WORLD TRADE ORGANIZATION

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Dispute Settlement Body
1 June 2011

MINUTES OF MEETING

Held in the Centre William Rappard
on 1 June 2011

Chairperson: Mrs. Elin Østebø Johansen (Norway)

1. European Communities[1] and certain member States – Measures affecting trade in large civil aircraft

(a) Report of the Appellate Body (WT/DS316/AB/R) and Report of the Panel (WT/DS316/AB/R)

1. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS316/15 transmitting the Appellate Body Report on: "European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft", which had been circulated on 18 May 2011 in document WT/DS316/AB/R, in accordance with Article 17.5 of the DSU. She reminded Members that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. She noted that, as Members were aware, Article 17.14 of the DSU and Article 7.7 of the SCM Agreement, as applicable in this case, required that an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 20 days following its circulation to Members. This adoption procedure was without prejudice to the right of Members to express their views on an Appellate Body report.

2. The representative of the United States said that his country thanked the members of the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work during this lengthy proceeding. Six years ago, almost to this very day, the US representative had explained before the DSB the problem facing the US large civil aircraft (or "LCA") industry. At that time, the United States had stated that it was concerned that certain measures of France, Germany, the United Kingdom, Spain, and the EU provided subsidies that were inconsistent with their obligations under the SCM Agreement and the GATT 1994. Over its 35 year history, Airbus had benefitted from massive amounts of EC member State and EC subsidies that had enabled the company to create a full product line of aircraft and gain more than a 50 per cent share of large civil aircraft sales. Every major Airbus aircraft model had been financed, in whole or in part, with government subsidies taking the form of "launch aid", i.e. with no or low rates of interest, and repayment tied to, and entirely dependent on, sales of the financed aircraft. Moreover, if a particular model did not sell well, Airbus

[1] On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a verbal note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

did not have to repay the financing. The Airbus A380 "super jumbo" alone had received approximately US$3.7 billion in launch aid subsidies from France, Germany, Spain, and the United Kingdom.[2] That situation prevailed to the present day unchanged. Airbus was now into its fifth decade of benefitting from the massive amounts of market distorting launch aid on past models. Furthermore, Airbus retained its leading global presence in the market for large civil aircraft.

3. The Panel and the Appellate Body Reports had vindicated the US position by speaking clearly on this point that every single grant of launch aid to Airbus over four decades had conferred a subsidy that had caused adverse effects to the United States. The Appellate Body had taken a slightly different approach from the Panel but had found that under any valid measurement, the terms the EU governments had offered Airbus for launch aid support had been more favourable than a commercial lender would have offered. And the amounts of launch aid to Airbus were enormous. The Panel had found that launch aid payments prior to 2000 had amounted to US$10.5 billion dollars.[3] Public data indicated that at the current exchange rates, launch aid for the A380 alone came to US$4.3 billion. The Panel had concluded that launch aid was fundamental to Airbus' ability to launch and bring to market each of its models of large civil aircraft when and as it did. The Appellate Body had confirmed this conclusion for each Airbus model.[4] The Appellate Body had stated that "either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380"[5] and that "it would not have been possible for Airbus to launch the A380 in 2000 relying exclusively on market financing".[6] The Appellate Body had also flatly rejected the EU's arguments that, even without launch aid, Airbus could have launched an A320 type aircraft in 1987 and an A330 type aircraft in 1991.[7] When it came to the remaining aircraft, the EU itself had conceded that "a non-subsidized Airbus would not have been able to launch the A300, A310, and A340 LCA projects by the 2001-2006 reference period".[8] It was no exaggeration to say that the Reports had concluded that, without launch aid, Airbus and its family of aircraft would not have existed as they were known at present. The Panel and the Appellate Body had also been clear on the immensity of the adverse effects suffered by the US large civil aircraft industry. The Reports found that subsidies to Airbus had caused lost market share in some of the biggest aircraft markets in the world, including Europe and China. The Reports also confirmed that Boeing, the US LCA manufacturer, had lost sales amounting to hundreds of aircraft in sales campaigns involving ten major airlines. The finding of lost sales of hundreds of aircraft was particularly significant in light of the fact that the yearly output of the US industry was 300-400 aircraft.

4. European subsidies did not stop with launch aid. The Panel and the Appellate Body had upheld US claims regarding a number of other payments that the EU and four of its member States had made to Airbus on subsidized terms and had found that those payments had worked with launch aid to harm the US industry. The Appellate Body had confirmed that France and Germany subsidized Airbus by giving it equity financing worth US$1.6 billion at a time when no commercial investor would have made such investments.[9] The Appellate Body had found that EU member States had provided WTO-inconsistent subsidies to Airbus through infrastructure payments worth more than US$1.2 billion. For example, the government of the German city of Hamburg had paid approximately

[2] See WT/DSB/M/191, para. 2.
[3] EC - Large Civil Aircraft (Panel), para. 7.380.
[4] EC - Large Civil Aircraft (AB), paras. 1300, 1352, 1356, 1368, 1377, 1378, 1414(q).
[5] EC - Large Civil Aircraft (AB), para. 11414(q).
[6] EC - Large Civil Aircraft (AB), para. 1352.
[7] EC - Large Civil Aircraft (AB), paras. 1298-1300.
[8] EC - Large Civil Aircraft (AB), para. 1273.
[9] EC - Large Civil Aircraft (Panel), para. 7.1089 and 7.1101; EC - Large Civil Aircraft (AB), paras. 984-993.

€750 million to drain a wetland next to Airbus' factory and had then charged Airbus below-market rent for use of that land to produce the A380.[10]

5. Together, launch aid and other subsidies added up to some US$18 billion in payments that the market would not have made, that had benefitted Airbus, and that had caused serious prejudice to the US large civil aircraft industry and to US interests. In economic terms, the adverse effects of lost market share and lost sales far exceeded the value of those payments. In finding that those subsidies had violated WTO rules, the Panel and the Appellate Body had affirmed what the United States had told the DSB, six years ago, that launch aid had conferred an immense subsidy on Airbus that had caused real and serious commercial harm to US interests. Other subsidies had contributed to that harm by allowing Airbus to develop and bring to market its aircraft when and as it did. [11]

6. The United States also took note of reports that Airbus was currently receiving launch aid for its newest aircraft, the A350. The findings from the Panel and the Appellate Body, however, should make it clear to the EU, its member States, and to Airbus that a "business as usual" approach to funding Airbus was no longer acceptable. Now that the DSB was ready to adopt these recommendations and rulings, it was time to start thinking about how to move forward. The United States was confident that, in light of the long history of WTO-inconsistent adverse effects that launch aid and other subsidies had created, the EU and its member States would move quickly to comply with their obligations to withdraw the subsidies or remove their adverse effects within the six-month period provided under Article 7.9 of the SCM Agreement. The United States remained ready to work with the EU and the member States to achieve that end.

7. The representative of the European Union said that the EU thanked the members of the Appellate Body, the panelists and the Secretariat for their work on this case. Although the EU regretted the finding of actionable subsides in this case, in particular despite the fact that the EU had always meticulously complied with its bilateral 1992 agreement with the United States regulating the contested measures, it nonetheless welcomed the Appellate Body Report that corrected a number of errors committed by the Panel. The EU was already satisfied with a number of findings of the Panel Report in this case. In particular, the Panel had rejected a number of the US export subsidy claims, had found that loans from the European Investment Bank were not actionable subsidies, and that a market-based debt settlement in Germany had conferred no benefit to Airbus. The Panel had also confirmed the non-specificity of certain EU research and development (R&D) and regional schemes. On adverse effects, the EU welcomed the Panel's findings that Boeing had not suffered material injury and that the EU support measures had no price effects whatsoever. Finally, both the non-existence of any alleged subsidy programme and the exclusion of the A350 from this proceeding had been confirmed. However, while the Panel had dismissed many of the US claims, many of its findings of subsidy and adverse effects remained a cause for concern and the EU had, therefore, appealed them. The Appellate Body had reversed the findings that export subsidies had been granted to Airbus and had usefully clarified the standard for *de facto* export contingency under Article 3 of the SCM Agreement. The EU fully agreed with the rationale and content of this refined test. It was in line with the objective of prohibiting subsidies, which were trade distorting by objective design, rather than by subjective intention, and it provided legal certainty to Members by establishing an objective and workable standard.

8. The Appellate Body had also corrected the Panel's incorrect approach when examining the relevant transaction for the financial contribution determination and analysing the provision of infrastructure applying a "cost to the government" standard. It had also confirmed that, with this type of measure, the examination of whether there was a benefit to the recipient was the correct approach under the SCM Agreement. That was an important finding from a public policy perspective and the

[10] EC - Large Civil Aircraft (AB), paras. 995 and 998-1012.
[11] EC - Large Civil Aircraft (AB), para. 1414(r).

role of governments in that context. The EU also welcomed the reversal of the Panel's finding that certain research and technology development (R&TD) programmes had caused adverse effects. In that regard, the EU pointed out to the reasoning of the Appellate Body, according to which it must be demonstrated that technology or production processes funded by R&TD had contributed to a LCA manufacturer's ability to launch and bring to the market particular models of LCA. It was not sufficient to make generalized allegations about the effect of such subsidies. The Appellate Body had also made important corrections to the reasoning of the Panel for establishing the benefit under Member State Financing (MSF). It had rejected the US interest rate benchmark as being too high, and had confirmed that MSF financing was significantly less risky than the United States had alleged. The EU also welcomed the Appellate Body's findings on excluding the US claim of MSF "as a programme" from the scope of the proceedings for jurisdictional reasons. That being said, the EU noted that the Panel had correctly rejected this claim on substance as well. With those findings, it was now crystal clear that MSF did not constitute a "subsidy programme". The mere fact that this loan instrument was used in a particular instance, in the past or in the future, did not have any bearing on the issue of whether it constituted an actionable subsidy.

9. The Appellate Body Report also contained important findings on the concepts of extinction of benefits, and the passage of time. The EU welcomed, in particular, that the Appellate Body had recognized that changes in ownership in the subsidy recipient affected the evaluation of subsidization, and that both the effects of a subsidy and the subsidy itself dissipated over time. The EU also welcomed the Appellate Body's reversal of the subsidy findings in the case of the French government's transfer of its shares in Dassault to Aérospatiale, in the context of the latter's privatization. Concerning the findings of adverse effects, the Appellate Body had confirmed that it was for the Panel, as the first trier of facts, to define the subsidized product, and the market in which it competed with the corresponding product. It had confirmed the EU's long-standing argument that there was not "one" LCA market but rather a number of distinct markets. While the EU noted that the Appellate Body had found that there were some adverse effects caused in the reference period, the scope of the adverse effects had been significantly reduced.

10. The EU believed that this case was, and remained, exceptional in various ways, not least because of its complexity and length. The same was true for the case in which the EU challenged US measures in the same sector, and where there would be an opportunity to comment on the Panel and the Appellate Body findings in the near future. This case had also shown that the WTO dispute settlement system was capable of adjudicating disputes of this kind while ensuring the protection of highly sensitive information and transparency through open hearings and publication of submissions at the same time. Finally, at the present meeting, the EU had again heard a figure of US$18 billion in launch aid subsidies as stated by the United States. The figure mentioned by the United States appeared to be based on the principal amount of repayable MSF loans. That figure had no relation whatsoever to the amount of subsidy given under a loan, where the benefit was merely the difference between actual payments and those on comparable terms on the market. The EU wished to point out the fact that neither the Panel Report nor the Appellate Body Report contained a quantification of the subsidy amounts granted. In any event, any subsidy benefit would nowhere be near the fantasy-figure mentioned again at the present meeting.

11. The representative of China said that her country thanked the Appellate Body, the Panel, and the Secretariat for their work in this dispute. China had participated as a third party in this dispute because it had considered that the dispute raised important questions of legal interpretation under the SCM Agreement. China noted that the Appellate Body Report had made a significant contribution to the interpretation of subsidy disciplines, including, *inter alia*, systemic issues related to the life of a subsidy, the infrastructure measures, the export subsidies and the determination of serious prejudice. China was pleased to see that for most of these issues, the Appellate Body had, to a great extent, concurred with China's views presented in the proceedings. China supported and welcomed the adoption of the Panel and the Appellate Body Reports at the present meeting and hoped that, for

subsidies found to be inconsistent with the SCM Agreement, appropriate steps would be taken by the EU to withdraw them, or to remove the adverse effects caused by them, so as to ensure that the industries of other Members did no longer suffer from such adverse effects.

12. The representative of Brazil said that his country thanked the Panel, the Secretariat, the members of the Appellate Body, and the Appellate Body Secretariat for their hard work in this dispute and for preparing the Reports, which were before the DSB for adoption at the present meeting. Brazil's participation in this dispute as a third party stemmed from its long-standing systemic interest in the interpretation of the SCM Agreement, in particular with respect to the civil aircraft industry. Brazil was and continued to be concerned about the distortive effects of subsidies of a particularly pernicious nature such as the launch aid measures that were at issue in this case. At the present meeting, Brazil wished to address three issues in the Appellate Body Report: (i) the interpretation of "benefit" under Article 1 of the SCM Agreement and its application to some facts of this case; (ii) *de facto* export subsidies under Article 3.1(a) and footnote 4 of the SCM Agreement; and (iii) the analysis of serious prejudice.

13. With regard to the issue of "benefit", Brazil welcomed some clarifications provided by the Appellate Body in respect of financial instruments such as loans. According to the Appellate Body, "[b]ecause the assessment focuses on the moment in time when the lender and borrower commit to the transaction, it must look at how the loan is structured and how risk is factored in, rather than looking at how the loan actually performs over time. Such *ex ante* analysis of financial transactions is commonly used and appropriate financial models have been developed for these purposes."[12] In Brazil's view, this statement and the explanations were entirely appropriate. For the purposes of a benefit analysis undertaken against the context of Article 14(b), they meant that, in determining the terms of a comparable commercial loan that the borrower could obtain in the market, one must take the *ex ante* perspective of a commercial lender. This included how that lender would factor in the risk of the transaction, looking forward. The measure of this risk was thus an objective one, and would not depend, for instance, on the particular historical experience of the government that provided the loan. In Brazil's view, the same logic would apply to the assessment of loan guarantees under Article 14(c).

14. Brazil also welcomed the Appellate Body's finding that the rate of return demanded by risk-sharing suppliers in a project that benefitted from launch aid could not serve as a valid benchmark for the benefit analysis.[13] This was a proposition that Brazil had advanced before the Panel based on a reasonable argument that if launch aid worked to shift part of the risk of the project to the governments, there would be less risk for risk-sharing suppliers to "share". Their terms, therefore, could not be reflective of what market-based operators would demand in the absence of launch aid. The Panel had agreed, and Brazil was pleased that the Panel's findings had been upheld by the Appellate Body.

15. Turning to export subsidies, and in particular to the issue of *de facto* export contingency, Brazil wished to highlight some of its concerns with the interpretation developed by the Appellate Body and its application to the facts of this dispute. Footnote 4 of the SCM Agreement provided that a subsidy was in fact contingent on export performance when the granting of the subsidy was in fact "tied to (...) anticipated exportation or export earnings". The Appellate Body had stated in turn that, when the relationship of conditionality between the granting of a subsidy and anticipated exportation was not expressly or by necessary implication provided in the law, the "factual equivalent" of such conditionality could be established by recourse to the following test: "is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?"[14] The Appellate Body

[12] Appellate Body Report (WT/DS316/AB/R), para. 836.
[13] Appellate Body Report (WT/DS316/AB/R), paras. 896-922.
[14] Appellate Body Report (WT/DS316/AB/R), para. 1044.

had explained that the standard for *de facto* export contingency would be met when the subsidy was granted "so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy".[15]

16. The Appellate Body had explained that the assessment could be based on a comparison between, "on the one hand, the ratio of *anticipated* export and domestic sales that would come about in consequence of the granting of the subsidy and, on the other hand, the situation in the absence of the subsidy. The situation in the absence of the subsidy may be understood on the basis of historical sales of the same product by the recipient (...) before the subsidy was granted. In the event that there are no historical data untainted by the subsidy, or the subsidized product is a new product (...), the comparison could be made with the performance that a profit-maximizing firm would hypothetically be expected to achieve in the export and domestic markets in the absence of the subsidy. (...) The granting of the subsidy will not be tied to anticipated exportation if, all other things being equal, the anticipated ratio of export sales to domestic sales is *not* greater than the existing ratio".[16] In Brazil's view, there were a number of problems with those statements. Brazil noted that, according to the standard formulated by the Appellate Body in this dispute, in order to demonstrate that the granting of a subsidy was in fact "tied to" anticipated exportation, it was not sufficient to establish a "tie" between the granting of the subsidy and expected exports. Rather, one would have to demonstrate that the subsidy provided an incentive to export, and more than that, an incentive to export in a way "that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy". That, however, could be an unwarranted requirement, and one that was likely to lead to incongruous results. The text of the SCM Agreement did not only prohibit subsidies "contingent upon the substitution of domestic sales by export sales", as seemed to have been the new test introduced by the Appellate Body. Nor was there any basis in the text of the SCM Agreement or in the jurisprudence developed by the Appellate Body for imposing a different legal standard for *de facto* export contingency.

17. It was not clear whether the findings of the Panel and the Appellate Body in the "Canada - Aircraft" dispute, for instance, would stand in light of the test now set out by the Appellate Body. The evidence in that dispute had revealed that "funding in the regional aircraft sector is expressly designed and structured to <u>generate sales of particular products</u>, and that the Canadian government expressly takes into account, and attaches considerable importance to, the proportion of those sales that will be for export, when making TPC contributions in the regional aircraft sector".[17] The Panel had not sought to elucidate what would be the proportion of exports to domestic sales that would come about as a result of the subsidy, nor what that proportion would have been had the subsidy not been granted. Those proportions might well not have been different, in which case the original TPC, which had been found to be an export subsidy in that dispute, would not have been an export subsidy according to the standard articulated by the Appellate Body in this dispute. Furthermore, this new standard appeared to imply that, by definition, subsidies provided to enterprises that only exported could never be found to be in fact contingent on export performance, no matter how much factual evidence a complainant amassed to challenge those measures. That was because the ratio of domestic to export sales would always be the same, zero, with or without the subsidy because the firm only exported. Thus, even where a subsidy worked in such a way that its provision was conditioned, for example, on a showing of growing export sales, thus being by any reasonable standard "contingent on export performance", such a demonstration would not meet the Appellate Body's new test for *de facto* export contingency.

18. There was a further problem related to the application of this standard to the facts of this dispute. The Appellate Body had found that, in order to demonstrate that the granting of subsidies

[15] Appellate Body Report (WT/DS316/AB/R), para. 1045.
[16] Appellate Body Report (WT/DS316/AB/R), paras. 1047-1048. (Emphasis in the original.)
[17] Panel Report, Canada - Aircraft, para. 9.341. (Underlining in the original.)

under some of the launch aid contracts at issue had in fact been tied to anticipated export sales, the Panel would have had to determine whether the fact that Airbus was anticipated to make a significant number of exports in order to repay the loans would not be "simply reflective of conditions of supply and demand undistorted by the granting of the subsidies".[18] In light of its standard, the Appellate Body had affirmed that the factual record of the Panel had left the following question unanswered: "[at] what level would Airbus be anticipated to sell in the domestic and export markets *undistorted by the granting of the subsidies* under the [launch aid] contracts in question?"[19]

19. In Brazil's view, however, the Panel record had not contained the answer to this question, at least in respect of the A380. In fact, the Appellate Body itself had upheld the Panel's conclusion that "the launch of the A380 would not have occurred in 2000 without [launch aid]".[20] Thus, the levels that Airbus would have anticipated to sell, measured in number of A380 aircraft, in the domestic and export markets undistorted by the granting of the subsidies, would have been respectively zero and zero. The application of the Appellate Body's test of comparing two proportions would then involve a comparison between, on the one hand, the anticipated ratio of exports to domestic sales that would result if launch aid were granted, as reflected in Airbus' forecasts and, on the other hand, the ratio between zero and zero which, as was known, was a mathematical indeterminacy. In sum, it was Brazil's view that the standard articulated by the Appellate Body in this dispute departed significantly from the text of the SCM Agreement and this was not without serious consequences. The comparison called for by the Appellate Body potentially involved the assessment of hypothetical scenarios on both sides of the equation. This had the potential not only to increase the room for exercises of a speculative nature but it may also make it impossible to undertake a demonstration that otherwise could find direct support in the text of the SCM Agreement.

20. Finally, Brazil wished to address the Appellate Body's findings with respect to the US allegations of serious prejudice. Brazil considered problematic the Appellate Body's conclusion that the term "market" in the context of a serious prejudice analysis referred to both a geographic and a product market. The Appellate Body had found that "a panel is required to make an objective assessment of the competitive relationship between specific products in the marketplace and to define the relevant product market in order to determine whether particular products can be treated as forming part of a single product market or several product markets for purposes of an analysis of displacement under Article 6.3(a) and 6.3(b)".[21] It had further found that "the notion of 'subsidized product' and 'like product' is, in each case, to be analysed as an integral part of a panel's duty objectively to assess a particular claim of serious prejudice and its obligation to assess the relevant market".[22] Brazil was of the view that the text of Article 6.3 of the SCM Agreement clearly referred to a geographic market only. Furthermore, there was no textual guidance regarding the definition of the "subsidized product" in the SCM Agreement, and the definition of a "like product" was focused on the "essential characteristics" of the product in comparison with the subsidized product. There did not appear to be a textual basis to require panels to examine the appropriateness of a complainant's definition of the "subsidized" and the "like" product "under the discipline of the product market"[23] as required by the Appellate Body. Brazil considered that the introduction of concepts and approaches that appeared to be derived from competition law in a trade agreement like the SCM Agreement was unwarranted and imposed an undue burden on complainants as well as panels, ill-suited to conduct such a competition-like analysis.

[18] Appellate Body Report (WT/DS316/AB/R), para. 1091.
[19] Appellate Body Report (WT/DS316/AB/R), para. 1098. (Emphasis in the original.)
[20] Appellate Body Report (WT/DS316/AB/R), para. 1355.
[21] Appellate Body Report, para. 1123.
[22] Appellate Body Report, para. 1131.
[23] Appellate Body Report, para. 1119.

21. On a different note, and turning to the analysis of causation, he said that Brazil appreciated the Appellate Body's recognition that, in this dispute, the issue was one of assigning probabilities to the particular scenarios outlined by the Panel, and that the Panel's findings regarding the different probabilities associated with them were important in determining the extent to which the Panel was required to further pursue the counterfactual analysis. In the end, the Appellate Body had confirmed that, in this unique market, characterized by considerable barriers to entry and very large sunk costs for product development, launch aid subsidies could enable the launch of aircraft at a time and in a manner that would not be possible in the absence of such subsidies. That was sufficient to establish a causal link with the displacement of imports or with lost sales that might be experienced as a result of competition with such subsidized products. Brazil welcomed those findings and believed they would help safeguard the disciplines of the SCM Agreement in a way that contributed to ensuring a level playing field, where manufacturers could develop products and compete with each other on the basis of their own strength, and not on the basis of the leverage provided by national treasuries.

22. The representative of Canada said that her country thanked the Panel, the Appellate Body and the Secretariat for their work in these proceedings. Canada was a third participant in this dispute due to its role as one of the world's major producers of civil aircraft and its systemic interest in the interpretation of the SCM Agreement. At the present meeting, Canada wished to briefly register its views on three systemic issues considered by the Appellate Body: (i) the test for export contingency in Article 3.1(a) of the SCM Agreement; (ii) whether a subsidy must confer a benefit during the reference period for a "serious prejudice" claim; and (iii) when was a subsidy *de jure* specific under Article 2.1(a) of the SCM Agreement. First, Canada welcomed the Appellate Body's adoption of a rigorous test to demonstrate *de facto* prohibited export subsidization under Article 3.1(a) of the SCM Agreement. Under that test, a subsidy was export contingent if the granting of the subsidy was geared to induce the promotion of future export performance by the recipient. In Canada's view, such a test appropriately shifted the focus of the export contingency analysis away from an examination of the granting authority's motivation for providing the subsidy, which was the approach adopted by the Panel, to an examination of whether the subsidy provided the recipient with an incentive to favour exports. However, with respect to serious prejudice, Canada was disappointed that the Appellate Body had found that the benefit conferred by a financial contribution did not need to continue during the reference period to permit a finding that the subsidy caused serious prejudice during that period. The Appellate Body's finding appeared inconsistent with the specific use of the term "subsidized product" in Article 6 of the SCM Agreement. Moreover, the Appellate Body's interpretation meant that a subsidy could give rise to an endless potential exposure to challenge under the SCM Agreement. Finally, Canada was concerned about the Appellate Body's finding that the allocation of funding to certain enterprises in a subsidy programme's budget could result in *de jure* specificity under Article 2.1(a) of the SCM Agreement irrespective of how other funding under that subsidy programme was distributed. The Appellate Body's finding appeared inconsistent with the need for overall consistency in the application of the specificity test under Article 2 of the SCM Agreement. Article 2.1(c) of the SCM Agreement required that, in assessing *de facto* specificity, the subsidy programme as a whole be used as the benchmark of comparison. That same benchmark should be used under Article 2.1(a) of the SCM Agreement.

23. The representative of Australia said that his country welcomed the findings of the Appellate Body in this dispute and the adoption of the Reports by the DSB at the present meeting. Australia wished to put on the record some important issues arising out of this dispute. Australia had a keen interest in the interpretation of Article 3.1(a) and footnote 4 of the SCM Agreement, which pertained to export subsidies. The interpretation of Article 3.1(a) and footnote 4 must avoid any potential discrimination against small or export-dependent economies, the firms of which may have a higher export orientation than firms operating in economies with large domestic markets. Where a firm had a high export orientation because of the market conditions it was operating under, and this was particularly likely for small and export-dependent economies, that "export propensity" should not contribute to a finding of export contingency. Export subsidies were prohibited because of their

potential to directly distort international trade. It was, therefore, imperative that Members, when designing public programmes, were clearly aware of the rules that determined whether a particular programme would amount to an export subsidy. In its findings, the Appellate Body had developed the test for determining export contingency, and thus the test for determining whether a particular subsidy amounted to a prohibited export subsidy. The Appellate Body stated that the following question should be asked: "Is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?" Australia hoped that this test, expanding as it did on the guidance provided by the Appellate Body in the "Canada - Aircraft" dispute, would assist Members and panels in their consideration of whether the granting of a subsidy was, in fact, "tied to" anticipated exportation and, further, that the application of this test would not discriminate against small or export-dependent economies.

24. Finally, Australia noted the time it had taken to reach this point in the dispute. Consultations in this dispute had begun on 6 October 2004, almost seven years ago. Over the years, both the Panel and Appellate Body had been required to evaluate an enormous quantity of evidence and consider issues of significant legal and factual complexity. The resources that had been required by the Appellate Body and Panel to hear the dispute, and the participants and third participants to participate in the dispute, had clearly strained the system. Notwithstanding this massive investment, the Appellate Body was ultimately unable to make findings in respect of all the claims. This was less than ideal as an outcome. The DSU highlighted the importance of the prompt settlement of disputes to the effective functioning of the WTO. Where that did not occur, or was not possible, the value of dispute settlement was called into question. Members needed to reflect on the systemic challenges this and other similarly complex cases posed. Australia thanked the Appellate Body and the Panel for their work in hearing this dispute. Australia hoped that the DSB's findings would be implemented in a timely manner, to finally bring this dispute to a close.

25. The representative of the United States said that his country wished to provide clarifications on two issues that had been raised in previous interventions. First, a question had been raised concerning the US$18 billion figure mentioned in the first US intervention. The EU had frequently argued that launch aid and other support were less than the United States had asserted. At the present meeting, the United States provided, in its statement, citations to the Panel and Appellate Body Reports so that Members could verify the accuracy of the numbers the United States was using. The United States was not aware that the EU provided similar support for any different numbers. Second, with respect to the issue of export subsidies, the Appellate Body had found that the Panel had misunderstood the applicable test to find *de facto* export contingency under Article 3.1(a) and footnote 4 of the SCM Agreement. The Appellate Body had reversed all of the Panel's conclusions on this issue, including the Panel's findings that certain grants of launch aid were not export subsidies.

26. Therefore, whether the instances of launch aid to Airbus were prohibited export subsidies remained, for the time being, an open question. The fact of the matter was that, at the present meeting, the DSB would rule that EU and member State subsidies breached their WTO obligations. Each grant of launch aid and the other subsidies provided by EU countries to Airbus over the last four decades had caused adverse effects to the interest of the United States. With respect to the argument that the adverse effects findings were narrowed, the United States wished to emphasize that it considered those findings to be quite broad. For example, the Reports had found lost sales in ten sales campaigns between Airbus and Boeing. Those campaigns had involved the airlines: EasyJet, Air Berlin, Czech Airlines, Air Asia, Iberia, South African Airways, Thai Airways International, Singapore Airlines, Emirates Airlines and Qantas. Furthermore, the Reports had found loss of market share in such non-minor markets as the EU, Australia, China and Korea. Therefore, even without prohibited subsidies findings, the EU and its member States must still bring themselves into compliance with the DSB's recommendations and rulings, once adopted. Specifically, the EU and its member States would have to take appropriate steps to withdraw the subsidies or remove the adverse effects within six months.

27. The representative of the European Union said that, with regard to the figure of US$18 billion, the United States had cited one paragraph from the Panel Report. The EU would read it again carefully but was sure that it did not mention a figure of US$18 billion. The EU could not prove the negative. To the extent Members had the time and resources, they should read the Report and see if those fantasy figures were there. Then Members would see for themselves that those were purely fantasy figures.

28. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS316/AB/R and the Panel Report contained in WT/DS316/R, as modified by the Appellate Body Report.