EC AND CERTAIN MEMBER STATES – LARGE CIVIL AIRCRAFT[1] (DS316)

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

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).

- **ACSM 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[2]

- **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.

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2 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).

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PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	*United States*	*ASCM Arts. 1, 2, 3.1, 3.2, 5, 6.3, 6.4 and 7.8* *GATT Arts. III:4, XVI:1 and 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 TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- 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.

2. SUMMARY OF KEY PANEL/AB FINDINGS[2]

- **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.

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

EC AND CERTAIN MEMBER STATES – LARGE CIVIL AIRCRAFT (ARTICLE 21.5 – EU)[1]

(DS316)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	*United States*	*ASCM Arts. 1, 2, 5, 6.3 and 7.8*	Referred to the Original Panel	*27 August 2018*
			Circulation of Panel Report	*2 December 2019*
Respondent	*European Union, France, Germany, Spain, United Kingdom*		Notification of appeal	*6 December 2019*

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- Launch Aid/Member State Financing (LA/MSF) provided by France, German, Spain and the United Kingdom for the Airbus A350XWB and A380 LCA models that was found to have caused adverse effects in the original and first compliance proceedings.

2. SUMMARY OF KEY PANEL FINDINGS

ASCM Art. 7.8 (remove adverse effects or withdraw the subsidy):

- **A380 LA/MSF:** The Panel rejected the European Union's argument that amendments to the French, German, Spanish and UK A380 LA/MSF agreements achieved the withdrawal of the subsidy for purposes of Art. 7.8. The Panel concluded that the European Union failed to demonstrate that a commercial lender, faced with the likely termination of the A380 programme, would have entered into the A380 LA/MSF amendments on the terms agreed between Airbus and the relevant member State governments. The Panel also rejected that the Spanish A380 LA/MSF subsidy had been withdrawn as a result of the alleged amortization of the pre-existing subsidy, or that Airbus' announcement to terminate the A380 programme by 2021 achieved the withdrawal of the A380 LA/MSF subsidies.

- **A350 LA/MSF:** The Panel rejected the European Union's argument that modifications to the German A350XWB LA/MSF agreement meant that the pre-existing subsidy had been replaced by a new and different loan to have resulted in the withdrawal of the subsidy by aligning its terms with a market benchmark. The Panel also rejected that Airbus' repayment of all outstanding principal and interest accrued under the UK A350XWB LA/MSF contract on subsidized terms, withdrew the subsidy for purposes of Art. 7.8.

- **Removal of adverse effects:** The Panel rejected the European Union's argument that the European Union and certain member States had taken appropriate steps to remove the adverse effects for the purpose of Art. 7.8, finding that the A380 and A350XWB LA/MSF subsidies continue to cause present serious prejudice to the United States' interests. The Panel also rejected that Airbus' decision to terminate the A380 programme by 2021 removed present day adverse effects of the A380 LA/MSF subsidies.

3. OTHER ISSUES

- **Preliminary ruling:** The Panel ruled that the United States' claims against certain research and technological development grants provided to Airbus were not within the Panel's terms of reference and were therefore excluded from the scope of the compliance proceeding.

1 *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the European Union and Certain Member States.* Panel Report subject to pending appeal.