

*European Communities and Certain Member States –
Measures Affecting Trade in Large Civil Aircraft:
Recourse to Article 21.5 of the DSU by the United States*

(AB-2016-6 / DS316)

**OPENING STATEMENT
OF THE UNITED STATES OF AMERICA
AT THE FIRST ORAL HEARING**

May 2, 2017

1. In this appeal, the European Union (“EU”) does not contest the compliance Panel’s findings that without the massive LA/MSF subsidies, Airbus and its subsidized aircraft would not have been in the market, where they caused massive adverse effects to U.S. interests.
2. It does not dispute the compliance Panel’s finding that it has taken no affirmative steps to withdraw any of its WTO-inconsistent LA/MSF subsidies or to remove their adverse effects.
3. It also does not dispute the compliance Panel’s finding that its member States granted Airbus approximately \$5 billion more of the type of financing that the original panel and Appellate Body found to be a subsidy, this time for Airbus’s latest aircraft program, the A350 XWB.
4. Although the EU does not dispute any of this, it does not propose to change anything. Rather, the EU seeks absolution. It argues that it did not need to do anything about LA/MSF because the WTO inconsistencies affirmed by the Appellate Body in 2011 never triggered any compliance obligation with respect to LA/MSF given to Airbus to support its production of large civil aircraft in the first place. Regrettably, the EU’s approach in this dispute could only serve to diminish the WTO and its dispute settlement system.
5. Under the EU’s approach, the EU’s first reaction upon receiving the recommendations and rulings of the Dispute Settlement Body (“DSB”) must have been to contact its accountants. When they calculated that the “lives” of the A300 through A340 LA/MSF subsidies were over, the EU decided it had nothing more to do. With those subsidies out of the way, the EU concluded that the A380 subsidies couldn’t be causing any trouble all by themselves. And that meant it was fine to give Airbus many billions of euros more in LA/MSF for the A350 XWB. In this telling, the only action taken by the EU was to prolong these proceedings as much as possible so as to run out the clock on the lives of the subsidies, and the only action available to the Appellate Body is to confirm that the EU’s inaction, and the ongoing adverse effects to the United States, was fine.
6. Needless to say, the United States does not agree. As the Appellate Body found in *US – Upland Cotton*, when the DSB recommends under Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) that a Member withdraw its subsidies or remove their adverse effects, that Member “would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects will dissipate on their own.”¹ The EU’s arguments entirely reverse this guidance. Its reading of Article 7.8 would create a strong incentive for a Member found to be in breach of Articles 5 and 6.3 to remain idle, certain that the longer the proceeding lasted, the more likely it would be that the subsidy would expire on its own.
7. The correct approach is the one taken by the compliance Panel. As the Appellate Body found in the original appeal, the end of the ex ante “life” of a subsidy does not, by itself, mean the end of a Member’s obligation under Articles 5 and 6.3 of the SCM Agreement not to cause adverse effects through the use of the WTO-inconsistent subsidy. The compliance Panel rightly

¹ *US – Upland Cotton (AB)*, para. 236.

recognized that in light of this guidance and in the context of the rules of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) on compliance, Article 7.8 of the SCM Agreement cannot properly be interpreted as advocated by the EU. Rather, it signifies that, whether by withdrawing the subsidies or removing their adverse effects, the responding Member has an obligation to bring its subsidies into conformity with Articles 5 and 6.3.

8. Given that there are no relevant compliance steps to discuss, the remainder of our statement today will be brief. We will not attempt to summarize or recall every point made in our hundreds of pages of submissions, but instead will focus on a few general observations that in our view illuminate the issues on appeal. These fall into three areas: (1) the EU argument that its compliance obligations ended with the end of the “lives” of certain LA/MSF subsidies; (2) the benchmarking exercise for LA/MSF for the A350 XWB; and (3) the U.S. appeal of the compliance Panel’s findings under Article 3.1(b).

Implications of the end of the “life” of a subsidy

9. The EU makes a number of legal arguments in attempted defense of its “do nothing” interpretation of Article 7.8. All stem from a single proposition – that if the “existence” of a subsidy can be deemed to be over in spite of the Member taking no action, there is nothing left for a subsidy-granting Member to do. In this view, the measurement of the “life of the subsidy” is dispositive of whether a Member has met its compliance obligations, or has any such obligations at all. But the Appellate Body addressed, and rejected, this logic when it found that, even if the ex ante “life” of a subsidy has expired, that subsidy may still be inconsistent with Articles 5 and 6.3 if it continues to result in serious prejudice.² In other words, a Member does not evade its responsibility under those Articles if it structures a subsidy in such a way that the adverse effects outlast the expected “life” of the subsidy. It may remain in breach of Articles 5 and 6.3 if the adverse effects caused by the subsidy continue.

10. The compliance Panel correctly concluded that the same principle holds true in evaluating whether a Member found to have breached Articles 5 and 6.3 has withdrawn its subsidy or taken appropriate steps to remove the adverse effects for purposes of Article 7.8. Thus, if a Member has not withdrawn its WTO-inconsistent subsidies and those subsidies continue to cause adverse effects inconsistent with Articles 5 and 6.3, that Member has not complied with its obligation under Article 7.8.

11. In contrast, the EU’s argument leads to the absurd conclusion that an allegedly expired subsidy can at once be inconsistent with Articles 5 and 6 – because it causes present adverse effects – but be WTO-consistent under Article 7 because it allegedly has expired and, therefore, is either not being “granted or maintained” or has been “withdrawn.” Under this approach, any

² EC – Large Civil Aircraft (AB), para. 712.

DSB recommendations and rulings with respect to such subsidies become “purely declaratory.”³ As the compliance Panel correctly stated: “Needless to say, such an outcome would upset the balance of WTO rights and obligations and, thereby frustrate the very purpose of the WTO dispute settlement system.”⁴

12. Before moving on, we would like to return briefly to the U.S. conditional appeal of the compliance Panel’s findings that the LA/MSF subsidies have in fact expired. The U.S. and EU submissions lay out the participants’ arguments in detail. It is useful at this point to note a key item of agreement between us – that, just as with the evaluation of the benefit of a subsidy, the evaluation of its expected “life” is an *ex ante* analysis from the perspective of the parties at the time of conferral of the subsidy. We and the EU however diverge when it comes to the framing of that analysis.

13. The EU argues that the only permissible consideration is “future projections” from the time of the subsidy conferral as to how long the benefit will last. But the EU’s approach disregards the actual *ex ante* expectations of Airbus and its government benefactors, who had no idea how long Airbus would take to repay under the terms of the contract, or even whether it would ever repay. Therefore, the *ex post* evaluation by the EU’s accountants is largely a fiction. In addition, the Appellate Body observed that “intervening events . . . may affect the projected value of the subsidy.”⁵ Unlike a normal loan, the member States structured LA/MSF so that subsequent events would *determine* the duration and nature of the repayment obligation and, thus, the “trajectory of the subsidy.”⁶ These facts demonstrate that the parties’ *ex ante* expectation was that any payment stream generated by Airbus, and with it the benefit of the subsidy, would depend on those subsequent events. Therefore, the U.S. approach of factoring those events into the evaluation of the life of the subsidy is entirely in keeping with the Appellate Body’s guidance.

14. That completes our statement with respect to the subsidies already found to cause adverse effects. Our statement with respect to the new subsidies that the compliance Panel found to exist – LA/MSF conferred by France, Germany, Spain, and the UK with respect to the launch of Airbus’s newest aircraft, the A350 XWB – will also be brief.

The benchmark for A350 XWB LA/MSF

15. Some of the EU’s own member States have confirmed that LA/MSF for the A350 XWB is on better than commercial terms. For example, the UK Government stated that the “fundamental rationale of launch investment is to address the apparent ‘unwillingness of capital

³ Compliance Panel Report, para. 6.840.

⁴ Compliance Panel Report, para. 6.840.

⁵ EC – Large Civil Aircraft (AB), para. 709.

⁶ EC – Large Civil Aircraft (AB), para. 709.

markets to fund {LCA} projects with such high product development costs, high technological risks and such long pay back periods’.”⁷ The UK Appraisal of the A350 XWB project made similar statements, which are HSBI,⁸ and the French Government made similar statements as well.⁹

16. Consistent with this evidence, the compliance Panel found that LA/MSF for the A350 XWB was granted on better than commercial terms. The compliance Panel arrived at this conclusion by constructing a commercial benchmark for the LA/MSF subsidies and comparing it to the internal rates of return (“IRRs”) for each grant of LA/MSF. The compliance Panel followed the original panel’s approach to constructing a benchmark by relying on a company-specific borrowing rate (the “corporate borrowing rate”) and a project-specific risk premium (“PSRP”). For the corporate borrowing rate, the compliance Panel used an actual bond floated by EADS, in line with the arguments of the EU’s own expert, Professor Whitelaw. For the PSRP, the compliance Panel used the figure adopted by the original panel for the A380, after undertaking an extended fact-intensive analysis that four categories of risk (development risk, market risk, the price of risk, and contract risk) were at least as high for the A350 XWB program as for the A380 program. As the U.S. appellee submission explains in detail, this approach was consistent with both Article 1 of the SCM Agreement and Article 11 of the DSU.

17. The EU challenges two aspects of this calculation: the period over which to calculate the interest rate associated with the EADS bond, and the data source for the PSRP. We will address each of these in turn.

18. First, with respect to the corporate borrowing rate for Airbus, the EU proposed an average of the yields to maturity on a bond issued by EADS over a multi-month period that encompassed all of the grants of LA/MSF.¹⁰ The U.S. economist, Dr. Jordan, observed that this approach included interest rate data after the dates of certain LA/MSF agreements, introducing a downward bias in the results.¹¹ He demonstrated that this was true by calculating the average yield on the EADS bond for the six-month and one-month periods preceding the signature of each LA/MSF contract. He also reported data for each date of signature. Over the course of the compliance Panel’s extensive questioning of the parties, the EU did not question the use of average yields in benchmarking, or advocate use of the daily yield on the date each LA/MSF agreement was finalized. Thus, before the compliance Panel, the parties were in agreement that the average yield on the EADS bond over a period of months would be an appropriate

⁷ Compliance Panel Report, para. 6.652.

⁸ Compliance Panel Report, para. 6.652.

⁹ Compliance Panel Report, para. 6.654 & fn. 1144.

¹⁰ Robert Whitelaw, *Response to Dr. Jordan’s Report on the Benefits of MSF*, para. 12 (Exhibit EU-121).

¹¹ James Jordan, *Reply to Professor Whitelaw’s Response to Jordan Repot*, paras. 26-28 and Table 6.

benchmark for A350 XWB LA/MSF. The only disputes on this issue were over the length and starting date of the averaging period for each agreement.

19. This context illuminates the compliance Panel’s thought process. Both parties proposed period averages, while only one referenced a single-day benchmark. Even then, Dr. Jordan advanced the same-day interest rate primarily to illustrate the downward bias in the calculations of the EU and its economist. There is accordingly no error – and certainly not a lack of objectivity that would rise to the level of DSU Article 11 – in the compliance Panel’s decision to benchmark the internal rate of return for the A350 XWB LA/MSF contracts against a calculated rate based on the average interest rates for the one-month and six-month periods preceding each LA/MSF agreement.

20. Second, our appellee submission identifies a large number of other flaws in the EU’s opposition to the compliance Panel’s benchmark rate calculations. We will focus today on one particular assertion that encapsulates the fallacy of its arguments. That is the charge that “{t}he conceit of precision underlying the compliance Panel’s approach was central to its ‘benefit’ findings” such that “a small change in . . . the project risk premium . . . holds the potential to change the results.”¹²

21. The image the EU seeks to present here, and throughout its argumentation on this topic, is of a benefit finding balanced on a razor’s edge, and a panel seeking to mask the precariousness of its findings by presenting them with spurious precision. But none of this is the case. The compliance Panel cited extensive evidence in support of its finding that the EU member States granted LA/MSF on terms inconsistent with what a commercial lender would require. It did not pretend to make a minutely precise benchmark calculation, and certainly was not “highly dependent on”¹³ a minute level of precision. To the contrary, the compliance Panel identified several factors that would increase the subsidy margin, but did not make those adjustments because it could not determine the exact amount. This was true of both sides of the equation. For example:

- The compliance Panel found that EADS did not expressly ensure performance of the LA/MSF contract and that, therefore, “for the French and Spanish contracts the EADS bond may be an understatement of the corporate credit risk.”¹⁴ The compliance Panel could not precisely measure this effect, and so did not adjust the benchmark rates.

¹² EU Appellant Submission, para. 331.

¹³ EU Appellant Submission, para. 331.

¹⁴ Compliance Panel Report, para. 6.374.

- The compliance Panel found that at the time of the LA/MSF grants, the EADS bond had a term to maturity of between eight and nine years. Therefore, the EADS bond yield gave a “conservative estimate” of the corporate borrowing rate for all four LA/MSF contracts, which covered a substantially longer period.¹⁵ The compliance Panel could not precisely measure this effect, and so did not adjust the benchmark rates.
- The compliance Panel also found that the EU’s Macaulay duration calculation indicated that three LA/MSF contracts “involve more exposure than the EADS bond,”¹⁶ thereby warranting a further upward adjustment.¹⁷ Again, the compliance Panel could not precisely measure this effect, and so did not adjust the benchmark rates.
- The compliance Panel also found that Airbus’s status as a government-related issuer/entity “may have had an impact, albeit to a small degree, on the corporate credit rating of EADS.”¹⁸ The compliance Panel could not precisely measure this effect either, and so did not adjust the benchmark rates.
- Finally, the compliance Panel found that the EU had declined to provide information requested by the compliance Panel to calculate Airbus’s IRR, so that “we cannot be certain that those expected IRRs are correct and are not overstated.”¹⁹ The compliance Panel gave the EU the benefit of the doubt, and did not adjust the IRRs or the benchmark rates to correct for any errors that the EU’s non-responsiveness may have concealed.

22. Thus, the compliance Panel concluded that “the (likely understated) rate of return that a market lender would require . . . is in each case *higher* than the (likely overstated) IRR calculated by the European Union.”²⁰ Accordingly, the real gap between the commercial benchmark and the IRRs for the LA/MSF contracts is even greater than the compliance Panel’s numerical comparison indicates. The compliance Panel simply concluded that it was not able to precisely measure the impact that these understatements would have on the overall rate, but that in any event, such adjustments would only have further increased the benefit already found.

23. It is also worth noting that the Appellate Body upheld the original panel’s finding that Professor Whitelaw’s PSRP for the A380 “underestimates the level of risk” associated with

¹⁵ Compliance Panel Report, paras. 6.410 and 6.421.

¹⁶ Compliance Panel Report, para. 6.419.

¹⁷ Compliance Panel Report, para. 6.421.

¹⁸ Compliance Panel Report, para. 6.629.

¹⁹ Compliance Panel Report, para. 6.345.

²⁰ Compliance Panel Report, para. 6.633.

lending to the A380.²¹ Thus, to the extent that the risk associated with the A350 XWB LA/MSF is comparable to the risk associated with the A380 LA/MSF, Professor Whitelaw’s PSRP also underestimates for the A350 XWB what a commercial lender would charge to assume that risk.

24. And, on the topic of the PSRP, we will not delve at this stage into the details of the errors of the EU argument. However, we would like to emphasize that before the compliance Panel, the EU did not propose an alternative to use of the A380 PSRP for the purposes of benchmarking LA/MSF for the A350 XWB. It is only now, on appeal, that it argues that the compliance Panel should have used contracts between Airbus and the so-called risk-sharing suppliers (“RSS”), which are companies to which Airbus outsourced work for the A350 XWB project. The EU admits that these documents were not introduced as evidence to the compliance Panel and therefore are not on the record of this proceeding. The EU does not dispute that these documents were unavailable to the United States. It also does not dispute that the burden of proof on this issue would lie with the EU, as the party arguing that the RSS contracts provide a better measurement of risk associated with the A350 XWB. There can be no error by the compliance Panel, then, in not assessing evidence the EU could have, but did not, introduce to support an argument the EU now wishes it had made.

Interpretation of Article 3.1(b)

25. Finally, the United States will briefly address one of the issues raised in its Other Appeal: the compliance Panel’s interpretation of Article 3.1(b). The compliance Panel found that LA/MSF is not “contingent on the use of domestic over imported goods” regardless of whether the relevant instruments (*i.e.*, the LA/MSF contracts for the A350 XWB) require domestic production of particular LCA components for use in the downstream production of the A350 XWB. The basis for the compliance Panel’s finding was that:

the act of granting subsidies to firms so long as they engage in domestic production activities, without more, should not be equated to making those subsidies contingent on the use of domestic over imported goods and hence prohibited.²²

26. The compliance Panel stated that, in past WTO and GATT disputes involving subsidies found to be contingent on the use of domestic over imported goods, the subsidies “have contained elements requiring firms to use certain amounts of domestic goods as production inputs, *i.e.* to discriminate between upstream sources of domestic and imported goods in favour of the former.”²³ This was the case in *Indonesia – Autos*, *US – Upland Cotton*, *Canada – Autos*,

²¹ *EC – Large Civil Aircraft (AB)*, para. 927.

²² Compliance Panel Report, para. 6.785.

²³ Compliance Panel Report, para. 6.786 (underlining added; italics original).

and *Italy – Agricultural Machinery*, making the compliance Panel’s observation true at the time the report was circulated.²⁴

27. However, since release of the *EC – Large Civil Aircraft* report and after the U.S. filed its other appellant submission in this appeal, the *US – Conditional Tax Incentives* panel issued its report, adopting an interpretation of Article 3.1(b) contrary to the interpretation that resulted in findings of breach only where firms were required to use certain amounts of domestic goods as production inputs. That dispute addressed the state of Washington’s extension of the time period for receiving a preferential tax rate, which was made conditional on a decision to site production of Boeing’s 777X, including its wings and its fuselage, in the state of Washington. The panel found that the relevant conditions addressed the location of certain manufacturing activities, one of which was wing assembly, not a requirement to use certain amounts of domestic goods as production inputs.²⁵ Yet the panel in that dispute found that the subsidy is nevertheless *de facto* “contingent on the use of domestic over imported goods” – specifically, wings.²⁶

28. The United States presented to the compliance Panel arguments consistent with the interpretation eventually adopted by the panel in DS487, but the compliance Panel rejected those arguments. Accordingly, the United States has appealed the compliance Panel’s findings of law and legal interpretation.

29. The United States wishes to be clear that, contrary to suggestions by the EU, its Article 3.1(b) appeal in this dispute does not depend on the facts of DS487; it is based on what is the correct legal interpretation to apply to the facts in this dispute. The United States references DS487 as part of its explanation for why, at least in part, it considered the appeal of the compliance Panel’s interpretation of Article 3.1(b) in this dispute to be so important to protecting its interests.

30. The United States also notes that the EU advances in its other appellee submission a number of meritless procedural objections to the U.S. Article 3.1(b) appeal, including under Article 17.6 of the DSU and various rules of the Working Procedures of the Appellate Body. But, for purposes of Article 17.6 of the DSU, the compliance Panel’s interpretation of Article 3.1(b) is unquestionably an issue of law covered in the panel report as well as a legal interpretation developed by the Panel, and there is no genuine issue as to whether the EU received proper notice of the grounds for the U.S. appeal here.

31. Instead, what underlies various EU arguments is the U.S. acknowledgment that the interpretation of Article 3.1(b) it advances in this appeal would not, from a systemic perspective,

²⁴ See Compliance Panel Report, note 1418.

²⁵ Panel Report, *United States – Conditional Tax Incentives for Large Civil Aircraft* (WT/DS487/Final), para. 7.315.

²⁶ Panel Report, *United States – Conditional Tax Incentives for Large Civil Aircraft* (WT/DS487/Final), para. 7.367.

appear to be the best interpretation of Article 3.1(b). The United States recognizes that there are multiple potential outcomes to this interpretive question that the Appellate Body has never addressed. Acknowledging that uncertainty, and that an alternative interpretation may be the better reading of the provision, does not legally bar the United States from pursuing its appeal.

32. Nor does pursuing this position render the appeal declaratory in nature. If the Appellate Body determines that the correct interpretation of Article 3.1(b) is the one raised by the U.S. appeal, then the compliance Panel erred, and the United States is legally entitled to relief, which it has requested. Thus, the Appellate Body’s clarification of the interpretation of Article 3.1(b) would in no way be *obiter dicta*.

33. The United States would also like to address three flaws in the EU’s other appellee submission related to the U.S. case before the compliance Panel. First, the EU suggests that the United States advanced exclusively a *de facto* claim under Article 3.1(b).²⁷ This is incorrect. As the Panel recognized, the United States “argues that the French, German, Spanish, and UK A350 XWB LA/MSF measures are *de jure* and/or *de facto* contingent on the use of domestic over imported goods, and are therefore prohibited subsidies...”²⁸ The EU also previously recognized as much.²⁹

34. Second, the EU argues that the United States did not assert before the Panel that Airbus must *use* the domestically produced components in the manufacture of the finished A350 XWB airplanes.³⁰ This is also factually inaccurate. As the compliance Panel stated: “the United States claims that the relevant member States granted A350XWB LA/MSF to Airbus in exchange for commitments from Airbus to locate certain LCA production activities in the member States’ territories and then use the LCA components made in such domestic production activities in downstream LCA production activities’.”³¹ Here is how the EU itself described the U.S. argument before the compliance Panel:

²⁷ See EU Other Appellee Submission, para. 93, chart, box (1); paras. 94, 98.

²⁸ Compliance Panel Report, para. 6.746.

²⁹ See, e.g., EU FWS, para. 439.

³⁰ See EU Other Appellee Submission, paras. 167, 220, 230, 241, 251.

³¹ Compliance Panel Report, para. 6.780.

The United States argues that the investment agreements thus **require Airbus to produce** specific “sub-assemblies and components” or “parts” in the territory of the European Union, which accordingly become “domestic products” of the European Union, **and then use** those “domestic products” as “manufacturing inputs” in the production of the finished aircraft. The United States submits that, by definition, **this means that Airbus must use domestic components and not imports**, or in other words that the subsidies exclusively benefit domestic producers. Since, according to the United States, in each case, the financing was “tied to” these commitments, it is contingent upon the use of domestic over imported “goods”, and is thus prohibited.³²

Indeed, in providing this summary, the EU even reproduced portions of a U.S. submission stating that “the agreements granting LA/MSF were structured in each case so as to require Airbus to use domestic products (the components) in its finished aircraft in order to receive the subsidy,” and that “these commitments meant that Airbus would only receive LA/MSF if it produced particular components within the EU, and then produced (also within the EU) a finished aircraft using those components.”³³ Thus, the EU’s argument on appeal is directly contradicted by its own words and other aspects of the record before the compliance Panel.

35. The EU also mistakenly asserts that the U.S. argument before the compliance Panel was based on the *fact* that domestic components are used downstream in the assembly of the A350 XWB – as opposed to being based on specific provisions in the instruments. The EU simply ignores that A350 XWB components are, by definition, specifically for the A350 XWB and must be used to manufacture A350 XWB aircraft. Otherwise, they would not be A350 XWB components. This is definitional and not subject to reasonable dispute, and the EU did not dispute this before the compliance Panel. There is also the obvious commercial reality that Airbus cannot manufacture all of these parts in the specified domestic territories, throw them all away and thereby not use them, and then acquire duplicates of all of that production from elsewhere for use in assembling the finished A350 XWB aircraft. Again, the EU never suggested that, as a legal matter and as an economic matter, Airbus need not use any of these significant components it was required to manufacture domestically in producing the finished aircraft. It is beyond dispute and integral to A350 XWB LA/MSF that Airbus must use the A350 XWB components and sub-assemblies that Airbus must produce domestically in its downstream production of A350 XWB aircraft.

36. Third, the EU objects to the U.S. invocation of what may be described as penalty provisions in the relevant LA/MSF contracts despite not having explicitly relied on these provisions before the compliance Panel. These provisions appear in the LA/MSF contracts in evidence, and their contents and their existence in these instruments are undisputed. But these penalty provisions also are not critical to the U.S. case. The LA/MSF contracts between EU

³² EU First Written Submission, para. 442 (emphasis added) (internal footnotes omitted).

³³ EU FWS, note 595.

governments and the subsidy recipient clearly provide that Airbus produce specified A350 XWB components and sub-assemblies domestically and then use them in the downstream production of the A350 XWB aircraft for receipt of the subsidy. The separate penalty provisions in the contracts simply further confirm the breach of Article 3.1(b).

37. In sum, there are ample compliance Panel findings, and undisputed facts, to establish that Airbus must produce A350 XWB components, parts, and sub-assemblies in the EU; that these components, parts, and sub-assemblies are “domestic” in nature for purposes of Article 3.1(b); and that Airbus must use these A350 XWB components, parts, and sub-assemblies as inputs in its production in the EU of the finished A350 XWB aircraft. The interpretive legal question that remains for the Appellate Body is whether Airbus’s use of these domestic components, parts, and sub-assemblies in producing the finished aircraft constitutes the use of goods within the meaning of Article 3.1(b), or whether, as the compliance Panel found, a subsidy that requires production of intermediate inputs in addition to the finished product cannot be equated with a contingency on the use of goods for Article 3.1(b) purposes. If the Appellate Body endorses the former interpretation, then A350 XWB LA/MSF is contingent upon the use of domestic over imported goods, and the United States is entitled to the legal relief it has requested. This interpretive question is the one validly raised by the United States in its appeal.

38. We would like to draw a few other items to the attention of the Division today that may be helpful in the Appellate Body’s review of the appeal. First, the compliance Panel’s finding in paragraph 6.802 was that “when read in isolation, the text of Article 7.8 may arguably be viewed to suggest that a Member found to have caused adverse effects through the use of a subsidy would have no obligation to ‘take appropriate steps to remove the adverse effects’ or ‘withdraw the subsidy’ if the subsidy at issue *no longer exists* at the time of the DSB’s adoption of the adverse effects findings.” We put special emphasis on the phrase “may arguably be viewed to suggest”. The compliance Panel went on to apply treaty interpretation to say that the arguable supposition was in fact an incorrect supposition.

39. Turning to paragraph 6.633 of the compliance Panel Report, the compliance Panel said that “[i]n view of these calculations, we find that the (likely understated) rate of return that a market lender would require for lending on similar terms and conditions to the A350XWB LA/MSF contract is in each case *higher* than the (likely overstated) IRR calculated by the EU.” We also turn to the Appellate Body’s report in the appeal of the original proceeding. At paragraph 709, the Appellate Body found that “[t]he adverse effects analysis under Article 5 is distinct from the ‘benefit’ analysis under Article 1.1(b) of the *SCM Agreement* and there is consequently no need to re-evaluate under Article 5 the amount of the benefit conferred pursuant to Article 1.1(b).” And in paragraph 713, the Appellate Body found that “we agree with the Panel that the United States was not required, under Article 5 of the *SCM Agreement*, to establish ‘that all or part of the ‘benefit’ found to have been conferred by the provision of a financial contribution continues to exist, or presently exists’ during the reference period.” In our view, that signals that under Articles 5 and 6, there is no obligation to show that a benefit still exists. As Article 7.8 begins by referring to a panel or Appellate Body report being adopted...within the

meaning of Article 5, then that same principle exists in Article 7.8 because it makes reference to that finding under Article 5.

40. We would also note that in the EU's appellee submission, the EU has made several assertions that it was improper for the compliance Panel to have looked at and applied the same benchmarks for multiple LA/MSF contracts for multiple aircraft. We would look to paragraph 883 of the Appellate Body's report, where the Appellate Body said "we note that we do not consider that it was inappropriate *per se* for the Panel to have arranged the LCA projects into groups and to have determined a range for the project-specific risk premium applicable to the LCA projects within each group." So the Appellate Body has already found that this kind of grouping is in fact not prohibited, whereas the EU says it is in fact prohibited.

41. We would like to end by observing that this is a proceeding involving recourse to Article 21.5 of the DSU by the United States and this involves findings under Articles 5 and 6.3 of the SCM Agreement. Article 7.8 is the remedy for breaches of these provisions and is to be applied in concert with Article 21.5. We have read the EU's submissions and found that the EU makes exclusive reference to Article 7.8. In our view, the proper approach was the one taken by the compliance Panel of a holistic interpretation. To suggest otherwise is an inappropriate treaty interpretation.

Conclusion

42. We began this statement with a discussion of how the EU is asking the Appellate Body to excuse its complete failure to undertake any affirmative compliance steps. This has been a short statement because, despite the large volume of the EU submissions, there is simply no valid reason for the Appellate Body to retroactively absolve the EU of the finding that it breached its obligations under Articles 5 and 6.3.