European Communities and Certain Member States –
Measures Affecting Trade in Large Civil Aircraft
WT/DS316

Closing Statement of the United States
First Meeting of the Panel

March 21, 2007

1. Mr. Chairman, members of the Panel, let me begin by expressing our thanks to you and to the Secretariat staff for your hard work during this first meeting. Let me also state once again our thanks for your efforts to accommodate the public viewing of yesterday's opening statements during the public session.

2. We will use our closing statement to respond to particular statements made by the EC over the past two days. We will touch on the highlights and elaborate in our second written submission. Before doing so, however, I would like to say a word about the EC's litigation tactics.

3. In its statement yesterday, the EC helpfully reminded us of the Appellate Body's admonition in the *FSC* dispute that "'[t]he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.'"[1] Yet, today you saw a perfect example of the EC's disregard of that admonition.

4. The United States has carefully and diligently adhered to the detailed rules pertaining to the treatment of HSBI. At times, this has proved to be quite onerous and has made the preparation of submissions unduly difficult.

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[1]EC First Oral Statement, para. 38 (quoting *US - FSC* (AB), para. 166).

5. In our view, the EC has improperly designated information as HSBI when it did not deserve that status. A concern we had when the HSBI rules were established was that they could be manipulated in a way that would put the United States at a disadvantage in making its case. Regrettably, that concern was borne out by the EC's first submission, and was borne out again at this morning's meeting.

6. As you saw, the EC took information that had been designated as HSBI and re-designated it as BCI, because it suited the EC's purposes at this meeting.[2] When we questioned this re-designation, the EC said that it could revert to the HSBI designation if the United States preferred. That statement spoke volumes. It demonstrates the malleability of the HSBI designation and the potential to use that designation as a "litigation technique," precisely what the Appellate Body has warned Members *not* to do.

7. Let me turn now to some overarching observations about the EC's opening statement. The statement was remarkable both for what it omitted and for its window into how the EC wants you, the Panel, to think about this dispute. Key omissions include the following:

- The EC refers to the SCM Agreement almost as an after-thought and asks instead that you focus on agreements, such as the *Tokyo Round Subsidy Code* and the 1992 agreement, that are not covered agreements and that are outside the Panel's terms of reference.

- The EC disregards the concerted, systematic, deliberate aspect of the Launch Aid Program.

- The EC never mentions the $15 billion in Launch Aid that has been provided to Airbus.

- The EC never mentions the below-market interest rates that are characteristic of Launch Aid.

[2] *See* EC First Oral Statement (BCI/HSBI), paras. 19 and 24.

- The EC never mentions the amount of Launch Aid debt that is outstanding.
- The EC never mentions the $4.2 billion in Launch Aid provided for the A380.
- The EC never mentions explicit commitments of Launch Aid for the A350.
- The EC never mentions Boeing's 20-point market share loss.
- The EC never mentions sales campaigns that Boeing lost.

8. As for how the EC wants you to think about this dispute, the EC's statement was revealing in several respects. Much of the EC's view is summed up in paragraph 5 of its opening statement. There, the EC acknowledges that its support for the LCA industry is driven by a variety of social, non-commercial factors, such as maintaining "mass-employment" and preserving the "pride" invested in the industry. The EC would have you believe that because the LCA industry is special, it is subject to a different set of rules. But, that assuredly is not the case. The SCM Agreement is the only relevant standard for the dispute at hand, regardless of the factors that may make the LCA industry different from other industries.

9. Further, the EC wants you to believe that the EC's subsidies to Airbus are not causing adverse effects to the interests of the United States, because Boeing is still alive. But, being alive is not relevant to the issue of adverse effects. What is relevant, among other things, is that Boeing has suffered a 20-point market share loss and price erosion due to Airbus subsidies.

10. A third key aspect of how the EC wants you to think about this dispute is its hypothesis that Airbus and Boeing don't compete with one another, that they operate in entirely different worlds. In reality, as we have shown, they operate in the same world, one in which the inter-relationship between LCA models is obvious.

11. Curiously, the EC's acknowledgment of the LCA industry's exceptional characteristics does not carry over into the EC's understanding of the returns that a market player providing Launch Aid type financing would demand.

12. In any event, whatever the exceptional features of the LCA industry, they do not exempt it from the disciplines of the SCM Agreement. Quite the contrary, the very fact that the SCM Agreement discusses LCA issues in certain footnotes, makes clear that the drafters thought about the Agreement's applicability to LCA and found it applicable.

13. Yesterday, the EC repeatedly appealed to the concept of "fairness."[3] What is fair is that the rules that the United States and the EC agreed to in the SCM Agreement apply even-handedly. These are rules the EC voluntarily undertook, not rules that would be "forcibl[y] applied" to it, as it argued yesterday.[4]

14. I now would like to say a brief word on use of terminology. Yesterday, the EC urged against the use of the term "launch aid," which it called a "loaded term."[5] Curiously, it later accused the United States of using "terminological devices" to advance the U.S. argument.[6]

15. But, it is the EC that is using "terminological devices" to avoid substance in favor of arguments based on labels. The fact is that "launch aid" is the term consistently used by the Airbus governments, Airbus, and the markets. The United States did not invent the term.

16. As we discussed yesterday, consistent portrayals of Launch Aid by the parties that give it and receive it, and by key market actors, demonstrate that Launch Aid is indeed a coherent,

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[3]*See, e.g.*, EC First Oral Statement, para. 25.

[4]EC First Oral Statement, para. 6.

[5]EC First Oral Statement, para. 40.

[6]EC First Oral Statement, para. 114.

deliberate program. It is the EC that is using "terminological devices" by inventing a new label – "MSF" – to distract from the unmistakably systemic nature of Launch Aid.

17. I will turn now to the issue that the EC characterizes as the "pass-through" of subsidies. The EC repeatedly accuses the United States of failing to show that subsidies given to Airbus predecessor companies passed through to Airbus SAS. This argument is just a re-packaging of the EC's faulty "extinguishment" argument, which we discussed yesterday.

18. The EC pretends that by changing names and re-grouping subsidized entities, the resulting entity – Airbus SAS – emerges subsidy-free. Somehow, the subsidies magically disappeared. Talk about "dark alchemy," to use the EC's term![7]

19. In any event, the answer to the EC's false argument on pass-through was summed up by the European Commission itself in 2000, in reviewing the creation of EADS. It said:

> Most of the parties' activities in commercial aircraft are already integrated through Airbus. . . . There is no indication that the operation will affect the quality or nature of control of Airbus. . . . Accordingly, there is no indication that the operation will affect the competition position of Airbus.[8]

20. In a later statement, also regarding the creation of EADS, the Commission stated:

> The parties currently co-ordinate their Airbus activities through Airbus Industries, a "European Interest Grouping" formed under French law in 1967. . . . The operation enables the parties to bring together their Airbus assets, activities and interests under a single unified management. The proposed transaction constitutes a restructuring and rationalisation of the existing legal partnership between the parties. EADS and BAE have agreed to contribute all of their Airbus activities to Airbus Integrated Company.[9]

21. In short, Mr. Chairman and members of the Panel, as the European Commission itself

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[7] *See* EC First Oral Statement, para. 78.

[8] European Commission, Decision of 11 May 2000, COMP/M.1745 - EADS at paras. 15-16.

[9] European Commission, Press Release, *Commission Clears the Creation of the Airbus Integrated Company* (Oct. 18, 2000).

admitted, no economically significant transaction occurred in the regrouping that led to the creation of EADS and, hence, the current-day Airbus SAS. It simply was a matter of bringing together four subsidized producers under "a single unified management." This is confirmed by the schematic diagram at paragraph 68 of the EC's first written submission. This bringing together under a single unified management did not cause the embedded subsidies to magically disappear, as the EC would have you believe.

22. Next, I will turn to the issue of the appropriate benchmark for establishing that Launch Aid is a subsidy. In this regard, the EC would have you look at footnote 16 of the SCM Agreement. But, footnote 16 does not set the test for what constitutes a subsidy. If anything, footnote 16 corroborates the understanding that Launch Aid is indeed a type of subsidy covered by the SCM Agreement.

23. The EC states that footnote 16 tells you to look at the reasonableness of sales forecasts. But, even if sales forecasts are reasonable, if the interest rates demanded are below the rates that a market player would demand for the same shifting of risk, the Launch Aid would still be a subsidy.

24. Of course, it goes without saying that footnote 16 does not even apply to the definition of "subsidy." It is attached to article 6 of the SCM Agreement, not Article 1, which is where the definition of "subsidy" is set forth.

25. And, footnote 16 does not even say what the EC says it says. It does not say that "forecast sales" are "the decisive factor of royalty-based financing."[10] It says just the opposite. That is, it says that actual sales falling below forecast sales "does not in itself constitute serious

[10]EC First Oral Statement, para. 58.

prejudice for the purposes of this paragraph."

26. Also, with regard to the issue of the appropriate benchmark for determining whether Launch Aid is a subsidy, I wish to make several remarks regarding Professor Whitelaw's statement of this morning. First, the question of which benchmark rate is used is not central to the question of the existence of a subsidy, because both the Ellis benchmark and the Whitelaw benchmark show a substantial subsidy to Airbus.

27. Second, contrary to Professor Whitelaw's claim that Launch Aid is similar to typical corporate debt, Launch Aid differs from typical corporate debt in at least two crucial respects. First, the Airbus governments have no recourse if the repayments Airbus promises to make are never received because the corresponding sales are never made. By contrast, corporate debt-holders *do* have a claim on the debtor's assets in such a case. Second, Launch Aid is dependent on the success of a single project. By contrast, typical corporate debt is dependent on the success of the company in the aggregate.

28. A third problem with Professor Whitelaw's assessment is that it assumes incorrectly that Launch Aid is clearly less risky than equity in Airbus. One can readily identify scenarios in which the Airbus governments will receive little or no repayment, while the equity shareholders get returns from profits on other aircraft sales or other lines of business.

29. A fourth problem with Professor Whitelaw's assessment is that supplier financing is not comparable to Launch Aid for reasons we described in our statement yesterday. Curiously, if financing with Launch Aid features is as typical in the market as Professor Whitelaw asserts, one wonders why he chose to base his analysis on financing provided to Airbus by certain suppliers, whose relationship with Airbus necessarily is influenced by factors other than the

straightforward lending aspect of the transactions at issue.

30. In any event, as we explained yesterday and today, repayment to the suppliers examined by Professor Whitelaw is generally contingent on fewer deliveries than repayment to the government providers of Launch Aid. The amounts of financing provided by these suppliers are significantly less than the amounts provided by the Airbus governments. A number of these suppliers receive their own support from the Airbus governments. And, the suppliers must take account of business considerations other than the straightforward concern about return on financing they provide to Airbus. And, of course, very little of the Whitelaw analysis regarding supplier financing is backed up by any evidence the EC has supplied.

31. Next, I will make two brief points regarding the export-contingent nature of Launch Aid. First, contrary to the EC's statement at paragraph 80 of yesterday's statement, it is not the case that, following the U.S. view, every loan in a globalized sector would be an export-contingent subsidy. Typical loans are paid out of the debtor's general cash flow, not out of a particular revenue stream that necessarily is tied to exports. It is the fact that Launch Aid, under the terms of the Launch Aid contract, is tied to levels of sales which can be met only through export that makes Launch Aid export contingent.

32. Second, in discussing the issue of export contingency, the EC would have you ignore the text of footnote 4 of the SCM Agreement and, in particular, the key terms "tied to" and "anticipated exports."

33. Regarding the issue of the German government's forgiveness of DM 7.7 billion owed to it by Deutsche Airbus in 1998, the EC yesterday accused the United States of asserting a new claim, and stated that this supposed new claim is outside the Panel's terms of reference. The

United States has done no such thing. Rather, the United States simply responded to the EC's argument that the transaction at issue is better characterized as a "settlement for fair market value" rather than debt forgiveness.

34. The United States and the EC do not disagree about the identity of the underlying transaction. Nor does the EC argue that the underlying transaction is not a matter covered by the U.S. panel request. Rather, the EC seems to believe that in responding to the EC's characterization of the transaction at issue, the United States somehow has asserted a new claim.

35. As we said yesterday, the characterization of the transaction does not change the economics of what occurred. If one looks at the transaction as a settlement for fair market value, then one must inquire about the terms of the debt being settled. In this case, one cannot ignore that the debt carried an interest rate of zero. Therefore, when it was settled, Deutsche Airbus effectively received the benefit of the difference between the face value of the debt and the net present value of the interest rate benefit it otherwise would have received for years to come. Pointing this out is not an assertion of a new claim.

36. With respect to the issue of EIB loans, the EC's own words speak for themselves. The EC acknowledged that the EIB's decisions are "policy driven," that they are "not determined by purely commercial considerations," and that the EIB has no need to "maximize profits."[11] This acknowledgment confirms that the financing provided by the EIB provides a benefit to Airbus as compared to financing provided by commercial lenders – that is, lenders who do have a need to "maximize profits." Accordingly, this financing constitutes a subsidy.

37. Regarding equity infusions, as we said yesterday, the main problem with the EC's

[11]EC First Oral Statement, paras. 12 and 98.

argument is that it focuses on the intentions and perspective of the granter of the infusions. Under the SCM Agreement, the perspective you should look to is the perspective of the recipient. From that perspective, the infusions at issue in this dispute unquestionably provide a benefit and, therefore, constitute subsidies.

38. I will now turn to Mr. Yocis to make some closing remarks on the issue of adverse effects.

39. Mr. Chairman, members of the Panel, let me close by briefly discussing the methodology that is appropriate for analyzing the effects of the subsidies in this dispute. We believe there are three steps to this analysis.

40. The first question is: How do the subsidies work? How do they affect the market and how Airbus acts in the market? We have shown that the subsidies distort the market in two principal ways. It allows Airbus to launch aircraft it could not have launched on the scale and at the pace it has without subsidies. And, its impact on Airbus's cash flow and costs allows it to price aggressively to buy market share, all while maintaining its pace of product development.

41. The EC does not really contest the first point. And the EC largely avoids responding to the second point through its arguments about the subsidized product. By deciding in advance that there are five separate product markets, the EC decides in advance that, for example, the Launch Aid provided for the A320 can only affect sales of the A320. But this does not respond to the question of how the subsidy works; rather, the EC begs the question.

42. This leads to the second step in the analysis: what is the product that benefits from the subsidy? Given the way the subsidy works, the analysis must be of the effect of the subsidies on all LCA as a whole. The EC says that it is necessary to take account of the differences among

the various LCA models. We agree. Where we differ with the EC is in *how* we take account of these differences. The EC's approach is wrong, because it would force the Panel to ignore how the subsidy actually works.

43. After identifying how the subsidies work and the subsidized product, the third and final step in the analysis is whether the adverse effects – the various types of serious prejudice and the material injury – are the result of the subsidies. With regard to displacement and impedance, the subsidy affects what Airbus has to sell, and thus certainly has an effect on market share. With regard to lost sales, price undercutting, and price depression and suppression, the subsidy effects are plainly of sufficient magnitude, and the market is sufficiently competitive, that the effects on Boeing have been significant.

44. Thank you again, Mr. Chairman, Members of the Panel, for your attention. This concludes our closing statement.