Before the Appellate Body

of the World Trade Organisation

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

(AB-2010-1 / DS316)

Closing Memorandum of the European Union following the First Hearing

Contains no BCI or HSBI

Geneva
26 November 2010

TABLE OF CONTENTS

TABLE OF CASES

Short Title	Full Case Title and Citation
Brazil – Aircraft (Article 22.6 of the DSU and Article 4.11 of the SCM Agreement)	Decision by the Arbitration Panel, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 28 August 2000, DSR 2002:I, 19
Brazil – Aircraft (Article 21.5 – Canada)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the* DSU, WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, DSR
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
US – Offset Act (Byrd Amendment)	Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, 489
US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, 5
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417

I. INTRODUCTION

1. The European Union thanks the Appellate Body for this opportunity to provide a Closing Memorandum on certain issues covered during the First Hearing. In the limited time and space allocated for this Closing Memorandum, the European Union comments on only a few selected issues which were raised during the First Hearing. Silence on an issue should not, therefore, be construed as agreement with any position taken by the United States or a Third Participant. In particular, the European Union maintains each of its appeals.

II. TEMPORAL SCOPE OF THE *SCM AGREEMENT*

2. To briefly summarise the EU position as elaborated during the First Hearing. We consider it appropriate to consider both Article 28 of the *VCLT* and Article 14 of the ILC Draft Articles, which inform each other. We see the grant of a subsidy as an act (*VCLT*, Article 28); and disbursements (which might also be considered "use of the subsidy" within the meaning of Article 5 of the *SCM Agreement*) together with grant as a continuing act (ILC, Article 14(2)). We consider the distinction between a continuing act (ILC, Article 14(2)) and a situation (*VCLT*, Article 28) to be a fine one (pressure, for example, could be thought of either as a series of discrete events or as a continuous event). We see "situation" as a necessarily relational concept, and we see the classic example of a situation under the *SCM Agreement* as being a subsidy programme, in which the State is in a particular relation with one or more beneficiaries. However, in the case of a continuing act or situation completed before the new treaty, we reject the proposition that the new treaty applies simply because there are effects after the new treaty enters into force (ILC, Article 14(1)). We therefore reject the US proposition that adverse effects are a "situation" – they are no more a situation than they are a continuing act. Furthermore, we reject the proposition that by simply re-characterising an effect (ILC, Article 14(1)) as a fact (*VCLT*, Article 28) one can escape the language of ILC, Article 14(1). Thus, since the United States' and the Panel's assessment (based on the proposition that adverse effects are a

situation) is legally erroneous, we seek reversal. To the extent that the United States now invokes continuing benefit, we point out that it had the burden of proof on that point, but failed to discharge it. The United States cannot therefore invoke any continuing benefit to resist our request for reversal, or for the purposes of completing the analysis. We elaborate further on these points in the following terms.

3. The European Union submits that the Panel made an error in the interpretation and application of Article 5 of the *SCM Agreement* when concluding that *all* alleged actionable subsidies challenged by the United States in this dispute fell within the temporal scope of that provision.[1] During the Hearing, the United States suggested that, since the relevant obligation in Article 5 of the *SCM Agreement* that "binds" a Member is "not to cause adverse effects", this is the relevant act, fact or situation for the non-retroactivity analysis under Article 28 of the *VCLT*.[2] However, as explained in our submissions, and as supported by abundant case-law of other international courts, this is not the manner in which Article 28 of the *VCLT* operates.

4. According to Article 28 of the *VCLT*, when examining whether a particular provision of the new treaty can be applied retroactively, the interpreter should look into the provisions of the new treaty to identify the State action in relation to which the new treaty binds the Party. If that State action, as an act, fact or situation, took place in the past and has ceased to exist when the new treaty entered into force, the provisions of the new treaty (regardless of the obligations contained therein with respect to that State action) are irrelevant to that previous State action. That completed act, fact or situation has to be examined in view of the legal regime in force when the act, fact or situation took place and ceased to exist. Article 14(1) of the *Articles on Responsibility of States for Internationally Wrongful Acts* further confirms that State actions are distinct and separate from their effects and that those actions occurred at the moment they were performed.[3]

[1] EU Appellant Submission, paras 18 – 123; First EU Opening Statement, paras 2 – 9.

[2] First US Opening Statement, paras 12 – 16.

[3] Arbitration Panel Report, *Brazil – Aircraft (Article 22.6 of the DSU and Article 4.11 of the SCM Agreement)*, footnote 48 ("{W}e use the Draft Articles as an indication of the agreed meaning of certain

5. Taking the example of toxic waste raised by the United States,[4] suppose that the provision of the new treaty states that: "No Party shall, through the disposal of toxic waste, cause damage to another Party". Contrary to what the United States asserts, the fact that toxic waste was created before the entry into force of the new treaty is irrelevant. The relevant State action would be the disposal of toxic waste. The disposal of toxic waste before the entry into force of the new treaty would not be covered by that provision, even if the effects of such a disposal occur after the entry into force of the new treaty. An ongoing obligation not to cause damage by disposing of toxic waste is a continuing obligation, but that does not make the State action a "continuing situation". Since effects are different from the relevant State action, the intention to capture effects caused by State actions carried out before the entry into force of a new treaty must be expressly and unambiguously stated in the new treaty in order to rebut the non-retroactivity principle in Article 28 of the *VCLT*.

6. Article 28 of the *VCLT* further provides that the interpreter should look into the provisions of the new treaty to examine whether there is an expressed intention to give some or all of its provisions retroactive effect. Contrary to what the United States asserts,[5] the absence of an explicit exclusion of pre-1995 measures is not "compelling evidence" that the *SCM Agreement* applies to those subsidies. Rather, it simply demonstrates that the negotiators relied on the well-established principle of non-retroactivity of new treaties. In this respect, the United States reliance on the Appellate Body Reports in *EC – Sardines* and *EC – Hormones* is misplaced. Those cases referred to the examination of pre-1995 measures which continued to exist after 1995 (*i.e.*, "continuing situations"). The Appellate Body examined whether there was an explicit intention in the terms of the new treaty (*i.e.*, SPS and TBT Agreements) to exempt "continuing situations", since the general rule under Article 28 of the *VCLT* is that "continuing situations" fall under the scope of application of the new treaty. However, completed acts or situations are excluded

terms in general international law"); Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, footnotes 179 and 188 (referring to the value of the ILC Commentaries).

[4] US Appellee Submission, para. 23.

[5] First US Oral Statement, para. 17.

from the scope of application of the new treaty unless there is contrary intention expressed in the new treaty.

7. When examining the *SCM Agreement* as a whole, it can be observed that negotiators were aware of transitional problems caused by subsidy *programmes* and decided to address them in detail. However, with the exception of Annex IV.7, negotiators did not focus on individual instances of subsidisation in the past, thereby leaving the principle of non-retroactivity enshrined in Article 28 of the *VCLT* to fully apply to those completed acts or situations. In this sense, negotiators ensured a coherent and consistent approach by granting individual instances of subsidisation the same temporal scope, regardless of whether they fall under Articles 3 or 5 of the *SCM Agreement*.

8. The *SCM Agreement* thus seeks to discipline a specific government conduct: the granting or maintaining of a subsidy as defined in its Article 1. In this respect, the "use of any subsidy" in Article 5 refers to the granting of the financial contribution conferring a benefit by the government[6] and also includes the disbursements, as part of the same active government conduct or State action (*i.e.*, "maintaining" a subsidy). Post 1995 repayments by the recipient of capital plus interest, or of royalties, or any other action taken by private parties, does not resurrect the government conduct.[7] Nor did those repayments confer a new benefit on the recipient.

9. In view of the foregoing, the European Union requests the Appellate Body to *reverse* the Panel's finding that the measures listed in paras 60 – 71 and 73 – 76 of the EU Appellant Submission fell within the temporal scope of this dispute. If the subsidy was granted, disbursed or brought into existence and ended prior to 1 January 1995, such a subsidy does not fall under the temporal scope of Article 5 of

[6] Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.122 ("{G}uidance as to the manner in which a subsidy may be 'used' may be derived from the relevant context. We consider that SCM Article 7 constitutes particularly relevant context, since it sets forth the remedies available for alleged violations of *inter alia* SCM Article 5(b). In particular, Article 7.1 provides for the initiation of dispute settlement proceedings in respect of nullification or impairment caused by subsidies 'granted or maintained' by another Member. This is the same nullification or impairment as that caused by the 'use' of subsidies within the meaning of Article 5(b). In the context of Article 7.1, therefore, the 'use' of a subsidy is equated with the 'grant{}' or 'maintain{ing}' of a subsidy").

the *SCM Agreement*. Any alleged pre-1995 subsidies were subject to the obligations contained in the 1979 Tokyo Round Subsidies Code.[8]

10. As a reaction to the US argument according to which subsidies have a duration and their benefits can be allocated over a period of time, allegedly making a subsidy a "continuing situation", the European Union observes that the United States as the complainant had the burden of showing that any of the benefits conferred continued to exist after 1 January 1995. The United States failed to show this in the course of the Panel proceedings. The Panel also refused to make any findings on "continuing benefit". Thus, even if the Appellate Body were to conclude that a subsidy continues in existence insofar as its benefit can be allocated to the future, the Appellate Body should still reverse the Panel's analysis for the reasons set out above, and furthermore there would not be sufficient uncontested facts to complete the analysis in the manner now suggested by the United States. The only evidence in the record shows that, taking into account the marketing life of the product concerned (*i.e.*, 17 years from the launch of the aircraft, and less for derivatives such as the A310)[9] and applying amortisation rules,[10] no "continuing benefits" existed after 1 January 1995 for the A300 and the A310. Consequently, even if the Appellate Body would follow the approach suggested by the United States, and even if it would consider completing the analysis, the European Union's request that the Appellate Body *reverse* the Panel's findings that MSF for the A300 and the A310 fell within the temporal scope of this dispute remains unaffected; these measures fall out side the temporal scope.

[7] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, footnote 179 ("We note that the conduct of private bodies is presumptively not attributable to the State").

[8] Article 70.2 of the VCLT ("{T}he termination of a treaty under its provisions or in accordance with the present Convention: (…) (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination").

[9] ITR Report, paras 25 – 28 (exhibit EC-13) (BCI).

[10] Committee on Subsidies and Countervailing Measures, *Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures*, 15 May 1998 (G/SCM/W/415/Rev.2).

III. IDENTITY OF RECIPIENT, PASS THROUGH, EXTINCTION, EXTRACTION AND WITHDRAWAL OF SUBSIDIES

11. The European Union also addresses a number of issues that relate to the question of continuity of "benefit" and its appeal of the Panel's findings on pass-through, extinction, extraction and withdrawal of subsidies.[11] To recall, the European Union requests that, at a minimum, the Appellate Body modify the Panel's recommendation that the European Union withdraw the subsidy or remove the adverse effects such that it applies *only "to the extent that" such withdrawal has not already been achieved*.

12. The European Union also recalls the Panel's comment that the issue of the continuity of "benefit" is relevant to the analysis of causation of adverse effects, rather than to the examination of the existence of subsidy.[12] While the European Union disagrees, it also observes that the Panel should not only have stated that it would return to the issue of continuing benefit in its causation analysis, but should actually have done so.[13]

A. Implementation through private actions

13. Under Articles 4.7 and 7.8 of the *SCM Agreement*, it is the subsidising Member's responsibility to ensure that withdrawal occurs. That said, to the extent private action has resulted in withdrawal of the subsidy from the relevant recipient, substantive compliance has been achieved, and the Member need not take any further action.

14. Withdrawal of the subsidy, under Articles 4.7 and 7.8 of the *SCM Agreement*, involves "remov{ing}" or "tak{ing} away"[14] the subsidy in a manner that removes or takes away the benefit from the *relevant recipient* of the subsidy, thereby

[11] EU Appellant Submission, paras 124-281.

[12] Panel Report, para. 7.218.

[13] EU Appellant Submission, para. 224.

[14] Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45.

ending the WTO inconsistency and ensuring performance by the subsidising Member of the primary obligation breached.[15]

15. Neither the *SCM Agreement*, nor the law on state responsibility, prescribe how this result is to be achieved. Consistent with the jurisprudence of the International Court of Justice, the obligation of withdrawal is an obligation of result, not of means.[16] There exists, therefore, no basis in general international law, or in the *SCM Agreement*, to preclude the possibility that a private party can dispense with the performance of a State's obligation of withdrawal. If private action removes the benefit from the recipient of the subsidy, the State's obligation of withdrawal has been met. In that event, withdrawal *via* private action achieved substantive compliance by the subsidising Member with the primary obligation breached.

16. It follows that withdrawal of a subsidy need not involve payments to the government. Indeed, consistent with the approach of the *SCM Agreement* to "benefit", the question whether withdrawal of a subsidy has been achieved must be assessed from the perspective of the *relevant recipient* of the subsidy. That is, where a subsidy is removed from its original recipient – or from an entity to which the subsidy had demonstrably "passed through" – substantive compliance with Articles 4.7 and 7.8 of the *SCM Agreement* is achieved exactly as if it had been withdrawn by the Member concerned. Whether that withdrawal has resulted in returning money to the public purse, or in a private party removing subsidised value from the original recipient, is irrelevant; the relevant question is solely whether the beneficiary continues to benefit from the subsidy. If it does not, the subsidy has been withdrawn, and the subsidising Member's duty to ensure substantive compliance discharged.

17. The context of Part III of the *SCM Agreement* supports this conclusion. Part III is concerned with the effects of subsidies in specific geographic and product markets. Where the subsidy is withdrawn from effective use by its recipient in those markets, whether through actions by government or a private party, substantive

[15] *ILC Articles on Responsibility of States for Internationally Wrongful Acts*, Article 30.

[16] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, I.C.J. Reports 2002, p. 3, para. 76.

compliance with a recommendation under Article 7.8 of the *SCM Agreement* is achieved. The European Union also recalls the Appellate Body's finding in *US – Upland Cotton* that the disciplines of Part III of the *SCM Agreement* do not apply where the products at issue do not benefit from the subsidies, and, therefore, do not constitute "subsidized products".[17]

18. In any event, even if another interpretation of the *SCM Agreement* is upheld, the European Union would recall that the Appellate Body has clarified that a panel and the DSB may not make a recommendation under Article 7.8 where the measure no longer exists.[18] In the same vein, where a subsidy has been withdrawn, no recommendation can be made.

B. Changes to the "economic realities" post formation of Airbus SAS

19. Turning to the issue of "control", and its legal relevance in the context of the extinction of subsidies through significant share transactions, the European Union notes the US arguments that the various sales transactions[19] at issue have not changed "economic realities".[20] In fact, as the European Union explained during the Hearing, these sales transactions significantly restrain the individual, former 100 percent owners of the various companies contributed to EADS,[21] in their exercise of indirect and collective control over the newly-formed single company, EADS; specifically, with the formation of EADS, these owners are now required

[17] Appellate Body Report, para. 472 (the "'subsidized product' must be properly identified for purposes of significant price suppression … {a}nd if the challenged payments do not, in fact, subsidize that product, this may undermine the conclusion that the effect of the subsidy is significant price suppression of that product in the relevant market").

[18] *See, similarly*, Appellate Body Report, *US – Certain EC Products*, paras 81, 129.

[19] *See* EU Appellant Submission, para. 147. *See also* EU Response to Question 5(b) of 12 November 2010, paras 21-27.

[20] *See also* US Responses to First and Second Set of Questions at the First Hearing, paras 15, 26 (quoting Panel Report, para. 7.199).

[21] In this Closing Memorandum, the European Union occasionally refers to these owners in shorthand as the "old" owners.

to take into account the economic interests of significant minority shareholders.[22] At the end of 2006, these held 45.7 percent of EADS shares.[23]

20. On an interpretative level, the European Union emphasises that the concept of "control" and its relevance must be viewed in the proper context. The term "control" is not treaty text; rather, it reflects economic principles that flow from the relevant provisions of the *SCM Agreement*, providing guidance for panels and investigating authorities on one way in which significant events can change the continuing access recipients of prior subsidies enjoy to the benefits of those subsidies.

21. In addressing the issue of control, the United States refers to Panel findings regarding the formation of Airbus SAS, and the termination of the Airbus GIE.[24] The precise content of these findings is significant in several respects. First, the formation of Airbus SAS is not itself one of the transactions that the European Union argues affects the continued existence of benefits. Thus, the Panel's finding that the formation of Airbus SAS might have been "legally significant", but has not changed "the economic realities of the production of Airbus LCA",[25] does not address the cumulative impact of the various share transactions that the European Union argues affected control, and that it listed at paragraph 147 of its Appellant Submission and discussed in response to Question 5(b) of the Appellate Body's first set of questions.[26] These transactions resulted in significant minority shareholders in EADS, and required the "old" shareholders to exercise restraint in

[22] *See also* First EU Opening Statement, para. 23. EU Response to Question 5(b) of 12 November 2010, paras 21-27.

[23] Taking into account BAE Systems' sale of its shares in Airbus SAS, the percentage of "new" owners in Airbus SAS reaches 56.5 percent. *See* EU Response to Question 5(b) of 12 November 2010, table at para. 23.

[24] US Responses to First and Second Set of Questions at the First Hearing, paras 15, 26 (quoting Panel Report, para. 7.199).

[25] Panel Report, para. 7.199. Setting aside the fact that the formation of Airbus SAS is not itself a transaction covered by the EU arguments, the Panel's description of the unchanged "economic realities" addresses solely aspects that are not relevant to the issue of control. The Panel's finding refers to Airbus SAS being the same producer of LCA and carrying out the same activities previously carried out by the members of the Airbus GIE. This is irrelevant; certainly, it would also have applied to the privatised steel companies at issue in the Appellate Body's previous consideration of the so-called "privatisation" disputes.

[26] EU Response to Question 5(b) of 12 November 2010, paras 21-27.

their indirect and collective control of the company to preserve the market value of the new shareholders' investment.

22. What is significant is that the Panel's findings fail to address the fact that the rationalisation of the economic activities of the former Associated Manufacturers in a single corporate entity – that, by way of background, the United States had been advocating throughout the 1990s – resulted in significant economic changes. In particular, the Associated Manufacturers lost their independence, resulting in significant increases in cost transparency and managerial and organisational efficiency of the new entity, compared to Airbus GIE.[27] Given these changes, it is not surprising that the increased efficiency resulted in Airbus being a more effective and increasingly successful competitor.

23. Thus, the Panel erred in its finding on control, and the Appellate Body should reverse this finding along with the other erroneous findings on pass-through, extinction, extraction and withdrawal.[28]

C. Issues involving "initial public offerings", "stock exchange sales", "arm's length" and "fair market value"

24. The European Union also addresses a number of issues relating to various concepts relevant to the determination of whether a share sale resulted in the extinction of a portion of prior subsidies.

1. <u>"Initial public offerings", "stock exchange sales" and the concept of "arm's length" sales</u>

25. In its responses to the Appellate Body's questions, the United States presented an erroneous understanding of the Panel's finding with regard to the initial public

[27] Panel Report, para. 7.1947 ("it is evident from the EADS offering memorandum that the corporate restructuring of Airbus Industrie GIE, Aérospatiale, CASA and Deutsche Airbus was intended to improve the companies' operations by rationalizing resources, eliminating duplication and consolidating overall management under a more integrated corporate structure"). *See also* Panel Report, para. 4.48 (summarising US argument referring to "rationalisation" of the Airbus activities); European Commission Press Release, Commission Clears the Creation of the Airbus Integrated Company, 18 October 2000 (exhibit US-496) (referring to same "rationalisation").

[28] EU Appellant Submission, paras 124-281.

offering ("IPO") of EADS. In fact, the entirety of the shares sold to institutional and retail investors were sold between independent and unfettered buyers and sellers and, therefore, were presumptively at "arm's length". By contrast, the United States argues that only the shares sold to retail investors were sold at "arm's length", because only those shares constitute "stock exchange sales of EADS shares"[29] that are presumptively at "arm's length".[30] According to the United States, EADS shares offered to institutional investors were sold in "private" transactions.[31] The United States errs.

26. To recall, and as described in the EADS Offering Memorandum, the global offering of 144,807,407[32] shares in EADS consisted of three tranches: (i) approximately 80 million shares offered at retail, (ii) approximately 52 million shares offered to institutional investors, and (iii) approximately 12 million shares sold to employees of EADS.[33] With the exception of the employee shares, to which specific sales conditions attached (and which were excluded from the European Union's "extinction" arguments), the share sales under (i) and (ii) fall within the Panel's definition of a "stock exchange sale of EADS".

27. The United States arrived at its erroneous conclusion that sales of EADS shares to institutional investors were not at arm's length based on its flawed equation of an initial public offering ("IPO") and a stock exchange sale ("initial public offering, i.e., on the stock exchanges").[34] As the EADS Offering Memorandum explains, "{p}rior to this offering, there has been no public market for EADS shares. EADS expects to list its shares"[35] on various stock exchanges. Thus, these exchanges were not used in the IPO for the institutional or retail tranches. Instead, trading on the exchanges was established after the IPO to provide an *aftermarket* for re-sales by both retail and institutional purchasers.

[29] Panel Report, para. 7.249.

[30] US Responses to First and Second Set of Questions at the First Hearing, paras 19-20, 31, 35-36.

[31] US Responses to First and Second Set of Questions at the First Hearing, para. 21.

[32] EADS Offering Memorandum, p. 1 (exhibit EC-24).

[33] EADS Offering Memorandum, p. 11 (exhibit EC-24).

[34] US Responses to First and Second Set of Questions at the First Hearing, para. 21.

[35] EADS Offering Memorandum, p. 1 (exhibit EC-24) (underlining added).

28. This does not, however, mean that the initial share sales to institutional or retail investors were not at arm's length. As with virtually all IPOs, the EADS IPO was distributed through a consortium of underwriters. While, within the IPO, the purchasers of the shares allocated for institutional and retail investors vary, the underwriting and distribution process does not.[36] Pages 1 and 2 of the EADS Offering Memorandum list the participating banks and their respective role in the institutional and retail offering. Many of the distributing banks participated in both retail and institutional distribution. While retail shares were sold at a small discount compared to institutional shares – reflecting differences in distribution cost and the desire to have wide distribution to private investors – both parts of the EADS IPO were conducted transparently, in an open market offering, and under the auspices of the relevant regulatory government agencies. The same applied for the IPO of Aérospatiale-Matra.[37] Both IPOs must, therefore, presumptively be considered at arm's length (and in any event at fair market value).

29. Accordingly, the Appellate Body should reject the confused US argument that only the retail portion of the EADS IPO was at arm's length, and should reverse the other erroneous findings on pass-through, extinction, extraction and withdrawal.[38]

2. Sales at "arm's length" and for "fair market value"

30. The United States also offered erroneous arguments on what constitutes an "arm's length" transaction, and fails to appreciate the significance of the concept of "fair market value".[39]

31. First, the European Union recalls that absent evidence to the contrary, any transaction between independent and unfettered buyers and sellers is presumptively at arm's length. By contrast, the United States – to some extent

[36] The shares reserved for sale to employees were not underwritten. *See* EADS Offering Memorandum, p. 11 (exhibit EC-24).

[37] *See* ASM Offering Memorandum (exhibit EC-53).

[38] EU Appellant Submission, paras 124-281.

[39] *See also, e.g.*, US Responses to First and Second Set of Questions at the First Hearing, paras 31, 35.

based on the Panel's errors[40] – adopted a definition of arm's length that is unreasonable, illogical and overly restrictive. Simply because sales are made through private placements outside the context of public exchanges does not undermine their arm's length nature.

32. The Panel appears to have found that the IPO of EADS shares – including the institutional and retail offering – was at arm's length. However, it erroneously found that other sales of EADS shares between independent and unfetter buyers and sellers, which were not "stock exchange sales",[41] were not presumptively at arm's length. The Panel held that "{t}he European Communities does not argue, much less demonstrate, that the transactions in question (with the exception of the stock exchange transactions of EADS shares) were on arm's length terms".[42] The European Union recalls that it has appealed this finding,[43] and addresses each of the share sale transactions in turn.

33. First, the post-IPO sales of *direct* shares in EADS held by DaimlerChrysler, Lagardère and the French State were made on the exchanges and, thus, meet even the Panel's narrow definition of arm's length.[44]

34. Similarly, the sale of 7.5 percent of their *indirect* shares in EADS by both Lagardère and DaimlerChrysler were made at arm's length, with the assistance of the respective companies' investment banks, to investors unrelated to Lagardère and DaimlerChrysler.[45] DaimlerChrysler sold its shares forward at the exchange market price on 4 April 2006.[46] Lagardère sold its shares using Mandatory

[40] *See* Panel Report, para. 7.249.

[41] Panel Report, para. 7.249.

[42] Panel Report, para. 7.249.

[43] EU Appellant Submission, paras 278-291 (under Article 11 of the DSU), 192-197 (under Articles 4.7 and 7.8 of the *SCM Agreement*) and 237-271 (under Articles 1, 5 and 6 of the *SCM Agreement*).

[44] EU Appellant Submission, para. 144 (and evidence cited therein). *See also* EU FWS, para. 262. The Panel appears to recognise that these sales were at arm's length, since it excludes "stock exchange sales of EADS shares" from its assertion that the European Union did not argue that the transactions were at arm's length. *See* Panel Report, para. 7.249.

[45] EU FWS, paras 269-270.

[46] EU Appellant Submission, para. 145 and footnote 137 (and evidence cited therein).

Exchange Bonds sold by its investment bank based on an exchange value with upward price movement protection afforded Lagardère.[47]

35. Likewise, the sale by BAE System of its 20 percent stake in Airbus SAS to EADS was at arm's length between two independent and profit maximising companies.[48]

36. Finally, the IPO of Aérospatiale-Matra was similarly at arm's length. That IPO adopted the same basic procedure as the EADS IPO described above,[49] and was hence at arm's length.[50]

37. In none of these situations does the Panel explain why these transactions would not be at arm's length, in light of the arguments raised by Parties.

38. In any event, evidence that a sale was for fair market value acts as a check on any concern that the sale was not at arm's length. This is because the concept of the extinction of subsidies reflects the fact that new owners, having paid a market price for their shares, need the company to earn a market return on their investment.[51] Thus, where the evidence establishes that the price paid for the shares constituted fair market value, it is irrelevant whether the sale was also at arm's length. For example, even if one were to consider that the combination of Aérospatiale and Matra Hautes Technologies was not at arm's length (*quod non*), the evidence of price setting by numerous independent investment banks demonstrates the fair-market value nature of the sale.[52]

39. Accordingly, the Appellate Body should reject the US arguments asserting the absence of arm's length conditions in some of the share sales, should reverse the Panel's finding in this regard, and also reverse the other erroneous findings on

[47] EU Appellant Submission, para. 145 and footnote 138 (and evidence cited therein).

[48] EU Appellant Submission, para. 146 (and evidence cited therein). *See also* EU FWS, paras 318-319; EU Response to Question 113, paras 116-119.

[49] ASM Offering Memorandum (exhibit EC-53).

[50] EU FWS, paras 233-242; EU SNCOS, paras 66-70.

[51] *See, e.g.*, First EU Opening Statement, para. 23; EU Response to Appellate Body Questions of 12 November, paras 21-27.

[52] EU Appellant Submission, paras 1139-1144; First EU Oral Statement, para. 126.

pass-through, extinction, extraction and withdrawal identified by the European Union.[53]

D. Requirement to demonstrate continued existence of "benefit" and burden of proof

40. Although the United States now accepts that the benefit of a subsidy is a continuing phenomenon, it continues to deny that, as the complaining Member, it must establish the continued existence of benefits from historic subsidies.

41. During the Hearing, the United States referred to an alleged need to demonstrate some kind of "epical shift" in the status of a company before there is any question of subsidies being extinguished by changes in ownership. Indeed, the United States went as far as to revive its "same person" theory, which was rejected by the Appellate Body in *US – Countervailing Measures on Certain EC Products*.[54] The inconvenient truth for the United States is that it cannot ignore the significant changes of ownership and cash extractions raised by the European Union; it cannot just "tick the boxes" of financial contribution and benefit at the time the subsidy is granted, and then pretend that nothing can ever change the existence of that subsidy.

42. The European Union has demonstrated that the consequences of certain transactions, whether privatisations or private-to-private, full or partial,[55] must be examined. The United States has not rebutted the fact that WTO case law confirms that private-to-private sales remove the benefit of past subsidies in the same way that privatisations do,[56] or that partial privatisations remove a corresponding part of past subsidies.[57] Indeed, the European Union has shown that

[53] EU Appellant Submission, paras 124-281.

[54] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para 151.

[55] As explained during the Hearing, in the context of *individual* changes in ownership, the European Union does not consider a change in control to be a requirement for the extinguishment of past subsidies.

[56] First EU Opening Statement, para. 17

[57] First EU Opening Statement, para. 18

the United States actually follows the above approaches in its domestic countervailing duty practice.[58]

43. The United States also relies on the Appellate Body's findings regarding expired measures in *US – Upland Cotton* to argue that a demonstration of the continued existence of a subsidy is not a requirement under Part III of the *SCM Agreement*. The United States errs.

44. First, in *US – Upland Cotton*, the Appellate Body clarified that "the amount of the subsidy, as well as other elements, are relevant for the assessment of whether price suppression exists",[59] and that "a panel should have regard to the magnitude of the challenged subsidy",[60] even though a "precise" quantification may not be required.[61] Thus, some quantification and assessment of the continued existence and magnitude of the subsidy is required.

45. The same applies for the assessment of whether the subsidy passed through to the current producer of LCA, or was extinguished, extracted or otherwise withdrawn. As the Appellate Body explained in *US – Upland Cotton*, the "'subsidized product' must be properly identified for purposes of significant price suppression … {a}nd if the challenged payments do not, in fact, subsidize that product, this may undermine the conclusion that the effect of the subsidy is significant price suppression of that product in the relevant market".[62] Thus, absent a determination on the existence of a continuing benefit, the Panel could not have made a finding of adverse effects.

46. The US reference to the Appellate Body findings that the effect of a subsidy may last (i) beyond the expiry of its legal basis,[63] and (ii) beyond the year in which a recurring subsidy is paid out,[64] do not change the requirement that, as a legal

[58] EU Appellant Submission, footnote 250 and paras 257-260.

[59] Appellate Body Report, *US – Upland Cotton*, para. 466.

[60] Appellate Body Report, *US – Upland Cotton*, para. 467.

[61] Appellate Body Report, *US – Upland Cotton*, paras 465, 466, 467.

[62] Appellate Body Report, *US – Upland Cotton*, para. 472.

[63] Appellate Body Report, *US – Upland Cotton*, paras 262, 266

[64] Appellate Body Report, *US – Upland Cotton*, paras 475-477.

matter, a continuing benefit be shown before a finding of causation can be made. In any event, the subsidies at issue in that dispute were, and the context in which these findings were made involved, annual recurring subsidies.

47. Thus, the United States, as the complaining Member, was required to demonstrate the continued existence of the subsidies. It failed to do so, and the Panel should have made a finding in this respect, ending its causation analysis for those subsidies that no longer confer a benefit on Airbus SAS.

48. Moreover, even if it had been the European Union's burden to adduce the relevant evidence, the European Union had done more than enough to shift the burden to the United States to rebut the evidence it had presented. The United States failed to do so.

49. In short, given the argument and evidence before it, the Panel was required to address the issue of the continuity of benefits in its analysis, but failed to do so. The Panel's failure in this respect amounts to reversible legal error.[65]

E. Completion of the Analysis and Remand

50. As the European Union stated in its Opening Statement,[66] as a result of the Panel's erroneous rejection of any relevance of "continuing benefit" for its analysis of subsidisation, the factual basis for the Appellate Body to complete the analysis does not exist. This raises the question, briefly discussed at the First Hearing, of what the Appellate Body can or should do in these or similar circumstances.

51. The European Union would like to make clear that, in its view, there are a number of possible solutions to this kind of problem, which will often arise in appellate proceedings, and that those solutions include the possibility of remand.

52. In some cases, the Appellate Body may be able to complete the analysis on the basis of other panel findings and uncontested facts on the record. In its Other Appellee Submission, the European Union has developed at some length its view

[65] EU Appellant Submission, para. 224.

[66] First EU Opening Statement, para 21.

on the limits to this exercise, responding to the United States' requests to complete the analysis made in its Other Appellant Submission.

53. In other cases, a reversal of critical errors by a panel may lead to the conclusion that no inconsistency with the covered agreements has been established (although it may be that if the panel had conducted a proper analysis, a finding of inconsistency might have been made.) In these circumstances, the case could be remanded to the Panel with instructions to conduct a proper analysis.

54. The European Union notes that there is no provision in the DSU that prevents remand, and that it has advocated this solution to the Appellate Body in the past.[67] It also notes that these issues have been discussed in the literature.[68] In light of the position taken by the United States at the Hearing and the fact that it is the defendant in these proceedings, the European Union refrains from further discussion at this stage. It simply repeats that remand is a possibility under the DSU, and stands ready to develop its view on the possibilities open to the Appellate Body in response to questions from the Appellate Body, if necessary.

IV. ALLEGED MSF PROGRAMME

55. Through its interventions at the First Hearing, the United States has helped to clarify four critical issues with regard to the baseless US appeal of the Panel's finding that the alleged MSF programme does not exist.

56. *First*, neither the United States nor any Third Participant has disputed the European Union's position that the United States is attempting to use these Appellate Body proceedings to improperly cleanse the alleged MSF programme of

[67] *See* European Communities' Oral Pleading, *US – Gasoline*, 19 Apr. 1996) ("Although remand is not explicitly provided for in the DSU … it should be exercised."); European Communities' Written Answers to the Questions of the Appellate Body, *US – Gasoline*, 16 (Apr. 1996) ("[I]f the Appellate Body were to reverse the finding of the panel on Article XX GATT 1994 as requested by the US the Community considers that the case should be remanded to the Panel.").

[68] *See, e.g.*, Bourgeois, J. (2001), *Some Reflections on the WTO Dispute Settlement System from a Practitioner's Perspective*", Journal of International Economic Law, 4: 145, 152 and Pauwelyn, J, (2007), *Appeal without remand: A design Flaw in WTO Dispute Settlement and how to fix it*, ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper N°1. *See also* David Palmeter, *The WTO Appellate Body Needs Remand Authority*, J. WORLD TRADE, Feb. 1998, at 41, 41–44.

characteristics that, before the Panel, the United States had ascribed to the alleged programme.

57. For example, the United States had described the alleged measure to the Panel as one entailing "future conduct",[69] creating "expectations among the public and among private actors, demonstrating that it has normative value" and "possess{ing} the qualities the Appellate Body identified in *US – Zeroing (EC)*".[70]

58. This is of critical importance, because it was the inability of the United States to demonstrate that a measure with these characteristics actually existed that served as the basis for the Panel's finding that the alleged programme did not exist. Indeed, the Panel did not contest that, if the measure described by the United States existed as a written document, it could be subject to challenge in WTO dispute settlement proceedings.[71] Having failed to appeal the Panel's understanding of "the matter before it" under Article 11 of the DSU, the United States can not now simply wish away these characteristics, and ask the Appellate Body to consider, *de novo*, the existence of a very different MSF programme. Similarly, absent an appeal under Article 11, even if the Appellate Body were to reverse, it lacks jurisdiction to weigh anew the totality of the facts to determine whether the alleged MSF programme, as newly formulated by the United States on appeal, actually exists.

59. *Second*, the European Union was correct in suspecting that it did not know the legal basis for the United States' appeal of the Panel's finding, a problem that impacts not only the Appellate Body's jurisdiction over this aspect of the US appeal, but also the due process rights of the European Union and Third Participants.[72] It was not until the United States' Opening Statement that the European Union first understood that the legal basis for the US appeal derived from Articles 1 and 2 of the *SCM Agreement*.[73] The United States does not

[69] US FWS, para. 106.

[70] US FNCOS, para. 25 (internal quotations omitted); US SNCOS, para. 36 (internal quotations omitted).

[71] Panel Report, para. 7.524, final sentence.

[72] EU Other Appellee Submission, paras 199-206.

[73] First US Opening Statement, paras 77, 79-80.

mention these provisions anywhere in its Notice of Other Appeal or in its Other Appellant Submission in the context of the MSF programme. Accordingly, it was prevented from raising legal error under those provisions at this late stage.

60. *Third*, now that the United States has disclosed that its appeal is based on Articles 1 and 2 of the *SCM Agreement*, it becomes even clearer that its appeal must fail. Simply stated, the Panel never conducted an analysis under Articles 1 and 2 of the *SCM Agreement* with respect to the alleged MSF programme. Consequently, there can be no legal error in the interpretation or application of those provisions. On this point, the Panel was crystal clear, stating, in paragraph 7.581 of its Report, that it "need not evaluate the United States' claims that the alleged Programme is a subsidy", within the meaning of Articles 1 and 2. Putting aside the lack of notice and the jurisdictional problem – the United States did not even refer to this paragraph in its Notice of Other Appeal – the US appeal is analogous to an appellant claiming a legal error under Articles 3 or 5 of the *SCM Agreement*, even in an instance where a panel clearly ended its legal analysis after finding that an alleged measure was not a subsidy under Articles 1 and 2. There could simply be no basis for a legal error under these provisions, because there is no analysis whatsoever pursuant to them.

61. The United States now asserts that "it is impossible to make a purely factual conclusion as to whether evidence demonstrates the existence of an unwritten 'measure'".[74] Yet, this is precisely what the Panel did, and it is also what the Appellate Body did in the relevant aspect of the very decision relied upon by the United States – *i.e.*, *US – Continued Zeroing*. At the outset, the Panel in this dispute explicitly divided its analysis of the existence of the alleged MSF programme into three parts, considering "that the United States must demonstrate (i) the existence of the alleged LA/MSF Programme; (ii) that the alleged Programme is a subsidy within the meaning of Article 1 of the SCM Agreement; and (iii) that the subsidy causes adverse effects within the meaning of Article 5 of the SCM Agreement".[75] The Panel stopped at step (i) because it found that the

[74] First US Opening Statement, para. 78.

[75] Panel Report, para. 7.513.

measure described by the United States did not exist. Thus, it never got to step (ii), in which it would have needed to determine whether the alleged MSF programme was a "measure" subject to WTO dispute settlement, and in particular whether the alleged programme/practice/regime qualifies as something that can be covered by the *SCM Agreement*. In *US – Continued Zeroing*, the Appellate Body recognised that the question of existence is a *question of fact*, indicating that it needed to "ascertain whether the *factual findings* made by the Panel and the *undisputed facts* in the record show that the zeroing method has been used repeatedly in successive proceedings, in each of the 18 cases, by which the duties are maintained".[76]

62. The fact that the Appellate Body in *US – Continued Zeroing* found that some of the alleged measures existed, while the Panel in this dispute did not find the alleged MSF programme to exist, is not, as the United States contends, the result of different legal standard, but simply the result of different facts. As the European Union has explained: (i) *US – Continued Zeroing* involved conduct clearly attributable to the United States, while the Panel in this dispute failed to find concerted actions by the EU Member States involved; (ii) unlike *US – Continued Zeroing*, there are significant differences between the various instances of MSF loans at issue, and the Panel found the vast majority of terms to be different; (iii) the Appellate Body found prospective applicability in *US – Continued Zeroing*, but Panel did not find it here; and (iv) the alleged measure here, unlike in *US – Continued Zeroing*, does not go beyond individual instances of application.[77] The United States does not appeal any of the underlying factual findings that led the Panel to a different conclusion than that arrived at by the Appellate Body in *US – Continued Zeroing*.

63. *Fourth*, the US responses to the Appellate Body's oral questions during the First Hearing confirmed that the MSF programme that the United States now alleges to exist is nothing but a repetitive reference to the individual MSF measures already

[76] Appellate Body Report, *US – Continued Zeroing*, para. 189 (emphases added).

[77] EU Other Appellee Submission, paras 285-326.

found to be subsidies.[78] This approach on appeal stands in stark contrast to the US arguments before the Panel, where it asserted that (i) the MSF programme was of prospective application, (ii) conferred a benefit separate from the individual instances of MSF loans,[79] and (iii) caused adverse effects separate from the effects of the individual instances of MSF loans.[80] This understanding provides an additional, and independent, basis for the Appellate Body to reject the United States' appeal, for it would not aid "secur{ing} a positive solution"[81] and a "prompt settlement"[82] of the dispute.

64. For these reasons, and those set out in its other submissions, the Appellate Body should reject the US appeal.

V. MSF BENEFIT ISSUES

A. 1992 Agreement

65. The European Union submits that Article 4 of the 1992 Agreement amounts to a *relevant* rule of international law[83] applicable in the relation *between* the United States and the European Union in the sense of Article 31(3)(c) of the *VCLT* and, thus, serves as relevant context to interpret the notion of "benefit" in Article 1.1(b) of the *SCM Agreement*.[84] In this respect, we further explained during the Hearing the need for a reasonable and flexible approach to the interpretation of Articles 31

[78] *See also* EU Other Appellee Submission, paras 321-326 (discussing US Other Appellant Submission, paras 59-82).

[79] Panel Report, para. 7.498. *See also*, *e.g.*, US SNCOS, para. 36; US Response to Questions 139, paras 22-25. *See also* EU Comments on US Response to Question 139, paras 44-53.

[80] Panel Report, para. 7.498. *See also*, *e.g.*, US SNCOS, para. 36; US Response to Questions 138, paras 17-21. *See also* EU Comments on US Response to Question 139, paras 54-55.

[81] Article 3.7 of the DSU.

[82] Article 3.3 of the DSU.

[83] Article 38(1) of the ICJ Statute.

[84] Appellate Body Report, *US – Shrimp*, para. 158 and foonote 157 ("{O}ur task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law {Fn 157 Vienna Convention, Article 31(3)(c)}"); and Appellate Body Report, *China – Auto Parts*, footnote 215, referring to Appellate Body Report in *EC – Chicken Cuts* ("{T}he Appellate Body did not exclude that the Harmonized System could also fall within the scope of Article 31(2)(b) or Article 31(3)(c) of the Vienna Convention").

to 33 of the *VCLT*, including the word "parties", also to ensure that Article 31(3)(c) is not deprived of all utility in the context of the WTO. We noted that, in agreeing with the panel's approach to Article 31(1) (which by implication contains the words "between the parties") in *EC – Biotech*, the United States effectively agreed. We also emphasised the significance of this discussion in the context of the "bilateral" nature of a Member's interests referenced in Article 5 of the *SCM Agreement* (and the consequent lack of impact on other WTO Members).

66. Article 4 of the 1992 Agreement was in force when MSF was granted for the A330-200, A340-500/600 and A380, and provided for certain limits in the support for those projects. Pursuant to the 1992 Agreement, support beyond those limits was not permitted. Moreover, the United States and the European Union agreed on a particular benchmark as part of those limits (*i.e.*, the government cost of borrowing at the time of granting the support plus a premium). The European Union complied with those limits (including the threshold of 33 percent of eligible costs).

67. The European Union further submits that Members are free to determine the relevant benchmark independent of particular market situations. For instance, item (k) of Annex I of the *SCM Agreement* refers to the *OECD Arrangements on Export Credits* as a relevant benchmark. If a Member grants an export credit following the interest rates provided for in those arrangements for the specific sector at issue, it would not be considered an export subsidy. This conclusion does not change even where the OECD interest rates are *below* the interest rates that the market would have demanded for a similar credit. Similarly, Article 4 of the 1992 Agreement became the understood benchmark for MSF, regardless of the specific market situations in a given moment.

68. During the Hearing, the United States argued that the 1992 Agreement was and remains irrelevant to any assessment of benefit under the *SCM Agreement* because one of its recitals states the parties' intention to act without prejudice to their rights and obligations under "multilateral agreements negotiated under the auspices of the GATT". However, the United States misses the point. First, the phrase in question is contained in a recital. Recitals in general (for instance, in contract law)

are not operative provisions and it is hard to fathom how they could defeat, or be the cause of derogations, from operative provisions. Second, as explained during the Hearing, the phrase contained in the fifth recital is unclear. Since the 1992 Agreement pre-dates the WTO, the two references to GATT must be understood as references to GATT 1947. Thus, "multilateral agreements negotiated under the auspices of the GATT" should be understood as referring, for example, to the 1979 Tokyo Round Subsidies Code. Third, and importantly, there are some things that one cannot contract out of. For example, one cannot contract out of the general public international law principle of *good faith*, which is extensively re-iterated in the *VCLT*, in the *DSU* and in the WTO case law. Nor can one contract out of the *facts* – that is the *real world*. It is a *fact* that the recitals of the relevant MSF measures recall the EU Member States' objective aim of complying with the 1992 Agreement. It is also a *fact* that in concluding the 1992 Agreement the parties recorded their *consensus ad idem* or meeting of minds, and the United States has never asserted otherwise, either during these proceedings or at any time during the over ten years of operation of the 1992 Agreement. It is precisely because the European Union assumes *good faith* on the part of the United States that it assumes that the United States was not itself knowingly concluding and operating an international agreement which did not provide in its Article 4 for an agreed benchmark. Thus, the European Union considers that the parties' intention as contained in the fifth recital cannot render the 1992 Agreement meaningless; that Agreement must serve at least as context to interpret the *SCM Agreement* or as part of the facts relevant to establish the benchmark in the benefit analysis under Article 1.1(b).

69. During the Hearing, the United States also claimed that the European Union had not complied with the provisions of the 1992 Agreement because of its alleged failure to respect the Agreement's "transparency provisions".[85] This claim, which the United States did not make before the Panel, must be rejected. Whether or not the European Union complied with the transparency provisions (and the European Union believes it did), the United States has had access to all the relevant MSF contracts since the beginning of this dispute and has therefore had all the necessary

[85] 1992 Agreement, Article 8.

information to judge EU compliance. It has never questioned the compatibility of these MSF measures with the 1992 Agreement, which the European Union demonstrated before the Panel.[86]

70. Consequently, contrary to the Panel's findings, MSF loans granted since 1992, *i.e.*, for the A330-200, A340-500/600 and A380, are not subsidies within the meaning of Article 1.1 of the *SCM Agreement*. The European Union requests the Appellate Body to *reverse* the Panel's findings accordingly.

B. Project-specific risk premium

71. Turning to the discussion of the project-specific risk premium, the European Union reiterates that the Panel failed to apply the very benchmark it set out to apply – thereby violating Article 1.1 of the *SCM Agreement* – and that it failed to provide a reasoned and adequate, as well as internally coherent and consistent, explanation of its findings, contrary to its obligations under Article 11 of the DSU. The Panel's decision to adopt an approach requiring a variable risk premium for individual Airbus LCA projects was not itself error, but its application of that approach, in the absence of evidence concerning the risk of the various Airbus LCA projects relative to one another, constituted error. The European Union refers the Appellate Body to its submissions in this respect.[87]

72. In this memorandum, the European Union first addresses one specific issue, concerning its appeal of the Panel's finding that the US Ellis benchmark is the "minimum" project risk premium for the A300 and A310 and the "outer limit" of the project risk premium for the A380.[88] Those findings constitute not only error in the application of Article 1.1(b);[89] they also reflect incoherent and inconsistent reasoning that reveals a lack of objectivity in the Panel's assessment.[90] This is in particular (i) because the Panel had found that the Ellis venture capital based

[86] EU FWS, paras 415 – 441.

[87] EU Appellant Submission, paras 755-791; First EU Opening Statement, paras 33-41.

[88] Panel Report, paras 7.469, 7.481, 7.485, 7.487.

[89] EU Appellant Submission, paras 770-774.

[90] EU Appellant Submission, para. 786.

benchmark was "on the higher side"[91] and rejected it as "inherently more risky"[92] than MSF, and, (ii) as discussed during the Hearing, because the Panel's findings are inconsistent with its endorsement of the Dorman report in the context of its adverse effects findings. Although the European Union highlighted the contradiction between the Ellis estimate and the Dorman estimate before the Panel, and the Panel described those arguments in the descriptive part of its Report,[93] the Panel altogether failed to address and resolve this critical inconsistency in its assessment of the US venture-capital based Ellis benchmark.[94]

73. As explained during the Hearing, the Ellis report stipulated a project-specific benchmark for the A380, including a project-specific risk premium, of approximately **[ ]** percent.[95] This benchmark is **[ ]** percent higher than the project-specific cost of capital benchmark of 10 percent that US consultant Dr. Dorman adopted for a hypothetical wide-body aircraft. Logically, however, the Dorman benchmark must be higher – not lower – than the Ellis benchmark. As explained below, this flows from the nature and derivation of both values.

74. As the United States noted during the Hearing, the Ellis and Dorman benchmarks serve different purposes. Specifically, to satisfy its purpose, the Ellis benchmark must adequately account for the risk of financing an LCA project, in this case the A380, where the returns on the investment depend on the development of the aircraft and on a sufficient number of aircraft deliveries. The Dorman benchmark, by contrast, must adequately account for the risk of financing an LCA project, in this case a wide-body aircraft similar in description to the Boeing 787, with returns dependent on profits.[96]

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[91] Panel Report, para. 7.467.

[92] Panel Report, para. 7.464. *See also* Panel Report, paras 7.462-7.463.

[93] Panel Report, para. 4.133. The Panel summarises the US response at paras 4.104-4.105.

[94] *See* Panel Report, paras 7.461-7.469.

[95] Ellis Report, at Exhibit 10 (exhibit US-80) (BCI).

[96] Dr. Dorman describes his hypothetical programme as a middle-of-the-market, wide body aircraft launched in 2004 with a development cost of $10 billion. *See* Dorman Report, p. 1, 3 (exhibit US-70) (BCI). Boeing describes the 787, also launched in 2004, also as a middle-of-the-market wide-body aircraft. *See* Boeing Commercial Airplanes, Technical Information for the 787-3, 787-8 and 787-9 (exhibits EC-318, EC-319, EC-320) (The 787-3/8/9 "will bring the economics of large jet transport to the middle of the market") *See*

75. Delivery-dependent returns are reliant on the aircraft being successfully developed and on the number of aircraft deliveries. In contrast, profit dependent returns are not only reliant on (i) the aircraft being successfully developed and the number of aircraft delivered, but also on (ii) the timing of deliveries, (iii) the average price per aircraft, (iv) the average recurring cost per aircraft, and (v) the amount of non-recurring development cost. At the launch of an aircraft programme, all five variables are uncertain and must be forecast for a period of typically 20 years – 5 years of development followed by 15 years of deliveries.

76. The fact that profit dependent returns are more uncertain (and, thus, more risky) than delivery dependent returns is illustrated by the histories of the A380 and the 787. Due to multi-year delays in delivering the first aircraft, both the A380 and the 787 projects have incurred billions of dollars in cost overruns. As a consequence, it is uncertain whether claimants on profits (the shareholders of Airbus and Boeing, respectively) may ever earn the projected market return on these projects.[97] By contrast, as long as the requisite number of deliveries is made, albeit late, the Member States will be fully repaid on their A380 MSF investment. And, for a majority of A380 MSF, the Member States will earn the agreements' expected rate of return, as returns are protected against the effects of unforeseen delivery delays.[98]

77. Thus, to account for the significantly higher profit-based risks, the Dorman benchmark should be <u>significantly higher</u> than the Ellis benchmark, which needs to capture only delivery risk, but not additional profit risks that reflect also timing, pricing- and cost-related risks.[99] That the opposite was true – the Ellis benchmark is significantly higher than the Dorman benchmark – demonstrates a fundamental flaw in the United States' and the Panel's approach. It is *impossible* for the Panel

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also exhibits EC-298 and EC-317. Aerospace industry analysts have estimated that the development cost of the 787 at $10 billion. *See* Boeing Bets Big on a Plastic Plane, Chicago Tribune, p. 5 (exhibit EC-265).

[97] *See, similarly*, Panel Report, para. 7.1927.

[98] *See, e.g.*, German A380 MSF Agreement, Section 6.5 (**[ ]**) (exhibit EC-85) (BCI); *see also* EU Appellant Submission, paras 737 (footnote 923) and 759 (footnote 969); UK MSF Agreement, Section 4 of Schedule 3 (**[ ]**) (exhibit EC-89) (BCI).

[99] *See also* Whitelaw Report, paras 12, 14-20, 41 (exhibit EC-11) (HSBI and BCI).

to have accepted both the Dorman and Ellis benchmarks as accurate; for the reasons stated above, either one, or the other, is flawed.

78. During the Hearing, the United States attempted to brush aside this simple logic by asserting that Dr. Dorman's benchmark discount rate is incidental to his analysis. This is false. In fact, the benchmark discount rate is critical to Dr. Dorman's analysis, and the Panel identified it as one of only three "key assumptions".[100]

79. Dr. Dorman designed his study to demonstrate that MSF distorts the decision to launch a new aircraft by improving its apparent return on investment.[101] In other words, Dr. Dorman contends that MSF can cause the launch of an aircraft that would not be viable absent preferential financing. To demonstrate the effect, Dr. Dorman constructed a typical capital budgeting study which discounts expected costs and revenues over the life of the project to a present value *at the project-specific benchmark cost of capital*.[102] In a model of this type, if the project results in a positive net present value (*i.e.*, a return/profit in excess of the project-specific cost of capital), the project is viable because it creates economic value (*i.e.*, its return on capital is higher than its cost of capital). Thus, the benchmark rate adopted is critical.

80. To make his case, Dr. Dorman must estimate a reliable project-specific cost of capital benchmark / hurdle rate for a 20-year project in the aerospace industry. To that end, Dr. Dorman undertook considerable analysis to compute an average cost of capital of a portfolio of aerospace companies, which he then increased (i) to compensate for what he considered historically low long-term interest rates and, critically, (ii) to convert his average company-wide cost of capital to a project-specific cost of capital.[103]

81. Thus, Dr. Dorman's cost of capital benchmark of 10 percent reflects what the United States has proffered as a reliable measure of the profit risk in the aerospace

[100] Panel Report, para. 7.1882.

[101] Dorman Report, p. 1-2, 5-7 (exhibit US-80).

[102] Dorman Report, p. 5-7 (exhibit US-80).

[103] Dorman Report, p. 3 (footnote 6) (exhibit US-70) (BCI).

industry for what Dr. Dorman describes as a very risky wide body programme.[104] Dr. Ellis, by contrast, estimates a venture capital benchmark for a delivery-dependent instrument that is inherently less risky than a profit-dependent return.[105] Unsurprisingly, rather than estimating a benchmark significantly below Dr. Dorman's 10 percent, Dr. Ellis estimates a significantly higher benchmark of **[ ]** percent.

82. This difference between the two benchmarks cannot be explained by changes in economic circumstances. Interest rates during the period encompassing the launch of the A380 and the 787 – 2001 to 2004 – were stable.[106] Nor can differences in risk between the A380 and the 787 explain the difference. Indeed, arguably, the 787, with its ground breaking use of composite materials, is more risky than the A380, which, although large, uses more traditional materials.

83. Since the Dorman benchmark is based on a common, text book measure of project risk in the aerospace industry, and the Ellis benchmark is based on an unorthodox and often inconsistent method applied to venture capital silicon valley start-up companies, the only credible explanation is that Dr. Ellis' flawed method has yielded an exaggerated measure of risk. Professor Whitelaw, by contrast, has derived a delivery-dependent benchmark which is **[ ]** and, thus, relationally consistent with Dr. Dorman's 10 percent profit-dependent benchmark.[107]

84. This is yet another reason that the Appellate Body should reverse the Panel's findings that the Ellis benchmark is the "minimum" project risk premium for the A300 and A310 and the "outer limit" of the project risk premium for the A380.[108]

85. Finally, the European Union also addresses three additional points. First, the US contends that it did not argue for a constant project-specific risk premium of 700

[104] Dorman Report, p. 1 (exhibit US-70) (BCI).

[105] Panel Report, para. 7.464.

[106] *See* Ellis Report, Exhibit 3 (risk-free rates, based on long-term government borrowing rates) (exhibit US-80) (BCI).

[107] Whitelaw Report, paras 38-40, Exhibits 2 and 3 (exhibit EC-11) (HSBI and BCI).

[108] Panel Report, paras 7.469, 7.481, 7.485, 7.487.

bps.[109] This is false. As the Panel found, "the United States seeks to apply one and the same project-specific risk premium".[110] Moreover, while the Ellis report briefly mentioned the option of developing a varying project-risk premium, it ultimately adopted a constant project-specific risk premium.[111] Moreover, throughout its First Written Submission, the United States used a benchmark that reflected a constant project-specific risk premium of 700 bps.[112]

86. Second, with respect to the risks faced by France in providing MSF for the A330-200, the European Union would like to supplement its written response with reference to the actual number of A330-200 deliveries achieved at the end of 2007. At that point, Airbus had delivered 286 A330-200, with a further 193 firm orders yet to be delivered.[113] A comparison with the business case delivery forecast reveals that these figures **[ ]**,[114] demonstrating the conservative nature of the forecast, and the low risk of the project.

87. Third, during the Hearing, the United States argued that the Panel examined, for each of the Airbus projects at issue, the factor "conditions of competition",[115] and made reference to paragraph 7.466 of the Panel Report and paragraph 195 of the EU's Second Written Submission. However, the only conditions of competition discussed in those paragraphs were those affecting the market for *regional aircraft* at the time relevant to the *CASA State Aid decision*. The Panel never examined, much less explained its assessment of, the conditions of competition in relation to each LCA project. This again shows that the Panel failed to apply its own standard to the specific facts of the case.

[109] US Appellee Submission, para. 190.

[110] Panel Report, para. 7.468.

[111] *See* Ellis Report p. 20 ("Nonetheless we apply the much lower 600-700 bps as if it were a well diversified portfolio"); Table 5 (applying the 700 bps project risk premium); Annex 1 (assumptions: 700 bps) (exhibit US-80) (BCI).

[112] *See*, *e.g.*, US FWS, paras 185, 198, 200, 203-204,223, 226-227, 239, 248, 257, 270, 279, 287, 295.

[113] Airclaims Order and Delivery Data (exhibit EC-21) (data up to 2006); Airclaims Order and Delivery Data (exhibit EC-987) (2007 data).

[114] *See* ITR Report, p. 25 of 56 (exhibit EC-13) (HSBI).

[115] Panel Report, para. 7.468.

88. In sum, for the reasons set out in its submissions, and as further explained here, the European Union requests the Appellate Body to reverse the challenged findings regarding the project-specific risk premiums, and also reverse the Panel's finding that French MSF for the A330-200 conferred a benefit.

C. EU benchmark

89. The European Union appealed a series of findings by the Panel on the EU benchmark for MSF loans.[116] In this memorandum, the European Union focuses on one issue raised in the context of its appeal of the Panel's erroneous agreement "with the view expressed by Brazil and the United States that government support for the A380 in the form of LA/MSF reduces the level of risk associated with risk-sharing supplier financing".[117] The Panel's agreement with that speculative "view" is inconsistent with Article 11 of the DSU for two reasons: first, there is no evidence supporting its finding; and, second, the Panel fails to provide any analysis or a reasoned and adequate explanation for that finding. Each ground demonstrates a lack of objectivity in the Panel's assessment.[118] Indeed, the fact that, in its Appellee Submission,[119] the United States saw the need to offer *new* arguments not made before the Panel only serves to highlight the Panel's error, and supports the EU's request that the Appellate Body reverse the Panel's finding.[120]

90. With these considerations in mind, and given that the Appellate Body pursued the question whether the very presence of MSF might reduce the risk borne by risk-sharing suppliers, the European Union offers further considerations on the matter. In particular, the European Union explains why the US assertion that MSF to Airbus somehow rendered the risk-sharing supplier benchmark unreliable is false as a matter of fact.

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[116] EU Appellant Submission, paras 791-836.

[117] Panel Report, para. 7.480.

[118] EU Appellant Submission, paras 822-828; First EU Opening Statement, para. 47.

[119] US Appellee Submission, para. 222.

[120] First EU Opening Statement, para. 47.

91. In considering the issue, it is useful to distinguish between two stages – (i) the possible effect of MSF on Airbus' decision to launch a project (*i.e.*, its decision to begin developing an aircraft and to accept firm orders from customers[121]) and (ii) the possible effect of MSF on the risks involved in the project, as well as on risk-sharing suppliers' decisions to participate and on what terms.

92. Concerning Airbus' decision to launch a project, the Panel found that MSF makes that decision more likely, and that MSF was decisive for each launch. With the exception of the A380 launch decision,[122] the European Union does not appeal that finding. Thus, if MSF affects the decision to launch the aircraft project and when, the issue becomes how, if at all, that effect impacts the market pricing that risk-sharing suppliers demand of Airbus to participate in a project once it is launched.

93. This is the second, and relevant, issue in this context. Specifically, the question to consider is whether the allocation of risk between Airbus, the EU Member States and risk-sharing suppliers affects the overall level of risk in the project and the type and level of risk assumed – and, hence, priced – by the risk-sharing suppliers. The United States asserts that it does. The European Union explains, below, that the United States is wrong. While MSF, like any other risk-diversifying instrument, might affect the launch decision, it does not affect the post-launch risk objectively entailed in the project.

94. Risk diversification functions, and can be thought of, as a form of insurance. The insured (*i.e.*, Airbus) pays a premium (*i.e.*, an expected return based on delivery-based repayments of principal and interest) for transferring risk to the insurer (*i.e.*, risk-sharing suppliers and the Member States). This insurance, or risk diversification, leaves the overall risk of the project unaffected, much as the risk of a home burning can not be reduced by insuring it against fire.

95. Thus, as explained during the Hearing, and as the world was reminded of painfully in the recent financial crisis, risk diversification does not reduce the overall

[121] *See, e.g.*, Panel Report, para. 7.296, footnote 2421 (discussing commercial and industrial launch of A350 as the decision to market and to develop and accept firm orders, respectively).

[122] EU Appellant Submission, paras 599-629.

quantum of risk. It does what its label states it does – diversifies the financial risk of project failure over many participants.

96. Ameliorating the pain of failure for any single participant does not, however, increase the chances of success or, conversely, reduce the risk of failure. The extent of the risk, and, conversely, the chances of success, are entirely unaffected by the existence of other investors that might face similar losses because they assumed similar risks. The degree to which an investment will be affected by project failure is solely a function of the degree of the risk borne by the investor in question. When an investor assumes risks, and those risks materialise, its investment will suffer proportionate to the level of risk assumed.

97. Applying these general considerations to the investments at issue, the European Union notes, first, that, with development costs of many billions of dollars in the LCA industry, any new aircraft development involves risks for a single manufacturer irrespective of its scale and resources. Both LCA manufacturers, therefore, pursue strategies to diversify the risk of project failure. For their most recent projects, the 787 and A380, both Boeing and Airbus obtained financing on delivery-based risk-sharing terms, covering approximately 60 percent of development costs. In the case of Boeing, risk-sharing suppliers assumed approximately 60 percent of development costs.[123] For Airbus, the participating Member States assumed slightly less than one third of the risk, and risk-sharing suppliers assumed a **[ ]**.[124] Combining the two projects, risk-sharing suppliers – many of which serve both Airbus and Boeing – provided in the neighbourhood of **[ ]** billion[125] in what the United States describes as "success dependent" financing.

[123] Deutsche Bank Analyst Report, p. 9 (exhibit EC-76).

[124] A380 Business Case, p. 5 (exhibit EC-362) (HSBI).

[125] Industry analysts have estimated the development cost for the Boeing 787 to be $10 billion. *See, e.g.*, Dorman Report, p. 1 (exhibit US-70) and, Boeing Bets Big on a Plastic Plane, Chicago Tribune, p. 5 (exhibit EC-265). With an estimated 60 percent of development cost out-sourced Deutsche Bank Analyst Report, p. 9 (exhibit EC-76), $6 billion is financed by risk-sharing suppliers. With regard to the A380, the business case estimated the contribution by risk-sharing suppliers to the development cost of the aircraft. A380 Business Case, p. 5 (exhibit EC-362).

98. This risk diversification spreads project risk – *i.e.*, it allocates certain risks away from the party undertaking the project. Spreading risk among multiple investors reduces the likelihood that a project failure would be catastrophic to any single participant. For example, if either the A380 or the 787 were to fail, with risk-sharing financing in place, it is far more likely that the affected manufacturer would survive.

99. However, risk diversification – whether to the Member States or to risk-sharing suppliers – does not affect the level of any of the following risks that make up the project risk for each of the LCA projects at issue: (i) the risk that the aircraft cannot be developed successfully; (ii) the risk that an insufficient number of aircraft will be delivered; (iii) the risk of the timing of the deliveries that take place; (iv) the average price per aircraft; (v) the average recurring cost per aircraft; and (vi) the amount of non-recurring development cost for the aircraft. In other words, development and market risks relating to the specific project remain unaltered.

100. Instead, risk diversification simply spreads risk. In additional to the risk-free rate and a premium for Airbus' corporate risk, like the Member States,[126] risk-sharing suppliers to Airbus and Boeing assume, and therefore face, the following risks:[127] the risk that the aircraft cannot be developed successfully (risk (i), above), the risk that an insufficient number of aircraft will be delivered (risk (ii), above), and the risk that the timing of the deliveries gets delayed (risk (iii), above). Risk-sharing financing that is repayable based on deliveries, therefore, partially distributes away from Airbus risks (i), (ii) and (iii), above.[128] However, it leaves unaffected the

[126] Professor Whitelaw explained – and the Panel ignored – that risk-sharing suppliers face some risks, not borne by the Member States, and that these compensate for the additional risk borne by the Member States that the Panel identified, roughly cancelling each other out. *See* EU Appellant Submission, paras 805-807.

[127] As explained in the previous section, the risks assumed by risk-sharing suppliers are significantly less than the risks assumed by equity investors in Airbus or Boeing.

[128] As noted in paragraph 76, for the A380, the majority of MSF does not assume the risk of delayed deliveries (risk (iii), above), and will earn their MSF agreements' expected rate of return as long as the projected number of deliveries occur. *See, e.g.*, German A380 MSF Agreement, Section 6.5 (**[** **]**) (exhibit EC-85) (BCI); *see also* EU Appellant Submission, paras 737 (footnote 923) and 759 (footnote 969); UK MSF Agreement, Section 4 of Schedule 3 (**[** **]**) (exhibit EC-89) (BCI).

overall level of these risks. Indeed, the United States has offered no argument, much less any evidence, that would support the Panel's unexplained conclusion that MSF affects any of these risks.

101. During the Hearing, the United States asserted that Airbus' behaviour over the course of the project is affected by the existence of MSF, and that, as a consequence, the risk borne by risk-sharing suppliers is somehow reduced. The United States failed, however, to explain how, or why, this would occur. Indeed, while the Panel found that the existence of MSF at below market rates caused Airbus to launch aircraft earlier than it would have in its absence,[129] the Panel did not find that Airbus' market behaviour after launch would be different absent MSF.[130] Accordingly, there is no basis in the Panel Report to conclude that MSF would cause Airbus to behave in a manner that would mitigate the overall level of delivery-based risks that the risk-sharing suppliers face. Nor is there any evidence in the record that demonstrates that the presence of below-market risk-sharing financing by governments reduces the delivery-based risk – or even the perception of that risk – borne by the risk-sharing suppliers.

102. In short, since the existence of another risk-sharing investor in the same project does not affect the level of the overall risk of the project, it also does not mitigate the delivery-based risk borne by each individual provider of risk-sharing financing.[131] In pricing the financing, each supplier/investor must independently assess the likelihood of project failure, and the manner in which it is affected by such project failure. The Panel was, therefore, wrong in its agreement with Brazil's and the United States' argument.

103. Moreover, with respect to the A380 and the 787, both Airbus and Boeing secured **[ ]** levels of risk-sharing financing that is repayable on delivery. Since, with respect to risk diversification, MSF and risk-sharing suppliers are

[129] *See*, *e.g.*, Panel Report, para. 7.1976.

[130] Panel Report, paras 7.2009-7.2010, 7.2024.

[131] The European Union notes that the risk premiums at issue here are also unaffected by the amount of financing provided. That is, while the absolute quantum of risk assumed by a single risk-sharing supplier or Member States varies proportionately to the amount of financing provided on delivery-based repayment terms, this does not affect the overall project risk. It simply affects the entity that bears the risk.

indistinguishable, Airbus and Boeing are on an **[ ]** regardless of whether that risk diversification is achieved by means of MSF or risk-sharing suppliers. Other than a small impact of below-market pricing for most MSF, there is no substantive difference between risk diversification through MSF and risk-sharing suppliers. As the study authored by Ben Fidler, a noted aerospace analyst, and his colleagues at Deutsche Bank – to which the United States referred during the Hearing – demonstrates, the markets perceive the effects of MSF to be small.[132] The study concluded "that ending launch aid would have just a limited impact on IRR and NPV for a successful new aircraft programme".[133]

104. The European Union also addresses the issue from a slightly different angle. Although the Panel expressed its agreement "with the view expressed by Brazil and the United States that government support for the A380 in the form of LA/MSF reduces the level of risk associated with risk-sharing supplier financing"[134] in the context of assessing the EU's *project-specific* risk premium, the finding could be read – similarly erroneous – as suggesting that MSF affects Airbus' *corporate* risk. In the context of its adverse effects analysis, the Panel found that MSF improved Airbus creditworthiness, affecting corporate risk.[135] Initially, it is important to recall that, as risk-diversifying instruments, MSF and risk-sharing supplier financing have the same effect on Airbus' credit rating. Moreover, both Parties agreed on the level of the corporate risk premium (as well as on the risk-free rate). Since Professor Whitelaw used the agreed values in deriving his project-specific risk premium,[136] any effect on the corporate risk premium would not affect the project risk premium he derived.[137]

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[132] Deutsche Bank Analyst Report, p. 1 (exhibit EC-74).

[133] Deutsche Bank Analyst Report, p. 1 (exhibit EC-74). *Compare also* A380 internal rate of return ("IRR") and net present value ("NPV") with and without MSF. *See* A380 Business Case, p. 6, 29 (exhibit EC-362) (HSBI).

[134] Panel Report, para. 7.480.

[135] Panel Report, paras 7.2020-7.2022.

[136] Whitelaw Report, para. 39 and exhibit 2 (exhibit EC-11) (HSBI and BCI).

[137] If MSF had reduced Airbus' corporate risk, the corporate risk premium would be higher by the same amount that the return demanded by risk-sharing suppliers would be higher. Accordingly, the project-risk premium would be unaffected. To express this mathematically, Professor Whitelaw's derivation was as follows:

Return demanded by risk sharing suppliers – risk-free rate – corporate risk = project-specific risk premium.

105. In any event, the impact of past MSF on *corporate* risk is an effect of the subsidy that is legally irrelevant to the determination of the market benchmark. Under Article 1.1(b), the relevant benchmark for MSF is the price that Airbus would need to pay for the risk-sharing financing at market, whether or not that price is affected by the reduced risk of the corporation due to prior subsidisation. The European Union notes that, otherwise, there could never be a market benchmark for any company with government involvement, as that involvement might always affect that company's creditworthiness.

106. Finally, the European Union notes that both EADS/Airbus and Boeing are important industrial companies in their respective economies. Both are engaged in critical aspects of defence and are market leaders in large civil aircraft, employing tens of thousands of skilled workers. The European Union and some of its Member States, as well as the United States, have shown an interest in the well being of "their" respective company. Possibly, investors in both companies anticipate that their governments would not let them fail. This might reduce the price for risk that each company must pay to finance its operations. However, whether this possibility exists in reality is irrelevant as a matter of law. Under Article 1.1 of the *SCM Agreement*, the relevant market benchmark is the price that the company – as found to exist – would need to pay for its financing at market. In this dispute, had Airbus gone to the capital markets to finance aircraft development – as BAE Systems did to develop the A340-500/600 derivative,[138] and as, in fact, Airbus does with respect to its risk-sharing suppliers – the same market forces would have reduced the risk / cost of financing, whether that financing would have been provided by the market or a private party. That is not the result of MSF or any particular subsidy, but the result of the market perceptions of both Boeing and Airbus.

If MSF had reduced the corporate risk premium, absent MSF, the derivation would be as follows, with the result unaffected:

(Return demanded by risk sharing suppliers + effect of MSF) – risk-free rate – (corporate risk + effect of MSF) = project-specific risk premium.

[138] *See* EU SWS, paras 204-206. In this case, Airbus UK preferred such financing to MSF offered by the UK government.

107. In sum, there is no basis for the Panel's agreement "with the view expressed by Brazil and the United States that government support for the A380 in the form of LA/MSF reduces the level of risk associated with risk-sharing supplier financing".[139] The European Union's explanation, above, constitutes further support for a reversal on the grounds that the Panel made its finding without an objective basis in the evidence, and without a reasoned and adequate explanation.[140]

108. The only other manner in which MSF could potentially influence the pricing demanded by a risk-sharing supplier is if the supplier received MSF directly. The European Union appealed the Panel's finding in this respect.[141] As discussed with the Appellate Body during the Hearing, Professor Whitelaw tested that proposition, and found that, even assuming full pass-through to Airbus of any benefits conferred on risk-sharing suppliers through their direct receipt of MSF, the effect on the MSF benchmark was small.[142] The Panel failed to address the significance of that evidence, much less, in light of that evidence, to provide a reasoned and adequate explanation of its finding.[143]

109. Thus, none of these considerations provide a basis for the Appellate Body to uphold the Panel's criticisms of the EU benchmark. Instead, the Panel's findings regarding the EU benchmark[144] constitute reversible legal error under Article 11 of the DSU. As an aside, the European Union notes that, following a reversal, these issues could, if necessary, be explored in more detail if there were subsequent proceedings in this dispute.

[139] Panel Report, para. 7.480.

[140] EU Appellant Submission, paras 822-828.

[141] Panel Report, para. 7.480 ("there is information contained in the Airbus A380 business case which suggest that the risk-sharing participant's involvement in the A380 project may not have been on strictly market terms for all participants").

[142] Whitelaw Rebuttal Report, paras 30-31 and exhibit 1 (exhibit EC-656) (BCI) (HSBI).

[143] EU Appellant Submission, paras 829-834

[144] Panel Report, paras 7.480 – 7.481.

VI. ALLEGED EXPORT CONDITIONALITY/CONTINGENCY

110. The European Union observes that during the First Hearing the United States finally reverted to its original case and opted to defend the double standard articulated and applied by the Panel. The European Union is of the view that it has demonstrated why that double standard constitutes legal error and that this has not been rebutted by the United States.

VII. RESEARCH AND TECHNOLOGICAL DEVELOPMENT FUNDING

111. With regard to the failure of the United States to identify the Spanish PROFIT programme in its panel request, in breach of Article 6.2 of the DSU, the European Union pointed out during the Hearing that this programme was notified to the WTO in 2003 and that the notification contained a reference to the publication in the Spanish Official Journal of the Order of 7 March 2000 which established PROFIT and which contains an explicit reference to the aeronautics sector.[145] It is highly implausible that the United States was not aware of this. In fact, in April 2004, the United States submitted specific questions on the PROFIT programme, asking, *inter alia*, which "technological areas" were covered by the programme.[146] In December 2004, the European Union answered on behalf of Spain, and specifically identified "aeronautics" as one of the sectoral areas covered.[147]

112. The European Union also pointed out during the Hearing that French R&D support was notified to the WTO in 2003,[148] that the United States was able to identify the "Direction des Programmes Aeronautiques Civils (DPAC)" in its Annex V questions, and that public information pre-dating the US panel request illustrates that French R&D support was not provided in secrecy.[149]

[145] G/SCM/N/95/EEC/Add.13 of 15 December 2003, p.23.

[146] G/SCM/Q2/EEC/43 of 15 April 2004.

[147] G/SCM/Q2/EEC/46 of 14 December 2004, p.32

[148] G/SCM/N/95/EEC/Add. 5 of 15 December 2003.

[149] *See, e.g.*, article by DPAC Deputy-Director Hervé H. Moraillon on "Overview of the French R&TD Programme", published in: Air & Space Europe, Vol. 3 (2001), No 3/4.

VIII. FRENCH CAPITAL CONTRIBUTIONS

113. Finally, with respect to the French capital contributions, the European Union corrects a factual error in the US Opening Statement at the First Hearing. At paragraph 86, the United States erroneously states that there were six capital contributions to Aéospatiale. In fact, there were four capital contributions – in 1987, 1988, 1992 and 1994, respectively[150] – plus the 1998 transfer by the French State of its 45.76 percent stake in Dassault Aviation.[151]

[150] Panel Report, para. 7.1380.

[151] Panel Report, para. 7.1414.