

NON-BCI VERSION

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

(AB-2010-1/DS316)

WRITTEN MEMORANDUM OF THE UNITED STATES OF AMERICA
PURSUANT TO RULE 28
OF THE *WORKING PROCEDURES FOR APPELLATE REVIEW*

November 26, 2010

SERVICE LIST

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TABLE OF CONTENTS

I.	Introduction.....	1
II.	Non-Retroactivity	1
	A. Applying Article 5 of the SCM Agreement to the Current Adverse Effects of Pre-1995 Subsidies is Consistent with the Non-Retroactivity Rule Under Article 28 of the Vienna Convention.	1
	B. If the Subsidy Itself is the Relevant Act, Fact, or Situation, Application of Article 5 of the SCM Agreement to Pre-1995 Subsidies is Consistent with the Non-Retroactivity Rule Under Article 28 of the Vienna Convention.....	2
III.	LA/MSF as a Program	5
IV.	The Benefit Conferred by LA/MSF	9
	A. The EU Has Identified No Flaw With the Panel’s Appreciation of the Relative Risk Associated with the Development of Individual Airbus Aircraft.....	9
	B. The European Union Has Identified No Flaw With the Conclusion that the Internal Rates of Return Proposed by the EU “Could Only Represent, at Most, the Outer Limit of What the EC Member State Governments Could Have Reasonably Expected at the Time of Concluding the Contracts.”	10
	C. The European Union Has Identified No Flaw With the Panel’s Conclusion that Dr. Whitelaw’s Proposed Benchmark Did Not Accurately Reflect the Cost of Obtaining LA/MSF in the Market.....	11
	D. The EU Has Identified No Flaw With the Panel’s Conclusion that French and Spanish LA/MSF for the A330/200 and A340-500/600 Conferred a Benefit.	19
	E. The Dorman Discount Rate is Not an Appropriate Market Benchmark and Was Never Represented as One.	21
V.	LA/MSF as an Export-Contingent Subsidy	22
VI.	Article 11 of the DSU does not Impose an Obligation for a Panel to Provide a “Reasoned and Adequate Explanation” of its Findings.	28
VII.	Conclusion	30

TABLE OF REPORTS AND OTHER DOCUMENTS
TABLE OF REPORTS

Short Form	Full Citation
<i>Australia – Salmon (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<i>Canada – Autos (AB)</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
<i>Canada – Periodicals (AB)</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>EC – Poultry (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998
<i>Japan – Varietals (AB)</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999
<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000
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<i>Mexico – Corn Syrup (AB)</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R, adopted 24 February 2000, and Corr.1
Panel Report	<i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, 30 June 2010
<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

Short Form	Full Citation
<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 – 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
<i>US – Zeroing (21.5 – EC)(AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

TABLE OF OTHER DOCUMENTS

1992 Agreement	<i>Agreement concerning the application of the GATT Agreement on Trade in Civil Aircraft on trade in large civil aircraft (12 April 1979)</i>
<i>New Shorter Oxford English Dictionary</i>	<i>The New Shorter Oxford English Dictionary on Historical Principles (Clarendon Press, Oxford) (1993)</i>
SCM Agreement	<i>Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization.</i>
Vienna Convention	United Nations, <i>Vienna Convention on the Law of Treaties</i> , 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

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EC Comment on US RPQ XXX	Comments by the European Communities on the US Responses to Questions from the Panel Following the Panel's Second Substantive Meeting with the Parties, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)</i> (5 October 2007)
EC FCOS	BCI Statement of the the European Communities at the First Meeting of the Panel, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)</i> (21 March 2007)
EC FWS	First Written Submission by the European Communities, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)</i> (5 April 2007)
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EC SOS	Oral Statement of the the European Communities to the Second Meeting of the Panel, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)</i> (14 November 2007)
EU Appellant Submission	Appellant Submission of the European Union, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)</i> (16 August 2010)
US Appellee Submission	Appellee Submission of the United States <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)</i> (September 30, 2010)
US FWS	First Written Submission by the United States, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)</i> (November 15, 2006)
US SCOS	Statement of the United States at the Second Meeting of the Panel, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)</i> (July 26, 2007)

US SWS	Second Submission of the United States of America, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316)</i> (June 28, 2007)
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I. INTRODUCTION

1. This dispute is about 40 years of massive, consistent subsidization by European governments of Airbus large civil aircraft. The most significant of these subsidies was “LA/MSF,” an acronym coined by the Panel to reflect the various names given to the success-dependent, back-loaded, below-market financing that the governments of France, Germany, Spain, and the United Kingdom give Airbus. LA/MSF and the other subsidies granted by the European Union (“EU”) and its member States, allowed Airbus to become the world’s largest producer of large civil aircraft, contributed greatly to the EU trade balance, and caused significant adverse effects to the interests of the United States and its large civil aircraft manufacturers – first Boeing and McDonnell Douglas, and later just Boeing. In this appeal, the European Union has presented nothing to justify reversing the Panel’s findings to that effect.

2. The United States submits this memorandum at the request of the Division to address any issues raised during the hearing of November 11-17, 2010, that might benefit from written explication. The United States understands that the Members of the Division are familiar with the submissions of the parties and the arguments made orally at the hearing. This submission will elaborate on those arguments, and will not repeat material with which the Division is already familiar, except as necessary to understand any new points raised in this memorandum.

3. For the sake of convenience, this memorandum will address issues in the order they arose over the course of the hearing. It will then end with a discussion of the overarching question of the proper standard for review of a Panel’s compliance with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

II. NON-RETROACTIVITY

A. Applying Article 5 of the SCM Agreement to the Current Adverse Effects of Pre-1995 Subsidies is Consistent with the Non-Retroactivity Rule Under Article 28 of the Vienna Convention.

4. The European Union at the hearing provided no reason to question the Panel’s conclusion that application of Article 5 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) to all the subsidies in this dispute did not give rise to retroactivity concerns. The Panel correctly recognized Article 28 of the *Vienna Convention on the Law of Treaties* as reflecting the relevant non-retroactivity rule, and properly considered the nature of Article 5 of the SCM Agreement in reaching its conclusion. Furthermore, the Panel properly found that adverse effects caused through the use of subsidies – and not the subsidies themselves – are the situation bound by Article 5, and focused its retroactivity analysis on that situation.

5. The European Union never provided a convincing rebuttal to the Panel’s analysis. It argued instead that the Panel should have ignored the text of Article 5 and focused on the government grant of a subsidy as the relevant “fact” for purposes of applying Article 28 of the Vienna Convention. In the EU view, such a grant comes into existence at the time of the decision to confer it and remains in existence up through the time that the government completes

disbursing funds, and any subsequent effects of those disbursements are irrelevant for purposes of non-retroactivity. This analysis is completely wrong.

6. In the first place, it is difficult to see how a panel could evaluate whether application of a provision was retroactive while ignoring the obligation imposed by that provision. It is also difficult to understand why only the grant of a subsidy, and not the continued maintenance of the subsidy and the adverse effects of the subsidy, would be relevant for the retroactivity analysis. At the hearing, the European Union attempted to find support for its view regarding the effects of a subsidy in Article 14(1) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which provides that “[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.” The United States takes no position with regard to whether this provision accurately reflects customary international law. However, the key point is that the European Union has conceded that the subsidy, in the form of a benefit conferred by a financial contribution, will have a continuing character. Therefore, Article 14(1) of the Draft Articles, which is premised on an obligation “not having a continuing character,” does not apply to the subsidies at issue in this dispute.

7. The European Union also did not succeed in rebutting the primary U.S. argument, namely, that the Panel correctly found that the SCM Agreement applies to adverse effects after 1995 even if some of the subsidies causing those adverse effects were granted before the 1995 entry into force of the Agreement. In particular, the United States pointed out that Article 5 of the SCM Agreement does not prohibit the granting or even the use of subsidies, but rather the adverse effects caused by the use of such subsidies.¹

8. In short, the European Union has provided no basis for the Appellate Body to reverse or modify the Panel’s conclusions regarding the non-retroactivity of the application of Article 5 of the SCM Agreement.

B. If the Subsidy Itself is the Relevant Act, Fact, or Situation, Application of Article 5 of the SCM Agreement to Pre-1995 Subsidies is Consistent with the Non-Retroactivity Rule Under Article 28 of the Vienna Convention.

9. Many of the questions at the hearing focused on the U.S. alternative argument, that if adverse effects caused through the use of subsidies were not the relevant situation for purposes of the retroactivity analysis, then the subsidies themselves were the relevant acts, facts, or situations. The United States demonstrated in its appellee submission that, if this were the case, the Appellate Body could complete the Panel’s analysis and conclude that the application of the

¹ *E.g.*, U.S. Appellee Submission, paras. 13 and 47-63.

SCM Agreement to the subsidies at issue that were granted to Airbus large civil aircraft before 1995 did not raise retroactivity concerns.²

10. The Panel based its conclusion on the text of Article 5 of the SCM Agreement, which provides that “{n}o Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members.” The Panel reasoned that:

While “cause” is used as a verb in Article 5, it does not connote specific action on the part of a Member. Rather, it describes a particular relationship between the antecedent conduct of a Member and subsequent events which ultimately are attributed to that Member. To the extent that Article 5 involves “acts” or conduct, they relate to the “use” of the subsidy, and not the “bringing into existence” or granting of the subsidy.³

If the Appellate Body were to conclude that adverse effects caused through use of subsidies were not the relevant “situation,” that would not change the accuracy of the Panel’s observation that Article 5 does not relate to the grant or “bringing into existence” of subsidies, as the European Union asserts. Thus, a finding that the Panel erred would not support the conclusion that the European Union was correct. Rather, the focus would move to the phrase “through the use of any subsidy,” which would indicate the subsidy itself as the relevant act, fact, or situation for purposes of the non-retroactivity analysis.

11. In its appellee submission, the United States requested that, if the Appellate Body reversed the Panel’s findings on retroactivity, it complete the Panel’s analysis based on the alternative approach outlined above. In *US – Zeroing (EC) (21.5)*, the Appellate Body explained that

{i}n previous disputes, the Appellate Body has completed the analysis with a view to facilitating the prompt settlement of the dispute. However, the Appellate Body has held that it can do so only if the factual findings of the panel and the undisputed facts in the panel record provide it with a sufficient basis for the completion of its own analysis.⁴

12. Applying this standard, the factual findings of the Panel and the undisputed facts in the panel record provide more than a sufficient basis to complete the analysis. In particular, the findings and the record establish the existence of the subsidies that the European Union asserts

² U.S. Appellee Submission, paras. 64-70.

³ Panel Report, para. 7.52.

⁴ *US – Zeroing (21.5 – EC) (AB)*, para. 388, citing *Australia – Salmon (AB)*, paras. 209, 241, and 255; *Korea – Dairy (AB)*, paras. 91 and 102; *Canada – Autos (AB)*, paras. 133 and 144; *Korea – Various Measures on Beef (AB)*, para. 128; *EC – Asbestos (AB)*, paras. 82 and 83; *Canada – Periodicals (AB)*, p. 24.

are outside the temporal scope of the SCM Agreement. To begin, the European Union conceded at the hearing that a subsidy is a continuing action, beginning at the grant of the financial contribution and continuing as long as the subsidy confers a benefit. The United States agrees, so there is no dispute on this point. The participants also agree that LA/MSF, the largest subsidies at issue in this dispute, was granted at particular times in the past, was subject to per-aircraft repayments each time Airbus sold an aircraft, and that each of the aircraft with respect to which Airbus received LA/MSF before 1995 – the A300, A310, A320, A330, and A340 – was also sold after 1995.⁵ Therefore, Airbus continued to enjoy a below-market repayment obligation, which is a “benefit” under the SCM Agreement. The participants also agree that all of the LA/MSF granted for these aircraft conferred a subsidy. (The only Airbus aircraft that the European Union asserts was not subsidized, the A330-200, received LA/MSF after 1995.⁶) These facts lead inescapably to the conclusions that Airbus made LA/MSF payments after 1995 for each of the pre-1995 aircraft, and that those payments were less than it would have paid for comparable market financing – *i.e.*, they conferred a benefit on Airbus. Thus, the Appellate Body can complete the Panel’s analysis to find that all of the LA/MSF initially granted before 1995 conferred a subsidy after 1995, and that application of Article 5 to that act, fact, or situation accordingly does not raise any retroactivity concerns.

13. The same conclusion applies to the other subsidies that the European Union asserted were outside the temporal scope of the SCM Agreement – the lengthening of the runway at Bremen (and associated noise reduction measures), the share transactions between Kreditanstalt für Wiederaufbau (“KfW”) and Daimler, the French government capital contributions to Aérospatiale, and the Second and Third Framework Programmes.⁷ The Panel found with regard to the Bremen runway that Airbus pays usage fees less than it would pay if it had to secure use of the lengthened runway at commercial rates.⁸ That finding applies to the present day, indicating that the subsidy conferred a benefit after 1995. The Panel found that the government capital contributions to Aérospatiale in 1987, 1988, 1992, and 1994 were inconsistent with the usual investment practice of private investors.⁹ This logic also indicates that the transfer of 1989 and 1992 KfW-Daimler transactions conferred a benefit after 1995. The European Union has argued that subsequent events extinguished, extracted, or withdrew certain subsidies, but all of those occurred in 1999 or later.¹⁰

⁵ ITR, Calculating Magnitude of the Subsidies Provided to the Recipient Entities, pp. 2-3 (Exhibit EC-13(BCI)); Airclaims CASE Database, data query as of 19 January 2007 (Exhibit EC-21).

⁶ EU Appellant Submission, para. 20.

⁷ EU Appellant Submission, paras. 73-76.

⁸ Panel Report, para. 7.1133.

⁹ Panel Report, paras. 7.1367, 7.1371, and 7.1378.

¹⁰ EU Appellant Submission, para. 147.

14. The EU arguments against this conclusion are unconvincing. In its oral statement at the hearing, the European Union argued “any ‘continuing benefit’ arising from subsidies granted with respect to the A300 and A310 ceased to exist *before* 1995 pursuant to amortisation rules and, therefore, would be outside the temporal scope of this dispute.”¹¹ However, the European Union never raised this point with any clarity before the Panel, and has not appealed on the grounds that the Panel should have used an amortization theory to determine an artificial date for expiration of the benefit. In any event, the EU assertion that amortization is *required* raises a legal issue, that the Appellate Body should reject on the basis that the EU has cited no authority for the existence of such a requirement. (While amortization and allocation are tools for calculating and attributing the benefit conferred by a subsidy over time, the SCM Agreement does not require use of that tool.) It is hard to see how, as a matter of logic, repeated open-ended subsidies such as LA/MSF could stop conferring benefit even as sales and, thus, below-market repayments, continue.

15. The European Union asserted at the hearing that it is only permissible for the Appellate Body to complete a panel’s analysis when the panel has made findings in the context of the issue for which it is completing the analysis. The European Union overlooks the fact that the Appellate Body can complete the analysis relying on either uncontested facts on the record or factual findings of a panel. The Appellate Body reports cited above make this clear. In any event, the findings and uncontested facts on which the Appellate Body would rely in this instance relate to the existence of a benefit, an issue that the parties debated extensively before the Panel. Finally, as noted above, it is in fact the European Union that is making entirely new arguments on appeal that it did not present to the Panel and that have no basis in the evidence on the record.

16. Thus, if the Appellate Body concludes that the subsidy itself is the relevant act, fact, or situation for purposes of applying the rule in Article 28 of the Vienna Convention, rather than the adverse effects caused by use of the subsidy, the Appellate Body should complete the Panel’s analysis and conclude that each of the subsidies that the European Union asserts to be outside the temporal scope of the SCM Agreement was in existence after January 1, 1995 and, therefore, within the scope of the SCM Agreement.

III. LA/MSF AS A PROGRAM

17. The United States demonstrated to the Panel that France, Germany, Spain, and the United Kingdom repeatedly gave LA/MSF with the same core terms each successive time that Airbus requested aid, and that this constituted a measure subject to challenge under the SCM Agreement. The Panel disagreed, finding that to establish the existence of an unwritten measure under Articles 1 and 2 of the SCM Agreement, a complaining party must demonstrate that the measure is of “general and prospective application.” The Panel concluded that the United States failed to satisfy this requirement.

¹¹ EU Oral Statement, para. 7 (emphasis in original).

18. In its submissions and during the first Appellate Body hearing, the United States showed that in doing so, the Panel failed to identify and apply the legal standard articulated by the Appellate Body. In *US – Continued Zeroing*, the Appellate Body found that a complaining party establishes the existence of a measure subject to challenge under the Antidumping Agreement if the facts provide evidence of the precise content of the measure and its repeated use in successive proceedings.¹² The Panel found that those very facts exist in this dispute. The Panel identified the “precise content” of the LA/MSF Program as the “four core terms” identified by the United States – “loans that are (a) unsecured, (b) repayable on a success-dependent basis (*i.e.*, through per sale levies), (c) with the levy amounts greater for later sales than earlier sales (*i.e.*, back-loaded) and (d) with interest accruing at rates below what the market would demand for the assumption of similar risk.”¹³ The Panel also found that all the grants of LA/MSF, spread over 40 years, shared these terms.¹⁴ Thus, the content of the LA/MSF Program is precise, and used repeatedly in successive proceedings.

19. In its submissions to the Appellate Body, the European Union has sought to evade this conclusion by arguing that the LA/MSF Program is no different than the individual grants of LA/MSF and, therefore, has no independent existence. However, in its review of the adverse effects caused by the LA/MSF and other measures at issue, the Panel explained how each of the provisions of LA/MSF worked together and systematically provided an advantage to Airbus in the market. Because of the very nature and effects of the subsidies, the whole was greater than the parts. Therefore, the European Union is wrong to argue that a finding with regard to LA/MSF as a program would be redundant of the Panel’s findings with regard to the individual grants of LA/MSF. This is consistent with the Appellate Body’s approach in *US – Continued Zeroing*, in which it did not consider it redundant to make a finding as to “continued use.”

20. For example, the Panel found that LA/MSF taken as a whole had a positive effect on Airbus’s creditworthiness, as well as levels of cash flow and debt.¹⁵ The Panel also relied specifically on the fact that “we are not concerned here with a one-off grant of a single subsidy”¹⁶ and, in several places in its report, refers to evidence of the collective nature of the European governments’ actions:

While we have found that the United States has not demonstrated the existence of a “LA/MSF programme” *per se*, based on the evidence before us, we consider that the governments of France, Germany, Spain, and the United Kingdom, and

¹² *US – Continued Zeroing (AB)*, para. 189.

¹³ Panel Report, para. 7.525.

¹⁴ Panel Report, para. 7.525.

¹⁵ Panel Report, para. 7.2022.

¹⁶ Panel Report, para. 7.1975.

the European Communities, have pursued a policy of providing support for LCA development and production since 1969.¹⁷

21. The Panel’s own findings and the evidence on the record demonstrate the concerted nature of this behavior. For example, the Panel’s overview of LA/MSF contracts and agreements specifically refers to several intergovernmental agreements in which the Airbus governments jointly agreed to fund Airbus’ large civil aircraft development.¹⁸ This includes intergovernmental cooperation agreements for the A300, A310, A320, and A330/340.¹⁹ It also includes the Airbus A380 [***]²⁰ and the Framework Agreement [***], which refers specifically to the [***] and [***].²¹ These agreements and arrangements clearly demonstrate the concerted and quite systematic nature of the governments’ behavior and confirm that the provision of LA/MSF was not merely an *ad hoc* decision of individual governments, but a coordinated policy among multiple EU member States, just as the Panel found.²²

22. We note in this respect in particular the 1981 agreement between the governments of France, Germany, Great Britain and Spain concerning the A300 and A310 projects.²³ This agreement goes well beyond the EU description of it as a general expression of “cooperation and coordination on proposed new LCA.”²⁴ It sets out detailed obligations regarding [***]²⁵ It is also, once again, an intergovernmental agreement between the Airbus governments, rather than an action of any one individual government alone.

23. The United States also pointed out that the roots of the Airbus governments’ LA/MSF program can be traced to 1969, when the governments of France and Germany entered into an intergovernmental agreement to “reinforce European cooperation in the field of aeronautics.”²⁶ Under the terms of the agreement, France and Germany agreed to provide up to FF 2.05 billion and DM 1.65 billion, respectively, in LA/MSF to underwrite the costs of developing the first

¹⁷ Panel Report, footnote 5731.

¹⁸ Panel Report, para. 7.290.

¹⁹ Panel Report, para. 7.290.

²⁰ Exhibit EC-80 (HSBI).

²¹ Exhibit EC-77 (BCI); *e.g.*, p. 3/24, 5/24.

²² Panel Report, footnote 5731, *supra*.

²³ Exhibits EC-941 and EC-942.

²⁴ EC Comments on U.S. RPQ 137, para. 9.

²⁵ *See* *Accords Intergouvernements – France, Allemagne, Royaume Uni, Espagne – Extension des accords précédents au programme A310*, Arts. 8 and 9 (Sep. 28, 1981) (Exhibit EC-942 (BCI)).

²⁶ *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*, preamble (1969) (“1969 agreement”) (Exhibit US-11).

Airbus aircraft, the A300-B.²⁷ This was to be the first such intergovernmental arrangement of many.²⁸ (The Panel never explicitly referred to these intergovernmental arrangements as such in its analysis of the existence of LA/MSF as a “measure with normative value.” It merely reviewed some of them in its analysis of the U.S. argument regarding intergovernmental *institutional* structures.)

24. The United States also refers in this context to several statements the European Union made in response to Panel Question 249. The European Union acknowledged that the terms of repayment under the Spanish A330/A340 LA/MSF agreement were set [***]. A few sentences later, it also clarified that the A330/A340 agreement, “consistent with the A320 agreement . . . [***].” The references by the European Union to such explicit commonalities among LA/MSF agreements re-emphasize the systematic nature of LA/MSF as a program and its operation as a “European industrial policy” in support of Airbus.²⁹

25. The United States also notes again the Appellate Body’s assessment that “in principle, any act or omission attributable to a WTO Member can be a measure of that member for purposes of dispute settlement proceedings.”³⁰ Here, that includes both the individual applications of LA/MSF for Airbus’ various large civil aircraft models and by each of the individual EU member States, and the overall LA/MSF program. As Brazil noted in its Third Participant Submission,

if the complaining Member is not challenging a norm but instead is challenging a string of actions based on the same support mechanism . . . it is not useful to require the complaining Member to demonstrate that the government engaging in these actions felt ‘under an obligation’ to provide such support or that the support has ‘general and prospective application’ in the sense that such support necessarily will be provided in the future.”³¹

If a Member believes that the root of the WTO inconsistency stems from a deliberate policy or program to consistently provide a subsidy over time, then if it can establish the existence of that policy or program, that Member should be able to challenge that measure and not merely each of the individual decisions to grant funding.

²⁷ 1969 Agreement, Art. 6.

²⁸ Panel Report, paras. 93-94.

²⁹ Airbus Press Release, *Heads of State Help Celebrate the A380* (Jan. 18, 2005) (Exhibit US-44); US FWS, para. 85, footnote 70.

³⁰ *US – Carbon Steel (AB)*, para. 81.

³¹ Third Participant Submission of Brazil, para. 29.

IV. THE BENEFIT CONFERRED BY LA/MSF

A. The EU Has Identified No Flaw With the Panel’s Appreciation of the Relative Risk Associated with the Development of Individual Airbus Aircraft.

26. The Panel clearly distinguished between the different risk profiles of different aircraft, and placed each development project in one of three groups based on the level of risk. The United States explained in its appellee submission and at the hearing that this exercise did not mean that the Panel failed to conduct an individualized assessment of each aircraft. The Panel stated that it conducted such an assessment, and the European Union provides no reason to doubt it. Rather, the grouping of aircraft signifies that the results of the Panel’s evaluation of each aircraft, indicated risk premiums that fall into three different ranges.

27. The European Union argued at the hearing that because the Panel did not include footnotes to specific sources in its concluding paragraph, it failed to support its conclusions. What the European Union fails to acknowledge is that the Panel arrived at its finding after an extremely thorough discussion of the appropriate benchmark rate. The Panel Report evinces a consideration of all of the arguments and evidence before the Panel, with 51 pages and 115 paragraphs on the general question of whether LA/MSF conferred a benefit,³² 24 pages (65 paragraphs) on the appropriate rate of return of comparable market-based financing,³³ and six pages (15 paragraphs) on why it arrived at its particular conclusion with regard to the benchmark rate. The Panel devoted 19 paragraphs exclusively to laying out the arguments of the United States and the European Union with regard to the appropriate project-specific risk premium,³⁴ and eight paragraphs to explaining its own conclusion on the risk premium.³⁵ Ample evidence supports the Panel’s conclusions regarding the relative riskiness of the various Airbus projects at issue. Apart from the evidence cited in the U.S. appellee submission, this evidence includes the various HSBI-designated Project Appraisals,³⁶ Global Market Forecasts,³⁷ and other pertinent information.³⁸ The United States noted that even a former head of Deutsche Airbus and DASA

³² Panel Report, paras. 7.382–7.497.

³³ Panel Report, paras. 7.433–7.497.

³⁴ Panel Report, paras. 7.442–7.460.

³⁵ Panel Report, paras. 7.461–7.468.

³⁶ French government’s “critical project appraisal”. See also US, FWS, HSBI Appendix, paras. 34 and 36 (HSBI); French A380 project appraisal (DS316-EC-HSBI-00011434, at 9-10); French A330-200 Project Appraisal (cited in US HSBI Appendix to FWS, para. 55 and US SCOS).

³⁷ E.g., Panel Report, paras. 7.651 (Exhibits US-356, US-358), 7.652, pp. 500 (US-366 and US-367), 502 (citing US FWS, para. 380); 503–504 (citing US FWS, para. 353–357); 505, 506, 507 (citing US FWS, paras. 353–357).

³⁸ US Appellee Submission, footnote 339, citing Panel Report, para. 7.468, footnote 2679 (citing Ellis Report, Exhibit US-80 (BCI), fn. 28); US FWS, footnote 113 and evidence cited there (concerning the A380); US FWS, paras 142–145 (also concerning the A380); US FWS, footnote 185 (concerning the A300/A310).

board member stated that “everybody knows that {the A380} is extremely high risk from every point of view: technically, airframewise, engine-wise, money-wise, certification-wise” and describing the A380 as “extremely risky.”³⁹ There can, therefore, be no argument that the Panel lacked evidence in support of this finding.

28. Accordingly, the Panel did not fail to recognize, acknowledge, or analyze the different degrees of risk associated with different aircraft. To the contrary, the Panel Report demonstrates that the Panel considered this issue carefully and simply concluded that with respect to certain models, the appropriate model-specific risk premiums lie within a common range. The Panel was clear regarding factors it found important in this regard: “the conditions of competition in the aircraft industry and differences in the levels of technology associated with developing different models of LCA.”⁴⁰ The Panel continued on to note that:

a project-specific risk premium may even vary over time because of the levels of risk that the finance industry is willing to accept at different moments in its own economic cycle. Moreover, if the project-specific risk premium is intended to relate to the risk of default attached to LA/MSF for a particular LCA development project, it would seem to follow that, all things being equal, it should be greater for earlier LCA development projects, when Airbus had relatively less experience – or conversely, the risk premium associated with development of a later model of LCA should be lower in light of the successful prior experience.⁴¹

These statements show that the Panel carefully considered this issue. The fact that it did not write out each and every step of its analysis in its final Report, and that it ultimately found that it was enough to attribute a certain range of premiums to certain models, is by no means an error and cannot legally justify reversal.

B. The European Union Has Identified No Flaw With the Conclusion that the Internal Rates of Return Proposed by the EU “Could Only Represent, at Most, the Outer Limit of What the EC Member State Governments Could Have Reasonably Expected at the Time of Concluding the Contracts.”

29. The Panel’s observations in paragraphs 7.408 and 7.414 regarding the uncertainty of forecast sales and sale prices in the large civil aircraft industry should be noncontroversial, as both parties emphasized this point.⁴² These paragraphs also reflect concerns the Panel expressed in paragraph 7.415, and explained in footnotes 2533 and 2541, that the European Union did not provide sufficient support for its delivery forecasts, or demonstrate that the forecasts reported to

³⁹ US FWS, para 260-262.

⁴⁰ Panel Report, para. 7.468.

⁴¹ Panel Report, para. 7.468.

⁴² EC FWS, paras. 27-30; US FWS, paras. 112-115.

the Panel were the same as those on which the member States relied when granting LA/MSF. These are serious reservations, which cast doubt on the reliability of the EU data. As the U.S. second written submission explained, in a passage cited by the Panel,⁴³

{w}hat the EC calls the “internal rate of return” is based not on the actual interest rate set out in a Launch Aid contract but on “the business case delivery forecast . . . over the life of an aircraft programme.” In other words, this rate is a function not just of the levies to repay the Launch Aid amount but also anticipated royalties on later deliveries.⁴⁴

Thus, the internal rates of return calculated by the European Union are not directly analogous to an interest rate.

30. Nonetheless, the point is largely moot because, with two exceptions, the Panel accepted the EU internal rates of return as “reasonable proxies for the *maximum* rates of return that the EC member State governments could have reasonably anticipated when entering into the LA/MSF agreements.”⁴⁵ The two exceptions were the French A330-200 contract and the Spanish A340-500/600 contract. For these two grants of LA/MSF, the Panel had *additional* concerns, laid out in paragraphs 7.416-7.424, that led it to reject the EU proposed internal rates of return. Although the Panel found the EU figures to be a “maximum,” when it came to comparison with benchmark rates, it treated them as if they were the actual interest rates, rather than the top of a range of possible rates. This is another way in which the Panel’s methodology was conservative. Had it used a range of internal rates of return for LA/MSF contracts, as it did with the benchmarks, the high end of the benefit ranges in paragraph 7.488, Table 7 would have been even higher.

C. The European Union Has Identified No Flaw With the Panel’s Conclusion that Dr. Whitelaw’s Proposed Benchmark Did Not Accurately Reflect the Cost of Obtaining LA/MSF in the Market.

31. The European Union also argued in its appellant submission and at the hearing that the Panel erred in rejecting Prof. Whitelaw’s risk-sharing supplier (“RSS”) premium because “there is no evidentiary basis for certain of these findings,” the Panel “failed to request the information it considered necessary for its assessment of the European Union’s argument,” and the Panel failed to provide “a reasoned and adequate explanation.”⁴⁶ In fact, the Panel conducted a thorough and objective analysis of the European Union’s arguments and the relevant evidence concerning the RSS project-specific risk premium at the core of the benchmark constructed by Prof. Whitelaw. In rejecting this risk premium, the Panel carefully explained how it arrived at its

⁴³ Panel Report, para. 7.409, footnote 2536.

⁴⁴ US SWS, para. 121.

⁴⁵ Panel Report, para. 7.415 (emphasis in original).

⁴⁶ EU Appellant Submission, para. 793.

conclusions. This explanation demonstrated both that the European Union failed to establish that its benchmark satisfied the benefit standard under Article 1.1(b) of the SCM Agreement and also that the Panel itself fulfilled its duties under Article 11 of the DSU. (The United States explains in section VI that “reasoned and adequate explanation” is not a standard imposed by Article 11. Even putting this aside, however, the Panel’s assessment of Dr. Whitelaw’s proposal would meet the test.) And, finally, the European Union bore the burden of supporting its assertions regarding the Whitelaw risk premium. The Panel had no obligation under Article 11 to prod the European Union to be more forthcoming with evidence to support its assertions.

32. The Panel began its analysis of the EU benchmark by reviewing the project-specific risk premium proposed by Prof. Whitelaw.⁴⁷ The Panel explained how that benchmark was based on the returns the Airbus risk-sharing suppliers expected to achieve on the financing they provided for the purpose of developing the A380. It described in detail the EU argument that reliance on the Airbus A380 risk-sharing supplier contracts was appropriate because they contain similar terms and conditions to LA/MSF and involved comparable risk.⁴⁸ The Panel also outlined the methodology laid down in the EU’s expert report and noted that the European Union advanced three cross-checks that purportedly supported its proposed project-specific risk premium.⁴⁹ Finally, the Panel recounted the counter-arguments and critiques submitted by both parties, including all of the EU responses in its second confidential and non-confidential oral statements to the U.S. criticisms of the Whitelaw project-specific risk premium.⁵⁰ The Panel then provided detailed findings and explained how it arrived at those findings.⁵¹

33. Specifically, the Panel found deficiencies in the EU arguments in support of the Whitelaw RSS risk premium:

- the limited sample of risk-sharing supplier contracts on which the EU’s expert relied; the differences in risk between RSS contract terms and LA/MSF;
- the RSS incentives to lower expected rates of returns based on the specific nature of their relationship with Airbus;
- the fact that government support for the A380 in the form of LA/MSF reduces the level of risk associated with risk-sharing supplier financing, thereby limiting its comparability with LA/MSF; and

⁴⁷ Panel Report, paras. 7.470–7.481.

⁴⁸ Panel Report, paras. 7.470–7.474.

⁴⁹ Panel Report, paras. 7.472–7.473.

⁵⁰ Panel Report, para. 7.478.

⁵¹ Panel Report, paras. 7.475–7.479; 7.479–7.481.

- the fact that “there is information in the Airbus A380 business case which suggests that the risk-sharing participants’ involvement in the A380 project may not have been on strictly market terms for all participants.”⁵²

34. On the basis of these deficiencies, the Panel reached the conclusions laid out in paragraphs 7.480 and 7.481 of its report that:

the shortcomings in the evidence relied upon by Professor Whitelaw to derive the European Communities proposed project-specific risk premium and the notable differences between the risks assumed by the risk-sharing suppliers compared with the EC member State governments, lead us to conclude that the European Communities’ project-specific risk premium for the A380 is unreliable and understates the risk premium that a market operator would have reasonably demanded Airbus pay for financing on the same or similar terms as LA/MSF for this particular model of LCA.⁵³

35. We note in this regard that, contrary to what the EU arguments suggest, the Panel was under no obligation to ask the European Union to further substantiate its case. In fact, the European Union bore the burden of supporting its benchmark argument. The European Union was clearly well aware of the U.S. criticisms of the Whitelaw benchmark, which put it on notice of the need to provide further evidence to support its arguments.

36. In terms of the EU contention that the Panel failed to provide a reasoned and adequate explanation of its findings, in preparing its report, the Panel worked under a set of somewhat unusual constraints, imposed largely by the European Union itself. Much of the information on which the EU RSS risk premium relied was HSBI. By necessity, the U.S. counterarguments also used HSBI. The Panel did its best to avoid directly referring to such data in its final report. What the Panel did do, however, was to refer specifically to the various places where the U.S. expert, Dr. Ellis, demonstrated the errors in the EU proposed benchmark rates. It referred to this HSBI evidence, *inter alia*, in footnotes 2692 through 2698, 2700 and 2701 and paragraphs 7.475 – 7.478 of its Report. A review of this part of the Panel Report makes clear that the Panel accepted the broad outlines of Dr. Ellis’s reasoning, even if it did not adopt his figures for all Airbus aircraft development programs, and relied on passages from the Ellis reports that the United States referenced in its submissions.

37. In its second confidential oral statement, the European Union argued that Dr. Ellis’s critique of Dr. Whitelaw’s RSS risk premium failed to show: (1) that risk-sharing suppliers bear “significantly lower risk;”⁵⁴ (2) that the sample of RSS contracts used in the Whitelaw Report is

⁵² *E.g.*, Panel Report, para. 7.480.

⁵³ Panel Report, para. 7.481.

⁵⁴ EC SCOS, paras. 78-83.

flawed;⁵⁵ (3) that government support to risk-sharing suppliers distorts the IRR values in the Whitelaw Report;⁵⁶ (4) that LA/MSF provided to Airbus reduces the risk associated with Airbus and therefore distorts the RSS benchmark;⁵⁷ and (5) that risk sharing suppliers are invalid “market actors.”⁵⁸ In fact, Dr. Ellis’s Rebuttal Report explained in detail why flaws in Prof. Whitelaw’s RSS risk premium made it an unreliable measurement of what a market actor would charge to assume a risk comparable to LA/MSF. The Panel Report then explains why the Panel decided to reject Prof. Whitelaw’s arguments.

38. **Comparable Risk.** The Panel was well aware of the EU argument that risk-sharing supplier contracts “are widely used in the LCA industry, contain similar terms and conditions and involve comparable risk.”⁵⁹ It cited to the EU attempt, in its second confidential oral statement, to rebut Dr. Ellis’s observation that risk-sharing supplier contracts understate the risks associated with LA/MSF:

referring mostly to HSBI evidence, the European Communities argues that there are only modest differences between the repayment terms of risk-sharing supplier contracts and LA/MSF, and that these differences are offset by two sources of risk not faced by the member States: *i.e.*, the risk of cost overruns and the risk in the timing of their receipts. The European Communities also dismisses the United States’ reliance on the Fitch Ratings agency report, arguing that the latter did not know whether the A380 suppliers received minimum purchase commitments.⁶⁰

39. The Panel rejected these arguments, and fully explained its reasons for doing so. The EU Second Confidential Oral Statement relies heavily on Exhibit EC-860 (HSBI), a chart purporting to confirm that “in contrast with equity measures, the risk-sharing supplier benchmark closely mirrors the risk profile of MSF loans.”⁶¹ The Panel noted the absence of evidence to substantiate the EU assertions as to the comparability of the risk profiles for RSS contracts and LA/MSF:

the European Communities has submitted little if any of the underlying data used in Professor Whitelaw’s calculations. Specifically, the European Communities has provided a table summarizing various pieces of information that appear to be taken and derived from the sampled risk-sharing supplier contracts, and five pages

⁵⁵ EC SCOS, paras. 84-88.

⁵⁶ EC SCOS, paras. 89-91.

⁵⁷ EC SCOS, paras. 92.

⁵⁸ EC SCOS, paras. 94-97.

⁵⁹ Panel Report, para. 7.471; *cf.* EC SCOS, paras. 72-76.

⁶⁰ Panel Report, para. 7.478 (citing EC SCOS (HSBI), paras. 78-80, EC FCOS, para. 23, EC SCOS (HSBI), para. 83).

⁶¹ EC SCOS, para. 72.

of one of those contracts. Even on the basis of only the number of risk-sharing supplier contracts actually sampled we find this to be clearly insufficient to substantiate the European Communities' assertions in respect of the appropriate project-specific risk premium.⁶²

40. In short, the Panel considered the evidence and expert opinions, and concluded that the EU expert was wrong on this point. Any absence of information supporting Prof. Whitelaw's analysis is not the Panel's fault. The Panel gave the parties ample opportunity to brief and comment on the risk premium issue, allowed lengthy oral statements at panel meetings, and posed several questions regarding the benchmark and project-specific risk premium following its first⁶³ and second substantive meetings.⁶⁴ The European Union's failure to take these opportunities to document Prof. Whitelaw's conclusion reflects a decision it made not to respond to U.S. criticism on this point. It does not constitute an error on the part of the Panel.

41. Crucially, the Panel noted that even the small amount of supporting documentation that the European Union did provide served only to contradict the EU argument, noting that "the one contract that the European Communities has submitted shows that there is at least one major difference between the repayment terms under this contract and LA/MSF which we believe reduces its relative level of risk."⁶⁵ Thus, the European Union at no point overcame U.S. demonstration that RSS contracts do not have a risk profile comparable to LA/MSF.

42. **Sampling.** The Panel was also aware of EU arguments that the sample of risk-sharing supplier contracts used by Prof. Whitelaw provided a reliable basis for the project-specific risk premium he calculated. The Panel referred to the EU Second Confidential Oral Statement in noting that:

Professor Whitelaw responds to the United States' criticisms regarding the sampling of risk-sharing supplier contracts, asserting that the sample used comprised 100% of the contracts for which an internal rate of return could be calculated. In addition, Professor Whitelaw notes that the total agreed amount of A380 development costs assumed by the risk-sharing suppliers included in the sample represents 42.09 percent of total value of development costs for all A380 risk-sharing suppliers contracts.⁶⁶

⁶² Panel Report, para. 7.480 (citing Whitelaw Report, Exhibit EC-11 (HSBI), Exhibit 1; Risk-Sharing Supplier Contract re A380, Exhibit EC-117 (HSBI)).

⁶³ Questions for the Parties, Nos. 8, 9, 66, 67, 73, 74, 75 (March 30, 2007).

⁶⁴ Questions for the Parties, Nos. 143, 170 (July 31, 2007).

⁶⁵ Panel Report, para. 7.480 (citing for comparison the repayment provisions of the Risk Sharing Supplier Contract Re A380, Exhibit EC-117 (HSBI), with *e.g.*, UK A380 LA/MSF contract, Schedule 3, para. 3, Exhibit US-79 (BCI)).

⁶⁶ Panel Report, para. 7.478 (citing EC, SOS (HSBI), paras. 84-88).

43. The core problem with Prof. Whitelaw's defense of his sampling methodology is that it is based on little more than his assertions, as the Panel recognized:

Professor Whitelaw used information from only a sample of the risk-sharing supplier contracts to construct the proposed project-specific risk premium. Although Professor Whitelaw asserts that the contracts used amounted to 100% of those for which an internal rate of return could be calculated, *we have no way of verifying this assertion because the European Communities has submitted little if any of the underlying data used in Professor Whitelaw's calculations.*⁶⁷

This statement shows that the Panel considered Prof. Whitelaw's analysis, and explains in full the reason for dismissing it – that the European Union made it impossible to evaluate the accuracy of his statements. Again, the absence of this evidence is not the fault of the Panel. The U.S. criticisms of Prof. Whitelaw's work gave ample notice that the lack of documentation for the RSS risk premium methodology was a concern, but the European Union nevertheless decided to rest its argument on unsupported assertions.

44. **Government Support to Suppliers.** The Panel was also familiar with EU arguments that government support to risk-sharing suppliers did not distort the internal rate of return values in the Whitelaw Report, including arguments in the EU Second Confidential Oral Statement. The Panel noted that:

the European Communities argues that the United States has offered no evidence that government financing for the risk-sharing suppliers affects the terms of the finance contracts agreed with Airbus. Moreover, the European Communities argues that even if this were the case, the resulting change to the benchmark rate would be negligible.⁶⁸

Here, the Panel accurately characterized the European Union's arguments. Those arguments, however, fail to undermine the Panel's finding that "there is information contained in the Airbus A380 business case which suggests that the risk-sharing participants' involvement in the A380 project may not have been on strictly market terms for all participants."⁶⁹ Regardless of how one quantifies the impact of RSS participation on below-market terms for Whitelaw's RSS benchmark, the Panel's finding here lends further support to its conclusion that the Whitelaw benchmark is not an accurate reflection of the risk premium that the market would demand for the provision of LA/MSF financing.

45. **Effects of LA/MSF on the Risk Associated with Airbus Aircraft.** The Panel was also aware of EU arguments, including those of Prof. Whitelaw in the EU Second Confidential Oral

⁶⁷ Panel Report, para. 7.480 (emphasis added).

⁶⁸ Panel Report, para. 7.478 (citing EC, SOS (HSBI), paras. 89-91).

⁶⁹ Panel Report, para. 7.480.

Statement that “there is no evidence to support the hypothesis that the risk-sharing suppliers would accept lower returns based on the possibility that Airbus would receive LA/MSF on terms and amounts unknown to them.”⁷⁰ The Panel disagreed, and concluded that “{w}e furthermore agree with the view expressed by Brazil and the United States that government support for the A380 in the form of LA/MSF reduces the level of risk associated with risk-sharing supplier financing, thereby limiting its comparability with LA/MSF.”⁷¹ This concise statement, coming after an extended discussion of the operation of LA/MSF, is self-explanatory. The European Union has never hidden the fact that one function of LA/MSF is to shift part of the risk of large civil aircraft development from the manufacturer to the government.⁷² Dr. Dorman explained that “launch aid may cause an otherwise unprofitable program to be undertaken, since it both increases the expected profitability of a program and lowers its risk from the perspective of the manufacturer.”⁷³ The parties also agreed that perceived risk affects the rate of return that a market actor will demand in exchange for providing financing.⁷⁴ Because LA/MSF reduces the risk an aircraft poses to the manufacturer, it reduces the risk faced by outside suppliers of financing, which necessarily affects the rate of return they demand from the financing. Thus, Airbus’ receipt of LA/MSF distorts the financing decisions undertaken by risk-sharing suppliers, making them an inappropriate benchmark. The Panel’s explanation, in combination with its other findings, fully captures this reasoning.

46. In the EU Second Confidential Oral Statement, Prof. Whitelaw protested that “RSS do not know whether or on what terms Airbus will receive MSF loans. On what basis are we asked to conclude that RSS would take lower returns based on the *possibility* that Airbus would receive MSF, and on terms and even amounts of which they are not aware?”⁷⁵ The answer is obvious. Airbus’ risk-sharing suppliers for the A380 did not need to know the exact terms and amounts of LA/MSF for the A380. They knew that Airbus had received LA/MSF for all prior new LCA launches. They could therefore expect that Airbus would receive LA/MSF for the A380; that with the benefit of LA/MSF Airbus would actually launch, develop and market the A380; and that, as in the past, that benefit would be substantial. The effect of LA/MSF on the profitability of the A380 would also make it likely to remain in the market longer. All of these conditions would increase the likelihood that risk-sharing suppliers would receive full repayment from Airbus and, therefore, reduce the risk associated with financing the A380. Thus, Prof. Whitelaw’s argument creates no basis to question the Panel’s conclusion.

⁷⁰ Panel Report, para. 4.478 (citing EC, SNCOS, para. 14; EC, SOS (HSBI), para. 92).

⁷¹ Panel Report, para. 4.480.

⁷² EC FWS, paras. 303-484; Whitelaw Report, para. 36 note 29 (Exhibit EC-11) (BCI).

⁷³ Dorman Report, p. 9 (Exhibit US-70).

⁷⁴ EC RPQ 66, paras. 78-79; Whitelaw Report, paras. 4 and 16 (Exhibit EC-11) (BCI).

⁷⁵ EC SCOS, para. 92.

47. **Risk-Sharing Suppliers as Market Actors.** The Panel also noted that “the European Communities rejects the idea that the risk-sharing suppliers are not fully-fledged market actors.”⁷⁶ The European Union made this comment in response to Dr. Ellis’s explanation that risk-sharing suppliers faced incentives to charge less for financing Airbus than a market-based supplier of LA/MSF would. The European Union further explained that:

the notion that the risk-sharing suppliers have fewer options for their investment capital than investors such as banks and pension funds is irrelevant. In the view of the European Communities, what matters is that risk-sharing suppliers provide alternative sources of market financing. Similarly, the European Communities does not see any reason to believe that the prospect of obtaining future contracts with Airbus would have affected the terms of the supply agreements. In this regard, the European Communities alleges that the United States does not offer any evidence for this argument and the European Communities does not see any aftermarket for the sort of products sold by the risk-sharing suppliers nor any incentive for them to reduce their returns.⁷⁷

The Panel, however, found that “there is some logical merit to the United States’ arguments suggesting that the risk-sharing suppliers had incentives to lower their expected rates of return.”⁷⁸ It cited to the U.S. comment on the EU response to Panel Question 174, which explained that risk-sharing suppliers expected that Airbus would receive LA/MSF, and perceived the aid as lowering the risk posed by offering financing to Airbus.

48. On this point, and throughout their analyses, both Dr. Ellis and the Panel demonstrated their understanding that risk-sharing suppliers were fully market actors seeking to maximize their profit, and treated them as such. However, Dr. Ellis and the Panel recognized that the situation created a set of incentives that would lead a profit-maximizing actor to take decisions that a market actor would not otherwise take when deciding the terms on which to grant risk-sharing financing for Airbus aircraft. The points discussed above represent several of these aspects. They all signaled that risk-sharing supplier contracts did not, to use the words of Article 14(b) of the SCM Agreement, represent with respect to LA/MSF offered by the governments “the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market.”

49. Thus, Prof. Whitelaw’s observation about risk-sharing suppliers being fully-fledged market actors rebuts an assertion that the United States never raised, and a finding that the Panel never made. As to the rest of the EU argument in this regard, it represents the conclusions that the European Union drew from the evidence. As the United States has shown in the preceding

⁷⁶ Panel Report, para. 4.478 (citing EC SOS (HSBI), paras. 94-97).

⁷⁷ Panel Report, para. 4.478 (citing EC SOS (HSBI), paras. 94-97).

⁷⁸ Panel Report, para. 7.480.

paragraphs, the Panel reached different logical conclusions, and explained them in its report. The European Union's ability to sketch out a different rationale with a different outcome does not, however, illustrate any inconsistency with Articles 1 and 2 of the SCM Agreement, or with Article 11 of the DSU.

* * * * *

50. In sum, the Panel thoroughly considered all relevant arguments made by the European Union, including in its Second Confidential Oral Statement and provided a reasoned explanation for why those arguments did not warrant reliance on the Whitelaw RSS risk premium. As one would expect in a dispute dealing with such a large number of issues, the Panel could not expound at length on all of them. On each point, however, the Panel's report demonstrates that it considered both sides of the issue, and provides an explanation that allows the reader to understanding the reasoning underlying the conclusions it reached.

D. The EU Has Identified No Flaw With the Panel's Conclusion that French and Spanish LA/MSF for the A330/200 and A340-500/600 Conferred a Benefit.

51. The evidence in the record confirms that French LA/MSF for the A330-200 and A340-500/600 conferred a benefit, as did Spanish LA/MSF for the A340-500/600. Airbus launched the A330-200 in 1995 as a derivative of the A330; the French government had provided LA/MSF to cover 60 percent of Aerospatiale's development cost for the original A330, and it agreed to provide an additional FF 330 million in LA/MSF for the A330-200.⁷⁹ Airbus launched the A340-500/600 in 1997 as derivatives of the original A340, and the French government agreed to provide approximately FF 2.11 billion in LA/MSF for the A340-500/600.⁸⁰ As a general matter, and as with all previous grants of LA/MSF, the funding for the A330-200 and A340-500/600 was success-dependent, with project-specific repayment via per-plane levies on the first [***] deliveries in the case of the French A330-200, the [***] sale for the French A340-500/600 and similar per-aircraft levies for the Spanish A340-500/600 LA/MSF. As explained below, the *octavo* preambular paragraph and the *quinta cláusula* of the Spanish A340-500/600 LA/MSF contract require Airbus to make repayments of the loaned principal through per-aircraft levies. However, the EU redacted the relevant numbers from the LA/MSF agreement's repayment schedule, and did not otherwise provide them to the Panel, so it is impossible to determine over how many deliveries Airbus must repay the financing. The United States drew the reasonable inference that Airbus must repay the loan over [***].⁸¹ The "interest" charged on all of these

⁷⁹ US FWS, para. 234; *see, e.g.*, 1997 Senate Report, at 67 (Exhibit US-18); Collin (Yvon), Senate Report No. 89 (Exhibit US-33); *The Commission Approves a French R&D Scheme for the Aeronautics Sector*, IP/96/665 (July 18, 1996) (valuing the Launch Aid as ECU 51 million) (Exhibit US-89).

⁸⁰ US FWS, paras. 243–244 and footnote 263.

⁸¹ US SWS, para. 373, citing Exhibit US-37 (BCI). *See also* US FWS, para. 237; *see, e.g.*, A330-200 Convention and Protocole, Annexe A, Art. 6.2, DS316-EC-BCI-0000323 (Exhibit US-78; *see* BCI Annex).

LA/MSF provisions was below-market by both the U.S. and EU experts' standards, as the Panel clearly established.⁸²

52. The European Union now argues that, in light of the Panel's choice of an individualized assessment of each aircraft development project, the Panel was required to reject the EU expert's conclusion that LA/MSF for the A330-200 and A340-500/600 conferred a benefit, and find against the United States based on a theory that the European Union never advanced. Specifically, the European Union contends that in its project-specific assessment of the A330-200 and A340-500/600, the Panel had to conclude that these aircraft were less risky than the A380 and apply a smaller risk premium. The facts do not support the EU argument. Just as importantly, taking the approach advocated by the European Union would put the Panel in the untenable position of serving as both adjudicator and advocate – a merging of roles that the Appellate Body has condemned.⁸³

53. The EU argument also fails because the facts do not support it. The EU critique relies on the supposition that the Panel considered that the rejection of a constant project-specific risk premium "could only result in increasing the benchmark above that offered by the European Union." The Panel made no such assumption. It evaluated each party's benchmark proposal, and concluded – for each aircraft at issue – that "the project-specific risk premium advanced by the European Communities for these same models underestimates the reasonable project-specific risk premium that a market lender would have asked Airbus to pay for financing on the same or similar terms and conditions as LA/MSF for all of these models, as well as the A380."⁸⁴ Thus, the Panel did not reject out of hand the possibility that the European Union risk premium might be appropriate for individual aircraft. Rather, it considered each aircraft and found that the EU proposal did not work for any of them. The Panel clarified that this was true for the A320, A330/340, A330-200 and A340-500/600, as well as for the A380 (rather than just for the A380 as the EU's argument suggests).

54. The European Commission has itself found that LA/MSF for the A330-200 was "state aid . . . in the form of a repayable advance of ECU 51 million."⁸⁵ A measure is not "state aid" within the meaning of EU state aid rules unless it "confers an economic advantage on the recipient,"⁸⁶ a test that involves comparing market rates to the rate charged by the government. Although a Member's domestic law is not dispositive of a conclusion as to benefit under the SCM Agreement, the European Commission's finding, in effect, serves to confirm that Panel's

⁸² Panel Report, para. 7.488, Table 7, and conclusion in para. 7.489.

⁸³ *Japan – Varietals (AB)*, paras. 130-131.

⁸⁴ Panel Report, para. 7.481 (emphasis added).

⁸⁵ *The Commission Approves a French R&D Scheme for the Aeronautics Sector*, IP/96/665 (July 18, 1996) (Exhibit US-89).

⁸⁶ US FWS, paras. 158-163.

conclusion that LA/MSF confers a benefit.⁸⁷ The same is true with respect to the A340-500/600, with regard to which the European Commission found that “{t}hrough Aerospatiale, the entire A340-500/600 program has been made possible thanks to the measure reported by the French authorities. . . . The reimbursable advance from the French authorities is helping to promote the A340-500/600 program, which could not be implemented without this government support.”⁸⁸

55. Similarly, the current EU position should be rejected for another reason as well. Before the Panel, the European Union clearly took the position that the A380 risk sharing supplier-based risk premium that its expert had calculated was the appropriate premium to apply for all LA/MSF measures. It could not have expected the Panel to have applied instead a premium that was lower than what the European Union itself argued was appropriate. In fact, for the Panel to do so would have been inappropriate, as it would have involved both making the case for the European Union and also rejecting the EU concession as to the appropriate commercial interest rate without any evidence as to what a lower rate would be. The European Union has, therefore, identified no basis to reverse or modify the Panel’s findings in this regard.

E. The Dorman Discount Rate is Not an Appropriate Market Benchmark and Was Never Represented as One.

56. The European Union also argued at the hearing that the Panel failed to take into account as a potential benchmark the 10 percent discount rate Dr. Dorman applied to Airbus in his analysis of the effect of LA/MSF on launch decisions, based on data for the year 2000. The European Union noted that the Ellis Report identified a 14 percent benchmark rate for that year, and asserts that the difference reveals a flaw in Dr. Ellis’s reasoning.

57. The European Union made this same argument before the Panel. The United States responded that:

31. Mr. Whitelaw attempts to suggest that Dr. Dorman and Dr. Ellis were performing comparable analyses, but using different benchmarks. That is simply false. The Dorman model examined the changes in profitability of a generic LCA program resulting from variations in prices, costs and airplanes sold, and examined the effect on profitability of Launch Aid. The discount rate was ancillary to this analysis, independent of the identity of the manufacturer and how the project was financed, and did not vary between the base case and the various Launch Aid scenarios. In contrast, the Ellis analysis was specifically intended to determine the interest rate that appropriately reflected the risks borne by a supplier of capital with Launch Aid terms.

32. Mr. Whitelaw also asserts that they were looking at the same data – that is, Dr. Dorman and Dr. Ellis. That too is false. In fact, the basis for the weighted average cost

⁸⁷ US FWS, para. 240.

⁸⁸ US FWS, paras. 163, note 157, and 249.

of capital (WACC) used by Dr. Dorman was data for six U.S. aerospace companies (not Airbus), while Dr. Ellis specifically examined the loans granted to Airbus. Moreover, Mr. Whitelaw asserts that Dr. Dorman upwardly adjusts his discount rate, which he claims will be higher than the company's average cost of capital, to reflect individual project risk. Professor Whitelaw's statement is factually accurate, but inapposite. It in no way undermines the validity of Dr. Ellis' benchmark. It was Dr. Ellis – not Dr. Dorman – who examined the return that a supplier of capital with Launch Aid terms would expect in return for providing such capital.”

58. To put it slightly differently, Dr. Dorman used an industry average because his analysis did not require him to place a precise number on Airbus' company-specific discount rate. Dr. Ellis, by contrast, set out specifically to calculate a benchmark rate for Airbus, and concluded that it was 14 percent. There is no inconsistency here, just a different focus of analysis. Dr. Dorman never set out to calculate a correct internal rate of return expected by a supplier of LA/MSF; Dr. Ellis did. His number, therefore, is the more appropriate one to use.

V. LA/MSF AS AN EXPORT-CONTINGENT SUBSIDY

59. Having demonstrated that each and every provision of LA/MSF for the past four decades constituted a subsidy within the meaning of Articles 1 and 2 of the SCM Agreement, the United States also presented evidence that demonstrated that seven of these measures were in fact contingent upon anticipated exportation and, therefore, were prohibited export subsidies. The Panel agreed with respect to three measures: the German, Spanish, and UK A380 LA/MSF. The Panel disagreed with respect to the other four.

60. There is no debate between the parties as to the existence of two of the requisite elements: the “granting” of a subsidy and the existence of “anticipated exportation.” Indeed, the Panel found that both elements had been demonstrated for each of the seven LA/MSF measures⁸⁹ and the EU has not appealed the Panel's findings in this respect. The EU did, however, appeal the Panel's findings with respect to the final element – establishing the requisite “tie” to show the in fact contingency. The United States appealed on different grounds – that it was legal error for the Panel to establish a separate and additional requirement of “subjective” motivation on top of the three requisite elements.⁹⁰ In particular, the United States has demonstrated that the Panel erroneously applied a new requirement – in addition to the three required elements – that is not found in the text of the SCM Agreement. This additional element would require – in addition to establishing a relationship of “contingency” – a demonstration of member State subjective “motivation.” By requiring evidence of subjective “motivation,” the Panel introduced a subjective *requirement* where none exists in Article 3.1(a) and footnote 4 of the SCM Agreement. This fundamental error led the Panel to conclude that this additional requirement

⁸⁹ Panel Report, paras. 7.650, 7.654, 7.657, and 7.660.

⁹⁰ U.S. Other Appellant Submission, paras. 7-24.

had not been met for certain of the measures and, consequently, that *de facto* export contingency had not been demonstrated with respect to four of the seven instances of LA/MSF.

61. The United States has demonstrated that for each of the seven LA/MSF measures the Panel made factual findings for each of the three requisite elements (the grant of a subsidy; the anticipated exportation; and the “exchange of commitments” that established the contingency). With respect to the Panel’s findings regarding the existence of an “exchange of commitments,” the Panel found that this suggested that the provision of LA/MSF in each of the seven instances was, “at least in part, conditional’ or ‘dependent for its existence’ upon the EU member State’s anticipated exportation or export earnings.”⁹¹ The United States has also demonstrated that for the Appellate Body to reverse the Panel and to conclude that all seven LA/MSF measures were “tied” to anticipated exportation would require no further factual analysis. All of the relevant factual findings are contained in the paragraphs leading to and including paragraph 7.678 of the Panel Report.⁹²

62. In paragraph 7.678, the Panel concluded that “under each of the 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.” The evidence cited by the Panel confirms this for each of the seven LA/MSF measures.

63. The Panel refers to the relevant provisions in each of the seven contracts, as well as to specific passages in the U.S. First Written Submission HSBI Appendix that confirm the existence of the “exchange of commitments,” which the Panel found demonstrated that the grant was “at least in part, ‘conditional’ or ‘dependent for its existence’ upon the EC member State’s anticipated exportation or export earnings.”⁹³ The evidence considered by the Panel confirms a clear exchange of commitments in each instance and that anticipated export sales were a critical element for each of the LA/MSF contracts at issue.

⁹¹ Panel Report, para. 7.678.

⁹² Panel Report, paras. 7.650 (grant of subsidy); 7.651 to 7.660 (anticipated exportation); and 7.661 to 7.678 (“exchange of commitments”, demonstrating in fact contingency).

⁹³ Panel Report, para. 7.678 and footnote 3243 (citing French A380 contract, Exhibits US-358 and US-365 (BCI); US FWS, HSBI Appendix, paras. 39-41. German A380 contract, Exhibits US-358 and US-72 (BCI). Spanish A380 contract, Exhibits US-358 and US-73 (BCI). UK A380 contract, Exhibits US-358 and US-79 (BCI); US FWS, HSBI Appendix, para. 42. French A340-500/600 contract, Exhibit US-36 (BCI); US FWS, HSBI Appendix, paras. 50-53, Exhibit DS316-EC-HSBI-0001143; US, SCOS, HSBI Appendix, paras. 2-7. Spanish A340-500/600 contract, Exhibits US-37 (BCI), US-366 and US-367. French A330-200 contract, Exhibit US-78 (BCI); US FWS, HSBI Appendix, paras. 57-60; US SCOS, HSBI Appendix, paras. 2-7).

64. The United States turns next to the evidence of contingency considered by the Panel for each of the seven measures. With respect to the German A380 LA/MSF, an annex to the German A380 contract refers to [***] forecast A380 deliveries in 20 years.⁹⁴ Section 7 of the German A380 LA/MSF contract requires Airbus to make repayments of the loaned principal through per-aircraft levies on the [***] sales. In 2000, Airbus forecast a total market size for aircraft with more than 400 seats in “Europe” of 247 aircraft. It therefore follows that the German government “tied” its grant of LA/MSF to Airbus making at least [***] anticipated export sales.⁹⁵ Airbus’ actual export needs for the A380 are even greater, as the 2000 Global Market Forecast (“GMF”) defines the more than 400 seat market segment as including the A340-600 and the Boeing 747 and Boeing 777-300. Thus, when the German government [***] it necessarily [***].⁹⁶

65. UK A380 [***].⁹⁷ Schedule 3, paragraph 3, of the UK A380 LA/MSF contract requires Airbus to make repayments of the loaned principal through per-aircraft levies on the [***].⁹⁸ Measured against the same information of the projected European market size based on the same GMFs, it follows that the UK government “tied” its grant of LA/MSF for the A380 to Airbus making at least [***] export sales.

66. With respect to the Spanish A380 LA/MSF, as noted by the Panel, the Spanish contract made clear the [***].⁹⁹ The Spanish LA/MSF contract requires Airbus to make full repayment over [***] A380 sales.¹⁰⁰ Importantly, the *Séptima cláusula* of the Spanish A380 LA/MSF contract requires Airbus to make repayments of the loaned principal through per-aircraft levies on the [***]. If sales are fewer than expected, the Spanish government has no other recourse to obtain repayment. These repayment provisions show that the Spanish government conditioned the provision of LA/MSF on repayment over [***] sales, a level of sales that, as the United States explained, could not be achieved but for substantial exports.¹⁰¹ Again, measured by the same GMF projections, it follows that the Spanish government “tied” its grant of LA/MSF for the A380 to Airbus making at least [***] export sales.¹⁰²

⁹⁴ Panel Report, para. 7.651 (recounting U.S. argument). The Panel specifically relied on this information in paragraph 7.652. *See also* Exhibit US-357 (BCI).

⁹⁵ Panel Report, p.505 (recounting U.S. argument). Airbus, Global Market Forecast 2000, at 37 (Exhibit US-358); US, FWS paras. 346, 353–357.

⁹⁶ Panel Report, p.505 (recounting U.S. argument and citing US FWS, paras. 353-357 (citing Exhibits US-358 and US-72 (BCI))).

⁹⁷ Panel Report, p. 497 (recounting U.S. argument); *see also* DS316-EC-HSBI-0001211, at 35–36, as discussed in US FWS, HSBI Appendix, paras. 29–32.

⁹⁸ Panel Report, p.507 (recounting U.S. argument).

⁹⁹ Panel Report, para. 7.652.

¹⁰⁰ Panel Report, p. 497 (recounting U.S. argument).

¹⁰¹ Panel Report, p.506 (recounting U.S. argument).

¹⁰² Panel Report, p.506 (recounting U.S. argument).

67. With respect to the French A380 LA/MSF, as noted by the Panel, [***] is set out in the French A380 “project appraisals”, as well as the Airbus business case for the A380.¹⁰³ French LA/MSF contracts foresee repayment over [***] A380 sales.¹⁰⁴ Articles 6.2 and 6.3 of the French A380 LA/MSF contract require Airbus to repay the loaned principal through per-aircraft levies on the [***] sales.¹⁰⁵ These repayment provisions show the French government conditioned the provision of LA/MSF on repayment over [***] sales, a level of sales that could not be achieved without substantial exports.¹⁰⁶ Measured against the same Airbus GMF numbers referenced above, the French government “tied” its grant of LA/MSF for the A380 to Airbus making at least [***] export sales.

68. At the first Appellate Body hearing, the EU criticized the Panel’s decision to attach probative value to the relationship between the governments’ critical project appraisals, on the one hand, and the sales-dependent repayment terms for the A340-500/600 and the A330-200 LA/MSF measures, on the other, and the Panel’s finding of an “exchange of commitments” partly on this basis. As part of its argument the EU juxtaposed the “critical project reports” with Airbus’ Global Market Forecasts. In doing so, the EU implicitly confirmed the probative value and evidentiary weight of the relationship between the GMFs, on the one hand, and the repayment commitments in each of the A380 LA/MSF contracts, on the other, as appropriate for helping to demonstrate the “tie” between the grant of the subsidy and “anticipated exportation” in each instance of A380 LA/MSF. Indeed, this further confirms that the GMF is relevant for *each* of the A380 LA/MSF measures, including for the French A380 LA/MSF.

69. With respect to the French A340-500/600 LA/MSF, the Panel refers, in footnote 3243, to the French A340-500/600 contract, Exhibit US-36 (BCI), which confirms that the total number of sales to which repayment was tied was [***] and the U.S. First Written Submission, HSBI Appendix, paragraphs 50-53, and U.S. Second Confidential Oral Statement HSBI Appendix, paragraphs 2-7. In those HSBI Appendices, the United States referred to the French A340-500/600 Project Appraisal which we discuss in further detail in the HSBI Appendix to this Memorandum. These facts were part of the total configuration of the facts before the Panel and they confirm the relationship of in fact contingency.

70. As for the Spanish A340-500/600 LA/MSF, the Panel relied on several types of evidence. For example, the Spanish A340-500/600 LA/MSF contract to which the Panel refers [***]¹⁰⁷ On

¹⁰³ Panel Report, p. 497 (recounting U.S. argument); French A380 project appraisal, DS316-EC-HSBI-00011434, at 9-10; Airbus A380 business case, DS316-EC-HSBI-0001261.

¹⁰⁴ Panel Report, para. 7.651 (recounting U.S. argument). In Panel Report, page 496 and note 3083, the Panel cites to US SWS paras. 137-140; in turn, in US SWS para. 139 refers to the French A380 project appraisal. *See* France, A380 project appraisal, DS316-EC-HSBI-0001174, at 9-10.

¹⁰⁵ Panel Report, p.503 (recounting U.S. argument).

¹⁰⁶ Panel Report, p.503 (recounting U.S. argument).

¹⁰⁷ Panel Report, para. 7.655 (Panel findings, first bullet); Spanish A340-500/600 contract, Exhibits US-37 (BCI), US-366 and US-367.

the date the Spanish government signed its LA/MSF agreement with Airbus, almost half of the firm orders that Airbus had already received were export sales: Virgin Atlantic, Lufthansa and Swissair had ordered a total of 29 A340-500/600s; and Air Canada, Emirates, ILFC (based in the United States), and Egyptair had ordered a total of 23 aircraft.¹⁰⁸ The *octavo* preambular paragraph and the *quinta cláusula* of the Spanish A340-500/600 LA/MSF contract require Airbus to make repayments of the loaned principal through per-aircraft levies. Because all of the numbers from the LA/MSF agreement's repayment schedule were redacted, it was not possible to determine with precision over how many deliveries Airbus must repay the financing. However, the contract anticipates [***] worldwide sales of the aircraft over a 20 year period. In light of the European Union's refusal to provide the actual information from the repayment schedule, a reasonable inference that may be drawn is that Airbus repayment commitment is tied to a similar number of sales.¹⁰⁹ We discuss evidence of contingency in further detail in the HSBI Appendix to this Memorandum. These facts were part of the total configuration of the facts before the Panel and they confirm the relationship of in fact contingency.

71. With respect to French A330-200 LA/MSF, the Panel refers to the French A330-200 contract, Exhibit US-78 (BCI), which confirms that repayment was foreseen to take place over [***] sales, and the U.S. First Written Submission HSBI Appendix, paragraphs 57-60, and U.S. Second Confidential Oral Statement, HSBI Appendix, paragraphs 2-7, which we discuss in further detail in the HSBI Appendix to this Memorandum. These facts were part of the total configuration of the facts before the Panel and they confirm the same relationship of in fact contingency.

72. In sum, for each of the seven LA/MSF provisions that the United States challenged as contingent in fact upon anticipated exports, the Panel specifically found the existence of an "exchange of commitments." The Panel also specifically referred to the particular evidence underlying that finding, as well as the total configuration of the facts that it reviewed in the paragraphs preceding and leading to the conclusions it drew in paragraph 7.678. The Panel's findings were properly supported by evidence.

73. The Panel's discussion of the "additional" evidence in paragraph 7.690 of its report further illustrates the point that the Panel had earlier made findings for each of the three requisite elements earlier in its analysis. Paragraph 7.690 provides, in part:

Our conclusion that the German, Spanish and UK A380 LA/MSF contracts were prohibited export subsidies is based on what we have objectively inferred from the "total configuration of the facts constituting and surrounding the granting of the subsidy." These facts included not only evidence showing that compliance with the sales-dependent contractual repayment provisions would necessarily

¹⁰⁸ Panel Report, p.500; US FWS, para. 367 (referring to Exhibit US-368 and containing data derived from the Airclaims database).

¹⁰⁹ Panel Report, p. 510; US SWS, para. 373 (citing Exhibit US-37 (BCI)).

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 (italics added).

74. This passage demonstrates that the Panel made findings for the three elements ((i) grant of a subsidy; that is (ii) tied to (iii) anticipated exportation) necessary to establish export contingency in fact. The requisite “tie,” or contingency, is reflected in the Panel findings that “compliance with the sales-dependent contractual repayment provisions would necessarily involve exportation” and “that they counted upon and expected Airbus to fully repay the loaned principal plus interest.” The Panel made these findings for all seven instances of the LA/MSF challenged by the United States as prohibited export subsidies. This passage also shows that in addition to the three requisite elements, the Panel required an additional finding of subjective motivation. In considering the “additional” evidence, the Panel found that it established the existence of subjective motivation for only three of the measures – the German, Spanish and UK A380 LA/MSF, which turned on, in the Panel’s words, “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” (emphasis added).

75. Having found, at the beginning of paragraph 7.678 of its Report “that under each of the 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”, and that “[a]lthough 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,” the Panel could have concluded that all of the elements for in fact export contingency had been demonstrated, and the United States believes that it should have.

76. At this point, the Panel’s findings for each of the seven instances of challenged LA/MSF satisfied the three-prong legal standard. The Panel found the granting of a subsidy, anticipated exportation, and an “exchange of commitments.”¹¹⁰ On the exchange of commitments, the Panel found that this suggested that the provision of LA/MSF was, “at least in part, ‘conditional’ or ‘dependent for its existence’ upon the EC member States’ anticipated exportation or export earnings.”¹¹¹ While the EU challenges a range of Panel findings, it does not challenge the Panel’s fundamental findings of fact on which this assessment was based. There is no basis, moreover, for the EU’s argument that the Appellate Body cannot “complete the analysis.” As the discussion above demonstrates, the Panel made factual findings for each of the three requisite

¹¹⁰ Panel Report, paras. 7.650 (grant of subsidy); 7.651 to 7.660 (anticipated exportation); and 7.661 to 7.678 (“exchange of commitments”, demonstrating in fact contingency).

¹¹¹ Panel Report, para 7.678.

elements for establishing a prohibited subsidy based on “in fact” contingency for each of the seven instances of LA/MSF challenged by the United States.

VI. ARTICLE 11 OF THE DSU DOES NOT IMPOSE AN OBLIGATION FOR A PANEL TO PROVIDE A “REASONED AND ADEQUATE EXPLANATION” OF ITS FINDINGS.

77. The U.S. appellee submission demonstrated that, contrary to the European Union’s assertion, Article 11 of the DSU does not create an obligation for a panel to include in its report a “reasoned and adequate explanation” of its findings regarding consistency with the covered agreements, or of any intermediate findings.¹¹² Prior Appellate Body reports do not suggest such an obligation, either.

78. A comparison of Articles 11 and 12.7 of the DSU confirms that Article 11 does not create obligations with regard to the explanation that a panel advances for its conclusions. Article 11 provides that:

a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

Article 12.7 provides that:

the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.

Both provisions address the “facts,” “applicability of relevant provisions” or of “applicability of . . . relevant covered agreements,” and “recommendations”. But they differ in that Article 11 creates an obligation with regard to the “assessment” of facts and applicability of the agreements, while Article 12.7 creates an obligation with regard to the report that the panel issues to “set out” its findings and “the basic rationale behind any findings and recommendations.” In short, these two provisions apply to different aspects of the panel process. Article 11 addresses a panel’s decisionmaking process, requiring that the “assessment” be “objective,” while Article 12.7 addresses the end result of that process, the report that explains what the Panel did. Thus, it is Article 12.7, and not Article 11, that governs the quality of a panel’s explanation.

79. The ordinary meaning of the key terms in the two articles supports this conclusion. The dictionary defines “objective” as “[d]ealing with or laying stress on what is external to the mind; concerned with outward things or events; presenting facts uncoloured by feelings, opinions, or

¹¹² U.S. Appellee Submission, paras. 163-167.

personal bias; disinterested”¹¹³ and “assessment” as “{e}valuation, estimation; an estimate of worth, extent.”¹¹⁴ Thus, the obligation in Article 11 to provide an “objective assessment” requires an evaluation that is disinterested or uncolored by feelings or bias. The Appellate Body has recognized this point, finding that

An allegation that a panel has failed to conduct the “objective assessment of the matter before it” required by Article 11 of the DSU is a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself. . . . “Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts.”¹¹⁵

80. In contrast, the dictionary defines “rationale” as “{a} reasoned exposition of principles; an explanation or statement of reasons. . . . The fundamental or underlying reason for or basis of a thing; a justification,”¹¹⁶ and “basic” as “{o}f, pertaining to, or forming a base; fundamental, essential; . . . constituting a minimum, esp. in a standardized scale (of wages, prices, etc.); at the lowest acceptable level.”¹¹⁷ The Appellate Body has considered these definitions and concluded:

We, therefore, consider that Article 12.7 establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations. Panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations.¹¹⁸

Thus, unlike Article 11, the ordinary meaning of “basic rationale” in Article 12.7 *does* cover a panel’s explanation.

81. The comparison of the key terms in these provisions should end the inquiry – they address different aspects of a Panel’s proceedings, and only one of them covers the explanation. The principle of effectiveness in treaty interpretation, which disfavors any interpretation that reduces treaty terms to inutility, further exposes the fallacy of the EU’s arguments. If Article 11 requires a “reasoned and adequate explanation,” as the EU asserts, it would completely subsume the requirement of a “basic rationale” under Article 12.7, leaving the latter provision with no independent force. Only by finding that Article 12.7 applies to the explanation advanced by a panel, and that Article 11 does not, can the Appellate Body avoid this result.

¹¹³ New Shorter Oxford English Dictionary, p. 1965.

¹¹⁴ New Shorter Oxford English Dictionary, p. 130.

¹¹⁵ *EC – Poultry (AB)*, para. 133, quoting *EC – Hormones (AB)*, para. 133..

¹¹⁶ New Shorter Oxford English Dictionary, p. 2482.

¹¹⁷ New Shorter Oxford English Dictionary, p. 188.

¹¹⁸ *Mexico – Corn Syrup (AB)*, para. 106.

82. It is also worth noting that the EU explication of its arguments at the hearing demonstrated that it would not prevail even if the standard were “reasoned and adequate explanation.” The supposed flaws identified by the European Union go not to the Panel’s reasoning or the adequacy of the explanations, but to whether the concluding paragraphs contained enough cross-references to evidence and findings made earlier in the report, or sufficient footnotes to evidence cited elsewhere. These criticisms are entitled to no weight under either Article 11 or Article 12.7.

83. Thus, the rules of treaty interpretation all militate against the EU’s arguments that the Panel bore an obligation to provide a “reasoned and adequate explanation” for each step of its analysis. The terms of Article 11 do not impose such an obligation, as they go only to the objectivity of the assessment, and not to the extent of the explanation. Article 12.7 does create an obligation with regard to a panel’s explanation, in the form of requiring a “basic rationale,” but it does not frame that obligation in terms of “reasoned and adequate.” In any event, the EU has not asserted an appeal under Article 12.7, so its assertions with regard to the Panel’s explanation are not pertinent to the Appellate Body’s analysis in this dispute.

VII. CONCLUSION

84. For all of the reasons noted above, the United States requests that the Appellate Body reject the EU appeal, and reverse or modify the Panel’s findings as requested in the U.S. appeal.