

**FINAL NON-BCI VERSION**

***EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES –  
MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT***

**(AB-2010-1 / DS316)**

**Other Appellant Submission of the United States of America**

August 23, 2010

***EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES –  
MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT***

**(AB-2010-1 / DS316)**

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Short Form	Full Citation
Panel Report	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, circulated on 30 June 2010
<i>Australia – Leather (Panel)</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather</i> , WT/DS126/R, adopted 16 June 1999
<i>Canada – Aircraft (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999
<i>Canada – Aircraft (Panel)</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS70/AB/R
<i>Chile – Alcoholic Beverages (AB)</i>	Appellate Body Report, <i>Chile - Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
<i>Chile – Price Band System (AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>EC – Biotech (Panel)</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006
<i>EEC – Regulation on Imports of Parts and Components (GATT)</i>	GATT Panel Report, <i>EEC – Regulation on Imports of Parts and Components</i> , L/6657, BISD 37S/132, adopted 16 May 1990
<i>Japan – Alcoholic Beverages II (AB)</i>	Appellate Body Report, <i>Japan - Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996

<i>Japan – DRAMs (Panel)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R, adopted 17 December 2007, as modified by the Appellate Body Report, WT/DS336/AB/R
<i>Japan – Film (Panel)</i>	Panel Report, <i>Japan - Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998
<i>Japan – Semi-Conductors</i>	GATT Panel Report, <i>Japan - Trade in Semi-Conductors</i> , L/6309, BISD 35S/116, adopted 4 May 1988
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States - Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States - Sunset Review of Anti Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Offset Act (Byrd Amendment) (AB)</i>	Appellate Body Report, <i>United States - Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
<i>US – OCTG Sunset Reviews (AB)</i>	Appellate Body Report, <i>United States - Sunset Reviews of Anti Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Softwood Lumber IV (AB)</i>	Appellate Body Report, <i>United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004

<i>US – Upland Cotton (AB)</i>	Appellate Body Report, <i>United States - Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005
<i>US – Upland Cotton (Article 21.5 – Brazil) (AB)</i>	Appellate Body Report, <i>United States - Subsidies on Upland Cotton - Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008
<i>US – Upland Cotton (Panel)</i>	Panel Report, <i>United States - Subsidies on Upland Cotton</i> , WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report, WT/DS267/AB/R
<i>US – Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1

## TABLE OF ABBREVIATIONS

<b>Abbreviation</b>	<b>Description</b>
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
LA/MSF	Launch Aid/Member State Financing
LCA	Large Civil Aircraft
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
USDOC	United States Department of Commerce
WTO	World Trade Organization



## **I. Introduction and Executive Summary**

1. The United States seeks review of two errors committed by the Panel in its report, namely (1) that certain launch aid does not constitute a prohibited subsidy, and (2) that the United States had not demonstrated the existence of the Launch Aid Program.

2. First, the United States seeks review of the Panel's analysis of *de facto* export contingency under Article 3.1(a) and footnote 4 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and its finding that the French A380, the French A340/500-600, the Spanish A340/500-600, and the French A330-200 launch aid was not contingent in fact upon anticipated export performance. The United States contends that the Panel erroneously applied a standard, not found in the text of the SCM Agreement, that would require evidence of specific member State "motivation" to find export subsidization. By requiring such evidence of "motivation," the Panel introduced a subjective requirement where none exists in Article 3.1(a) and footnote 4. This fundamental error led the Panel to conclude that this requirement had not been met and, consequently, that *de facto* export subsidization had not been demonstrated in respect of these four instances of launch aid.

3. The United States therefore respectfully requests that the Appellate Body reverse the Panel's finding on this issue, in paragraph 7.689 of its report, that the United States had not shown that the granting of the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid was contingent in fact upon anticipated export performance. The United States also respectfully requests that the Appellate Body complete the analysis by applying the correct legal standard and concluding that the EU, France and Spain acted inconsistently with their respective obligations under Article 3.1(a) of the SCM Agreement by granting launch aid that was contingent in fact upon anticipated export performance, in respect of

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the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid. Finally, the United States requests that the Appellate Body clarify the Panel’s specification of the time-period within which the export subsidies must be withdrawn to make clear that the rulings and recommendations of the DSB address the time-period for withdrawing the prohibited export subsidies discussed above.

4. The second error for which the United States seeks review concerns the Panel’s error in concluding that the United States had not demonstrated the existence of the Launch Aid Program, as distinct from the individual instances of launch aid that were found. Although the United States did not challenge the Launch Aid Program “as such,” the Panel applied the legal framework set out by the Appellate Body in *US - Zeroing (EC)* for determining whether an alleged measure could be challenged “as such” in WTO dispute settlement proceedings. In so doing, the Panel committed legal error and incorrectly inferred from the facts before it that the United States had not demonstrated the existence of the Launch Aid Program. The Panel also erred in its alternative finding, in which it concluded that, even if the approach set out in that report would not require, as a legal matter, that the United States demonstrate the general and prospective application of the Launch Aid Program, the Panel would nevertheless have found that the United States had not established the existence of the Launch Aid Program. As a result of the Panel’s application of an improper legal framework, the Panel also failed to determine whether the Launch Aid Program constituted a subsidy that causes adverse effects to the interests of the United States.

5. The United States respectfully requests that the Appellate Body *find* that (1) the Launch

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Aid Program is a measure subject to challenge in WTO dispute settlement proceedings; and (2) the Launch Aid Program constitutes a specific subsidy, provided by France, Germany, Spain and the United Kingdom to Airbus, that causes adverse effects to the interests of the United States.

### **II. The Panel Erred in Finding that Certain Launch Aid Did Not Constitute Prohibited Export Subsidies**

6. The first error for which the United States seeks review concerns the Panel's analysis of *de facto* export contingency under Article 3.1(a) and footnote 4 of the SCM Agreement. The United States claimed that each of the following seven instances of launch aid constituted a *de facto* export subsidy: French A380 launch aid, German A380 launch aid, Spanish A380 launch aid, UK A380 launch aid, French A340/500-600 launch aid, Spanish A340/500-600 launch aid, and French A330-200 launch aid. The Panel found that the A380 launch aid provided by Germany, Spain and the UK was contingent in fact upon anticipated export performance, but did not so find in respect of the other challenged launch aid. This latter finding is the subject of this aspect of the U.S. request for appellate review.

#### **A. The SCM Agreement Does Not Require Evidence of a Subsidizing Member's Subjective Motivation to Establish *De Facto* Export Subsidization**

7. Article 3.1(a) generally prohibits "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance" (footnote omitted). Footnote 4 to that provision adds the following clarification for establishing *de facto* export subsidization:

This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

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A complaining Member alleging *de facto* export subsidization must thus demonstrate (i) the granting of a subsidy (ii) that is “tied to” (iii) actual or anticipated exportation or export earnings.<sup>1</sup> With respect to the second element (“tied to”), the Appellate Body has observed that the granting of the subsidy must be “conditional” or “dependent for its existence on” actual or anticipated export performance.<sup>2</sup>

8. Nothing in the text of Article 3.1 or footnote 4 *compels* an inquiry into the subjective intent of a Member in the context of the *tie* between the subsidy and anticipated exports. An examination of such a tie focuses instead on the *relationship* between a particular subsidy and anticipated exports. Rather than focusing on any particular factor, or requiring evidence of any one factor, the Appellate Body has emphasized that “this relationship of contingency, between the subsidy and export performance, must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which is likely to be decisive in any given case.”<sup>3</sup> The subjective motivation of a granting authority may be one factor in that analysis, but is not in and of itself a necessary condition for a finding of contingency.

9. Previous Appellate Body and panel reports examining *de facto* export subsidies make clear that the demonstration of the tie between a subsidy and anticipated exports does *not* require evidence of subjective motivation of the subsidizing Member. In *Canada - Aircraft*, the panel

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<sup>1</sup> *See Canada - Aircraft (AB)*, para. 171.

<sup>2</sup> *Canada - Aircraft (AB)*, para. 166, quoting *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 494; *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 289.

<sup>3</sup> *Canada - Aircraft (AB)*, para. 167 (original emphasis).

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considered whether certain royalty-based financing to underwrite the costs of developing a new aircraft model – virtually identical to launch aid – constituted a *de facto* export subsidy. The panel examined a range of evidence without giving decisive weight to the presence or absence of any particular factor, stating the following:

Footnote 4 ... refers to “facts” in general, without any suggestion that certain factual considerations should prevail over others. In our opinion, it is clear from the ordinary meaning of footnote 4 that any fact could be relevant . . . In any given case, the relative importance of each fact can only be determined in the context of that case, and not on the basis of generalities.<sup>4</sup>

In this respect, the Appellate Body noted in its report that it “agree[d] with the Panel that what facts *should* be taken into account in a particular case will depend on the circumstances of that case [and] that there can be no general rule as to what facts or what kinds of facts *must* be taken into account.”<sup>5</sup>

10. Similarly, in *Australia - Leather*, the panel concluded that certain grants constituted *de facto* export subsidies without equating the requirement of a tie with the subjective motivation of the subsidizing Member. Indeed, the panel went so far as to expressly avoid making any findings about the motivation of the subsidizing Member: “We are not drawing any specific conclusions concerning the intent of the Australian government – we recognize that there may have been a number of purposes, a variety of ‘intent’, involved in the decision to assist [the subsidized firm].”<sup>6</sup>

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<sup>4</sup> *Canada - Aircraft (Panel)*, para. 9.337 (original emphasis; footnote omitted).

<sup>5</sup> *Canada - Aircraft (AB)*, para. 169 (original emphasis).

<sup>6</sup> *Australia - Leather (Panel)*, para. 9.65, fn. 210.

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11. These reports thus recognize that Article 3.1(a) and footnote 4 call for *de facto* export subsidization to be determined on the particular set of facts in a dispute, and that no one fact, such as the subjective motivation of the subsidizing Member, can be a prerequisite to such a determination.

**B. The Panel Improperly Required Evidence of Subjective Motivation to Find That the United States Had Demonstrated the Export Contingency of the Challenged Launch Aid**

12. In its analysis of the U.S. export subsidy claims, the Panel departed significantly from the above, objective legal standard of “conditionality” under Article 3.1(a) and footnote 4. Instead, the Panel effectively and erroneously applied a standard, not found in the text of the SCM Agreement, that *requires* evidence of specific member State “motivation” to find export subsidization.

13. The Panel found that the extensive evidence submitted by the United States demonstrated the granting of a subsidy (launch aid) and the Airbus governments’ anticipation of exports in respect of each of the seven instances of launch aid challenged by the United States.<sup>7</sup> As to the requisite “tie” between the subsidies and anticipated exports, the Panel found that each of the seven launch aid contracts at issue established repayment terms that generally required Airbus to make a substantial number of exports.<sup>8</sup> This led the Panel to conclude in respect of each of the seven challenged instances of launch aid that, “[the] evidence support[ed] the view that the provision of [launch aid] on sales-dependent repayment terms was, at least in part, ‘conditional’

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<sup>7</sup> See Panel Report, paras. 7.650, 7.654, 7.657 and 7.660.

<sup>8</sup> See Panel Report, para. 7.678.

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or ‘dependent for its existence’ upon the EC member States' anticipated exportation or export earnings.”<sup>9</sup> As discussed below, the Panel’s correct recognition of “conditionality” or “dependence” at this point in its analysis was sufficient to determine that the provision of all seven instances of launch aid contracts was tied to anticipated exports.

14. However, the Panel concluded that this demonstration was “{not} decisive”<sup>10</sup> and, following a review of additional evidence provided by the United States, found that only the German, Spanish, and UK A380 launch aid constituted *de facto* export subsidies,<sup>11</sup> and that the United States had failed to demonstrate that the other instances of challenged launch aid were provided, “even in part, on the *condition* or *because* of {the member State’s} anticipation of exports.”<sup>12</sup>

15. The Panel explained that it considered the German, Spanish and UK A380 launch aid to be export subsidies on the basis of its review of the facts:

These facts included not only *evidence showing that compliance with the sales-dependent contractual repayment terms would necessarily involve exportation*, but also evidence of the three governments' anticipation of export performance, the fact that they counted upon and expected Airbus to fully repay the loaned principal plus interest, as well as other contractual provisions and information advanced by the United States that revealed at least part of the respective *government's motivation for entering into each contract*.<sup>13</sup>

16. In other words, the Panel found the following four elements critical to its finding of *de*

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<sup>9</sup> Panel Report, para. 7.678.

<sup>10</sup> Panel Report, para. 7.678.

<sup>11</sup> See Panel Report, paras. 7.680-7.681, 7.683 and 7.689.

<sup>12</sup> Panel Report, paras. 7.685-7.688 (original italics).

<sup>13</sup> Panel Report, para. 7.690 (emphasis added).

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*facto* export contingency with respect to the German, Spanish and UK A380 launch aid: (i) repayment terms that necessarily involved exportation; (ii) anticipation of export performance; (iii) member States’ reliance on full repayment by Airbus; and (iv) the *motivation* of the member States to promote exports through the launch aid contracts. The Panel had found the first three of these factors to exist with respect to *all seven* challenged instances of launch aid.<sup>14</sup> The only element that the Panel did not find for the French A380, French and Spanish A340-500/600 and French A330-200 launch aid was the specific motivation of the respective member State to promote exports. The Panel’s own characterization of its reasoning thus reveals that the Panel effectively *required* evidence of specific motivation in order to find a tie between the subsidy and anticipated exports.

17. The Panel’s quest for evidence of the subjective motivation of the member States is particularly apparent in its analysis of “conditionality” with respect to Spanish A340-500/600 launch aid. After considering the repayment terms of the launch aid contracts, the Panel considered “additional evidence” for each specific instance of launch aid challenged by the United States. As to the Spanish A340-500/600 launch aid, the United States had argued that certain preambular language in the launch aid contracts together with evidence of the repayment

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<sup>14</sup> As to the second factor, the Panel found anticipated export performance in the previous section of its analysis before proceeding to discuss whether the requisite tie existed between the subsidy and the anticipated exports. *See* Panel Report, paras. 7.654 (French, German, Spanish and UK A380); 7.657 (French and Spanish A340-500/600); 7.660 (French A330-200). As to the first and third factors, the Panel found that the repayment terms of all seven launch aid contracts necessarily involved a substantial number of exports and that the member States were counting on such repayment resulting from those exports. *See* Panel Report, para. 7.678.



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terms of the launch aid contracts and the market forecasts provided by Airbus, established the fact that Airbus exports were not only “anticipated,” but that they were a critical condition expected to be met in exchange for launch aid from Spain. The Panel acknowledged that preambular language in the launch aid contract included the following statements:

[

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] <sup>15</sup>

18. The Panel also found these statements to be similar to the statements it had examined in the context of the Spanish A380 launch aid,<sup>16</sup> for which the Panel concluded that the requisite tie

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<sup>15</sup> Panel Report, para. 7.687, quoting Spanish A340-500/600 Launch Aid Contract, DS316-EC-BCI-0000534, at 2 (Exhibit US-37 (**BCI**)) (BCI Panel Report, para. 7.688).

<sup>16</sup> The Panel was referring to its evaluation of certain statements from the Spanish A380 launch aid contract:

We also find persuasive the additional evidence the United States has pointed to in respect of the Spanish A380 contract. In particular, we note that the sixth preambular paragraph that is cited by the United States explicitly states that the Spanish government's support for the A380 project is [

\* \* \*

]. The seventh preambular paragraph then goes on to identify that the [

\* \* \*

]. We are satisfied that together with the evidence the United States has advanced concerning the exchange of commitments between Airbus and the Spanish government, the evidence discussed in this paragraph demonstrates that the

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between the subsidy and anticipated exports existed. However, the Panel determined that the above-quoted statements were meaningfully different because they did not reflect the motivation of the Spanish government in entering into the launch aid contract:

In our view, when read together as a whole, the two statements made in the first preambular paragraph are close (but not identical) to those made in the Spanish A380 contract. One particular difference is that unlike the statements referred to by the United States in the Spanish A380 contract, they do not explicitly identify the Spanish governments' justification for entering into the A340-500/600 contract.<sup>17</sup>

19. Thus, instead of considering evidence of the subsidy granting authority's "motivation" as part of the "total configuration of the facts"<sup>18</sup> relevant to discerning the existence of a tie between the subsidy and the anticipated exports, the Panel effectively established a *requirement of* specific motivation in order find such a tie. Put differently, the Panel effectively concluded that what it considered to be the absence of direct evidence of such specific motivation was dispositive and precluded a finding of *de facto* export subsidization.

20. One of the objectives of the SCM Agreement, as recognized by the Appellate Body, is to discipline the use of subsidies.<sup>19</sup> The SCM Agreement contains no stronger discipline than the prohibition on certain kinds of subsidies in Article 3. That prohibition would be easily

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<sup>16</sup> (...continued)

Spanish A380 LA/MSF contract was, in fact, concluded at least in part on the *condition* or *because* of the Spanish government's anticipation of exportation.

Panel Report, para. 7.681, quoting Spanish A380 Launch Aid Contract at 3, DS316-EC-BCI-0000549 (Exhibit US-73 (BCI)) (BCI Panel Report, para. 7.682).

<sup>17</sup> Panel Report, para. 7.687 (original emphasis).

<sup>18</sup> *Canada - Aircraft (AB)*, para. 167.

<sup>19</sup> See, e.g., *US - Softwood Lumber IV (AB)*, paras. 64 and 95; *US - Carbon Steel (AB)*, para. 74.

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circumvented if Article 3.1(a) and footnote 4 of the SCM Agreement were interpreted, as the Panel did, to require a complaining Member to demonstrate the subjective motivation of the subsidizing Member.

21. As panels and the Appellate Body have recognized, divining the subjective motivation of a Member pursuing a particular policy may not always be possible, particularly given the multiple motivations that may underlie the adoption of a given measure.<sup>20</sup> If, as the Panel's approach reflects, subjective motivation were a necessary requirement for reaching a finding of *de facto* export subsidization, a subsidizing Member could tie the grant of a subsidy to exports and still avoid a finding of WTO-inconsistency, for example, simply by ensuring no public statements of motivation were made or included in the measure or discussion of it, or by publicly declaring additional motivations that did not relate to the desire to increase exports.

22. The Panel's findings in respect of the German, Spanish and UK A380 launch aid

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<sup>20</sup> See, e.g., *Japan - DRAMS (Panel)*, para. 7.104 (“Depending on the circumstances, there may well be a certain degree of speculation in seeking to establish the intent of a government in the abstract.”); *Japan - Alcoholic Beverages II (AB)*, pp. 27-29; *EEC - Parts and Components (GATT)*, para. 5.6. This also helps explain why, when considering the consistency of a measure under provisions of the WTO Agreement, the Appellate Body has made clear that the purpose and effect of that measure are *not* to be determined based on an evaluation of the specific motivation of the Member adopting the measure. See, e.g., *United States - Byrd Amendment (AB)*, para. 259 (“We agree with the Panel that the intent, stated or otherwise, of the legislators is not conclusive as to whether a measure is ‘against’ dumping or subsidies under Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*.”); *Japan - Film (Panel)*, para. 10.87 (“In our view, if a measure that appears on its face to be origin-neutral in its effect on domestic and imported products is nevertheless shown to have been intended to restrict imports, we may be more inclined to find a causal relationship in specific cases, bearing in mind that intent is not determinative where it in fact exists.”); *EC - Biotech (Panel)*, para. 7.2558; *Japan - Alcoholic Beverages II (AB)*, pp. 27-29; *Chile - Alcoholic Beverages (AB)*, paras. 62-63.

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reinforce this concern. In each instance, as discussed above, the Panel searched for evidence of subjective motivation of the member State, having concluded that the exchange of commitments in the launch aid contracts did not provide such evidence. The Panel found such evidence primarily in language from the launch aid contracts that reveals that the member States' decisions to enter into these contracts were driven by, or in "contractual reliance"<sup>21</sup> on, Airbus' assurance that a substantial amount of sales would be exports.<sup>22</sup> By explicitly making this language the determinative basis for finding the subjective motivation that the Panel considered necessary for a claim of *de facto* export subsidization, the Panel has essentially reduced compliance with Article 3.1 and footnote 4 to a semantic matter of deleting a few phrases from future financing agreements. Nothing in the SCM Agreement permits such a formalistic means of evading the prohibition against export subsidies.

23. By effectively requiring evidence of "motivation" of the member States entering into launch aid contracts, the Panel in this dispute introduced a subjective requirement where none exists in Article 3.1(a) and footnote 4. This fundamental error led the Panel to conclude that this requirement had not been met and, consequently, that *de facto* export subsidization had not been demonstrated, in respect of the French A380, French A340-500/600, Spanish A340-500/600, and the French A330-200 launch aid.

24. The United States therefore respectfully requests that the Appellate Body *reverse* the Panel's finding, in paragraph 7.689 of its report, that the United States had not shown that the

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<sup>21</sup> Panel Report, para. 7.683.

<sup>22</sup> See Panel Report, paras. 7.680-7.683.

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granting of the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid was contingent in fact upon anticipated export performance.

**C. A Proper Application of the Legal Standard to the Facts Found by the Panel Reveals that Each of the Seven Challenged Instances of Launch Aid is a *De Facto* Export Subsidy**

25. The United States recalls that the Panel found that each of the seven challenged instances of launch aid constituted subsidies, and that these subsidies involved “anticipated” exports. To establish *de facto* export subsidization, the subsidies must also be “conditional” or “dependent for [their] existence” on the anticipation of exports.<sup>23</sup> The United States demonstrated this conditionality on the basis of the facts in this dispute. Because those facts are undisputed or have been found by the Panel, the United States respectfully requests that the Appellate Body complete the analysis by applying the correct legal standard and concluding that the EU, France and Spain acted inconsistently with their respective obligations under Article 3.1(a) of the SCM Agreement by granting launch aid that was contingent in fact upon anticipated export performance, in respect of the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid.

26. Before the Panel, the United States established that the member States expected certain levels of export performance in return for the provision of launch aid. These expectations were based not only on the significant export-oriented nature of Airbus, but also on assurances provided by Airbus forecasts and existing orders for certain models at the time the member States

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<sup>23</sup> *Canada - Aircraft (AB)*, para. 166. See also, e.g., Panel Report, paras. 7.644 and 7.648.

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committed to provide launch aid. These expectations, and Airbus' commitment to meet or exceed them, were codified in the form of launch aid contracts signed by each member State for a particular model of aircraft. Without these contracts, launch aid would not have been provided.

27. As is the nature of most contracts, each of these launch aid contracts reflected a commitment by one party to perform an act in exchange for a commitment from the other party to perform another act. In the launch aid context, this exchange of commitments specifically meant the commitment of the relevant member State to provide launch aid in exchange for Airbus' express commitment to repay that launch aid on a per sale basis over a specified number of deliveries that could not be made without exports. The repayment terms of these contracts were therefore an integral component of the obligation Airbus was required to undertake in order to receive the launch aid.

28. For each of the seven challenged instances of launch aid, the contract called for repayment not to begin until deliveries of the manufactured aircraft, often several years after the provision of the launch aid funds began. Repayment was based on levies per aircraft delivered, over a specified number of deliveries. And, for each of the seven challenged instances of launch aid, the requisite number of deliveries far exceeded the number of sales Airbus itself calculated – and on which the government relied – for the European market, and therefore, could only be achieved by substantial export sales.

29. The Panel fully agreed with this explanation of the facts in respect of all seven instances of challenged launch aid:

Turning to the exchange of commitments themselves, we note that under each of the

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seven LA/MSF contracts at issue, Airbus was required to repay the loaned principal plus any interest from the proceeds of the sale of a specified number of LCA developed with the financing provided by the EC member States. Although the text of the repayment provisions is neutral as to the origin of the required sales, it is clear from various pieces of information that achieving the level of sales needed to fully repay each loan would require Airbus to make a substantial number of exports. Exports were therefore not merely incidental to full repayment of the loans; and they could not be replaced with domestic sales in order to achieve the number of sales necessary to fully repay the loans. Moreover, while it is true that the contracts impose no obligation on Airbus to make any sales at all, the European Communities has explained that the EC member States expected their LA/MSF contributions would be fully repaid and achieve their target rate of return. Indeed, it is on the basis of the EC member States' expectations of full repayment over the number of LCA sales predicted in the Airbus business cases for each of the relevant LCA models, that the European Communities argues the relevant contractual rates of return should be calculated. The EC member States also knew that Airbus was a highly export-oriented company. It follows that the EC member States must have been counting on Airbus to make LCA sales that necessarily included a substantial number of exports when concluding the LA/MSF contracts. This means that the EC member States, fully expecting to be repaid, must have held a high degree of certainty that the provision of LA/MSF would result in Airbus making those export sales.<sup>24</sup>

30. The Panel considered that

this evidence supports the view that the provision of LA/MSF on sales-dependent repayment terms was, at least in part, 'conditional' or 'dependent for its existence' upon the EC member States' anticipated exportation or export earnings.<sup>25</sup>

Nevertheless, because the Panel had not yet identified the specific motivations of the member States in providing the launch aid, as discussed above, the Panel erroneously concluded that these facts were not "decisive."<sup>26</sup>

31. To be clear, it is the particular structure of the launch aid contracts that provides the

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<sup>24</sup> Panel Report, para. 7.678 (footnotes omitted).

<sup>25</sup> Panel Report, para. 7.678.

<sup>26</sup> Panel Report, para. 7.678.

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“conditionality” required under Article 3.1(a) and footnote 4. The member States could have structured these contracts in other ways more consistent with the central features of standard financing agreements, for example, by establishing a repayment calendar based on specific dates without regard to the deliveries made by Airbus. Alternatively, they could have insisted on repayment over much smaller numbers of deliveries than actually were set out in the contracts, that is, using numbers that could be reached without necessarily exporting. The member States, however, did not choose those options as commitments they would accept in exchange for the launch aid.<sup>27</sup>

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<sup>27</sup> In this respect, the approach selected by the member States in structuring their launch aid contracts in a manner that results in export contingency stands in stark contrast to the loan arrangement found *not* to constitute a *de facto* export subsidy by the panel in *Australia - Leather*. The panel in that dispute observed as follows:

There is nothing in the loan contract that explicitly links the loan to Howe's production or sales, and therefore nothing in its terms, the design of the loan payment, or the repayment provisions that would tie the loan directly to export performance, or even sales performance.

While it may be true that some of the money to repay the loan is likely to be generated through export sales, ... [t]he source of funding will not necessarily be export sales, and there is nothing in the facts before us to suggest that it was expected at the time the loan was entered into that export sales would generate the funds to repay the loan. In our view, the mere fact that one possible source of funds to pay off the loan is potential export earnings is insufficient to conclude that the loan was contingent in fact upon anticipated exportation or export earnings. ... [T]he loan is secured by a lien on the assets and undertakings of ALH, which is itself responsible for repayment of the loan, and not merely on the assets and undertakings of Howe. Moreover, there is nothing in the terms of the loan contract itself which suggests a specific link to actual or anticipated exportation or export earnings, as there is in the terms of the grant contract. These factors persuade us that there is not a sufficiently close tie between the loan and anticipated exportation or export earnings.

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32. Instead, by tying repayment of those loans to a specific number of deliveries that required exportation, the member States dictated, with precision, that exports occur in order for the launch aid contracts to be concluded. Without the export sales that were required to satisfy the number of deliveries over which repayments were to be made, Airbus could not meet its contractual repayment obligations.

33. Airbus' assumption of those repayment obligations was a condition specified in the contracts for the member States' corresponding contractual obligation to provide launch aid. This exchange of commitments is the essence of "conditionality." Thus, under the circumstances that follow from the particular structure of these launch aid contracts (i.e., Airbus' consequent obligation to export), as the United States established before the Panel, the provision of launch aid was tied to anticipated exportation within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.

34. For the foregoing reasons, the United States respectfully requests that the Appellate Body *find* that the EU, France and Spain acted inconsistently with their respective obligations under Article 3.1(a) of the SCM Agreement by granting launch aid that was contingent in fact upon anticipated export performance, in respect of the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid.

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<sup>27</sup> (...continued)

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**D. The Seven Instances of Launch Aid That Constitute Prohibited Export Subsidies Should be Withdrawn Within 90 Days**

35. Finally, the United States requests that the Appellate Body clarify the scope of the Panel’s specification, pursuant to Article 4.7 of the SCM Agreement, that the prohibited subsidies must be withdrawn within 90 days. The United States makes this request in order to make clear that the recommendations and rulings of the DSB also address the time-period for withdrawing the prohibited export subsidies discussed in the preceding section, namely the French A380, French and Spanish A340-500/600, and French A330-200 launch aid.

36. Based on its finding that the United States had demonstrated export contingency only in respect of German, Spanish and UK A380 launch aid, and the “nature” of those subsidies, the Panel specified 90 days for those export subsidies to be withdrawn.<sup>28</sup> This specification reflects the Panel’s application of Article 4.7 of the SCM Agreement, a “special or additional rule or procedure” listed in Appendix 2 to the DSU.

37. In the first instance, if a subsidy is found to be prohibited, Article 4.7 of the SCM Agreement requires a recommendation that the subsidizing Member “withdraw subsidy without delay.” Article 4.7 further requires a panel to “specify in its recommendation the time period within which the measure must be withdrawn.”

38. As demonstrated above, the French A380, French A340-500/600, Spanish A340-500/600,

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<sup>28</sup> See Panel Report, para. 8.6 (“Accordingly, taking into account the nature of the prohibited subsidies we have found in this dispute, we recommend that the subsidizing Member granting each subsidy found to be prohibited withdraw it without delay and specify that this be done within 90 days.”).

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and French A330-200 launch aid are also subsidies contingent in fact upon anticipated export performance. Accordingly, they must be withdrawn without delay. The United States recalls that the Panel specified that “we recommend that the subsidizing Member granting each subsidy found to be prohibited withdraw it without delay and specify that this be done within 90 days.” Should the Appellate Body find, as the United States has requested, that the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid are prohibited subsidies, then they would fall within the scope of the Panel’s recommendation and specification of a 90 day period. Accordingly, the Appellate Body could simply uphold the Panel’s recommendation and specification, explaining that the reference to “each subsidy found to be prohibited” includes the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid.

39. Alternatively, should the Appellate Body wish to address this issue in more detail, then the nature of these additional prohibited subsidies is identical to those found by the Panel for German, Spanish and UK A380 launch aid. In particular, these additional prohibited subsidies take the same form (launch aid); are effectuated through the same types of instruments (contracts negotiated between Airbus and the relevant member State); and are provided under the same four “core terms” as the subsidies found by the Panel to be prohibited. Under these circumstances, the time period that the Panel specified for withdrawing the German, Spanish and UK A380 launch aid should apply equally to the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid.

40. The Appellate Body could in its report specify that the 90-day time period applies for

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withdrawing *all* of the subsidies found by the Panel, as modified by the Appellate Body, to be prohibited. Article 4.7 of the SCM Agreement, in the first instance, refers only to panels and not to the Appellate Body as having the authority to specify the time-period for withdrawal.

However, the Appellate Body may *modify* that specification, just as it modifies any legal finding or conclusion of a panel, pursuant to Article 17.13 of the DSU. Therefore, the United States requests, in the alternative, that the Appellate Body *modify* the Panel’s finding, in paragraph 8.6 of the Panel Report, by clarifying that the recommendation for the subsidizing Member to withdraw each prohibited subsidy within 90 days applies to the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid, in addition to the German, Spanish and UK A380 launch aid.

### **III. The Panel Erred in Finding that the United States Had Not Demonstrated that the Launch Aid Program Exists**

41. The second error for which the United States seeks review concerns the Panel’s conclusion that the United States had not demonstrated the existence of the Launch Aid Program. The United States challenged the Launch Aid Program as a subsidy, separate from the individual instances of launch aid, that causes adverse effects to the interests of the United States. In support of this claim, the United States presented evidence to the Panel that established the existence of such a subsidy, including the consistent provision of billions of dollars of launch aid, under the same commercially advantageous terms, in every instance in which it was sought by Airbus over a period of time covering four decades.

42. Although the United States did not challenge the Launch Aid Program “as such,” the

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Panel applied the legal framework set out by the Appellate Body in *US - Zeroing (EC)* for determining whether an alleged measure could be challenged “as such” in WTO dispute settlement proceedings. In so doing, the Panel committed legal error and incorrectly inferred from the facts before it that the United States had not demonstrated the existence of the Launch Aid Program.<sup>29</sup>

### A. The Panel Applied the Wrong Legal Framework When Evaluating the U.S. Challenge to the Launch Aid Program

43. The United States informed the Panel on multiple occasions during the panel proceedings that its claim against the Launch Aid Program was *not* an “as such” challenge.<sup>30</sup> Rather, the U.S. challenge was “that the Launch Aid Program is a measure that currently is breaching EC obligations under the {SCM Agreement} by causing adverse effects to the interests of the United

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<sup>29</sup> The United States notes that the Panel appears to have described its conclusion on the existence of the Launch Aid Program as a *factual* matter. (*See, e.g.*, Panel Report, paras. 7.575 and 7.580.) However, this characterization is incorrect. As discussed above, the Panel’s conclusion followed directly from its application of the *legal framework* elaborated by the Appellate Body for determining whether an alleged measure may be challenged “as such” in WTO dispute settlement proceedings. The Panel’s misplaced reliance on that framework to address the existence of the measure at issue here, which was not challenged “as such,” relates to the legal question of what the proper standard should be when examining the challengeability of a measure that is *not* challenged “as such.” Therefore, notwithstanding the Panel’s characterization, its conclusion as to the existence of the Launch Aid Program is an appropriate subject for appellate review. *See US – Continued Zeroing (AB)*, paras. 184 and 189 (Appellate Body evaluates existence of measure after reversing panel’s finding under Article 6.2 of the DSU). *See also Chile – Price Band System (AB)*, para. 224 (finding that Panel’s characterization of its finding as a “factual matter” did not preclude appellate review because it reflected an application of law to the facts of the case).

<sup>30</sup> *See* Panel Report, para. 7.518; U.S. Answers to Second Panel Questions, para. 4; U.S. Second Non-Confidential Oral Statement, paras. 34-37.

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States.”<sup>31</sup> Although not challenging the Launch Aid Program “as such,” the United States specifically distinguished the Launch Aid Program as a broader measure than the individual instances of launch aid, in that it was the consistent provision of launch aid on the same terms.<sup>32</sup> The Panel was thus required to determine whether, in light of the above formulation, the unwritten measure identified by the United States was properly subject to challenge in WTO dispute settlement proceedings.

44. Identifying the proper framework for this determination begins with the text of the covered agreements. The DSU does not define what constitutes a “measure” for purposes of WTO dispute settlement proceedings; nor does the SCM Agreement provide such a definition for subsidy-related disputes. Article 3.3 of the DSU, however, refers to the importance of the settlement of disputes where a Member may consider its benefits under the covered agreements are being impaired “by measures taken by another Member.” In the light of this provision, the Appellate Body has observed that, “[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.”<sup>33</sup> The Appellate Body has also stated that a Member’s “ongoing conduct” may itself be

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<sup>31</sup> U.S. Answers to Second Panel Questions, para. 4 (original emphasis).

<sup>32</sup> U.S. Answers to Second Panel Questions, para. 21. This distinction between a broader, overarching measure, on the one hand, and the individual instances of that measure’s application, on the other hand, is not uncommon and has been reflected in previous WTO disputes. *See, e.g., US - Upland Cotton (Article 21.5) (AB)*, para. 203 (noting distinction between GSM 102 program “in its totality” and application of GSM 102 program for particular agricultural products); *Canada - Aircraft (AB)*, paras. 175-180 (noting applicability of TPC program beyond aerospace sector even though claim and finding were limited to “TPC assistance to regional aircraft industry”).

<sup>33</sup> *US - Corrosion-Resistant Steel Sunset Review (AB)*, para. 81.

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challengeable in WTO dispute settlement proceedings, separate from the specific applications of that conduct in particular circumstances.<sup>34</sup>

45. The Panel did not apply this legal framework when evaluating the U.S. claim against the Launch Aid Program. Instead, the Panel began its analysis by reviewing the Appellate Body’s finding in *US - Zeroing (EC)* that one of the measures alleged in that dispute was challengeable “as such” in WTO dispute settlement proceedings. The Panel then explained that, in reviewing the U.S. challenge to the Launch Aid Program, it would follow the Appellate Body’s “guidance” in that dispute:

As both parties appear to recognize, the existence of a challenged measure must be established on the basis of an objective assessment of all relevant facts and circumstances; and as we read it, the Appellate Body's guidance in *US – Zeroing (EC)* explains how to undertake such an assessment for the purpose of demonstrating the existence of an unwritten measure that is claimed to have general and prospective application in the sense of a “rule or norm”.

It follows that regardless of the nature of a complaint, when challenging the WTO-consistency of an alleged *unwritten measure* that is alleged to have *normative value*, the criteria laid down by the Appellate Body in *US – Zeroing (EC)* will be relevant to determining whether any such measure actually exists. Therefore, when confronted with a complaint against an unwritten measure that is considered to have general and prospective application, as we are here faced with in respect of the alleged LA/MSF Programme, a panel must not lightly assume its existence. The arguments and evidence advanced by the complaining party to demonstrate its existence must be carefully and rigorously examined with a view to assessing whether the complainant has clearly established at least the precise content of the alleged unwritten measure, that it is attributable to the responding Member and that it has general and prospective application. It is only by satisfying this “high threshold” that a complainant will succeed in establishing the existence of the challenged measure. Conversely, where any one of the above elements cannot be

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<sup>34</sup> *US - Continued Zeroing (AB)*, paras. 180-181.

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established, the complaining party will have failed to make its case.<sup>35</sup>

46. The Panel followed this “guidance” in its analysis of the U.S. claim against the Launch Aid Program, including by requiring a demonstration of the general and prospective application of the Launch Aid Program. For example, in reviewing the past instances of launch aid, which the Panel had determined were each provided on the same “core terms” alleged by the United States, the Panel concluded that “they do not support a conclusion that such a programme would necessarily involve the *provision of loans in the future* at below-market interest rates.”<sup>36</sup>

Similarly, the Panel failed to recognize that the European Commission and EADS (Airbus’ parent company) themselves effectively acknowledged the Launch Aid Program as a fixture in Airbus’ commercial landscape. Because it considered the *US - Zeroing (EC)* framework to require the United States to establish in this dispute that the Launch Aid Program had general and prospective application, the Panel determined that such statements failed to reveal a “time horizon” for the operation of the Launch Aid Program and, therefore, did not reflect the Program’s existence.<sup>37</sup>

47. Based on its application of the *US - Zeroing (EC)* framework, including the requirement of general and prospective application, the Panel concluded that the United States had failed to demonstrate the existence of the Launch Aid Program.<sup>38</sup> The United States recalls, however, that

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<sup>35</sup> Panel Report, paras. 7.519-7.520 (footnote omitted; original italics; underlining added).

<sup>36</sup> Panel Report, para. 7.531 (emphasis added).

<sup>37</sup> Panel Report, para. 7.571.

<sup>38</sup> See Panel Report, para. 7.575 (“We have explained that in order to establish the existence of the alleged unwritten LA/MSF Programme it has described, the United States must

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the “guidance” of the Appellate Body in *US - Zeroing (EC)* specifically addressed the existence of a measure that was challenged “as such” in that dispute. As the Appellate Body made clear, it considered precise content, attribution to the complaining Member, and general and prospective applicability of the challenged measure to be “criteria for bringing an ‘as such’ challenge.”<sup>39</sup> The requirement of “general and prospective application,” in particular, is uniquely related to “as such” challenges, which are inherently concerned with the WTO-consistency of conduct that could be mandated in the future.<sup>40</sup> The Panel therefore erred in applying the Appellate Body’s framework developed exclusively in the context of “as such” challenges to the U.S. challenge to the Launch Aid Program.<sup>41</sup>

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<sup>38</sup> (...continued)

demonstrate at least its precise content, that it is attributable to governments of France, Germany, Spain and the UK, and that it has general and prospective application.”).

<sup>39</sup> *US - Zeroing (EC) (AB)*, para. 203.

<sup>40</sup> See, e.g., *US - OCTG Sunset Reviews (AB)*, para. 172.

By definition, an “as such” claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member’s conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member’s WTO obligations. In essence, complaining parties bringing “as such” challenges seek to prevent Members *ex ante* from engaging in certain conduct.

<sup>41</sup> The United States cautioned the Panel against relying on the *US - Zeroing (EC)* framework, noting that, “[b]ecause the U.S. challenge is not an ‘as such’ challenge, the Appellate Body’s identification of ‘the criteria for bringing an ‘as such’ challenge’ does not provide the relevant test.” U.S. Answers to Second Panel Questions, para. 4. See also U.S. Second Non-Confidential Oral Statement, paras. 34-37. The United States instead referred specifically to *EC - Biotech* and *Japan - Semi-conductors* as examples of disputes that provided a more appropriate analogue to the nature of the U.S. challenge to the Launch Aid Program. See U.S. Answers to Second Panel Questions, paras. 5-6. The Panel nevertheless appears to have pursued the approach of the Appellate Body in *US - Zeroing (EC)* because, in the Panel’s view, the “normative value” of the Launch Aid Program was a “central feature” of the measure described by the United States. (Panel Report, para. 7.581. See also *id.*, paras. 7.519-7.521.) This

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### **B. The Panel’s Alternative Finding is Similarly Based on the Panel’s Erroneous Reliance on the Legal Framework in *US – Zeroing* for Evaluating “As Such” Claims**

48. After concluding that the United States had failed to satisfy the “high threshold” set out by the Appellate Body in *US - Zeroing (EC)*,<sup>42</sup> the Panel made an alternative finding. The Panel concluded that, even if the approach set out in that report would not require, as a legal matter, that the United States demonstrate the general and prospective application of the Launch Aid Program, the Panel would nevertheless have found that the United States had not established the existence of the Launch Aid Program.<sup>43</sup>

49. Specifically, the Panel queried whether, as a factual matter, a “programme of any kind [could] exist without having general and prospective application.”<sup>44</sup> The Panel similarly expressed confusion as to what the United States meant when arguing that the evidence showed the existence of a program “that is not of general and prospective application.”<sup>45</sup> In this respect,

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<sup>41</sup> (...continued)

characterization was incorrect, as the United States informed the Panel during the interim review. (*See* Panel Report, para. 6.93.) Before the Panel, the EU asserted that, pursuant to the Appellate Body Report in *US - Zeroing (EC)*, the United States was required to demonstrate the general and prospective application of the Launch Aid Program. (EU First Confidential Oral Statement, para. 2; EU Second Written Submission, para. 107.) The United States contested this assertion, but nevertheless made such a demonstration as specifically requested by Panel Question 137. (*See* U.S. Answers to Second Panel Questions, paras. 3 and 9.) In doing so, however, the United States noted the general and prospective application of the Launch Aid Program as an “additional factor [that] would support the conclusion that the Launch Aid Program is a measure in its own right. However, the Panel is not required to consider this factor.” (U.S. Answers to Second Panel Questions, para. 7 (original emphasis).)

<sup>42</sup> Panel Report, para. 7.576.

<sup>43</sup> Panel Report, para. 7.580.

<sup>44</sup> Panel Report, para. 7.580.

<sup>45</sup> Panel Report, para. 7.580.

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the Panel cited a prior paragraph of the report,<sup>46</sup> in which the Panel emphasized that “[t]he repetition of government action over time does not necessarily prove that the government has adopted a *general rule governing its future conduct*.”<sup>47</sup>

50. Thus, even in its alternative finding, where the Panel assumes that the legal requirement of general and prospective application under the *US - Zeroing (EC)* framework does not apply, the Panel effectively continues to require general and prospective application. This is because the Panel appears to consider that this characteristic is inherent in any “program.” By requiring evidence of general and prospective application even under its alternative finding, the Panel essentially maintains the *US - Zeroing (EC)* framework that we have already shown to be inapplicable.<sup>48</sup>

51. The Panel’s approach in its alternative finding also imposes a formalistic requirement based on the particular label given by a complaining Member to the measure it is challenging. In most disputes involving a challenge to an unwritten measure, there may be no official name or

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<sup>46</sup> Panel Report, para. 7.580 fn. 2966, citing *id.*, para. 7.532.

<sup>47</sup> Panel Report, para. 7.532 (emphasis added).

<sup>48</sup> The United States does not suggest that *only* “as such” challenges can have implications for future conduct. To the contrary, as the Appellate Body recognized in *US - Continued Zeroing*, a challenge that is broader than individual instances of application, but not based on “as such” claims, may serve a potentially meaningful role in furthering the effective resolution of a dispute. *See US - Continued Zeroing (AB)*, para. 181 (emphasizing that, “in seeking an effective resolution of its dispute with the United States,” the EU was “entitled to frame the subject of the challenge in such a way as to bring the ongoing conduct, regarding the use of the zeroing methodology in these 18 cases, under the scrutiny of WTO dispute settlement”). This role may be of greater significance in this dispute where member States are on the verge of granting new launch aid for the A350, and thereby fulfilling what the Panel found to be the “in principle commitment on the part of the EC member State governments to support the development of the A350 through [launch aid].” Panel Report, para. 7.314.

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characterization of that measure that a complaining Member can rely on to describe the measure. In those instances, the standard for evaluating whether the measure exists should not depend on whether the complaining Member happens to describe it as a program, policy, “ongoing conduct,”<sup>49</sup> “continued use,”<sup>50</sup> or “moratorium.”<sup>51</sup> The Panel’s requirement of general and prospective application in its alternative finding arbitrarily imposes a higher burden on complaining Members that style their challenge against a “program” instead of some other label for the unwritten measure at issue.

### **C. The Facts of This Dispute Demonstrate That the Launch Aid Program Is a “Measure” Subject to Challenge in This Dispute**

52. As a result of the Panel’s application of an improper legal framework in evaluating the U.S. challenge to the Launch Aid Program, the Panel failed to determine whether the Launch Aid Program constituted a subsidy that causes adverse effects to the interests of the United States. The United States respectfully requests that the Appellate Body complete the analysis using the proper legal framework for evaluating the U.S. claim and on the basis of the facts established by the Panel.

#### **1. The Appellate Body’s Evaluation of “Ongoing Conduct” in *US – Continued Zeroing* Provides More Appropriate “Guidance” Than *US – Zeroing***

53. As discussed above, the Panel erred in relying on the legal framework set out by the Appellate Body in *US - Zeroing (EC)* when evaluating the U.S. claim against the Launch Aid

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<sup>49</sup> *US - Continued Zeroing (AB)*, paras. 171 and 181.

<sup>50</sup> *US - Continued Zeroing (AB)*, paras. 183-184.

<sup>51</sup> *EC - Biotech (Panel)*, paras. 7.455-7.456.

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Program. Rather than relying for “guidance” on a report limited to addressing an “as such” challenge, the Panel could have looked to how the Appellate Body has treated a measure that, like the Launch Aid Program, was not challenged “as such,” but was nevertheless not limited to specific instances of application. Had the Panel followed the approach in the Appellate Body report in *US - Continued Zeroing*, it would have found the existence of the Launch Aid Program.

54. That dispute concerned, *inter alia*, eighteen cases of the application or continued application of anti-dumping duties that were maintained as a result of the latest relevant administrative proceeding, whether an original investigation, assessment review, changed circumstances review, or sunset review.<sup>52</sup> In respect of each of the eighteen cases, the EU challenged, as one of the measures at issue, the “use of the zeroing methodology” in successive administrative proceedings as “ongoing conduct” that the EU sought to have discontinued.<sup>53</sup>

55. The Launch Aid Program has the same key feature to the measure at issue in *US - Continued Zeroing*. Specifically, through the Launch Aid Program, the United States in this dispute has challenged the “ongoing conduct” that consists of the provision of launch aid on the same “core terms”<sup>54</sup> by the Airbus governments in respect of a series of aircraft models over several decades. The Appellate Body’s evaluation of the EU’s challenge in *US - Continued Zeroing* is therefore particularly instructive for this appeal.

56. In that dispute, the Appellate Body first addressed whether the measure identified by the

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<sup>52</sup> Panel Request, *US - Continued Zeroing*, WT/DS350/6, p. 3. *See also US - Continued Zeroing (AB)*, para. 166.

<sup>53</sup> *US - Continued Zeroing (AB)*, para. 181.

<sup>54</sup> Panel Report, para. 7.530.

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EU could be the subject of a WTO challenge. The Appellate Body observed that the “use of the zeroing methodology” challenged by the EU was a measure that was broader than “discrete applications ... in particular determinations” but was not a rule of general and prospective application.<sup>55</sup> The Appellate Body then illustrated the content of the “continued use of the zeroing methodology” by identifying a “string of [administrative] determinations” wherein the investigating authority used that methodology to calculate anti-dumping duties.<sup>56</sup> On the basis of this information, the Appellate Body concluded that “ongoing conduct that consists of the use of the zeroing methodology”<sup>57</sup> constitutes a measure subject to challenge in WTO dispute settlement proceedings.<sup>58</sup>

57. Turning to the question of the existence of the “use of the zeroing methodology, as an ongoing conduct,” the Appellate Body stated that it “must ascertain whether the factual findings made by the Panel and undisputed facts in the record show that the zeroing methodology has been used repeatedly in successive proceedings.”<sup>59</sup> The Appellate Body found that “the repeated action by the USDOC in a string of determinations relating to [four of the eighteen challenged] cases confirms the use of the zeroing methodology as an ongoing conduct.”<sup>60</sup> For thirteen of the cases in respect of which such repetition could not be established on the basis of the available

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<sup>55</sup> *US - Continued Zeroing (AB)*, para. 181.

<sup>56</sup> *US - Continued Zeroing (AB)*, para. 184.

<sup>57</sup> *US - Continued Zeroing (AB)*, para. 181.

<sup>58</sup> *US - Continued Zeroing (AB)*, para. 185.

<sup>59</sup> *US - Continued Zeroing (AB)*, para. 189.

<sup>60</sup> *US - Continued Zeroing (AB)*, para. 192.

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facts, the Appellate Body concluded that it could not complete the analysis.<sup>61</sup>

58. Put simply, the Appellate Body in *US - Continued Zeroing* found that where a complaining Member has demonstrated another Member’s repeated course of action, that “ongoing conduct” itself may be challengeable in WTO dispute settlement proceedings, even if the scope of that challenge is narrower than an “as such” claim.

**2. Finding the Launch Aid Program to be a Measure Subject to WTO Challenge is Consistent with the Appellate Body’s Analysis in *US - Continued Zeroing***

59. The Launch Aid Program presents an equally persuasive, if not more compelling, case for a measure subject to WTO dispute settlement than the “ongoing conduct” at issue in *US - Continued Zeroing*. The discussion below begins by showing how the United States demonstrated, in respect of the Launch Aid Program, the same elements that the Appellate Body found necessary to find the “ongoing conduct that consists of the use of the zeroing methodology”<sup>62</sup> to be a measure subject to WTO dispute settlement. In the subsequent section, we identify additional facts found by the Panel that reinforce the existence and challengeability of the Launch Aid Program.

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<sup>61</sup> See *US - Continued Zeroing (AB)*, para. 195 (“{W}e have not completed the analysis where the factual findings are absent in respect of the use of the zeroing methodology in each of the successive proceedings whereby the duties are maintained, or where there are insufficient factual findings to indicate that zeroing has been repeatedly applied.”).

<sup>62</sup> *US - Continued Zeroing (AB)*, para. 181.

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**a. The Airbus Governments Have Consistently Provided Launch Aid to Airbus on the Same Core Terms Over the Last Four Decades**

60. Like the EU in *US - Continued Zeroing*,<sup>63</sup> the United States identified the “ongoing conduct” at issue, and its attribution to a Member, by establishing the repeated use of a particular action<sup>64</sup> by the responding Member. Specifically, the U.S. challenge was based on a demonstration that over the past four decades (since 1969), the Airbus governments have consistently subsidized Airbus, in the form of launch aid, by underwriting the costs of developing each and every single model through long-term unsecured loans at zero or below-market rates of interest, with back-loaded repayment schedules that allow Airbus to repay the loans through a levy on each delivery of the financed aircraft.

61. Each grant of launch aid, in other words, takes essentially the same form. Thus, what the United States termed the “Launch Aid Program” is the “ongoing conduct” or repeated provision of launch aid to each and every major Airbus model, under the same four core conditions and benefitting the same subsidized product (Airbus LCA) over a period of four decades.

62. The Panel agreed. As in *US - Continued Zeroing*, the facts before the Panel in this dispute established the requisite “ongoing conduct.” Specifically, the Panel concluded that the facts demonstrated the “consistent” provision of launch aid, across decades of support to Airbus by the relevant member States, and involving the same four “core terms”:

[I]n the light of our findings in respect of the individual LA/MSF measures, there is no doubt that all of the challenged LA/MSF contracts may be characterised as

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<sup>63</sup> See *US - Continued Zeroing (AB)*, paras. 181, 183-184.

<sup>64</sup> *US - Continued Zeroing (AB)*, paras. 181 and 189.



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unsecured loans granted to Airbus on back-loaded and success-dependent repayment terms, at below-market interest rates, for the purpose of developing various new models of LCA. While not demonstrating that the LA/MSF Programme described by the United States actually exists, the contracts do show that every time LA/MSF was provided in the past, it involved the four “core terms” the United States identifies.<sup>65</sup>

...

Although we consider that the United States’ description of the precise content of the alleged LA/Programme has not always been crystal clear, it is apparent from the entirety of its arguments and submissions that the United States characterizes the precise content of the alleged LA/MSF Programme in the terms we have expressed above, that is, as the consistent provision of LA/MSF on the same essential conditions whenever *sought* by Airbus.<sup>66</sup>

63. Also like the EU in *US - Continued Zeroing*, the United States demonstrated the existence of the measure at issue by submitting evidence that established that the “ongoing conduct” had “been used repeatedly in successive” instances.<sup>67</sup> In this dispute, the United States showed that since 1969, the relevant member States offered launch aid (as discussed above, on the same four “core terms”<sup>68</sup>) for every major model of aircraft produced by Airbus – A300, A310, A320, A330/340, A330-200, A340-500/600, and A380. Put differently, those member States never turned down an Airbus request for launch aid. The Panel agreed:

[W]hile we understand that the Airbus governments did not provide LA/MSF for each and every model of LCA developed by Airbus, the evidence we have reviewed does show that whenever Airbus *sought* LA/MSF it was offered by each of the Airbus governments on the same four “core terms”, and in all but one case, the terms

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<sup>65</sup> Panel Report, para. 7.525.

<sup>66</sup> Panel Report, para. 7.527 (original emphasis).

<sup>67</sup> *US - Continued Zeroing* (AB), para. 189. See also *id.*, para. 191.

<sup>68</sup> Panel Report, para. 7.525.

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and conditions of that LA/MSF were agreed between the parties.<sup>69</sup>

The Panel also emphasized the consistent nature of the subsidization involved, noting that launch aid was not simply a series of isolated instances of subsidization:

{W}e are not concerned here with a one-off grant of a single subsidy, or even a number of subsidies, ‘decades’ ago, but with repeated grants of subsidies benefiting the same product over a period of decades, which product has been produced and sold throughout that period and continues to be produced and sold now and into the future.<sup>70</sup>

64. In sum, the United States demonstrated before the Panel that the Launch Aid Program consisted of the repeated provision of launch aid on the same four “core terms,” and that launch aid had been provided in respect of every model of aircraft for which Airbus sought such assistance over four decades. Therefore, the Panel’s factual findings, viewed in the light of the Appellate Body’s analysis in *US - Continued Zeroing*, make clear that the United States had demonstrated the existence of the Launch Aid Program as a measure subject to challenge in WTO dispute settlement proceedings.

**b. Additional Facts in This Dispute Support the Existence of the Launch Aid Program**

65. The Panel’s other factual findings provide additional support for the existence of the Launch Aid Program. In particular, the Panel recognized that a successful LCA manufacturer requires a *family* of aircraft – that is, a series of different models – in order to meet the diverse needs of its customers. Therefore, the objective of establishing a European LCA manufacturer

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<sup>69</sup> Panel Report, para. 7.530 (original emphasis). *See also* Panel Report, para. 7.1976 (noting that “the subsidies at issue in this dispute were repeatedly granted over the entire history of Airbus’ LCA development with respect to that same product”).

<sup>70</sup> Panel Report, para. 7.1975 (footnote omitted).

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could not be achieved without the *consistent subsidization* necessary across a whole range of aircraft models in order for Airbus to successfully compete against U.S. LCA manufacturers (i.e., what the United States identified as the Launch Aid Program).

66. Since 1969, Airbus governments have provided launch aid to “reinforce European cooperation in the field of aeronautics”<sup>71</sup> by jointly manufacturing LCA.<sup>72</sup> A successful LCA manufacturer, however, could not be established on the basis of a single model of aircraft; that objective could only be met by a manufacturer that produced a series of aircraft models that covered the range of customers’ needs:

7.1665 Since its inception, Airbus has recognized the importance to its continued success in the LCA market of developing a full line – a family – of different LCA models:

“Since Airbus was established for the precise purpose of becoming a viable, profitable, long term enterprise, it was necessary to plan for a family of aircraft. As early as 1973, Airbus Industrie proposed the development over time of five related aircraft types. With the recent launch of the A330 and A340 programs, these five types are now in place.”

More recently, a report to shareholders by the EADS Board of Directors states, with reference to the “long-term strategic goal” of striving for a “leading position in commercial aircraft: A complete product portfolio is seen as necessary to serve the customer base and to maintain overall competitiveness.” Airbus’s business strategy focuses on an integrated family of LCA:

“To achieve its market success, Airbus has pursued a consistent product strategy to offer competitive airliners across the market. The family of aircraft concept has enabled a high degree of commonality

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<sup>71</sup> Agreement Between the Government of the Republic of France and the Government of the Federal Republic of Germany Concerning the Realization of the Airbus A-300-B, at preamble (1969) (“1969 agreement”) (Exhibit US-11).

<sup>72</sup> Panel Report, para. 7.534.

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to be offered in all aspects of the aircraft operation from flight and cabin crew training to maintenance and spares.”

“**{E}very Airbus aircraft belongs to a single family**, sharing the same cockpit, flight deck and spare parts, thus saving time and money for operators in terms of pilot training and maintenance as well as in other areas.”

.....

7.1666 Commonality is important not only from the perspective of the purchasers of LCA, but also for the manufacturers. Producing a full family of different models of aircraft allows an LCA manufacturer to achieve production efficiencies. Increasing production of one aircraft type reduces the marginal cost of producing related aircraft types “due to the transferability of some production methods between different models in a manufacturer's range”. Airbus recognizes that the development of new aircraft also supports the development of production facilities and technologies across its LCA family:

“In the 1980s, we were able to widen our family by launching the A310 that incorporated many systems and power plant improvements that had occurred in the years since the A300 was designed,” an Airbus executive said. “Then we turned around and put many of the A310 improvements back into the A300 and came up with an updated aircraft that we designated the A300-600. The same philosophy will be followed with our new aircraft. Additionally, there is a strong possibility that the A320/A330/A340 technology can be used as well to create an advanced A300 and/or A310 in the 1990s.”

“But the A350 is going to be the sistership of the A380 so it's technology you can already touch and see. It's tangible because the A380 is flying.”

Airbus also manages its LCA production activities on a family basis. For example, recently, in response to an analyst's question as to whether increased production of other models could “offset the pain on the A380 delays,” EADS CEO Thomas Enders commented that sustained higher production rates for the A320 would provide “upside” to offset the costs of the A380 delays. Thus, the production and sales of one model of LCA support the development, production and sales of other LCA models. As a consequence, it seems clear to us that subsidies benefiting one particular model of Airbus LCA can have spillover effects for other Airbus models.

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7.1667 ...[T]he identification of the “subsidized product” cannot ignore that Airbus has developed an entire range of LCA family comprising various models, that is marketed to customers as an integrated whole, and that the entire range of models has, at least potentially, been supported by the subsidies in dispute.<sup>73</sup>

67. The Panel also observed that the EU has recognized how critical the ability to produce a *family* of aircraft, as opposed to simply any single model, is for the viability, much less the success, of an LCA manufacturer:

“[T]he need to offer separate products whose commonality keep operating costs down for customer airlines across the fleet but which can perform the various missions dictated by an airline’s route structure has historically meant that *no manufacturer of a single product or family of products, no matter how compelling, has survived in the LCA industry.*”<sup>47</sup>

The late 1980s through the first half of the 1990s was a critical period for Airbus. With only the A300 and A310 programmes available for sale, Airbus could not compete effectively with Boeing’s full line of passenger aircraft, which ranged from the single aisle 737 to the long haul 747. Airbus’ relatively small market share during the years before the entry into service of the A320 in 1988 and the A330/A340 programme in 1993 demonstrate that the company either had to grow, or face a static future. *Developing a full line of LCA was crucial to the company’s growth, especially as Boeing was itself investing in major new programmes.*<sup>75</sup>

[A]s the European Communities has observed, a significant reason for the ultimate demise of McDonnell Douglas was its *limited product line*, all “derivatives of earlier Douglas models, rather than entirely new designs” (in contrast to the “broader and

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<sup>73</sup> Panel Report, paras. 7.1665-7.1667 (footnotes omitted). The Panel similarly noted, at paragraph 7.1721 of its Report, the importance of commonality across a family of aircraft from the perspective of potential customers: “Once an airline orders any particular LCA model from a given manufacturer, efficiencies in operating a fleet of similar aircraft (including those related to spare parts, maintenance and training) favour follow-on orders of the same models, as well as orders of other aircraft models from the same manufacturer, in order to take advantage of commonalities across an LCA fleet.”

<sup>74</sup> Panel Report, para. 7.1665, quoting EU First Written Submission, para. 30 (emphasis added).

<sup>75</sup> EU First Written Submission, para. 30, cited in Panel Report, para. 7.1665 fn. 5081 (emphasis added).

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more modern families of aircraft offered by Boeing and Airbus”)....<sup>76</sup>

68. The Panel reiterated this critical point and noted the relevance of such a range of aircraft from the “early days” of Airbus:

[A]s the European Communities itself has noted, no manufacturer of LCA has been able to survive without a full range of models to offer. *From its early days, Airbus contemplated a full range of related LCA models.* Airbus has, in fact, introduced such a full range to the market since 1970, in competition with the full range of Boeing models.<sup>77</sup>

69. The above statements reflect the Panel’s findings that (1) from the outset, launch aid was provided to support the establishment of an LCA manufacturer in Europe; (2) the existence of a full line, or “family,” of aircraft was a key consideration of LCA customers and was well-recognized by governments and LCA manufacturers alike; (3) an LCA manufacturer could be established as a viable competitor only by developing such a family of aircraft instead of any single model; and (4) Airbus contemplated developing just such a family of aircraft “[f]rom its early days.”

70. These findings indicate that the provision of launch aid in respect of each of the models challenged by the United States were not “one-off grant[s] of a single subsidy”<sup>78</sup> for the development of that model. Given the particular nature of the LCA market, known to

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<sup>76</sup> Panel Report, para. 7.1726 fn. 5207, quoting *EC Merger Analysis*, Exhibit US-375, para. 59 (emphasis added). See also Panel Report, para. 7.1957 (noting that the “goal” of the “overall Airbus effort” was “{to} develop{} a full range of LCA for the market”).

<sup>77</sup> Panel Report, para. 7.1667 fn. 5087 (citations omitted; emphasis added). See also Panel Report, para. 7.1665 (“*Since its inception*, Airbus has recognized the importance to its continued success in the LCA market of developing a full line – a family – of different LCA models.”) (emphasis added).

<sup>78</sup> Panel Report, para. 7.1975.

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governments and Airbus, the provision of launch aid reflected a concerted and coherent approach – that is, a “program” or “ongoing conduct” – designed to contribute to the long-term competitiveness of Airbus in the only way possible: through the production of a *range* of aircraft covering the varying needs of LCA customers and with commonality of features to retain those customers. Any other, less broad approach to supporting Airbus could not have ensured the viability of a European LCA manufacturer.

71. In conclusion, the facts found by the Panel demonstrate the existence of the measure challenged by the United States as a repeated course of action by the responding Members. Specifically, those facts show the consistent and repeated use of launch aid, on the same four “core terms,” for all major models of Airbus aircraft since 1969, together with the recognition by governments and Airbus that an LCA manufacturer needed to produce a range of aircraft models in order to be successful, which was the objective of establishing Airbus. Thus, as the United States explained, each individual grant of launch aid effectuated the broader scheme that the Airbus governments maintain to ensure that at least one of the world’s LCA producers will be European. Taken collectively, these facts evince the Launch Aid Program, a specific course of ongoing conduct comprising a “measure,” separate from the individual instances of launch aid, that is the proper subject of challenge in WTO dispute settlement proceedings.

72. For the reasons discussed above, the United States respectfully requests that the Appellate Body *reverse* the Panel’s findings, in paragraphs 7.580 and 7.581 of its report, that the United States had failed to demonstrate the existence of the Launch Aid Program.

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**D. The Launch Aid Program Constitutes a Subsidy That Causes Adverse Effects to the Interests of the United States**

73. As discussed above, the Launch Aid Program comprises the repeated provision of launch aid to Airbus, on the same commercially advantageous terms, for every major Airbus model produced in the last four decades. The United States also challenged each of those individual instances of launch aid from that four-decade period. For *each* of those instances of launch aid, the Panel found a financial contribution, in the form of a “direct transfer of funds” under Article 1.1(a)(1)(i) of the SCM Agreement,<sup>79</sup> and a benefit.<sup>80</sup> The Panel also agreed with the United States, and the EU did not contest, that *each* of these subsidies was specific.<sup>81</sup> In other words, the panel findings establish that launch aid is a specific subsidy. Accordingly, the Launch Aid Program is a specific subsidy.

74. The Launch Aid Program also causes adverse effects to the interests of the United States. Pursuant to Article 5 of the SCM Agreement, subsidies are actionable where they cause adverse effects to the interests of another Member. Adverse effects can take the form of serious prejudice which, under Article 6.3, may arise where the “effect of the subsidy” is market displacement and significant lost sales. The Appellate Body has clarified that Article 6.3 “requires the establishment of a causal link between the subsidy and the {effect}”<sup>82</sup> and that the causal link

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<sup>79</sup> See Panel Report, paras. 7.377 and 7.379.

<sup>80</sup> See Panel Report, paras. 7.488-7.490.

<sup>81</sup> See Panel Report, para. 7.497.

<sup>82</sup> *US – Upland Cotton (AB)*, para. 435, quoting *US – Upland Cotton (Panel)*, para. 7.1341.



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must be genuine and substantial.<sup>83</sup>

75. The Appellate Body has observed that panels have discretion with respect to how they conduct the causation analysis under Article 6.3 because the text does not provide “the more elaborate and precise ‘causation’ and ‘non-attribution’ language found in the trade remedy provisions of the SCM Agreement.”<sup>84</sup> In this case, the Panel first considered whether the subsidies were the cause of the market displacement and lost sales and then whether other factors severed that causal link.<sup>85</sup>

76. The Panel found that the provision of launch aid to Airbus over a forty year period allowed it to enter the LCA market and, over time, bring a full family of competitive LCA to market at a pace and in a way that would otherwise have been impossible:

{W}e conclude that the United States has demonstrated that LA/MSF shifts a significant portion of the risk of launching an aircraft from the manufacturer to the governments supplying the funding, which we recall is on non-commercial terms. Based on our review of the development of successive models of Airbus LCA, we conclude that Airbus’ ability to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized LA/MSF.<sup>86</sup>

77. The Panel also found that Airbus’ ability to bring its LCA family to market when and as it did was the key to its market share gains and the significant sales it captured from Boeing between 2001 and 2006:

It is in our view clear that Airbus would have been unable to bring to the market the

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<sup>83</sup> See *US – Upland Cotton (AB)*, para. 438; *US – Upland Cotton (Article 21.5) (AB)*, para. 375.

<sup>84</sup> *US – Upland Cotton (Article 21.5) (AB)*, para. 368.

<sup>85</sup> This is the same approach adopted by the Panel and affirmed by the Appellate Body in *US – Upland Cotton*.

<sup>86</sup> Panel Report, para. 7.1949.

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LCA that it launched but for the specific subsidies it received from the EC and the governments of France, Germany, Spain and the United Kingdom.... We consider that Airbus' market presence during the period 2001-2006, as reflected in its share of the EC and certain third country markets and the sales it won at Boeing's expense, is clearly an effect of the subsidies in this dispute. We therefore conclude that the displacement of United States' LCA from the EC and certain third country markets and lost sales we have found during the period 2001-2006 are an effect of the specific subsidies to Airbus that we have found. <sup>78</sup>

78. The Panel reviewed the totality of the evidence and arguments, and provided a reasoned basis for its finding that the "effect of the subsidies in this dispute" is displacement in the EC and third country markets and significant lost sales within the meaning of Article 6.3.

79. The Panel also found that each individual instance of launch aid worked cumulatively to enable the Airbus to develop its family of LCA – both in terms of the generation of "learning curve" economies of scope and scale and the savings from the large amount of heavily subsidized financing. <sup>88</sup>

80. The Panel found that the United States had demonstrated that the effect of the launch aid was to allow Airbus to launch each of the LCA models that it did, when it did, and the EU had not successfully rebutted the case that the United States had made. <sup>89</sup> The Panel found that "{b}ased on our review of the development of successive models of Airbus LCA, we conclude that Airbus' ability to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized LA/MSF." <sup>90</sup>

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<sup>87</sup> Panel Report, para 7.1993.

<sup>88</sup> See Panel Report, para. 7.1936 (A310), para. 7.1938 (A320), para. 7.1939 (A330/340), para. 7.1940 (A330-200), para. 7.1941 (A340-500/600), 7.1948 (A380) and 7.1949.

<sup>89</sup> Panel Report, para. 7.1934.

<sup>90</sup> Panel Report, para. 7.1949.

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81. The Panel’s analysis and findings regarding the cumulative effect of each individual instance of launch aid are equally applicable to the Launch Aid Program. That analysis and those findings provide the factual and legal basis for the Appellate Body to find that the Launch Aid Program caused serious prejudice to the interests of the United States in the form of displacement of United States’ LCA from the EC and certain third country markets and the significant lost sales during the period 2001-2006 found by the Panel with respect to individual instances of launch aid.

82. For these reasons, the United States respectfully requests that the Appellate Body find that (1) the Launch Aid Program is a measure subject to challenge in WTO dispute settlement proceedings; and (2) the Launch Aid Program constitutes a specific subsidy, provided by France, Germany, Spain and the United Kingdom to Airbus, that causes adverse effects to the interests of the United States.

**IV. Conclusion**

83. For the reasons set forth in this submission, the United States respectfully requests that the Appellate Body:

- (a) *reverse* the Panel’s finding, in paragraph 7.690 of its report, that the United States had not shown that the granting of launch aid in respect of the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 was contingent in fact upon anticipated export performance;
- (b) *find* that launch aid in respect of the A380, A340-500/600, A340-500/600, and A330-200 is contingent in fact upon anticipated export performance and so is a prohibited export subsidy within the meaning of Article 3.1(a) of the SCM Agreement;
- (c) *uphold* the Panel’s recommendation and specification that the subsidies found to

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be prohibited must be withdrawn within 90 days, explaining that such recommendation and specification apply equally to the additional subsidies found by the Appellate Body to be prohibited, namely the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid; or, alternatively, *modify* the Panel's recommendation and specification, in paragraph 8.6 of its report, that the subsidies found to be prohibited must be withdrawn within 90 days, by clarifying that they apply to the French A380, French A340-500/600, Spanish A340-500/600, and French A330-200 launch aid, in addition to the German, Spanish and UK A380 launch aid;

- (d) *reverse* the Panel's findings, in paragraphs 7.580 and 7.581 of its report, that the United States had failed to demonstrate the existence of the Launch Aid Program; and
- (e) *find* that the Launch Aid Program constitutes a specific subsidy, provided by France, Germany, Spain and the United Kingdom to Airbus, that causes adverse effects to the interests of the United States.