

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

Revision to the
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

Communication from the Appellate Body
to the Chairman of the Dispute Settlement Body

The following communication, dated 12 August 2010, from the Chairman of the Appellate Body addressed to the Chairman of the Dispute Settlement Body, is being circulated to Members.

I am writing to advise you that, by letter of 5 August 2010, the European Union requested authorization from the Appellate Body, pursuant to Rule 23*bis* of the *Working Procedures for Appellate Review* (the "*Working Procedures*"), to amend its Notice of Appeal dated 21 July 2010. The Division hearing the appeal provided the United States and all third participants with an opportunity to comment in writing on the request. No objections to the European Union's request were received. On 11 August 2010, the Division authorized the European Union to amend its Notice of Appeal.

The amended Notice of Appeal is attached.

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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* (WT/DS316). 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. The European Union also believes that it may not be necessary for the Appellate Body to decide all the issues raised in this notice of appeal since some may become moot as a result of decisions on other issues.

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 Report¹:

I. Preliminary Issues

A. Legal irrelevance of pre-1995 subsidies (Section VII.C.2 of the Report)

1. The Panel erred in its interpretation and application of Article 5 of the *SCM Agreement* when concluding that all alleged actionable subsidies granted by the European Union prior to 1 January 1995 were included in the temporal scope of these proceedings.²

B. Identity of recipient, pass through, extinction, extraction and withdrawal of subsidy (Section VII E.1 of the Report)

2. The Panel erred in its interpretation and application of the *SCM Agreement*, in particular Articles 1, 4.7, 7.8, 5 and 6.3, by failing to distinguish the recipients of the alleged subsidies over time, and by failing to properly account for sales, transfers and changes in ownership of assets and companies and the extinction, extraction, removal or withdrawal of the alleged subsidies.³

3. In this respect the Panel also failed to make an objective assessment of the law and facts contrary to Article 11 of the *DSU* in a number of ways. In particular, the Panel failed to offer reasoned and adequate explanations for its findings that the European Union "did not argue" that the transactions were at arm's length,⁴ that certain of the transactions were in fact not at arm's length,⁵ that the SEPI and Daimler extractions did not remove the funds from use for LCA development and manufacture⁶ and that cash was not truly "withdrawn" from CASA.⁷ The Panel also lacked a sufficient evidentiary basis for these findings. The Panel's findings concerning the provision and removal of money to a state-owned entity by its government shareholder are also internally inconsistent and incoherent.⁸

4. The Panel erred in its interpretation and application of Articles 4.7 and 7.8 of the *SCM Agreement* in recommending that the European Union "withdraw the subsidy" and "remove the adverse effects or ... withdraw the subsidy", to the extent that the European Union had already done so.⁹

¹Paragraph numbers provided in footnotes to the following description of the errors of the Panel are intended to indicate the primary instance of the errors. Of course 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 8.1 and 8.2 of the Panel Report, and also in particular all the recommendations of the Panel in Sections 8.6 and 8.7 of the Panel Report.

²Panel Report, para. 7.65 and the findings in paras. 7.44 to 7.64; and para. 7.325 and the findings in paras. 7.321 to 7.324.

³Panel Report, para. 7.200 and the findings in paras. 7.286 to 7.289 and 7.190 to 7.199 (pass-through); para. 7.255 and the findings in paras. 7.286 to 7.289 and 7.214 to 7.254 (extinction); paras. 7.286 to 7.289 and 7.266 to 7.285 (extraction and withdrawal); paras. 7.726 to 7.729 (para. 7.729, in particular).

⁴Panel Report, para. 7.249.

⁵Panel Report, para. 7.249 and footnote 2175.

⁶Panel Report, paras. 7.275 to 7.276 and 7.283 to 7.285.

⁷Panel Report, paras. 7.284 to 7.285.

⁸Panel Report, paras. 7.1400 to 7.1403, 7.284 to 7.285 and 7.289.

⁹Panel Report, paras. 8.6 and 8.7.

II. MSF Issues (Section VII E.2 of the Report)

5. The Panel erred in failing to take account of Article 4 of the *1992 Agreement* in interpreting and applying the notion of "benefit" under Article 1.1(b) of the *SCM Agreement*.¹⁰

6. The Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement* and under Article 11 of the *DSU* in making findings regarding project-specific risk premia for various Airbus LCA programmes that fail to apply the Panel's own standard and are made without a sufficient evidentiary basis for these findings and without adequately explaining these findings.¹¹

7. The Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement* and under Article 11 of the *DSU* in finding short-comings of the European Union's risk-sharing supplier benchmark for LA/MSF without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation.¹²

8. To the extent that the Panel has made findings with respect to the relevance of the number of sales over which full repayment is expected to the appropriateness of the market rate of return,¹³ the Panel made an error under Article 1.1(b) of the *SCM Agreement*.

III. Export Subsidy Findings (Section VII E.4 of the Report)

9. The Panel erred in its interpretation and application of Article 3.1(a) and footnote 4 of the *SCM Agreement*, including but not limited to the terms "subsidies", "contingent/condition", "tied-to", "actual or anticipated" and "export performance".¹⁴

10. In reaching those findings the Panel also erred under Article 7.2 of the *DSU* in failing to address the relevant provisions cited by the parties, Article 12.7 of the *DSU* in failing to set out or to set out adequately the basic rationale behind its findings and recommendations and under Article 11 of the *DSU* in failing to make an objective assessment of the matter before it, including an objective assessment of the law and the facts.

IV. EIB Measures (Section VII E.5 of the Report)

11. If the United States appeals the Panel's findings on the lack of specificity of the EIB measures, then the European Union appeals the Panel's findings that such measures confer a benefit and requests the Appellate Body to rule that the Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement* and failed to make an objective assessment of the law and the facts as required by Article 11 of the *DSU* in its findings that the challenged EIB measures confer a benefit.¹⁵

¹⁰Panel Report, paras. 7.388 to 7.389.

¹¹Panel Report, paras. 7.469, 7.481 and 7.483 to 7.490, including Table 7, and para. 8.1(a).

¹²Panel Report, paras. 7.480 and 7.481.

¹³Panel Report, para. 7.397.

¹⁴Panel Report, para. 8.1(a)(ii) and the "findings" in light of which such conclusion is reached, including para. 7.689 (conclusion on export subsidies), para. 7.680 (A380 Germany), para. 7.681 (A380 Spain), para. 7.683 (A380 United Kingdom), para. 7.678, and the other findings in paras. 7.612 to 7.716 of the Panel Report.

¹⁵Panel Report, para. 7.885 and the other findings in paras. 7.717 to 7.881 of the Panel Report on which these findings are based or "in light of" which these findings are made.

V. Infrastructure (Section VII E.6 of the Report)

12. The Panel erred in its interpretation and application of Article 1.1(a)(1)(iii) of the *SCM Agreement* in finding that the Mühlenberger Loch measures, the Bremen runway extension and the ZAC Aéroconstellation measures constitute financial contributions.¹⁶

13. The Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement* in finding that the Mühlenberger Loch measures, the Bremen runway extension and the ZAC Aéroconstellation measures confer a benefit on Airbus Deutschland and Airbus France.¹⁷

VI. Aerospatiale Equity Contributions (Section VII E.9 of the Report)

14. The Panel erred in finding that a "benefit" was conferred by virtue of capital contributions within the meaning of under Article 1.1(b) of the *SCM Agreement* by the French State to a state-owned company, Aérospatiale¹⁸ and in its interpretation of the term "benefit" in Article 1.1(b).¹⁹

15. The Panel erred in its interpretation and application of Article 1.1(b) of the *SCM Agreement* and Article 11 of the *DSU* in making findings without a sufficient evidentiary basis concerning reasonable market-based rates of return, and in the absence of coherent reasoning in its assessment of evidence concerning the performance of Aérospatiale's peers.²⁰

16. The Panel erred in finding that a "benefit" within the meaning of Article 1.1(b) of the *SCM Agreement* was conferred by virtue of the transfer by the French State to a state-owned company, Aérospatiale, of the French State's shares in Dassault Aviation and erred under Article 11 of the *DSU* in finding such a "benefit", without a sufficient evidentiary basis to support that finding.²¹

VII. RT&D Issues (Section VII E.10 of the Report)

17. The Panel erred in its interpretation and application of Article 2.1(a) of the *SCM Agreement* when concluding that R&TD support granted under each of the Framework Programmes constituted specific subsidies.²²

18. The Panel erred in its interpretation and application of Article 6.2 of the *DSU* in concluding that the Spanish PROFIT programme²³ and French R&TD funding²⁴ had been properly identified in the US panel request.

VIII. Adverse Effects (Section VII F of the Report)

19. The Panel erred in its interpretation and application of Articles 5(c), 6.3(a), 6.3(b) and 6.3(c) of the *SCM Agreement* in finding that the effect of the subsidies constitutes serious prejudice to the interests of the United States, including displacement of imports from the European Union,

¹⁶Panel Report, paras. 7.1084, 7.1121, 7.1179, and 8.1(b)(i) to (iii).

¹⁷Panel Report, paras. 7.1097, 7.1134, 7.1190 and 8.1(b)(i) to (iii).

¹⁸Panel Report, paras. 7.1367, 7.1371, 7.1375, 7.1380 and 8.1(d)(i).

¹⁹Panel Report, paras. 7.1364, 7.1366, 7.1370, 7.1374 and 8.1(d)(i).

²⁰Panel Report, paras. 7.1360, 7.1367, 7.1371, 7.1375, 7.1380 and 8.1(d)(i).

²¹Panel Report, paras. 7.1409, 7.1411, 7.1412, 7.1414 and 8.1(d)(ii).

²²Panel Report, paras. 7.1566 and paras. 7.1562 to 7.1565; para. 8.1(e).

²³Panel Report, paras. 7.1422 and paras. 7.1420 to 7.1421; para. 8.1(e).

²⁴Panel Report, paras. 7.150 and 7.148 to 7.149; para. 8.1(e).

displacement of exports from certain third country markets or threat thereof and significant lost sales in the same market.²⁵

20. In reaching those findings the Panel also erred under Article 12.7 of the *DSU* in failing to set out or to set out adequately the basic rationale behind its findings and recommendations and under Article 11 of the *DSU* in failing to make an objective assessment of the matter before it, including an objective assessment of the law and the facts.

A. *1992 Agreement*

21. The Panel erred in its interpretation and application of Article 5(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* in failing to take account of the fact that the United States had expressly consented to all subsidies covered by the *1992 Agreement* and could therefore not suffer serious prejudice as a result of such subsidies.²⁶

B. *Subsidized product*

22. The Panel erred in its interpretation and application of Articles 5(c), 6.3(a), 6.3(b) and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that it did not need to independently and objectively make a determination regarding the subsidized product.²⁷

C. *Displacement or threat thereof*

23. The Panel erred in its interpretation and application of Articles 5(c), 6.3(a) and 6.3(b) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that there is only one, rather than several distinct product markets, and by finding that it could therefore assess displacement, significant price suppression and price depression on the basis of a single product market, thereby exaggerating the extent of the displacement and price suppression and depression it found.²⁸

24. The Panel erred in its interpretation and application of Articles 5(c) and 6.3(b) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that there was displacement in the markets of Mexico and Brazil, although the United States did not lose market share in those markets.²⁹

25. The Panel erred in its interpretation and application of Articles 5(c) and 6.3(a) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that the subsidies caused displacement in the EU market.³⁰

26. The Panel erred in its interpretation and application of Articles 5(c) and 6.3(b) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that the subsidies caused displacement in the third country markets of Australia, Brazil, China, Chinese Taipei, Korea, Mexico and Singapore.³¹

²⁵Panel Report, paras. 8.2(a), (b), (c) and (d) and the "findings" in light of which such conclusions are reached, including the findings set out in the following paragraphs of this notice of appeal and the other findings in paras. 7.1610 to 7.2186 of the Panel Report.

²⁶Panel Report, para. 8.2 and any findings that may be considered to support this conclusion.

²⁷Panel Report, paras. 7.1650, 7.1652, 7.1653, 7.1654, 7.1656, 7.1662 and 8.2.

²⁸Panel Report, paras. 7.1742, 7.1751, 7.1755, 7.1756, 7.1757, 7.1758, 7.1777, 7.1779, 7.1780, 7.1781, 7.1782, 7.1786, 7.1788 to 89 and 7.1790 to 7.1791 and 8.2(a), 8.2(b) and 8.2(c), as well as any other paragraphs that rely on such finding.

²⁹Panel Report, paras. 7.1785, 7.1786, 7.1791, 7.1993, 7.2025 and 8.2(b).

³⁰Panel Report, paras. 7.1985, 7.1986, 7.1993, 7.2025 and 8.2(a).

³¹Panel Report, paras. 7.1985, 7.1986, 7.1993, 7.2025 and 8.2(b).

27. The Panel erred in its interpretation and application of Articles 5(c) and 6.3(b) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found, that the subsidies caused a threat of displacement in the third country market of India.³²

D. *Lost sales*

28. The Panel erred in its interpretation and application of Articles 5 and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU*, when it found that the A380 Emirates Airlines order constituted a significant lost sale.³³

29. The Panel erred in its interpretation and application of Articles 5 and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* when it found that the subsidies caused significant lost sales in the easyJet, Air Berlin, Czech Airlines, Air Asia, Singapore Airlines, Emirates and Qantas sales campaigns.³⁴

E. *Serious prejudice*

30. The Panel erred in its interpretation and application of Articles 5 and 6.3 of the *SCM Agreement* when it found that it need not make a further finding that the displacement, threat of displacement and lost sales it found were caused by the subsidies each amount to serious prejudice to the interests of the United States.³⁵

F. *Price suppression/depression*

31. The Panel erred in its interpretation and application of Articles 5 and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* in finding that it need not assess price suppression on the basis of the individual product markets.³⁶

32. The Panel erred in its interpretation and application of Articles 5 and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* in finding that there exists price suppression and price depression for the 777.³⁷

G. *Causation with respect to subsidies other than MSF*

33. The Panel erred in its interpretation and application of Articles 5 and 6.3(a), 6.3(b) and 6.3(c) of the *SCM Agreement* and Articles 12.7 and 11 of the *DSU* in failing to distinguish the effects of non-MSF alleged subsidy measures from MSF measures in assessing adverse effects and in failing to provide a reasoned and adequate explanation as to how the following measures could cause or contribute to causing adverse effects:

- the Mühlenberger Loch measures; the Bremen airport runway extension; the ZAC Aéroconstellation measures; the grants provided by Germany and Spain for construction of facilities in Nordenham, Germany, and Sevilla, La Rinconada, Toledo, Puerto de Santa Maria and Puerto Real, Spain; and the grants provided by the governments of Andalusia and Castilla-La Mancha in Puerto Real, Sevilla, and Illescas (Toledo);³⁸

³²Panel Report, paras. 7.1985, 7.1986, 7.1993, 7.2025 and 8.2(c).

³³Panel Report, para. 7.1832, and 8.2(d).

³⁴Panel Report, paras. 7.1985, 7.1986, 7.1993, 7.2025 and 8.2(d).

³⁵Panel Report, paras. 7.1736 and 8.2.

³⁶Panel Report, paras. 7.1854 to 7.1855 and 7.1860 to 7.1861.

³⁷Panel Report, paras. 7.1854 to 7.1855 and 7.1860 to 7.1861.

³⁸Panel Report, paras. 7.1958, 8.1(b), and 8.2.

- the capital contributions by the French State and Crédit Lyonnais to Aérospatiale and the transfer by the French State of its shares in Dassault Aviation to Aérospatiale;³⁹
 - the acquisition by Kreditanstalt für Wiederaufbau (KfW) of a 20 percent equity interest in Deutsche Airbus in 1989, and the 1992 transfer by KfW of its 20 percent equity interest in Deutsche Airbus to Messerschmitt-Bölkow-Blohm GmbH (MBB);⁴⁰ and
 - the provision of R&TD funding pursuant to: the Second, Third, Fourth, Fifth, and Sixth EC Framework Programmes; the French government grants between 1994-2005; the German Federal government grants under the LuFo I, II and III programmes; the German sub-Federal government grants from the Bavarian authorities under the OZB and Bayerisches Luftfahrtforschungsprogramm, from the Bremen authorities under the AMST programmes, and from the Hamburg authorities under the Luftfahrtforschungsprogramm; Spanish government loans from the PROFIT and PTA programmes; and UK government grants under the CARAD and ARP programmes.⁴¹
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³⁹Panel Report, paras. 7.1957, 8.1(d), and 8.2.

⁴⁰Panel Report, paras. 7.1957, 8.1(c), and 8.2.

⁴¹Panel Report, paras. 7.1959, 8.1(e), and 8.2.