



26 October 2016

(16-5858)

Page: 1/5

Original: English

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

**RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES**

**NOTIFICATION OF AN APPEAL BY THE EUROPEAN UNION  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 13 October 2016, from the delegation of the European Union, is being circulated to Members.

Pursuant to Article 16.4 and Article 17.1 of the *DSU*, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Measures Affecting Trade in Large Civil Aircraft (Recourse to Article 21.5 of the DSU by the United States)* (WT/DS316/RW). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

The European Union is restricting its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect, the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report<sup>1</sup>:

**I. WHETHER THE PANEL PROPERLY INTERPRETED ARTICLE 7.8 OF THE  
SCM AGREEMENT (SECTIONS 6.6.2 AND 6.6.3 OF THE REPORT)**

1. The Panel erred in interpreting Article 7.8 of the *SCM Agreement* to require an implementing Member to “remove the adverse effects” found from an actionable subsidy in original proceedings, even if that subsidy has been “withdraw{n}” and is no longer “maintain{ed}”.<sup>2</sup>
2. The Panel additionally erred in its interpretation of Article 7.8 (in conjunction with Article 1.1(a)) of the *SCM Agreement*) when finding that bringing about the end of a

<sup>1</sup> Paragraph numbers provided in footnotes to the following description of the errors of the Panel are intended to indicate the primary instance of the errors. These errors have consequences throughout the report, and the European Union also appeals all findings and conclusions deriving from or relying on the appealed errors, and in particular the relevant findings and conclusions in Sections 7.1, 7.2, 7.3 and 7.4 of the Panel Report.

<sup>2</sup> Panel Report, paras. 6.803, 6.813, 6.819, 6.822, 6.838, 6.839-6.841, 6.1078, 6.1089, 6.1094, 6.1100, 6.1101-6.1102, 6.1451-6.1452, 6.1463, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(i), 7.1(d)(viii), 7.1(d)(ix), 7.1(d)(xii)-(xvii) and 7.2.

financial contribution does *not* result in withdrawal of the subsidy.<sup>3</sup> The European Union requests the Appellate Body to consider this appeal only if the Appellate Body reverses the Panel's interpretation of Article 7.8 and attempts to complete the analysis under a proper interpretation of Article 7.8.

**II. WHETHER THE PANEL ERRED BY REFUSING TO ASSESS WHETHER THE EUROPEAN UNION ACHIEVED COMPLIANCE IN RESPECT OF THE MÜHLENBERGER LOCH AND BREMEN AIRPORT RUNWAY SUBSIDIES (SECTIONS 5.10, 6.2.5 AND 6.6.3.4.4 OF THE REPORT)**

3. The Panel erred in interpreting Article 21.5 of the DSU as providing an original respondent with the right to seek findings of compliance in Article 21.5 compliance proceedings only in the narrow factual circumstances of the *US/Canada – Continued Suspension* dispute.<sup>4</sup>
4. The Panel erred in the application of Article 21.5 of the DSU by finding that no disagreement, within the meaning of Article 21.5 of the DSU, existed between the European Union and the United States, and consequently by failing to make findings concerning the European Union's withdrawal of the Mühlenberger Loch and Bremen airport runway subsidies.<sup>5</sup>
5. Separately, by declining to make findings on a matter that was properly before it, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>6</sup>

**III. WHETHER LA/MSF FOR THE A350XWB IS A SUBSIDY (SECTION 6.5.2 OF THE REPORT)**

6. The Panel erred when identifying the appropriate point in time from which to draw the *corporate borrowing rate component* of the market benchmark to determine whether each A350XWB launch aid/member state financing ("LA/MSF") contract confers a "benefit", and therefore constitutes a subsidy, under Article 1.1(b) of the *SCM Agreement*.<sup>7</sup> Specifically, in identifying the corporate borrowing rate as "the average yields {on the relevant EADS bond} one-month prior and six-months prior to the conclusion of the contract, in the form of a range",<sup>8</sup> the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.<sup>9</sup>
7. Separately, by rejecting the yield on the day of the conclusion of each contract, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>10</sup>
8. Should the Appellate Body disagree with the European Union and reject the appeals described in paragraphs 6 and 7, the European Union appeals the Panel's inclusion, in its construction of the corporate borrowing rate, of the six-month average yield on the relevant EADS bond within the Panel's range of average yields.<sup>11</sup> Specifically, by including the six-month average yield within its range, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.<sup>12</sup>

<sup>3</sup> Panel Report, paras. 6.1072-6.1074, 6.1451-6.1452, 6.1463, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(i), 7.1(d)(viii), 7.1(d)(ix), 7.1(d)(xii)-(xvii) and 7.2.

<sup>4</sup> Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

<sup>5</sup> Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

<sup>6</sup> Panel Report, paras. 5.76-5.78, footnote 53 to para. 6.3, footnote 109 to para. 6.42, and footnote 1847 to para. 6.1102.

<sup>7</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

<sup>8</sup> Panel Report, para. 6.389.

<sup>9</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

<sup>10</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

<sup>11</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

<sup>12</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

9. Separately, by including the six-month average yield within its range, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>13</sup>
10. Further, the Panel erred in identifying the *project risk premium component* of the market benchmark to determine whether each A350XWB LA/MSF contract confers a “benefit”, and therefore constitutes a subsidy, under Article 1.1(b) of the *SCM Agreement*.<sup>14</sup> The Panel selected a single undifferentiated project risk premium for each A350XWB LA/MSF contract, which was developed for a different programme (i.e., the A380) in the original proceedings. In so doing, the Panel committed three sets of error.
11. First, the Panel failed to establish a project-specific risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB programme. As a result, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.<sup>15</sup>
12. Separately, by failing to consider more appropriate benchmarks and by deviating from the approach to project-specific benchmarks taken in the original proceedings, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>16</sup>
13. *Second*, by failing to establish similarity between the risks involved in the A350XWB project and the A380 LA/MSF project, as well as between the risks involved in the A350XWB LA/MSF contracts and the A380 LA/MSF contracts, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>17</sup>
14. *Third*, and finally, the Panel erroneously adopted a single project risk premium to benchmark all four A350XWB LA/MSF contracts. As a result, the Panel erred in the application of Articles 1.1(b) and 7.8 of the *SCM Agreement*.<sup>18</sup>
15. Separately, by failing to adopt a differentiated project risk premium while adopting a differentiated corporate borrowing rate, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>19</sup>

#### **IV. WHETHER THE PANEL ERRED IN IDENTIFYING APPROPRIATE PRODUCT MARKETS (SECTION 6.6.4.4 OF THE REPORT)**

16. The Panel erred in its interpretation of the term “market” in Article 6.3 of the *SCM Agreement*, as permitting two products to be placed in the same product market on the basis of any competition between them, rather than on the basis of the existence of significant competitive constraints between them.<sup>20</sup>
17. Should the Appellate Body disagree with the European Union and reject the appeal described in paragraph 16, the Panel erred in the application of Articles 5(c), 6.3 and Article 7.8 of the *SCM Agreement* when it identified the relevant product markets for

<sup>13</sup> Panel Report, paras. 6.389, 6.430 (Table 7) and 6.632 (Table 10).

<sup>14</sup> Panel Report, paras. 6.435, 6.459, 6.487, 6.492, 6.527, 6.539-6.542, 6.579, 6.595, 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>15</sup> Panel Report, paras. 6.435, 6.459, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>16</sup> Panel Report, paras. 6.435, 6.459, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>17</sup> Panel Report, paras. 6.487, 6.492, 6.527, 6.539-6.542, 6.579, 6.595, 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>18</sup> Panel Report, paras. 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>19</sup> Panel Report, paras. 6.607, 6.608-6.610, 6.632 (Table 10), 6.633, 6.656, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(c)(i), 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>20</sup> Panel Report, paras. 6.1210, 6.1211, 6.1236, 6.1280, 6.1289, 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

purposes of assessing the United States' adverse effects claims in a manner that is inconsistent with its own legal standard.<sup>21</sup>

18. Separately, by limiting its assessment of the existence of the relevant product markets for purposes of assessing the United States' adverse effects claims to competition between only those products that the United States had placed in the same product markets, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>22</sup>

**V. WHETHER THE PANEL ERRED IN REACHING ITS FINDINGS RELATING TO THE "NON-SUBSIDIZED LIKE PRODUCT" PROVISIONS OF ARTICLES 6.3, 6.4 AND 6.5 OF THE SCM AGREEMENT (SECTION 6.6.4.3 OF THE REPORT)**

19. The Panel erred in reaching its findings on whether there is a new matter. Specifically, the Panel erred in its interpretation and application of the term "matter" in Article 11 of the DSU.<sup>23</sup> The Panel also erred in failing to make an objective assessment of the matter, under Article 11 of the DSU.<sup>24</sup>
20. In addition, the Panel erred in reaching its findings on cogent reasons. Specifically, the Panel erred in its interpretation and application of "security and predictability" within the meaning of Article 3.2 of the DSU as it relates to the cogent reasons rule;<sup>25</sup> and, erred in failing to make an objective assessment of the matter, under Article 11 of the DSU.<sup>26</sup>
21. Finally, the Panel erred in its interpretation and application of Articles 6.3(a), 6.3(b), 6.3(c), 6.4 and 6.5 of the *SCM Agreement*.<sup>27</sup>

**VI. WHETHER THE PANEL ERRED IN FINDING ADVERSE EFFECTS (SECTION 6.6.4.4 OF THE REPORT)**

**A. EFFECTS OF LA/MSF ON THE LAUNCH AND MARKET PRESENCE OF AIRCRAFT**

22. The Panel erred in the interpretation of Article 5(c) of the *SCM Agreement* in adopting a "but for" approach to causation that failed to consider the passage of time, and events that occurred during that time, and consequently attributing the current market presence of the A320, A330 and A380 families of aircraft to pre-A350XWB LA/MSF.<sup>28</sup>
23. Should the Appellate Body disagree with the European Union and reject the appeal described in paragraph 22, the Panel erred in the application of Articles 5(c) and 7.8 of the *SCM Agreement* in adopting a "but for" approach to causation that failed to consider the passage of time, and events that occurred during that time, and consequently attributing the current market presence of the A320 and A330 families of aircraft to pre-A350XWB LA/MSF.<sup>29</sup>

<sup>21</sup> Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>22</sup> Panel Report, paras. 6.1292, 6.1305, 6.1320, 6.1348, 6.1382, 6.1362, 6.1409, 6.1416, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xi), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>23</sup> Panel Report, paras. 6.1125-6.1138, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>24</sup> Panel Report, paras. 6.1125-6.1138, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>25</sup> Panel Report, paras. 6.1125-6.1153, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>26</sup> Panel Report, paras. 6.1125-6.1153, 6.1154, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>27</sup> Panel Report, paras. 6.1125-6.1154, 6.1798, 6.1817, 6.1847, 7.1(d)(x), 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>28</sup> Panel Report, paras. 6.1515, 6.1527, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

<sup>29</sup> Panel Report, paras. 6.1527, 6.1534, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

24. Separately, to the extent the Panel found that LA/MSF for the A380 resulted in "direct effects" on the launch and market presence of the A380, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>30</sup>
25. The Panel additionally erred in the application of Articles 5(c) and 7.8 of the *SCM Agreement* by attributing the market presence of the A350XWB to the "indirect effects" of LA/MSF for the A380.<sup>31</sup>
26. Separately, to the extent the Panel found that LA/MSF for the A350XWB resulted in "direct effects" on the launch and market presence of the A350XWB, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.<sup>32</sup>

## **B. FINDINGS OF DISPLACEMENT, IMPEDANCE AND LOST SALES**

27. The Panel erred in the application of Articles 5(c), 6.3 and 7.8 of the *SCM Agreement* by failing, in its assessment of lost sales, displacement and impedance, to account for the differences in closeness of competition between various aircraft.<sup>33</sup>
28. The Panel erred in the application of Articles 5(c), 6.3 and 7.8 of the *SCM Agreement* by failing, in its assessment of lost sales, displacement and impedance, to account for non-attribution factors.<sup>34</sup>
29. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* in finding that non-withdrawn subsidies cause "displacement and/or impedance", thereby conflating the two separate forms of serious prejudice.<sup>35</sup>
30. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* as permitting findings of "displacement" without any assessment of sales volume and market share data.<sup>36</sup>
31. In addition, the Panel also erred in the application of Articles 5(c), 6.3(a), 6.3(b) and 7.8 of the *SCM Agreement* by finding "displacement" without any assessment of sales volume and market share data.<sup>37</sup>
32. The Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the *SCM Agreement* as permitting findings of "impedance" without any assessment of sales volume and market share data.<sup>38</sup>
33. In addition, the Panel also erred in the application of Articles 5(c), 6.3(a), 6.3(b) and 7.8 of the *SCM Agreement* by finding "impedance" without any assessment of sales volume and market share data.<sup>39</sup>

---

<sup>30</sup> Panel Report, paras. 6.1507, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xii)-7.1(d)(xvii) and 7.2.

<sup>31</sup> Panel Report, paras. 6.1747, 6.1771, 6.1773, 6.1774, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>32</sup> Panel Report, paras. 6.1717, 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiii)-7.1(d)(xvii) and 7.2.

<sup>33</sup> Panel Report, paras. 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>34</sup> Panel Report, paras. 6.1798, 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>35</sup> Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>36</sup> Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>37</sup> Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>38</sup> Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.

<sup>39</sup> Panel Report, paras. 6.1817, 6.1838, 6.1846, 6.1847, 7.1(d)(xiv)-7.1(d)(xvii) and 7.2.