X. Findings and Conclusions

1414. For the reasons set out in this Report, in relation to the issues raised on appeal by the European Union, the Appellate Body:

(a) reverses the Panel's finding, in paragraph 7.1422 of the Panel Report, that the R&TD loans provided pursuant to the Spanish PROFIT programme were within the Panel's terms of reference;

(b) upholds the Panel's finding, in paragraph 7.158 of the Panel Report, that the French R&TD grants were within the Panel's terms of reference;

(c) modifies the Panel's interpretation of Article 5 of the *SCM Agreement*, but upholds the Panel's conclusion, in paragraph 7.65 of the Panel Report, rejecting the European Communities' request to exclude all alleged prohibited and actionable subsidies granted prior to 1 January 1995 from the temporal scope of the dispute;

(d) with respect to the Panel's interpretation of Articles 1, 4.7, 5, 6, and 7.8 of the *SCM Agreement* and their application to transactions involving certain Airbus companies:

(i) modifies the Panel's interpretation, but upholds the Panel's ultimate finding, in paragraphs 7.222 and 7.287 of the Panel Report, that Articles 5 and 6 of the *SCM Agreement* do not require that a complainant demonstrate that a benefit "continues" or is "present" during the reference period for purposes of an adverse effects analysis;

(ii) reverses the Panel's finding, in paragraphs 7.248, 7.255, and 7.288 of the Panel Report, that the sales transactions at issue did not "extinguish" a portion of past subsidies, because the Panel failed to assess whether the partial privatizations and private-to-private sales transactions were at arm's-length terms and for fair market value, and to what extent they involved a transfer in ownership and control to new owners; but finds that there are insufficient factual findings by the Panel or undisputed facts on the Panel record to complete the legal analysis and determine whether these transactions "extinguished" a portion of past subsidies;

(iii) does not *a priori* exclude the possibility that all or part of a subsidy may be "extracted" by the removal of cash or cash equivalents; but upholds the Panel's ultimate finding, in paragraphs 7.276 and 7.288 of the Panel Report, that the "cash extractions" from Dasa and CASA did not remove a portion of past subsidies;

(iv) upholds the Panel's ultimate finding, in paragraphs 7.283, 7.284, and 7.289 of the Panel Report, that the "cash extractions" did not result in the "withdrawal" of subsidies within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*; and has no basis on which to make a finding that the sales transactions at issue resulted in the "withdrawal" of subsidies within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*;

(v) declines to make additional findings as to whether the Panel failed to make an objective assessment of the matter and thereby acted inconsistently with Article 11 of the DSU in its treatment of the European Communities' arguments concerning the "extinction", "extraction", and "withdrawal" of subsidies; and

(vi) upholds the Panel's finding, in paragraphs 7.200 and 7.286 of the Panel Report, that the United States was not required to demonstrate, as part of its *prima facie* case under Article 5 of the *SCM Agreement*, that subsidies provided to the Airbus Industrie consortium "passed through" to the current producer of Airbus LCA, Airbus SAS;

(e) regarding the issue of whether the challenged LA/MSF measures conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*:

(i) finds that Article 4 of the 1992 Agreement is not a *relevant* rule of international law applicable in the relations between the parties, within the meaning of Article 31(3)(c) of the *Vienna Convention*, that informs the meaning of "benefit" under Article 1.1(b) of the *SCM Agreement*, and that Article does not form "part of the facts to establish the relevant market benchmark";

(ii) finds that the Panel's reasoning relating to its use of the project-specific risk premium proposed by the United States was internally inconsistent, and that

the Panel thereby failed to comply with its duty to make an objective assessment of the facts as required under Article 11 of the DSU; and consequently reverses the Panel's findings, in paragraphs 7.481 and 7.488 of the Panel Report, that the United States' proposed project-risk premium constituted the minimum project risk for the A300 and A310, the exterior upper boundary of the range of project risk for the A320, A330/A340, A330-200, and A340-500/600, and the internal upper boundary of the range of project risk for the A380;

(iii) finds that several aspects of the Panel's assessment of the project-specific risk premium proposed by the European Communities were not consistent with the requirement in Article 11 of the DSU to make an objective assessment of the facts; but nevertheless upholds the Panel's conclusion, in paragraph 7.479 of the Panel Report, that the European Communities' proposed project-specific risk premium underestimated the risk premium that a market operator would have reasonably demanded Airbus pay for financing on the same or similar terms as the challenged LA/MSF;

(iv) because the uncontested evidence indicates that, even leaving aside the project-specific risk premium, the rates of return obtained by the member States on all but two of the challenged LA/MSF measures are below a market benchmark that does not include a project-specific risk premium, and the rate of return obtained by the member States under the other two LA/MSF measures is below a market benchmark that includes the project-specific risk premium proposed by the European Communities, upholds the Panel's findings, in paragraphs 7.489 and 7.490 of the Panel Report, that the challenged LA/MSF measures conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*; and

(v) reverses the Panel's finding, in paragraph 7.397 of the Panel Report, that "the number of sales over which full repayment is expected says little, if anything, about the appropriateness of the rate of return that will be achieved by the lender";

(f) upholds the Panel's finding, in paragraph 7.1566 of the Panel Report, that the R&TD subsidies granted to Airbus under each of the EC Framework Programmes were "specific" within the meaning of Article 2.1(a) of the *SCM Agreement*;

(g) modifies the Panel's characterization, in paragraphs 7.1084, 7.1121, and 7.1179 of the Panel Report, of the financial contribution, under Article 1.1(a)(1)(iii) of the *SCM Agreement*, provided by virtue of the infrastructure measures in Hamburg, Bremen, and Toulouse; reverses the Panel's findings, in paragraphs 7.1096, 7.1133, and 7.1190 of the Panel Report, that these financial contributions conferred a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*; and finds, instead, that the provision of the lease of the land at the Mühlenberger Loch industrial site in Hamburg and the provision of the right to exclusive use of the extended runway at the Bremen airport conferred a benefit on Airbus within the meaning of Article 1.1(b) of the *SCM Agreement*; but finds that there are insufficient factual findings by the Panel or undisputed facts on the Panel record to complete the legal analysis and determine whether a benefit was conferred with respect to the Aéroconstellation industrial site in Toulouse;

(h) upholds the Panel's findings, in paragraphs 7.1367, 7.1371, and 7.1375 of the Panel Report, that the four challenged capital investments in Aérospatiale conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the *SCM Agreement*;

(i) reverses the Panel's finding, in paragraph 7.1412[3068] of the Panel Report, that the French Government's transfer of shares of Dassault Aviation to Aérospatiale conferred a benefit on Aérospatiale within the meaning of Article 1.1(b) of the *SCM Agreement*; but finds that there are insufficient factual findings by the Panel or undisputed facts on the Panel record to complete the legal analysis and determine whether a benefit was conferred;

(j) finds, as regards the alleged export subsidies granted under the German, Spanish, and UK A380 contracts, that the Panel erred in the interpretation of Article 3.1(a) and footnote 4 of the *SCM Agreement*, in paragraph 7.648 of the Panel Report, that, in order to find that the granting of a subsidy is in fact tied to anticipated exportation, a subsidy must be granted *because* of anticipated export performance; and consequently reverses the Panel's finding, in paragraph 7.689 of the Panel Report, that the United States had demonstrated that the German, Spanish, and UK A380 contracts amounted to prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*; finds that a subsidy is *de facto* export contingent within the meaning of Article 3.1(a) and footnote 4 of the

[3068]See also Panel Report, para. 7.1414.

SCM Agreement if the granting of the subsidy is geared to induce the promotion of future export performance by the recipient; but finds there are insufficient factual findings by the Panel or undisputed facts on the Panel record to complete the legal analysis;

(k) finds that, in analyzing "displacement" on the basis of a single subsidized product and a single market for LCA determined by the complaining Member, the Panel erred in its interpretation and application of the term "market" in Article 6.3(a) and (b) of the *SCM Agreement*, and acted inconsistently with its obligations under Article 11 of the DSU by concluding that it was not required to "make an independent determination of the 'subsidized product', as opposed to relying on the complaining Member's identification of that product"; finds that, in the absence of an objective determination of the relevant product market by the Panel, its conclusion that there is a single subsidized product and a single like product cannot stand, and consequently reverses the Panel's findings on displacement;

(l) completes the analysis on the basis of the uncontested evidence on the Panel record and finds, in respect of the first step of the Panel's two-step approach to its assessment under Article 6.3(a) of the *SCM Agreement*, that there was displacement during the reference period 2001-2006 in the single-aisle and twin-aisle LCA product markets in the European Communities;

(m) completes the analysis on the basis of the uncontested evidence on the Panel record and finds, in respect of the first step of the Panel's two-step approach to its assessment under Article 6.3(b) of the *SCM Agreement*, that there was displacement during the reference period 2001-2006:

(i) in the single-aisle LCA product market in Australia;

(ii) in the single-aisle and twin-aisle LCA product markets in China; and

(iii) in the single-aisle and twin-aisle LCA product markets in Korea;

(n) completes the analysis and finds that the uncontested evidence on the Panel record does not establish displacement over the reference period in Brazil, Mexico, Singapore, and Chinese Taipei, or threat of displacement in India;

(o) upholds the Panel's finding, in paragraph 7.1845 of the Panel Report, under the first step of its two-step approach to its assessment under Article 6.3(c) of the *SCM Agreement*, that the sale to Emirates Airlines of A380 LCA constituted "significant lost sales";

(p) upholds the Panel's ultimate finding under the second step of its two-step approach, in paragraph 7.2025 of the Panel Report, that the displacement and lost sales were the effect of the challenged LA/MSF measures, to the extent it refers to the displacement in the single-aisle LCA product market in Australia and in the single-aisle and twin-aisle LCA product markets in the European Communities, China, and Korea, and lost sales in the Air Asia, Air Berlin, Czech Airlines, easyJet, Emirates Airlines, Qantas, and Singapore Airlines sales campaigns;

(q) upholds the Panel's finding, in paragraph 7.1948 of the Panel Report, that "either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380";

(r) upholds the Panel's finding, in paragraphs 7.1956, 7.1957, 7.1958, and 8.2 of the Panel Report, that the "product effect" of the LA/MSF measures was "complemented and supplemented" by the equity infusions, referred to in paragraph 1379 above, and infrastructure measures, referred to in paragraph 1388 above, except those that have been found not to constitute specific subsidies within the meaning of Articles 1 and 2 of the *SCM Agreement*; and

(s) reverses the Panel's finding, in paragraphs 7.1956, 7.1959, and 8.2 of the Panel Report, that the "product effect" of the LA/MSF was "complemented and supplemented" by the R&TD subsidies at issue.

1415. For the reasons set out in this Report, in relation to the issues raised by the United States in its other appeal, the Appellate Body:

(a) finds that the alleged LA/MSF "Programme" was not within the Panel's terms of reference because it was not identified in the request for the establishment of a panel, as required by Article 6.2 of the DSU;

(b) as a consequence of the Panel's errors in interpreting and applying Article 3.1(a) and footnote 4 of the *SCM Agreement*, reverses the Panel's finding, in paragraph 7.689 of the Panel Report, that the United States had not shown that the granting of the French

LA/MSF for the A380 and A330-200, and the French and Spanish LA/MSF for the A340-500/600, were contingent in fact upon anticipated exportation, within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*; but finds that there are insufficient factual findings by the Panel or undisputed facts on the Panel record to complete the legal analysis.

1416. The Appellate Body notes that, having reversed the Panel finding, in paragraph 7.689 of the Panel Report, that certain A380 LA/MSF contracts amounted to prohibited export subsidies, the Panel's recommendation pursuant to Article 4.7 of the *SCM Agreement*, in paragraph 8.6 of the Panel Report, consequently must be reversed; however, to the extent we have upheld the Panel's findings with respect to actionable subsidies that caused adverse effects, as set out in paragraph 8.2 of the Panel Report, or such findings have not been appealed, the Panel's recommendation pursuant to Article 7.8 of the *SCM Agreement*, in paragraph 8.7 of the Panel Report, 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'", stands.

1417. We realize that, after five years of panel proceedings and almost ten months of appellate review, there are a number of issues that remain unresolved in this dispute. Some may consider that this is not an entirely satisfactory outcome. Our mandate under Article 17 of the DSU does not permit us to engage in fact-finding. However, wherever we have found that there are sufficient factual findings by the Panel or undisputed facts to complete the legal analysis, we have done so with a view to achieving a "prompt settlement" of the dispute in accordance with Article 3.3 of the DSU.

1418. The Appellate Body recommends that the DSB request the European Union to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *SCM Agreement*, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 9th day of May 2011 by:

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David Unterhalter
Presiding Member

_____ _____

Lilia R. Bautista
Member

Peter Van den Bossche
Member