction, and prior financial contributions are irrelevant.[628]

366. This reasoning betrays an error that also appears in the EU's analysis of the word "provides" – an overly narrow view of the government-recipient economic relationship. It may be that the provision of infrastructure becomes final upon the "act of provision."[629] But that does not mean that the "transfer" or "provision" is limited to that point in time. The Panel in this dispute found that the Mühlenberger Loch project was "tailor-made" for Airbus, the Bremen runway extension "was undertaken to fulfil Airbus' specific needs," and the ZAC Aéroconstellation site was "uniquely adapted to Airbus' needs."[630] In each case, the government did not provide merely a piece of land or an undifferentiated landing right. The Panel specifically found that:

- Hamburg undertook the project for Airbus and to support its A380 assembly operations;
- in Toulouse, there was "no evidence … to suggest that the French authorities would have undertaken the development of the site and the construction of the EIG facilities but for the fact that it was desirable in order to provide a suitable site for Airbus' A380 final assembly line"[631]; and
- in Bremen, the extended runway was specifically created for Airbus, and its use restricted to Airbus both in fact and in law.[632]

Thus, whether conceptualized as a "transfer of economic resources" or a "provision of goods," the government action involves more than merely turning over a piece of existing infrastructure – it includes designing and building the infrastructure for the recipient.

367. In perhaps its least persuasive effort to defend to defend the theory that creation of infrastructure is "carved out" of the SCM Agreement, the EU speculates on the "reason" WTO Members would take such a step. It cites no negotiating history or text, but opines that Members recognized that "the fostering of economic, social and cultural development is primordial" and

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[627] EU Appellant Submission, para. 1029.

[628] EU Appellant Submission, para. 1034.

[629] EU Appellant Submission, para. 1038.

[630] Panel Report, paras. 7.1084, 7.1121, and 7.1177.

[631] Panel Report, para 7.1177.

[632] Panel Report, paras. 7.1116 and 7.1118.

that "{o}nly the *provision* to an economic operator (as opposed to creation) of infrastructures . . . is capable of distorting trade."[633] It is, of course, easy to speculate on reasons that the negotiators intended any particular outcome. One could as easily conclude (and with substantially more plausibility) that the WTO Members intended the analysis of the financial contribution to include all of the steps of providing a particular piece of infrastructure because that is the only way to understand what exactly the government is providing. Or that the Members intended to include tailor-made infrastructure within the SCM Agreement because they recognized that such super-specific provisions were super-distortive. The EU's speculation is, therefore, entitled to no weight.

368. Thus, the reasoning advanced in defense of the EU's theory that creation of infrastructure is excluded from the SCM Agreement finds no support in the SCM Agreement, or in any other relevant authority. The Appellate Body should accordingly uphold the Panel's reasoning, which ensures a proper analysis by using all of the available evidence to understand exactly what the government provided, and to whom it was provided.

2. The European Union's argument relies on a fictitious separation of different parts of the transactions involved that the Panel found was factually incorrect

369. In its legal analysis, the EU theorizes that the "creation" and "provision" of infrastructure are two distinct actions for purposes of analyzing whether a provision of goods is a financial contribution. In its individual appeals of the Panel's conclusions regarding the Mühlenberger Loch project, the Bremen runway extension, and the creation of the ZAC Aéroconstellation site, the EU simply assumes that the facts comport with its theoretical construct. It then accuses the Panel of erring by failing to distinguish between the "creation" and "provision" of the infrastructure.

370. A more careful review of the Panel's factual findings, most of which the EU has not challenged, demonstrates that the creation of infrastructure was not distinct from its provision in Hamburg, Bremen, and Toulouse *as a matter of fact*. This conclusion has two critical implications. First, it suggests at the very least that the EU's theoretical construct does not apply to these situations. Second, it confirms the analysis above, which demonstrates that the EU's theoretical construct is wrong.

371. With respect to the provision of the Mühlenberger Loch site, the Panel began by a careful review of the facts pertaining to that transaction. Before anything else, said the Panel, it would consider whether it was possible to review the creation of the land (i.e., the turning of wetland

[633] EU Appellant Submission, para. 1030 (emphasis in original).

into usable land) separately from the lease of the land and facilities (i.e., the 'site') to Airbus, i.e., to review them as "distinct elements".[634]

372. The Panel noted that "{t}he European Communities does not contend that the land reclamation was undertaken for reasons unrelated to the needs of Airbus, and then, afterwards, independently, the land was rented to Airbus." Indeed, said the Panel:

> The European Communities has submitted no evidence that would suggest that the Hamburg authorities would have undertaken the reclamation of wetlands in the Mühlenberger Loch and Ruschkanal but for the fact that it was necessary to reclaim the land in order to make possible the expansion of Airbus' existing facilities in Hamburg, to enable Airbus to assemble the A380 at that facility. Indeed, in its second written submission, the European Communities acknowledges that the land reclamation was undertaken to accommodate Airbus' needs in connection with assembly of the A380.[635]

373. Moreover, none of the facts that the EU pointed to "supports the basic premise of the European Communities, that we must consider as distinct elements the land reclamation, the building of the dykes, and the lease of the land and special purpose facilities." Instead, the Panel concluded that:

> {w}e agree with the United States that the lease of the land and special purpose facilities to Airbus *cannot be separated* from the creation of the land, including the flood protection measures and the building of the special purpose facilities, because it was necessary to create the land in the first place in order to allow the remainder of the project, including the building and subsequent lease of the special purpose facilities, to be undertaken . . . . It is clear from the evidence before us that the land reclamation in question was undertaken in order to make possible the expansion of Airbus' existing facilities, and not for any independent purpose. Thus, it is part of an integrated project to provide a site adjacent to Airbus' existing Finkenwerder site for expansion of its facilities.[636]

374. The Panel found further support for its conclusion in that

> {t}he circumstances surrounding the creation of the Mühlenberger Loch site, including all aspects discussed above, clearly demonstrate to us that the Hamburg authorities were not simply "aware" that Airbus would be the first user of the site, but undertook the entire project specifically in order to enable Airbus to expand

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634 Panel Report, para. 7.1074.

635 Panel Report, para 7.1075 (emphasis added).

636 Panel Report, para 7.1077 (emphasis added).

> its existing facilities . . . No other beneficiary was considered at any time – the project was undertaken exclusively for Airbus.[637]

Thus, the facts show that from the outset, the government of Hamburg sought to help Airbus by creating new land in Mühlenberger Loch. The sole purpose for the project was the end result of providing the new land to Airbus. To say the same thing in a slightly different way, if not for the objective of giving land to Airbus, the land would not exist. They were a seamless, integrated effort. The "creation" and "provision" cannot be viewed separately because they are one and the same.

375. Similar considerations emerge from the Panel's findings with respect to the extension of the main runway at Bremen airport. Specifically, the Panel found that:

> {i}t is clear from the evidence before us that the extension of the runway at Bremen airport, and the associated noise reduction measures, were undertaken by the Bremen city authorities specifically for Airbus' needs . . . For example, the January 1989 contract relating to the airport specifies that that {sic} the use of the runway extensions should be limited to ensuring the transport of Airbus wings assembled in Bremen.[638]

376. The Panel observed that a motion in the Bremen Parliament "cited costs of DM 40 million for the construction of the 'company runway'." The motion referred to the "extension of a 'company runway at the Bremen Airport . . . . being done exclusively for use in the industrial transport of MBB Bremen to transport the Airbus wings' ."[639] During discussions in the Bremen Parliament prior to the eventual approval of this motion, "it was noted that the planned "restrictions in use" limited the use of the extensions 'only for {Airbus predecessor company} MBB'."[640] The Panel concluded:

> Having found, as a matter of fact, that the runway extension was undertaken to fulfill Airbus' specific needs, and that the use of the extended runway is *de jure*

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[637] Panel Report, para 7.1082. See also the EU's own Appellant Submission, Summary of Panel's Findings, para. 1021. Not only did the Panel find that there "no legal requirement that we separate the various elements of the project for purposes of our analysis", but also that "we {are not} persuaded that there is any *factual* basis that necessitates separating the elements as proposed by the European Communities. It is clear from the evidence before us that the land reclamation in question was undertaken in order to make possible the expansion of Airbus' existing facilities, and not for any independent purpose. Thus, it is part of *an integrated project* to provide a site adjacent to Airbus' existing Finkenwerder site for expansion of its facilities. We therefore proceed on the basis of an analysis of the entire project as a *single measure*." Panel Report, para 7.1078 (emphasis added).

[638] Panel Report, para 7.1116.

[639] Panel Report, para 7.1116.

[640] Panel Report, para 7.1116 (original footnotes omitted). The Panel noted, moreover, that the use of the full length of the extended runway "is limited to Airbus *by regulation*." Panel Report, para 7.1118 (emphasis added).

> limited to Airbus for the purpose of transporting aircraft wings, we do not agree with the European Communities that only the right to exclusive use of the extended runway is at issue here. Rather, *the entire project*, extending the runway, the associated noise reduction measures, and the right of exclusive use, constitute a financial contribution to Airbus, within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[641]

Again, these facts do not indicate any difference between the creation of this infrastructure and its provision to Airbus. The runway extension would not have occurred without the objective of transferring it to Airbus. It was conceived, planned, and executed as part of a single package. Treating one or more elements as "creation" and others as "provision" would be an artificial exercise with no grounding in reality or in the SCM Agreement.

377. Finally, with respect to the ZAC Aéroconstellation site, the Panel found that:

> Indeed, it is clear to us that the development of the ZAC Aéroconstellation site and the construction of the EIG facilities was undertaken specifically to enable Airbus to situate an A380 final assembly line in an advantageous location, in France. The ZAC Aéroconstellation is specifically designated as a site for aeronautics-related activities, and the sale of land in the ZAC was limited to companies in the aeronautics industry, and the purchasers are companies concerned specifically with the assembly and testing of the A380. The EIG facilities are, as the European Communities itself argues, necessary to the efficient and effective operation of the A380, assembly operations for which the site was developed, as well as for other aeronautics related activities undertaken at the site. Moreover, we do not accept the European Communities' view that Airbus purchased "undifferentiated" industrial land, and that similar land is available throughout Europe. It is clear to us that the ZAC Aéroconstellation site was, from the outset, uniquely adapted to Airbus' needs, from its situation next to and connection to the Toulouse-Blagnac airport, to the highly specific EIG facilities.[642]

The elements from the Mühlenberger Loch project and the Bremen airstrip extension appear again – project conception, project planning, and execution all directed at provision of a specialized site to Airbus. The same conclusion also applies – identifying some of these steps as "creation" of the site and others as its "provision" would be an artificial exercise with no grounding in the SCM Agreement or in reality.

378. Therefore, even if the Appellate Body were to find that, in principle, the creation of infrastructure and its provision could be different, the situation of tailor-made, user-specific

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[641] Panel Report, para 7.1121 (emphasis added).

[642] Panel Report, paras 7.1177-7.1178.

infrastructure in this dispute does not fit with the principle. That is, with respect to these particular facts at the least, they are the same.

3. The Panel did not ignore the EU's "creation of infrastructure" argument but rather explicitly rejected it

379. The EU repeatedly accuses the Panel of "ignoring" the EU argument that the creation of infrastructure is different from its provision.[643] This is not the case. The Panel referred to the EU's "two-step approach" argument in paragraphs 7.1042 and 7.1043 of its report, and rejected it. (The two steps are first that "the government may build general infrastructure," and second "a government may limit the use of that general infrastructure to certain companies."[644]) The Panel explained that:

> we are not convinced . . . by the European Communities' argument that a distinction must be drawn between, and a two-step analysis conducted in respect of, the "provision" of infrastructure in the sense, as we understand it, of creating the infrastructure in question, and subsequent limitations on use or access.[645]

380. In fact, the Panel found that if one were to follow such a "two-step approach", this "would imply that the general nature of some infrastructure is inherent and that circumstances surrounding the provision of that infrastructure do not change its general nature. We, however, consider that if an evaluation of the circumstances surrounding the creation of the infrastructure demonstrates that it was provided to a single entity or a limited group of entities, this supports the conclusion that the infrastructure created is not properly considered general."[646] The Panel added that "this is, in our view, particularly the case where the infrastructure in question was created for the particular needs of the entity or group which has the right to access or use of that infrastructure."[647]

B. The Panel correctly found that the Hamburg, Toulouse and Bremen infrastructure projects each conferred a 'benefit' within the meaning of Article 1.1(b) of the SCM Agreement

381. The Panel, having found that the provision of the Mühlenberger Loch project, the Bremen runway extension, and the ZAC Aéroconstellation site were the relevant financial contributions, based the benefit analysis on how much a market investor would charge to provide comparable infrastructure. Each of the infrastructure projects was undertaken specifically for

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[643] EU Appellant Submission, paras. 1026 and 1031.

[644] EU Appellant Submission, para. 7.1042.

[645] Panel Report, para 7.1043. The Panel also referenced the EU's argument earlier, in para 7.1019.

[646] Panel Report, para 7.1043. The Panel also referenced the EU's argument earlier, in para 7.1019.

[647] Panel Report, para 7.1043. The Panel also referenced the EU's argument earlier, in para 7.1019.

Airbus and to suit its particular needs. In each case, the government made substantial upfront investments to create infrastructure tailor-made for Airbus which the company would otherwise have had to create itself or rely on commercial project developers to create. The EU argues on appeal that this standard is inconsistent with Article 1.1(b) of the SCM Agreement because it adopted what amounts to a "return-to-government" or "cost-to-government", rather than a "benefit-to-recipient" standard."[648] Taking into account those specific facts as well as the legal standard set out in Article 1.1(b), each of the EU's arguments in this respect, like those it made concerning the Panel's findings of "financial contribution," fails.

382. First, the EU's charge that the Panel applied a "cost-to-government" standard fails because the Panel did no such thing. The Panel understood that "a benefit will be conferred whenever a financial contribution is granted *to a recipient* on terms more favourable than those available *to the recipient* in the market."[649] It used the cost of the initial infrastructure development not because that was how much the subsidy cost the government, but as a *factual* element indicative of the return that a commercial investor would have demanded. Thus:

> While the parties agree that, in this case, no commercial investor would have undertaken the project, it is clear to us that this is because the investment necessary in reclaiming the land was disproportionately large in comparison to any potential returns. The parties are in general agreement as to the market value of industrial land in Hamburg, and the value of the Mühlenberger Loch land – between EUR 71,600,000 and EUR 85,900,000, according to the United States, or approximately [***], according to the EC. It is clear that a market-based rental on land of that value is necessarily far less than would be a market based rental on an investment in land worth EUR 750 million. Indeed, the European Communities does not even suggest that the rental paid by Airbus provides a market return on the investment in reclaiming the land. Yet, in our view, a market actor who invested EUR 750 million in land, whether by purchasing it or by creating it through reclamation would, in renting the property, seek a return on that investment.[650]

383. That approach, as the Panel itself indicates, is not a "cost-to-government" approach. Instead, it simply asks what "price" a commercial real estate developer, under the same circumstances would have demanded to provide a tailor-made site, a runway extension, or facilities exclusively for a certain company or companies. The best proxy for that market price is what a commercial investor would have sought as a return on that investment, namely, recovery of its cost plus a certain profit (a notion the EU does not dispute).[651] The "cost" to the

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[648] EU Appellant Submission, para 1052.

[649] Panel Report, para 7.1092 (emphasis added).

[650] Panel Report, para 7.1094.

[651] Panel Report, para 7.1094.

government of developing the infrastructure involved was a *factor* in determining whether Airbus would have had to pay more on the market to receive the same thing it actually received from the governments. It was not itself the *standard* against which the Panel determined the existence of a benefit.[652]

384. Panels and the Appellate Body have previously found that, although the introductory words of Article 14 state that the guidelines it establishes apply for purposes of Part V of the SCM Agreement, Article 14 constitutes relevant context for the interpretation of "benefit" in Article 1.1(b).[653] Article 14(d) supports the Panel's approach, as it specifies that:

> the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for *less than adequate remuneration*, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale). (emphasis added)

That is exactly what the Panel did.[654] By directing the benefit inquiry at "whether a market actor would have provided the good or service to the recipient at the time, on the same terms and conditions as the government provision at issue,"[655] it evaluated the adequacy of the remuneration paid by Airbus. On that basis, in addressing the Mühlenberger Loch project, the Panel concluded that "a market actor who invested EUR 750 million in land, whether by purchasing it or by creating it through reclamation, would, in renting the property, seek a return on that investment."[656] It followed a similar approach for the Bremen runway extension and ZAC Aéroconstellation.

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[652] Indeed, it is worth noting in this respect that the EU itself acknowledges the possible relevance of" return to government" or "cost to government" (the EU defines both as two sides of the same coin; see footnote 1426) in the context of Article 1.1(a)(1)(i), yet at the same time disputes that it can be a relevant factor in determining the appropriate market benchmark for the "benefit to the recipient" under Article 1.1(a)(1)(iii).

[653] Panel Report, para 7.1355-7.1356, citing *Canada – Aircraft (AB)*, para 155; *Japan – DRAMS (Korea)*, para 173.

[654] Article 14(d), by enumerating a non-exhaustive list of factors that may be taken into account in determining the adequacy of remuneration – "including price, quality, availability, marketability, transportation and other conditions of purchase or sale" – explicitly acknowledges the highly fact-specific nature of the analysis.

[655] *E.g.*, Panel Report, para 7.1091.

[656] Panel Report, para 7.1094.

385. The European Union does not dispute that the cost of the Mühlenberger Loch project was approximately €750 million,[657] or that a private investor[658] would spend that sum of money only if it could obtain a commercial return. Nor does it argue against the accuracy of comparable findings for the Bremen runway extension or ZAC Aéroconstellation. The EU instead contends that these figures are "pointless"[659] because Article 14(d) of the SCM Agreement, "guides towards assessing any 'benefit' based on market value and price, rather than any return earned."[660] As the text quoted in the preceding paragraph indicates, that is not what Article 14(d) does. It frames the benefit analysis in terms of "adequacy of remuneration" based on "prevailing market conditions," including a number of factors. The Panel followed the approach laid out in Article 14(d) by considering the price the authorities paid for creating the infrastructure in question, based on prevailing market conditions. These would obviously include such considerations as the fact that the land that Airbus wanted was at the bottom of the River Elbe, or did not have specialized features desirable to aerospace companies.

386. Second, the EU's arguments based on the panel and Appellate Body reports in *Canada – Aircraft* also fail. The Panel's approach to the value of the infrastructure projects is entirely consistent with the Appellate Body's findings on the concept of "benefit" in Article 1.1(b) of the SCM Agreement and its definition of a "cost-to-government" approach. Specifically, in *Canada – Aircraft*, the Appellate Body found "that the word "benefit", as used in Article 1.1(b), implies some kind of comparison."[661] There can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been".[662] For that determination, said the Appellate Body, "the marketplace provides an appropriate basis for comparison".[663]

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[657] The EU favored a figure of €693 million, based on initial estimates of the cost of the project. Panel Report, para. 7.1088. The Panel instead found that a revised figure of €750 million, which included financing costs, was more accurate. Panel Report, para. 7.1089. The EU does not dispute this aspect of the Panel's findings.

[658] The EU also argued that the Panel "wrongly considered the government an investor, which is required to obtain a return on its investment. However, under Article 1.1(a)(l)(iii), the government must be considered as a provider of a good or service. Any benefit must, therefore, be measured against the market value of that good or service provided, not the cost of creating it." EU Appellant Submission, para 1067. That argument fails for the same reasons listed in the text above. In each of the fact patterns involved, moreover, the *provider* of the goods or services is in fact the same person *investing* in the creation of those goods and services. As we discussed above, the creation of the infrastructure and the subsequent lease or other transaction completing the "provision" of that infrastructure to the recipients are one and the same integral "provision" of infrastructure.

[659] EU Appellant Submission, para. 1037.

[660] EU Appellant Submission, para 1067.

[661] *Canada – Aircraft (AB)*, para. 157.

[662] *Canada – Aircraft (AB)*, para. 157.

[663] *Canada – Aircraft (AB)*, para. 157.

387. The EU cites these principles in its appeal, and argues that the marketplaces in question are for the rental of industrial property in Hamburg, the usage of runways in Bremen, and the purchase of industrial property in the Toulouse region.[664] But in none of these cases did Airbus receive the item the EU seeks to value in the marketplace in which the EU seeks to value it. The proper marketplaces are for the reclamation and protection of swampland along the River Elbe, for exclusive use of a runway in Bremen, and customized aerospace-ready property in Toulouse. In addition, the standard under Article 14(d) of the SCM Agreement for evaluating these items is not the generalized "market value," but the adequacy of the remuneration received by the government that provided the infrastructure. By examining what a commercial investor would expect, the Panel satisfied that standard.

388. The European Union at one point criticizes this approach as "economically naive" because "{n}o market actor can, as the Panel implies, set a price for a good simply based on its own investment or cost, and independent from the market value of the good created."[665] This criticism simply reflects the central flaw of the EU analysis of these projects. It assumes that a good, in the form of infrastructure, specially designed and developed for the recipient, can properly be compared to an ordinary good. Such a comparison is invalid. The Panel's characterization of the Mühlenberger Loch project as "tailor-made" suggests a useful analogy. Clothing designed by a tailor for a particular person will invariably cost more than comparable clothing purchased off the rack at a store because it is customized. The price will be negotiated up front as a fixed fee, or based on hours worked. These cannot be compared to average, or "off-the-rack" goods. Thus, the Panel's approach demonstrates a sophisticated understanding of the economics of the situation. It is the EU that is being unrealistic.

389. In sum, contrary to the EU suggestions, the Panel did not err in its interpretation and application of Articles 1.1(a)(1)(iii) and 1.1(b) of the SCM Agreement. It properly found that the creation and provision by European government authorities of the Mühlenberger Loch project, the extension of the runway at Bremen airport, and the Aéroconstellation site constituted the "provision of goods or services other than general infrastructure" within the meaning of Article 1.1(b) of the SCM Agreement, and conferred a "benefit" under Article 1.1(b). Those findings, as demonstrated above, were entirely consistent with the text of the SCM Agreement, as well as prior panel and Appellate Body reports. The United States, therefore requests that the Appellate Body reject the EU's appeal in this respect and uphold the Panel's findings.

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[664] EU Appellant Submission, paras. 1068-1069, 1081, and 1086.

[665] EU Appellant Submission, para. 1074.

VII. THE PANEL CORRECTLY FOUND THAT FRENCH GOVERNMENT EQUITY INFUSIONS TO AÉROSPATIALE CONFERRED A BENEFIT

390. The grim financial condition of Aérospatiale, one of the Airbus manufacturing companies, during the period 1987-1998 is beyond question. The company routinely lost money, and performed far worse than comparable companies in the French aerospace and defense sectors. Nonetheless, in addition to LA/MSF and the specific non-general infrastructure measures discussed above, the French State repeatedly gave Aérospatiale new capital – cash transfers of FF 1.25 billion in 1987, another FF 1.25 billion in 1988, FF 1.4 billion in 1992, and FF 2 billion in 1994, and a transfer of FF 5.28 billion in shares of Dassault Aviation in 1998. In light of the company's dire financial performance, along with other considerations, the Panel concluded that each of these transfers was inconsistent with the usual investment practice of private investors in France and, therefore, conferred a benefit. The EU does not contest that these were financial contributions, or that they were specific.

391. As the European Union itself indicates, this new capital was provided to Airbus "to fund the expansion in LCA product development", to "ramp-up for the manufacture of the A320, with the first delivery due in 1988" and for "a new long-haul programme that was eventually launched in 1987 as the A330/A340, with the first delivery in 1993."[666] In the case of the 1998 infusion, the new capital enabled the further consolidation of the French aerospace and defense sector and future public offering of Aérospatiale shares. This ambitious investment programme, said the EU, "required additional equity capital as a base for further borrowing capacity; in addition to the initial design cost, the production of a new aircraft requires significant capital investment in specialised facilities and equipment."[667] These billions of French francs of equity infusions were provided in addition to LA/MSF that the French and other Airbus governments provided during the same period of time.

392. The United States argued and the Panel found that each of the equity infusions that the French government provided to Aérospatiale constituted a "financial contribution" in the form of an "equity infusion" (i.e., a direct transfer of funds) and that each conferred a "benefit". In particular, the Panel found that these equity infusions were provided to Aérospatiale at a time when that company was unable to attract any private capital, and no private investor would have done the same. The EU challenges this finding on appeal. In particular, it argues that certain evidence relating to Boeing's performance in the same time period should have been given greater weight and that, in the case of the 1998 equity infusion, the Panel should have taken into account a second, subsequent transaction (which it actually did). Each of the EU's arguments, in other words, fails.

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[666] EU Appellant Submission, para 1094.

[667] EU Appellant Submission, para 1094.

393. Below, we discuss the Panel's findings and the EU's appeal with respect to the 1987 through 1994 equity infusions first, followed by a discussion of the Panel's findings and the EU appeal concerning the 1998 equity infusion, second.

A. The Panel adopted and applied the right legal standard in finding that the 1987 through 1994 equity infusions conferred a benefit under Article 1.1(b) of the SCM Agreement

394. At each of the relevant points during the period 1987-1994, Aérospatiale was in dire condition. Profits were virtually non-existent, return on equity was low or negative, and the company was continually unable to cover debt payments. Even so, the French government invested more than FF 6 billion in Aérospatiale during this time. Article 14(a) of the SCM Agreement provides that an equity infusion confers a benefit when it is "inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member." In applying this standard, the Panel considered a broad range of information regarding Aérospatiale. It looked at data on the company's past performance compared with peer group companies in the French aerospace and defense sectors. It looked at statements by company officials and in financial reports. It looked at market analyses. The Panel then went on to review the French equity infusions in light of the total configuration of the facts. It concluded that particular weight should be given to the financial performance ratios of Aérospatiale in the relevant years which, compared to a peer group of other French aerospace and defense companies, were absolutely abysmal. In light of that, as well as all of the other evidence on the record, the Panel found that a private investor, based on the same information available to it, would not have made the investments that the French government did.

395. On appeal, the EU argues that the Panel did not properly identify and apply the standard to assess whether the equity infusions conferred a "benefit". The EU wants the Appellate Body to believe that the Panel identified one standard and applied another; and that the Panel failed to review any evidence supporting the standard that it had established. The EU also argues, in the alternative, that the Panel erred by disregarding certain evidence relating to Boeing and its investors. According to the EU, the Panel should have used the behavior of Boeing's investors vis-à-vis Boeing as its "benchmark", rather than considering the financial performance of a peer group of aerospace and defense companies in France. Each of the EU's arguments in this respect fails.

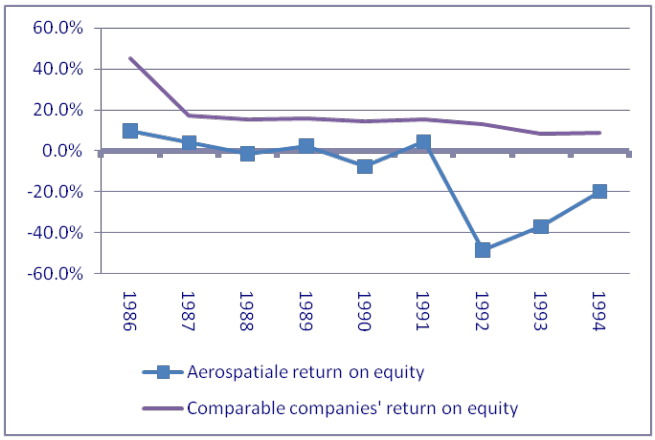
1. Factual background of the 1987 through 1994 French equity infusions

396. Before addressing the individual claims of error raised by the EU, it is useful to review the evidence that the Panel cited with regard to the equity infusions that the French government provided to Aérospatiale between 1987 and 1994. Perhaps the best summary of the situation in the 1987-1994 period came from Aérospatiale's president, who is now CEO of Airbus' parent company EADS. He told journalists that the company's state was "repellent" from an investor's

point of view.[668] He made this statement in 1994, at the end of an eight-year period in which the French government made almost FF6 *billion* in capital contributions to Aérospatiale, not to mention billions more in LA/MSF for the A320 (starting in 1984), A330/A340 (between 1987 and 1996), and in the ramp-up to Airbus' launch of the A330-200 (in 1995) and A340-500/600 (in 1997).

397. The facts relied upon by the Panel fully support this characterization. Based on data from Aérospatiale's financial reports and the financial reports of comparable French companies, the Panel concluded that "between 1985 and 1994, Aérospatiale's financial ratios were uniformly and, in many cases, significantly inferior to the corresponding average ratios of its peer group of companies."[669] The financial ratios to which the Panel referred were Aérospatiale's return on equity, debt-to-equity ratio, and debt coverage ratio, as compared to other companies engaged in the aerospace and defense sectors.[670] Each series of data demonstrates the validity of the Panel's conclusion that Aérospatiale's financial ratios were uniformly and significantly inferior to comparable companies.

398. The return on equity is the ratio of a company's income divided by the value of shareholder equity, and measures the extent to which shareholders' investment is producing revenue that can be returned to them in the form of dividends or used to increase the value of the company. As the graph shows, Aerospatiale's return on equity during the 1986-1994 period was rarely above zero, and frequently far below zero. In contrast, other French companies in the aerospace and defense sectors consistently had positive return on equity between 10 and 35 points higher than Aérospatiale's.[671]



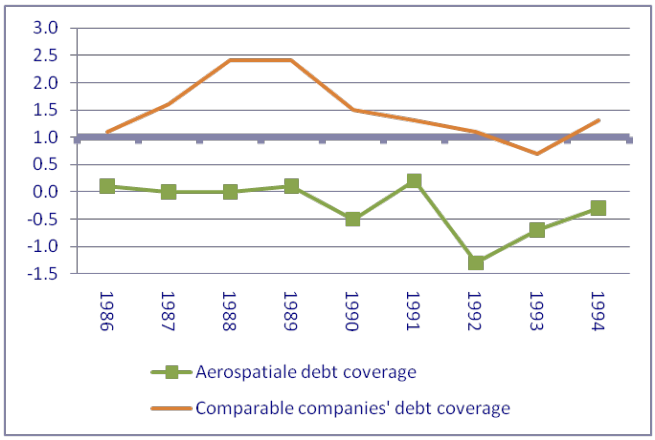
[668] EC to review France's Aérospatiale capital injection, *Aerospace Daily*, pp. 217-218 (Feb. 9, 1994) (Exhibit US-275).

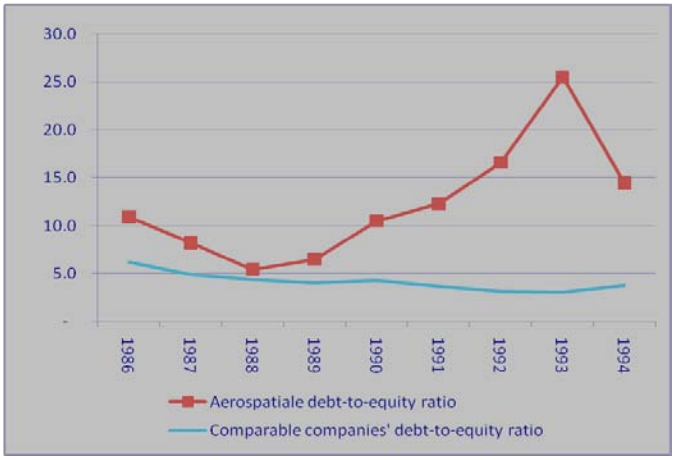
[669] Panel Report, para 7.1360.

[670] Panel Report, paras 7.1360, 7.1363, 7.1368 and 7.1372.

[671] All data are from Exhibit US-274.

399. The debt coverage ratio is the ratio of a company's income to its debt payments, and measures the company's ability to meet its debt payments on an ongoing basis. A debt coverage ratio of less than 1.0 – as Aérospatiale's were – indicates a company that cannot pay its debt out of profits. In contrast, other companies in the French aerospace and defense sectors consistently maintained ratios of greater, and often far greater, than 1.0. Aérospatiale effectively spent most of the period on the brink of bankruptcy.





400. The debt-to-equity ratio is the ratio of a company's shareholder equity to its total liabilities, and measures the extent to which the company is leveraged. A company that is overly leveraged is at a substantial risk of being unable to meet its long-term debt obligations. For almost all of the 1986-1994 period, Aérospatiale's debt-to-equity ratio was significantly, and in some years vastly, higher than other companies in the French aerospace and defense sectors. These are factors a private investor would have certainly taken to heart.

401. The Panel also reviewed a range of other facts on the record. In particular, this included statements in various Airbus and Boeing annual reports and investor publications; market and business forecasts published by Airbus GIE, and forecasts published by Boeing and the U.S. government.[672] Having reviewed this evidence, it obviously accorded some of it greater weight than other. Specifically, the panel concluded that "{t}he European Communities has submitted evidence purporting to demonstrate that at the times at which the French government made the

[672] Panel Report, paras. 7.1361, 7.1364-7.1366, 7.1369-7.1370, and 7.1373-7.1374.

various equity infusions, Aérospatiale had positive future prospects which, when coupled with the company's commitment to invest in product development, justified the commitment of expansion capital."[673] Because of the nature of this evidence, the Panel was "inclined to accord the evidence in {certain} of these categories relatively less weight than the evidence of Aérospatiale's past financial performance in comparison to that of its peers, coupled with management's statements as to expectations and prospects for the company contained in Aérospatiale's annual reports."[674] Based on that finding, and following its review of the totality of the facts involved, the Panel found that, with respect to each of the equity infusions provided between 1987 and 1994, a "benefit" had been conferred and that each constituted an "actionable subsidy" within the meaning of Articles 1 and 2 of the SCM Agreement. The Panel rejected each of the EU's arguments to the contrary.

2. The Panel adopted and applied the correct legal standard to determine whether the equity infusions conferred a benefit and performed a thorough and objective assessment of the facts

402. On the one hand, the EU specifically acknowledges that the Panel set out the correct legal standard,[675] namely whether the French government's equity infusions were inconsistent with the usual investment practice of private investors in France.[676] On the other hand, it argues that the Panel stated "that the relevant legal standard was whether the French State 'could have expected to achieve a *reasonable rate of return* on its investment'"[677] and then subsequently failed to "identify, much less assess" any evidence relating to *that* standard. The EU's argument fails because it is internally inconsistent and unsupported by the actual findings of the Panel.

a. The Panel identified the correct legal standard

403. The Panel correctly found that under the SCM Agreement, an equity infusion to Aérospatiale would confer a benefit if it were "inconsistent with the usual investment practice of private investors in France." It recognized that applying this standard involves an inquiry into whether a private investor would have made the same "investment decisions" that the French government did. The Panel then went on to review all of the evidence under that legal standard. Thus, there is no basis for the EU's assertion that "the Panel stated that the relevant legal standard was whether the French State 'could have expected to achieve a *reasonable rate of return* on its investment'."[678]

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673 Panel Report, para 7.1361.

674 Panel Report, para 7.1361.

675 EU Appellant Submission, paras. 1100-1101.

676 *E.g.*, Panel Report, paras. 7.1367, 7.1371, 7.1375, and 7.1380.

677 EU Appellant Submission, para 1100.

678 EU Appellant Submission, para 1100.

404. Specifically, the Panel observed that "it is well established that a financial contribution confers a benefit within the meaning of Article 1.1(b) where the terms of the financial contribution are more favourable than the terms available to the recipient in the market."[679] The Panel noted that Article 1.1(b) of the SCM Agreement does not describe exactly how to perform this analysis, but that Article 14 of the SCM Agreement provides further guidance.

405. Thus, the Panel explained that "{o}ur approach to the issue of benefit in the context of the French government's capital investments in Aérospatiale is to ask whether the United States has demonstrated that a private investor would not have made the capital investments in question based on information available at the time."[680] On this basis, it concluded that each of the French government's investment decisions was "consistent with the usual investment practice of private investors in France."[681] The European Union in fact agrees that this is the correct standard, although it typically omits the requirement that the private investors be in France.[682]

b. The Panel applied the standard that it set out

406. The Panel applied the "usual investment practice of private investors in France" standard throughout its analysis. It did not, as the EU argues, offer an "initial nod"[683] but then "apply{ } a different standard, i.e., a "reasonable rate of return" standard."[684] Rather, the Panel Report shows clearly that the Panel identified *and* applied precisely the standard that it set out and that the EU agrees is the correct one.[685] It noted, in that context, that a private investor, of course, will seek a "reasonable rate of return" on an investment, but it did not elevate this observation to become a standard in and of itself.

407. The Panel summarized its approach to the Article 1.1(b) analysis quite clearly:

> Our approach to the issue of benefit in the context of the French government's capital investments in Aérospatiale is to ask whether the United States has

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[679] Panel Report, para 7.1353, citing *Canada – Aircraft (AB)*, paras 157-158; *US – Countervailing Duty Investigation on DRAMS*, para 7.179; *EC – Countervailing Measures on DRAM Chips*, paras 7.173-7.175; *Japan – DRAMS (Korea)*, para 7.256.

[680] Panel Report, para 7.1358.

[681] Panel Report, paras. 7.1367, 7.1371, and 7.1375.

[682] EU Appellant Submission, paras. 1103 (acknowledging that the standard referred to by the Panel was the correct one), and 1105 (referring to it as the "equity worthiness" standard).

[683] EU Appellant Submission, para 1105, 1103-1105.

[684] EU Appellant Submission, para 1105.

[685] Indeed, the standard actually applied by the Panel, if anything was too high. The Panel asked whether private investors would have made the investments in question at all (and answered that they would not); Article 14(a), by contrast, requires a comparison only to the "*usual* investment *practice* of private investors". The terms "usual" and "practice" both suggest that a mean average, as opposed to a more absolute standard applies.

> demonstrated that a private investor would not have made the capital investments in question based on the information available at that time. In this regard, we note that a private investor evaluating an equity investment in an enterprise will be seeking to achieve a reasonable rate of return on its investment. Information relevant to such an evaluation would include current and past indicators of an enterprise's financial performance (including rates of return on equity) calculated from the enterprise's financial statements and accounts, information as to the future financial prospects of the enterprise, including market studies, economic forecasts and project appraisals, equity investment in the enterprise by other private investors, and marketplace prospects for the products produced by the enterprise.[686]

408. The Panel, in other words, did three things. First, it set out a legal standard (whether "a private investor would not have made the capital investments in question based on the information available at that time"). That standard, if anything, is higher than what is required by the SCM Agreement which calls merely for a comparison to the "usual investment practice of private investors". Second, it "note{d}" that to determine whether that standard is met, it is relevant to recognize "that a private investor evaluating an equity investment in an enterprise will be seeking to achieve a reasonable rate of return on its investment." Finally, the Panel provided an overview of "{i}nformation relevant to such an evaluation," namely, an evaluation whether "a private investor would not have made the capital investments in question based on the information available at that time" and recognizing "that a private investor … will be seeking to achieve a reasonable rate of return …". Such information, said the Panel, includes "current and past indicators of an enterprise's financial performance (including rates of return on equity) calculated from the enterprise's financial statements and accounts, information as to the future financial prospects of the enterprise, including market studies, economic forecasts and project appraisals, equity investment in the enterprise by other private investors, and marketplace prospects for the products produced by the enterprise."[687]

409. Under the Panel's standard, an expectation of a reasonable rate of return is simply part of the usual investment practice of private investors as a matter of economics. To put it differently, the Panel did not *apply* a different standard (namely, whether the French government "could have expected to achieve a reasonable rate of return"). Rather, it identified considerations that informed its evaluation of the standard set out in Articles 1.1(b) and 14(a) of the SCM Agreement. The fact, which the EU does not dispute, that a private investor would seek a reasonable return was one of those considerations, and suggested several factors for the Panel to include in its analysis into whether the facts surrounding each infusion satisfied the standard. Thus, the Panel correctly articulated the standard and identified a set of factors that allowed it to apply that standard correctly.

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[686] Panel Report, para 7.1358.

[687] Panel Report, para 7.1358.

c. The Panel performed a thorough and complete assessment of the facts and did not "fail{ } to identify, much less assess" any relevant evidence

410. The Panel equally did not "fail{ } to *identify*, much less *assess*" the relevant evidence, or fail to make an objective assessment of the facts.[688] Rather, the Panel performed a thorough analysis of the facts and, on that basis, concluded that the equity infusions were inconsistent with the usual investment practice of private investors and, accordingly, conferred a benefit within the meaning of Article 1.1(b) of the SCM Agreement. The EU arguments against this conclusion suffer from the same flawed reading of the Panel's findings that we discussed in sections VII.A.2.a and VII.A.2.b.

411. As the United States discussed above, the Panel determined that a range of information may be relevant to establish whether a government-provided equity infusion was consistent with the "usual investment practice of private investors" and recognizing "that a private investor . . . will be seeking to achieve a reasonable rate of return."[689] This includes "current and past indicators of an enterprise's financial performance (including rates of return on equity) calculated from the enterprise's financial statements and accounts", "information as to the future financial prospects of an enterprise, including market studies, economic forecasts and project appraisals", "equity investment in the enterprise by other private investors", and "marketplace prospects for the products produced by the enterprise".[690]

412. The Panel returned to these factors throughout its analysis[691], as well as to the general benchmark that it had set out, namely, whether private investors would have made the capital investments in question at all.[692] In doing so, the Panel relied on an extensive factual record. It asked many questions to the parties and, during five years of intensive panel proceedings, each

[688] EU Appellant Submission, para 1106 (emphasis in original).

[689] Panel Report, para 7.1358.

[690] The Panel's approach of looking at this evidence, moreover, comported with actual market practice. It is rarely possible for a private investor, at the time it decides to make an investment, to have clear expectations as to the actual rate of return it can expect and to make a decision based on any one single fact or piece of evidence. Rather, an investor will try to discern the overall financial health and prospects of a company based on the total configuration of the facts available to him at the time of investment. The evaluation includes financial ratios such as the ones relied on by the Panel in particular.

[691] To the extent that the EU believes the Panel should have considered additional factors, it had every opportunity to try to raise them in rebuttal of the United States' *prima facie* case. Rather than do so, however, the EU withheld certain key information from the Panel. The United States requested the Panel to draw logical inferences based on this refusal. Panel Report, para. 7.1367, note 4516. Given its conclusions with regard to the evidence presented, the Panel did not find it necessary to draw such logical inferences. The United States agrees, and notes that the EU is to blame if the Panel lacked evidence on any particular factual element.

[692] *E.g.*, Panel Report, para 7.1360 (final sentence), 7.1367 (first sentence), 7.1371 (first sentence), and 7.1375 (first sentence).

of the parties laid out the relevant facts in significant detail in dozens of pages of written and oral submissions, along with numerous exhibits and attachments.

413. The Panel's assessment of the potential for a "reasonable return" was an important part of that analysis. The evidence on which the Panel relied, including market forecasts and studies, and statements contained in Airbus's annual reports, indicate perceptions of the company's commercial expectations and anticipated future performance.[693] The financial ratios that the Panel reviewed and to which it attributed particular weight also reflect such potential (or increased risk) for future investment returns. Financial ratios as bad as Aérospatiale's were at the time signal that the company will need new equity over and over again, just to keep it afloat and competitive. Thus, when the Panel found that this information, taken together, indicated that the government's decision was not consistent with the usual practice of private investors in France, that necessarily implied that the investment did not promise a rate of return reasonable in the eyes of a private investor.

414. In sum, there is no basis for the EU's argument that the Panel somehow "failed to identify, much less assess" any evidence relating to this particular determination. In fact, the Panel performed a detailed and thorough assessment and produced a careful analysis as to each of the specific factual elements it considered relevant.[694] The United States, therefore, asks the Appellate Body to reject the EU's primary claim of error and uphold the Panel's finding of benefit under Article 1.1(b) of the SCM Agreement.

3. Boeing's performance was not a relevant "benchmark" and, even if it was, confirmed rather than undermined the Panel's findings

415. The European Union argues that the Panel erred by basing its analysis of the "usual investment practice of private investors in France" on Aérospatiale's peer companies in France, rather than on Boeing. Under this view, the fact that *Boeing's* investors continued to buy and sell *Boeing's* shares on the U.S. stock exchange is somehow probative of what the European Union calls the "equity worthiness" of Aérospatiale. According to the European Union, the Panel should have used the behavior of Boeing's investors vis-à-vis Boeing, as the market "benchmark" rather than the financial performance of the peer group of aerospace and defense companies in France on which the Panel relied. The Panel, however, specifically rejected the

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[693] Panel Report, paras. 7.1361, 7.1366, 7.1370, and 7.1374.

[694] Nor did the Panel fail to make an "objective assessment of the facts" by not identifying what rate of return a private investor would have considered "reasonable" or how that rate differs from the rate of return anticipated by the French State. EU Appellant Submission, para. 1107. The Panel's non-mathematical evaluation of the adequacy of the rate of return is perfectly acceptable in the context of Part III of the SCM Agreement. Moreover, information on the French State's anticipated rate of return was uniquely available to the EU and the French State, which provided no such information during the course of the proceeding. Panel Report, para. 7.1376. Such information might have formed the basis for a rebuttal. For the Panel to have attempted to raise that point itself would be to make the case for the EU, which is not consistent with the role of a panel under the DSU. *Japan – Varietals*, para. 127-129; *US – Shrimp (AB)*, paras. 106 and 109.

this EU attempt to rely on certain information relating to the market for large civil aircraft in general, as well as Boeing's performance and outlook in that respect in particular.[695] The European Union's appeal provides no reason to consider the practice of Boeing's investors to be relevant.

416. First, it is important to note that the Panel did not base its analysis solely on the peer group comparison to which the EU refers. Rather, it based its findings on a careful review of the totality of the facts. Apart from the peer group numbers, this included Airbus' own market forecasts and statements in Aérospatiale's financial reports. Even if the Appellate Body were to agree with the EU's argument that Boeing's performance was somehow a relevant "benchmark", this would not by itself change the overall outcome of the Panel's analysis.

417. Second, the SCM Agreement clearly supports the Panel's approach, and not the EU's. Specifically, as the Panel noted, Article 14 of the SCM Agreement has previously been found to constitute relevant context for interpretation of Article 1.1(b). The Panel, in fact, relied on that provision to determine the Article 1.1(b) benchmark standard – "usual investment practice of private investors". Article 14(a) of the SCM Agreement, however, calls specifically for a comparison to "the usual investment practice … of private investors *in the territory of that {i.e., the subsidizing} Member*". The SCM Agreement, in other words, calls for a comparison to French peer group companies and French investors, not a U.S. company traded on U.S. financial markets. The Panel's own findings reflect this territorial focus on the behavior of private investors in France.[696]

418. Prior panel and Appellate Body reports make clear that Article 1.1(b) itself requires a comparison with "the market". The "market" in which Boeing's investors operate – the United States, U.S. stock exchange, U.S. dollar denominated, etc. – is of course neither the same nor easily comparable to the market in which Aérospatiale's investors or potential investors operate – France, the French stock exchange and, at the time, French franc denominated. The question is not who Aérospatiale or Airbus competes with in terms of its own product markets, but rather which financial markets it is a part of and where its investors are (predominantly) active. For Aérospatiale and in the 1987 through 1994 period, these were of course the French, not the U.S. financial and investment markets. (The same holds true for the French government.)

419. Third, further factual considerations support the Panel's reliance on a peer group of French aerospace and defense companies as opposed to a U.S.-based large civil aircraft company. The United States notes in particular that during the relevant time period Aérospatiale was, in much more substantial part, a European *defense* company. Boeing had not yet merged

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[695] The Panel noted, for example, that it did not consider evidence of Boeing's market outlook forecasts particularly probative of the expectations of a private investor contemplating an investment in Aérospatiale. Panel Report, para 7.1366, 7.1370, 7.1374. See also US SWS, paras 465 ff. *{CITE OTHER/PQ2*?} where the US rebutted each of the EU's points in further detail.

[696] Panel Report, paras. 7.1367, 7.1371, and 7.1375.

with McDonnell Douglas and was much more heavily invested in large civil aircraft markets. The EU and the Panel acknowledge this.[697] From a financial and private investor perspective, in other words, the two companies were not very easily comparable at all.[698]

420. Much of the evidence that the EU refers to, moreover, continues to relate to general market expectations, the expectations of Boeing's *management*[699], the U.S. Government[700], or independent (and *ex post*) outside observers.[701] These are not the expectations and actions of Boeing, let alone Aérospatiale, "*investors*" at the time. The Panel, in fact, considered this evidence and either rejected it or accorded it relatively less weight.

421. The European Union also refers to Boeing's stock *price* and its development over time, which was not an issue it raised before the Panel. The fact that *Boeing* investors invested in *Boeing*, however, indicates nothing about their or anyone else's attitudes towards Aérospatiale. The fact that "The Boeing Company's stock moved roughly in tandem with the market (as represented by the S&P 500 and Down Jones Industrial Average)"[702], at most indicates that Boeing's investors, *on the U.S. market*, might expect *Boeing's performance* to move roughly in tandem with the *U.S. market*. This has no bearing whatsoever on the question of how investors would have expected stock prices for a different company (Aérospatiale) to move in a different country (France).[703] Since Aérospatiale was not publicly listed for most of this time, it is difficult to see how Boeing's share price would be relevant, and the EU has not even attempted to explain how it would.

422. Finally, it is useful to look in a little more detail at the comparison the European Union proposes. In particular, it asserts that "{i}n the early 1990s, while the commercial airline industry was in distress, Boeing's LCA revenue, which at the time accounted for approximately 80 percent of the company's overall revenue declined by 30 percent, and company pre-tax profits fell by 50 percent." Those numbers are highly selective, to say the least. Large civil aircraft

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[697] EU Appellant Submission, para 1113. This only changed after the Boeing-McDonnell Douglas merger in the late 1990s, well after the 1987-1994 equity infusions took place. Panel Report, paras 7.1366, 7.1370 (noting that market forecasts on which the EU relied related to large civil aircraft markets only and thus did not encompass prospects for "Aérospatiale's Missiles, Space and Defence and Helicopters divisions, which would also be relevant to an investor contemplating an investment in the company as a whole").

[698] The companies in the peer group to which the Panel referred, in fact, were both defense and aerospace companies, in addition to the fact that they were all French.

[699] EU Appellant Submission, para 1116.

[700] EU Appellant Submission, para 1117.

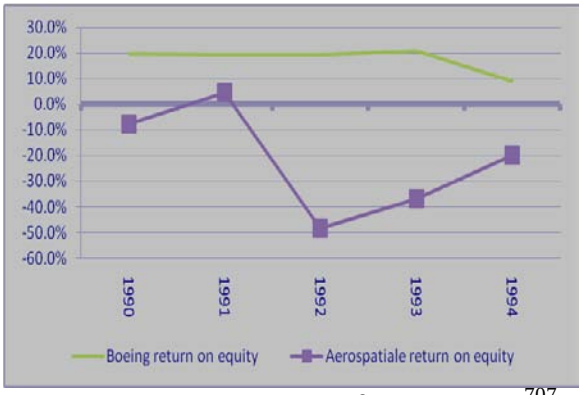
[701] EU Appellant Submission, footnote 1518.

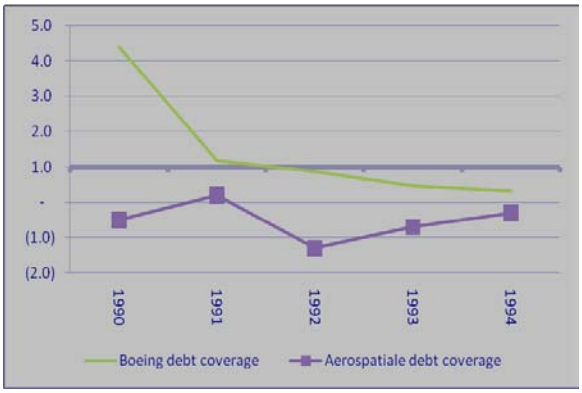
[702] EU Appellant Submission, footnote 1512.

[703] It also has no bearing on the question whether private investors would have provided *additional* capital to that company. We note that The Boeing Company did not receive additional capital or cash injections such as the ones Aérospatiale received and that are the focus of this discussion; the EU nowhere argues that it did.

revenue accounted for 76.86 percent of Boeing's overall revenue in 1994, and 80.86 percent in 1993. And revenue for commercial aircraft fell from $24 billion in 1992 to $20.56 billion in 1993 and $16.9 billion in 1994. Those are declines of 14.77 percent and 18.07 percent, respectively. From 1992 until 1994, the decline is 30.17 percent. In the early 1990s, while much of the commercial airline industry was in distress, Boeing's large civil aircraft revenue declined by only about 10 percent. From 1991 until 1993 (a two-year period beginning one year earlier than that to which the European Union is citing), commercial aircraft revenues fell from $23 billion to $20.6 billion, a decline of just 10.46 percent. Boeing, in the relevant period of time, produced solid revenue and outperformed the market. The same simply cannot be said for Aérospatiale.

423. A comparison of the financial ratios of the two companies makes this point particularly clear.[704] As noted above, Aérospatiale's debt-to-equity ratio between 1990 and 1994 ranged from 10.5 to 25.5.[705] By contrast, Boeing's ratio was as low as 0.7, indicating less risk.[706] As shown on the graph on the left, Aérospatiale's return on equity ranged between *negative* 48.5 percent and positive 2.2 percent, compared with 9 percent and 21 percent for Boeing, indicating





substantially greater return for investors.[707] As shown on the graph to the right, Aérospatiale's debt coverage ratio was between *minus* 0.7 and positive 0.2, compared to *positive* 0.3 to *positive* 4.4 for Boeing.[708] Aérospatiale's best debt coverage ratio (positive 0.2) was lower than Boeing's worst.

424. Therefore, the EU's alternative arguments fail by all accounts.

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[704] Aérospatiale stock was not publicly traded, so there is no share price to compare with Boeing's.

[705] Aérospatiale and peer group data appear in Exhibit US-274.

[706] The only data before the Panel on Boeing's total liabilities, one of two elements used to calculate the debt-to-equity ratio, are for 1993 and 1994. Exhibit EC-169, pp. 36 and 56.

[707] Exhibit US-274; Exhibit EC-169, p. 56.

[708] Data for Boeing return on equity and debt coverage are from Exhibit EC-169, page 56:

	Boeing net earnings	**Boeing shareholder equity**	**Boeing return on equity**	**Boeing total debt**	**Boeing debt coverage**
1990	1,385	6,973	19.9%	315	4.4
1991	1,567	8,093	19.4%	1,317	1.2
1992	1,554	8,056	19.3%	1,793	0.9
1993	1,244	5,953	20.9%	2,630	0.5
1994	856	9,700	8.8%	2,610	0.3

B. The Panel correctly fund that the 1998 transfer of the French Government's 45.76 percent equity interest in Dassault Aviation to Aérospatiale conferred a benefit

425. The Panel found that a private investor, standing in the shoes of the French State, would not have surrendered a controlling interest in Dassault Aviation in order to transfer state-owned shares in that company to Aérospatiale. The transactions had several elements, and the Panel considered all of them. It found that the execution of the share transfer terminated an arrangement under which the French State exercised control over Dassault Aviation, and that the French State received nothing in return for the resulting transfer of (sole) control of the company to the Dassault family. The Panel also found that Aérospatiale remained in poor (albeit improved) circumstances, and concluded, in light of these facts, that no private investor would have done what the French State did. Therefore, the transaction was "inconsistent with the usual investment practice of private investors" and conferred a "benefit".

426. The EU contends that the analysis should have covered only the exchange of shares between the French State and Aérospatiale, and disregarded the transaction with Dassault Aviation as irrelevant. In particular, it asserts that control of Dassault Aviation had no market value, so that the surrender of control by the French State should have had no effect on the benefit analysis. It also asserts that the two-for-one exchange of Aérospatiale and Dassault Aviation shares was, considered in isolation, an "even" exchange. This is sophistry. First, control does have definite economic value and ceding control in a highly profitable company like Dassault Aviation is not something that a private investor would do without compensation. Second, the Panel did not reach the question whether the evidence showed that the two-for one exchange of 4,633,547 shares in state-owned Dassault Aviation shares for 9,267,094 newly issued shares in Aérospatiale was, considered in isolation, an even exchange.[709] It did not have to because the investment decision challenged by the United States was not the decision as to the ratio for the exchange of shares, but the decision whether to convey the Dassault Aviation shares to Aérospatiale, and to do so despite having to forego significant value in the form of control over Dassault Aviation. The Panel found that this decision was inconsistent with the usual investment practice of private investors, and the EU offers no arguments why that finding was in error.

1. Factual background concerning the 1998 Dassault Aviation share transfer

427. Before discussing the EU's arguments in particular, it is useful to review the basic facts. Despite the equity infusions received in 1987, 1988, 1992, and 1994, and the LA/MSF that the French government provided in 1988 (for the A330/A340), 1995 (for the A330-200) and 1997 (for the A340-500/600), Aerospatiale remained heavily undercapitalized. At this point, the French government sought to achieve the political and industrial policy objective of further

[709] Panel Report, para. 7.1046.

consolidating the French and European aeronautics sector, and Airbus in particular. It sought as well to prepare Aérospatiale's balance sheet for a likely future public offering. It was of course also done precisely at a time when Airbus was ramping up for the launch of yet another major large civil aircraft project, the Airbus A380.[710]

428. Rather than an infusion of cash, remunerated in company stock, the French government, in 1998, transferred its 45.76 percent share of Dassault Aviation's capital to Aerospatiale. In return, it received additional Aérospatiale stock. Based upon Dassault Aviation's share value at the time, the measure translated into a FF5.28 billion equity infusion that increased Aérospatiale's consolidated total capital by about 20 percent and created a link between Dassault Aviation and Aérospatiale. The share transfer was to take place at an exchange ratio of two Aérospatiale shares to one Dassault Aviation share.

429. This was only one aspect of the transfer. Based on a previous arrangement with the owners of the remaining Dassault Aviation shares, the Dassault family, some of the French State's shares carried double voting rights, which effectively gave it control over the company. That same arrangement required the consent of the Dassault family before the State could sell its shares, and required two years' advance notice before the State could transfer its double voting rights to a third party.[711] In conjunction with the 1998 transfer of shares, the French State agreed to waive its double voting rights, thereby ceding control to the Dassault family.[712] The Dassault family also received board seats in Aérospatiale as part of the overall deal.

430. Statements by French observers at the time, as well as a U.S. financial transaction expert – not to mention of course, the Panel itself – confirm that the transfer conferred a benefit. A contemporaneous French Senate report noted that "{i}t seems that the agreement was hardly burdensome for Dassault Aviation while for the State its loss of double voting rights and the accounting treatment of the tie up with Aerospatiale that was achieved raise certain questions."[713] One insider was quoted as saying "the double voting rights are worth whatever control of a defense company with a FF20 billion turnover is worth. . . ."[714]

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[710] Cf. Panel Report, para. 7.472, citing the EU expert, Dr. Whitelaw.

[711] Panel Report, para. 7.1384, note 4552.

[712] Panel Report, para. 7.1384, note 4552.

[713] Collin (Yvon), Senate report No. 89, p. 54 (footnote omitted).

[714] Jean-Pierre Neu, "For de l'avis du Conseil d'Etat validant ses droits de vote double, le gouvernement est en mesure de negocier l'abandon de son privilege d'actionnaire", *Les Echos* (October 5, 1998) (Exhibit US-309). See also Anne Marie Rocco, "Le gouvernement scelle le marriage entre Aérospatiale et Dassault", *Le Monde* (November 12, 1998) (Exhibit US-310) noting that the shareholders' agreement provides for equal representation in the company's board, joint decision-making on important issues, and the abandonment of the government's double voting rights which gave it a 55% majority); Jacques Isnard, "L'Etat et la famille Dassault étudient un scheme pour rapprocher l'avionneur et Aérospatiale, Le Monde (January 17, 1998) (Exhibit US-311). See also US FWS paras 617-618.

431. An expert report submitted by the United States confirmed this. Specifically, the report found that the surrender of voting control over a company, as happened with the French government in Dassault Aviation, would normally have commanded a 30 percent premium above the value of the shares held. As such, both the initial transfer of the Dassault Aviation shares, and the subsequent flotation of combined Aerospatiale-Matra shares, resulted in a foreseeable value destruction for the French government that would not have been entered into by a professional private investor seeking market rates of return.[715] Indeed, the fact alone that Dassault itself was so hard to convince of the corporate tie-up and effectively had to be bought off through additional concessions by the French government already confirms that this behavior was inconsistent with the behavior of private investors (such as Dassault) in France.

2. The Panel correctly established that the 1998 Dassault Aviation share transfer conferred a benefit and did not err in rejecting the Commissaires Aux Apports Report as a relevant "benchmark"

432. As it did for the 1987 through 1994 equity infusions, the Panel, based its assessment of "benefit" in the 1998 Dassault Aviation share infusion on the "usual practice of private investors" standard.[716] Its approach was "to ask whether the United States has demonstrated that a private investor would have made the equity investment in question based on the information available at the time."[717] That is, would a private investor have transferred shares it held in Dassault Aviation, to Aerospatiale based on the information available at the time, including Aerospatiale's financial position and health, and knowing that to do so would require surrendering control of Dassault Aviation.[718]

433. Applying this standard, the Panel's findings were clear:

> Aerospatiale's financial position and prospects immediately prior to the French government's transfer of its 45.76 percent interest in Dassault Aviation, while improved, were not improved to a degree that would have enabled Aerospatiale, absent the addition of the 45.76 percent interest in Dassault Aviation (representing a 20 percent increase in its total consolidated capacity), to attract private capital.[719]

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[715] Lauren Fox, 1998 Dassault Share Transfer Valuation Report, Exhibit US-595 HSBI, pp 1-2; Panel Report, para 7.1388, noting that the Fox report calculates that the French government's relinquishment of control of Dassault Aviation without compensation translated into a loss to the French government.

[716] Panel Report para 7.1405.

[717] Panel Report, para 7.1407.

[718] As we noted above, that approach, if anything, imposes a standard that is too high, as Article 14 requires a comparison to the "usual investment practice of private investors" only.

[719] Panel Report, para 7.1409.

In other words, a private investor would not have transferred shares, a form of capital to a company in Aérospatiale's condition.

434. The EU does not dispute that the Dassault Aviation share transfer was necessary to make Aérospatiale more attractive to private investors. It argues instead that the Panel should have limited its analysis to the exchange of shares and should not have considered whether engaging in that transaction in the first place was something a private investor would have done. The problem with this suggestion is that the transaction was not limited to the exchange of shares or valuation of such shares, as the French State's arrangement with the Dassault family played a critical role in the process. Thus, the analysis suggested by the EU would not provide insight into whether the transfer, taken as a whole, was consistent with the usual practice of investors in France because it did not address the whole transfer.

435. For the same reasons, the EU's argument that the Panel erred by "disregarding" a report by the French *Commissaires aux Apports* fails as well. That report, as the EU asserts and Panel found, assesses the exchange ratio between the Aérospatiale and Dassault Aviation shares.[720] The EU argues[721] that the report also established that this exchange ratio "was consistent with a market valuation of Aérospatiale and Dassault Aviation using the discounted cash flow method."[722] Even if that were true, however, none of that is relevant to the determination that the Panel made. The United States claimed that the 1998 share transfer, taken as a whole, was inconsistent with the usual practice of investors in France. The exchange ratio findings of the *Commissaires aux Apports*, even if taken at face value, go to only part of that issue.[723] If they establish that the value of the Aérospatiale shares was commensurate with the value of the Dassault Aviation shares, that merely underscores that the French State received nothing for surrendering control of Dassault Aviation. The United States has shown that such a transaction is not consistent with the usual investment practice of private investors in France.

3. The Panel did not hold the EU to a higher "benefit" standard than required under Article 1.1(b) of the SCM Agreement

436. The Panel recognized that a responding party may defend against a claim that an equity infusion conferred a benefit by demonstrating that the infusion was part of a restructuring in

[720] Panel Report, para 7.1382, at footnote 4548.

[721] The Panel did not and did not need to find on this.

[722] EU Appellant Submission, para 1139.

[723] Indeed, as the Panel indicates in footnote 4607 of its report, "{t}he United States agrees with the European Communities that the ratio at which the French government exchanged its Dassualt Aviation shares for newly issues shares in Aérospatiale is of "no economic significance"". The Panel also explicitly concluded in its report that the investment bank reports concern the "valuations" of Aérospatiale shares and its interest in Dassault; not the relative merits of the French government retaining its Dassault share or transferring it to Aérospatiale. See Panel Report, para 7.1412.

which the infusion was not inconsistent with the usual practice of private investors.[724] The EU attempted to make just such a defense, arguing that the 1998 share transfer was consistent with the usual investment practice of private investors because it was part of a government effort to "consolidate" wholly owned assets in advance of a sale.[725] However, the Panel found that the EU "presented no evidence to persuade us" that transferring the Dassault Aviation shares to Aérospatiale would improve the French State's overall returns on its aerospace assets.[726] On appeal, the EU makes essentially the same argument. It provides no basis to reverse the Panel's finding.

437. The Panel did not question that the 1998 share transfer was part of a broader strategy. The Panel found "as a factual matter that the French government's transfer of its 45.76 percent interest in Dassault Aviation to Aérospatiale was envisaged as a preliminary step in the consolidation of the French aeronautics industry."[727] The notion was to build up Aérospatiale so it could successfully merge with Matra Hautes Technologies ("MHT"), with a sale of shares in the merged company (known as "ASM") to the public. The Panel concluded that there was

> no evidence . . . that the overall returns {the French State} could expect from a public offering of shares in an entity that combined the French government's interests in Dassault Aviation with Aérospatiale exceeded the rate of return it could expect from retaining its 46.75 percent equity interest is Dassault Aviation (including the double voting rights . . .) separately from its ownership of Aérospatiale."[728]

The EU considered that it had such evidence in the form of investment assessments indicating that when the French State offered the public shares in the merged MHT-Aérospatiale company (including the Dassault Aviation shares), it received the full market value of the Dassault Aviation shares. However, the Panel found this evidence came from a time when the French government had already decided to transfer the Dassault Aviation shares to Aérospatiale.[729] It found further that the assessments did not provide any information that would allow the comparison the Panel considered relevant – between returns from the sale of Aérospatiale with the Dassault shares and the returns that the government would have made if it kept Dassault

[724] Panel Report, para. 7.1411.

[725] EU Appellant Submission, para. 1148.

[726] Panel Report, para 7.1411.

[727] Panel Report, para 7.1411.

[728] Panel Report, para. 7.1411.

[729] Indeed, the U.S. expert demonstrated that the subsequent flotation of the combined entity, while achieving France's political and industrial policy objectives, resulted in additional value destruction. Lauren Fox, 1998 Dassault Share Transfer Valuation Report, p. 2 (Exhibit US-395 (HSBI)).

Aviation and Aérospatiale separate.[730] For ease of reference, the United States will refer to these, respectively as the Combination Scenario and the Separate Scenario.

438. The EU advances three arguments against this finding. First, the EU asserts that if a comparison of rates of return were necessary, the Panel could only rule against the EU if there were evidence that rate of return for the Combination Scenario was *less* than the rate of return for the Separate Scenario.[731] This is basically a burden of proof argument, because it would require either the Panel or the United States – the EU is never clear on this point – to prove that the Combination Scenario offered a lower return than the Separate Scenario, and therefore was inconsistent with the usual investment practice of investors in France. But the EU forgets that in WTO disputes, "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof."[732] As the Panel noted, the EU is the party that asserted that the 1998 share transfer was consistent with the usual investment practice of private investors because it was part of a larger consolidation that was itself consistent with usual investment practice.[733] Therefore, the EU, and not the Panel or the United States, of proving that that was the case. Its failure to do so means that the attempted defense fails.

439. Second, the EU accuses the Panel of holding the EU to an inappropriate better-than-market standard when it rejected evidence that the French State received fair market value for its Dassault Aviation shares, first in the 1998 share transfer and then in the merger of Aérospatiale and MHT.[734] The European Union misunderstands the situation. As the United States explained in section VII.B.2, the Panel did not reject evidence regarding the relative value of Dassault Aviation and Aérospatiale shares themselves in the 1998 share transfer. It instead concluded that the relative value was only one element of a larger transaction that, considered as a whole, was inconsistent with the usual investment practice of private investors in France.

440. There is simply no basis for the EU's criticism that the Panel required better-than-market returns for the merger of Aérospatiale and MHT. The Panel found that a private investor in the shoes of the French State would have entered into the Combination Scenario only if there was "a rational basis for believing" that it would yield greater returns than the then-existing Separate Scenario.[735] This conclusion is axiomatic if one accepts that private investors are rational. The Panel never suggested, however, that the returns on the Combination Scenario had to be higher than market. They merely had to be higher than the status quo. Its analysis reflects the reality that the market offers investments with many different rates of return, and that private investors

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[730] Panel Report, para. 7.1412.

[731] EU Appellant Submission, para. 1152.

[732] *Japan – Apples (AB)*, para. 154, *quoting US – Wool Shirts*, p. 14.

[733] Panel Report, para. 7.1411.

[734] EU Appellant Submission, para. 1155.

[735] Panel Report, para. 7.1411.

routinely reject market-consistent returns that are not as high as returns on their existing investments. Similarly, the Panel's comparison did not require that the Combination Scenario yield higher-than-market returns. If the Separate Scenario returns had been lower than market, lower-than-market returns on the Combination Scenario might have been sufficient as long as they were higher than returns under the Separate Scenario.[736]

441. Third, and finally, the European Union asserts that the Panel acted improperly in rejecting the relevance of the investment analyses because "they were not available to the French State at the time of the contribution."[737] However, the timing was not the only reason for considering that this information did not support the EU agument. The Panel also had a more fundamental reason – that the assessments "do not analyze the relative merits of the French government retaining its separate shareholdings of Dassault Aviation (including the French government's double voting rights) and Aerospatiale, on the one hand, as opposed to combining those holdings (and cancelling the double voting rights attached to the Dassault Aviation shares) and merging them with MHT."[738] The Panel found instead that the assessments "are valuations of Aerospatiale and MHT and estimates of the synergies that could be expected from their combination."[739] To use the shortened terminology of this section, the assessments discuss the virtues of the Combination Scenario, but do not compare its returns to the returns of the Separate Scenario. Like the *Commissaires aux Apports* report, the assessments do not address the question before the Panel – whether a private investor would have engaged in the transactions at all. They assume that Aerospatiale and MHT were to merge and that the further consolidation was to take place. The EU never addresses this flaw with the reports on which it relies.

442. In any event, the Panel was right to conclude that the timing of the assessments meant that they did not support the EU argument. . The EU presented the assessments to demonstrate "that at least five different investment banks undertook valuations of Aérospatiale and MHT to arrive at an agreed exchange ratio that served in turn as the basis for the share price in the public offering of ASM shares."[740] The EU later stressed that these were "internationally-renowned, independent investment banks" and that their studies "total{ed} over 1000 pages."[741] The Panel's point was that at the time of the Dassault Aviation share transfer, December 1998, the French State could not have known that a series of banks would present reports favoring the

[736] The EU also contends that the Panel's theory would prevent privatizations unless they produced higher rates of return than continued government ownership. The market return issue arises in this dispute only because the EU seeks to use the subsequent reorganization as a defense against claims that one of the steps in the process was inconsistent with the usual investment practice of investors in France. But as long as all of the steps of the privatization process are consistent with the SCM Agreement, there is no need to compare rates of return.

[737] EU Appellant Submission, para 1159.

[738] EU Appellant Submission, para 1159.

[739] EU Appellant Submission, para 1159.

[740] EC SWS, para. 559.

[741] EC RPQ 158, para. 194.

privatization of ASM in February, March, and April of 1999.[742] Therefore, those reports would not provide any guidance as to whether the transaction was consistent with the usual investment practice of private investors in France at the time of the transaction.

443. The European Union now asserts that the reports were relevant to the Panel's analysis because they "evaluated financial conditions that existed at the time of the capital contribution."[743] The European Union seeks to support this view based on a footnote in the *Canada – Aircraft* panel report stating "{t}here is no reason why the absence of 'benefit' cannot be demonstrated on the basis of an *ex post* rationalisation, provided the benchmarks relied on relate to the time that the transaction was made."[744] In other words, the European Union argues that the investment assessments are relevant because they reflect data pertaining to the time of the 1998 share transfer that would have led a private investor in late 1998 to reach the same conclusion that the investment banks reached four to six months later. It is worth noting that the Panel was reacting to the original EU argument, that the conclusions in the assessments and the renown of the investment banks that authored them – facts that the French State plainly could not have known in late 1998 – were evidence that the 1998 share transfer was consistent with usual investment practice. However, the new EU argument also fails, because it has not demonstrated that the investment assessments provide what the *Canada – Aircraft* panel envisaged – an "*ex post* rationalisation" based on data that "relate to the time that the transaction was made." The EU has merely cited the assessments themselves, and has not shown that they rely on data available to a private investor at the time of the 1998 share transfer. In addition, the U.S. expert found that serious questions could be raised as to the independence of the analysis reflected in the reports, which may simply have served the purpose of supporting the government's intention to privatize ASM.[745]

444. In sum, each of the European Union's arguments on appeal fails and each, in fact, is based on a misperception of the legal standard, the Panel's actual findings in its report, and the facts underlying the issues to which this appeal relates. The United States, consequently, asks the Panel to reject the EU's claims of appeal and to uphold the Panel's findings.

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[742] Panel Report, para. 7.1412.

[743] EU Appellant Submission, para. 1161.

[744] EU Appellant Submission, para. 1161, *quoting Canada – Aircraft (Panel)*, para. 7.242 (footnote 201).

[745] Lauren Fox, 1998 Dassault Share Transfer Valuation Report, pp. 1-2 (Exhibit US-595 (HSBI)).

VIII. THE PANEL'S FINDINGS REGARDING SUBSIDIES OF AIRBUS R&D ACTIVITIES ARE CORRECT

A. The Panel correctly found that the Second through Sixth Framework Programs were specific within the meaning of Article 2.1(a) of the SCM Agreement

445. The Panel found, and the European Union does not dispute, that the Second through Sixth EU Framework Programmes made a stated quantity of funds available exclusively for research for certain named industries, including the aerospace industry.[746] The European Union also does not contest that the relevant Framework Programmes made financial contributions that conferred a benefit to Airbus. It argues instead that the targeting of funds to the aeronautics industry is not specific because many industries and groups of industries received funds under the Framework Programmes,[747] which also included funds that were generally available to all industries. The Panel rejected these arguments, finding that these R&D subsidies were specific within the meaning of Article 2.1(a) of the SCM Agreement because "amounts of subsidization were explicitly set aside under each of the relevant Framework Programmes for the research efforts of 'certain enterprises'."[748] The EU appeal gives no valid reason to question this finding.

446. The European Union contends that because it organized research support to Airbus under the rubric of the Framework Programmes, the analysis of specificity must occur at that level. The European Union observes that a large number of industry sectors receive funding under each Framework, and argues that this variety is dispositive evidence of non-specificity, even though individual disbursement categories applicable to aerospace set tight limitations on eligibility. Under this approach, the bureaucratic organization of subsidy programs, rather than the substance of how they limit funding, dictates whether they are specific. Nothing in the SCM Agreement supports such a formalistic analysis.

447. Article 2 of the SCM Agreement defines the term "specific," which is one of the triggering criteria for disciplines on subsidies elsewhere in the Agreement. Article 2.1(a) sets out one scenario that is "specific": "{w}here the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific." It defines "specific" in terms of a verb – "limit" – and object – "access to subsidies." The adverb "explicitly" modifies "limit," specifying that not all actions of "limiting" access result in a subsidy becoming "specific." The subject of the sentence indicates that two actors may take the relevant action – the "granting authority" or the "legislation" under which the granting authority operates.

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[746] Panel Report, para. 7.1563; EU Appellant Submission, para. 1184.

[747] EU Appellant Submission, para. 1189.

[748] Panel Report, para. 7.1566.

448. As its title indicates, the SCM Agreement focuses on subsidies. Therefore, the specificity analysis starts with the "subsidy" that is "deemed to exist" by operation of Article 1, which then will drive the identification of the proper "authority" or "legislation" for purposes of Article 2. The inquiry will then focus on how the relevant actors – the granting authority and the legislation – "limit access" and whether they do so "explicitly." Article 1.1 defines a "subsidy" as a "financial contribution" by which a "benefit" is "conferred". The term "financial contribution" is defined in ways that encompasses individual government acts ("a financial contribution", "a benefit") as well as groups of such acts ("potential direct transfers"). The context of the term "subsidy" confirms that it may mean individual acts of conferring a subsidy. Several provisions of the SCM Agreement refer to a "subsidy programme." The ordinary meaning of "programme" is a "{a} plan or outline of (esp. intended) activities; *transf.* a planned series of activities or events."[749] In a "subsidy programme", those "activities" or "events" would be individual grants of subsidies. These references to a "subsidy programme" indicate that for purposes of the SCM Agreement, the term "subsidy" includes individual acts of granting subsidies within a broader subsidy program. The usage in Article 1.1 further indicates that "subsidy" can also mean multiple grants of the same type of subsidy. In short, it is a flexible term.

449. As noted above, the European Union did not contest that the grants to Airbus under the Second through Sixth Framework Program were "subsidies." As the first step in evaluating whether the grants were specific, the Panel found that the legal regimes established through the constituent instruments of each Framework Programme were the "legislation under which the authority operates."[750] After an exhaustive review of the terms under which Airbus received Framework Programme funding,[751] the Panel found that each iteration of the Framework set aside specified portions of funding with eligibility criteria that made them available exclusively for "aeronautics" or "aeronautics and space" research.[752] The Panel concluded that through these criteria, the Framework Programmes created "a closed system of subsidization that focused on 'aeronautics' or 'aeronautics and space'."[753] It therefore found that the legislation explicitly limited funds to "certain enterprises" for purposes of Article 2.1(a).

450. The European Union appeals this finding, arguing as it did before the Panel that the specificity analysis under Article 2.1(a) of the SCM Agreement should start with whatever "program" generated the subsidy and examine the program as a whole.[754] There is no textual support for this approach. Unlike other provisions of the SCM Agreement, Article 2.1(a) does not even mention the word "programme". Moreover, the EU theory leads it to a specificity

[749] New Shorter Oxford English Dictionary, p. 2371.

[750] Panel Report, para. 7.1562.

[751] Panel Report, paras. 7.1514-7.1558

[752] Panel Report, para. 7.1563.

[753] Panel Report, para. 7.1563.

[754] EU Appellant Submission, para. 1187.

analysis in which the bureaucratic organization of subsidization dictates the results, to the exclusion of the actual limitations on access to funds. This reasoning leads it to conclude that if a funding system embraces a large enough number of targeted subsidies, none is specific because they collectively benefit a multitude of enterprises. That is not the inquiry set out in Article 2.1(a).

451. The European Union also argues that the standard adopted by the Panel would focus the specificity analysis on individual acts of granting subsidies, which would reduce the specificity requirement to a nullity.[755] This is incorrect. The Panel's approach looks at the conditions imposed by the legislation for access to defined pools of money. If one pool funds multiple subsidy grants, as was the case with the Airbus subsidies, the analysis applied by the Panel would not apply to individual grants. Finally, the European Union argues that the Panel's standards would prevent Members from ensuring an even distribution of subsidy funds among multiple sectors by targeting funds to particular sectors. The notion that targeted subsidies lessen specificity does not comport well with the definitions of "specific" in Article 2.1. Moreover, the Panel's reasoning leaves Members a number of mechanisms to prevent individual sectors from making disproportionate use of subsidies intended for general application.

452. The European Union advances only one legal argument in support of its argument that "the reference to 'a *subsidy' must* mean the subsidy programme as a whole"[756] – that by making use and duration of "subsidy programmes" factors in the *de facto* specificity analysis, Article 2.1(c) of the SCM Agreement means that "there is no reason to choose another benchmark for assessing *de jure* specificity."[757] However, the reference to "programmes" in Article 2.1(c) but not in Article 2.1(a) would support the opposite conclusion – that the reference to "subsidies" in Article 2.1(a) does *not* mean subsidy programs. Moreover, the text does not support the EU view that Articles 2.1(a) should use the same "benchmark." Article 2.1(c) sets out a means to establish specificity "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)." In other words, Article 2.1(c) addresses a different set of circumstances than Article 2.1(a), applicable when Article 2.1(a) indicates non-specificity. Thus, there is no reason to conclude that the criteria for *de facto* specificity under Article 2.1(c) would inform the meaning of the criteria for *de jure* specificity under Article 2.1(a).

453. It is also important to note that the EU understanding of the term "programme" is entirely artificial. It never establishes the funding system called the "Framework Programme" is a "subsidy programme" for purposes of the SCM Agreement. It simply assumes that the use of the denomination of the system as a "Programme" dictates the result of the analysis under Article 2.1(a) of the SCM Agreement. However, it is well established that the domestic law

[755] EU Appellant Submission, para. 1188.

[756] EU Appellant Submission, para. 1186.

[757] EU Appellant Submission, para. 1187 (emphasis added in EU submission).

categorization of a measure is generally not dispositive of the applicability of WTO disciplines.[758]

454. The European Union argues that the Panel's reasoning "risks rendering the specificity criterion in Article 2 . . . meaningless" because "{e}xamining benchmarks below the level of the subsidy programme as a whole will, at a certain level, inevitably indicate specificity."[759] But the Panel never advocates such an atomized analysis. It examines the limitations on discrete pools of funding, all of them large enough to cover large numbers of individual subsidies.

455. The European Union also contends that the Panel's analysis penalizes Members who target funds to particular sectors to avoid the kind of disproportionate use that would trigger *de facto* specificity under Article 2.1(c) of the SCM Agreement or are open about the terms under which they grant subsidies.[760] Neither concern is valid. First, the idea that Members would avoid *de facto* specificity by placing sector-specific limitations on the use of defined pools of subsidies contradicts the point of Article 2.1(a) – that targeted subsidies are specific and, therefore, subject to SCM Agreement disciplines. Moreover, nothing in the Panel's reasoning would prevent use of more plausible methods to ensure even distribution of subsidies, such as caps on the amount that any one applicant or any one sector could access. Second, the Panel's analysis only penalizes Members with transparent subsidy programs if the criteria are specific. If a Member maintains a program that ensures impartial, general access, such as by allowing a large number of sectors access to a unitary fund based on the merit of the research project as evaluated by neutral panels of scientists, transparency can only help to establish non-specificity.

456. In truth, it is the EU theory that presents the greatest opportunity for abuse. It would allow a Member seeking to target research funding to specific sectors to bundle them up in a single funding system, perhaps with a few generally available funds, and argue that the rampant specificity cancelled out. This outcome makes the bureaucratic organization of the subsidy mechanism determinative, rather than the *de facto* or *de jure* substantive limitations on access to subsidies, the criteria established under Article 2.1(a) of the SCM Agreement. Such a result

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[758] The Appellate Body found in *US – Softwood Lumber IV* that:

> Previous Appellate Body Reports confirm that an examination of municipal law or particular transactions governed by it might be relevant, as evidence, in ascertaining whether a financial contribution exists. However, municipal laws – in particular those relating to property – vary amongst WTO Members. Clearly, it would be inappropriate to characterize, for purposes of applying any provisions of the WTO covered agreements, the same thing or transaction differently, depending on its legal categorization within the jurisdictions of different Members. Accordingly, we emphasize that municipal law classifications are not determinative of the issues raised in this appeal.

US – Softwood Lumber IV (AB), para. 56. *Accord China – Auto Parts (AB)*, para. 178.

[759] EU Appellant Submission, para. 1188.

[760] EU Appellant Submission, paras. 1190-1192.

might help Members seeking to hide subsidies, but it would negate the effectiveness of the SCM Agreement.

457. Finally, the entire EU argument rests on a characterization of the Framework Programmes for which it cites no factual support. The European Union argues that:

> While it is true that the funding amounts so allocated {to aeronautics-related research} could not be accessed by entities seeking support for types of R&TD projects other than those concerning aeronautics, it is equally true that entities involved in aeronautics-related R&TD projects could not access funds under the remainder (and therefore the great majority) of the Framework Programme budgets.[761]

This statement is the sole factual support for the EU argument that the Framework Programmes consisted of such a number of targeted funds that they collectively were nonspecific. However, it provides no support for this statement. Panel findings that the European Union has not challenged indicate that this was not the case. For example, under the Second Framework Program, "{m}ost of the activities appear to be of a general horizontal nature, potentially cutting across a variety of business segments. Others seem to be more focused, concentrating on particular economic sectors."[762] The Panel made similar findings about the Third, Fourth, Fifth, and Sixth Framework Programmes.[763] The European Union provides no evidence that the Framework Programme barred Airbus and other aerospace companies from funding under these "general horizontal" programs. Thus, the facts do not support the EU argument that the Framework Programmes were non-specific because companies in all sectors, including the aerospace sector, faced the same situation of access to sector-specific funds but exclusion from other funds.

458. In conclusion, the European Union has provided no valid reason to overturn the Panel's conclusion that subsidies to Airbus under the Second through Sixth Framework Programmes were specific to aerospace enterprises. Therefore, the Appellate Body should uphold the Panel's findings.

B. The U.S. panel request met the requirements of Article 6.2 of the DSU with regard to the PROFIT Program and French Governmental support of Airbus R&D

459. The U.S. request for establishment of a panel ("panel request") in this dispute covered research and development ("R&D") subsidies to Airbus by the EU level, the national governments of France, Germany, Spain, and the United Kingdom, and regional governments in France, Germany, and Spain. The United States framed its request as covering all funding of

[761] EU Appellant Submission, para. 1189.

[762] Panel Report, para. 7.1515.

[763] EU Appellant Submission, paras. 7.1524, 7.1534, 7.1546, and 7.1554.

Airbus R&D by these governments, explicitly included a list of named programs in Germany, Spain, and the United Kingdom. The panel request also referenced the U.S. request for consultations submitted by the United States on October 6, 2004, and the consultations held with the EU on November 4, 2004. The panel request did not explicitly list French R&D programs by name, or the Spanish Programa de Fomento de la Investigación Técnica ("PROFIT"). (Public information at that time did not identify those program names, and the EU had not provided additional information during consultations.) The Panel found that, considering the panel request as a whole in light of its attendant circumstances, the United States presented its claims against both PROFIT and the French R&D programs with sufficient clarity to satisfy Article 6.2 of the DSU. Therefore, it ruled that these programs were within its terms of reference.

460. The European Union argues on appeal that the U.S. panel request did not identify PROFIT or the French R&D programs with sufficient specificity to satisfy Article 6.2 of the DSU. It also contends that the Panel erred in relying on certain documents related to this proceeding as "attendant circumstances" for purposes of understanding the U.S. panel request. These documents include U.S. questions submitted under Annex V of the SCM Agreement, questions submitted during consultations, a supplement to the U.S. request for consultations, and the European Union's own request for a preliminary ruling.

461. The European Union is mistaken, both in its understanding of the standard applicable to a claim under Article 6.2 of the DSU, and in the materials that a panel may consult as "attendant circumstances." The panel request meets the requirements of Article 6.2, in that it "identif{ies} the specific measures at issue and provide{s} a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Therefore, the Appellate Body should uphold the Panel's finding in this regard.

1. In evaluating a claimed inconsistency with Article 6.2 of the DSU, a panel must carefully scrutinize the panel request, considered as a whole, and in light of the attendant circumstances, including submissions and statements made during the course of the panel process

462. Article 6.2 of the DSU provides that "{t}he request for the establishment of a panel shall . . . identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The Appellate Body has noted that the panel request, as defined by the "specific measures at issue" and "the legal basis of the complaint," determines the "matter referred to the DSB," which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[764] Thus, the panel request serves two purposes – it defines the scope of the dispute and serves a due process function of notifying the parties and

[764] *US – Carbon Steel (AB)*, para. 125; *accord US – Continued Zeroing*, para. 180; *US – Zeroing (Japan) (21.5) (AB)*, para. 107.

third parties of the nature of the dispute.[765] A panel must "scrutinize carefully the request for establishment of a panel 'to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.'"[766] The Appellate Body has described the nature of this examination as follows:

> compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced. Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.[767]

Thus, a panel has at its disposal a number of tools to evaluate the scope of a panel request. The inquiry starts with the words (the "face" of the request) but includes other materials that informed the parties' understanding of the claims made.

463. The European Union notes some of the language of Article 6.2 and prior Appellate Body findings in its argument, in particular the need to identify the "specific" measures at issue. In particular, it notes the Appellate Body's finding in *EC – Selected Customs Matters* that "{t}he word 'specific' in Article 6.2 establishes a specificity requirement regarding the identification of the measures regarding the identification of the measures that serves the due process objective of notifying the parties and the third parties of the measure(s) that constitute the object of the complaint."[768] But in doing so, it neglects equally significant findings, such as the Appellate Body's conclusion that "although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."[769] It also neglects the reasoning, quoted above, regarding the use of submissions and statements made during the course of the proceeding. Finally, it disregards the conclusion in *US – Continued Zeroing* that "so long as each measure is discernable in the panel request, the

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[765] *US – Carbon Steel (AB)*, para. 126; *US – Continued Zeroing*, para. 161; *US – Zeroing (Japan) (21.5) (AB)*, para. 108.

[766] *US – Carbon Steel (AB)*, para. 126, *quoting EC – Bananas III*, para. 142; *US – Continued Zeroing*, para. 161; *US – Zeroing (Japan) (21.5) (AB)*, para. 108. {*}

[767] *US – Carbon Steel (AB)*, para. 127.

[768] EU Appellant Submission, para. 1207, *quoting EC – Selected Customs Matters (AB)*, para. 152.

[769] *US – Continued Zeroing*, para. 169.

complaining party is not required to identify in its panel request each challenged measure independently from other measures in order to comply with the specificity requirement in Article 6.2 DSU."[770]

464. Thus, scrutiny of a panel request for purposes of Article 6.2 of the DSU allows reference to other materials, and remains open to the possibility that a panel request can afford sufficient specificity without identifying each measure by name.

2. The Panel correctly found that the U.S. panel request presented the claim against the PROFIT loans in a manner that was sufficiently clear to meet the standards of Article 6.2 of the DSU

465. Although the United States did not reference PROFIT loans explicitly in its panel request, it asked questions about the program four months later during the information gathering process under Annex V of the SCM Agreement. It also demonstrated continued interest in the program by including it in an updated consultation request submitted with regard to this dispute. The European Union stated in one submission during the Annex V process that it considered PROFIT to be outside the Panel's terms of reference, but when it submitted a request for a preliminary ruling that the U.S. panel request did comply with Article 6.2 of the DSU, it did not mention PROFIT. The Panel concluded from this set of facts that "the United States panel request presents the United States' claim against the PROFIT loans in a manner that is sufficiently clear to meet the standards of Article 6.2 of the DSU."[771]

466. Specifically, the panel request states:

> The measures of the EC and the member States that are the subject of this panel request include:
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> * * * * *
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> (6) The provision by the EC and the member States of financial contributions for aeronautics-related research, development, and demonstration ("R&D"), undertaken by Airbus, whether alone or with others, or in any other way to the benefit of Airbus, including:
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> * * * * *
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> (d) Funding from the Spanish government, including regional and local authorities, since 1993 for civil aeronautics-related R&D projects *in which Airbus* participated, including loans and other financial support provided

[770] *US – Continued Zeroing*, para. 170.

[771] Panel Report, para. 7.1422.

> under the Plan Técnico Aeronaútico I and the Plan Técnico Aeronaútico II. (emphasis added)

The European Union criticizes this request as "un-specific" and "very generic," and argues that it "would potentially comprise a multitude of programmes and other measures without the European Union knowing which ones constitute the object of the US complaint."[772]

467. The EU statement is an exaggeration. As the Panel noted, "this description indicates the provider, . . . the timing, . . . the purpose, . . . and the subject of the funding at issue."[773] It found further that the U.S. questions submitted as part of the information gathering process under Annex V of the SCM Agreement made clear that PROFIT was "one of two Spanish government R&TD loan programmes about which the United States was interested in collecting information."[774] In other words, the Annex V questions made explicit what was clear from the panel request – that because PROFIT provided funding for aeronautics research, it fell within the scope of the U.S. panel request. The same was true for the explicit references to PROFIT in the U.S. updated request for consultations.

468. The European Union argues that U.S. actions at this time created the impression that the United States had no interest in PROFIT loans. It considers that the references to the Planes Técnicos Aeronaúticos in the panel request show that the United States should have known about PROFIT at the time it filed its panel request, and that the Annex V questions about PROFIT show that it actually did know.[775] There is no basis for this supposition. The great detail of the U.S. request for consultations, which contained a ten-page list of available evidence, indicated both that there was a vast quantity of information, and that the United States was listing everything of which it was aware. Thus, the omission of an explicit reference to PROFIT suggests only that the information necessary to include that program in the explicit list of Spanish R&D subsidies was unavailable at the time of the panel request. A more general reference to the Spanish programs was sufficient to put the EU on notice that those issues that had been part of the U.S. request for consultations, and would become part of its Annex V request, were subject to the U.S. claims.

469. The European Union also argues that the Panel erred in referring Annex V questions because the Appellate Body has found that "{d}efects in the request for the establishment of a panel cannot be 'cured' in the subsequent submissions of the parties during the panel proceedings."[776] The European Union misperceives the Panel's analysis. It did not refer to the Annex V questions to expand the scope of the dispute, but to confirm its initial conclusion that

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[772] EU Appellant Submission, para. 1208.

[773] Panel Request, para. 7.1420.

[774] Panel Request, para. 7.1422.

[775] EU Appellant Submission, para. 1211.

[776] EU Appellant Submission, para. 1211.

the panel request on its face was not overly expansive.[777] As the United States has noted, the Appellate Body has explicitly endorsed reference to a complaining party's first written submission for just this purpose. As the Annex V questions come earlier in the process, they are more contemporaneous with the panel request and, therefore, reflect even more faithfully the meaning of the request and the parties' understanding of the request.

470. The Panel also referred to the European Union preliminary ruling request, which asked for a ruling that several programs – but not PROFIT – were outside the terms of reference, as evidence that the EU recognized the program was properly within the scope. The European Union asserts that unspecified U.S. actions led it to believe that there was no claim against PROFIT and, therefore, the preliminary ruling request's silence on the program does not indicate its understanding of the terms of reference. It argues that if a preliminary ruling request were used to evaluate the scope of a dispute "a defendant would be obliged to raise, through preliminary ruling requests, Article 6.2 issues concerning an open-ended number of measures not mentioned in a panel request."[778] The European Union is wrong about the U.S. actions, and its concerns are unwarranted. The facts outlined by the Panel should have made the EU aware of the continued U.S. interest in PROFIT loans. Thus, in the circumstances of this dispute, the EU's decision not to include PROFIT in its preliminary ruling request is evidence of how it understood the terms of reference. As the Panel does not purport to cite a general rule that preliminary ruling requests are always relevant to requests under Article 6.2 of the DSU, the EU's general concern about the effect of such a rule is unfounded.

471. Finally, the European Union criticizes the Panel for referring to the U.S. consultation and panel requests in DS347 to "bring this measure within the scope of the separate dispute WT/DS316."[779] The European Union misunderstands the situation. These documents were initially filed as supplements to the U.S. consultation request and panel requests in this dispute. Only after consultation between the parties was there a decision that they were also part of a separate dispute, labeled *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint).* The Panel did not use them as direct evidence of the scope of this dispute. Rather, it referred to the supplemental consultation request as evidence that "the European Communities could have had no doubt that the PROFIT loans formed part of the United States' complaint."[780] The Panel cited the panel request only as background, and did not suggest that its contents contained evidence relevant to the terms of reference.[781]

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[777] Panel Report, para. 7.1420.

[778] EU Appellant Submission, para. 1212.

[779] EU Appellant Submission, para. 1213.

[780] Panel Report, para. 7.1422.

[781] Panel Report, para. 7.1422, note 4651 ("Subsequently, and with reference to *inter alia*, this communication, the United States requested the establishment of a new panel, in WT/DS316/6.").

472. The Appellate Body should also note that the United States addressed PROFIT explicitly in its first written submission.[782] Although the Panel did not cite this fact in support of its finding, the Appellate Body has upheld reference to the complaining party's first written submission "to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced."[783] In addition, the context provided by other claims against R&D subsidies in other jurisdictions indicated that the U.S. claims were exhaustive, applying to every known example of government R&D funding. The Panel did not cite to this fact in its conclusions, but it is also relevant to an evaluation of U.S. conformity with Article 6.2 of the DSU.

473. In conclusion, the United States panel request indicated that the dispute covered Spanish R&D subsidies to Airbus, and attendant circumstances indicated that U.S. claims in this regard covered PROFIT loans. Therefore, the Appellate Body should uphold the Panel's finding that PROFIT loans are within the terms of reference.

3. The Panel correctly found that the U.S. panel request presented the claim against the French government civil aeronautics R&D subsidies in a manner that was sufficiently clear to meet the standards of Article 6.2 of the DSU

474. The U.S. panel request included a claim regarding "{f}unding from the French government, including regional and local authorities, since 1986 for civil aeronautics-related R&D projects in which Airbus participated,"[784] but did not reference funding sources by name. The earlier consultation request had referenced information on these programs in the Statement of Available Evidence. The United States asked questions about these programs during consultations, and suggested additional questions for the information gathering process under Annex V of the SCM Agreement. That process revealed that Direction des Programmes Aéronautiques et de la coopération ("DPAC") conferred a number of subsidies on Airbus. The United States referenced that information in its first written submission, and demonstrated that the DPAC programs conferred specific subsidies.[785] The Panel concluded, based on the consultation questions, the Statement of Available Evidence, and a statement made at a DSB meeting by the United States, that "the panel request, considered as a whole and in light of attendant circumstances, identifies the measures at issue in a manner sufficient to present the problem clearly" and, therefore, satisfied Article 6.2 of the DSU."[786]

475. Specifically, the U.S. panel request states:

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[782] US FWS, paras. 697-703.

[783] *US – Carbon Steel (AB)*, para. 127.

[784] U.S. panel request, para. 6(e).

[785] US FWS, paras. 678-685.

[786] Panel Report, para. 7.150.

> The measures of the EC and the member States that are the subject of this panel request include:
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> (6) The provision by the EC and the member States of financial contributions for aeronautics-related research, development, and demonstration ("R&D"), undertaken by Airbus, whether alone or with others, or in any other way to the benefit of Airbus, including:
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> * * * * *
>
> (e) Funding from the French government, including regional and local authorities, since 1986 for civil aeronautics-related R&D projects in which Airbus participated.

476. Despite the explicit reference to Airbus-related civil aeronautics R&D projects, the European Union complains that the U.S. panel request "appears extremely un-specific 'on its face'," and that "the complainant should, at a minimum, be required to identify the legal basis for such a series of actions."[787] The European Union identifies no basis in the DSU or SCM Agreement for this statement. As the Appellate Body explained "the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."[788] This conclusion relates back to the two purposes of the panel request – to define the scope of the dispute and notify the parties and third parties of the nature of the dispute.[789] Thus, compliance with Article 6.2 of the DSU depends not on an abstract level of specificity or identification of the "legal basis for such a series of actions," but on communicating enough information that the panel, the parties, and the third parties can understand what the dispute is about. The U.S. request did that, especially in light of the attendant circumstances.

477. The Panel identifies three such circumstances: questions presented to the European Union at the consultations, the information in the U.S. Statement of Available Evidence, and the statement the United States made to the DSB at the time its panel request was first on the agenda. The EU argues that the Panel erred in relying on each of these considerations.

478. With regard to the information relating to the consultations in this dispute, the European Union argues that the confidential nature of that process makes it impossible to verify the

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[787] EU Appellant Submission, para. 1224.

[788] *US – Continued Zeroing*, para. 169.

[789] *US – Carbon Steel (AB)*, para. 126; *US – Continued Zeroing*, para. 161; *US – Zeroing (Japan) (21.5) (AB)*, para. 108.

accuracy of any statements about what occurred.[790] It asserts, without explanation, that the same concern applies to written questions presented at consultations, which it in any event asserts "do not remedy a later panel request that fails to identify specific measures."[791] The European Union is correct that the Appellate Body has expressed concern that examining what occurred at consultations is problematic because of their confidential nature, the lack of a written record, and frequent disagreements among parties about what, precisely, they discussed.[792] In this case, however, the United States does not propose to reveal the substance of the discussion – merely the fact that a particular issue was raised. The European Union has never denied that the United States referenced French government R&D subsidies. Moreover, the written questions obviate the need for a formal written record, as they document the sole point the U.S. seeks to make – that the European Union knew that the United States considered French government R&D subsidies to be an actionable subsidy, and within the scope of the Panel request. The confidential nature of the substance of consultations does not prevent reference to this particular non-confidential document.

479. The European Union also errs in believing that the United States cited the questions, and the Panel relied upon them, to remedy the panel request's failure to identify specific measures. Rather, the questions help to understand what the panel request covered. They list pertinent facts about French R&D subsidies, including the amounts and years of grant, which would help to identify which programs the United States sought to challenge, and how they related to the Statement of Available Evidence. Thus, they elucidate, rather than add to, the panel request. In short, the Panel's use of information related to consultations was entirely appropriate, and demonstrated that the panel request was sufficiently specific to identify

480. With regard to documents listed in the Statement of Available Evidence, the EU asserts that they were French Senate budget reports, that "do not specify measures either by reference to a programme or to an entity providing funding."[793] The EU misses the point. Neither the United States nor the Panel asserted that the budget reports named programs or the agencies that conducted them. However, they do list amounts of money budgeted, and link them to an official document of the French government. This information would give *the French government*, and the EU, solid information to identify both particular programs that the United States had challenged and the agencies that administered those programs.

481. Along the same lines, the EU also contends that claims against other countries' R&D measures, which named particular subsidies as examples of the claims regarding each country's subsidies, demonstrate the a fatal lack of specificity in the claims against France.[794] In fact, the

[790] EU Appellant Submission, para. 1228.

[791] EU Appellant Submission, para. 1229.

[792] EU Appellant Submission, para. 1228, *citing US – Upland Cotton (AB)*, para. 287.

[793] EU Appellant Submission, para. 1230.

[794] EU Appellant Submission, para. 1225.

EU's observation reflects a different problem. As with the other countries, the clear evidence established that the French government subsidized Airbus research – the Senate budget reports said so. However, the available documents did not indicate how, under what program, or by whom. Thus, the U.S. claim exactly matched the level of specificity of the information that France made available to the public. To hold the U.S. consultation request and panel request to a higher standard of specificity would create a rule whereby Members could shield any subsidy from WTO scrutiny by simply not talking about it.[795] Thus, the references to the Statement of Available Evidence identify French government support for Airbus R&D "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."[796]

482. Finally, with regard to the U.S. statement to the DSB, the EU argues that "it would be problematic under the due process objective of Article 6.2 of the DSU if complainants were allowed to bring measures within the scope of a dispute by orally mentioning them in a subsequent DSB meeting if they had not been identified in writing in the panel request."[797] Again, the EU misunderstands. The United States, and the Panel, referred to the U.S. statement at the DSB as evidence of the meaning of the claim against "{f}unding from the French government, including regional and local authorities, since 1986 for civil aeronautics-related R&D projects in which Airbus participated." As the Panel explained, the United States made "specific references to the nature of the R&D subsidies." The EU asserts that the Panel's conclusion is wrong, because the statement "does not mention French R&D support at all, let alone any specific measures."[798] It is the EU that is mistaken. The United States informed the DSB that "the EC and its member States had provided billions of euros to Airbus for civil aeronautics research and development."[799] It then explained further that

> {m}ost of the funding at issue took the form of outright grants that Airbus had used to underwrite its commercial research. And unlike civil aeronautics R&D in the United States, EC-funded civil aeronautics R&D focused on producing results that Airbus could apply to products in the near- and medium-term.[800]

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[795] In evaluating a claim in *Thailand – H-Beams* that Poland's panel request was inconsistent with Article 6.2 of the DSU, the Appellate Body explained that "{w}e are of the view that lack of access to this information may have affected the precision with which Poland set out the claims in its panel request." It found that although the panel request listed the article alleged to have been violated, without reference to subparagraphs or specific facts, was consistent with Article 6.2 of the DSU. *Thailand – H-Beams (AB)*, paras. 91-92.

[796] *US – Continued Zeroing*, para. 169.

[797] EU Appellant Submission, para. 1231.

[798] EU Appellant Submission, para. 1231.

[799] Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 13 June 2005, WT/DSB/M/191, para. 3 (28 June 2005).

[800] Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 13 June 2005, WT/DSB/M/191, para. 3 (28 June 2005).

Thus, the U.S. statement at the DSB provided further information that would help the government of France understand the extent of the panel request's reference to French research and development subsidies.

483. The absence of any reference to particular programs is irrelevant because, as the United States noted above, Article 6.2 of the DSU requires that the panel request identify "specific measures" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." It does not dictate *how* Members satisfy this standard, let alone require that they do so by naming specific programs or administrative agencies. Thus, the United States was free to satisfy Article 6.2 with a functional description of the French R&D subsidies it challenged, rather than by naming them.

484. In conclusion, the U.S. panel request provided specificity sufficient to allow the EU and the government of France to identify that DPAC fell within its terms. The Panel properly relied on attendant circumstances in the form of the consultation questions, the U.S. Statement of Available Evidence, and the U.S. statement to the DSB. These materials confirmed the meaning of paragraph 6(e) of the panel request, and its applicability to DPAC.

IX. THE PANEL CORRECTLY FOUND THAT THE SUBSIDIES CAUSED ADVERSE EFFECTS TO THE INTERESTS OF THE UNITED STATES

A. Introduction

485. The development of large civil aircraft is extraordinarily risky and massively expensive. A new model aircraft requires billions of dollars of upfront investment years before any revenues can be generated. If the volume of sales or the prices the aircraft can command are lower than projected, or the production costs are higher than projected, an LCA program may never cover its sunk costs. At the same time, the success of a producer depends on its ability to offer a family of competitive LCA suitable for the needs of airlines, the principal customers. Airlines seeking to purchase LCA look to minimize costs and maximize revenues. They must also consider both their existing fleet structure and the need to service varied routes efficiently with an appropriate mix of aircraft. Given these considerations, and despite the cost and risk inherent in LCA development, producers must continually bring new LCA to market.

486. Under these circumstances, subsidies that substantially lower a producer's development costs and shift a significant part of the risk of LCA development from the producer to its sponsoring governments have a major impact on competition in the market. The Panel found that Airbus received a steady stream of such subsidies over a 40 year period. These subsidies were instrumental, the Panel found, to Airbus' ability to enter the LCA market and, thereafter, to develop, produce and market, one on another, its family of LCA when and as it did. And the Panel found that Airbus was able to use its subsidized LCA supply to capture market share and significant sales from Boeing during the 2001-2006 reference period and, accordingly, that the subsidies provided to Airbus were the cause of adverse effects to the interests of the United States.[801]

487. The Panel ultimately concluded that the effect of the subsidies is serious prejudice to the interests of the United States in the form of the displacement of imports of U.S. LCA into Europe under Article 6.3(a) of the SCM Agreement, the displacement (and, in one case, threat of displacement) of U.S. LCA to a number of third country markets under Article 6.3(b), and the loss of significant sales of U.S. LCA under Article 6.3(c).[802] The Panel Report sets out the Panel's findings of fact, the applicability of the relevant provisions of the SCM Agreement to those facts, and the basic rationale for the conclusions it reached.

488. Among the Panel's key findings are that:

[801] Panel Report, paras. 7.1985, 7.1993.

[802] Panel Report, para. 8.2(a)-(d).

- It was reasonable and appropriate to analyze the U.S. adverse effects claim on the basis of the identification by the United States of "all Airbus LCA" as the "subsidized product" and "all Boeing LCA" as the "like product";[803]

- Airbus received significant LA/MSF and other subsidies for every one of its major LCA launches over a 40 year period, and these subsidies worked together to allow Airbus to develop and bring to market its full family of LCA both when and as it did – *i.e.*, "but for" the subsidies in dispute, Airbus would not have been able to compete with U.S. LCA producers when and as it did;[804]

- The benefits of these subsidies, which built on one another, were spread over Airbus' entire product line because of (a) the "commonality" in the design of Airbus' LCA, (b) Airbus' incorporation of technology initially developed for one LCA model in other models, (c) the importance of Airbus' ability to offer a full family of LCA to its success in the market, and (d) the way in which reduction of the financial burden of developing one LCA model facilitated Airbus' development of other models;[805] and

- Between 2001 and 2006, Airbus used its subsidized LCA supply to gain market share at Boeing's expense in Europe, China, Australia and certain other markets,[806] and to capture significant LCA sales from Boeing at easyJet, Air Berlin, Czech Airlines, Air Asia, Iberia, South African Airways, Thai Airways International, Singapore Airlines, Emirates Airlines and Qantas.[807]

489. The European Union does not challenge the Panel's core finding that the subsidies allowed Airbus to participate in the LCA market as it did. Moreover, its appeal contains several key concessions – some of which are implicit and others explicit. For instance:

- The European Union has not argued on appeal that large civil aircraft is not a "product" or that its LCA were not "subsidized," and it does not dispute the Panel's finding that, given Airbus' emphasis on LCA commonality and the incorporation of technology across its LCA family, the subsidies in dispute built on one another over time and across models to benefit Airbus' full family. These findings support the conclusion that all Airbus LCA is, in fact, a coherent "subsidized product" and it was entirely reasonable for the Panel to have conducted its adverse effects analysis on this basis;

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[803] *See* Panel Report, paras. 7.1662, 7.1670, 7.1680.

[804] Panel Report, paras. 7.1949, 7.1975.

[805] Panel Report, paras. 7.1665-7.1667.

[806] Panel Report, paras. 7.1753, 7.1754, 7.1790.

[807] Panel Report, paras. 7.1845, 7.1985, 7.1993.

- The European Union does not dispute that LA/MSF changed the economics of Airbus' LCA launches by lowering Airbus' costs and shifting risks of program failure from Airbus to its sponsoring governments. In fact, the European Union has stressed that: "the European Union does not generally appeal a central aspect of the Panel's 'product-launch' causation findings – namely that, but for the MSF, Airbus would not have launched each of its LCA *at the time and the form that it did*";[808]

- The European Union has not repudiated statements of Airbus executives, of executives of Airbus' national affiliates, of the European Commission, and of various Member State officials and officials of European institutions that Launch Aid was essential to all of Airbus' major product launches; and

- With limited exceptions, the European Union generally does not dispute the accuracy of data supporting the Panel's findings with respect to market displacement and significant lost sales.

490. Thus, the European Union largely accepts several core findings of the Panel that support the ultimate conclusion that the subsidies caused serious prejudice. Instead, the EU's appeal essentially reduces to the following arguments of Panel error at the margins:

- The Panel afforded the United States "absolute and unreviewable discretion" with respect to the U.S. identification of a single subsidized product (all Airbus LCA) and a single like product (all Boeing LCA), and that the Panel should have reformulated the U.S. adverse effects claim and segmented it according to several purported subsidized product categories suggested by the EU;[809]

- The Panel did not segment and disaggregate its analysis of the existence of displacement from the EU and third country markets pursuant to the EU's "product market" theory;[810]

- The Panel also should have speculated in further detail about the way in which a non-subsidized Airbus *might* have participated differently in the LCA market, and what *might* have been the *possible* effects of such *theoretical and different* competition;[811]

- The Panel should not have concluded that the Emirate Airlines order of A380s constitutes a significant lost sale caused by the subsides in dispute;[812]

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[808] EU Appellant Submission, para. 412 (emphasis in original); *see also* para. 416 ("The Panel spent a considerable portion of the causation analysis to find that the Dorman Model supported the unremarkable finding that MSF loans, to the extent they confer a benefit, improved Airbus' business cases, and made a launch decision less risky and more likely.")

[809] *See* EU Appellant Submission, Part Five, Section II.

[810] *See* EU Appellant Submission, Part Five, Section III.

[811] *See* EU Appellant Submission, Part Five, Section IV.

- The Panel should not have considered the effects of *all* of the disputed subsidies in the aggregate;[813] and

- The Panel should have found that the 1992 Agreement precluded U.S. arguments as to the WTO consistency of the subsidies in dispute.[814]

None of the arguments establish Panel error. Each aspect of the EU's appeal rests on a deficient legal and factual foundation, and cannot support reversal of the Panel's findings.

491. ***Subsidized Product.*** *The Panel properly assessed the U.S. adverse effects claims on the basis presented by the United States, including the U.S. identification of "all Airbus LCA" as the "subsidized product." (see section IX.B).* The European Union contends that the Panel erred by affording the United States "absolute and unreviewable" discretion to frame the definition of the subsidized and like products at issue. This contention is baseless. The Panel correctly recognized that a complainant has the right to structure its own complaint as it chooses, and the Panel confirmed the reasonableness of the U.S. subsidized product and like product definitions in light of the evidence before it, and proceeded with its analysis on that basis.

492. ***Displacement.*** *The Panel properly found displacement in the EU and third country markets in accordance with Articles 6.3(a) and (b) of the SCM Agreement (see section IX.C).* The European Union appeals the Panel's findings of displacement of imports of Boeing LCA into the European market and exports of Boeing LCA to third country markets as "overstated" because, according to its appeal, the Panel should have assessed the U.S. displacement claims by reference to disaggregated market share data for five distinct "product markets." The European Union's arguments are based on a "product market" theory that is inconsistent with Articles 6.3(a) and (b) of the SCM Agreement and the Panel's findings in this case.

493. ***Causation.*** *The Panel found that there is a genuine and substantial link between the subsidies in dispute and the effects of displacement and lost sales, and that no other factors in the market cut this causal link (see section IX.D).* The Panel's causation finding rests on evidence that (1) Airbus received an uninterrupted stream of LA/MSF and the other subsidies in dispute over a 40 year period; (2) these subsidies were, by design, supply-creating, and their benefits flowed across Airbus' entire LCA product line; (3) the subsidies shaped Airbus' participation in the market by allowing it to develop and bring to market its product line at a pace and in a way that it could not otherwise have done; and (4) the availability of Airbus' subsidized LCA supply was the fundamental factor enabling Airbus to capture market share and sales at Boeing's expense, and that no other factors in the market attenuated that link. The European Union does not contest the underlying evidence that supports each of the Panel's findings.

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[812] *See* EU Appellant Submission, Part Five, Sections V-VI.

[813] *See* EU Appellant Submission, Part Five, Section VII.

[814] *See* EU Appellant Submission, Part Five, Section IX.

494. The Panel also took an additional step in its causation analysis by considering how the market for LCA might have developed during the reference period if Airbus had not been subsidized. In the view of the United States, this step, while not affecting the Panel's ultimate displacement and lost sales findings, was both unnecessary and contrary to the terms of the SCM Agreement. The threshold question raised by the EU's appeal is whether the SCM Agreement compels a panel to *speculate* about what else might have happened (but did not happen) if subsidies had not been provided. There is no ambiguity in the text of the SCM Agreement. Under Articles 5 and 6.3 of the Agreement, a panel is to examine the *actual use* of subsidies and their *actual effects* on competition; a finding of serious prejudice does not call for additional speculation about alternate competition that might have been introduced into the market absent the subsidies. Thus, once the Panel concluded that, over the period 2001-2006, the effects of the subsidies were to allow Airbus to bring its LCA supply to market in a way that displaced imports of Boeing LCA into Europe, displaced Boeing's exports to third country markets, and captured significant sales from Boeing, it had found serious prejudice within the meaning of Articles 6.3(a), 6.3(b) and 6.3(c), irrespective of speculation as to what else might have happened had Airbus not been subsidized. *The possibility that a different competitor might have emerged in the place of a subsidized Airbus cannot and does not negate the actual effects of the subsidies given to Airbus.*

495. ***Emirates A380.*** *The Panel properly found under Article 6.3(c) of the SCM Agreement that the Emirate Airlines order of A380s constitutes a significant lost sale that was an effect of the subsides (see section IX.E).* The Panel did not err in finding that subsidies enabled Airbus to launch the A380, or that the sale was "lost" by Boeing, and therefore the European Union provides no basis for reversing the finding that the effect of the subsidies was lost sales at Emirates, Singapore and Qantas.

496. ***Aggregation of non-LA/MSF subsidies.*** *The Panel properly found, based on its aggregated assessment, that the effects of the non-LA/MSF subsidies were serious prejudice to the United States under Articles 6.3(a), (b), and (c) (see section IX.F).* The Panel found that all of the non-LA/MSF subsidies were granted during the period each succeeding model of Airbus LCA was being developed and brought to market, and that the non-LA/MSF subsidies complemented and supplemented the "product" effect of LA/MSF. An aggregated analysis of the effects of these subsidies on that basis satisfies the requirement of Article 6.3 because the Panel found that that each subsidy shares in common the alleged causal link – *i.e.*, each of the challenged subsidies impacts Airbus's launch of LCA.

497. ***Inapplicability and irrelevance of the 1992 Agreement****. The Panel properly addressed and rejected all of the arguments regarding the 1992 Agreement that the European Union also repeated in its serious prejudice arguments (see section IX.G).* In any event, the arguments it raises are again without merit. The 1992 Agreement explicitly foresees and addresses that the parties might have a dispute related to their obligations under the GATT or the SCM Agreement. Nothing in the 1992 Agreement prejudices the parties' rights under the WTO agreement. In addition, and contrary to the European Union's arguments, EU compliance with the 1992

Agreement is not a "fact" – it is a legal conclusion, and one that was not within the Panel's terms of reference. It would plainly have been improper for the Panel to "take into account" as a "fact" something that was not proven and that constitutes a legal conclusion it was not entitled to make.

498. ***Conclusion.*** In sum, the Panel's findings confirm, based on an extensive evidentiary record, that Airbus has been massively subsidized for decades, that it used these subsidies to bring its aircraft to market in a way that otherwise would have been impossible, and that during the 2001-2006 reference period Airbus used its supply of heavily subsidized LCA to become the world's largest supplier by displacing sales of U.S. LCA in the EU and third country markets and capturing significant sales from Boeing.

B. The Panel's decision to accept the U.S. definition of the "subsidized product" / "product under consideration" as "all Airbus LCA" and to analyze the U.S. adverse effects case on that basis is consistent with Articles 5 and 6.3 of the SCM Agreement and also accords with the Panel's obligations under Article 11 of the DSU

1. Introduction and overview

499. As required by Article 11 of the DSU, the Panel understood its task was to objectively assess the "matter" before it, including whether the subsidized product identified by the United States as a basis for assessing its adverse effects claim was consistent with the SCM Agreement.[815] In doing so, the Panel noted that the term "subsidized product" is not defined in the SCM Agreement. The Panel considered and rejected the European Union's contention that it should recast each U.S. claim based on a single subsidized product/like product into five separate claims based on five separate subsidized product categories. The Panel concluded, correctly, that the SCM Agreement does not require a panel to "reformulate" a Member's complaint.

500. The European Union narrowly appeals what it calls the Panel's findings "that as a matter of law it had no discretion to divide a broad single 'subsidized product' as alleged in a complaining Member's request for establishment and that it need not independently and objectively assess the scope of the 'subsidized product', as defined by the United States."[816] The European Union then goes on to characterize the Panel's decision as "ceding to the complaining Member . . . absolute and unreviewable discretion."[817] And, as it attempted unsuccessfully before the Panel, the European Union continues to suggest that the Panel's adverse effects analysis should have been based on several distinct products rather than "all Airbus LCA" as the "subsidized product." Its argument is based on a mischaracterization of the Panel's findings and a fundamental misconception of the Panel's obligations, and should be accordingly rejected.

[815] Panel Report, paras. 7.1653-7.1655, 7.1662 – 7.1663.

[816] EU Appellant Submission, para. 298.

[817] EU Appellant Submission, para. 298.

501. The Panel found that (1) the United States' definition of the subsidized product as "all Airbus LCA" is reasonable,[818] (2) "that there is a single United States' product that is 'like' the subsidized product, namely all Boeing LCA";[819] and (3) that the subsidies in dispute worked together over time and across aircraft models to give Airbus the full family of aircraft it needed to be competitive in the LCA market.[820] Nothing in the SCM Agreement permits, much less requires, the Panel to redefine the "subsidized product" the United States identified as benefiting from the challenged subsidies, or to adopt a framework for analyzing adverse effects, so as to align with litigation preferences of the European Union. The Panel had an obligation to apply the provisions of the SCM Agreement, to conduct an objective examination of the matter before it, and to make findings with respect to the claims as advanced by the complaining Member. The Panel did just that.

502. In its analysis, the Panel recognized that a complaining Member's proposed subsidized product definition needed to identify a valid subsidized "product," and also observed that the European Union had not contended in its subsidized product arguments that Airbus LCA cannot be considered a single subsidized product because some or all of them are not subsidized.[821] The Panel undertook a detailed analysis of the "reasonableness" of the subsidized product definition proposed by the United States against the "totality of the facts":

> {Article 11 of the DSU} does not require a panel to make a determination of the subsidized product *ab initio*. Rather, in our view, it would at most be appropriate for a panel to start with the complaining Member's allegations, and consider whether, having regard for the totality of the facts, the complaining member has made a reasonable allegation regarding the product that benefits from the alleged subsidies in dispute.[822]

503. Based on its analysis, the Panel confirmed it could, consistent with the SCM Agreement, assess the U.S. adverse effects claim on the basis of the subsidized product consisting of all "Airbus LCA." Nothing more was required of the Panel under Articles 5(c) and Article 6.3 of the SCM Agreement, or Article 11 of the DSU.

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[818] Panel Report, para. 7.1670; *see also* Panel Report, para. 7.1680.

[819] Panel Report, para. 7.1680.

[820] Panel Report, paras. 7.1976 ("While the effect of a single subsidy may well dissipate over time, in our view, the fact that the subsidies at issue in this dispute were repeatedly granted over the entire history of Airbus' LCA development with respect to that same product has had rather the opposite effect, through the learning and spillover effects, and production synergies that are inherent in this industry, which spread the effect of LA/MSF for the development of one model of LCA, and of other subsidies, to both subsequent and earlier models."); 7.1981 ("Economies of scope make it difficult to enter one segment only.").

[821] Panel Report, para. 7.1655.

[822] Panel Report, para. 7.1663.

2. The European Union's subsidized product claims on appeal are narrowly drawn

504. The European Union's appeal of the subsidized product issue relates only to the Panel's displacement findings under Articles 6.3(a) and (b).[823] The EU Appellant Submission makes this point explicitly: "The European Union's request does not affect the Panel's findings with respect to significant lost sales…."[824]

505. With respect to its challenge to the definition of the subsidized product as it relates to the Panel's displacement findings, the European Union's claims on appeal are limited to the following:

> The European Union appeals the Panel's findings, at paragraphs 7.1650, 7.1652-7.1654, 7.1656 and 7.1662 of its Report, that as a matter of law it had no discretion to divide a broad single "subsidized product" as alleged in a complaining Member's request for establishment and that it need not independently and objectively assess the scope of the "subsidized product", as defined by the United States. By ceding to the complaining Member such absolute and unreviewable discretion, the Panel acted inconsistently with Articles 5(c) and 6.3 of the SCM Agreement, as well as Article 11 of the DSU.[825]

506. Thus, while it challenges the Panel's alleged (and mischaracterized) grant of "absolute and unreviewable discretion" to the United States in identifying the "subsidized product," the

[823] Because the United States has not appealed the Panel's findings with respect to price suppression and depression, the European Union's conditional appeals related to price suppression and depression are moot.

[824] EU Appellant Submission, para. 314, n. 313. If the Appellate Body were to find that the identification of a subsidized product/product under consideration could be read into the text as an implied element of claims under Article 6.3(c), the United States refers to its arguments herein and notes that they would also apply in the context of lost sales.

[825] EU Appellant Submission, para. 298.

European Union does not argue (1) that "Airbus LCA" is not an identifiable "product" [826] or (2) that "Airbus LCA" are not "subsidized."[827]

3. The Panel's treatment of the subsidized product identified by the United States

507. While the European Union complains of "absolute and unreviewable discretion" that the Panel accorded to the United States in defining the subsidized product,[828] the Panel did no such thing.

508. The Panel observed at the outset of its analysis that "there is no specific guidance in Articles 5 or 6 of the SCM Agreement, or in any other provision of the SCM Agreement, or in any other provision of the SCM Agreement, regarding the identification of a 'subsidized product' or a panel's role in that process. Indeed, the European Union has not argued otherwise."[829] Moreover, the term's meaning does not, as the European Union argues, contain the additional criteria that a subsidized product include only those items produced by the subsidizing Member that are "like" one another according to footnote 46 of the SCM Agreement or that a subsidized product must be defined by reference to a so-called "product market." As the Panel observed:

> {W}hile Articles 6.3(a) and (b) refer to displacement or impedance of imports or exports of a 'like product' from certain markets … there is no linkage in the text of these provisions between the terms like product and subsidized product, nor between those terms and 'market' in any way that would suggest the definitional import posited by the European Communities.[830]

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[826] *Compare* Panel Report, paras. 7.1664-1667 (findings related to the reasonableness of an "all LCA" product definition) *with* EU Appellant Submission paras. 298, 313 (asking the Appellate Body to reverse only the Panel's reasoning in Panel Report paras. 7.1650, 7.1652-7.1654, 7.1656, 7.1662, and referring the Appellate Body to its "separate appeal" in Section III.D of its Appellant Submission that the "Panel's supplemental findings in paragraph 7.1665-7.1671" do not support the finding that there is a "single LCA market") *and* EU Appellant Submission, para. 335 (limiting its "separate appeal" in Section III.D(a) to the Panel's findings at Panel Report, paras. 7.1742, 7.1755, 7.1758, 7.1777, 7.1779-7.1982, 7.1786, 7.1790-7.1791) and EU Appellant Submission para. 359 (limiting its "separate appeal" in Section III.D(b) to the Panel's findings at Panel Report, 7.1638, 7.1650, 7.1653, 7.1662, 7.1679-7.1680, 7.174107.1742, 7.1777 and note 5465), referencing Panel Report paras. 7.1664-7.1667 only to the extent it alleges that these findings do not support a "single product market" in this case.

[827] *See* Panel Report, para 7.1655 ("Certainly, if a complaining Member were to put forward a proposed 'subsidized product' that does not benefit from the alleged subsidies in dispute, a panel would have to address whether that product is, in fact, a relevant subsidized product. However, this is not such a case, as the European Communities' arguments in this context are not based upon the contention that Airbus LCA are not subsidized.") *and* EU Appellant Submission, para 298 (which does not challenge the Panel's finding at para 7.1655).

[828] EU Appellant Submission, para. 301.

[829] Panel Report, para. 7.1652.

[830] *See* Panel Report, para. 7.1653.

Indeed, separate SCM Agreement provisions cover the concepts of "likeness" ("like product" defined in footnote 46) and "market" (used to refer to geographic areas) in Article 6.3, and, therefore, on their own terms, indicate that they should not be assumed to be implicit in other terms as well.

509. The Panel's adverse effects analysis required the identification of the subsidized product.[831] The Panel was thus faced with a choice between, on the one hand, the European Union's favored approach that requires an "independent determination" (*i.e.*, a determination of the subsidized product independent from the subsidized product on which the complaining Member has based its case – in other words, a panel's "determination of the subsidized product *ab initio*"[832]), and, on the other hand, an approach that requires an objective assessment as to whether the subsidized product identified by the complaining Member satisfies the SCM Agreement.[833] The Panel found that the latter approach was in accord with its obligations under the SCM Agreement and DSU[834] and tested the reasonableness of the United States' product definition under a thorough factual analysis.[835]

510. Thus, the Panel did not grant "absolute and unreviewable discretion" to the United States, as the European Union contends.[836] To the contrary, the Panel recognized that the subsidized product identified by a complaining Member must be a "subsidized product" within the meaning of the SCM Agreement. [837] On this point, the Panel found no basis in the European Union's evidence and argumentation for upsetting the subsidized product definition proposed by the United States.[838]

511. The Panel also took account of the "strong arguments" that supported the U.S. definition of the subsidized product as "all Airbus LCA", none of which are challenged by the European Union in this aspect of its appeal and found that:

> Overall, the evidence and arguments before us suggest that the single product definition advanced by the United States is not inappropriate. While there may be a variety of parameters along which LCA can be categorized, there are no obvious reasons for choosing one among these as the single dividing line that must be respected, instead of treating LCA as a single subsidized product. Airbus itself

[831] Panel Report, para. 7.1653.

[832] Panel Report, para. 7.1663.

[833] *See* Panel Report, paras. 7.1655, 7.1662.

[834] Panel Report, para. 7.1653.

[835] Panel Report, paras. 7.1663-7.1670.

[836] EU Appellant Submission, para. 298.

[837] Panel Report, paras. 7.1655, 7.1662.

[838] Panel Report, para. 7.1655.

> recognizes the importance of developing one single 'family' of LCA made up of different models of aircraft for its business; a factor that carries equal weight in the minds of LCA customers…. In this light, we do not believe it would be appropriate to reject the United States' proposed subsidized product, and will proceed with our analysis on that basis.[839]

512. In particular, the Panel based its conclusion that the United States had reasonably defined the subsidized product as all Airbus LCA on several findings of fact, including those based on characteristics and uses, [840] a lack of clear dividing lines between models and families of Boeing and Airbus LCA,[841] the nature of the LCA market, [842] considerations of LCA family "commonality,"[843] and that the subsidies in dispute have benefitted Airbus' full family of LCA.[844]

513. First, the Panel found that all LCA share the same basic characteristics and uses and that there are no clear dividing lines between models and families of Boeing and Airbus LCA:

> All Airbus LCA share particular characteristics, and certainly the same general uses. In our view, while there are a variety of parameters along which LCA can be categorized, including number of aisles, number of seats, number of engines, range of operations, etc., there are no obvious reasons for choosing one among these as a single dividing line that must be respected, as suggested by the European Communities' argument. The choice of a particular model of aircraft by a customer is not driven purely by the number of seats, but depends on a number of factors related to the airline, the routes, the economics of operation, the existing fleet, as well as the characteristics of the available aircraft such as range and operating costs.[845]

514. Second, the Panel found that Airbus itself recognizes that that "'**{e}very Airbus aircraft belongs to a single family**…,'"[846] and that success in the LCA market requires a full family of aircraft that can meet demand for different aircraft suited to different routes, *e.g.:*

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[839] Panel Report, para. 7.1670.

[840] Panel Report, para. 7.1664.

[841] Panel Report, para. 7.1664.

[842] Panel Report, para. 7.1665.

[843] Panel Report, para. 7.1666.

[844] Panel Report, para. 7.1667.

[845] Panel Report, para. 7.1664.

[846] Panel Report, para. 7.1665 (quoting Exhibit US-503)(emphasis added by the Panel).

> Since its inception, Airbus has recognized the importance to its continuing success in the LCA market of developing a full line – a family – of different LCA models…
>
> "A complete product portfolio is seen as necessary to serve the customer base and to maintain overall competitiveness. Airbus' business strategy focuses on an integrated family of LCA…."
>
> The European Communities itself acknowledged the importance of offering a full range of LCA … "whose commonality keep operating costs down for customer airlines across the fleet but which can perform various missions dictated by an airline's route structure. … {H}istorically … no manufacturer of a single product or family of products, no matter how compelling, has survived in the LCA industry."[847]

515. Third, the Panel found that Airbus produces its LCA as an integrated family that shares basic "commonality" and that the subsidies in dispute have benefitted Airbus' full family of LCA:

> Commonality is important not only from the perspective of the purchasers of LCA, but also for the manufacturer. Producing a full family of different models of LCA allows an LCA manufacturer to achieve production efficiencies. … Airbus recognizes that the development of new aircraft also supports the development of production facilities and technologies across its LCA family. … Airbus also manages its LCA production activities on a family basis. … Thus, the production and sales of one model LCA support the development, production and sales of other LCA models. As a consequence, it seems clear to us that subsidies benefitting one particular model of Airbus LCA can have spillover effects for other Airbus models."[848]

516. Fourth, the Panel found that "identification of the 'subsidized product' cannot ignore that Airbus has developed an entire range of LCA family comprising various models that is marketed to customers as an integrated whole, and that the entire range of models has, at least potentially, been supported by the subsidies in dispute."[849]

517. As its findings make clear, the Panel has solid evidentiary support for its conclusion that the United States had identified a reasonable and coherent subsidized product according to these criteria.

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[847] Panel Report, para. 7.1665 (quoting BAE Systems Annual Report 1999 at 15, Exhibit US-388; EC FWS, para. 30).

[848] Panel Report, para. 7.1666.

[849] Panel Report, para. 7.1667.

518. Moreover, the Panel considered and found compelling reasons to reject the European Union's effort to subdivide the United States' subsidized product / like product definitions according to the passenger seating capacity of Airbus LCA. The Panel found that "the dividing lines drawn by the European Communities are not sufficiently clear to allow us to conclude, were we required to consider the matter, that separate products **must** be defined on the basis of those lines."[850] After reviewing the evidence and arguments submitted by both parties, the Panel made the following findings:

- "It is not clear to us that seating capacity *per se* is an appropriate or necessary basis for drawing distinctions among aircraft in terms of market competition,"[851]

- "It seems clear to us that there is at least some degree of competition between adjacent product groups identified by the European Communities, for instance, between a Boeing 747 and Airbus A380."[852]

- "{E}ven by the European Communities' own standards, two different families of Airbus LCA compete in the same alleged product markets, with at least one of these (the A350 family) straddling two of the alleged product markets." [853]

- "We cannot accept the proposition that there is no competition between LCA in the different model groups proposed by the European Communities…"[854]

519. Yet even if the European Union's approach could be considered a factually reasonable alternative to the United States' subsidized product definition, the Panel's decision to reject that alternative would not constitute reversible error in light of its finding that the definition of the product offered by the United States was reasonable.

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[850] Panel Report, para. 7.1668 (emphasis in Panel report).

[851] Panel Report, para. 7.1664. *See also* Panel Report, para. 7.1668, n. 5091 ("We note that the European Communities' expert, Mr. Scherer, stated that "Aircraft market segments typically are distinct from each other in about 15-20% seat increment. We understand from this that to the extent two LCA have seating capacity within 15-20 percent of each other, they compete with each other. In this regard, we note that there are overlapping seating capacities with that range between the A330 and A340 families posited by the European Communities, and seating capacities that are beyond that range in the A320 model family.").

[852] Panel Report, para. 7.1668.

[853] Panel Report, para. 7.1668.

[854] Panel Report, para. 7.1668. See also para. 7.1670 ("{I}t is evident that different degrees of competition exist between at least the adjacent markets the European Communities alleges should be used to define the 'subsidized product").

4. The European Union's challenge under Article 11 of the DSU is inadequate as a matter of law

520. Declining to "reformulate" the U.S. claim in the manner requested by the European Union was consistent with the Panel's obligations under Article 11 of the DSU to make an objective assessment of the matter before it. Had the Panel accepted the European Union's argument regarding the appropriate subsidized product definition, it would have overstepped the boundaries of its mandate pursuant to Article 11 to make an "objective assessment of the matter before it." As the Panel itself recognized:

> {Article 11 of the DSU} does not require a panel to make a determination of the subsidized product *ab initio*. Rather, in our view, it would at most be appropriate for a panel to start with the complaining Member's allegations, and consider whether, having regard for the totality of the facts, the complaining Member has made a reasonable allegation regarding the product that benefits from the alleged subsidies in dispute.[855]

521. The Panel's consideration of the facts and legal arguments relating to the identification of all Airbus LCA as the "subsidized product" / "product under consideration" reviewed above belies the European Union's assertions that the Panel afforded the United States "absolute and unreviewable discretion," that the Panel "uncritically accept{ed}" the position of the United States regarding the "subsidized product" and that the Panel failed "to independently assess the United States' definition of the subsidized product."[856] Accordingly, the Appellate Body should reject the European Union's arguments regarding the "subsidized product" and its requests for reversal of the Panel's reasoning and findings.[857]

522. The Appellate Body should also reject the European Union's appeal of the subsidized product issue under Article 11 of the DSU because it falls well short of the requirements for an Article 11 claim on appeal. As discussed, the Panel conducted a thorough examination that confirmed the reasonableness of the United States' proposed subsidized product definition.[858] The European Union's subsidized product appeal does not challenge the findings made in that examination as inconsistent with Article 11 of the DSU.[859] Rather, the European Union's claim under Article 11 of the DSU consists of arguments that the Panel failed to correctly interpret and apply provisions of Articles 5 and 6.3 of the SCM Agreement and the contention that the Panel afforded the United States "absolute and unreviewable discretion" with respect to its

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[855] Panel Report, para. 7.1663.

[856] *See* EU Appellant Submission, paras. 301, 303, 304.

[857] EU Appellant Submission, para. 313.

[858] Panel Report, paras. 7.1673-7.1670.

[859] *See* EU Appellant Submission, para. 298.

identification of the "subsidized product."[860] This blanket assertion coupled with recast arguments going to the interpretation and application of the SCM Agreement cannot support a claim under Article 11. The European Union's DSU Article 11 claim is essentially unsupported by any argumentation or citation to prior reasoning, and in any event, the Panel's thorough review of the "subsidized product," as described above, disposes of the EU's assertion that the Panel abdicated its responsibilities or otherwise failed to act objectively.

523. The Appellate Body has previously found that a claim pursued under Article 11 of the DSU must stand on its own and should "not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements":

> We further note that, in *Chile – Price Band System (Article 21.5 – Argentina)*, the Appellate Body found that a Member cannot base its claims under Article 11 of the DSU "on the same grounds" as its claims under substantive provisions in the covered agreements. In particular, the Appellate Body ruled that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements." In that case, the Appellate Body also referred to its decision in *US – Steel Safeguards*, where it found that:
>
> > {a} challenge under Article 11 of the DSU must not be vague or ambiguous. On the contrary, such a challenge must be clearly articulated and substantiated with specific arguments. An Article 11 claim is not to be made lightly, or merely as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement. A claim under Article 11 of the DSU must stand by itself and be substantiated, as such, and not as subsidiary to another alleged violation.[861]

524. In *US – Zeroing (Article 21.5 – EC)*, the Appellate Body rejected the Article 11 claims because it was "not persuaded that the claims and arguments by the European Communities under Article 11 of the DSU differ from its claims that the Panel failed to apply correctly other provisions…."[862] The same basis exists here for the Appellate Body to reject the European Union's Article 11 claim, which is nothing more than an appendage to the European Union's

[860] EU Appellant Submission, para. 301.

[861] *US – Zeroing (Article 21.5 – EC) (AB)*, para. 401 (footnotes omitted).

[862] *US – Zeroing (Article 21.5 – EC) (AB)*, para. 402.

arguments concerning the requirements in Articles 5 and 6.3(c) of the SCM Agreement with respect to the identification of the subsidized product.[863]

525. Consistent with its obligations under Article 11 of the DSU, the Panel considered the evidence and arguments advanced by the parties, including those regarding the "subsidized product" identified by the United States. As the Appellate Body has made clear, it will not "interfere lightly" with the Panel's discretion and that the purpose of an appeal is not to revisit the Panel's findings of fact except to the extent that the Panel's assessment of the evidence was not "objective." The Panel's findings of fact in this case reflect an exhaustive review of a detailed body of evidence.

526. As set forth above, the Panel fully complied with its obligations under DSU Article 11 and evaluated the record evidence and the parties' arguments to test the reasonableness of the United States identification of "all Airbus LCA" as the "subsidized product" and the Panel committed no legal error in proceeding with its analysis of adverse effects on this basis.

5. The European Union's preferred method for defining the subsidized product has no basis in the SCM Agreement

527. The European Union argues that "{s}ubsidized aircraft may be considered to be in the same market, and hence a single 'subsidized product', only if they are engaged in actual or potential competition."[864] The EU's proffered "rationale" for this supposed requirement is based on a misreading of the Appellate Body's report in *US – Upland Cotton*:

> Every one of the subparagraphs of Article 6.3 defines serious prejudice with respect to certain effects in "markets". That term covers both geographic and product markets. With respect to the product market dimension, the Appellate Body in *US – Upland Cotton* held that "two products would be in the same market if they were engaged in actual or potential competition in that market" and where there is "homogeneity of the conditions of competition". This means that a panel must objectively assess whether the product market(s) asserted by the complaining Member exist and can serve as a proper basis for analysing the complaining Member's adverse effects claims. This analysis must start with an assessment of the complaining Member's definition of the "subsidized product".[865]

528. In that dispute, however, the Appellate Body was not considering the definition of the subsidized product. Rather, it was evaluating the parties' contentions regarding the *geographic*

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[863] *See* EU Appellant Submission, paras. 301-304.

[864] EU Appellant Submission, para. 310.

[865] EU Appellant Submission, para. 307 (emphasis in original) (citing *US – Upland Cotton (AB)*, paras. 405-410).

scope of the term "same market" in the context of Brazil's price suppression claim under Article 6.3(c) of the SCM Agreement. The full quote is as follows:

> According to the United States, if the market examined pursuant to a claim of significant price suppression under Article 6.3(c) is a "world market", then the subsidized product and any like product will necessarily be in that market and the word "same" in Article 6.3(c) would have no meaning. We do not agree with this argument. As we have explained above, there is no per se geographical limitation of a market under Article 6.3(c). It could well be a national market, a world market, or any other market. It is for the complaining party to identify the market *where* it alleges significant price suppression and to establish that that market exists. In doing so, it is for the complaining party to establish that the subsidized product and its product are in actual or potential competition in that alleged market. If that market is established to be a "world market", it cannot be said, for that reason alone, that the two products are not in the "same market" within the meaning of Article 6.3(c).[866]

529. The passages from *US – Upland Cotton* cited by the European Union do not support its challenge to the Panel's approach to determining the scope of the "subsidized product." The Appellate Body's report in *US – Upland Cotton* is relevant to the European Union's appeal, however, because it demonstrates that even under Article 6.3(c) "the determination of the relevant market under Article 6.3(c) of the SCM Agreement *depends on the subsidized product in question*."[867] Hence, the order of analysis is to establish first the definition of the subsidized product and then the definition of the like product against which it competes, and then to determine the geographic scope of the market in which that competition occurs and adverse effects are alleged to have been caused.

530. Nor is there any sound basis for the European Union's repeated insistence that "actual or potential"[868] competition amongst all items within a product grouping is the determining factor for defining the subsidized product. In a passage truncated by the European Union,[869] the Appellate Body in *Cotton* found that:

> it seems reasonable to conclude that two products would be in the same market if they were engaged in actual or potential competition in that market. Thus, *two products may be 'in the same market' even if they are not necessarily sold at the same time and in the same place or country*. As the Panel correctly pointed out, *the scope of the 'market' for determining the area of competition between two*

[866] *US – Upland Cotton (AB)*, para. 409 (emphasis added).

[867] *US – Upland Cotton (AB)*, para. 408 (emphasis added).

[868] EU Appellant Submission, para. 310.

[869] *See* EU Appellant Submission, para. 307 (quoting *US – Upland Cotton (AB)*, para. 408).

> *products*, may depend on several factors such as the nature of the product, the homogeneity of the conditions of competition, and transport costs. [870]

The full passage again makes clear what the European Union seeks to obscure: that "actual or potential competition" may be relevant "for determining the *area* of competition between two products" but it is not a concept that limits the definition of the term "subsidized product."

531. Finally, the Appellate Body has never required that there be "actual or potential competition" *within* a subsidized product grouping. The Panel rejected the EU's arguments that "because different Boeing LCA models compete in separate markets with corresponding Airbus LCA markets" all Airbus LCA cannot be a single subsidized product, and pointed to the panel in *US – Softwood Lumber V* which rejected similar arguments advanced with regard to softwood lumber, "the product under consideration," as including a broad range of articles.[871]

6. Conclusion: The European Union's subsidized product appeals provide no basis for disturbing the Panel's definitions of the subsidized product and like product, or its findings of displacement under Articles 6.3(a) and (b)

532. Consistent with Article 11 of the DSU, the Panel correctly recognized that its task was to objectively assess the "matter" before it, including whether the U.S. subsidized product definition was a reasonable basis for assessing the U.S. adverse effects claim.[872] The Panel recognized that the subsidized product identified by a complaining Member must be a "subsidized product" within the meaning of the SCM Agreement,[873] and found that the evidence and arguments offered by the European Union provided no basis for upsetting the subsidized product definition proposed by the United States.[874] The Panel thus considered and rejected the European Union's contention that it should recast the U.S. claims based on the single subsidized product/like product identified by the United States into separate claims. The Panel also took account of the "strong arguments" that supported the U.S. definition of the subsidized product as "all Airbus LCA."

533. The European Union suggests that its appeal of certain of the Panel's findings regarding the subsidized product "has implications for the Panel's findings of displacement and price suppression and depression that mirror those of a reversal of the European Union's independent

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[870] *US – Upland Cotton (AB)*, para. 408 (emphasis added).

[871] Panel Report, para. 7.1675 (citing *US – Softwood Lumber V (Panel)*, para. 7.157).

[872] Panel Report, paras. 7.1653-7.1655, 7.1662 – 7.1663.

[873] Panel Report, paras. 7.1655, 7.1662.

[874] Panel Report, para. 7.1655.

appeal of the Panel's product market finding."[875] There are no such implications, as the United States explains below in Section IX.C.

C. The Panel's analysis and findings regarding the existence of displacement of U.S. LCA is consistent with the SCM Agreement and fully supported by the evidence

1. Introduction and overview

534. The European Union appeals the Panel's assessment of the existence of displacement in two respects. The principal argument alleges the Panel conducted an erroneous assessment of displacement on the basis of what the European Union calls a "single product market."[876] The European Union also claims that the data do not support the Panel's findings of the existence of displacement under Article 6.3(b) in the third country markets of Brazil, Mexico, Singapore, Korea, and Chinese Taipei.[877] The United States' rebuttal of these two arguments is set out below. The European Union also challenges certain causation-related aspects of the Panel's displacement findings; those are addressed in Section IX.D.

535. The European Union's appeal of the Panel's finding of the existence of displacement cannot be reconciled with the market gains that subsidized Airbus LCA made at the expense of Boeing LCA. Before the Panel, the United States presented evidence of substantial market share losses by the like product (Boeing LCA), and corresponding market share gains by the subsidized product (Airbus LCA), in the EC market and in certain third country markets. On the basis of these data, and its earlier findings, the Panel made the following key findings:

- "We have already rejected the fundamental premises underlying the European Communities' arguments, having concluded that it is appropriate to analyze adverse effects on the basis that all Airbus LCA constitute the subsidized product at issue in this dispute and all Boeing LCA are the relevant like product. The clear dividing lines the European Communities argues exist between models and families of Boeing and Airbus LCA are not supported by the facts that are before us. This is not a case where the complainant's definition of the subsidized product and like product, and the data submitted corresponding to that definition, risks distorting the market displacement and impedance analysis that must be performed under Article 6.3(a). Thus, in the light of our findings on the subsidized product and like product, we will conduct our evaluation of whether the United States has demonstrated displacement or impedance of imports of United States' LCA into the EC market by looking at

[875] EU Appellant Submission, para. 313.

[876] EU Appellant Submission, paras. 335-392.

[877] EU Appellant Submission, paras. 319-334.

market share data for the subsidized product and like product defined by the United States, that is, Airbus LCA and Boeing LCA."[878]

- "Airbus' share of the EC market increased by 9 percentage points over the period 2001 to 2006," while Boeing's share of the EC market dropped from 42 percent in 2001 to 33 percent in 2005 and 2006;[879]
- "Boeing's LCA deliveries over this {2001-2006} period declined more than did Airbus LCA deliveries, and the decline in Boeing deliveries is disproportionate to the decline in overall deliveries";[880]
- "{I}t is clear that Boeing's share of LCA deliveries to the EC market declined over the period, while Airbus' share of that market increased. . . .As the only other competitor in the market was Airbus, it follows that the evidence we have reviewed demonstrates that imports of the United States' LCA into the EC market were displaced by Airbus LCA over the relevant period";[881]
- "it is clear that in certain individual third country markets, Airbus' market share increased significantly over the period 2001 to 2005, and even in 2006 remained higher than Boeing's market share, and that Airbus obtained a significantly larger number of orders in the Indian market than did Boeing. As the only other competitor in the relevant markets over the period we are considering was Airbus, it follows that the evidence demonstrates that Boeing's exports of LCA were displaced from the markets of Australia and China by sales of Airbus LCA over the period we examined, and that there is a likelihood of future displacement of Boeing LCA from the Indian market";[882] and
- "the evidence demonstrates that United States' exports of LCA were displaced from these markets {*i.e.*, Brazil, Chinese Taipei, Korea, Mexico, and Singapore} by sales of Airbus LCA over the period we examined as well."[883]

536. The Panel noted that "{t}he European Communities does not dispute the accuracy of the data" presented by the United States showing Boeing's market share losses over the 2001-2006 period in the EC[884] and third country markets. [885]

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[878] Panel Report, para. 7.1742.

[879] Panel Report, para. 7.1753.

[880] Panel Report, para. 7.1754.

[881] Panel Report, para. 7.1758.

[882] Panel Report, para. 7.1790.

[883] Panel Report, para. 7.1791.

[884] Panel Report, para. 7.1742.

[885] Panel Report, para. 7.1775.

537. On appeal, the European Union "does not request the Appellate Body to reverse the displacement findings in their entirety."[886] Rather, the European Union asks the Appellate Body to rearrange the data and then find that they do not support the Panel's displacement findings. The European Union's arguments reflect an incorrect interpretation of the SCM Agreement and are at odds with the facts found by the Panel and should be rejected.

2. The Panel did not err in assessing displacement on the basis of a single "product market"

538. Despite its extensive arguments regarding "product market," the European Union concedes that the Panel "need not have accepted the European Union's argument that there were five different LCA markets."[887] The European Union nonetheless requests the Appellate Body to overturn the Panel's assessment of the existence of displacement on the basis of a single subsidized product and a single like product. The European Union advances this appeal despite its acceptance of the following key aspects of the Panel's analysis, including:

- the Panel's findings that "all Airbus LCA" is a product;[888]
- the Panel's finding that "all Airbus LCA" received the subsidies at issue;[889]
- the Panel's use of the European Union as the "the market of the subsidizing Member" within the meaning of Article 6.3(a), and Australia, Brazil, China, Chinese Taipei, India, Korea, Mexico, and Singapore as "third country" markets within the meaning of Article 6.3(b);[890]

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[886] EU Appellant Submission, para. 376.

[887] EU Appellant Submission, para. 370.

[888] *Compare* Panel Report, paras. 7.1664-1667 (findings related to the reasonableness of an "all LCA" product definition) *with* EU Appellant Submission paras. 298, 313 (asking the Appellate Body to reverse only the Panel's reasoning in Panel Report paras. 7.1650, 7.1652-7.1654, 7.1656, 7.1662, and referring the Appellate Body to its "separate appeal" in Section III.D of its Appellant Submission that the "Panel's supplemental findings in paragraph 7.1665-7.1671" do not support the finding that there is a "single LCA market") *and* EU Appellant Submission, para. 335 (limiting its "separate appeal" in Section III.D(a) to the Panel's findings at Panel Report, paras. 7.1742, 7.1755, 7.1758, 7.1777, 7.1779-7.1982, 7.1786, 7.1790-7.1791) and EU Appellant Submission para. 359 (limiting its "separate appeal" in Section III.D(b) to the Panel's findings at Panel Report, 7.1638, 7.1650, 7.1653, 7.1662, 7.1679-7.1680, 7.174107.1742, 7.1777 and note 5465) referencing Panel Report paras. 7.1664-7.1667 only to the extent it alleges that these findings do not support a "single product market" in this case.

[889] *See* Panel Report, para 7.1655 ("Certainly, if a complaining Member were to put forward a proposed 'subsidized product' that does not benefit from the alleged subsidies in dispute, a panel would have to address whether that product is, in fact, a relevant subsidized product. However, this is not such a case, as the European Communities' arguments in this context are not based upon the contention that Airbus LCA are not subsidized.") *and* EU Appellant Submission, para 298 (which does not challenge the Panel's finding at para 7.1655).

[890] *Compare* Panel Report, paras. 7.1758, 7.1790-7.1791 with EU Appellant Submission, para. 335 (appealing an alleged error in the Panel's assessment of displacement claims "on the basis of a single product

- the Panel's use of LCA market share data based on deliveries as a means of determining whether "imports" or "exports" of the like product have been displacement;[891] and

- the Panel's use of a 2001-2006 reference period over which to examine whether market share trends show displacement of the Boeing like product by the Airbus subsidized product.[892]

539. These are the essential elements that the SCM Agreement requires for conducting a displacement analysis under Articles 6.3(a) and (b). They include: a subsidized product (*i.e.*, all Airbus LCA); a like product (*i.e.*, all Boeing LCA); geographic markets in which to assess trends with respect to the subsidized and like products (*i.e.*, the European Union, and the third countries, respectively); import/export data; and a reference period over which to determine whether a trend of displacement exists.

a. The European Union's appeal is based on an incorrect interpretation of Article 6.3(a) and (b) as wrongly calling for the identification of "the scope of a product market"

540. In challenging the Panel's assessment of displacement under Article 6.3(a) and (b) on the basis of what it calls a "single product market," the European Union argues that the Panel was required to deconstruct the United States' adverse effects case along the lines of five "product markets," i.e., three of which have a subsidized product (comprising multiple Airbus LCA models) and a like product (comprising multiple Boeing LCA models), and two of which are monopoly markets (one for each of Airbus' A380 and Boeing's 747). The European Union's attempt to use the concept of "product markets" as a means of restructuring the displacement analysis has no foundation in, and is contradicted by, the SCM Agreement and the facts of this case.[893]

541. To begin, the SCM Agreement does not contain the term "product market." Articles 6.3(a) and (b) use the term "market," but the context indicates that the term relates to the identification of a specific geographic market – *i.e.*, "the market of the subsidizing Member" and

market", but not arguing any error in its assessment of displacement claims in the geographic markets identified by the United States.).

[891] *See* Panel Report, para. 7.1748, which is unappealed in the EU Appellant Submission.

[892] *See* Panel Report, paras. 7.1712-7.1713, which is unappealed in the EU Appellant Submission.

[893] *See, e.g.*, EU Appellant Submission, para. 341 (asserting, in the course of its arguments concerning the "legal standard for assessing the scope of a product market," that "{t}he concepts of 'markets' and 'competition' – as well as 'subsidized' and 'like' products – are inseparable concepts that play a crucial role in assessing serious prejudice under Article 6.3 of the SCM Agreement.").

"a third country market," respectively.[894]. The concept of "product" is addressed in the identification of the "subsidized product" and the product that is "like" it according to the definition set out in footnote 46.[895] It is the definition of the subsidized product and the like product that sets the product framework for the displacement analysis, while the references to "market" in Articles 6.3(a) and (b) define the geographic scope of that analysis.

542. Moreover, the European Union's argument is anchored to a mischaracterization of the Appellate Body's findings in *US – Upland Cotton*.[896] The European Union asserts that in *US – Upland Cotton* "the Appellate Body clarified that those 'markets' are defined including by reference to their product dimension"[897] and that the Appellate Body purportedly emphasized that "two products are in the same market if they are in 'actual or potential competition' and there exists 'homogeneity of competition' in the market."[898]

543. In *US – Upland Cotton*, the Appellate Body neither found nor implied that a "product market" is a requisite element of a displacement claim under Articles 6.3(a) and (b) of the SCM Agreement. Rather it found that Article 6.3(c) called for evidence and argumentation to define the geographic scope of the "same market."[899] Moreover, given the Panel's findings that indicate homogenous conditions of competition amongst all Airbus and Boeing LCA (see below Section IX.C.2.), the *US – Upland Cotton* report provides no basis for the European Union to argue that the Panel erred in treating all LCA as competing "in the same market."[900]

544. The European Union's citation to *EC – Asbestos* is also misplaced. The European Union states that "in assessing whether two products are in the same market, the Panel must apply the correct legal standard to the specific facts of the case and analyse which products compete based on, *inter alia*, the criteria set out above {*i.e.*, pertaining to the GATT 1994 Article III:4 like product inquiry at issue in *EC – Asbestos* }."[901] In that dispute, however, the Appellate Body was not looking at the definition of "market"; rather it was considering whether two products are "like" – *i.e.*, whether domestic and imported products are "like" within the meaning of Article III:4 of the GATT.[902] But the European Union is not appealing the Panel's determination of the

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[894] Even in Article 6.3(c), where the term market is not explicitly qualified by a geographic term, the Appellate Body has found that the term focuses on "where" competition between two products is taking place. *US-Upland Cotton* (AB), para. 408.

[895] The competitive relationship between the subsidized product and like product will also be relevant in a Panel's assessment of whether the subsidy caused the displacement, impedance, etc. of the like product.

[896] *See* EU Appellant Submission, paras. 342-344.

[897] EU Appellant Submission, para. 342.

[898] EU Appellant Submission, para. 343.

[899] *US – Upland Cotton (AB)*, para. 408.

[900] EU Appellant Submission, para. 350.

[901] EU Appellant Submission, para. 345.

[902] *EC – Asbestos (AB)*, para. 103.

product that is "like" the subsidized product. Rather, it argues that having identified the subsidized and like product, the Panel was then obligated to segment each subsidized product/like product pairing into multiple market segments for the purpose of assessing displacement of the like product. As demonstrated above, neither the SCM Agreement nor prior Appellate Body findings regarding the definition of the "like product" provide support for its appeal.

545. The *Indonesia – Autos* panel's approach to assessing displacement/impedance claims is instructive:

> In this case, the European Communities and the United States have alleged that the subsidies in question are conferred on the Timor. Accordingly, our analysis of the effects of these subsidies *must be performed in relation to* their effects on products which are "like products" to that passenger car.[903]

546. After identifying the relevant subsidized product and like product for its Article 6.3(a) assessment (*i.e.*, displacement or impedance in the Indonesian market), the *Indonesia – Autos* panel proceeded to examine market share data without the additional "product market" inquiry proposed by the European Union in the current dispute:

> Having determined that the EC and US models in the C1 Segment (and arguably those in the C2 Segment) are "like" the subsidized Timor, we consider it appropriate to analyze market shares for the C Segment." [904]

The *Indonesia – Autos* panel's like product assessment properly confirmed that the identity of the subsidized product and like product, respectively, address "product" issues. Thus, the term "market" in Articles 6.3(a) and (b) pertains only to the geographic location in which competition between the subsidized product and like product is to be assessed.

547. In sum, the Panel's decision, after evaluating all the facts presented, to accept the U.S. definition of a single "subsidized product" rather than five separate "products" offered by the European Union (but not defended on appeal), as the basis for its displacement analysis, was a reasonable one, and there is no basis for the Appellate Body to overturn it.

b. The Panel's analytical framework for its displacement analysis is consistent with Articles 6.3(a) and (b)

548. The European Union also argues that the Panel erred in the factors it considered in structuring its displacement analysis. Its arguments in this respect relate to (and repeat) alleged errors in "subsidized product" analysis. The European Union transposes these arguments into an

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[903] *Indonesia – Autos (Panel)*, para. 14.164 (emphasis added).

[904] *Indonesia – Autos (Panel)*, para. 14.212.

appeal based on the manner in which the Panel structured its analysis of the existence of displacement. As discussed above, the SCM Agreement sets up the framework in which displacement under Article 6.3(a) and (b) is assessed on the basis of the subsidized product, the like product, and the geographic market. The Panel conducted an appropriate analysis of each of these elements, and conducted its analysis in accordance with the SCM Agreement. The European Union's arguments provide no basis to disturb the structure of the Panel's analysis or its findings.

549. For example, the European Union argues that "the Panel made an interpretive error when it found relevant to its 'market' assessment the possibility of linkages and spill-over effects of the subsidies in question."[905] As discussed above, these considerations are not relevant to identifying the geographic "market" under Article 6.3(a), (b) or (c) – the Panel did not take them into account in that context, nor did it have any obligation to do so. They are, however, relevant to the determination of the subsidized product, and the Panel considered them in that context.[906]

550. The Panel considered all of the evidence and argumentation concerning the conditions of competition applicable to all Airbus LCA. These included, for example "'spill-over' benefits with regard to technologies or production facilities from one model benefit both subsequently developed and existing models;" that "common elements in design and operation are a central feature in selling the entire Airbus LCA fleet to customers, indicating a significant degree of commonality;" and that "aircraft are sold in 'package' deals, either simultaneous or consecutive, of different models."[907] Under these conditions of competition, the Panel found that the ways the subsidies benefit all Airbus LCA is that "subsidies that facilitate the development of one Airbus LCA model improve the marketability of all Airbus LCA models."[908] On this basis, the Panel recognized that the identification by the United States of "all Airbus LCA" as the subsidized product was consistent with the text of the SCM Agreement. The Panel also recognized that were it "to accept the European Communities' views concerning the subsidized product, we would be precluding even the possibility of examining whether these linkages and spillover effects exist, and therefore whether the subsidies challenged by the United States are causing the adverse effects alleged."[909]

551. The European Union now argues that the Panel's "concern is unwarranted":

> As the Panel itself appears to recognize – and the European Union fully accepts – any such linkages and spill-over effects could be relevant to an assessment of the 'effects of the subsidy' under Article 6.3 – *i.e.*, to causation. . . . Thus, a panel

[905] EU Appellant Submission, para. 353 (citing Panel Report, para. 7.1655).

[906] Panel Report, para. 7.1655.

[907] Panel Report, para. 7.1655.

[908] Panel Report, para. 7.1655.

[909] Panel Report, para. 7.1655.

> may appropriately consider those potential linkages and spill-over effects of subsidies provided to one product when assessing product launch causation for subsequent products – where they may be demonstrated.[910]

Before the Panel, however, the European Union made a concerted effort to have the Panel disregard the spillover effect of the subsidies prior to subsequent product launches.[911] It attempted to quantify the magnitude of subsidies only with respect to those provided for a particular LCA program and, on that basis, argued that the subsidy magnitude was *de minimis* for each Airbus LCA model.[912]

552. Similarly, the European Union argues that the Panel's findings related to the identification of the subsidized product failed "to speak to the existence of a market in which products compete under 'homogeneity of the conditions of competition."[913] Even assuming that homogeneity of the conditions of competition were a relevant factor in a displacement analysis under Articles 6.3(a) and (b), the Panel's findings in the context of its subsidized product analysis support the conclusion that "all Airbus LCA" an "all Boeing LCA" compete under homogenous conditions of competition. In particular, the Panel made findings as to:

- Airbus' longstanding recognition of "the importance to its continued success of developing a full line – a family – of different LCA models," such that its "business strategy focuses on an integrated family of LCA";[914]

- the European Union's own acknowledgement of "the importance of offering a full range of LCA" for survival in the LCA industry;[915]

- LCA product commonality that is important both to customers (in terms of operating cost benefits and confidence in technologies proven on earlier models) and to manufacturers (in terms of production efficiencies and management of production activities to offset new product development costs);[916]

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[910] EU Appellant Submission, para. 354.

[911] Panel Report, para. 7.1869, 7.1873 ("In keeping with its assertion of separate and distinct subsidized and like products . . .").

[912] Panel Report, para. 7.1963 ("The European Communities then allocated these amounts over orders for the LCA for which the LA/MSF was provided . . .").

[913] EU Appellant Submission, para. 354.

[914] Panel Report, para. 7.1665.

[915] Panel Report, para. 7.1665.

[916] Panel Report, para. 7.1666.

- Airbus' development of "an entire range of LCA family comprising various models, that is marketed to customers as an integrated whole"; [917]

- the existence of competition between Airbus and Boeing LCA (*e.g.*, the A380 and 747, and the A330-200 and 777-200) outside of the product groups identified by the European Union;[918] and

- the ambiguity in the European Union's product segmentation, whereby the A350XWB-800 is in one segment and the other A350XWB models in another.[919]

553. The European Union's "homogeneity" arguments ignore the Panel's extensive findings as to the conditions of competition, which cite repeatedly to the European Union's own LCA industry expert, Rod Muddle, and his opinions on conditions of competition that apply to all LCA, and *which are not challenged by the European Union*. These Panel findings demonstrate the homogeneity of conditions of competition across all of the allegedly distinct "product markets" identified by the European Union.[920] Indeed, the Panel's description of competition between Airbus and Boeing LCA relies heavily on the European Union's own evidence and the statements of Mr. Muddle and Airbus' own Christian Scherer.[921]

[917] Panel Report, para. 7.1667.

[918] Panel Report, para. 7.1668.

[919] Panel Report, para. 7.1668.

[920] *See* Panel Report, paras. 7.1716-7.1727.

[921] Panel Report, para. 7.1725 ("When choosing aircraft, airlines evaluate the economics of the competing aircraft from both Airbus and Boeing, and the impact those factors will have on the revenues that the aircraft can be expected to generate over its economic life of approximately 30 years. In doing so, customers quantify and weigh numerous factors, including price, net of concessions such as cash discounts, scheduled pre-delivery payments, provisions for price escalation, and guarantees related to performance, maintenance, or residual value; financing, including consideration of elements such as direct financing support by the manufacturer; date of delivery; engine manufacturers; the make-up of existing LCA in the purchaser's fleet and cost of change and cost of diversifying, and direct operating costs, such as fuel efficiency. Each customer has different cost-related concerns, and so different aspects may be valued differently by different customers or at different times. Each of the technical, physical and economic characteristics of aircraft under consideration is translated by customers into a revenue or cost element that is included in their assessment of an offer and its net present value. Despite the complexity of the factors involved in a sales campaign, LCA customers, as well as LCA manufacturers, are generally able to account for these factors in assessing the economic value of a sales proposal. Thus, competition between Boeing and Airbus is driven by the performance characteristics of the aircraft that the two manufacturers have developed and the price (net of all concessions) and sales terms at which they offer their respective LCA. Since both Airbus and Boeing offer a range of competing LCA models suited for various customer needs, price is a significant factor in a customer's purchase determination, but not necessarily determinative. That this competition may not be manifest in offers from each producer for each potential order does not, in our view, detract from the basic fact of intense competition between Airbus and Boeing for sales of LCA world-wide.")

554. Thus, even if the SCM Agreement called for a separate "product market" analysis under Articles 6.3(a)-(d), there is evidence of "product market" in which all Airbus LCA compete against all Boeing LCA under homogenous conditions of competition irrespective of the European Union's proposed "product markets,"[922] and there is uncontested evidence of LCA competition outside the EU's proposed "product markets."[923]

c. The European Union's DSU Article 11 challenge is meritless

555. According to the European Union, the Panel acted contrary to its obligations under Article 11 of the DSU to make an objective assessment when it "marginalized and disregarded `entire categories of highly relevant and contemporaneous evidence," and "failed to provide a reasoned and adequate explanation based on a coherent reasoning."[924]

556. The Panel did not disregard this "highly relevant" evidence submitted by the European Union in the context of assessing the U.S. definition of the subsidized product; rather, the Panel found it unpersuasive.[925]

557. As a factual matter, the Panel found it "clear . . . that there is at least some degree of competition between adjacent product groups identified by the European Communities, for instance, between a Boeing 747 and an Airbus A380."[926] Consistent with the Panel's findings, the evidence given such weight in the European Union's brief[927] shows a number of *actual, "head-to-head" campaigns* in which Boeing and Airbus offered LCA across every adjacent "product market" identified by the European Union.

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[922] Panel Report, para. 7.1725.

[923] Panel Report, para. 7.1668.

[924] EU Appellant Submission, para. 359.

[925] *See* Panel Report, 7.1668.

[926] Panel Report, para. 7.1668.

[927] *See, e.g.,* EU Appellant Submission, paras. 362-363.

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558. Citing to Exhibit EC-322 (BCI) (a list of Boeing Campaigns Won 2000-Aug. 31, 2005, provided by the United States during the Annex V process), the European Union asserts that "{o}nly in rare instances does the US document indicate any competition *across* the product

groupings identified by the European Union."[928] The above chart – using information from only Exhibits EC-322 and EC-323 (which excludes, for instance, Emirates' purchase of the 777 prompted by Airbus A380 delivery delays) – shows that such instances are hardly "rare." Indeed, the table above shows that *none* of the "product markets" identified by the European Union is a self-contained segment, capturing the full scope of competition for the models within it. In fact, LCA from each "product market" have competed head-to-head against LCA from other "product markets."

559. When the European Union refers to Exhibit EC-322 and states that "{t}here were no sales campaigns in which Airbus A340 LCA family competed against any Boeing models other than the 777 LCA family,"[929] it fails to mention that Exhibit EC-322 shows the Boeing 777 as having competed against the A330 (which the European Union places in a separate, "distinct product market") in no fewer than **[***]** campaigns won by Airbus. Similarly, when the European Union states that Exhibit EC-322 shows that "{t}here were *no* sales campaigns in which the Airbus A380 LCA family competed against Boeing 737NG, 767, 777 or 787 LCA family," [930] it ignores the **[***]** competitions between the 747 and the A380, which are somehow in separate "product markets" according to the European Union.

560. In referring to the list of campaigns produced by Airbus in Exhibit EC-323 (BCI), the European Union states that "{t}he evidence confirms that competition takes place almost exclusively in the product groupings identified by the European Union." [931] The use of the qualification "almost" is an explicit recognition of what the Panel found: that, even if it were relevant to the definition of the subsidized product, the EU's product groupings fail to capture the full scope of competition in the LCA industry.[932]

561. In a similar vein, the European Union cites to a variety of materials in an attempt to show a "lack of direct head-to-head competition" between the A380 and 747-8 (*i.e.*, a derivative of earlier 747 models that was launched in 2005).[933] While it is true that the A380 and 747-8 do not have identical characteristics (*e.g.*, the standard A380 configuration has approximately 90 more seats than the 747-8), this does not change the essential fact that the A380 has competed against the 747 for sales. As the Panel noted, the A380 business case clearly contemplates competition between the A380 and the 747, and **[***]**.[934] In rejecting the EU's argument that the A380 should be separated from all other LCA competition,

[928] EU Appellant Submission, Annex II: Product Markets Annex, para. 11.

[929] EU Appellant Submission, Annex II: Product Markets Annex, para. 11.

[930] EU Appellant Submission, Annex II: Product Markets Annex, para. 11.

[931] EU Appellant Submission, Annex II: Product Markets Annex, para. 13.

[932] Panel Report, para. 7.1668.

[933] EU Appellant Submission, Annex II: Product Markets Annex, Part III(A).

[934] Panel Report, paras. 7.1676, 7.1831-1832.

the Panel also considered evidence that customers purchased Boeing's 777 "to replace the delayed A380."[935] And while the European Union finds Boeing's list of campaigns lost to Airbus persuasive in other aspects of its product arguments, it fails to mention, in its A380/747 discussion, that the Boeing document shows the 747 competed against, and lost to, the A380 in **[*******]** campaigns during the reference period.[936] In this connection, the European Union cites to the statement of Airbus' Christian Scherer, to the effect that "Airbus did not compete – *i.e.*, it made no offers, in any sales campaigns that resulted in orders for Boeing 747 family LCA during the 2001-2005 period," [937] without acknowledging the numerous campaigns in which the 747 lost to the A380. Those lost sales are at the core of the U.S. complaint.

562. The European Union cites a number of campaign-specific and other documents in an attempt to "demonstrate that demand for customers in sales campaigns for new LCA is specifically targeted at the particular groups of Boeing and Airbus LCA products as identified in Section I."[938] All these sources show is that, in many instances where a customer conducts a formal head-to-head campaign, the offerings from each manufacturer will have been pared down to a single aircraft – something the United States has never contested. If, however, these sources were given the import the European Union favors, then it would preclude the use of the "product markets" it identifies, as these sources never show an Airbus A318 competing with an A321 (even though the European Union would have the Appellate Body determine the subsidized product by assessing "actual or potential competition" *within* a subsidized product grouping), nor do they show an A319 competing with the Boeing 737-900 (even though the European Union groups them in the same "product market").

563. The European Union cites to statements from Boeing officials and marketing materials from Airbus and Boeing that, in its view, "point towards the existence of different product groupings."[939] In doing so, the European Union fails to acknowledge that the Panel duly considered the European Union's arguments and evidence concerning "distinct product markets" but found them contradicted by the weight of the evidence showing competition of a far broader scope, as well as by an inadequate legal basis for disturbing the U.S. definition.

564. Perhaps because of the factual weaknesses the Panel found in the European Union efforts to segment the LCA market by seating capacity, the European Union now attempts to re-frame its "product" arguments when it states that its seating-based divisions of the LCA market:

> are not meant to suggest that seating capacity is the single, or even the most important of the many characteristics of an aircraft. That terminology is simply

[935] Panel Report, para. 7.1831.

[936] *See* Exhibit EC-322 (BCI).

[937] EU Appellant Submission, Annex II: Product Markets Annex, Part III(A)(1), last bullet.

[938] EU Appellant Submission, Annex II: Product Markets Annex, para. 14-15.

[939] EU Appellant Submission, Annex II: Product Markets Annex, para. 16.

> convenient shorthand to describe various groups of products, within each group, have similar relevant characteristics, and which differ from LCA in other groups.[940]

This raises the obvious question – and one anticipated by the Panel[941] – as to why, if seating capacity is no more than "convenient shorthand," the European Union placed the A350XWB-800 in the 200-300 seat category, while placing the other A350XWB "model family" members (*i.e.*, the A350XWB-900 and A350XWB-1000) , which have very similar maximum flight ranges, in the 300-400 seat category.[942]

565. Similarly, the European Union now claims that Airbus statements, relied upon by the Panel, concerning the importance of a full family of LCA are "irrelevant to the question of whether all the Airbus LCA can be grouped together as one 'subsidized product' competing in one single product market."[943] The European Union's assertion that the term "Airbus family" is something that is merely "colloquial" or "alleged" by the United States rings hollow. The term "Airbus family" originated with *Airbus*, and did so in *Airbus' marketing materials to its customers.*[944] Indeed, it is difficult the reconcile dismissal of the term "Airbus family" as irrelevant to competition as the European Union claims, when Airbus markets its LCA as a full family to customers, stressing the economic benefits of buying from the "Airbus family" over buying from Boeing's product line.[945]

566. Finally, the European Union's proposed multiple product market definitions have no support in the facts of the case. Airbus and Boeing each produce a full line of LCA models that compete against each other. The evidence before the Panel demonstrated actual competition outside the European Union's so-called "product markets," including: (1) bundled sales (such as the South African Airways lost sale, in which the airline chose A319s, A320s, and A340s over Boeing 737s and 777s); and (2) Emirates and FedEx ordering the 777 when Airbus' A380 delays left those customers short on capacity.[946] Indeed, the European Union itself recognizes that the evidence it cites in support of its five proposed "product markets" is so ambiguous that the Appellate Body could reasonably find fewer, broader product markets.[947] The European Union

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[940] EU Appellant Submission, Annex II: Product Markets Annex, para. 3.

[941] Panel Report, para. 7.1668.

[942] *See* EU Appellant Submission, para. 297.

[943] EU Appellant Submission, Annex II: Product Markets Annex, para. 23.

[944] *See, e.g.,* Airbus, "Excellence Runs in the Family" (Exhibit US-390).

[945] *See* Panel Report, paras. 7.1665-1666.

[946] *See, e.g.,* Panel Report, paras. 7.1655 (U.S. evidence of aircraft sold in "package" deals), 7.1822-7.1824 (South African Airways lost sales), and 7.1831 (ordering Boeing 777s in place of delayed Airbus A380s).

[947] EU Appellant Submission, para. 375.

further concedes that the Panel "need not have accepted the European Union's argument that there were five different LCA markets."[948]

567. In sum, the European Union has offered no basis on which the Appellate Body could find that the Panel's assessment of displacement under Article 6.3(a) and (b) on the basis of the specified geographic markets in which "all Boeing LCA" compete with "all Airbus LCA" is inconsistent with Article 11 of the DSU.

d. No basis exists for completing the analysis of "the single-aisle market" as requested by the European Union

568. Given the legal and factual failings of the European Union's "product market" appeals, there is no basis for the Appellate Body to "complete the analysis and find that there is a separate single-aisle LCA product market."[949]

e. The Panel committed no error under Articles 6.3(a) and (b) of the SCM Agreement in analyzing displacement of U.S. LCA imports and exports by reference to data for the LCA market as a whole

569. The European Union concludes by alleging a general error of "distortion" resulting from the Panel's assessment of displacement under Article 6.3(a) and (b) on the basis of the subsidized product, like product, and geographic market.[950] That is, the European Union alleges that the Panel erred in applying the applicable provisions of the SCM Agreement. It offers no textual support for its argument, and indeed there is none to be found. As discussed throughout this section, the framework for a displacement analysis under Articles 6.3(a) and (b) is set by the definition of the subsidized product, the like product, and the geographic market. By testing the U.S.'s subsidized product definition for reasonableness, the Panel ensured, in the first instance, that the analysis of displacement is not based on an "inappropriately broad" product; and, notably, the European Union has not challenged the Panel's findings that "all LCA" is a reasonable and coherent "subsidized product." Other factors indicating that the market position of the subsidized product in any particular segment of the market is not an effect of subsidy is a legitimate issue for a causation analysis; however, the Panel raised every other factor raised by the European Union and found not attenuation of the causal link.

[948] EU Appellant Submission, para. 370.

[949] EU Appellant Submission, para. 374.

[950] EU Appellant Submission, para. 90.

3. The Panel's displacement findings

a. The European Union and third country markets

570. With respect to the data underlying the Panel's findings of displacement under Article 6.3(b) of the SCM Agreement in the third country markets of Brazil, Chinese Taipei, Korea, Mexico, and Singapore, the European Union grants that "the Panel correctly determined that it should evaluate the US claims of displacement by reviewing sales and market share data," [951] and concedes that "the concept of 'displacement' revolves around the notion that market *shares* of 'like' imports or exports *fall* over a reference period."[952] The European Union claims, however, that "a trend was absent" in those countries.[953]

571. The European Union argues that "the Panel *found that*, of the three elements for a displacement finding – *i.e.*, (i) a decline following (ii) a trend over (iii) a reference period – *a trend was absent*."[954] This is not accurate. The Panel simply found that for the LCA markets of Brazil, Chinese Taipei, Korea, Mexico, and Singapore, the situation "is less compelling" than that concerning Australia and China because, in these other third country markets "sales were sporadic and volumes were relatively small, making identification of any trends more difficult."[955] The Panel's conclusion that identifying trends in these markets was "more difficult" does not, however, mean that the Panel's findings that there were such trends are incorrect.

572. Article 6.3(b) does not require a specific type or amount of evidence by which a complaining Member may demonstrate the existence of displacement. Article 6.3(b) does not provide any textual guidance for determining whether a given amount of data, whether in the form of export volumes, market share, or both, provides a sufficient basis for finding the existence of displacement. Article 6.4 contemplates displacement findings under Article 6.3(b) based on "a change in relative shares of the market to the disadvantage of the non-subsidized like product" where there this change occurs "over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year."[956] Yet, as the Panel concluded, Article 6.4 is not exhaustive and does not describe all means by which a complaining Member may demonstrate displacement or impedance. By the terms "shall *include* any case in which," Article

[951] EU Appellant Submission, para. 319

[952] EU Appellant Submission, para. 324.

[953] EU Appellant Submission, paras. 320.

[954] EU Appellant Submission, paras. 320 (emphasis added)

[955] Panel Report, para. 7.1792.

[956] SCM Agreement, Art. 6.4.

6.4 expressly contemplates that a complaining Member may demonstrate displacement or impedance under Article 6.3(b) in a manner not described by Article 6.4.[957]

573. Yet even to the extent that the Appellate Body looks to Article 6.4 for context in determining the sufficiency of evidence provided to demonstrate displacement, it is important to note that Article 6.4 discusses the demonstration of "clear trends" only in temporal terms and specifies no level of data or quantum of evidence from a given time period that is required to establish such trends. The United States provided, and the Panel considered, market share and/or delivery data for all third country markets at issue covering a period far longer than the "one year" threshold identified in Article 6.4 as providing the basis for demonstrating clear trends. And the trends in the data relied upon by the Panel are unmistakable: Boeing lost significant market share to Airbus and Boeing's market share losses in those markets were apparent to the Panel, which found that "the information before us is sufficient to draw conclusions concerning displacement or impedance from a third country market with respect to certain individual third country markets."[958]

574. Finally, the European Union's attempt to show insufficient data for a finding that displacement exists – *i.e.*, "(i) a decline following (ii) a trend over (iii) a reference period" – is confined to data for Brazil and Mexico [959] It has nothing to say concerning the data for Chinese Taipei, Korea, or Singapore. In each of those three markets, the European Union's own data confirms that (1) Boeing lost market share, with corresponding share gains by Airbus, over the 2001-2006 reference period (Chinese Taipei – Boeing's share fell from 62% in 2001 to 44% in 2006; [960] Korea – Boeing's share fell from 83% in 2001 to 58% in 2006;[961] Singapore – share fell from 89% in 2001 to 54% in 2006);[962] and (2) multiple LCA deliveries occurred in each year of the reference period.[963] Thus, the European Union has provided no basis for its challenge of the adequacy of the data for these markets.

575. Similarly unavailing are the European Union's arguments about the distinction between displacement and impedance under Articles 6.3(a) and (b).[964] While the European Union spends considerable time developing these arguments, they are irrelevant with respect to the third country markets where Boeing's market share did, in fact, fall over the reference period. The

[957] Panel Report, para. 7.1769.

[958] Panel Report, para. 7.1789.

[959] EU Appellant Submission, paras. 321-323.

[960] EU Appellant Submission, Annex III: Displacement Annex, para. 22.

[961] EU Appellant Submission, Annex III: Displacement Annex, para. 43.

[962] EU Appellant Submission, Annex III: Displacement Annex, para. 29.

[963] EU Appellant Submission, Annex III: Displacement Annex, paras. 22, 29, 43.

[964] EU Appellant Submission, paras. 323-328.

European Union concedes that "the concept of 'displacement' revolves around the notion that market *shares* of 'like' imports or exports *fall* over a reference period."[965]

b. The Panel did not err under Article 6.3(b) of the SCM Agreement and Article 11 of the DSU by finding a threat of displacement in the Indian market.

576. The European Union claims that the Panel erred under Article 6.3(b) of the SCM Agreement and Article 11 of the DSU by finding a threat of displacement in the Indian market.[966] This appeal has no legal or factual basis.

577. The Panel concluded that a threat of displacement in the Indian market existed based on the following findings:

> The data on orders for the period 2001 to 2005 presented by the United States demonstrates that Airbus gained most of the orders for LCA in the Indian market during that period. In 2000 and 2001 there were no orders for LCA by Indian customers. While Boeing obtained 100 per cent of orders in the Indian market in 2003, Airbus obtained 100 per cent in 2004. In 2005, Airbus' share of orders in the Indian market dropped to 70 per cent while Boeing's share increased to 30 per cent. However, the actual number of LCA represented by these orders paints a very different picture than the percentages. Boeing's 100 percent of orders in 2003 represents one LCA, while Airbus' 100 percent in 2004 represents two LCA. However, in 2005, there were 225 orders for Airbus LCA, compared with 98 orders for Boeing LCA, representing a massive increase in the Indian market. This indicates that, as these LCA are delivered over the ensuing years, it is likely that Airbus will have a significantly greater share of the Indian market than Boeing. While Boeing may obtain additional orders, and may even obtain orders for more LCA than Airbus, in the future, those LCA would likely be delivered at an even later date than the already-ordered LCA, and thus the more immediate future is likely to be an Indian market with more deliveries of Airbus LCA than of Boeing LCA.[967]

Thus, the relevant data before the Panel showed a surge in orders from the Indian market in 2005, with Airbus obtaining more than double the orders (and, consequently, more than double the likely future deliveries) received by Boeing. This is a sufficient and objective basis upon which the Panel could make a finding of threat of displacement with respect to India.

[965] EU Appellant Submission, para. 324.

[966] EU Appellant Submission, paras. 386-390.

[967] Panel Report, para. 7.1784.

578. The European Union asserts that "the undisputed evidence before the Panel demonstrated that Boeing's market share of deliveries in the Indian market actually *increased* in the 'immediate future' post-2006, and followed an upward trend."[968] The first problem with this assertion is that, in fact, no such "undisputed evidence" exists in the record to support it. The European Union provides no support for its argument regarding post-2006 delivery share; rather it cites to Exhibit EC-987, which pertains to *order* data for 2007, not delivery data.[969] Moreover, Exhibit EC-987 was never referenced to the Panel in any EU argument concerning displacement, or threat thereof, in India. Rather, Exhibit EC-987 was offered only at a very late stage in the Panel proceeding to support the European Union's arguments pertaining to the U.S. threat of material injury claim.[970] Lastly, the Panel's threat finding was based on "the most recent available, relevant and reliable data that {it} could evaluate in a manner consistent with the requirements of due process, and in light of practical limitations, including in this case data from 2006."[971] No error lies in the Panel basing its threat of displacement finding on evidence and argumentation that was *actually submitted* concerning the U.S. claims in respect of the Indian market.

D. The Panel properly found that the subsidies in dispute caused serious prejudice to the United States in the form of market displacement and lost sales

1. Introduction and overview

579. The Panel found that Airbus' access to launch aid over a 40 year period allowed it to enter the market and bring a full family of competitive LCA to market at a pace and in a way that would otherwise have been impossible, that Airbus' ability to bring its LCA family to market when and as it did was the fundamental cause of its market share gains and the significant lost sales it captured between 2001-2006, and, therefore, that these subsidies were the cause of the market displacement and lost sales that the Panel found within the meaning of Article 6.3 of the SCM Agreement.[972]

580. Central to the Panel's causation analysis was its finding that the LA/MSF (1) fundamentally changed the economics of Airbus' launch decisions and (2) provided the very ability of Airbus to launch its aircraft when and as it did:

> {W}e conclude that the United States has demonstrated that LA/MSF shifts a significant portion of the risk of launching an aircraft from the manufacturer to

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[968] EU Appellant Submission, paras. 389 (underlining added; italics in original).

[969] *Compare* EU Appellant Submission, para. 389 n. 452 (citing Exhibit EC-987), *with* Exhibit EC-987 (entitled, "Airclaims CASE database, 2007 Orders, data query as of 28 January 2008").

[970] *See, e.g.*, EC Comments on US RPQ 240, footnote 310.

[971] Panel Report, para. 7.1713.

[972] Panel Report, paras. 7.1985, 7.1993.

> the governments supplying the funding, which we recall is on non-commercial terms. Based on our review of the development of successive models of Airbus LCA, we conclude that Airbus' ability to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized LA/MSF.[973]

581. The European Union now concedes this "central aspect" of the Panel's causation analysis, and it has decided not to appeal this point: "the European Union does not generally appeal a central aspect of the Panel's 'product-launch' causation findings – namely that, but for the MSF, Airbus would not have launched each of its LCA *at the time and the form that it did*."[974]

582. Rather than challenge the crux of the Panel's causation finding, the European Union instead seizes on the notion that Airbus *might have*, at some other point in time, under different circumstances, and in the absence of subsidies, launched different aircraft that might have won sales. In crafting its appeal in this manner, the European Union necessarily is forced to seek reversal on the basis of an absence of "findings." However, the findings that the European Union argues are missing from the Panel's analysis do not relate to the actual use of the subsidies in light of their impact on the recipient and in relation to other factors actually present in the market at the same time as the subsidy. Rather, the European Union argues that the Panel should have speculated about the possible effects of hypothetical competition from a "non-subsidized" Airbus in an alternative universe. Moreover, the "missing" findings the European Union alleges the Panel could have made are at odds with the findings that the Panel actually made that the subsidies in dispute worked together over time and across aircraft models to give Airbus its full family of aircraft, and that these subsidies were the cause of the market displacement and lost sales that the Panel found.

583. The arguments advanced by the European Union in appeal of the Panel's causation findings under Article 6.3 of the SCM Agreement are (1) inconsistent with Articles 5 and 6.3 of the SCM Agreement, (2) contrary to the purpose of the SCM Agreement in seeking to discipline subsidies that cause adverse effects, and (3) inconsistent with the Panel's factual findings.

584. The European Union attempts to diminish aspects of the Panel's core causation analysis finding as "unremarkable."[975] For example, the European Union observes that "{t}he Panel spent a considerable portion of the causation analysis to find that the Dorman Model supported the unremarkable finding that MSF loans, to the extent they confer a benefit, improved Airbus' business cases, and made a launch decision less risky and more likely."[976] A finding that

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[973] Panel Report, para. 7.1949.

[974] EU Appellant Submission, para. 412 (emphasis in original). The United States addresses the EU arguments with respect to the A380 in section XX.

[975] EU Appellant Submission, para. 416.

[976] EU Appellant Submission, para. 416.

LA/MSF shifted the risk of launching LCA from Airbus to the Member State governments, in an industry in which the launch of a new model aircraft is enormously risky, and where mammoth upfront investment is required, cannot be simply dismissed as "unremarkable." Indeed, the obviousness of this point, which the European Union concedes, demonstrates the soundness of the Panel's reasoning with regard to this core aspect of its causation analysis.

585. The European Union concedes that the subsidies enabled Airbus to do what it did, when it did, and as it did. It concedes, in other words, that Airbus used the subsidies to bring its LCA to market and "but for" them, Airbus would not have been able to capture the market share in European and various third countries or win significant sales campaigns in the way it did. Rather than challenge the core causation findings, the European Union's appeal of the Panel's causation analysis is predicated on the proposition that a "but for" analysis requires a Panel to go beyond the use to which subsidies were actually put and the actual effects of the subsidies on competition, into speculation about a chain of events that might possibly have occurred (but did not actually occur and is at odds with what did occur) in an alternative universe populated with "non-subsidized" and different Airbus LCA. In this fantasy world posited by the European Union, an unsubsidized Airbus would have launched fewer but technologically superior aircraft models at later times, priced those aircraft aggressively, and benefitted from advantages such as access to capital generally reserved for incumbents, and it would have done so without any of the subsidization the real Airbus needed to launch each and every one of its aircraft. In the fictitious world posited by the European Union, an unsubsidized Airbus would have behaved in this different manner without triggering any changes in the behavior of other actual and potential market players, so that the LCA market would look the same as it does today.

586. The European Union argues that the Panel improperly "presumed" that no alternative LCA offered by a non-subsidized Airbus during the 2001-2006 reference period could have been competitive in any of the challenged sales campaigns or country markets, asserting that such a presumption cannot be reconciled with the Panel findings and other evidence on the record.[977] Similarly, the European Union argues that the Panel's finding that a non-subsidized Airbus could not have sold and delivered the particular LCA that Airbus actually sold and delivered during the reference period is only the initial step in a proper causation analysis. According to the European Union, the Panel was required to determine whether there were different, fewer, and later launched LCA model(s) that a non-subsidized Airbus *could* have sold and delivered by 2001-2006, and that would have allowed it to win the sales and market share increases actually secured by Airbus.[978] In addition, the European Union also argues that the Panel failed to provide a reasoned and adequate explanation why Airbus could not win the sales or the market share with "different" LCA.[979] In the end, each of the formulations of its claim of error is premised on the single argument that the Panel was required to consider whether any "different"

[977] EU Appellant Submission, para. 400.

[978] EU Appellant Submission, para. 404.

[979] EU Appellant Submission, para. 409.

aircraft that Airbus could have launched absent the subsidy would have won any of the same sales or displaced Boeing from the same share of the market.

587. The European Union's claims are without merit and fail for several reasons. First, and foremost, it asks for an interpretation and causation standard under Article 6.3 that requires a complainant to demonstrate, and the Panel to find, that there is no alternate universe in which a hypothetical factor other than the subsidy (not one present in the market at the same time as the subsidy) could result in the same market outcome as the use of the subsidy. This interpretation is plainly inconsistent with the text, context, and object and purpose of the SCM Agreement. Article 6.3 requires a Panel to determine whether "the effect of the subsidy" is the displacement or impedance of imports into the market of the subsidizing Member, the displacement or impedance of imports of another Member from a third country market, or significant price depression, price suppression or lost sales in the same market. Thus, the meaning of the text requires a panel to maintain a focus on the use to which subsidies are actually put and their actual effect, not on hypothetical effects of hypothetical, non-subsidized competition that is different from the competition created by the subsidy in an alternate reality.

588. The European Union's appeal also depends upon a factually baseless assertion that the Panel was required to engage in this speculation because it *"found"* that a non-subsidized Airbus "*would exist.*" The European Union's arguments in this regard are predicated on mischaracterizations of the Panel's findings. The Panel's report contains no finding that Airbus *would* have been able to enter or remain in the LCA market absent the subsidies at issue. To the contrary, the only "finding" that the Panel made is that Airbus would not have been able to launch its LCA when and as it did absent the subsidy. As to the possibility that an unsubsidized Airbus could have entered and remained in the market, the Panel's review of the facts led it to conclude that this hypothetical scenario was "unlikely." [980]

589. The question before the Appellate Body is straightforward, and the answer is found in the text of the SCM Agreement. On the one hand are the Panel's factual and legal findings that the way in which Airbus actually used the subsidies it received caused serious prejudice to the United States in the form of market displacement and lost sales. Those findings are based on a comprehensive and objective examination of a detailed body of evidence and a thorough examination of the arguments presented by the Parties, consistent with the Panel's obligations under Article 11 of the DSU, and a legal analysis and conclusion that is in accord with the SCM agreement. On the other hand, the European Union seeks reversal of the Panel's findings based on its failure to engage in complicated speculation about how an unsubsidized Airbus might have participated differently in the LCA market and how the U.S. LCA industry might have been affected. Such speculation is inconsistent with the SCM Agreement and, in any event, such "findings" even were they made, could not have "undone" what the Panel found to be the actual effects of the subsidies in the world as it actually existed. Indeed, once the Panel determined what the effects of the subsidies were, its analysis was over. For the Panel to have gone on to

[980] Panel Report, para. 7.1984.

speculate as to other potential competition *that might also* have produced market outcomes akin to the actual adverse effects caused by the subsidies would have been inconsistent with the SCM Agreement.

590. For these and the reasons that follow, the Appellate Body should reject in their entirety the European Union's claims of legal error as set forth in Part Five, Section IV of its Appellant Submission.

2. The Panel found a genuine and substantial link between the subsidies and the effects of displacement and lost sales, and that no other factors in the market cut this causal link

a. Assessing causation under Articles 5 and 6.3 of the SCM Agreement

591. Articles 5 and 6.3 of the SCM Agreement govern the causation analysis for claims of subsidies that result in serious prejudice. Article 5(c) provides:

> 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, i.e.:
>
> ***
>
> (c) serious prejudice to the interests of another Member.[981]

592. Article 6.3, in turn, defines serious prejudice in terms of "*the effect of the subsidy*" and states that serious prejudice the sense of Article 5(c) may arise where one or several of the following apply:

> (a) the effect of the subsidy is to displace or impede the imports of a like product of another member into the market of the subsidizing Member;
>
> (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;
>
> (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;
>
> ***

[981] SCM Agreement, Article 5(c) (emphasis added, footnote omitted).

593. The Appellate Body has explained that Article 6.3(c) of the SCM Agreement "requires the establishment of a causal link between the subsidy and the significant price suppression"[982] and the causal link must be genuine and substantial.[983] The Appellate Body's reasoning applies with equal force to all the indicia of serious prejudice, including lost sales, displacement and impedance. The Appellate Body explained in *US – Upland Cotton* that:

> {t}he Panel's approach with respect to causation and non-attribution is similar to that reflected in Appellate Body decisions in the context of other WTO agreements. In connection with the Agreement on Safeguards, the Appellate Body has stated that a causal link "between increased imports of the product concerned and serious injury or threat thereof" "involves a genuine and substantial relationship of cause and effect between these two elements", and it has also required non-attribution of effects caused by other factors.[984]

594. Because the text of Article 6.3 does not provide "the more elaborate and precise 'causation' and 'non-attribution' language" found in Part V of the SCM Agreement," the Appellate Body has observed that panels have discretion with respect to how they conduct the causation analysis.[985] Recognizing "there is no one single approach to determining causation for all claims of serious prejudice," the panel in *Korea – Commercial Vessels* explained that:

> Each case presents a unique combination of kinds of subsidies, of products, of markets, and of forms of serious prejudice, which operate together in a unique way. Causation analysis thus necessarily must be case-by-case, tailored to the particular situation presented in each individual dispute. The considerable variety of approaches taken by previous panels is simply a reflection of this reality.

595. As articulated by the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)*, however, the central aspect of any serious prejudice analysis is that "the effect… must result from a chain of causation that is linked to the impugned subsidy." Thus, to determine causation under Articles 5 and 6.3, the focus must be on the way in which the subsidies in dispute were used and their resulting effects. Focusing on the use and effects of the subsidies to demonstrate "a chain of causation that is linked to the impugned subsidy" means that a panel has to examine *what were the actual effects* in the markets in question. In its causation analysis, a panel must also ensure that it does not attribute to the subsidies the effect of other factors in the market at the same time as those subsidies.[986] Similarly, in a "but for" analysis, the Panel must focus on the

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[982] *US – Upland Cotton (AB)*, para. 435, *quoting US – Upland Cotton (Panel)*, para. 7.1341.

[983] *See US – Upland Cotton (AB)*, para. 438; *US – Upland Cotton (21.5) (AB)*, para. 375.

[984] *See US – Upland Cotton (AB)*, para. 438.

[985] *US – Upland Cotton (Article 21.5) (AB)*, para. 370-72.

[986] *US – Upland Cotton (AB)*, para. 438; *US – Upland Cotton (Article 21.5) (AB)*, para. 368.

market as it actually existed absent the subsidy.[987] The chain of causation that must be established under Articles 5 and 6 does not involve speculative, alternate market developments or events that did not happen.

b. The Panel found there is a genuine and substantial link between the subsidies and the effects of displacement and lost sales, and that no other factors cut this causal link

596. The Panel first found that LA/MSF, on its own, enabled Airbus to bring each model of its full LCA family to market. It based this finding on an examination of the nature (*i.e.*, the structure, design, operation) and magnitude of the subsidies. The Panel began its analysis by restating its earlier, undisputed findings with respect to the structure and design of LA/MSF:

> Each LA/MSF … takes the form of a long-term, unsecured loan at a below-market rate of interest with success-dependent and generally graduated repayment terms. The success-dependent nature of the loans means that Airbus' repayment obligations arise only after it has successfully developed and begins selling the financed aircraft. Once repayment begins, it occurs through a levy on each delivery of financed aircraft and is generally graduated on an ascending scale, meaning that repayments of the first aircraft deliveries are lower than repayments on later deliveries. Should Airbus fail to sell enough of the financed aircraft to repay the entire loan, the government lenders have no contractual right to the outstanding balances. The nature of this financing shifts a portion of the commercial and financial risks of developing new models of LCA to the governments providing the LA/MSF.[988]

597. The Panel then considered the report of Dr. Gary Dorman, which modeled the economic impact of launch aid on the net present value of an LCA program. After significant evaluation and discussion of the Dorman model, including the parameters and arguments proposed by both Parties,[989] it found that the Dorman Report demonstrated that the operational effect of LA/MSF is significant and meaningful:

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[987] *See US – Upland Cotton (Article 21.5) (AB)*, para. 375.

[988] Panel Report, para. 7.1881.

[989] The Panel considered the European Union's rebuttal of the parameters used in the Dorman Report based both on the Wachtel Report (Exhibits EC-12 and EC-659), and the aircraft business cases, including the *ex post* business case analysis done in the Carballo Declaration, (Exhibit EC-665 (HSBI)). The Panel found that: (a) Wachtel's "natural duopoly" argument was inapposite and incorrect (Panel Report, para. 7.1984), (b) Wachtel did not, in fact, offer any assessment of the specific parameters of a hypothetical LCA program used in the Dorman model (Panel Report, para 7.1895) and, even under the Carballo parameters, the model still demonstrates that LA/MSF has a significant impact on launch decisions, and (c) Wachtel's allegation of a misstatement of the amount of subsidy was incorrect, and in fact contradicted by the EC's own evidence in the form of the ITR report and the Panel's own findings with respect to the interest rate benchmarks for each LA/MSF tranche (Panel Report, para.

> {T}he Dorman Report **does** in our view demonstrate that LA/MSF will have a significant impact on the NPV of any particular project, and that irrespective of the specific parameters used to model costs and income streams, LA/MSF will increase potential profits and act to limit potential downside losses. It also demonstrates that in some circumstances, the availability of LA/MSF makes the difference between a positive or negative NPV, or lowers the risk profile of a project sufficiently to make an affirmative decision to launch a particular aircraft more likely.[990]

598. The Panel also found that the business case generated by Airbus to evaluate the A380 demonstrated the instrumental nature of the subsidized financing.[991] The business case calculated the net present value of the A380, in a manner similar to the methodology used in the Dorman Report, under a set of best and realistic worst case scenarios. The Panel found that:

> {T}he realistic worst case scenario for the A380 is not tested against a base case in which Airbus does not receive LA/MSF. In our view, the inference that can be drawn from this is that Airbus did not contemplate or provide for the possibility of launching the A380 in the absence of LA/MSF.[992]

Moreover, the Panel found that the even the *ex post facto* sensitivity analysis done in the Carballo Declaration did not calculate the NPV of all of the realistic worst case scenarios without the assistance of LA/MSF. The Panel determined, however, that based on the comparison of the lower and higher discount rate scenarios in other parts of the analysis, it was able to conclude that, without launch aid, the higher discount rate would have had a significant negative impact on the overall NPV of the A380 program, affirming its finding as to how LA/MSF operates and the strong influence it has on launch decisions.[993] Thus, the Panel found that the A380 business case supported its finding as to the impact of LA/MSF on an LCA producer's launch decisions.

7.1903-1906), and his allegation regarding the tendency of LA/MSF to increase, rather than decrease LCA prices was both unsupported by evidence and inapposite (Panel Report, para. 7.1902). Thus, the Thus, the Panel addressed all of the European Union's criticism of the Dorman Report, including those related to the parameters used to model a hypothetical LCA program, and found that all were either inaccurate or did not impact the conclusion that it drew from the model. *See US – Upland Cotton (Article 21.5)(AB)*, para. 357 ("Like other categories of evidence, a panel should reach conclusions with respect to the probative value it accords to economic simulations or models presented to it. This kind of assessment falls within the panel's authority as the initial trier of fact in a serious prejudice case.")

[990] Panel Report, para. 7.1911 (emphasis in original).

[991] Panel Report, para. 7.1927. The Panel's basis for rejecting the European Union's arguments based on the A380 business case is objective, its reasoning is clearly stated, and the United States recalls that "{i}t is not necessary for panel to accord to factual evidence of the parties the same meaning and weight as do the parties." *US – Upland Cotton (AB)*, para. 445, *citing Australia-Salmon (AB)*, para. 267.

[992] Panel Report, para. 7.1923.

[993] Panel Report, para. 7.1924-1925.

599. The Panel also considered the undisputed public statements of government and Airbus officials regarding the necessity of LA/MSF for each LCA launch.[994] It gave significant weight to the "quasi-judicial" finding of the EC Commission in the context of a State Aid determination that the LA/MSF for the A340-500/600 was necessary for the launch of the aircraft.[995] In addition, the Panel reviewed public statements related to the necessity of LA/MSF made by Airbus and government officials. The Panel recognized that the self-interest underlying the statements affected their probative value; however, as the EC had not disputed the truth of the public statements or of the facts stated in them, the Panel determined that it was appropriate to "take this evidence into account, making our own judgments as to its weight and probative value, together with other evidence in our evaluation of the United States claims.[996] Under these circumstances, the Panel ultimately found that "although we do not draw specific conclusions as to the intent of the entities on behalf of which the statements were made, and while we recognize that there may have been a variety of motivations at play, taken together, we consider these statements … generally support the inference that, but for the provision of LA/MSF, Airbus would not have been able to launch any of its existing range of LCA, that is, the A300, A320, A330/A340, A340-500/600 and A380, as and when it did."[997] The Panel thus used the public statements to confirm conclusions based on other evidence, and in doing so took an approach was appropriate as a matter of law.[998] The United States recalls that the Appellate Body will not lightly interfere with a panel's discretion as trier of fact to weigh the probative value of evidence and draw conclusions from it.[999] The Panel's treatment of the public statements in this case gives it no cause to do so.

600. The Panel then summed up all the evidence regarding the nature of the subsidies and Airbus' need for support in the context of each LCA launch, and found that all of the tranches of launch aid worked individually and cumulatively to enable the Airbus to develop an LCA family

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[994] Panel Report, paras. 7.1913-1918.

[995] Panel Report, para. 7.1919 ("{W}e note that the Decision letter of the European Commission seems to us to be in the nature of a quasi-judicial evaluation and finding, rather than mere statements by public officials, and therefore the same concerns {related to self-interest} do not arise in evaluating that decision.")

[996] Panel Report, para 7.1919.

[997] Panel Report, para. 7.1920.

[998] *See, e.g., US – Upland Cotton (Article 21.5)(AB)*, para. 357 (finding that the assessment of the probative value of evidence provided to a panel "falls within the panel's authority as the initial trier of fact in a serious prejudice case.") See also Panel Report, para. 7.1919, n. 5600, *citing Australia – Automotive Leather II*, para. 9.65, n. 210.

[999] In this regard, the United States notes that the Panel did not make any findings based on public statements whose meaning the European Union disputed, e.g., statements related to the purpose of provision of LA/MSF being to "attack", to "destroy" or to "kill" particular Boeing LCA models. Panel Report, para. 7.1920, n. 5601.

– both in terms of the generation of "learning curve" economies of scope and scale and the savings from the large amount of heavily subsidized financing.[1000]

601. With respect to the non-LA/MSF subsidies, the Panel found that "we do not agree with the European Communities' view that differences in the structure, operation, and design of the different subsidies at issue in this dispute preclude their being considered in the aggregate."[1001] In this regard, the Panel considered the nature and circumstances of the provision of each of the subsidies, which led it to conclude that (1) all of the non-LA/MSF subsidies "were granted during the period each succeeding model of Airbus LCA was being developed and brought to market,"[1002] and (2) they "complemented and supplemented" the "product" effect of LA/MSF."[1003]

602. The Panel summed up its reasoning as follows:

> LA/MSF and the other subsidies played a vital role in permitting Airbus to not only launch and develop the model of LCA actually funded by each grant of LA/MSF, but also each of the subsequent models. Moreover, advantages in technology and production flowed from the development of each succeeding model of LCA supported by LA/MSF and other subsidies to production of earlier models, and the development of derivative and improved versions of earlier models….. While the effect of a subsidy may well dissipate over time, in our view, the fact that the subsidies at issue in this dispute were repeatedly granted over the entire history of Airbus's LCA development with respect to that same product has had rather the opposite effect, through the learning and spillover effects, and the production synergies that are inherent in this industry, which spread the effect of LA/MSF for the development of one model of LCA, and of other subsidies, to both subsequent and earlier models.[1004]

603. The Panel next concluded that by enabling Airbus to bring to market its LCA, the specific subsidies caused Boeing to lose its position in the EU and third country markets and at individual sales accounts in competition with the subsidized Airbus LCA – i.e., the subsidies caused serious prejudice to the interests of the United States within the meaning of Article 6.3(a), (b) and (c) of the SCM Agreement. It based this finding on factual findings pertaining to the conditions of competition and basis for purchasing decisions in the LCA industry, and the magnitude and age of the subsidies themselves, and a non-attribution analysis of other factors identified by the European Union.

[1000] *See* Panel Report, para. 7.1937 (A310), 7.1939 (A320), 7.1940 (A330/340), 7.1941 (A330-200), para. 7.1942 (A340-500/600) and 7.1949 (A380).

[1001] Panel Report, para. 7.1955.

[1002] Panel Report, para. 7.1956, n. 5692.

[1003] Panel Report, para. 7.1956.

[1004] Panel Report, para. 7.1976-1977.

604. The Panel found that the conditions of competition in the LCA industry are such that having an aircraft to offer at the time of purchase that meets a customer's needs is the fundamental factor in winning sales. In particular:

- "Customers choose among the various LCA models available those they deem most suitable for their needs at the time of ordering."[1005]

- "Given the importance of LCA costs to the customers' successful operations, we cannot accept the implication that customers knowledgeable about the market would not consider the competitive products available from the two producers in most cases, even if formal offers are neither requested nor made in a particular instance."[1006]

- "It is apparent to us that, with only two manufacturers in the market, there is overall competition between Boeing and Airbus for all sales of LCA."[1007]

605. These findings demonstrate that once Airbus was able to develop its LCA family, the conditions of competition in the market were such that its market presence resulted in the demonstrated market effects – i.e., lost sales and market share due to competition with the subsidized product during the 2001-2006 period.

606. The Panel also assessed the magnitude of the benefit from each tranche of launch aid, in terms of the percentage of development costs and amount of discount off market interest rates, both in the context of each individual launch and the spillover benefit of earlier support at the time of each subsequent launch. With respect to each tranche of support, the Panel recalled the percentage of total development costs and the interest rates Airbus would have paid for the financing,[1008] and found that

> considering that the proportion of development costs covered by LA/MSF for the early models of Airbus LCA was close to 100 percent and that even 33 percent of development costs of the post 1992 model is a significant amount of subsidized funding, we conclude that the magnitude of the specific subsidies is certainly

[1005] Panel Report, para. 7.1721.

[1006] Panel Report, para. 7.1723.

[1007] Panel Report, para. 7.1725.

[1008] Panel Report, para. 7.1935 (A300), para. 7.196 (A310), para. 7.1939 (A320), para. 7.1940 (A330/340), para. 7.1941 (putting relatively small development costs of derivative aircraft in the context of the support provided for the base models), para. 7.1948 (A380), para. 7.1975 ("We have concluded that LA/MSF and the other subsidies played a vital role in permitting Airbus to not only launch and develop the model of LCA actually funded by each grant of LA/MSF, but also each of the subsequent models.").

> sufficient to have had the effect of enabling Airbus to launch successive models of LCA at a pace it could not otherwise have achieved.[1009]

607. Reviewing the totality of this evidence regarding the nature and magnitude of the LA/MSF in the context of each Airbus LCA launch, the Panel found that the United States had "met its evidentiary burden" to demonstrate that the effect of the launch aid was to allow Airbus to launch each of the LCA models that it did, when it did, and the European Union had not successfully rebutted the case that the United States had made.[1010]

608. The European Union challenges none of this. Moreover, contrary to the European Union's claims,[1011] the Panel also fulfilled its obligation to ensure that it did not attribute to the subsidies the effect of other factors in the market.[1012] Specifically, the Panel assessed whether the link between the market presence of Airbus's LCA and the loss of market share and significant sales by the U.S. LCA industry was cut by any other factors.

609. The primary "other factors" that the Parties had addressed in their submissions related to the dynamics of the competition between Boeing and Airbus in the LCA market during the period 2001-2006. The Panel examined the various other factors which, according to the European Union, cut the causal link between the subsidies and serious prejudice to the interests of the United States, including Boeing's alleged mismanagement of its customer relations, geopolitical considerations and the role of engine manufacturers in the LCA market. It rejected each of the European Union's assertions as unsupported by the evidence:

> As discussed above, there is no dispute that Airbus succeeded in the sales campaigns we have considered, and we have therefore concluded that the United States has demonstrated that Boeing suffered substantial lost sales during the period 2001-2006. We noted that there are numerous factors involved in a customer's decision as to which LCA to purchase. However, one factor which is essential is the availability of a particular model or models of LCA suitable for a particular customer's needs at the time of the sale. We have concluded that, but for LA/MSF and the other subsidies in dispute, Airbus would not have been able to launch the particular LCA it did at the time if did. Thus, the presence of these subsidized LCA in the market is a fundamental cause of the lost sale observed. But for the subsidies, Airbus would not have been competing for these sales with the LCA it actually sold. Similarly, Airbus' market share is directly attributable to its ability to sell and deliver to the European Communities and relevant third

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[1009] Panel Report, para. 7.1973.

[1010] Panel Report, para. 7.1933.

[1011] *See* EU Appellant Submission, paras. 558-568 (for displacement).

[1012] *US – Upland Cotton (AB)*, para. 438; *US – Upland Cotton (Article 21.5) (AB)*, para. 368.

country markets, LCA which it would not have had available but for the subsidies which supported the launch of every model of Airbus LCA.[1013]

610. Thus, while the Panel agreed with the European Union that there are "numerous factors involved in a customer's decision as to which LCA to purchase" – including particular product characteristics, personal relationships, and geopolitical factors – it found that the "one factor which is essential {in a customer's decision as to which LCA to purchase} is the availability of a particular model or models of LCA suitable for a particular customer's needs at the time of the sale."[1014] The Panel similarly considered that the European Union's argument that the post-9/11 market contraction impacted Boeing more than it did Airbus did not "detract from {its} conclusions concerning the effects of the subsidies in this dispute, which enabled Airbus to have available the particular models of LCA that it sold and delivered in the distressed market."[1015]

611. Given its conclusion that, but for LA/MSF and other subsidies in dispute, Airbus would not have been able to launch the particular LCA it did at the time it did, the Panel found that regardless of these other factors, the availability of the subsidized Airbus LCA in the market is a *fundamental cause* of the sales and market share lost by the U.S. LCA industry.[1016] That is, the Panel properly found a genuine and substantial link between the subsidies and the market displacement and lost sales, and that other factors in the market did not attenuate that link.

612. The Panel's findings in this regard were based on the evidence before it and reflect a reasoned assessment of the relationship of these factors to the "product" effect of the subsidies. The Appellate Body has indicated that it will not disturb factual findings in these situations.[1017] As the Appellate Body clarified in *US – Upland Cotton*, a Panel must ensure that "the effect of other factors… did not dilute the 'genuine and substantial' link between the subsidies and the {adverse effect}." The Panel's non-attribution analysis is fully in line with the requirements of Article 5 and 6.3.

613. In sum, the Panel found that "{b}ased on our review of the development of successive models of Airbus LCA, we conclude that Airbus' ability to launch, develop, and introduce to the

[1013] Panel Report, para. 7.1985.

[1014] Panel Report, para. 7.1985.

[1015] Panel Report, para. 7.1987. The United States also recalls the Panel's finding related to the impact of 9/11 on the basic conditions of competition in the LCA industry: "While clearly there was a significant decline in the market for LCA after 9/11, in our view, this did not result from any changes in the fundamental nature of competition between Airbus and Boeing, but rather was driven by the general global economic downturn and decline in air travel, resulting in a decline in demand for new LCA. And while this decline in demand did not affect both producers to the same degree, the basic considerations described above continue to define the conditions of competition between Airbus and Boeing." Panel Report, para. 7.1729.

[1016] Panel Report, para. 7.1985.

[1017] *US – Upland Cotton (Article 21.5) (AB)*, para. 381.

market, each of its LCA models was dependent on subsidized LA/MSF"[1018] and that all of the non-LA/MSF subsidies "were granted during the period each succeeding model of Airbus LCA was being developed and brought to market,"[1019] and that they "complemented and supplemented" the "product" effect of LA/MSF."[1020] The Panel also found that the presence of these subsidized LCA in the market is a fundamental cause of the market share Airbus obtained and the sales that Boeing lost. [1021] The European Union concedes the core of this analysis and in its appeal it largely ignores the evidence and the Panel's review of the parties' arguments. Instead, the European Union focuses almost exclusively on the idea that the Panel should have pursued the hypothetical scenarios that the Panel raised briefly – and unnecessarily in the view of the United States – in its causation analysis.

c. After finding a genuine and substantial link between the subsidies and the adverse effects in a manner consistent with the SCM Agreement, the Panel's additional step in considering other possible effects from theoretical competition in speculative scenarios was both unnecessary and contrary to Articles 5 and 6.3 of the SCM Agreement

614. As noted above, in this case, the Panel first considered whether the subsidies were the cause of the market displacement and lost sales and, then, whether other factors cut the causal link.[1022] In accordance with this framework, the Panel analyzed causation under Article 6.3 by asking and answering the following questions. First, was Airbus' ability to bring its aircraft to market when and as it did attributable to the subsidies in dispute? Second, was Airbus' ability to offer the aircraft it did when it did instrumental to its market share gains and the significant sales it won? Third, did factors other than the subsidies cut the causal link between the effects of the subsidies and serious prejudice to the interests of the United States? Based on its review of an extensive evidentiary record, the Panel answered all of these questions in the affirmative.[1023]

615. Then, the Panel also considered the possibility that a different unsubsidized Airbus or other potential competitors might have existed absent the subsidies, and further considered whether the U.S. LCA industry might also have lost equivalent market share and significant sales in these alternate universes. Although this step in the Panel's analysis involved unnecessary and unwarranted conjecture about *what else* might have occurred in the LCA market in the absence of a subsidized Airbus, the Panel concluded that the U.S. LCA industry would not have lost the market share and significant sales that it lost to the subsidized Airbus under any of four

[1018] Panel Report, para. 7.1949.

[1019] Panel Report, para. 7.1956, n. 5692.

[1020] Panel Report, para. 7.1956.

[1021] Panel Report, paras. 7.1985, 7.1993.

[1022] This is the same approach adopted by the Panel and affirmed by the Appellate Body in *US-Cotton*.

[1023] *See, e.g.*, Panel Report, paras. 7.1984, 7.1949; 7.1993, 7.2025; 7.1985-7.1993.

speculative scenarios regarding competition that it found could have plausibly been present in the LCA market absent a subsidized Airbus.[1024]

616. The United States disagrees that the Panel's speculation about how the LCA market might have developed differently without a subsidized Airbus is either necessary or appropriate in determining the "*effects of the subsidies*" (Article 6.3) in dispute. In this regard, the United States considers that the Panel was not required to look beyond the "effects of the subsidies," *i.e.*, beyond how the subsidies were used by Airbus and how Airbus' use of them affected its competition with the U.S. LCA industry. That is, once the Panel found that, absent the subsidies it received, Airbus could not have launched the LCA that led to the adverse effects, and no other factors in the market broke that causal link, the Panel had found that the subsidies caused adverse effects within the meaning of Article 6.3(a), (b) and (c). The possibility that an unsubsidized competitor – either Airbus or another entity – might have emerged in the place of a subsidized Airbus does not negate the actual effects of the subsidies given Airbus.

617. Thus, the United States considers that it was incorrect for the Panel to continue its analysis after it found that the "effects of the subsidies" were to cause the observed adverse effects, *i.e.*, market displacement and significant lost sales. In light of the European Union's appeal, however, it is relevant that the Panel concluded that it was *unlikely* that a non-subsidized Airbus would have been able to enter the LCA market, and even if it had been able to enter and remain in the market, it would have been a much weaker and different entity that was incapable of achieving the same sales or market share.[1025] As discussed in more detail below, the European Union cites these findings as the predicate for its argument that the Panel had an obligation to consider whether that potential, unlikely, different and weaker competition could have had a similar impact on the U.S. LCA industry (as the Panel found that the subsidies actually had). To the contrary, the Panel's findings in this regard directly contradict the premise of the European Union's appeal – *i.e.*, that an unsubsidized Airbus would have been able to compete during the 2001-2006 reference period in essentially the same way that a subsidized Airbus did, and would have had essentially the same impact on the market share and sales of the U.S. LCA industry.

d. The Panel's reasoning is objective, complete, coherent and internally consistent, and the European Union's claims under Article 11 are baseless

618. While the United States disagrees with the Panel's decision to consider the speculative scenarios regarding potentially different competition in the LCA market in assessing the effects of the subsidies, the core of the Panel's causation analysis and its findings are correct, consistent with the SCM Agreement, supported by the evidence, and reflect an exhaustive and compete review of the record of the proceeding. Despite this, the European Union argues that the Panel's

[1024] Panel Report, para. 7.1995.

[1025] Panel Report, paras. 7.1985, 7.1993.

causation analysis is "incomplete," "inconsistent," and "incoherent."[1026] These arguments should be rejected. The Panel produced a reasoned and comprehensive analysis to support its causation findings. It examined a factual record of thousands of pages of documentary evidence. Consistent with its obligations under Article 11 of the DSU, the Panel considered the evidence and arguments advanced by the parties and produced a detailed and reasoned report.

619. As it has done with other aspects of its appeal, the European Union has again restyled alleged claims of error regarding the interpretation and application of the SCM Agreement as also being inconsistent with Article 11 of the DSU. This is clear from the European Union's mechanistic use of the same formulation for casting its claims of interpretation and application errors as also breaches of the Panel's obligations under Article 11: "In the alternative, that is, if the Appellate Body disagrees with any of the characteristics of the legal errors in Sections {of its Appellant's Submission}, the European Union appeals, under Article 11 of the DSU…"[1027]

620. As the Appellate Body has confirmed, a claim pursued under Article 11 of the DSU must stand on its own and should "not be made merely as a subsidiary argument or claim in support of a claim that a panel failed to apply correctly a provision of the covered agreements" and that Article 11 claims fashioned in such a manner will fail.[1028] In *US – Zeroing (Article 21.5 – EC)*, the Appellate Body rejected the Article 11 claims because it was "not persuaded that the claims and arguments by the European Communities under Article 11 of the DSU differ from its claims that the Panel failed to apply correctly other provisions…"[1029] Here too the Appellate Body should reject the European Union's Article 11 claims which merely recast the European Union's arguments concerning the interpretation and application of Articles 5 and 6.3(c) of the SCM Agreement as inconsistent with Article 11 of the DSU.[1030]

621. The Panel's findings of fact in this case reflect an exhaustive review of a detailed body of evidence, the analysis is comprehensive and organized and there are no reasonable grounds to question the objectivity of the Panel's findings. To the extent that the European Union's arguments call for reweighing the evidence, the Appellate Body has made clear, it will not "interfere lightly" with the Panel's discretion and that the purpose of an appeal is not to revisit the Panel's findings of fact except to the extent that the Panel's assessment of the evidence was not "objective."

[1026] *See, e.g.*, EU Appellant Submission, para. 507.

[1027] *See* EU Appellant Submission, paras. 506 ("In the alternative, that is, if the Appellate Body disagrees with any of the characteristics of the legal errors in Sections IV.C.1 and IV.C.2, above the European Union, under Article 11 of the DSU…); para. 573 ("In the alternative, that is, if the Appellate Body disagrees with any of the characteristics of the legal errors in Sections IV.D.1 and IV.D.2, above the European Union, under Article 11 of the DSU…).

[1028] *US – Zeroing (Article 21.5 – EC) (AB)*, para. 401 (footnotes omitted).

[1029] *US – Zeroing (Article 21.5 – EC) (AB)*, para. 402.

[1030] *See* EU Appellant Submission, paras. 506-516, paras. 573-581.

3. The European Union's arguments are based on an incorrect interpretation and application of Articles 5 and 6.3

a. The European Union reintroduces its erroneous arguments concerning "market segments" and "competition," and continues to misinterpret and confuse key terms, including "subsidized product," "like product," and "market," in its causation claims of error

622. The European Union again repeats arguments it raised regarding the "subsidized product" and the existence of displacement in challenging the Panel's causation analysis. Arguing that "competition" and "market segments" "are crucial and inseparable concepts" in the causation analysis, the European Union asserts:

> The requirement to assess causation based on actual market(s) or market segment(s) where competition occurs also necessarily means a panel cannot slavishly adhere to a particular product grouping proposed by a complaining Member – such as a very broad subsidized product definition encompassing various distinct market segments.[1031]

623. The United States refers the Appellate Body to sections IX.B. and C. above, which address these arguments. Moreover, the Panel itself considered this question and found "nothing that would preclude us from making … an objective assessment on the basis of the case, including the subsidized product allegations put forward by the United States."[1032] It found, to the contrary, that "all Airbus LCA" is a reasonable basis on which to proceed and considered causation related arguments raised by the European Union.

624. In light of its initial findings regarding the "subsidized product" (*i.e.*, all Airbus LCA), the "like product" (*i.e.*, all Boeing LCA), the relevant geographic markets (*i.e.*, the European Union, Australia, Brazil, China, Chinese Taipei, India, Korea, Mexico, and Singapore, respectively), and the existence of displacement and lost sales during the reference period, the foundation on which the Panel conducted its analysis of the effects of the subsidies was fully in accord with the SCM Agreement.

b. The European Union's arguments based on speculative scenarios rests entirely on conjecture and an incorrect interpretation and application of Articles 5 and 6.3, and are also predicated on mischaracterizations of the Panel's findings

625. The centerpiece of European Union's causation appeal is its argument that the Panel erred in not further investigating the effects of hypothetical and different competition that might

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[1031] *See* EU Appellant Submission, para. 437

[1032] Panel Report, para. 7.1654.

have evolved in the absence of the presence of subsidized Airbus LCA. According to the European Union, "the Panel could not simply stop after finding that a non-subsidised Airbus could have launched only different LCA, in fewer market segments, and at a later time than Airbus actually did."[1033] The European Union argues that Article 6.3(a) and (b) of the SCM Agreement, and the available facts, required the Panel to consider:

> if not the particular LCA that Airbus actually launched, sold and delivered, which LCA, if any, could a non-subsidised Airbus have launched, sold, and delivered in each of the sales campaigns and markets at issue during the reference period? And how, if at all, would that "different" competition, based on fewer models of "different" LCA, have resulted in the US LCA industry securing the particular sales and market share increases at issue."[1034]

626. The questions posited by the European Union call for speculation and, in any event, pursuing this line would not affect the Panel's core findings that the but for the subsidies Airbus would not have launched its LCA when and as it did, and that the presence of those aircraft in the market were a fundamental cause of the market share gains and sales that Airbus won. Indeed, the European Union accepts the legal and factual finding of the Panel that the subsidies give to Airbus changed its competitive behavior by allowing it to launch aircraft it could not have launched as and when it did. Nor does the European Union dispute the proposition that Airbus' ability to offer the LCA it did during the reference period *gave it the means* to capture market share and significant sales at Boeing's expense in the 2001-2006 period.

627. Nonetheless, the European Union wants the Appellate Body to disregard the Panel's exhaustive, well reasoned finding of a causal link between the subsidies and effects (and therefore the Panel's finding of serious prejudice within the meaning of Article 6.3(a), (b), and (c)), because the Panel did not also consider in detail sufficient to satisfy the European Union whether Airbus could have launched different, but comparable (or perhaps even better) aircraft in certain LCA market segments that would have won the same sales and taken the same market share. The European Union argues:

> {R}ecourse to a "counterfactual" or "but for" analysis is a legitimate methodology for a panel to determine whether a subsidy caused serious prejudice under Articles 5(c) and 6.3 of the SCM Agreement. Indeed, application of some form of counterfactual is almost inescapable given the required comparison between a factual situation and a counterfactual situation – i.e., the absence of subsidies. However, the choice of one of more counterfactuals does not end a panel's analysis. On the basis of the chosen counterfactual, a panel must still determine whether serious prejudice "is the effect of the subsidy and there is a 'genuine and substantial relationship of cause and effect'" between the subsidy

[1033] EU Appellant Submission, para. 518.

[1034] EU Appellant Submission, para. 399.

> and serious prejudice, based on a chain of causation that is linked to the impugned subsidy.[1035]

628. A "but for" causation analysis of the effects of a subsidy does not permit, much less require, an analysis of one or more "counterfactuals" regarding how the recipient of a subsidy might have evolved differently without the subsidy. Rather, a "but for" analysis in a serious prejudice context is limited to whether the subsidy recipient could have done what it did to cause adverse effects without the subsidies, and if the answer is "no" (as the Panel found here), the only remaining issues are (1) did the behavior enabled by the subsidy cause any form of serious prejudice, and (2) was the chain of cause and effect cut by any other factor actually affecting competition at the same time.[1036]

629. The European Union's assertion regarding lost sales misses this point completely:

> The Panel's lost sales causation findings were not based on analysis of any, let alone a sufficient number, of these steps to establish the necessary "chain of causation". Instead, the Panel's causation conclusion stopped with its finding that a non-subsidised Airbus could not sell "the particular models of LCA that {Airbus} sold" in each of the challenged sales campaigns. But because the Panel also found a non-subsidised Airbus could compete with different LCA models, this finding literally shouted out additional questions – and demanded that the Panel take the additional analytical and evidentiary steps to seek answers.[1037]

630. The European Union's appeal calls for an incorrect interpretation and application of the causation standard under Articles 5 and 6.3. As discussed at length in Section IX.D.2.c, the Panel itself should not have proceeded beyond consideration of the effects of the subsidies. Here, the European Union asks that the Appellate Body find that the Panel erred by not going even further down the road of speculation as to the effects of hypothetical alternate events not present in the market at the same time as the subsidy.

631. In addition, its argument is deeply flawed in that it is predicated on a mischaracterization of the Panel's finding. The European Union states that its challenge to the Panel's causation findings flow directly from the Panel's findings, including "one of the most important such finding by the Panel… that a non-subsidized Airbus *would exist* as an LCA manufacturer" and

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[1035] *See* EU Appellant Submission, paras. 431-432.

[1036] *See* Panel Report, paras. 7.1985, 7.1993.

[1037] EU Appellant Submission, para. 490.

that there would have been different, fewer, or later in time Airbus LCA products.[1038] The Panel made no such findings, and thus there is no predicate for its appeal on this basis.[1039]

632. What the Panel found was that "Airbus' ability to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized LA/MSF."[1040] The European Union has conceded the point that but for the LA/MSF "Airbus would not have launched each of its LCA *at the time and the form that it did*."[1041] It is also clear that the Panel *did not find*, as the European Union argues, that there would have been different, fewer, or later-in-time Airbus LCA products. The Panel's finding, and the European Union's concession, that "but for" the subsides Airbus would not have launched LCA when and as it did says absolutely nothing about whether a non-subsidized Airbus might have existed at all, and even if it did, the types of aircraft it may or may not have been able to bring to market, when it might have been able to do so, and whether it might have won sales with those LCA.

633. The passages of the Panel Report relied on by the European Union cannot be read as finding anything at all about what a non-subsidized Airbus would do. For instance, the Panel says the following:

> *We reiterate that we do not conclude that Airbus necessarily would not exist at all but for the subsidies*, but merely that it would, at a minimum, not have been able to launch and develop the LCA models it has actually succeeded in bringing to the market. Had Airbus successfully entered the LCA industry without subsidies, it would be a much different, and we believe, a much weaker LCA manufacturer during the period we examined, with at best a more limited offering of LCA models." [1042]
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> ***
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> "{O}ur evaluation of the arguments and evidence the parties have submitted leads us to conclude that there are *multiple possibilities* for the LCA industry in the counterfactual world that would exist in the absence of subsidies to Airbus. In one scenario, *Airbus would not have entered the LCA market at all*…. In a second plausible scenario, *Airbus would not have entered the market*, but there would

[1038] EU Appellant Submission, para 401 (EU original emphasis).

[1039] The EU's entire Annex I: Counterfactual Annex is also predicated entirely on a finding that the Panel did not make. Indeed, the European Union has created a lengthy narrative "Annex" to its Appellant Submission that relies entirely on the premise that the Panel found "that a non-subsidized Airbus *would exist*, but would have launched aircraft at a later stage…." EU Appellant Submission, Annex I: Counterfactual Annex, para. 3. The Panel made no such finding, however.

[1040] Panel Report, para. 7.1949.

[1041] EU Appellant Submission, para. 412 (emphasis in original).

[1042] Panel Report, para. 7.1993 (emphasis added).

nevertheless have been two players, which one the basis of the evidence before us, would most likely have been Boeing and McDonnell Douglas, the latter having merged with Boeing in 1997…. Finally, in a third and a fourth scenario, Airbus *might have entered* the LCA market without subsidies, either in competition with Boeing alone, or in competition with a United States' industry comprising Boeing and another US producer. In either case, *Airbus could not conceivably have been present in the LCA market with the same aircraft and at the same times as it actually was*, given our conclusions concerning the cumulative effect of LA/MSF and the other subsidies in dispute on Airbus' ability to launch successive models of LCA as and when it did. In our view, it is simply *not feasible that*, without LA/MSF and the other subsidies, relying entirely on non-subsidized financing, Airbus could have undertaken the pace of aircraft development that would have enabled it to launch the range of LCA that is has successfully launched to date, which has resulted in the it present position in the market for LCA. It follows that *even in the unlikely event that Airbus would have been able to enter* the LCA market as a non-subsidized competitor, we are confident that it would not have achieved the market presence it did over the period 2001 to 2006 and that we have described in the previous sections of this Report." [1043]

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We have found that the effect of LA/MSF, complemented by the other subsidies in dispute, is to enable Airbus to launch and bring to market LCA that it otherwise would have been unable to – that is, the subsidies support the presence of Airbus in each segment of the LCA market with each of its LCA models. Since we have concluded that, but for the subsidies, Airbus would not have had the market presence it did have during the period we examined, it is clear that those LCA have displaced Boeing LCA from the relevant markets and caused lost sales in the same market. [1044]

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We reiterate that we do not conclude that Airbus necessarily would not exist at all but for the subsidies, but merely that *it would, at a minimum, not have been able to launch and develop the LCA models it has actually succeeded in bringing to the market. Had Airbus successfully entered the LCA industry without subsidies, it would be a much different, and we believe, a much weaker LCA manufacturer*

[1043] Panel Report, para. 7.1984 (emphasis added).

[1044] Panel Report, para. 7.1986 (emphasis added).

> *during the period we examined, with at best a more limited offering of LCA models*.[1045]
>
> ***
>
> {W}e are satisfied that the specific subsidies the United States has shown to exist *enabled Airbus to bring to the market LCA that it would not otherwise have been able to develop and launch as and when it did*, and thus caused displacement of United States' imports of LCA from the EC market and of United States' export from the markets of certain third countries, as demonstrate in the data concerning market share before us. Furthermore, we conclude that those subsidies caused lost sales of United States' LCA because, *but for the subsidies, Airbus would not have had available the LCA that it was able to sell to the customers at issue in the sale we have found were lost by Boeing* between the years 2001 and 2006. [1046]

634. Thus, the Panel never found, as the European Union asserts, "that a non-subsidized Airbus would exist."[1047] It only speculated that "Airbus *might* have entered the LCA market without subsidies" in two of four "plausible scenarios."[1048] The Panel did not find the scenarios with non-subsidized Airbus LCA to be very "plausible" – it referred to them as "the unlikely event that Airbus would have been able to enter the LCA market as an unsubsidized competitor."[1049]

4. Contrary to the European Union's mischaracterizations, the Panel's factual findings support its conclusions (in the context of its consideration of the hypothetical scenarios) that while an unsubsidized Airbus was unlikely to have entered and remained in the market, even if had existed, it would have been much different and weaker, and would not have had the market presence it had did during the reference period

635. In the speculative exercise that the European Union proposes, an unsubsidized Airbus would have launched different aircraft at different times and those aircraft would have won the same sales as its subsidized A320 family aircraft, and would have garnered the same market share as was occupied by the subsidized A320, A330, and A380 family aircraft during the 2001-2006 period.[1050] The European Union argues that:

[1045] Panel Report, para. 7.1993 (emphasis added).

[1046] Panel Report, para. 7.2025 (emphasis added).

[1047] EU Appellant Submission, para. 532.

[1048] Panel Report, para. 7.1984 (emphasis added).

[1049] Panel Report, para. 7.1984.

[1050] *See* EU Appellant Submission, paras. 483-505, *see also generally* Annex I: Counterfactual Annex.

> The evidence and findings detailed {in its Counterfactual Annex} provide a sufficient basis to conclude that a non-subsidized Airbus could have launched a single-aisle LCA in or about 1987 and a 200-300 seat twin-aisle LCA in or about 1991, thereby competing in the two most significant LCA market segments. The evidence also provides a basis for a finding that Airbus could have launched the A380 in 2000.[1051]

This scenario and the European Union's criticism of the Panel are at odds with the Panel's actual findings.

636. First, the notion that an unsubsidized Airbus could have developed and marketed a single-aisle aircraft without having the knowledge, experience and market credibility it gained from the A300 and A310, or developed and marketed a four-engine 500 plus seat aircraft without the knowledge, experience and market credibility it gained from the four-engine A340 and A340-500/600, is inconsistent with the Panel's finding regarding the significant barriers to market entry that the subsidies allowed it to overcome,[1052] the essential spillover and learning effects across models[1053] and Airbus's own recognition of the important learning gained on each of its LCA programs.[1054]

637. Second, the notion that an unsubsidized Airbus that did not launch the A300/A310 would be better financially situated than the actual subsidized Airbus to launch a single-aisle and 200-300 aircraft is contradicted by the Panel's findings that the subsidized Airbus received almost 100% of the development costs of the A300/A310.[1055] That is, the hypothetical decision to refrain from launching the A300 and A310 could not have put Airbus in a materially better financial position than having launched them with the subsidies it received. To the contrary, a non-subsidized Airbus would have been worse off because it would not have benefitted from the learning effects (including the learning of "working together" as a single entity) or revenue stream gained from production and delivery of these aircraft.

638. Third, the notion that a non-subsidized Airbus would have received significant "cash flow" generated by a later-launched single-aisle aircraft benefitting from the "large number of single-aisle deliveries demanded by the market during the late 1980s and early 1990s"[1056] is contradicted by the Panel's finding that the majority of proceeds from the sale of an aircraft at made at the time of delivery.[1057] Even if a non-subsidized Airbus had been in a position to win

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[1051] EU Appellant Submission, para. 500, *see also* Annex I: Counterfactual Annex, paras. 3-7, 58-67.

[1052] Panel Report, para. 7.1948.

[1053] Panel Report, paras. 7.1717, 7.1976 (*citing, inter alia,* EC-98 (HSBI) and EC-362 (HSBI)).

[1054] *See, e.g.,* Exhibit EC- 98 (HSBI), para 1.2(f).

[1055] Panel Report, para. 7.1934 and 7.1935.

[1056] EU Appellant Submission, Annex I: Counterfactual Annex, para. 38, 70.

[1057] Panel Report, paras. 7.1749, 7.1750.

the orders that preceded the increase in demand, the four-year lag between order and delivery posited by the European Union would necessarily translate into at least a four-year delay in deliveries, causing Airbus to miss much of this revenue to be gained during this window of high demand.

639. Finally, and perhaps most importantly, the European Union's entire speculative exercise[1058] runs against the grain of the Panel's ultimate conclusion, based on its thorough review of all the evidence, that it was "unlikely" Airbus would have been able to enter the LCA market as a non-subsidized competitor, but if it had, the Panel was "confident that it would not have achieved the market presence it did over the period 2001-2006" and "it would be a much different, and we believe, a much weaker LCA manufacturer during the period we examined, with at best a more limited offering of LCA models."[1059]

E. The Panel did not err in finding that the Emirates Airlines order of A380s constitutes a significant lost sale that was one of the effects of the subsides under Article 6.3(c) of the SCM Agreement

1. The Panel correctly found that the Emirates Airlines order of A380s constitutes a significant lost sale

640. The European Union argues that the Panel erred in finding that the Emirates Airlines decision to purchase A380s from Airbus constitutes a "lost sale" for the U.S. LCA industry within the meaning of Article 6.3(c) of the SCM Agreement. Specifically, the European Union argues that the Panel presumed that if Airbus had not won the sale, Boeing could have secured the Emirates order by offering a Boeing LCA.[1060] The Panel, however, made no such presumption. To the contrary, the Panel found that the evidence demonstrated that Boeing lost a sale to Emirates Airlines that it otherwise could have won, in accordance with Article 6.3(c) of the SCM Agreement.

641. First, the Panel found that Boeing marketed and sold LCA that competed with the A380. In particular, the Panel rejected the argument that the A380 had no competition on the basis of the European Union's own evidence and found instead:

> While it is clear that the A380 offered unique characteristics to these airlines, we do not agree that it did not compete with the 747. Information in the A380 business case contradicts the European Communities' position in this regard. [1061]

[1058] *See generally* EU Appellant Submission, Annex I: Counterfactual Annex.

[1059] Panel Report, paras. 7.1984, 7.1993.

[1060] EU Appellant Submission, para. 584.

[1061] Panel Report, para. 7.1832, citing Exhibit EC-362(HSBI); *see also* Panel Report, para. 7.1831.

642. Second, the Panel found that customers in the LCA industry consider all available aircraft to fulfill their purchasing requirements. Responding to the European Union's argument that a sale can be considered competitive only where both manufactures make a formal, binding proposal, the Panel made the following finding:

> With only two producers in a highly competitive industry, and knowledgeable customers in both airlines and leasing companies, we consider that sales campaigns involve competition even in the absence of a 'formal, binding proposal' by either manufacturer, albeit perhaps not to the same degree as when such a proposal is made. Given the importance of LCA costs to the customers' successful operations, we cannot accept the implication that customers knowledgeable about the market would not consider the competitive products available from the two producers in most cases, even if formal offers are neither requested nor made in a particular instance.[1062]

643. Third, the Panel noted that the European Union "does not dispute that Boeing lost sales to Airbus, in the sense that the customer purchased Airbus rather than Boeing LCA".[1063] It still does not do so. To the contrary, the European Union explains in its appellant submission that while Emirates may have chosen the A380 over the available Boeing aircraft because of its huge seating capacity, it "need{ed} the bloody seats".[1064] Therefore, had Airbus not received subsidies that enabled it to launch the A380, Emirates would have bought another LCA with seats to fulfill the need. In fact, this is precisely what Emirates did when its A380 deliveries were delayed – *i.e.*, it purchased additional Boeing 777s to meet its demand.[1065]

644. Thus, the Panel's findings were sufficient to satisfy Articles 5 and 6.3(c) of the SCM Agreement.

645. The arguments raised by the European Union in the form of an Article 11 claim provide no basis to disturb those findings. The European Union first argues that the Panel erred in not considering evidence that Emirates' status as an A380 launch customer and its appreciation of the "unique" high seating capacity indicates that it would not have purchased competing Boeing aircraft. The Panel disagreed, finding that Boeing had available aircraft that competed with the A380.[1066] The evidence cited by the European Union indicates that if Airbus had not received subsidies that enabled it to launch such a uniquely large aircraft, Emirates would have turned to a

[1062] Panel Report, para. 7.1722.

[1063] Panel Report, para. 7.1845.

[1064] EU Appellant Submission, para. 590.

[1065] Panel Report, para 7.1831.

[1066] Panel Report, para. 7.1668.

Boeing aircraft to fulfill what even the European Union recognizes was its simple "need for bloody seats."[1067]

646. The European Union's second argument is that the Panel erred in not considering whether Boeing was really "serious" about launching a new aircraft to compete with the A380 at the time of the Emirates order.[1068] For the European Union's argument to be relevant, however, it would have had to demonstrate that the 747-X is the only aircraft that Emirates would have considered if the A380 were not available. In discussing the respective roles of the Appellate Body and a Panel, the Appellate Body has clarified that "a panel's appreciation of the evidence falls, in principle, 'within the scope of the panel's discretion as the trier of facts'" and the Appellate Body "will not interfere lightly with the panel's exercise of its discretion."[1069]

647. Here, the Panel found that airlines consider all available aircraft, and the evidence shows that Emirates itself purchased other Boeing aircraft to fulfill its need for seats, thus demonstrated that the 747-X was not the only aircraft that Emirates would have considered if the A380 were not available it. Thus, Boeing's decision not to launch the 747-X in the face of insufficient demand is not a basis to disturb the Panel's finding that Boeing lost a sale that the Panel found otherwise might have been awarded to its other competitive aircraft in production and available for sale.

648. In sum, the Panel did not, as the European Union argues, "presume{} a lost sale, instead of identifying and securing the necessary proof to make such a finding as required by Article 6.3(c) of the SCM Agreement"[1070] and it did not fail to address relevant evidence. [1071] To the contrary, the Panel considered all of the arguments and evidence and determined that the facts supported a finding that the Emirates decision to purchase A380s constituted a significant lost sale for the U.S. LCA industry.

2. The Panel correctly found that subsidies enabled Airbus to launch the A380, and therefore the European Union provides no basis for reversing the finding that the effect of the subsidies were lost sales at Emirates, Singapore and Qantas

649. The European Union argues that the Panel erred in finding first that a non-subsidized Airbus could not have launched the A380 absent the subsidies it received, and thus on that basis also erred in its finding that an effect of the subsidy was that the U.S. LCA industry lost the sales

[1067] EU Appellant Submission, para. 590.

[1068] EU Appellant Submission, para. 597.

[1069] *US – Wheat Gluten Safeguards (AB)*, para. 151.

[1070] EU Appellant Submission, para. 588.

[1071] *See* EU Appellant Submission, para. 589.

won by this aircraft within the meaning of Article 6.3(c)).[1072] With this argument, the European Union is seeking to re-litigate a factual question decided by the Panel. As the Appellate Body in *US – Upland Cotton (Article 21.5)*, confirmed, the assessment of the probative value of evidence provided to a panel "falls within the panel's authority as the initial trier of fact in a serious prejudice case" [1073] and where the Panel, as it has done here, has conducted an objective assessment of the arguments and evidence presented by the Parties, the Appellate Body "will not interfere lightly" or disturb those findings of fact.[1074]

650. The European Union nevertheless appeals the Panel's finding on the grounds that the Panel erred in rejecting its rebuttal argument that Airbus could have launched the A380 without subsidization. The first two bases for appeal relate to the Panel's factual findings regarding the A380 business case and the ability of EADS, BAE, and risk-sharing suppliers to provide sufficient additional unsubsidized capital such that Airbus would not have required the launch aid provided specifically for the A380 launch.[1075]

651. The Panel's factual findings in this regard are sound. The Panel also found that it was not solely that tranche of LA/MSF that was necessary for the launch of the A380 in 2000, but also all of the essential financial and technical benefits that Airbus received from its subsidized launch of its earlier aircraft.[1076] The European Union's third basis for appeal is that the Panel erred by not considering a speculative scenario under which an unsubsidized Airbus launching different aircraft at different times could have nevertheless ended up in the same financial and technical position in 2000, and still have had the ability to finance the A380 launch without subsidies. None of these arguments provide a basis for disturbing the Panel's finding.

652. First, the European Union alleges that the Panel erred in finding that the A380 business case – which the European Union submitted as rebuttal evidence – "by no means demonstrates" that the A380 project would have been viable absent launch aid.[1077] The United States recalls that the Panel did a thorough and careful analysis and asked many questions related to the business case evidence submitted by the European Union. The Panel ultimately found that the A380 business case itself did not attempt to consider the viability of any of the realistic worst case scenarios without launch aid, and even a ex post sensitivity analysis submitted by the

[1072] EU Appellant Submission, para. 600.

[1073] *US – Upland Cotton (Article 21.5)(AB)*, para. 357.

[1074] *See, e.g., US – Upland Cotton (Article 21.5)(AB)*, paras. 357 and 435; *see also US – Wheat Gluten Safeguards (AB)*, para. 151.

[1075] *See* Panel Report, paras. 7.1922-7.1927.

[1076] Panel Report, para. 7.1948

[1077] EU Appellant Submission, para. 603.

European Communities for this very purpose failed to make this demonstration in respect to all of these scenarios.[1078]

653. The European Union ignores these findings, however, and argues solely that the Panel erred with respect to its observations about the credibility of the business case – specifically, that Airbus has "an economic incentive to be optimistic in its forecasts of, inter alia, the number of aircraft likely to be sold and the pace of those sales when preparing a business case in support of a programme for which LCA/MSF is sought."[1079] The United States considers that the Panel set out a thoughtful and reasoned basis for this observation. At the same time, however, the Appellate Body need not consider this aspect of the European Union's appeal because the Panel's observation played no part in the Panel's ultimate finding that the European Union had failed to rebut the causal link between LA/MSF and Airbus's launch of the A380. That is, despite the Panel's obvious concerns about the completeness and accuracy of the business case, its finding with respect to the effect of LA/MSF in the context of the A380 launch is based on "the assumption that the {A380} business case… demonstrate{s} a positive NPV in a no-LA/MSF and Realistic Worst Case scenario."[1080]

654. Second, the European Union alleges Panel error on the basis that it ignored evidence that commercial financing for the A380 would have been available from EADS, BAE systems and risk sharing suppliers.[1081] The Panel's report, however, demonstrates that it did not ignore the European Union's arguments and evidence as to whether Airbus had other sources of financing available for the A380. Rather, the Panel objectively assessed the evidence and arguments offered by the European Union and rejected them.

655. The Panel explicitly found that while the EADS offering memorandum indicated that its corporate restructuring was intended to improve the companies' operations, the Panel found that the evidence did not sufficiently demonstrate how that reorganization would have better enabled the company to raise funds that its constituent entities could not have done so just a few years earlier.[1082]

656. Similarly, the European Union offers no evidence or argument with respect to its assertion about the ability of BAE Systems to provide additional market financing besides a citation to the company's annual report. The United States notes that BAE Systems business is much broader than the 20 percent stake it held in Airbus,[1083] and therefore a simple reference to its company-wide balance sheet says nothing about whether it would have committed additional

[1078] Panel Report, paras. 7.1922-1927; *see also* Panel Questions 76, 265 and 266.

[1079] EU Appellant Submission, para 603, *citing* Panel Report, para. 7.1926,

[1080] Panel Report, para. 7.1943.

[1081] EU Appellant Submission, para. 613.

[1082] Panel Report, para. 7.1947.

[1083] EC FWS, para. 1058.

funds beyond those already committed to the A380 project. In fact, the European Union's assertion is contradicted by the Panel's finding that the statements of UK Department of Trade and Industry, which conducted the analysis underlying the UK decision to provide LA/MSF for the A380, recognized that "the fundamental rationale of launch aid is to address the apparent unwillingness of the capital markets to fund projects with such high product development costs, high technological and market risks and such long pay back periods."[1084]

657. With respect to risk-sharing suppliers, the Panel explicitly considered the European Union's argument that Airbus could have increased the share of financing provided by risk-sharing suppliers – including its arguments that these companies were already providing such funding to the project, and many were also willing to fund part of the 787 development costs a few years later – and found that the argument did not demonstrate that these risk-sharing suppliers would have been willing to put additional capital into what was widely acknowledged as a very risky project.[1085] A Panel, as trier of fact, does not err simply because it draws a different conclusion from the evidence than the party that submitted it, and the Appellate Body has recognized that it is neither charged with, nor in a position to review, a reasoned finding of fact based on a thorough review of record evidence. Here, there is no basis to reverse this aspect of the Panel's finding.

658. Thus, the European Union has not shown that the Panel erred by ignoring evidence that it alleges demonstrates that Airbus would have been able to launch the A380 in 2000 without launch aid; rather, all it has demonstrated is that the Panel's review of the evidence led it to a different conclusion than the European Union. Moreover, both arguments are irrelevant, because the Panel did not base its finding solely on the necessity of the particular provision of LA/MSF for the A380 launch. Rather, it found that the European Union's arguments as to whether Airbus could have launched the A380 with all commercial financing were all insufficient to rebut the U.S. prima facie case because they took no account of the essential enabling role of all of its prior aircraft programs. It found: "{t}he view that Airbus could have launched the A380 as a stand-alone proposition is dependent upon Airbus having received LA/MSF to develop all of its previous models of LCA."[1086] The European Union has conceded that Airbus would not have been able to launch any of these aircraft as it did and when it did without the earlier subsidization. [1087]

659. With its third argument, the European Union tries to avoid that history and that concession by invoking the hypothetical scenario, set out in Annex I to its submission, that Airbus could have launched a single-aisle aircraft in 1987 and a 200-300 seat aircraft in 1991,

[1084] Panel Report, para. 7.1917-1918, 7.1920.

[1085] Panel Report, para. 7.1917-1918, citing UK DTI finding of high risk and long pay back period.

[1086] Panel Report, para. 7.1948.

[1087] EU Appellant Submission, para. 412 (emphasis in original).

and then been able launch the A380 (both as a financial and technical matter) in 2000.[1088] It suggests that the Panel erred by not considering that under this hypothetical scenario, Airbus could have achieved the same technical and financial position on the eve of the A380 launch without any of the prior subsidization.

660. As demonstrated above, the Panel's findings indicate that it considered a hypothetical scenario in which Airbus would achieve its market position and sales without subsidies to be "unlikely" and to be contradicted by other record evidence.[1089] Moreover, evidence demonstrates that Airbus itself recognizes the critical importance of the technical experience gained from each of its LCA.[1090] The fundamental error in the European Union's third argument with respect to causation as it pertains to the A380, however, is that it employs the same flawed argument that it made with respect to causation as it pertains to all of the other Airbus LCA. That is, the European Union's appeal again falls back on the argument that the Appellate Body should reverse the Panel's findings as to the effects of the subsidies because it also did not make a finding as to whether there is a wholly speculative counterfactual under which an entirely unsubsidized Airbus could have launched fewer and different LCA at different times throughout its history, yet still have ended up able to launch the A380 in 2000.

661. In sum, the Panel made an objective and well reasoned assessment of the link between LA/MSF and the launch of the A380, and its finding may be sustained on that basis.

F. The Panel correctly found that the effects of the non-LA/MSF subsidies were serious prejudice to the United States in the form of market displacement and lost sales

662. The European Union "does not challenge the Panel's combined assessment of the various MSF measures."[1091] Rather, the European Union argues that the Panel erred in aggregating the non-LA/MSF subsidies based on the finding that each "complement{ed} and supplement{ed}" the LA/MSF. In particular, it argues that "the Panel erred in this case by aggregating the non-MSF measures under its '*product launch*' theory of causation, despite an absence of factual findings that each of those measures impacted the launch of particular *products*."[1092] The European Union further contends that this alleged failure meant that "the Panel also lacked any legal or evidentiary basis to find that the non-MSF-subsidies 'cause{d}' adverse effects within the meaning of Article 5, or that they had the 'effect' of displacement or lost sales pursuant to

[1088] *See* EU Appellant Submission, Annex I.

[1089] *See* Section IX.D.4 above.

[1090] *See, e.g.*, Exhibit EC-98 (HSBI), para. 1.2(f).

[1091] EU Appellant Submission, para. 646.

[1092] EU Appellant Submission, para. 638 (emphasis in original).

Articles 6.3(a) – (c) of the SCM Agreement, as these findings all build exclusively on the Panel's 'product-launch' theory of causation."[1093]

663. The Panel's decision to analyze on an aggregate basis all of the subsidies it found in its analysis of serious prejudice to the interests of the United States is consistent with the SCM Agreement and past panel and Appellate Body reasoning. Article 6.3 provides no specific methodological instructions regarding a causation analysis; it simply requires that a subsidy cause serious prejudice. An aggregated analysis of the effects of the multiple subsidies at issue in this case satisfies the requirement of Article 6.3 because the Panel found that that each subsidy shares in common the causal link – *i.e.*, each of the challenged subsidies facilitated Airbus's development of its LCA family.

664. In *US – Upland Cotton*, the Panel conducted an aggregated analysis under Article 6.3 of the SCM Agreement of subsidies that shared a sufficient nexus with both the subsidized product and the particular effects-related variable under consideration.[1094] The Panel reasoned that "{t}o the extent a sufficient nexus with these exists among the subsidies at issue so that their effects manifest themselves collectively, we believe that we may legitimately treat them as a 'subsidy' and group them and their effects together."[1095] Although the specific finding was not directly challenged in the appeal of that report, the Appellate Body did affirm that Panel's overall causation finding in many respects, including its approach to grouping together certain subsidies for the purpose of assessing their effects.[1096]

665. The European Union does not dispute that the SCM Agreement permits an aggregated analysis of subsidies, and in fact it explicitly "does not challenge the Panel's combined assessment of the various MSF measures."[1097] Moreover, it recognizes that "the ability to combine the effects of various subsidies is necessarily tied to the particular theory or theories of causation being advanced by a party, and evaluated by a panel."[1098] Rather, the European Union seeks to relitigate the Panel's factual findings regarding the relationship of the subsidies at issue and Airbus' product development.

666. The European Union also mischaracterizes the Panel's findings. In particular, it represents the extent of the Panel's factual findings as being that "the principal commonality" between the non-LA/MSF subsidies and the LA/MSF subsidies "is simply that they were received by entities linked to Airbus and that the United States chose to challenge all of them in

[1093] EU Appellant Submission, para. 638.

[1094] Panel Report, para. 7.1960, citing *US-Cotton (Panel)*, para. 7.1192; *see also Korea – Commercial Vessels (Panel)*, para. 7.616.

[1095] *US – Upland Cotton (Panel)*, para. 7.1192.

[1096] *US – Upland Cotton (AB)*, para. 483-484; *see also US – Upland Cotton (Article 21.5)(AB)*, para. 401.

[1097] EU Appellant Submission, para. 646 (emphasis added).

[1098] EU Appellant Submission, para. 647.

the same dispute,"[1099] and that the Panel engaged in "causation by association."[1100] In doing so, however, the European Union ignores that the Panel's aggregated analysis of the other subsidies in dispute is based on its finding that the nature and operation of each of the subsidies provided in respect of Airbus LCA enhanced Airbus' ability to develop and bring to market its LCA family as it did, and when it did, and consequently allowed it to gain market share and significant sales at Boeing's expense.[1101]

667. Similarly, the European Union contention that the Panel "failed to notice the critical differences"[1102] among the non-LA/MSF measures focuses solely on characteristics of the subsidies that are irrelevant in light of the causal theory on which the Panel's serious prejudice finding is based. In doing so, it ignores the Panel's factual finding that "we do not agree with the European Communities' view that differences in the structure, operation, and design of the different subsidies at issue in this dispute preclude their being considered in the aggregate"[1103] because all of the non-LA/MSF subsidies shared the one critical similarity that constituted a "shared nexus" between each of the subsidies and the demonstrated displacement and lost sales.

668. The Panel's finding in this regard is based on its review of an exhaustive record regarding the nature and circumstances of the provision of each subsidies, which led it to conclude that (1) all of the non-LA/MSF subsidies "were granted during the period each succeeding model of Airbus LCA was being developed and brought to market,"[1104] and (2) they "complemented and supplemented" the "product" effect of LA/MSF."[1105] Specifically, the Panel found:

- The *equity infusions and share transfer measures* "ensured the continued existence and financial stability of the respective national entities engaged in the Airbus enterprise" and "without their participation in the overall effort, Airbus would not have been able to continue to develop, launch and produce LCA in fulfillment of the goal of developing a full range of LCA for the market." For example, the EC State Aid memorandum demonstrated that "Aerospatiale could not have undertaken these investment {in fixed assets an inventory, and advances to suppliers, in connection

[1099] EU Appellant Submission, para. 642.

[1100] EU Appellant Submission, para. 656.

[1101] EU Appellant Submission, para. 646.

[1102] EU Appellant Submission, para. 643. Subsidies do not have to have identical structure in order to nevertheless operate collectively, along the same causal pathway, to cause the same effect. For example, the panel in *US – Upland Cotton* found that loans and direct payments were properly assessed in the aggregate where they were both tied to the price of the subsidized product, and therefore shared a nexus to the market effect at issue in the case – the price of cotton. *US – Upland Cotton (Panel)*, paras. 7.1303, 7.1349.

[1103] Panel Report, para. 7.1955.

[1104] Panel Report, para. 7.1956, n. 5692.

[1105] Panel Report, para. 7.1956.

with the development of new aircraft" without the government's assistance through equity infusions."[1106]

- The *infrastructure subsidies* "provided essential support to the development and production of Airbus LCA, relieving Airbus of significant expenses in connection with the development of facilities for the production of, most particularly, the A380, and thus enabling it to continue with the launch of successive models of LCA."[1107]

- The *R&TD subsidies* enabled Airbus to "develop features and aspects of its LCA on a schedule that it would otherwise have been unable to accomplish."[1108]

669. Indeed, elsewhere in its Appellant Submission, the European Union seems to acknowledge the shared nexus among the subsidies.[1109] For instance, the arguments advanced by the European Union regarding French state capital contributions are revealing:

> The United States challenged four capital contributions made by the French State to Aérospatiale, a French company wholly-owned by the French State, in the years 1987, 1988, 1992 and 1994. The purpose of the new capital was to fund expansion in LCA product development, in light of robust prospects for substantial future growth in the demand for LCA. From the mid-1980s, among other projects and product lines, Aérospatiale began to ramp-up for the manufacture of the A320, with the first delivery due in 1988. In addition, the company was contemplating a new long-haul programme that was eventually launched in 1987 as the A330/A340, with the first delivery in 1993. This ambitious investment programme required additional equity capital as a base for further borrowing capacity; in addition to the initial design cost, the production of a new aircraft requires significant capital investment in specialised facilities and equipment. [1110]

[1106] Panel Report, para. 7.1957.

[1107] Panel Report, para. 7.1958. In this context, the Panel considered and dismissed the factual argument regarding the Muhlenberger Loch project in Hamburg that the European Union again seeks to litigate in this appeal. EU Appellant Submission, para. 656.

[1108] Panel Report, para. 7.1959. Although the Panel recognized that the impact of pre-competitive R&TD subsidies of Airbus' market presence was perhaps more attenuated, compared with the other subsidies at issue, or with R&TD subsidies that funded research and technology actually used on LCA that were launched," it nevertheless found that the "the ability to fund such {pre-competitive} efforts at a time when it would likely have been unable to do so in light of other demands on its resources was, in our view, significant in ensuring the launch of successive models of Airbus LCA." Panel Report, para. 7.1959. The United States recalls that the European Union provided no rebuttal information demonstrating that any of the government-funded R&D projects were unrelated to the development of its LCA.

[1109] *See* EU Appellant Submission, para. 1094 (citing EU FWS, paras 1134-1135).

[1110] EU Appellant Submission, para. 1094 (citing EU FWS, paras 1134-1135).

670. This passage makes abundantly clear that the "purpose of the new capital was *to fund expansion in LCA product development*" [1111] Simply put, in the European Union's words, *"{t}his ambitious investment programme required additional equity capital as a base for further borrowing capacity; in addition to the initial design cost, the production of a new aircraft requires significant capital investment in specialised facilities and equipment."*[1112]

671. More importantly, however, the EU's arguments on each measure simply seek to relitigate factual issues decided by the Panel on the basis of its review of many thousands of pages describing the nature, magnitude and timing of each subsidy.[1113] In addition, the European Union entirely overlooks the Panel's analysis of the relevance of the timing of each subsidy in supporting Airbus's product development program and the product in respect of which the subsidies were provided.[1114]

672. Given the evident sufficiency of the Panel's analysis of the nature and operation of each subsidy in relation to Airbus's product development, the European Union also appears to argue that the Panel erred in failing to establish additionally that each of the subsidies was "necessary" to bring about a particular product launch.[1115] The standard for an aggregated analysis implicit in this argument is too high. It would permit circumvention of the SCM Agreement disciplines simply by subdividing a program of subsidization into a series of smaller measures – none of which on its own would be found significant enough to cause adverse effects but which, in total, had a significant distortive impact on competition in manner inconsistent with Articles 5 and 6.3 of the SCM Agreement. The Panel's finding that it could cumulatively assess the effects of measures operating by the same causal mechanism that "complemented and supplemented" each other is sufficient, even if certain of these measures would not, on their own, be of a sufficient magnitude to cause adverse effects.

673. The Panel correctly applied the legal standard under Article 6.3 when it undertook an aggregate analysis of the effects of the LA/MSF and non-LA/MSF subsidies based on its finding that the various measures shared a sufficient nexus with both the subsidized product and the particular effects-related variable under consideration. It explicitly found that each subsidy was provided in respect of Airbus LCA – which, as the Panel explicitly recalled in this context, is the

[1111]EU Appellant Submission, para. 1094 (citing EU FWS, paras 1134-1135).

[1112]EU Appellant Submission, para. 1094 (citing EU FWS, paras 1134-1135).

[1113] EU Appellant Submission, paras. 652-659. In Section E of its Report, the Panel conducted an exhaustive analysis of the nature, magnitude and timing of each subsidy.

[1114] Panel Report, para 7.1956, n. 5692.

[1115] EU Appellant Submission, para. 646; *see also* EU Appellant Submission, para. 652 ("There are simply no underlying factual findings to support the Panel's ultimate conclusion that but for the equity investment and share transfers, individual Airbus LCA would not have been launched. Rather, the Panel appears to be relying predominantly on the understanding that these are other subsidies that 'complemented and supplemented' the MSF subsidies…".)

subsidized product in this case;[1116] that each subsidy was "granted during the period {that} each succeeding model of Airbus LCA was being developed and brought to market;"[1117] and, most critically, that each subsidy operated by the same causal mechanism, *i.e.*, facilitating Airbus's ability to bring to market its full family of LCA. In sum, it found that "all provided in connection with the subsidized product, Airbus LCA and they all had the same effect of Airbus' ability to launch the LCA it launched at the time that it did."[1118]

G. The Panel's treatment of the European Union's arguments regarding the applicability of the 1992 Agreement to the serious prejudice analysis was consistent with Article 5(c) of the SCM Agreement and Articles 11 and 12.7 of the DSU

674. The European Union again raises, in the context of its serious prejudice arguments, the argument that the Panel should have considered as relevant certain aspects of the 1992 Agreement. In particular, it asserts that by failing to address the EU's 1992 Agreement arguments in the specific context of its serious prejudice findings, the Panel somehow failed to properly apply Article 5(c) of the SCM Agreement and failed to meet its obligations under Articles 11 and 12.7 of the DSU.

675. The European Union never explains what these errors consist of, other than to argue that the Panel erred in failing to "make reference to" an argument or "fact" that the European Union believes was relevant, and further that, "the Panel was required to take into consideration."[1119]

676. The Panel, however, was under no obligation to do so and, even if it were, it actually did address each of the EU's arguments, and rejected them. Neither Article 11 nor Article 21.7 of the DSU, let alone Article 5(c) of the SCM Agreement, contains a requirement for a panel to "make reference to" each and every fact or argument that a party to a dispute believes may be relevant, or that it do so in a particular section of its report, here, for example, in the adverse effects section.

677. Articles 11 and 12.7 of the DSU require, in brief, an "objective examination" and "the basic rationale behind any findings and recommendations that it makes." The Panel's exhaustive review of the U.S. serious prejudice claim and the European Union's arguments, including its detailed review of the record evidence, against that claim amply satisfied those standards. This is particularly so because the Panel's analysis of EU subsidies addressed, and properly rejected, all of the arguments that the EU made again with regard to using the 1992 agreement in the serious prejudice analysis.

[1116] Panel Report, para 7.1956, n. 5692.

[1117] Panel Report, para 7.1956, n. 5692.

[1118] Panel Report, para. 7.1956.

[1119] EU Appellant Submission, paras. 690-691.

678. The United States made claims under Article 5(c) that European Union subsidies caused, *inter alia*, displacement of exports and imports and lost sales. The United States supported its claims with hundreds of pages of argument, and the European Union devoted hundreds of pages to attempting to rebut those arguments. Well more than 200 pages of the Panel Report reflect the Panel's examination of the various arguments and it findings with regard to the U.S. claims. The European Union now asserts that because the adverse effects section of the panel report did not address a one-page argument in the first written submission, the report is inconsistent with Article 12.7 of the DSU,[1120] the Panel itself violated Article 11 of the DSU, and the findings of serious prejudice are inconsistent with Article 5(c) of the SCM Agreement.

679. The European Union's argument does not cite support for its appeals under Article 11 or 12.7 of the DSU. In fact, these obligations lead to a result opposite from what the EU seeks. The Appellate Body has explained the requirements imposed by Article 12.7 of the DSU:

> {A} panel is to "submit its findings in the form of a written report to the DSB" and, according to the second sentence of Article 12.7, "the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." The Appellate Body has explained that this provision "establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations", namely, that the explanations and reasons provided must suffice "to disclose the essential, or fundamental, justification for those findings and recommendations". Panels need not "expound at length on the reasons for their findings and recommendations" in order to satisfy their obligations under Article 12.7.[1121]

680. The United States has discussed Article 11 in other parts of this submission, and will not repeat those points here. The Appellate Body has found that:

> Just as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim. So long as it is clear in a panel report that a panel has reasonably considered a claim, the fact that a particular argument relating to that claim is not specifically addressed in the "Findings" section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the

[1120] The EU cites paragraphs 1353-1359 of its first written submission. EU Appellant Submission, para. 686, note 866. The EU also notes that it made arguments related to the 1992 Agreement in section VI of its first written submission, but these were in the context of determining the existence of a subsidy. The Panel fully addressed these in its report. Panel Report, paras. 7.386-7.389.

[1121] *Chile – Price Bands (Article 21.5) (AB)*, *quoting Mexico – Corn Syrup (21.5) (AB)*, paras. 106 and 109.

> "objective assessment of the matter before it" required by Article 11 of the DSU.[1122]

681. The Panel's findings with regard to Article 5(c) were consistent with both Articles 11 and 12.7 of the DSU. Its report "disclose{d} the essential, or fundamental, justification for those findings," thereby satisfying Article 12.7. The Panel also provided an "objective assessment of the applicability of and conformity with the covered agreements," addressing the arguments necessary to resolve the U.S. claims under Article 5.3(c), which completed its obligations under Article 11.

682. The European Union never explains how the Panel's alleged failure to "make reference to" certain facts or arguments could result in an error in the Panel's application of Article 5(c) of the SCM Agreement. Moreover, any alleged failure by the Panel to "make a reference to" a particular fact or argument cannot by itself result in an erroneous interpretation or application of Article 5(c).[1123] In any event, even were one to assume for the sake of argument that the EU's discussion of the 1992 Agreement was somehow relevant to an analysis under Article 5(c) of the SCM Agreement, the Panel's findings demonstrate that the arguments advanced by the European Union would fail.

683. First, the European Union asserts that "{h}aving agreed in its bilateral relations with the European Union to the acceptable level of government support that it now alleges constitute subsidies, the United States could not subsequently allege that those same measures are actionable, causing adverse effects to its interests."[1124] This argument reprises the 1992 Agreement arguments from the EU's first written submission, which the Panel rejected, finding specifically,

> we construe Article 2 of the1992 Agreement as providing that, with the exception of the notification obligation contained in Article 8.2, the relevant measures of support committed prior to the effective date of the 1992 Agreement were to be outside the scope of the 1992 Agreement. Moreover, the context of Article 2 suggests that the parties in fact intended to preserve their rights to challenge pre-1992 measures for inconsistency with the GATT/WTO subsidies disciplines. We note in particular that the fifth preambular paragraph of the recitals indicated that the 1992 Agreement was intended to operate without prejudice to the parties' rights and obligations under the GATT and other multilateral Agreements negotiated under the auspices of the GATT, which would include the SCM Agreement.[1125]

[1122] *EC – Poultry (AB)*, para. 135 (emphasis added).

[1123] *See, e.g., Mexico – Rice (AB)*, paras. 271-275.

[1124] EU Appellant Submission, para. 689.

[1125] Panel Report, para. 7.95.

684. Thus, the 1992 Agreement explicitly foresees and addresses that the parties might have a dispute related to their obligations under the GATT or the SCM Agreement, and clarifies that the 1992 Agreement will not prejudice the parties' rights under those agreements, which would include the right to commence a dispute pursuant to the DSU. Consequently, there is no basis for the European Union to claim that the 1992 Agreement precludes arguments as to WTO consistency when the 1992 Agreement itself provides the opposite.[1126]

685. Second, the European Union asserts that its compliance with the 1992 Agreement was a "fact" that the Panel "was required to take into consideration in assessing whether adverse effects exist."[1127] However, European Union's compliance with the 1992 Agreement is not a "fact" – it is a legal conclusion, and one that was not within the Panel's terms of reference. It would have been improper for the Panel to "take into account" as a "fact" something that was not proven and that constitutes a legal conclusion it was not entitled to make.

686. Thus, the Panel had no obligation to address these particular issues. Even if it did, the EU's appeal would fail because the Panel addressed the European Union's arguments on the 1992 Agreement at length in response to the EU's preliminary ruling request.[1128] There is no obligation for the Panel to repeat findings that it has already made.

687. In sum, the Panel's alleged failure to "make reference to" the EU's 1992 argument in the adverse effects section of its report does not give rise to a violation of Articles 5(c) of the SCM Agreement or Articles 11 or 12.7 of the DSU.

[1126] To the extent that the EU is alluding to an "estoppel" argument, the Panel also rejected that argument. Panel Report, paras. 7.101-7.105.

[1127] EU Appellant Submission, para. 690.

[1128] Panel Report, paras. 7.88-7.105.