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

(AB-2010-1/DS316)

COMMENTS OF THE UNITED STATES OF AMERICA
ON THE CLOSING MEMORANDUM OF THE EUROPEAN UNION
FOLLOWING THE FIRST HEARING

December 1, 2010

SERVICE LIST

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Arrest Warrant of 11 April 2000	*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium*, I.C.J. Reports 2002, (ICJ 2002).
Dorman Report	Gary J. Dorman, *The Effect of Launch Aid on he Economics of Commercial Airplane Programs* (Nov. 6, 2006) (Exhibit US-70)
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC – Customs (AB)	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
Ellis Report	NERA, *Economic Assessment of the Benefits of Launch Aid (Nov. 10, 2006) (Exhibit US-80)*
EU Memorandum	Closing Memorandum of the European Union following the First Hearing, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)* (26 November 2010)
Panel Report	*European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, 30 June 2010
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization.
US Appellee Submission	Appellee Submission of the United States *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)* (September 30, 2010)
US – Certain EC Products (AB)	*Appellate Body Report, United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – Lead and Bismuth II (AB)	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000
US – Upland Cotton (AB)	Appellate Body Report, United States – Subsidies on Upland Cotton, WT/DS267/AB/R, adopted 21 March 2005
Vienna Convention	United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331

I. INTRODUCTION

1. The United States submits these Comments in response to the EU Memorandum. Most of the arguments in the EU Memorandum simply repeat points made in the EU Appellant Submission or EU First Oral Statement. To be clear, the United States disagrees with all of them. In light of the limitations on the length of these Comments, the United States relies generally on its earlier submissions, which the European Union ("EU") has never successfully rebutted. These comments will focus on the most serious errors and misstatements in the EU Memorandum.

II. TEMPORAL SCOPE

2. The Panel's reasoning with regard to the temporal scope of the SCM Agreement is compelling. Article 5 of the SCM Agreement provides that "{n}o Member should cause, through the use of any subsidy . . . adverse effects to the interests of other Members," so it binds Members as to the causing of adverse through use of subsidies. Therefore, application of Article 5 to discipline those adverse effects in the present day does not retroactively penalize Members for acts taken prior to entry into force of the SCM Agreement. In line with this, the Panel found that the EU and member State governments caused adverse effects between 2001 and 2006 – well after the entry in to force of the SCM Agreement – through the use of subsidies subject to this dispute. The Panel also found that this "situation", and not the act of providing a subsidy, is the focus of Article 5.[1]

3. To avoid having to remove these subsidies or their adverse effects, the EU has tried to create the impression that any application of a treaty to the present-day effects of pre-treaty government actions (such as the adverse effects of pre-1995 subsidies) is inconsistent with international law. This is obviously incorrect. In its appellee submission, the United States presented the example of applying international environmental treaties to existing pollution, and noted that no one would seriously argue that such obligations would become inoperative if the state had generated the pollution prior to entry into force of the treaty.[2] The same logic applies with regard to the adverse effects of pre-1995 subsidies.

4. The EU has never rebutted this analogy or even tried to explain why it is not comparable to the situation under Article 5. At the hearing, and now in its Memorandum, the EU tried to evade the implications of the pollution example by changing the subject. In the Memorandum, it presents the different hypothetical (incorrectly attributed to the United States) of an obligation that "{n}o Party shall, through the disposal of toxic waste, cause damage to another Party."[3] While the United States welcomes the EU acceptance that LA/MSF is aptly analogized to economic toxic waste, the new hypothetical misses the point. Article 5 does not discipline the one-time act of granting the subsidy or the disbursement of subsidy funds – the analogy to "disposing" toxic waste. It disciplines "causing" adverse effects through the broader concept of

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[1] Panel Report, para. 7.52.

[2] US Appellee Submission, para. 23.

[3] EU Memorandum, para. 5.

"use" of "any subsidy referred to in paragraphs 1 and 2 of Article 1." In addition, paragraphs 1 and 2 define the existence of a subsidy in terms of a benefit conferred by a financial contribution, without requiring that the government still disbursing be funds. Thus, the EU observation that the member States finished disbursing some subsidy funds prior to 1995 indicates nothing about whether use of the subsidies caused adverse effects after January 1, 1995, or whether the subsidies themselves existed after that point. This is particularly true in light of the Panel's findings as to how all of the LA/MSF measures operated together and jointly caused adverse effects to U.S. interests in the 2001-2006 period.

5. For these reasons, the Appellate Body should uphold the Panel's conclusion that Article 5 applies to causing adverse effects through the use of subsidies, and that its application to the 2001-2006 adverse effects of the Airbus subsidies is not retroactive. However, endorsing the EU theory that the SCM Agreement "seeks to discipline a specific government conduct: the granting or maintaining of a subsidy" would not change the outcome. As noted in the previous paragraph, a "subsidy" is a financial contribution that confers a benefit. In this case, the benefit in question is Airbus's enjoyment of LA/MSF or capital contributions on more favorable terms than it could have received in the market. The United States established before the Panel (and the EU does not contest) that with regard to LA/MSF, which represents by far the largest amount of the subsidies, Airbus continued to make payments at less-than-market rates for LA/MSF on all of its aircraft into the 2004-2006 period. Thus, even under the EU theory, the government conduct of "maintaining" the subsidy in the form of below-market LA/MSF payments (and other payments) continued well past 1995 and into the period examined by the Panel.

6. The EU attempts to avoid this conclusion by asserting that the United States argued for "allocation" of subsidies, and that the EU's proposed 17-year amortization period is the "only evidence on the record."[4] This is incorrect. Allocation is one tool that may be used, but is not required, to analyze the benefit of a subsidy. It was not part of the U.S. demonstration of the existence of the subsidies or the adverse effects they caused, or of the Panel's findings on these issues. The EU has done nothing to show that allocation was required in this dispute. It has not demonstrated that a 17-year period, rather than the period during which any financing is outstanding, was appropriate. Nor has the EU ever explained how accounting conventions like allocation or amortization could change the fact that Airbus continued to make payments at less-than-market rates after January 1, 1995, for all of the subsidies at issue in this dispute. Therefore, the EU's argument on temporal scope fails.

III. CONTINUING BENEFIT

7. The Panel correctly found that Articles 1, 2, and 5 of the SCM Agreement impose no obligation on a complaining party to establish that post-disbursement transactions did not extinguish, extract, or withdraw the continuing benefit of past subsidies. But even if post-

[4] EU Memorandum, para. 10.

subsidy events, other than a full privatization[5] could reduce the subsidy benefit, as the EU posits, the burden of establishing that the necessary conditions existed would fall on the responding party. As the EU made clear at the hearing, under its theory the responding party identifies and raises transactions it considers as "significant" as a defense to a claim of subsidization. The complaining party clearly cannot identify in advance which transactions those will be, guess the reasons, and provide an advance rebuttal. However, the EU has failed throughout this proceeding to establish that the alleged extinction/extraction transactions were "significant" or explain how they would reduce or eliminate the benefit conferred by the immense subsidization of Airbus large civil aircraft by the EU and its member States.

8. To begin, the EU has put forward no argument that would justify reversing the Panel's primary conclusion that Article 5 of the SCM Agreement requires only that a Member has conferred a specific subsidy in the form of a financial contribution that confers a benefit, and that the subsidy causes adverse effects. Nothing in the article suggests that the subsidy must be established both at the time of grant and at some later date. The EU has pointed out that in *US – Certain EC Products*, the Appellate Body found that a full privatization "*presumptively* extinguishes any benefit received from the non-recurring financial contribution bestowed upon a state-owned firm."[6] That finding does not apply to the alleged extinction/extraction activities in this dispute, as none of them was a full privatization, the type of transaction covered by the findings in those reports.[7] The EU has advocated extending the reasoning in *US – Certain EC Products* to transactions other than full privatizations, but in that same report the Appellate Body strongly rejected that possibility.[8]

9. Moreover, the United States has explained at length why the Appellate Body's reasoning in *US – Certain EC Products* does not apply outside the limited context of countervailing duties on companies that were subject to a full privatization.[9] It is worth noting, in particular, that the Appellate Body in *US – Upland Cotton* has already rejected an argument similar to the EU's. In response to the U.S. argument that subsidies to a producer of raw materials cannot be presumed to "pass through" to the producer of finished products, the Appellate Body found that:

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

[5] "Full privatization" means the type of transaction described in *US – Certain EC Products (AB)* – "a privatization at arm's length and for fair market value where the government transfers all or substantially all the property and retains no controlling interest in the firm." *US – Certain EC Products*, para. 117.

[6] *US – Certain EC Products (AB)*, para. 126.

[7] *US – Certain EC Products (AB)*, paras. 118-119.

[8] *US – Certain EC Products (AB)*, paras. 118-119.

[9] US Appellee Submission, paras. 105-118.

> Part III of the SCM Agreement. Nevertheless, we acknowledge that the "subsidized product" must be properly identified for purposes of significant price suppression under Article 6.3(c) of the SCM Agreement. And if the challenged payments do not, in fact, subsidize that product, this may undermine the conclusion that the effect of the subsidy is significant suppression of prices of that product in the relevant market.[10]

The same logic applies in this dispute, as the EU concedes that the subsidies in question conferred a benefit on Airbus aircraft when granted, through the extinction/extraction transactions, and even afterward. Moreover, the Panel specifically found that the subsidized product continues to be present in the market and that use of the subsidies causes adverse effects today.

10. However, even if the Appellate Body concludes that transactions in addition to full privatizations can extinguish/extract subsidies, the EU has established no basis to believe that the activities it identified did so. As the Panel observed, "based on the economic realities of the production of Airbus LCA, we consider the Airbus Industrie consortium (*i.e.*, each of the Airbus partners, their respective affiliates and Airbus GIE) to be the *same producer* of Airbus LCA as Airbus SAS."[11] The EU Memorandum now attempts to challenge this finding on the ground that the Panel did not take into account that the reorganization of Airbus GIE into Airbus SAS "required the 'old' shareholders to exercise restraint . . . to preserve the market value of the new shareholders' investment."[12] The change in control is illusory. Most of the old Airbus partners – BAE Systems, DaimlerChrysler, and even CASA – had minority shareholders. The creation of Airbus SAS simply meant that there were more of them and their identities were different. The EU also argues that the Panel failed to take account of "increases in cost transparency and managerial and organisational efficiency of the new entity."[13] However, both state-owned and privately held companies strive to increase their efficiency, and any increased efficiency would do nothing to change the benefit associated with prior subsidies. Moreover, to the extent that subsidized funds helped to pay for the reorganization, any increased efficiency and resulting enhancement of Airbus' competitiveness against Boeing was the *effect* of subsidies, rather than proof that the subsidies had ceased to exist. Since so little changed about the production of Airbus aircraft, there is no basis to conclude that that there was any change in benefit those subsidies conferred on the aircraft.

11. The Appellate Body findings regarding the extinction of subsidies following full privatizations have emphasized that the relevant transactions were at arm's length.[14] There are obvious reasons for this requirement, as a transaction not at arm's length might involve collusive behavior that would negate the assumption underlying the extinction findings, namely, that the

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[10] *US – Upland Cotton (AB)*, para. 472.

[11] Panel Report, para. 7.199.

[12] EU Memorandum, para. 21.

[13] EU Memorandum, para. 22.

[14] *US – Certain EC Products (AB)*, para. 54; *US – Lead and Bismuth II (AB)*, para. 65.

purchaser paid the full value of what it got, including any subsidies.[15] The EU makes much of the parenthetical statement in the Panel's observation that "{t}he European Communities does not argue, much less demonstrate, that the transactions in question (with the exception of the stock exchange transaction of EADS shares) were on arm's length terms."[16] The parenthetical statement refers to the 2006 sales by DaimlerChrysler, Lagardère, and the French State of some of their EADS shares, but as events after the filing of the U.S. panel request, these transactions cannot change the conclusion as to whether the EU measures were inconsistent with its WTO obligations at the time the United States requested establishment of a Panel. The EU attempts to stretch the parenthetical statement to encompass the IPOs of EADS and ASM,[17] but as even the EU concedes that these transactions did not occur in on a stock exchange,[18] it is impossible to view the Panel's finding regarding "stock exchange transactions" as relevant. (The United States demonstrated that the ASM IPO gave rise to a number of additional questions that would require answers before it could be treated as a fair market value, arm's length transaction.[19] The same would likely be true for the EADS transactions, but the EU never submitted evidence that would have allowed the Panel to evaluate whether they took place at arm's length or for fair market value.) For all of these reasons, the EU argument to treat the IPO of Aérospatial-Matra as arm's length because it "adopted the same basic procedure as the EADS IPO" must also fail.[20] In short, the EU does nothing to disprove the Panel's finding that the EU never established the arm's length nature of the alleged extinction/extraction activities.

12. In the end, the EU seeks to nullify this finding by arguing that "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."[21] It cites no authority for this assertion, and in fact these concepts address different concerns – arm's length deals with the potential for collusion between parties with common interests, while fair market value goes only to the price paid. A transaction at market price could involve collusive non-price terms, so the two concepts are not identical, as the EU asserts. The Appellate Body has in the past listed them as separate criteria, reflecting a similar understanding.[22]

13. The section of the EU Memorandum on continued benefit also argues that private actions, such as the alleged extinction/extraction activities, can "withdraw" a subsidy for purposes of Article 7.8 of the SCM Agreement.[23] However, as Article 7.8 provides for a recommendation

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[15] *US – Certain EC Products (AB)*, para. 127.

[16] Panel Report, para. 7.249.

[17] EU Memorandum, paras. 25-26.

[18] EU Memorandum, para. 27.

[19] *E.g.*, Panel Repport, para. 4.340.

[20] EU Memorandum, para. 36.

[21] EU Memorandum, para. 38.

[22] *E.g., Lead and Bismuth II (AB)*, para. 65; *US – Certain EC Products*, para. 117.

[23] EU Memorandum, paras. 13-18.

that "the Member . . . shall withdraw the subsidy," action by a private party independent of the government would not qualify. The EU attempts to get around the implications of this language by arguing that an International Court of Justice decision provides that "the obligation of withdrawal is an obligation of result, not of means.[24] However, the passage cited by the EU merely observes that reparation of a wrongful act under international law "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed."[25] The Court then found that the responding party, Belgium, should "by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated."[26] The United States fails to see how this finding, unrelated to the covered agreements or customary rules of international law for the interpretation of treaties, would have any relevance in this proceeding. In any event, it clearly does not support the EU's "withdrawal is an obligation of result" interpretation. Rather, if it applied to this dispute, it would require the EU to withdraw the subsidy (the equivalent of "cancel the warrant") *and also* to eliminate the adverse effects (the equivalent of "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed.") In short, the authorities cited by the EU do not support the view that the EU can evade its obligations under the SCM Agreement by relying on the supposed effects of actions by non-governmental parties.

IV. LA/MSF AS A PROGRAM

14. The EU discussion of the U.S. appeal of the Panel's finding that the LA/MSF Program is not a measure for purposes of Articles 1 and 2 simply repeats arguments made in the EU Appellant Submission. None of them have merit. In particular, the EU argument that the United States cannot appeal the Panel's finding as inconsistent with Articles 1 and 2 ignores the fact that the Panel rendered its finding pursuant to those Articles, making them the only possible basis for an appeal of the Panel's incorrect application of the legal standard. The U.S. oral statement at the hearing fully addresses this point, and all of the others raised in this section of the EU Memorandum.[27]

V. BENEFIT CONFERRED BY LA/MSF

15. In its submission and at the hearing, the United States demonstrated that the Panel correctly relied on Dr. Ellis's risk premium in determining the benchmark for LA/MSF to the A300, A310, and A380, and correctly rejected Prof. Whitelaw's proposed risk premium for numerous reasons. The EU Memorandum focuses its criticisms in three areas. It first asserts that a figure used by Dr. Dorman in his modeling of the effects of LA/MSF undermines the credibility of Dr. Ellis's benchmark. However, the two figures measure different things, so one

[24] EU Memorandum, para. 15, *citing Arrest Warrant of 11 April 2000*, para. 76 (ICJ 2002).

[25] *Arrest Warrant of 11 April 2000*, para. 76, *quoting Factory at Chorzów*, P.C.I.J. Series A, No. 17, p. 47.

[26] *Arrest Warrant of 11 April 2000*, para. 76.

[27] Oral Statement of the United States at the First Hearing, *EC – Measures Affecting Trade in Large Civil Aircraft*, paras. 66-80.

cannot be legitimately compared with the other. The EU then argues that LA/MSF did not reduce the risk faced by risk-sharing suppliers who provided financing to Airbus. However, Dr. Dorman's findings, which the EU accepts, show that this assertion is incorrect. Finally, the EU contends that actual sales figures for the A330-200 show that it was not a risky proposition. But an *ex post* consideration of outcomes says nothing about how risky a project was at its initiation. Thus, none of the EU arguments undercut the Panel's findings.

A. Comparison of the Ellis benchmark and the Dorman industry-wide discount rate

16. The Ellis Report and the Dorman Report had different objectives. Dr. Ellis sought to construct the rate a commercial lender would charge for providing Airbus financing with terms comparable to the LA/MSF it actually received. Dr. Dorman sought to understand how LA/MSF affected an aircraft manufacturer's product launch decisions by examining a generic manufacturer's business case for a generic aircraft, and examining how LA/MSF at varying amounts would affect the profitability of the business case.[28] By their very natures they are not comparable. Dr. Ellis derived a company-specific figure indicating how much a commercial financier would charge for a particular type of financing before taxes. Dr. Ellis sought to estimate a generic figure covering the cost of all types of financing used by companies in the aerospace sector net of taxes.

17. Dr. Dorman estimated a discount rate "representative of the long-term cost of capital for a 20-year investment project in the aerospace industry."[29] He used the average cost of capital for six U.S. aerospace companies: Boeing, General Dynamics, Lockheed Martin, Northrop Grumman, Raytheon and United Technologies,[30] which covered all forms of financing by these companies – equity and all forms of debt – on an after-tax basis. Dr. Dorman treated this figure as an assumption, and tested it against other assumptions ranging from 8 to 11 percent.[31] Because the study was comparative in nature, looking at profits with and without LA/MSF, the level of the discount rate (which factored into both sides of the equation) was not terribly important. As Dr. Dorman explained, "{w}hile the specific numbers . . . would change, their relationships and implications would not."[32] His conclusion was that LA/MSF, in light of its nature as pre-launch financing and its very substantial magnitude, significantly distorts the market by making it more likely that Airbus will launch new aircraft models and will do so sooner.

18. In contrast, Dr. Ellis sought to develop a benchmark specific to Airbus and the particular LA/MSF form of financing by adding (1) the risk-free (*i.e.*, government) borrowing rates in France, Germany, Spain, and the United Kingdom, (2) a corporate risk premium based either on Airbus-specific data or data from those countries, and (3) a risk premium specific to the risk

[28] Panel Report, para. 7.1882.

[29] Dorman Report, p. 3, note 6.

[30] Dorman Report, p. 3, note 6.

[31] Dorman Report, p. 3, note 6.

[32] Dorman Report, p. 3, note 6.

imposed by LA/MSF.[33] He considered only how much a commercial financier would charge, and not how those costs would affect the borrower's balance sheet.

19. Thus, there are two critical differences between these figures that make it impossible to compare them as such. First, Dr. Ellis addresses specifically the price for Airbus to secure financing with terms comparable to LA/MSF. In contrast, Dr. Dorman's number reflects figures applicable to all forms of financing by companies other than Airbus. He uses a sample of six aerospace companies in the U.S. market, and none in the European markets in which Airbus operates. Moreover, Dr. Dorman does not differentiate among types of financing, as is clear from his use of the same discount rate in the base case (no LA/MSF) and the various LA/MSF scenarios, and he did not look more specifically at how Airbus was financed and what mix of equity and debt it had on its balance sheet.

20. Second, not only does Ellis specifically cover LA/MSF to Airbus and Dorman all financing used by U.S. companies, they also use different yardsticks. Dr. Dorman's discount rate reflected the Weighted Average Cost of Capital ("WACC") of a sample of U.S. aerospace companies, which includes the cost of equity and the after-tax cost of debt. His 10 percent discount rate does not provide "a reliable measure of the profit risk in the aerospace industry" as the EU asks the Appellate Body to believe,[34] because he derived his data from financing costs filtered through the balance sheets of the companies involved, not the actual price a commercial investor would charge for certain financing. One key point is that he used financing cost data net of taxes. They accordingly do not reflect what actual financiers charged the companies for actual financing. In contrast, Dr. Ellis used pre-tax data reflecting what financiers actually charged in exchange for providing financing.

21. It is also important to note that Dr. Dorman based his exercise on "a high-volume wide-body airplane program" with "850 expected deliveries.[35] He did not, as the EU asserts, seek to model the cost or risk of the 787 or any other specific aircraft.[36]

22. The EU ignores these important points and continues to suggest, as it did before the Panel, that the assumed Dorman discount rate and the Ellis benchmark commercial rate reflect the same thing. The Panel rejected that argument and the broader EU critique of the Ellis benchmark following detailed briefing by the parties. The EU provides no valid reason to reverse the Panel's careful findings in this respect.

B. A380 Launch Aid and the EU's Risk-Sharing Supplier Benchmark

23. The Panel's finding that LA/MSF for the A380 reduced the riskiness of any additional private financing for that aircraft, was one of reasons discrediting the Whitelaw risk-sharing

[33] Ellis Report, pp. 7-8, 9-10, 14-18, and 19-21.

[34] EU Memorandum, para. 81 (emphasis in original).

[35] Dorman Report, p. 3.

[36] EU Memorandum, para. 74.

supplier lending rates as a benchmark. The EU asserts that the Panel's findings in this respect were "speculative views."[37] In fact, the Panel's finding was consistent with a range of other findings throughout the Panel Report as to the risk involved in large civil aircraft launch and how the economics and effects of LA/MSF transfer such risk from Airbus to the lending governments.

24. The parties largely agreed on the nature and magnitude of risk in the large civil aircraft market, and also agreed that LA/MSF operates to shift this risk from Airbus to the governments. The Dorman Report, which the Panel relied on heavily, makes precisely these points. The Panel reviewed the economics of LA/MSF and large civil aircraft development in great detail. So did other evidence before the Panel, much of which it specifically referenced.[38] The Panel's findings that LA/MSF lessens the risk faced by other entities financing Airbus aircraft development, in other words, were well reasoned and supported by evidence, and not merely a "speculative view."

25. On the other hand, in arguing that LA/MSF had no impact on Airbus's ability to secure other forms of financing, the EU relies on two assertions that find no support in the Panel report, in the record before, or in the economic arguments made before the Panel:

(i) the statement that "{w}hile 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;"[39] and

(ii) the statement that "{a}meliorating the pain of failure for any single participant does not, however, increase the chances of success or, conversely, reduce the risk of failure."[40]

The first of these two statements indicates that the EU considers that the provision of massive amounts of LA/MSF to an aircraft project does not ultimately change that project's chances of success. The second suggests that the only thing LA/MSF does is to serve as a form of financial insurance to Airbus in the case of failure of a new large civil aircraft model. Elsewhere, the EU also indicates its view that LA/MSF *diversifies* risk, but does not *reduce* it.[41]

26. These statements and the conclusions the EU draws from them, are on their faces, thoroughly illogical and demonstrably incorrect. Of course LA/MSF increases a project's chances of success and decreases the risk of failure – that is the very reason that it motivates a company to launch an aircraft that it otherwise would not launch. And after the aircraft becomes

[37] EU Memorandum, para 89.

[38] *See generally* US FWS paras. 110-135; Panel Report, paras. 7.332-7.333, footnotes 2351, 2352, and 2354, and para. 7.367, footnote 2421.

[39] EU Memorandum, para. 93.

[40] EU Memorandum, para. 96.

[41] E.g., EU Memorandum, para. 96.

a reality, the fact of subsidized funding decreases the cost to Airbus of supplying the aircraft, influencing the economics of the model throughout its life.

27. The Panel's findings reflect this understanding. It found that:

- "LA/MSF functions as a risk transferring device which significantly alters the economics of a decision to launch any given LCA programme;"[42]
- "the provision of LA/MSF improves the predicted results of the aircraft programme in question;"[43] and
- "LA/MSF was necessary for Airbus to have launched the A300 as originally designed and at the time that it did. We come to the same conclusion with respect of the remaining models of Airbus LCA. . . ."[44]

Thus, as Dr. Dorman explained, LA/MSF "both increases the expected profitability of a program *and* lowers its risk from the perspective of the manufacturer."[45] The Panel adopted this reasoning, observing specifically that LA/MSF had the "dual impact of risk reduction and profit enhancement."[46]

28. LA/MSF, in other words, does precisely what the EU now suggests it does not. It massively shifts the risk of aircraft launch to the subsidizing governments and, in doing so, enables the launch of a new model large civil aircraft. It does not just *diversify*, but actually *reduces* risk, and it *enhances* future profits. LA/MSF affects the launch decision, the likelihood of success of a launch, and its timing and future profitability. It does not just "ameliorat{e} the pain of failure" as the EU claims but, increases the chances of success or, conversely, reduces the risk of failure.[47]

29. Finally, as noted, the Panel's finding on the effect of LA/MSF on the risk faced by private entities financing Airbus aircraft development was only one of several reasons for rejecting the EU's Whitelaw benchmark. Other reasons included that

- the EU's expert relied on a non-representative sample of contracts,
- the EU refused to provide underlying data needed to validate its proposal,

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[42] Panel Report, para. 7.1934.

[43] Panel Report, para 7.1934.

[44] Panel Report, para. 7.1934.

[45] Dorman Report, p. 9 (emphasis added).

[46] Panel Report, para 7.1934.

[47] Cf. EU Memorandum, para 93.

- "the one contract that the European Communities has submitted shows that there is at least one major difference between the repayment terms under this contract and LA/MSF";

- "risk-sharing suppliers had incentives to lower their expected rates of return"; and

- "information contained in the Airbus A380 business case which suggests that the risk-sharing participants' involvement in the A380 project may not have been on strictly market terms."[48]

Thus, the finding discussed in the EU Memorandum was ultimately only one of many flaws that made the Whitelaw benchmark unreliable. Even assuming *arguendo* that the Panel's conclusion regarding the effect of LA/MSF on the risk of private financing was "speculative", as the EU believes, this would not affect the validity of the Panel's overall rejection of the Whitelaw numbers.

C. The alleged "conservative nature" of A330-200 delivery forecasts

30. Finally, the EU attempts to characterize the A330-200 project as "low risk" based on a comparison of the actual performance of that model against the delivery forecast in the business case.[49] Any *ex post* performance, however, is legally irrelevant as it is the risk *at the time of financing* that matters when a lender determines his risk and sets repayment terms. The fact that a risky transaction turns out well does not mean it was less risky. To take an example, betting a single number on a roulette wheel pays off at more than thirty-to-one odds. When it is a success, the winnings are lucrative. That does not, after the fact, mean that the initial bet was any less risky.

VI. REMAND

31. The EU requests the Appellate Body, in the event it decides the extinction issues in its favor, to remand this dispute to the Panel.[50] The only support it provides is the assertion that "there is no provision in the DSU that prevents remand."[51] However, in reality, Article 17.13 of the DSU clearly limits the options at this stage to upholding, modifying, or reversing the legal findings and conclusions of the Panel. The DSU does not provide for remand. Indeed, WTO Members have been engaged for some time in negotiations over whether the DSU should be amended to provide for the possibility of a remand. Members have recognized that this is a complicated issue that would require a number of decisions by Members, including the scope of any remand, the precise task of the panel, timing, and the disposition of any findings not subject to remand.

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[48] Panel Report, para. 7.480.

[49] EU Memorandum, para 86.

[50] EU Memorandum, para. 54.

[51] EU Memorandum, para. 54.