

# EC AND CERTAIN MEMBER STATES – LARGE CIVIL AIRCRAFT<sup>1</sup>

## (DS316)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>ASCM Arts. 1, 2, 3.1(a), 5(a), 5(c), and 6.3</i>	Establishment of Panel	<i>20 July 2005</i>
			Circulation of Panel Report	<i>30 June 2010</i>
Respondents	<i>European Communities, France, Germany, Spain, United Kingdom</i>		Circulation of AB Report	<i>18 May 2011</i>
			Adoption	<i>1 June 2011</i>

### 1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Subsidies allegedly granted by the European Communities and certain EC member States to Airbus large civil aircraft, including (i) "Launch Aid"/"Member State Financing" (LA/MSF) contracts; (ii) European Investment Bank loans; (iii) infrastructure-related measures; (iv) corporate restructuring measures (debt forgiveness, equity infusions and grants); and (v) research and development funding.
- **Product at issue:** Large civil aircraft developed, produced and sold by Airbus.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ASCM Art. 3.1(a) (prohibited subsidies – export subsidies):** The Appellate Body found that a subsidy is *de facto* export contingent within the meaning of Art. 3.1(a) and footnote 4 if the granting of the subsidy "is geared to induce the promotion of future export performance by the recipient". This standard cannot be met simply by showing that anticipated exportation is the reason for granting the subsidy. Rather, the satisfaction of the standard must be assessed by examining the measure granting the subsidy and the facts surrounding the granting of the subsidy, including the design, structure, and modalities of operation of the measure. The Appellate Body, having reversed the Panel's legal standard, was unable to complete the analysis as to whether the challenged LA/MSF measures were *de facto* export contingent.
- **ASCM Arts. 5(c) and 6.3 (adverse effects – serious prejudice (displacement and lost sales)):** The Appellate Body upheld, although narrower in scope, the Panel's finding that the LA/MSF measures and certain non-LA/MSF measures, found to constitute specific subsidies caused serious prejudice to the interests of the United States within the meaning of Art. 5(c). In reaching this conclusion, the Appellate Body clarified that a panel was not permitted to simply rely on the complaining Member's identification of a product, but was required under Art. 6.3 to make an independent product market determination to ascertain the specific products that compete in the same market.
- **ASCM Art. 5(a) (injury/threat of injury):** The Panel found that the United States had failed to demonstrate material injury or threat of material injury to the United States LCA industry, and therefore rejected a claim under Art. 5(a).
- **ASCM Art. 7.8 (remedies – "to remove adverse effects or withdraw the subsidy"):** The Appellate Body stated that to the extent it upheld the Panel's findings with respect to actionable subsidies that caused adverse effects or such findings were not been appealed, the Panel's recommendation pursuant to Art. 7.8 stands. Art. 7.8 provides in relevant part that "the Member granting each subsidy found to have resulted in such adverse effects, 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy'".

### 3. OTHER ISSUES<sup>2</sup>

- **Additional procedures to protect confidential information:** At the joint request of the parties, the Appellate Body, for the first time in an appellate proceeding, adopted additional procedures to protect the business confidential information and highly sensitive business information submitted in the proceedings. In submitting the request, the parties argued that disclosure of such information could be "severely prejudicial" to the originators of the information, that is, to the LCA manufacturers at the heart of the dispute and possibly to the manufacturers' customers and suppliers.

<sup>1</sup> *European Communities – Measures Affecting Trade in Large Civil Aircraft*

<sup>2</sup> Other issues addressed: temporal scope of the ASCM; extinguishment of past subsidies through partial privatizations and other transactions; withdrawal of past subsidies through cash extractions; pass-through of past subsidies to current producer; information-gathering procedure and adverse inferences (ASCM Annex V); existence of a financial contribution (ASCM Art. 1.1(a)(1)); existence of a benefit (ASCM Art. 1.1(b)); specificity of subsidies (ASCM Art. 2); enhanced third party rights (DSU Art. 10); open Panel meetings and Appellate Body hearings; measures allegedly not subject to consultations; measure not yet in existence at time of panel establishment; failure to identify measures in the panel request (DSU Art. 6.2); non-retroactivity of treaties (VCLT Art. 28); relevance of other rules of international law to the interpretation and application of the WTO Agreement (VCLT Art. 31(3)(c)); status of EC member States as respondents; appeals on issues involving application of the law to the facts; Member's freedom to formulate its complaint; objective assessment of the matter (DSU Art. 11).

# EC AND CERTAIN MEMBER STATES – LARGE CIVIL AIRCRAFT (ARTICLE 21.5 – US)<sup>1</sup> (DS316)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	United States	ASCM Arts. 1, 2, 3.1, 3.2, 5, 6.3, 6.4, 7.8 GATT 1994 Arts. III:4, XVI:1, XXIII:1	Referred to the Original Panel	13 April 2012
			Circulation of Panel Report	22 September 2016
Respondent	European Union, France, Germany, Spain, United Kingdom		Circulation of AB Report	15 May 2018
			Adoption	28 May 2018

## 1. MEASURE AND PRODUCT AT ISSUE

- **Measures at issue:** The measures from the original proceedings found to have caused adverse effects (Launch Aid/Member State Financing (LA/MSF) for Airbus A300, A310, A320, A330/A340, and A380; French and German governments' capital contributions in connection with the corporate restructuring of Aérospatiale and Deutsche Airbus; and German and Spanish authorities' infrastructure-related measures), as well as LA/MSF for Airbus A350XWB.
- **Product at issue:** Large civil aircraft developed (LCA), produced and sold by Airbus.

## 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- **ASCM Arts. 1 and 2 (financial contribution, benefit, specificity):** The Appellate Body upheld the Panel's findings that Airbus paid a lower interest rate for the A350XWB LA/MSF than would have been available to it on the market and, consequently, a benefit was thereby conferred within the meaning of Art. 1.1(b). Consequently, the Appellate Body also upheld the Panel's findings that the A350XWB LA/MSF measures were specific subsidies within the meaning of Arts. 1 and 2.
- **ASCM Art. 3.1(a) and (b) (prohibited subsidies):** The Panel rejected the United States' claims that the A380 and A350XWB LA/MSF measures were *de facto* contingent upon export performance, and that the A350XWB LA/MSF measures were prohibited import substitution subsidies. The Appellate Body agreed with the Panel that the fact that a subsidy *results* in the use of domestic over imported goods cannot by itself demonstrate that that subsidy is contingent upon the use of domestic over imported goods, whether in law or in fact.
- **ASCM Art. 7.8 (remove adverse effects or withdraw the subsidy):** The Appellate Body reversed the Panel's interpretation of Art. 7.8 that an implementing Member would be required to "withdraw" or "take appropriate steps to remove the adverse effects" of past subsidies irrespective of whether such subsidies have expired prior to the end of the implementation period. Instead, the Appellate Body found that this obligation concerns subsidies that are granted or maintained by the implementing Member at the end of the implementation period. Consequently, the Appellate Body found that the European Union had no compliance obligation with respect to subsidies that had expired before 1 December 2011.
- **ASCM Arts. 5(c) and 6.3 (adverse effects, serious prejudice):** The Appellate Body upheld the Panel's finding that the United States appropriately defined product markets for LCA, namely, the global markets for single-aisle LCA, twin-aisle LCA, and very large aircraft (VLA). With regard to subsidies existing in the post-implementation period, the Appellate Body found that (i) in the twin-aisle and VLA LCA markets, the Panel's findings support the conclusion that the identified sales represent "significant lost sales" to the US LCA industry which were the effect of the existing LA/MSF subsidies; and (ii) the "product effects" of the existing LA/MSF subsidies are a genuine and substantial cause of impedance of US LCA in the VLA markets in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates.

<sup>1</sup> *European Communities – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States*

<sup>2</sup> Other issues addressed: DSU Art. 21.5 (the existence of "disagreement" to resolve).