World Trade Organisation

*European Communities – Measures Affecting Trade in Large Civil Aircraft*

Recourse to Article 21.5 of the DSU by the United States

(DS316)

# Opening Statement of the European Union

*Contains no BCI or HSBI*

Geneva, 16 April 2013

*As delivered*

Mr. Chairman, distinguished Members of the Panel,

1. We come to this hearing as the Party that has filed the most recent written submission, which, like our first written submission, is a substantial document. You may be relieved to hear that we therefore have a relatively short oral statement for you today.

2. So what is it that we should say to you today? We are not in a position to react, in this oral statement, to the submission just delivered by the United States, although we will of course do so in due course, in response to your written questions. You have already seen our written submissions, in which we explain how and why we have complied with the recommendations and rulings of the DSB, and we do not want to repeat ourselves. This is an oral statement, not a written submission, and we do not wish to burden you with inappropriate and excessive detail.

3. How, then, should we use the time available to us in this hearing most profitably? It seems evident to us that we should rather focus on the big picture. In particular, we would like to focus on some broad cross-cutting shortcomings and attempted (but failed) short-cuts in the overall structure of the US case.

4. That does not mean that what we have to say today is mere rhetoric, detached from the specific legal determinations you are charged with making. Rather, we take this approach in order to highlight a pattern in the US arguments in these proceedings. Specifically, when the matters in dispute get refined down to the detailed point of adjudication, the United States tends to have recourse, expressly or by implication, to one of the big picture issues we address today, attempting to use it, subjectively, to mask a shortcoming in its evidence, or to colour the adjudication in its favour. You, in contrast, are charged with making an *objective* assessment of the matter at hand. These big picture issues are, therefore, highly pertinent to the assessment that you are called upon to make in this case, in the sense that they need to be *brought out of the shadows, challenged* and *dispelled*. That is what we set out to do in this oral statement.

5. Were we to encapsulate these issues in one word, that word would probably be "assumption". It is sometimes said that the devil is in the detail. Well, as I have

already indicated, we think we have covered the detail in our written submissions, and we would say that what is in that detail is the truth, or at least as close as one can reasonably get to it. In the case of the US submissions, we would rather say that *the devil is in the assumptions* – the subjective assumptions – that litter the entire US case. People say that the bigger the assumption the more likely it is to be believed. Thankfully, such assertions carry no weight in the WTO's unflinching rules-based system, which is based on an *objective* assessment of the matter, and particularly of the evidence.

6. What sort of subjective assumptions are we speaking of? Here are a few of them, taken from the US' submissions and public statements:

- The WTO found that the amount of the subsidies at issue in this dispute is USD 18 billion.[1]
- The complainant does not have the burden of proof in compliance proceedings involving subsidies. Accordingly, the United States need not demonstrate that subsidies exist after the end of the implementation period, in order to show that the subsidies have not been withdrawn. Nor need the United States demonstrate present adverse effects presently caused, in order to show that the adverse effects have not been removed.
- Although a responding Member enjoys the choice between withdrawing a subsidy or removing the adverse effects, WTO implementation obligations are more stringent for subsidies than for other types of measure, such that the respondent remains responsible for allegedly lingering adverse effects from withdrawn subsidies.
- The market never engages in project finance, and risk-sharing cannot be priced at market.
- In competitive markets, *every* subsidy causes adverse effects.
- In particular, financing extended by the EU member States always causes an LCA programme to be launched, even where the programme was economically viable without the alleged subsidy, and even where the recipient could have funded the launch without the alleged subsidy, as long as newspaper articles and the generic Dorman model say so.
- A complainant can assume that subsidies benefiting one product cause

[1] "In April 2012, the United States initiated compliance panel proceedings due to the EU's apparent failure to comply with the WTO's 2011 findings that $18 billion in subsidies conferred on Airbus by the EU and member countries were WTO inconsistent". The President's 2013 Trade Policy Agenda, available at: http://www.ustr.gov/sites/default/files/Chapter%20I%20-%20The%20President's%20Trade%20Policy%20Agenda.pdf.

economic harm to another product, without *evidence and analysis* demonstrating that the two products fall into the same product market.

- The adverse effects from an actionable subsidy do not dissipate, but instead increase, with time, for as long as a subsidised product, and any subsequent products, are in the market.
- Without the subsidies, there would be no EU LCA industry, or at least none of Airbus' current or future products would exist.
- The United States never grants subsidies, has never granted subsidies to Boeing, and in any event this is irrelevant.

7. These subjective and erroneous assumptions permeate the entire US case, expressly or by implication. When the overall effect is considered, the US approach is simply jaw-dropping, remote as it is from the requirements set out within the four corners of the *SCM Agreement*.

8. Well, we have covered these issues in our written submissions, and as I have said, we do not want to repeat ourselves. But let us take a couple of points by way of example, to illustrate what we mean.

9. Consider the proposition that where two firms compete, each and every subsidy to one must be *assumed* to cause adverse effects to the other. That is exactly what the United States does in this dispute: it asks you to accept the assumption that each and every alleged subsidy to Airbus causes adverse effects to Boeing, because the two companies compete for LCA sales.

10. Now, the WTO has indeed found that some EU member States have provided repayable loans to finance portions of Airbus' development costs. But there is no such thing as a free lunch – and this is a pertinent observation here in two senses.

11. First, these loans are not grants given without any repayment obligation in return (like the funds provided by the United States to Boeing) – they are *repayable.* Why then does the United States insist on asserting that the WTO has found that the amount of the subsidies is USD 18 billion? Every person in this room knows this assertion to be false. The WTO has "found" no such thing. The United States appears to refer to what it alleges to be the amount of the *principal* involved. But the *objective* facts and evidence reveal more – that the agreements *require repayment* (and in fact many of the loans have been *repaid*, with *interest*). The US *assumption* about USD 18 billion

worth of subsidies is thus untenable, and directly contradicted by the facts and the *evidence*.

12. Second, even if the United States would have established that the interest rate on any of the loans was below a market benchmark, there has still been a ***quid pro quo***. And that *quid pro quo* is ***location*** – that is, *the* ***additional costs*** to Airbus in being constrained to develop and produce the aircraft in Europe as opposed to elsewhere.

13. As in the United States, including with respect to Boeing, a cornerstone of European industrial policy is creating and maintaining high quality jobs. We are not ashamed of that, any more than is the United States – and a great many statements to that effect have been made by both the US authorities and by Boeing.

14. The covered agreements do not suggest that this type of measure, which is conceptually similar to financing the additional costs of adapting to more stringent local environmental standards, is particularly problematic. Quite the contrary. The *SCM Agreement* expressly recognises that government assistance for various purposes is widely provided by Members, and that the mere fact that such assistance may not be non-actionable does not restrict the ability of Members to provide it.[2] Environmental subsidies were temporarily non-actionable,[3] and even today, like all other subsidies, and by way of an additional requirement compared to other types of measure, a complaining Member must *demonstrate*, with evidence, that a subsidy *causes* serious prejudice.

15. Accordingly, if a Member finances the cost of fitting a scrubber to a firm's chimney to comply with local environmental standards in its jurisdiction, a panel bound by the requirement to undertake an objective assessment of the matter cannot *assume* that this causes serious prejudice to a firm in another jurisdiction that is not subject to the same environmental standard.

16. That observation is *just as pertinent* to the case before you today, and triggers a critical question. Even if the EU member States' financing *offsets* Airbus' *additional*

[2] *SCM Agreement*, footnote 23: "It is recognized that governmental assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance".
[3] *SCM Agreement*, Article 8.2(c).

*costs* in being constrained to develop and produce the aircraft in Europe as opposed to elsewhere, how can it be used to *cause* serious prejudice to US interests, that is, to Boeing?

17. In a rules-based dispute settlement system, the answer to this question cannot be that, because Airbus and Boeing compete in various product and geographic markets, every subsidy to one must be *assumed* to have "created" the recipient or one of its products, and for this reason, to have caused serious prejudice to the other. Rather, the existence of a subsidy to one causing adverse effects to the other must be *proven*, with *evidence*, on the basis of a reasonable and appropriately calibrated causal mechanism.

18. Rather than undertaking the required task of *demonstrating* that net funds remain, and are used to price down LCA and trigger one of the enumerated forms of serious prejudice listed in Article 6.3 of the *SCM Agreement*, the United States has resorted to various attempted short-cuts, which collectively amount to little more than a leap of faith. This is particularly true of the US' cascading "creation" causation argument, which culminates with the alleged effect of European government financing on the launch of the A350XWB. Specifically, the United States argues that EU member State financing caused Airbus to launch an aircraft that it would not otherwise have launched, and that that launch taught Airbus things that caused *subsequent* aircraft to be launched, and that each of these launches caused Airbus to win sales and take market share from Boeing, and that this harm persists for as long as *any* Airbus aircraft, including those that may subsequently be developed and launched, are sold.

19. In short, the alleged subsidy itself is not shown, with evidence, to cause any of the enumerated forms of serious prejudice listed in Article 6.3. Instead, the starting point – that Airbus received EU member State financing – and the ending point – that Boeing has made some sales but not others and has a particular market share – are simply fused together. The middle, or how those two points are bridged, is murky, and joined through attempted short-cuts, artifice and mere assumption.

20. We are not saying that an attenuated causal chain involving multiple links from alleged subsidy to alleged adverse effects is impossible to construct. But the longer and more attenuated the alleged chain, the more diligent and rigorous a complainant

must be if it is to succeed, and the more demanding the adjudicator should be. In this case, the United States is asserting a particularly attenuated causal chain, in an attempt to jump the gap from alleged subsidy to alleged adverse effects, particularly by employing a series of attempted short-cuts, which are simply not supported by the evidence. It is a leap of faith that fails.

21. Thus, we are calling the US bluff. We are raising our hand and saying that the emperor has no clothes. A rules-based system requires *proof* of claims made. An *intuition* that an alleged subsidy to one firm harms a competing firm is *not enough*. A rules-based system requires *objective evidence establishing* the alleged causal links the United States asserts, rather than attempted short-cuts and assumption. What does this mean in practice in this case?

22. First, it means holding the United States to its procedural obligations. We know that the United States is trying to back-load these proceedings and deprive the European Union of its due process rights by ambushing us, and constraining our ability to respond. This tactic began by filing a first written submission that lacked any real substance and that challenged as actionable subsidies measures it had not even seen, on the false assumption that it lacked the procedural means to seek evidence in advance, through Annex V, or questions posed pursuant to Article 13.1 of the DSU. The tactic has had a knock-on effect, such that, only today, we are hearing for the first time evidence and argument that should, consistent with the United States' burden as complainant, have been provided to us and to you nearly 12 months ago. We say that untimely material must simply be rejected.

23. Second, it means holding the United States to the law, as clarified by prior disputes. When the United States sets out, as it has done in other instances, such as with respect to Annex V, to challenge the Appellate Body – the agreed final adjudicator in our treaty system – its submissions need to be dealt with accordingly. We note in this regard the United States' refusal to accept the Appellate Body's express finding, in this dispute, that a subsidy has a finite life, set on an *ex ante* basis at the time of grant. Similarly, the United States challenges the Appellate Body's finding that the repayment of the financial contribution (for example in the form of principal and interest) brings a subsidy to an end. Moreover, it challenges the Appellate Body's

finding that the effects of subsidies dissipate over time, asserting instead that the effects of any subsidies to Airbus exist for as long as Airbus sells and delivers any and all of its products.

24. Third, and perhaps above all, it means holding the United States to its burden of proof and persuasion. The United States had a job to do in these proceedings, as a function of its role as complainant in a dispute governed by the DSU and Article 7.8 of the *SCM Agreement*. That was to *demonstrate* that subsidies exist after the end of the implementation period – such that they have not been withdrawn – and that those subsidies presently cause present adverse effects – such that those adverse effects have not been removed. It has shirked the task, in favour of the types of attempted short-cuts and subjective assumptions we have already mentioned.

25. Shirking that task is a choice, and the United States is free to have made it. You, however, are not free to accept it. You are charged with *objectively* assessing the *evidence*, to determine whether it supports the claims advanced by the United States. That the US gamble involves high stakes is no reason to substitute subjective assumptions for objective and detailed assessment, based on *evidence*. WTO dispute settlement is not a game of poker. It is an international legal adjudication. As I have already said, we are calling the US bluff, and we respectfully ask you to do the same. If this means rejecting the US case, then that is entirely right and proper, as a response to a strategic choice by the United States to employ attempted short-cuts and subjective assumptions instead of evidence.

26. In closing our oral statement, it is worth recalling that we evidently did not choose to bring this dispute, or the companion dispute involving US subsidies to Boeing, to the WTO. We recognise that it places a huge burden on the WTO dispute settlement system. Moreover, these disputes, triggered by a US objection to an alleged location subsidy to create jobs in the European Union, do nothing to advance trade – something evident from the mutual requests for countermeasures involving tens of billions of US dollars annually. It appears that, for Boeing, this litigation may be a relatively cheap option to pursue commercial interests by other means, with potentially substantial results. It suits Boeing to paint Airbus as "the bad guy" for domestic reasons, including US government procurement, asserting alleged WTO

findings that Airbus received USD 18 billion of subsidies, whilst Boeing has, as the story goes, received none.

27. Everyone understands perfectly well that resolving the underlying issues may require an agreement of some kind, and one that may well be of interest to or involve other Members. We understand that. This is the multilateral way forward, capable of adequately reflecting the trade interests of all WTO Members. The European Union is ready to engage in it, on balanced terms. The imbalanced and unsupported assumptions that underpin the US case – to the effect that Airbus should not even exist – and which appear to be driven by an agenda that is not conducive to trade, are fundamentally at odds with such a rational outcome, and we ask you to reject them, in favour of an objective assessment of the evidence.

Mr. Chairman, distinguished Members of the Panel, we thank you for your attention, and stand ready to answer any questions you may have.