INTERNATIONAL AND REGIONAL TRADE LAW: THE LAW OF THE WORLD TRADE ORGANIZATION

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Unit XIV: Subsidies and Countervailing Duties

International and Regional Trade Law:
The Law of the World Trade Organization

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Supplementary Readings

Peter van den Bossche, The Law and Policy of the World Trade Organization, 2013, 744-849.

Raj Bhala, Modern GATT Law. A Treatise on the General Agreement on Tariffs and Trade, 2013, 1055-1380.

Michael J. Trebilcock et al., The Regulation of International Trade, 4rd ed. 2013, 364-410.

John H. Jackson et al., Legal Problems of International Economic Relation, 6th ed. 2013, 941-1034 .

Subsidies and Countervailing Duties: An Overview

In this unit, we will be discussing the legality of "subsidies" in international trade law. Subsidies in a generic sense are not very difficult to understand. In our everyday lives, we use terms like "subsidies" or "subsidization" all the time. In most cases, they mean some sort of financial support. This largely rings true in international trade law under which subsidies mean certain financial "benefits" provided by governments (or other public entities) to specific private parties (such as exporters or producers).

Then, why should GATT/WTO norms regulate subsidies? Why, and when, would subsidies harm international trade? Also, you should pay attention to the evolution of subsidies regulation under the old GATT (Articles VI and XVI) and later under the new WTO system (WTO Subsidies Code). We will address basic rules and obligations under the WTO Subsidies Code, such as the "traffic light" system. You should be able to distinguish among these three different kinds of subsidies (prohibited (red); actionable (yellow); non-actionable (green)) as well as their corresponding different legal effects.

After we learn basic rules and obligations on subsidies and countervailing duties, we will discuss how those rules and obligations actually apply to a real case (*Airbus*). Next, we will probe an interesting distinction between the subsidy discipline and the National Treatment principle. (*Italian Tractor*) Finally, if time permits, we will address certain issues on the auto bailout, in particular whether and how the bailout would violate WTO subsidies rules.

If you have any questions, please email me (scho1@kentlaw.edu).

GATT Provisions on Subsidies and Countervailing Duties

Article VI

Anti-dumping and Countervailing Duties

(...)

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.

(...)

6. (*a*) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(...)

Article XVI

Subsidies

Section A _ Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Section B _ Additional Provisions on Export Subsidies*

2. The contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.

3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.*

(...)

SUBSIDIES AND COUNTERVAILING MEASURES: OVERVIEW
(From the WTO Website, http://www.wto.org/english/tratop_e/scm_e/subs_e.htm)

Agreement on Subsidies and Countervailing Measures ("SCM Agreement")

The Agreement on Subsidies and Countervailing Measures ("SCM Agreement") addresses two separate but closely related topics: multilateral disciplines regulating the provision of subsidies, and the use of countervailing measures to offset injury caused by subsidized imports.

Multilateral disciplines are the rules regarding whether or not a subsidy may be provided by a Member. They are enforced through invocation of the WTO dispute settlement mechanism. Countervailing duties are a unilateral instrument, which may be applied by a Member after an investigation by that Member and a determination that the criteria set forth in the SCM Agreement are satisfied.

Structure of the Agreement

Part I provides that the SCM Agreement applies only to subsidies that are specifically provided to an enterprise or industry or group of enterprises or industries, and defines both the term "subsidy" and the concept of "specificity." Parts II and III divide all specific subsidies into one of two categories: prohibited and actionable(1), and establish certain rules and procedures with respect to each category. Part V establishes the substantive and procedural requirements that must be fulfilled before a Member may apply a countervailing measure against subsidized imports. Parts VI and VII establish the institutional structure and notification/surveillance modalities for implementation of the SCM Agreement. Part VIII contains special and differential treatment rules for various categories of developing country Members. Part IX contains transition rules for developed country and former centrally-planned economy Members. Parts X and XI contain dispute settlement and final provisions.

Coverage of the Agreement

Part I of the Agreement defines the coverage of the Agreement. Specifically, it establishes a definition of the term "subsidy" and an explanation of the concept of "specificity". Only a measure which is a "specific subsidy" within the meaning of Part I is subject to multilateral disciplines and can be subject to countervailing measures.

Definition of subsidy Unlike the Tokyo Round Subsidies Code, the WTO SCM Agreement contains a definition of the term "subsidy". The definition contains three basic elements: (i) a financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit. All three of these elements must be satisfied in order for a subsidy to exist.

The concept of "**financial contribution**" was included in the SCM Agreement only after a protracted negotiation. Some Members argued that there could be no subsidy unless there was a charge on the public account. Other Members considered that forms

of government intervention that did not involve an expense to the government nevertheless distorted competition and should thus be considered to be subsidies. The SCM Agreement basically adopted the former approach. The Agreement requires a financial contribution and contains a list of the types of measures that represent a financial contribution, e.g., grants, loans, equity infusions, loan guarantees, fiscal incentives, the provision of goods or services, the purchase of goods.

In order for a financial contribution to be a subsidy, it must be made **by or at the direction of a government or any public body within the territory of a Member**. Thus, the SCM Agreement applies not only to measures of national governments, but also to measures of sub-national governments and of such public bodies as state-owned companies.

A financial contribution by a government is not a subsidy unless it confers a "**benefit.**" In many cases, as in the case of a cash grant, the existence of a benefit and its valuation will be clear. In some cases, however, the issue of benefit will be more complex. For example, when does a loan, an equity infusion or the purchase by a government of a good confer a benefit? Although the SCM Agreement does not provide complete guidance on these issues, the Appellate Body has ruled (Canada – Aircraft) that the existence of a benefit is to be determined by comparison with the market-place (i.e., on the basis of what the recipient could have received in the market). In the context of countervailing duties, Article 14 of the SCM Agreement provides some guidance with respect to determining whether certain types of measures confer a benefit. the context of multilateral disciplines, however, the issue of the meaning of "benefit" is not fully resolved.

Specificity. Assuming that a measure is a subsidy within the meaning of the SCM Agreement, it nevertheless is not subject to the SCM Agreement unless it has been specifically provided to an enterprise or industry or group of enterprises or industries. The basic principle is that a subsidy that distorts the allocation of resources within an economy should be subject to discipline. Where a subsidy is widely available within an economy, such a distortion in the allocation of resources is presumed not to occur. Thus, only "specific" subsidies are subject to the SCM Agreement disciplines. There are four types of "specificity" within the meaning of the SCM Agreement:

- **Enterprise-specificity**. A government targets a particular company or companies for subsidization;
- **Industry-specificity.** A government targets a particular sector or sectors for subsidization.
- **Regional specificity.** A government targets producers in specified parts of its territory for subsidization.
- **Prohibited subsidies.** A government targets export goods or goods using domestic inputs for subsidization.

Categories of Subsidies

The SCM Agreement creates two basic categories of subsidies: those that are prohibited, those that are actionable (i.e., subject to challenge in the WTO or to countervailing measures). All specific subsidies fall into one of these categories.

Prohibited subsidies Two categories of subsidies are prohibited by Article 3 of the SCM Agreement. The first category consists of subsidies contingent, in law or in fact, whether wholly or as one of several conditions, on export performance ("**export subsidies**"). A detailed list of export subsidies is annexed to the SCM Agreement. The second category consists of subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods ("**local content subsidies**"). These two categories of subsidies are prohibited because they are designed to directly affect trade and thus are most likely to have adverse effects on the interests of other Members.

The scope of these prohibitions is relatively narrow. Developed countries had already accepted the prohibition on export subsidies under the Tokyo Round SCM Agreement, and local content subsidies of the type prohibited by the SCM Agreement were already inconsistent with Article III of the GATT 1947. What is most significant about the new Agreement in this area is the extension of the obligations to developing country Members subject to specified transition rules (see section below on special and differential treatment), as well as the creation in Article 4 of the SCM Agreement of a rapid (three-month) dispute settlement mechanism for complaints regarding prohibited subsidies.

Actionable subsidies Most subsidies, such as production subsidies, fall in the "actionable" category. Actionable subsidies are not prohibited. However, they are subject to challenge, either through multilateral dispute settlement or through countervailing action, in the event that they cause adverse effects to the interests of another Member. There are three types of adverse effects. First, there is **injury** to a domestic industry caused by subsidized imports in the territory of the complaining Member. This is the sole basis for countervailing action. Second, there is **serious prejudice**. Serious prejudice usually arises as a result of adverse effects (e.g., export displacement) in the market of the subsidizing Member or in a third country market. Thus, unlike injury, it can serve as the basis for a complaint related to harm to a Member's export interests. Finally, there is **nullification or impairment** of benefits accruing under the GATT 1994. Nullification or impairment arises most typically where the improved market access presumed to flow from a bound tariff reduction is undercut by subsidization.

The creation of a system of multilateral remedies that allows Members to challenge subsidies which give rise to adverse effects represents a major advance over the pre-WTO regime. The difficulty, however, will remain the need in most cases for a complaining Member to demonstrate the adverse trade effects arising from subsidization, a fact-intensive analysis that panels may find difficult in some cases(**2**).

Agricultural subsidies Article 13 of the Agreement on Agriculture establishes, during the implementation period specified in that Agreement (until 1 January 2003), special

rules regarding subsidies for agricultural products. Export subsidies which are in full conformity with the Agriculture Agreement are not prohibited by the SCM Agreement, although they remain countervailable. Domestic supports which are in full conformity with the Agriculture Agreement are not actionable multilaterally, although they also may be subject to countervailing duties. Finally, domestic supports within the "green box" of the Agriculture Agreement are not actionable multilaterally nor are they subject to countervailing measures. After the implementation period, the SCM Agreement shall apply to subsidies for agricultural products subject to the provisions of the Agreement on Agriculture, as set forth in its Article 21.

Countervailing Measures

Part V of the SCM Agreement sets forth certain substantive requirements that must be fulfilled in order to impose a countervailing measure, as well as in-depth procedural requirements regarding the conduct of a countervailing investigation and the imposition and maintenance in place of countervailing measures. A failure to respect either the substantive or procedural requirements of Part V can be taken to dispute settlement and may be the basis for invalidation of the measure.

Substantive rules A Member may not impose a countervailing measure unless it determines that there are **subsidized imports, injury to a domestic industry, and a causal link** between the subsidized imports and the injury. As previously noted, the existence of a specific subsidy must be determined in accordance with the criteria in Part I of the Agreement. However, the criteria regarding injury and causation are found in Part V. One significant development of the new SCM Agreement in this area is the explicit authorization of cumulation of the effects of subsidized imports from more than one Member where specified criteria are fulfilled. In addition, Part V contains rules regarding the determination of the existence and amount of a benefit.

Procedural rules Part V of the SCM Agreement contains detailed rules regarding the initiation and conduct of countervailing investigations, the imposition of preliminary and final measures, the use of undertakings, and the duration of measures. A key objective of these rules is to ensure that investigations are conducted in a transparent manner, that all interested parties have a full opportunity to defend their interests, and that investigating authorities adequately explain the bases for their determinations. A few of the more important innovations in the WTO SCM Agreement are identified below:

- **Standing.** The Agreement defines in numeric terms the circumstances under which there is sufficient support from a domestic industry to justify initiation of an investigation.
- **Preliminary investigation.** The Agreement ensures the conduct of a preliminary investigation before a preliminary measure can be imposed.
- **Undertakings.** The Agreement places limitations on the use of undertakings to settle CVD investigations, in order to avoid Voluntary Restraint Agreements or similar measures masquerading as undertakings

- **Sunset.** The Agreement requires that a countervailing measure be terminated after five years unless it is determined that continuation of the measure is necessary to avoid the continuation or recurrence of subsidization and injury.
- **Judicial review.** The Agreement requires that Members create an independent tribunal to review the consistency of determinations of the investigating authority with domestic law.

Transition Rules and Special and Differential Treatment

Developed countries Members not otherwise eligible for special and differential treatment are allowed three years from the date on which for them the SCM Agreement enters into force to phase out prohibited subsidies. Such subsidies must be notified within 90 days of the entry into force of the WTO Agreement for the notifying Member.

Developing countries The SCM Agreement recognizes three categories of developing country Members: least-developed Members ("LDCs"), Members with a GNP per capita of less than $1000 per year which are listed in Annex VII to the SCM Agreement, and other developing countries. The lower a Member's level of development, the more favourable the treatment it receives with respect to subsidies disciplines. Thus, for example, LDCs and Members with a GNP per capita of less than $1000 per year listed in Annex VII are exempted from the prohibition on export subsidies. Other developing country Members have an eight-year period to phase out their export subsidies (they cannot increase the level of their export subsidies during this period). With respect to import-substitution subsidies, LDCs have eight years and other developing country Members five years, to phase out such subsidies. There is also more favourable treatment with respect to actionable subsidies. For example, certain subsidies related to developing country Members' privatization programmes are not actionable multilaterally.. With respect to countervailing measures, developing country Members' exporters are entitled to more favourable treatment with respect to the termination of investigations where the level of subsidization or volume of imports is small.

Members in transformation to a market economy Members in transformation to a market economy are given a seven-year period to phase out prohibited subsidies. These subsidies must, however, have been notified within two years of the date of entry into force of the WTO Agreement (i.e., by 31 December 1996) in order to benefit from the special treatment. Members in transformation also receive preferential treatment with respect to actionable subsidies.

Notifications

Subsidies Article 25 of the SCM Agreement requires that Members notify all specific subsidies (at all levels of government and covering all goods sectors, including agriculture) to the SCM Committee. New and full notifications are due every three years with update notifications in intervening years. The notifications are the subject of extensive review and discussion by the SCM Committee.

Countervailing legislation and measures All Members are required to notify their countervailing duty laws and regulations to the SCM Committee pursuant to Article 32.6 of the SCM Agreement. Members are also required to notify all countervailing actions taken on a semi-annual basis, and preliminary and final countervailing actions at the time they are taken. Members also are required to notify which of their authorities are competent to initiate and conduct countervailing investigations.

Dispute Settlement

The SCM Agreement generally relies on the dispute settlement rules of the DSU. However the Agreement contains extensive special or additional dispute settlement rules and procedures providing, inter alia, for expedited procedures, particularly in the case of prohibited subsidy allegations. It also provides special mechanisms for the gathering of information necessary to assess the existence of serious prejudice in actionable subsidy cases.

Notes:

1. The Agreement as it originally entered into force contained a third category — non-actionable subsidies. This category (along with a provision establishing a presumption of serious prejudice in respect of certain specified types of actionable subsidies) applied provisionally for five years ending 31 December 1999, and pursuant to Article 31 of the Agreement, could be extended by consensus of the SCM Committee. As of 31 December 1999, no such consensus had been reached.

2. To mitigate this problem, the SCM Agreement established, during a five-year provisional period which ended 31 December 1999, a sub-category of actionable subsidies with respect to which a rebuttable presumption of serious prejudice existed. Under Article 31, this provision (along with the provisions concerning non-actionable subsidies) could be extended by consensus of the SCM Committee. As of 31 December 1999, no such consensus had been reached.

GATT Article III (National Treatment)

Paragraph 8 (b)

The provisions of this Article shall not prevent the payment of **subsidies exclusively to domestic producers**, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

15 July 1958

ITALIAN DISCRIMINATION AGAINST IMPORTED AGRICULTURAL MACHINERY

Report adopted on 23 October 1958 (L/833 - 7S/60)

(...)

II. Facts of the case

2. In accordance with the Law of 25 July 1952, the Italian Government established a revolving fund which enabled the Ministry of Agriculture and Forestry to grant special credit terms *inter alia* for the purchase of Italian agricultural machinery. (...) The loans are granted at 3 per cent, including fees to the Credit Institute, for a period of five years to finance up to 75 per cent of the cost of the machinery. (...) Eligible purchasers may benefit from these favourable terms when they buy Italian agricultural machinery; if, on the other hand, they wish to buy foreign machinery on credit the terms would be less favourable. The United Kingdom delegation indicated that loans on commercial terms were presently available at the rate of about 10 per cent (...).

III. Alleged inconsistency of the effects of the provisions of the Italian Law with the provisions of paragraph 4 of Article III

(...)

12. In addition, the text of paragraph 4 referred both in English and French to laws and regulations and requirements *affecting* internal sale, purchase, etc., and not to laws, regulations and requirements governing the conditions of sale or purchase. The selection of the word "affecting" would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.

13. The Italian delegation alleged that the provisions of paragraph 8 (b) which exempted the granting of subsidies to producers from the operation of this Article showed that the intention of the drafters of the Agreement was to limit the scope of Article III to laws and regulations directly related to the conditions of sale, purchase, etc. On the other hand, the Panel considered that if the Italian contention were correct and if the scope of Article III was limited in this way (which would, of course, not include any measure of subsidization) it would have been unnecessary to include the provisions contained in paragraph 8 (b) since they would be excluded *ipso facto* from the scope of Article III. The fact that the drafters of Article III thought it necessary to include this exemption for production subsidies would indicate that the intent of the drafters was to provide equal conditions of competition once goods had been cleared through customs.

14. Moreover, the Panel agreed with the contention of the United Kingdom delegation that in any case the provisions of paragraph 8 (b) would not be applicable to this particular case since the credit facilities provided under the Law were granted to the purchasers of agricultural machinery and could not be considered as subsidies accorded to the producers of agricultural machinery.

(...)

WORLD TRADE ORGANIZATION

WT/DS316/R
30 June 2010

(10-3375)

Original: English

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

Report of the Panel

(...)

II. Factual Aspects

(...)

B. Measures at Issue

2.5. The United States, in its request for establishment, identified the measures at issue in this dispute as including the following:

(a) The provision by certain member States of the European Communities (Germany, France, the United Kingdom, and Spain ("the member States")) of financing for large civil aircraft design and development to the Airbus companies[1] (referred to by the United

[1] The United States defined the "Airbus companies" to include Airbus SAS, its predecessor Airbus GIE and current and predecessor affiliated companies, including each person or entity that directly, or indirectly through one or more intermediaries or relationships, controls or controlled, is or was controlled by, or is or was under common control with Airbus SAS or Airbus GIE, such as parent companies, sibling companies and subsidiaries, including Airbus Deutschland GmbH, Airbus España SL, Airbus France S.A.S., Airbus UK Limited, European Aeronautic Defence and Space Company (hereinafter "EADS"), and BAE Systems. The European Communities disputes that the "Airbus companies", as defined by the United States, are recipients of the alleged subsidies. For purposes of this description of the measures at issue, the Panel has used the terminology of the United States' request for establishment. This should not be taken to have any significance for the Panel's consideration of the substance of

States as "Launch Aid").[2] This financing is alleged to provide benefits to the recipient companies including financing for projects that would otherwise not be commercially feasible. The non-commercial terms of the financing may include no interest or interest at below-market rates and a repayment obligation that is tied to sales. If the aircraft is not successful, some or all of the financing need not be repaid. Specific examples of the financing at issue include:

(i) French financing for the Airbus A300, A310, A320, A330/340, A330-200, A340-500/600, A380, and A350;

(ii) German financing for the Airbus A300, A310, A320, A330/340, A380, and A350;

(iii) United Kingdom financing for the Airbus A300, A310, A320, A330/340, A340-500/600, A380, and A350; and

(iv) Spanish financing for the Airbus A300, A310, A320, A330/340, A340-500/600, A380, and A350.

(...)

III. Parties' Requests for Findings and Recommendations

A. United States

3.1 The United States requests that the Panel find that:

(a) Launch Aid provided to Airbus for the A380, the A340-500/600, and the A330-200 aircraft are export subsidies inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement;

(b) The Launch Aid Program, individual provisions of Launch Aid, and the other measures at issue in this dispute are specific subsidies that cause or threaten to cause adverse effects to the United States and, thus, are inconsistent with Articles 5(a), 5(c), 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement;

(c) The Launch Aid Program, individual provisions of Launch Aid, and the other measures at issue in this dispute are subsidies that are inconsistent with Article XVI:1 of the GATT 1994; and

(d) the breaches of the SCM Agreement and the GATT 1994 set forth above nullify or impair benefits accruing to the United States.

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the dispute. This question is addressed further in the Panel's findings at Section **Error! Reference source not found.**.

[2] The European Communities and the member States concerned use different terms to describe the type of financing at issue, such as member State financing, launch aid, launch investment, avances remboursables, Rückzahlbare Zuwendungen, Entwicklungsbeihilfen, Zuschüsse zur Entwicklung von zivilen Flugzeugen, anticipo reembolsable, and prestamo reembolsable. The European Communities disputes that the term "Launch Aid", as used by the United States, is an appropriate designation of these alleged subsidies. For purposes of this description of the measures at issue, the Panel has used the terminology of the United States' request for establishment. This should not be taken to have any significance for the Panel's consideration of the substance of the dispute. This question is addressed further in the Panel's findings at paragraph **Error! Reference source not found.**

(...)

IV. Arguments of the Parties

(...)

4.9 The EC notes that the main US argument seems to be that "{f}or a serious prejudice analysis, it is necessary to establish that the product at issue is subsidized but not that the recipient of the subsidy is one enterprise rather than another." In the EC view, the US logic omits a certain number of essential steps. The EC explains that a product may be considered directly subsidised where an amount is paid on each item produced or sold. But where a subsidy is paid to a person before products are produced or sold, or independently of production or sale, it is necessary to first establish a benefit to the producer or seller of the product in order to establish that goods produced or sold by that person are subsidised. As the Appellate Body made clear in *Canada– Aircraft*, "{a} 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient."[3]

4.10 Taking into account this standard, the EC argues that it is necessary in analyzing the alleged subsidies in this case to identify the precise recipients.[4] And according to the EC, the US does not address this issue at all in its first written submission and attempts to disguise the issue by sometimes using the term "Airbus" to cover many different entities.[5]

(...)

4.58 The US challenges not only each individual grant of Launch Aid, but also the Launch Aid program as a whole. The US argues that evidence of the Launch Aid program includes, *inter alia*, intergovernmental agreements, the Launch Aid contracts, the intergovernmental institutions, and the dedicated bureaucracies. Further evidence is the "legally binding" commitments of Launch Aid for the A350 XWB, as well as the value that market actors place on Launch Aid. The perception of Launch Aid by rating agencies should leave no doubt that Launch Aid is a program. It "creates expectations among the public and among private actors," demonstrating that it has "normative value" and should be considered as a measure in its own right.[6]

(...)

Launch Aid Constitutes a Financial Contribution to Airbus

4.69 The US notes that Article 1.1(a)(1)(i) of the SCM Agreement states that "there is a financial contribution" by a government where "a government practice involves a direct transfer of funds (*e.g.*, grants, loans, and equity infusion)" or "potential direct transfers of funds or liabilities (*e.g.*, loan guarantees)." According to the US, the Airbus governments' Launch Aid program is a government practice that involves the direct transfer of funds or potential direct transfer of funds in the sense of Article 1.1(a)(1)(i) – namely, success-dependent loans. Therefore, in the US view, "there is a financial contribution" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[7]

Launch Aid Confers a Benefit on Airbus

4.70 The US argues that the Airbus governments have designed the Launch Aid system to benefit Airbus by providing the funds it needs to develop new models of LCA [Large Commercial Aircrafts], carefully tailored to address the extremely high costs and risks of LCA development, at interest rates that are

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[3] EC, SWS, Executive Summary, para. 11.
[4] EC, FWS, Executive Summary, para. 16
[5] EC, FNCOS, Executive Summary, para. 3.
[6] US, FNCOS, Executive Summary, para. 1.
[7] US, FWS, Executive Summary, para. 18.

substantially below what the market would demand for financing with similar characteristics. The US describes the ways in which the Airbus governments have designed Launch Aid to insulate Airbus from those risks and the reasons why the financing confers a benefit within the meaning of the SCM Agreement.[8]

(...)

Launch Aid is Specific

4.76 Lastly, the US submits that the Launch Aid program is specific to Airbus. According to the US, the Airbus governments conceived and maintain their Launch Aid program for the specific benefit of Airbus. The US argues that they have used the program in a systematic and methodical way since its very inception to provide Airbus the means to develop a full family of LCA to compete against US producers in the LCA market. Accordingly, in the US view, the Launch Aid subsidies that Airbus has received have always been, and remain, specific to Airbus within the meaning of Article 2 of the SCM Agreement.[9]

(...)

4.85 The EC does not accept the US descriptions of "launch aid programme" as a generic system denoting "long-term unsecured loans at zero or below-market rates of interest, with back-loaded repayment schedules". The EC points out that "rather than using the suggestive and oversimplifying term "launch aid", the EC will refer to each of the member States' measures separately. In the EC view, if a generic term is suitable to cover measures from all the four member States together the EC will denote them as "member State Financing" ("MSF").[10]

(...)

4.88 The EC asserts that each instance of financing is memorialized in an MSF contract. The terms on which MSF is provided are negotiated on a deal-by-deal basis; as a consequence, they vary considerably depending on the Airbus LCA programme at issue, both within and as between member States. In its condensed factual description of MSF, the EC describes some common attributes of MSF. Those common attributes speak solely to the similarity of the type or form of financing provided by the four member States. Each MSF contract is, however, a separate and independent measure.[11] In its submissions, the EC describes the basic elements of MSF loans as financial instruments, and their role in the development of the A320, the A330/A340 (including the A330/340 basic, the A330-200, and the A340-500/600), and the A380 aircraft programmes.[12]

(...)

4.94 First, the tenor of MSF loans is consistent with the tenors of other long-term financing instruments available at market.[13] Second, unsecured financing instruments are common in the market and do not, for that reason alone confer a benefit.[14] Third, financing with success-dependent repayment terms is available to both Airbus and Boeing from commercial actors, including private banks and risk-sharing

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[8] US, FWS, Executive Summary, para. 19. *See, also,* US, FWS, Executive Summary, para. 5.
[9] US, FWS, Executive Summary, para. 25.
[10] EC, FWS, Executive Summary, para. 28.
[11] EC, FWS, Executive Summary, para. 29.
[12] EC, FWS, Executive Summary, para. 31.
[13] EC, FCOS, para. 15.
[14] EC, Answer to Panel Question 65, paras. 72-76.

suppliers.[15] While the success-dependent nature of the repayment does, indeed, transfer risk from the borrower to the creditor, this is a feature shared by most financing instruments. The degree of risk-sharing will be reflected in the price – *i.e.*, the interest rate – charged by the creditor for the financing instrument. Success-dependent repayment terms are, therefore, not indicative of benefit either.[16] Fourth, back-loaded repayments are common for many financing instruments. Commercial bonds for example are repaid in total at the end of their tenor, *i.e.*, their repayment is entirely back-loaded.[17]

(...)

4.132 First, the EC argues that the US overlooks the fact that government financing may impose costs on the recipient that market instruments do not. This distinction, in the view of the EC, should be taken into account when comparing MSF loans with a market benchmark.[18]

(...)

4.135 The EC submits that the benchmark proposed by the US fails to reflect financing terms available at market.[19] By contrast, when one looks to the returns obtained by market participants in the LCA industry – Airbus risk-sharing suppliers investing in the same project – the benchmark returns are far lower. These returns provide an ideal market benchmark, as both risk-sharing suppliers and MSF lenders bear risk associated with the same market (LCA), same company (Airbus), and the same project.[20]

Whether the Launch Aid that Airbus has received for the A380, the A340-500/600, and the A330-200 are prohibited export subsidies

(...)

4.149 The US argues that the Launch Aid that Airbus has received for the A380, the A340-500/600, and the A330-200 are prohibited export subsidies.[21] The US observes that a finding of export contingency involves three elements: (1) the "granting" of a subsidy; (2) that is "tied to" (3) "actual or anticipated exportation or export earnings."[22]

(...)

4.183 The EC contends that the US is interpreting the term "actual" as if it means "real" – that is, "actually" has taken place in the past or "actually" takes place in the future; and the term "anticipated" (in juxtaposition to the term "actual") as if it means "potential", so that, according to the US, and specifically in the case of an *ad hoc* subsidy, whether or not the "anticipated" export ever "actually" takes place is irrelevant to the question of whether or not there is a subsidy contingent upon export performance. Thus, for the US, the required condition is not export, but "the anticipating of" export; this necessarily involves an enquiry into the hypothetical "state of mind" or "intent" of a natural person whose thoughts are imputable to the defending Member, with mere anticipation or consideration or motivation being sufficient to demonstrate contingency – an approach that the EC considers inherently flawed and legally

[15] EC, Answer to Panel Question 64, paras. 58-66.
[16] EC, FCOS, para. 18.
[17] EC, FCOS, para. 16.
[18] EC, SWS, Executive Summary, para. 19.
[19] EC, FWS, Executive Summary, para. 38.
[20] EC closing statement, second meeting, Executive Summary, para. 7.
[21] US, FWS, Executive Summary, para. 29.
[22] US, FWS, Executive Summary, para. 30.

erroneous.[23] The EC contends that the US bases its arguments on terms such as "precondition" and "predicate" that are not found in the text of the SCM Agreement.[24]

(...)

VII. Findings

(...)

Whether the challenged measures are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement

(...)

7.496 For all of the above reasons, we therefore dismiss the European Communities' contention that the costs of public policy obligations contained in "most" of the challenged LA/MSF measures are enough to call into question the existence of a benefit indicated by our comparison of LA/MSF rates of return with the rates of return associated with market financing on the same or similar terms as LA/MSF.

(...)

7.497 The United States considers that each of the subsidies conferred upon Airbus through the LA/MSF contracts is specific, within the meaning of Article 2 of the SCM Agreement because *inter alia*, each individual grant of LA/MSF is made pursuant to a specific contract between the relevant EC member State government and Airbus.[25] The European Communities has not contested the United States' submission. We agree with the United States. Each of the challenged LA/MSF contracts involves a unique transfer of funds at below-market interest rates to one particular company, Airbus. It follows that the subsidies granted under each of the contracts are explicitly limited to Airbus – explicitly limited to "certain enterprises" within the meaning of Article 2.1(a) of the SCM Agreement. We therefore find that each of the subsidies granted pursuant to the challenged LA/MSF contracts is specific within the meaning of Article 2 of the SCM Agreement, and can therefore be challenged under Part III of the Agreement.

(...)

Whether LA/MSF for the A380, A340-500/600 and the A330-200, constitutes, in each case, a prohibited export subsidy within the meaning of Article 3 of the SCM Agreement

(...)

7.689 Having carefully reviewed and considered the evidence and related arguments advanced by the parties as they concern each of the challenged LA/MSF measures, we find that the United States has demonstrated that the German, Spanish and UK A380 contracts amount to prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement. However, we consider that the United States has not shown that the granting of the other challenged LA/MSF subsidies was contingent in fact upon anticipated export performance, within the meaning of the same provisions.

(...)

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[23] EC, SWS, para 233; EC, Answer to Panel Question 217, paras. 528 to 530 and 533 to 535.
[24] EC, SNCOS, para. 145.
[25] US, FWS, paras. 186-188, 206-210, 229-233, 251, 258, 271, 280, 288 and 297.

insights

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The WTO *EC - Aircraft* Panel and Appellate Body Reports on Subsidies to Airbus

By Simon Lester

Introduction

The WTO dispute in *EC—Aircraft* (DS316)[1] has been both lengthy (six years from the first consultations request to the circulation of the Appellate Body report) and complex (in terms of both legal and factual issues). This *Insight* provides a brief overview of the issues involved in the panel and appellate proceedings.

Factual Background

In this dispute, the United States challenged the legality of alleged subsidies by the European Union and certain member States to the various Airbus companies under the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). The U.S. complaint alleged "more than 300 separate instances of subsidization, over a period of almost forty years, by the European Communities and four of its member States, France, Germany, Spain and the United Kingdom, with respect to large civil aircraft ('LCA') developed, produced and sold by the company known today as Airbus SAS."[2] The Panel grouped these measures into five general categories:

- *"Launch Aid" / Member State Financing ("LA/MSF")*: Provision by France, Germany, Spain, and the United Kingdom of financing to the Airbus companies for large civil aircraft design and development. The United States alleged that this financing provides benefits to the recipient companies, such as below-market interest rates and a repayment obligation that arises only if sales are successful.
- *Design and Development Financing Loans*: Provision by the European Communities and the member States of financing through the European Investment Bank ("EIB") to the Airbus companies for large civil aircraft design,

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DOCUMENTS OF NOTE

Panel Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*

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development, and other purposes.

- *Infrastructure and Related Grants*: Provision by the European Communities and the member States of financial contributions to develop, expand, and upgrade facilities and other infrastructure for the Airbus companies.
- *Corporate Restructuring Measures (Debt Forgiveness, Equity, and Grants)*: Assumption and forgiveness by the European Communities and the member States of debt resulting from Launch Aid and other financing for large civil aircraft development and production; and provision by the European Communities and the member States of equity infusions and grants, including through government-owned and government-controlled banks.
- *Research and Development*: Provision by the European Communities and the member States of financial contributions for aeronautics-related research, development, and demonstration undertaken by Airbus, whether alone or with others, or in any other way to the benefit of Airbus.

The product at issue is large civil aircraft ("LCA") (as distinguished from smaller (regional) aircraft and military aircraft). LCA are generally described as large (weighing over 15,000 kilograms) "tube and wing" aircraft, with turbofan engines carried under low-set wings, designed for subsonic flight. LCA are designed for transporting hundred or more passengers and/or a proportionate amount of cargo.

In terms of the companies in the industry, LCA are presently produced only by Boeing (a U.S. company) and Airbus (a European company), which both sell a range of LCA models world-wide. Both companies engage in continued development of LCA, which requires significant up-front investments over a period of three to five years before any revenues are obtained.

As the Panel explained, before 2001, no single legal entity produced Airbus LCA. Airbus LCA were produced by a consortium of French, German, Spanish, and (from 1979) United Kingdom aerospace companies (the Airbus partners), operating in a form of partnership arrangement through the French entity Airbus GIE. In 2000, the Airbus partners consolidated their LCA-related activities under the European Aeronautic Defence and Space Company, EADS N.V. (EADS): each of the French, German, and Spanish Airbus partners placed its Airbus-related design, engineering, manufacturing, and production assets and activities into legal entities that would become wholly owned subsidiaries of the newly formed EADS, in return for shares in EADS representing the agreed values of the Airbus partners' corresponding contributions. In 2001, EADS and Airbus' British partner BAE Systems placed their Airbus-related assets and operations and their membership rights in Airbus GIE under the common control of a newly-created holding company, Airbus SAS. Finally, in 2006, EADS purchased BAE Systems' twenty percent interest in Airbus SAS, and Airbus SAS became a wholly-owned subsidiary of EADS.[3]

The Claims

The U.S. claims fell into two categories:

- Claims that the challenged *LA/MSF* measures are *prohibited export subsidies* within the meaning of SCM Agreement Article 3.1(a);[4] and
- Claims that each challenged measure is a specific subsidy within the meaning of SCM Agreement Articles 1 and 2, and that the European Communities and the four member States, through the use of these subsidies, caused *adverse*

Airbus

Boeing

effects to U.S. interests under the SCM Agreement. The adverse effects claims involved allegations of both "injury" under Article 5(a) and serious prejudice under Articles 5(c) and Article 6.3.[5]

The Panel's Rulings

Adverse effects claims: The SCM Agreement only applies to "specific subsidies," so the initial issues confronting the Panel were: (1) Is there a subsidy (a "financial contribution" by government or a public body that confers a "benefit")? And (2), if so, is it "specific" (as opposed to generally available)?

With regard to "financial contribution," the Panel focused on issues of *direct and potential direct transfers of funds* under Article 1.1(a)(1)(i) and *provision of goods and services "other than general infrastructure"* under Article 1.1(a)(1)(iii). Past cases have established that a "benefit" exists if government financial contributions are provided on terms more favorable than those available on the market[6]—and the Panel here considered whether that was true in this instance.

Article 2 provides that subsidies are "specific" if, *inter alia*, they go to "an enterprise or industry or group of enterprises or industries." Here, the Panel focused on *de jure* specificity under Article 2.1(a), *de facto* specificity under Article 2.1(c), and regional specificity under Article 2.2.

For those subsidies found to be specific,[7] the Panel then considered whether the United States had demonstrated the existence of "adverse effects" as defined by SCM Articles 5 and 6, examining in particular the following "serious prejudice" issues:

- Article 6.3(a) - Displacement and Impedance in the EC Market;
- Article 6.3(b) - Displacement and Impedance in Third Country Markets;
- Article 6.3(c) - Price Undercutting;
- Article 6.3(c) - Price Depression;
- Article 6.3(c) - Price Suppression; and
- Article 6.3(c) - Lost Sales.

The Panel considered first whether serious prejudice exists; and then, separately, whether this serious prejudice has been caused by the subsidies. Ultimately, the Panel found that the subsidies caused the following types of serious prejudice: Displacement in the EC Market; Displacement in Third Country Markets; and Lost Sales.[8] The Panel rejected claims under Article 5(a) related to injury and threat of injury made as part of an additional U.S. "adverse effects" claim.[9]

Export subsidies: The Panel found that some instances of LA/MSF constituted export subsidies, whereas others did not.[10] In the context of reaching this conclusion, the Panel set out what it considered to be the correct interpretation of the *de facto* export contingency legal standard. In this regard, it said that "a subsidy may be found to be contingent *in fact* upon *anticipated* export performance, and therefore prohibited under Article 3.1(a), when there is evidence demonstrating the existence of three distinct elements: (i) the granting of a subsidy; (ii) that is tied to; (iii) anticipated exportation or export earnings." The Panel noted that "[a]t the heart of this legal standard is the second element, which reflects the notion of contingency set out in Article 3.1(a)." The meaning of "contingent" in Article 3.1(a) is "conditional" or "dependent for its existence upon," and thus in order to qualify as a prohibited export subsidy, the grant of the subsidy "must be *conditional* or *dependent*

upon actual or anticipated export performance." In this regard, the Panel explained that under this standard, "a subsidy must be granted *because* of actual or anticipated export performance."[11]

The Appellate Body's Rulings

The EU filed a notice of appeal[12] alleging various errors in relation to the Panel's findings of violation, as well as on some systemic issues. In addition, the United States filed a notice of other appeal,[13] alleging errors related to certain claims that had been rejected.

On appeal, the Appellate Body reversed some of the Panel's findings and upheld others. In some instances where it reversed the Panel's findings, it was able to complete the legal analysis and make a finding of its own. In others, it was not.

Adverse Effects: The Appellate Body modified and reversed several of the Panel's findings on adverse effects, but it upheld the broad thrust of these findings: a large number of the EU subsidies at issue, including LA/MSF, had caused adverse effects, in the form of "serious prejudice," to U.S. interests. In particular, this serious prejudice here was the "displacement" and "lost sales" experienced by Boeing in various markets.[14]

Export Subsidies: The Appellate Body reversed the Panel's legal interpretation on *de facto* export contingency. Rather than focusing on whether a subsidy is granted "*because of*" actual or anticipated export performance, the Appellate Body said the standard should involve looking at whether the subsidy creates an incentive to export as compared to selling domestically. As the Appellate Body stated:

> Where the evidence shows, all other things being equal, that the granting of the subsidy provides an incentive to skew anticipated sales towards exports, in comparison with the historical performance of the recipient or the hypothetical performance of a profit-maximizing firm in the absence of the subsidy, this would be an indication that the granting of the subsidy is in fact tied to anticipated exportation within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.[15]

Having reversed the Panel's legal interpretation, the Appellate Body was unable to complete the analysis to determine whether any of the particular LA/MSF subsidies at issue constitute an export subsidy.[16]

As a result, the legal status of these subsidies is uncertain. There is simply no finding on whether any such measures are export subsidies, and such a finding could only be made if a new proceeding were brought.

In addition to these findings, the Panel and Appellate Body also considered a number of important issues of systemic interest, including the following: the proper consideration of the "subsidized product" and the product markets; the issue of "extinguishing" subsidies through sale of the subsidized company or similar events; the role of non-WTO legal instruments in interpreting WTO rules; how to evaluate subsidies granted many years before a dispute; and the appropriate method of appealing issues involving application of the law to the facts.

Implementation

A great deal of uncertainty remains as to how these rulings will be implemented and the impact this will have on future EU subsidies to Airbus. In this regard, one key overarching issue was whether "Launch Aid" could be challenged as a "program," beyond the individual instances of financing that had been undertaken for specific Airbus planes. The Panel had found that the United States did not prove that such a "program" existed.[17] The United States appealed this finding. On appeal, the Appellate Body found that the panel request (which defines the scope of the claims in a WTO dispute) did not properly identify Launch Aid as a measure subject to challenge—and so the U.S. challenge to Launch Aid as a program was outside the scope of this dispute.[18] Arguably, this result is an important setback for the United States in terms of achieving fundamental changes to future Launch Aid, as it may make enforcement of these rulings in relation to new Launch Aid financing more difficult.

In addition, there is the more general question of how compliance with these rulings will be achieved. The rulings do not find that Launch Aid is *per se* illegal under the SCM Agreement. Rather, they simply find that the way these particular instances of Launch Aid were carried out violated the rules. The practical question becomes, how can the EU modify future Launch Aid so as to comply with the rules? In all likelihood, the parties will have strong disagreements as to what is required, and this will provide the next battleground for the dispute (along with the related complaint against alleged subsidies to Boeing, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (DS353), which is currently in the appeal stage).

About the Author:

Simon Lester, a former Legal Affairs Officer at the Appellate Body Secretariat of the World Trade Organization, has taught courses on international trade law at American University's Washington College of Law and the University of Michigan Law School. He is co-founder of WorldTradeLaw.net.

Endnotes:

[1] *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft.*

[2] Panel Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶ 7.1, WT/DS316/ (June 30, 2010) [hereinafter Panel Report, *EC—Aircraft*].

[3] *Id*. ¶¶ 2.1-5, 7.1, 7.183, 7.619-623, 7.1716-1728; Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶¶ 573-632, WT/DS316/AB/ (May 18, 2011) [hereinafter Appellate Body Report, *EC—Aircraft*].

[4] Panel Report, *EC—Aircraft,* ¶ 3.1(a).

[5] *Id*. ¶ 3.1(b).

[6] Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, ¶ 157, WT/DS70/AB/R (Aug. 2, 1999).

[7] The EIB financing was the only category of measures not found to be specific subsidies.

[8] Panel Report, *EC—Aircraft,* ¶ 7.2025.

[9] *Id*. ¶ 7.2186.

[10] *Id*. ¶ 7.689.

[11] *Id*. ¶ 7.648.

[12] Revision to the Notification of an Appeal by the European Union, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/12/Rev.1 (Aug. 17, 2010).

[13] Notification of an Other Appeal by the United States, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/13 (Aug. 20, 2010).

[14] Appellate Body Report, *EC—Aircraft,* ¶¶ 1105-1413.

[15] *Id*. ¶ 1047; and, more generally, ¶¶ 1040-1055.

[16] *Id*. ¶¶ 1085-1101.

[17] Panel Report, *EC—Aircraft,* ¶¶ 7.576-580.

[18] Appellate Body Report, *EC—Aircraft*, ¶¶ 778-796.

DISPUTE SETTLEMENT: DISPUTE DS487

United States — Conditional Tax Incentives for Large Civil Aircraft

See also:
> The basics: how disputes are settled in WTO
> Computer based training on dispute settlement
> Text of the Dispute Settlement Understanding

Other disputes involving:
> Aircraft
> European Union (formerly EC)
> United States
> Agreement on Subsidies and Countervailing Measures

Current status back to top

Panel report circulated on **28 November 2016** ⓘ

Key facts back to top

Short title:	US — Tax Incentives
Complainant:	European Union
Respondent:	United States
Third Parties:	Brazil; China; India; Japan; Korea, Republic of; Russian Federation; Australia; Canada
Agreements cited: (as cited in request for consultations)	Subsidies and Countervailing Measures: Art. 1, 2, 1.1(a)(1)(ii), 1.1(b), 3.1(b), 3.2, 2.3
Request for Consultations received:	19 December 2014
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Summary of the dispute to date back to top

The summary below was up-to-date at 28 November 2016 ⓘ

Consultations

Complaint by the European Union.

On 19 December 2014, the European Union requested consultations with the United States with respect to conditional tax incentives established by the State of Washington in relation to the development, manufacture, and sale of large civil aircraft.

The European Union alleges that the measures constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement. The European Union also considers that the measures are prohibited subsidies that are inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement.

On 12 February 2015, the European Union requested the establishment of a panel.

Panel and Appellate Body proceedings

At its meeting on 23 February 2015, the DSB established a panel. Brazil, China, India, Japan, Korea and the Russian Federation reserved their third-party rights. Subsequently, Australia and Canada reserved their third-party rights.

On 13 April 2015, the European Union requested the Director-General to compose the panel. On 22 April 2015, the Director-General composed the panel. On 29 September 2015, the Chairperson of the Panel informed the DSB that it estimated to issue its report within 12 months. On 23 September 2016, the Chairperson of the Panel informed the DSB that the final report was to be circulated to all Members by the end of November 2016.

On 28 November 2016, the panel report was circulated to Members.

Summary of key findings

This dispute concerns legislation enacted in the state of Washington in the United States in November 2013 through Engrossed Substitute Senate Bill 5952 (ESSB 5952), which amended and extended various tax incentives for the aerospace industry. The European Union identified seven separate tax incentives, including a reduced business and occupation tax rate, credits against business taxation, and exemptions from various other taxes in the state of Washington.

The European Union claimed that those tax incentives are prohibited under Articles 3.1(b) and 3.2 of the SCM Agreement as subsidies that are contingent on the use of domestic over imported goods. According to the European Union, the contingency results from two siting provisions contained in ESSB 5952, namely a First Siting Provision and a Second Siting Provision. In the European Union's view, the challenged aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods inasmuch as the text of the relevant legislation sets out the prohibited contingency. The European Union also made a secondary claim that the aerospace tax measures are *de facto* contingent upon the use of domestic over imported goods.

The Panel found that, under each of the aerospace tax measures at issue, there is a financial contribution by the Washington State government and a benefit is thereby conferred. The Panel concluded therefore that each of the aerospace tax measures at issue constitutes a subsidy within the meaning of Article 1 of the SCM Agreement.

With respect to the European Union's *de jure* claim against the aerospace tax measures at issue, the Panel looked separately at the First Siting Provision and the Second Siting Provision contained in ESSB 5952, to assess whether the European Union had successfully demonstrated the existence of the prohibited contingency in either of the provisions. In this regard, the Panel concluded that the European Union had not demonstrated that, on their own, and based on their express terms, the First Siting Provision or the Second Siting Provision make the challenged aerospace tax measures *de jure* contingent upon the use of domestic over imported goods.

The Panel subsequently considered the two siting provisions acting jointly and concluded that the European Union had not demonstrated that, acting together, the First Siting Provision and the Second Siting Provision make the challenged aerospace tax measures *de jure* contingent upon the use of domestic over imported goods.

With respect to the European Union's *de facto* claim against the aerospace tax measures at issue, the Panel considered the joint operation of the First Siting Provision and the Second Siting Provision contained in ESSB 5952, to assess whether the European Union had successfully demonstrated the existence of the prohibited contingency. The Panel concluded that the siting provisions in ESSB 5952, and in particular the prospective modalities of operation of Washington State Department of Revenue's discretion under the Second Siting Provision, make one of the challenged aerospace tax measures (namely, the reduced business and occupation tax rate for the manufacturing or sale of commercial airplanes under the 777X programme) *de facto* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

Having found that the reduced business and occupation tax rate for the manufacturing or sale of commercial airplanes under the 777X programme is inconsistent with Article 3.1(b) of the SCM Agreement, the Panel also found that the United States has acted inconsistently with Article 3.2 of the SCM Agreement.