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***European Communities and Certain Member States –
Measures Affecting Trade in Large Civil Aircraft:
Recourse to Article 21.5 of the DSU by the United States***

(DS316)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

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<i>Australia – Automotive Leather (21.5)</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189
<i>Australia – Salmon (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
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<i>Canada – Aircraft (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
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<i>Chile – Price Band System (21.5) (AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, 513
<i>EC – Bananas III (21.5 – US) (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, 7165
<i>EC – Bed Linen (21.5) (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
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<i>US – FSC II (21.5) (AB)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, 4721
<i>US – Gambling (21.5)</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Article 21.5 of the DSU by Antigua and Barbuda</i> , WT/DS285/RW, adopted 22 May 2007, DSR 2007:VIII, 3105
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<i>US – Upland Cotton (21.5) (AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, 809
<i>US – Upland Cotton (21.5) (Panel)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW, DSR 2008:III, 997 to DSR 2008:VI, 2013
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<i>US – Zeroing (21.5 – EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009

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EU FWS	First Written Submission of the European Union (July 13, 2012)
EU Notification	Letter from the European Union to the United States (Dec. 1, 2011)
PwC Life of Subsidies Report	PriceWaterhouse Coopers, <i>Report: Analysis of the expected life of subsidies to Airbus conferred by Member State Financing Loans, capital contributions and regional development grants as found in the WTO dispute DS 316</i> (Exhibit EU-5)
U.S. Original Consultation Request	Request for Consultations by the United States, WT/DS316/1 (12 October 2004)
U.S. Original Panel Request	Request for Establishment of a Panel, WT/DS316/2 (3 June 2005)
U.S. Compliance Panel Request	Request for Establishment of a Panel, WT/DS316/23 (3 April 2012)
US FWS	First Written Submission of the United States (June 6, 2012)

I. INTRODUCTION

1. The EU's first written submission provides a spirited defense of . . . doing nothing.
2. More specifically, the EU asserts that, after panel and Appellate Body findings that Airbus received WTO-inconsistent subsidized financing worth billions of euros, with tens of billions of dollars of adverse effects to U.S. interests, the EU could come into compliance by doing essentially nothing. The EU goes even further to argue that the only meaningful acts it did take with regard to large civil aircraft subsidies, grants of €3.5 billion in *new* subsidies for the A350 XWB, were immune from review by this compliance panel. In any event, these new subsidies were not acts designed to move the EU toward compliance with its WTO obligations.
3. This was not what the original Panel and the Appellate Body called for when they found that the EU had conferred subsidies inconsistent with Article 5 of the SCM Agreement, and consequently had an obligation under Article 7.8 of the SCM Agreement to withdraw the subsidies or take appropriate steps to remove their adverse effects. The Appellate Body has found that compliance with this obligation "will usually involve some action by the respondent Member. This affirmative action would be directed at effecting the withdrawal of the subsidy or the removal of the adverse effects."¹ The reverse is also true: "A Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own."²
4. Yet that is exactly what the EU proposes. Its first written submission makes clear what the EU Notification strongly implied – that the measures the EU has taken either are doing nothing, or are so small as to do nothing. (In fact, the EU essentially concedes that 12 of the LA/MSF-related measures listed in the EU Notification are meaningless, as its first written submission does not reference them.³) In short, for purposes of Article 21.5 of the DSU, the measures taken to comply either do not exist or, in the case of LA/MSF for the A350 XWB, exacerbate the WTO inconsistencies.
5. The EU advances a number of legal theories to defend this attempt to escape its obligations, but they do not justify its inaction. At the highest level, the EU errs in attempting to disaggregate its compliance obligations. The Panel and Appellate Body aggregated the subsidies for their adverse effects analysis, and made a *collective* recommendation with regard to *all* of them.⁴ However, when it comes to compliance, the EU treats the recommendation as if it applied separately to each subsidy, so that if it successfully withdraws *some* of the subsidies, it has no obligation to remove adverse effects with regard to the rest. That is not how Article 7.8 of the SCM Agreement operates. It provides that a Member maintaining "any subsidy"

¹ *US – Upland Cotton (AB)*, para. 236.

² *US – Upland Cotton (AB)*, para. 236.

³ See Section IV.A.2 of this submission.

⁴ The Appellate Body declined to aggregate some of the subsidies found by the original Panel, and performed a collective analysis for the subsidies at issue in this compliance dispute. *EC – Large Civil Aircraft (AB)*, paras. 1407-1408 and 1410-1412.

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inconsistent with Article 5 “shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.” “The subsidy” and “the adverse effects” are clearly those found to exist for purposes of Article 5. In this case, the original Panel and Appellate Body found that the subsidies operated collectively to cause adverse effects and that, as a general matter, the expiration of a subsidy does not remove it from the adverse effects disciplines under Article 5. The withdrawal of one subsidy would not result in withdrawal of “the subsidy” where various subsidies have operated collectively. Nor would withdrawal of one subsidy necessarily remove it from the collective adverse effects analysis with regard to the remaining subsidies.

6. The EU tries to portray its inaction in the face of the recommendations and rulings of the DSB as appropriate because the DSB was wrong. In some instances, the EU blatantly asserts that it is not bound by panel and Appellate Body findings with which it disagrees,⁵ while in others it seeks to hide its challenge.⁶ But that is not how a proceeding under Article 21.5 of the DSU operates. The task of a compliance panel is to evaluate whether the measures taken to comply with the recommendations and rulings of the DSB exist, or are otherwise inconsistent with the covered agreements. The DSU does not invite a compliance panel to evaluate whether the recommendations and rulings of the DSB are valid, such that measures taken to comply need not exist. And, indeed, the Appellate Body has repeatedly found that Article 21.5 does not allow parties to reargue issues that were already resolved in the original proceeding, and precludes panels from reopening such issues.

7. A core part of the EU defense is that the subsidies have “come to an end.” For many of the older LA/MSF subsidies, it defends its current inaction by arguing that the LA/MSF subsidies ended long ago when Airbus made payments envisaged under the relevant LA/MSF agreements. This argument fails because the payments in question were made on below-market terms, which was what made them subsidies in the first place. Thus, the payments did nothing to negate the benefit conferred, which was an integral part of the subsidy, and accordingly cannot have extinguished the subsidy.

8. The EU similarly argues that the life of most of the subsidies ended either before the reference period covered by the original proceedings or since that time. Again, the EU improperly measures the lives of the subsidies. In fact, its methodology treats several of them as having ended before the original Panel began its work – obviously inappropriate in a proceeding where the DSB recommendations and rulings on the existence of WTO-inconsistent subsidies are the starting point. The argument also fails to take into account that these were creation subsidies – they enabled Airbus to launch aircraft it otherwise would not have been able to launch. The life of such a subsidy lasts for at least the life of the commercial product that it spawned, and does not end in accordance with some artificial measurement related to the average useful life of product assets or generic aircraft, as the EU proposes. Indeed, the LA/MSF agreements carry no end date other than the end of the specific program to which they relate.

⁵ See Section II.C of this submission.

⁶ See Sections IV.B.2 and IV.C.2 of this submission.

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9. Finally, in the same vein, the EU asserts once again that events before or during the reference period extinguished or extracted the benefit. Both the Panel and the Appellate Body considered the events alleged to have extracted subsidies, and found that they did not do so, so the EU is precluded from re-arguing the issue in a compliance proceeding. Should the Panel decide to reopen the issue of subsidy extraction, the reasons for rejecting the EU arguments during the original proceedings still apply. As for alleged subsidy extinctions, the EU advocates and applies a test under which extinction occurs whenever there is a fair market transaction, at arm's length, that results in the transfer of ownership and control to new owners. This proposal ignores that the Appellate Body also mandated an additional inquiry into whether, in such a transaction, "a prior subsidy could be deemed to have come to an end."⁷ By omitting this additional criterion, the EU fails to establish that the transactions it cites meet the test for extinguishing prior subsidies. Moreover, those transactions do not even satisfy the "transfer of control" test that the EU advocates, and the original Panel and Appellate Body found to be necessary, albeit not sufficient by itself, for an evaluation of alleged subsidy extinction.

10. The EU first written submission also confirms that it has not taken appropriate steps to remove the adverse effects. The United States has demonstrated the continued validity of the underlying findings – including the genuine and substantial causal relationship between subsidies and adverse effects – in the current market situation. The United States has also demonstrated the absence of any meaningful action by the EU to address the situation, an unabated pattern of adverse effects that is consistent with what would be expected from EU inaction, and the existence of present adverse effects in the form of significant lost sales and displacement and impedance.⁸ The U.S. demonstration remains un rebutted. None of the EU's asserted compliance steps did anything to address, let alone remove, LA/MSF's adverse effects.

11. As with the subsidy findings, the EU response to the adverse effects findings against it was to do nothing that would resolve the dispute. Where it did take action, it provided yet another round of LA/MSF that enabled Airbus to bring to market the A350 XWB, compounding the serious prejudice experienced by the United States. The EU asserts that adverse effects of LA/MSF and other subsidies have expired on their own, and argues that this proceeding should be treated as an entirely new dispute, where it is free to re-litigate settled issues such as the effect of LA/MSF on Airbus's launch decisions and the existence of competition between Airbus and Boeing aircraft. The EU is, however, at a loss to explain how its inaction is consistent with Article 7.8 of the SCM Agreement; how it could disregard the rulings of the DSB; how subsidies that the original Panel described as "extremely large"⁹ could no longer cause adverse effects; and how Airbus's current product line, the very existence of which was found to be dependent on LA/MSF, could have taken the sales and market share it has without LA/MSF. As a result, the EU cannot show that it has removed the adverse effects.

⁷ *EC – Large Civil Aircraft (AB)*, para. 725.

⁸ US FWS, section VI.

⁹ *EC – Large Civil Aircraft (Panel)*, para. 7.1967.

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12. The EU’s disregard for its compliance obligations in this dispute came into even sharper focus when the EU finally¹⁰ submitted some of the confidential documents related to its grant of LA/MSF for the A350 XWB in [***].¹¹ These documents confirm not only that A350 XWB LA/MSF was identical to all prior LA/MSF in respect of its core terms, but also that [[HSBI]].¹² [[HSBI]]

13. Indeed, the LA/MSF contracts confirm not only that LA/MSF for the A350 XWB has a particularly close relationship with past LA/MSF, and is therefore within the scope of this compliance proceeding, but also that its terms were far more favorable than the market would have provided. As an attached analysis by the economic consulting firm NERA explains, the interest rates in the LA/MSF contracts [***].¹³ Moreover, the LA/MSF contracts specify [***].¹⁴ Accordingly, as the United States already demonstrated in its first written submission, the evidence before the Panel supports a finding that LA/MSF for the A350 XWB is both an actionable subsidy and a prohibited subsidy.

14. The EU begins the introduction to its first written submission by asserting that the U.S. objective is that “Airbus (or its products) should not exist” and that Airbus should “cease to exist.”¹⁵ The United States closes this introduction by noting that these statements are false. The United States is not seeking the end of Airbus. U.S. airlines own hundreds of Airbus aircraft and millions of U.S. citizens fly on them each year. We expect these situations to continue and welcome fair competition that can bring significant benefits to consumers worldwide. This dispute is about, and always has been about, the WTO-inconsistent EU subsidies that give Airbus an unfair advantage in its competition with Boeing across the product spectrum and that cause

¹⁰ The EU has repeatedly stalled in complying with the Panel’s request for information under Article 13. For example, the EU requested an 11-day extension solely for the purpose of bracketing documents. Letter from M. Huttunen to Mr. Carlos Pérez del Castillo, “*European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS316) – Recourse to Article 21.5 of the DSU by the United States*” (Sept. 17, 2012) (Exhibit USA-476).

¹¹ *EC – Large Civil Aircraft (Panel)*, para. 1.14; French A350XWB Protocole (Exhibit EU(Art.13)-1(BCI)); French A350XWB Convention (Exhibit EU(Art.13)-11(HSBI/BCI)); KfW A350 XWB Loan Agreement, p. 1 (Exhibit EU(Art.13)-14(HSBI/BCI)); Spanish A350 XWB LA/MSF Contract, p. 1 (Exhibit EU(Art.13)-29(HSBI/BCI)); UK A350 XWB Loan Agreement (Exhibit EU(Art.13)-30(HSBI/BCI)). The EU numbered the materials presented in response to the Panel’s request under Article 13 of the DSU out of sequence with the exhibits previously submitted to the Panel. To avoid confusing them with previously submitted materials, the United States has cited each of these documents using the numbers in the table appended to the EU submission of October 5, 2012, and designated them “Exhibit EU(Art.13)-##”.

¹² [[HSBI]].

¹³ *Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks*, para. 24 (Exhibit USA-475(HSBI)).

¹⁴ Section V.B.3 of this submission discusses this information in more detail. As the United States already explained in its first written submission, A350 XWB LA/MSF is also contingent on export sales. US FWS, Section V; Section V.A. of this submission.

¹⁵ EU FWS, para. 1.

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adverse effects to the interests of the United States. It is this WTO-inconsistent subsidization of Airbus, and not Airbus or its aircraft, that should “cease to exist.”

II. ANALYTIC FRAMEWORK

A. After Adoption of the Panel and Appellate Body Reports in *EC – Large Civil Aircraft*, the EU had an Obligation to Comply with the DSB’s Recommendation to Withdraw the Subsidies or Take Appropriate Steps to Remove Their Adverse Effects.

15. The original Panel found that all instances of LA/MSF to Airbus prior to 2006 were subsidies that caused adverse effects, as were certain capital contributions by the French State and share transfers by the government of Germany, provision of the Mühlenberger Loch site, and certain regional grants by the government of Spain.¹⁶ The original Panel then recommended that the Member found to be granting such subsidies “take appropriate steps to remove the adverse effects or . . . withdraw the subsidy.”¹⁷ The Appellate Body upheld these findings, and the recommendations the Panel made with regard to the subsidies.¹⁸ The DSB accordingly adopted the panel and Appellate Body reports with its recommendations and rulings at the DSB meeting of June 1, 2012.¹⁹

16. Article 7.8 of the SCM Agreement provides that:

Where a panel or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

17. Thus, the adoption of the finding that EU subsidies are inconsistent with Article 5 created an immediate and direct obligation on the EU to withdraw the subsidies or take appropriate steps to remove their adverse effects. The DSB adoption of its recommendations and rulings calling for the EU to take that action triggered an independent obligation under Article 7.8 for the EU,²⁰ which had until December 1, 2011, to comply.

¹⁶ *EC – Large Civil Aircraft (Panel)*, paras. 8.1-8.2.

¹⁷ *EC – Large Civil Aircraft (Panel)*, paras. 8.7 (ellipsis in original).

¹⁸ *EC – Large Civil Aircraft (AB)*, paras. 1414 and 1416.

¹⁹ Minutes of Meeting Held in the Centre William Rappard on 1 June 2011, WT/DSB/M/297, para. 28 (11 July 2011).

²⁰ *US – Upland Cotton (21.5) (AB)*, para. 243, note 494 (“We do not believe that only DSB recommendations and rulings of ‘as such’ WTO-inconsistency create implementation obligations with prospective effect. DSB recommendations and rulings involving findings of ‘as applied’ WTO-inconsistency also give rise to prospective implementation obligations as of the adoption of the panel and Appellate Body reports.”).

B. The Subject of this Proceeding under Article 21.5 of the DSU is Whether the EU Complied with its Obligation under Article 7.8 of the SCM Agreement.

18. The question before a panel considering a manner referred to it pursuant to Article 21.5 of the DSU is whether the responding party's declared (or undeclared) measures taken to comply with the recommendations and rulings of the DSB exist or are themselves WTO-inconsistent. The complaining party in a compliance proceeding prevails if it can show either that the measures taken to comply do not exist, or that they are themselves inconsistent with the covered agreements. Thus, the complaining party in an Article 21.5 proceeding bears the burden of proof with regard to its *prima facie* case, and satisfies that burden by putting forth legal arguments and evidence adequate to justify a finding in its favor in the absence of effective refutation by the responding party.²¹ The complaining party is free to adopt whatever approach it considers best, as long as its evidence and arguments make a *prima facie* case that the measures taken to comply do not exist, or are inconsistent with the covered agreements.

19. The recommendations and rulings of the DSB provide the measurement for judging compliance. A finding under Article 5 of the SCM Agreement carries with it a special obligation, set out in Article 7.8 of the SCM, providing that the responding Member "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy." As the United States pointed out in its first written submission, the Appellate Body found in *US – Upland Cotton (21.5)* that

Article 7.8 specifies the actions that the respondent Member must take when a subsidy granted or maintained by that Member is found to have resulted in adverse effects to the interests of another Member. This means that, in order to determine whether there is compliance with the DSB's recommendations and rulings in a case involving such actionable subsidies, a panel would have to assess whether the Member concerned has taken one of the actions foreseen in Article 7.8 of the SCM Agreement. We agree, therefore, with the Panel that we must also take into account Article 7.8 of the SCM Agreement in order to determine the proper scope of these Article 21.5 proceedings.²²

20. In its first written submission, the EU takes the view that "Article 21.5 of the DSU applies in this case as it would in any other case under any other covered agreement."²³ In the most basic sense, it is correct that in this proceeding as in any compliance proceeding, the focus is on whether the responding Member has complied with the recommendations and rulings of the DSB. However, the point is an academic one, because Article 7.8 of the SCM Agreement provides for recommendations and rulings applicable only with regard to findings of

²¹ *Chile – Price Band System (21.5) (AB)*, para. 134.

²² *US – Upland Cotton (21.5) (AB)*, para. 235, *quoted in* US FWS, para. 17.

²³ EU FWS, para. 23.

inconsistency under Article 5 of the SCM Agreement. As these recommendations and rulings are the focus of the analysis, the fact that Article 21.5 remains the same is of limited relevance.

21. This result stems from the ordinary meaning of the terms of Article 21.5 of the DSU and Article 7.8 of the SCM Agreement, in their context and in light of the object and purpose of the two texts. The EU efforts to find a “harmonious interpretation” by seeking analogies between the DSU and the SCM Agreements²⁴ are accordingly misplaced. Article 21.5 and Article 7.8 are already in harmony: they instruct the Panel to examine whether measures “exist” that withdraw the EU subsidies or those measures are appropriate steps to remove the adverse effects and, if so, whether those measures themselves are inconsistent with the covered agreements, taking full account of the related legal and factual background against which the relevant measures are taken.²⁵

C. The Recommendations and Rulings of the DSB, as Set Out in the Original Panel and Appellate Body Reports, Provide the Starting Point for a Panel’s Consideration of a Claim under Article 21.5 of the DSU.

22. Article 21.5 instructs a panel to evaluate “the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings,” which include the underlying panel and Appellate Body findings, in effect, taking them as a given. It is equally significant that Article 21.5 does not invite compliance panels to reopen or reconsider the DSB recommendations and rulings. Indeed, it is difficult to see how a compliance proceeding could function if the recommendations and rulings, which provide the measure of compliance, were subject to challenge.²⁶ Thus, the DSB recommendations and rulings, including as embodied in the panel and Appellate Body findings, are obviously important to an identification of whether a measure taken to comply exists, and also in evaluating whether any unchanged elements of a measure are consistent with the covered agreements. They can also play an important role in evaluating whether a revised measure is inconsistent with the covered agreements. In short, a compliance panel evaluates implementation of the DSB’s recommendations and rulings and, therefore, takes as a given by the findings of the original panel and the Appellate Body.

23. That said, as the United States noted in its first written submission, a party is free to pursue an issue that the recommendations and rulings do not settle.²⁷ Parties may also address issues related to aspects of a measure taken to comply that differ from the measure originally

²⁴ EU FWS, paras. 13-19.

²⁵ *US – Softwood Lumber CVDs (21.5) (AB)*, para. 69.

²⁶ *EC – Bed Linen (21.5) (AB)*, para. 98 (“It would be incompatible with the function and purpose of the WTO dispute settlement system if a claim could be reasserted in Article 21.5 proceedings after the original panel or the Appellate Body has made a finding that the challenged aspect of the original measure is not inconsistent with WTO obligations, and that report has been adopted by the DSB. At some point, disputes must be viewed as definitely settled by the WTO dispute settlement system.”).

²⁷ US FWS, para. 33.

found inconsistent with WTO obligations.²⁸ However, even in the situation in which measures taken to comply raise new issues, “{t}his does not mean that a panel operating under Article 21.5 of the DSU should not take account . . . of the reasoning of the original panel.”²⁹ Thus, the recommendations and rulings of the DSB will always provide the starting point for a Panel’s analysis under Article 21.5. Where the measure taken to comply does not exist, they may be the ending point, too. However, even when measures taken to comply raise new issues, a compliance panel always must take account of the views of the original Panel and the Appellate Body.

24. The Appellate Body explained in *Chile – Price Band System (21.5)* that:

Article 21.5 proceedings do not occur in isolation from the original proceedings, but . . . both proceedings form part of a continuum of events. The text of Article 21.5 expressly links the “measures taken to comply” with the recommendations and rulings of the DSB concerning the original measure. A panel’s examination of a measure taken to comply cannot, therefore, be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB. Such findings identify the WTO-inconsistency with respect to the original measure, and a panel’s examination of a measure taken to comply must be conducted with due cognizance of this background.³⁰

25. The Appellate Body explained further in *US – Stainless Steel (Mexico)* that

the mandate of an Article 21.5 panel includes the task of assessing whether the measures taken to comply with the rulings and recommendations adopted by the DSB in the original proceedings achieve compliance with those rulings.³¹

26. These limitations on the scope of an Article 21.5 proceeding place similar constraints on the claims and arguments that a party may raise. It is well established that a party in an Article 21.5 proceeding may not challenge findings made by the panel or the Appellate Body in the original proceedings,³² and is ordinarily precluded from making arguments that it could have raised in the original proceeding but did not.³³

²⁸ *US – Softwood Lumber VI (21.5) (AB)*, para. 102 (As the redetermination is “distinct from the original determination” and provides “more explanation and reasoning” based on “more information and evidence,” then “we do not see why the Panel would be bound by the findings of the original panel.”)

²⁹ *US – Softwood Lumber VI (21.5) (AB)*, para. 103.

³⁰ *Chile – Price Band System (21.5) (AB)*, para. 136.

³¹ *US – Stainless Steel (Mexico) (AB)*, para. 158, note 309.

³² *US – Upland Cotton (21.5) (AB)*, para. 210 (“{A} complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be WTO-consistent in the original proceedings.” (emphasis in original)); *EC – Bed Linen (21.5) (AB)*, para. 98 (“It would be incompatible with the function and purpose of the WTO dispute settlement system if a claim could be reasserted in Article 21.5 proceedings after the

27. At one point in its submission, the EU argues that these limitations on the parties' ability to raise issues in an Article 21.5 proceeding apply only to complaining Members, and not to responding Members.³⁴ There is no basis for this view. To begin, when a Member's measure is found to be inconsistent with a covered agreement, the recommendations and rulings under Article 19.1 of the DSU will instruct it to "bring the measure into conformity with that agreement." The DSU does not give the responding party the option of complying by advancing novel interpretations under which the measure was really inconsistent with the relevant covered agreement. The error in the EU's view is even clearer when the DSB issues recommendations based on Article 7.8 of the SCM Agreement. That provision offers only two options: withdraw the subsidy or take appropriate steps to remove adverse effects. Neither of these invites a responding party to concoct new arguments to overturn the findings of the panel or the Appellate Body embodied in the DSB recommendations and rulings.

28. The Appellate Body's jurisprudence confirms this conclusion. In *US – Upland Cotton (21.5)*, the Appellate Body found that:

As the Appellate Body found in *EC – Bed Linen (Article 21.5 – India)*, a *complainant* who had failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings. Similarly, a *complainant* may not reassert the same claim against an unchanged aspect of the measure that had been found to be WTO-consistent in the original proceedings. Because adopted panel and Appellate Body reports must be accepted by the parties to a dispute, allowing a *party* in an Article 21.5 proceeding to re-argue a claim that has been decided in adopted reports would indeed provide an unfair "second chance" to that *party*.³⁵

By first addressing past findings with regard to "complainants," and then reaching general conclusions as to the "parties," the Appellate Body clearly indicated that the rule against

original panel or the Appellate Body has made a finding that the challenged aspect of the original measure is *not* inconsistent with WTO obligations, and that report has been adopted by the DSB." (emphasis in original)); *Mexico – Corn Syrup (21.5) (AB)*, para. 79 ("We also note that Mexico did not appeal the original panel's report, and that Articles 3.2 and 3.3 of the DSU reflect the importance to the multilateral trading system of security, predictability and the prompt settlement of disputes. We see no basis for us to examine the original panel's treatment of the alleged restraint agreement.").

³³ *US – Upland Cotton (21.5) (AB)*, para. 211 ("A complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not."); *US – Zeroing (21.5 – EC) (AB)*, para. 432 (the finding in *US – Upland Cotton (21.5)* "excludes, in principle (ordinarily) from Article 21.5 proceedings new claims that could have been pursued in the original proceedings, but not new claims against a measure taken to comply – that is, in principle, a new and different measure.").

³⁴ EU FWS, para. 263-264.

³⁵ *US – Upland Cotton (21.5) (AB)*, para. 210 (footnotes omitted).

rearguing from the original dispute applied as well to arguments raised by responding parties.³⁶ The Appellate Body, moreover, grounded its finding in the fact that “adopted panel and Appellate Body reports must be accepted by the parties to a dispute” and Article 21.5 proceedings should not be conducted so as to “provide an unfair ‘second chance.’” Both concerns apply equally in the case of findings that the responding party may otherwise wish to reopen.

29. The EU attempts to support its position by asserting that the reargument by responding parties of issues settled in the original proceeding does not raise the same due process concerns as the reargument of settled issues by complaining parties.³⁷ The EU is again wrong. To begin, the Appellate Body has explained its reasons for precluding the reargument in a compliance proceeding of issues settled in the original proceeding:

When considering the status of adopted panel reports, the Appellate Body has indicated that they are binding on the parties “with respect to that particular dispute”. In our view, the Panel’s ruling in the original dispute disposed of India’s claim in this regard. Thus, we consider that India is precluded from reasserting in this proceeding and presenting arguments in support of a claim challenging the EC’s consideration of “other factors” of injury.³⁸

Adopted panel and Appellate Body reports apply equally to complaining and responding parties. Thus, where the DSB’s ruling in the original dispute disposed of an issue, neither party is permitted to negate the finality of the adopted ruling by rearguing that issue. The panel in *US – Gambling (21.5)* adopted this conclusion, finding that:

{T}he respondent, as a party to the dispute, is obligated by Article 17.14 of the DSU unconditionally to accept an adopted Appellate Body report. For the reasons given above, the Panel considers that that obligation precludes re-argument of the same defence in relation to the same measure without any change relevant to the measure.³⁹

In line with this principle, the EU may not re-argue defenses with respect to measures that have not undergone any relevant changes since the original proceedings, including the EU’s extinction and extraction arguments with regard to LA/MSF.

³⁶ Similarly, in *EC – Bed Linen (21.5)*, the Appellate Body endorsed the compliance panel’s findings that: the same principle applies to those aspects of the Panel’s report that are not appealed and are thus not addressed by the Appellate Body. Thus, the portions of the original Report of the Panel that are not appealed, together with the Appellate Body report resolving the issues appealed, must, in our view, be considered as the final resolution of the dispute, and must be treated as such by the parties.

EC – Bed Linen (21.5) (AB), para. 95, quoting *EC – Bed Linen (21.5) (Panel)*, para. 6.51.

³⁷ EU FWS, paras. 263-264.

³⁸ *EC – Bed Linen (21.5) (AB)*, para. 97, quoting *EC – Bed Linen (21.5) (Panel)*, para. 6.52.

³⁹ *US – Gambling (21.5)*, para. 6.59.

30. The short timeframe of Article 21.5 proceedings provides further support precluding the reopening of issues settled in the original proceedings.⁴⁰ Again, that concern applies equally to reargument of issues raised responding parties.

31. The EU asserts that precluding the reargument of settled issues presents greater due process concerns when applied to responding Members as opposed to complaining Members. In the EU's view, the complaining Member has the option to bring a new dispute to reargue an unsuccessful claim from the original proceeding, while a responding Member would not have such an opportunity with regard to a failed defense.⁴¹ However, the EU misses the point. The foundation for the Article 21.5 review is the DSB recommendations and rulings – they are taken as a given for purposes of determining compliance. The EU's arguments about "due process" would appear to be an attempt to re-write Article 21.5 of the DSU and turn it into a different type of inquiry altogether. Nor does the EU's argument withstand review even on its own terms. The EU never explains why a Member concerned would be re-arguing a defense in the absence of a complaining party raising the claim to which that defense would apply. And if the complaining party is permitted to raise that claim, then the Member concerned would have the same ability to raise its defense whether it is in the context of an Article 21.5 proceeding or a (new) original panel proceeding.

D. In a Proceeding Under Article 21.5, the Complaining Party Bears the Burden of Proof that the Responding Party's Measures Taken to Comply do not Exist or are Inconsistent with a Covered Agreement.

32. The general rules on burden of proof in an Article 21.5 proceeding like this one operate as in any other proceeding.⁴² Thus, the complaining party bears the burden of making a *prima facie* case that the measures taken to comply do not exist, or are inconsistent with the covered agreements. Conversely, the responding party bears its own burden of rebutting any *prima facie* case made by the complaining Member, including with regard to any affirmative defenses it raises.⁴³ A panel evaluating the various arguments "is not required to make an explicit ruling that a complaining party has established a *prima facie* case of inconsistency before examining the responding party's defence and evidence."⁴⁴ When the compliance dispute arises from a finding under Article 5 of the SCM Agreement, the "measures taken to comply" will be those the responding Member identifies as satisfying its obligation under Article 7.8 by withdrawing the

⁴⁰ *EC – Bed Linen (21.5) (AB)*, para. 98.

⁴¹ EU FWS, para. 264.

⁴² *Chile – Price Band System (21.5) (AB)*, para. 134.

⁴³ *US – Wool Shirts (AB)*, p. 14 ("it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption").

⁴⁴ *Chile – Price Band System (21.5) (AB)*, para. 135.

subsidy or taking appropriate steps to remove the adverse effects, along with any undeclared measures identified by the complaining party.

33. This allocation of burdens has several important implications. If the complaining Member establishes that a measure taken to comply does not exist, it has no obligation to establish that the measure is otherwise inconsistent with the relevant covered agreements. In the context of Article 7.8 of the SCM Agreement, this situation would apply when the declared measures taken to comply did not withdraw the subsidy or remove its adverse effects. On the other hand, if the complaining Member accepts the existence of the measures taken to comply, but shows that they are insufficient to bring the responding Member fully into compliance, it will have shown that those measures are inconsistent with the covered agreements.⁴⁵ In the context of Article 7.8 of the SCM Agreement, this situation would apply if a Member reduced, but did not end, the WTO-inconsistent subsidy, or removed some, but not all, of the adverse effects. Although the complaining Member may have the option of establishing non-compliance with Article 7.8 through an *ab initio* showing that extant measures conferred an actionable subsidy, it has no obligation to do so.

34. This last point is important. Although the general burden of proof is the same for a proceeding under Article 6 of the DSU and a compliance proceeding under Article 21.5, the underlying legal situation is different.⁴⁶ The complaining Member before a panel established under Article 6 must establish that the responding Member's measure is inconsistent with the covered agreements, but in an Article 21.5 proceeding, the WTO inconsistency of the original measure is a given. The amount and nature of the evidence and argumentation necessary for a complaining party to make a *prima facie* case may differ accordingly. In a compliance proceeding, the complaining party can prevail by showing that the responding Member has done nothing – that is, that a measure taken to comply does not exist. That is not an option in an original proceeding.

35. The responding Member also has a burden of proof in a compliance proceeding, namely, with regard to any propositions it advances. As the Appellate Body explained in *Japan – Apples*:

⁴⁵ *US – FSC II (21.5) (AB)*, para. 83 (“Where a Member withdraws a prohibited subsidy only in part, it has failed to comply fully with its WTO obligation and the Article 4.7 recommendation continues to be in effect with respect to the part of the subsidy that has not been withdrawn. Similarly, full withdrawal of a prohibited subsidy within the meaning of Article 4.7 of the SCM Agreement cannot be achieved by a ‘measure taken to comply’ that replaces the original subsidy with yet another subsidy found to be prohibited. In both instances, the Member cannot be said to have complied with the obligation to withdraw fully the prohibited subsidy”).

⁴⁶ As the Appellate Body explained in *Chile – Price Band System (21.5)*,

A panel's examination of a measure taken to comply cannot, therefore, be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB. Such findings identify the WTO-inconsistency with respect to the original measure, and a panel's examination of a measure taken to comply must be conducted with due cognizance of this background.

Chile – Price Band System (21.5) (AB), para. 136.

It is important to distinguish, on the one hand, the principle that the complainant must establish a *prima facie* case of inconsistency with a provision of a covered agreement from, on the other hand, the principle that the party that asserts a fact is responsible for providing proof thereof. In fact, the two principles are distinct. In the present case, the burden of demonstrating a *prima facie* case that Japan's measure is maintained without sufficient scientific evidence, rested on the United States. Japan sought to counter the case put forward by the United States by putting arguments in respect of apples other than mature, symptomless apples being exported to Japan as a result of errors of handling or illegal actions. It was thus for Japan to substantiate those allegations; it was not for the United States to provide proof of the facts asserted by Japan.⁴⁷

Thus, any responding party may argue, as the EU has in this dispute, that the complaining party has failed to make a *prima facie* case. The responding party, however, bears the burden of proof with regard to any facts it seeks to adduce or counterarguments it seeks to raise in making that argument.

36. Another important consequence is that the complaining Member does not have the burden of anticipating defenses and counterarguments that the responding Member may raise. It need only establish the elements of its claim. The responding Member then has the burden of choosing the arguments it considers most effective in rebuttal, and proving any necessary allegations. To paraphrase the Appellate Body's point in *Japan – Apples*, it will be for the responding party to substantiate those allegations; it will not be for the complaining party to provide proof of the facts asserted by the responding party.⁴⁸

37. The EU ignores this proper allocation of burdens and seeks at several points to force the United States to bear the burdens both of establishing the EU's non-compliance and of addressing in advance arguments that the EU now raises to attempt to establish compliance. In particular, the EU argues that the United States must prove again that measures found by the original Panel and Appellate Body to be WTO-inconsistent subsidies, which were unchanged by the alleged measures taken to comply, remained subsidies at the end of the compliance period.⁴⁹ These errors reach a peak in the EU's extensive list of "what the United States must demonstrate in these compliance proceedings."⁵⁰

38. Specifically, the EU demands that the United States *prima facie* case address the following, among other things:

- (1) Repayments of principal and interest (which the EU refused to reveal even to the original Panel);

⁴⁷ *Japan – Apples (AB)*, para. 157.

⁴⁸ *Japan – Apples (AB)*, para. 157.

⁴⁹ EU FWS, para. 34.

⁵⁰ EU FWS, paras. 36-39.

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- (2) modifications aligning measures with a market benchmark (which the EU alleged for only two measures, both of which the United States addressed⁵¹);
- (3) amortization of benefit (which the Appellate Body found to be one of several potential methodologies, and not required in all cases⁵²);
- (4) extinction (which the Appellate Body did not find to exist in the original dispute⁵³);
- (5) extraction (which the Appellate Body found not to have occurred in the first dispute⁵⁴);
- (6) a reference period beginning no earlier than December 1, 2011 (based on no legal authority and contrary to every past WTO subsidies dispute⁵⁵);
- (7) a revision to the product market definitions used in the original proceeding (which the Appellate Body adopted at the suggestion of the EU⁵⁶);
- (8) designation of “temporal markets” (which neither the original Panel nor the Appellate Body endorsed⁵⁷);
- (9) an estimate of the present amounts of alleged subsidies (which the Appellate Body has already identified as unnecessary⁵⁸); and
- (10) a consideration of non-attribution factors (which the EU identified for the first time in its first written submission).⁵⁹

39. This lengthy list has little to do with making a *prima facie* case that a responding Member has failed to comply with Article 7.8 of the SCM Agreement. Many of the items cover issues that, in circumstances not present in this dispute, might provide defenses to a claim under Article 5 of the SCM Agreement, but are not part of the complaining party’s *prima facie* case under Article 7.8.⁶⁰ Others represent novel legal theories, raised for the first time in the EU first written submission, that find no support in the SCM Agreement or WTO jurisprudence.⁶¹ Still others are potentially, but not necessarily, relevant to a finding under Article 5 and, therefore, are not necessary to establish an inconsistency with Article 7.8.⁶² The one relevant item on the list,

⁵¹ US FWS, paras. 5, note 13, and 97.

⁵² *EC – Large Civil Aircraft (AB)*, paras. 707 and 1241.

⁵³ *EC – Large Civil Aircraft (AB)*, paras. 735-736.

⁵⁴ *EC – Large Civil Aircraft (AB)*, para. 754.

⁵⁵ Section VI.B.4 of this submission discusses this issue in greater detail.

⁵⁶ *EC – Large Civil Aircraft (AB)*, paras. 1176-1177 and 1180.

⁵⁷ Section VI.C of this submission discusses this issue in greater detail.

⁵⁸ *US – Upland Cotton (AB)*, paras. 465 and 467; *US – Large Civil Aircraft (AB)*, para. 697.

⁵⁹ EU FWS, paras. 36 and 39.

⁶⁰ Factors (3), (4), (5), and (11).

⁶¹ Factors (6), (7), (8), and (9).

⁶² Factors (3), (4), (6), and (10).

factor (1), was addressed in the U.S. first written submission.⁶³ Thus, the EU’s list has no bearing on its allegation that the United States failed to make a *prima facie* case.

E. Withdrawal of the Subsidy Occurs Only When the Responding Member Removes the Subsidy or Takes it Away, and Normally Does Not Occur Simply by the Member Waiting for the “Passage of Time.”

40. The United States demonstrated in its first written submission that to withdraw a subsidy for purposes of the SCM Agreement, the Appellate Body has found that responding Member will usually have to take affirmative action to remove the subsidy or take it away.⁶⁴ The EU has not disagreed with these observations, although it has focused on the fact that the Appellate Body left open the “possibility” that “the absence of affirmative action” might lead to “expiry of the subsidy.”⁶⁵ But the panoply of EU arguments about withdrawal of subsidies through passage of time turns the Appellate Body’s reasoning on its head. If “amortization” periods that are relatively short, or extinction/extraction through non-governmental transactions, or the repayment of financial contributions on subsidized terms are enough to withdraw subsidies, as the EU advocates, then inaction on the subsidizing Member’s part is *always* sufficient to withdraw subsidies. In other words, the EU’s theories fail because they make the situation that the Appellate Body identified as “usual” – affirmative action being necessary to withdraw subsidies – into an exception to a general rule that inaction is enough.

41. For example, the introduction to the EU first written submission contends that a Member can achieve “withdrawal” of a subsidy for purposes of Article 7.8 by removing the financial contribution alone.⁶⁶ This assertion contradicts the EU’s position before the Appellate Body that a “financial contribution” is an event that cannot retrospectively cease to exist, such that “withdrawal” of the financial contribution is impossible.⁶⁷ The EU’s assertion is also incorrect as a legal matter because it presumes that a subsidy can be withdrawn while leaving the “benefit”

⁶³ US FWS, paras. 5, note 13, and 97.

⁶⁴ US FWS, paras. 19-20.

⁶⁵ EU FWS, para. 34, note 30.

⁶⁶ EU FWS, para. 32.

⁶⁷ The EU stated:

Pursuant to Article 1, two elements make up a subsidy: a financial contribution and a benefit. *Once a financial contribution has been given, the only element that can cease to exist is the benefit.* The benefit is, therefore, the element of a subsidy that may be discontinued over time if there is a significant change, either through the passage of time, or any other intervening event or action.

EU Appellant Submission, para. 205 (emphasis added) (Exhibit USA-319(BCI)); *see also EC – Large Civil Aircraft (AB)*, para. 699 (summarizing the EU’s view). The Appellate Body agreed that term “financial contribution” refers to a specific type of event (*i.e.*, a governmental action), implying that it cannot be withdrawn once it occurs. *EC – Large Civil Aircraft (AB)*, para. 702 (“The focus of the first element is on the action of the government in making the “financial contribution.””).

element in place. But Under Article 1 of the SCM Agreement, a subsidy exists when “there is a financial contribution by a government . . . and a benefit is thereby conferred. More concisely, the subsidy is the combination of the financial contribution, its (noncommercial) terms, and any difference between those terms and market-based commercial terms. Attempting to negate the financial contribution without addressing the benefit would, accordingly, fail to fully remove the subsidy. Thus, it would not have withdrawn the subsidy for purposes of Article 7.8.

42. Consideration against the “usual” need for affirmative action confirms this conclusion. If the EU’s theory regarding repayment of financial contributions is correct, every subsidy with a repayment obligation would be “withdrawn” upon repayment under the noncommercial terms, without any action by the Member, and without regard to whether the “life” of the subsidy has ended, as the Appellate Body understood that concept.

43. The EU also misunderstands the significance of the Appellate Body’s reasoning with regard to Article 5 of the SCM Agreement. The Appellate Body did not find that the “passage of time” in and of itself ended subsidies. Rather, it found the effects of subsidies could change because of *things that happened* over the course of time – the subsidy “accrues and diminishes,” a privatization occurs, or there is a “removal of cash or cash equivalents.”⁶⁸ References to the “passage of time” indicate only that these events occur after the grant of the subsidy, and not that time is an autonomous factor, as the EU indicates.

F. Appropriate Steps to Remove Adverse Effects

44. As with the subsidy findings, the EU’s response to the adverse effects findings against it was to do nothing that would resolve the dispute. The original Panel found, and the Appellate Body affirmed, that the EU gave Airbus billions of euros in subsidized financing resulting in tens of billions of dollars of adverse effects to the U.S. large civil aircraft industry.

45. The Appellate Body concurred with the original Panel’s conclusion that under the most likely counterfactual scenario in the absence of the subsidies, “Airbus would not have existed . . . and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred.”⁶⁹ At a minimum, absent the subsidies, Airbus would be a “much weaker LCA manufacturer,” and would have had “at best a more limited offering of LCA models.”⁷⁰ These findings confirm that LA/MSF enabled Airbus to develop and bring to market each of its models of large civil aircraft as and when it did.⁷¹ The presence of such subsidized aircraft enabled and continues to enable Airbus to capture sales and market share at the expense of the U.S. industry.

⁶⁸ *EC – Large Civil Aircraft (AB)*, paras. 709, 726, and 749. It is also significant that none of the subsidies in this dispute are recurring subsidies.

⁶⁹ *EC – Large Civil Aircraft (AB)*, para. 1264.

⁷⁰ *EC – Large Civil Aircraft (AB)*, paras. 1269 and 1270.

⁷¹ US FWS, paras. 335-347 (citing *EC – Large Civil Aircraft (AB)*; *EC – Large Civil Aircraft (Panel)*).

46. The EU's first written submission confirms its strategy of inaction. The only meaningful steps taken by the EU served to compound – and not remove – the adverse effects of its WTO-inconsistent subsidies subject to the DSB's recommendations and rulings. The EU is conspicuous in re-litigating many of the issues already resolved by the DSB. The EU claims of removing adverse effects are grounded in arguments that (1) the subsidies have been withdrawn,⁷² and (2) that time has passed.⁷³

47. Neither basis supports the EU's assertion of compliance. The United States has demonstrated that the EU has not withdrawn the subsidies.⁷⁴ The United States has also demonstrated that the passage of time has not invalidated the underlying findings or eliminated the causal link between the subsidies and adverse effects. The EU's assertions regarding Airbus's current financial situation, changes in conditions of competition, and technological advances do not change this conclusion.⁷⁵ As found by the original Panel and the Appellate Body, Airbus's entire product line, the technologies applied on those products, and indeed Airbus's financial condition are genuine and substantially related to the LA/MSF subsidies.

48. In short, nothing has happened since the original reference period to undermine that conclusion. LA/MSF and other subsidies have not been withdrawn; additional LA/MSF has been provided to the A350 XWB; Airbus still supplies the market with a product line that it would not have without launch aid, which is now even more competitive with the market entry of the A350 XWB; and, consequently, Boeing continues to lose sales and market share worth many billions of dollars.

G. The Choice of a Remedy Under Article 7.8 of the SCM Agreement Does Not Have Retrospective Effect.

49. The EU observes, correctly, that a Member granting or maintaining an actionable subsidy has only two mechanisms for coming into compliance with the SCM Agreement: withdraw the subsidy or take appropriate steps to remove its adverse effects. The subsidizing Member may choose either mechanism. If both are available, the subsidizing Member may choose either and, if it fully withdraws the subsidy or takes all appropriate steps to remove adverse effects, has no further obligation with respect to that subsidy.

50. However, the EU errs when it asserts that once a Member has withdrawn a subsidy, "that subsidy cannot play *any part* in an assertion or finding of *non-compliance*."⁷⁶ Remedies under Article 7.8, like all WTO remedies, are prospective. Withdrawal of an actionable subsidy does not change the fact that, prior to withdrawal, it was inconsistent with the SCM Agreement.

⁷² *E.g.*, EU FWS, paras. 482, 489, 503, 530, 542-546.

⁷³ *E.g.*, EU FWS, paras. 554 – 558.

⁷⁴ Section IV of this submission.

⁷⁵ *E.g.*, EU FWS, paras. 554 – 558.

⁷⁶ EU FWS, para. 31 (emphasis in original).

Withdrawal also does not change the role such a subsidy may have played, along with other conditions of competition, in the factual circumstances that led to other subsidies causing adverse effects. These factual circumstances are a critical part of any evaluation of the recent evolution of the market, which provides the only basis for a fact-based inquiry into whether withdrawal of some subsidies, but not others, is sufficient to comply with a subsidizing Member's obligations under Article 7.8. Thus, contrary to the EU's view, a panel evaluating assertions of non-compliance *must* give appropriate consideration to subsidies that have been withdrawn.

51. It is worth noting at this point that the EU does not actually abide by its stated view that withdrawn subsidies cannot play any part in an assertion of non-compliance. Rather, it treats them consistently as non-attribution factors, arguing that the effects of allegedly withdrawn subsidies (such as Airbus's accumulated cash, technology base, and customer base) are responsible for observed adverse effects, rather than the subsidies that even the EU concedes are still in effect. This approach is fundamentally inconsistent with the adopted Appellate Body finding that those subsidies were WTO-inconsistent during the reference period.

52. Section VI.D.1 of this submission lays out the appropriate analysis with regard to any subsidies that the Panel finds to have been withdrawn. As the United States has observed, the only subsidies that the EU has withdrawn are the discounted fee for the use of the Bremen runway and the below-market rental terms for the Mühlenberger Loch site.

H. There is No Basis in the SCM Agreement or the DSU for the EU's Novel Procedural Requests.

53. The EU begins Section II.C of its first written submission by assailing "litigation techniques" supposedly used by the United States, and then demands a series of unprecedented sanctions for the supposed misconduct. The EU cites *no* legal authority for either its claims that the United States has misbehaved, or for the penalties it suggests. The Panel should accordingly reject the EU's arguments.

54. The EU first attacks the United States for not requesting an information-gathering process under Annex V of the SCM Agreement prior to this proceeding, and charges that because of this course of action, the EU "has been deprived of the possibility of seeking rebuttal evidence."⁷⁷ Neither criticism is accurate. Paragraph 2 of Annex V provides that the DSB shall initiate an information-gathering process "{i}n cases where matters are referred to the DSB under paragraph 4 of Article 7." As the United States referred this matter to the DSB under Article 21.5 of the DSU, the information-gathering process was simply not available. Nor can this understanding on the part of the United States be understood to have deprived the EU of any right. If the EU were correct that Annex V is available in an Article 21.5 proceeding, nothing in the Annex precluded it from requesting an information gathering procedure on its own behalf. After all, paragraph 2 of Annex V provides that the DSB shall initiate an information-gathering

⁷⁷ EU FWS, para. 45.

procedure “upon request,” without requiring that the request originate with the complaining party.

55. The EU then attacks the United States for citing submissions and exhibits on the record of the original Panel, and submitting them for the record of this Panel.⁷⁸ On this broad question, the criticism is hard to understand. It is common practice for parties to submit documents to panels, including substantive analyses that support points made in their submission. In fact, the EU submits a number of textual annexes and cites documents submitted to the original Panel in its own first written submission, so it cannot legitimately criticize the United States for doing the same. The EU takes particular exception to the submission by the United States of documents containing EU BCI and HSBI, and erroneously accuses the United States of violating the BCI/HSBI Procedures of the Original Panel by not having destroyed those materials. The United States has addressed these issues separately.⁷⁹

56. The EU also charges that the United States violated Article 4.6 of the DSU by citing statements made by the EU during consultations.⁸⁰ The EU is wrong. The Panel in *Korea – Alcoholic Beverages* found that confidentiality under Article 4.6,

extends only as far as requiring the parties to the consultations not to disclose any information obtained in the consultations to any parties that were not involved in those consultations. We are mindful of the fact that the panel proceedings between the parties remain confidential, and parties do not thereby breach any confidentiality by disclosing in those proceedings information acquired during the consultations. . . . We find therefore, that there has been no breach of confidentiality by the complainants in this case in respect of information that they became aware of during the consultations with Korea on this matter.⁸¹

Based on this analysis, discussing information revealed at consultations has become a standard part of panel proceedings. In this instance, where the EU statements at consultations could be read as implicating BCI, the United States accordingly bracketed them,⁸² and the EU subsequently agreed with the public disclosure of the remaining supposedly confidential statements.⁸³ Thus, there has been no violation of the confidentiality accorded to the EU under Article 4.6.

57. The EU accuses the United States of attempting to shift the burden of proof to the EU by referring to declared measures taken to comply listed in the EU Notifications as “claims,”

⁷⁸ EU FWS, paras. 47 and 48.

⁷⁹ Letter from the United States to the Panel (October 5, 2012).

⁸⁰ EU FWS, para. 49.

⁸¹ *Korea – Alcoholic Beverages (Panel)*, para. 10.23, cited with approval in *Australia – Automotive Leather*, para. 9.33.

⁸² E.g., *Termination dates of LA/MSF Agreements* (Exhibit USA-296(BCI)).

⁸³ E-mail from the EU to the Panel (4 June 2012).

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“assertions,” and “arguments.”⁸⁴ The EU misunderstands. As noted above, the United States bears the burden of establishing EU measures taken to comply are either non-existent or inconsistent with the covered agreements. The description of the measures declared in the EU notification as “claims,” “assertions,” and “arguments” was not an attempt to shift the burden of proof. It merely reflects the fact that the EU Notification presented those measures as descriptions of actions, rather than citations to formal measures.⁸⁵

58. The EU then asserts that the United States “ignored” the Appellate Body’s guidance regarding how the passage of time affects subsidies.⁸⁶ As the United States shows in section IV.B, IV.C, and IV.D, it is the EU that misunderstands the Appellate Body’s findings in this regard. The United States has, in fact, framed its *prima facie* case in accordance with all of the relevant findings in panel and Appellate Body reports adopted by the DSB.

59. The EU ends by repeating its view that the United States has failed to make a *prima facie* case. This, of course, can generally be expected to be the position of every responding party in a WTO dispute. The EU, however, argues that it has identified deficiencies so “fatal” that there is no need for the EU to rebut them.⁸⁷ It also seeks special sanctions in the form of precluding any panel questions to the United States⁸⁸ and treating any U.S. criticism of arguments in the EU FWS as “irrelevant.”⁸⁹ The EU cites no authority for taking such extraordinary steps, and there is none. In fact, granting such a request would represent a severe dereliction of a panel’s duty under Article 11 of the DSU to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” That the EU would seek to insulate itself from all criticism in this way signals a recognition that the arguments in its first written submission cannot withstand scrutiny. The subsequent sections of this submission demonstrate that this is the case.

⁸⁴ EU FWS, para. 51.

⁸⁵ The EU asserts that the U.S. statements in question should be “struck from the record and receive no further consideration” based on “the general principle that tainted evidence must be excluded.” EU FWS, para. 49. As the EU cites no authority for this “general principle” or its applicability to proceedings under the DSU, the Panel should reject the request.

⁸⁶ EU FWS, para. 52.

⁸⁷ EU FWS, para. 54. The United States notes the inherent inconsistency between this position and the subsequent 1185 paragraphs in the EU first written submission attempting to rebut the *prima facie* case that the United States allegedly failed to make.

⁸⁸ EU FWS, para. 54.

⁸⁹ EU FWS, para. 55.

III. THE SCOPE OF THIS COMPLIANCE PROCEEDING

60. The EU does not dispute that most U.S. claims are properly before this compliance Panel. The EU argues however that, regardless of the merits, three categories of U.S. claims fall outside the Panel's terms of reference. First, the EU argues that this Panel cannot entertain claims under Articles 5(c) and 6.3(b) of the SCM Agreement, of *threatened* serious prejudice through displacement and impedance into the subsidizing Member market (*i.e.*, the EU market), because the U.S. panel request failed to meet the requirements of Article 6.2 of the DSU with respect to threat of serious prejudice.⁹⁰ Second, while the EU does not contest that the United States properly raised claims related to the LA/MSF for the A350 XWB, the EU argues that, nevertheless, the Panel cannot hear them because the subsidies to the A350 XWB are not "measures taken to comply" under Article 21.5 of the DSU. And third, the EU argues that the Panel's terms of reference do not include U.S. claims that the A380 subsidies violate Articles 3.1(a) and (b) of the SCM Agreement because they do not relate to any measures taken to comply, and the recommendations and rulings of the DSB did not obligate the EU to withdraw those measures pursuant to Article 4.7 of the SCM Agreement. In each instance, the EU is wrong, and the Panel should reach the merits of the U.S. claims.

61. With respect to the EU's arguments related to LA/MSF for the A350 XWB, in particular, the EU documents provided in response to the Panel's Article 13 request⁹¹ confirm the U.S. showing that LA/MSF for the A350 XWB is within the scope of this proceeding. First, the relevant member States granted A350 XWB LA/MSF on precisely the same four core terms as common to all previous iterations of LA/MSF: unsecured, success-dependent, levy-based, and back-loaded.⁹² And second, as Section IV.E explains in greater detail, Airbus received LA/MSF for the A350 XWB on better-than-commercial terms. Therefore, the Panel and Appellate Body description of all previous LA/MSF as "unsecured loans granted to Airbus on back-loaded and success-dependent repayment terms, at below-market interest rates, for the purpose of developing various new models of LCA{"'"⁹³ applies equally to LA/MSF for the A350 XWB. And, the subsidies for the A350 XWB were given for the development and production of a product that replaces a previous subsidized Airbus product in the twin-aisle segment that was found to cause adverse effects to U.S. interests. Because of the close nexus with the DSB's recommendations and rulings on past LA/MSF, LA/MSF for the A350 XWB is squarely within the scope of this proceeding.

⁹⁰ EU FWS, para. 151.

⁹¹ French A350XWB Protocole (Exhibit EU(Art.13)-1(BCI)); French A350XWB Convention (Exhibit EU(Art.13)-11(HSBI/BCI)); Spanish A350 XWB LA/MSF *Convenio de Colaboración*, p. 1 (Exhibit EU(Art.13)-29(HSBI/BCI)); KfW A350 XWB Loan Agreement (Exhibit EU(Art.13)-14(HSBI/BCI)); UK A350 XWB Loan Agreement, Art. 2.1 (Exhibit EU(Art.13)-30(HSBI/BCI)).

⁹² *EC – Large Civil Aircraft (Panel)*, paras. 7.374-7.375; *e.g.*, US FWS, para. 2.

⁹³ *EC – Large Civil Aircraft (AB)*, para. 604 (quoting *EC – Large Civil Aircraft (Panel)*, para. 7.525)).

A. The U.S. Threat of Serious Prejudice Claims under Articles 5(c) and 6.3(a) of the SCM Agreement are Squarely within this Compliance Panel’s Terms of Reference.

62. The United States has demonstrated that, as a result of the EU’s refusal to comply with the vast majority of the DSB’s recommendations and rulings, EU subsidies continue to cause adverse effects in the form of serious prejudice for purposes of Article 5(c) of the SCM Agreement. The continuing serious prejudice suffered by the United States arises from, *inter alia*, displacement or impedance of its large civil aircraft imports into the EU market and/or the threat thereof, as provided for in Article 6.3(a) of the SCM Agreement from 2007 through the present.⁹⁴

63. The EU argues that the case presented in the U.S. first written submission “contains arguments regarding alleged *threats* of displacement and impedance,”⁹⁵ while “the United States’ Article 21.5 Panel Request referred only to *actual*, rather than threatened, displacement and impedance of imports.”⁹⁶ The EU then concludes that, this Panel can entertain claims of *actual* serious prejudice, but cannot hear claims under Article 5(c) of *threatened* serious prejudice through displacement and impedance into the subsidizing Member market (*i.e.*, the EU market).⁹⁷

64. The EU has misinterpreted both the U.S. panel request and the SCM Agreement. Footnote 13 to Article 5(c) of the SCM Agreement explicitly provides that “[t]he term ‘serious prejudice to the interests of another Member’ is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.”⁹⁸ Thus, when Articles 5(c) and Article 6.3 refer to “serious prejudice,” they cover threat of serious prejudice as well.

65. The U.S. panel request does not refer to “actual serious prejudice” as distinct from “serious prejudice” as defined in footnote 13. Rather, it frames the U.S. claim in terms of “adverse effects” (which include threat of serious prejudice) and “subsidies . . . inconsistent with Articles 5(c), 6.3(a), 6.3(b), and 6.3(c)” (which include threat of serious prejudice).⁹⁹ Thus, the U.S. panel request includes any claims of threat of serious prejudice embodied in the U.S. first written submission, which should end the inquiry.

66. However, the EU seeks to avoid the clear meaning of the terms used in the U.S. panel request by noting that the phrase “causing or threatening to cause serious prejudice”¹⁰⁰ appears in

⁹⁴ US FWS, paras. 504-19.

⁹⁵ EU FWS, para 157.

⁹⁶ US FWS, paras. 159 (emphasis original).

⁹⁷ EU FWS, para. 151.

⁹⁸ SCM Agreement, Art. 5 note 13 (emphasis added).

⁹⁹ U.S. Panel Request, para. 8.

¹⁰⁰ U.S. Panel Request, WT/DS316/6, (11 April 2006), *quoted in* EU FWS, para. 158 (emphasis omitted).

the U.S. panel request in the original proceeding, but not in the U.S panel request for this proceeding. The EU views this difference as indicating that the panel request in this dispute does not cover “threat of serious prejudice.” There is no basis for this argument.

67. Article 6.2 of the DSU requires that a panel request “identify the specific measure at issue and provide a brief summary of the legal basis of the complaint, sufficient to present the problem clearly.”¹⁰¹ The U.S. compliance panel request satisfies this requirement by clearly setting out a claim of adverse effects by reason of serious prejudice within the meaning of Article 6.3(a), (b), and (c), with “serious prejudice” having the meaning explicitly given to it by the SCM Agreement (that is, encompassing threat of serious prejudice). There is accordingly no need to refer back to the original panel request.

68. In any event, a comparison of the two panel requests only serves to reinforce the conclusion that the U.S. compliance panel request covers serious prejudice, including threat of serious prejudice. The original panel request describes the relevant violation as consisting of subsidies that “appear to be causing adverse effects to U.S. interests within the meaning of . . . Articles 5(c), 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement because the measures . . . are causing or threatening to cause serious prejudice to the interests of the United States. . . .”¹⁰² The compliance panel request does not reference serious prejudice *or* threat of serious prejudice; it states the claim in terms of “subsidies . . . inconsistent with Articles 5(c), 6.3(a), 6.3(b), and 6.3(c).” Referring to the original panel request, which the United States emphasizes is unnecessary, would accordingly suggest that the inconsistency with Articles 6.3(a) and (b) is the same in both, namely, serious prejudice *and* threat of serious prejudice.

69. Contrary to suggestions by the EU, past panel and Appellate Body reports confirm that serious prejudice includes the threat of serious prejudice. The EU relies upon the Appellate Body’s statement in *US – Upland Cotton (21.5)* that “a threat of serious prejudice claim does not necessarily capture and provide a remedy with respect to the same scenario as a claim of present serious prejudice.”¹⁰³ But this statement merely indicates that a *threat* of prejudice claim may not encompass an *actual* serious prejudice claim. It indicates nothing about the reverse situation arising here, where in keeping with the definition, a serious prejudice claim encompasses a *threat* of serious prejudice claim.

70. Indeed, the original panel in *US – Upland Cotton* found that GATT 1994 and the SCM Agreement “make it clear that, whatever the overall scope of the concept of serious prejudice may be, that scope includes the concept of ‘threat’ of serious prejudice. The ordinary meaning of the verb ‘include’ is: ‘comprise or reckon in as part of a whole.’ Thus, serious prejudice includes

¹⁰¹ *EC – Fasteners (AB)*, para. 562.

¹⁰² U.S. Panel Request, para. 8.

¹⁰³ *US – Upland Cotton (21.5) (AB)*, para. 244; EU FWS, para. 159.

a threat of serious prejudice.”¹⁰⁴ Similarly, the panel in *Korea – Commercial Vessels*, citing footnote 13 to the SCM Agreement, reiterated that “the concept of serious prejudice includes threat of serious prejudice (just as the term ‘injury’ in the *SCM Agreement* includes ‘threat of material injury’).”¹⁰⁵

71. It is also significant that, as a practical matter, past panels have understood claims of “serious prejudice” to include claims of “threat of serious prejudice.” For example, in *Indonesia – Autos*, neither the United States nor the European Communities referenced “threat of serious prejudice” in their panel requests,¹⁰⁶ yet both made specific threat claims in their written submissions, and the panel ultimately made findings on those claims.¹⁰⁷ In *Korea – Commercial Vessels*, the European Communities, as the complainant, made no specific threat claims in its panel request,¹⁰⁸ yet the panel itself raised the question of threat of serious prejudice, indicating that it saw no need to differentiate claims of actual and threatened prejudice.¹⁰⁹ Thus, the EU has in the past shared the U.S. understanding that explicit reference to threat of serious prejudice in a panel request is unnecessary.

72. In any event, any misconceptions that the EU had about the inclusion of threat of serious prejudice in this dispute¹¹⁰ are not due to a deficiency in the U.S. panel request. Consistent with Article 6.2 of the DSU, the U.S. panel request “present{s} the problem clearly,” in making claims under Articles 5(c) and 6.3(a) of the SCM Agreement. The EU concedes that the panel request properly alleged continuing adverse effects in the form of serious prejudice through displacement or impedance of U.S. like product in the EU market. And the SCM Agreement explicitly states that “serious prejudice . . . includes threat of serious prejudice.” Accordingly, any U.S. claims regarding threat of serious prejudice remain within this Panel’s terms of reference.

¹⁰⁴ *US – Upland Cotton (Panel)*, para 7.1493. The panel made clear that “{t}he converse would not necessarily hold. That is, a finding of *threat* of serious prejudice would not necessarily include present serious prejudice.” *US – Upland Cotton (Panel)*, para 7.1493 note 1555.).

¹⁰⁵ *Korea – Commercial Vessels*, para. 7.589. *US – Line Pipe (AB)*, paras. 138, 170 (rejecting panel’s contention that substantial cause of serious injury and threat of serious injury were mutually exclusive, and finding instead that it saw “‘serious injury’ – because it is something *beyond* a ‘threat’ – as necessarily *including* the concept of a ‘threat’ and *exceeding* the presence of a ‘threat’” (emphasis original)).

¹⁰⁶ Request for the Establishment of a Panel by the United States, *Indonesia – Autos*, WT/DS59/6, 12 June 1997; Request for the Establishment of a Panel by the European Communities, *Indonesia – Autos*, WT/DS54/6, 12 May 1997.

¹⁰⁷ *Indonesia – Autos*, paras 8.445, 8.448.

¹⁰⁸ Request for the Establishment of a Panel by the European Communities, *Korea – Commercial Vessels*, WT/DS273/2, 11 June 2003.

¹⁰⁹ *Korea – Commercial Vessels*, paras. 7.529, 7.589.

¹¹⁰ EU FWS, para. 151.

B. U.S. Claims Related to LA/MSF for the A350 XWB are within this Panel’s Terms of Reference.

73. In its first written submission, the United States explained that LA/MSF for the A350 XWB satisfies the nature, effects, and timing elements of the close nexus test and, therefore, falls within the terms of reference of this compliance Panel. Drawing on the evidence contained in some 45 publicly available exhibits, the United States demonstrated that A350 XWB LA/MSF has the same core terms as all previous LA/MSF for Airbus models, as well as the same grantor, grantee, purpose, and product (with regard to twin-aisle aircraft); that it has the effect of undermining the EU’s compliance with the recommendations and rulings of the DSB; and that the A350 XWB LA/MSF legal instruments and disbursements occurred close in time to the DSB’s adoption of the reports of the original Panel and the Appellate Body, the issuance of the Panel’s interim report, the EU’s compliance period, and other significant milestones in this dispute.¹¹¹

74. The EU disputes very little of this. In particular, the EU does not contest that LA/MSF for the A350 XWB has the same four core terms as all previous LA/MSF, or that LA/MSF for the A350 XWB has the effect of negating the EU’s compliance with the DSB recommendations and rulings in this dispute, or that the legal instruments conferring A350 XWB LA/MSF were issued from June 2009 onward, and that disbursements occurred continually from 2009 to 2012.¹¹² The documents submitted by the EU in response to the Panel’s request for information under Article 13 of the DSU confirm each and every one of these points.

75. Rather, the EU invents and then subjects the U.S. claims to an “overarching measure” test that has no basis in the text of the DSU or previous panel or Appellate Body reports. The EU also raises several tangential issues regarding the nature, effects, and timing of LA/MSF for the A350 XWB. And finally, the EU argues that two previously independent bases for including undeclared measures taken to comply in the scope of a compliance proceeding – “replacement” and “circumvention” – are merely factors for consideration within the close nexus test. However, no “overarching measure” test exists. The EU’s arguments regarding the nature, effects, and timing of LA/MSF for the A350 XWB are either contrary to past Appellate Body reports or irrelevant to the issues before the Panel. Therefore, the EU has failed to undermine the U.S. demonstration that LA/MSF for the A350 XWB is properly in the scope of this proceeding because it satisfies the “close nexus” test, this challenge to the terms of reference must fail.

1. There is no threshold “overarching measure” test.

76. Perhaps recognizing that it cannot rebut the U.S. showing under the close nexus test, the EU attempts to subject U.S. claims to an “overarching measure” test. This “threshold” inquiry, invented by the EU for this proceeding, would allow a compliance panel to consider only those measures that are “all instances of the application of the *same overarching measure at issue*”

¹¹¹ US FWS, Section IV.C.

¹¹² EU FWS, para. 109; *id.*, para. 1102; *see also, e.g.*, US FWS, para. 118.

before the original and compliance panels.”¹¹³ This is incorrect. The Appellate Body has repeatedly recognized that the close nexus test calls for an examination of the nature, effects, and timing of an undeclared measure taken to comply to determine whether it falls within the terms of reference of a compliance panel.¹¹⁴ However, the Appellate Body has never indicated – explicitly or implicitly – that there is a separate threshold requirement, the so-called “overarching measure” test. This is true not only of the reports cited by the EU (*i.e.*, *US – Cotton (21.5)*, *US – Zeroing (21.5 – EC)*, and *US – Softwood Lumber CVDs (21.5)*), but also of cases where there was nothing remotely resembling what the EU calls an “overarching measure,” such as *Australia – Salmon (21.5)*, *Australia – Automotive Leather (21.5)*, and *EC – Bananas III (21.5 – US)*. Thus, previous panel and Appellate Body reports confirm that a claim is within the terms of reference if it satisfies the close nexus test based solely on the three factors explicitly cited by the Appellate Body: nature, effects, and timing.

77. Neither these reports nor any other has imposed a threshold “overarching measure” requirement separate from the close nexus test.¹¹⁵ In *Australia – Salmon* and *Australia – Automotive Leather*, the compliance panels did not evaluate whether there was an “overarching measure,” and the facts show that there was none. In *Australia – Salmon (21.5)*, the original panel declared WTO-inconsistent a salmon quarantine measure enacted pursuant to Australia’s Quarantine Proclamation 86A (“QP86A”), while the compliance panel included in its terms of reference a separate import restriction imposed by the government of Tasmania, *not* pursuant to QP86A.¹¹⁶ In *Australia – Automotive Leather (21.5)*, the original Panel had found subsidies to an automotive leather manufacturer to be WTO-inconsistent, but the compliance panel later found that even though Australia terminated the original subsidies, the Panel’s terms of reference covered a new subsidized government loan to an affiliated company.¹¹⁷ In both cases, the compliance panels found that their mandate included undeclared measures taken to comply, even though there were no assertions of an “overarching measure” of the type envisioned by the EU.

78. Moreover, the Appellate Body praised the approach these two compliance panels took in including the undeclared measures taken to comply in their terms of reference, despite their failure to cite an overarching measure. The Appellate Body stated that the two panels’ reports served “as useful illustrations of when such a finding is appropriate. In each of these cases, the

¹¹³ EU FWS, para. 69.

¹¹⁴ *E.g.*, *US – Zeroing (21.5 – EC) (AB)*, paras. 204-205 (quoting *Softwood Lumber CVDs (21.5) (AB)*).

¹¹⁵ EU FWS, paras. 75-76. The EU at times insinuates that the “overarching measure” test is an additional element of the close nexus test. EU FWS, para. 76 (“As explained above, if a complaining Member cannot make the requisite threshold showing that the alleged undeclared measure taken to comply is an application of the overarching measure at issue in the original proceedings, or an application of the declared measure taken to comply, then there is no need for a compliance panel to proceed with any *additional* steps of the ‘close nexus’ analysis.”) (emphasis added). Given that the EU’s overarching measure test functions as a gatekeeper mechanism, it is more accurately understood as a separate “threshold” test.

¹¹⁶ *Australia – Salmon (AB)*, paras. 2-3; *Australia – Salmon (21.5)*, para. 2.32.

¹¹⁷ *Australia – Automotive Leather (21.5)*, para. 1.4.

panel examined a measure that the implementing Member maintained was not a measure taken to comply.”¹¹⁸ The Appellate Body would not have endorsed the approach taken by these compliance panels, which considered measures entirely distinct from those covered by the original proceedings, if the EU’s “overarching measure” test were valid.

79. In *US – Softwood Lumber CVDs (21.5)*¹¹⁹, the Appellate Body interpreted Article 21.5 as confirming that:

{s}ome measures with a particularly close relationship to the declared ‘measure taken to comply’, and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures.¹²⁰

The Appellate Body then analyzed each of those factors.¹²¹ It concluded that it saw “no error on the facts of this case in the Panel’s finding that ‘...there is sufficient overlap in the timing, or temporal effect, and nature of the Final Determination, Section 129 Determination and First Assessment Review for the latter to fall within the scope of the present DSU Article 21.5 proceedings.’”¹²² The Appellate Body never mentioned the term “overarching measure” or examined whether one existed.¹²³ This fact undermines yet again the EU’s contention that this is a threshold requirement that must be met to even reach the close nexus test.

80. *EC – Bananas (21.5 – US) (AB)* provides yet another example where the presence or absence of an overarching measure was irrelevant. There, “the Panel relied upon the Appellate Body’s finding in *US – Softwood Lumber IV (Article 21.5 – Canada)* that some measures with a particularly close relationship to the declared ‘measure taken to comply’, and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5.”¹²⁴ The Appellate Body found that the analysis must begin with the question of whether the measure at issue was in itself a measure taken to comply, and only if it was not would the Appellate Body turn to the close relationship analysis from *US – Softwood Lumber IV (21.5)*.¹²⁵ The Appellate Body never mentioned that an “overarching measure” test might be relevant at any point, nor did the Appellate Body fault the compliance panel for not conducting

¹¹⁸ *US – Softwood Lumber CVDs (21.5) (AB)*, para. 74.

¹¹⁹ *US – Softwood Lumber CVDs* is also sometimes referred to as *US – Softwood Lumber IV*.

¹²⁰ *US – Softwood Lumber CVDs (21.5) (AB)*, para. 77.

¹²¹ *US – Softwood Lumber CVDs (21.5) (AB)*, paras. 82-85.

¹²² *US – Softwood Lumber CVDs (21.5) (AB)*, para. 91 (quoting Panel Report, *Softwood Lumber CVDs (21.5)*, para. 4.42).

¹²³ *US – Softwood Lumber CVDs (21.5) (AB)*, para. 82.

¹²⁴ *EC – Bananas (21.5 – US) (AB)*, para. 243 (internal quotations and citations omitted).

¹²⁵ *EC – Bananas (21.5 – US) (AB)*, para. 245.

one. This confirms again that satisfying the “close nexus” test alone is sufficient for a measure to come within the terms of reference of a compliance panel.

81. Moreover, the EU’s invented “overarching measure” test would undermine an important part of a compliance panel’s mandate – preventing circumvention. As the Appellate Body stated with respect to terms of reference, the “limits {on Article 21.5 proceedings} should not allow circumvention by Members by allowing them to comply through one measure, while, at the same time, negating compliance through another.”¹²⁶ The EU itself has admitted this, both in this dispute and in prior disputes.¹²⁷ However, the EU’s “overarching measure” argument would invite circumvention, both in this dispute and in others.

82. To illustrate, it is useful to consider the situation in *US – Upland Cotton (21.5)*. According to the EU, the compliance panel’s terms of reference included cotton subsidies paid after the expiration of the reasonable period of time only because those subsidies were granted under the same “legislative and regulatory provisions” as the cotton subsidies before the original Panel.¹²⁸ Under the EU’s approach, a Member could negate a measure taken to comply simply by switching to a new legislative or regulatory provision. The Appellate Body deemed this approach unacceptable, as the responding Member could repeat the tactic in successive disputes to evade review indefinitely.¹²⁹

¹²⁶ *US – Softwood Lumber CVDs (21.5) (AB)*, para. 71. In addition, the Appellate Body has stated: “The requirements in Article 21.5 to examine whether compliance measures exist and whether the measures taken to comply are consistent with the covered agreements also suggest that substantive compliance is required, rather than formal removal of the inconsistent measure.” *EC – Hormones (AB)*, para. 308; *cf.* Brazil Third Party Submission, para. 31 (“Brazil believes the Panel should put substance over form and focus on the nature and effects of the challenged measures in comparison with the measure taken to comply and the original measures and the need to provide an effective resolution to the dispute.”).

¹²⁷ “[A]s the Appellate Body made clear from its analysis in *US – Zeroing (EC) (Article 21.5 – EC)*, a consideration of circumvention is part of the ‘effects’ element of the ‘close nexus’ test” EU FWS, para. 90; *see also* US FWS, para. 164 (discussing the EU’s statements about circumvention in the context of *US – Zeroing (21.5 – EC) (AB)*).

¹²⁸ EU FWS, paras. 74-75 (“In *US – Cotton (Article 21.5 – Brazil)*, it was not in dispute that, ‘since the adoption of the original panel and Appellate Body reports, the United States continued to provide marketing loan and counter-cyclical payments to United States producers of upland cotton, *and the legislative and regulatory provisions governing these payments remained unchanged*’. In other words, the payments were made pursuant to the same overarching measure, which in that dispute was considered by the Appellate Body to be a ‘subsidy programme’. In sum, the Appellate Body Reports discussed above demonstrate that while establishing the existence of an overarching measure may *not always be sufficient* to demonstrate jurisdiction over alleged undeclared ‘measures taken to comply’, it is an important *threshold element* of the jurisdiction analysis.”) (italics and underline original).

¹²⁹ *US – Upland Cotton (21.5) (AB)*, para. 245 (“a complaining Member that has demonstrated that subsidies provided by another Member have resulted in adverse effects would obtain relief only with respect to any lingering effects of the subsidies provided during the period examined by the panel. As Australia notes, such panel findings would essentially be declaratory in nature, because there would be no impact on subsidies granted or maintained after the panel made its finding. The complaining Member would have to initiate another dispute to obtain relief with respect to payments made after the period examined by the panel, even if those subsidies are

83. In sum, WTO panel and Appellate Body reports do not mention the concept of an overarching measure in evaluating whether undeclared measures taken to comply are in the scope of a compliance proceeding. Indeed, the EU's euphemistic references to its "overarching measure" requirement as "implicit" and an "{implicit} understanding",¹³⁰ underscore the very conspicuous absence of any discussion of such a test in previous panel and Appellate Body reports and confirm that this is a newly coined EU invention. Further, the EU cites no basis in the text of the covered Agreements for its "overarching measure" argument, nor does any such basis exist.¹³¹ And the existence of such a test would invite circumvention and frustrate the purpose of compliance proceedings under Article 21.5, in particular, and the dispute settlement process, generally. All considerations point to the same conclusion: no "overarching measure" requirement exists.

2. LA/MSF for the A350 XWB satisfies the requirements of the close nexus test.

84. The United States demonstrated in its first written submission that subsidies to the A350 XWB satisfied the "close nexus" test and, therefore, constituted undeclared measures taken to comply for purposes of this proceeding under Article 21.5 of the DSU. The EU raises various minor arguments intended to rebut the U.S. *prima facie* case regarding the nature, effects, and timing of LA/MSF for the A350 XWB. Such arguments are either squarely at odds with past panel and Appellate Body reports, irrelevant, or both.

85. In fact, the EU's first written submission confirms that, by its nature, and in light of its effects and timing, LA/MSF for the A350 XWB is well within this Panel's terms of reference. The EU's submission confirms that LA/MSF for the A350 XWB and the previous seven tranches of LA/MSF that EU member States have granted to Airbus since 1969¹³² have essentially the same nature. Each of these instances of LA/MSF is a loan, with the same core terms and conditions (levy-based, unsecured, success-dependent, and back-loaded). All of these loans have the same purpose, the development of new models of large commercial aircraft. The loans target

recurring payments or otherwise of the same nature as those found to have resulted in adverse effects. Even if the complaining Member were to succeed in its claims a second time, the subsidizing Member could provide further subsidies after the second panel's ruling, and the complaining Member would have to initiate yet another dispute, and this cycle could continue."); *cf.* Brazil Third Party Submission, para. 30 ("Brazil is of the view that an overly narrow approach to an Article 21.5 Panel's terms of reference would undermine the effectiveness of the dispute settlement process.").

¹³⁰ EU FWS, para. 69 ("The understanding that an undeclared 'measure' taken to comply' should be limited to measures that are all instances of the application of the *same overarching measure at issue* before the original and compliance panels is implicit from the findings of every Appellate Body report that has considered this issue, as well as from the manner in which the Appellate Body has applied the 'close nexus' test in those reports.").

¹³¹ In addition, the term "overarching measure" does not appear in the negotiating history of the SCM Agreement. See GATT Digital Library, <http://gatt.stanford.edu> (providing zero search results for the term "overarching measure").

¹³² US FWS, para. 353 (illustrating the successive tranches of LA/MSF since the 1960's).

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the same products: single-aisle aircraft, twin-aisle aircraft, or very large aircraft. And, Airbus received all of this financing on better-than-commercial terms.¹³³

86. In terms of effects, the EU's grant of fresh LA/MSF for the A350 XWB has the effect of detracting from the EU's compliance status, and undercutting any meaningful steps which – hypothetically and counterfactually – the EU might have taken to comply with the DSB's rulings on LA/MSF.¹³⁴

87. In terms of timing, all four LA/MSF contracts were executed after the Panel issued its interim report; disbursements pursuant to all four contracts occurred [[**HSBI**]];¹³⁵ and discussions between Airbus and the governments about the LA/MSF [***]. Therefore, there is no doubt that A350 XWB LA/MSF bears a close nexus with the recommendations and rulings of the DSB as they relate to prior LA/MSF, and the inconsequential measures taken to comply.

88. It also bears repeating that LA/MSF for the A350 XWB funded the development and production of aircraft in the twin-aisle segment of the market, where LA/MSF for previous Airbus models (A300, A310, A330, and A340) had already been found to confer subsidies that cause serious prejudice. Thus, the Panel should treat LA/MSF for the A350 XWB is properly treated as an undeclared measure within the scope of this proceeding,

- a. Similarities in the nature of LA/MSF for the A350 XWB and previous grants of LA/MSF because of similarities in their nature demonstrate their close relationship.*

89. In terms of nature, the United States explained in its first written submission that LA/MSF for the A350 XWB bears a close nexus to the recommendations and rulings in this dispute, and to the EU's declared measures taken to comply. In particular, the United States showed that LA/MSF for the A350 XWB and all previous LA/MSF grants had the same grantors and grantees (*i.e.*, Airbus and the four EU member States), the same core terms (*i.e.*, unsecured, success-dependent, levy-based, and back-loaded), and the same purpose (*i.e.*, financing for the

¹³³ Section IV.E demonstrates this point, as does the U.S. first written submission, paragraphs 137-138.

¹³⁴ Rather than address this point head-on, the EU reverts to its arguments on *adverse* effects (in the sense of the SCM Agreement), attempting to distort the close nexus test into a determination about serious prejudice in the sense of the SCM Agreement. Section III.B.2.b discusses this issue in more detail.

¹³⁵ Annexe 4 to French A350 Protocole (Exhibit EU(Art.13)-5(HSBI)); KfW A350 XWB Loan Agreement [***], Art. 3.2 (Exhibit EU(Art.13)-14(HSBI version)); Spanish A350 XWB Convenio de Colaboración, Art. 3 (Exhibit EU(Art.13)-29) (HSBI version); UK A350 XWB Loan Agreement, Art. 1.1 (Exhibit EU(Art.13)-30) (HSBI version).

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development of new models).¹³⁶ Furthermore, like LA/MSF for the A300, A310, A330, and A340, the subsidized product for LA/MSF for the A350 XWB is a twin-aisle aircraft.¹³⁷

90. The EU does not contest these facts about the commonality of the parties, the core terms, the purpose, and the subsidized product.¹³⁸ Rather, the EU disputes the existence of a close nexus in terms of the nature of the measures because: (i) the A350 XWB LA/MSF agreements were putatively “confirmed” at least two years after commercial launch, in December 2006;¹³⁹ (ii) there was putatively no intergovernmental agreement associated with LA/MSF for the A350 XWB;¹⁴⁰ and (iii) “{t}he US argument that the four A350 XWB financing agreements are of the same ‘nature’ as earlier financing agreements is tantamount to reasserting that these measures are accorded pursuant to an overarching MSF programme.”¹⁴¹ None of these arguments is valid.

91. With respect to point (i), the EU argues that confirmation of the A350 XWB financing agreements after the decision to launch the aircraft “is in contrast with member State financing agreements for other aircraft, where the agreements were generally entered into much closer in time to the launch of the related aircraft.”¹⁴² However, the only example given by the EU is the A380, where the first agreement was entered into a few months prior to the launch decision.¹⁴³ Of course, the remaining three A380 agreements were confirmed *after* the launch decision, just as was the case with the A350 XWB financing agreements. In fact, the EU member States frequently issued documents granting LA/MSF after (and in some cases, long after) the formal launch of the relevant aircraft:

¹³⁶ US FWS, para. 147.

¹³⁷ US FWS, para. 147 (stating, in the EU’s discussion of “nature,” that “none of the four A350XWB financing agreements was confirmed until 2009, more than two years *after* the decision to launch the aircraft (in December 2006).” Thus the EU argument “that identity, for example, of the product and country coverage impacted by the alleged measure taken to comply and the original measure at issue, **does not suffice** to establish a close nexus{ },” EU FWS, para. 82 (bolding and underlining in original), is irrelevant, since the United States has pointed to several other features that A350 XWB LA/MSF has in common with previous LA/MSF.

¹³⁸ Thus, the parties both agree that LA/MSF for the A350 XWB was granted by France, Spain, Germany, and the UK to Airbus, for the purpose of developing a new model of large civil aircraft, on unsecured, success-dependent, levy-based, and back-loaded terms. US FWS, paras. 142-147.

¹³⁹ EU FWS, para. 105.

¹⁴⁰ EU FWS, para. 106 (“{T}he United States has presented no evidence of intergovernmental agreements associated with the A350XWB development, or any associated financing agreements. In fact, there were no such agreements, either prior to launch or after launch.”).

¹⁴¹ EU FWS, para. 107.

¹⁴² EU FWS, para. 105.

¹⁴³ EU FWS, para. 105.

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LA/MSF Contracts Post-Dating Commercial Launch¹⁴⁴

LCA Program	Program Launch Date	LA/MSF Document	Document Date
A300	1969	French A300B LA/MSF contract	[***] ¹⁴⁵
A300	1969	Spanish A300 LA/MSF contract	[***] ¹⁴⁶
A310	1978	French A310 LA/MSF contract	Apr. 30, 1980 ¹⁴⁷
A320	1984	German A320 LA/MSF contract	[***] ¹⁴⁸
A320	1984	UK A320 LA/MSF contract	[***] ¹⁴⁹
A320	1984	French A320 LA/MSF contract	[***] ¹⁵⁰
A330/340	1987	Spanish A330/340 LA/MSF contract	[***] ¹⁵¹
A330/340	1987	UK A330/340 LA/MSF contract	[***] ¹⁵²
A330/340	1987	French A330/340 LA/MSF contract	[***] ¹⁵³
A330-200	1995	French A330-200 LA/MSF contract	[***] ¹⁵⁴
A340-500/600	1997	Spanish A340-500/600 LA/MSF contract	[***] ¹⁵⁵
A340-500/600	1997	French A340-500/600 LA/MSF contract	[***] ¹⁵⁶
A380	2000	Spanish A380 LA/MSF contract	[***] ¹⁵⁷
A380	2000	French A380 LA/MSF contract	[***] ¹⁵⁸
A380	2000	German A380 LA/MSF contact	[***] ¹⁵⁹

¹⁴⁴ This list may be non-exhaustive, since the EU has not accounted for all past LA/MSF contracts with Airbus in a transparent manner. *E.g.*, *EC – Large Civil Aircraft (Panel)*, note 2439 (pointing out that the EU refused to provide the German A330/340 contract, even though the Panel had specifically asked the EU for it).

¹⁴⁵ EU FWS, Exhibit List.

¹⁴⁶ EU FWS, Exhibit List.

¹⁴⁷ *See* 1997 Senate Report, p. 67 (indicating that the A310 agreement was notified (“*notifiée*”) on Apr. 30, 1980) (Exhibit USA-312).

¹⁴⁸ German A320 MSF Agreement, p. 12 (Exhibit USA-313(BCI)).

¹⁴⁹ EU FWS, p. 405.

¹⁵⁰ A320 Protocole, p. 6 (Exhibit USA-314(BCI)).

¹⁵¹ EU FWS, Exhibit List.

¹⁵² EU FWS, Exhibit List.

¹⁵³ EU FWS, Exhibit List.

¹⁵⁴ French A330-200 Launch Aid Convention and Protocole, p. 5 (Exhibit USA-315(BCI)).

¹⁵⁵ *Protocole d’Accord entre l’Etat & Airbus France relatif au programme Airbus A340-500 et A340-600*, p. 6 (Exhibit USA-316(BCI)).

¹⁵⁶ Spanish A340-500/600 Agreement, p. 1 (Exhibit USA-317(BCI)).

¹⁵⁷ Spain A380 LA/MSF Contract, p. 1 (Exhibit USA-88(BCI)).

¹⁵⁸ French A380 Launch Aid Protocol, p. 7 (Exhibit USA-318(BCI)).

¹⁵⁹ German A380 LA/MSF Contract, p. 22 (Exhibit USA-83(BCI)).

92. This table shows that the formal grant of LA/MSF for an aircraft often follows its launch. Therefore, the fact that the LA/MSF for agreements for the A350 XWB were signed after launch of that aircraft does not differentiate them in any meaningful way from past grants of LA/MSF. And, these past differences in timing did not prevent the conclusion that LA/MSF enabled Airbus to bring the aircraft to market when and as it did.

93. With respect to point (ii), the presence or absence of an explicit or written intergovernmental agreement is also an incidental feature of particular LA/MSF agreements, rather than an essential characteristic of the “nature” of all LA/MSF. Indeed, as the Panel noted during the original proceedings, not all previous grants of LA/MSF involved intergovernmental agreements:

No inter-governmental agreements were concluded in the context of the LA/MSF provided by the governments of France and Spain for the A330-200 and A340-500/600 projects (respectively launched in 1995 and 1997), nor in the context of the LA/MSF provided by the governments of France, Germany, Spain and the UK for the A380 (launched in 2000). Instead, for these projects it appears that the EC member States entered into separate national-level contracts, setting forth all relevant terms and conditions¹⁶⁰

94. With respect to point (iii), the EU asserts that the U.S. argument on the nature of LA/MSF for the A350 XWB is “tantamount to reasserting that those measures are accorded pursuant to an overarching MSF programme.”¹⁶¹ The EU’s attempted rebuttal fails for four reasons.

95. First, the close nexus test, in its many applications, has never inquired whether the measures are all part of an overarching program. Second, no prior Appellate Body or panel report, nor any logic advanced by the EU, suggests that the evidence necessary to satisfy the nature element of the close nexus test is equivalent to the evidence required to demonstrate a single, overarching program. In fact, it almost certainly is not. Similarities in nature may well be sufficient for the purpose of the close nexus test even if they do not indicate the existence of an overarching program. Third, the EU’s argument is internally inconsistent. Having first argued that an “overarching measure” test must precede analysis under the close nexus test, the EU cannot consistently argue that one of the elements of the close nexus test requires showing

¹⁶⁰ *EC – Large Civil Aircraft (Panel)*, para. 7.371.

¹⁶¹ EU FWS, para. 107. It should be noted that the existence of an unwritten LA/MSF program was left unresolved by the DSB in the original proceeding. The Appellate Body “found that the alleged unwritten LA/MSF Programme was not within the Panel’s terms of reference.” *EC – Large Civil Aircraft (AB)*, para. 796. Accordingly, the Appellate Body “declare{d} declare moot and of no legal effect the Panel’s finding, in paragraphs 7.579, 7.580, and 8.3(a)(iv) of the Panel Report, that the United States failed to establish the existence of an unwritten LA/MSF Programme measure constituting a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*.” *EC – Large Civil Aircraft (AB)*, para. 796.

the existence of an overarching program. Doing so would render the nature element of the close nexus test superfluous.

96. Fourth, and finally, the EU argument ignores the original Panel’s view that past instances of LA/MSF all share the same four core terms, despite not being instances of a single overarching program.¹⁶² Thus, it stands beyond doubt that all instances of LA/MSF share such a common “nature.” They are all forms of long-term, unsecured loans whose repayment is levy-based, success-dependent, and back-loaded. Indeed, the Panel found:

*Each LA/MSF loan we have found to constitute a specific subsidy takes the form of a long-term, unsecured loan at a below-market rate of interest with success-dependent and generally graduated repayment terms. The success-dependent nature of the loans means that Airbus’ repayment obligations arise only after it has successfully developed and begins selling the financed aircraft. . . . The nature of this financing shifts a portion of the commercial and financial risks of developing new models of LCA to the governments providing the LA/MSF. The extent of this risk-shifting varies with the proportion of the development costs being financed, which has decreased from 100 percent for the first Airbus LCA, the A300, in 1969, to 33 percent for the most recently financed aircraft, the A380, in 2000. Other features of LA/MSF that affect the degree of risk-shifting include the degree to which repayment is back-loaded and/or graduated and the assumptions concerning sales forecasts used as a basis for the repayment schedule. The questions addressed in the Dorman Report, and the parties’ arguments, focus on the mechanics of the risk-shifting element of LA/MSF-type financing.*¹⁶³

97. Thus, the Panel not only referred to all LA/MSF by the same common name (“LA/MSF”), but very clearly identified all LA/MSF as sharing a common nature or “type,” despite possible differences in some of the details. Indeed, the original Panel repeatedly referred to the very same core terms of LA/MSF (as opposed to the nature of any individual LA/MSF measure) that the United States has used to describe the nature of LA/MSF, and it effectively based its adverse effects findings on the impact of each of these individual LA/MSF measures, working together, over time.¹⁶⁴ Even the EU itself acknowledged during the original dispute that

¹⁶² *EC – Large Civil Aircraft (Panel)*, para. 7.579. On appeal, the Appellate Body declared this finding “moot and of no legal effect.” *EC – Large Civil Aircraft (AB)*, paras. 795-796.

¹⁶³ *EC – Large Civil Aircraft (Panel)*, para. 7.1881 (emphasis added).

¹⁶⁴ *E.g.*, *EC – Large Civil Aircraft (Panel)*, para 7.525 (“ . . . every time LA/MSF was provided in the past, it involved the four ‘core terms’ the United States identifies.”); *ibid.*, para. 7.1956 (“We do not agree with the European Communities’ view that differences in the structure, operation, and design of the different subsidies at issue in this dispute preclude their being considered in the aggregate in examining whether their effect is serious prejudice. We have concluded that LA/MSF was necessary to the launch of each successive model of Airbus LCA, and that the individual *and cumulative* effect of those measures was fundamental to Airbus’ ability to launch the particular LCA models it launched at the time that it did.”) (emphasis added); *ibid.*, para. 7.1984 (also referring to the Panel’s “conclusions concerning the cumulative effect of LA/MSF”).

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LA/MSF, by its very nature, reduces development and marketing risk.¹⁶⁵ These statements and the Panel’s approach to this effect, clearly confirm that all pre-A350 XWB LA/MSF had a common nature, despite the fact that the Panel did not find any single overarching measure or “MSF program.” A350 XWB LA/MSF has the same nature – as demonstrated by the United States in its first written submission – and therefore satisfies the “nature” element of the close nexus test.

98. Finally, the LA/MSF contracts now confirm the U.S. *prima facie* case, undermine the EU’s various attempted defenses, and underscore the particularly close relationship between the nature of A350 LA/MSF and previous grants of LA/MSF:

- The **French A350 XWB LA/MSF contract** [***]¹⁶⁶ The contract grants Airbus [***] in “*avances remboursables*” to develop and manufacture A350 XWB.¹⁶⁷ Disbursements were slated to commence in [[**HSBI**]].¹⁶⁸ However, repayments do not begin [***], which was slated to occur in [***].¹⁶⁹ This is because the contract provides [***] for repaying the LA/MSF: a levy due upon the delivery of each aircraft in the A350 XWB family.¹⁷⁰ The amount of the levy is defined in terms of [***].¹⁷¹ The contract anticipates full repayment of the LA/MSF after [***] deliveries, at which point the French government will have realized an annualized rate of return of [***].¹⁷²
- The “execution copy” of **the German LA/MSF contract** is dated [***].¹⁷³ It grants Airbus a total of [***] in LA/MSF to develop and manufacture the A350 XWB. [***].¹⁷⁴ However, repayments do not begin [***], because repayment is through per-aircraft

¹⁶⁵ EC Comments to the United States’ response to Panel Question 162, para. 222 (“Nature: Although MSF loans reduce development and market risk, the amount of this risk is limited. . . . MSF loans are not price contingent.”) (Exhibit USA-377); *see also EC – Large Civil Aircraft (AB)*, para. 905 (“Indeed, the European Communities expressly acknowledged before the Panel that the nature of LA/MSF is to reduce development and marketing risk.”).

¹⁶⁶ French A350XWB Protocole (Exhibit EU(Art.13)-1(BCI)); French A350XWB Convention (Exhibit EU(Art.13)-11(HSBI/BCI)).

¹⁶⁷ French A350XWB Protocole, Art. 3.1 (Exhibit EU(Art.13)-1(BCI)).

¹⁶⁸ Annex 4 to French A350XWB Protocol (Exhibit EU(Art.13)-5(HSBI)).

¹⁶⁹ *See* Annexe 3 to French A350 XWB Protocole (Exhibit EU(Art.13)-4(BCI)); EADS Press Release, *Improving Performance: EADS Reports Nine-Month Results 2011* (Nov. 10, 2011) (Exhibit USA-64).

¹⁷⁰ French A350XWB Protocole, Art. 6.1 (Exhibit EU(Art.13)-1(BCI)).

¹⁷¹ French A350XWB Protocole, Art. 6.3 (Exhibit EU(Art.13)-1(BCI)). [***] French A350XWB Protocole, Art. 6.3 (Exhibit EU(Art.13)-1(BCI)).

¹⁷² French A350XWB Protocole, Art. 6.3 (Exhibit EU(Art.13)-1(BCI)). [***] French A350XWB Protocole, Art. 6.5 (Exhibit EU(Art.13)-1(BCI)).

¹⁷³ KfW A350 XWB Loan Agreement KfW A350 XWB Loan Agreement, p. 1 (Exhibit EU(Art.13)-14(HSBI/BCI)).

¹⁷⁴ KfW A350 XWB Loan Agreement, Art. 3.2 (Exhibit EU(Art.13)-14(HSBI/BCI)).

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levies, which are anticipated to achieve repayment of the loan after [***] deliveries.¹⁷⁵
The effective interest rate is set at [***¹⁷⁶***¹⁷⁷***]¹⁷⁸

- The **Spanish LA/MSF contract** – issued pursuant to the Spanish Royal Decree 1666/2009¹⁷⁹ – is [***]¹⁸⁰ The contract grants Airbus a total of €32,228,670 to develop and manufacture the A350 XWB, starting with a payment of €41,493,300 in 2009 [[HSBI]].¹⁸¹ However, repayments do not begin [***], because the contract provides [***] for repayment of the LA/MSF: a per-aircraft levy for each A350 XWB aircraft delivered, [***].¹⁸² The contract provides that the effective interest rate for this LA/MSF is [***].¹⁸³
 - The **UK LA/MSF contract** is dated [***], and it provides [***] in LA/MSF to Airbus for developing the A350 XWB.¹⁸⁴ Disbursements began in [[HSBI]], in the amount of [[HSBI]].¹⁸⁵ The contract provides for Airbus to repay the LA/MSF principal [***] per-aircraft levies of [***], starting with the [***] delivery.¹⁸⁶ The contract also charges Airbus interest on outstanding principal amounts, at a rate of [***¹⁸⁷***¹⁸⁸***]¹⁸⁹
99. Therefore, as the United States previously demonstrated on the basis of publicly available information, French, German, Spanish, and UK LA/MSF for the A350 XWB are unsecured, success-dependent, and levy-based, and back-loaded. They are unsecured, because “the scheduled repayments are not secured by any lien on Airbus assets nor are they guaranteed by

¹⁷⁵ KfW A350 XWB Loan Agreement, Arts. 6.1, 6.3 (Exhibit EU(Art.13)-14(HSBI/BCI)). [***].

¹⁷⁶ KfW A350 XWB Loan Agreement, Art. 5.3 (Exhibit EU(Art.13)-14(HSBI/BCI)). [***]. *Ibid.*, Art. 4.1.

¹⁷⁷ KfW A350 XWB Loan Agreement, Art. 5.4 (Exhibit EU(Art.13)-14(HSBI/BCI)).

¹⁷⁸ KfW A350 XWB Loan Agreement, Art. 8.3 (Exhibit EU(Art.13)-14(HSBI/BCI)).

¹⁷⁹ *Real Decreto 1666/2009, de 6 de noviembre*, BOLETIN OFICIAL DEL ESTADO DE ESPANA, Num. 270, Sec. 1 (Nov. 9, 2009) (Exhibit USA-46).

¹⁸⁰ Spanish A350 XWB *Convenio de Colaboración*, p. 1 (Exhibit EU(Art.13)-29(HSBI/BCI)).

¹⁸¹ Spanish A350 XWB *Convenio de Colaboración*, Art. 3 (Exhibit EU(Art.13)-29(HSBI/BCI)).

¹⁸² Spanish A350 XWB *Convenio de Colaboración*, Art. 9 (Exhibit EU(Art.13)-29(HSBI/BCI)). [***] *Ibid.*, Art. 9. [***] *Ibid.*, Art. 11.

¹⁸³ Spanish A350 XWB *Convenio de Colaboración*, Art. 9 (Exhibit EU(Art.13)-29(HSBI/BCI)).

¹⁸⁴ UK A350 Loan Agreement, Art. 2.1 (Exhibit EU(Art.13)-30(HSBI/BCI)).

¹⁸⁵ Annex 4 to French A350XWB Protocol (Exhibit EU(Art.13)-5(HSBI)); Amendment 2 to UK Repayable Investment Agreement in Relation to the Airbus A350 XWB [***] (Exhibit EU(Art.13)-32(HSBI/BCI)).

¹⁸⁶ UK A350 XWB Loan Agreement, Arts. 5.1, 5.3, p. 5 (Exhibit EU(Art.13)-30(HSBI/BCI)).

¹⁸⁷ UK A350 XWB Loan Agreement, Art. 7.1, pp. 4-5 (Exhibit EU(Art.13)-30(HSBI/BCI)).

¹⁸⁸ [***] UK A350 XWB Loan Agreement, Art. 17.13 (Exhibit EU(Art.13)-30(HSBI/BCI)) (emphasis added).

¹⁸⁹ [***]

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any third party.”¹⁹⁰ They are success-dependent, because “Airbus’ obligation to fully repay the loans provided under the challenged LA/MSF measures is entirely dependent upon the success of the particular LCA project{ },” *i.e.*, the A350 XWB project.¹⁹¹ LA/MSF for the A350 XWB is levy-based, because “repayments are made in the form of per-aircraft levies and follow a pre-established repayment schedule.” [***]¹⁹² Finally, LA/MSF for the A350 XWB is back-loaded, because disbursements occur before deliveries commence, and the corresponding levy-based repayment becomes due. Consequently, like all LA/MSF before it, A350 XWB LA/MSF “initially remove{s}, and then minimize{s}, the debt service burden on Airbus in the early years of its LCA programmes when costs are still high and revenues from first deliveries – typically highly discounted – are relatively low. In other words, the effect of back-loaded repayment terms {in combination with the other terms of LA/MSF} is to delay repayment to a moment in the LCA business cycle that best suits Airbus’ competitive needs.”¹⁹³

100. Furthermore, [[**HSBI**]].¹⁹⁴

101. In light of this information, there can be no serious dispute as to whether the nature (or the effects and timing) of LA/MSF for the A350 XWB confirm the existence of a close nexus.

b. LA/MSF for the A350 XWB has a close relationship with previous grants of LA/MSF because they all have similar effects.

102. In its first written submission, the United States explained that LA/MSF for the A350 XWB satisfies the effects element of the close nexus test because, if the EU had taken any meaningful steps to comply with the DSB recommendations and rulings on LA/MSF, which it has not, LA/MSF for the A350 XWB would undermine such steps. For example, if Airbus had repaid some LA/MSF subsidies to the EU beyond what it already owed under the subsidized terms of the LA/MSF contracts, the EU’s conferral of fresh LA/MSF for the A350 XWB, with the same core terms and conditions as before, would undermine any effects of the repayment¹⁹⁵

103. The EU does not directly deny that LA/MSF for the A350 XWB has the effect of undermining the EU’s compliance with the recommendations and rulings of the DSB in this dispute. Rather, the EU constructs the following syllogism: (1) the United States views “adverse effects” to be the relevant “effects” for purposes of the close nexus test;¹⁹⁶ (2) “the United States has not demonstrated that any of the four separate A350 XWB financing

¹⁹⁰ *EC – Large Civil Aircraft (Panel)*, para. 7.375.

¹⁹¹ *EC – Large Civil Aircraft (Panel)*, para. 7.375.

¹⁹² *EC – Large Civil Aircraft (Panel)*, para. 7.374.

¹⁹³ *EC – Large Civil Aircraft (Panel)*, para. 7.331.

¹⁹⁴ [[**HSBI**]].

¹⁹⁵ US FWS, paras. 148-152.

¹⁹⁶ EU FWS, para. 109.

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agreements constitute a subsidy, nor that they cause adverse effects”; therefore, “the A350XWB financing agreements do not satisfy the ‘effects’ aspect of the close nexus test.”¹⁹⁷

104. As an initial matter, the United States has more than amply demonstrated that LA/MSF for the A350 XWB confers subsidies that cause adverse effects.¹⁹⁸ Specifically, the grants of LA/MSF allowed airbus to launch a new twin-aisle aircraft that would otherwise have been impossible to launch when and as Airbus did.

105. Even putting that aside, the EU’s argument fails because its other premises are flatly incorrect. The United States has never taken the position that the “effects” examined in the close nexus test are the same as the “adverse effects” described in Articles 5 and 6 of the SCM Agreement.¹⁹⁹ There is obviously some overlap, as both address the “effects” of a measure. However, the close nexus test is a broader inquiry, requiring a consideration of all of the effects of a group of measures to identify commonalities and differences. The adverse effects analysis evaluates the effects subsidies have on the recipient and on the complaining Member’s products to discern whether the result is one of the specified indicators of adverse effects. Thus, there is a distinction between factual and economic conclusions regarding the “effects” of a subsidy on the market and the legal conclusion as to whether they rise to the level of “adverse effects.” The effect of the subsidy in the market may be one factor to consider in the close nexus test, while conclusions as to its “adverse effects” for purposes of Articles 5 and 6 are not. Thus, in the effects analysis in the first written submission, the United States discussed how LA/MSF for the A350 XWB increased the funds available to Airbus and enabled launch of a new aircraft²⁰⁰ – both economic effects that are not in and of themselves adverse effects.²⁰¹

¹⁹⁷ EU FWS, para. 109.

¹⁹⁸ As discussed in Section VI.D.4, without LA/MSF to the A350 XWB, Airbus would have been unable to proceed with the A350 XWB program as and when it did, and therefore the U.S. LCA industry’s sales and market share would have been significantly higher than they have in fact been. Moreover, the [[**HSBI**]].

¹⁹⁹ Cf. EU FWS, para. 109, with US FWS, para. 148 (“In approaching the “effects” element of the close nexus analysis, the Appellate Body has examined whether the measure’s effects undermine the respondent’s declared compliance measures. This is the case with LA/MSF for the A350 XWB. Its entire purpose is to allow Airbus to launch a modern airplane Thus, while the United States believes that the EU compliance steps achieved nothing, even if they did, LA/MSF for the A350 XWB would reverse any movement toward compliance.”).

²⁰⁰ EU FWS, paras. 148 and 151.

²⁰¹ The United States also noted that one relevant question under the “effects” prong of the close nexus test is “whether the alleged undeclared measure taken to comply has the effect of undermining compliance (if any) that is achieved through the declared measures taken to comply.” US FWS, paras. 150 and 152. At points in its submission, the EU agrees with this view. EU FWS, para. 83. Clearly, such an evaluation could involve examining whether the undeclared measure would prevent the removal of adverse effects, which would require an inquiry into the adverse effects of the undeclared measure.

c. The timing of LA/MSF for the A350 XWB demonstrates its close relationship with previous grants of LA/MSF.

106. In its first written submission, the United States explained that all aspects of LA/MSF for the A350 XWB – including the gradual evolution of member State commitments to confer A350 XWB LA/MSF, the finalization of these commitments, and the consequent disbursements to Airbus – were closely connected in terms of timing with the issuance and adoption of the recommendations and rulings in this dispute (and with certain of the EU’s very limited declared measures taken to comply).²⁰² Therefore, the U.S. A350 XWB LA/MSF claims satisfy the timing element of the close nexus test.

107. The EU does not contest any of the facts underlying the U.S. analysis of timing.²⁰³ Rather, the EU limits its entire response regarding timing to three sentences, arguing that the timing element is not satisfied because the terms and conditions of the A350 XWB financing agreements were agreed to approximately [***] *before* the DSB adopted its recommendations and rulings (on 1 June 2011). This argument is inconsistent with the facts and the Appellate Body’s reasoning in prior disputes.

108. The A350 XWB LA/MSF contracts were executed [***].²⁰⁴ Discussions about LA/MSF, including the exact form it would take, were occurring during the end-stages of the panel process. Indeed, [[**HSBI**]].²⁰⁵ Thus LA/MSF for the A350 XWB grew from a deliberative process that took place in the shadow of the DSB’s future rulings and recommendations.

109. Furthermore, disbursements pursuant to all four contracts occurred [[**HSBI**]].²⁰⁶ Therefore, the relevant date for the timing analysis – whether considered to be the conclusion of the contract or the actual disbursement of LA/MSF to Airbus – occurred after the EU was on notice that LA/MSF for the A350 XWB would be WTO-inconsistent.

110. In any event, even if the temporal sequence of events is divorced from their context, as is the case in the EU’s cursory timing analysis, Appellate Body jurisprudence makes it clear that

²⁰² US FWS, paras. 153-154; *see also ibid.*, para. 118.

²⁰³ EU FWS, para. 103.

²⁰⁴ *EC – Large Civil Aircraft (Panel)*, para. 1.14; French A350XWB Protocole (Exhibit EU(Art.13)-1(BCI)); French A350XWB Convention (Exhibit (Art.13)-11(HSBI/BCI)); KfW A350 XWB Loan Agreement, p. 1 (Exhibit (Art.13)-14(HSBI/BCI)); Spanish A350 XWB Convenio de Colaboración, p. 1 (Exhibit (Art.13)-29(HSBI/BCI)); UK A350 XWB Loan Agreement (Exhibit (Art.13)-30(HSBI/BCI)). [***] *See* French A350XWB Convention (Exhibit (Art.13)-11(HSBI/BCI)); Annex 2 to the French A350XWB Convention (Exhibit (Art.13)-13(BCI)).

²⁰⁵ [[**HSBI**]].

²⁰⁶ Annexe 4 to French A350 Protocole (Exhibit EU(Art.13)-5(HSBI)); KfW A350 XWB Loan Agreement, Art. 3.2 (Exhibit EU(Art.13)-14(HSBI version)); Spanish A350 XWB Convenio de Colaboración, Art. 3 (Exhibit EU(Art.13)-29(HSBI version)); UK A350 XWB Loan Agreement, Art. 1.1 (Exhibit EU(Art.13)-30(HSBI version)).

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a close nexus may exist with respect to measures adopted one to two years before the DSB's adoption of recommendations and rulings. In *US – Zeroing (21.5 – EC)*, which the United States cited in its first written submission²⁰⁷, the Appellate Body affirmed that a close nexus existed where the undeclared measures taken to comply were imposed 1-2 years *before* DSB adoption of recommendations and rulings – [***].²⁰⁸

111. In fact, the Appellate Body reached this conclusion at the urging of the EU, which argued at that time: “The Appellate Body already found {in *US – Softwood Lumber IV (21.5)*} that the fact that a measure *predates* the adoption of the DSB report in question cannot exclude *per se* such a measure from the scope of compliance proceedings.”²⁰⁹ The EU also argued: “{I}n *US – Upland Cotton (21.5)* the Appellate Body observed that where *a violation was found to exist* (in particular, a violation of the *SCM Agreement* arising from a subsidy which had caused serious prejudice) and the Member in question *continues violating the same relevant provisions* of the covered agreements . . . then there is a particularly *close relationship* between the new measure subject to compliance proceedings and the DSB recommendations and rulings in the original dispute.”²¹⁰

112. Thus, despite ignoring previous Appellate Body reports and the U.S. discussion with reference to those reports, the EU certainly is aware that those reports contradict its argument (and reinforce the U.S. argument) with respect to the timing element of the close nexus test. Therefore, the EU failed to rebut to any degree the U.S. *prima facie* demonstration that its A350 XWB LA/MSF claims satisfy the timing element of the close nexus test. And even if the timing of A350 XWB LA/MSF did not *affirmatively support* finding a close nexus – which, again, has not been shown here – “the fact that the {A350 XWB LA/MSF subsidies} pre-date the adoption of the recommendations and rulings of the DSB is not sufficient to sever the pervasive links that {} exist, in terms of *nature* and *effects*, between such {subsidies}, the recommendations and rulings of the DSB, and the declared measures ‘taken to comply’.”²¹¹

²⁰⁷ US FWS, notes 224-225.

²⁰⁸ *US – Zeroing (EC – 21.5) (AB)*, paras. 223-227. In particular, the Appellate Body found that a likelihood-of-dumping determination in the sunset review of the antidumping order on Stainless Steel Strip and Coils from Germany fell within the scope of compliance proceedings, even though this determination was issued on November 22, 2004, and DSB adoption of the merits reports did not occur until May 9, 2006. *Ibid.*, paras. 234-235 (“The fact that the likelihood-of-dumping determinations in the sunset reviews listed above pre-date the adoption of the recommendations and rulings of the DSB is not sufficient to sever the pervasive links that we have found to exist, in terms of *nature* and *effects*, between such sunset reviews, the recommendations and rulings of the DSB, and the declared measures ‘taken to comply’.”); see also *Stainless Steel Sheet and Strip in Coils From Germany; Final Results of the Expedited Sunset review of the Antidumping Duty Order*, 69 Fed. Reg. 67,896 (Dep’t Commerce Nov. 22, 2004). (Exhibit USA-385).

²⁰⁹ *US – Zeroing (21.5 – EC) (AB)*, EU Appellant Submission (Feb. 20, 2009), para. 91 (emphasis original).

²¹⁰ *US – Zeroing (21.5 – EC) (AB)*, EU Appellant Submission (Feb. 20, 2009), para. 92 (emphasis original).

²¹¹ *US – Zeroing (21.5 – EC) (AB)*, para. 234.

3. Regardless of whether “replacement” and “circumvention” are distinct bases for inclusion of undeclared measures taken to comply in a compliance proceeding, they all lead to the same conclusion: A350 XWB LA/MSF is properly before this Panel.

113. The U.S. first written submission presented three legal bases for including LA/MSF for the A350 XWB in the scope of this compliance proceeding: its close nexus with the recommendations and rulings of the DSB, its replacement of previous LA/MSF, and its circumvention of the EU’s obligation under Article 7.8.²¹² The EU responds by arguing that “although {replacement and circumvention} may be relevant considerations for the ‘close nexus’ test, neither of these elements constitutes a stand-alone test for jurisdiction.”²¹³

114. The EU’s argument is beside the point. Whether there is a total of three, two, or one tests, they all lead to the same conclusion: LA/MSF for the A350 XWB is in the scope of this proceeding. Indeed, the EU does not provide any independent reason, aside from those discussed in relation to the close nexus test, that LA/MSF for the A350 XWB is not properly before this panel as a replacement measure or a measure that would circumvent the EU’s compliance obligation. Thus, it has failed, as a substantive matter, to rebut the U.S. demonstration that these tests bring LA/MSF for the A350 XWB within the scope of this proceeding. As a legal matter, the EU denies that a measure’s status as a replacement measure or circumvention measure is a separate consideration in determining the terms of reference of a compliance panel, but this effort fails.

a. Independent of the results of the close nexus test, a measure replacing a WTO-inconsistent measure is within the terms of reference of a compliance panel.

115. Whereas the close nexus test elaborates on the text of Article 21.5 of the DSU, the replacement test has additional support in the text of the SCM Agreement, read in conjunction with Article 21.5, to which it relates. In *US – Upland Cotton (21.5)*, the Appellate Body pointed out that Article 7.8 of the SCM Agreement refers to a Member “‘granting or maintaining such a subsidy’ { },”²¹⁴ and then found:

116. The verb “maintain” suggests to us, that the obligation set forth in Article 7.8 is of a continuous nature, extending beyond subsidies granted in the past. . . .

117. { . . . } In *US – FSC (Article 21.5 – EC II)*, the Appellate Body stated that, “if, in an Article 21.5 proceeding, a panel finds that the measure taken to comply with the Article 4.7 recommendation made in the original proceedings does not achieve *full* withdrawal of the

²¹² US FWS, Sections IV.D-E.

²¹³ EU FWS, para. 85.

²¹⁴ *US – Upland Cotton (21.5) (AB)*, para. 237 (quoting Art. 7.8 of the SCM Agreement) (emphasis added).

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prohibited subsidy – either because it leaves the entirety or part of the original prohibited subsidy in place, or because it replaces that subsidy with another subsidy prohibited under the *SCM Agreement* – the implementing Member continues to be under the obligation to achieve full withdrawal of the subsidy”. Similarly, a Member would not comply with the obligation in Article 7.8 to withdraw the subsidy if it leaves an actionable subsidy in place, either entirely or partially, or replaces that subsidy with another actionable subsidy.²¹⁵

Thus the replacement test finds additional support in the term “maintain” in Article 7.8 of the *SCM Agreement*.

118. The Appellate Body’s reasoning in *US – Upland Cotton (21.5)* is also significant. Although it had used the close nexus test, grounded in Article 21.5 of the DSU, in previous appeals, it framed the analysis in different terms, based on Article 7.8 of the *SCM Agreement*, for evaluating whether to include undeclared measures taken to comply in the terms of reference.

119. In any case, as stated above, given that LA/MSF for the A350 XWB satisfies the close nexus test, it is ultimately beside the point whether “replacement” constitutes a stand-alone basis for inclusion in a compliance proceeding.

b. Independent of the results of the close nexus test, a measure that circumvents the recommendations and rulings of the DSB is within the terms of reference of a compliance panel.

120. Prior Appellate Body reports also confirm that circumvention is a separate and distinct basis for assessing the terms of reference. A measure that would allow a Member to circumvent the recommendations and rulings of the DSB may also fall within the scope of Article 21.5 proceedings, regardless of its nature and/or timing.

121. Specifically, in *US – Softwood Lumber CVDs (21.5)*, the Appellate Body found that “there are some limits on the claims that can be raised in Article 21.5 proceedings. Yet these limits should not allow circumvention by Members by allowing them to comply through one measure, while at the same time, negating compliance through another.”²¹⁶ Indeed, the EU’s own statements in the *US – Zeroing (21.5 – EC)* compliance dispute confirm that “the ‘inherent limits’ of the claims that may be submitted to an Article 21.5 panel should not allow circumvention of a WTO Member’s implementation obligations, and should not undermine effective resolution of disputes.”²¹⁷ By this logic, the limits on Article 21.5 proceedings should not allow the EU to negate compliance through new LA/MSF for the A350 XWB, as the United States previously explained.²¹⁸ However, as the responding party, the EU argues that circumvention is merely a consideration to be taken into account with respect to the “effects”

²¹⁵ *US – Upland Cotton (21.5) (AB)*, para. 238.

²¹⁶ *US – Softwood Lumber CVDs (21.5) (AB)*, para. 71.

²¹⁷ *US – Zeroing (21.5 – EC) (AB)*, para. 24; *see also* US FWS, para. 164 (citing the EU’s argument).

²¹⁸ US FWS, Section IV.E.

element of the close nexus test.²¹⁹ The EU fails, however, to identify any basis for its position in the text of the agreements or to explain how this interpretation can be squared with the Appellate Body’s specific findings in *Softwood Lumber CVDs (21.5)*, as well as its own arguments in *Zeroing (21.5 – EC)*.

122. In fact, [[**HSBI**]]. Accordingly, these grants of LA/MSF are circumvention measures, which should not evade review by this compliance panel. In any case, as mentioned above, given that LA/MSF for the A350 XWB satisfies the requirements of the close nexus test, it is ultimately beside the point whether “circumvention” is a stand-alone basis for inclusion in a compliance proceeding.

C. This Panel’s Terms of Reference Include U.S. Claims That LA/MSF For The A380 Constitutes Prohibited Subsidies Under Articles 3.1(a) and (b).

123. The EU asserts that the Panel’s terms of reference exclude U.S. claims that LA/MSF for the A380 is a prohibited subsidy under both Articles 3.1(a) and (b) of the SCM Agreement. Both, however, are directly contradicted by either prior findings of the Appellate Body (in the case of the Article 3.1(a) claim) or the facts (in the case of the Article 3.1(b) claim). The United States discusses these points below.

1. This Panel’s terms of reference include the U.S. claim against A380 LA/MSF under Article 3.1(a) of the SCM Agreement.

124. The U.S. raised claims under Article 3.1(a) of the SCM Agreement against LA/MSF for the A380 during the original proceeding, but the Appellate Body ultimately did not resolve them.²²⁰ It is well established that a compliance panel may consider claims in this procedural posture.²²¹ Therefore, the EU’s argument that these claims fall outside the Panel’s terms of reference²²² should be rejected.

125. During the original proceeding in this dispute, the Panel found that German, UK, and Spanish LA/MSF for the A380 are export-contingent subsidies inconsistent with Article 3.1(a), but that the United States had not demonstrated that French LA/MSF for the A380 was as well.²²³ The Appellate Body agreed with the Panel’s assessment that the Airbus governments

²¹⁹ EU FWS, para. 90 (“a consideration of circumvention is part of the ‘effects’ element of the ‘close nexus’ test, rather than a separate test itself.”).

²²⁰ *EC – Large Civil Aircraft (AB)*, para. 1100 (“{T}here is not a sufficient evidentiary basis on the record, nor are there relevant factual findings by the Panel, that would enable us to conduct an examination regarding the hypothetical performance of a profit-maximizing firm in the absence of the granting of the subsidy. Hence, in the absence of sufficient factual findings by the Panel and undisputed facts on the record, we are not in a position to apply the test enunciated in section C above and complete the analysis.”).

²²¹ *US – Upland Cotton (21.5) (AB)*, para. 210; *US – OCTG Sunset Reviews (21.5) (AB)*, paras. 149-150.

²²² EU FWS, para. 119.

²²³ *EC – Large Civil Aircraft (Panel)*, paras. 7.685, 7.690.

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“anticipated” exportation, but reversed the Panel’s findings as to the requisite “contingency” or “tie.”²²⁴ However, because the Appellate Body did not have before it facts “regarding the hypothetical performance of a profit-maximizing firm in the absence of the granting of the subsidy{ },” it determined that it was unable to complete the analysis.²²⁵ Thus the issue of A380 LA/MSF’s status as an export-contingent subsidy inconsistent with Article 3.1(a) was litigated during the original proceeding, but left unresolved.²²⁶

126. In this compliance proceeding, the United States has renewed its Article 3.1(a) challenge against A380 LA/MSF.²²⁷ The EU responds by challenging the inclusion of the U.S. claim within the compliance Panel’s terms of reference.²²⁸ According to the EU, since there was no DSB-adopted recommendation or ruling, the EU has no compliance obligations with respect to A380 LA/MSF as a prohibited export subsidy, but only as a WTO-inconsistent actionable subsidy.²²⁹ The EU draws upon *EC – Bed Linen (21.5) (AB)* as support for what it describes as “[t]he principle that one should not ordinarily be allowed to raise a claim against a measure in a compliance proceeding that it previously argued unsuccessfully during the original proceedings (*i.e.*, where there were no relevant recommendations and rulings).”²³⁰ Therefore, according to the EU, A380 LA/MSF as a prohibited export subsidy falls outside the scope of this compliance panel – even though the claim was ultimately left unresolved.²³¹

²²⁴ *EC – Large Civil Aircraft (AB)*, para. 1091.

²²⁵ *EC – Large Civil Aircraft (AB)*, para. 1100 (“{T}here is not a sufficient evidentiary basis (on the record, nor are there relevant factual findings by the Panel, that would enable us to conduct an examination regarding the hypothetical performance of a profit-maximizing firm in the absence of the granting of the subsidy. Hence, in the absence of sufficient factual findings by the Panel and undisputed facts on the record, we are not in a position to apply the test enunciated in section C above and complete the analysis.”).

²²⁶ The Appellate Body also reversed the Panel’s finding that French A380 LA/MSF was not a subsidy. *See EC – Large Civil Aircraft (AB)*, para. 1083.

²²⁷ US FWS, Part V.A.

²²⁸ EU FWS, Part III.B.1.

²²⁹ EU FWS, paras. 118-119 (“{F}or an original measure that was previously challenged before a panel, a responding Member is charged with adopting ‘measures taken to comply’ only if compelled to do so by ‘recommendations and rulings’ of the DSB. In other words, a responding Member is not under any obligation to comply with recommendations and rulings of the DSB that do not exist, but which the complaining Member wishes did exist.”).

²³⁰ EU FWS, para. 125. This so-called “principle” is invalid. In *US – OCTG Sunset Reviews (21.5) (AB)*, the Appellate Body recognized that the mere absence of DSB-adopted recommendations and rulings with respect to a particular measure does not preclude raising such claims before a compliance panel, even if such claims could have been raised during the merits phase. *US – OCTG Sunset Reviews (21.5) (AB)*, paras. 149-150; *see also US – Zeroing (21.5 – EC) (AB)*, para. 424 (“We disagree with the notion that a Member may be entitled to assume in Article 21.5 proceedings that an aspect of a measure that was not challenged in the original proceedings is consistent with that Member’s obligations under the covered agreements.”).

²³¹ The EU also bases its argument in part on the following incorrect presumption:

127. The findings of the Appellate Body in *US – Upland Cotton (21.5)* contradict this EU argument.²³² The current fact pattern, moreover, is different from the one addressed by the Appellate Body in *EC – Bed Linen*, and does not raise the same issue that was involved there, as the United States does not ask the Panel to reopen an issue that was previously resolved.

128. In *US – Upland Cotton (21.5)*, Brazil challenged an export subsidy program known as “GSM 102” as it was used for certain agricultural products. The original panel disposed of the issue, but on appeal, the Appellate Body left Brazil’s claim for these products unresolved because it was unable to complete the analysis.²³³ During the compliance phase, Brazil challenged the GSM 102 program again, on the same grounds. The compliance panel found that Brazil’s renewed claim fell within its terms of reference, and the Appellate Body agreed:

As the Appellate Body found in *EC – Bed Linen (Article 21.5 – India)*, a complainant who had failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings. . . . The situation before us is different. Brazil’s claims against export credit guarantees provided under the GSM 102 programme to pig meat and poultry meat were not resolved on the merits in the original proceedings, because the Appellate Body was unable to complete the analysis as a result of there being insufficient factual findings or undisputed facts on the record. . . . Brazil is not unfairly getting a “second chance” to make a case that it failed to make out in the original

Having asserted that there are no ‘measures taken to comply’ with respect to the recommendations and rulings related to the four A380 financing agreements, the United States’ implicit position appears to be that the compliance Panel has jurisdiction over its prohibited subsidy claims related to A380 financing agreements pursuant to its authority under Article 21.5 to consider a ‘disagreement as to the *existence* ... of measures taken to comply with the recommendations and rulings’.

EU FWS, para. 117. This statement (which has no citations) imputes a view to the United States that the United States never expressed. It is also wrong – the dispute between the United States and the EU turns both on the question of whether the EU has taken any affirmative measures to comply, which it has not, and to the extent the EU has taken such measures, whether they are consistent with the DSB’s recommendations and rulings in the original proceedings, and with obligations under the WTO agreements more broadly.

²³² In addition, in other appeals, the Appellate Body has confirmed that certain aspects of a measure may fall within the scope of compliance proceedings, even if the DSB did not issue any rulings or recommendations specific to that aspect of the measure. *E.g.*, *US – OCTG Sunset Reviews (21.5) (AB)*, paras. 149-150 (rejecting an argument that there were no compliance obligations with respect to an aspect of a WTO-inconsistent measure, merely because the DSB had failed to make findings on that specific aspect of the measure).

²³³ *US – Upland Cotton (21.5) (AB)*, para. 203 (“{T}he original panel found that Brazil had not established that export credit guarantees for pig meat and poultry meat resulted in circumvention of the United States’ export subsidy commitments. The Appellate Body reversed this finding, but was unable to complete the analysis of Brazil’s claims. Thus, although Brazil’s claims were extensively argued, there were no findings of consistency or inconsistency specifically addressed to the export credit guarantees for pig meat and poultry meat that were part of the DSB’s recommendations and rulings in the original proceedings.”).

proceedings such that the finality of the DSB’s recommendations and rulings would be compromised.²³⁴

This same reasoning applies in this case. As the Appellate Body reasoned in *US – Upland Cotton (21.5)*, when a claim is litigated but left unresolved by the Appellate Body during the original proceeding, the same claim is not precluded during the compliance proceeding.

129. *EC – Bed Linen (21.5)*, which the EU relies on, is inapposite in this regard, because that dispute involved a situation where – as the Appellate Body described it in *US – Upland Cotton (21.5)* – the “complainant . . . had failed to make out a *prima facie* case.”²³⁵ The Appellate Body clearly distinguished that situation from one where an issue was before the original panel and/or Appellate Body, but was left unresolved because “the Appellate Body was unable to complete the analysis as a result of there being insufficient factual findings or undisputed facts on the record.”²³⁶ It is this latter situation that applies here.

130. Indeed, the EU’s terms of reference argument – if accepted – would undermine the purpose and effect of compliance proceedings. As the Appellate Body has recognized:

“the aim of Article 21.5 of the DSU is to promote the prompt compliance with DSB recommendations and rulings and the consistency of ‘measures taken to comply’ with the covered agreements by making it *unnecessary for a complaining Member to begin new proceedings and by making efficient use of the original panelists and their relevant experience.*”²³⁷

131. Yet, according to the EU’s argument, any legal claims left unresolved on appeal during the merits phase are immune from challenge during the compliance phase. This result would, to quote the Appellate Body, make it “{ } necessary for a complaining Member to begin new proceedings” and make it impossible to “mak{e} efficient use of the original panelists and their relevant experience.”

2. This Panel’s terms of reference include the U.S. claim against A380 LA/MSF under Article 3.1(b) of the SCM Agreement.

132. The EU also argues that the U.S. claim against LA/MSF for the A380 under Article 3.1(b) falls outside of the terms of reference of this compliance Panel. Those arguments equally fail.

²³⁴ *US – Upland Cotton (21.5) (AB)*, para. 210.

²³⁵ *US – Upland Cotton (21.5) (AB)*, para. 210.

²³⁶ *US – Upland Cotton (21.5) (AB)*, para. 210.

²³⁷ *US – Upland Cotton (21.5) (AB)*, para. 212 (*quoting US – OCTG Sunset Reviews (21.5) (AB)*) (emphasis added).

133. In general, the compliance phase precludes claims against unchanged measures if either (i) they could have been litigated before the original Panel, but were not;²³⁸ or (ii) they were litigated and resolved during the original proceedings.²³⁹ The EU argues that the U.S. claim is precluded in this compliance proceeding because the United States chose not to pursue the claim in the original proceeding, subsequently *did* include the claim in a separate 2006 panel request, and then allowed the authority for the establishment of that second panel to lapse.²⁴⁰ According to the EU, including the U.S. claim in this compliance proceeding would allow the United States “to nullify the effect of that lapse for this dispute, and to override the DSB’s authority.”²⁴¹ The EU provides no support for its contention that the lapse of DS347 affects the reference terms of this compliance proceeding in any way.

134. Indeed, it does not. The United States does not dispute that it *can* bring a claim under Article 3.1(b) in a separate proceeding. But it is not *required* to. In fact, doing so would undermine the very aim of the Article 21.5 compliance process, which is “to promote the prompt compliance with DSB recommendations and rulings and the consistency of ‘measures taken to comply’ with the covered agreements by making it unnecessary for a complaining Member to begin new proceedings and by making efficient use of the original panelists and their relevant experience.”²⁴²

135. Moreover, the United States did not “choose” not to pursue the Article 3.1(b) claim in the original proceeding in this dispute, for which consultations and a panel were requested on October 12, 2004, and May 31, 2005, respectively.²⁴³ Rather, as the suggested by the inclusion of the claim in the 2006 panel request, the United States was not aware in 2005 that French LA/MSF for the A380 was contingent in law on the use of domestic over imported goods, or that UK, German, and Spanish LA/MSF for the A380 was contingent in law *and* in fact on the use of domestic over imported goods. Nor *should* the United States have known of the prohibited nature of these subsidies, as information about the required use of domestic inputs was not publicly available at the time.

136. Therefore, the EU’s reliance on *US – Upland Cotton (21.5 – Brazil)*, and *EC – Bed Linen (21.5 – India)*, is misplaced. In those disputes, the complaining Member *could* have raised, or

²³⁸ E.g., *US – Upland Cotton (21.5) (AB)*, para. 211; *but see US – Zeroing (21.5 – EC) (AB)*, paras. 426-432 (circumscribing the Appellate Body’s statement in *Cotton*, to clarify that new claims against a measure taken to comply – “in principle, a new and different measure{ }” – are within the scope of compliance proceedings).

²³⁹ E.g., *US – Upland Cotton (21.5) (AB)*, para. 210; *but see US – Zeroing (21.5 – EC) (AB)*, paras. 426-432.

²⁴⁰ EU FWS, para. 142.

²⁴¹ EU FWS, para. 142.

²⁴² *US – Upland Cotton (21.5) (AB)*, para. 212 (quoting *US – OCTG Sunset Reviews (21.5) (AB)*).

²⁴³ See *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, Request for the Establishment of a Panel by the United States, WT/DS316/2 (3 June 2005).

did raise, the claim in the initial proceeding. But the United States *could not* have raised its Article 3.1(b) claim in 2005. Those cases are therefore inapposite.

137. Even though a prohibited subsidy had been given prior to the United States' 2005 panel request, the United States could not have realistically brought an Article 3.1(b) claim at that time. The claim is closely related to the claims the United States did bring in the original proceeding as well as the recommendations and rulings of the DSB. Therefore, its inclusion in this compliance proceeding will “promote the prompt compliance with DSB recommendations and rulings and the consistency of ‘measures taken to comply’ with the covered agreements by making it unnecessary for a complaining Member to begin new proceedings and by making efficient use of the original panelists and their relevant experience.”²⁴⁴ And the fact that the United States at one point contemplated bringing it in a separate dispute (which it still has the right to do) indicates nothing about whether it can raise the claim in this compliance proceeding, or whether doing so is efficient and serves the object and purpose of the SCM Agreement and the DSU. Accordingly, this Panel should find that its terms of reference include the U.S. claim against LA/MSF for the A380 under Article 3.1(b).

IV. THE EU’S WTO-INCONSISTENT SUBSIDIES HAVE NOT EXPIRED, AND HAVE NOT BEEN WITHDRAWN.

138. For the most part, the EU does not deny that it took no new action to withdraw the WTO-inconsistent subsidies it conferred on Airbus. Rather, it defends its inertia by arguing that no action was needed because most of the subsidies had supposedly ended already at the time the original Panel made its findings. This argument is both fundamentally at odds with the EU’s compliance obligations in this dispute, and unsupportable on the record. The EU’s legal theories – whether framed as removal of financial contributions, extinction or extraction of subsidies, or ending subsidies through amortization – do not support the conclusion that the benefit from billions of euros in subsidized financing – which the original Panel described as “extremely large”²⁴⁵ – simply disappeared. Moreover, even if the EU could establish that subsidies expired – a point it has failed to prove at any time during the six-year course of the original dispute – that would not remove the violation of Article 5 of the SCM Agreement that the original Panel and Appellate found to exist. They specifically addressed the EU’s allegation that many of these subsidies had ended before the reference period, and found that such subsidies could nevertheless cause adverse effects actionable under Article 5. Thus, the EU’s arguments about expiration of subsidies, even if successful, would not remove its obligation to “take affirmative action . . . directed at effecting the withdrawal of the subsidy or the removal of its adverse effects.”²⁴⁶ Its failure to do so leaves the EU out of compliance with its obligations under Article 7.8 of the SCM Agreement, and establishes that measures taken to comply do not exist for purposes of Article 21.5 of the DSU, or are inconsistent with the covered agreements.

²⁴⁴ *US – Upland Cotton (21.5) (AB)*, para. 212 (quoting *US – OCTG Sunset Reviews (21.5) (AB)*).

²⁴⁵ *EC – Large Civil Aircraft*, para. 7.1967.

²⁴⁶ *US – Upland Cotton (21.5) (AB)*, para. 236.

139. Throughout its first written submission, the EU tries to distract attention from the deficiencies in its compliance efforts by arguing that the United States has failed to establish the existence of subsidies as of December 2, 2011. However, the EU's effort to change the topic ignores the fact that this is a proceeding under Article 21.5 of the DSU, which addresses measures Members have taken to comply with findings of WTO inconsistency. The WTO-inconsistency of the original measure is a given, and the complaining Member bears no burden of making that case again. Thus, the EU's arguments that the United States has not established the existence of subsidies after December 1, 2011, has no bearing on this proceeding.

140. It is also worthwhile to step back and consider the EU's argument from a broader perspective. The Panel, affirmed by the Appellate Body, found that the EU granted billions of euros in subsidized financing to Airbus, with tens of billions of dollars in adverse effects during the reference period alone. The DSB adopted recommendations and rulings obligating the EU to withdraw the subsidies or take appropriate steps to remove their adverse effects. All of this followed the framework laid out in Articles 5, 6, and 7 of the SCM Agreement. The EU's argument, however, would nullify the findings under Article 5, at least insofar as they applied to subsidies that had expired before the reference period, by leaving them without a remedy under Article 7.8. For the reasons laid out in the remainder of this section, that proposition is wrong in every sense of the word.

141. Before addressing the EU's arguments in detail, it is useful to inject consistent terminology. The EU refers to removal or repayment of financial contributions, extinction and extraction of subsidies, bringing subsidies "to an end," end of the life of a subsidy, expiration of subsidies, and withdrawal of subsidies in various and overlapping ways. In particular, the EU tends to refer to expiration, extinction, or extraction of a subsidy as synonymous with the term "withdraw" in Article 7.8 of the SCM Agreement, even though the Appellate Body explicitly found that the extinctions and extractions alleged by the EU did not, and could not, withdraw subsidies. To avoid confusion, the United States will use the following terms to refer to the EU's allegations:

Removal of a subsidy refers to the EU allegations that Airbus made payments to member States in accordance with the subsidized terms of the various LA/MSF Agreements, which in the EU view removed the financial contributions.

Extraction refers to the EU allegations that member State governments and private entities removed cash and cash equivalents from Airbus companies, which in the EU view reduced the value of prior subsidies.

Extinction refers to the EU allegations that certain transactions involving ownership of certain Airbus entities eliminated the benefit conferred by prior subsidies.

End of the life of a subsidy refers to the EU allegations that the life of certain subsidies has ended supposedly in accordance with the findings of the Appellate Body in *EC – Large Civil Aircraft*. The EU frames this issue in terms of "amortization." (As the United States explains below, the Appellate Body in fact did not endorse this approach, and found that there were other ways to determine the life of a subsidy.)

Expiration of a subsidy refers generally to removal, extraction, extinction, or end of the life of a subsidy.

Withdrawal refers to anything that withdraws a subsidy for purposes of Article 7.8 of the SCM Agreement.

142. In the remainder of this Part, the United States will address: in Section A, EU arguments regarding removal; in section B, EU arguments regarding the life of subsidies, including amortization; in Section C, EU arguments regarding extractions and extinction; in section D, the consequence of the DSB findings with respect to all of the EU withdrawal arguments; and in section E, EU arguments regarding the existence of LA/MSF subsidies on for the A350 XWB.

A. The EU’s Alleged Removal of the LA/MSF Subsidies through Alleged Repayment on Subsidized Terms or “Termination” of Agreements Did Not Cause the Subsidies to Expire.

143. Financing confers a subsidy if the repayment terms are more favorable than the recipient could have obtained on the market. Individual payments may be lower or they may be structured in a way that makes them better for the recipient than a commercial financier would have allowed. Therefore, the recipient’s payments in accordance with the terms of subsidized financing package are the heart of the subsidy. They do not remove the subsidy, as the EU alleges, because the benefit, in the form of what the recipient would have paid for commercial financing but did not pay to the government, remains with the recipient.

144. The EU argues that such payments have the effect of removing the financial contribution, and thereby causing the subsidy to expire. This argument fails at the outset because it asks this compliance panel to reopen the adopted finding that these subsidies were in fact subsidies at the time of the reference period. Moreover, should the Panel decide to address the substance of this issue, it should reject the EU theory because when a recipient pays for financing on subsidized terms it gets to keep the benefit. Such a transaction does not, as the EU contends, withdraw the subsidy.²⁴⁷

1. The EU cannot argue during compliance proceedings that subsidies found actionable in adopted panel and Appellate Body reports ceased to exist prior to the period covered by the DSB findings.

145. Now that the DSB has adopted the original Panel and Appellate Body reports finding that “each of the challenged LA/MSF measures constitutes a specific subsidy,”²⁴⁸ the EU cannot argue that the subsidies ended before the Panel’s 2001-2006 reference period and, thus, removed

²⁴⁷ In its submission, the EU attempts to support its position by using the word “termination” to describe the alleged repayments of outstanding amounts on LA/MSF Agreements. If the EU’s use of this phrase is intended to imply that the subsidy, as opposed to the LA/MSF legal agreement, has been withdrawn, it does nothing but introduce confusion. The issue in this dispute is whether the EU has withdrawn the LA/MSF subsidies that the DSB found to exist, and not the legal status of the LA/MSF agreements under EU domestic law.

²⁴⁸ *EC – Large Civil Aircraft (Panel)*, para. 8.1(a)(i).

any obligation to comply. To do so would represent a collateral attack on the Panel and Appellate Body findings of a WTO violation, which is not permitted in a proceeding under Article 21.5 of the DSU. It would also call into question whether the EU accepts the report of the Appellate Body unconditionally Article 17.14 of the DSU. The same conclusion holds true for the original Panel's findings with regard to other EU subsidies: that KfW's 1989 acquisition of Dasa shares "is a specific subsidy;" KfW's 1989 transfer of and equity interest in Dasa "is a specific subsidy;" and the French State's 1987, 1988, 1992, and 1994 equity infusions into Aéropatiale "are specific subsidies."²⁴⁹ In each case, the original Panel framed its finding, which DSB subsequently adopted, in the present tense, indicating existence of the subsidy as of the time period covered by the panel's findings.

146. The EU's only response to the fact that the original Panel and Appellate Body have found these subsidies to be inconsistent with the SCM Agreement is to treat the issue as arising from the fact that "the subsidy was subject to an adverse effects finding in the original proceedings."²⁵⁰ But this argument disregards the parallel, and equally important, findings that the measures were subsidies relevant to the original Panel's conclusions. The EU is not at liberty to reargue that finding.

2. The EU acknowledges that the termination of LA/MSF agreements listed in the EU Notification did not in and of themselves result in expiration of the subsidies.

147. The EU now agrees that the United States demonstrated in its first written submission that termination of a subsidy instrument does not, in and of itself, withdraw a subsidy.²⁵¹ Specifically, the EU it stated in its first written submission that:

"Termination" manifests the fact of ending a contractual relationship under the domestic law that governs that relationship. Therefore, it does not, by itself, definitely indicate that a loan has been fully repaid before the agreement was terminated.²⁵²

There is accordingly no disagreement between the parties that the act of terminating an LA/MSF Agreement does not remove, extinguish, or extract the subsidy granted through that agreement.

148. Moreover, although the EU Notification lists 24 "terminations" of LA/MSF Agreements as "steps to bring its measures fully into conformity with its WTO obligations,"²⁵³ the first written submission lists only 12 of these "terminations" as relevant to the panel's analysis:

²⁴⁹ *EC – Large Civil Aircraft (Panel)*, para. 8.1(c) and (d)(i).

²⁵⁰ EU FWS, para. 166.

²⁵¹ US FWS, para. 39.

²⁵² EU FWS, para. 164.

²⁵³ EU Notification, para. 1.

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Termination of the French LA/MSF Agreement for the A300B
Termination of the French LA/MSF Agreement for the A300B2/B4
Termination of the French LA/MSF Agreement for the A300-600
Termination of the Spanish LA/MSF Agreement for the 300B
Termination of the Spanish LA/MSF Agreement for the A300B2/B4
Termination of the Spanish LA/MSF Agreement for the 300-600
Termination of the French LA/MSF Agreement for the A310-300
Termination of the French LA/MSF Agreement for the A320
Termination of the Spanish LA/MSF Agreement for the A320
Termination of the French LA/MSF Agreement for the A330/A340
Termination of the Spanish LA/MSF Agreement for the A330/340
Termination of the French LA/MSF Agreement for the A330-200²⁵⁴

The EU first written submission also lists repayment of UK financing for the A320 and A330/340 as having removed the financial contributions conferred through those agreements, even though the UK government did not terminate the relevant agreements.²⁵⁵ The EU Notification did not list this particular “repayment” as a compliance measure. 149. Thus, it appears that the EU has abandoned the position that the following 12 “terminations” of LA/MSF Agreements were measures taken to comply with the recommendations and rulings of the DSBs:

Termination of the German LA/MSF Agreement for the A300B
Termination of the German LA/MSF Agreement for the A300B2/B4
Termination of the German LA/MSF Agreement for the A300-600
Termination of the French LA/MSF Agreement for the A310
Termination of the German LA/MSF Agreement for the A310
Termination of the German LA/MSF Agreement for the A310-300
Termination of the Spanish LA/MSF Agreement for the A310
Termination of the Spanish LA/MSF Agreement for the A310-300
Termination of the German LA/MSF Agreement for the A320
Termination of the German LA/MSF Agreement for the A330/A340
Termination of the French LA/MSF Agreement for the A340-500/600
Termination of the Spanish LA/MSF Agreement for the A340-500/600

The EU’s position on UK LA/MSF for the A320 and A330/A340 is at present unclear.

²⁵⁴ Termination of French Financing for A300 (which appears to correspond to steps 1, 2, and 3 in the EU Notification); Termination of Spanish LA/MSF for the A300 (which appears to correspond to steps 7, 8, and 9 in the EU Notification); Financing for the A310-300 (which appears to correspond to step 11 in the EU Notification); French and Spanish Financing for the A320 (which appear to correspond, respectively, to steps 16 and 18 in the EU Notification); French and Spanish Financing for the A330/A340 (which appear to correspond, respectively, to steps 19 and 21 in the EU Notification); and Financing for the A330-200 (which appears to correspond to step 22 in the EU Notification. EU FWS, footnotes 191, 192, 199, 200, 206, 209, 211, 216, 224, and 230.

²⁵⁵ EU FWS, paras. 175 and 179.

3. Airbus’s payment pursuant to the LA/MSF agreements on subsidized terms did not result in the expiration of the subsidies.

150. While recognizing that the termination of subsidy instruments, such as the LA/MSF agreements, does not by itself have any effect on subsidies, the EU takes the position that Airbus’s payments pursuant to an LA/MSF agreement do result in the expiration of subsidies. There is no basis for this view. The panel and Appellate Body found that Airbus LA/MSF was a subsidy because it gave the company funding on better terms than a commercial entity would offer. Thus, each time Airbus made a payment under an LA/MSF agreement, it paid less than it would have paid for commercial financing. Such payments effectuated the financial benefit promised under the agreements by leaving the balance sheet with more cash and less debt that would otherwise be the case. In short, they conveyed the subsidy, rather than removing it.

151. Article 1 of the SCM Agreement establishes that a subsidy exists if “there is a financial contribution by a government . . . and a benefit is thereby conferred.” Thus, the subsidy is the financial contribution (including its noncommercial terms) plus the benefit (the difference between commercial and government terms). A true repayment would occur only when the recipient makes payments covering what a commercial lender would have demanded. If the repayment takes place after the recipient has made payments at the subsidized rate, it would have to take into account any underpayment (as compared to a commercial rate) prior to the date of repayment. Otherwise, the supposed repayment would leave the benefit with the recipient and the government with nothing to recompense the non-commercial advantage to the recipient.

152. With this framework in mind, the EU cannot support its assertion that making payments pursuant to LA/MSF “removes” the financial contribution in a way that results in the expiration of the subsidy. In fact, the EU itself stated before the Appellate Body: “Pursuant to Article 1, two elements make up a subsidy: a financial contribution and a benefit. Once a financial contribution has been given, the only element that can cease to exist is the benefit.”²⁵⁶ However, the EU now argues that the Appellate Body “found that the ‘removal of the financial contribution’ results in the ‘life’ of a subsidy coming ‘to an end.’”²⁵⁷ The Appellate Body made no such “finding.” It simply used a position on which the parties agreed as an analytical starting point, and did not endorse it as correct.²⁵⁸ Moreover, the Appellate Body did not express any view as to *how* a Member would remove LA/MSF, and certainly did not adopt the EU view that repayment on subsidized terms was sufficient. To the contrary, later in the paragraph cited by the EU, the Appellate Body found that “the fact that a subsidy is ‘deemed to exist’ under Article 1.1 once there is a financial contribution that confers a benefit does not mean that a subsidy does not continue to exist after the act of granting the financial contribution.”²⁵⁹ In other words, once

²⁵⁶ Appellant Submission of the European Union, *EC – Large Civil Aircraft*, para. 205 (16 August 2010) (Exhibit USA-319(BCI))

²⁵⁷ EU FWS, para. 162, quoting *EC – Large Civil Aircraft (AB)*, para. 709.

²⁵⁸ *EC – Large Civil Aircraft (AB)*, para. 709.

²⁵⁹ *EC – Large Civil Aircraft (AB)*, para. 708.

a subsidy exists, there is no need to inquire as to whether the financial contribution is also separately extant.

153. This is a necessary result of the construction of the SCM Agreement. As a subsidy consists of a financial contribution (including below-market terms) plus a benefit, there is no basis for assuming, as the EU does, that a payment equal to the financial contribution alone would remove the financial contribution while leaving the benefit untouched. To put the point another way, the United States recalls that the EU argued that “termination ends the existence of an MSF agreement under domestic law; whether or not the existence of the subsidy under WTO law has also ended, is a separate question. . . .”²⁶⁰ Similarly, repayment of subsidized lending in accordance with the terms of the subsidy may end the recipient’s financial obligation under domestic law. The question of whether it ends the subsidy for purposes of the subsidizing Member’s obligations under the SCM Agreement, as the EU put it, “is a separate question.” To be sure, the EU argues that “whether the financial contribution . . . has been removed” answers that “question.”²⁶¹ But there is no reason that repayment of a subsidy as provided under domestic law would dictate a termination of that subsidy for purposes of the SCM Agreement any more than would termination of the subsidy agreement pursuant to domestic law.

154. This makes sense from an economic perspective as well. As the economic analyses submitted by the EU confirm, all that happened under the EU’s “repayment of subsidy” approach was for Airbus to pay the relevant governments the net present value of future scheduled and anticipated LA/MSF payments, the amounts of which were based on below-market, subsidized terms.²⁶² From a financial point of view, this action left Airbus in exactly the same position it would have occupied had it made the payments as scheduled. In other words, nothing changed.

155. The consequences of the EU approach demonstrate its error. If the EU is correct, the larger an interest rate subsidy is, the less it costs to repay. To use an example, suppose the market interest rate is 10 percent, and the government provides two one-year loans for \$10 million, one at 9 percent (for a subsidy of 1 percent) and the other at 0 percent (for a subsidy of 10 percent). Under the EU approach, the recipient would have to pay \$10.9 million to “repay” the smaller subsidy, but could “repay” the larger subsidy for only \$10 million. Nothing in the SCM Agreement supports the proposition that the cost to the recipient of repaying a subsidy is inversely proportional to the size of the subsidy.

156. As a final point, it is also important to take account of the peculiarities of the subsidy in question. Under LA/MSF, the financier grants money at a fixed interest rate, and the recipient agrees to repay in fixed and escalating increments each time it sells an airplane. The recipient remains liable for payments as long as the program is commercially active. Thus, if early sales

²⁶⁰ EU FWS, para. 164.

²⁶¹ EU FWS, para. 164.

²⁶² *E.g.*, PriceWaterhouse Coopers, *Fairness Opinion regarding the settlement agreement between Airbus Operations S.A.S. and the French State for the A330-200 member state financing loan agreement*, paras. 11-19 (Exhibit EU-1).

are slower than expected, the financier makes up the difference on later sales. Under this structure, if Airbus can pay interest plus subsidized interest by date X, rather than later date X+Y under market terms (with Y being the time necessary to pay higher interest costs), *the ability to repay early is part of the subsidy*. If a commercial financier would have required royalty payments beyond the date for repaying principal plus interest, which the United States considers likely,²⁶³ it is even clearer that Airbus's ability to satisfy its financial obligation by paying interest plus principal only is part of the subsidy.

4. Contingent claim: if the Panel agrees with EU's view that repayment of LA/MSF in accordance with contracted terms removes the financial contribution, that act would create an independent subsidy.

157. To reiterate, the United States views payment of LA/MSF in accordance with its subsidized terms as insufficient to remove the subsidy or the underlying financial contribution. However, if the Panel finds otherwise, the government act of terminating the subsidy recipient's financial obligation would create a new subsidy by effectively forgiving the future payments that a theoretical commercial supplier of LA/MSF would demand. Thus, there would be a new financial contribution, either in the form of a forgiveness of debt (under Article 1.1(a)(1)(i)) or as revenue foregone that is otherwise due (under Article 1.1(a)(1)(ii)). In either case, the value of the subsidy would be equal to the difference between the total amount the recipient paid under the government financing and what it would have paid under commercial financing.

158. The EU observes in its first written submission that the United States did not make a specific allegation of debt forgiveness in its first written submission.²⁶⁴ But the United States did, in fact, challenge, under Article 21.5 of the DSU, the existence or consistency with a covered agreement of a measure taken to comply with the findings of the DSB. In these circumstances, no greater specificity was possible or required. In fact, the EU's own descriptions of its alleged measures taken to comply, as set out in the EU Notification, indicated only the possibility, but not the certainty, of forgiveness. In the unlikely event that the Panel accepted the proposition that repayment of LA/MSF in accordance with its subsidized terms expunges the benefit, the acceptance of that repayment as full forgiveness of amounts owed on the LA/MSF Agreements would constitute a separate subsidy equal to the amount of interest that the government forwent.

B. The EU Arguments Regarding Amortization do not Properly Measure the Lives of the Subsidies in Question, and Do Not Prove that They have Expired.

159. Faced with its obligation to withdraw billions of euros in subsidized financing or remove their adverse effects in the form of billions of dollars in lost sales and displacement in markets around the world, the EU responds that it has no obligation to do anything, because amortization has already taken care of the problem.

²⁶³ Section IV.B.4 discusses this issue in greater detail.

²⁶⁴ EU FWS, para. 355.

160. That is wrong.

161. It is wrong because the Appellate Body has not, as the EU argues, found that the life of LA/MSF or the various equity subsidies is determined through amortization. And, it is wrong because the life of a subsidy creating a new product must be measured by the life of the product it creates, and not by accounting conventions or projections as to the period that the product is likely to remain competitive in the market. In other words, nothing that the EU has stated demonstrates in any way that the relevant subsidies at issue have expired or been paid in any way.

162. The U.S. first written submission addressed in detail the steps in the EU Notification that the EU appeared to identify as relevant to withdrawal of subsidies, and demonstrated why they did not result in withdrawal. This section deals with the EU assertion in its second written submission that “amortization” or “expiration” of subsidies – two terms that did not appear in the EU notification – brought it into compliance with the DSB recommendations and rulings.

1. With respect to 12 measures, the EU has not even attempted to rebut the U.S. showing that the compliance measures notified by the EU were not sufficient to withdraw the subsidies that the original Panel and the Appellate Body found to exist.

163. The U.S. first written submission started with the original Panel and the Appellate Body findings that all grants of LA/MSF before 2006, the 1984-1988 French equity contribution, and the German capital contribution were subsidies that caused adverse effects during the 2001-2006 period. The United States then showed that none of the compliance measures notified by the EU resulted in the withdrawal of those subsidies.²⁶⁵ The EU appears to have conceded that the United States was correct with regard to 12 of those measures.²⁶⁶

164. In particular, the U.S. first written submission addressed step 26 from the EU Notification, which stated that the EU had brought its measures into conformity with the recommendations and rulings of the DSB by “{b}ringing ‘to an end’” all of the subsidies in question. It is noteworthy that this item did not make any statement with regard to amortization or expiration of the benefit. Rather, the only further detail took the form of a citation to paragraph 709 of the Appellate Body report in *EC – Large Civil Aircraft*. The U.S. first written submission explained that this reference could not be understood to relate to withdrawal of the subsidies because the Appellate Body specifically linked the reasoning in paragraph 709 to the adverse effects analysis, rather than the existence of benefit under Article 1.1(b).²⁶⁷ Thus, on its own terms, the measure notified by the EU went to the question of adverse effects, which under Article 7.8 of the SCM Agreement is distinct from the question of withdrawal. Therefore, the

²⁶⁵ US FWS, Section III.

²⁶⁶ See above, Section III.A.2.

²⁶⁷ US FWS, para. 44.

EU has brought forward no argument to support a conclusion that the 12 terminations listed in paragraph 149 advanced its compliance with the recommendations and rulings of the DSB.

2. The United States does not bear the burden of re-establishing the existence of EU subsidies that the DSB found to exist.

165. The United States bore only the burden of showing that the EU's compliance measures did not exist or were themselves inconsistent with the covered agreements, for example, because they did not withdraw the subsidy and were not appropriate steps to remove the adverse effects. As Article 21.5 of the DSU indicates, a complaining party could meet that standard by showing that there were no measures taken to comply, or that the declared measures taken to comply were ineffective and, therefore, were not really measures taken to comply. In appropriate circumstances, the responding party might raise the expiration or nonexistence of a subsidy, as a counterargument. However, the United States did not bear the additional burden of anticipating that the EU would raise such potential counterarguments, and addressing them in its first written submission. The EU is accordingly mistaken in asserting that “{a}s the complaining Member, it is for the United States to establish that these subsidies exist after the end of the implementation period.”²⁶⁸

166. During the original proceeding, the United States met its burden of showing the existence of the EU subsidies, resulting in a DSB finding that the EU subsidies existed. The EU is never clear as to why it considers that in this proceeding focused on EU measures taken to comply, the United States now has an additional burden to again show the existence of subsidies that the DSB has already found to exist. At one point the EU simply declares, without explanation, that “the United States must first demonstrate the existence of subsidies . . . taking into account . . . amortisation of benefit.”²⁶⁹ The Panel should accord no weight to such an unsupported statement.

167. At another point, the EU suggests that the United States bore an obligation as the complaining party to address “the guidance provided by the Appellate Body regarding the amortisation of subsidies over time.”²⁷⁰ This view reflects several errors. First, the Appellate Body emphatically did not find that a complaining party must take account of amortization. It merely indicated that amortization was an “example” or “one way” to assess the life of a subsidy, which could be relevant to the adverse effects analysis under Article 5 of the SCM Agreement.²⁷¹ The United States did not “ignore” these findings and others regarding the life of subsidies. It explicitly addressed them, and demonstrated that they did not lessen the EU's obligation under

²⁶⁸ EU FWS, para. 198.

²⁶⁹ EU FWS, para. 37.

²⁷⁰ EU FWS, para. 51.

²⁷¹ EC – Large Civil Aircraft, paras. 1236 and 1241.

Article 7.8 of the SCM Agreement to withdraw its subsidies or take appropriate steps to remove their adverse effects.²⁷²

168. And finally, the Appellate Body did not assign the burden of proof for life of a subsidy to the complaining party. To the contrary, the Appellate Body was clear that “[t]he adverse effects analysis under Article 5 is distinct from the ‘benefit’ analysis under Article 1.1(b) of the SCM Agreement and there is consequently no need to re-evaluate under Article 5 the amount of the benefit conferred pursuant to Article 1.1(b).”²⁷³ Once the complaining party establishes the existence of a subsidy for purposes of Article 1.1, the burden for demonstrating that the life of that subsidy has ended lies with the responding party. Such a showing is relevant only to the demonstration of adverse effects under Article 5. As the obligation under Article 7.8 proceeds directly from a finding that a Member is out of compliance with Article 5, there is no reason to assign a complaining Member under Article 7.8 the burden of showing continuation of the subsidy. Instead, the complaining party satisfies its burden with regard to existence of the subsidy by reference to the adopted reports of the original Panel and the Appellate Body. It must then demonstrate that the actions, or the inaction, of the responding Member with regard to that subsidy failed to comply with Article 7.8. Thus, the United States did not bear the burden of establishing continued subsidization by the EU.

169. The EU asserts that the EU Notification “identified in item 26 thereof, ‘the “expiration of the benefit” has occurred’ and ‘the subsidy has reached the end of its life’” as compliance measures that the United States had to address.²⁷⁴ Step 26 did not, in fact, use the terms “expiration of the benefit” or “life.”²⁷⁵ In any event, the United States responded to Step 26 by showing that the actions it described did not withdraw any of the listed subsidies. That satisfied any U.S. burden triggered by the statements in Step 26.

170. In this regard, the EU accuses the United States of treating the EU Notification “as if it were a first written submission” containing “claims” as to amortization that the EU had to “establish.”²⁷⁶ The United States was under no such misimpression. Rather, it took the EU Notification at face value, as a narrative description of measures the EU declared that it had taken to comply, and addressed each of the steps as set out by the EU. The reference to the EU “claims to have withdrawn subsidies” used “claims” in the colloquial sense, reflecting the structure of the notification as a series of assertions about what the EU had done, without citation to legal instruments or instrumentalities. The United States then observed that the EU had not set out any action (and in fact demonstrated inaction) to bring the subsidies “to an end.” This did not treat the EU Notification as a first written submission, or create a burden of proof. It simply addressed the notification on its own terms.

²⁷² *E.g.*, US FWS, paras. 43-45.

²⁷³ *EC – Large Civil Aircraft (AB)*, para. 709.

²⁷⁴ EU FWS, para. 198.

²⁷⁵ EU Notification, step 26 (Exhibit USA-1).

²⁷⁶ EU FWS, paras. 51 and 199.

171. Finally, as for the burden of proof, on this issue as with any other in WTO dispute settlement, it rests with the party asserting the affirmative of the claim or defense.²⁷⁷ In this instance, the recommendations and rulings of the DSB establish that EU subsidies both existed and caused adverse effects to the interests of the United States. The DSB instructed the EU to withdraw its subsidies or take appropriate steps to remove the adverse effects. The United States showed in its first written submission that the measures declared by the EU failed to comply with that obligation – in other words, they were not measures taken to comply or were otherwise inconsistent with EU obligations under the covered agreements. That satisfied the U.S. burden of proof. If the EU seeks now to argue that amortization satisfied its obligation, it bears the burden of rebuttal. It has not met that burden.

3. The EU focus on amortization gives an improperly narrow reading to the Appellate Body’s statements regarding the life of a subsidy.

172. The Appellate Body found that “at the time of the grant of a subsidy, the subsidy will necessarily be projected to have a finite life and to be utilized over that finite period.”²⁷⁸ The EU attempts to portray the Appellate Body as “having interchangeably, referred to the concepts of ‘depreciation’ and ‘amortization’ as defining the life of a subsidy.”²⁷⁹ However, the Appellate Body actually had a much broader understanding of how to measure the life of a subsidy. It identified several indicators: “nature, amount, and projected use of the challenged subsidy;” “whether the subsidy is allocated to purchase inputs or fixed assets; the useful life of these inputs or assets; whether the subsidy is large or small; the period of time over which the subsidy is expected to be used for future production;” and “the anticipated marketing life of an aircraft programme.”²⁸⁰

173. The Appellate Body did not in any way equate “amortization” with the “life of a subsidy,” as the EU attempts to portray. In fact, the words “amortize” or “amortization” appear only 11 times in the report, primarily (eight times) to describe EU *arguments* that the Appellate Body did not endorse.²⁸¹ The Appellate Body used “amortization”²⁸² three other times: twice to describe how EU member States calculated payments under the LA/MSF instruments²⁸³ and once to describe it as one “example” that a panel might consider in evaluating whether the life of

²⁷⁷ *US – Wool Shirts (AB)*, p. 14.

²⁷⁸ *EC – Large Civil Aircraft (AB)*, para. 709.

²⁷⁹ EU FWS, para. 197.

²⁸⁰ *EC – Large Civil Aircraft (AB)*, paras. 707 and 1241.

²⁸¹ *EC – Large Civil Aircraft (AB)*, paras. 51, 54, 77, 698, 1240, and 1241.

²⁸² The EU asserts that the Appellate Body used “depreciation” interchangeably with “amortization.” EU FWS, para. 167. In fact, the Appellate Body used the term “depreciation” only once in its report, but again in the context of the adverse effects analysis. *EC – Large Civil Aircraft (AB)*, para. 710.

²⁸³ *EC – Large Civil Aircraft (AB)*, paras. 827 and 885.

a subsidy had ended.²⁸⁴ It emphasized that it would “neither endorse nor reject the specific amortization methodology proposed by the European Union.”²⁸⁵ Thus, the EU effort to depict the Appellate Body as having required an amortization-based methodology is unfounded.

4. The EU’s arguments on amortization do not justify a conclusion that the lives of the LA/MSF, equity infusion, and regional grant subsidies have ended.

174. As noted above, the original Panel and the Appellate Body found that the grants of LA/MSF, the capital contributions, German infrastructure, and Spanish regional measures were subsidies that caused adverse effects in the 2001-2006 reference period. This compliance Panel takes these adopted DSB findings as a given, and the EU cannot reopen them in this proceeding. Therefore, the EU is precluded from raising arguments that the subsidies expired during or before the 2001-2006 reference period.

175. In any event, when properly measured, none of the lives of the of the EU subsidies has ended. The life of a product creation subsidy, like LA/MSF, lasts at least as long as the commercial life of the product it creates, and beyond in certain instances. The EU proposes a number of alternatives – average useful life of assets in the large civil aircraft industry, “expected market life of the aircraft programme,” “expected life of a generic aircraft programme,” or “expected repayment schedule implied in the loan.”²⁸⁶ All of them err in ignoring the close relationship between LA/MSF and the products it spawns and, equally important, by disregarding the expectation of all of the parties that repayments (and hence the benefit of the subsidy) will continue throughout the commercial life of the aircraft until Airbus has fully repaid principal plus interest.

176. As noted above, the Appellate Body did not specify a particular method for a panel to measure the life of a subsidy. Instead, it called for “an assessment of the period over which the benefit from a financial contribution *might be expected to flow*,” and provided examples of factors to consider, including the “nature, amount, and projected use of the challenged subsidy.”²⁸⁷ An inquiry into the “nature” of LA/MSF would start with the four core terms, namely that funding is (1) unsecured, (2) success-dependent, (3) levy-based, and (4) back-loaded.²⁸⁸ A commercial financier that provided financing both unsecured against corporate assets and with recourse only to revenue from a particular project would expect to have that recourse *for the entire life of the project and any expected commercial upgrades* until it received all of its principal and interest. The financier would not expect that recourse would stop with the average life of the program or assets in the industry. A commercial financier giving success-dependent financing would expect not merely to bear the risk of failure, but also to reap some

²⁸⁴ *EC – Large Civil Aircraft (AB)*, para. 1236.

²⁸⁵ *EC – Large Civil Aircraft (AB)*, para. 1239.

²⁸⁶ EU FWS, paras. 206-208.

²⁸⁷ *EC – Large Civil Aircraft (AB)*, para. 707.

²⁸⁸ *EC – Large Civil Aircraft (AB)*, paras. 7.374-7.375.

advantage if the program performed better than expected, including by lasting longer than average. (The United States notes in this regard that some LA/MSF agreements provided for continuing “royalty” payments if Airbus succeeded in repaying principal plus subsidized interest.²⁸⁹) If repayments were levy-based, that financier would expect to continue receiving them at least until it earned back its principal plus interest, even if that took longer than the expected life of a program. And, finally, a commercial financier accepting back-loaded repayment terms would not expect an arbitrary cut-off of payments before full repayment.

177. For its part, the recipient of the financing would expect to have to repay the principal plus any interest to the commercial financier out of revenues from the funded aircraft or any upgrade. It would not expect to walk away after 17 or 21 years if the relevant aircraft remained commercially alive and there were still outstanding principal and interest.

178. These observations about the nature of the subsidies indicate that a hypothetical commercial grantor of LA/MSF would expect payments to continue until it earned back principal plus interest, for as long as the sales of the relevant aircraft continued to earn revenue. An LA/MSF recipient making repayments on more favorable terms than those available from a commercial entity would understand the benefit to continue at least as long as it was paying less (including if it paid nothing) than the commercial entity would have charged. This would include any bonus that a commercial financier would have expected if the program performed better than initial projections indicated. Thus, the life of the LA/MSF subsidy would last for the actual commercial life of the aircraft, from launch until delivery of the last aircraft of the model in question.

179. The projected use of the subsidy, another factor the Appellate Body found indicative of the life of a subsidy, points to the same result. The original Panel, as affirmed by the Appellate Body, found that LA/MSF was a creation subsidy, designed to create a commercial product for Airbus to sell. The grantor would expect the recipient to use the funds to design the aircraft, create the technology necessary to make the design work and to manufacture the parts for the aircraft, and build the facilities to produce the aircraft. The grantor would also assume that the recipient would develop derivatives of that model, building on successes for a successful model, or remedying problems with an underperforming model. Thus, the benefit would continue as long as that product (rather than a hypothetical generic aircraft) continued in the market and the particular facilities (rather than generic assets) continued to operate

180. This methodology leaves open two questions – how to measure the life of an LA/MSF subsidy if (1) the commercial life of the aircraft ends earlier than expected (A340-500/600) or (2) the commercial life of the specific model ends, but the benefits in terms of technological know-how carry over into subsequent models (A300/A310). In the first instance, when the commercial life ends earlier than expected, the relevant member States do not receive back the full amount of interest and principal that Airbus promised. If the terms were commercial terms, that would be a loss consistent with market practices, because the company would have paid the financier a

²⁸⁹ *EC – Large Civil Aircraft (Panel)*, para. 7.342.

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premium to bear the risk of loss. However, in the case of the A340-500/600, the finding by the original Panel, affirmed by the Appellate Body, that Airbus paid a below-market rate for the LA/MSF²⁹⁰ means that it did not pay the member States enough to assume that risk. The acceptance by the member States of the loss of remaining payments due for A340-500/600 LA/MSF forgave debt on non-commercial terms.

181. In the analytical framework laid out by the Appellate Body, the unexpected demise of an aircraft model may constitute an “intervening event” that affects the value of the subsidy. If so, however, this would mean that Airbus transitions from making below-market payments on its repayment obligations to a below-market expungement of those obligations, in essence, a grant equal to outstanding principal and interest. That grant does not confer any advantage on the defunct A340-500/600, so it instead acts as a generalized subsidy to Airbus. Its life would reflect some generalized expectation regarding the company’s use of money – perhaps the average useful life of productive assets or the average life of a generic aircraft program that the company might fund.²⁹¹

182. In the second instance, even if the commercial life of the specific aircraft model ends, the life of the subsidy may extend to subsequent models that are based on the original. In considering this question, one would need to keep in mind the Appellate Body’s admonition to “take into account how the subsidy has materialized over time.”²⁹² In the case of LA/MSF for the A300 and A310, one key development was that Airbus originally envisioned the A330 and A340 as derivatives of the A300, and based the fuselage design for the A330 and A340 on the fuselage of the A300 and A310.²⁹³ Therefore, the life of the A300 and A310 LA/MSF continues with the A330 and A340.

183. These principles lead to the following conclusions regarding the life of grants of LA/MSF:

	Last delivery	Program termination	End of the life of the subsidy
A300	2007	2007	governed by A330/A340 Basic

²⁹⁰ *EC – Large Civil Aircraft (AB)*, para. 924.

²⁹¹ The end of the A340 program does not constitute an earlier-than-expected termination for A340 LA/MSF. The evidence shows that EU member States packaged A330 and A340 LA/MSF together, reflecting the way that Airbus developed them jointly, using many similar design elements and technologies. The EU Notification reflects this fact, as does the Appellate Body presentation of data related to LA/MSF. *E.g.*, EU Notification, Annex, items 19, 20, and 21 (Exhibit USA-1); *EC – Large Civil Aircraft (AB)*, para. 817 (reproducing Panel Table 7). A commercial financier supporting the joint development of two products would expect that if one failed, it could still receive full payment from sales of the other.

²⁹² *EC – Large Civil Aircraft (AB)*, para. 710.

²⁹³ Guy Norris and Mark Wagner, *Airbus A340 and A330*, pp. 17-18, 36, and 48-54 (MBI, 2001) (Exhibit USA-320).

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A310	1998	2007	governed by A330/A340 Basic
A320	none	none	not yet
A330/A340 Basic	none	none	not yet
A330-200	none	none	not yet
A340-500/600	2010	2011	2028
A380	none	none	not yet
A350 XWB	none	none	not yet

184. The report that PwC prepared for Airbus S.A.S. and the four Airbus member States does not change any of these conclusions. In fact, it suffers from a number of critical flaws. At this stage, the United States would like to point out four of these key points:

185. First, the PwC approach results in an outcome that cannot be reconciled with the Panel’s findings in the underlying dispute, and those of the Appellate Body and, ultimately, the DSB. According to PwC, several subsidies expired during and before the reference period, even though the Panel and Appellate Body found that they continued to exist. Thus, according to PwC, [***] expired by 2005 at the very latest.²⁹⁴ A300/310 LA/MSF, according to PwC, expired as much as two decades before the Panel even began its consideration of this case (1987).²⁹⁵ In short, any proposed methodology that is inconsistent with the DSB recommendations and rulings in the underlying dispute may not be adopted in this compliance proceeding.

186. Second, the PwC report takes for granted that the *ex ante* expected life of LA/MSF was either the average life of an aircraft program at that time, or what the EU calls the “market life” at that time. But by doing so, PwC confuses the number of years a typical aircraft model remained in the market, and the expected life of LA/MSF as the subsidy. PwC posits that the governments did not expect LA/MSF to last beyond the average large civil aircraft program or market life. In fact, LA/MSF is specifically tied to deliveries of the aircraft model that is financed. As such, both the government providing LA/MSF and Airbus, as the recipient, fully expected that the measure would continue to be in place at least as long as the program would continue to exist (with any remaining benefit accrued at that point converted to a de facto grant or debt forgiveness to Airbus). Indeed, PwC itself notes in its report that “{t}he benefit arising from a loan is limited to its term – irrespective of whether the loan was used to purchase assets that are used for longer or shorter terms than the term of the loan.”²⁹⁶ Elsewhere it notes that “{f}rom an *ex ante* perspective, the benefit of a loan expires at the point in time at which full repayment of principal and interest is envisaged.”²⁹⁷ In fact, Airbus received LA/MSF for a term defined only by the actual life of the program, which of course was not known at the time of

²⁹⁴ PwC Life of Subsidies Reports, Table 7.

²⁹⁵ PwC Life of Subsidies Reports, Table 6.

²⁹⁶ PwC Life of Subsidies Report, para 47.

²⁹⁷ PwC Life of Subsidies Report, para. 48.

grant, and not for the anticipated or average life of an aircraft program or any other period determinable with precision at the time of the grant. The parties fully expected that repayment would continue for as long as Airbus made deliveries that triggered levy payments. Thus, the very basis for the LA/MSF repayment system was that the commercial life of a large civil aircraft program is inherently difficult to predict, and that Airbus would have to continue repaying for as long as the relevant aircraft model was being delivered.

187. Third, the entire PwC report and the methodology it applies is based on the assumption that the *ex ante* assessment of the life of a subsidy must result in a fixed period of years. The report tries to justify this approach based on the finding by the Appellate Body that the question whether a benefit has been conferred for purposes of Article 1.1(b) of the SCM Agreement “the determination of benefit under Article 1.1(b) of the *SCM Agreement* is an *ex ante* analysis that does not depend on how the particular financial contribution actually performed after it was granted.”²⁹⁸ But the Appellate Body directed this finding to the determination of the benefit, and not to the life of the subsidy. PwC fails to consider that, when it came to the life of the subsidy, the Appellate Body focused on expectations.

188. The nature, amount, and projected use of the challenged subsidy may be relevant factors to consider in an assessment of the period over which the benefit from a financial contribution *might be expected* to flow. A panel may consider, for example, as part of its *ex ante* analysis of benefit, whether the subsidy is allocated to purchase inputs or fixed assets; the useful life of these inputs or assets; whether the subsidy is large or small; and the period of time over which the subsidy is expected to be used for future production.²⁹⁹

189. As noted above, the *ex ante* expectation with regard to LA/MSF is that it will create a liability that lasts until the end of the aircraft model that it funded. While that is not a period of years calculable at the time of grant, it does designate a finite period after which the benefit of LA/MSF will cease.³⁰⁰

190. Fourth, the same or similar flaws exist with respect to PwC’s approach to the French and German equity infusions and capital contributions. It is unclear why PwC treats these differently from LA/MSF, as the Appellate Body specifically found that these equity infusions “provided support to Airbus’ efforts in developing and bringing to the market {the A320 and A330/340 in particular}”³⁰¹ Moreover, under the EU’s approach, all of the equity and capital infusions, except for those that occurred in 1994, had “expired” by 2006.³⁰² Thus, as in the case of

²⁹⁸ PwC Life of Subsidies Report, pra. 3, quoting *US – Large Civil Aircraft (AB)*, para. 706.

²⁹⁹ *EC – Large Civil Aircraft (AB)*, para. 707.

³⁰⁰ As noted earlier in this section, the termination of an LA/MSF program earlier than expected may be treated as a forgiveness of amounts outstanding, which creates a new subsidy.

³⁰¹ *EC – Large Civil Aircraft (AB)*, paras. 1388-1389.

³⁰² PwC Report Life of Subsidies Reports, para. 88.

LA/MSF, the EU’s methodology results in expiration, which the EU equates with “compliance,” well before this Panel and the DSB even began their work.

C. The Transactions Identified in the EU First Written Submission Did Not “Extract” or “Extinguish” Prior Subsidies or Result in their Expiration.

1. The Dasa and CASA transactions are not properly before this Panel.

191. The original Panel found that the Dasa and CASA transactions did not extract or extinguish prior subsidies, and the Appellate Body upheld that finding. That should end the inquiry – the EU had a chance to make its case, and failed, and is accordingly precluded from raising the issue again in an Article 21.5 proceeding. In any event, if the original Panel decides to revisit this question, the EU’s arguments are essentially the same as the ones that the original Panel and Appellate Body have already rejected. This Panel should reach the same conclusion.

192. The Appellate Body’s findings on this question are explicit:

- “We are not persuaded by the arguments advanced by the European Union under the first ground of its ‘extraction’ theory. . . . Beyond its general assertions, the European Union provides no persuasive evidence as to how the specific subsidies provided to Dasa and CASA increased the ‘incremental value’ of those companies, and therefore how the cash ‘removed’ could be deemed to remove that value.”³⁰³
- “Given that the link between the subsidies and the cash ‘extracted’ has not been sufficiently demonstrated by the European Union, we need not consider the European Union’s further argument that the Panel improperly relied on the ‘joint control’ exercised through the Contractual Partnership to which both DaimlerChrysler and SEPI belonged.”³⁰⁴
- “In the light of the foregoing, although we do not a priori exclude the possibility that all or part of a subsidy may be ‘extracted’ by the removal of cash or cash equivalents, we uphold the ultimate finding by the Panel, 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.”³⁰⁵

In short, the EU had the opportunity to present evidence and argumentation, and failed to provide enough to meet the burden of proof for its extinction and extraction theory with regard to the Dasa and CASA transactions. As the United States explained in Section II.C of this submission, this finding on the merits by the Appellate Body precludes the EU raising this issue again.

193. The EU makes two arguments in an attempt to avoid this conclusion. First, it asserts that the Appellate Body “took issue with the sufficiency of the explanations provided by the

³⁰³ *EC – Large Civil Aircraft (AB)*, para. 746.

³⁰⁴ *EC – Large Civil Aircraft (AB)*, para. 748.

³⁰⁵ *EC – Large Civil Aircraft (AB)*, para. 749.

European Union,” and did not address the substance.³⁰⁶ The distinction is unpersuasive. A finding that a party has not met its burden of proof is a substantive disposition of the issue. When a party has had the opportunity to advance its position and failed, Article 21.5 of the DSU does not, in the words of the Appellate Body, “provide an unfair ‘second chance’ to that party.”³⁰⁷ It is worth noting at this point that deviating from this principle would certainly be unfair to the United States, which has devoted time and effort to rebutting the EU’s Dasa and CASA arguments over the course of almost eight years of this dispute. That the EU now wishes it had done a better job the first time is no valid reason to reopen this issue.

194. The EU also argues that the Panel and Appellate Body did not really address the merits of whether the Dasa and CASA transactions withdrew subsidies, but instead found that the question would not be ripe for assessment until commencement of an Article 21.5 proceeding.³⁰⁸ Again, the EU is wrong. After upholding the Panel’s finding that the transactions did not extinguish or extract subsidies, the Appellate Body made a finding in the alternative that “{e}ven if the European Union had been successful in its arguments on ‘extinction’ and ‘extraction’, we do not consider that the sales transactions and ‘cash extractions’ resulted in the ‘withdrawal’ of subsidies within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*.”³⁰⁹ The Appellate Body provided three independent rationales, the first of them that:

under Article 7.8, a recommendation to “withdraw” subsidies or remove their adverse effects is directed at actionable subsidies that have been found to cause adverse effects. We recall that, in this dispute, at the time the sales transactions and “cash extractions” took place, there had been no findings by a panel or the Appellate Body that alleged subsidies were either prohibited subsidies or actionable subsidies causing adverse effects. Therefore, we do not consider that the sales transactions and “cash extractions” resulted in the “withdrawal” of subsidies, within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*.³¹⁰

Thus, as a matter of law, the Dasa and CASA transaction could not “withdraw” subsidies for purposes of Article 7.8 because prior subsidies to those companies had not been found to be subsidies at the time of the transaction.

195. Second, the Appellate Body noted that it

understood the recommendations made by the Panel to be collective, in the sense that they concern all those subsidies ultimately found to be prohibited subsidies or actionable subsidies causing adverse effects. They do not concern subsidies that have been “extinguished” or “extracted”. Such recommendations

³⁰⁶ EU FWS, para. 257.

³⁰⁷ *US – Upland Cotton (21.5) (AB)*, para. 210 (footnotes omitted).

³⁰⁸ EU FWS, para. 257.

³⁰⁹ *EC – Large Civil Aircraft (AB)*, para. 755.

³¹⁰ *EC – Large Civil Aircraft (AB)*, para. 756.

request the European Union to withdraw those subsidies and/or remove adverse effects; panels or the Appellate Body are not required to make recommendations pursuant to Articles 4. and 7.8 with respect to subsidies measures that are found to be “extinguished” or “extracted.”³¹¹

196. The final rationale was that the question of withdrawal “is, if contested, best left to a compliance panel whose principal task is to assess whether a Member's implementation measures bring it into compliance with its obligations under the *SCM Agreement*.”³¹² The EU interprets this statement as signifying “that the question of the specific cash extractions had *not* been resolved in the original proceeding.”³¹³ The EU misunderstands. The Appellate Body resolved the issue of the cash extractions when it found that “the European Union provides no persuasive evidence” for its theory, and explicitly “upheld the ultimate finding by the Panel” that the Dasa and CASA transactions did not extract or extinguish subsidies. The remainder of the Appellate Body’s reasoning, including the paragraph cited by the EU, is based on an *arguendo* assumption that the EU “had been successful in its arguments on ‘extinction’ and ‘extraction’”³¹⁴ Thus, it is meant to complement, rather than negate, the Appellate Body’s main conclusion that the EU had failed to prove its cash extraction theory, and provides more general guidance for future panels.

197. It is also significant that the Appellate Body presented its view that withdrawal was a matter “best left to a compliance panel” as one of three independent reasons for rejecting the EU’s withdrawal arguments. It does not supersede the earlier conclusion that a transaction prior to a DSB ruling that subsidies are actionable cannot, as a matter of law, “withdraw” a subsidy for purposes of Article 7.8. Indeed, describing the issue as one “*best* left to a compliance panel,” left open the possibility that an original panel or the Appellate Body might appropriately address the alleged withdrawal in a different type of proceeding – which is just what the Appellate Body had done in the two preceding paragraphs.

198. The EU also argues that, while complaining parties in an Article 21.5 proceeding cannot challenge panel or Appellate Body findings in the original proceeding, responding parties are free to do so. Section II.C demonstrates that all parties, and not just the complaining party, are subject to the Appellate Body’s reasoning precluding reargument in an Article 21.5 proceeding of issues settled in the original proceeding.

199. In sum, the Appellate Body found that “the European Union provides no persuasive evidence as to how the specific subsidies provided to Dasa and CASA increased the ‘incremental value’ of those companies, and therefore how the cash ‘removed’ could be deemed to remove

³¹¹ *EC – Large Civil Aircraft (AB)*, para. 757.

³¹² *EC – Large Civil Aircraft (AB)*, para. 758.

³¹³ EU FWS, para. 257.

³¹⁴ *EC – Large Civil Aircraft (AB)*, para. 754.

that value.”³¹⁵ It accordingly “uph{e}ld the ultimate finding by the Panel . . . that the ‘cash extractions’ from Dasa and CASA did not remove a portion of past subsidies.”³¹⁶ The EU’s measures taken to comply, both declared and undeclared, did nothing to change those transactions. Therefore, there is no basis to seek review by this Panel of whether the Dasa and CASA transactions extracted or extinguished prior subsidies.

2. If the Panel finds that the Dasa and CASA transactions are properly before it, the EU has provided no reason to disturb the original Panel and Appellate Body findings that the transactions did not remove all, or a portion of, past subsidies.

200. The EU’s arguments regarding the Dasa and CASA transactions fail at this stage for the same reason they failed before the original Panel and the Appellate Body – the EU has not satisfied any of the elements of the test for establishing the extraction of subsidies from Airbus. It has not shown that the cash transfers actually “extracted” anything of value from EADS in the first place. It has also failed to show that the cash involved was actually related to the value of past subsidies, rather than some other element in the value of EADS. Thus, even if the Panel were to find that the Dasa and CASA transactions were properly before it, the EU has not met its burden of proof for the proposition that the Dasa and CASA transactions reduced or eliminated the benefit from past subsidies to Airbus.

- a. To satisfy its burden of proof, the EU would need to show a causal relation between the cash extraction and the subsidy, and that cash was actually extracted.*

201. The evolution of the legal analysis of the Dasa and CASA transactions began with the EU’s proposal that it could establish removal of subsidies through a two-factor test: “(i) there must be a causal relationship of some sort between the cash ‘extraction’ and the subsidy and (ii) the ‘extraction’ must effectively move the money beyond the reach of the ‘company-shareholder unit’.”³¹⁷ The Panel assumed *arguendo* that the EU test was correct, and rejected the EU arguments for failure to satisfy the elements of its own test.³¹⁸ The Appellate Body did not endorse the EU test, but did find that it provided “a useful point of departure in examining the EU’s arguments on ‘extraction’.”³¹⁹ The Appellate Body then rejected the EU’s arguments regarding the first factor, and exercised judicial economy with regard to the second.³²⁰

202. The Appellate Body explained:

³¹⁵ *EC – Large Civil Aircraft (AB)*, para. 746.

³¹⁶ *EC – Large Civil Aircraft (AB)*, para. 749.

³¹⁷ *EC – Large Civil Aircraft (AB)*, para. 740, quoting *EC – Large Civil Aircraft (AB)*, para. 7.271.

³¹⁸ *EC – Large Civil Aircraft (Panel)*, paras. 7.273 and 7.275.

³¹⁹ *EC – Large Civil Aircraft (AB)*, para. 745.

³²⁰ *EC – Large Civil Aircraft (AB)*, paras. 746-748.

Although we do not mean to suggest that a “euro-for-euro” link between the subsidies and the cash extracted is necessary to prevail on an argument on “extraction”, we do consider that, at a minimum, the European Communities was required to explain how the specific subsidies received by Dasa and CASA were reflected in the balance sheets of those companies, and how the cash removed or “extracted” represented the remaining or unused value of these subsidies. The mere assertion by the European Communities, without more, that subsidies to Dasa and CASA increased the value of those companies and that *therefore* any cash taken out represents the subsidy or its “incremental value”, does not in our view satisfy the requirement of establishing a “causal relationship” between the “cash extraction” and the subsidy, as argued by the European Communities before the Panel.³²¹

Thus, the Appellate Body outlined two steps for establishing that a causal relationship between the subsidies and an alleged cash extraction: first, a demonstration how the subsidies appeared in the recipient’s balance sheet and, second, an explanation of how the extraction “represented” those subsidies. Prior to setting out this reasoning, the Appellate Body had found that “consideration of whether the cash removed from a company eliminates past subsidies is a fact-specific inquiry that must be assessed based on the circumstances of the case.”³²² It emphasized that “mere assertion” is not sufficient to establish the requisite causal relationship.

203. In its first written submission, the EU advances an interpretation of the Appellate Body’s findings that effectively nullifies the second step in the analysis of the causal relationship – showing how the cash removed “represented” the remaining value of the subsidies. The EU notes that the second step does not “require” either “a showing that the cash extraction was done with the *purpose* of removing the subsidy” or “*to whom* the cash payment is made.”³²³ It then surmises that this means that only “objective effects” of extractions are relevant, and not their purpose or to whom they were made.³²⁴ This reasoning is specious. The fact that the Appellate Body did not *require* consideration of the purpose of an extraction or the entity receiving the extraction does not render those considerations irrelevant. Rather, given that the Appellate Body’s call for a “fact-specific inquiry . . . based on the circumstances of the case,”³²⁵ the analysis would have to include all relevant factors, whether subjective or objective, and including the identity of the entity receiving the money.

204. As a practical matter, the considerations that the EU seeks to exclude from the analysis could prove highly instructive. For example, the stated purpose of a transaction may provide insight as to whether the cash removed “represented” the subsidies. If a Member gave a subsidy

³²¹ *EC – Large Civil Aircraft (AB)*, para. 746 (emphasis in original)

³²² *EC – Large Civil Aircraft (AB)*, para. 744.

³²³ EU FWS, paras. 274-275.

³²⁴ EU FWS, para. 274.

³²⁵ *EC – Large Civil Aircraft (AB)*, para. 744.

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with the stated intent of providing financing on beneficial terms, and then made an extraction with the express objective of changing nothing about the recipient's situation, that would support a strong inference that the extraction did not remove subsidies. Information about the purpose of a transaction might also cast light on whether it was at arm's length or at market value. In addition, if the entity removing the money is the recipient's private owner, one logical inference is that the owner sought repayment for past investments it had made. If the removing entity is government-owned, and the government still expresses interest in subsidizing the company (for example, by giving it new LA/MSF), the logical inference would be that the government sought to leave the subsidy untouched.

205. Finally, the EU errs in summarizing the second step of the test as addressing “whether the two cash extractions under consideration were *capable* of removing the subsidies.”³²⁶ The Appellate Body called for a showing of “how the cash removed or ‘extracted’ *represented* the remaining or unused value of these subsidies.”³²⁷ While this does not require a “‘euro-for-euro’ link,” cash removed from a company could not be said to “represent subsidies” without some real relationship between the two. The mere fact that an extraction is “capable” of removing subsidies might be a relevant consideration, but is not enough by itself. After all, any payment is at least notionally “capable” of some portion of a subsidy.

- b. The EU fails to satisfy the first factor of the Appellate Body test because it does not “explain . . . how the cash removed or ‘extracted’ represented the remaining or unused value of these subsidies.”*

206. The EU's arguments on the Dasa and CASA transactions do not meet even the “minimum” threshold set out by the Appellate Body – “to explain how the specific subsidies received by Dasa and CASA were reflected in the balance sheets of those companies, and how the cash removed or ‘extracted’ represented the remaining or unused value of these subsidies.”³²⁸ With respect to the first step in the analysis, the EU provides a lengthy discussion of basic accounting principles. At no point, however, does it even attempt to apply these observations to any of the particular subsidies involved or explain how Dasa and CASA balance sheets recorded those subsidies. The EU offers no meaningful evidence or arguments with regard to the second step, either. Thus, the situation is the same as it was before the Appellate Body – “the European Union provides no persuasive evidence as to . . . how the cash ‘removed’ could be deemed to remove that value.”³²⁹ And, as the Appellate Body has already found, such an omission is fatal to the EU's argument that the Dasa and CASAS transaction removed past subsidies.

³²⁶ EU FWS, para. 276.

³²⁷ *EC – Large Civil Aircraft (AB)*, para. 746 (emphasis added).

³²⁸ *EC – Large Civil Aircraft (AB)*, para. 746.

³²⁹ *EC – Large Civil Aircraft (AB)*, para. 746.

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Measures Affecting Trade in Large Civil Aircraft:
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207. The United States has no objection to the Appellate Body’s summary of the facts, which the EU cites as the starting point of its argument,³³⁰ or to the description of how European accounting principles, as applied by Airbus, treated the subsidies to Dasa and CASA. It is clear, however, that the EU failed to provide any information as to how the relevant companies treated the particular subsidies on their balance sheets.

208. However, the Panel need not reach this question, as it is also clear that the EU has not completed the second step of explaining how the cash removed “reflects” any remaining value of past subsidies. The EU first tries to meet this burden by simple assertion. It states that subsidized financing or capital increased the value of Dasa and CASA by the present value of the difference between the payment streams of the subsidized loan and a comparable commercial loan.³³¹ It then asserts that “[b]y extracting cash at the time of transfer, DaimlerChrysler and SEPI, in effect, extracted the value of any residual benefits from prior subsidies.”³³² This is the same approach the EU tried before the original Panel and the Appellate Body: “mere assertion . . . , without more, that subsidies to Dasa and CASA increased the value of those companies and that *therefore* any cash taken out represents the subsidy or its ‘incremental value.’”³³³ The Appellate Body found this reasoning insufficient, and this Panel should do the same.³³⁴

209. The only additional argumentation that the EU puts forward consists of the assertion that “given the magnitude of the extractions . . . and the failure of the United States to offer any evidence concerning the amount of the subsidies, the Panel should conclude that the extractions removed entirely the residual value of prior subsidies.”³³⁵ It is difficult to see how the size of the extractions (an issue in dispute between the United States and the EU) or a calculation of the size of the subsidies (which the EU declines to provide) is relevant to the question of whether either payment “reflected” the value of past subsidies. It is clear that the cash payments did not account for the major part of the value of either Dasa or CASA.³³⁶ Thus, to the extent they

³³⁰ The EU notes that paragraphs 738 and 739 discuss the facts of the Dasa and CASA transactions, and then goes on to present those facts “in brief.” EU FWS, para. 267. One of these “facts” – that “the cash extracted from Dasa was €1.133 billion” – is not one of the facts found by the original Panel or the Appellate Body. Rather, the Appellate Body noted that “the parties contested the exact amount of cash or cash equivalents ‘extracted’ by DaimlerChrysler.” *EC – Large Civil Aircraft (AB)*, para. 739. The United States continues to dispute the EU’s valuation. Comments of the United States of America on the Answers of the European Communities to the Panel’s Questions in Connection with the Second Substantive Meeting, para. 206 (Exhibit USA-321); EADS Offering Memorandum, p. F-79 (Exhibit EU-55).

³³¹ EU FWS, para. 281.

³³² EU FWS, para. 282.

³³³ *EC – Large Civil Aircraft (AB)*, para. 746 (emphasis in original).

³³⁴ *EC – Large Civil Aircraft (AB)*, para. 746.

³³⁵ EU FWS, para. 283.

³³⁶ The EU conceded before the original Panel that the CASA payment accounted for 26 percent of the value of the company. First Written Submission by the European Communities, *EC – Large Civil Aircraft*, para. 253, note 170. (Exhibit USA-322). The EU provides no comparable figure for Dasa.

“represented” a portion of the value of either company, that portion could easily have consisted entirely of non-subsidy value.

210. As to the EU observation that that the United States did not calculate the size of the subsidy, that also indicates nothing about the relationship between any payments and prior subsidies. The EU put forward the Dasa/CASA extraction argument as a defense to the U.S. demonstration that the declared measures taken to comply failed to withdraw the subsidies. Therefore, the EU bears the burden of proof on the issue, as specifically confirmed by the Appellate Body. That means that if a calculation of the value of the subsidy is necessary to the argument, the EU bears the burden of providing that calculation.

211. In sum, the EU’s first written submission repeats the error of its arguments before the original Panel and the Appellate Body. Rather than the “fact-specific inquiry . . . based on the circumstances of the case” that the Appellate Body found necessary,³³⁷ the EU advances mere assertions that the Dasa and CASA payments corresponded to past subsidies. That is not enough.

c. The EU fails to satisfy the second factor of the Appellate Body test because it has not established that the Dasa and CASA transactions actually extracted money.

212. When it comes to the second factor, whether the extraction “effectively moved the money beyond the reach of the ‘company-shareholder unit’,” the EU also makes the same unsuccessful arguments it made to the original Panel, and once again falls short. To begin with, it never establishes the existence of an “extraction” – the Dasa and CASA transactions simply shifted assets among corporate balance sheets for a net zero effect. Moreover, the EU has done nothing to establish that the removal was permanent.

213. It is indicative of the extent to which the EU is retreading old ground that the U.S. appellee submission in the original proceeding remains a convincing rebuttal of the arguments made by the EU in this proceeding:

142. The European Union . . . argues that the creation of EADS, in which Dasa and the other Airbus partners combined their independently held LCA assets in exchange for shares in EADS, resulted in the dilution of each participant’s share in the resulting company. In the EU’s view, because DaimlerChrysler held a much smaller share of EADS than it had previously held of Dasa, any return of the money would be spread over a larger shareholder base, and change the value of DaimlerChrysler’s investment to a relatively small degree. For these reasons, the European Union argues that the transfer had to be considered permanent.²³²

³³⁷ *EC – Large Civil Aircraft (AB)*, para. 744.

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143. There are numerous problems with this theory. Permanent or not, the transaction did not involve a payment to the German government so there is no basis to conclude that “the Member granting or maintaining such subsidy . . . withdr{e}w the subsidy” for purposes of Article 7.8. Moreover, the EU focuses on the wrong corporate relationship. DaimlerChrysler owned Dasa, and extracted the money from Dasa. Its incentives to return the money to Dasa were unchanged after the transaction because it still owned 100 percent of Dasa.²³³ Thus, if DaimlerChrysler were to return the money to Dasa, that company’s value would become equal to the value of its existing assets plus the value of the money, with a concomitant increase in the value of DaimlerChrysler ownership interest. And finally, as the Panel itself pointed out, the Airbus creation process “was structured so as to maintain the overall interests of DaimlerChrysler and the Spanish government in Airbus Industrie as a whole.”²³⁴ This emphasis on maintaining the status quo belies the EU view that the transaction changed DaimlerChrysler’s incentives so radically as to preclude any reinvestment of funds in Dasa (or EADS).

* * * * *

145. Finally, it is also important to recognize that DaimlerChrysler conferred something to Dasa in exchange for the funds transferred to it. The transfer took place because, based on the valuation of Dasa, DaimlerChrysler would be entitled to a larger number of shares than it had agreed with the other Airbus partners. The transfer reduced the value of Dasa’s assets to a level where it was equivalent to the correct number of EADS shares.²³⁷ Dasa received those shares, and DaimlerChrysler got the money. This result is no different than if Dasa had contributed its assets to EADS without the cash transfer, received a higher number of shares than it was entitled to, and Daimler Chrysler had sold the excess back to EADS in exchange for cash. No one would argue that this transaction “extracted” or “withdrew” subsidies because all it did was shuffle shares and cash among related entities. The equivalent transaction in which DaimlerChryser transferred funds to itself before the exchange of Dasa’s assets for shares achieved the same result. As a value-for-value exchange, it would not qualify as a “withdrawal” for purposes of Articles 4.7 and 7.8 of the SCM Agreement.

²³² EU Appellant Submission, para. 190 {(Exhibit USA-319(BCI))}.

²³³ Panel Report, Section VII.E.1 Attachment, para. 4, note 2241.

²³⁴ Panel Report, para.7.275.

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²³⁷ EU Appellant Submission, paras. 326-328 {(Exhibit USA-319(BCI))}.

214. The EU also argues that the Panel erred in concluding that, because DaimlerChrysler and the Spanish State continued to exercise control over Airbus through a shareholders' agreement, the cash transferred from Dasa and CASA to their owners never left the company-shareholder unit. Specifically, the EU argues that the agreement affected only voting rights, and not each owner's rights to EADS earnings.³³⁸ This is a distinction without a difference. The test suggested by the EU, which the Appellate Body used as a "point of departure," calls for an evaluation of whether the cash transfer "effectively moved the money beyond the reach of the 'company-shareholder unit'." The control that DaimlerChrysler and the Spanish State exercise over the company and their role as owners make them part of that unit. Therefore, any money they removed has not left the unit.

215. Moreover, the EU's arguments on this point only underscore that the transactions in question did not make any meaningful change in control over the Airbus operation. Before the creation of EADS, each of the national Airbus entities had only limited individual control over Airbus, but collectively exercised full control. Each could claim only a limited share of revenues and profits. After the creation of EADS, although the Airbus entities worked through a new mechanism, they each continued to have limited individual control, were each entitled to a limited share of the profits, and collectively exercised full control.

3. The Aérospatiale-Matra merger, the creation of EADS, and acquisition of BAE shares did not extinguish prior subsidies or cause them to expire.

216. The EU's arguments on extinction fail for the most basic reasons – they rely on an incorrect legal test, and the facts at issue do not satisfy the correct test.

217. Identifying the legal test to be used in this compliance proceeding requires, among other things, a careful look at the Appellate Body findings in *EC – Large Civil Aircraft*. First, the Appellate Body reversed the original Panel's finding that partial privatizations and private-to-private transactions would not extinguish subsidies. Second, Members of the Division agreed that an assessment of whether a transaction extinguished subsidies required "a fact-intensive inquiry" into whether it was at fair market value and arm's length, involved a transfer in ownership and control, and "whether a prior subsidy could be deemed to have come to an end."³³⁹ Third, they could not agree on what other criteria were necessary, and took the unusual step of issuing separate views. The EU, however, does not base its argument on a careful analysis of the Appellate Body report, and instead proceeds as if there were a consensus, ignoring the serious concerns raised by two of the three Members. This is not a proper application of the Appellate Body's reasoning. A proper approach, which the United States applied in its first written submission, would address the concerns of *all* of the Appellate Body Members, before reaching a conclusion as to subsidy extinction. Such an analysis demonstrates that the transactions cited by the EU did not extinguish or withdraw prior subsidies.

³³⁸ EU FWS, para. 290, note 381.

³³⁹ *EC – Large Civil Aircraft (AB)*, para. 725.

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218. It is also significant that the EU’s analysis fails on its own terms. The EU relies on the reasoning of one Member of the Division, designated “Member B” in the U.S. submission,³⁴⁰ who considered that the analysis of subsidy extinction “depends on the facts of each case” and that “{a}n important consideration in this context is to what extent the partial privatization or private-to-private transactions resulted in a transfer of control to new owners who paid fair market value for shares in the company.”³⁴¹ The EU interprets this statement to signify that change in ownership and control is the only relevant consideration for a sale at arm’s length and for fair market value. Neither Member B nor the Appellate Body as a whole has ever made such a finding. Member B’s reasoning indicates the opposite – it describes the transfer of control as “{a}n important factor,” which indicates that other factors exist, and that they may also be important. Therefore, the EU’s analysis based exclusively on control, without consideration of other potentially relevant factors, is not sufficient to establish extinction of past subsidies.

219. In any event, even if the EU’s three-factor test were applied, the Aérospatiale-Matra merger, the creation of EADS, and the acquisition of BAE’s shares did not extinguish prior subsidies because they did not result in the transfer of ownership and control from old owners to new owners for fair market value and at arm’s length.

a. The EU bears the burden of proof with regard to allegations that the transactions identified in its submission have extinguished subsidies.

220. A *prima facie* case of a failure to meet the compliance obligations under Article 7.8 of the SCM Agreement need not re-prove the existence of subsidies that the DSB already has found to exist. As discussed at length in Section III.B, the EU has no support for placing this burden of proof on the United States.

221. The EU nevertheless argues that the U.S. *prima facie* case “must address . . . any intervening events, such as the extraction and extinction events discussed in the following sections of our submission.”³⁴² The only support the EU provides for this assertion is another assertion, without citation, that “under Article 21.5 of the DSU and Article 7.8 of the *SCM Agreement*, it is for the United States, as the complaining Member, to demonstrate, as part of its *prima facie* case, that the challenged subsidies have not been withdrawn, and are instead maintained after the end of the implementation period.”³⁴³

222. The EU’s explanation contains clear legal errors. First, Article 21.5 and Article 7.8 require a complaining Member to show only that there is no measure taken to comply, which in the context of Article 7.8 means that the responding Member has not withdrawn the subsidy or

³⁴⁰ EU FWS, paras. 391 (citing Member B’s analysis) and 393 (citing with approval the U.S. discussion of Member B’s analysis).

³⁴¹ *EC – Large Civil Aircraft (AB)*, para. 726(b).

³⁴² EU FWS, para. 293, *citing* EU FWS, para. 246.

³⁴³ EU FWS, para. 246.

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taken appropriate steps to remove its adverse effects. There is no requirement under either Article to take additional steps to show that the subsidies “are instead maintained.” Second, since transactions in a company’s shares – the “extinction events” alleged by the EU – do not automatically extinguish prior subsidies, they are not a required element for showing either withdrawal or existence of a subsidy. Therefore, a complaining Member need not address such transactions as part of its *prima facie* case.

223. The responding party is free to rebut the *prima facie* case made by the complaining party, including by asserting that post-subsidy transactions extinguished the subsidy. In that case, in line with normal WTO rules regarding the burden of proof,³⁴⁴ the responding party bears the burden of proof, and the panel must address the arguments made regarding the transaction.³⁴⁵

224. It is also worth noting that, in addition to these legal flaws with the EU’s proposed allocation of burdens of proof, the EU proposal raises practical problems. An allegation of “extinction” is by its nature a defense against a claim of subsidization, and defenses are normally the burden of the responding party. By putting the initial burden of addressing subsidy extinction events on the complaining party, the EU theory would require the complaining party to formulate and rebut in advance all the defenses that the responding party might raise. There is nothing in the DSU or the SCM Agreement that requires a complaining party to do the responding party’s legal work in this fashion. Moreover, such an allocation of burdens would waste resources, because it would force the complaining party to address potential defenses that the responding party may not even wish to raise.

225. In the particular instance of subsidy extinction, that Appellate Body found a successful argument requires a showing of how the recipient accounted for the subsidy in its balance sheet. The EU’s theory would require the complaining party to advance detailed evidence of the subsidy recipient’s accounting practices – information accessible only to the recipient or its government. Such an requirement is obviously infeasible.

226. This dispute provides a good example of these practical problems. Under the EU’s theory, a *prima facie* case for the United States would have to address all of the “extraction and extinction events” the EU raised in the original dispute. The EU raised eight of such transactions

³⁴⁴ As the Appellate Body has observed:

the Appellate Body’s statement in *EC – Hormones* does not imply that the complaining party is responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent with a given provision of a covered agreement. In other words, although the complaining party bears the burden of proving its case, the responding party must prove the case it seeks to make in response.

Japan – Apples (AB), para. 154.

³⁴⁵ *EC – Large Civil Aircraft (AB)*, para. 709 (“where it is so argued, a panel must assess whether there are ‘intervening events’ that occurred after the grant of the subsidy that may affect the projected value of the subsidy as determined under the *ex ante* analysis.”)

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at issue by the time of the Appellate Body proceedings,³⁴⁶ but the EU has apparently dropped three of those extinction claims in this proceeding. Thus, to meet the EU's definition of a *prima facie* case, the United States would have had to address three transactions that the EU itself considers irrelevant.

227. Thus, the law places the burden of proof for subsidy extinctions on the EU, and practical considerations validate that result.

b. The Appellate Body indicated that the subsidy extinction analysis goes beyond an inquiry limited to whether there was a market value, arm's length transaction that effected a "substantive change in control."

228. The Appellate Body found that allegations of subsidy extinction require "a fact-intensive inquiry" into whether transactions were at fair market value and arm's length, involved a transfer in ownership and control, and "whether a prior subsidy could be deemed to have come to an end."³⁴⁷ In addition to these common views, one of the Members of the Division expressed doubt that such transactions were legally capable of extinguishing subsidies, and another expressed skepticism that a share transaction would do so.³⁴⁸ Thus, in addition to addressing fair market value, arm's length, and transfers in ownership and control, a party asserting the extinction of subsidies would need to address other factors indicating "whether a prior subsidy could be deemed to have come to an end." Considerations highlighted by one of the Appellate Body Members would, of course, play an important role in that analysis.

229. The EU, however, takes a least common denominator approach to the Appellate Body's reasoning with regard to subsidy extinction, reducing the Appellate Body's "fact-intensive inquiry" to a three-factor test consisting solely of "(i) whether the transaction was for fair market value, (ii) whether it was at arm's length, and (iii) to what extent there was a transfer of ownership and control."³⁴⁹ While the Appellate Body considered these to be *necessary* criteria, it did not find them to be *sufficient* by themselves. In particular, the EU omits a consideration of whether transactions involved only a transfer of shares, and whether other factors might prevent the conclusion that the subsidy "could be deemed to have come to an end." Such a limited analysis is not enough.

230. The Appellate Body addressed the issue of subsidy extinction at length. It began by finding that

³⁴⁶ Appellant Submission of the European Union, *EC – Large Civil Aircraft*, para. 147 (Exhibit USA-319(BCI)).

³⁴⁷ *EC – Large Civil Aircraft (AB)*, para. 725.

³⁴⁸ *EC – Large Civil Aircraft (AB)*, para. 726(a) and (c).

³⁴⁹ EU FWS, para. 298.

a fact-intensive inquiry into the circumstances surrounding the changes in ownership would be required in order to determine the extent to which there are sales at fair market and at arm's length, accompanied by transfers of ownership and control, and whether a prior subsidy could be deemed to have come to an end.³⁵⁰

However, the Members of the Division could not reach a consensus as to the legal test for evaluating whether partial privatizations and private-to-private transactions extinguished prior subsidies. Member A considered that such transactions would not extinguish subsidies; Member B considered that they *could*, but that the conclusion “depends on the facts of each case,” in particular whether there was a transfer in control; and Member C “had no small measure of doubt” that a purchase of shares in a company could extinguish prior subsidies.³⁵¹ In its first written submission, the United States addressed this situation by applying each Member's legal theory to the facts of each post-2006 transaction involving EADS or Airbus shares, and demonstrated that none of the tests indicated a reduction in subsidy value.³⁵² The EU apparently agrees, as it has not alleged that any of those transactions are subsidy extinction events.

231. The Appellate Body then observed that the original Panel evaluated extinction in terms of whether “(i) benefits resulting from a prior non-recurring financial contribution (ii) are bestowed on a state-owned enterprise (iii) following a privatization at arm's length and for fair market value, and (iv) the government transfers all or substantially all the property and retains no controlling interest.”³⁵³ The Appellate Body reviewed how the Panel applied this test to the facts before it, and concluded that:

we do not consider the Panel to have sufficiently examined the circumstances surrounding the partial privatizations and private-to-private sales transactions at issue. In order properly to address the relevance of these transactions for purposes of the United States' claims of adverse effects under Article 5, the Panel should have assessed whether each of the sales was on arm's-length terms and for market value, and to what extent they involved a transfer in ownership in control to new owners.³⁵⁴

232. The EU relies on the Appellate Body's critique of the Panel's findings and the views expressed by Member B to distill a three-factor “Appellate Body approach” under which a transaction extinguishes subsidies if it (i) was at fair market value, (ii) was at arm's length, and (iii) resulted in a transfer of ownership and control.³⁵⁵ But, as the preceding summary shows, the

³⁵⁰ *EC – Large Civil Aircraft (AB)*, para. 725.

³⁵¹ *EC – Large Civil Aircraft (AB)*, para. 726.

³⁵² US FWS, paras. 51-54. The EU has not challenged this conclusion.

³⁵³ *EC – Large Civil Aircraft (AB)*, para. 729.

³⁵⁴ *EC – Large Civil Aircraft (AB)*, para. 735.

³⁵⁵ EU FWS, para. 297.

Appellate Body did not endorse a single “approach.” The Members of the Division expressed agreement on a few general principles, and then set out additional individual views “without prejudice as to the further circumstances and findings set out below,”³⁵⁶ and then addressed the original Panel’s analysis.

233. A true effort to synthesize an “approach” would begin with what the Members of the Division agreed to be necessary, as set out in paragraph 725 of the report:

“a fact-intensive inquiry into the circumstances surrounding the changes in ownership would be required,” based on:

- (1) “the extent to which there are sales at fair market and”
- (2) “at arm’s length,”
- (3) “accompanied by transfers of ownership and control, and”
- (4) “whether a prior subsidy could be deemed to have come to an end.”³⁵⁷

The structure of this consensus statement indicates that none of the Members of the Division found the three factors of the EU proposed test to be sufficient by themselves. They all envisaged a further evaluation into whether the prior subsidy could be deemed to have come to an end.

234. The Members’ individual views confirm this conclusion. Member A considered that transactions meeting the three EU criteria did not extinguish subsidies. Member B considered that “there is ‘no inflexible rule’ that a ‘benefit’ derived from pre-privatization financial contributions expires following privatization at arm’s length and for fair market value.”³⁵⁸ That Member also considered that “{a}n important question is the extent the partial privatization or private-to-private transactions resulted in a transfer of control to new owners who paid fair market value for shares in the company.”³⁵⁹ By describing this factor as “an important question,” Member B signaled a view that other important “questions” were also “important.” Member C accepted that a consideration of relevant facts might lead to a finding of subsidy extinction, but expressed “no small measure of doubt that an acquisition of shares, concluded at arm’s length and for fair market value, constitutes relevant circumstances warranting the conclusion that an extinction of benefit has taken place.”³⁶⁰ Thus, all of them rejected the limited, three-factor test that the EU now proposes.

235. Given the divergent views expressed by the Members of the Division in *EC – Large Civil Aircraft*, there is no single “approach.” There is consensus on the need for a fact-intensive inquiry in which the three factors identified by the EU are necessary, but not sufficient. However, the Members of the Division reached no consensus on what further proof is needed.

³⁵⁶ *EC – Large Civil Aircraft (AB)*, para. 726, chapeau.

³⁵⁷ *EC – Large Civil Aircraft (AB)*,

³⁵⁸ *EC – Large Civil Aircraft (AB)*, para. 726(b), quoting *US – Countervailing Measures on Certain EC Products (AB)*, para. 127.

³⁵⁹ *EC – Large Civil Aircraft (AB)*, para. 726(b).

³⁶⁰ *EC – Large Civil Aircraft (AB)*, para. 726(c).

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Therefore, the best approach at this time would be to apply the tests of Members A, B, and C, and conclude that a transaction extinguishes prior subsidies if it satisfies two of them. The evaluation would in any event need to address any and all factors beyond the three identified by the EU that would indicate “whether a prior subsidy could be deemed to have come to an end.”³⁶¹

236. Thus, the EU case for subsidy extinction fails from the outset, because it never goes beyond fair market value, arm’s length relationship, and change in control. Accordingly, it does not provide the requisite additional information demonstrating “whether a prior subsidy could be deemed to have come to an end”³⁶² that all Members of the Division considered necessary, and which the EU has the burden of proving.

c. The Aérospatiale-Matra merger, the creation of EADS, and acquisition of BAE shares do not extinguish subsidies under any of the rationales set out in EC – Large Civil Aircraft.

237. The United States considers that the analysis of the EU extinction arguments could end with the observation that the EU did not address all of the relevant factors that would allow the panel to evaluate “whether a prior subsidy could be deemed to have come to an end.” However, should the panel decide to continue onward and apply the proper analysis outlined at the end of section IV.C.4.b to the three transactions highlighted by the EU, it should conclude that none of them resulted in extinction or extraction, and reject the EU’s arguments in this regard.

238. The United States recalls that the proper approach, in light of Division Members’ inability to come to consensus, is to apply each Member’s test separately to the facts. The United States starts with Member A’s approach, under which only full privatizations can extinguish subsidies.³⁶³ The Aérospatiale-Matra merger, the creation of EADS, and the acquisition of BAE shares were not full privatizations, so they did not extinguish past subsidies.

239. Under Member B’s test, none of the transactions resulted in a transfer of control. The original Panel found that:

Although the EADS transaction altered the legal ownership of the aeronautics-related assets and activities of Dasa and CASA, it was structured so as to maintain the overall interests of DaimlerChrysler and the Spanish government *in Airbus Industrie as a whole.*^{2218,,364}

³⁶¹ *EC – Large Civil Aircraft (AB)*, para. 725.

³⁶² *EC – Large Civil Aircraft (AB)*, para. 725.

³⁶³ *EC – Large Civil Aircraft (AB)*, para. 726.

³⁶⁴ *EC – Large Civil Aircraft (Panel)*, para. 7.275.

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²²¹⁸ Rather than holding and exercising their membership interests in Airbus Industrie directly through subsidiaries such as Dasa and CASA, DaimlerChrysler (through Dasa) and the Spanish government (through SEPI) were members of a contractual partnership that exercised voting rights in respect of 65.48 percent of the outstanding shares of EADS. As a practical matter, the nature of control that DaimlerChrysler and the Spanish government exercised over the LCA activities of Airbus through EADS was substantially the same as the control that they had previously exercised over the LCA activities of Airbus as members of the Airbus Industrie consortium.

As recounted in this passage, and reflected in the evidence, the whole point of the EADS transaction, which was the centerpiece of the creation of EADS and part of the context for the Dasa and CASA transactions, was *not* to change control of Airbus. Thus, the French State, the Spanish State, and DaimlerChrysler collectively controlled Airbus through their role in the Airbus consortium prior to the creation of EADS, and controlled Airbus through the shareholders' agreement after the creation of Airbus. While the mechanism may have differed, the level of control, by design, remained the same.

240. The result is the same for the EADS acquisition of BAE's shares in Airbus, although for somewhat different reasons. Member B framed the question of control in terms of whether the transaction "resulted in a transfer of control to new owners who paid fair market value for shares in the company."³⁶⁵ BAE had no "control" to "transfer" because, while it had some heightened rights as a significant minority shareholder, it never "controlled" Airbus in the sense of determining policy or directing operations. Moreover, as EADS bought the BAE shares, there was no "new owner" – EADS had been the dominant owner all along. The BAE transaction was, in fact, the exercise of a put option by BAE Systems. As such, it resulted only in a transfer of shares by one (non-controlling) co-owner of Airbus to another (controlling) co-owner.³⁶⁶ In the Aérospatiale-Matra merger the government lessened its ownership interest and private shareholders did become new minority owners of the company. However, there was no *transfer* of control to Lagardère because the French State remained the largest shareholder, and continued to name more members to the supervisory board than any other entity.³⁶⁷

241. Member C affirmed the general test that a finding of extinction depends on a consideration of all relevant facts, but expressed "no small measure of doubt that an acquisition of shares, concluded at arm's length and for fair market value, constitutes relevant circumstances

³⁶⁵ *EC – Large Civil Aircraft (AB)*, para. 726(b).

³⁶⁶ Indeed, according to a 2006 Letter from the Chairman of BAE announcing BAE's exercise of the put option: "In reaching this judgment {to sell the shareholding in Airbus to EADS} it weighed heavily with the Board that BAE Systems' 20 per cent. shareholding in Airbus represents a minority shareholding in a business over which BAE Systems does not have full control and has no realistic prospects of gaining full control." Letter from Dick Olver, Chairman, BAE Systems, to Ordinary Shareholders, "BAE Systems plc: Proposed Disposal of Airbus Shareholding and Notice of Extraordinary General Meeting," p. 4 (Sept. 11, 2006) (Exhibit USA-331). Thus BAE's lack of control over Airbus drove BAE to exercise its put option; if the transaction had satisfied the "control" prong of the Appellate Body test, then it would most likely never have transpired.

³⁶⁷ EU FWS, para. 314, note 406.

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warranting the conclusion that an extinction of benefit has taken place.”³⁶⁸ That Member explained further:

The central point is that a sale of shares, whether or not it conveys control, transfers rights in the shares to a new owner. The assets of the company, to which the shares attach, do not change at all. Nor could it be otherwise, because the buyer would then not acquire the full benefit of the bargain: the buyer would pay for an asset (the subsidy) that had in the very sales transaction been “extinguished”. Shares in listed companies are traded on stock exchanges with great frequency and without any fear that sales on the market diminish the underlying value of the assets owned by these companies. The changing price of listed securities reflects the different valuations that buyers and sellers place upon companies and their underlying assets. However, nothing about these trades extracts the value of any asset, including the benefit of any subsidy granted. That subsidy continues to benefit the recipient, even if the ownership of the recipient's shares changes from one day to another.³⁶⁹

242. The alleged extinction event in the Aérospatiale-Matra merger was the sale of shares in government-owned ASM to the general public in exchange for cash, and to Lagardère in exchange for its shares in Matra Hautes Technologies.³⁷⁰ The EU provides no basis to conclude that the change in ownership of the shares changed the value of the subsidy to Aérospatiale.

243. The alleged extinction event in the creation of EADS was a massive corporate reorganization that combined the various separate national Airbus entities into a single company, EADS, that would in turn own the large majority of shares in Airbus. To achieve this merger, they created EADS as a new entity, which issued shares to each company commensurate to the assets it contributed. In conjunction with this transaction, EADS issued a number of shares to the general public. Thus, the creation of EADS was essentially a share transaction, with all parties contributing money or large civil aircraft production operations in exchange for shares. The EU provides no basis to conclude that the reorganization changed the value of past subsidies to the various Airbus entities.

244. Finally, EADS' acquisition of BAE's Airbus shares was a straightforward share transaction, with EADS contributing money in exchange for BAE's shares in Airbus. The EU provides no basis to conclude that the reorganization changed the value of past subsidies to Airbus.

³⁶⁸ *EC – Large Civil Aircraft (AB)*, para. 726(c).

³⁶⁹ *EC – Large Civil Aircraft (AB)*, para. 726(c).

³⁷⁰ EU FWS, paras. 309-311.

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245. Therefore, while Members A, B, and C adopted different tests, they lead to the same conclusion – that the Aérospatiale-Matra merger, the creation of the EADS, and the acquisition of BAE’s shares did not extinguish past subsidies.

d. Even under the EU three-factor test, the Aérospatiale-Matra merger, the creation of EADS, and the acquisition of BAE’s shares do not extinguish prior subsidies.

246. Even if the Appellate Body’s extinction analysis could be reduced to the three-factor test advocated by the EU, none of the transactions in question would satisfy the various elements of the test. The EU tries to change this result by lowering the threshold for a change in control to a point where it becomes essentially meaningless. Nothing in the Appellate Body’s analysis, or in the views of the individual Members of the Division, supports such an approach. The EU also tries to ignore the requirements of an “arm’s length” relationship and “fair market value,” and the extensive debate on these issues before the original Panel.

247. It is also significant that the facts about the partial privatization of Aérospatiale, the creation of EADS, and the acquisition of BAE’s shares do not support a finding that they met the criteria set out by the Appellate Body: fair market value, arm’s length, and a transfer of ownership and control to new owners

i. Under the Appellate Body’s reasoning, a change in control only extinguishes subsidies if the control passes from the subsidy recipient to new owners.

248. The United States has shown that the EU effort to distill the Appellate Body’s analysis into a three-factor test ignores what the Appellate Body found, and in particular, ignores the views of two of the three Members of the Division. However, even in its treatment of the three factors, the EU has disregarded important limitations on the reasoning of the Appellate Body.

249. The first factor in the EU test is whether the new owners paid fair market value. Although the United States and the EU agree that a transaction can withdraw subsidies only if it is at fair market value, the EU goes too far in arguing that a stock market transaction is *ipso facto* at fair market value.³⁷¹ That may not be the case if, for example, a share offering was affected by fraudulent or collusive behavior. Moreover, by suggesting what is essentially an irrebuttable presumption, the EU deviates from the “fact-intensive” analysis mandated by the Appellate Body.

250. The second factor in the EU test is whether the original owners and new owners operated at arm’s length in the transaction. The EU frames this question in terms of whether each party “is able” to act in its own interest.³⁷² However, the source it cites for this proposition, the report

³⁷¹ EU FWS, para. 298.

³⁷² EU FWS, para. 298.

of the compliance panel in *US – Countervailing Measures on Certain EC Products*, adopted a different approach:

We note that neither the *SCM Agreement* nor prior reports have defined the concept of “arm’s length”. The parties have referred to various dictionary definitions of “arm’s length” to support their positions. For instance, the *Black’s Law Dictionary* defines arm’s length as “{o}f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship”. The *New Shorter Oxford Dictionary* defines arm’s length as “without undue familiarity; (of dealings) with neither party controlled by the other”.

The United States contends that the definition contained in its new privatization methodology corresponds to the ordinary meaning of arm's length. The definition provides that an arm’s-length transaction is "a transaction negotiated between unrelated parties, each acting in its own interest, or between related parties such that the terms of the transaction are those that would exist if the transaction had been negotiated between unrelated parties". This definition appears to coincide with the above dictionary definitions in that all highlight the independence of the parties in an arm’s length transaction: either the parties have equal bargaining power, neither party controls the other, or each party is acting in its own interest.³⁷³

Thus, the analysis focuses on whether each party actually *does* act independently, not whether it *is able* to act independently. The distinction is important. Entities that are in theory *able* to act independently may not in practice actually do so. One such example would be when a government uses its authority to pressure a private entity to buy shares in a government-owned company. Although the government and the entity might appear to be independent, government pressure (or promises of favors in other areas) might lead the private entity to take a decision it would not take if evaluating the situation independently. The EU “able to act independently” standard would treat that transaction as at arm’s length, even though it manifestly is not. 251. The third factor in the EU test, “to what extent there is a transfer of ownership and control,” presents a number of problems. The words used by the EU derive from the Appellate Body’s finding that the subsidy extinction analysis would require a panel to “determine the extent to which there are sales at fair market value and at arm’s length, accompanied by transfers of ownership and control.”³⁷⁴ Both the Appellate Body and Member B found that subsidy extinction would occur only after a “transfer” of ownership and control, namely one that moves ownership and control from old owners to new owners.

³⁷³ *US – Countervailing Measures on Certain EC Products (21.5)*, paras. 7.133-7.134 (footnotes omitted).

³⁷⁴ EU FWS, para. 298, quoting *EC – Large Civil Aircraft (AB)*, para. 725.

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252. However, the EU seeks to lower the threshold by arguing that, when read together with the separate views of Member B of the Division,³⁷⁵ this test would find a “transfer of control” any time the purchase of some portion of the company “brings about a qualitative change in control that impacts the way the company is run.”³⁷⁶ The only support the EU provides for this test is a citation to the U.S. first written submission.³⁷⁷ However, the cited paragraph does not support the EU position – the point it makes is that transfer of control occurs only when there is “replacement of old owners with new owners who seek more market-oriented results.”³⁷⁸ Thus, like the Appellate Body and Member B, the United States focused on the movement of control from old owners to new owners. There are many situations in which a “qualitative change in control that impacts the way the company is run” does not rise to this level.³⁷⁹ Therefore, the EU’s articulation of the test does not capture the Appellate Body’s meaning. In fact, the EU is never clear as to the meaning of the key concept, “qualitative change in control.”

253. At another point, the EU cites to International Accounting Standard 28, which provides that an investment in a company is subject to the equity method of accounting when the investor has “significant influence.” The standard specifies that such influence may exist when the investor has representation on the board of directors or participates in policy making, there are material transactions between the company and the investor, or there is an interchange of managerial personnel. It also provides for a rebuttable presumption of “significant influence” if the investor has more than 20 percent of the voting power in the company.³⁸⁰ The EU never explains why the concept of “significant influence” for accounting purposes is relevant to this inquiry. In fact, several of the bases for the existence of significant influence involve criteria (material transactions and interchange of managerial personnel) that suggest the investor and the company do not operate at arm’s length. Therefore, “significant influence” is not a valid proxy for a change in control that would extinguish subsidies.

254. In any event, EADS’ own accounting standards confirm that IAS 28 does not apply to the relationship between EADS and BAE prior to the 2006 exercise of BAE’s put option. EADS’

³⁷⁵ EU FWS, para 299, quoting *EC – Large Civil Aircraft (AB)*, para. 726(b).

³⁷⁶ EU FWS, para. 303. The EU asserts that the United States agrees with this approach. In fact, the U.S. arguments cited by the EU all address situations in which control of the company moves from the old owners to new owners, and not the minor changes in control addressed by the EU.

³⁷⁷ EU FWS, para. 303, citing US FWS, para. 53.

³⁷⁸ US FWS, para. 53.

³⁷⁹ One example would be the purchase of a minority interest by a quarrelsome investor with idiosyncratic views. That situation might change how the company’s managers acted, but would not transfer control from the original owners to the quarrelsome new investor. Another example would be sales of shares in a company to government entity. Control might change, but not in a way that would lead to the extinction of subsidies.

³⁸⁰ International Accounting Standard No. 28, p. 2/6 (Exhibit EU-57). The EU misstates the presumption as applying to any “shareholder that holds a 20 percent stake in a company.” However, the standard is clear that it applies only “{w}here an entity holds 20% of the *voting power* (directly or through subsidiaries) on an investee.” *Ibid.*, p. 2/6. (emphasis added).

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2005 Annual Report indicates that EADS accounted for BAE’s minority shareholding by applying IAS 32, which applies to “all types of financial instruments except,” *inter alia*, “those interests in subsidiaries, associates and joint ventures that are accounted for in accordance with . . . IAS 28 *Investments in Associates*”³⁸¹ Therefore, according to EADS itself, IAS 28 is not the appropriate standard for gauging BAE’s level of influence over EADS.

255. The EU ends its analysis by observing, correctly, that the Appellate Body emphasized the need for “a fact-intensive inquiry to determine the extent to which the transaction proceeded at fair market value and at arm’s length, accompanied by transfers of ownership and control.”³⁸² That is clear. However, the purpose of the exercise is not, as the EU asserts, merely to examine whether there has been *any* “qualitative change in control” that somehow “affects the way the company is run.”³⁸³ The objective is to discover whether there has been a “*transfer of ownership and control*,” namely, one that replaces old owners with new owners, and moves control from the former to the latter.

ii. The Aérospatiale-Matra merger, the creation of EADS, and the purchase of BAE’s shares in Airbus did not satisfy the EU’s own three-part test.

256. After laboring extensively to lower the threshold posed by its three-factor test, the EU still fails to demonstrate that any of the three alleged extinction extractions satisfy that test. On the transfer of ownership and control, it focuses on minutiae, such as the limited rights of minority shareholders, and ignores the question posed by the Appellate Body – whether there is a *transfer of ownership and control to new owners*. On the question of fair market value and arm’s length transaction, the EU essentially repeats the arguments it made to the original Panel.

257. First, none of the transactions referred to by the EU resulted in an economically relevant *transfer of control or ownership*. This alone should be sufficient for the Panel to determine that none of the transactions resulted in the extinction of any prior subsidy benefit.

³⁸¹ EADS Financial Statements 2005, p. IV (“revised application of IAS 32 standards required changes regarding the account of the put option granted to BAE Systems as a minority shareholder of Airbus.”) (Exhibit USA-412); EC staff, *International Accounting Standard 32: Financial Instruments: Presentation*, p. 1 (Exhibit USA-413).

³⁸² *EC – Large Civil Aircraft (AB)*, para. 725; EU FWS, para. 307. Immediately after listing fair market value, arm’s length relationship, and change in ownership and control as necessary elements of the inquiry, the Appellate Body found that a Panel would additionally need to inquire “whether a prior subsidy could be deemed to have come to an end.” The EU continually omits this additional step from its discussion of the subsidy extinction analysis.

³⁸³ EU FWS, para. 307.

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258. For example, the EU itself has emphasized that the transactions resulting in the creation of EADS and Airbus SAS did *not* “affect the quality or nature of control of Airbus.”³⁸⁴ They represented nothing more than “a restructuring and rationalization of the existing legal partnership between the parties,” namely, the entities that previously had coordinated their Airbus activities through Airbus GIE.³⁸⁵ The EU has provided no valid reason that the Panel should consider a set of transactions devoted to ensuring continuity of control as transferring control to new owners.

259. Similarly, with regard to the Dassault share transaction that was the necessary precursor to the Aérospatiale-Matra merger, the EU itself noted that it “did not have any economic effect on Aérospatiale.”³⁸⁶ The French government certainly did not relinquish control of Aérospatiale-Matra. Rather, the 48 percent stake in the entity that it retained was by far the largest shareholding, and the government also obtained a valuable “golden share.”³⁸⁷

260. The purchase of the BAE shares, for its part, resulted only in one (minority) co-owner of Airbus (BAE) selling shares to another (majority and controlling) shareholder (EADS). As such, it did not result in the transfer of ownership or control to a new owner either. It simply resulted in the further consolidation of Airbus ownership within EADS.

261. Second, the United States notes that the EU has in no way demonstrated that the transactions occurred at arm’s length and for fair market value. In the case of the Aérospatiale-Matra merger, the French government privately negotiated the terms with Lagardère. Not surprisingly, a report from the French Senate suggests that Aérospatiale was undervalued, giving Lagardère and those who purchased shares following the partial flotation a sweetheart deal.³⁸⁸ Similar concerns were voiced in the press, and valuations of Aérospatiale were openly referred to as “seriously underestimated.”³⁸⁹

262. Indeed, one of the expert reports the EU submitted to the original Panel specifically addressed the EU’s argument that the Aérospatiale-Matra tie-up was for “fair market value.” An

³⁸⁴ Commission of the European Communities, Merger Procedure, Case No. COMP/M.1745 – EADS, paras. 15-16 (May 11, 2000) (Exhibit USA-323).

³⁸⁵ European Commission, Press Release of 18 October 2000, European Commission Clears the Creation of the Airbus Integrated Company” (Exhibit USA-324).

³⁸⁶ EU FNCOS, para. 103, also cited in the Panel Report at para. 4.345.

³⁸⁷ Décret no. 99-97 du 15 février 1999 instituant une action spécifique de l’Etat au capital de la société Aérospatiale, société nationale industrielle, Journal officiel de la République Française (Feb. 16, 1999), p. 2428 (Exhibit USA-325); see also Reuters, France publishes AS/Matra “golden share” decree (Feb. 16, 1999) (Exhibit USA-326).

³⁸⁸ Sénat, No. 414 (session ordinaire 1998-1999), Rapport d’Information, Commission des Finances du Comntrole Budgetaire et des Comptes Economiques de la Nation sur la restructuration de l’Industrie aeronautique européenne, pp. 144-145, 155 (Exhibit USA-327). See also, Assemblée Nationale, Avis No. 1866, p. 26 (Exhibit USA-328).

³⁸⁹ *E.g.*, Aérospatiale – Matra merger in weeks, Reuters, February 11, 1999 (Exhibit US-329).

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analysis by corporate finance and investment expert Lauren D. Fox (“the Fox Report”) found that the French government “failed to secure adequate compensation for its Dassault shares” was giving up its double voting rights.³⁹⁰ The Fox Report established that the value of voting control in a typical entity is 30 percent above the value of the individual shares. Applying that standard, the report found that the Dassault share transfer resulted in a substantial loss in value for the French government.³⁹¹ An additional way in which the French government “failed to secure adequate compensation for its Dassault shares” was through its reliance on valuation reports which, according to the Fox Report, are not independent “fairness opinions” but merely valuations by investment banks seeking to ratify a previously identified outcome.³⁹² In this regard, it is notable that the valuation reports post-date the actual Dassault transaction – a fact that the EU has not disputed and that the original Panel reflected in its report.³⁹³

263. The transaction between BAE and EADS also fails to satisfy the EU’s own three-part test. First of all, the transaction did not take place at arm’s length, but was in fact orchestrated by the UK government. In the words of a UK parliamentary report:

The potential political ramifications of the sale of BAE Systems’ stake were also of concern to the DTI {Department of Trade and Industry}. Hence, prior to the sale, the Government actively engaged at ministerial and official level with EADS and Airbus in order to agree {sic} certain concessions from the parent company. In June 2006, the DTI announced that EADS had agreed to transfer to the Government the undertakings given to BAE Systems by EADS in 2000. The details of the undertakings are confidential, but essentially are designed to ensure that any decisions on the location of work packages affecting the UK are made on commercial grounds, without political influence or pressure. EADS also agreed to create a ‘transparency mechanism’ with regard to decisions about location of work; to establish a UK research and development centre; and to appoint a non-executive director to the EADS board agreed by the UK government. EADS also said it would consider a secondary listing on the London Stock Exchange, although it has subsequently decided not to pursue this.³⁹⁴

³⁹⁰ Lauren D. Fox, 1998 Dassault Share Transfer Valuation Report (“Fox Report”) (Exhibit USA-330(HSBI)). Pursuant to paragraph 52(*kbis*) of the May 23, 2007 revision of the BCI/HSBI Procedures, the United States is providing with this submission an HSBI-Redacted Version of Exhibit US-595. The HSBI-Redacted Version is labeled as Exhibit US-595a.

³⁹¹ Fox Report, p. 6 (Exhibit USA-330(HSBI)).

³⁹² Fox Report, p. 4-5 (Exhibit USA-330(HSBI)).

³⁹³ Panel Report, para. 7.1412. The United States notes that the Appellate Body reversed the Panel’s legal reasoning with respect to a separate question, namely whether the Dassault share transfer resulted in a “benefit” to Airbus under Article 1.1(b) in and of itself, and that it was unable to complete the analysis in this regard. That, however, is not a question that the Panel will have to resolve at this stage.

³⁹⁴ United Kingdom House of Commons Trade and Industry Committee, *Recent Developments with Airbus – Volume I*, p. 16 (June 19, 2007) (Exhibit USA-25); *see also, e.g., id.*, p. Ev 55 (Exhibit USA-414) (“5.1 The UK

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Thus the ultimate BAE-EADS transaction in 2006 reflected a political bargain, not a merely financial one.³⁹⁵ Indeed, media reports suggested that in the absence of UK government influence, BAE systems might have sold its share in Airbus to a company other than EADS, but that it did not attempt to do so because of political pressure.³⁹⁶

264. Real questions also exist as to whether BAE paid fair market value to EADS. In particular, the transactions took the form of the exercise, by BAE Systems, of a put option on terms that were negotiated years earlier.³⁹⁷ The EU refers in this regard to “independent investment banks and advisors” that it argues provided “valuations” of the BAE share, but it fails to provide any of these reports in support of its argument.³⁹⁸ A letter by BAE’s Chairman to its

government is actively engaged at ministerial and official level with Airbus and EADS. Just before the Farnborough Air Show in July 2006, EADS agreed in principle to: – Transfer the undertakings given to BAE Systems by EADS in 2000 to the government, and strengthen those undertakings; – Create a transparency mechanism in respect of EADS’s decisions about location of work; – Establish a UK research and development centre; – Appoint to the EADS board, subject to the due process of EADS governance, one non-executive director whose appointment is agreed with the UK government; and – Consider a London Stock Exchange secondary listing. 5.2 The details of the undertakings are confidential 5.3 Progress is being made, and EADS confirmed in October {2006} that it would honour the original undertakings pending the conclusion of negotiations.”); David Gow, *BAE’s plan to sell Airbus stake in jeopardy*, The Guardian (UK) (July 3, 2006) (Exhibit USA-415) (referring to the UK government’s “anger” over BAE’s “original decision to sell” to EADS).

³⁹⁵ According to UK parliamentary discussions, the UK government extracted these concessions from EADS by leveraging its so-called “golden share” in BAE. When Margaret Hodge, the UK cabinet member responsible for civil aerospace, described the deal in 2007 as “a commercial decision for BAE{}”, the MP Mr. Lindsay Hoyle responded:

It is not quite, is it, because, in fairness, if I am correct, we are still meant to hold this golden share in the company because it was of strategic interest to the UK? Our aircraft industry is strategic, along with other industries, so we still have this so-called golden share, so it is not quite, “It is nothing to do with us gov; it is a private firm”. No, it is a little bit more serious than that

In response, Minister Hodge agreed that

we do have an enormous interest in ensuring both that the jobs are protected in the aerospace industry and that the sector is maintained here as a vibrant sector with a very strong future. That is why we entered into negotiations at a very early stage to secure a number of undertakings from EADS as to the position of Airbus once the sale of the BAE shares went through.

United Kingdom House of Commons Trade and Industry Committee, *Recent Developments with Airbus – Volume I*, pp. Ev 20 (June 19, 2007) (Exhibit USA-414). Thus, Minister Hodge confirmed that “it is not quite, ‘it has nothing to do with us gov.’”

³⁹⁶ E.g., Douglas Barrie & Robert Wall, *Divorce Proceedings: Investment institutions called in to resolve dispute of Airbus valuation*, Aviation Week & Space Tech. (June 12, 2006) (Exhibit USA-416) (“What’s not in doubt is that EADS will take ownership of 100% of Airbus, insists a senior EADS official. The BAE stake will not be sold to anyone else.”); *EADS vows UK Airbus jobs secure*, Flight Int’l (Apr. 11, 2006) (Exhibit USA-417) (“Although EADS is not obliged to buy the stake {in Airbus from BAE}, it is inconceivable that BAE would sell to an outside investor instead.”).

³⁹⁷ US FNCOS, para. 120.

³⁹⁸ In the original proceeding, the EU did identify the advisors and investment banks involved. EU FWS, paras. 271 ff.

shareholders observed of the independent bank that “[t]he Price determined by Rothschild was significantly lower than had been expected by the general market” but that “[t]he terms of the Shareholders’ Agreement preclude the Company from discussing with Rothschild the basis of Rothschild’s determination of the Price.”³⁹⁹ As such, as in the case of the Aérospatiale-Matra merger and creation of EADS before it, conditions characteristic of a market transaction – such as the “unfettered interplay of supply and demand” and “broad-based access to information on equal terms”⁴⁰⁰ – were absent, and real questions exist as to whether “fair market value” was ultimately paid in such a way that any prior subsidy benefit could be deemed to have been “extinguished.”

4. The modifications to the Mühlenberger Loch lease did not make the terms consistent with the market and, therefore, failed to withdraw the subsidy.

265. The United States has reviewed the explanation of the EU’s methodology for adjusting the rental for the Mühlenberger Loch site to a market rate, which the EU provided for the first time in its first written submission. Based on that description, the United States is not pursuing its claim with regard to this measure at this time.

D. The Appellate Body’s Findings in *EC – Large Civil Aircraft* Preclude Treatment of the Removal of the Financial Contribution, or the Extinction, Extraction, or End of the Life of Subsidies Alleged by the EU as Withdrawing Subsidies for Purposes of Article 7.8 of the SCM Agreement.

266. The Appellate Body found that the role of the LA/MSF, capital, and regional subsidies in creating the A300, A310, A320, A330, A340, and A380 established a genuine and substantial causal link between the subsidies and the lost sales and displacement experienced by Boeing between 2001 and 2006. The Appellate Body also found that the expiration of subsidies prior to the reference period would not necessarily preclude a finding that they had adverse effects during that time. The Appellate Body made explicit findings that the extractions alleged by the EU did not affect the value of past subsidies, but made no findings with regard to other transactions or

³⁹⁹ Letter of BAE’s then-Chairman Dick Olver to BAE Shareholders, of 11 September 2006, <http://www.defense-aerospace.com/article-view/verbatim/73020/bae-explains-rationale-for-sale-of-airbus-stake.html> (Exhibit USA-331). Indeed, industry analysts at the time valued BAE’s share at several times the price EADS was eventually required to pay (e.g., <http://www.defenseindustrydaily.com/reports-analysis-bae-in-talks-to-sell-its-20-stake-in-eads-airbus-updated-02135/>, noting valuation of the share at between GBP 3.0-4.5BN or \$5.2-7.8BN; and http://articles.marketwatch.com/2006-04-07/news/30769767_1_defense-and-aerospace-strategy-airbus-shareholding-airbus-stake, noting industry valuation of between GBP 2.8 and 3.3 BN, or more). During the period from April to July 2006 (leading up to the issuance of the Rothschild valuation on July 2), EADS shares were subject to a “temporary imbalance in supply in demand and an increase in the free float.” This imbalance was caused by, *inter alia*, the April sale by Lagardère and DASA of 7.5 percent of EADS, “negative customer feedback about the A350 and the A340’s cost of operations,” “delivery delays” for the A380, and “market uncertainty” provoked by BAE’s announcement that it would exercise its put-option. EADS Financial Statements 2006, p. X (Exhibit USA-418).

⁴⁰⁰ *US – Countervailing Measures on Certain EC Products (AB)*, para. 122.

events. In short, the possibility that subsidies had expired did not prevent the original Panel and the Appellate Body finding those subsidies inconsistent with Article 5 of the SCM Agreement due to their continuing adverse effects.

267. Notwithstanding that the original Panel and the Appellate Body rejected the EU's legal arguments regarding the implications of expiration of subsidies, the EU has presented them again. It argues that the repayments, extinctions, extractions, and ends of life described in its first written submission resulted in "withdrawal" of subsidies for purposes of Article 7.8 of the SCM Agreement. This view ignores the findings of the original Panel and the Appellate Body that all of the subsidies caused adverse effects during the reference period *without regard as to whether they had expired before that time*.

268. Thus, as a compliance matter, the alleged expiration of those same subsidies did not "withdraw" them or otherwise excuse the EU from the Article 7.8 obligation triggered by its earlier violations of Article 5. The EU, however, takes an approach opposite to that of the original Panel and the Appellate Body. The EU argues that the analysis under Article 7.8 of the SCM Agreement is essentially the reverse of the legal analysis required under Article 5. Under the EU's theory, even though the alleged expirations of subsidies a finding under Article 5 that the subsidies caused WTO-inconsistent adverse effects, the same expirations of the same subsidies *require* a finding under Article 7.8 that the subsidies are WTO-consistent. There is no legal or factual support for this contradictory result.

269. As explained above, the WTO inconsistencies found by the original panel and Appellate Body define the responding Member's obligation to comply with the recommendations and rulings of the DSB. In the case of a finding under Article 5 of the SCM Agreement, the subsidy and adverse effects found to exist will determine the extent of the subsidizing Member's obligation under Article 7.8 of the SCM Agreement to withdraw the subsidy or take appropriate steps to remove the adverse effects.

270. In the original dispute, the Panel and the Appellate Body found that LA/MSF, certain government capital contributions to Airbus companies, and certain regional programs were subsidies. They reached these findings despite EU arguments that the subsidies had expired. The Appellate Body explained that once the United States, as the complaining party, established that the EU had granted a subsidy, there was no requirement for a further showing that the subsidy continued to exist during the reference period.⁴⁰¹ The Appellate Body explained that:

By its terms, Article 5 of the *SCM Agreement* imposes an obligation on Members not to cause adverse effects to the interests of other Members through the use of any subsidy as defined in Article 1. We disagree with the proposition that this obligation does not arise in respect of subsidies that have come to an end by the time of the reference period. In fact, we do not exclude that, under certain

⁴⁰¹ *EC – Large Civil Aircraft (AB)*, para. 713.

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circumstances, a past subsidy that no longer exists may be found to cause or have caused adverse effects that continue to be present during the reference period.⁴⁰²

Thus, for example, even if one presumes that a subsidy granted in 1995 expired by 2000, as the EU argues, that subsidy would be inconsistent with Article 5 if it caused adverse effects in the reference period *in spite of* its putative expiration.

271. The Appellate Body also found that the EU, as responding party, was free to argue that the subsidy had expired, but that the existence of the subsidy is relevant only to the adverse effects analysis, and is not relevant to the evaluation of whether the measure in question is a subsidy under Articles 1 and 2. The Appellate Body explained that:

the concept of “continuing benefit” may be relevant for purposes of assessing how the *effect* of a subsidy is to be analyzed over time, and considered this to be an aspect of the causation analysis to be undertaken pursuant to Articles 5 and 6 of the *SCM Agreement* and part of an assessment of the “effects” of a subsidy under these provisions. It is relevant, in our view, to examine the trajectory of the life of a subsidy in order to determine whether a Member is causing, through the use of any subsidy, adverse effects to the interests of another Member within the meaning of Article 5 of the *SCM Agreement*. Moreover, a panel should consider, where relevant for the adverse effects analysis, that the effects of a subsidy will ordinarily dissipate over time and will come to an end.⁴⁰³

The original Panel found that the effects of LA/MSF and the other EU subsidies had not dissipated as of the original Panel’s reference period. Section VI of this submission demonstrates that those effects continue today.

272. As part of its extinction/extraction argument, the EU asserted that the Panel should have concluded in the original proceeding that extinctions and extractions had “withdrawn” prior subsidies for purposes of Article 7.8 and, therefore, were not subject to Article 5. The Appellate Body responded:

under Article 7.8, a recommendation to “withdraw” subsidies or remove their adverse effects is directed at actionable subsidies that have been found to cause adverse effects. We recall that, in this dispute, at the time the sales transactions and “cash extractions” took place, there had been no findings by a panel or the Appellate Body that alleged subsidies were either prohibited subsidies or actionable subsidies causing adverse effects. Therefore, we do not consider that the sales transactions and “cash extractions” resulted in the “withdrawal” of subsidies, within the meaning of Article { } . . . 7.8 of the *SCM Agreement*.

The logic behind that finding – that an event cannot “withdraw” a measure that has not yet been found to be a subsidy – also applies to the alleged subsidy repayments and expirations that pre-

⁴⁰² *EC – Large Civil Aircraft (AB)*, para. 712.

⁴⁰³ *EC – Large Civil Aircraft (AB)*, para. 714 (citation omitted).

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date the WTO findings against the EU. Thus, to the extent it was relevant, any alleged expiration of past subsidies would have to be part of the adverse effects analysis, just as they are for purposes of Article 5.

273. These findings define the extent of the EU's obligations under Article 7.8. Any repayments or extinctions before the finding of WTO inconsistency cannot satisfy the EU's obligation to withdraw the subsidies. (Subsidy extractions are not an issue in this proceeding, as the Appellate Body rejected the EU's only extraction arguments, with regard to the Dasa and CASA transactions.⁴⁰⁴) The Appellate Body found that such transactions did not withdraw prior subsidies, and that finding is not open to challenge in this proceeding. Any allegations of repayment or extinction would accordingly have to be addressed as part of the analysis of whether the EU has removed the adverse effects for purposes of Article 7.8. Section VI addresses this analysis.

274. The EU, however, argues that "withdrawal" for purposes of Article 7.8 occurs any time a financial contribution is removed or a subsidy is repaid, extinguished, or extracted, or expires, and that when one of those events happens, the responding party has no further obligation with regard to that subsidy. The EU's main legal point is that Article 7.8 provides a Member two options to bring an actionable subsidy into compliance with its WTO obligations: withdraw the subsidy *or* take appropriate steps to remove the adverse effects.⁴⁰⁵ This is uncontroversial. However, Article 7.8 does not indicate what actions are sufficient to "withdraw" a subsidy, and the EU provides *no* support for its view that the transactions highlighted in its first written submission are sufficient.

275. Section IV.A, IV.B, and IV.C identify additional errors in the EU assertions regarding repayment, extinction, extraction, or the end of the life of a subsidy. The critical point is that none of these arguments justifies the EU's assumption that any of the asserted subsidy expiration events automatically qualifies as withdrawal of a subsidy.

276. Thus, the Appellate Body's findings did not leave the EU the option of doing nothing and relying on events from the past to satisfy its obligation to "withdraw" the subsidy for purposes of Article 7.8. To use the Appellate Body's words, the "usual" situation prevailed – the EU had an obligation to take "affirmative action . . . directed at effecting the withdrawal of the subsidy or the removal of its adverse effects."⁴⁰⁶ But the measures taken to comply, as listed in the EU Notification and elaborated in the EU first written submission, reveal no such action. Therefore, the EU has not withdrawn its subsidies.

277. On a final note, even if the EU succeeded in demonstrating that some of the subsidies had expired, which it has not done, and even if it succeeded in its arguments that those expirations constituted withdrawals for purposes of Article 7.8, which the EU has not done, the expired

⁴⁰⁴ *EC – Large Civil Aircraft (AB)*, para. 749.

⁴⁰⁵ EU FWS, paras. 29-31.

⁴⁰⁶ *US – Upland Cotton (21.5) (AB)*, para. 236.

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subsidies would remain part of the adverse effects analysis with regard to extant subsidies. As noted above, the Appellate Body has found that an expired subsidy remains inconsistent with Article 5 of the SCM Agreement if its adverse effects continue after the time of withdrawal. Section VI of this submission explains that all of the subsidies found inconsistent with Article 5 in *EU – Large Civil Aircraft* continue to have adverse effects in the present. Therefore, even if the EU has complied with its obligation to remove one subsidy, the effects of that subsidy prior to its withdrawal remain part of the analysis of the adverse effects of the remaining subsidies. Section VI.D.1 explains this reasoning in greater detail.

E. The EU Fails to Rebut the U.S. *Prima Facie* Case that LA/MSF for the A350 XWB is a subsidy.

278. The U.S. first written submission demonstrated that the grantors of LA/MSF for the A350 XWB agreed that such financing was necessary precisely because capital markets were unwilling to provide it. The EU attempts to rebut this evidence only by arguing that the United States has not provided sufficient evidence to sustain a *prima facie* case. Its arguments fail, however, because it provides no credible evidence that such financing is available from commercial financiers. The documents the EU provided in response to the Panel’s request under Article 13 of the DSU confirm that LA/MSF for the A350 XWB was on better-than-market terms.

279. The EU explicitly concedes that LA/MSF for the A350 XWB was a financial contribution,⁴⁰⁷ so there is no dispute on that point.

280. The EU also does not dispute the EU member States granted LA/MSF for the A350 XWB because capital markets were unwilling to provide it. Specifically, the United States presented UK and French government statements describing this financing as being “‘designed to address the unwillingness of capital markets to fund projects’” like Airbus’s launch of the A350, and “‘necessary to supplement market financial support’.”⁴⁰⁸ The United States also presented a German media report confirming the same point about A350 XWB LA/MSF from all four Airbus governments.⁴⁰⁹

281. [[HSBI]]⁴¹⁰ [[HSBI]]⁴¹¹ [[HSBI]]⁴¹²

⁴⁰⁷ EU FWS, para. 366 (conceding that German, French, Spanish, and UK A350 XWB LA/MSF “constitutes a financial contribution in the form of a loan, within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*.”).

⁴⁰⁸ US FWS, para. 137.

⁴⁰⁹ US FWS, para. 137.

⁴¹⁰ [[HSBI]].

⁴¹¹ [[HSBI]].

⁴¹² [[HSBI]].

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282. By itself, this evidence makes a *prima facie* case as to the existence of a subsidy, because it establishes the existence of a financial contribution, and that the market would not have provided Airbus with that financing on the terms that it obtained from the government.⁴¹³

283. The documents submitted by the EU in response to the Panel’s request under Article 13 of the DSU confirm this conclusion, showing that France, Germany, Spain, and the UK each provided LA/MSF for the A350 XWB at an anticipated rate of return far below the relevant commercial benchmark. The Appellate Body found with respect to LA/MSF that

Article 14 of the *SCM Agreement* provides certain guidelines applicable to the calculation of benefit in countervailing duty investigations, but which may also be of contextual assistance to WTO panels confronted with subsidy claims. The most relevant guideline in this particular case, given the Panel’s characterization of the LA/MSF as loans, is Article 14(b), which provides that “a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market”.

The European Union accepts that the assessment of benefit in this case called for a comparison of the rates of return of the LA/MSF measures with the rates of return that would have been demanded by a market lender.⁴¹⁴

Thus the Panel and the parties to the dispute agreed that a subsidy exists if the rates of return obtained by the member States were lower than a corresponding market benchmark.⁴¹⁵

284. To apply this principle, two inputs are necessary: the rate of the return actually obtained by the member States under the LA/MSF contracts, and the rate of return that would be obtained under an appropriate market benchmark. The United States has asked NERA to review both rates and perform an interest rate benchmark analysis consistent with the DSB’s findings.⁴¹⁶ For the first input (*i.e.*, the actual rate of return), NERA uses the rates of return that were cited in the LA/MSF agreements.⁴¹⁷ This is the same approach that NERA used in the original proceedings.⁴¹⁸ Although the Panel described this approach as not fully accounting for the

⁴¹³ *Canada – Aircraft (AB)*, para. 157 (“In our view, the marketplace provides an appropriate basis for comparison in determining whether a ‘benefit’ has been ‘conferred’, because the trade-distorting potential of a ‘financial contribution’ can be identified by determining whether the recipient has received a ‘financial contribution’ on terms more favourable than those available to the recipient in the market.”).

⁴¹⁴ *EC – Large Civil Aircraft (AB)*, paras. 873-74.

⁴¹⁵ *E.g.*, *EC – Large Civil Aircraft (AB)*, para. 924.

⁴¹⁶ *Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks*, paras. 7 and 23. (Exhibit USA-475(HSBI)).

⁴¹⁷ Section III.B.2.a provides information on these rates.

⁴¹⁸ NERA, *Economic Assessment of the Benefit of Launch Aid* (Nov. 10, 2006) (Exhibit USA-474(HSBI)).

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effects of royalty payments,⁴¹⁹ it discounted the importance of such royalty payments, saying: “although *ostensibly* required by the terms of the LA/MSF agreements, royalty payments may never be made if attached to a number of aircraft sales, which . . . cannot realistically ever be achieved.”⁴²⁰ Moreover, the Panel did not endorse the EU’s methodology for determining the actual rates of return, instead describing it as “at most, the outer limit.”⁴²¹

285. For the benchmark rate of return, NERA uses the methodology accepted by the Panel, the Appellate Body, and the parties to the dispute: a composite rate consisting of the sum of a government borrowing rate, the general corporate risk premium, and the project-specific risk premium.⁴²² The United States and the EU accepted the Panel’s methodology for determining the government borrowing rate and the general corporate risk premium.⁴²³ For the project-specific risk premium, the United States uses the method advanced by the EU and Professor Robert Whitelaw during the merits phase, and further adjusted based on the specific criticisms of that approach reflected by the Panel and the Appellate Body.⁴²⁴ However, it is important to keep in mind that this results in a relatively conservative estimate of the market benchmark, as acknowledged by the Appellate Body.⁴²⁵ Nonetheless, the results are clear:

Country	Minimum Project-Specific Market Rate	Actual LA/MSF Rate
<i>Using Project-Specific Market Rates in 2009</i>		
France	[[HSBI]]	[***]
Germany	[[HSBI]]	[***]
Spain	[[HSBI]]	[***]
UK	[[HSBI]]	[***]
<i>Using Project-Specific Market Rates in 2010</i>		
France	[[HSBI]]	[***]

⁴¹⁹ *EC – Large Civil Aircraft (Panel)*, para. 7.403.

⁴²⁰ *EC – Large Civil Aircraft (Panel)*, para. 7.412.

⁴²¹ *EC – Large Civil Aircraft (Panel)*, para. 7.414. Since the true rates of return lie somewhere between the approach used by NERA and that used by the EU during the merits phase, NERA relies on its own approach for purposes of this compliance dispute.

⁴²² *EC – Large Civil Aircraft (AB)*, paras. 860-62, 874.

⁴²³ *EC – Large Civil Aircraft (AB)*, para. 874.

⁴²⁴ *Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks*, paras. 14- 22 (Exhibit USA-475(HSBI)).

⁴²⁵ *EC – Large Civil Aircraft (AB)*, para. 927 (“the appropriate level of risk premium for these projects is somewhere above the level calculated by Professor Whitelaw.”).

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Germany	[[HSBI]]	[***]
Spain	[[HSBI]]	[***]
UK	[[HSBI]]	[***]

286. As this table shows, even under the very conservative estimates proposed by the EU, the commercial benchmark rates are higher than the actual rates that France, Germany, Spain, and the UK actually charged Airbus for LA/MSF for the A350 XWB.⁴²⁶ In fact, in [***] cases, even if the project-specific risk premium is ignored entirely (*i.e.*, set at zero and not even the Whitelaw premium is used), the commercial benchmark is still higher than the actual rates.⁴²⁷ Consequently, and based on NERA’s various conservative assumptions, NERA concludes that the LA/MSF financing conferred by France, Germany, Spain, and the UK to Airbus for the A350 XWB was provided at rates that were between [[HSBI]] and [[HSBI]] below market rates. Therefore, all such LA/MSF confers a benefit to Airbus within the meaning of Article 1 of the SCM Agreement.

287. The EU rebuttal submission sought to side-step the benefit analysis from the original proceeding by submitting a report from Prof. Whitelaw focusing entirely on the notion that “*With the Possible Exception of Price, the Terms of MSF Do Not Deviate from Market Instruments.*”⁴²⁸

288. Now that information on the “price” of A350 XWB LA/MSF is available, Prof. Whitelaw’s assertions that “there is nothing unusual” about “unsecured,” “success-dependent,” “levy-based,” or “backloaded” loans are irrelevant. Whether widely available or not, LA/MSF gave Airbus financing under those terms for less than the market would have charged.

289. However, it is important to note that Prof. Whitelaw’s assertions are deeply flawed. To begin with, his inquiry into whether the individual core terms of LA/MSF are available in other context asks the wrong question. What makes LA/MSF so risky, and thus so unusual, is that it provides all four of these characteristics in a single instrument and with the governments assuming a highly significant (33% and more) proportion of the overall project risk. Thus, the availability of one of those terms in another type of financing – backloading in some bonds or loans without security for example, or the availability of LA/MSF-like financing in some form or other but that does not result in this fundamental transfer of risk – is beside the point.

290. Prof. Whitelaw attempts to address the question of financing that combines all of the core terms of LA/MSF by quoting a paragraph from a recent Boeing Annual Report that describes

⁴²⁶ See NERA, *Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks*, pp. 12-13 (Exhibit USA-475(HSBI)).

⁴²⁷ See NERA, *Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks*, pp. 12-13 (Exhibit USA-475(HSBI)).

⁴²⁸ Charles Whitelaw, *Comments on US and NERA’s Discussion of MSF Benefit and Effects on Product Launch*, para. 4, heading (June 27, 2012) (“Whitelaw Report”) (Exhibit EU-7) (emphasis added).

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Boeing's R&D cost-sharing agreements.⁴²⁹ He extrapolates from this paragraph that LA/MSF for the A350 XWB is really the same type of financing as is provided by risk-sharing suppliers to Boeing and Airbus. He then asserts that “{e}ven more than the Member States supplying MSF, the risk sharing suppliers to Boeing (and Airbus) are fully unsecured, relying solely on the success of the programme”), and observes that “MSF Agreements generally protect the returns of the Member States against delays in the programme.”⁴³⁰

291. Of course, the original Panel and the Appellate Body already found that risk-sharing supplier agreements between Airbus and some of its suppliers are not a valid benchmark for LA/MSF to Airbus, because they do not, in fact, have the same risk profile. The very fact that Airbus receives massive amounts of LA/MSF is at least one factor that substantially reduces the risk incurred by such risk-sharing suppliers.

292. Prof. Whitelaw's statement that “MSF Agreements generally protect the returns of the Member States against delays in the programme” is also wrong. In fact, as evidenced by the LA/MSF agreements and the findings of the original Panel and Appellate Body, LA/MSF is entirely success-dependent. That is, if Airbus fails to deliver the expected number of planes or fails to do so according to the schedule on which repayment terms were calculated, the governments, as lenders, take the financial hit and absorb the risk.⁴³¹

⁴²⁹ Whitelaw Report, para. 12 (Exhibit EU-7).

⁴³⁰ Whitelaw Report, para. 13 and note 10 (Exhibit EU-7).

⁴³¹ *E.g., EC – Large Civil Aircraft (Panel)*, para. 7.412 (referring to the “graduated levy-based and success-dependent nature of LA/MSF repayments”); *EC – Large Civil Aircraft (AB)*, paras. 604, 866, 1322 (quoting the Panel on the same point); 1969 A300-B Intergovernmental Agreement (Exhibit USA-388); German A300 Launch Aid Contract (Exhibit USA-393(BCI)); French A300 Launch Aid Contract (Exhibit USA-395(BCI)); Spanish A300 Launch Aid Contract (USA-397(BCI)); German A310 Launch Aid Contract (Exhibit USA-394(BCI)); French A310 Launch Aid Contract (Exhibit USA-396(BCI)); Spanish A310 Launch Aid Contract (Exhibit USA-398(BCI)); A320 Launch Aid Agreement (Exhibit USA-403(BCI)); UK A320 Launch Aid Contract (Exhibit EU-41); A320 Protocole (Exhibit USA-314(BCI)); German A320 MSF Agreement (Exhibit USA-313(BCI)); Spanish A320 Launch Aid Agreement (Exhibit USA-391(BCI)); Amendment to French A320 Agreement (Exhibit USA-399(BCI)); Spanish A330/A340 Launch Aid Agreement (Exhibit USA-389(BCI)); A330/340 Intergovernmental Agreement (Exhibit USA-404(BCI)); UK A330/A340 Launch Aid Contract (Exhibit USA-390(BCI)); French A330/340 Launch Aid Contract (Exhibit USA-392(BCI)); A330/340 Convention (Exhibit USA-400(BCI)); A330/340 Business Case (Exhibit USA-485(HSBI)); A330/A340 Report (Exhibit USA-406(HSBI)); *Protocole d'Accord entre l'Etat & Airbus France relatif au programme Airbus A340-500 et A340-600* (Exhibit USA-316(BCI)); French A340-500/600 Launch Aid Convention and Protocole (Exhibit USA-405(BCI)); Spanish A340-500/600 Agreement (Exhibit USA-317(BCI)); A340-500/600 Business Case (Exhibit USA-402(BCI)); UK A340-500/600 LA/MSF Contract (Exhibit USA-484(BCI)); A340-500/600 Business Case (Exhibit USA-486(HSBI)); German A380 LA/MSF Contract (Exhibit USA-83(BCI)); Spanish A380 Launch Aid Contract (Exhibit USA-88(BCI)); French A380 Launch Aid Protocole (Exhibit USA-409(BCI)); French A330-200 Launch Aid Convention and Protocole (Exhibit USA-315(BCI)); A330-200 Business Case (Exhibit USA-401(BCI)); United Kingdom A380 LA/MSF Contract (Exhibit USA-87(BCI)); French A380 Launch Aid Convention (Exhibit USA-407(BCI)); A380 Launch Aid Agreement (Exhibit USA-408(BCI)); German A380 LA/MSF Contract, Appendix 14 (Exhibit USA-86(BCI)); Airbus Germany Launch Aid Application (Exhibit USA-85(BCI)); Letter from Rainer Hertrich and Dr. Gustav Humbert to Ministers Eichel and Muller and Dr. Steinmeir (Nov. 9, 2000) (Exhibit USA-84(BCI)); Letter [***] (Exhibit USA-419(HSBI)); German A380 Launch Aid Application (Exhibit USA-286(BCI)); French A380 Launch Aid Agreement

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293. In sum, Prof. Whitelaw's argument simply misses the mark. It is irrelevant, because it does not actually address the U.S. argument – that A350 XWB LA/MSF was granted precisely because capital markets were unwilling to provide it and therefore confers a benefit. And it even fails to provide any good evidence that financing like LA/MSF is commercially available – or that such financing would have been commercially available *to Airbus* when it sought such financing for the A350 XWB. Therefore, Prof. Whitelaw's views and the EU's argument as a whole, do not detract in any way from the U.S. *prima facie* case that A350 XWB LA/MSF conferred a benefit to Airbus within the meaning of Article 1 of the SCM Agreement.

(Exhibit USA-287(BCI)); Project Appraisal (Exhibit USA-420(HSBI)); Airbus Industrie [***] (Exhibit USA-421(HSBI)); Airbus Industrie - Large Aircraft Division, A3XX Final Assembly Line Evaluation - Final Report (Confidential), 30 November 1999 (Exhibit USA-422(HSBI)); Project Appraisal (Exhibit USA-423(HSBI)); Appendix to project appraisal (Exhibit USA-424(HSBI)); Comparison of Actual Deliveries (Exhibit USA-425(HSBI)); Business Case (Exhibit USA-426(HSBI)); Business Case (Exhibit USA-487(HSBI)).

V. GRANTS OF LA/MSF FOR THE A380 AND A350 XWB ARE PROHIBITED SUBSIDIES

294. As the U.S. first written submission demonstrated, LA/MSF for both the A380 and the A350 XWB are contingent in fact upon anticipated export performance.⁴³² The design, structure, and operation of the subsidies themselves, which led to high levels of export sales, support this conclusion. The U.S. application of numerical tests confirms that the anticipated proportion of export sales to come about as a consequence of the subsidies was far in excess of what was normal, by historical standards. Therefore, the subsidies are contingent on anticipated export performance, and prohibited under Article 3.1(a) of the SCM Agreement.

295. The U.S. first written submission also demonstrated that the Airbus governments granted LA/MSF for the A380 and the A350 XWB in anticipation that Airbus would manufacture aircraft components domestically, using domestic (rather than imported) goods and labor, and that such components would be used to construct the aircraft.⁴³³ The United States demonstrated that the grant of A380 and A350 XWB LA/MSF was made contingent upon such anticipated use of domestic goods, making them prohibited under Article 3.1(b) of the SCM Agreement.

296. The evidence submitted by the EU in response to these claims amounts to three exhibits, which fail to rebut the U.S. claims in any way and have tangential relevance at best.⁴³⁴ The EU's legal arguments fail as well, faulting the United States for applying the Appellate Body's Article 3.1(a) test "mechanistically"⁴³⁵ – as if fidelity to the Appellate Body's guidance were a weakness. With regard to the U.S. Article 3.1(b) claims, the EU expends more effort to set out the U.S. arguments than to respond to them.⁴³⁶ It argues that "{n}either domestic development nor production"⁴³⁷ is to be equated with a contingency upon the use of domestic over imported goods; but it nowhere addresses the U.S. claim that, *in fact* (and in some cases even *in law*), this is precisely what such contingency means.

297. Below, the United States demonstrates that the EU failed to rebut the U.S. *prima facie* demonstration of inconsistency with Articles 3.1(a) and 3.1(b). First, the United States

⁴³² US FWS, paras. 172-177.

⁴³³ US FWS, paras. 204-209, 222-224, 227-229, 232-238.

⁴³⁴ The EU supported its prohibited subsidy arguments with four exhibits: Airbus Global Market Forecast 2000 (Exhibit EU-71), Table and Graph EU and World GDP (Exhibit EU-72), Boeing forecast deliveries of large airplanes (Exhibit EU-73), and Boeing Current Market Outlook 2011-2030 (Exhibit EU-74). The 2000 GMF had already been submitted by the United States. Exhibit USA-68. The world GDP data are not directly relevant. Section V.A.3.a discusses this issue in more detail. The significance of Exhibit EU-73 is unclear, and the EU neglected to explain it. Section V.A.3.c discusses this issue in more detail. The Boeing Market Outlook for 2011-2030 post-dates the grant of LA/MSF for both the A380 and the A350 XWB by several years, and is therefore not directly relevant to the question of what was anticipated at the time of grant.

⁴³⁵ EU FWS, p. 132.

⁴³⁶ Cf. EU FWS, paras. 439-454, 461-463, 465-467, 469, 471-474 (attempting to summarize and characterize the views of the United States), *with* 455-460, 464, 468, 470, 475 (expressing the EU's own views).

⁴³⁷ EU FWS, para. 457.

demonstrates that none of the EU's attempted jurisdictional challenges regarding the A380 has any merit, in light of the unique procedural posture and procedural history of the U.S. claims involved. Second, the United States reaffirms its original presentation of the Appellate Body's interpretation of the standard for *de facto* export contingency, as well as its demonstration that A380 and A350 XWB LA/MSF meet that standard. Third and finally, the United States demonstrates that the EU's brief comments on import substitution are contradicted by prior Appellate Body jurisprudence, fail to engage with the U.S. claims under Article 3.1(b), and fail to undermine the United States' *prima facie* case.

A. The EU Has Failed To Rebut the United States' *Prima Facie* Case That Grants of LA/MSF for the A380 and the A350 XWB were Prohibited Subsidies Inconsistent with Article 3.1(a) of the SCM Agreement.

298. As discussed in the U.S. first written submission, for a claim of *de facto* export contingency, a complaining party must show: (i) the grant of a subsidy, (ii) actual or anticipated exports or export earnings, and (iii) the existence of a "tie" (*i.e.*, a relation of contingency or conditionality) between them.⁴³⁸ The United States demonstrated that grants of LA/MSF for the A380 and the A350 XWB satisfied all three elements.⁴³⁹ The first two elements are not in dispute here. With regard to element (iii), the United States demonstrated the existence of a tie (in fact) between anticipated exportation and the grant of the subsidy by demonstrating that the design, structure, and modalities of operation of the LA/MSF were geared to induce exports.

299. More specifically, the United States did this by applying the test the Appellate Body found to be the final analytic step necessary to complete the *de facto* export contingency analysis for A380 LA/MSF.⁴⁴⁰ In doing so, the United States demonstrated that the A380 and A350 XWB LA/MSF subsidies were anticipated to skew Airbus's production of the A380 and A350 XWB in favor of exports by 66.7 percent and 97.8 percent, respectively, as compared with a historical baseline set by sales of previously existing aircraft in the same product market segments.⁴⁴¹ Thus, the United States addressed the gap in the analysis that the Appellate Body identified, leading to the conclusion that both sets of subsidies were contingent in fact upon anticipated export performance and thus prohibited subsidies within the meaning of Article 3.1(a) of the SCM Agreement.

300. The EU attempts to rebut this *prima facie* demonstration of export contingency, but its primary legal argument boils down to an assault on the validity of the numerical test laid out by

⁴³⁸ US FWS, para. 168.

⁴³⁹ US FWS, Section V. Indeed, the Panel and Appellate Body already found that elements (i) and (ii) were satisfied for A380 LA/MSF, and the United States provided additional evidence to demonstrate that the same is true of A350 XWB LA/MSF. US FWS, paras. 172-177. With regard to LA/MSF for the A350 XWB, Section IV.D demonstrates that the facts establish element (i), regarding grant of a subsidy, and the EU does not contest element (ii).

⁴⁴⁰ US FWS, paras. 170-171, 178-201.

⁴⁴¹ US FWS, paras. 167, 188, 199.

the Appellate Body. Its argument over the facts fails because the United States used the correct information, and the alternative information favored by the EU, if used, would not change the result.

1. The United States faithfully applied the numerical test laid out by the Appellate Body, and the EU criticisms actually make a veiled challenge to the legal sufficiency of the Appellate Body’s reasoning.

301. To a large extent, the EU bases its criticism of the U.S. claims under Article 3.1(a) on its position that the United States somehow committed an “error” in applying the Appellate Body’s numerical, ratio-based test.⁴⁴² According to the EU, that test, which the Appellate Body set out in great detail, is essentially irrelevant. For example, the EU derides the results of the test as “do{ing} *nothing* to explain why the design, structure and modalities of operation *set out in the measure . . .* demonstrate that the alleged subsidies are geared to induce the promotion of future exports by the recipient.”⁴⁴³ The Appellate Body found that the analysis of export contingency “could be based on a comparison between, on the one hand, the ratio of *anticipated* export and domestic sales of the domestic product that would come about in consequence of the granting of the subsidy, and, on the other hand, the situation in the absence of the subsidy.”⁴⁴⁴ The EU’s inability to see how this test is relevant is, therefore, a challenge to the Appellate Body rather than to the sufficiency of the U.S. *prima facie* case.

302. The Appellate Body reviewed the evidence examined by the original Panel, and found that it “established” that “at the time the LA/MSF subsidies were granted, the relevant Member State governments anticipated a substantial number of export sales by Airbus in order to repay the LA/MSF subsidies granted under the French, German, Spanish, and UK A380 contracts”⁴⁴⁵ With respect to French, German, Spanish and UK LA/MSF for the A380, the Appellate Body found that the evidence examined by the original Panel, “including the market forecasts and repayment schedules under LA/MSF contracts,” indicated that:

(i) the financing under the LA/MSF contracts is provided in exchange for the condition that it be repaid; (ii) pursuant to the repayment terms under the contracts, Airbus undertook the obligation to repay the loans, on a per-sale basis, over a specified number of sales of the subsidized aircraft; and (iii) the number of sales contemplated under the repayment provisions of the contracts involves a significant amount of export sales. The Panel concluded that “it is clear from various pieces of information that achieving the level of sales needed to fully repay each loan would require Airbus to make a substantial number of exports.” On this basis, as well as the relevant market forecasts, the Panel found that “the

⁴⁴² EU FWS, para. 396.

⁴⁴³ EU FWS, para. 400.

⁴⁴⁴ *EC – Large Civil Aircraft (AB)*, para. 1047.

⁴⁴⁵ *EC – Large Civil Aircraft (AB)*, para. 1091.

EC member States, fully expecting to be repaid, must have held a high degree of certainty that the provision of LA/MSF would result in Airbus making those export sales.”⁴⁴⁶

303. The Appellate Body concluded that these findings established “anticipated exportation” within the meaning of footnote 4 of the *SCM Agreement*. However, it concluded that the findings were insufficient to demonstrate that subsidies were “in fact tied” to the anticipated exportation. To meet that aspect of the Article 3.1(a) standard for *de facto* export subsidies, the Appellate Body turned to its ratio-based test.⁴⁴⁷

304. In that vein, the Appellate Body concluded that the findings of the original Panel and undisputed facts on the record enabled it to calculate a ratio for Airbus’s export-to-domestic sales in the situation *with* A380 LA/MSF, but not the ratio of Airbus export sales to domestic sales in the absence of A380 LA/MSF. Accordingly, it could not complete the original Panel’s analysis, and could not reach a conclusion as to whether A380 LA/MSF was, or was not, a prohibited export subsidy.⁴⁴⁸ The Appellate Body’s approach and the sequence of its analysis make clear that it considered the numerical or ratio-based comparison that the United States presented in its first written submission highly relevant to the analysis under Article 3.1(a) of the *SCM Agreement*. In fact, under the Appellate Body’s approach, completion of the numerical analysis was the single missing element that prevented a successful demonstration that the relevant LA/MSF measures were export contingent in fact, or for the EU to demonstrate that they were not.

305. The EU’s argument that the United States somehow “elide{s} the ‘test’ and the ‘indicative’ ‘illustrative’ ‘numerical examples’” is clearly beside the point because it was *the Appellate Body* – not the United States – that described the “numerical examples” as “indicative” and “illustrative,” as even the EU itself acknowledges.⁴⁴⁹ Thus, while the EU may not agree, the approach followed by the United States is exactly that set out by the Appellate Body in its report *in this dispute*. And while the EU may consider that the “indicative” and “illustrative” examples “do{ } nothing to explain why the design, structure and modalities of operation *set out in the measure*{ } . . . demonstrate that the alleged subsidies are geared to induce the promotion of future exports by the recipients,”⁴⁵⁰ the Appellate Body clearly considered them relevant to the analysis.⁴⁵¹

⁴⁴⁶ *EC – Large Civil Aircraft (AB)*, para. 1090 (original footnotes omitted).

⁴⁴⁷ *EC – Large Civil Aircraft (AB)*, paras. 1098-1101.

⁴⁴⁸ *EC – Large Civil Aircraft (AB)*, paras. 1098 and 1101.

⁴⁴⁹ EU FWS, para. 398.

⁴⁵⁰ EU FWS, para. 400.

⁴⁵¹ Indeed, the Appellate Body concluded its discussion of the numerical example with the following words: “By contrast, the granting of the subsidy would be tied to anticipated exportation if, all other things equal, the recipient is expected to export at least three of the five additional units to be produced. *In other words, the*

2. The EU cannot refute the U.S. demonstration of de facto export contingency by pointing to an absence of de jure evidence.

306. The EU is also wrong in faulting the U.S. *de facto* export contingency argument for demonstrating a contingency not present in the text of the LA/MSF contracts. As the EU acknowledges, that is the point of a *de facto* claim: “that the measure is wholly or partially unwritten or undisclosed, and the complainant sets out to demonstrate its alleged existence and precise content.”⁴⁵² The Appellate Body turned to its ratio analysis to apply an objective approach to its analysis of the factual circumstances, beyond the text of the LA/MSF agreements alone. Yet the EU effectively seeks to defend against the U.S. *de facto* claim by noting that all elements of the measure do not appear on the face of the legal instruments conferring the subsidies. In so doing, the EU improperly blurs the *de jure* and *de facto* export contingency analyses.⁴⁵³

307. The United States drew on the Panel and Appellate Body findings in this dispute, as well as publicly available information and market data, to demonstrate that grants of LA/MSF for the A380 and the A350 XWB constituted *de facto* export contingent subsidies.⁴⁵⁴ The EU responds by arguing that the LA/MSF instruments “are not contingent upon Airbus making any sale at all. . . . If the measures are not contingent upon sales, they cannot be contingent upon export sales.”⁴⁵⁵ According to the EU, the U.S. argument “contradict{s} the terms of the financing agreements.”⁴⁵⁶ Thus, the EU attempts to rebut a *de facto* argument with evidence that the measure is not *de jure* export contingent. The argument is a *non sequitur*.

308. The EU’s *de jure* arguments are also completely unsupported, and contrary to the findings of the original Panel and the Appellate Body. With regard to the A380, the Panel already found, and the Appellate Body affirmed,⁴⁵⁷ that the subsidy was granted in anticipation of Airbus making a large number of export sales. As the Panel noted:

subsidy is designed in such a way that it is expected to skew the recipient’s future sales in favour of export sales, even though the recipient may also be expected to increase its domestic sales.” EC – Large Civil Aircraft (AB), para. 1048 (emphasis added).

⁴⁵² EU FWS, para. 382.

⁴⁵³ It is the United States’ view that a *de jure* and *de facto* analysis apply the same basic legal standard but that they allow a complaining Member to rely on different types of legal and factual evidence: *de jure*, in one instance; and *de facto* (or *de jure* and *de facto*) in the other.

⁴⁵⁴ US FWS, paras. 179-200.

⁴⁵⁵ EU FWS, paras. 401-402.

⁴⁵⁶ EU FWS, para. 401, heading (emphasis added).

⁴⁵⁷ *EC – Large Civil Aircraft (AB)*, para. 1091 (“The Panel’s above findings thus establish that, at the time the LA/MSF subsidies were granted, the relevant member State governments anticipated a substantial number of export sales by Airbus in order to repay the LA/MSF subsidies granted under the French, German, Spanish, and UK A380 contracts These findings merely establish ‘anticipated exportation’ within the meaning of footnote 4 of the *SCM Agreement*.”).

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{T}he “total configuration of facts constituting and surrounding the granting of the subsidy” . . . included not only evidence showing that compliance with the sales-dependent contractual repayment terms would necessarily involve exportation, but also evidence of the three governments’ anticipation of export performance, the fact that they counted upon and expected Airbus to fully repay the loaned principal plus interest, as well as other contractual provisions and information advanced by the United States that revealed at least part of the respective government’s {sic} motivation for entering into each contract.⁴⁵⁸

309. The EU itself concedes the validity of the Panel’s findings on “anticipation.”⁴⁵⁹ In combination with the results of the numerical test, as well as circumstantial evidence of *de facto* export contingency, including statements by EU member officials and Airbus executives’ statements,⁴⁶⁰ this same evidence also demonstrates that LA/MSF for the A380 is *de facto* contingent on anticipated export performance.

310. Likewise, the EU’s *de jure* comments with respect to LA/MSF for the A350 XWB fail to engage with the United States’ *de facto* argument.⁴⁶¹ In any event, as is now clear from the contracts submitted by the EU in response to the Panel’s request under Article 13 of the DSU, the contracts for this most recent set of LA/MSF have the same *de jure* features that previously led the Panel to conclude that A380 LA/MSF was granted in anticipation of a large number of exports. In particular, LA/MSF for the A350 XWB has exactly the same structure, design, and operation as A350 XWB LA/MSF.⁴⁶² Furthermore, the contracts indicate that the EU governments conferred the LA/MSF in anticipation of a very high level of export performance. In particular, France expected Airbus to fully repay the LA/MSF after [***] deliveries of A350 XWB aircraft; for Germany, the figure is [***] deliveries; for Spain, [***] deliveries; for the UK, [***] deliveries.⁴⁶³ Moreover, [[HSBI]].⁴⁶⁴ Therefore, the EU’s *de jure* arguments with respect to A350 XWB LA/MSF are not only irrelevant, but also wrong.

⁴⁵⁸ *EC – Large Civil Aircraft (Panel)*, para. 7.690.

⁴⁵⁹ EU FWS, para. 428 (“Leaving aside the issue of ‘anticipation’, following the Appellate Body Report, there is precisely *nothing* left of the US arguments relating to contingency.”).

⁴⁶⁰ US FWS, paras. 172-177.

⁴⁶¹ *See* EU FWS, paras. 401-404.

⁴⁶² Section III.B.2.a of this submission discusses this issue in greater detail.

⁴⁶³ French A350XWB Convention, Art. 6.3 (Exhibit EU(Art.13)-1(BCI)); Spanish A350 XWB LA/MSF Contract, Art. 9 (Exhibit EU(Art.13)-29(HSBI/BCI)); KfW A350 XWB Loan Agreement, Art. 6.1 (Exhibit EU(Art.13)-14(HSBI/BCI)); UK A350 XWB Loan Agreement, Art. 5.3 (Exhibit EU(Art.13)-30(HSBI/BCI)). The German text in the document submitted by the EU is largely illegible.

⁴⁶⁴ *E.g.*, UK A350 XWB Loan Agreement, Schedule 4 (Exhibit EU(Art.13)-30(HSBI/BCI)); Airbus business case-related document, p. 12 (Exhibit EU(Art.13)-35(HSBI)).

3. The United States correctly applied the Appellate Body’s Numerical Test.

311. The most striking flaw in the EU’s attempted rebuttal, however, is its failure to effectively address, let alone rebut on the merits, the U.S. application of the Appellate Body’s numerical test. In its first written submission, the United States showed that LA/MSF for the A380 and A350 XWB were anticipated to increase the proportion of Airbus’s export sales by 66.7 percent and 97.8 percent, respectively.⁴⁶⁵ Under the Appellate Body’s reasoning, those facts indicate that the subsidies are geared to induce exports and, therefore, are prohibited export subsidies. The EU attempts to cast doubt on the information used by the United States, but as the following analysis shows, all of the EU arguments miss the mark.

a. Trends in economic growth outside the EU do not prevent the use of historical data in the Appellate Body’s numerical test.

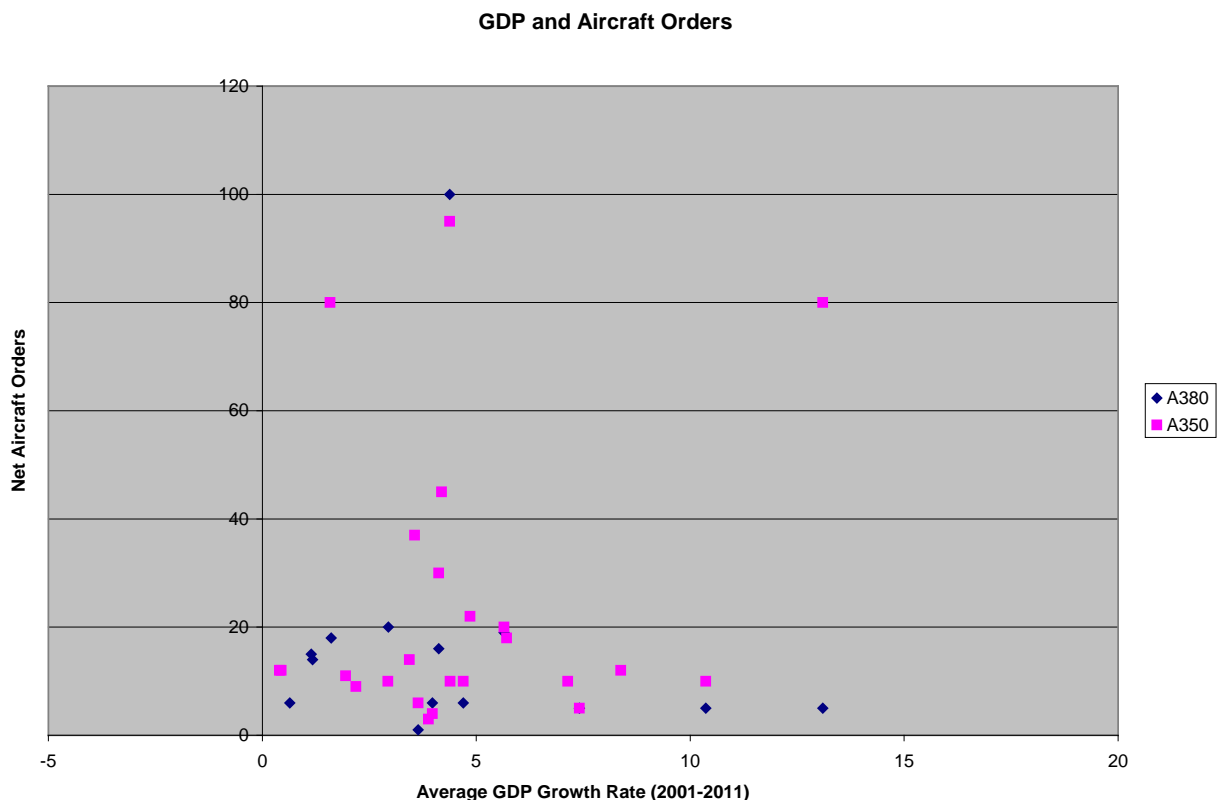
312. In its First Written Submission, the United States calculated an “anticipated” export-to-domestic ratio for the A380 with LA/MSF of approximately 8:2, compared to a “baseline” ratio of 5:2 for the A380 in the absence of LA/MSF.⁴⁶⁶ For the A350 XWB, the “anticipated” ratio is approximately 21:2, compared to a “baseline” ratio of 11:2.⁴⁶⁷ The pronounced differences between the “anticipated” and “baseline” ratios reflect the fact that the design, structure, and operation of LA/MSF for the A380 and the A350 XWB are geared to induce exports. The EU seeks to explain away these differences by asserting that they merely reflect broader economic trends, including in particular faster economic growth outside of the EU.⁴⁶⁸ However, contrary to the EU’s argument, the empirical evidence suggests an absence of correlation between GDP growth and demand for aircraft during the time periods and aircraft in question, as shown in the following graph:

⁴⁶⁵ US FWS, para. 166.

⁴⁶⁶ US FWS, para. 188.

⁴⁶⁷ US FWS, para. 199.

⁴⁶⁸ EU FWS, para. 426 (“Finally, as in the case of the A380, as a simple matter of logic, the US fails to take into account that projected demand in the relevant product market in the EU will grow at a lower rate than demand in the rest of the world. As indicated above, that is because, outside the European Union, growth in GDP is relatively high, and related processes of demographics, urbanisation and deregulation mean that there are many more people progressively becoming able to afford air travel.”); *see also* EU FWS, para. 427 (also citing “relative GDP growth”).



313. Each point on this graph represents an individual country and its net orders of either the A380 or the A350 XWB.⁴⁶⁹ If the EU was correct to argue that economic growth was responsible for increased aircraft demand outside the EU, then the points would lie on an upward-sloping line: the higher a country’s GDP growth rate, the more aircraft it buys. In fact, the graph indicates an absence of any correlation between GDP growth rate and net aircraft orders. If anything, the points lie on a downward-sloping line. Thus, the EU has failed to show that high GDP growth rates outside of the EU explain the divergence between the anticipated and baseline ratios for the A380 and the A350 XWB.⁴⁷⁰

⁴⁶⁹ Several countries appear twice, because each country/order pair is represented by a single point, and several countries placed more than zero net orders for both the A380 and the A350 XWB. *A380/A350 XWB Orders and GDP Growth Rates* (Exhibit USA-332).

⁴⁷⁰ The EU also cites various other potential factors that may explain the divergence between the “anticipated” and “baseline” ratios, including “processes of demographics, urbanization and deregulation.” EU FWS, para. 418; *see also* EU FWS, para. 427. However, the EU fails to articulate how these “processes” purportedly explain the output of the Appellate Body’s numerical test (as applied by the United States), and the EU also fails to support these claims with any evidence. Therefore, these comments do not detract from the U.S. *prima facie* case.

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- b. *The differences between Airbus and Boeing aircraft strengthen the United States’ application of the numerical test, rather than “vitiat[e]”⁴⁷¹ them, as the EU argues.*

314. The U.S. first written submission presented baseline ratios for the A380 and the A350 XWB by using historical sales data from the Boeing 747 and 777, respectively.⁴⁷² In the context of this dispute, such data provide the most reliable basis for implementing the Appellate Body’s instructions concerning the baseline ratio.⁴⁷³ The EU urges the United States to do more to account for the differences between Boeing 747 and 777 on the one hand, and the A380 and the A350 XWB on the other.⁴⁷⁴ However, Airbus’s own views about how the market works indicate that such adjustments would tend to *increase* the difference between the “anticipated” and “baseline” ratios, further confirming that A380 and A350 XWB LA/MSF are *de facto* export contingent.

315. As the EU notes, one difference between the Airbus and Boeing aircraft at issue is that they are produced in the territories of different WTO Members, which have different domestic and export markets.⁴⁷⁵ Adjusting for this difference would, if anything, *decrease* the ratio of non-EU-to-EU sales for the 747 and 777 sales, and *increase* the anticipated subsidized ratio for the A380 and the A350 XWB, resulting in a *larger* gap between the baseline ratios and the

⁴⁷¹ EU FWS, paras. 413, 423 (and corresponding headings).

⁴⁷² US FWS, paras. 186-188, 196-199.

⁴⁷³ *EC – Large Civil Aircraft (AB)*, para. 1047 (“The situation in the absence of the subsidy may be understood on the basis of historical sales of the same product by the recipient in the domestic and export markets before the subsidy was granted. In the event that there are no historical data untainted by the subsidy, or the subsidized product is a new product for which no historical data exists, the comparison could be made with the performance that a profit-maximizing firm would hypothetically be expected to achieve in the export and domestic markets in the absence of the subsidy.”).

⁴⁷⁴ EU FWS, paras. 413, 423 (and corresponding headings).

⁴⁷⁵ EU FWS, paras. 413-414, 423-424 (“This data relates to earlier *deliveries* . . . by a different manufacturer, located in a different WTO Member, whose domestic market is not the European Union, whose very large domestic market is actually treated by the United States as an ‘export’ market, and in relation to a different product.”). As the EU points out, the United States calculates the baseline ratios on the basis of delivery data, rather than order data. EU FWS, paras. 413, 423. In addition, the United States also presents potential baseline ratios based on order data, for purposes of comparison. *See Analysis of LCA Sales Data* (Exhibit USA-292), Revised Analysis of LCA Sales Data (Exhibit USA-458). (Exhibit USA-458 is a revised version of Exhibit USA-292 that corrects for an error noted by the EU. EU FWS, para. 416 (observing that Exhibit USA-292 describes the benchmark as a “747 Benchmark” rather than an “A380 Benchmark.”) In principle, delivery data are a more secure basis for calculating the baseline ratios, and using delivery data is more faithful to the Appellate Body’s decision in this dispute. As noted above, the Appellate Body’s preference was to establish the baseline ratio through “historical sales” of the product that would receive the subsidy. *EC – Large Civil Aircraft (AB)*, para. 1047 (emphasis added). Furthermore, the Appellate Body commented: “whereas ‘actual exportation’ in footnote 4 {of the SCM Agreement} refers to exportation that has occurred at the time a subsidy is granted, ‘anticipated exportation’ means exportation that is expected to occur in the future.” *EC – Large Civil Aircraft (AB)*, para. 1044. Thus for purposes of determining the baseline ratio, the Appellate Body preferred to focus on “exportation that has occurred” – a standard that is more closely approximated by deliveries than by orders.

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anticipated ratios with subsidies.⁴⁷⁶ According to Airbus, having manufacturing facilities in a country makes it easier to sell airplanes there. For example, when Airbus and EADS recently announced plans to open an assembly line in the United States, Fabrice Brégier, the CEO of Airbus, “predicted that closer proximity to its U.S. airline customers would quickly translate into new aircraft orders. ‘If we have a stronger presence in America we can progressively target a 50 percent market share’ within the next two decades, he said.”⁴⁷⁷ By this logic, Airbus’s presence in Europe enables it to sell relatively more aircraft in Europe, and Boeing’s presence in the United States enables it to sell relatively more aircraft there. Accordingly, to correct for this difference, one would lower the non-EU-to-EU sales baseline ratio (which is based on sales of Boeing aircraft), and elevate the non-EU-to-EU sales anticipated ratio (which is based on sales of Airbus aircraft) – resulting in an even wider gap between the two ratios, and thus an even more pronounced pattern of *de facto* export contingency.⁴⁷⁸

- c. *Boeing Current Market Outlook forecasts corroborate the U.S. demonstrations of de facto export contingency – not contradict them (as the EU falsely claims).*

316. Boeing periodically publishes Current Market Outlooks, which forecast future sales of aircraft, including by geographical market. As the United States explained in its first written submission, the 2000 Current Market Outlook provides a potential alternative to Airbus’s 2000 GMF for calculating the anticipated ratio with subsidies.⁴⁷⁹ The data in the Current Market Outlook yield an anticipated ratio with subsidies of 4.84:1 (non-EU-to-EU sales),⁴⁸⁰ versus a lower anticipated ratio with subsidies of 4:1 based on the 2000 Airbus GMF.⁴⁸¹ Relying on the 2000 GMF was the conservative choice, resulting in a smaller (*i.e.*, by 17.4 percent) gap between the baseline and anticipated ratios.

⁴⁷⁶ For example, suppose, for the sake of simplicity, that the observed baseline ratio based on Boeing sales data is two U.S. sales for every one EU sale. By the EU’s logic, Boeing’s U.S. sales are artificially high because Boeing is a U.S. company. So the true baseline would be lower, perhaps at 1.5 U.S. sales for every EU. Thus, the baseline ratio would fall to 1.5:1.

⁴⁷⁷ Nicola Clark, *EADS to Build U.S. Assembly Line for Airbus A320*, N.Y. Times (July 2, 2012) (Exhibit USA-333).

⁴⁷⁸ Furthermore, the EU is incorrect to assert that the United States failed to account for the “substantial differences” between the 747 and the A380 on the one hand, and the 777 and the A350 XWB on the other hand. EU FWS, paras. 414, 424. In fact, in its first written submission, the United States provided evidence (including evidence from Airbus itself) demonstrating that these aircraft compete head-to-head. *E.g.*, US FWS, notes 300, 312. Therefore, rather than choosing a broader set of aircraft to construct the baseline ratios (*e.g.*, all Boeing twin-aisle aircraft vs. the A350 XWB), the United States instead tailored the baseline ratios directly to the commercial setting in which Airbus’ aircraft compete.

⁴⁷⁹ US FWS, note 297.

⁴⁸⁰ US FWS, note 297; *Analysis of LCA Sales Data* (Exhibit USA-292, Exhibit USA-458).

⁴⁸¹ US FWS, para. 185 (discussing the Boeing 2000 Current Market Outlook as a potential alternative basis for determining the anticipated ratio).

317. Thus, data from the 2000 Current Market Outlook demonstrate that the EU errs in suggesting that data from Boeing market forecasts somehow cast doubt on the validity of the A380 “anticipated” ratio calculated by the United States. In fact, the opposite is true – it is the alternative measure proposed by the EU that is wrong. First of all, the EU based its figures in part on Boeing market forecasts dating from 2006-2008 – several years after the conclusion of the A380 LA/MSF contracts and, therefore, not illustrative of the granting authority’s expectations at the time of grant.⁴⁸² Second, the EU figures reflect a statistic the import of which is unclear, and left unexplained by the EU: the simple average of three consecutive 20-year forecasts for Boeing’s predicted domestic-to-export ratios.⁴⁸³

d. The Appellate Body’s discussion of the 2000 GMF confirms that it is a helpful tool for establishing the “anticipated” ratio.

318. In the Appellate Body’s view, the 2000 GMF was a useful indication of Airbus’s anticipated aircraft sales at the time that A380 LA/MSF was granted, but it was insufficient to indicate the baseline ratio. The Appellate Body explicitly found the GMF to be “objective evidence” of anticipated exportation,⁴⁸⁴ and noted that the member States used those forecasts in their evaluation of LA/MSF for the A380.⁴⁸⁵ Thus the 2000 GMF is a sound basis for calculating the anticipated export ratio with subsidies. The Appellate Body also considered whether the GMF provided a basis to calculate the baseline ratio, which the United States never advocated, but rejected it for that purpose.

319. Consequently, the EU is wrong to characterize the 2000 GMF as unhelpful,⁴⁸⁶ and to claim that the Appellate Body “rejected” it outright.⁴⁸⁷ Rather, it rejected one usage of the

⁴⁸² EU FWS, para. 419 (“In fact, the US’ own claims are contradicted by the data and information published by its own industry (Boeing). Thus, if one simply reviews the relevant Boeing Current Market Outlook publications one sees that the average figure for 747 and larger aircraft for Europe over a representative three year period prior to the relevant A380 financing agreements (1997-2000) was 20.5%. The average for the following three years was (21.3%), and the average for the last three years for which data is available (2009-2011) is 23.7%. This is hardly indicative of a measure that has skewed the ratio towards exports.”); *see also* Exhibit EU-73 (displaying the basis for the calculations).

⁴⁸³ EU FWS, para. 419 (referring to 20.5% (1997-2000), 21.3% (2000-2002), and 23.7% (2009-2011) as “the average figure for 747 and larger aircraft for Europe,” according to Boeing Current Market Outlook publications); Exhibit EU-73 (indicating that these figures are the simple average of consecutive twenty-year ratios, as derived from Current Market Outlooks). Thus the EU apparently arrived at these “average figure{s}” by taking Boeing’s projected proportion of worldwide aircraft sales to go to the EU during the time periods 1998-2017, 1999-2018, and 2000-2019, *i.e.* (according to the EU) 22.1%, 22.3%, and 17.1% respectively; and then (and for an unknown reason) taking the simple average of these three percentages, yielding 20.5%, 21.3%, and 23.7%.

⁴⁸⁴ *EC – Large Civil Aircraft (AB)*, para. 1078, referring to paras. 1073-1075.

⁴⁸⁵ *EC – Large Civil Aircraft (AB)*, para. 1078, referring to para. 1079.

⁴⁸⁶ *E.g.*, EU FWS, para. 410, heading (“The US assertions do not demonstrate an anticipated *subsidised* ratio and do not help to demonstrate any *de facto* export subsidy with respect to the A380”).

⁴⁸⁷ EU FWS, para. 411 (“the Appellate Body has already considered this evidence and rejected it”).

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GMF, which played no role in the U.S. calculations. The EU’s argument on this issue takes the Appellate Body’s words out of context, reproducing only the underscored sentence in the following finding:

{T}he evidence does not give an indication as to the proportion of its production that Airbus would be expected to sell in the domestic *and export markets undistorted* by the granting of the LA/MSF subsidies at issue. The evidence therefore does not help to show whether the LA/MSF subsidies were granted so as to give Airbus an incentive to skew its future sales in favour of export sales.⁴⁸⁸

As the more complete quotation demonstrates, the Appellate Body regarded the 2000 GMF as *insufficient* to establish *de facto* the baseline ratio for the export contingency analysis, and not as generally unhelpful.

320. The EU is also wrong to suggest that the 2000 GMF is less relevant than [***] for purposes of calculating the “anticipated” ratio.⁴⁸⁹ The 2000 GMF essentially [***], and therefore constitutes a more relevant portion of “the information available to the granting authority at the time the subsidy is granted.”⁴⁹⁰

e. The United States correctly described the 2000 GMF’s tally of 1,235 forecasted sales as relating only to prospective Airbus A380 sales.

321. The United States presented a sales forecast from the 2000 Airbus GMF as an indicator of the anticipated export ratio of A380s as subsidized by LA/MSF. According to this forecast, 1,235 aircraft with over 500 seats would be sold from 2000-2019, with only 237 of these aircraft (*i.e.*, 20%) being sold to European customers.⁴⁹¹ On this basis, the United States derived an “anticipated” ratio for the A380 of 4:1. Now the EU attempts to criticize this reasoning by arguing that the “1,235” figure was meant to include not only A380s, but also competing Boeing aircraft.⁴⁹² The 2000 GMF itself directly contradicts this argument.

322. The 2000 GMF forecast that 80 percent of the forecasted 1,235 deliveries would be to non-European countries.⁴⁹³ Thus, four times as many deliveries were forecasted to go to non-

⁴⁸⁸ *EC – Large Civil Aircraft (AB)*, para. 1092; *See* EU FWS, para. 411 and note 540 (emphasis added).

⁴⁸⁹ EU FWS, para. 417 (“If, for the ‘baseline ratio’, instead of looking at delivery data, as the United States does, one considers the order data, one immediately sees that in 1999-2001 the ratio is 1:3.37. This is broadly in line with, and in fact *exceeds*, the ‘anticipated ratio’ of 1:3 referenced in the Deutsche Airbus A380 finance application.”). Importantly, this statement incorrectly describes the ratio as “1:3.” The precise figure implied is [***]. *See* German A380 Launch Aid Application, p. 15 (Exhibit USA-286(BCI)).

⁴⁹⁰ *EC – Large Civil Aircraft (AB)*, para. 1049.

⁴⁹¹ US FWS, para. 183; Airbus 2000 Global Market Forecast, p. 37 (Exhibit USA-68).

⁴⁹² EU FWS, paras. 407, 416.

⁴⁹³ Airbus 2000 Global Market Forecast, p. 37 (Exhibit USA-68).

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European customers as to European customers.⁴⁹⁴ (The true anticipated ratio should actually be higher, because some of the “European” sales would most likely go to non-EU European countries.)⁴⁹⁵

323. The 2000 GMF indicates that *all* of these 1,235 anticipated deliveries would involve aircraft with more than 500 seats.⁴⁹⁶ The 2000 GMF also breaks down the 1,235 figure by seat category, as follows: 575 aircraft with 500-600 seats, 404 aircraft with 600-800 seats, 223 aircraft with 800-1,000 seats, and 33 aircraft with more than 1,000 seats – for a total of 1,235 “very large aircraft” deliveries from 2000 to 2019.⁴⁹⁷

324. A table at the back of the 2000 GMF indicates that as of 1999, there were 36 Boeing aircraft with more than 500 seats in service; however, there it projected zero deliveries of these aircraft from 2000 to 2019.⁴⁹⁸ Since zero deliveries of Boeing aircraft with more than 500 seats were forecast, and 1,235 deliveries of aircraft with more than 500 seats were forecast, all 1,235 deliveries must have been anticipated deliveries of Airbus aircraft – *i.e.*, in particular, the “A3XX.” Therefore, the United States correctly derived an “anticipated” ratio for the A380 of 4:1.

⁴⁹⁴ *E.g.*, US FWS, para. 183.

⁴⁹⁵ US FWS, para. 184.

⁴⁹⁶ There is apparently a typographical error in the 2000 GMF, as it states elsewhere that there would be “1,235 (through 2019) aircraft in seat categories above 400 seats.” Airbus 2000 Global Market Forecast, p. 29 (emphasis added) (Exhibit USA-68). This statement may have contributed to the EU’s confusion on this score. It is also possible that this statement misled the Panel and Appellate Body into believing that the 1,235 figure included some aircraft in the 400-500 seat category. *E.g.*, *EC – Large Civil Aircraft (AB)*, para. 1092 (“For example, the GMFs issued in 1999 and 2000 predict, respectively, that demand by European airlines would represent 23% of total demand by airlines worldwide by 2018, and that, by 2019, demand by European airlines for ‘aircraft with more than 400 seats’ would be 247 aircraft, or 20% of the worldwide demand.” (footnotes omitted)); *EC – Large Civil Aircraft (Panel)*, para. 7.651 (“The United States argues that the repayment provisions of the four LA/MSF contracts anticipate a level of A380 sales substantially exceeding the 247 sales Airbus predicted in the 2000 GMF for aircraft with more than 400 seats in Europe between 2000 and 2019.”). In any event, the explicit break-downs of sales by number of seats demonstrates that the 1,235 aircraft projection did not include any Boeing aircraft.

⁴⁹⁷ Airbus 2000 Global Market Forecast, p. 36 (Exhibit USA-68).

⁴⁹⁸ In a table, the 2000 GMF lists the two types of Boeing aircraft that then existed with more than 500 seats: the 747HD and the 747SR. This same table indicates that there would be zero deliveries of the 747HD and the 747SR from 2000 to 2019. Airbus 2000 Global Market Forecast, p. 74 (Exhibit USA-68).

The narrative explained, moreover, that all of the 36 Boeing aircraft that were in service in 1999, were expected to be phased out of service by 2019: “Very large aircraft{:} By definition, the market for aircraft larger than anything flying today is driven by growth. Currently only 36 high-density aircraft are in service with more than 500 seats, with an average capacity of 551 seats each. By 2019 all of these aircraft will have been withdrawn from passenger service. At the same time the airlines will need a total of 1,235 very large and economical aircraft to accommodate traffic growth on highly-travelled routes at projected levels of frequency, and to meet intensifying global competition.” Airbus 2000 Global Market Forecast, p. 36 (Exhibit USA-68).

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- f. *The United States correctly concluded that the 2000 GMF reflects the anticipated export-to-domestic ratio of A380 sales in the presence of the subsidy.*

325. By the time that the 2000 GMF was issued in July 2000, the UK and Airbus had already concluded the A380 LA/MSF contract. Indeed, the EU stressed this fact before the original merits Panel. As the Appellate Body noted: “Before the Panel, the European Communities argued that the Airbus GMF 2000 ‘carrie{d} no probative weight’ because it was dated after conclusion of the UK A380 contract.”⁴⁹⁹ Nonetheless, the EU now advances the argument that the 2000 GMF cannot possibly be premised on the eventual grant of A380 LA/MSF, because it *pre-dates* the conclusion of the A380 LA/MSF contracts.⁵⁰⁰ The EU cannot have it both ways. The timing of the other three provisions of A380 LA/MSF further disproves the EU argument.⁵⁰¹

- g. *The 10.7:1 anticipated export ratio with subsidies for the A350 XWB was reasonably calculated, and significantly understates the anticipated ratio.*

326. In its first written submission, the United States derived a 10.7:1 anticipated ratio for the A350 XWB based on Airbus’s order book as of the end of the calendar year 2009.⁵⁰² At that time, only 43 of the 505 outstanding orders for the A350 XWB were for EU sales,⁵⁰³ and these public figures would have been available to the EU member States that began disbursing LA/MSF in 2009.

327. Airbus’s A350 XWB order book constitutes the best available evidence of the foreign-to-domestic ratio anticipated by the EU member States when they signed the A350 XWB LA/MSF contracts, starting in June 2009, according to the EU.⁵⁰⁴ This figure represents the best available information regarding “the ratio of *anticipated* export and domestic sales of the subsidized

⁴⁹⁹ *EC – Large Civil Aircraft (AB)*, para. 1075, note. 2392 (emphasis added); *see also, e.g., EC – Large Civil Aircraft (Panel)*, para. 7.651 (“Finally, the European Communities notes that the 2000 GMF post-dates the conclusion of the UK A380 LA/MSF contract.”); *ibid.*, para. 7.654.

⁵⁰⁰ EU FWS, para. 410 (“{T}he Airbus 2000 Global Market Forecast is just that: a *forecast* with respect to the period 2000-2019. In other words, it was previously prepared in order to provide a *forecast* with respect to 2000-2019. However, the A380 financing agreements were concluded subsequently, that is, during the 2000-2019 period that was the subject of the forecast. Consequently, nothing in the evidence referenced by the United States is capable of supporting the conclusion that the Airbus 2000 Global Market Forecast is based on the grant of subsidies to the A380, which only occurred at a later date.”). As a factual matter, this argument is contradicted by the EU’s earlier argument that the 2000 GMF was “dated after the conclusion of the UK A380 contract.” *EC – Large Civil Aircraft (AB)*, para. 1075, note 2392.

⁵⁰¹ *EC – Large Civil Aircraft (Panel)*, para. 7.652, note 3112 (noting that “the French, German and Spanish A380 contracts were concluded respectively in 2002, 2002 and 2001.”).

⁵⁰² US FWS, para. 195.

⁵⁰³ *Ascend gross order and backlog order data* (Exhibit USA-293).

⁵⁰⁴ *E.g.*, EU FWS, para. 1086.

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product that would come about in consequence of the granting of the subsidy.”⁵⁰⁵ As of June 2009 – and long before – Airbus had reason to anticipate receiving government financing for the A350 XWB.⁵⁰⁶

328. The 10.7:1 figure is also conservative, as confirmed by data presented by the EU itself, which show that as of the time that the first A350 XWB LA/MSF agreement was concluded in June 2009, only 18 orders had been placed by EU airlines, with the other 377 orders coming from non-EU customers.⁵⁰⁷ Based on these data,⁵⁰⁸ the anticipated ratio with subsidization for the A350 XWB would actually be a much higher **21:1** (as compared to a baseline ratio of 5.4:1⁵⁰⁹) – approximately quadruple the ratio calculated by the United States.

329. In fact, Airbus launched the A350 XWB in December 2006 on the basis of assurances from the EU member States that they would cover €4 billion of the program’s development costs,⁵¹⁰ In February 2007, Airbus was sufficiently certain of the government funding it would receive that it concluded workshare agreements with the EU member States. UK government documents confirm that these agreements were the product of a “continuous dialogue” with Airbus,⁵¹¹ and that the UK jockeyed for better workshare packages with the other Airbus governments.⁵¹² Thus the EU’s criticism of the A350 XWB anticipated ratio – *i.e.*, that it is

⁵⁰⁵ *EC – Large Civil Aircraft (AB)*, para. 1047.

⁵⁰⁶ Section VI.D.4.c.ii discusses this issue in more detail.

⁵⁰⁷ EU FWS, para. 1120 (indicating that all A350 XWB orders as of June 2009 were non-EU, except 6 orders from Aer Lingus and 12 orders from Air One).

⁵⁰⁸ EU FWS, para. 1120 (presenting a table of all A350 XWB orders that Airbus had accepted up to June 2009).

⁵⁰⁹ US FWS, para. 196.

⁵¹⁰ *E.g.*, Peggy Hollinger, *Deal struck on Airbus A350 funding*, Financial Times (Nov. 30, 2006) (Exhibit USA-334) (“According to people close to the discussions, some €6bn of the A350’s development cost will be funded by EADS internally and a further €4bn through financing backed by state guarantees from the four countries supporting Airbus: France, the UK, Germany and Spain.”).

⁵¹¹ United Kingdom House of Commons Trade and Industry Committee, *Recent Developments with Airbus – Volume I*, p. 11 (June 19, 2007) (“The UK Government maintained a continuous dialogues with Airbus and its parent, EADS, up to the final announcement {of workshares} in February 2007.”) (Exhibit USA-25).

⁵¹² *E.g.*, United Kingdom House of Commons Trade and Industry Committee, *Recent Developments with Airbus – Volume I*, pp. 10-11 (June 19, 2007) (“The potential distribution of work across countries for the A350 XWB was of particular concern to the UK for both political and technological reasons. . . . An additional concern was that Germany and Spain in particular were in a position to make a case for some of the work usually undertaken by the UK, because of their growing competence in composite materials Overall, both Airbus UK and the Government said they were pleased with the work packages allocated to the UK. . . . The DTI said this ‘represents a good outcome for the UK, and is the result of sustained action by the UK Government to achieve a position on the A350 XWB that provides the most positive platform for the future.’”) (Exhibit USA-25).

putatively an “*unsubsidized ratio*”⁵¹³ – bears no relation to how the member State governments interacted with Airbus with regard to the A350 XWB program.

4. Conclusion

330. The EU advances a range of arguments as to the accuracy and relevance of the data used by the United States in performing the ratio analysis put forward by the Appellate Body. As the United States has shown, each of them misses the mark. The EU’s argument, moreover, is inconsistent with the approach followed by the Appellate Body, under which the application of the numerical test was the only step needed to complete the analysis for export contingency. Although the EU may disagree with the Appellate Body’s approach, it cannot simply set it aside. Finally, the Appellate Body’s numerical analysis is designed precisely to allow panels to perform an objective analysis of the facts to determine whether subsidies are contingent *in fact* upon anticipated exportation. The EU’s argument that the United States has not demonstrated a relationship of contingency *on the basis of the LA/MSF agreements* accordingly misses the entire point of the *de facto* analysis – to look beyond the written measure for evidence of contingency. Thus, the evidence of the design, structure, and modalities of operation of LA/MSF for the A380 and A350 XWB, along with the other relevant factors noted by the Appellate Body, support a finding of *de facto* contingency on anticipated exportation.

B. The EU Has Failed to Rebut the United States’ *Prima Facie* Case that LA/MSF for the A380 and the A350 XWB Violate Article 3.1(b) of the SCM Agreement.

331. In its first written submission, the United States explained that LA/MSF for the A380 and the A350 XWB are contingent on the use of domestic over imported goods, *de facto* and (at least for the A380) *de jure* as well. In particular, LA/MSF is granted in exchange for “workshare agreements,” which determine which aircraft components Airbus will manufacture within each EU member State, and how much labor Airbus will use to manufacture them. Thus, the workshare agreements amount to a requirement that, to receive LA/MSF, Airbus must manufacture certain components of the aircraft within the EU, which accordingly become domestic products of the EU, and then use those domestic products in its aircraft. This means that Airbus must use domestic components instead of imports, in violation of Article 3.1(b) of the SCM Agreement.⁵¹⁴ The A350 XWB LA/MSF contracts now on the record confirm that A350 XWB LA/MSF is both *de jure* and *de facto* inconsistent with Article 3.1(b).

1. The evidence already presented by the United States demonstrates that LA/MSF for the A380 and the A350 XWB is contingent on the use of domestic over imported goods.

332. To establish that the workshare agreements were *contingent* on the grant of LA/MSF, the United States presented both *de jure* and *de facto* evidence. On the *de jure* side, for example, the

⁵¹³ EU FWS, para. 421.

⁵¹⁴ US FWS, paras. 202-239.

German A380 LA/MSF contract committed Airbus [***],⁵¹⁵ and [***].⁵¹⁶ The UK A380 LA/MSF contract committed Airbus [***].⁵¹⁷ It also committed Airbus to construct [***], within the UK.⁵¹⁸ The Spanish A380 LA/MSF contract required Airbus to produce certain specified aircraft components in Spain, including [***].⁵¹⁹ The fact that these terms are present in the A380 LA/MSF legal instruments indicates that the LA/MSF commitments were *de jure* contingent upon the grant of German, UK, and Spanish A380 LA/MSF.

333. On the *de facto* side, government statements and press reports confirm the relation of contingency, as they indicate that Airbus allocated the production of particular A380 and A350 XWB components to particular EU member States, as part of a *quid pro quo* for LA/MSF. For example, Spain reportedly withheld A380 LA/MSF when it was dissatisfied with its workshare package,⁵²⁰ and the UK minister responsible for civil aerospace made it clear that the UK leveraged the prospective grant of LA/MSF for the A350 XWB to secure a better workshare for the UK.⁵²¹ The EU does not dispute any of these facts.⁵²² Thus, LA/MSF for both models of aircraft was granted in exchange for Airbus producing certain goods domestically.⁵²³

2. The EU fails to rebut the United States' prima facie demonstration that LA/MSF for the A380 and the A350 XWB are de jure and de facto inconsistent with Article 3.1(b) of the SCM Agreement.

334. The EU criticizes the United States' demonstration of inconsistency with Article 3.1(b) of the SCM Agreement with two poorly supported arguments. First, the EU argues that the LA/MSF agreements do not use the words "contingent" or "conditional."⁵²⁴ However, this observation is irrelevant. The Appellate Body has found that:

⁵¹⁵ EU FWS, para. 451.

⁵¹⁶ EU FWS, para. 449; *see also* US FWS, para. 222 (indicating additional Airbus A380 workshare commitments with respect to Germany).

⁵¹⁷ EU FWS, paras. 462-463.

⁵¹⁸ US FWS, para. 223.

⁵¹⁹ EU FWS, para. 466; US FWS, para. 224 ; *see also generally* EU FWS, paras. 448-467.

⁵²⁰ US FWS, para. 228.

⁵²¹ US FWS, para. 207.

⁵²² EU FWS, paras. 448-475 (discussing the U.S. Art. 3.1(b) SCM claims, but only discussing *de jure* evidence).

⁵²³ Some of the particular goods which Airbus was obligated to manufacture domestically are detailed at US FWS, para. 205.

⁵²⁴ EU FWS, para. 456 (pointing out that the LA/MSF contracts "do not contain the terms 'contingent' or 'conditional'."). The EU also argues, "the provisions relating to employment are qualified: Airbus Deutschland merely undertakes to make 'every effort' subject to 'market conditions' and subject to changes in the delivery schedule." *Ibid.* Nonetheless, these provisions are legally binding, and further confirm the relation of contingency between German A380 LA/MSF and the use of domestic over imported goods to manufacture A380 components. In

for a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfillment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure.

Thus, it is the substance of the legal relationship between export performance that matters, and not the particular words used. The LA/MSF contracts, government statements and press reports confirm this relationship of contingency. These indicate, in particular, that Airbus allocated the production of particular A380 and A350 XWB components to particular EU member States, and that doing so was an element of the overall (political) deals to confer LA/MSF.⁵²⁵ Second, the EU asserts that the United States has failed to properly account for the distinction between labor, production, and goods in its analysis of *de facto* contingency on the use of domestic goods. The EU's arguments, however, lack support and do not comport with prior findings of the Appellate Body.

335. The EU's first argument tries to portray the LA/MSF Agreements and other evidence provided by the United States as reflecting a conditionality upon the use of domestic employment only.⁵²⁶ Requirements to create and maintain substantial numbers of domestic jobs are certainly a key part of these agreements and one of the bases for the United States' claims. But they are not alone. In fact, the U.S. first written submission demonstrated that in a number of instances, the LA/MSF Agreements were specifically conditioned upon the production of identified parts or components of the relevant Airbus aircraft within the territory of the granting authorities.⁵²⁷ Therefore, these subsidies were directly contingent upon the use of domestically produced goods.

336. Moreover, as the United States explained in its first written submission, Article 3.1(b) of the SCM Agreement prohibits subsidies which are "contingent, whether solely or as one of several other conditions, on the use of domestic over imported goods." A subsidy that requires the use of domestic *labor* may violate Article 3.1(b) of the SCM Agreement if the subsidy recipient must use domestically produced goods to meet the domestic labor (or labor and production) requirement.⁵²⁸ The United States specifically referred in this regard to the Appellate Body's finding in *Canada – Autos*, that a subsidy that was available only if the

addition, the EU argues, "Further, since the end of 2010, the relevant employment provisions are no longer in force." *Ibid.* This observation does not undermine the fact that at the time of grant, A380 LA/MSF was anticipated to induce Airbus to use domestic over imported goods in the manufacture of A380 (and in any case, the effects of Airbus' pre-2010 employment decisions likely affected the allocation of labor post-2010). Finally, Airbus argues, "[T]he United States does not even attempt to relate the cited provisions {in the German LA/MSF contract} to any *subsidy* . . . as opposed to the *investment*." *Id.* This comment seemingly ignores the fact that German A380 LA/MSF – like all A380 LA/MSF – has already been found to be a subsidy in the sense of Article 1 of the SCM Agreement. *EC – Large Civil Aircraft (Panel)*, paras. 7.489-7.490 and 7.497.

⁵²⁵ US FWS, paras. 205-208, 227-229, 232-238.

⁵²⁶ EU FWS, para 457.

⁵²⁷ *E.g.*, US FWS, paras. 205-208, 222-224, 227, 232, 237-238.

⁵²⁸ US FWS, paras. 214 ff.

recipients' combined value of domestic labor and domestic goods exceeded a certain threshold was contingent in fact upon the use of domestic over imported goods. According to the Appellate Body, "whether or not a particular manufacturer is able to satisfy the {value-added} requirements without using any Canadian parts and materials in its production depends very much on the *level* of the applicable CVA requirements. For example, if the level of the CVA requirements is very high, we can see that the use of domestic goods may well be a necessity and thus be, in practice, required as a condition for the {subsidy}."⁵²⁹ Thus, for the Appellate Body, the key question was whether "a particular manufacturer is able to satisfy {the subsidy's} . . . requirements without using any {domestic} parts and materials in its production." If the answer, *in fact*, is no, then the measure is contingent *in fact* upon the use of domestic over imported goods.

337. The EU appears to disagree with this, but it nowhere addresses the Appellate Body's reasoning in *Canada – Autos* specifically, nor does it explain why it believes that analysis to be inapplicable to this dispute.⁵³⁰ Thus, the EU's observations that "{a}n employee is not a good{}", and that "neither domestic development nor production is to be equated with 'the use of domestic over imported goods'{}",⁵³¹ are irrelevant. The United States has not *equated* domestic development and production with the use of domestic goods. Instead, the United States has demonstrated that under the facts *in this dispute*, the development and production of aircraft components and the requirement to create or maintain substantial numbers of domestic jobs effectively mandate the use of domestic over imported goods.⁵³² The EU has not disputed the facts underlying that analysis and the analysis is consistent with prior adopted panel and Appellate Body findings, so the United States' conclusions should stand.

3. The Documents submitted by the EU in response to the Panel's request under Article 13 of the DSU further confirm that LA/MSF for the A350 XWB is contingent on the use of domestic over imported goods.

338. Documents provided by the EU in response to the Panel's Article 13 request provide further confirmation that LA/MSF for the A350 XWB was contingent on the use of domestic over imported goods. [***] [[HSBI]]⁵³³ All four contracts guarantee that Airbus would manufacture [***] with components manufactured domestically, rather than imported from

⁵²⁹ *Canada – Autos (AB)*, para. 130 (emphasis in original).

⁵³⁰ Notably, the EU does not even refer to the appellate Body's report in this dispute or try to explain why it is not relevant in this case.

⁵³¹ EU FWS, para. 457.

⁵³² *E.g.*, US FWS, para. 203 ("These 'workshare agreements' amount to a requirement that, to receive LA/MSF, Airbus must manufacture certain components of the aircraft within the EU, which accordingly become domestic products of the EU, and then use those domestic products in its aircraft. Needless to say, this means that Airbus must use domestic components instead of imports.").

⁵³³ [[HSBI]].

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abroad. Therefore, LA/MSF for the A350 XWB is a prohibited export subsidy that the EU should withdraw without delay, in accordance with Article 4.7 of the SCM Agreement.

a. French LA/MSF for the A350 XWB was granted contingent on the use of domestic over imported goods.

339. [***]⁵³⁴ Therefore, under the terms of the French contract, these domestic-origin goods, rather than imported goods, must be used in the manufacture of A350 XWB aircraft.

340. [***⁵³⁵***⁵³⁶]

341. [***]⁵³⁷

342. Consequently, French LA/MSF for the A350 XWB is inconsistent with the EU's obligations under Article 3.1(b) of the SCM Agreement.

b. German LA/MSF for the A350 XWB was granted contingent on the use of domestic over imported goods.

343. The contingent requirements in the German A350 XWB contract take a very similar form. As Article 2.2 states, [***]⁵³⁸

344. [***⁵³⁹] [[**HSBI**]]⁵⁴⁰

345. [***⁵⁴¹***]⁵⁴²

346. Consequently, German LA/MSF for the A350 XWB is inconsistent with the EU's obligations under Article 3.1(b) of the SCM Agreement.

⁵³⁴ French A350XWB Protocole, Annex 2 (Exhibit EU(Art.13)-3(BCI)).

⁵³⁵ French A350XWB Protocole, Art. 2.2 (Exhibit EU(Art.13)-1(BCI)).

⁵³⁶ French A350XWB Protocole, Annex 2 (Exhibit EU(Art.13)-3(BCI)).

⁵³⁷ [***]

⁵³⁸ KfW A350 XWB Loan Agreement, Art. 2.2 (Exhibit EU(Art.13)-14(HSBI/BCI)) (emphasis added).

⁵³⁹ Annex 1.4.(a)(ii) to the KfW A350 XWB Loan Agreement (Exhibit EU(Art.13)-16(HSBI)).

⁵⁴⁰ Exhibit EU(Art.13)-16(HSBI).

⁵⁴¹ KfW A350 XWB Loan Agreement, Art. 15.5 (Exhibit EU(Art.13)-14(HSBI/BCI)).

⁵⁴² KfW A350 XWB Loan AgreementKfW A350 XWB Loan Agreement, Art. 15.5 (Exhibit EU(Art.13)-14(HSBI/BCI)).

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- c. *Spanish LA/MSF for the A350 XWB was granted contingent on the use of domestic over imported goods.*

347. In exchange for LA/MSF for the A350 XWB from Spain, Airbus agreed to manufacture the lower wing cover, the horizontal stabilizer, the belly fairing, and sections 19 and 19.1 in Spain. Therefore, under the terms of the German contract, Airbus was required to use these domestic-origin goods, rather than using imported goods, in the manufacture of A350 XWB aircraft.

348. The Spanish contract states:

The purpose of the present Agreement is to establish a framework for collaboration between MITYC {i.e., the Spanish Ministry of Industry, Tourism, and Commerce} and the company Airbus Operations S.L for this company's participation in the program to develop the AIRBUS A350 XWB aircraft which entail the following obligations on the Parties as set out below:

- MITYC . . . will contribute to the financing of the work under the responsibility of Airbus Operations S.L in the program to develop the A350 XWB aircraft through the grant of reimbursable advances at an interest rate of [***] as is detailed in this Agreement.

- Airbus Operations S.L will perform the work that has been assigned for its participation in the A350 XWB development program, which take the form of non-specialized engineering tasks such as the development of the lower wing cover, the horizontal stabilizer, the belly fairing, and sections 19 and 19.1, and which are detailed in the report presented by the company together with its application for these {reimbursable} advances.⁵⁴³

349. A similar description of Airbus Operations S.L's workshare also appear in the Spanish Royal Decree pursuant to which the Spanish LA/MSF contract was concluded.⁵⁴⁴ (The Decree identifies Airbus Operations S.L as the Spanish affiliate of Airbus.)⁵⁴⁵ Airbus S.L's operations include "Centres of Excellence" (i.e., factories) in Getafe, Puerto Real, and Illescas, which specialize in the horizontal tail plane.⁵⁴⁶ Therefore, in order to comply with the terms of the LA/MSF contract, Airbus (and Airbus Operations S.L) effectively had to manufacture these

⁵⁴³ Spanish A350 XWB *Convenio de Colaboración*, p. 2 (Exhibit EU(Art.13)-29(HSBI/BCI)).

⁵⁴⁴ *Real Decreto 1666/2009, de 6 de noviembre*, BOLETIN OFICIAL DEL ESTADO DE ESPANA, Num. 270, p. 1 (Nov. 9, 2009) (Exhibit USA-46).

⁵⁴⁵ *Real Decreto 1666/2009, de 6 de noviembre*, BOLETIN OFICIAL DEL ESTADO DE ESPANA, Num. 270, p. 1 (Nov. 9, 2009) (Exhibit USA-46).

⁵⁴⁶ Airbus Website, *Airbus In Spain* (Exhibit USA-459).

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products in Spain, rather than importing the same goods for use in manufacturing A350 XWB aircraft.

350. Consequently, Spanish LA/MSF for the A350 XWB is inconsistent with the EU's obligations under Article 3.1(b) of the SCM Agreement.

d. UK LA/MSF for the A350 XWB was granted contingent on the use of domestic over imported goods.

351. The UK LA/MSF contract requires Airbus to [***] For all of these reasons, the UK LA/MSF contract for the A350 XWB requires Airbus to use certain UK-origin goods in the production of [***], and is therefore inconsistent with Article 3.1(b) of the SCM Agreement.

352. In a section on [***] the contract states:

[***]⁵⁴⁷

The contract also specifies [***]⁵⁴⁸

353. [***]

354. The portion of the contract related to [***] states:

[***]⁵⁴⁹

355. Finally, the UK LA/MSF contract sets out [***].⁵⁵⁰ [[HSBI]]⁵⁵¹ [[HSBI]]⁵⁵²

These concerns are apparently reflected in the UK LA/MSF contract, which [***]

356. Thus the UK LA/MSF contract requires Airbus to use UK-origin [***] in the production of [***]. Furthermore, the contract requires Airbus to [***] in the UK, and it requires Airbus to place [***] In order to comply with these requirements, Airbus must use UK-origin goods rather than foreign goods in the manufacture of [***]. Consequently, UK LA/MSF for the A350 XWB is inconsistent with the EU's obligations under Article 3.1(b) of the SCM Agreement.

⁵⁴⁷ UK A350 XWB Loan Agreement, Art. 20.2 (Exhibit EU(Art.13)-30(HSBI/BCI)).

⁵⁴⁸ UK A350 XWB Loan Agreement, Art. 20.2 (Exhibit EU(Art.13)-30(HSBI/BCI)) (emphasis added).

⁵⁴⁹ UK A350 XWB LA/MSF Agree

ment, Art. 20.2 (Exhibit EU(Art.13)-30(HSBI/BCI)) (italics added; boldface in original).

⁵⁵⁰ UK A350 XWB Loan Agreement, Art. 20.1, Schedule 4 (Exhibit EU(Art.13)-30(HSBI/BCI)).

⁵⁵¹ [[HSBI]].

⁵⁵² UK A350 XWB Loan Agreement, Art. 20 (Exhibit EU(Art.13)-30(HSBI/BCI)).

VI. THE UNITED STATES HAS DEMONSTRATED THAT THE EU HAS NOT TAKEN APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS OF ITS SUBSIDIES, AND THE EU HAS FAILED TO REBUT THE U.S. CASE.

A. Introduction

357. The Panel's assessment of the EU's claim of compliance with the recommendations and rulings of the DSB should be straightforward. The original Panel found, and the Appellate Body affirmed, that the EU gave Airbus billions of euros in subsidized financing – the largest amount of subsidized financing in the history of the WTO and the GATT 1947 – resulting in tens of billions of dollars of adverse effects to the U.S. LCA industry. The DSB adopted these findings. As with the subsidy findings, the EU response to the adverse effects findings against it was to do nothing that would resolve the dispute. Where it did take action, it was to provide yet another round of LA/MSF, this time to enable Airbus to launch and bring to market the A350 XWB in a manner that would have been impossible otherwise.⁵⁵³ This is manifestly inappropriate. Under Article 7.8 of the SCM Agreement, the EU needed to take action to remedy the situation. Because it has not done so, the Panel should find that the EU has failed to comply.

358. With its first written submission, the EU confirmed that it relies overwhelmingly on inaction in asserting that it has taken appropriate steps to remove the adverse effects.⁵⁵⁴ In the face of the DSB's rulings and recommendations, the EU attempts to justify its inaction by citing two factors: (1) withdrawal of prior subsidies,⁵⁵⁵ and (2) the passage of time.⁵⁵⁶ Neither supports the EU's claim of compliance. The United States has demonstrated that the EU has not withdrawn the subsidies.⁵⁵⁷ The United States also demonstrates that the passage of time has not invalidated the underlying findings or eliminated the causal link between the subsidies and adverse effects, notwithstanding the EU's baseless assertions regarding Airbus's current financial situation, changes in conditions of competition, and technological advances.⁵⁵⁸ As found by the original Panel and the Appellate Body, Airbus's entire product line, the technologies applied on those products, and indeed Airbus's financial condition are genuine and substantially related to the LA/MSF subsidies. Nothing has happened since the reference period to undermine that conclusion. Therefore, the EU has failed to comply with Article 7.8 of the SCM Agreement and with the rulings and recommendation of the DSB.⁵⁵⁹

⁵⁵³ See, e.g., [[HSBI]].

⁵⁵⁴ See generally, EU FWS, section VI.

⁵⁵⁵ See, e.g., EU FWS, paras. 482, 489, 503, 530, 542-546.

⁵⁵⁶ See, e.g., EU FWS, paras. 554 – 558.

⁵⁵⁷ See Section IV of this submission.

⁵⁵⁸ See, e.g., EU FWS, paras. 554 – 558.

⁵⁵⁹ Action by the Dispute Settlement Body, WT/DS316/16, 1 June 2011.

359. The EU seeks to treat this compliance proceeding as a new, entirely independent dispute. It argues that the United States must show present adverse effects, presently caused, independent from and without any regard to the EU's past conduct or to the past measures and adverse effects at issue in the original dispute. The EU also contends that the Panel should not look to any facts that predate December 1, 2011, as they are not "relevant to the showing that the United States must make in these compliance proceedings."⁵⁶⁰ For its part, the EU considers itself free to ignore and/or re-litigate the original Panel and Appellate Body findings, adopted by the DSB, that the EU gave billions of euros in subsidized financing to create a line of Airbus aircraft that causes billions of dollars in adverse effects to the interests of the United States. The EU is mistaken in each respect.

360. The approach urged by the EU would require a prevailing Member to obtain new findings in a new dispute without regard to the recommendations and rulings adopted by the DSB in the original dispute. The EU approach is fundamentally at odds with the nature of a proceeding under Article 21.5 of the DSU. The starting point must be the DSB's recommendations and rulings.

361. In this case, the Appellate Body concurred with the original Panel's conclusion that under the most likely counterfactual scenario in the absence of the subsidies, "Airbus would not have existed . . . and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred."⁵⁶¹ At a minimum, absent the subsidies, Airbus would be a "much weaker LCA manufacturer," and would have had "at best a more limited offering of LCA models."⁵⁶² The original Panel and the Appellate Body made clear findings as to the product effects of LA/MSF, which enabled Airbus to develop and bring to market each of its models of LCA as and when it did.⁵⁶³ The original Panel and the Appellate Body recognized that the primary effects of LA/MSF to a given Airbus model was to cause that model to be launched when and as it was and to thereby inject supply into the market that would not exist otherwise. The presence of such subsidized aircraft enabled and continues to enable Airbus to capture sales and market share at the expense of the U.S. industry.

362. The United States demonstrated the continued validity of the underlying findings – including the causal link – in the current market situation, the absence of any meaningful action by the EU to address the situation, and the unabated, continuing present adverse effects in the form of significant lost sales and displacement and impedance, and threat thereof.⁵⁶⁴ None of the EU's asserted compliance steps did anything to address, let alone remove, LA/MSF's adverse effects. In fact, the sole notable action that the EU did undertake was to compound the adverse effects by giving yet another round of LA/MSF to the A350 XWB.

⁵⁶⁰ EU FWS, para. 7.

⁵⁶¹ *EC – Large Civil Aircraft (AB)*, para. 1264.

⁵⁶² *EC – Large Civil Aircraft (AB)*, paras. 1269 and 1270.

⁵⁶³ See US FWS, paras. 335-347 (citing *EC – Large Civil Aircraft (AB)*; *EC – Large Civil Aircraft (Panel)*).

⁵⁶⁴ See US FWS, section VI.

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363. The EU's first written submission is devoid of reference to EU action that could remove LA/MSF's adverse effects. Rather, the EU seeks to re-litigate issues already settled in the reports adopted by the DSB. The EU has tried to rebut the U.S. causation demonstration by citing the supposed "withdrawal," through expiration or extraction, of LA/MSF to all Airbus LCA from the A300 through the A340,⁵⁶⁵ and subsequent investment by Airbus and its suppliers in the A320 and A330. The EU has also recycled arguments that Airbus could have launched the A380 in the absence of LA/MSF. All of these arguments fail for the same reasons they failed in the original proceeding.⁵⁶⁶

364. Also without merit are the EU's arguments regarding Articles 6.4 and 6.5 of the SCM Agreement and what it refers to as "non-subsidized like product rules."⁵⁶⁷ The EU ignores a threshold point: the unchallenged original Panel findings, adopted by the DSB, that any non-subsidized like product requirement is limited to analyses under Articles 6.4 and 6.5, and that the United States satisfied the relevant requirements of Articles 6.3(b) and 6.3(c) without resort to Articles 6.4 or 6.5, are not to be reopened in this compliance proceeding. After electing to "not pursue this matter on appeal" in the original proceeding,⁵⁶⁸ the EU now attempts in the context of a compliance proceeding to overturn findings adopted by the DSB. This is contrary to the DSU.

365. In its first written submission, the EU largely does not dispute the conditions of competition found by the original Panel and the Appellate Body and cited by the United States.⁵⁶⁹ The notable exception is that the EU for the first time asserts the existence of *seven* wholly separate product markets, four of which are purportedly monopoly markets with no competition. This is contrary to adopted Appellate Body findings, in which the Appellate Body agreed with the EU's prior position that LCA could properly be divided into three appropriate product markets – single aisle, twin aisle, and very large aircraft. Nor does the EU's approach bear any resemblance to real patterns of competition involving large civil aircraft.

366. In sum, the EU first written submission does not change the key facts of this compliance dispute: LA/MSF and other subsidies have not been withdrawn; additional LA/MSF has been provided to the A350 XWB; Airbus still supplies the market with a product line that it would not have without LA/MSF, which is now even more competitive with the market entry of the A350 XWB; and, consequently, Boeing continues to lose sales and market share worth many billions of dollars. Below, the United States details the reasons why the Panel should reject the EU's attempts to forestall compliance.

⁵⁶⁵ The EU argues the same for the A380 LA/MSF, although its arguments betray a lack of confidence that it has withdrawn LA/MSF to the A380.

⁵⁶⁶ See *EC – Large Civil Aircraft (Panel)*, paras. 7.1984, 7.1993, 7.1994; *EC – Large Civil Aircraft (AB)*, paras. 1265, 1266, 1270, 1273.

⁵⁶⁷ EU FWS, paras. 707-708.

⁵⁶⁸ EU FWS, para. 656.

⁵⁶⁹ Compare EU FWS, paras. 569-633, with US FWS, paras. 295-301.

B. The Analytical Framework Advocated by the EU is Deeply Flawed.

1. *The starting point in a compliance proceeding is the recommendations and rulings of the DSB. This is not a “new” case.*

367. In its first written submission, the United States demonstrated the continued existence of present adverse effects, and that the situation which forms the basis for the DSB rulings and recommendations essentially remains unchanged. In fact, the situation is now *worse* in the wake of LA/MSF for the A350 XWB. In response, the EU argues that “the United States failed properly to establish *present* adverse effects” and repeatedly criticizes the assertion by the United States that “there has been no material change in the circumstances underpinning the findings of the original Panel and Appellate Body.”⁵⁷⁰ In essence, the EU faults the United States for using the DSB rulings and recommendations as its baseline, and for reasoning that the EU’s lack of any meaningful action supports the conclusion that the findings underlying those rulings and recommendations remain applicable. But the EU’s position ignores that the DSB recommendations and rulings must be the starting point for the compliance Panel.

368. The Appellate Body has found that “[a]n *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular claim* and the *specific* component of a measure that is the subject of that claim.”⁵⁷¹ The Appellate Body further noted in *US – Stainless Steel (Mexico)* that:

the mandate of an Article 21.5 panel includes the task of assessing whether the measures taken to comply with the rulings and recommendations adopted by the DSB in the original proceedings achieve compliance with those rulings.⁵⁷²

369. With the adoption of the Panel and Appellate Body Reports in *EC – Large Civil Aircraft*, the EU had an obligation to comply with the DSB’s rulings and recommendation to withdraw the subsidies or take appropriate steps to remove their adverse effects by December 1, 2011.

370. The question for the Panel in this proceeding is whether the EU has done so. The answer is no.

371. Section IV above confirms that the EU not only failed to withdraw the subsidies but conferred new subsidies. This Section demonstrates that the EU has failed to take appropriate steps to remove the adverse effects caused by its subsidies.

372. The original Panel found and the Appellate Body confirmed that, without LA/MSF, Airbus would not have been able to develop, offer, and sell the aircraft that it did during the 2001-2006 reference period. Through the presence of those aircraft in the market, the LA/MSF

⁵⁷⁰ See, e.g., EU FWS, paras. 532, 548, 769, 875.

⁵⁷¹ *EC – Bed Linen (21.5) (AB)*, para. 93 (emphasis original).

⁵⁷² *US – Stainless Steel (Mexico) (AB)*, para. 158, note 309.

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and other subsidies caused adverse effects to the United States in the form of lost sales and lost market share to Boeing. The Appellate Body concurred with the original Panel's conclusion that, under the most likely counterfactual scenario, in the absence of the subsidies "Airbus would not have existed . . . and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred."⁵⁷³ At a minimum, absent the subsidies, Airbus would be a "much weaker LCA manufacturer," and would have had "at best a more limited offering of LCA models."⁵⁷⁴ In sum, the panel and Appellate Body found that:

- Airbus received a steady stream of LA/MSF and the other subsidies in dispute over a 40-year period;⁵⁷⁵
- these subsidies were, by design, supply-creating, and their benefits flowed across Airbus's entire LCA product line;⁵⁷⁶
- the subsidies shaped Airbus's participation in the market by allowing it to develop and bring to market its product line at a pace and in a way that it could not otherwise have done, in the unlikely event that Airbus existed at all;⁵⁷⁷ and
- the availability of Airbus's subsidized LCA supply was the fundamental factor enabling Airbus to capture market share and sales at Boeing's expense, and that no other factors in the market attenuated that causal link.⁵⁷⁸

373. The DSB recommended that the EU take appropriate steps to remove the adverse effects or withdraw the subsidies by December 1, 2011.⁵⁷⁹ The EU not only failed to heed this deadline, it has disregarded the findings of the original Panel and Appellate Body by attempting to re-litigate settled issues:

- The original Panel found that the reference to the "non-subsidized like product" in Article 6.4 of the SCM Agreement did not preclude a finding of displacement under Article 6.3(b) even if the U.S. like product were subsidized.⁵⁸⁰ The EU did not appeal this

⁵⁷³ *EC – Large Civil Aircraft (AB)*, para. 1264.

⁵⁷⁴ *EC – Large Civil Aircraft (AB)*, paras. 1269 and 1270.

⁵⁷⁵ *EC – Large Civil Aircraft (AB)*, paras. 1414(e),(l),(m),(o),(p),(q),(r), 1416; *EC – Large Civil Aircraft (Panel)*, paras. 7.488, 7.497, 8.1(a),(b),(c),(d), 8.2.

⁵⁷⁶ *EC – Large Civil Aircraft (AB)*, paras. 1352, 1355, 1356; *EC – Large Civil Aircraft (Panel)*, paras. 7.1717, 7.1914-7.1920, 7.1938, 7.1948.

⁵⁷⁷ *EC – Large Civil Aircraft (AB)*, paras. 1264, 1265, 1266, 1270, 1273; *EC – Large Civil Aircraft (Panel)*, paras. 7.1933, 7.1984.

⁵⁷⁸ *EC – Large Civil Aircraft (AB)*, paras. 1414(p); *EC – Large Civil Aircraft (Panel)*, paras. 7.1934, 7.1936, 7.1938, 7.1939, 7.1941, 7.1942, 7.1948, 7.1949; 7.1986-7.1993, 8.2.

⁵⁷⁹ *EC – Large Civil Aircraft (Panel)*, para. 8.7; *EC – Large Civil Aircraft (AB)*, paras. 1416, 1418.

⁵⁸⁰ See *EC – Large Civil Aircraft (Panel)*, para. 7.1769.

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issue,⁵⁸¹ but the EU now asks the Panel to reach a contradictory interpretation of the SCM Agreement.⁵⁸²

- The Appellate Body found, and the EU agreed, that displacement could properly be analyzed according to three LCA “product markets.”⁵⁸³ The EU now asserts that there are seven product markets.⁵⁸⁴
- The Appellate Body found that LA/MSF and the other subsidies caused displacement of Boeing twin-aisle LCA (*i.e.*, the 767 and 777) in the EU, China, and Korea twin-aisle product markets,⁵⁸⁵ but the EU now asserts that the Airbus twin-aisle A330 is in its own monopoly market in which no displacement or impedance of Boeing LCA could occur;⁵⁸⁶
- The original Panel rejected the EU’s contention that the A380 and 747 do not compete against each other,⁵⁸⁷ and the Appellate Body confirmed sales the 747 lost to the A380 because of LA/MSF.⁵⁸⁸ The EU, however, now repeats its contention that the 747 does not compete with, and cannot lose sales or market position to, the A380.⁵⁸⁹
- The original Panel found that the 2006 Dorman Report “and the simulation reported therein, supports the United States’ position that Airbus product launches would not have occurred in the absence of LA/MSF,”⁵⁹⁰ and the EU did not appeal this finding. Nevertheless, the EU now repeats its arguments that the Dorman Report is invalid, including by impugning the validity of the program delivery parameters in the Dorman model.⁵⁹¹
- The original Panel found, and the Appellate Body affirmed, that the launch of the A380 was dependent on LA/MSF;⁵⁹² that the A380 business case did not demonstrate that Airbus would have undertaken the project absent LA/MSF, even assuming the business case demonstrated a positive net present value (“NPV”);⁵⁹³ and that the EU had not demonstrated it would have been able to fund the A380 program absent LA/MSF by relying on the resources of its parent companies and additional contributions from risk

⁵⁸¹ EU FWS, para. 656.

⁵⁸² EU FWS, paras. 707-708.

⁵⁸³ *EC – Large Civil Aircraft (AB)*, paras. 1176, 1178.

⁵⁸⁴ EU FWS, paras. 606, 619, 632.

⁵⁸⁵ *EC – Large Civil Aircraft (AB)*, para. 1414(l), (m)(ii-iii), and (p).

⁵⁸⁶ EU FWS, para. 619.

⁵⁸⁷ *EC – Large Civil Aircraft (AB)*, para. 1227 (citing *EC – Large Civil Aircraft (Panel)*, para. 7.1832).

⁵⁸⁸ *EC – Large Civil Aircraft (AB)*, para. 1228.

⁵⁸⁹ EU FWS, para. 620.

⁵⁹⁰ *EC – Large Civil Aircraft (Panel)*, para. 7.1887.

⁵⁹¹ EU FWS, paras. 1016-1022.

⁵⁹² *EC – Large Civil Aircraft (AB)*, para. 1414(q).

⁵⁹³ *EC – Large Civil Aircraft (AB)*, paras. 1333-1335.

sharing suppliers.⁵⁹⁴ The EU now, however, repeats its arguments that Airbus could have, and would have, launched the A380 absent LA/MSF to the A380.⁵⁹⁵

374. The compliance Panel should reject the EU's efforts to re-litigate issues now settled by findings of the original Panel and Appellate Body that were adopted by the DSB. While the United States discusses each of these arguments in greater detail below, a consistent theme throughout the EU's assertions of adverse effects compliance is the repetition of arguments that the original Panel and Appellate Body already rejected. That is not affirmative action toward compliance.

2. The EU has not fulfilled the mandate of Article 7.8 of the SCM Agreement and the requirement to “take appropriate steps to remove adverse effects.”

375. Article 7.8 of the SCM Agreement required the EU to comply with the DSB's recommendations and rulings by withdrawing LA/MSF and other subsidies to Airbus or taking appropriate steps to remove their adverse effects. The United States has demonstrated that the subsidies have not been withdrawn.⁵⁹⁶ The United States has also demonstrated that the EU's cited compliance “steps” are meaningless because they are nonexistent, do not constitute action by the EU, and/or are facially incapable of removing the adverse effects. Further, the market situation continues to show that Airbus's LA/MSF-funded product line continuing to take sales and market share from the U.S. LCA industry.⁵⁹⁷ Once it showed that the subsidies remained in place and that the EU had done nothing to remove their adverse effects, the United States had no further obligation to demonstrate anew that LA/MSF and the other subsidies to Airbus cause present adverse effects. Nevertheless, the United States took the additional (and unnecessary step) of showing that those subsidies continue to cause adverse effects subsequent to December 1, 2011, and as of the date of the referral of the matter to the compliance panel.⁵⁹⁸ In addition, the United States has demonstrated that the EU has provided new WTO-inconsistent LA/MSF to the A350 XWB, which is properly within the scope of this dispute.⁵⁹⁹ Once presented with the U.S. evidence and argument, the EU had the opportunity to demonstrate that, consistent with Article 7.8, it had either withdrawn the subsidies or had taken appropriate steps to remove their adverse effects. The EU did neither.

376. Article 7.8 of the SCM Agreement guides a DSU Article 21.5 panel's analysis of whether a responding party has brought itself into compliance with its obligations in a case involving actionable subsidies:

⁵⁹⁴ *EC – Large Civil Aircraft (AB)*, paras. 1341-1342, 1344, 1348-1349, 1352.

⁵⁹⁵ EU FWS, para. 1009.

⁵⁹⁶ *See* US FWS, Section III; *see also* Section IV of this submission.

⁵⁹⁷ *See* US FWS, Section VI; *see also* Section IV of this submission.

⁵⁹⁸ *See* US FWS, Section VI; *see also* Section VI of this submission.

⁵⁹⁹ *See* US FWS, Section IV; *see also* Section IV of this submission.

{I}n order to determine whether there is compliance with the DSB’s recommendations and rulings in a case involving such actionable subsidies, a panel would have to assess whether the Member concerned has taken one of the actions foreseen in Article 7.8 of the *SCM Agreement*. We agree, therefore, with the Panel that we must also take into account Article 7.8 of the *SCM Agreement* in order to determine the proper scope of these Article 21.5 proceedings.⁶⁰⁰

377. Article 7.8 of the SCM agreement provides:

Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

378. The Appellate Body has made clear that the implementing Member has two options under Article 7.8 to achieve full compliance with the DSB rulings and recommendations involving findings of actionable subsidies, both of which normally mandate affirmative action by the respondent Member:

Pursuant to Article 7.8, the implementing Member has two options to come into compliance. The implementing Member: (i) shall take appropriate steps to remove the adverse effects; or (ii) shall withdraw the subsidy. The use of the terms “shall take” and “shall withdraw” indicate that compliance with Article 7.8 of the *SCM Agreement* will usually involve some action by the respondent Member. This affirmative action would be directed at effecting the withdrawal of the subsidy or the removal of its adverse effects. A Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own.⁶⁰¹

379. The mandatory nature of Article 7.8 is clear from the term “shall.” The plain meaning of the word “remove” means to “eliminate” and entails “the action of taking away” or the action of “getting rid of a thing.”⁶⁰² A step entails an “action, measure, or proceeding” and especially where an action is “one of a series, which leads towards a result.”⁶⁰³ The term “appropriate” denotes the concept of something that is “specially suitable for” or “proper” or “fitting.”⁶⁰⁴ These definitions, consistent with the Appellate Body’s guidance, make clear that the direction in Article 7.8 that “the Member granting or maintaining such subsidy shall take appropriate steps to

⁶⁰⁰ *US – Upland Cotton (21.5) (AB)*, para. 235.

⁶⁰¹ *US – Upland Cotton (21.5) (AB)*, para. 236.

⁶⁰² *New Shorter Oxford English Dictionary*, p. 2543 (Exhibit USA-452).

⁶⁰³ *New Shorter Oxford English Dictionary*, p. 3050 (Exhibit USA-452).

⁶⁰⁴ *New Shorter Oxford English Dictionary*, p. 103 (Exhibit USA-452).

remove the adverse effects” means that a Member must usually take “actions,” undertake a “proceeding,” or employ “measures” that are “proper” and “fitting” and that are “specially suitable” to “lead toward a result” – that result being the “elimination” or “taking away of” or “getting rid of” “adverse effects.”

380. Here, because the DSB found that LA/MSF, infrastructure and equity infusion subsidies to Airbus cause adverse effects, appropriate steps to remove the adverse effects were steps that would have resulted in a situation where those subsidies no longer cause adverse effects. The adverse effects compliance analysis under Article 7.8 starts with the subsidies that the DSB determined to cause adverse effects and examines (i) whether there exist any measures taken to comply by the responding Member, and if so, (ii) whether the measures taken to comply have “removed” the adverse effects.

381. If no measures taken to comply exist – *i.e.*, the responding Member has not taken *any* steps to remove the adverse effects, and the subsidies have not been withdrawn, the compliance Panel would be able to conclude, absent any contrary affirmative showing, that the findings of the original Panel and Appellate Body, as adopted by the DSB, remain applicable and the responding Member has failed to comply with the DSB’s recommendations and rulings. That is the case here, where the EU has taken no real action to remove the adverse effects, and the minor steps it cites are both insignificant in magnitude and incapable of undermining the basis of the Panel and Appellate Body findings adopted by the DSB.

382. The compliance Panel need only look at the EU’s arguments in its first written submission to see this is the case. The EU is not arguing that its member States’ LA/MSF subsidies to Airbus have been brought up to commercial terms; it is arguing that LA/MSF have expired on their own, with the passage of time, and it does not assert that the rate charged for the new LA/MSF to the A350 XWB was a market rate. In fact, the evidence submitted by the EU confirms that it was not.⁶⁰⁵ Nor does the EU argue that it has taken steps to eliminate or mitigate LA/MSF’s market-distorting product effects. Instead, the EU argues that LA/MSF’s adverse effects have been eliminated through Airbus’s efforts to enhance the competitiveness of LA/MSF-funded A320 and A330, and through the automatic, retroactive effect of subsidy expiration on Airbus’s ability to launch the A380 and A350 XWB. Where the EU tries to take credit for compliance “steps,” the cited step is either a meaningless formality with no bearing on adverse effects, such as “terminating” LA/MSF contracts, or events in which the EU had no involvement whatsoever, such as Airbus’s delivery of LCA pursuant to sales that the original Panel found were lost by Boeing as a result of the EU’s WTO-inconsistent subsidies. The EU’s failure to take any real steps, and the relative insignificance of the minor steps upon which it relies, fall well short of the obligation in Article 7.8 to take appropriate steps to remove the adverse effects.

⁶⁰⁵ See NERA, Comparison of A350 Loan Rates with Market Benchmarks (Oct. 19, 2012) (Exhibit USA-475(HSBI)).

3. The EU provides no basis for disaggregating the effects of LA/MSF or decumulating the effects of other subsidies to Airbus in analyzing whether the EU has taken appropriate steps to remove the adverse effects of the subsidies.

383. In its first written submission, the United States discussed the standard for conducting an aggregate analysis of the effects from multiple subsidies, as articulated most recently by the Appellate Body in *US – Large Civil Aircraft*:

{A} panel may group together subsidy measures that are sufficiently similar in their design, structure and operation in order to assess their aggregated effects in an integrated causation analysis⁶⁰⁶

The United States demonstrated that, under this standard, it is appropriate to assess EU compliance (or lack thereof) using an integrated, or aggregated, analysis of the effects of all instances of LA/MSF to Airbus, from the A300 through the A350 XWB, because they all share the “same structure, design and operation,”⁶⁰⁷ and because this was the approach followed by the original Panel and affirmed by the Appellate Body.⁶⁰⁸ The United States also observed that EU compliance with respect to equity infusion and infrastructure subsidies should be assessed in terms of how those subsidies “complement and supplement” the effects of LA/MSF, consistent with the approach taken by the original Panel and endorsed by the Appellate Body.⁶⁰⁹

384. The EU contends that “the United States has failed to provide” argument and evidence that would enable the Panel “to decide whether or not to aggregate subsidies for purposes of assessing their effects.”⁶¹⁰ The EU is mistaken. Moreover, the EU offers no substantive arguments or evidence concerning the relevant criteria for aggregation of subsidies’ effects and thus provides no valid basis for deviating from the approach proposed by the United States.

385. The common structure, design, and operation of LA/MSF to all Airbus models from the A300 through the A380, and the propriety of their aggregation for purposes of the causation analysis, are not subject to re-litigation, as the original Panel found as much and was affirmed by the Appellate Body.⁶¹¹ The EU does not dispute these common features of LA/MSF.⁶¹² Nor can there be any serious dispute that the LA/MSF to the A350 XWB shares the same structure, design, and operation as prior LA/MSF. The United States provided extensive evidence and

⁶⁰⁶ *US – Large Civil Aircraft (AB)*, para. 1285, quoted in US FWS, para. 282.

⁶⁰⁷ US FWS, paras. 283, 330.

⁶⁰⁸ US FWS, para. 282 (citing *EC – Large Civil Aircraft (AB)*, para. 1378).

⁶⁰⁹ US FWS, para. 284 (citing *EC – Large Civil Aircraft (AB)*, paras. 1390, 1397).

⁶¹⁰ EU FWS, para. 559-560.

⁶¹¹ *EC – Large Civil Aircraft (AB)*, para. 1378.

⁶¹² Cf. EU FWS, paras. 559-560.

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argumentation on this point in its first written submission,⁶¹³ which the EU has not rebutted. The EU also does not contest that, in accordance with the original Panel’s approach, the effects of infrastructure and equity infusion subsidies should be cumulated with those of LA/MSF.⁶¹⁴

386. In this regard, the EU’s aggregation argument does not concern the aggregation criteria identified by the Appellate Body – *i.e.*, commonalities in the structure, design, and operation of multiple subsidies. Rather, the EU’s argument invokes other EU assertions regarding “measures that no longer exist by virtue of, *inter alia*, repayment and/or amortisation.”⁶¹⁵ The United States has demonstrated that all LA/MSF subsidies to Airbus remain in existence, and as a separate legal and factual matter, have not been withdrawn.⁶¹⁶ Even assuming *arguendo* that some LA/MSF subsidies had expired on their own, that would neither preclude the Panel from accounting for their present effects,⁶¹⁷ nor provide a basis for disaggregating those effects from the effects of other LA/MSF subsidies,⁶¹⁸ which indisputably share the same structure, design and operation.⁶¹⁹

4. The period before December 1, 2011 is relevant to the compliance Panel’s assessment of present adverse effects and whether the EU has taken appropriate steps to remove the adverse effects.

387. The U.S. burden was to make a *prima facie* case demonstrating that the EU failed to comply by the December 1, 2011 deadline, and through the date of referral of this matter to the compliance Panel. With respect to adverse effects compliance, the United States discharged this burden by demonstrating that the EU failed to take any compliance steps that had any plausible capacity to remove the adverse effects caused by LA/MSF and other subsidies to Airbus. The United States confirmed the EU’s failure with a showing that adverse effects have persisted from the original reference period through the present, including post-December 1, 2011, evidence of significant lost sales and displacement and impedance.⁶²⁰ The persistence of adverse effects from 2006 until the end of the reasonable period of time (“RPT”) is highly relevant to the Panel’s analysis of whether the EU has removed the adverse effects, because so many of the EU’s

⁶¹³ US FWS, Sections IV.B.2, IV.C., VI.E.5.a-b.

⁶¹⁴ *Compare* EU FWS, paras. 559-560, *with* US FWS, para. 284.

⁶¹⁵ EU FWS, para. 560.

⁶¹⁶ *See* Section IV of this submission.

⁶¹⁷ *EC – Large Civil Aircraft (AB)*, paras. 712 (“In fact, we do not exclude that, under certain circumstances, a past subsidy that no longer exists may be found to cause or have caused adverse effects that continue to be present during the reference period.”), 1238 (“The question of whether there are residual effects is a fact-specific matter that may have to be considered.”).

⁶¹⁸ *See US – Large Civil Aircraft (AB)*, para. 1285 (providing that a panel may aggregate the effects of subsidies sharing the same structure, design and operation).

⁶¹⁹ *EC – Large Civil Aircraft (AB)*, para. 1378; *see also* US FWS, Sections IV.B.2, IV.C., VI.E.5.a-b (concerning LA/MSF to the A350XWB).

⁶²⁰ *See* US FWS, paras. 433-437, 496, 513-532.

alleged compliance steps arose well before the end of the RPT and their effects, if any, should be assessed by reference to observable market phenomena, both contemporaneous with, and subsequent to, the alleged compliance steps. The market situation over many years, before and since the compliance deadline, shows that Boeing continues to lose sales and experience displacement and/or impedance, thereby demonstrating that the alleged compliance steps have had no impact, and the EU has failed to remove the adverse effects. Now that more recent evidence is reasonably available, the United States is presenting additional and further post-December 1, 2011 updated evidence on lost sales and the situation in various country markets, discussed in greater detail below.

388. Moreover, the EU fundamentally misunderstands the role of a reference period in a compliance dispute and mischaracterizes the U.S. position. The essence of the EU’s argument is that the Panel should not look to any facts that predate December 1, 2011, as such facts are not “relevant to the showing that the United States must make in these compliance proceedings.”⁶²¹ The EU faults the United States for presuming that “temporally and fact specific adverse effects in the past and before the end of the implementation period pertain to or are relevant to the showing that the United States must make in these compliance proceedings.”⁶²² The EU further argues that United States is trying to avoid “the requirement to demonstrate *presently* caused *present* adverse effects”⁶²³ and that “in the context of compliance proceedings, the starting point for assessing United States’ claims may be no earlier than the end of the implementation period.”⁶²⁴ The EU is mistaken on all counts. As the original Panel aptly stated, “a review of the past is necessary to draw conclusions about present adverse effects.”⁶²⁵

389. The original Panel already rejected the EU’s notion that a demonstration of present adverse effects cannot be made by reference to data covering a number of years:

{I}t is impossible to assess the “present” situation, as immediate data is not available, and thus a review of the past is necessary to draw conclusions about present adverse effects we consider that it is our responsibility, in making a determination consistent with our obligations under Article 11 of the DSU, to examine the evidence put forward by the United States, and the rebuttal evidence put forward by the European Communities, including recent information where relevant and reliable, in determining whether the United States has demonstrated that subsidies cause present adverse effects within the meaning of Article 5 of the SCM Agreement. While this makes our task of assessment of the evidence more complicated, it serves to ensure that we carry out an objective examination, as

⁶²¹ EU FWS, para. 7.

⁶²² EU FWS, para. 7.

⁶²³ EU FWS, para. 562.

⁶²⁴ EU FWS, para. 565.

⁶²⁵ *EC – Large Civil Aircraft (Panel)*, paras. 7.1693-7.1694.

required by Article 11 of the DSU, of all the evidence in reaching our conclusions.⁶²⁶

390. In carrying out its task under Article 21.5, a compliance Panel must consider the recommendations and rulings of the DSB and the existence of any measures taken by the responding Member to comply. The compliance deadline is the point in time at which the responding Member is obligated to have achieved full compliance, but an assessment of compliance must account for all relevant evidence, particularly as it relates to the responding Member's cited measures taken to comply.

391. This is the approach followed by the compliance panel in *US – Upland Cotton*, which never restricted the temporal scope of its analysis in the manner now proposed by the EU. In *US – Upland Cotton*, the DSB's adoption of the underlying reports occurred on March 31, 2005, with the compliance deadline under Article 7.8 of the SCM Agreement falling in September 2005.⁶²⁷ The compliance panel did not restrict its adverse effects analysis to evidence arising after the compliance deadline. Rather, the compliance panel considered data on subsidies and market conditions over marketing years ("MY") 2002 through 2006⁶²⁸ – *i.e.*, picking up where the original Panel's MY 1999-2002 reference period left off – and then examined the more recent data together with the older, 1999-2002 data.⁶²⁹ Notably, the *US – Upland Cotton (21.5)* compliance panel found that the timing of the measure taken to comply in that dispute was an "important consideration" in identifying relevant data.⁶³⁰ It also recognized the value of a longer-term perspective:

Moreover, while our determination relates to the present period, we agree with the observation of the original Panel that consideration of developments over a longer period of time "provides a more robust basis for a serious prejudice evaluation than merely paying attention to developments in a single year".⁶³¹

392. In reviewing the compliance panel's report in *US – Upland Cotton (21.5)*, the Appellate Body confirmed that "nothing in Article 6.3(c) of the *SCM Agreement* suggests that the examination of the effect of a subsidy must focus exclusively on the short-term perspective" and it endorsed a long-term perspective for assessing adverse effects in a compliance proceeding

⁶²⁶ *EC – Large Civil Aircraft (Panel)*, para. 7.1694.

⁶²⁷ *See US – Upland Cotton (21.5) (Panel)*, para. 2.14.

⁶²⁸ *See, e.g., US – Upland Cotton (21.5) (Panel)*, paras. 10.23-10.25, 10.32, 10.56, 10.127, 10.135-10.136.

⁶²⁹ *See US – Upland Cotton (21.5) (Panel)*, paras 10.138, 10.141.

⁶³⁰ *US – Upland Cotton (21.5) (Panel)*, para. 10.18 ("An important consideration reinforcing the need to take into account data pertaining to the period since July 2006 is that the "measure taken to comply" by the United States – the elimination of the Step 2 programme – was effective as of the beginning of MY 2006.").

⁶³¹ *US – Upland Cotton (21.5) (Panel)*, para. 10.19.

involving upland cotton, a product with a far shorter life-cycle than large civil aircraft.⁶³² Moreover, the Appellate Body recognized in particular that “the effect of a subsidy on production can also be assessed on the basis of a long-term perspective that focuses on how the subsidy affects decisions of producers to enter or exit a given industry.”⁶³³

393. Here, as in *US – Upland Cotton (21.5)*, the end of the RPT should not artificially restrict the Panel’s analysis. Indeed, the need for a long-term perspective is more acute here, considering the timing of subsidization and the alleged measures to comply. The EU member States have been providing Airbus with LA/MSF for a long time, starting in 1969 and continuing through the present with the A350 XWB. Indeed, the EU cites as alleged compliance steps events arising well before the compliance deadline, including, in the case of the 1997-1998 German LA/MSF restructuring and the “termination” of the German LA/MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320, and A330/A340 Basic, events that pre-date the 2001-2006 period used by the United States to demonstrate its *prima facie* case before the original Panel.⁶³⁴ The EU also cites to the “bringing ‘to an end’” of various measures, including most LA/MSF subsidies. According to the EU and its experts, all, or nearly all, LA/MSF expired or was extinguished by [***].⁶³⁵ Relatively few of the EU’s alleged compliance steps occurred around the December 1, 2011 compliance deadline.

394. If the EU’s alleged compliance steps either did not exist or were devoid of substance, then neither the United States nor the Panel would require much, if any, post-December 1, 2011 data to conclude that the EU had failed to remove the adverse effects. Conversely, if the EU were correct that its asserted compliance steps had removed the adverse effects, one should be able to discern their impact on competition in the LCA industry well before December 1, 2011, since many of the steps allegedly occurred well before then. In either case, the Panel should consider all relevant data, including recent data as it becomes available. The U.S. case has proceeded on this basis, and it relies in part on providing market volume and share data through year-end 2011 and other evidence, including evidence of lost sales, from 2012. The more recent data are appropriately analyzed within the broader context of this dispute, particularly given the presumption that the original Panel’s and Appellate Body’s findings remain applicable in the face of nearly total inaction by the EU. The EU’s insistence on a tightly constrained reference period is misplaced.

⁶³² *US – Upland Cotton (21.5) (AB)*, para. 392; *see also US – Upland Cotton (21.5) (Panel)*, para. 10.19 (“Moreover, while our determination relates to the present period, we agree with the observation of the original Panel that consideration of developments over a longer period of time ‘provides a more robust basis for a serious prejudice evaluation than merely paying attention to developments in a single year.’”)

⁶³³ *US – Upland Cotton (21.5) (AB)*, para. 392.

⁶³⁴ *See, e.g., EU FWS*, paras. 205-210.

⁶³⁵ *See PwC Report – Analysis of the expected life of subsidies*, at pp. 22-24 (Nov. 29, 2011; July 2, 2012) (Exhibit EU-5) (BCI).

5. The “passage of time” has not severed the causal link between the subsidies and adverse effects, nor has the passage of time obviated the EU’s compliance obligation under Article 7.8 to take appropriate steps to remove the adverse effects of its subsidies.

395. The Appellate Body provided the following guidance on the compliance obligations arising under Article 7.8 of the SCM Agreement: “A Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own.”⁶³⁶ Nevertheless, the passage of time is central to the EU’s claim of full compliance. The EU’s arguments are littered with references to the “passage of time,” and it is the passage of time, rather than EU action, that the EU alleges has brought about both the withdrawal of pre-A380 LA/MSF through expiration, and the end of LA/MSF’s adverse product effects.⁶³⁷ The EU in essence argues that given the passage of time, the EU was under no obligation to *do* anything. The EU position conflicts with the language of Article 7.8, which mandates action by the responding Member, and the Appellate Body’s interpretation of that provision.

396. If, as the Appellate Body has found, abstaining from action is “normally” insufficient, it is particularly inadequate here, where LA/MSF causes adverse effects in an industry with long product life cycles. Regardless of the alleged expiry of the oldest subsidies examined in the original proceeding, Airbus’s *present* product line still consists of LCA that were created by LA/MSF; Airbus and Boeing continue to compete for sales; and Airbus has retained its position as the world’s largest producer of LCA. If the EU were correct that compliance could be achieved here through the dissipation of their effects on their own, then the Appellate Body’s guidance would be turned on its head, since there would be no principled reason why any responding Member with a compliance obligation under Article 7.8 could not follow the EU’s example.

397. The EU’s reliance on the passage of time is premised on a number of errors, but the most fundamental is a failure to come to terms with the magnitude and profound effects of the LA/MSF and other subsidies to Airbus. The original Panel found that the magnitude of the LA/MSF and other subsidies was “extremely large”⁶³⁸ and that, without LA/MSF, Airbus likely would not exist.⁶³⁹ Even under the improbable assumption that Airbus would have existed and launched its LCA without LA/MSF, the cost of commercial financing would have left Airbus with “massive” debt.⁶⁴⁰ Because Airbus did have LA/MSF, it was able to develop and bring to market the product line that it had during the original reference period and has today. On these

⁶³⁶ *US – Upland Cotton (21.5) (AB)*, para. 236.

⁶³⁷ *See, e.g.*, EU FWS, paras. 486, 493, 494, 497, 507, 508, 549, 553, 555, 557, 567, 639, 640, 642, 644, 645, 650, 727, 728, 872, 874, and 875.

⁶³⁸ *EC – Large Civil Aircraft (Panel)*, paras. 7.1967.

⁶³⁹ *EC – Large Civil Aircraft (Panel)*, paras. 7.1984.

⁶⁴⁰ *EC – Large Civil Aircraft (Panel)*, paras. 7.1948.

facts, “appropriate steps” to remove the adverse effects would have to be capable of negating LA/MSF’s severe market distortions. There is no basis for the EU to assume that the effects of massive WTO-inconsistent subsidies have, with the passage of time, ended on their own.

398. On this deeply flawed foundation, the EU layers other errors by arguing that all LA/MSF prior to the A380 has either expired or been extinguished, that expiration or extinguishment equals withdrawal, and that the effects of expired subsidies must be excluded from the adverse effects compliance analysis. As demonstrated above, none of the LA/MSF subsidies has, in fact, expired and, even if any had, such “expiration” would not constitute withdrawal within the meaning of Article 7.8 of the SCM Agreement. Nor did these subsidies’ alleged expiration have any necessary implications for the Panel’s assessment of adverse effects compliance. The Appellate Body has noted that an expired subsidy may still cause adverse effects.⁶⁴¹ Where, as here, the present adverse effects of the subsidies are indisputable, any expiration of the subsidies does not alter the conclusion.

399. In this light, it is evident that the EU’s reliance on the Appellate Body’s discussion of the life of subsidies and their effects is badly misplaced. The EU attempts to tether its arguments concerning the passage of time, including much of its causation argument, to the Appellate Body’s statement that “generally, the effects of *any subsidy* can be expected to diminish and eventually come to an end with the passage of time.”⁶⁴² The EU errs, however, in clinging to this statement while ignoring the Appellate Body’s guidance that Article 7.8 normally requires affirmative compliance steps,⁶⁴³ and in disregarding the original Panel and Appellate Body’s findings.

400. The passage of time is not sufficient in this dispute because LA/MSF, in its design, structure, and operation, has primary and secondary effects that are long lasting. As the original Panel and the Appellate Body found, the primary effect of LA/MSF to a given LCA model is to cause that model to be launched and inject supply into the market that would not exist otherwise, thereby taking sales and market share that the U.S. industry would otherwise have enjoyed. The United States recognizes that the primary effect of LA/MSF diminishes over time as the specific model’s competitiveness diminishes with the advent of new competing products and technologies and as operators retire that model from their fleets, thereby freeing up demand. This primary effect declines significantly with the termination of an LCA program. For example, the Appellate Body stated “that LA/MSF for the A300 and A310 are likely to cause minimal, if any, adverse effects during the reference period 2001-2006.”⁶⁴⁴ At the same time, however, even though the A340 is out of production, its sister model from the A330/A340 program, the A330, is still in production, and demand for the 777 is still depressed because

⁶⁴¹ *EC – Large Civil Aircraft (AB)*, paras. 712, 1238.

⁶⁴² *EC – Large Civil Aircraft (AB)*, para. 1238 (emphasis in original).

⁶⁴³ *US – Upland Cotton (AB)*, para. 236.

⁶⁴⁴ *EC – Large Civil Aircraft (AB)*, para. 1241.

current A340 operators have yet to replace the A340 with the 777, and now may never do so with the advent of the LA/MSF-funded A350 XWB.

401. LA/MSF to a given model also has secondary effects on subsequent LCA programs. These effects take four principal forms: (1) financial effects, whereby the previous subsidized financing enables launches of subsequent models by alleviating the capital burdens that would otherwise exist; (2) the technology and learning effects, where there is a transfer of technology, knowledge and production processes that benefit subsequent LCA programs and that otherwise would not exist; (3) economies of scope and scale effects; and (4) revenue effects in the form of sales of earlier subsidized LCA that provide Airbus with revenue to help fund new launches that would not have been launched in the absence of LA/MSF to the earlier programs. These secondary effects persist as long as the subsequent, benefitting LCA programs remain in production, although the significance of these secondary effects over time will vary according to the circumstances.

402. As with the primary effect of LA/MSF, the secondary effect of subsidies to a relatively old model (for example, the A300) will tend to diminish over time, particularly where its sales (and thus revenue generation) are modest or low, and where the technology and learning benefits from that early model have more limited applicability on more recent models. It is, however, simply incorrect for the EU to assert that the United States, in citing LA/MSF's "cascading effects," does not recognize this fact.⁶⁴⁵ Here, the EU conflates cascading effects with never-ending effects. LA/MSF's cascading, secondary effects from one Airbus model to another were recognized by both the original Panel and the Appellate Body.⁶⁴⁶ They are indisputable. In citing findings that LA/MSF has effects beyond a specific model that it funded, the United States is recognizing what has already been found by the original Panel and the Appellate Body in this dispute, and what the EU refuses to acknowledge – that given the design, structure, and operation of LA/MSF in an industry with such long product life cycles and with important economies of scale and scope, the effects of LA/MSF last for a long time.

403. Apart from the passage of time alone, the EU also argues that there are changes in the conditions of competition that post-date the original reference period and other alleged intervening causes and non-attribution factors that affect the causation analysis.⁶⁴⁷ The EU, however, has offered no legitimate basis for the compliance Panel to depart from the findings of the original Panel. In its first written submission, the United States accounted for all relevant developments occurring since the original reference period and explained why they did not mitigate the EU's failure under Article 7.8 of the SCM Agreement to remove the adverse effects, did not undermine the U.S. demonstration that the market situation is consistent with what would

⁶⁴⁵ EU FWS, para. 640.

⁶⁴⁶ See, e.g., *EC – Large Civil Aircraft (AB)*, paras. 1264, 1265, 1266, 1269, 1270, 1273, 1275-1278, 1352, 1355, 1356; *EC – Large Civil Aircraft (Panel)*, paras. 7.1717, 7.1914-7.1920, 7.1933, 7.1938-7.1941, 7.1948, 7.1984.

⁶⁴⁷ EU FWS, paras. 649-651.

be expected in the absence of meaningful compliance action, and did not eliminate the genuine and substantial causal relationship between LA/MSF and present adverse effects.⁶⁴⁸ As discussed below, alleged changes in competition, the improvement of Airbus LCA, and Airbus's current financial situation have done nothing to sever the causal link between LA/MSF and the other subsidies and the existence of Airbus aircraft in the market.

6. The question of the subsidization of the U.S. like products is irrelevant to this compliance proceeding.

404. The original Panel found that Article 6.4 of the SCM Agreement does not preclude a finding of displacement under Article 6.3(b) when the exports of the complaining Member have themselves been subsidized.⁶⁴⁹ The EU did not appeal this finding.⁶⁵⁰ The Panel recently summarized the situation:

{W}e recall that in the original dispute, the Panel concluded that Article 6.4 is not the exclusive means for demonstrating displacement or impedance of exports for purposes of a finding of serious prejudice under Articles 6.3(b) of the SCM Agreement. The United States did not rely on Article 6.4, and the Panel therefore did not address the question whether there was a "non-subsidized like product" and made no determinations in that regard. Thus, the Panel rejected the arguments of the European Communities that subsidization of Boeing LCA precluded a finding of serious prejudice in the form of displacement or impedance of exports. That decision by the Panel was not appealed, and was therefore adopted by the DSB.⁶⁵¹

405. Nevertheless, the EU now argues that the original Panel misinterpreted Articles 6.3 and 6.4, that there is a "non-subsidized like product rule" that allows certain findings of serious prejudice only when the complaining Member is not subsidizing its own like product, and that this rule precludes the U.S. claims of displacement under Article 6.3(b).⁶⁵² However, the DSB adopted the unappealed findings of the original Panel in this regard, so the EU is not entitled to reopen the issue in this compliance proceeding. In any event, the EU position is erroneous for several reasons, including the very same reasons given by the original Panel.

⁶⁴⁸ See US FWS, paras. 295-316.

⁶⁴⁹ See *EC – Large Civil Aircraft (Panel)*, para. 7.1769.

⁶⁵⁰ EU FWS, para. 656.

⁶⁵¹ *EC – Large Civil Aircraft (21.5) (Panel)*, Communication from the Panel to the Parties, para. 21 (Sept. 4, 2012).

⁶⁵² EU FWS, paras. 707-708. The United States understands what the EU refers to as the "relevant" claims of serious prejudice to be those that fall under Article 6.3(b) (displacement or impedance of like product exports from a third country market) and Article 6.3(c) (significant price undercutting by the subsidized product and significant price suppression, price depression, or lost sales in the same market), but not claims under Article 6.3(a) (displacement or impedance of like products from the subsidizing Member market).

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406. As a threshold matter, the EU disregards the fact that the unchallenged Panel findings, adopted by the DSB, that references in Articles 6.4 and 6.5 to the “non-subsidized like product” apply only to the situations outlined in those Articles, and that the United States satisfied the requirements of Articles 6.3(b) and 6.3(c) without resort to Articles 6.4 or 6.5, are not to be reopened in this compliance proceeding.⁶⁵³ After electing to “not pursue this matter on appeal,”⁶⁵⁴ the EU now attempts in the context of a compliance proceeding to overturn findings adopted by the DSB. The EU argument relies on the propositions that Article 6.4 of the SCM Agreement includes a non-subsidized like product “rule,” and that the criteria in Article 6.4 must be met for all claims under Article 6.3(b).⁶⁵⁵ The contrary findings adopted by the DSB preclude the result urged by the EU.⁶⁵⁶

407. Furthermore, the EU errs in criticizing the original Panel’s reasoning. The EU proposes in its place a tortured interpretation of Articles 5, 6.3, and 6.4 of the SCM Agreement. Indeed, the significant flaws in the EU’s interpretation are what led the original Panel to reject it in the first place. If the compliance Panel does entertain this argument, it should reach the same result.

- a. *The EU is precluded from re-litigating in this compliance proceeding an issue already resolved by the Panel and Appellate Body in findings adopted by the DSB.*

408. The Appellate Body has spoken clearly: “[a]n *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular claim* and the *specific* component of a measure that is the

⁶⁵³ The EU argues that the relationship between Article 6.3(b) and Article 6.4 mirrors the relationship between Article 6.3(c) and Article 6.5, and therefore any analysis with respect to the former applies equally to the latter. See EU FWS, paras. 657, note 856, 660, note 858. The Panel essentially agreed, finding that the EU’s argument with respect to Articles 6.3(c) and 6.5 raised “essentially the same question {it} addressed with respect to the relationship between Articles 6.3(b) and 6.4, and in {its} view, the same result should be reached.” *EC – Large Civil Aircraft (Panel)*, para. 7.1799. Thus, “for the same reasons,” the Panel found that Article 6.5 does not set forth the exclusive means by which serious prejudice can be demonstrated for purposes of Article 6.3(c). *EC – Large Civil Aircraft (Panel)*, para. 7.1799.

In any event, Article 6.5 only addresses price undercutting. The only findings adopted by the DSB and relevant to this compliance proceeding under Article 6.3(c) relate to lost sales, not price undercutting. Therefore, Article 6.5 is irrelevant even under the EU’s theory, and no non-subsidized like product rule even arguably applies to the United States’ Article 6.3(c) lost sales claims.

⁶⁵⁴ EU FWS, para. 656.

⁶⁵⁵ See EU FWS, para. 653.

⁶⁵⁶ See *US – Stainless Steel (Mexico) (AB)*, para. 158, note 309 (“{P}anels established under {Article 21.5} are bound to follow the legal interpretation contained in the original Panel and Appellate Body reports that were adopted by the DSB.”).

subject of that claim.”⁶⁵⁷ Similarly, an adopted Appellate Body report “shall be...unconditionally accepted by the parties to the dispute.”⁶⁵⁸

409. The original Panel “reject{ed} the European Communities’ view that Article 6.4 is the exclusive basis for a finding of displacement or impedance under Article 6.3(b) of the SCM Agreement.”⁶⁵⁹ It found that the circumstances set out in Article 6.4 provide a way to establish serious prejudice without a further assessment of whether the changes in the market share are the effect of the subsidy.⁶⁶⁰ It also found that Article 6.3(b) allows for a finding of serious prejudice in other situations, by demonstrating that the observed displacement or impedance is the effect of the subsidy.⁶⁶¹

410. The original Panel found that the United States did not rely on an Article 6.4 analysis to establish its claims under Article 6.3(b); rather, the United States demonstrated that displacement or impedance of its exports from third country markets existed *and* was the effect of the subsidies in dispute.⁶⁶² Thus, the original Panel analyzed the United States’ claims under Article 6.3(b) without regard to Article 6.4, and concluded that the United States successfully established, *inter alia*, claims of displacement under Article 6.3(b) (and claims of lost sales under Article 6.3(c)).⁶⁶³ The EU concedes that it “did not pursue this matter on appeal.”⁶⁶⁴

411. The original Panel report, as modified by the Appellate Body report, was adopted by the DSB on June 1, 2011.⁶⁶⁵ The DSB thus adopted findings by the Panel and the Appellate Body that actionable EU subsidies caused displacement under Article 6.3(b) of the SCM Agreement, establishing adverse effects in the form of serious prejudice without regard to whether or not the U.S. like products were subsidized. The DSB adopted further findings by the Panel and the Appellate Body that actionable EU subsidies caused lost sales under Article 6.3(c) of the SCM Agreement, establishing adverse effects in the form of serious prejudice without regard to

⁶⁵⁷ *EC – Bed Linen (21.5) (AB)*, para. 93 (emphasis original).

⁶⁵⁸ DSU, Art. 17.14.

⁶⁵⁹ *EC – Large Civil Aircraft (Panel)*, para. 7.1770.

⁶⁶⁰ *EC – Large Civil Aircraft (Panel)*, para. 7.1769.

⁶⁶¹ *EC – Large Civil Aircraft (Panel)*, paras. 7.1768-7.1770. In addition, “{t}he European Union did not appeal the Panel’s analysis of causation in relation to the lost sales involving A340 sales to Iberia, South African Airways, and Thai Airways International. Therefore, this aspect of the Panel’s analysis st{ood}.” *EC – Large Civil Aircraft (AB)*, para. 1412, note 3067.

⁶⁶² *EC – Large Civil Aircraft (Panel)*, para. 7.1768.

⁶⁶³ *EC – Large Civil Aircraft (Panel)*, para. 8.2.

⁶⁶⁴ EU FWS, para. 656.

⁶⁶⁵ Action by the Dispute Settlement Body, WT/DS316/16, 1 June 2011.

whether or not the U.S. like products were subsidized. These findings are to be taken as a given in an Article 21.5 proceeding.⁶⁶⁶

412. Given these adopted findings, the EU is precluded from arguing in this compliance proceeding that the U.S. like products are themselves subsidized, and that such subsidization of U.S. like products immunizes the EU from its obligation to withdraw subsidies already found to be actionable or to remove the adverse effects of those subsidies.⁶⁶⁷

b. The EU relies on a mischaracterization of the Panel’s reasoning in attempting to justify what amounts to an appeal of the Panel’s original decision.

413. Instead of acknowledging the nature of the findings adopted by the DSB, the EU argues that the reasons why it chose to “not pursue this matter on appeal” justify reopening the issue now.⁶⁶⁸ The EU asserts that it chose not to appeal this issue because “the panel’s reasoning rested in substantial part on the difficulty that a panel would have in determining that a like product is not subsidized, and since, at the relevant time, there were still no final DSB findings in DS353 *US – Large Civil Aircraft*.”⁶⁶⁹ According to the EU, the subsequent developments in DS353 offer a cogent reason for this compliance Panel to consider this matter.⁶⁷⁰ This line of argument mischaracterizes the original Panel’s reasoning.

414. The EU implies that the Panel rejected its non-subsidized like product argument because, in the absence of a finding in DS353, it was simply too difficult to evaluate subsidization of the U.S. like products. That was not the case. The original Panel found that the EU’s position has “no basis in the text,”⁶⁷¹ and that the United States made the appropriate demonstrations under Articles 6.3(b) without resort to Article 6.4, *rendering subsidization of U.S. like products irrelevant in this case*.⁶⁷²

415. The Panel’s observation about the difficulty of evaluating the complaining party’s subsidies was not driven by the facts of this dispute. Rather, the original Panel observed that the EU position would “as a practical matter, . . . enormously complicate the task of panels considering claims under Article 6.3(b).”⁶⁷³ As the original Panel pointed out, panels *in all cases*

⁶⁶⁶ See *EC – Bed Linen (21.5) (AB)*, para. 93; DSU, Art. 17.14; *US – Stainless Steel (Mexico) (AB)*, para. 158, note 309.

⁶⁶⁷ See *EC – Bed Linen (21.5) (AB)*, para. 93; DSU, Art. 17.14.

⁶⁶⁸ EU FWS, para. 656.

⁶⁶⁹ EU FWS, para. 656.

⁶⁷⁰ EU FWS, para. 657.

⁶⁷¹ *EC – Large Civil Aircraft (Panel)*, para. 7.1770.

⁶⁷² See *EC – Large Civil Aircraft (Panel)*, paras. 7.1768-7.1770.

⁶⁷³ *EC – Large Civil Aircraft (Panel)*, para. 7.1770.

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involving Article 6.3(b) claims “would have to consider whether the Member challenging those measures itself provides any subsidy with respect to the exported like product.”⁶⁷⁴ This implication provided additional support for the original Panel’s view that the EU’s interpretation would lead to an “absurd result.”⁶⁷⁵ In other words, it is so implausible that the drafters of the SCM Agreement intended the consequences that flow from the EU’s interpretation – including that panels would have to consider subsidies to the complaining party’s like product in evaluating all Article 6.3(b) claims – that the EU’s proposed interpretation must be wrong.

c. The EU erroneously criticizes the original Panel’s findings on a non-subsidized like product rule and attempts to substitute a deeply flawed interpretation.

416. The EU criticizes numerous aspects of the original Panel’s findings, and proposes in their place the EU’s own preferred “harmonious” interpretation of Articles 5, 6.3, 6.4, and 6.5. However, the EU’s criticisms are erroneous. Furthermore, the interpretation re-proposed by the EU suffers from numerous flaws, many of which were discussed by the original Panel.

417. The original Panel found, *inter alia*, that its reading of Article 6.4 led it “to the conclusion that if the circumstances set out in Article 6.4 are satisfied, a further assessment of whether the changes in market share are ‘the effect of the subsidy’ is not necessary.”⁶⁷⁶ The EU understands the original Panel to have found that Article 6.4 eliminates or diminishes a complaining Member’s obligation to demonstrate causation.⁶⁷⁷

418. Based on this understanding, the EU undertakes a lengthy exercise to prove that Articles 6.3(b) and 6.4 cannot be distinguished with reference to causation. The EU first argues that the causation obligation is rooted in the chapeau of Article 5, and is not reflected to any extent in Articles 6.3 and 6.4.⁶⁷⁸ The EU next argues that, even if the causation obligation is reflected in Article 6.3, it must be equally reflected in Article 6.4.⁶⁷⁹ The EU concludes that the causation standard cannot be diminished as between Articles 6.3 and 6.4.⁶⁸⁰

419. As an initial matter, the EU is incorrect that causation is not reflected in Article 6.3(b). Article 6.3(b) provides that serious prejudice in the sense of paragraph (c) of Article 5 may arise where “*the effect of the subsidy* is to displace or impede the exports of a like product of another

⁶⁷⁴ EC – Large Civil Aircraft (Panel), para. 7.1770.

⁶⁷⁵ EC – Large Civil Aircraft (Panel), para. 7.1770.

⁶⁷⁶ EC – Large Civil Aircraft (Panel), para. 7.1769.

⁶⁷⁷ EU FWS, para. 658 & note 857.

⁶⁷⁸ See EU FWS, paras. 660-667.

⁶⁷⁹ See EU FWS, paras. 660, 668-673.

⁶⁸⁰ See EU FWS, paras. 660, 674-679. The EU couches this as a “third line of reasoning,” but it is actually just a conclusion that the EU draws from the two alternative premises it previously discussed.

Member from a third country market.”⁶⁸¹ Thus, Article 6.3(b) clearly reflects an element of causation. The Appellate Body has adopted essentially the same view.⁶⁸²

420. Moreover, the “effect of the subsidy” language is not contained in Article 6.4 or in Article 6.5, nor is any other language similarly alluding to causation. Therefore, the EU is incorrect in stating that the causation obligation is necessarily reflected in Article 6.4 to the extent that it is in Article 6.3(b). Thus, contrary to the EU’s arguments, Articles 6.3(b) and 6.4 *can* be distinguished with reference to causation.

421. As the EU notes, “[t]he original Panel also reasoned that the terms ‘shall include’ indicate that Article 6.4 is not exhaustive. So there may be other circumstances in which breach of 6.3(b) may be demonstrated.”⁶⁸³ The EU responds that “those other circumstances need not be ‘with a demonstration, or further demonstration, of causation’.”⁶⁸⁴ The EU then lists three sets of circumstances not included in Article 6.4 that it considers obvious examples.⁶⁸⁵ But the EU’s argument seemingly suggests that there might be other circumstances besides those in Article 6.4 that can satisfy Article 6.3(b) *without* a demonstration, or further demonstration, of causation. That proposition is irrelevant, as it indicates nothing about circumstances where causation *was actually demonstrated*, as is the case here.

422. The EU also argues that the Appellate Body has found the phrase in Article 6.4, “over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned,” to apply to all claims under Article 6.3(b).⁶⁸⁶ The EU concludes that, if this phrase is to be read into Article 6.3(b), then the non-subsidized like product requirement must be read into Article 6.3(b) as well.⁶⁸⁷

423. However, the EU’s premise is incorrect; the Appellate Body has never found that claims under Article 6.3(b) must *in all cases* be assessed in accordance with Article 6.4. The EU cites two sources for its proposition, but neither of them supports the EU’s contention.

424. First, the EU cites the Appellate Body report in this dispute.⁶⁸⁸ There, the Appellate Body reviewed the language in Article 6.4, as well as the view of this language espoused in *US* –

⁶⁸¹ Emphasis added.

⁶⁸² *US – Upland Cotton (AB)*, para. 435 (“observ[ing] that Article 6.3(c) does not use the word ‘cause,’” but noting that, “the ordinary meaning of the noun ‘effect’ is ‘{s}omething...caused or produced; as a result, a consequence’”) (quoting *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 793).

⁶⁸³ EU FWS, para. 682 (citing *EC – Large Civil Aircraft (Panel)*, para. 7.1769).

⁶⁸⁴ EU FWS, para. 682.

⁶⁸⁵ EU FWS, para. 682.

⁶⁸⁶ EU FWS, para. 679.

⁶⁸⁷ EU FWS, para. 679.

⁶⁸⁸ EU FWS, para. 679, note 862 (citing *EC – Large Civil Aircraft (AB)*, para. 1166).

Upland Cotton.⁶⁸⁹ The Appellate Body then noted the importance of trends in the safeguards context, citing *Argentina – Footwear (EC)*.⁶⁹⁰ The Appellate Body concluded with regard to both that “{s}imilarly, a panel assessing a claim of displacement would have to look at clearly discernible trends during the reference period.”⁶⁹¹ The Appellate Body went on to discuss the need to balance greater accuracy from using larger data sets against the risk of making a requirement so strict that a Member is precluded from timely challenging subsidies that cause adverse effects.⁶⁹² Thus, the Appellate Body discussed Article 6.4 of the SCM Agreement and findings with regard to the *Agreement on Safeguards* as examples of how to analyze trends in import volumes and market share. It treated them equally as context, not as criteria directly applicable to Article 6.3(b).

425. Second, the EU cites *US – Upland Cotton*.⁶⁹³ But in that dispute, the Appellate Body was not even analyzing a claim under Article 6.3(b); it was assessing an Article 6.3(c) claim, to which even the EU does not suggest Article 6.4 is applicable.⁶⁹⁴ The Appellate Body treated Article 6.4 as “*relevant context* for interpreting Article 6.3(c).”⁶⁹⁵ Along with contextual clues from Article 6.2, the Appellate Body reasoned by analogy that, under Article 6.3(c), the effect of a subsidy may continue beyond the year in which it was paid.⁶⁹⁶ Thus, the Appellate Body in no way found that the criteria in Article 6.4 applied to claims under Article 6.3(c), much less all claims under Article 6.3(b).

426. After these erroneous criticisms of the Panel’s interpretation, the EU proposes its own “harmonious” interpretation of Articles 5, 6.3, and 6.4. It bears repeating that a compliance proceeding is simply not the appropriate context for proposing any interpretation at odds with the adopted findings. The United States argued before the original Panel and continues to believe that “non-subsidized like product” referenced in Articles 6.4 and 6.5 is the like product that did not receive the particular subsidy (or subsidies) at issue in the dispute, namely, the like product of the complaining party. Therefore, Articles 6.4 and 6.5 do not include a call for any inquiry into whether the complaining Member is subsidizing like products produced by its own industry.⁶⁹⁷ However, having not appealed the Panel’s ruling in this regard, the United States does view this compliance proceeding as an appropriate forum for re-proposing its own

⁶⁸⁹ *EC – Large Civil Aircraft (AB)*, para. 1166.

⁶⁹⁰ *EC – Large Civil Aircraft (AB)*, para. 1166.

⁶⁹¹ *EC – Large Civil Aircraft (AB)*, para. 1166 (emphasis added).

⁶⁹² *EC – Large Civil Aircraft (AB)*, para. 1167.

⁶⁹³ EU FWS, para. 679 & note 862 (citing Appellate Body Report, *US – Upland Cotton*, para. 478).

⁶⁹⁴ Appellate Body Report, *US – Upland Cotton*, para. 476.

⁶⁹⁵ Appellate Body Report, *US – Upland Cotton*, para. 478 (emphasis added).

⁶⁹⁶ Appellate Body Report, *US – Upland Cotton*, paras. 476-478, 482.

⁶⁹⁷ See US Second Oral Statement, 25 July 2007, paras. 190-192; US Comments to Answers of EC to 2d Panel Questions and on Answers of Third Parties to Panel Questions, 16 Nov. 2007, paras. 223-232.

harmonious approach to interpretation. Nevertheless, if this compliance Panel is inclined to allow the parties to re-argue the original Panel’s unappealed findings on this question, the United States urges that its interpretation, which it hereby incorporates by reference, is far more “harmonious” and consistent with the text of Articles 5, 6.3, 6.4, and 6.5 than the EU’s interpretation.

427. In any event, there is no question that the EU’s interpretation is incorrect. There is no justification for why a non-subsidized like product requirement would only apply to certain showings of serious prejudice under Article 6.3, but not others. Article 6.4 refers only to displacement or impedance of exports for the purpose of Article 6.3(b), and Article 6.5 refers only to price undercutting for the purpose of Article 6.3(c). There is no parallel provision referring to displacement or impeding of exports for the purpose of Article 6.3(a), nor is there a parallel provision referring to price suppression, price depression, or lost sales in Article 6.3(c). Therefore, if Articles 6.4 and 6.5 contain non-subsidized like product “rules” as the EU argues, the EU must explain why a non-subsidized like product rule applies to displacement or impeding of exports to third country markets under Article 6.3(b), and price undercutting under Article 6.3(c), but not to displacement or impeding of exports to the subsidizing Member market under Article 6.3(a), or price suppression, price depression, or lost sales under Article 6.3(c).

428. The EU attempts to justify this selective application by purportedly differentiating price effects (one of the subjects of Article 6.3(c)), volume effects in the subsidizing Member market (the subject of Article 6.3(a)), and volume effects in third country markets (the subject of Article 6.3(b)). According to the EU, a non-subsidized like product rule applies to price effects and volume effects in third country markets, but not to volume effects in the subsidizing Member market, based on a “same direction”/“different direction” distinction.

429. The EU’s “same direction”/ “different direction” distinction does not withstand scrutiny. The EU argues that, “if both the product and the like product are subsidised, and the subsidised like product is causing price effects, the subsidising like product will also be causing those same price effects. In any event, *both of the subsidies are necessarily pushing in the same direction,*”⁶⁹⁸ and the EU finds it impossible to discern causation in that situation. However, the EU continues, a subsidy from the complaining member “will, if anything, tend to lead to an *underestimate* of such volume effect. *Each of the subsidies is pushing in different directions,*”⁶⁹⁹ which in the EU’s view allows the discernment of effects caused by the subsidies. The EU ignores that if the complaining Member can sell at lower prices due to its own subsidization of the like product, the price effects of the subsidization by the responding Member will be less pronounced (or similarly underestimated). Thus the EU’s distinction is illusory.

430. Moreover, volume effects of each party’s subsidies in third country markets will push in the “same direction.” Even so, under the EU theory, the non-subsidized like product rule would

⁶⁹⁸ EU FWS, para. 689 (emphasis original).

⁶⁹⁹ EU FWS, para. 691 (emphasis original).

not apply. The EU tries to justify this self-contradiction on the basis that “because another Member is implicated,” the appropriate perspective is that of the third country (or any other Member).⁷⁰⁰ The EU reasons that, “{i}f the third country Member conducted a countervailing duty investigation, both of the subsidizing Members would be part of the problem.”⁷⁰¹ According to the EU, it would be “fundamentally contradictory if a Member could at the same time be countervailed by or found to have caused injury to a third country in its domestic market, and, at the very same time, win an adverse effects case for injury caused to *it* in that very same third country market.”⁷⁰² It is not clear why this is “fundamentally contradictory,” nor is it clear why a Member’s domestic countervailing duty law is at all relevant here.

431. Even putting these concerns aside, the EU provides no valid reason for considering only the litigants’ perspectives when assessing volume effects in the subsidizing Member market, but considering only the third country’s perspective (or any other Member’s perspective) when assessing volume effects in third country markets. The EU fails to explain why other Members are only “implicated” with respect to third country markets. The EU ignores that other Members will often have an interest in exporting to the subsidizing Member market, either because they currently do or because they would like to at some point in the future. And viewed from another Member’s perspective, subsidization from the complaining Member and the responding Member will push in the same direction in terms of volume effects in the subsidizing Member market, just as they would in a third country market. Thus, the more one considers the EU same direction / different direction theory the more the internal contradictions multiply.

432. By treating Articles 6.4 and 6.5 as subsets of Articles 6.3(b) and 6.3(c), the original Panel’s interpretation avoids the problems outlined above and is a “harmonious” interpretation. The interpretation offered by the EU is, in contrast, tortuous.

433. Furthermore, the EU’s proposed interpretation provides no mechanism for dealing with the significance of subsidies to the products of responding and complaining Members. Therefore, even if the complaining Member demonstrated that massive subsidies from the responding Member caused enormous displacement or impedance in third country markets, under the EU’s non-subsidized like product “rule,” the complaining Member could not establish a claim under Article 6.3(b) if its like product benefitted from a subsidy of just a single Swiss franc.⁷⁰³

434. In addition, the EU’s non-subsidized like product “rule” would incentivize behavior antithetical to the object and purpose of the SCM Agreement. Suppose Member A established a breach due to subsidies from Member B and began retaliating in an amount approved under

⁷⁰⁰ EU FWS, para. 692.

⁷⁰¹ EU FWS, para. 692.

⁷⁰² EU FWS, para. 693.

⁷⁰³ See US Comments to Answers of EC to 2d Panel Questions and on Answers of Third Parties to Panel Questions, 16 Nov. 2007, para. 225.

Article 22.6 of the DSU. While exercising its rights to impose countermeasures, Member A could simultaneously begin providing unlimited subsidies to its like product, and Member B would have no recourse against Member A's massive new subsidies, as any WTO action would be precluded by the EU's approach.

435. Furthermore, the EU's interpretation is subject to the same criticisms that led the original Panel to reject it. As the EU notes, the "original Panel was concerned that a panel might have to examine whether the like product benefitted from 'subsidies' that are 'not specific'."⁷⁰⁴ The EU argues that this is not a concern because Article 1.2 states that a subsidy will be subject to the provisions in Part III of the SCM Agreement, including Article 6.4, only if it is specific.⁷⁰⁵ Therefore, according to the EU, a subsidy that is not specific is not subject to Article 6.4 and does not therefore preclude any claim pursuant to Article 6.3(b).⁷⁰⁶

436. The original Panel already rejected this reasoning, explaining that "there is nothing in the term 'non-subsidized like product' which suggests a limitation."⁷⁰⁷ Thus, the Panel noted, accepting the EU's interpretation "would leave open the possibility that a complaining Member would be precluded from pursuing a claim under Article 6.3(b) (and 6.3(c)), because its like product benefits from subsidies that do not fall within the definition of Article 1 of the SCM Agreement."⁷⁰⁸

437. For these reasons, the original Panel correctly rejected the EU's proposed interpretation. The result should be the same in this compliance proceeding – if the EU's non-subsidized like product argument is addressed at all.⁷⁰⁹

C. Conditions of Competition and Product Markets

438. In its first written submission, the EU largely does not dispute the conditions of LCA industry competition found by the original Panel and cited by the United States.⁷¹⁰ The EU does take issue with subsidized product, like product, and product market definitions adopted by the

⁷⁰⁴ EU FWS, para. 684 (citing *EC – Large Civil Aircraft (Panel)*, para. 7.1770).

⁷⁰⁵ EU FWS, para. 684.

⁷⁰⁶ EU FWS, para. 684.

⁷⁰⁷ *EC – Large Civil Aircraft (Panel)*, para. 7.1770.

⁷⁰⁸ *EC – Large Civil Aircraft (Panel)*, para. 7.1770.

⁷⁰⁹ The United States recalls its argument before the original Panel that "the term 'non-subsidized like product' is to be understood as calling for the comparison of the market share of the product which benefits from the subsidies in question (that is, the product of the subsidizing Member) with the market share of the like product which does not benefit from that/those subsidy(ies)." See *EC – Large Civil Aircraft (Panel)*, para. 7.1763. If the Panel decides to revisit the interpretation of "non-subsidized like product" made by the original Panel and adopted by the DSB, the United States submits that the correct interpretation is either that made by the original Panel, or the position taken by the United States before the original Panel, and not what the EU proposes.

⁷¹⁰ Compare EU FWS, paras. 569-633, with US FWS, paras. 295-301.

Appellate Body and used by the United States.⁷¹¹ For the first time, the EU now asserts the existence of seven, wholly separate product markets, four of which are purportedly monopoly markets with no competition. The EU's new product market strategy is a transparent attempt to minimize the magnitude of its noncompliance by rearranging the analytical framework in a manner that prevents consideration of real competition between Airbus and Boeing.

439. The EU's "seven product market" arguments must fail because:

- The EU has already conceded that LCA competition can be analyzed according to the three product markets identified by the Appellate Body, and the EU has lost arguments concerning the existence of competition between particular LCA models, such as the Airbus A380 and Boeing 747;⁷¹²
- The EU misapplies the relevant legal standard, mistaking the competitive harm inflicted when one LCA model dominates another as the absence of competition, rather than an indication of adverse effects;⁷¹³
- Both Airbus and Boeing frequently view industry competition on an "all LCA" basis and according to the three product markets identified by the Appellate Body, but do not use the seven product markets conceived by the EU;⁷¹⁴ and
- Overwhelming evidence, particularly Airbus's own statements and materials, shows that significant competitive constraints exist among:
 - all single-aisle LCA, where Airbus treats the re-engined A320neo as part of a single "A320 family" and uses it to take sales from both the Boeing 737NG and the re-engined 737 MAX;⁷¹⁵
 - all twin-aisle LCA, where Airbus targets the A350 XWB against the Boeing 787 and 777, and compares the A330 against the 767, 787, and 777;⁷¹⁶
 - all very large LCA, where Airbus's A380 has been found by the original Panel and the Appellate Body to have taken sales from the Boeing 747, and continues to do so.

The United States discusses these points below.

1. The EU's product market arguments seeks to re-litigate settled issues and are based on fundamentally flawed premises.

440. Before the Appellate Body in the underlying dispute, the EU favored the use of five product markets, but it accepted that competition, including the existence of displacement, could be analyzed by reference to three LCA product markets: single-aisle, twin-aisle, and very large

⁷¹¹ Compare EU FWS, paras. 569-633, with US FWS, paras. 290-294, 302-316.

⁷¹² See Section VI.C.1 of this submission.

⁷¹³ See Section VI.C.2 of this submission.

⁷¹⁴ See Section VI.C.3 of this submission.

⁷¹⁵ See Section VI.C.4 of this submission.

⁷¹⁶ See Section VI.C.5 of this submission.

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aircraft (“VLA”).⁷¹⁷ The Appellate Body agreed with one of the EU’s proposed approaches (the EU had also proposed 5 product markets) – three product markets – so the EU cannot now complain. Changes identified by the EU that have occurred since the underlying dispute do not in any way alter the composition of the single-aisle, twin-aisle, or VLA product markets and the EU should be precluded from re-litigating issues it lost (such as, that the A380 and 747 do not compete) and from raising issues it could have raised (such as, that the A330, 767, and 777 face no significant competition from other LCA).

441. The three-segment approach adopted by the Appellate Body and followed by the United States in this proceeding, involves three product markets:⁷¹⁸

No.	Market of Competition	“Subsidized Product”	Like Product
1	Single-aisle market	A318, A319, A319neo, A320, A320neo, A321, A321neo	737-600, 737-700, 737 MAX 7, 737-800, 737 MAX 8, 737-900ER, 737 MAX 9
2	Twin-aisle market	A330-200, A330-300, A340-300, ⁷¹⁹ A340-500, A340-600, A350 XWB-800, A350 XWB-900, A350 XWB-1000	767-300ER, 787-8, 787-9, 777-200ER, 777-200LR, 777-300ER
3	Very Large Aircraft market	A380	747-8

⁷¹⁷ US FWS, paras. 292-294, citing *EC – Large Civil Aircraft (AB)*, para. 1176 (“The European Union notes that the displacement could be assessed on the basis of either three or five product markets.”); *EC – Large Civil Aircraft*, EU Appellant Submission, Annex II, para. 3 (“The European Union further recalls that it refers to the various LCA groups (or families) of models by a shorthand description: “single-aisle” LCA (with 100-200 seats), “200-300 seat” and “300-400 seat” LCA (together referred to as “twin-aisle” LCA), “400-500 seat” LCA and “500+ seat” LCA (together referred to as Very Large Aircraft).”); *EC – Large Civil Aircraft*, EU Appellant Submission, para. 375 (“Accordingly, for purposes of this appeal and as detailed in the following section, the European Union considers market share developments on the basis of two sets of wide-body aircraft markets, one involving four wide-body LCA markets and one involving two wide-body LCA markets.”).

⁷¹⁸ This dispute also involves freighter LCA. See *EC – Large Civil Aircraft (Panel)*, para. 2.1 (“The parties agree that the product at issue in this dispute is large civil aircraft, as distinguished from smaller (regional) aircraft and military aircraft. Large civil aircraft (“LCA”) can generally be 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 100 or more passengers and/or a proportionate amount of cargo across a range of distances serviced by airlines and air freight carriers.”). Airbus currently offers the A330-200F, which competes against Boeing’s 767-300F, and to a lesser extent, the 777F. Boeing also offers the 747-8F, which has experienced better sales than its passenger counterpart, the 747-8I, since the latter must compete against the A380 while the development of an A380 freighter variant has been deferred indefinitely. See Declaration of Michael Bair: Products and Competition in the LCA Industry (Aug. 16, 2012), paras. 13, 48 (Exhibit USA-339) (BCI).

⁷¹⁹ The A340 was in production for most of the period since the original reference period until Airbus ceased production in November 2011.

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442. Based on its most recent arguments, the EU now views the LCA industry as follows (with purported monopoly segments shaded):

No.	Alleged Market of Competition	“Subsidized Product”	Like Product
1	Single-aisle market I	A318, A319, A320, A321	737-600, 737-700, 737-800
2	Single-aisle market II	A319neo, A320neo, A321neo	737MAX7, 737MAX8, 737MAX9
N/A	767 non-market	*none*	Boeing 767
3	A330 <u>monopoly</u> market	A330-200, A330-300	*none*
4	A350/787 market	A350 XWB-800, A350 XWB-900, A350 XWB-1000	787-8, 787-9
5	777 <u>monopoly</u> market	*none*	777-200ER, 777-200LR, 777-300ER
6	747 <u>monopoly</u> market	*none*	747-8
7	A380 <u>monopoly</u> market	A380	*none*

443. The EU does not produce any evidence demonstrating that Airbus, Boeing, or their customers, normally view LCA competition in this manner. At the same time, however, there is overwhelming evidence that the manufacturers typically view competition at broader levels, most notably according to an “all LCA” and the three-segment approach adopted by the Appellate Body and followed by the United States. Nevertheless, the EU now insists that its new, seven-fold approach is the only permissible approach. However, to accept the EU’s new approach, the Panel would have to accept all of its implications, including that:

- in most product markets (*i.e.*, four of seven), there is no competition between Airbus and Boeing, with one manufacturer selling its LCA free from competitive constraints and reaping monopoly profits;
- when one Airbus model marginalizes, or threatens to marginalize, a Boeing model that performs similar missions, that is evidence that the two models exist in separate markets, rather than evidence of serious prejudice;
- when a major all-Boeing customer like American Airlines chooses the A320neo over the Boeing 737-800, and Boeing then responds with the 737-MAX, that is evidence that the A320neo does not compete against the 737-800;

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- Boeing’s 767 has earned 168 customer and freighter orders since 2006, yet it does not exist in *any* product market;
- Airbus’s A330 freighter and Boeing’s 767 freighter fulfill similar customer requirements for mid-sized, twin-aisle freighters, yet the two do not exercise competitive constraints on each other;
- Airbus is upgrading the A330 to enhance its competitiveness against the 787, despite the fact that the A330 and 787 do not compete against each other;
- previously, when the A350 XWB was farther from its entry into service, it competed against Boeing’s 767, 787, and 777, but the A350 XWB now competes only against the 787;
- when Airbus’s John Leahy speaks of the A350 XWB rendering the 777 “obsolete” he is speaking of two aircraft that do not compete against each other;
- the 747 and A380 do not compete against each other, despite the original Panel’s findings that the 747 lost sales to the A380 at Emirates, Qantas, and Singapore Airlines, and despite the 747’s loss to the A380 at British Airways and at other accounts since the period examined by the original Panel;

As these propositions are contrary to the evidence, the EU’s approach cannot be valid.

2. The EU misapplies the legal standard for defining product markets.

444. The EU misconstrues the product market criteria identified by the Appellate Body. The Appellate Body has clarified that a “market” for purposes of Articles 6.3(a) and (b) should be understood as “a set of products in a particular geographical area that are in actual or potential competition with each other,” and requires “{a}n assessment of the competitive relationship between products in the market” to “determine whether and to what extent one product may displace another.”⁷²⁰ The Appellate Body identified a number of factors to consider in determining whether products are in the same market, including the standard “like product” factors such as physical characteristics, end-uses, and consumer preferences, as well as demand-side and supply-side substitutability.⁷²¹ On the issue of substitutability, the Appellate Body stated:

Demand-side substitutability – that is, when two products are considered substitutable by consumers – is an indispensable, but not the only relevant, criterion to consider when assessing whether two products are in a single market. Rather, a consideration of substitutability on the supply-side may also be required. For example, evidence on whether a supplier can switch its production at limited or prohibitive cost from one product to another in a short period of time may also inform the question of whether two products are in a single market.⁷²²

⁷²⁰ *EC – Large Civil Aircraft (AB)*, para. 1119.

⁷²¹ *EC – Large Civil Aircraft (AB)*, paras. 1120-1121.

⁷²² *EC – Large Civil Aircraft (AB)*, para. 1121.

445. In identifying the product market factors, the Appellate Body observed that “it may also be relevant to consider whether customers demand a range of products or whether they are interested in only a particular product type. In the former case, when customers procure a range of products to satisfy their needs, this may give an indication that all such products could be competing in the same market.”⁷²³

446. The EU rightly identifies “competitive constraints” as central to the Appellate Body’s approach to defining product markets,⁷²⁴ but it fails to mention the ample evidence of the competitive constraints that contradict its seven-market view of the LCA industry. Here, the United States recalls relevant, unappealed findings by the original Panel on the conditions of competition in the LCA industry:

Customers choose among the various LCA models available those they deem most suitable for their needs at the time of ordering. In making their purchase decisions, customers will consider such matters as the route structure to be served by the aircraft, the structure of the existing fleet, and operating costs, with a view to minimizing costs and maximizing revenues. Some airlines purchase a mix of LCA models to serve a variety of needs, while others may limit themselves to one LCA model because of the efficiencies generated by the operation of a single aircraft type.⁷²⁵

When choosing aircraft, airlines evaluate the economics of the competing aircraft from both Airbus and Boeing, and the impact those factors will have on the revenues that the aircraft can be expected to generate over its economic life of approximately 30 years. In doing so, customers quantify and weigh numerous factors, including price, net of concessions such as cash discounts, scheduled pre-delivery payments, provisions for price escalation, and guarantees related to performance, maintenance, or residual value; financing, including consideration of elements such as direct financing support by the manufacturer; date of delivery; engine manufacturers; the make-up of existing LCA in the purchaser's fleet and cost of change and cost of diversifying, and direct operating costs, such as fuel efficiency.⁷²⁶

447. Thus, demand-side substitutability and the competitive constraints that exist between various LCA derive in large part from (a) the wide variety of customer preferences based on

⁷²³ *EC – Large Civil Aircraft (AB)*, para. 1120 (emphasis added).

⁷²⁴ EU FWS, para. 580.

⁷²⁵ *EC – Large Civil Aircraft (Panel)*, para. 7.1720; see also *EC – Large Civil Aircraft (AB)*, para. 1142 (discussing the findings set forth in *EC – Large Civil Aircraft (Panel)*, para. 7.1720) (“Thus, while certain customers may purchase only certain LCA models – such as single-aisle LCA – to meet their needs, others base their purchase decisions on the manufacturer's ability to offer a full range of LCA comprising various models to serve a variety of needs.”).

⁷²⁶ *EC – Large Civil Aircraft (Panel)*, para. 7.1725.

different circumstances (e.g., business model, route network, existing fleet, etc.), and (b) the tendency of customers to monetize differences in attributes between various LCA. These findings are echoed in the attached declaration of Michael Bair, Senior Vice President of Marketing for Boeing Commercial Airplanes (“BCA”)⁷²⁷ As Mr. Bair observes, often there will be no single LCA model that perfectly fits a customer’s requirements.⁷²⁸ Rather than build one LCA model to meet the particular requirements of one customer for a particular route or group of routes, Airbus and Boeing offer full product lines to meet aggregate LCA demand.⁷²⁹ A manufacturer’s ability to raise prices for a given LCA may be, and often is, constrained by the existence of other LCA that can perform the same types of missions.⁷³⁰ The features and prices of those other aircraft can offset the advantages of the “best fit” LCA.⁷³¹

448. An analysis of competitive constraints must also consider the likely effects that the absence of one LCA model would have on prices and sales of other models.⁷³² This is particularly relevant here, where the effect of LA/MSF has been to cause new models to enter the market. If an older Boeing model were placed in a market separate from the newer Airbus model that marginalized it, the effects of LA/MSF would be masked despite the fact that the subsidies had the desired effect on competition.

449. Whereas these competitive constraints are reflected in the three product markets referenced by the United States, they are ignored by the EU’s arguments for seven product markets. The United States addresses this and other EU errors below, in the context of the LCA industry overall as well as the three product markets it has identified.

3. Airbus and Boeing frequently assess competition on an “all LCA” basis or a three-segment basis, but not according to the EU’s seven-market approach.

450. The Panel need not, and should not, accept the EU’s distorted view of competition, which asserts that most LCA markets are monopolies featuring no competition between Airbus and Boeing. The three product markets used by the Appellate Body are grounded in commercial reality, while the EU’s seven-market approach is not.

The EU ignores the patterns of competition in the LCA industry, whereby Airbus and Boeing compete to satisfy highly variable market demand with full product lines and frequently assess the state of competition on that basis. As Boeing’s Michael Bair explains:

⁷²⁷ Declaration of Michael Bair: Products and Competition in the LCA Industry (August 16, 2012) (Exhibit USA-339) (BCI) (“Bair Declaration”).

⁷²⁸ Bair Declaration at para. 16 (Exhibit USA-339) (BCI).

⁷²⁹ Bair Declaration at para. 16 (Exhibit USA-339) (BCI).

⁷³⁰ Bair Declaration at para. 17 (Exhibit USA-339) (BCI).

⁷³¹ Bair Declaration at para. 17 (Exhibit USA-339) (BCI).

⁷³² Bair Declaration at para. 18 (Exhibit USA-339) (BCI).

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Given the importance of the overall product lines to both the customers and the producers, both Boeing and Airbus frequently use a single-market, or “all LCA,” view to help analyze competition in the industry (*e.g.*, by comparing orders, deliveries, and market share), and to plan future product development.⁷³³

451. Mr. Bair’s observation is illustrated in Airbus’s January 2012 commercial review presentation, which assessed Airbus’s competitive position vis-à-vis Boeing using several measurements based on a single, “all LCA” market.⁷³⁴

452. Dividing the broader LCA market into segments, or sub-markets, can be, as Mr. Bair explains, “a tricky exercise because customer demand for, and use of, LCA is highly variable,”⁷³⁵ reflected in “the use of different-sized LCA on the same routes, and the use of the same LCA in very different configurations.”⁷³⁶ Nevertheless, Airbus and Boeing do indeed subdivide the overall LCA market into segments, or markets. In doing so, they commonly use the three-market segmentation found by the Appellate Body: single-aisle LCA, twin-aisle LCA, and very large LCA (or VLA). For instance, Airbus in a January 2012 presentation referred to its latest Global Market Forecast, which projected future demand according to three categories: single-aisle; twin-aisle; and VLA:⁷³⁷

⁷³³ Bair Declaration at para. 13 (Exhibit USA-339) (BCI).

⁷³⁴ EADS Airbus, *New Year Press Conference 2012 – Commercial review*, slide 7 (Jan. 17, 2012) (Exhibit USA-12); EADS Airbus, *New Year Press Conference 2012 – Commercial review*, slide 8 (Jan. 17, 2012) (Exhibit USA-436); EADS Airbus, *New Year Press Conference 2012 – Commercial review*, slide 18 (Jan. 17, 2012) (Exhibit USA-12).

⁷³⁵ Bair Declaration at para. 16 (Exhibit USA-339) (BCI).

⁷³⁶ Bair Declaration at para. 16 (Exhibit USA-339) (BCI). Among the examples of varied LCA uses cited by Mr. Bair are the following:

1. “On the Beijing-Tokyo route, airlines use the following models: A310 (Pakistan International Airlines), A319 (Air China), A320 (All Nippon, Air China), A321 (Air China), 737-800 (Air China, JAL), 747SP (Iran Air), 767 (All Nippon, Delta, JAL), 777 (All Nippon, Air China, JAL), 787 (JAL, All Nippon).”

2. “Emirates Airlines uses the 777-300ER in five different configurations, from 354 to 442 passengers. It uses the A380 in two configurations, 489 and 517 passengers. It uses both the 777-300ER and A380 on routes between Dubai and Beijing, Hong Kong, London, New York, Paris, and Rome. On its Dubai-Frankfurt route, Emirates Airlines operates the A330-200, A340-500, 777-200ER, and 777-300ER.”

⁷³⁷ EADS presentation, *New Year Press Conference 2012 – John Leahy, Chief Operating Officer – Customers - Commercial Review* (Jan. 16, 2012) at slide 27 (Exhibit USA-335).

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Airbus GMF demand forecast

20-year new deliveries of passenger and freight aircraft



19,170 single-aisle aircraft



6,910 twin-aisle aircraft



1,780 very large aircraft

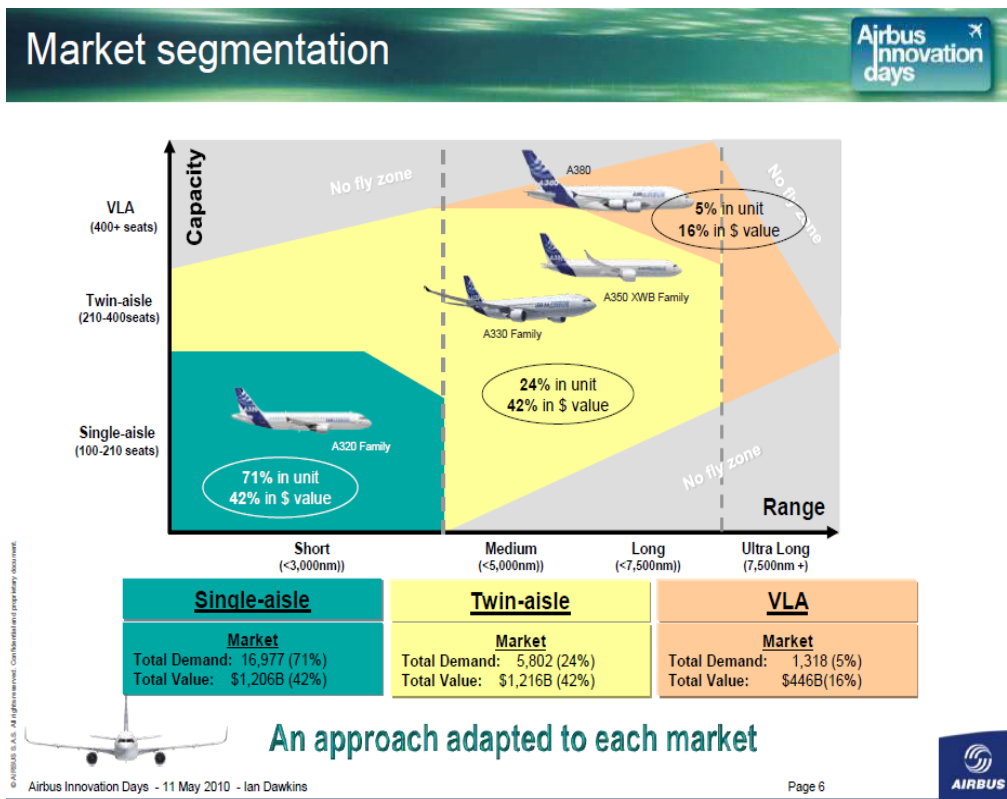
~27,900 new aircraft

Market value of \$3.5 trillion



453. This three-segment view of the LCA market is not an anomaly and is wholly consistent with Airbus’s view of “market segmentation,” whereby it claims to have an “approach adapted to each market”:⁷³⁸

⁷³⁸ Airbus presentation, Airbus Innovation Days – Presentation by Ian Dawkins (May 11, 2010) (Exhibit USA-336).

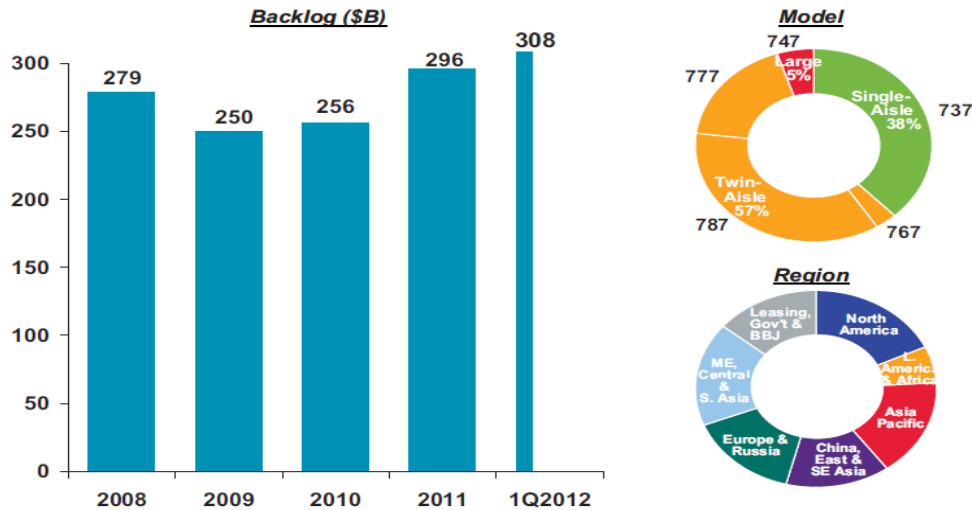


In the slide above, Airbus identifies *one* single-aisle market including the A320, *one* twin-aisle market including both the A330 and A350 XWB, and *one* VLA market including the A380. 454. Boeing does the same. As Mr. Bair explains, “Boeing uses this three-segment approach in preparing its annual Current Market Outlook, which projects LCA demand twenty years into the future.”⁷³⁹ This is illustrated in a presentation from July 2012:⁷⁴⁰

⁷³⁹ Bair Declaration at para. 13 (Exhibit USA-339) (BCI).

⁷⁴⁰ Boeing presentation, Current Market Outlook by Randy Tinseth (July 2012) (Exhibit USA-337).

Substantial, balanced backlog validates Boeing's product strategy



455. Mr. Bair also observes that “Boeing does not use a seven-segment – or seven-‘market’ – view of LCA products in the normal course of business, and based on my familiarity with Airbus’ marketing materials and annual Global Market Forecasts, Airbus does not appear to do so either.”⁷⁴¹

456. It is not just marketing materials and related evidence that contradict the EU’s seven product markets segmentation. Product development strategies at both companies also belie the EU’s theories about competition.⁷⁴² The core U.S. complaint underlying the original dispute, accepted by the original Panel and affirmed by the Appellate Body, and continuing into this compliance dispute is that LA/MSF has enabled Airbus to bring to market a full family of LCA at a pace and in a manner that would have been impossible otherwise. Because of LA/MSF, Airbus can continue to update and expand its LCA product line to Boeing’s detriment, forcing Boeing to respond as best it can to mitigate losses. For example, Boeing’s 787 was developed in large part because its 767 had been marginalized by Airbus’s A330.⁷⁴³ Similarly, Boeing invested several billion dollars to update the 747 into the 747-8 because of the A380.⁷⁴⁴ More recently, [***] Airbus introduced a more fuel-efficient A320 in A320neo, forcing Boeing to

⁷⁴¹ Bair Declaration at para. 15 (Exhibit USA-339) (BCI).

⁷⁴² See EU FWS, paras. 603 (“Boeing’s inability to compete with the 737NG against the A320neo. . .”), 616 (“Over time, the availability of the A350XWB and the performance advantages that the A350XWB has over the 777 will mean that, in the future, airlines will not consider the 777.”), 618 (“As for the 767, given its much older technology – which carries a significant performance penalty at today’s fuel prices – airlines do not generally consider it economical to purchase the aircraft. . .”); 632 (“the A380 and the 747-8 do not compete in a single market for ‘very large aircraft.’”).

⁷⁴³ Bair Declaration at para. 38 (Exhibit USA-339) (BCI).

⁷⁴⁴ Bair Declaration at paras. 46-47 (Exhibit USA-339) (BCI).

respond with the 737MAX.⁷⁴⁵ And Boeing is now considering an update to the 777 to stave off competitive pressure from the A350 XWB.⁷⁴⁶ These are not indicia of many separate product markets, as the EU would have it; these are the quintessence of serious prejudice caused by LA/MSF to Airbus. As the original Panel found:

In our view, that Boeing chooses to meet subsidized competition from Airbus to the best of its ability cannot be considered to eliminate the adverse effects caused by the subsidies in dispute. To conclude otherwise would in our view eviscerate the SCM Agreement's remedies for subsidies that cause adverse effects, as it would imply that a Member must not seek to respond to or mitigate adverse effects caused by subsidies for fear of being unable to demonstrate their existence in a dispute. We cannot believe that such an outcome is warranted.⁷⁴⁷

457. With these broader considerations in mind, the United States turns to the errors in the EU's attempt to fragment the three LCA product markets identified by the Appellate Body.

4. Single-aisle product market

458. All Airbus and Boeing single-aisle LCA compete in the same product market. The EU admits that the Airbus and Boeing single-aisle LCA with currently-in service engines (*i.e.*, the A320ceo, or "current engine option," and 737NG series LCA, respectively) compete in the same product market, yet it contends that single-aisle LCA equipped with new engines (*i.e.*, the A320neo and 737MAX, respectively) are in a completely separate market. The EU's view is contradicted by the evidence of the product characteristics of single-aisle LCA, as well as the uses, customer preferences, and substitutability of single-aisle LCA.

459. First, the United States and the European Union agree that single-aisle product distinctions should not be made between different single-aisle variants on the basis of size or typical seating capacity. That is because the manufacturers and customers consider single-aisle of different sizes to constitute an integrated product group, whereby, on the demand side, customers seek flexibility to mix (or substitute) different-sized LCA and, on the supply side, the manufacturers offer a mix of sizes and the ability to "change types" after order, since all single-aisle LCA are produced on the same production lines and production among the different types can be shifted with relative ease. This is reflected in Airbus's promotion of its largest single-aisle model, the A321, which saw production increase after customers converted orders for the smaller A319 and A320.⁷⁴⁸

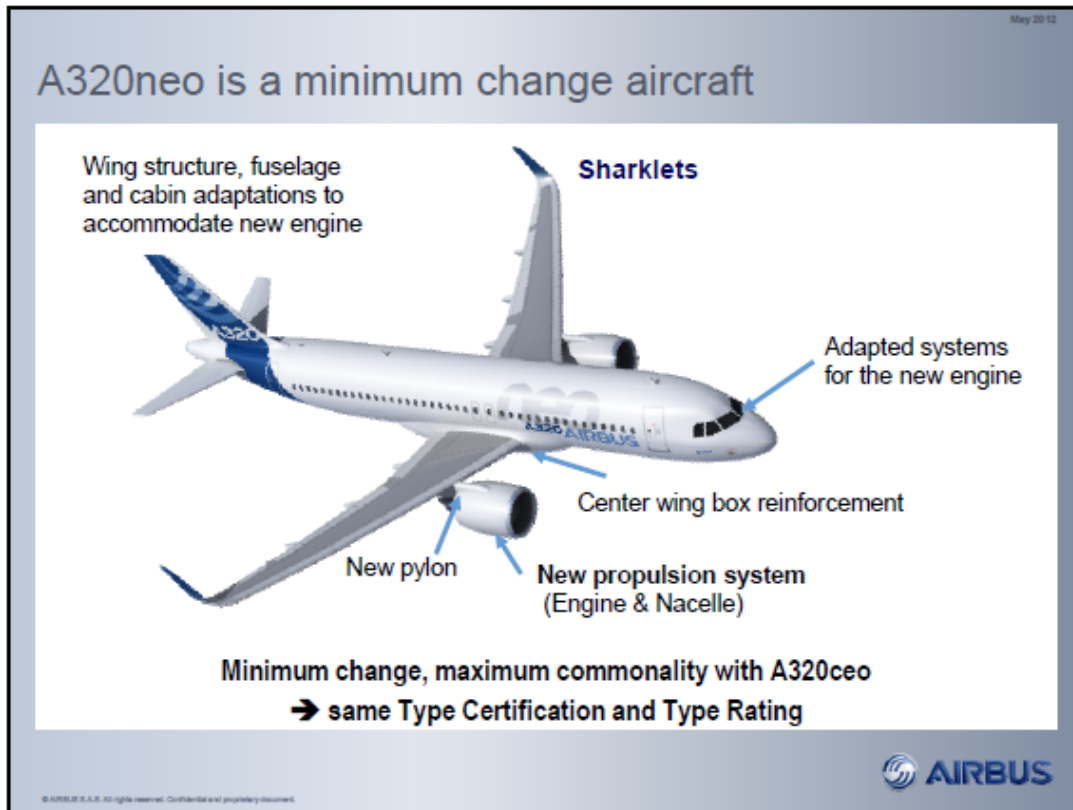
⁷⁴⁵ Bair Declaration at para. 25 (Exhibit USA-339) (BCI).

⁷⁴⁶ Dominic Gates, *Boeing: 777X by end of decade*, Seattle Times (Aug. 24, 2012) (Exhibit USA-453).

⁷⁴⁷ *EC – Large Civil Aircraft (Panel)*, para. 7.1992.

⁷⁴⁸ EADS/Airbus presentation, Global Investor Forum – Commercial Update - John Leahy (Nov. 15-16, 2010) at slide 29 (Exhibit USA-352).

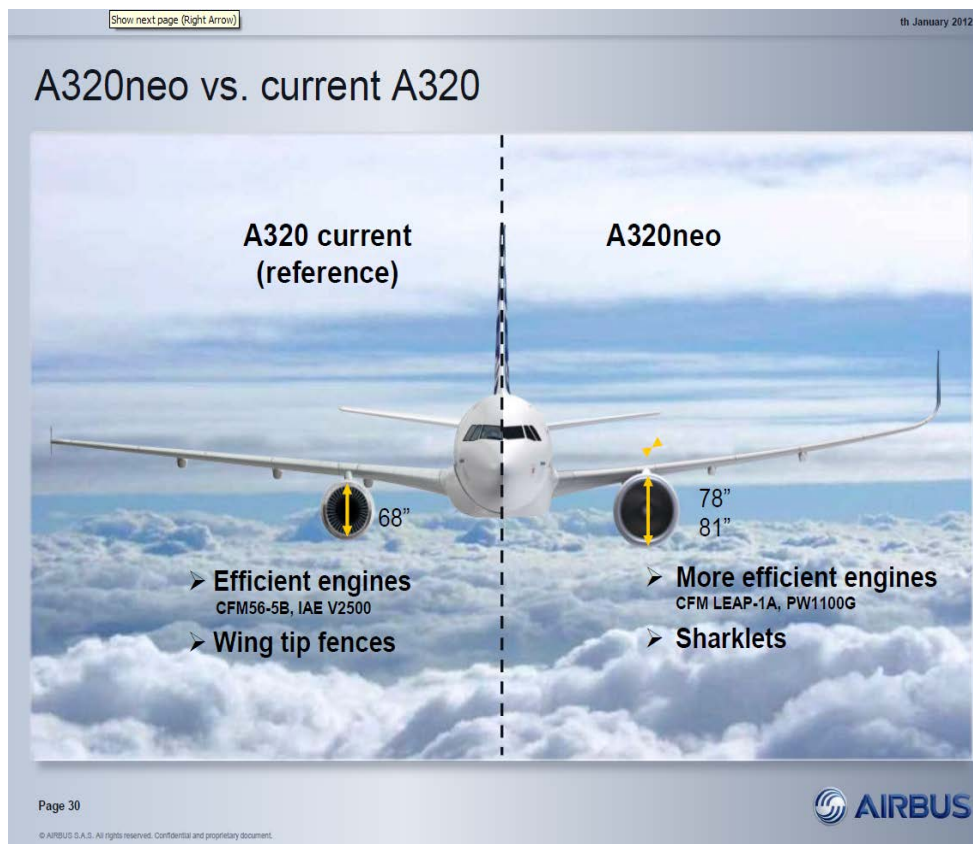
460. The existence of one single-aisle product market has not been altered by the recent marketing of A320s and 737s with new, improved engines. As confirmed by Airbus’s own terminology, “neo” stands for “new engine option.” In selecting an A320neo a customer opts for an A320 with new engines. Indeed, Airbus itself stresses that the A320neo is “a minimum change aircraft” with “maximum commonality with A320ceo” and “same Type Certification and Type Rating”.⁷⁴⁹



461. Airbus also emphasizes the physical similarities between the A320neo and A320ceo:⁷⁵⁰

⁷⁴⁹ Airbus presentation, Programme Update Williams Innovation Days (May 2012) (Exhibit USA-342).

⁷⁵⁰ Airbus presentation slide, A320neo v. current A320 (Jan. 2012) (Exhibit USA-480).



462. The A320neo and A320ceo are so similar because, as described by Airbus personnel, the A320neo has been designed to change “only what is necessary to integrate the new engines,” such that the A320neo has 95 percent spare parts commonality with the A320ceo:

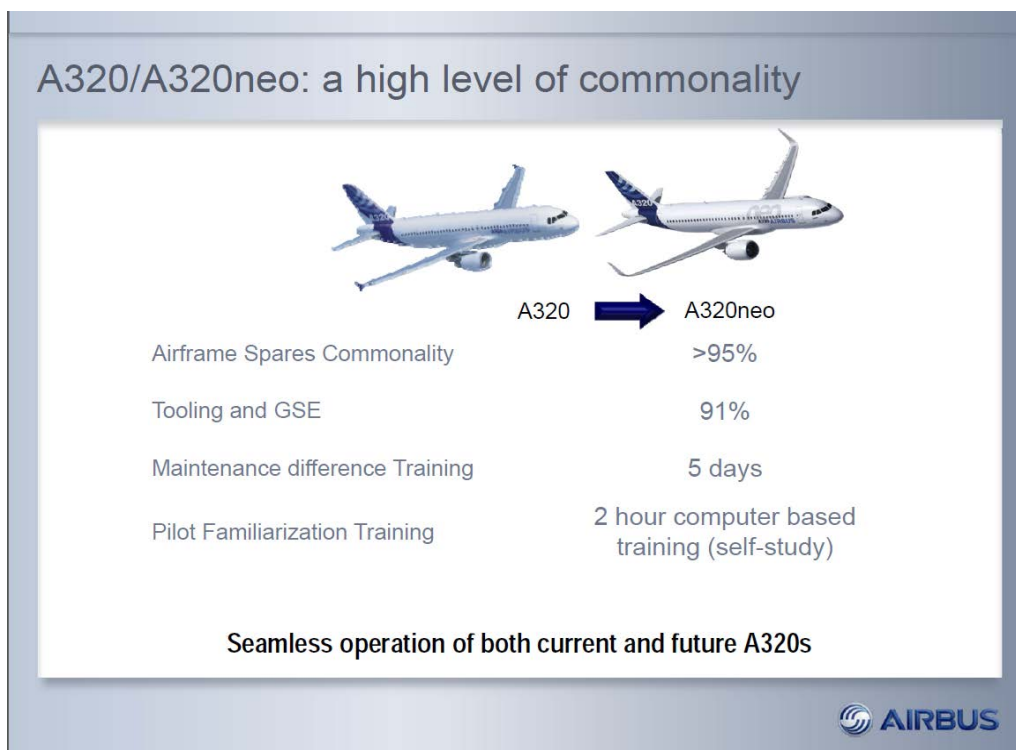
Commonality is one of the key drivers of the A320neo development. The A320neo series, where neo stands for ‘new engine option’, has a target of over 95% spare parts commonality with the existing models, enabling the new aircraft to fit seamlessly into existing A320 Family fleets and customers’ operations.

...

The A320neo series is a programme which uses innovative new engine and aerostuctural technologies to provide a significant improvement in performance for the A319, A320 and A321 aircraft. Whilst striving to deliver this benefit to the operators, Airbus is also keen on minimizing the changes to a proven product. Changing only what is necessary to integrate the new engines, keeping the rest of

the aircraft in harmony with the operators’ existing economic and logistical models, can ensure the future operators a simpler, lower cost service entry.⁷⁵¹

463. Because of its efforts to minimize changes, Airbus can offer customers “a high level of commonality” between the A320neo and A320ceo, including just two hours of self-study for pilot familiarization training:⁷⁵²



464. Accordingly, Airbus treats the A320ceo and A320neo as part of the same “A320 Family”:⁷⁵³

⁷⁵¹ Andrew Mason, Project Manager New Programmes IP Airbus Material, Logistics and Suppliers, and Graham Jackson, A320neo Operability Technical Integrator Airbus Engineering, *Ensuring A320neo series commonality with the existing A320 Family*, Airbus Flight Airworthiness Support Technology No. 49 (Jan. 2012) at 2 (Exhibit USA-344).

⁷⁵² Airbus presentation slide, A320/A320neo: a high level of commonality (Exhibit USA-479).

⁷⁵³ EADS/Airbus presentation, Commercial review - John Leahy (Jan. 2012) at slide 13 (Exhibit USA-343).

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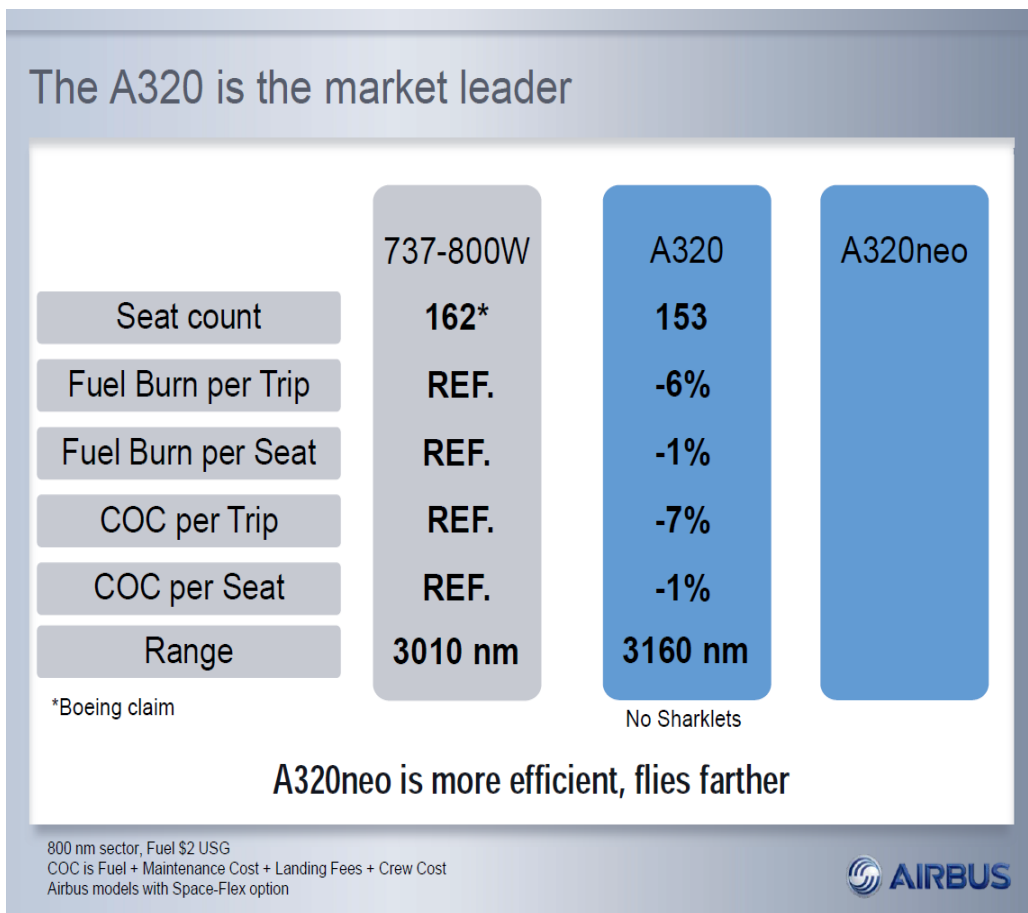
2011 Airbus orders, deliveries and backlog

	Orders	Deliveries	Backlog
A320 Family	1,470	421	3,345
Current Engine Option	244	421	2,089
New Engine Option	1,226		1,256
A330	99	87	351
A350	10		555
A380	29	26	186
Total	1,608	534	4,437



465. Airbus also compares the A320neo and A320ceo together against Boeing's 737-800 in the same "market," rather than treating the two as existing in separate markets:⁷⁵⁴

⁷⁵⁴ Airbus presentation slide, The A320 is the market leader (Exhibit USA-478).



466. Airbus’s launch of the A320neo and Boeing’s launch of the 737 MAX did not create a second, separate single-aisle market.⁷⁵⁵ While the A320neo and the 737 MAX offer somewhat greater range than earlier models, such increased range is not a primary concern for most customers. As Boeing’s expert explains, the customer generally seeks to capture benefits of greater fuel efficiency on routes already flown by in-service A320s and 737s rather than trade that efficiency for greater range.⁷⁵⁶ This is one more indication that significant competitive relationships exist between the A320neo and 737 MAX, on the one hand, and in-service A320s and 737s, on the other. Of central importance to the customer in this context and the key difference between the two is an operating cost difference driven by the improved fuel efficiency of the new engines on the neo and MAX.⁷⁵⁷ At the same time, neither company can increase prices for their respective newer models by the net present value of their enhanced fuel efficiency, as price changes would neutralize any operating cost advantage over earlier models

⁷⁵⁵ Bair Declaration at paras. 26-29 (Exhibit USA-339) (BCI).

⁷⁵⁶ Bair Declaration at para. 26 (Exhibit USA-339) (BCI).

⁷⁵⁷ Bair Declaration at para. 27 (Exhibit USA-339) (BCI).

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thereby leaving customers with little incentive to adopt the newer models.⁷⁵⁸ As Boeing's expert explains, pricing for the A320neo and 737 MAX is generally constrained by the market presence of earlier models, as the value of the latter's fuel burn disadvantages tend to diminish on a dollar-for-dollar basis as neo and MAX prices increase.⁷⁵⁹ It is therefore unsurprising that the Airbus "has sought to increase the A320neo price by approximately \$7-8 million over the baseline A320, which is estimated to be one-half of the net present value of the lifetime fuel burn improvement."⁷⁶⁰

467. Market developments demonstrate this competition. Even if Airbus and Boeing had not launched these new models, customers would still have chosen new single-aisle LCA to replace less efficient, earlier generation single-aisle aircraft such as the MD-80 and 737-300.⁷⁶¹ Yet, because Airbus went ahead with its strategy to provide a new engine option for its A320, some of this demand was satisfied by the A320neo instead of the 737NG. This scenario played out with the 2011 American Airlines campaign where Boeing lost its position as the sole supplier because the A320neo was available.⁷⁶²

468. In sum, there is a clear and significant competitive relationship among all current Boeing and Airbus single-aisle LCA, *i.e.*, the 737NG, 737 MAX, A320ceo, and A320neo. These aircraft are highly substitutable and the absence from the market of one model would lead to sales of other models to fill any supply gap.⁷⁶³ All current Boeing and Airbus single-aisle LCA compete in the same market, and the EU is incorrect in asserting that the Boeing's 737NG LCA could not have lost sales to, or be threatened with displacement or impedance by, the A320neo.

469. The single-aisle product market does not include significant competition from new entrants, and the EU agrees.⁷⁶⁴ Recently, Bombardier, COMAC, Mitsubishi Aircraft Corporation, Sukhoi, and United Aircraft Corporation have begun marketing new passenger aircraft with capacity around or above the 100-seat threshold typically used to delineate LCA from regional passenger jets.⁷⁶⁵ While the majority of Boeing and Airbus single-aisle sales comprise models with seating capacity typically around 150 seats or higher, most of the new entrant's aircraft offerings are positioned at the low end of the single-aisle market segment, roughly around 100 to 130 seats.⁷⁶⁶ Moreover, these offerings do not yet have broad market

⁷⁵⁸ Bair Declaration at para. 27 (Exhibit USA-339) (BCI).

⁷⁵⁹ Bair Declaration at para. 27 (Exhibit USA-339) (BCI).

⁷⁶⁰ John Ostrower, EADS CFO confirms A320neo pricing premium, Flightglobal (Aug. 11, 2011) (Exhibit USA-346).

⁷⁶¹ Bair Declaration at para. 28 (Exhibit USA-339) (BCI).

⁷⁶² Bair Declaration at para. 28 (Exhibit USA-339) (BCI).

⁷⁶³ Bair Declaration at para. 29 (Exhibit USA-339) (BCI).

⁷⁶⁴ EU FWS, para. 599 note 753.

⁷⁶⁵ Bair Declaration at para. 30 (Exhibit USA-339) (BCI).

⁷⁶⁶ Bair Declaration at para. 30 (Exhibit USA-339) (BCI).

acceptance because of the customer perception of significant and often prohibitive risks in ordering aircraft from new entrants.⁷⁶⁷

5. Twin-aisle product market

470. The United States uses in its analysis the twin-aisle product market as defined by the Appellate Body. The EU argues that this compliance Panel should ignore the Appellate Body's findings in this regard because, according to the EU, only the A350 XWB and 787 compete in the same market, leaving the A330, 767, and 777 in their own monopoly markets.⁷⁶⁸ The EU's position stands in stark contrast not only to the Appellate Body's findings, but to the position the EU itself endorsed before the Appellate Body – namely that competition could properly be assessed by reference to one twin aisle market.⁷⁶⁹ The EU has identified no developments to justify departure from the product market framework upon which the findings adopted by the DSB are based.

471. The EU's position is also contradicted by the evidence concerning the twin-aisle market. All Boeing and Airbus twin-aisle aircraft share similar characteristics and uses, even though there is a wider variation when compared to the single-aisle market.⁷⁷⁰ While twin-aisle seating capacity varies, ranging from approximately 210 to 370 seats in standard configurations, it is difficult to draw clear dividing lines given the significant degree of overlap in the seating capacities of Boeing and Airbus model families.⁷⁷¹ Illustrative is that the A330-300, A350 XWB-800, 787-9, and 777-200ER all fall within a fairly narrow capacity range between approximately 280 and 300 seats.⁷⁷² While maximum range also varies, the key point is the high degree of overlap in terms of the routes that are served by all twin-aisle LCA.⁷⁷³

472. Airlines determine which twin-aisle aircraft to operate on a given route based in part on how that route fits within its overall network and business model.⁷⁷⁴ For example, because it can fill seats, an airline may nonetheless use a longer-range twin-aisle model for a relatively short flight route. An airline may also want to operate at higher frequencies that better fit its network

⁷⁶⁷ Bair Declaration at para. 30 (Exhibit USA-339) (BCI).

⁷⁶⁸ EU FWS, paras. 607-619.

⁷⁶⁹ Moreover, before the original Panel, EU's expert Rod Muddle adopted a position at odds with the EU's current arguments, opining that (a) Boeing's 787 competes against Airbus's A330-200, A330-300, and A350XWB-800, and (b) Boeing's 777 competes against Airbus's A340 variants and the A350XWB-900 and A350XWB-1000. Rod Muddle, *The Dynamics of the Large Civil Aircraft Industry* (Feb. 1, 2007) (Exhibit USA-347).

⁷⁷⁰ Bair Declaration at para. 34 (Exhibit USA-339) (BCI).

⁷⁷¹ Bair Declaration at para. 34 (Exhibit USA-339) (BCI).

⁷⁷² Bair Declaration at para. 34 (Exhibit USA-339) (BCI).

⁷⁷³ Bair Declaration at para. 34 (Exhibit USA-339) (BCI).

⁷⁷⁴ Bair Declaration at para. 35 (Exhibit USA-339) (BCI).

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and thus choose smaller twin-aisles over larger twin-aisles that could also profitably serve the same routes.⁷⁷⁵

473. Several factors apart from capacity and range influence an airline's selection of a particular twin-aisle aircraft.⁷⁷⁶ For example, operating and maintenance costs and commonality benefits, including those accruing between model families figure prominently.⁷⁷⁷ The high degree of overlap in the use of all twin-aisle aircraft means that the value of various model attributes can be reduced or eliminated by pricing concessions from the competing producer.⁷⁷⁸

474. The entry of new models and derivatives of twin-aisle LCA best illustrates the competitive relationships. In 1987 Boeing's 767 was the market's preferred choice for twin-aisle aircraft smaller than the 747. At that time the 767-300 had recently entered service and the 767-300ER was poised to do so.⁷⁷⁹ That year Airbus launched the joint A330/A340 program. That program aimed to achieve economies by using the same production line, fuselage cross-section, and wing components on the two-engine A330-300 and the four-engine A340-200 and A340-300.⁷⁸⁰ However, the combined approach ultimately compromised the design and performance of each program.⁷⁸¹ In 1995 Airbus introduced the A330-200, a "shrink" of the A330-300.⁷⁸² Over time the A330 depressed 767 sales and pricing, in part by Airbus's use of low pricing to compensate for the A330's operating economics.⁷⁸³

475. Boeing introduced a larger 767, the 767-400ER, which entered into service in 2000. Nevertheless, the 767 could not win back the market share lost to the A330. Airbus continued to market the A330 in part by comparing it to the 767, as well as the 777:⁷⁸⁴

⁷⁷⁵ Bair Declaration at para. 35 (Exhibit USA-339) (BCI).

⁷⁷⁶ Bair Declaration at para. 36 (Exhibit USA-339) (BCI).

⁷⁷⁷ Bair Declaration at para. 36 (Exhibit USA-339) (BCI).

⁷⁷⁸ Bair Declaration at para. 36 (Exhibit USA-339) (BCI).

⁷⁷⁹ Bair Declaration at para. 37 (Exhibit USA-339) (BCI).

⁷⁸⁰ Bair Declaration at para. 37 (Exhibit USA-339) (BCI).

⁷⁸¹ Bair Declaration at para. 37 (Exhibit USA-339) (BCI).

⁷⁸² Bair Declaration at para. 37 (Exhibit USA-339) (BCI).

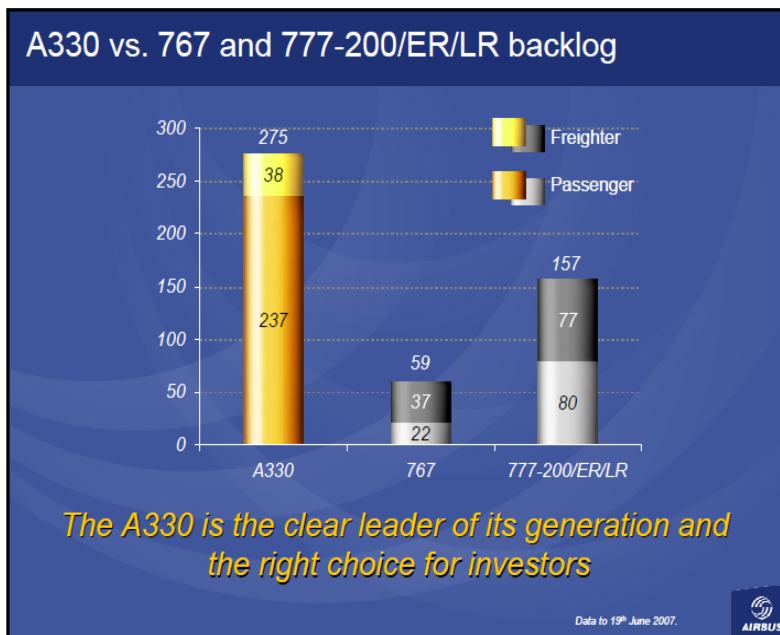
⁷⁸³ Bair Declaration at para. 37 (Exhibit USA-339) (BCI) (see chart depicting).

⁷⁸⁴ EADS presentation, Market Update by COO John Leahy (June 20, 2007) p. 8 (Exhibit USA-348).

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476. The market entry of Boeing’s 787 did not end sales of older twin-aisle aircraft. The 767 recorded 49 767-300ER and 119 767F freighter orders since January 2007. Airbus’s A330, however, sold in much higher volumes, achieving record order levels, including through the 2007 introduction of the A330-200F that limited sales of the 767F freighter.⁷⁸⁵ Sales of the 767 would be much higher if the A330 were not in the market. That 767 sales are not higher is evidence of the A330’s competitive impact, not lack of competition between the two aircraft.⁷⁸⁶

477. Boeing’s 787 and 777 are also targets of the A330. Mr. Bair explains that the 787-8 and A330-200 have similar capacities, as do the 787-9 and A330-300, but the 787 is a more technologically advanced aircraft that offers superior operating economics and maintenance costs.⁷⁸⁷ Yet, these differences do not alter the fact that the A330 and 787 compete. Boeing and Airbus each expect that in coming years the A330 will continue to compete against the 787.⁷⁸⁸ The A330 offers customers a substitute for the 787 and it thus constrains Boeing’s ability to increase 787 prices. Airbus itself touts how the A330 can counteract the 787’s operational and maintenance advantages:⁷⁸⁹

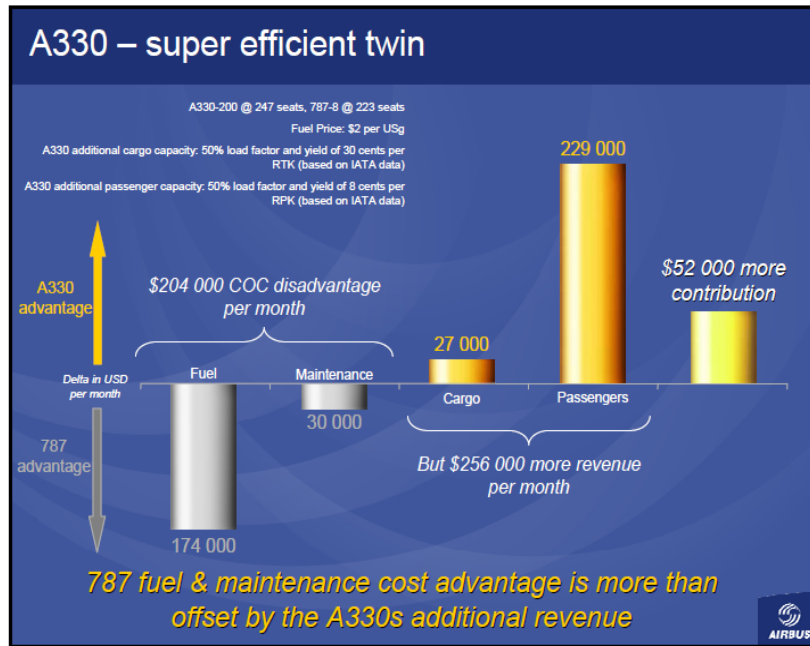
⁷⁸⁵ Bair Declaration at para. 38 (Exhibit USA-339) (BCI).

⁷⁸⁶ Bair Declaration at para. 38 (Exhibit USA-339) (BCI).

⁷⁸⁷ Bair Declaration at para. 39 (Exhibit USA-339) (BCI).

⁷⁸⁸ Bair Declaration at para. 39 (Exhibit USA-339) (BCI).

⁷⁸⁹ EADS presentation, Market Update by COO John Leahy (June 20, 2007) p. 8 (Exhibit USA-348).



478. The 777 is subject to similar constraints as the A330-300 offers customers a viable substitute for the 777-200ER.⁷⁹⁰ In the view of Airbus, the A330 is a replacement for Boeing’s 777-200ER and its own A340, evidenced by John Leahy’s statement: “It is the perfect replacement for the 777-200ER and the A340-300, and there are a lot of 777s and 340s to be replaced.”⁷⁹¹ Singapore Airlines has already leased A330s to replace its Boeing 777-200 and 777-200ERs.⁷⁹² The fluid nature of the competition in the twin-aisle product market may best illustrated by the example of Malaysia Airlines:

Malaysia Airlines (MAS) is the frontrunner in becoming one of the launch customers for the 240-tonne A330 aircraft, which intends to decommission its 777-200ER within 3 years and its 9 remaining 747-400s by November this year, Bloomberg reported. “We’ll be looking at Airbus’ announcement to see if it can do the job of the 777s. We’d love to have new models like the 787 or the A350, and maybe one day we will, but right now we need to simplify the fleet and operate four types of plane instead of maybe six or seven,” Malaysia Airlines chief executive Ahmad Jauhari Yahya said.⁷⁹³

479. Thus, the A330 competes against three Boeing model families, reflecting the broad scope of competition in the twin-aisle market.

⁷⁹⁰ Bair Declaration at para. 39 (Exhibit USA-339) (BCI).

⁷⁹¹ Aspire Aviation, *Airbus is right on A330 improvement strategy* (July 12, 2012) (Exhibit USA-349).

⁷⁹² Aspire Aviation, *Airbus is right on A330 improvement strategy* (July 12, 2012) (Exhibit USA-349).

⁷⁹³ Aspire Aviation, *Airbus is right on A330 improvement strategy* (July 12, 2012) (Exhibit USA-349).

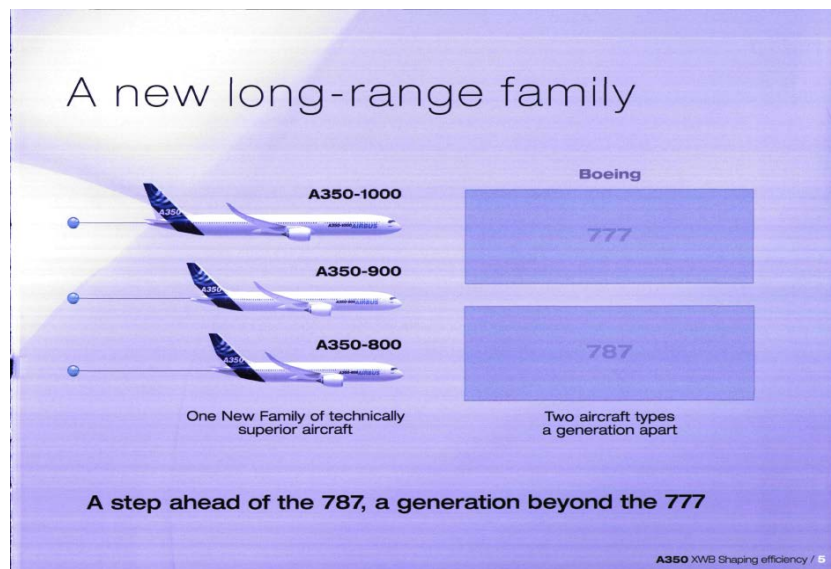
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480. The A340 and Airbus's newest twin-aisle, the A350 XWB also fall within the scope of the twin aisle market. Competition between the A340 and 777 dates to the early 1990s.⁷⁹⁴ The four-engine A340 was disadvantaged because the two-engine 777, particularly the 777-200ER, could perform many of the same missions at lower cost.⁷⁹⁵ The A340 also suffered from the compromised design that it shared with the A330.⁷⁹⁶ In 1997 Airbus launched the A340-500 and A340-600 enhanced derivatives in an attempt to remedy these deficiencies. Boeing responded in 2000 with the launch of the enhanced 777-200LR and 777-300ER.⁷⁹⁷ During the early 2000s, the A340-500/600s sold as well or better than the new 777s. Increasing fuel prices starting in 2004, however, widened the A340's fuel burn disadvantage and as a result pricing and sales of 777's rose.⁷⁹⁸

481. In 2006 Airbus redesigned the A350, now known as the A350 XWB, to better compete against both the 787 and the 777. The focus on the A350 XWB marked Airbus's response to the problems with the A340 program and to the market success of Boeing's 787. Airbus has been quite explicit in targeting both the 787 and 777 with its A350 XWB:⁷⁹⁹



⁷⁹⁴ Bair Declaration at para. 40 (Exhibit USA-339) (BCI).

⁷⁹⁵ Bair Declaration at para. 40 (Exhibit USA-339) (BCI).

⁷⁹⁶ Bair Declaration at para. 40 (Exhibit USA-339) (BCI).

⁷⁹⁷ Bair Declaration at para. 40 (Exhibit USA-339) (BCI).

⁷⁹⁸ Bair Declaration at para. 40 (Exhibit USA-339) (BCI).


⁷⁹⁹ Airbus presentation, A350XWB Shaping efficiency (July 2008) (Exhibit USA-451), and EADS presentation, A350XWB launch briefing (Dec. 4, 2006) at slide 22 (Exhibit USA-350).

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A350 XWB – Xtra efficiency



	A350-900	787-9	777-200ER
Seats (3-class)*	314	280	301
Design range	8,400nm	8,500nm	7,700nm
MWE per seat	Datum	+2%	+16%
Block fuel per seat	Datum	+4%	+30%
Cash Operating Cost per seat	Datum	+7%	+25%
Noise Classification at London			
Departure	QC1	QC1	QC2
Arrival	QC0.5	QC0.5	QC1

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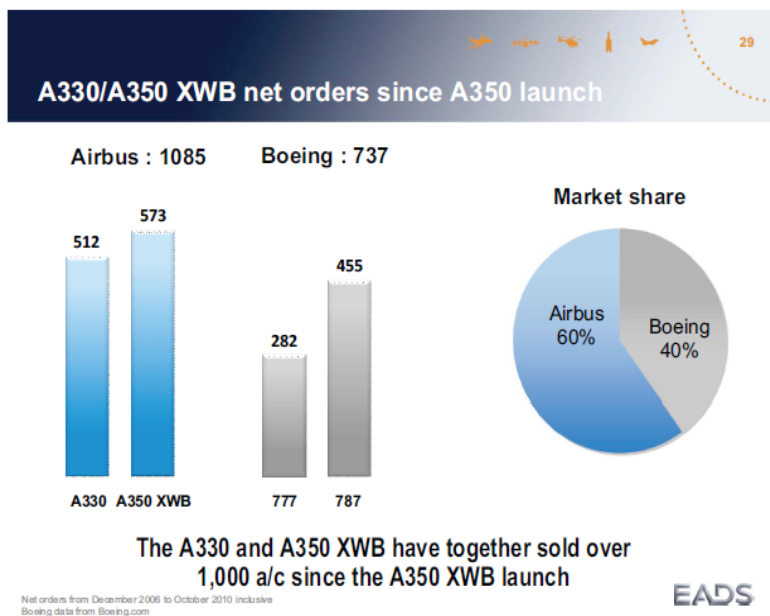
*G-abreast economy class



482. Airbus also touts the A350 XWB and A330 as a “winning combination”⁸⁰⁰ and combines sales of these two models in a “market share” comparison with Boeing’s 787 and 777:⁸⁰¹

⁸⁰⁰ EADS/Airbus presentation, Global Investor Forum – Commercial Update - John Leahy (Nov. 15-16, 2010) at slide 41 (Exhibit USA-351).

⁸⁰¹ EADS presentation, Mark Pearman Wright – Airbus Market Update (Nov. 2010) (Exhibit USA-477).



483. The A350 XWB has a primarily composite fuselage, as does the 787, which offers advantages over older aluminum fuselages, and like the 777, the A350 XWB has two engines and not four which is an improvement over the A340.⁸⁰² The A350 XWB-800 is the smallest version and has similar capacity and range compared to the 787-9.⁸⁰³ Airbus offers the larger A350 XWB-900 as a substitute for the 777-200ER and 777-300ER.⁸⁰⁴ The largest version, the A350 XWB-1000, is offered as a substitute for Boeing’s largest, best-selling 777, the 777-300ER.⁸⁰⁵ As Boeing’s expert, Mr. Bair explains “there is a significant degree of substitutability between the A350 XWB and the 787 and 777, now and for the foreseeable future. Customers often consider A350 XWB models against a Boeing offering of 787s and 777s. Consequently, the market presence of the A350 XWB constrains Boeing’s ability to increase sales and prices for the 787 and 777.”⁸⁰⁶

484. The significant competitive relationship between Boeing and Airbus twin-aisle LCA is evident. Further segmenting the twin-aisle market as the EU would do would not reflect the reality of the competition. All current Boeing and Airbus twin-aisle LCA compete in the same

⁸⁰² Bair Declaration at para. 41 (Exhibit USA-339) (BCI).

⁸⁰³ Bair Declaration at para. 41 (Exhibit USA-339) (BCI).

⁸⁰⁴ Bair Declaration at para. 41 (Exhibit USA-339) (BCI).

⁸⁰⁵ Bair Declaration at para. 41 (Exhibit USA-339) (BCI).

⁸⁰⁶ Bair Declaration at para. 41 (Exhibit USA-339) (BCI).

market, and the EU's attempts to depart from the Appellate Body's findings in this regard are contradicted by the evidence.

6. *Very Large Aircraft product market*

485. The EU continues to dispute the existence of competition between the A380 and 747, despite the clear findings of the original Panel rejecting the EU position:

While it is clear that the A380 offered unique characteristics to these airlines, we do not agree that it did not compete with the 747. Information in the A380 business case contradicts the European Communities' position in this regard.⁸⁰⁷

486. The Appellate Body made findings on this basis that have been adopted by the DSB. There is no basis for the EU to reargue this issue.

487. Both the 747-8I and the A380 were developed for airlines that need aircraft larger than the 747-400 for use on high capacity or slot constrained⁸⁰⁸ routes. Both aircraft are equipped with four engines, typically seat more than 400 passengers, and have seating on two decks. Airbus and Boeing each regularly attempts to develop customer interest in its very large aircraft by comparing its attributes to those of the other producer's VLA model.⁸⁰⁹

488. The A380's capacity is 15 to 20 percent greater than that of the 747-8I. However, the 747-8I enjoys lower fuel burn and better revenue cargo capability. Consequently, airlines consider both aircraft when selecting for use routes that require high capacity or face slot constraints.⁸¹⁰ Accordingly, Boeing's ability to raise 747-8I prices is constrained by the market presence of the A380.

489. Airbus launched the A380 in 2000. Its substitutability with the 747 became immediately evident when Air France, Singapore Airlines, and Qantas ordered the A380 to replace 747-400s and older 747s in their respective fleets.⁸¹¹ Boeing offered potential very large aircraft customers the enhanced 747X, but airlines such as Emirates Airlines, Singapore Airlines, and Qantas selected the A380.⁸¹²

⁸⁰⁷ *EC – Large Civil Aircraft (Panel)*, para. 7.1832.

⁸⁰⁸ “A slot constrained route involves at least one destination airport where aircraft landing slots are so scarce that it would be very difficult for an airline to increase passenger traffic by increasing the frequency of flights.” Bair Declaration at para. 44 (Exhibit USA-339) (BCI).

⁸⁰⁹ Bair Declaration at para. 45 (Exhibit USA-339) (BCI).

⁸¹⁰ Bair Declaration at para. 45 (Exhibit USA-339) (BCI).

⁸¹¹ Bair Declaration at para. 46 (Exhibit USA-339) (BCI).

⁸¹² Bair Declaration at para. 46 (Exhibit USA-339) (BCI).

490. There are relatively few routes with capacity or slot constraints such that a very large aircraft is clearly the most efficient choice. Moreover, relatively few airlines serve those routes. Accordingly, by the time the 747-8I was launched in 2005, most airlines with very large aircraft requirements had already ordered the A380.⁸¹³ While Lufthansa and Korean Air find it efficient to operate both the A380 and 747-8I, other airlines using A380s prefer to order additional A380s rather than introduce an additional very large aircraft model into their fleet.⁸¹⁴ Were the A380 absent from the market, however, sales of the 747-8I would increase because it would be the sole model capable of meeting demand for aircraft on high capacity or slot constrained routes.⁸¹⁵ Even if the A380 had just been offered later in time, the 747-8I may have enjoyed incumbency advantages that instead were enjoyed by Airbus. The A380 has undoubtedly limited sales of the 747, as the original Panel and Appellate Body found.⁸¹⁶

491. Comparing very large passenger and freighter orders also demonstrates the strong competitive relationship between the 747-8I and A380. Airbus delayed development of the A380 freighter model indefinitely amidst production problems experienced by the A380 passenger model.⁸¹⁷ Boeing's 747-8F is therefore the only very large aircraft freighter. In contrast, the 747-8I must compete against the A380 for passenger VLA orders. From launch through August 2012, the 747-8I has obtained only 36 orders (nine of which are VIP versions, not for commercial service), as compared to the 70 orders for the 747-8F.⁸¹⁸

492. The 747-8I and the A380 are, therefore, substitutable and compete against each other for sales of very large aircraft, and the Panel should reject the EU's effort to split the VLA product market into two monopoly markets.

7. The EU concedes that the U.S. geographic market definitions are appropriate.

493. The United States notes the EU's agreement that, "geographically speaking, there are global markets for LCA and that these global markets also operate at a country level for purposes of assessing displacement and impedance."⁸¹⁹ Taking this together with the failure of the EU to support its product market arguments, there is no basis to depart from the product market analysis that forms the basis for the DSB rulings and recommendations and the structure of the U.S. displacement and impedance claims.

⁸¹³ Bair Declaration at para. 47 (Exhibit USA-339) (BCI).

⁸¹⁴ Bair Declaration at para. 47 (Exhibit USA-339) (BCI).

⁸¹⁵ Bair Declaration at para. 47 (Exhibit USA-339) (BCI).

⁸¹⁶ See, e.g., *EC – Large Civil Aircraft (Panel)*, para. 7.1832.

⁸¹⁷ Bair Declaration at para. 48 (Exhibit USA-339) (BCI).

⁸¹⁸ Bair Declaration at para. 48 (Exhibit USA-339) (BCI).

⁸¹⁹ EU FWS, para. 592.

D. The EU Has Failed to Rebut the U.S. Demonstration that EU Subsidies to Airbus Continue to Cause Present Adverse Effects.

494. The United States demonstrated a causal link based on the findings of the original Panel and the Appellate Body, the absence of any meaningful action by the EU to address the situation, and the fact that lost sales and lost market share have continued unabated.⁸²⁰ The U.S. demonstration that LA/MSF continues to cause adverse effects is based on three principal points. *First*, the original Panel and the Appellate Body found that LA/MSF had “product effects,” enabling Airbus to supply the market with aircraft that it would not otherwise have had when and as it did, and these aircraft took sales and market share from the U.S. industry.⁸²¹ *Second*, none of the EU’s asserted compliance steps did anything to address, let alone remove, the product effects of LA/MSF. In fact, the sole notable action that the EU did undertake has been to compound the product effects of LA/MSF by giving yet another round of it to the A350 XWB. *Third*, the pattern of lost sales and lost market share has persisted from the original reference period up through the present, despite the EU’s claims of compliance.

495. The EU’s first written submission confirms that it has not taken meaningful compliance steps to remove the adverse effects that LA/MSF causes. Its submission is devoid of reference to EU action that could remove or even mitigate the effects of LA/MSF that continue to so severely distort competition in the LCA industry. Unable to rely on real compliance action, the EU tries to rebut the U.S. causation demonstration in four ways: (1) the supposed withdrawal, through expiration or extraction, of LA/MSF to all Airbus LCA from the A300 through the A340 (it argues the same for the A380 LA/MSF, although its arguments betray a lack of confidence that it has withdrawn LA/MSF to the A380); (2) subsequent investment by Airbus and its suppliers in the A320 and A330; (3) Airbus’s supposed ability to launch the A380 in the absence of LA/MSF; and (4) Airbus’s supposed ability to launch the A350 XWB in the absence of LA/MSF. All of these arguments fail.

496. Indeed, as is clear from its argument, the EU concedes that it did nothing to break the causal relationship between the LA/MSF and the other subsidies and serious prejudice to the United States. Rather, it argues that conditions have changed such that an entirely new assessment of causation must take place. But the causal mechanism identified by the original Panel and confirmed by the Appellate Body still operates, including through the LA/MSF to the A350 XWB. The EU’s efforts to portray the causal nexus as non-existent are contrary to the evidence.

⁸²⁰ See US FWS, section VI.

⁸²¹ *EC – Large Civil Aircraft (AB)*, paras. 1414(p); *EC – Large Civil Aircraft (Panel)*, paras. 7.1934, 7.1936, 7.1938, 7.1939, 7.1941, 7.1942, 7.1948, 7.1949; 7.1986-7.1993, 8.2.

1. The EU's causation arguments depend on erroneous assertions concerning the purported termination, expiration and or "withdrawal" of LA/MSF.

497. The EU argues that all LA/MSF given to Airbus LCA through the A340 has been withdrawn through expiration, extinction, and extraction. To the contrary, the United States confirms in Section IV above that none of the LA/MSF subsidies has expired or otherwise ended through any means. The United States also demonstrated that, even if some LA/MSF had expired in the ways described by the EU, this would not constitute withdrawal under Article 7.8 of the SCM Agreement. Once the EU's hollow assertions regarding subsidy withdrawal are stripped away from its causation arguments, little remains because, as shown below, the adverse effects caused by these subsidies unquestionably continue.

498. Even assuming *arguendo*, that the compliance Panel were to consider that the LA/MSF for certain Airbus models was "terminated" or had "expired" and that such termination or expiry constituted "withdrawal" for purposes of Article 7.8 of the SCM Agreement, the EU is mistaken as to what effect such a finding would have on the *causation* analysis in the compliance proceeding for purposes of the remaining subsidies.

499. If the compliance Panel were to find that some of the subsidies have expired and that in a particular context expiry constitutes "withdrawal," the effects of the withdrawn subsidies (as distinct from the "adverse effects") remain essential to the compliance Panel's analysis of the remaining subsidies that form the basis for the adopted DSB findings. The original Panel and the Appellate Body found that LA/MSF, in its design, structure, and operation, has primary and secondary effects that are long-lasting.⁸²² These effects cannot be used to excuse the EU from its compliance obligations.

500. These significant effects caused by WTO-inconsistent subsidies defined reality for decades, and the remaining subsidies enjoyed by Airbus (*i.e.*, those that have not even purportedly been withdrawn) were received by Airbus, benefitted Airbus, and injured U.S. interests within this specific factual context. Withdrawal of a WTO-inconsistent subsidy provides a prospective remedy for that subsidy, but it does not require this compliance Panel to rewrite history or ignore reality.

501. The consequences of the LA/MSF were and remain significant, however, as reflected in the findings of the original Panel, as affirmed by the Appellate Body: (1) Airbus received a steady stream of the subsidies in dispute over a nearly 40 year period;⁸²³ (2) these subsidies were, by design, supply-creating, and their benefits flowed across Airbus's entire LCA product line;⁸²⁴ and (3) the subsidies shaped Airbus's participation in the market by allowing it to

⁸²² See Section VI.B.5 of this submission (discussing primary and secondary effects of LA/MSF).

⁸²³ *EC – Large Civil Aircraft (AB)*, paras. 1414(e),(l),(m),(o),(p),(q),(r), 1416; *EC – Large Civil Aircraft (Panel)*, paras. 7.488, 7.497, 8.1(a),(b),(c),(d), 8.2.

⁸²⁴ *EC – Large Civil Aircraft (AB)*, paras. 1352, 1355, 1356; *EC – Large Civil Aircraft (Panel)*, paras. 7.1717, 7.1914-7.1920, 7.1938, 7.1948.

develop and bring to market its product line at a pace and in a way that it could not otherwise have done, in the unlikely event that Airbus would have existed at all.⁸²⁵

502. Thus, for any particular LA/MSF that the compliance Panel were to consider had been “withdrawn,” the primary and secondary effects of LA/MSF, would continue to be part of an aggregate causation analysis that accounts for prior to the date of withdrawal. “Withdrawal” of individual subsidies for purposes of Article 7.8 does not retrospectively invalidate the analysis of the original Panel and the Appellate Body which formed the basis for the DSB rulings and recommendations. In short, the DSB factual findings of the effects of subsidization cannot be rendered undone and irrelevant to an analysis of causation of subsidies that remain, and past subsidies deemed to have been withdrawn cannot magically be transformed into non-attribution factors.

2. Subsequent post-launch investments in the A320 and A330 have not eliminated the genuine and substantial causal link between LA/MSF and adverse effects.

503. In the underlying case, the Panel found – and the Appellate Body affirmed – the existence of a genuine and substantial link between LA/MSF and the market presence of A320 and A330 aircraft during the 2000-2006 period. The EU now contends that post-launch investments by Airbus and its suppliers to improve the A320 and A330 have diluted the effects of LA/MSF to the extent that there is no longer a genuine and substantial causal link between the subsidy and the market presence of those aircraft in the current period. This argument is, however, inconsistent with the underlying findings and the evidence.

504. The United States notes at the outset that the corporate investments cited by the EU are not actions by the EU and, therefore, are not measures taken by the EU to comply or appropriate steps taken by the EU to remove the adverse effects within the meaning of SCM Agreement Art. 7.8. As the Appellate Body has found, compliance “will usually involve some ... affirmative action ... directed at effecting the withdrawal of the subsidy or the removal of its adverse effects. A Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own.”⁸²⁶ In this case, the investments made by Airbus in the normal course of its business to improve its existing aircraft have not absolved the EU of its obligation under SCM Agreement Art. 7.8 to bring its measures into conformity with the SCM Agreement.

505. In particular, the post-launch improvements itemized by the EU in its submission have not “dissipated” the effects of the subsidy so as to eliminate the causal link that the original Panel found to exist between LA/MSF and the A320 and A330s. To the contrary, the factual situation

⁸²⁵ *EC – Large Civil Aircraft (AB)*, paras. 1264, 1265, 1266, 1270, 1273; *EC – Large Civil Aircraft (Panel)*, paras. 7.1933, 7.1984.

⁸²⁶ *US – Upland Cotton (21.5) (AB)*, para. 236.

presented by the EU does not warrant a deviation from the original Panel’s findings.⁸²⁷ As the Appellate Body has explained, a panel in a compliance proceeding generally will not “deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record.”⁸²⁸ Guidance from both Airbus and Boeing confirms that the A320s and A330s in the market during the present period remain directly linked to the LA/MSF that enabled Airbus to launch those models. As Airbus itself has summarized the situation, its improved aircraft in the post-2006 period reflect the advantage of the LA/MSF provided for the original model – specifically, “maximum benefit, minimum change.”⁸²⁹

506. The EU tries to skirt the original Panel’s finding by posing the following counterfactual question for the compliance Panel’s consideration – “but for the non-subsidised investments, would the product originally launched with subsidies be competitive in the LCA markets today?”⁸³⁰ This is the wrong counterfactual. The correct counterfactual analysis is to determine whether, but for LA/MSF, Airbus would have been able to offer and sell the A320 and A330 as it has. Because the answer to that question is “no,” it does not matter that the improvements cited by the EU contributed to the competitiveness of those models. As the Appellate Body has observed, “In order to find that the subsidy is a genuine and substantial cause, a panel need not determine it to be the *sole* cause of that effect, or even that it is the *only* substantial cause of that effect.”⁸³¹ Thus, it is not sufficient for the EU to show that other factors are now contributing to the market presence and sales of the A320 and A330 aircraft during the present period. Rather, to demonstrate that the causal link found by the original Panel has been eliminated, the EU is required to demonstrate that the market presence of the A320 and A330 aircraft (not just the

⁸²⁷ See US FWS, paras. 335-347 (citing *EC – Large Civil Aircraft (AB)*; *EC – Large Civil Aircraft (Panel)*). The US notes that almost all of the improvements set out in the submissions by the Airbus engineers occurred prior to 2006 – i.e., the Panel took account of them in its original ruling and nevertheless found a genuine and substantial link between the subsidies for the original aircraft and the aircraft models being sold in the 2000-2006 period. For instance, the majority of improvements in the A330 maximum takeoff weight, range, [***], and [***] occurred on or before 2006. See Crawford Hamilton, Statement on the Market Significance of Technological and Production Improvements to the A330 Programme at paras. 27, 28, 42, and 59 (Exhibit EU-12) (BCI).

⁸²⁸ *US – Softwood Lumber VI (21.5) (AB)*, para. 103; see also *Chile – Price Band System (21.5) (AB)*, para. 136 (“{T}he adopted findings from the original proceedings may well figure prominently in proceedings under Article 21.5, especially where the measure taken to comply is alleged to be inconsistent with WTO law in ways similar to the original measure.”) and *US – Upland Cotton (21.5)* (finding that it is appropriate for a compliance panel reviewing a complaining Member’s claims of continued adverse effects “to have relied on the findings from the original proceedings unless ‘any change in the underlying evidence in the record’ would have justified departing from them.”) *US – Upland Cotton (21.5) (AB)*, para. 386 (quoting *US – Softwood Lumber VI (21.5) (AB)*, para. 103).

⁸²⁹ Airbus, A320neo Family: Maximum benefit, minimum change (January 2012) (Exhibit USA-355) (BCI). The same statement is also made on the Airbus website, at <http://www.airbus.com/aircraftfamilies/passengeraircraft/a320family/a320/specifications/>.

⁸³⁰ EU FWS, para. 743. The EU argument assumes that the investments were not “subsidized”; as the United States demonstrates below, however, many of the improvements to the A320 and A330 have been drawn from research and in-flight experience in the context of later subsidized product launches, particularly the development of the A380.

⁸³¹ *EC – Large Civil Aircraft (AB)*, para. 984.

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improvements) no longer depends upon the provision of the subsidies. That is something it has not done.

- a. *The findings of the original Panel establish a causal link between the subsidies at issue in this case and improved and derivative A320 and A330 aircraft.*

507. The original Panel examined the relationship between an original and an improved/derivative aircraft, and found that the subsidies that enabled Airbus to launch the original A320 and A330 were also genuinely and substantially linked to the improved and derivative A320 and A330 aircraft that it was selling during the 2001-2006 period. The Appellate Body reviewed and affirmed this finding. The Panel continued on to find a genuine and substantial link between the subsidies and the adverse effects stemming from the evolved versions of these models aircraft on the market during the 2001-2006 period (including derivative aircraft that were not directly subsidized), and that conclusion was also affirmatively endorsed upon thorough review by the Appellate Body.⁸³² Furthermore, both the Panel and the Appellate Body firmly rejected the EU's counterfactual arguments regarding alternative routes to the same market position on the basis of factual findings that made it "unlikely" Airbus would have been able to achieve a comparable competitive position through 2006 without subsidization.⁸³³

508. The United States recalls these findings of the original Panel and Appellate Body, noting in particular that nothing in the EU submissions disturbs the facts and reasoning connecting the subsidies received by Airbus to the market presence of improved and derivative aircraft.⁸³⁴ The Panel's findings with respect to derivative aircraft (which involve even more significant modification than the incremental improvements primarily at issue in this proceeding) are particularly relevant:

- "Knowledge and experience gained in the development and production of one model of aircraft will lower the costs of development and production of subsequent aircraft launched. This is particularly true for derivative aircraft, where the subsequently launched model is a variant of an existing model.... Consequently, we consider that the economic viability and, indeed the very existence of the {derivative aircraft}, is dependent on the aircraft which preceded it, including in particular the original ... aircraft from which it is derived. The relatively small development costs of the {derivative} aircraft in our view are a function of the fact that it is a derivative of an {aircraft}, the

⁸³² *EC – Large Civil Aircraft (Panel)*, para. 7.1984, 7.1940-41; *EC – Large Civil Aircraft (AB)*, para. 1270.

⁸³³ *EC – Large Civil Aircraft (Panel)*, para. 7.1993; *EC – Large Civil Aircraft (AB)*, paras. 1266-1267, 1274-1281.

⁸³⁴ *EC – Large Civil Aircraft (Panel)*, paras. 7.1938 (A320) and 7.1939 (A330); *US – Large Civil Aircraft (AB)*, para. 1275 (A320 and A330).

launch of which, as we concluded above, would not have occurred as and when it did but for the LA/MSF granted in respect of that aircraft.”⁸³⁵

- “In considering the impact of LA/MSF on the launch of ... a derivative aircraft, we consider it appropriate not only to consider the LA/MSF directly linked to the particular aircraft model but also to consider the role that LA/MSF played in the launch of the aircraft on which it is based, as well as all other Airbus LCA launched before it.”⁸³⁶

509. The Panel also found, more generally, that LA/MSF allows Airbus to develop valuable knowledge, experience and technology that it applies in further LCA development and production, and that the revenues that Airbus earns from the sale of subsidized LCA are available for (and, for Airbus in particular, have been necessary to sustain) reinvestment in subsequent product development.⁸³⁷

510. The Panel and Appellate Body findings regarding causation are clear. The EU has presented an assortment of improvements to the A320 and A330 aircraft, but because it does not identify any real change in the fundamental conditions of competition in the LCA industry, the same causal link established between subsidies and Airbus’s 2000-2006 market presence remains intact.

- b. The EU grossly understates the significance of LA/MSF in enabling the subsequent improvements it cites (both pre- and post-2006).*

511. Although the A320s and A330s being sold by Airbus today reflect improvements, the EU does not dispute that they are incremental improvements on those same models that would only exist in the first place because of the WTO-inconsistent subsidies at issue in this case. Whatever the contribution of recent technology improvements to the competitive position of the A320 and A330 today, the fact remains that these updates – both as a financial and technological matter – are dependent on subsidized investment in the original models. Thus, Airbus’s ability to field these aircraft during the present period remains inextricably linked to the subsidies that enabled it to launch the original models. In short, if the subsidized portion of today’s A320 were stripped away, Airbus would be left with engines alone and nothing for them to power.

- i. LA/MSF for the A320 and A330 enables Airbus to pursue an advantageous strategy of incremental improvements to an established platform.*

512. One way in which the EU seeks to establish the significance of post-launch investments is by emphasizing the amount of those investments relative to the original launch

⁸³⁵ EC – Large Civil Aircraft (Panel), para. 7.1940.

⁸³⁶ EC – Large Civil Aircraft (Panel), para. 7.1941.

⁸³⁷ EC – Large Civil Aircraft (Panel), para. 7.1932-7.1949. See also EC – Large Civil Aircraft (AB), para. 1277 and 1278.

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expenditures.⁸³⁸ Its comparison of *total* post-launch investments to the original launch expenditures, however, ignores the key beneficial effect of LA/MSF in the context of ongoing innovation. Specifically, LA/MSF gives Airbus the option to maintain its competitiveness by undertaking *incremental* improvements to that original model. The cost of an incremental improvement is relatively small in comparison to the cost of launching an all-new aircraft.⁸³⁹ From Airbus's perspective then, the beneficial effect of LA/MSF in the context of improved and derivative aircraft is the difference between the cost of making incremental investments in an existing aircraft platform spread over time, on the one hand, and making a massive, lump-sum expenditure to launch an all-new program, on the other hand. Airbus has never been in a position to finance the latter without the decades long, uninterrupted stream of LA/MSF.

513. The declaration of Larry Schneider, Vice President of Product Development for Boeing Commercial Airplanes, explains in more detail the calculation that leads aircraft manufacturers to prefer an incremental improvement strategy for as long as it will satisfy the market.

Aircraft manufacturers decide to improve incrementally on existing aircraft models, rather than developing an all-new aircraft, because of the cost savings to be had from maintaining the same basic configuration of the original model. In particular, the re-design, re-optimization, and re-certification processes for aircraft enhancements require significantly fewer resources than what is required for an all-new aircraft, because the company can leverage the massive amount of upfront work done to develop, certify, and produce the original model. While every program is different, a general industry rule of thumb is that incremental updates and improvements of individual technologies are many orders of magnitude less expensive than the development of an all-new aircraft (in the range of only hundreds of millions of dollars) and often can be certified through abbreviated processes.

When deciding how to respond to market demand for improved aircraft, a manufacturer will compare the cost of incremental improvements to the cost of an all-new program, and ultimately select the least expensive option that will satisfy the market and maintain its competitiveness. Whenever possible, an aircraft manufacturer will try to maximize its investment and effort in the original model by enhancing its performance with as little additional investment as possible. A manufacturer can achieve significant performance enhancements over time to an existing model, particularly as engines, systems, and materials technologies

⁸³⁸ EU FWS, paras. 735 (A320), 880 (A330). The EU's calculation of the original investment is understated – it does not appear to take account of the fact that the cost of that money reflects the artificially low interest rate attached to the LA/MSF funds, and the amount is not inflation-adjusted such that it can be properly compared to later-in-time expenditures for improvements.

⁸³⁹ See Declaration of Larry Schneider, Senior Vice President of Product Development, Boeing Commercial Aircraft, The Relevance of Prior Commercial Aircraft Experience to Existing Model Improvements and New Aircraft Developments, paras. 5-6 (Oct. 17, 2012) (Exhibit USA-354) (BCI) (“Schneider Declaration”).

advance. This commercial strategy can only be pursued, however, if the manufacturer has an existing aircraft configuration upon which to improve.⁸⁴⁰

514. The financial advantage of working from a pre-existing aircraft model is thus significant, in terms of the ability to satisfy market demand at a reduced expenditure by leveraging the LA/MSF-funded design, testing, certification and subsequent in-flight experience of the original subsidized aircraft models. There are also non-financial advantages to being able to improve upon an existing model to meet market demand for innovation. For example, offering a competitive aircraft by improving upon an existing platform allows a manufacturer to sell the commonality of its up-to-date offering with existing aircraft of the same model in an airline's fleet. All of the benefits to be gained from an incremental improvement strategy are only available to Airbus because of the subsidies that enabled it to launch the A320 and A330 in the first place.

515. Additionally, the United States recalls that the original Panel and Appellate Body determined that Airbus would not have been in a position to launch all-new A320 or A330 aircraft later in time if it had not developed the technical expertise and revenue streams from the original aircraft.⁸⁴¹ Thus, in Airbus's case, not only is the ability to pursue an incremental improvement strategy often advantageous vis-a-vis the alternative of a new product launch; the original Panel and Appellate Body have already found that no other strategy would have been available to Airbus absent the subsidies it received for all of its original aircraft models.

ii. Improvements to the original A320 and A330 families do not alter the fundamental configuration of the aircraft so as to eliminate the genuine and substantial causal link between the launch of the aircraft and its current market position and sales.

516. A closer look at the post-launch improvements themselves reveals that Airbus's additional investments do not eliminate the genuine and substantial link between the LA/MSF and the aircraft in the market during the relevant period. Although improvements over time to original aircraft models may have a meaningful performance impact (indeed, they are intended to sufficiently enhance the aircraft's performance so that airlines will pay for the cost of the improvements), the changes required to the original model configuration are relatively minor.

517. To begin, the United States recalls that a significant portion of the investments and improvements in the A320 and A330 now cited by the EU in support of its "compliance" argument occurred in or before 2006.⁸⁴² Its post-launch "subsequent investments" argument

⁸⁴⁰ Schneider Declaration, paras. 5-6 (Exhibit USA-354) (BCI).

⁸⁴¹ *EC – Large Civil Aircraft (AB)*, para 1267-1300.

⁸⁴² The EU refers to "technological advances to the A320 family since 1995," EU FWS, para. 750, and "very significant 'Continuing Development' and 'Continuing Support' investments made by Airbus into the A330 programme from 1998 to 2011." EU FWS, para. 881. Similarly, large swathes of the statements by Airbus personnel pertain to developments that occurred during the period considered by the original panel. *See* A320 Chief

must be discounted accordingly to reflect the fact that a large portion of these facts were already taken into account by the original Panel and Appellate Body findings.

518. With respect to the A320 family, the primary post-2006 improvements are the availability of “Sharklet” winglets and the development of the A320 “new engine option” (“neo”). These latest improvements do not bring the EU into compliance with the rulings in this case by eliminating the genuine and substantial relationship between A320 sales and subsidies. To the contrary, these A320 improvements are specifically calibrated to ensure that they make as minimal change as possible to the original configuration – and thereby minimize the additional investment and certification required to market an “advanced” model.⁸⁴³

519. The Sharklet winglets are offered as an option on both the “ceo” and “neo” A320 models.⁸⁴⁴ The Sharklets are an update of the winglets that Airbus has previously offered, and are expected to increase the aerodynamic efficiency and lower the fuel burn of the A320 models. Incorporating them into the design will require some additional engineering and optimization of the wing, but not a fundamental change to the underlying aircraft design. As Mr. Schneider explains:

Airbus’s latest improvement – “Sharklet” winglets that can be affixed to the wings to enhance aerodynamic performance – is a good example of how a manufacturer can maximize its original investment without incurring the cost of changing the fundamental architecture of the aircraft. [***]⁸⁴⁵

The EU does not contest this basic point.

520. Similarly, the A320neo is overwhelmingly dependent on the original A320 platform. The A320neo will retain 95 percent airframe commonality with the current A320 family.⁸⁴⁶ In Airbus’s own words, the A320neo family offers “maximum benefit, minimum change” from the current A320 family.⁸⁴⁷ As further explained in the Schneider Declaration, the re-engine effort involves only “minimal changes required to support the newest engine technology,” primarily by “using thicker gauges to support bigger engines, and making software modifications required to interface with the new engines.”⁸⁴⁸

Engineering Statement at pp. 14-31, 35-39, 42 (Exhibit EU-10) (BCI); Crawford Hamilton, Statement on the Market Significance of Technological and Production Improvements to the A330 Programme, paras. 27, 28, 42, and 59 (Exhibit EU-12) (BCI).

⁸⁴³ See Schneider Declaration, paras. 7-9 (Exhibit USA-354) (BCI).

⁸⁴⁴ See Airbus website, Technology - New “sharklets” and A320neo (Exhibit USA-454); AirAsia to become first Airbus A320 ‘Sharklets’ operator (Sept. 11, 2012) (Exhibit USA-455).

⁸⁴⁵ Schneider Declaration, para. 7 (Exhibit USA-354) (BCI).

⁸⁴⁶ Schneider Declaration, para. 10 (Exhibit USA-354) (BCI).

⁸⁴⁷ Airbus, A320neo Family: Maximum benefit, minimum change (January 2012) (Exhibit USA-355).

⁸⁴⁸ Schneider Declaration, para. 9 (Exhibit USA-354) (BCI).

521. The A330 post-launch improvements at issue are even less significant than the A320 improvements. Over the life of the A330 program, the only major performance changes that Airbus has made relate to the increase of its maximum take-off weight (MTOW) and range. These improvements do not, however, reflect major new changes. Rather, as the Schneider Declaration explains:

As a general matter, these performance benefits are achieved by strengthening the airframe structure – typically, the wing, although significant increases in MTOW may also require strengthening in other sections of the airframe as well, such as the fuselage or tail. This strengthening is accomplished by making these parts out of a thicker material.

Furthermore, the most significant modification that Airbus has done to increase the MTOW of the A330-300 was [***].⁸⁴⁹

522. In addition, the Schneider Declaration details [***]. Mr. Schneider explains that, “[i]mplementing these sorts of technology enhancements requires localized testing and design adjustments, but they do not require any fundamental changes to the original airframe configuration.”⁸⁵⁰

523. Thus, to the extent Airbus has modified the A330, it has achieved performance enhancements without significant modification to the original aircraft, and many of the modifications themselves have been imported from other subsidized development programs. As these examples demonstrate, both the technology improvements and process improvements worked out during the course of the subsidized A380 development have been – and will undoubtedly continue to be – fed back into the A320 and A330 programs. It is not simply LA/MSF for the original models, but also LA/MSF for the subsequent models – particularly the A380 – that is also linked to the current A320 and A330 aircraft.

524. The evidence confirms that there is a genuine and substantial link between the LA/MSF that Airbus has received and the current A320 and A330 models, and the further investments – including those since 2006 – do not eliminate that link.

525. Finally, the United States notes that the EU cites findings in *US – Large Civil Aircraft* as support for its contention that investments in the A320 and A330 “preclude any *substantial* causal connection” between subsidies to those aircraft and “any alleged presently arising adverse effects.”⁸⁵¹ The EU’s reliance on *US – Large Civil Aircraft* is misplaced. In that dispute, the

⁸⁴⁹ Schneider Declaration, para 10 (Exhibit USA-354) (BCI). The US recalls that Airbus received LA/MSF for, and the Panel found that it could not have otherwise launched, the original A330/A340, and the A330-200 derivative model Panel Report, paras. 7.1939, 7.1940.

⁸⁵⁰ Schneider Declaration, para. 12 (Exhibit USA-354) (BCI); Airbus Website, A330 Family Technology (Exhibit USA-461).

⁸⁵¹ EU FWS, para. 741 (quoting *US – Large Civil Aircraft (AB)*, para. 987).

only effect of the subsidy was found to be an acceleration of Boeing's knowledge accumulation that enabled it to launch an all-new aircraft with a certain suite of technologies earlier than that it would otherwise have been prepared to launch.⁸⁵² In this case, by contrast, LA/MSF was found to enable the launch of aircraft that would not otherwise have been launched at all. As the original Panel in the original dispute found, and the Appellate Body affirmed: (1) Airbus likely would not exist absent LA/MSF, and if Airbus did exist, it would be much weaker and with a more limited product line, (2) Airbus could not have launched the A320 and A330 as and when it did without LA/MSF, and (3) Airbus could not have launched the A320 and A330 at a later date without LA/MSF.⁸⁵³ Accordingly, the United States does not disagree that in the particular situation at issue in DS353, Boeing's subsequent investments and the spread of technology to suppliers would eventually erase the advantage of the subsidy (that is, otherwise catch it up to where the subsidized R&D support brought it). However, in this case – by sharp contrast, the effect of the subsidy on the competitive position of Airbus remains genuine and substantial so long as the subsidy has not been withdrawn and the market presence and sales of those aircraft – including improved versions of those aircraft that would not exist apart from the original model – are still causing adverse effects.

3. The A380's launch and current market presence was, and remains, dependent on LA/MSF.

526. The EU has not even attempted to show that, absent pre-A380 LA/MSF, Airbus would have been able to develop and offer the A380 for sale during the current period.⁸⁵⁴ Such an effort would have failed in any event given the findings of the original Panel and the Appellate Body on this point. The EU's A380 causation arguments rely entirely on ignoring the effects of pre-A380 LA/MSF. Under the EU's approach, the effects of all pre-A380 LA/MSF (*e.g.*, furnishing Airbus with its product line, the financial strength it enjoyed at the A380's launch, and the resulting knowledge and technology incorporated into the A380) must be considered to be non-attribution factors. However, as discussed above, none of the pre-A380 LA/MSF has been withdrawn,⁸⁵⁵ and there is no basis for excluding the effects of pre-A380 LA/MSF from the analysis of current adverse effects occurring through the A380.⁸⁵⁶ Thus, the EU's A380 causation argument fails at its inception.

⁸⁵² *US – Large Civil Aircraft (Panel)*, para. 7.1775.

⁸⁵³ *EC – Large Civil Aircraft (AB)*, paras. 1264, 1265, 1266, 1270, 1273; *EC – Large Civil Aircraft (Panel)*, paras. 7.1933, 7.1984.

⁸⁵⁴ *Cf.* EU FWS, paras. 989-992.

⁸⁵⁵ As shown in Section IV of this submission, none of the pre-A380 subsidies have expired. Moreover, as also shown, even if they have "expired," expiry does not constitute withdrawal for purposes of Article 7.8 of the SCM Agreement.

⁸⁵⁶ For the reasons explained in Section VI.D.1 of this submission, this is true even if the pre-A380 LA/MSF is assumed to have been withdrawn.

527. But even putting aside the EU’s invalid premise, its A380 causation argument has, as noted, already been rejected by the original Panel and the Appellate Body. Ignoring the findings in the original dispute, the EU contends that, once the effects of pre-A380 LA/MSF are treated as non-attribution factors, Airbus could have launched the A380 as and when it did without relying on LA/MSF to the A380, using instead alternative funding sources such as internal funds, external investment, and additional support from risk-sharing suppliers. The EU cannot establish now what it tried and failed to establish in the original dispute, and so its A380 causation arguments should once again be rejected *even if* the Panel were to ignore the effects of pre-A380 LA/MSF (which the United States contends is not appropriate).

528. The EU should not be permitted to re-litigate settled issues concerning the role of LA/MSF in the launch of the A380. The EU asserts that, “the original Panel based its ultimate causation finding regarding the A380 *not* on the impact of A380 MSF on the launch decision, but solely on the impact of *all* previous MSF, beginning with the A300, on the launch decision for the A380.”⁸⁵⁷ In fact, the original Panel found that the launch of the A380 was caused by LA/MSF to the A380 as well as LA/MSF to prior Airbus LCA. Indeed, significant aspects of the original Panel’s analysis pertained solely to LA/MSF for the A380.

529. The original Panel’s “ultimate causation finding” concerning the effect of LA/MSF on the launch of the A380 is as follows: “Thus, either directly or indirectly, LA/MSF was a necessary precondition for Airbus’ launch in 2000 of the A380.”⁸⁵⁸ The concluding statement is based on the entirety of the original Panel’s A380 analysis. In using the phrase “either directly or indirectly,” the original Panel found that LA/MSF to the A380 was “directly” a necessary precondition for the A380’s launch, while also finding that LA/MSF to prior Airbus LCA was “indirectly” a necessary precondition for the A380’s launch. The meaning of “directly” and “indirectly” in this regard is evident from the three sets of findings the original Panel made. The first two sets of findings pertain solely to the effects of A380 LA/MSF, and the third set concerns the effects of other LA/MSF. The EU’s A380 causation arguments thus improperly seek to have this compliance Panel revisit issues that are already settled and subject to findings adopted by the DSB.

530. In the first set of A380 causation findings, the original Panel considered the significance of the A380 business case. The EU asserts that the original Panel and the Appellate Body “did not resolve” whether “the A380 business case was viable absent A380 MSF,” and it further asserts that the United States agrees with this proposition.⁸⁵⁹ The EU is wrong on both counts. The expert analyses in the EU first written submission speak to a question already answered.

⁸⁵⁷ EU FWS, para. 981 (*italics and underline in original*).

⁸⁵⁸ *EC – Large Civil Aircraft (Panel)*, para. 7.1948.

⁸⁵⁹ EU FWS, para. 1012.

531. The EU argues in this compliance proceeding that “the Panel did not resolve the issue of the viability of the business case absent A380 MSF.”⁸⁶⁰ In fact, the original Panel found that, contrary to the EU’s arguments, positive net present values (“NPVs”) in the business case, or based on data underlying the business case, *did not* demonstrate that Airbus would have launched the A380 in the absence of LA/MSF:

{T}he United States suggests that given the high risk involved in a programme such as the A380, LA/MSF increases confidence in the business model, including confidence that the Realistic Worst Case scenario is, in fact, the realistic worse case. If market conditions are more adverse to Airbus than those considered in the realistic worst case scenario, LA/MSF ensures that the project may nevertheless result in a positive NPV, or at a minimum, as the Dorman simulation predicts, will limit losses. *In this way the launch decision remains dependent upon the provision of LA/MSF.* The United States also argues that the sensitivity analysis provided by Airbus overstates likely sales volumes and understates the risk of a shortfall. *For similar reasons, we have concerns about the A380 business case, as discussed above, and we are thus not persuaded that the A380 business case alone demonstrates that Airbus would have launched the A380 even in the absence of LA/MSF.*⁸⁶¹

⁸⁶⁰ EU FWS, para. 977.

⁸⁶¹ *EC – Large Civil Aircraft (Panel)*, para. 7.1944 (emphasis added). In referring to the concerns about the A380 business case that it “discussed above,” the original Panel referred to paragraph 7.1927 of its report (emphasis added below):

A critical element of the credibility of the business case is the reasonableness of the demand predictions on which the sales and delivery projections are based. The A380 programme was launched in the face of basic disagreement between Airbus and Boeing about the size of the potential market for the aircraft. As the United States observes, “the main risk of non-repayment of {LA/MSF} is not a risk associated with development or manufacturing; it is a risk associated with sales”. While we are in no position to judge at this time whether the sales estimates in the A380 business case were, in fact, reasonable, we note that the A380 business case reflects consideration of a rather limited range of possibilities in terms of failure to achieve sales targets, particularly in view of the uncertainty of demand forecasts for the aircraft. Moreover, it appears that the Realistic Worst Case Scenario is not the worst with respect to all parameters considered in the sensitivity testing. The A380 may yet succeed in reaching the sales levels predicted in the business case. However, the actual delays in ramping up production, and relatively limited sales and deliveries to date, make it clear that such success will, if it occurs, likely take a good deal longer than originally projected, thus delaying achievement of the break-even point of the programme. The financial consequences of the A380 production problems and resulting programme delays have been significant, with EADS reporting a consequent reduction in Airbus’ earnings before interest and taxes of EUR 2.5 billion as of 2006. Thus, *it is by no means apparent that the Realistic Worst Case Scenario actually captured what could reasonably have been envisioned to be the worst case scenario at the time the business case was developed.* These concerns inform our consideration of the European Communities’ contention that the A380 business case demonstrates that Airbus would have gone forward with the launch even in the absence of LA/MSF.

532. The EU misses the point of the original Panel’s findings. The original Panel found that the A380 business case *did not* demonstrate “that Airbus would have launched the A380 even in the absence of LA/MSF,”⁸⁶² even under the assumption that the NPV of the A380 project was positive absent LA/MSF.⁸⁶³ Thus, there is nothing left to resolve in this compliance proceeding. The original Panel concluded that a positive NPV in the absence A380 LA/MSF did not establish that Airbus would have launched the A380 in the counterfactual assessment. Hence, it would be redundant and irrelevant for this compliance Panel to assess whether the A380 business case would have a positive NPV absent LA/MSF.

533. The EU also mischaracterizes the Appellate Body’s findings in its attempt to re-open the A380 causation issue:

The original Panel expressed concerns about the reliability of the business case, referring to US assertions that “the sensitivity analysis provided by Airbus overstates the likely sales volumes and understates the risk of a shortfall.” However, the Appellate Body reversed that finding. It held that the original Panel had erred, under Article 11 of the DSU, in making this finding, because the panel “inappropriate{ly}” and “not permissibl{y}” relied on *ex post* considerations as well as on “speculati{on}” about Airbus’ “economic incentives” to overstate the A380 delivery forecast.

Picking up where the Appellate Body left off, the European Union establishes below that the A380 business case was viable absent A380 MSF, and, thus, that Airbus would have launched the A380 absent A380 MSF.⁸⁶⁴

534. This statement contains several errors. Most importantly, the Appellate Body did not leave any A380 causation issues for the EU to “pick up” in this compliance proceeding. As with other A380 causation issues discussed in the EU first written submission, the EU failed in appealing the original Panel’s analysis of the A380 business case.

535. The Appellate Body stated that “it is clear that the Panel proceeded on the assumption that the A380 business case and the Carballo Declaration predicted a positive NPV in a non-LA/MSF scenario.”⁸⁶⁵ The Appellate Body identified problems with part of the original Panel’s assessment of the A380 business case, but it did not disturb the panel’s finding that the A380 business case alone did not demonstrate “that Airbus would have launched the A380 even in the absence of LA/MSF”:

⁸⁶² *EC – Large Civil Aircraft (Panel)*, para. 7.1944.

⁸⁶³ *EC – Large Civil Aircraft (Panel)*, para. 7.1943.

⁸⁶⁴ EU FWS, paras. 1013-1014.

⁸⁶⁵ *EC – Large Civil Aircraft (AB)*, para. 1333.

{D}espite the Panel’s impermissible assessment of the A380 business case with reference to ex post events and its speculation concerning economic incentives to overstate likely sales, we do not consider that this invalidates the Panel’s overall analysis. We reach this conclusion because the Panel did take into account the A380 business case, and proceeded on the basis that it predicted a positive NPV for the project in a non-LA/MSF scenario. However, the Panel decided to attribute to the A380 business case a probative weight that is different to that suggested by the European Communities because of other factors such as the parameters considered in the sensitivity analysis. In doing so, the Panel acted within the bounds of its discretion as initial trier of facts, and we do not see a basis for disturbing the Panel’s factual finding.⁸⁶⁶

536. Thus, the Appellate Body did not “reverse” the original Panel’s assessment of the A380 business case, as the EU contends.⁸⁶⁷ To the contrary, the Appellate Body sustained the original Panel’s finding that positive NPV values for the A380 program, based on data in the A380 business case, do not by themselves demonstrate that Airbus would have launched the A380 in the absence of LA/MSF. Accordingly, the Panel is bound by this finding, and the EU’s attempts to re-litigate this issue are misplaced. Indeed, in arguing that Airbus would have launched the A380 without A380 LA/MSF because “the A380 business case was viable absent A380 MSF,” the EU is asking the compliance Panel to accept a premise explicitly rejected by the original Panel: “we are thus not persuaded that the A380 business case alone demonstrates that Airbus would have launched the A380 even in the absence of LA/MSF.”⁸⁶⁸

537. The original Panel’s findings concerning the A380 business case were not the only reasons it concluded that the launch of the A380 was “directly” dependent on LA/MSF to the A380. Even if the EU had been successful in showing that Airbus would have found the A380 project to be an attractive investment absent LA/MSF, the original Panel also found that the EU had failed to demonstrate that Airbus would have been able to fund the A380 project without the LA/MSF that was provided to the A380 by raising additional funds and/or increasing reliance on risk-sharing suppliers:

{E}ven if Aérospatiale could find outside funding in respect of the A380 programme (which it considered it could not) the impact of such funding on the balance sheet of Aérospatiale would be such that it would have difficulties following this strategy....

While the financial situation of Airbus France in 2000 would have clearly been different from the position of Aérospatiale in 1997 (when the French Senate Report was released) the European Communities has submitted no persuasive

⁸⁶⁶ *EC – Large Civil Aircraft (AB)*, paras. 1335 (emphasis added).

⁸⁶⁷ *Cf. EU FWS*, paras. 1013.

⁸⁶⁸ *EC – Large Civil Aircraft (Panel)*, para. 7.1944.

evidence to suggest that Airbus France was in a better position than Aérospatiale to fund its part of the A380 project without LA/MSF.... *Likewise, the European Communities has submitted no evidence to support the contention that merely because, reportedly, Boeing was able to finance a significant portion of the non-recurring costs of development of the 787 through risk-sharing supplier arrangements, Airbus would necessarily have been able to do the same with respect to the A380. Airbus does use risk-sharing supplier arrangements, but there is no indication that it could have increased its use of such arrangements so as to replace the entire amount of financing provided by LA/MSF, which, we recall, was up to 33 percent of the development costs of the A380....*⁸⁶⁹

538. The EU appealed these findings, but the Appellate Body considered and rejected the EU's arguments regarding the original Panel's assessment of the Senate Report concerning the condition of Aérospatiale in 1997; the ability of Airbus's parent companies to finance the A380 without LA/MSF for the A380; and the ability of risk-sharing suppliers to increase their share of development funding.⁸⁷⁰ Now, in the context of this compliance proceeding, the EU disregards the findings of the original Panel and the Appellate Body when it asks the compliance Panel to consider the very same factors in its compliance assessment:

The evidence discussed below shows that Airbus, as it existed in 2000, would have been able to replace the funds received from the member States in the form of A380 MSF through any combination of additional risk-sharing supplier funding, its own resources and additional funds from its parent companies EADS and BAE Systems. Accordingly, absent any remaining subsidies, Airbus could have funded the launch of the A380.⁸⁷¹

539. The Appellate Body agreed with the original Panel in rejecting the EU's arguments concerning additional risk-sharing supplier funding, including the arguments – cited repeatedly in the EU's first written submission to this compliance Panel – that Boeing's use of risk-sharing suppliers on the 787 program is probative of what Airbus could have achieved absent LA/MSF:

The Panel examined the A380 business case and was not persuaded that this evidence sufficiently demonstrated that Airbus "could have increased its use of {risk-sharing supplier} arrangements so as to replace the entire amount of financing provided by LA/MSF."....

.... Given the significant distinctions between the A380 and 787 projects, and the potentially different risk profiles of Airbus and Boeing, we see no reason to

⁸⁶⁹ *EC – Large Civil Aircraft (Panel)*, paras. 7.1945-7.1947 (emphasis added).

⁸⁷⁰ *EC – Large Civil Aircraft (AB)*, paras. 1341-1349.

⁸⁷¹ EU FWS, para. 996.

disturb the Panel's assessment of the probative value of the evidence concerning Boeing's use of risk-sharing supplier funding.⁸⁷²

540. The Appellate Body also agreed with the original Panel in rejecting the EU's arguments concerning the ability of Airbus France, Airbus S.A.S., and Airbus's parent companies to obtain funds that would replace LA/MSF to the A380:

the Panel made the additional point that the European Union had “submitted no persuasive evidence to suggest that Airbus France was in a better position than Aérospatiale to fund its part of the A380 project without LA/MSF.”

*Even if the documents show that EADS and BAE Systems had financial resources available, it does not necessarily follow that those resources would have been directed to the A380 project.*⁸⁷³

The EU thus errs in characterizing the underlying A380 causation findings as based “*not* on the impact of A380 MSF on the launch decision, but *solely* on the impact of *all* previous MSF, beginning with the A300, on the launch decision for the A380.”⁸⁷⁴ The original Panel found, and the Appellate Body confirmed, that the A380's launch was “directly” dependent on A380 LA/MSF. The EU's arguments related to the A380 business case and the original Panel's assessment have already been rejected by the Appellate Body, which found that the EU failed to demonstrate that Airbus would have launched the A380 absent LA/MSF to the A380. The Appellate Body also rejected EU arguments that LA/MSF to the A380 could have been replaced by funding from Airbus's parent companies and additional support from risk sharing suppliers. LA/MSF to the A380, by itself, had a genuine and substantial causal impact on the A380 launch. Thus, the issues have been addressed by the original Panel, the original Panel's findings were subject of the EU's appeal, the EU advanced these same arguments, these arguments were considered by the Appellate Body, and as demonstrated below these arguments were rejected by the Appellate Body.

541. Of course, LA/MSF to the A380 was not the *only* subsidy that caused the A380's launch and market presence. The effects of pre-A380 LA/MSF gave the original Panel another strong basis to conclude that Airbus would have been unable to undertake the A380 program on a commercial basis:

{W}hile the A380 business case suggests, but by no means demonstrates, that as a stand-alone proposition the project might have been economically viable even without LA/MSF, in our view, that conclusion rests in part on the assumption that at the time of the launch, Airbus would have been in a position to not only design and manufacture the A380, *i.e.*, had the necessary development and production

⁸⁷² EC – Large Civil Aircraft (AB), paras. 1346-1349.

⁸⁷³ EC – Large Civil Aircraft (AB), paras. 1341-1343 (emphasis added).

⁸⁷⁴ EU FWS, para. 981.

technologies available to it, but also would have been able to obtain all the necessary financing on market terms. However, Airbus's technical capabilities derived in part from its experience in the development of its earlier model LCA funded in significant part by LA/MSF. Moreover, because of the significant amount of debt that developing its previous models of LCA would have generated, we consider Airbus would not have been in a position to obtain market financing for the A380, had it not financed the development of its earlier model LCA in significant part through LA/MSF. It follows that the view that Airbus could have launched the A380 as a standalone proposition is dependent upon Airbus having received LA/MSF to develop all of its previous models of LCA. Thus, either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380.⁸⁷⁵

542. Thus, the findings of the original Panel and the Appellate Body have settled the A380 causation issues that the EU now seeks to revive. The EU goes so far as to recycle its criticisms of the Dorman Report, including by using the same Carballo Declaration from the underlying proceeding,⁸⁷⁶ but neither the EU nor its expert, Professor Whitelaw, provide a legitimate basis for disturbing the original Panel's rejection of these arguments.⁸⁷⁷

543. To provide further confirmation that the A380's launch and market presence was dependent on LA/MSF, and in light of very similar EU arguments concerning the A350 XWB, the United States asked Professor David Wessels of the University of Pennsylvania's Wharton School of Business to conduct a quantitative counterfactual analysis of Airbus's ability to undertake a major new LCA program.⁸⁷⁸ Framing the analysis in conservative terms, Professor Wessels proceeds under the "impossible" counterfactual scenario contemplated by the original Panel, whereby Airbus would have approached the A380 launch point having launched all of its earlier LCA through commercial financing.⁸⁷⁹ (It is impossible because the original Panel found that Airbus likely would not exist without LA/MSF, and in the unlikely event that Airbus did exist, would have been a smaller and weaker manufacturer with a narrower product line).⁸⁸⁰

⁸⁷⁵ *EC – Large Civil Aircraft (Panel)*, para. 7.1948.

⁸⁷⁶ EU FWS, paras. 1015-1027.

⁸⁷⁷ See Section VI.C.4.e.i of this submission.

⁸⁷⁸ Professor David Wessels, *Assessing Airbus' Capacity to Fund Large Scale Projects Without LA/MSF* (Oct. 17, 2012) (Exhibit USA-364) ("Wessels Report").

⁸⁷⁹ *EC – Large Civil Aircraft (Panel)*, para. 7.1948 ("We have found that the cost for Airbus of obtaining market financing for the A300, A310, A320 and A330/A340 would have been many percentage points greater than what it actually was because of LA/MSF in each instance. Given the amount of funding transferred to Airbus under the individual LA/MSF contracts, and in the light of the formidable risks associated with the LCA business and the learning curve effects that are necessary to successfully participate in this sector, we have found that it would not have been possible for Airbus to have launched all of these models, as originally designed and at the times it did, without LA/MSF. Even assuming this were a possibility, and that Airbus had actually been able to launch these aircraft relying on only market financing, the increase in the level of debt Airbus would have accumulated over the years would have been massive.").

⁸⁸⁰ *EC – Large Civil Aircraft (Panel)*, paras. 7.1948, 7.1984, 7.1993.

U.S. and EC Business Confidential Information (BCI) redacted

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According to the original Panel, the higher cost of financing its actual product line on commercial terms would have imposed on Airbus a “massive” debt and prevented Airbus from launching the A380 as and when it did.⁸⁸¹

544. Under the “massive” debt scenario contemplated by the original Panel, Professor Wessels’ analysis proceeds in three steps:

In the first step, I estimate Airbus’ commercial debt burden in 2001 by applying a below investment grade debt rating (but not default rating) to the company. In Step 2, I forecast the income statement and balance sheet over the next twenty years to determine Airbus’ ability to pay down debt. In Step 3, I determine when Airbus would gain investment grade status, allowing the company to redeploy capital to new large scale projects and raise external funding.⁸⁸²

545. Professor Wessels calculates that Airbus’s debt in 2001 would have been at least €24.3 billion. Paying down this debt to sustainable levels would have required Airbus to delay its next major LCA program – that is, delay any new development program on the scale of the A380 or A350 XWB – until at least 2019. As Professor Wessels explains:

Under the massive debt scenario, and based on reasonable assessments of operating margin and capital turnover associated with Airbus’ pre-A380 models over the 2001-2020 period, I believe Airbus would ultimately be able to pay down its massive commercial debt burden, but only gradually, not reaching investment grade status until 2019. Only upon reaching investment grade status would the company be able to rededicate internal cash flow to large scale projects. In a similar vein, external capital providers would be reluctant to fund large scale projects before Airbus reached investment grade status, given the significant likelihood of bankruptcy. Therefore, I conclude that Airbus would have been unable to fund, either through internal or external means, the A350 XWB or the A380 prior to 2019 without LA/MSF. This conclusion is consistent with the principle that an unsubsidized company with excessive debt must forego new large scale investments until it has paid down debt to a manageable level.⁸⁸³

546. Thus, even granting the EU the benefit of an “impossible” counterfactual that is more favorable than the likely counterfactual scenarios absent LA/MSF, Airbus would have been unable to launch the A380 or the A350 XWB until 2019. Professor Wessels’ analysis accords with the original Panel’s findings that “the magnitude of the specific subsidies is certainly

⁸⁸¹ *EC – Large Civil Aircraft (Panel)*, paras. 7.1948.

⁸⁸² Wessels Report, p. 3 (Exhibit USA-364).

⁸⁸³ Wessels Report, p. 6 (Exhibit USA-364).

sufficient to have had the effect of enabling Airbus to launch successive models of LCA at a pace it could not otherwise have achieved.”⁸⁸⁴

547. In sum, the EU has failed to rebut the U.S. demonstration that LA/MSF, including LA/MSF to the A380, is a genuine and substantial cause of the A380’s launch and current market presence, and continues to cause present adverse effects to the interests of the United States.

4. The A350’s launch and current market presence are dependent on LA/MSF, and the EU has failed to rebut this.

548. In its attempt to rebut the U.S. demonstration that LA/MSF is a genuine and substantial cause of the A350 XWB’s launch and market presence, the EU argues, first, that all LA/MSF to Airbus LCA prior to the A350 XWB must be excluded from the Panel’s analysis of LA/MSF’s effects on the A350 XWB, such that the effects of prior LA/MSF must be considered non-attribution factors. Second, the EU contends that, once the effects of pre-A350 XWB LA/MSF are treated as non-attribution factors, Airbus could have launched the A350 XWB as and when it did without relying on LA/MSF, using instead alternative funding sources such as internal funds, external investment, and additional support from risk-sharing suppliers.

549. The EU’s attempts to deny the genuine and substantial causal relationship between LA/MSF and the launch and market presence of the A350 XWB collapse under the evidence it provided in response to the Panel’s request of September 4, 2012. Although the EU seems to have failed to comply fully with the Panel’s request – the EU [***]⁸⁸⁵ – what the EU did submit provides compelling confirmation of the U.S. adverse effects arguments related to the A350 XWB. Despite receiving billions of euros in LA/MSF for prior LCA programs, Airbus [[HSBI]]⁸⁸⁶ [[HSBI]]⁸⁸⁷ This evidence confirms what the United States demonstrated in its first written submission: without LA/MSF, the A350 XWB would be absent from the market, and the U.S. industry’s sales and market share would be significantly higher.

550. Below, the United States demonstrates that the EU:

- fails, generally, to account for the effects of pre-A350 LA/MSF (particularly pre-A380 LA/MSF), under the mistaken premise that such LA/MSF has been withdrawn;
- fails, specifically, by dismissing the technology effects of pre-A350 LA/MSF, without which Airbus would have been unable to develop the A350 XWB as and when it did;

⁸⁸⁴ See *EC – Large Civil Aircraft (Panel)*, para. 7.1972.

⁸⁸⁵ See EU Replies to the Panel’s 4 September 2012 Request to the European Union under Article 13.1 of the DSU, paras. 3-4 (Oct. 5, 2012).

⁸⁸⁶ See, e.g., [[HSBI]].

⁸⁸⁷ See, e.g., [[HSBI]].

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- fails to show that the launch of the A350 XWB in December 2006 was not influenced by A350 XWB LA/MSF, because the EU member States guaranteed and coordinated their support with Airbus before, during and after the A350 XWB's launch, following a similar temporal sequence as in previous batches of WTO-inconsistent LA/MSF;
- fails to show that Airbus could have funded the A350 XWB's development absent LA/MSF, because the EU's vague assertions regarding the availability of funding from EADS, and risk-sharing suppliers ignore the immense financial effects of pre-A350 XWB LA/MSF; repeat the same arguments regarding support from EADS and risk-sharing suppliers that were rejected by the original Panel and the Appellate Body; and imagine that risk-sharing suppliers could nearly double their share of development funding when many of those suppliers needed EU member State aid of their own just to participate at existing levels; and
- fails to show that the A350 XWB business case would have been viable absent LA/MSF, because the EU provides no supporting evidence, while the available evidence contradicts the EU position.

551. The U.S. causation demonstration remains un rebutted: without LA/MSF, the A350 XWB would not be in the market, and, as a consequence, the U.S. LCA industry's sales would have enjoyed higher sales, and would not be threatened with displacement and impedance.

- a. The EU's A350 XWB causation argument relies on the erroneous premise that the effects of pre-A350 XWB LA/MSF on the A350 XWB's launch and market presence should be ignored and treated instead as non-attribution factors.*

552. In its first written submission the United States demonstrated that a genuine and substantial relationship exists between LA/MSF to prior Airbus LCA and the launch and market presence of the A350 XWB.⁸⁸⁸ The EU never even attempts to demonstrate that Airbus could have launched the A350 XWB in the absence of some or all of the pre-A380 XWB LA/MSF. Thus, the EU appears to have conceded that Airbus could not have funded the A350 XWB absent that prior LA/MSF. Indeed, the decisive financial effects of pre-A380 XWB LA/MSF on Airbus's ability to undertake the A350 XWB program are confirmed by Professor Wessels' quantitative analysis, as discussed in Section VI.D.4.d below.

553. Instead, similar to its A380 causation argument, the EU relies on the faulty premise that all pre-A350 XWB LA/MSF – *i.e.*, from the A300 through the A340 (and with less conviction, the A380) has been withdrawn,⁸⁸⁹ and on that basis, argues that the effects of those subsidies cannot be considered with respect to U.S. claims concerning the launch and market presence of the A350 XWB. According to the EU, the effects of those subsidies, which the original Panel concluded and Appellate Body affirmed were profound, must now be treated as non-attribution factors. Indeed, the EU cites Airbus's current financial capacity and its LCA experience,

⁸⁸⁸ US FWS, paras. 370-378.

⁸⁸⁹ EU FWS, para. 1095.

knowledge and technologies – the specific effects of pre-A380 LA/MSF – as the very bases for its ability to launch the A350 XWB without the most recent two rounds of LA/MSF.⁸⁹⁰

554. Again, as demonstrated above, none of the pre-A350 XWB LA/MSF has been withdrawn and there is no basis for excluding the effects of prior LA/MSF from the analysis of current adverse effects caused by the A350 XWB LA/MSF.⁸⁹¹ Because the effects of prior LA/MSF cannot be ignored, the EU’s A350 XWB causation argument collapses, and the Panel can dispose of the EU’s A350 XWB causation argument before entertaining the EU’s unsustainable contention that the technology and learning developed on prior Airbus LCA programs had nothing to do with the A350 XWB, its implausible characterization of the A350 XWB launch decision as uninfluenced by LA/MSF, or its hypotheses concerning Airbus’s ability and willingness to fund the A350 XWB program absent LA/MSF. Nevertheless, all of these EU arguments fail on their own terms, as shown below.

b. The EU has failed to rebut the U.S. demonstration that pre-A350 XWB LA/MSF had significant technology and learning effects that contributed to the launch and market presence of the A350 XWB.

555. In the underlying case, the original Panel found – and the Appellate Body affirmed – the existence of a genuine and substantial link between the subsidies and the market presence of every single one of Airbus’s aircraft during the 2000-2006 period.⁸⁹² The original Panel recognized the spillover financial effects of the LA/MSF, and also found that the learning and experience accumulated on each subsidized aircraft program launch has been essential in enabling Airbus to advance along the learning curve and develop each subsequent competitive aircraft programs. As the original Panel stated:

That static and dynamic (“learning curve”) economies of scope and scale achieved in the context of one model of LCA are an important part of the development and production of other LCA models has also been recognized by economists. It is undisputed that LCA projects involve complex development and production technology. Therefore, knowledge and experience gained in the development and production of one model aircraft will tend to lower the costs of development and production of subsequent aircraft.⁸⁹³

556. The original Panel also specifically recognized that Airbus’s ability to design and manufacture the A380 was dependent upon its “technical capabilities derived in part from its

⁸⁹⁰ See EU FWS, para. 1099.

⁸⁹¹ For the reasons explained above, this is true even if the pre-A350 LA/MSF is assumed to have been withdrawn.

⁸⁹² *EC – Large Civil Aircraft (Panel)*, paras. 7.1932-7.1949.

⁸⁹³ *EC – Large Civil Aircraft (Panel)*, para. 7.1936.

experience in the development of its earlier model LCA funded in significant part by LA/MSF.”⁸⁹⁴ The Appellate Body agreed:

Given the Panel’s earlier factual finding concerning the importance of learning curve effects in the LCA industry, it can only follow that a counterfactual Airbus with a narrower product offering would have accumulated less technical experience that Airbus actually did in the development of its full range of LCA. Following this logic, a non-subsidized Airbus that had developed fewer LCA models would have accumulated less technical experience than the subsidized Airbus actually did, which in our view supports the Panel’s conclusion that the launch of the A380 would not have occurred in 2000 without LA/MSF.⁸⁹⁵

557. In its first submission, the United States demonstrated that the same general learning curve effect operated to enable Airbus to launch the A350X WB when and as it did, with the promised delivery schedule offered, and, additionally, that Airbus intentionally drew on particular technologies that were developed and proven on earlier subsidized programs in order to allay some of the time, expenditure and uncertainty inherent in any new aircraft program. The EU weakly disputes the specific technology connections, and then contends that the presence of certain “all-new” technologies on the A350 XWB breaks the learning curve, such that the experience gained from prior aircraft programs made possible by LA/MSF is not genuinely and substantially linked to the A350 XWB. The evidence, in contrast, reveals quite a different reality.

558. The EU’s argument is based, at its core, on two “new” things that Airbus was required to learn in order to launch the A350 XWB: (1) how to design and manufacture composite aircraft structures, including an all-composite fuselage; and (2) how to develop an all-new aircraft through a design and development process that is “more front-loaded” than the process used for its earlier aircraft development programs.⁸⁹⁶ Neither breaks the causal link. As the United States demonstrates below, including through Airbus’s own statements and the views of Boeing experts who just completed the similar task of launching the all-composite fuselage 787, the use of certain new technologies and development processes for the A350 XWB does not minimize the importance of Airbus’s prior experience. First, although the A350 XWB incorporates new technologies, it is also uncontested (in fact, Airbus is selling the fact) that it utilizes many key technologies that were developed and proven on earlier subsidized aircraft programs. Second, Airbus’s use of composites technologies on its prior commercial aircraft programs directly informed its ability to design and manufacture new composite structures on the A350 XWB. Third, the risks and challenges associated with the “new” aspects of the aircraft, particularly in light the front-loaded design process adopted for the A350 XWB actually heighten the importance of Airbus’s prior experience in the large civil aircraft market. Fourth, Airbus’s

⁸⁹⁴ *EC – Large Civil Aircraft (Panel)*, para. 7.1948

⁸⁹⁵ *EC – Large Civil Aircraft (Appellate Body)*, para. 1355.

⁸⁹⁶ EU FWS, para. 1159.

ability to manage (and its market credibility to sell) the A350 XWB program depends on the overall prior experience Airbus gained on LCA programs. Importantly, all of these significant benefits flowing from Airbus's experience in prior programs exist solely because of WTO-inconsistent LA/MSF that has not been brought into compliance.

- i. The A350 XWB utilizes many technologies and systems that were developed and “proven” in the launch and in-service phases of its prior commercial aircraft programs.*

559. The EU, citing statements made by Airbus personnel, argues that the United States has not made a prima facie case regarding the utilization of many technologies from earlier programs on the A350 XWB. The United States disagrees and here offers additional evidence to confirm that the A350 XWB is drawing on many technologies developed and proven on prior aircraft programs – most notably, the recently-developed A380.

560. To begin, Airbus current marketing touts that “{m}any of the {A350 XWB’s onboard systems} are derived from Airbus’ A380, providing the advantages of operational experience with this 21st century flagship aircraft and ensuring a high level of maturity at the A350XWB’s entry into service.”⁸⁹⁷ Airbus lists, in particular:

- “The application of variable frequency generators, which were first introduced with the A380, provides more power with less weight and lower maintenance costs, along with increased reliability and time-between-removals.”⁸⁹⁸
- “Another A380-proven concept is the use of two hydraulic circuits (instead of three on other jetliners), with redundancy provided by a dual-channel electro-hydraulic backup system.”⁸⁹⁹
- “In addition, A350 XWB’s hydraulics will be operated at the higher pressure level of 5,000 psi., which also is used on the A380. This increased operating pressure reduces the size of pipes, actuators and other system components while also facilitating the overall access – leading to improved reliability and maintainability, as well as reducing weight and increasing cost savings.”⁹⁰⁰
- “The A350 XWB will be a faster, more efficient and quieter aircraft as the result of its advanced wing design – which combines aerodynamic enhancements already validated on the A380 with further improvements developed by Airbus engineers.”⁹⁰¹

561. Airbus has also touted the “reuse” of A380 flight control systems,⁹⁰² and highlighted the A350 XWB’s use of A380 flight controls and cockpit systems:⁹⁰³

⁸⁹⁷ Airbus website, A350XWB-Technology (Exhibit USA-427).

⁸⁹⁸ Airbus website, A350XWB-Technology (Exhibit USA-427).




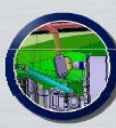

⁸⁹⁹ Airbus website, A350XWB-Technology (Exhibit USA-427).

⁹⁰⁰ Airbus website, A350XWB-Technology (Exhibit USA-427).


⁹⁰¹ Airbus website, A350XWB-Technology (Exhibit USA-427).

A350 XWB systems

- **2 hydraulic/ 2 electric (2H/2E) flight control architecture**
 - Proven in A380 flight-test
- **Electro-Pneumatic bleed system**
 - More efficient at aircraft level
- **3 tank fuel system with inerting**
 - Simplified architecture. No trim tank
- **4 variable frequency electrical generation systems**
 - Significant maintenance cost reduction
- **A380 Interactive Cockpit Concept with modular server systems**
 - + enhanced functionalities
- **Double side stay main landing gear**
 - Reduced weight and maintenance cost



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Building on A380 experience



- **Head-up display**
- **Dual Integrated Standby Instrument System**
- **Vertical Display**
- **Onboard Information System**
- **Brake to Vacate**
- **Onboard Airport Navigation System**

ADVANCED SYSTEMS & FLIGHT DECK



⁹⁰² Flight Global, *A350XWB Ready to Rock* (Exhibit USA-428) (quoting Airbus official regarding the 2H2E architecture developed for the A380, including the 5000psi hydraulic system).

⁹⁰³ EADS presentation, *A350XWB launch briefing* (Dec. 4, 2006) at slide 10 (Exhibit USA-366); Airbus presentation, *A350 XWB launch briefing* (Dec. 4, 2006) at slide 11 (Exhibit USA-439).

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Airbus also cites the “Benefit of A380 evolutions” and “Common type rating with A330 targeted” as examples of A350 XWB “commonality and innovations.”⁹⁰⁴

562. In addition, the Schneider Declaration details the significant use on the A350 XWB of technologies developed and proven on the A380 program:

- [***]⁹⁰⁵
- “[T]he avionics system on the A350XWB will be an enhanced version of the same integrated modular avionics system developed for the A380 and the Air Data and Inertial Reference system is the also the same as the one developed and used on the A380. More basically, the A350XWB will share the common flight deck that Airbus uses across its aircraft models -- including fly-by-wire, side-stick controllers, internal displays, as well as the pilot interface with cursor control device and QWERTY keyboard used on the A380 -- to facilitate “cross-crew qualification” and its ability to sell a mixed-fleet to its customers.”⁹⁰⁶
- [***]⁹⁰⁷
- “The A350XWB nose section [***] Furthermore, [***]”⁹⁰⁸
- “There are many other examples of ‘reused’ systems on the A350XWB. [***]”⁹⁰⁹

563. Many of these systems have been supplied on both the A350 XWB and A380 programs by third parties, in many cases the same third parties. Indeed, a hallmark advantage to be gained from prior commercial aircraft development experience is the ability to return to the same systems (which the manufacturer now has experience integrating into its aircraft and data from the in-flight service of aircraft utilizing these systems), and the same suppliers (who have proven themselves able to work with your development and production system).⁹¹⁰ As observed in the Schneider Declaration, the existence of the prior aircraft development program also gives suppliers an opportunity to develop and hone their technologies in a manner that would not have been possible in the laboratory or single prototype demonstrations.⁹¹¹

564. Airbus’s own suppliers have expressed the same view about the relationship between their work on the A380 and their work on the A350 XWB. For example, Greg Albert, Vice President for Airbus Programs at Honeywell Aerospace, has explained that the systems used on the A350 XWB are on a “[t]echnology continuum from systems developed for the A380, its

⁹⁰⁴ Airbus presentation, A350 and NEO update – Harry Nelson, Experimental Test Pilot (Apr. 2012) (Exhibit USA-379).

⁹⁰⁵ Schneider Declaration, para. 31 (internal citations omitted) (Exhibit USA-354) (BCI).

⁹⁰⁶ Schneider Declaration, para. 36 (internal citations omitted) (Exhibit USA-354) (BCI).

⁹⁰⁷ Schneider Declaration, para. 32 (internal citations omitted) (Exhibit USA-354) (BCI).

⁹⁰⁸ Schneider Declaration, para. 33 (internal citations omitted) (Exhibit USA-354) (BCI).

⁹⁰⁹ Schneider Declaration, para. 37 (internal citations omitted) (Exhibit USA-354) (BCI).

⁹¹⁰ Schneider Declaration, para. 18 (Exhibit USA-354) (BCI).

⁹¹¹ Schneider Declaration, para. 16 (Exhibit USA-354) (BCI).

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larger sister, which also will contribute to earlier systems maturity.”⁹¹² Similarly, he explains that “[t]he goal of maintaining hardware commonality between the A380 and A350 – that has a lot of benefits in running an A350 development program and focusing on early maturity.”

565. These technology links between Airbus’s prior aircraft programs and the A350 XWB make clear that the “old” has not been completely abandoned in favor of “all-new.” The fact that the A350 XWB incorporates new applications of composites material (the implications of which are discussed in the next section) does not – as the EU attempts to argue – eliminate the “valuable lessons learned” or “critical technologies, processes and knowledge that Airbus applied” from its prior program.⁹¹³ Contrary to the EU’s arguments, many of the technologies and technical capabilities “derived from its experience in the development of earlier (metallic) LCA”⁹¹⁴ remain highly relevant, even directly applied, despite the decision to utilize a composite fuselage and wing.

566. In addition, Airbus has drawn from its experience on prior aircraft programs to reject certain technologies that did not perform according to expectation. The Schneider Declaration highlights the example of GLARE, a technology that was touted on the A380, [***]⁹¹⁵ A more high profile example of Airbus’s learning from experience relates to the cracks that have emerged in the A380 wings during in-service experience:

{I}t is clear that the company has learnt significant lessons from the A380 and is incorporating them into the design of the A350XWB. It has already, according to Tom Williams, scoured the A350 design and replaced any instances of the lighter 7449 aluminium with the stronger 7010. Secondly, the company will be doing extra thermal testing to assess fatigue. One of the issues of the A380 wing cracks was that the implications of temperature changes from low temperature at altitude, and the aircraft baking on a hot ramp in the sun, had not been fully investigated or assessed.⁹¹⁶

567. In sum, the A350 XWB relies on technologies developed for prior commercial aircraft programs, including, most recently, the A380. Given that the original Panel found that Airbus would not have been able to launch any of its aircraft programs, including the A380, without LA/MSF – and, therefore, it would not have had an opportunity to develop these technologies to commercial scale and gain experience with in-service performance – the EU cannot sustain its argument that the prior LA/MSF is not a genuine and substantial cause of Airbus’s ability to launch the A350 XWB as and when it was launched.

⁹¹² Avionics Today, *A350 Extra Wide Responsibility* (June 1, 2009) (Exhibit USA-429).

⁹¹³ EU FWS, para 1160.

⁹¹⁴ EU FWS, para 1166.

⁹¹⁵ Schneider Declaration, para. 34 (Exhibit USA-354) (BCI).

⁹¹⁶ Tim Robinson, *Winning the X(WB) factor*, Aerospace Int’l (July 2012) (Exhibit USA-367).

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ii. Airbus’s use of composites technologies on its prior commercial aircraft programs directly informed its ability to design and manufacture “new” composite structures on the A350 XWB.

568. The EU’s arguments, and the statements by Airbus personnel, emphasize the “new” use of composites on the A350 XWB, including an all-composite fuselage and a composite-metal hybrid wing.⁹¹⁷ The significantly increased use of composites reflects the same sort of technology advance that Boeing also undertook for its 787 aircraft. As the Schneider Declaration explains, however, the decision to use a composite fuselage and wing does not diminish the relevance a manufacturer’s prior commercial program composites experience. To the contrary, Boeing considers that its “ability to undertake and resolve these challenges drew heavily on our prior experience designing and producing composites for our earlier commercial aircraft programs, including, for example, the 777 composite horizontal and vertical stabilizers.”⁹¹⁸ Similarly, Airbus’s effort to increase the use of composites for these applications requires it to draw directly on the commercial-scale manufacturing composites application experience and in-flight data that it gained on prior commercial aircraft programs.

569. Prior to the A350 XWB launch, Airbus had some very significant prior commercial aircraft program experience (recognizing that each of these innovations was developed on a launch-aid enabled program). The following list summarizes Airbus’s first adoption of each of the many composite commercial aircraft parts it used prior to A350 XWB launch.

- A300 composite tailfin leading edges
- A300/A310 composite rudder
- A310-300 composite commercial aircraft primary structure, a vertical stabilizer
- A320 composite tail
- A340 composite horizontal stabilizer -- a “wet” structure (i.e., containing fuel)
- A340-500/600 composite carbon-fiber keel beam
- A380 composite center wing box⁹¹⁹ and rear fuselage section

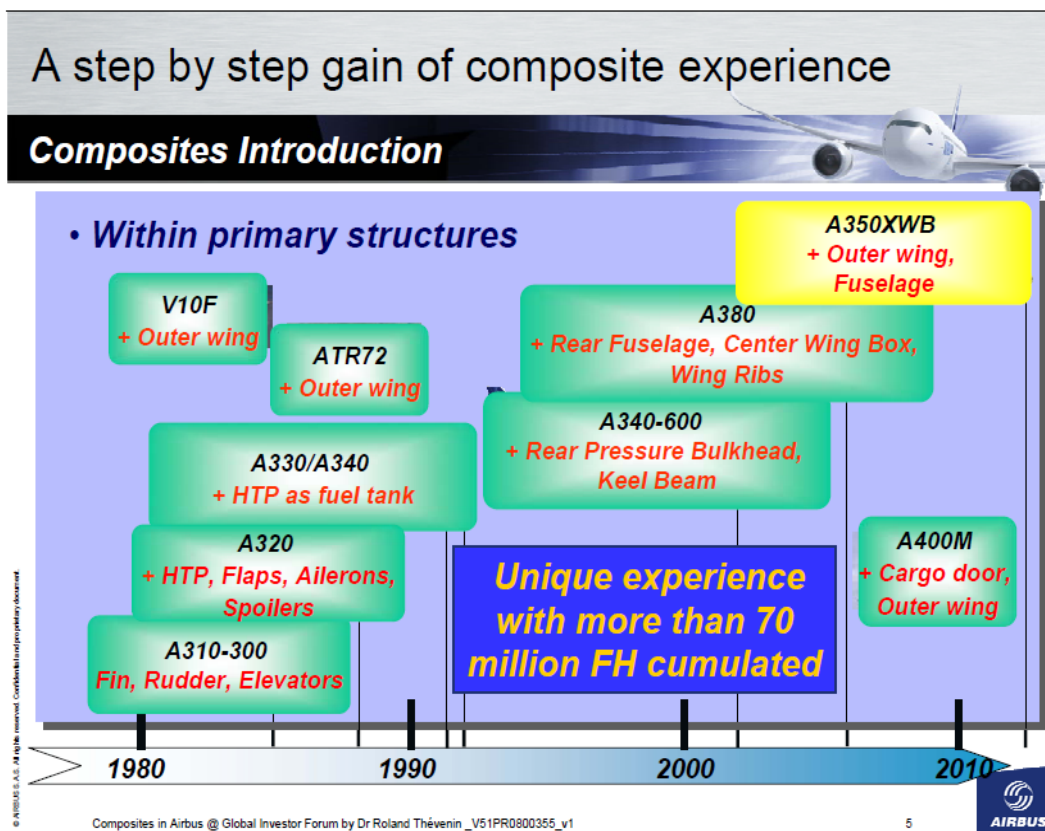
570. Indeed, Airbus summarizes its “step by step gain of composite experience” over the course of its history in the following graphic:⁹²⁰

⁹¹⁷ EU FWS, para. 1163.

⁹¹⁸ Schneider Declaration, para. 22 (Exhibit USA-354) (BCI).

⁹¹⁹ The EU emphasized in its FWS that the A380 does not have a “composite wing.” See EU FWS para 1185. The US accordingly assumes that the “A380 wing experience” referenced in the Bregier presentation submitted as Exhibit US-143 was a reference to the A380 composite wing box.

⁹²⁰ EADS presentation, Composites in Airbus – A Long Story of Innovations and Experiences by Guy Hellard (2008), slide 5 (Exhibit USA-440).



571. It is the A380 experience, in particular, that provided Airbus with some of the most relevant experience as it has undertaken A350 XWB development, including with large-scale composite structures. As detailed in the Schneider Statement, the A380 composite parts include:

a vertical tail (1,238 sq. ft), a horizontal stabilizer (2,203 sq. ft, which is as large as the main wing of the A310), a center wing box, aft pressure bulkhead and rear fuselage section. In order to achieve commercial-scale production of the A380 using these technologies, Airbus had to learn not just to design very large-scale composite parts, but also to manufacture such large composite structures at a reasonable cost. In addition, now that the program has reached commercial-scale, it has developed a wealth of “in-flight” data on the latest composite technologies and significant commercial-scale production experience.⁹²¹

572. Another example of A380 composites technology being transferred to the A350 XWB is the single-piece composite engine inlet, which

⁹²¹ Schneider Declaration, para. 24 (internal citations omitted) (Exhibit USA-354) (BCI). In the slide reproduced above, Airbus also recognizes the importance of its “unique experience with more than 70 million FH {flight hours} cumulated.”

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[***]⁹²² As explained in the Schneider Declaration, [***]⁹²³

573. The relevance of prior commercial program experience is evident not only in the direct drawing on experience and data developed on prior programs, but also in the allocation of workshare on the A350 XWB. Airbus has designated internal “centers of excellence” for various technologies among its various facilities, and many of those facilities that focused on design and production of the composite structures for the A380 have again been selected to do this work for the A350 XWB.⁹²⁴ And as Airbus itself explains, the “Nantes {facility} specialises in centre wing boxes for all Airbus aircraft, including the A380 and A350 XWB. This site also is a leader in the manufacturing of structural parts in carbon fiber reinforced plastic, such as the keel beam for the A350 XWB and A340-500/600, and the centre wing box for the A380 – representing an industry first.”⁹²⁵

574. Finally, the Schneider Declaration emphasizes that, from the perspective of a commercial aircraft manufacturer, the most relevant experience for a new commercial aircraft program, including in the context of composites applications, is prior commercial aircraft program experience.⁹²⁶ The specifications of commercial aircraft regulators and customers differ from other customers. Understanding the benefits and limitations of various manufacturing tools can only be finally determined once commercial-scale production is underway. And the most valuable in-service performance data (i.e., how the part is really working under extended mission conditions) can only be derived once parts are actually flying in-service on a fleet of commercial aircraft.

575. The evidence is clear that Airbus’s decision to design and deploy a composite fuselage and wing on the A350 XWB has put a premium on the knowledge gained on its prior commercial aircraft program composites experience. Given that its prior experience – in particular, its most recent A380 development and operational experience with large composite primary structures – was gained on a program enabled by LA/MSF, it is inconsistent with the facts and the very experience of Airbus over the past 40 years to argue that prior LA/MSF is not genuinely and substantially related to Airbus’s ability to develop the A350 XWB as it is doing.

iii. Airbus’s adoption of an accelerated development schedule with significant front-loading of design work puts a premium on prior commercial aircraft program experience.

⁹²² Schneider Declaration, para. 26 (internal citations omitted) (Exhibit USA-354) (BCI).

⁹²³ Schneider Declaration, para. 26 (internal citations omitted) (Exhibit USA-354) (BCI).

⁹²⁴ Schneider Declaration, para. 28 (Exhibit USA-354) (BCI).

⁹²⁵ Airbus, Airbus Centres of Excellence (Exhibit USA-306).

⁹²⁶ See Schneider Declaration, para. 16-20 (Exhibit USA-354) (BCI).

576. The EU has also emphasized that links to prior aircraft programs are broken by the changes to its aircraft development process for the A350 XWB.⁹²⁷ The “new” DARE (Develop and Ramp-up Excellence) process, as it is called, requires “a significant level of engineering effort much earlier in the process in order to attain a higher maturity of the aircraft design earlier on.”⁹²⁸

577. To begin, this new moniker does not describe a “new” development process – the aircraft manufacturer must still achieve all the same technology maturation, integration and certification milestones prior to first delivery. Airbus personnel have not said otherwise.

578. Moreover, the pace of development and front-loading of various design work is, in large part, made possible by innovation and adoption of the most advanced computer-aided design (CAD) software. Airbus learned direct and recent lessons related to CAD software during development of the A380 – both the dangers of not having uniform deployment of the same software across the various design partners, and the benefits of having all design partners use the latest tools. In particular, Airbus expended significant resources during the A380 development phase to address the need for standardized computer-aided design software across all of its facilities (after a major error was discovered resulting from the initial use of different CAD software in different facilities), including adopting 3-D mock-ups, and correcting for the incidence of unfinished work being flowed down the line.⁹²⁹ As a result, Airbus is now well-positioned to achieve the development schedule that it has set for itself on the A350 XWB program.⁹³⁰

579. More generally, the benefit of lessons learned by Airbus on its prior aircraft programs are of particular value in the context of an ambitious new aircraft development schedule that emphasizes an early design freeze. As explained in the Schneider Statement, prior expertise and in-flight data help engineers to select and assess new technologies at a faster pace:

Under tight program development timelines, every bit of prior commercial expertise matters immensely in helping engineers to select and assess the commercial viability of technologies (both proven and new) to be included on the new platform. In particular, there is a huge advantage to understanding how certain types of technologies can be scaled to commercial production and how

⁹²⁷ EU FWS, para. 1116

⁹²⁸ EU FWS, para. 1116

⁹²⁹ Bloomberg News, “Airbus vows computers will speak same language after A380 delay,” (Sept 28, 2006) (Exhibit USA-430) (“In a two-page memo to Airbus employees dated Sept. 11, {EADS CEO} Streiff, 52, highlighted software as a key challenge in fixing wiring problems that were “even more complex than the company envisaged earlier.” Airbus has begun putting in place “electrical engineering IT tools” common to the French and German teams and training the Hamburg engineers on them, he wrote in the memo obtained by Bloomberg News. “Together, as ‘one Airbus,’ we will overcome these challenges,” he wrote.”)

⁹³⁰ See Schneider Declaration, para. 21 (Exhibit USA-354) (BCI); see also Flightglobal, “A350 is a study in lessons learned by Airbus on A380,” (May 11, 2010) (Exhibit USA-432)

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they function and interact in-flight. There will always be surprises when moving from the laboratory to a commercial-scale aircraft program; but the more commercial experience a manufacturer has, the better able it is to minimize the surprises and deal with the ones that do surface.⁹³¹

580. Finally, Airbus’s prior relationships with suppliers in the context of commercial aircraft development programs, and lessons learned from past integration errors, can help it to avoid costly mistakes as a manufacturer moves beyond the point of concept freeze. As Airbus CEO Fabrice Bregier explains, Airbus expects to be able to manage an A350 XWB development process that put significant demands on its suppliers because it has learned lessons regarding supplier management issues from its A380 program experience. With respect to supplier management, he has stated: “We learned our lessons from the A380. . . .”⁹³² Airbus has also confirmed that it has learned from integration and assembly errors made during the development stage of the A380 program, including about flowing unfinished work down the line, and it is putting these lessons to work on the A350 XWB program. As Bregier stated recently in the context of a delay related to wing development: “We don’t want to rush to final assembly with incomplete wings,’ he said during the Airbus wrap-up news conference at the Farnborough air show. ‘This will not happen with me as Airbus CEO. I have no intention of repeating past mistakes.’”⁹³³ Bregier’s statements are evident acknowledgement of the direct manner in which manufacturers draw on the lessons learned during their past new aircraft program development efforts.

iv. Airbus’s prior aircraft program experience, in general, is of paramount importance to its overall ability to manage the A350 XWB development program and convince the market that it will be able to do so.

581. Getting an all-new aircraft program off the ground is an incredibly complex, high-risk endeavor. Airbus’s ability to convince the market that it can successfully manage an all new program – which is critical to accessing capital and customer advance payments necessary to help fund such an effort – relies on market credibility established through prior experience. No matter how much design work can be done in a theoretical and prototype test setting, that sort of experience cannot substitute for the expertise and learning achieved by overcoming the challenges of designing, integrating, certifying, scaling-up, producing, and managing unexpected in-service performance of a commercial aircraft program. A manufacturer undertaking such an effort must not only be able to achieve its objective (and the relevance of past commercial program experience in this regard is discussed above), but it must also be able to convince the

⁹³¹ Schneider Declaration, para. 20 (Exhibit USA-354) (BCI).

⁹³² The Wall Street Journal, “Supply chain continuity is main risk for Airbus A350 Program,” (January 17, 2012) (Exhibit US-431).

⁹³³ Aviation Week, “Airbus CEO says A350 wing delayed, but under control (July 12, 2012) (Exhibit USA-435) (emphasis added).

market that it will be able to do so. Airbus was only in a position to make that case because of its experience on the prior aircraft programs made possible by LA/MSF.

582. The original Panel recognized that program experience provides essential market credibility for an entity undertaking the launch of an all-new aircraft program. For example, it took note of the following statement by past Airbus managing director Jean Pierson:

Imagine if I had gone {in 1970} to a bank and said, ‘I have just started a management team from various European countries. I intent to make a large aircraft to compete with Boeing. Will you lend me \$1 billion? You may lose it all. Or you may start to make some money twenty years from now! I leave it to your imagination the welcome I would have had. No financial institution would have taken such a risk, or if it had the interest rates would have been simply prohibited.’⁹³⁴

Based on this and related evidence, it ultimately found that prior technical program experience is essential to mitigating launch risk.

583. The original Panel specifically found that launching an LCA program without prior experience significantly increases the risk of an already risk-fraught endeavor: “Prior to the {ir} 1969 Agreement, the companies that would eventually form part of Airbus Industrie GIE ... had not yet worked together on any endeavour of similar scope of ambitions. Both {the US and the EU} have recognized the complexities and the risk involved in launching such a project.... {T}he degree of risk associated with Airbus’ first venture into LCA manufacturing was probably the greatest among all of its LCA projects.”⁹³⁵

584. Moreover, Airbus itself has recognized the importance of selling its experience to the market. For example, when cracks began to appear in the wings of in-service A380 aircraft, Airbus CEO Tom Enders reassured the market as follows:

“Are we learning from this? Absolutely. We are taking lessons from the A380 programme for the A350 programme,” he said, referring to the company's next project, a mid-sized jetliner designed to compete with the Boeing 787 Dreamliner.... “We have a thorough investigation underway on how we could make these mistakes in the first place and to eradicate the sources of the mistakes,” he said.”⁹³⁶

585. The EU’s attempt to dismiss the importance of prior LCA industry experience – none of which Airbus would likely have absent LA/MSF – implies that any company with sufficient resources could successfully develop and bring to market new LCA, even if it had never before

⁹³⁴ *EC – Large Civil Aircraft (Panel)*, para. 7.1933.

⁹³⁵ *EC – Large Civil Aircraft (Panel)*, para. 7.1933.

⁹³⁶ Reuters, Airbus learns from A380 saga (Feb. 15, 2012) (Exhibit USA-433).

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designed, developed, managed, and produced an LCA program. This proposition is refuted not only by Airbus's demonstrable reliance on its own prior experience, discussed above, but also by the difficulties faced by aspiring entrants to the single-aisle LCA market segment – *i.e.*, Bombardier, COMAC, Mitsubishi Aircraft Corporation, Sukhoi, and United Aircraft Corporation.⁹³⁷ These new entrants are marketing all-new metallic single-aisle aircraft, essentially up-to-date versions of the same aircraft that Boeing and Airbus have been building for 30 years. Yet, these companies, some of which have vast financial resources and supplier experience on Airbus and Boeing LCA programs,⁹³⁸ are struggling to achieve broad market acceptance for their products because customers perceive significant, and often prohibitive risks, in ordering aircraft from new entrants that do not have a successful track record.⁹³⁹

586. In sum, the EU argument boils down to the proposition that Airbus would be in a position to launch (and sell) the A350 XWB absent the LA/MSF that enabled it to undertake all of its prior commercial aircraft programs. The facts, as set forth above, demonstrate that despite the “new” technologies and processes that it is implementing on the A350 XWB program, Airbus's ability to achieve its technical goals (and convince the market that it will do so) is genuinely and substantially related to the specific technologies and experience – most notably, from the recent A380 program – that Airbus would not have absent LA/MSF.

c. The EU has failed to show that the launch of the A350 XWB was unaffected by LA/MSF to the A350 XWB.

587. The United States demonstrated the effects of LA/MSF on the A350 XWB in terms of both pre-A350 XWB LA/MSF and A350 XWB LA/MSF. Whether considered in the aggregate or solely in terms of A350 XWB LA/MSF, LA/MSF has a genuine and substantial relationship with the launch and market presence of the A350 XWB.⁹⁴⁰

588. The EU conspicuously fails to deny two critical points. First, the EU does not deny that LA/MSF to the A350 XWB is a specific subsidy, stating instead that LA/MSF for the A350 XWB is “on terms and conditions that may or may not involve subsidisation.”⁹⁴¹ This is confirmed by [[HSBI]]⁹⁴² Second, the EU does not deny that the member States agreed in principle to provide funding to the A350 XWB well before the LA/MSF arrangements were formalized in 2009.

⁹³⁷ Bair Declaration at para. 30 (Exhibit USA-339) (BCI).

⁹³⁸ Andrew Parker, Aerospace: A dogfight for the duopoly, Financial Times (Aug. 6, 2012) (Exhibit USA-456).

⁹³⁹ Bair Declaration at para. 30 (Exhibit USA-339) (BCI); Andrew Parker, Aerospace: A dogfight for the duopoly, Financial Times (Aug. 6, 2012) (Exhibit USA-456).

⁹⁴⁰ US FWS, paras. 360, 370, 374, 375, 379.

⁹⁴¹ EU FWS, para. 1129.

⁹⁴² *See, e.g.*, [[HSBI]].

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589. The EU instead focuses on timing, specifically the dates on which the A350 XWB LA/MSF agreements were signed and funds distributed.⁹⁴³ Stating that “the first agreement for the A350XWB was not concluded until June 2009,” the EU contends that “even if any of the Member State financing agreements for the A350XWB were to involve a subsidy – it logically could not have been a cause of the launch of the A350XWB in December 2006.”⁹⁴⁴

590. Notwithstanding the evidence contained in these documents, the core of the EU argument concerns the timing of events. The EU’s arguments concerning the A350 XWB launch decision focus on the role played by the formal LA/MSF agreements, asserting that “the financing agreement played no role in Airbus’s commitment to the A350XWB” but remaining silent on the role played by member States’ commitments that preceded, and were memorialized in, the financing agreements.⁹⁴⁵

591. The EU’s timing argument fails for several reasons:

- *First*, the EU member States had a pattern and practice of providing LA/MSF throughout Airbus’s history;
- *Second*, formalizing LA/MSF agreements many months or a few years after an Airbus LCA program’s commercial launch is not unusual, and the provision of A350 XWB LA/MSF followed a pattern similar to prior LA/MSF subsidies that were found by the original Panel and Appellate Body to cause adverse effects. Despite faulting the United States for not “adducing evidence of a binding agreement prior to the launch of the A350XWB,”⁹⁴⁶ the EU itself concedes that some prior Airbus LCA programs were launched *before* the conclusion of formal LA/MSF agreements;⁹⁴⁷ and
- *Third*, the evidence makes clear that the EU member States had committed to provide LA/MSF to the A350 XWB before the program’s December 2006 launch. The EU, while emphasizing the role played by the formal LA/MSF agreements, remains silent on the role played by member States’ commitments that preceded, and were memorialized in, the financing agreements.⁹⁴⁸

The United States elaborates on each point below.

- i. Airbus’s history of receiving LA/MSF for each new LCA program shaped the A350 XWB launch decision.*

⁹⁴³ EU FWS, para. 1102.

⁹⁴⁴ EU FWS, para. 1086.

⁹⁴⁵ See EU FWS, para. 1105.

⁹⁴⁶ EU FWS, para. 1103.

⁹⁴⁷ EU FWS, para. 1102 (“Contrary to *some of* the other *major LCA programmes* for which Airbus received funding in the past, the company launched the A350XWB several years before the A350XWB financing agreements were even in place and funds began to be disbursed.”) (emphasis added).

⁹⁴⁸ See EU FWS, para. 1105.

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592. At the time Airbus considered launching the A350 XWB in 2006, the EU member States had provided LA/MSF to all major Airbus LCA programs, as well as derivative programs, over nearly 40 years. And less than a year before the A350 XWB program was unveiled in July 2006, Airbus applied for LA/MSF to fund its predecessor, the Original A350. The EU member States had agreed in principle to do so, although the Original A350 program was replaced by the A350 XWB prior to the conclusion of formal LA/MSF agreements. Given this long and consistent history – some of it very recent – it strains credulity to think that Airbus did not consider LA/MSF in determining whether to launch the A350 XWB, launched the A350 XWB without expecting that the program would be funded in the same way as all other major Airbus LCA programs, and then was happily surprised to later receive a new round of LA/MSF.

ii. *The post-launch formalization of A350 XWB LA/MSF agreements is consistent with the pattern for LA/MSF to earlier Airbus LCA programs.*

593. The original Panel found that A380 LA/MSF was an actionable subsidy that contributed to Airbus’s decision to launch the A380, despite that all of the formal A380 LA/MSF agreements were concluded at least one year after the A380’s December 2000 launch. Therefore, the EU’s argument⁹⁴⁹ that post-launch formalization of the A350 XWB LA/MSF precludes a similar finding of WTO-inconsistent subsidization cannot be reconciled with the original Panel’s findings.

594. Indeed, there is nothing unusual in the fact that LA/MSF commitments for the A350 XWB were formalized after the LCA program launch. The EU hints at this when it states that “{c}ontrary to *some of the other major LCA programmes* for which Airbus received funding in the past, the company launched the A350XWB several years before the A350XWB financing agreements were even in place and funds began to be disbursed.”⁹⁵⁰ implying that some of Airbus’s major LCA programs were launched well before LA/MSF financing agreements were in place. In fact, such a pattern can be seen for a number of Airbus LCA programs:

LA/MSF Contracts Post-Dating Commercial Launch⁹⁵¹

LCA Program	Program Launch Date	LA/MSF Document⁹⁵²	Document Date
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⁹⁴⁹ Cf. EU FWS, para. 1101.

⁹⁵⁰ EU FWS, para. 1102 (emphasis added).

⁹⁵¹ This list may be non-exhaustive, since the EU has not accounted for all past LA/MSF contracts with Airbus in a transparent manner. See, e.g., *EC – Large Civil Aircraft (Panel)*, note 2439 (pointing out that the EU refused to provide the German A330/340 contract, even though the Panel had specifically asked the EU for it).

⁹⁵² There was no intergovernmental agreement for the A330-200, the A340-500/600, or the A380. See *EC – Large Civil Aircraft (Panel)*, para. 7.371.

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LCA Program	Program Launch Date	LA/MSF Document⁹⁵²	Document Date
A300	1969	A300 Intergovernmental Agreement (France and Germany)	May 29, 1969 ⁹⁵³
A300	1969	French A300B LA/MSF contract	[***] ⁹⁵⁴
A300	1971	A300 Intergovernmental Agreement (All 4 Governments)	[***] ⁹⁵⁵
A300	1969	Spanish A300 LA/MSF contract	[***] ⁹⁵⁶
A310	1978	French A310 LA/MSF contract	Apr. 30, 1980 ⁹⁵⁷
A310	1978	A310 Intergovernmental Agreement	[***] ⁹⁵⁸
A320	1984	German A320 LA/MSF contract	[***] ⁹⁵⁹
A320	1984	UK A320 LA/MSF contract	[***] ⁹⁶⁰
A320	1984	French A320 LA/MSF contract	[***] ⁹⁶¹
A330/340	1987	Spanish A330/340 LA/MSF contract	[***] ⁹⁶²
A330/340	1987	UK A330/340 LA/MSF contract	[***] ⁹⁶³
A320	1984	A320 Intergovernmental Agreement	[***] ⁹⁶⁴
A330/340	1987	French A330/340 LA/MSF contract	[***] ⁹⁶⁵
A330/340	1987	A330/340 Intergovernmental Agreement	[***] ⁹⁶⁶
A330-200	1995	French A330-200 LA/MSF contract	[***] ⁹⁶⁷
A340-500/600	1997	Spanish A340-500/600 LA/MSF contract	[***] ⁹⁶⁸

⁹⁵³ 1969 A300-B Intergovernmental Agreement, p. 429 (Exhibit USA-388).

⁹⁵⁴ EU FWS, p. 404.

⁹⁵⁵ EU FWS, p. 404.

⁹⁵⁶ EU FWS, p. 404.

⁹⁵⁷ See 1997 Senate Report, p. 67 (Exhibit USA-312) (indicating that the A310 agreement was notified (“*notifiée*”) on Apr. 30, 1980).

⁹⁵⁸ Intentionally left blank.

⁹⁵⁹ Germany A320 MSF Agreement, p. 12 (Exhibit USA-313(BCI)).

⁹⁶⁰ EU FWS, p. 405.

⁹⁶¹ A320 Protocole, p. 6 (Exhibit USA-314(BCI)).

⁹⁶² EU FWS, p. 405.

⁹⁶³ EU FWS, p. 405.

⁹⁶⁴ A320 Launch Aid Agreement (Exhibit USA-403(BCI)).

⁹⁶⁵ EU FWS, p. 405 (providing a non-BCI date for Exhibit EU-43-BCI).

⁹⁶⁶ A330/340 Intergovernmental Agreement (Exhibit USA-404(BCI)). [***].

⁹⁶⁷ French A330-200 Launch Aid Convention and Protocole, p. 5 (Exhibit USA-315(BCI)).

⁹⁶⁸ *Protocole d'Accord entre l'Etat & Airbus France relatif au programme Airbus A340-500 et A340-600*, p. 6 (Exhibit USA-316(BCI)).

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LCA Program	Program Launch Date	LA/MSF Document⁹⁵²	Document Date
A340-500/600	1997	French A340-500/600 LA/MSF contract	[***] ⁹⁶⁹
A380	2000	Spanish A380 LA/MSF contract	[***] ⁹⁷⁰
A380	2000	French A380 LA/MSF contract	[***] ⁹⁷¹
A380	2000	German A380 LA/MSF contract	[***] ⁹⁷²
A380	2000	A380 Agreement Between 4 Airbus Governments and Airbus	[***] ⁹⁷³

The [***] gap between the launch of the A350 XWB and the conclusion of formal LA/MSF agreements is not even large compared to, for example, the six-year gap for the French A330/A340 LA/MSF contract. Thus, the A350 XWB timing gap is unremarkable considering the past practice of Airbus and the supporting EU member States, and is completely consistent with the original Panel’s A380 findings. It also does not bar the United States from establishing that A350 XWB LA/MSF is an actionable subsidy under the SCM Agreement that contributed to the launch of the A350 XWB.⁹⁷⁴

iii. Airbus launched the A350 XWB knowing that the EU member States were committed to finance the program.

595. Against the backdrop of the EU member States’ pattern of providing LA/MSF to prior Airbus LCA programs, the United States reviews the chronology of events concerning the launch of the A350 XWB and the provision of LA/MSF to that program. The evidence disproves the EU’s assertion that Airbus’s launch decision was made without regard to A350 XWB LA/MSF:

596. **2005:** Airbus launched what is now called the “Original A350,” a €4.35 billion effort to update the A330 fuselage with newer technology wings.⁹⁷⁵ It was this Original A350 with respect to which the EU made an in-principle agreement to provide LA/MSF, as the original Panel found, although the precise terms and conditions of the funding were not yet fixed as of July 2005.⁹⁷⁶

⁹⁶⁹ Spanish A340-500/600 Agreement, p. 1 (Exhibit USA-317(BCI)).

⁹⁷⁰ Spain A380 LA/MSF Contract, p. 1 (Exhibit USA-88(BCI)).

⁹⁷¹ French A380 Launch Aid Protocol, p. 7 (Exhibit USA-318(BCI)).

⁹⁷² German A380 LA/MSF Contract, p. 23 (Exhibit USA-83(BCI)).

⁹⁷³ A380 Launch Aid Agreement (Exhibit USA-408(BCI)).

⁹⁷⁴ Cf. EU FWS, para. 1101.

⁹⁷⁵ Robert Wall, *A350 Faces Busy Time Until Industrial Launch*, Aviation Week & Space Technology (June 20, 2005) (Exhibit USA-23).

⁹⁷⁶ EC – Large Civil Aircraft (Panel), para. 7.307.

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597. **March 2006:** Speculation intensified that Airbus would have to replace the Original A350 with a more ambitious design that would be better received by the market.⁹⁷⁷

598. **May 2006:** There were growing signs that the A350 would be redesigned and that the amount of LA/MSF to the A350 would grow as well:

“We have listened to some customer feedback on our way to make the final definition of the A350 aircraft,” Noel Forgeard, co-chief executive officer of European Aeronautic Defense and Space Co., said at the Berlin International Air Show. “Do not expect announcements now, but I think we can say that the definitive decision should be made before the Farnborough Air Show in July.”

...

French officials said a final decision on seeking launch aid for the A350 should come before the start of the Farnborough Air Show near London in mid-July.

...

“If it (Airbus) decides that the A350 needs its specifications changed ... it will talk about any necessary expenditure first with the shareholders of Airbus and then in second process we will have a consultation before the summer break with the governments,” Adamowitsch said.⁹⁷⁸

599. **June 2006:** Amid the costly A380 crisis, Airbus recognized the need for LA/MSF to the A350 and the member States expressed their support, even as they were careful in their public actions to avoid undermining their position during the pendency of the underlying dispute:

“As far as we can see, the negotiations have not led to anything,” said Rainer Ohler, an Airbus spokesman. He stopped short of saying that Airbus would request the aid – which could run into billions of euros - but called the money “*indispensable*” for establishing what he called a level playing field with Boeing. “Launch aid is the only available system right now,” he said.

In October, European governments put on ice a decision on subsidy payments for the A350 in a “good-will gesture” to Washington as talks to resolve the subsidy dispute got under way.

⁹⁷⁷ Dominic Gates, *Airplane Kingpins tell Airbus: Overhaul A350*, Seattle Times (Mar. 29, 2006) (Exhibit USA-24) (“Airbus will have to deal with this issue or accept a silver medal instead of a gold. . .”).

⁹⁷⁸ *Airbus to decide by July on A350 design*, Seattle Post-Intelligencer (May 16, 2006) (Exhibit USA-356) (emphasis added).

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However, a senior Airbus executive... *stressed that any decision to ask for the loans would be largely symbolic at first, since it would take at least a year before any such aid could be drawn upon.*

...

Meanwhile, the {A380} delivery delays will cut into profit. The financial pressures on EADS, which owns 80 percent of Airbus, have made *state support indispensable* for Airbus, industry experts say.

“This is no longer a mere product-development launch aid, it is *a rescue package: This aid is absolutely essential*,” said Richard Aboulafia, an analyst at Teal Group, an aerospace and military consulting group based in Fairfax, Virginia. “The prospect of a trade war has ratcheted up a notch.”

The crisis at Airbus appears to have persuaded government officials in several European capitals that the case for subsidies has been strengthened.

“*We are willing, within logical limits, to give sufficient support to EADS to help it through these problems*,” Prime Minister José Luis Rodríguez Zapatero of Spain said after a European Union summit meeting on Friday.

At the French Transport Ministry, a spokeswoman, Laurence Lasserre, said the selfimposed freeze could not be expected to last indefinitely.

...

Inside EADS and Airbus, executives said financial pressures created a pressing need to seek aid. “For Airbus, launch aid is becoming topical again,” one executive familiar with the company’s financial situation said. “*When the coffers are empty the pressure rises.*”

The process of formalizing a request for launch aid takes a long time. First, Airbus must decide how it will overhaul the A350’s design. The new design is expected to be unveiled at the Farnborough air show in England on July 17. After that, management must hammer out a business plan and present it to shareholder governments.⁹⁷⁹

600. **July 2006:** Airbus unveiled the new A350 XWB at the Farnborough Air Show. In a communiqué at the same air show, ministers responsible for the civil aerospace industries in France, Germany, Spain, and the United Kingdom:

⁹⁷⁹ Katrin Bennhold, *Airbus looks likely to seek state assistance*, Int’l Herald Tribune (June 18, 2006) (Exhibit USA-357) (emphasis added).

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welcomed Airbus's response to the market and its intention to launch an all-new family of widebody aircraft. The Ministers confirmed their commitment to support the European aerospace industry. They reaffirmed their agreement to support Airbus to continue to innovate and to develop programmes in the context of international competition.⁹⁸⁰

The EU tries to dismiss these statements by the member States as generic support “for the European aerospace industry – which is much broader than Airbus.”⁹⁸¹ The EU rebuttal is unpersuasive; the communiqué explicitly refers to “an all-new family of widebody aircraft” – *i.e.*, the A350 XWB – and to the member States’ “agreement to support Airbus.” The EU also mischaracterizes this communiqué as the only evidence adduced by the United States to show that A350 XWB LA/MSF enabled Airbus to launch and bring that aircraft to market.⁹⁸² The communiqué is far from the only relevant evidence on this point, as shown here and in the U.S. first written submission.⁹⁸³

601. **October 2006:** Airbus was “seriously questioning” whether it had the ability to finance the A350 XWB,⁹⁸⁴ especially as it remained mired in the “monumental task” of bringing the A380 into commercial service.⁹⁸⁵ EADS co-CEO Tom Enders stated that the A380 problems had carved

huge holes out of our resources. . . we have to take cost-cutting measures to compensate for this. . . . We don't want the A380 to be the last model we build. We want to keep making new airplanes.⁹⁸⁶

The A380 crisis gave Airbus every reason to continue its long-standing reliance on LA/MSF by obtaining LA/MSF for the A350 XWB. EADS' Chief Financial Officer Hans Peter Ring had to reassure investors that the company had a “roadmap” to overcome the A380 crisis, which included protecting its “conservative balance sheet structure” and “avoid{ing} unnecessary capital increase (no need nor intention to issue shares any time soon).”⁹⁸⁷ Relying on LA/MSF is

⁹⁸⁰ Airbus governments' communiqué at 2006 Farnborough Air Show (July 17, 2006) (Exhibit USA-31); *EC – Large Civil Aircraft (Panel)*, para. 7.674.

⁹⁸¹ EU FWS, para. 1103.

⁹⁸² EU FWS, para. 1103 (“the United States merely relies on a vague communiqué at the Farnborough Show in July 2006.”)

⁹⁸³ See, e.g., US FWS, paras. 379-388.

⁹⁸⁴ Thomas Enders Interview, *Le Monde* (Oct. 13, 2007) (Exhibit USA-8); Aaron Karp, *Airbus/EADS officials concede Boeing advantage, question A350 viability*, *Air Transport World Daily News* (Oct. 6, 2006) (Exhibit USA-9);

⁹⁸⁵ Mark Piling, *Dream date*, *Airline Business* (Apr. 1, 2004) (Exhibit USA-10).

⁹⁸⁶ Susanna Ray, *EADS' Enders Says Airbus Deliveries May Rise in 2007 (Update 1)*, *Bloomberg* (Oct. 19, 2007) (Exhibit USA-34).

⁹⁸⁷ EADS presentation by EADS CFO Hans Peter Ring, *A New Base for the Future* (Oct. 19-20, 2006) at slide 11 (Exhibit USA-358).

the obvious way to retain a conservative balance sheet and avoid a capital increase, as LA/MSF is not treated as debt by ratings agencies. Immediately after discussing this roadmap, Mr. Ring noted European member State's pledges of support for Airbus, including French President Jacques Chirac's declaration that he would take "full responsibility" to help Airbus overcome "its current difficulties" and Airbus "will always find the State at its side".⁹⁸⁸

Recent Press Quotes

« The leaders of France and Germany pledged support for Airbus ... »

« At a summit between the French and German governments, German Chancellor Angela Merkel confirmed that Berlin was considering the option of buying a stake in Airbus parent EADS but said no decision had been made yet. "Airbus and EADS are in difficulties but that does not prevent us from saying clearly that we have confidence in this product and the problems must be dealt with quickly and comprehensively," Merkel told a joint news conference. »

« Le président Jacques Chirac "prendra toutes ses responsabilités pour qu'Airbus puisse continuer à se développer et surmonte ses difficultés actuelles", a-t-on appris lundi dans l'entourage du chef de l'Etat. "L'entreprise a des difficultés et l'idée est de l'aider à les surmonter. Airbus trouvera toujours l'Etat à ses côtés", ajoutait-on de même source. »

Last but not least:

« U.S. Commerce Official says Germany should be careful about intervening in EADS crisis »

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That same month, the UK Minister for Industry and the Regions Margaret Hodge confirmed that she is "in regular contact with Airbus and EADS about a wide range of issues, including the UK's role in the proposed A350 XWB aircraft."⁹⁸⁹ She stated that "{t}he Government are working hard to safeguard British interests and will remain in close contact with EADS and Airbus as they work through the implications of ensuring that Airbus remains competitive."⁹⁹⁰

602. **November 30, 2006:** EADS shareholders agreed "on a €10bn (\$13bn) financing package for the Airbus A350 airliner" that included member State government "guarantees" at a level very close to the amount of A350 XWB LA/MSF that was announced later:

The French government, which holds 15 per cent of EADS, was on Thursday night understood to have *agreed to provide a state guarantee for part of the financing plan.*

⁹⁸⁸ EADS presentation by EADS CFO Hans Peter Ring, *A New Base for the Future* (Oct. 19-20, 2006) at slide 12 (Exhibit USA-358).

⁹⁸⁹ United Kingdom House of Commons Hansard Debates, colloquy of Mr. Gordon Prentice and Minister for Industry and the Regions Margaret Hodge (Oct. 23, 2006) (Exhibit USA-35).

⁹⁹⁰ United Kingdom House of Commons Hansard Debates, colloquy of Mr. Patrick Mercer and Minister for Industry and the Regions Margaret Hodge (Oct. 30, 2006) (Exhibit USA-36).

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According to people close to the discussions, some €6bn of the A350's development cost will be funded by EADS internally and *a further €4bn through financing backed by state guarantees from the four countries supporting Airbus: France, the UK, Germany and Spain.* This could be a combination of bond issue, reimbursable loans, or other measures.

A person close to the talks said the structure of the €4bn component of the funding had yet to be decided and was likely to remain unresolved for some time. EADS and its shareholders are keen to avoid inflaming a trade dispute between the US and European Union over state aid to Airbus.

...

EADS is expected initially to fund the A350 from cash reserves, estimated by one insider at €4bn, and €2bn in cost savings due to be achieved by 2010 from a recently announced restructuring programme. However, this will constrain overall group resources.⁹⁹¹

It is clear that the A350 XWB launch decision was predicated, not on “vague promises” of support as the EU describes the U.S. argument.⁹⁹² Rather the decision to launch the A350 XWB was based on French, German, Spanish, and UK “guarantees” covering roughly one-third of the A350 XWB's projected development costs. Information on the form of those guarantees was deliberately kept out of the public domain by Airbus and member State officials “to avoid inflaming a trade dispute between the US and European Union over state aid to Airbus.” It is now known that the government guarantees took the form of LA/MSF. With such guarantees, Airbus could wait until 2009 for the “formal” conclusion of the LA/MSF agreements and first disbursements of LA/MSF because only in 2010 would the bulk of the program's development spending begin.

603. ***December 1, 2006:*** Airbus officially launched the A350 XWB, and all four member States were again reported to have agreed to help Airbus to finance the aircraft.⁹⁹³

604. ***December 4, 2006:*** Airbus CEO Louis Gallois admitted that the board of EADS has asked Airbus to look at all the funding options for the aircraft, “not excluding any of them,” and that Airbus refused to rule out LA/MSF for the A350 XWB.⁹⁹⁴ In addition, French Economy and Finance Minister Thierry Breton confirmed that same day that, “{t}he four governments

⁹⁹¹ Peggy Hollinger, *Deal struck on Airbus A350 funding*, Financial Times (Nov. 30, 2006) (Exhibit USA-334) (emphasis added).

⁹⁹² EU FWS, para. 1104.

⁹⁹³ *Nous sommes prêts à prendre nos responsabilités*, La Tribune, p. 30 (Dec. 4, 2006) (Exhibit USA-37).

⁹⁹⁴ Aude Lagorce, *Airbus refuses to rule out state loans on the A350XWB*, MarketWatch (Dec. 4, 2006) (Exhibit USA-359).

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concerned have announced that they would provide guarantees at similar conditions.”⁹⁹⁵ Given this evidence, the EU cannot credibly claim that LA/MSF to the A350 XWB did not figure into Airbus’s launch decision.

605. ***December 6, 2006:*** UK Minister for Industry and the Regions Margaret Hodge confirmed before the UK House of Commons that an agreement “in principle” was reached with Airbus “on a number of issues” at the July 2006 Farnborough Air Show that resulted in the government communiqué, and that the UK Government was in confidential negotiations with Airbus that it and the other Airbus governments could “see {Airbus} through its immediate problems”⁹⁹⁶:

The hon. Gentleman asked me a number of questions, including what the Secretary of State had agreed with EADS on the position of Airbus following the sale by BAE Systems of its shares. *An agreement was reached in principle in Farnborough on a number of issues.*

. . .

All the detailed negotiations are currently taking place. As soon as they have reached a conclusion, we will be able to talk about them more openly. Our aim is to secure Britain’s best interest in the development of the new A350 XWB, and we are engaged in close negotiations on those issues with EADS and with the other Governments who have a stake in its development and production. . . .

. . .

*We will have to negotiate our way forward with the company. It faces considerable challenges at present, but I agree with the hon. Gentleman that it has a good long-term future. If we can see it through its immediate problems, and work with it and the other countries that have an interest in ensuring that there is a good European aerospace capacity to compete with the American capacity, that will be of benefit to ourselves and to the company.*⁹⁹⁷

The EU has attempted to portray Ms. Hodge and other UK government officials as only concerned about “the competitiveness of the Airbus’s UK subsidiary within the Airbus group, not EADS/Airbus’s ability to fund the A350XWB without financing.”⁹⁹⁸ Yet, Ms. Hodge is

⁹⁹⁵ Aude Lagorce, *Airbus refuses to rule out state loans on the A350XWB*, MarketWatch (Dec. 4, 2006) (Exhibit USA-359).

⁹⁹⁶ United Kingdom House of Commons Hansard Debates, colloquy of Mr. Steve Webb and Minister for Industry and the Regions Margaret Hodge (Dec. 6, 2006) (Exhibit USA-360).

⁹⁹⁷ United Kingdom House of Commons Hansard Debates, colloquy of Mr. Steve Webb and Minister for Industry and the Regions Margaret Hodge (Dec. 6, 2006) (Exhibit USA-360).

⁹⁹⁸ EU FWS, para. 1135.

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clear that the United Kingdom’s support of Airbus was necessary to “see it through its immediate problems” and “ensur{e} that there is a good European aerospace capacity to compete with the American capacity.”⁹⁹⁹

606. **February 2007:** The German Federal Government reported to the Bundestag that no further information on A350 XWB support could be provided, in light of ongoing WTO litigation and confidentiality obligations vis-à-vis Airbus.¹⁰⁰⁰

607. **March 24, 2007:** Margaret Hodge, was asked by a Member of Parliament, “do you intend to provide Launch Aid support for the A350 XWB?”¹⁰⁰¹ In response she never denied that was the UK’s intent and stated that the government was “clearly in discussion with EADS and Airbus on the sort of support that might be required with developing the new model.”¹⁰⁰² Without revealing details, Ms. Hodge clearly linked government support to the A350 XWB to the UK’s “good record of supporting Airbus” with LA/MSF:

I am sorry. I do not think I can tell you more, with the greatest respect, than I have said in that statement. We are in negotiation and discussion. We have a good record of supporting Airbus in the development of all its new models. We have put £1.2 billion of Launch Aid in and secured a return so far of £1.3 billion for that £1.2 billion investment, and we are in discussion with Airbus, as are the other countries, around what further support they require.¹⁰⁰³

With its reference to discussions between Airbus and all the member States, Ms. Hodge’s discussion of giving Airbus the support it “require{s}” cannot be fairly read as pertaining to the division of labor among Airbus’s subsidiaries, as the EU would have it.¹⁰⁰⁴ The EU’s attempt to characterize relevant UK government statements as saying “nothing about EADS/Airbus’s ability as a whole to fund the A350 XWB” cannot be reconciled with the statement by Mark

⁹⁹⁹ United Kingdom House of Commons Hansard Debates, colloquy of Mr. Steve Webb and Minister for Industry and the Regions Margaret Hodge (Dec. 6, 2006) (Exhibit USA-360).

¹⁰⁰⁰ Deutscher Bundestag, 16. Wahlperiode, Drucksache 16/4388, of 27 February, 2007, p. 4 (question from Representatives Shui, Dreibus, Holl, etc.) (Exhibit USA-39); *Le Tour de passe-passe\ d’Airbus pour financier son A400M*, La Tribune (Feb. 3, 2011) (Exhibit USA-40) (citing the French government’s “silence radio” on the terms of LA/MSF for the A350 XWB); *A350 va recevoir les premiers financements en 2010*, Les Echos, note 20568 (Dec. 8, 2009) (Exhibit USA-41) (indicating that the details of France’s disbursements would not be made public in order to avoid exacerbating tensions with the United States).

¹⁰⁰¹ United Kingdom House of Commons Trade and Industry Committee, *Recent Developments with Airbus – Volume II - Oral and Written Evidence* (June 19, 2007), p. Ev 22-23 (Exhibit USA-25).

¹⁰⁰² United Kingdom House of Commons Trade and Industry Committee, *Recent Developments with Airbus – Volume II - Oral and Written Evidence* (June 19, 2007), p. Ev 22-23 (Exhibit USA-25) (emphasis added).

¹⁰⁰³ United Kingdom House of Commons Trade and Industry Committee, *Recent Developments with Airbus – Volume II - Oral and Written Evidence* (June 19, 2007), p. Ev 22-23 (oral evidence provided by Margaret Hodge on Mar. 24, 2007 in response to Q139 (Exhibit USA-25)).

¹⁰⁰⁴ EU FWS, para. 1135.

Russell of the UK Shareholder Executive that same day. While noting the sensitivity of government support “given the WTO issues,” he discussed Airbus’s need for additional capital:

I think it is fair to say that Airbus have been through a great deal over the last few months and the future financing of Airbus has not been top of their agenda. Power8 and management changes have been really what have been using management time. *There is no doubt, if you look out on the financing of Airbus, that there will come a point where they will need to raise additional capital.* They have not yet provided us with detailed forecasts so we do not precisely know, but in terms of analysts’ reviews of the business it is pretty clear that they will need some sort of support.¹⁰⁰⁵

608. **March 27, 2007:** Airbus UK Managing Director Iain Gray was asked about the A350 XWB launch and whether Airbus needed “any financial support from the Government.” He responded in the affirmative: “We do need it, unambiguously we do need that.”¹⁰⁰⁶ The EU contends that this statement referred to enhancing the competitiveness of Airbus UK vis-à-vis Airbus operations in other countries, and not to “EADS/Airbus’ ability as a whole to find the A350XWB absent financing.”¹⁰⁰⁷ To the contrary, Airbus is the sum of its parts, and the fact that a key part of Airbus – the UK division responsible for A350 XWB wing components – “needed” government financial support does indeed undermine the EU’s claims that LA/MSF was not necessary to bring the A350 XWB to market.

609. **March 31, 2007:** The UK Department of Trade and Industry noted that during its April 1, 2006 to March 31, 2007, reporting period, the UK Government’s Shareholder Executive had led the UK Government’s consideration of an application from Airbus for “launch investment in connection with the A350.”¹⁰⁰⁸ Thus, Airbus had already requested LA/MSF from the United Kingdom.

610. **July 17, 2007:** Airbus CEO Louis Gallois admitted to “counting on some form of European government assistance” for the A350 XWB, in a report noting Airbus’s funding constraints with respect to the program:

¹⁰⁰⁵ United Kingdom House of Commons Trade and Industry Committee, *Recent Developments with Airbus – Volume II - Oral and Written Evidence* (June 19, 2007) at Ev 22-23 (oral evidence provided by Mark Russell, UK Shareholder Executive on Mar. 24, 2007) (emphasis added) (Exhibit USA-25).

¹⁰⁰⁶ United Kingdom House of Commons Trade and Industry Committee, *Recent Developments with Airbus – Volume II - Oral and Written Evidence* (June 19, 2007), p. Ev 7 (oral evidence provided by UK Managing Director Iain Gray on Mar. 27, 2007) (Exhibit USA-25).

¹⁰⁰⁷ EU FWS, para. 1135.

¹⁰⁰⁸ UK Department of Trade and Industry Annual Report 2006-2007, p. 107 (2007) (Exhibit USA-38) (“In this role over the last year, the Shareholder Executive continued to lead Government involvement in Bombardier Aerospace (an application for launch investment in connection with the proposed C Series aircraft) and Airbus (also an application for launch investment in connection with the A350).”).

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Until it has a larger book of orders, Airbus will have a hard time raising capital to help finance the 11.8 billion-euro cost of developing the A350 XWB. Airbus may need financing by late next year, when engineering and tooling costs start to rise as it begins to build the plane. EADS had 3.5 billion euros in its treasury at the end of March, down from 4.2 billion euros on Dec. 31.¹⁰⁰⁹

611. ***January 2008:*** Airbus indicates that “concrete” requests for government financing for the A350 XWB would be made after finalization of aircraft designs:

Thomas Enders, the Airbus chief executive, said the detailed design for the A350-XWB could be completed as early as this summer, about 18 months after the company's parent, European Aeronautic Defense & Space, authorized production of the plane, a twice-redesigned competitor to Boeing's hot-selling 787 Dreamliner.

According to one Airbus executive, once the detailed blueprints for the plane are defined, the company will be in position to present Germany, France and other European governments with concrete requests for financing the A350-XWB, which is expected to cost at least €10.5 billion, or \$15.4 billion, to develop.¹⁰¹⁰

612. [[HSBI]]¹⁰¹¹ [[HSBI]]¹⁰¹² [[HSBI]]¹⁰¹³ [[HSBI]]¹⁰¹⁴ [[HSBI]]¹⁰¹⁵

613. ***Before June 29, 2009:*** The UK Government conducted a “detailed analysis” of the A350 XWB business case prepared by Airbus,¹⁰¹⁶ and on that basis, determined that LA/MSF should be provided to the A350 XWB because “no viable commercial financing is available”¹⁰¹⁷

¹⁰⁰⁹ Andrea Rothman, *Airbus Struggles to Win Orders, End Nosedive Triggered by A380*, Bloomberg (July 17, 2007) (Exhibit USA-361).

¹⁰¹⁰ Nicola Clark, *Airbus to seek government aid for A350 in second half*, New York Times (Jan. 16, 2008) (Exhibit USA-434).

¹⁰¹¹ *See, e.g.*, [[HSBI]].

¹⁰¹² *See, e.g.*, [[HSBI]].

¹⁰¹³ *See, e.g.*, [[HSBI]].

¹⁰¹⁴ *See, e.g.*, [[HSBI]].

¹⁰¹⁵ *See, e.g.*, [[HSBI]].

¹⁰¹⁶ United Kingdom House of Commons, Answers to Questions by Ian Lucas, Minister of State, Department for Business, Innovation and Skills, June 23, 2009 (published June 29, 2009) (Exhibit USA-152).

¹⁰¹⁷ United Kingdom House of Commons Business, Innovation and Skills Committee, *Full Speed Ahead*, p. 11 (Mar. 22, 2010) (Exhibit USA-44) (emphasis added).

and because LA/MSF was “essential for the project to proceed on the scale and in the timeframe specified.”¹⁰¹⁸

614. ***Beginning in June 2009:*** Information concerning formal LA/MSF agreements between Airbus and the member States first became publicly available. It is now known that Airbus received commitments for a total of €3.5 billion in A350 XWB LA/MSF from the governments of France, Germany, Spain, and the United Kingdom,¹⁰¹⁹ with the first amounts distributed that same year. As they did with past grants of LA/MSF, the EU member States then memorialized their financing arrangements through LA/MSF contracts with fixed terms and conditions. France and Airbus concluded “*le protocole XWB*” on June 23, 2009.¹⁰²⁰ The United Kingdom announced that it would grant Airbus £340 million in LA/MSF for the A350 XWB in August 2009.¹⁰²¹ Germany concluded an agreement in September 2009 to grant Airbus €1.23 billion, an increase from the €1.1 billion previously announced at the Paris air show.¹⁰²² Spain issued a royal decree in 2009, promising Airbus €32.2 million.¹⁰²³

615. ***December 2009:*** Airbus CEO Louis Gallois stated that “he expected loans from EADS’s founding governments to help with the estimated €12bn cost of the project” and that, despite the cash drain from aircraft deferrals coinciding with the industrialization of the A350 XWB program, the program “is fine” and denied that the A350 XWB would require additional shareholder funding.¹⁰²⁴ Mr. Gallois assessment of the program’s finances was explicitly based on “loans from EADS’s founding governments,” contradicting the EU’s attempt to use Mr.

¹⁰¹⁸ United Kingdom House of Commons Business, Innovation and Skills Committee, *Full Speed Ahead*, p. 10 (Mar. 22, 2010) (Exhibit USA-44).

United Kingdom House of Commons Business, Innovation and Skills Committee, *Full Speed Ahead*, p. 10 (Mar. 22, 2010) (Exhibit USA-44) (emphasis added).

¹⁰¹⁹ E.g., Kevin Done & Peggy Hollinger, *Airbus set to gain aid for A350*, Financial Times (June 15, 2009) (Exhibit USA-7).

¹⁰²⁰ *Avenant n° 1 à la convention “recherche dans le domaine de l’aéronautique” du programme d’investissements d’avenir*, JORF n° 0119 (May 22, 2011), NOR: PRMX1113852X (citing “{l}’accord entre l’Etat et Airbus relatif à ce programme signé le 23 juin 2009 – protocole ci-après dénommé le ‘protocole A350 XWB’”) (Exhibit USA-42).

¹⁰²¹ E.g., UK Department for Business Innovation & Skills, *The UK Strategic Investment Fund Interim Report*, p. 15 (Oct. 2009) (Exhibit USA-43); see also House of Commons, Business, Innovation and Skills Committee, *Full speed ahead: maintaining UK excellence in motorsport and aerospace*, Sixth Report of Session 2009-10, p. Ev 65 (citing the UK’s £340 million Launch Aid commitment for the A350 XWB) (Exhibit USA-44).

¹⁰²² Andrea Rothman & Brian Parkin, *Airbus A350 Loan Projects at Least 1,500 Deliveries (Update1)*, Bloomberg (Sept. 17, 2009) (Exhibit USA-45).

¹⁰²³ *Real Decreto 1666/2009, de 6 de noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350 XWB*, BOLETÍN OFICIAL DEL ESTADO DE ESPAÑA, Num. 270, Sec. 1, Pag. 93091 (Nov. 9, 2009) (Exhibit USA-46).

¹⁰²⁴ Peggy Hollinger and Pilita Clark, *Deferrals to take toll on EADS’ cash pile*, Financial Times (Dec. 7, 2009) (Exhibit USA-153).

Gallois' statement to support its assertion that Airbus could have funded the A350 XWB without LA/MSF.¹⁰²⁵

616. In sum, the chronology of events set forth above shows a continuum of EU support for the A350 XWB program, in which “agreements in principle” in July 2006 solidified into European government “guarantees” underpinning the December 2006 launch decision, which were formalized in the LA/MSF agreements starting in mid-2009, just as the program’s development spending began to ramp up. Amid the risks inherent in developing new LCA, the A380 crisis, and the declining fortunes of the A340, Airbus made the 2006 launch decision secure in the knowledge that it had received LA/MSF for all of the LCA program launches in its history, that the European member States had offered LA/MSF for the prior iteration of the A350, and that they had guaranteed further support for the A350 XWB. Airbus was able to proceed with the A350 XWB because, following the promises of government support, it began receiving LA/MSF funds just as the program’s development costs became acute, with LA/MSF filling a funding gap that Airbus could not have filled otherwise, as discussed below.

d. The EU has failed to show that the Airbus could have funded the A350 XWB program without LA/MSF.

617. Looking past Airbus, the EU asserts that EADS could have funded the A350 XWB program absent LA/MSF to the A380 and A350 XWB, by relying on an indeterminate mixture of funds from internal and external sources (*i.e.*, cash that was actually distributed to shareholders by EADS, gross cash held by EADS, and additional debt), and additional support from risk-sharing suppliers.¹⁰²⁶ The EU’s arguments concede key points and are otherwise contradicted by the evidence:

- As discussed, the EU does not attempt to demonstrate that Airbus could have funded the A350 XWB program without some or all of the LA/MSF provided to Airbus models preceding the A380, despite the fact that such LA/MSF has not been withdrawn, and that the absence of such LA/MSF would have forced Airbus to delay the A350 XWB’s launch (or, indeed, the launch of any other major LCA program) until at least 2019;¹⁰²⁷
- The EU ignores statements from Airbus and European governments confirming that Airbus was unable to fund all of the A350 XWB development costs on a commercial basis;
- Even as it ignores the aforementioned factors, the EU does not attempt to show that Airbus could have funded the A350 XWB program without LA/MSF; instead, it improperly focuses on the counterfactual funding capabilities of Airbus’s parent, EADS. And even then it errs in presuming that EADS could have, and would have, diverted its resources from other uses to the A350 XWB program; and

¹⁰²⁵ Cf. EU FWS, para. 1144.

¹⁰²⁶ EU FWS, paras. 1338-1144.

¹⁰²⁷ See Wessels Report, pages 5-6 (Exhibit USA-364).

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- The EU also errs in presuming that “EADS/Airbus”¹⁰²⁸ could have replaced part of the LA/MSF funding by relying on much larger contributions from risk-sharing suppliers, especially considering that a number of these suppliers are themselves dependent on EU member State aid for their ability to participate at their actual, lower levels, and/or are EADS subsidiaries.

The United States discusses these points below.

- The EU erroneously excludes pre-A380 LA/MSF from the counterfactual analysis of Airbus’s ability to fund the A350 XWB program.*

618. As discussed above, the EU’s counterfactual analysis of EADS’ ability to fund the A350 XWB fails to account for pre-A380 LA/MSF, based on the flawed premise that all pre-A380 LA/MSF has been withdrawn.¹⁰²⁹ The effects of all pre-A350 XWB LA/MSF are properly part of the Panel’s analysis of adverse effects compliance, and these subsidies are still causing present adverse effects.

619. The failure of the EU’s A350 XWB counterfactual funding arguments is confirmed in the aforementioned quantitative analysis by Professor Wessels, which assesses Airbus’s ability to undertake a major new LCA program absent LA/MSF.¹⁰³⁰

620. As discussed, Professor Wessels proceeds under the “impossible” counterfactual scenario contemplated by the original Panel, whereby Airbus would have approached the A380 launch point having launched all of its earlier LCA through commercial financing, but with “massive” debt as a result.¹⁰³¹ Under these conditions, Professor Wessels calculates that Airbus’s debt in 2001 would have been at least €24.3 billion. Paying down this debt to manageable levels would have required Airbus to delay its next major LCA program – that is, delay any new development program on the scale of the A380 or A350 XWB – until at least 2019.¹⁰³² Only at that point would Airbus have obtained the minimum investment grade credit rating necessary to internally fund new projects and raise funds from external investors and risk-sharing suppliers.¹⁰³³

621. Thus, even granting the EU the benefit of an “impossible” counterfactual that is more favorable than the any of the likely counterfactual scenarios absent LA/MSF, Airbus would have been unable to launch the A350 XWB until 2019, and even then it would have to choose between

¹⁰²⁸ EU FWS, para. 1137.

¹⁰²⁹ The EU also contends that A380 LA/MSF has been withdrawn, but it apparently is less confident of persuading the Panel on this point, since it makes some gestures toward reflecting the effects of A380 LA/MSF in its counterfactual arguments concerning the A350XWB.

¹⁰³⁰ See Section VI.D.3 of this submission; see also Wessels Report (Exhibit USA-364).

¹⁰³¹ *EC – Large Civil Aircraft (Panel)*, para. 7.1948; see also *id.*, paras. 7.1984, 7.1993.

¹⁰³² Wessels Report, p. 6 (Exhibit USA-364).

¹⁰³³ Wessels Report, p. 3-6 (Exhibit USA-364).

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launching either the A350 XWB or the A380. Professor Wessels' analysis accords with the common sense proposition that a company with debt at below-market rates can fund new product development at a faster rate than a company that is forced to pay commercial rates.¹⁰³⁴ It also accords with the original Panel's findings that "the magnitude of the specific subsidies is certainly sufficient to have had the effect of enabling Airbus to launch successive models of LCA at a pace it could not otherwise have achieved."¹⁰³⁵ If Airbus would choose to launch the A380 at the first opportunity, then the A350 XWB's launch and promised initial deliveries would be many more years later than the actual 2006 launch and 2013 promised initial deliveries. Professor Wessels' work disproves all EU arguments that Airbus could have funded the A350 XWB program absent LA/MSF. This is before one even considers the views expressed by Airbus and European governments that Airbus needed additional government support to fund the A350 XWB program, even after it had already received massive LA/MSF subsidies for earlier LCA programs. Those statements are discussed in the following section.

ii. The EU ignores Airbus and European government statements attesting to Airbus's inability to obtain adequate commercial funds.

622. Contrary to the EU's assertions, the evidence confirms that that Airbus and government officials believed that government funding was necessary to proceed with the A350 XWB.

623. Most notable is [[HSBI]]¹⁰³⁶ [[HSBI]]¹⁰³⁷ [[HSBI]]¹⁰³⁸ [[HSBI]]¹⁰³⁹ [[HSBI]]¹⁰⁴⁰
This conclusion accorded with [[HSBI]]¹⁰⁴¹

624. This HSBI evidence is consistent with other evidence:

- Two months before the A350 XWB's launch, Airbus's Tom Enders admitted that the company was "seriously questioning" whether it had the ability to finance the A350 XWB,¹⁰⁴²

¹⁰³⁴ Wessels Report, p. 6 (Exhibit USA-364).

¹⁰³⁵ See *EC – Large Civil Aircraft (Panel)*, para. 7.1972.

¹⁰³⁶ See, e.g., [[HSBI]].

¹⁰³⁷ See, e.g., [[HSBI]].

¹⁰³⁸ See, e.g., [[HSBI]].

¹⁰³⁹ See, e.g., [[HSBI]].

¹⁰⁴⁰ See, e.g., [[HSBI]].

¹⁰⁴¹ See, e.g., [[HSBI]].

¹⁰⁴² Thomas Enders Interview, *Le Monde* (Oct. 13, 2007) (Exhibit USA-8); Aaron Karp, *Airbus/EADS officials concede Boeing advantage, question A350 viability*, *Air Transport World Daily News* (Oct. 6, 2006) (Exhibit USA-9);

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- Mark Russell of the UK Shareholder Executive stated in March 2007 that, “[t]here is no doubt, if you look out on the financing of Airbus, that there will come a point where they will need to raise additional capital.”¹⁰⁴³
- Airbus UK Managing Director Iain Gray was asked days later about the A350 XWB launch and whether Airbus needed “any financial support from the Government.” He responded in the affirmative: “We do need it, unambiguously we do need that.”¹⁰⁴⁴
- The UK Government conducted a “detailed analysis” of the A350 XWB business case prepared by Airbus,¹⁰⁴⁵ and on that basis, determined that LA/MSF should be provided to the A350 XWB because “no viable commercial financing is available”¹⁰⁴⁶ and because LA/MSF was “essential for the project to proceed on the scale and in the timeframe specified.”¹⁰⁴⁷
- The French ONERA Agreement, which governs A350 XWB LA/MSF, explains that the fundamental rationale of LA/MSF is to provide loans for capital-intensive undertakings that are not commercially available: “Taking account of the capital intensiveness required for such development operations, recourse to this system is generally necessary to supplement market financial support.”¹⁰⁴⁸
- The European Commission found that “R&D projects linked to the development of the A350 XWB models are exposed to a systematic risk associated with this program,” that “[t]he risks assumed by Airbus, taken together, have difficulties which are *a priori* likely

¹⁰⁴³ United Kingdom House of Commons Trade and Industry Committee, *Recent Developments with Airbus – Volume II - Oral and Written Evidence* (June 19, 2007) at Ev 22-23 (oral evidence provided by Mark Russell, UK Shareholder Executive on Mar. 24, 2007) (emphasis added) (Exhibit USA-25).

¹⁰⁴⁴ United Kingdom House of Commons Trade and Industry Committee, *Recent Developments with Airbus – Volume II - Oral and Written Evidence* (June 19, 2007), p. Ev 7 (oral evidence provided by UK Managing Director Iain Gray on Mar. 27, 2007) (Exhibit USA-25).

¹⁰⁴⁵ United Kingdom House of Commons, Answers to Questions by Ian Lucas, Minister of State, Department for Business, Innovation and Skills, June 23, 2009 (published June 29, 2009) (Exhibit USA-152).

¹⁰⁴⁶ United Kingdom House of Commons Business, Innovation and Skills Committee, *Full Speed Ahead*, p. 11 (Mar. 22, 2010) (Exhibit USA-44) (emphasis added).

¹⁰⁴⁷ United Kingdom House of Commons Business, Innovation and Skills Committee, *Full Speed Ahead*, p. 10 (Mar. 22, 2010) (Exhibit USA-44).

United Kingdom House of Commons Business, Innovation and Skills Committee, *Full Speed Ahead*, p. 10 (Mar. 22, 2010) (Exhibit USA-44) (emphasis added).

¹⁰⁴⁸ ONERA Agreement, art. 3.1 (Exhibit USA-54) (in the original French, “*Les avances récupérables permettent un partage entre l’Etat et l’industrie du risque lié au développement de nouveaux aéronaves. Compte tenu de l’intensité capitalistique requise par ces opérations de développement, le recours à ce dispositif est généralement nécessaire pour compléter les concours financiers de marché.*”) A subsequent amendment makes clear that this regulation covers LA/MSF for the A350 XWB. *Avenant n° 1 à la convention “recherche dans le domaine de l’aéronautique” du programme d’investissements d’avenir*, JORF n° 0119 (May 22, 2011), NOR: PRMX1113852X (Exhibit USA-42) (citing “[l]’accord entre l’Etat et Airbus relatif à ce programme signé le 23 juin 2009 – protocole ci-après dénommé le ‘protocole A350 XWB’”).

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to have an impact on the A350 XWB program,”¹⁰⁴⁹ and that “because of the important risks, manufacturers specializing in aerostructures are globally suffering a general lack of financing, which the current economic and financial crisis is still accentuating.”¹⁰⁵⁰

625. These statements contradict the EU position that the sufficient funds for the A350 XWB program would have been available absent LA/MSF to the A350 XWB.

iii. The EU improperly relies on the financial resources of EADS, apparently conceding that Airbus could not have replaced A350 XWB funding on its own, and presuming that Airbus could have relied on EADS shareholder distributions and gross cash.

626. The EU’s counterfactual analysis is unsupportable even on its own, unduly narrow terms. The EU contends that “EADS could have funded development of the . . . A350XWB without . . . member State financing loans.”¹⁰⁵¹ Notably, the EU does not make the same claim with respect to Airbus,¹⁰⁵² apparently accepting Airbus could not have funded the A350 XWB program without A350 XWB LA/MSF.

627. This is a remarkable concession, considering that the original Panel and the Appellate Body have already rejected the EU’s attempts to rely on EADS’ funds and access to capital as a counterfactual replacement for LA/MSF subsidies. As with the Appellate Body’s finding rejecting similar EU arguments concerning the LA/MSF to the A380, even if EADS had financial resources available, “it does not necessarily follow that those resources would have been directed to the” A350 XWB project, because EADS has “several units beyond aircraft production, all of which would have competed for internal financial resources.”¹⁰⁵³

628. Nevertheless, the EU proposes that Airbus could have replaced part of the LA/MSF with funds from EADS’ “significant cash holding,”¹⁰⁵⁴ but the cash holding cited by the EU is EADS’ “gross cash” balance as of December 2010.¹⁰⁵⁵ Gross cash is very different from funds that could easily be diverted to the A350 XWB program, because it does not reflect the uses to which the gross cash was put, either directly through commitments to other EADS activities or indirectly by providing investors with confidence that EADS has sufficient financial cushion to

¹⁰⁴⁹ European Commission, State aid N 414/2010 – Belgium – Aid to SABCA ‘Flap Support Structures’ project, para. 52 (Oct. 5, 2011) (Exhibit USA-441).

¹⁰⁵⁰ European Commission, State aid N 414/2010 – Belgium – Aid to SABCA ‘Flap Support Structures’ project, para. 55 (Oct. 5, 2011) (Exhibit USA-441).

¹⁰⁵¹ EU FWS, para. 1144 (“EADS could have funded development of the A380 and the A350XWB without such member State financing loans.”).

¹⁰⁵² Cf. EU FWS, paras. 1131-1144 (referring to the financial resources of EADS, but not those of Airbus).

¹⁰⁵³ *EC – Large Civil Aircraft (AB)*, paras. 1341-1343 (emphasis added).

¹⁰⁵⁴ EU FWS, para. 1144.

¹⁰⁵⁵ EU FWS, para. 1140.

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address future contingencies. For instance, in October 2006, EADS attempted to address investor concerns regarding its multiple crises by protecting its “conservative balance sheet structure,” maintaining a “strong liquidity position,” and retaining a “strong credit rating” for “strategic financial flexibility.”¹⁰⁵⁶ By the end of 2006, EADS had €10 billion in gross cash, but only €4.2 billion in net cash.¹⁰⁵⁷

629. Even if gross cash were a relevant metric in the abstract, the EU is citing EADS’ gross cash as of 2010 as evidence that Airbus could have launched the A380, weathered the A380 crisis and funded the A350 XWB without LA/MSF to those two programs. This misses the point of a “but for the subsidies” counterfactual. Leaving aside the fact that it is EADS’ cash and not Airbus’s cash, the 2010 gross cash figure incorporates the benefits of LA/MSF to the A380 and A350. That is, the figure does not reflect the gross cash that a non-subsidized Airbus would have available after a decade in which it undertook two major LCA programs with a combined projected development cost of at least EUR [***] billion,¹⁰⁵⁸ and paid higher, commercial rates on the capital used to fund those programs (assuming *arguendo* that Airbus would have been in a position to launch those programs in the first place). As EADS describes its cash flows:

EADS generally finances its manufacturing activities and product development programs, and in particular the development of new commercial aircraft, through a combination of flows generated by operating activities, customers’ advance payments, risk-sharing partnerships with sub-contractors and *European government refundable advances*.¹⁰⁵⁹

In effect, the EU is paradoxically trying to use the fact that EADS relies on LA/MSF subsidies for its financing to show that Airbus did not need subsidies. However, Airbus’s counterfactual funding capacity cannot be determined by comparing LA/MSF principal amounts to the amount of EADS’ funds at the end of a decade in which Airbus would otherwise have had to pay commercial costs for the capital it used.

630. The EU makes similar mistakes when it proposes that more than a decade’s worth of EADS’ shareholder distributions could have been diverted to fund “half the capital required for both” the A380 and A350 XWB programs.¹⁰⁶⁰ Investors are no indifferent to distributions in the form of dividends and share repurchases. Reducing shareholder distributions has a very real cost, as explained by a leading text on corporate valuation:

Cutting dividends naturally frees up funding for new investments. But the stock market typically interprets dividend reductions as a signal of lower future cash

¹⁰⁵⁶ EADS presentation by CFO Hans Peter Ring, A New Base for the Future (Oct. 19-20, 2006) at slide 11 (Exhibit USA-358).

¹⁰⁵⁷ EADS financial statements 2006, p. 39-40 (Exhibit USA-457).

¹⁰⁵⁸ EU FWS, para. 1142 note 1461.

¹⁰⁵⁹ EADS financial statements 2006, p. 39 (Exhibit USA-457).

¹⁰⁶⁰ EU FWS, paras. 1139-1141.

flows. As a result, share prices on average decline around 9 percent on the day a company announces dividend cuts or omissions. Furthermore, some investor groups may count on dividends being paid out every year, and skipping these dividends will force them to liquidate part of their portfolio, leading to unnecessary transaction costs.¹⁰⁶¹

Considering that its stock price declined by roughly 50 percent from June 2006 through June 2009,¹⁰⁶² EADS would seem to have had little interest in exacerbating the decline by reducing shareholder distributions.

631. Further, EADS' shareholder repayment decisions are subject to intense dispute even when Airbus enjoys the benefits of LA/MSF, as shown by the failure of the EADS Board of Directors to agree on a dividend policy in the wake of the A350 XWB launch and the A380 crisis.¹⁰⁶³ Accordingly, there is no reason to expect that Airbus could have replaced LA/MSF in part by convincing EADS to eliminate or substantially reduce shareholder distributions.

632. Finally, the EU's assertions regarding EADS' counterfactual funding ability [[HSBI]]¹⁰⁶⁴

iv. The EU errs in presuming that Airbus could have relied on additional funding from risk-sharing suppliers.

633. The EU also proposes that Airbus could have replaced LA/MSF funds in part by having risk-sharing suppliers make significant additional contributions to the A350 XWB development program.¹⁰⁶⁵ The EU asserts that Airbus could have "raised an additional 15 percent of the development costs from risk-sharing suppliers."¹⁰⁶⁶ This amounts to an additional €1.575 billion that risk-sharing suppliers would have had to provide in the midst of the global financial crisis, an 88 percent increase over the actual risk-sharing supplier contribution of €1.8 billion.¹⁰⁶⁷

¹⁰⁶¹ Koller, Goedhart, and Wessels, *Valuation: Measuring and Managing the Value of Companies* (4th ed 2005) at p. 500 (Exhibit USA-442).

¹⁰⁶² EADS website, share price from June 1, 2006, through June 1, 2009 (Exhibit USA-437)

¹⁰⁶³ Kevin Done and Gerrit Wiesmann, EADS unable to agree on payout policy, *Financial Times* (April 10, 2007) (Exhibit USA-362) ("The board of EADS, the Airbus parent company, has been unable to agree either on a dividend policy or on whether to raise fresh capital of €2bn to €4bn (\$2.7bn to \$5.3bn) because of continuing conflict among its core shareholders. EADS Tuesday published the resolutions for its annual shareholders meeting on May 4 but said that "directors could not finally agree a dividend proposal.").

¹⁰⁶⁴ *See, e.g.*, [[HSBI]].

¹⁰⁶⁵ EU FWS, para. 1142.

¹⁰⁶⁶ EU FWS, para. 1142.

¹⁰⁶⁷ In October 2007, EADS Chief Financial Officer Hans Peter Ring stated that risk-sharing partners were expected to contribute €1.8 billion of the A350XWB's development costs, or roughly 17 percent of the program's €10.5 billion total development costs as reported in January 2008. Nicola Clark, *Airbus to seek government aid for A350 in second half*, *NY Times* (Jan. 16, 2008) (Exhibit USA-434). To raise an additional 15 percent of this €10.5

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While it improperly criticizes the United States for failing to anticipate this argument,¹⁰⁶⁸ the EU does not provide any affirmative evidence that risk-sharing suppliers were willing or able to nearly double their contribution to A350 XWB development costs. Instead, the EU presumes that, if Boeing raised roughly 60 percent of the 787's development costs from risk-sharing suppliers, Airbus's risk-sharing suppliers would have increased their share of development spending up to "75 percent of the amount raised by Boeing."¹⁰⁶⁹ The EU risk-sharing supplier arguments fail for five reasons:

- (1) the EU's reliance on Boeing's 787 experience was already rejected by the original Panel and the Appellate Body;
- (2) increasing risk-sharing supplier contributions would have upset Airbus's "make vs. buy" strategy for the A350 XWB program;
- (3) the EU fails to account for how the absence of LA/MSF to Airbus would have increased the risks faced, and returns demanded, by risk-sharing suppliers;
- (4) many of Airbus's risk-sharing suppliers needed LA/MSF and other EU member State aid – accounting for roughly one-quarter of the total actual risk-sharing supplier contribution – just to participate in the A350 XWB program at their actual levels; and
- (5) some Airbus risk-sharing suppliers are EADS subsidiaries, and just as in the original dispute, the EU has not provided any evidence showing that EADS would have diverted additional resources from other uses to the A350 XWB program.

634. *First*, in relying on Boeing's use of risk-sharing suppliers on the 787 program,¹⁰⁷⁰ the EU is making the same argument that was rejected by the original Panel and the Appellate Body. As the Appellate Body said, "[g]iven the significant distinctions between the A380 and 787 projects, and the potentially different risk profiles of Airbus and Boeing, we see no reason to disturb the Panel's assessment of the probative value of the evidence concerning Boeing's use of

billion development cost total, Airbus would have had to obtain an additional €1.575 billion from risk-sharing suppliers, an 88 percent increase over the actual risk-sharing supplier contribution of €1.8 billion

¹⁰⁶⁸ The EU proclaims that the United States "has offered no evidence suggesting that Airbus could not have raised an additional 15 percent of the development costs from risk-sharing suppliers . . ." EU FWS, para. 1142. In fact, the U.S. first written submission did more than "suggest"; it provided decisions from the European Commission concluding that several A350XWB suppliers, some (if not all) of which are risk-sharing suppliers on the program, could not have participated on the program at existing levels, let alone at higher levels, without EU member State LA/MSF and other subsidies. US FWS, paras. 392-393.

¹⁰⁶⁹ EU FWS, para. 1142.

¹⁰⁷⁰ EU FWS, para. 1142.

risk-sharing supplier funding.”¹⁰⁷¹ There is no basis for giving the EU’s risk-sharing supplier argument, including its reliance on Boeing’s 787 development experience, any more weight with regard to the effect of LA/MSF on the A350 XWB than it had for the EU’s A380 causation arguments. Boeing and Airbus are different companies, as the Appellate Body recognized, and the 787 and the A350 XWB programs are different projects. Moreover, Boeing’s use of risk-sharing suppliers says nothing about the willingness and capacity of Airbus to increase its use of risk-sharing suppliers on the A350 XWB program, or of risk-sharing suppliers to undertake additional development costs and risks. The answers to those questions are matters of evidence, and the EU has provided no relevant evidence on these points. In fact, the available evidence undermines the EU position, as discussed below.

635. *Second*, Airbus’s experience shows that conclusions about support from risk-sharing suppliers must be based on the specific facts concerning the circumstances of a specific program, not, as the EU would have it, by casually extrapolating from conjecture about another producer’s LCA program. As Airbus’s parent company recognizes, risk-sharing in the LCA industry is “difficult to implement,” and ensuring the “financial survivability of the supplier base is key.”¹⁰⁷² On the A350 XWB program, Airbus sought a balanced “Make 50%/Buy 50%” approach to using risk-sharing suppliers, whereby “{c}ritical components are kept within Airbus.”¹⁰⁷³ Thus, a threshold issue is whether Airbus, in the absence of LA/MSF, would have been willing to upset this balance, allowing other companies to develop and produce the “critical components” that Airbus would prefer to keep in-house. The EU has presented no evidence to suggest Airbus would do so.

636. *Third*, the Panel must consider the effect of LA/MSF to Airbus on risk-sharing suppliers’ willingness and ability to participate in the A350 XWB program. The provision of LA/MSF to Airbus increases the probability that the A350 XWB program will be successful, thereby decreasing risk for risk-sharing suppliers and lowering the projected minimum returns necessary for them to participate in the program.¹⁰⁷⁴ Thus, *assuming arguendo* that Airbus’s risk-sharing suppliers had the wherewithal to participate in the A350 XWB program at the higher,

¹⁰⁷¹ *EC – Large Civil Aircraft (AB)*, para. 1349. *See also id.*, para. 1348 (“We are not persuaded that in its evaluation of the alleged availability of risk-sharing supplier financing the Panel failed to adequately address the totality of the evidence before it.”).

¹⁰⁷² EADS presentation, Global Investor Forum – Presentation by Marwan Lahoud, EADS Chief Strategy and Marketing Officer (Nov. 15-16, 2010) at 28 (Exhibit USA-363).

¹⁰⁷³ Airbus presentation, A350 XWB Programme Update – Presentation by Francois Caudron, Vice President, Head of A350 Customer & Business Development (July 2010) (Exhibit USA-443).

¹⁰⁷⁴ *See EC – Large Civil Aircraft (AB)*, para. 899 (“Risk sharing suppliers are rational, that is, profit-maximizing, entities. The terms that these suppliers negotiate with Airbus depend on how risky they perceive the specific project being undertaken to be—this is why they are called “risk-sharing” suppliers in the first place. LA/MSF reduces the risk that the project will fail (by, for example, reducing the risk that it will run into financial difficulties) and that it will not generate the revenues necessary to pay suppliers. Thus, it was reasonable from an economic perspective to consider that, all things being equal, the risk sharing suppliers will require a lower rate of return to participate in a project that receives LA/MSF compared to a project that does not receive LA/MSF.”); *id.* at para. 900 (“LA/MSF affects the terms on which the suppliers participate in the Airbus project . . .”).

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counterfactual levels proposed by the EU (a proposition that remains dubious and unsubstantiated, as demonstrated below), there is no evidence that, absent the LA/MSF, the A350 XWB program would provide adequate returns to justify participation by risk-sharing suppliers.

637. *Fourth*, the EU's speculation about a large increase in risk-sharing supplier funding is unfounded in light of the fact that a number of risk-sharing suppliers on the A350 XWB program would have been unable to participate as risk-sharing suppliers *at their actual levels* without state aid from EU member States. The table below summarizes the aid provided to eight A350 XWB suppliers that, based on available information, are risk-sharing suppliers on the program.

EU Member State Aid to A350 XWB Risk-Sharing Suppliers

Supplier	Inputs	State Aid Type	State Aid Amount
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AERNNOVA ¹⁰⁷⁵	Horizontal tail plane fixed parts and elevator; main landing gear bay pressure bulkhead	Below-market loans	€129,200,000
ALESTIS ¹⁰⁷⁶	Tailcone section; belly fairing	Below-market loans	€126,244,112
ARESA ¹⁰⁷⁷	Vertical tail plane; S19 internal structure	Below-market loans	€40,700,000
Daher-Socata ¹⁰⁷⁸	Main landing gear door	LA/MSF	€12,340,000
Diehl Aircabin GmbH ¹⁰⁷⁹	Crew rests; cabin lighting & lining; airducts	LA/MSF	€25,619,099
GKN ¹⁰⁸⁰	Rear spars and fixed trailing edges	LA/MSF	€68,304,000
SABCA ¹⁰⁸¹	Flap support structures	LA/MSF	€32,817,000
SOGERMA ¹⁰⁸²	Main landing gear bay	LA/MSF	€22,800,000
TOTAL EU MEMBER STATE AID:			€458,024,211

¹⁰⁷⁵ European Commission, *State aid N 3/2010 – Spain – AERNNOVA*, paras. 48-50 (Jan. 26, 2011) (Exhibit USA-159) (describing AERNNOVA’s role as a Tier 1 risk-sharing supplier); *id.* at para. 28 (providing amount of loan); *id.* at para. 13 (describing work package).

¹⁰⁷⁶ European Commission, *State aid N 4/2010 and N 7/2010 – Spain – Interest-free loans to Alestis*, para. 30 (Sept. 29, 2010) (Exhibit USA-157) (providing loan amounts); *id.* at paras. 22-25 (describing work packages); *id.* at 46-51 (describing ALESTIS’ role as a Tier-1 risk-sharing supplier).

¹⁰⁷⁷ European Commission, *State aid N 5/2010 and N 6/2010 – Spain – Interest-free loans to ARESA*, paras. 34-35 (July 20, 2010) (Exhibit USA-160) (providing loan amounts); *id.* at paras. 10-26 (describing work packages); *id.* at 62-63 (describing ARESA’s role as a Tier-1 risk-sharing supplier).

¹⁰⁷⁸ European Commission, *State aid N 527/2009 – France – Recuperable advance to Daher-Socata*, paras. 18-28, 33-66 (Apr. 14, 2010) (Exhibit USA-156).

¹⁰⁷⁹ European Commission, *State aid N 296/2009 – Germany – Diehl Aircabin GmbH*, para. 63 (Dec. 15, 2009) (Exhibit USA-161) (providing amounts of reimbursable advances); *id.* at paras. 19-22 (describing work packages); *id.* at para. 101 (describing Germany’s interest in giving aid to Tier-1 risk-sharing suppliers); *see also* Airbus presentation, A350 XWB Programme Update – Presentation by Francois Caudron, Vice President, Head of A350 Customer & Business Development (July 2010) (Exhibit USA-443) (showing Diehl as one of the “A350 XWB Risk Sharing Partners” on “cabin work packages”).

¹⁰⁸⁰ European Commission, *State aid N 357/2009 -- United Kingdom – Individual R&D aid to GKN ASL*, para. 53 (Sept. 15, 2009) (Exhibit USA-158) (providing amount of reimbursable advance); *id.* at paras. 9-49 (describing work packages); *see also* Airbus presentation, A350 XWB Programme Update – Presentation by Francois Caudron, Vice President, Head of A350 Customer & Business Development (July 2010) (Exhibit USA-443) (showing GKN as a risk sharing partner on the A350 XWB “big Aero structure Work Packages”). The amount of the reimbursable advance to GKN is GBP 60 million, converted to euros at the 1.1384 EUR/GBP rate prevailing in July 2009.

¹⁰⁸¹ European Commission, *State aid N 414/2010 – Belgium – Aid to SABCA ‘Flap Support Structures’ project*, para. 32 (Oct. 5, 2011) (Exhibit USA-441) (providing amount of reimbursable advance; *id.* at paras. 24-26 (describing work packages).

¹⁰⁸² European Commission, *State aid N 525/2009 – France – SOGERMA*, para. 32 (April 14, 2010) (Exhibit USA-444) (providing amount of reimbursable advances); *id.* at paras. 15-17 (describing work packages).

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638. These eight risk-sharing suppliers received €458 million in State aid, or roughly 25 percent of the €1.8 billion¹⁰⁸³ total contribution from risk-sharing suppliers to the A350 XWB's development costs. The situation of these suppliers contradicts what the EU assumes – that Airbus would have been able to raise an additional €1.575 billion from risk-sharing suppliers in the absence of LA/MSF to Airbus. This is evident from the European Commission's state aid decisions.

639. ***Obstacles to funding A350 XWB projects.*** The European Commission found that obtaining external commercial financing, including risk-sharing support, for LCA-related projects is inherently difficult, particularly so in the case of the A350 XWB program, which entails significant technical and commercial risks. In one of many such findings, the Commission stated:

In addition to the technical risks, the projects face market and commercial risks, stemming from the programme itself (difficulties likely to have an impact on the A350 XWB programme due to the technological, industrial or commercial choices made by Airbus and all its partners and subcontractors) or from external factors (for example a systemic crisis affecting air transport as a whole). In particular, the delay of the programme can compromise its commercial viability or even lead to its cancellation.

{I}t can be concluded that R&D projects in the aeronautic sector, and in particular the ones in question, are subject to technological, market and commercial risks. Given the technological complexity of the R&D activities to be carried out within the projects, financial institutions do not dispose of a sufficient visibility in order to properly estimate the risks or the profitability perspectives of the projects. The projects, therefore, suffer from financial constraints which can be explained by this asymmetric information.¹⁰⁸⁴

¹⁰⁸³ Nicola Clark, Airbus to seek government aid for A350 in second half, New York Times (Jan. 16, 2008) (Exhibit USA-434) (attributing the €1.8 billion figure to EADS CFO Hans Peter Ring).

¹⁰⁸⁴ European Commission, *State aid N 4/2010 and N 7/2010 – Spain – Interest-free loans to Alestis*, paras. 58-59 (Sept. 29, 2010) (Exhibit USA-157). See also, e.g., European Commission, *State aid N 3/2010 – Spain – AERNNOVA*, paras. 59, 60, 64, 65, 66 (Jan. 26, 2011) (Exhibit USA-159); European Commission, *State aid N 5/2010 and N 6/2010 – Spain – Interest-free loans to ARESA*, para. 72 (July 20, 2010) (Exhibit USA-160); European Commission, *State aid N 527/2009 – France – Recuperable advance to Daher-Socata*, para. 66 (Apr. 14, 2010) (Exhibit USA-156) (“{A}eronautical programs like the A350 XWB (managed by Airbus and in which Daher-Socata is a partner) seem particularly risky (i), and do not allow the financial industry sufficient visibility in terms of the project’s profitability (ii).”); European Commission, *State aid N 296/2009 – Germany – Diehl Air Cabin GmbH*, para. 99 (Dec. 15, 2009) (Exhibit USA-161) (“the Commission assumes that the market failed to deliver adequate financing for both R&D-projects, in particular due to the high levels of risk and the long-term credit periods.”); European Commission, *State aid N 357/2009 – United Kingdom – Individual R&D aid to GKN ASL*, paras. 83-84 (Sept. 15, 2009) (Exhibit USA-158) (“The main market failure cited by the UK is due to asymmetric information....”); European Commission, *State aid N 414/2010 – Belgium – Aid to SABCA ‘Flap Support Structures’ project*, para. 52 (Oct. 5, 2011) (Exhibit USA-441) (“As indicated in prior decisions of the Commission,

640. ***Global financial crisis.*** The European Commission found in a number of instances that the global financial crisis exacerbated suppliers' difficulties in obtaining financing, as discussed in the following example:

As also indicated in prior decisions, because of the important risks, manufacturers specializing in aerostructures are globally suffering a general lack of financing, which the current economic and financial crisis is still accentuating.¹⁰⁸⁵

641. ***Inability to undertake A350 XWB projects absent state aid.*** The European Commission found that the above-listed A350 XWB risk-sharing suppliers were, in fact, unable to obtain sufficient funding from internal and external commercial sources, and would not have been able to participate in the A350 XWB program without state aid. For example:

On the basis of its assessment, the Commission finds that the market would not deliver the project without aid. This is mainly due to imperfect and asymmetric

R&D projects linked to the development of the A350 XWB models are exposed to a systematic risk associated with this program. The risks assumed by Airbus, taken together, have difficulties which are a priori likely to have an impact on the A350 XWB program, whether they be endogenous to the program (for example, those having to do with the technological, industrial or commercial choices effectuated by Airbus and the group of its partners and subcontractors) or exogenous (for example, a massive decrease in demand due to a crisis affecting air transport as a whole.); *id.*, para. 68 (“recourse to risk-sharing partners seems impossible or necessarily only very limited. Consequently, the project suffers from financial constraints that are explained by an information asymmetry.”).

¹⁰⁸⁵ European Commission, *State aid N 414/2010 – Belgium – Aid to SABCA ‘Flap Support Structures’* project, para. 55 (Oct. 5, 2011) (Exhibit USA-441); *see also, e.g.*, European Commission, *State aid N 3/2010 – Spain – AERNNOVA*, para. 55 (Jan. 26, 2011) (Exhibit USA-159) (“Due to the above-mentioned risks, there seems to be a general lack of financing in the aeronautic industry that prevents the concerned enterprises to realise all the necessary adaptations to become risk-sharing Tier-1 suppliers. The current economic and financial crisis largely worsened the phenomenon.”), para. 63 (“due to the instable and insecure cash flows and high risk of the project (in particular the commercial risk since the revenues are dependent on Airbus sales of the plane without any guarantee as to either the size or the timing of payments), funding from the financial institutions could not be obtained for the project. Other domestic banks were also considered but, for the same reasons, were not interested in providing funding. In addition, contact was established with suppliers ({...}) in order to identify potential risk-sharing partners. However, none of them was willing to participate in the project in that quality, mainly due to the fact that they did not want to take on long-term risks in a situation characterised by a global financial crisis.”); European Commission, *State aid N 4/2010 and N 7/2010 – Spain – Interest-free loans to Aestis*, para. 54 (Sept. 29, 2010) (Exhibit USA-157) (“Due to the above-mentioned risks, there seems to be a general defect of financing in the aeronautic industry that prevents the concerned enterprises to realize all the necessary adaptations to become risk-sharing Tier-1 suppliers. The current economic and financial crisis largely worsened the phenomenon.”); European Commission, *State aid N 5/2010 and N 6/2010 – Spain – Interest-free loans to ARESA*, para. 72 (July 20, 2010) (Exhibit USA-160) (same quote); European Commission, *State aid N 296/2009 – Germany – Diehl Air Cabin GmbH*, paras. 90-91 (Dec. 15, 2009) (Exhibit USA-161) (“Eventually, the first banking consortium considered the project-related risks as too high and the current economic situation as too unfavourable.... and both projects’ considerable costs and risks as unacceptably high.”); European Commission, *State aid N 357/2009 – United Kingdom – Individual R&D aid to GKN ASL*, paras. 91-92 (Sept. 15, 2009) (Exhibit USA-158) (“These technological and commercial risks affect the ability of the companies to attract investment from the markets, particularly for a research and development project.”); *id.*, paras. 98-100.

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information linked to technological, commercial and market risks that render commercial financing particularly unlikely. This is compounded by the significant knowledge spill-over generated by the project.¹⁰⁸⁶

642. Thus, the European Commission’s own words demonstrate that it would have been impossible for many of Airbus’s risk-sharing suppliers to participate in the A350 XWB program at their actual levels without government support, in significant part because of the program’s technical and commercial risks and the global economic crisis prevailing as the risk-sharing arrangements were developed. This means that additional support from risk-sharing suppliers would be dependent on additional LA/MSF to those suppliers, something the EU has not demonstrated, and cannot demonstrate without another layer of counterfactual scenarios. Whereas the EU contends that, absent LA/MSF, Airbus could have increased risk-sharing supplier contributions by 85 percent (*i.e.*, an additional EUR 1.575 billion) from actual levels, the European Commission’s findings show this to be implausible, in addition to being unsupported by any relevant evidence.

¹⁰⁸⁶ European Commission, *State aid N 3/2010 – Spain – AERNNOVA*, para. 149 (Jan. 26, 2011) (Exhibit USA-159); *see also id.*, para. 96; European Commission, *State aid N 4/2010 and N 7/2010 – Spain – Interest-free loans to Alestis*, para. 109 (Sept. 29, 2010) (Exhibit USA-157) (“On the basis of the above, and in particular in view of the financial structure of ALESTIS in the absence of aid, and the corresponding impact on the level of profitability of the projects and related financial indicators, the Commission finds that the aid has an incentive effect insofar as ALESTIS would most probably not have undertake the projects in the absence of aid.”); European Commission, *State aid N 5/2010 and N 6/2010 – Spain – Interest-free loans to ARESA*, para. 71 (July 20, 2010) (Exhibit USA-160) (“[I]n the absence of aid, the profitability of the projects under assessment seems to be well below the level of profitability normally required for comparable projects in the aeronautic sector (the ‘hurdle rate’). It therefore did not enable ARESA, nor probably any other company in the sector, to guarantee an acceptable return for private investors, which consequently would not be inclined to invest in this type of projects.”); European Commission, *State aid N 527/2009 – France – Recuperable advance to Daher-Socata*, para. 118 (Apr. 14, 2010) (Exhibit USA-156) (“In light of the preceding discussion, and notably {in light of} the elements related to the levels of profitability and to the financial indicators presented above, the Commission is able to conclude that Daher-Socata would not have undertaken the MLGD project if the aforementioned State aid had not been granted to it.”); European Commission, *State aid N 296/2009 – Germany – Diehl Aircabin GmbH*, para. 126 (Dec. 15, 2009) (Exhibit USA-161) (“The Commission can conclude that, taking a decision on the investment on the basis of profitability, when including the risks, DA would not implement the project without the aid at all, which implies that the aid generates maximum incentive effect. The aid brings IRR at the minimum acceptable for the company, except in case additional commercial risks linked to the delay of delivery are considered. Then, the risk-sharing feature of the aid, together with the strategic importance of the projects acted as an incentive for the company to carry out the project.”); European Commission, *State aid N 357/2009 -- United Kingdom – Individual R&D aid to GKN ASL*, para. 121 (Sept. 15, 2009) (Exhibit USA-158) (“Considering the risks involved and the scale of investment, GKN would not proceed with the project without the aid. This is because the A350XWB project would not provide the rate of return required by the GKN Group for this type of investment.”); European Commission, *State aid N 414/2010 – Belgium – Aid to SABCA ‘Flap Support Structures’ project*, para. 95 (Oct. 5, 2011) (Exhibit USA-441) (“In more general terms, without State aid, SABCA would not have the opportunity to invest in the FSS project. In this case, even if SABCA had in principle been able to receive and to respond to bids for business related to subcontracting for manufacturing, the resulting reduction in the company’s R&D in civil aviation would ultimately risk significantly deteriorating its competitive position.”).

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643. *Fifth*, and finally, some of the A350 XWB risk-sharing suppliers – including partners on the “big” aero structure work packages – are themselves EADS subsidiaries. AEROLIA, Premium AERO TEC, and EADS SOGERMA are (or appear to be) Tier 1 risk-sharing suppliers on the A350 XWB program,¹⁰⁸⁷ and all are wholly owned subsidiaries of Airbus parent EADS.¹⁰⁸⁸ Thus, to postulate additional risk-sharing contributions from these suppliers, the EU must suppose that EADS would divert even more resources from other uses to facilitate the A350 XWB program, in addition to the counterfactual diversion of shareholder distributions and gross cash, discussed above. The Appellate Body has already rejected similar EU arguments concerning the LA/MSF to the A380, finding that, even if EADS had financial resources available, “it does not necessarily follow that those resources would have been directed to the” LCA project in question, considering that EADS has “several units beyond aircraft production, all of which would have competed for internal financial resources.”¹⁰⁸⁹ The result should be no different here, since the EU is asking the Panel to make a series of unwarranted assumptions to build an alternate universe in which the activities of not just Airbus, but EADS and its other subsidiaries, differ significantly from real life.

644. In sum, the EU has failed to demonstrate that Airbus could have, and would have, funded the A350 XWB without LA/MSF. The EU has ignored the effects of pre-A380 LA/MSF, yet in the absence of such LA/MSF (which has not expired, much less been withdrawn), Airbus would have been unable to undertake a large LCA development program until at least 2019, as Professor Wessels’ analysis shows.¹⁰⁹⁰ The EU also improperly focuses on EADS’ counterfactual funding resources, assuming but not demonstrating that they are freely available to Airbus despite their other uses. Even on their own terms, the EU’s arguments rely on the occurrence of elaborate sequences of events that differ from what actually occurred, hypothesizing that EADS would divert funds from other uses (*e.g.*, sustaining other business units), and that Airbus would succeed in demanding that risk-sharing suppliers nearly double their contributions to the A350 XWB development program, even though the condition of many risk-sharing suppliers was so weak, and funding so hard to come by during the global financial crisis, that EU member State aid was needed to fund one-quarter of the actual risk-sharing supplier contribution. Again, the plausibility of these scenarios is unsupported and, indeed, contradicted by the available relevant evidence. The original Panel and the Appellate Body

¹⁰⁸⁷ SOGERMA press release, EADS SOGERMA wins the Airbus contract for the Main Landing Gear Bay (MLGB) of the A350 XWB (Oct. 21, 2008) (Exhibit USA-445) (“This success consolidates EADS Sogerma’s position as an Airbus Tier 1 supplier . . .”); European Commission, *State aid N 525/2009 – France – Aide au projet de case de train principal de SOGERMA (Projet MLGB)* (April 14, 2010) at para. 65 (Exhibit USA-444) (referring to SOGERMA as a “partenaire” with Airbus on the A350XWB program); Airbus presentation, A350 XWB Programme Update – Presentation by Francois Caudron, Vice President, Head of A350 Customer & Business Development (July 2010) (Exhibit USA-443) (showing AEOLIA and Premium AEROTECH as two of the four “Risk Sharing Partners” on the “big” aero structure work packages).

¹⁰⁸⁸ SOGERMA website, The Group (Exhibit USA-446); AEROLIA press release, Birth of the French Aerostructures Leader and world No. 2 for Nose Fuselage subassemblies (Jan. 6, 2009) (Exhibit USA-447).

¹⁰⁸⁹ *EC – Large Civil Aircraft (AB)*, paras. 1341-1343 (emphasis added).

¹⁰⁹⁰ Wessels Report (Exhibit USA-364).

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rejected similar EU attempts to spin out elaborate counterfactual scenarios in the past, and the Panel should do the same here.

- e. The EU has failed to show that the A350 XWB program was viable absent LA/MSF.*

645. Because Airbus would have been incapable of funding the A350 XWB program in the absence of LA/MSF, the viability of the A350 XWB business case without LA/MSF is largely academic. As demonstrated above, even if the A350 XWB business case were viable in the absence of LA/MSF, a proposition the United States rejects, Airbus would not have had the funds to undertake the project. Indeed, [[HSBI]].¹⁰⁹¹

646. In any event, the EU's arguments on the viability issue fail. No evidence supports the EU's contention that "{t}he A350XWB programme was viable at launch."¹⁰⁹² The EU in its first written submission contends that "{t}he A350XWB programme was viable at launch,"¹⁰⁹³ and attempts to show this not by adducing directly relevant evidence, but by making unfounded criticisms of the Dorman Report¹⁰⁹⁴ and the Dorman-Terris Report¹⁰⁹⁵ and by dismissing relevant findings of the European Commission. The EU and Airbus have within their possession non-public information relevant to their assertion, but they did not provide it in the EU first written submission. Instead, the EU limited itself to criticizing evidence adduced by the United States. Now that it has submitted some (but almost certainly not all) documentation concerning the A350 XWB program that was responsive to the Panel's request, the EU's arguments concerning the counterfactual viability of the A350 XWB program are completely undermined. Below, the United States demonstrates the failure of the EU's arguments regarding the viability of the A350 XWB program, first by addressing the EU's criticisms, and then by discussing the documentation the EU recently provided.

- i. The EU's criticisms of the Dorman and Dorman-Terris Reports are meritless and rely on arguments already rejected in the underlying proceeding.*

¹⁰⁹¹ See, e.g., [[HSBI]].

¹⁰⁹² EU FWS, paras. 1145-1155. Cf. EU FWS, chapeau preceding para. 1145 ("The A350XWB programme was viable at launch").

¹⁰⁹³ Cf. EU FWS, chapeau preceding para. 1145 ("The A350XWB programme was viable at launch").

¹⁰⁹⁴ Dr. Gary J. Dorman, The Effect of Launch Aid on the Economics of Commercial Airplane Programs, NERA Economic Consulting (Nov. 6, 2006) (Exhibit USA-299) (BCI) ("Dorman Report").

¹⁰⁹⁵ Dr. Gary J. Dorman and Dr. Kristin Terris, *Report on the Continued Effects of Launch Aid on the Large Civil Aircraft Industry: A350 Launch Aid and the EU's Asserted Compliance Factors*, NERA Economic Consulting (May 18, 2012) (Exhibit USA-311(BCI)) ("Dorman-Terris Report").

647. The Dorman-Terris report demonstrated that, because A350 XWB LA/MSF shares the same key features analyzed in the Dorman Report, the Dorman Report’s conclusions apply to A350 XWB LA/MSF just as it did to prior LA/MSF. Unable to rebut this showing, the EU:

- criticizes the Dorman-Terris Report and Dorman Report for claims they do not make;
- erroneously asserts that the report of its expert, Professor Robert Whitelaw,¹⁰⁹⁶ is consistent with the original Panel’s relevant findings;
- distorts those findings by ignoring the original Panel’s agreement with the United States and Dr. Dorman that LA/MSF, in addition to increasing LCA program returns, makes launch more likely by shifting risk and limiting potential losses, even where the program’s base business case projects positive returns absent LA/MSF;
- recycles EU criticisms already rejected by the original Panel about the Dorman model’s delivery parameters that the original Panel rejected;
- dismisses the effects that LA/MSF features other than the interest rate have on the launch decision; and
- fails to identify examples of market financing that are comparable to LA/MSF.

648. As discussed in the U.S. first written submission, the Dorman-Terris report concludes that “A350XWB LA/MSF deviates from market-based financing of LCA programs and operates in the same way as LA/MSF analyzed in the 2006 Dorman Report relied upon by the original Panel and the Appellate Body.”¹⁰⁹⁷ The EU mischaracterizes the Dorman-Terris report as concluding that A350 XWB LA/MSF had the effect of “turning an otherwise non-viable programme into a viable programme,”¹⁰⁹⁸ and proclaims that “neither the 2006 Dorman Report nor the new ‘Dorman-Terris Report’ shows that the A350 XWB would have been non-viable absent such loans for the A350 XWB.”¹⁰⁹⁹

649. In fact, neither the Dorman Report nor the Dorman-Terris Report stated that the Dorman model underlying both reports by itself demonstrated that LA/MSF caused the launch of a specific Airbus LCA program by turning an otherwise unprofitable program into a profitable one.¹¹⁰⁰ Rather, the Dorman Report and model provide a generalized but realistic illustration of

¹⁰⁹⁶ See Professor Robert F. Whitelaw, Comments on US and NERA’s Discussion of MSF Benefit and Effects on Product Launch (June 27, 2012) (Exhibit EU-7) (“Whitelaw Comments”).

¹⁰⁹⁷ US FWS, para. 389.

¹⁰⁹⁸ EU FWS, para. 1147 (“the United States asserts that “a new report by Dr. Gary Dorman and Dr. Kristin Terris of NERA Economic Consulting” demonstrates that ‘A350XWB LA/MSF deviates from market-based financing of LCA programmes and operates in the same way as LA/MSF analyzed in the 2006 Dorman Report relied upon by the original Panel and the Appellate Body’, *turning an otherwise non-viable programme into a viable programme.*”) (emphasis added).

¹⁰⁹⁹ EU FWS, para. 1148.

¹¹⁰⁰ Dorman Report at p. 9 (Exhibit USA-299) (BCI) (“launch aid *may cause* an otherwise unprofitable program to be undertaken, since it both increases the expected profitability of a program and lowers its risk from the perspective of the manufacturer.”) (emphasis added); *EC – Large Civil Aircraft*, para. 7.1887 (“We note that the Dorman Report does not explicitly conclude that each Airbus LCA model, or indeed any particular Airbus LCA model, would not have been launched in the absence of LA/MSF.”); Dorman Terris Report at p. 7 (Exhibit USA-311(BCI)) (“This distortion of the competitive process allows the recipient to undertake airplane development

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how LA/MSF operates, leading the original Panel to find that, “it is clear to us that the Dorman Report, and the simulation reported therein, supports the United States’ position that Airbus product launches would not have occurred in the absence of LA/MSF.”¹¹⁰¹ The Dorman-Terris report observed that LA/MSF to the A350 XWB shares all the key features of LA/MSF to prior Airbus models, such that “Dr. Dorman’s conclusions in {the Dorman Report} regarding the effects of launch aid apply with equal force to the launch aid granted to Airbus for the A350 program.”¹¹⁰² The EU has not rebutted this point.

650. The EU and its expert, Professor Whitelaw,¹¹⁰³ do not dispute that A350 XWB LA/MSF has the same key features and better-than-commercial terms as prior LA/MSF, nor do they dispute that “subsidized loans enhance the expected returns of aircraft programmes.”¹¹⁰⁴ Instead, they attempt to impugn the Dorman-Terris Report because it relies on the Dorman Report and model, largely by repeating arguments that the original Panel rejected and were not raised on appeal:

as Professor Whitelaw explains, Dr. Dorman’s model creates the appearance that member State financing loans always causes that effect by the use of unrealistic assumptions that understate expected programme returns absent such loans. Professor Whitelaw finds that the Dorman model and the Dorman-Terris Report (which relies on the Dorman model), therefore, do not provide a reliable basis to conclude that such financing for the A350 XWB caused the launch of the A350 XWB.¹¹⁰⁵

651. As part of this effort, the EU mischaracterizes the underlying findings regarding the Dorman Report:

Professor Whitelaw’s conclusion is consistent with the original panel’s conclusion, and with the Appellate Body’s limited reliance on the Dorman report merely to find, that subsidised loans enhanced the expected returns of aircraft programmes – something the European Union does not dispute.¹¹⁰⁶

projects at a pace and scale that would be much more difficult – *perhaps impossible* – for a competitor that does not have access to launch aid.”) (emphasis added).

¹¹⁰¹ *EC – Large Civil Aircraft (Panel)*, para. 7.1887.

¹¹⁰² Dorman Terris Report at p. 7 (Exhibit USA-311(BCI)).

¹¹⁰³ See Professor Robert F. Whitelaw, Comments on US and NERA’s Discussion of MSF Benefit and Effects on Product Launch (June 27, 2012) (Exhibit EU-7) (“Whitelaw Comments”).

¹¹⁰⁴ EU FWS, para. 1152.

¹¹⁰⁵ EU FWS, para. 1151. Compare *id.* with *EC – Large Civil Aircraft (Panel)*, para. 7.1911.

¹¹⁰⁶ EU FWS, para. 1152 (citing *EC – Large Civil Aircraft (Panel)*, para. 7.1911).

652. The original Panel’s conclusion concerning the Dorman Report was not “merely” that “subsidised loans enhance the expected returns of aircraft programs,” as made clear by the passage of the original Panel that the EU cites:

*the Dorman Report does in our view demonstrate that LA/MSF will have a significant impact on the NPV of any particular project, and that irrespective of the specific parameters used to model costs and income streams, LA/MSF will increase potential profits and act to limit potential downside losses. It also demonstrates that in some circumstances, the availability of LA/MSF makes the difference between a positive or negative NPV, or alters the risk profile of a project sufficiently to make an affirmative decision to launch a particular aircraft more likely.*¹¹⁰⁷

653. LA/MSF’s effect, driven by its success-dependent nature, of limiting potential downside losses is a critical feature recognized by the original Panel but ignored by the EU and Professor Whitelaw. As the original Panel stated:

*In our view, the Dorman simulation demonstrates that LA/MSF will have a significant impact on the NPV of any given aircraft project, irrespective of the specific parameters used to model costs and income streams. In all cases, the Dorman simulation shows that LA/MSF will increase potential profits and limit potential losses. By limiting potential losses, LA/MSF transfers risk from Airbus to the governments supplying LA/MSF, thereby rendering it more likely, in any given case, that an LCA programme will be undertaken.*¹¹⁰⁸

654. The EU’s attempt to minimize the scope of the original Panel’s findings is also contradicted by the original Panel’s conclusion regarding the Dorman Report:

*Thus, we conclude that the Dorman Report demonstrates that the provision of LA/MSF is likely to change the behaviour of the recipient with respect to a decision to launch a LCA by increasing the likelihood of an affirmative decision to go forward with the launch.*¹¹⁰⁹

655. Accordingly, Professor Whitelaw’s conclusion is not, as the EU contends, “consistent with the original panel’s conclusion.”¹¹¹⁰ Professor Whitelaw concludes that “MSF could only distort the launch decision if the benefit from below-market financing increased the return to at

¹¹⁰⁷ *EC – Large Civil Aircraft (Panel)*, para. 7.1911 (emphasis added).

¹¹⁰⁸ *EC – Large Civil Aircraft (Panel)*, para. 7.1898 (emphasis added); *see also EC – Large Civil Aircraft (AB)*, para. 1248 (“The Panel noted that by limiting potential losses, LA/MSF transfers risk from Airbus to the governments supplying LA/MSF, thereby rendering it more likely, in any given case, that an LCA programme will be undertaken.”).

¹¹⁰⁹ *EC – Large Civil Aircraft (Panel)*, para. 7.1912; *see also EC – Large Civil Aircraft (AB)*, para. 1254.

¹¹¹⁰ *Cf.* EU FWS, para. 1151.

least the programme's risk adjusted cost of capital."¹¹¹¹ This is an unduly simplistic view of firm behavior, apparently reflecting Professor Whitelaw's dismissive attitude towards LA/MSF's risk-transferring effect.¹¹¹² More important, it is at odds with original Panel's findings.

656. As the original Panel found, LA/MSF distorts the launch decision even where, as in the Dorman model, the airplane program's base case without LA/MSF projects a positive NPV, because an assessment of the launch decision must account for the project's potential deviation from the base case.¹¹¹³ Airplane programs entail large costs and risks, and projections about the program's value require difficult predictions about costs, revenues and demand over a long time period.¹¹¹⁴ A "prudent planner" may decide not to undertake an airplane project where the base case shows a positive NPV but the project experiences significantly poorer results under more pessimistic scenarios.¹¹¹⁵ The Dorman model shows that an airplane program's fortunes can worsen considerably with relatively small changes in forecast cost, revenue and production levels under "realistic scenarios that would need to be considered by a manufacturer when making a launch decision."¹¹¹⁶ Because LA/MSF transfers risk to the subsidizing governments and thereby limits downside losses if actual conditions turn out worse than projected, a "prudent planner" is more likely to launch the program. As the original Panel stated:

As the Dorman Report notes, commercial airplane programmes are expensive and contain a large inherent amount of risk. Given the long-term nature of an aircraft programme, it is difficult to predict costs, revenues and demand for any particular aircraft and, consequently, a prudent planner might well expect that all cost and revenue variables will not come to pass as forecast. The Dorman simulation generates a positive NPV in the base case scenario (*i.e.*, without LA/MSF and with costs, revenue and production levels as forecast). However, relatively small changes in forecast cost, revenue and production levels result in significantly poorer results, generating either lower or negative NPV in all cases. The Dorman Report implies, and we agree, that such variations in the forecast parameters constitute realistic scenarios which would need to be considered by a manufacturer when making a launch decision. Given that a realistic scenario includes a negative NPV in the absence of LA/MSF, it follows that an affirmative

¹¹¹¹ Whitelaw Comments, para. 29 (Exhibit EU-7), *quoted in* EU FWS, para. 1150.

¹¹¹² *See* Whitelaw Comments, para. 34 ("There is but a single attribute that could distort the launch decision, the price of financing provided by Member States. Risk transfer to the Member States or the risk-sharing suppliers does not distort the launch decision.").

¹¹¹³ *EC – Large Civil Aircraft (Panel)*, para. 7.1887.

¹¹¹⁴ *EC – Large Civil Aircraft (Panel)*, para. 7.1887.

¹¹¹⁵ *See* Dorman Report, p. 7 (Exhibit USA-299) (BCI) ("Moreover, the NPV of the program quickly becomes negative when any one of the three factors (sales, pricing or recurring costs) becomes significantly unfavorable. Unless an airplane manufacturer believed that there was a relatively low probability of experiencing the worst case scenario, it would probably be reluctant to launch this airplane program.").

¹¹¹⁶ *EC – Large Civil Aircraft (Panel)*, para. 7.1887.

decision to launch is less likely upon consideration of the possible outcomes without LA/MSF. Accordingly, it is clear to us that the Dorman Report, and the simulation reported therein, supports the United States' position that Airbus product launches would not have occurred in the absence of LA/MSF.¹¹¹⁷

Thus, Professor Whitelaw's conclusion is not "consistent" with the original Panel's findings;¹¹¹⁸ it is contradicted by them.

657. Moreover, the EU and Professor Whitelaw also recycle criticisms of the Dorman model's parameters, criticisms that the original Panel has already rejected. Professor Whitelaw was explicit in retreading ground that another EU expert, Professor Paul Wachtel, covered without success in the underlying proceeding: "In this paper, I intend to address only Professor Wachtel's second criticism – i.e., that Dr. Dorman adopted overly pessimistic parameters that, in effect, lead to a preconceived conclusion that absent MSF the programme would not have been launched."¹¹¹⁹ Just as before, this "second criticism" relies on the 2007 declaration of Airbus's Francisco-Javier Riaza-Carballo (the "Carballo Declaration"), and its estimate of 1375 projected deliveries for the 787 program.¹¹²⁰

658. The original Panel already considered and rejected "Professor Wachtel's second criticism."¹¹²¹ As the Appellate Body observed:

the Panel addressed Dr. Wachtel's second criticism, namely, that the Dorman Report derived "its conclusions about the effects of LA/MSF from sensitivity tests performed on a simulation that is constructed with unrealistic parameter values and assumptions of costs and demand". The Panel rejected this criticism and instead agreed with the United States that the simulation in the Dorman Report demonstrated that LA/MSF will have a significant impact on the NPV of any given aircraft project, irrespective of the specific parameters used to model costs and income streams, by increasing potential profits and limiting potential losses. The Panel noted that by limiting potential losses, LA/MSF transfers risk from Airbus to the governments supplying LA/MSF, thereby rendering it more likely, in any given case, that an LCA programme will be undertaken.¹¹²²

¹¹¹⁷ *EC – Large Civil Aircraft (Panel)*, para. 7.1887.

¹¹¹⁸ *Cf.* EU FWS, para. 1151.

¹¹¹⁹ Whitelaw Comments at para. 21 (Exhibit EU-7).

¹¹²⁰ Whitelaw Comments at paras. 25, 28 (Exhibit EU-7) (citing Declaration of Francisco-Javier Riaza-Carballo (May 25, 2007) (Exhibit EU-15) (Exhibit EC-665 in original dispute) (BCI; HSBI)).

¹¹²¹ *See EC – Large Civil Aircraft (Panel)*, para. 7.1898.

¹¹²² *EC – Large Civil Aircraft (AB)*, para. 1248.

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659. The original Panel also rejected the EU’s attempt to use the Carballo Declaration and an *ex post facto* business case for the 787 to impugn the Dorman Report.¹¹²³ The Appellate Body summarized the original Panel’s findings on this point:

Before completing its assessment of the Dorman Report, the Panel referred to “a putative ‘Boeing 787 business case’” submitted by the European Communities and which showed a NPV and IRR higher than those the European Communities asserted were generated by the Dorman simulation. The Panel did not consider “that the results of an *ex post facto* business case for a Boeing LCA constructed on the basis of public information for purposes of this dispute has any relevance to our assessment of the effect of LA/MSF subsidies on Airbus”. It explained that, even assuming the correctness of the exercise, which the Panel considered to be “unclear”, it did not see how the conclusion that the NPV and IRR of this Boeing 787 business case are higher than those of the Dorman Report simulation informed its assessment of the effect of LA/MSF on Airbus.¹¹²⁴

660. The EU now attributes significance to the Appellate Body’s “limited reliance on the Dorman report,”¹¹²⁵ but the Appellate Body had no cause to discuss Dr. Dorman’s work more than it did, since the EU did not appeal any of the original Panel findings regarding the Dorman report and model. The Appellate Body’s discussion of the Dorman Report is, however, significant because it underscores both the resounding failure of the EU’s arguments in the original proceeding, and the improper repetition of those arguments in this compliance dispute.

661. As discussed in the attached comments of Dr. Kristin Terris,¹¹²⁶ a related problem with Professor Whitelaw’s work is its reduction of LA/MSF’s trade-distorting features to one variable: price. Criticizing “Dr. Dorman’s assertion that both the price and the transfer of risk can distort the investment decision,” Professor Whitelaw states that “{t}here is but a single attribute that could distort the launch decision, the price of the financing provided by the Member States.”¹¹²⁷ This criticism is misplaced, as Dr. Terris explains:

The Dorman Report demonstrated that each key feature of LA/MSF provides value to the recipient, in addition to the value provided by LA/MSF’s other features. A “below-market subsidized interest rate” is an “obvious advantage,” but it is not the only advantage to consider. The Dorman Report recognized that, all else equal, financing with all of the LA/MSF attributes shifts more risk away

¹¹²³ *EC – Large Civil Aircraft (Panel)*, para. 7.1912.

¹¹²⁴ *EC – Large Civil Aircraft (AB)*, para. 1253.

¹¹²⁵ EU FWS, para. 1152.

¹¹²⁶ Dr. Kristin Terris, Comments on Professor Whitelaw’s Response to NERA (Oct. 17, 2012) (Exhibit USA-365) (“Terris Response”).

¹¹²⁷ Whitelaw Comments at para. 34 (Exhibit EU-7).

from the recipient than would financing that only offered the same below-market interest rate:

“Launch aid offered at a subsidized interest rate effectively lowers the program’s non-recurring costs from the perspective of the manufacturer. . . . A payment structure with contingent repayment will further decrease the program’s risk to the manufacturer without necessarily requiring a corresponding sharing of upside benefits.”¹¹²⁸

Thus, as Dr. Terris demonstrates,¹¹²⁹ a thorough assessment of LA/MSF’s effects must account for than its interest rate and associated benchmarks that would be relevant to a benefit analysis. The original Panel recognized this,¹¹³⁰ but Professor Whitelaw and the EU do not.

662. Similarly, Professor Whitelaw’s reductive focus on the price of financing leads him, and the EU, to make additional, unwarranted criticisms of the Dorman-Terris Report. Building on the Dorman Report’s approach, the Dorman-Terris Report observed that A350 XWB LA/MSF has all of the key features of prior LA/MSF – *i.e.*, unsecured, success-dependent, backloaded, and below-market interest – and that “each of these characteristics of launch aid represents a deviation from market-based financing of LCA programs.”¹¹³¹ The EU and Professor Whitelaw contend that “the only attribute of the financing agreements that potentially deviates from the market is its interest rate,”¹¹³² and Professor Whitelaw attempts to show this by identifying various forms of market financing that have unsecured, success-dependent, and/or back-loaded characteristics.¹¹³³ Again, they miss the point of the Dorman-Terris and Dorman Reports, which analyzed how each key “non-price” feature of LA/MSF increases distortive effects in addition to a given subsidized interest rate.¹¹³⁴

663. The Dorman Report demonstrates that the non-price features of LA/MSF (*i.e.*, unsecured, success-dependent, back-loaded, and levy-based) increase the value of the loan to Airbus, holding all the other features of the loan constant (including the present value of the repayments. Accordingly, a principal goal of the Dorman Report was to identify and model all of the relevant features of LA/MSF subsidies: “Comparing the program’s NPV as scenarios in the model are

¹¹²⁸ Terris Response, pp. 10-11 (Exhibit USA-365) (quoting Dorman Report, p. 9.).

¹¹²⁹ Terris Response, p. 11 (Exhibit USA-365).

¹¹³⁰ *EC – Large Civil Aircraft (Panel)*, para. 7.1898 (“By limiting potential losses, LA/MSF transfers risk from Airbus to the governments supplying LA/MSF, thereby rendering it more likely, in any given case, that an LCA programme will be undertaken.”); *see also EC – Large Civil Aircraft (AB)*, para. 1248 (“The Panel noted that by limiting potential losses, LA/MSF transfers risk from Airbus to the governments supplying LA/MSF, thereby rendering it more likely, in any given case, that an LCA programme will be undertaken.”).

¹¹³¹ Dorman-Terris Report, p. 6 (Exhibit USA-311(BCI)).

¹¹³² EU FWS, para. 1149 (citing Whitelaw Comments, para. 10 (Exhibit EU-7)).

¹¹³³ Whitelaw Comments, paras. 10-17 (Exhibit EU-7).

¹¹³⁴ Terris Response, pp.3-4 (Exhibit USA-365).

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changed can isolate the incremental value of particular features of launch aid packages.”¹¹³⁵ A “non-price” feature such as delayed repayment (or graduated repayment) does not necessarily establish that a financing instrument is a subsidy, but it does increase the value of a subsidy to the recipient, including through the transfer of risk to the lender, compared to a below-market financing without delayed repayment.¹¹³⁶

664. Building off the Dorman Report, the Dorman-Terris Report applied the same analysis to LA/MSF to the A350 XWB. After noting that statements of the French and U.K. governments meant that “the interest rates attached to the launch aid are almost certainly below market levels,” the Dorman-Terris Report found that each of the A350 XWB LA/MSF’s characteristics “represents a deviation from market-based financing of LCA programs.”¹¹³⁷ That is, A350 XWB LA/MSF, like all prior LA/MSF, provides more value to, and has a more distortive effect on, Airbus (including by transferring more risk to the granting governments) than would financing with the same below-market interest rate that is not unsecured, success-dependent, back-loaded, and levy-based – as is LA/MSF.¹¹³⁸

665. The EU and Professor Whitelaw fail to appreciate this point, misconstruing the Dorman and Dorman-Terris Reports as arguing that all unsecured, success-dependent, back-loaded, and levy-based loans are necessarily better-than-commercial.¹¹³⁹ As a result, Professor Whitelaw is off-course when he sets out to show that there are, in fact, some commercially available loans with these terms. But even if Professor Whitelaw succeeded in this endeavor, he would nonetheless fail to undercut Dorman 2006 and Dorman-Terris, because he would fail to demonstrate that the non-price terms of LA/MSF do not increase the value of LA/MSF (holding all else equal) by transferring significant LCA program risks from Airbus to the EU member States.

666. In any event, Professor Whitelaw also fails in his misguided endeavor to demonstrate that financing with the same non-price terms as LA/MSF (*i.e.*, unsecured, success-dependent, back-loaded, and levy-based) is, in fact, commercially available.

667. Professor Whitelaw devotes a large portion of his paper to discussing risk-sharing supplier arrangements. He proposes these arrangements as a commercial source of funding that would have characteristics and market effects equivalent to LA/MSF, if LA/MSF were provided at market interest rates.¹¹⁴⁰ According to Professor Whitelaw, Airbus’s use of LA/MSF and risk-sharing suppliers in “roughly equal proportions” on the A380 program proves that

¹¹³⁵ Dorman Report 2006, p. 5 (Exhibit USA-299) (BCI).

¹¹³⁶ Terris Response, p. 4 (Exhibit USA-365).

¹¹³⁷ Dorman-Terris Report, p. 6 (Exhibit USA-311(BCI)).

¹¹³⁸ Terris Response, p. 4 (Exhibit USA-365).

¹¹³⁹ See EU FWS, para. 1149.

¹¹⁴⁰ See Whitelaw Comments, para. 17 (Exhibit EU-7).

LA/MSF's "unsecured, success-dependent, back-loaded and levy-based" terms are not a "deviation from market-based financing."¹¹⁴¹ However, Professor Whitelaw's conclusions are unsupported.

668. As Dr. Terris explains:

Professor Whitelaw states that risk sharing supplier arrangements are "unsecured, success-dependent and back-loaded" as well as "levy-based" as is LA/MSF. He never supports these assertions with direct evidence concerning Airbus' risk sharing supplier arrangements, and professes ignorance regarding the specific features of the Boeing cost sharing arrangements that he cites. Accordingly, Professor Whitelaw provides no basis for concluding that the features of a meaningful portion of risk-sharing supplier arrangements in the LCA industry are unsecured, success-dependent, and back-loaded in a manner comparable to LA/MSF. Indeed, there is reason to be skeptical on this point, since the original Panel found that the repayment terms of one of the few Airbus risk-sharing supplier contracts cited by Professor Whitelaw in the underlying proceeding contained at least "one major difference" as compared to the terms of LA/MSF.

Professor Whitelaw also fails to consider that the Airbus risk-sharing supplier arrangements are themselves distorted by LA/MSF, and therefore provide no support for the proposition that the "market" is willing to provide financing comparable to LA/MSF. LA/MSF distorts the Airbus risk-sharing supplier arrangements in two ways. First, LA/MSF to Airbus makes its LCA projects less risky overall, thereby reducing the risks – and required returns – for risk-sharing suppliers. Second, LA/MSF is provided directly to some risk-sharing suppliers where they could not otherwise participate in the project. Thus, Airbus' risk-sharing supplier arrangements provide no indication that the market provides LA/MSF-type financing.¹¹⁴²

669. In addition, as discussed above, the European Commission itself found that the A350 XWB program involves considerable technical and commercial risks which, combined with its long duration and the difficulty of predicting its profitability, made commercial financing difficult, if not impossible, to obtain. The EU attempts to dismiss these findings because they were made in the context of EU State Aid decisions pertaining to "other entities" and not to Airbus,¹¹⁴³ but this does not respond to the U.S. argumentation and evidence that the European Commission made findings concerning the entire A350 XWB program, including Airbus. Notably, the European Commission found "a considerable degree of uncertainty regarding the

¹¹⁴¹ Whitelaw Comments, para. 17 (Exhibit EU-7).

¹¹⁴² Terris Response, pp. 10-11 (Exhibit USA-365) (quoting EC – Large Civil Aircraft (Panel), para. 7.480; other citations omitted).

¹¹⁴³ EU FWS, para. 1135.

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commercial success of the A350 XWB,” including risks posed by the program’s “unpredictable” final completion date and the “economic downturn.”¹¹⁴⁴ It noted the risk that “delay of the programme can compromise its commercial viability or even lead to its cancellation.”¹¹⁴⁵ It also observed that “aeronautical programs like the A350 XWB (managed by Airbus and in which Daher-Socata is a partner) seem particularly risky (i), and do not allow the financial industry sufficient visibility in terms of the project’s profitability (ii).”¹¹⁴⁶ Further, the Commission found that “R&D projects linked to the development of the A350 XWB models are exposed to a systematic risk associated with this program,” that “{t}he risks assumed by Airbus, taken together, have difficulties which are *a priori* likely to have an impact on the A350 XWB program,”¹¹⁴⁷ and that “because of the important risks, manufacturers specializing in aerostructures are globally suffering a general lack of financing, which the current economic and financial crisis is still accentuating.”¹¹⁴⁸

670. All of these findings pertain to the risks posed by the entire A350 XWB program, “managed by Airbus.”¹¹⁴⁹ Even if the EU had supported its assertion that the A350 XWB program’s business case would be “viable” absent LA/MSF under some circumstances (a proposition that remains unsupported by direct evidence), the EU has failed to address the

¹¹⁴⁴ European Commission, *State aid N 493/2010 — Spain — Repayable Advances to Industria de Turbopropulsores, SA*, para. 55 (citation omitted) (Sept. 20, 2011) (Exhibit USA-154); *see also* European Commission, *State aid N 204/2010 – Sweden – Repayable advances to Volvo Aero*, para. 51 (citation omitted) (Feb. 23, 2011) (Exhibit USA-155).

¹¹⁴⁵ European Commission, *State aid N 4/2010 and N 7/2010 – Spain – Interest-free loans to Alestis*, para. 58 (Sept. 29, 2010) (Exhibit USA-157); *see also* European Commission, *State aid N 4/2010 and N 7/2010 – Spain – Interest-free loans to Alestis*, para. 59 (Sept. 29, 2010) (“On the basis of the above, it can be concluded that R&D projects in the aeronautic sector, and in particular the ones in question, are subject to technological, market and commercial risks. Given the technological complexity of the R&D activities to be carried out within the projects, financial institutions do not dispose of a sufficient visibility in order to properly estimate the risks or the profitability perspectives of the projects. The projects, therefore, suffer from financial constraints which can be explained by this asymmetric information.”) (Exhibit USA-157).

¹¹⁴⁶ European Commission, *State aid N 527/2009 — France — Recuperable advance to Daher-Socata*, para. 66 (Apr. 14, 2010) (Exhibit USA-156).

¹¹⁴⁷ European Commission, *State aid N 414/2010 – Belgium – Aid to SABCA ‘Flap Support Structures’ project*, para. 52 (Oct. 5, 2011) (Exhibit USA-441) (“Comme indiqué dans des décisions précédentes de la Commission,⁸ les projets R&D liés au développement des appareils A350 XWB sont exposés à un risque systémique associé à ce programme. Les risques endossés par Airbus tiennent à l’ensemble des difficultés qui sont a priori susceptibles d’avoir un impact sur le programme A350 XWB, qu’elles soient endogènes au programme (par exemple, tenant aux choix technologiques, industriels ou commerciaux effectués par Airbus et l’ensemble de ses partenaires et sous-traitants) ou exogènes (par exemple, réduction massive de la demande due à une crise affectant le transport aérien dans son ensemble).”).

¹¹⁴⁸ European Commission, *State aid N 414/2010 – Belgium – Aid to SABCA ‘Flap Support Structures’ project*, para. 55 (Oct. 5, 2011) (Exhibit USA-441) (“Comme indiqué également dans des décisions précédentes,¹⁰ du fait des risques importants, les industriels spécialisés dans les aérostructures subissent globalement un défaut généralisé de financement, que la crise économique et financière actuelle accentue encore.”).

¹¹⁴⁹ European Commission, *State aid N 527/2009 — France — Recuperable advance to Daher-Socata*, para. 66 (Apr. 14, 2010) (Exhibit USA-156).

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significant A350 XWB program risks identified by the European Commission, including its finding that the program does not “allow the financial industry sufficient visibility in terms of the project’s profitability.” Given those risks, it does not follow that, merely because a business case is “viable” under some conditions, Airbus would necessarily be willing or able to undertake the project absent LA/MSF.

671. Indeed, the United Kingdom’s provision of LA/MSF to Airbus for the A350 XWB was based on its conclusions that commercial financing for the program was unavailable, and that LA/MSF was “essential for the project to proceed on the scale and in the timeframe specified.”¹¹⁵⁰ The EU never even attempts to reconcile the United Kingdom’s determination that LA/MSF to the A350 XWB was “essential” to the project with its own arguments that LA/MSF was irrelevant to the program. In light of this and the other evidence discussed above, the EU cannot credibly maintain that LA/MSF to the A350 XWB did not contribute to the launch and market presence of the A350 XWB.

ii. The EU’s documentation on the A350 XWB supports U.S. claims and is inconsistent with the EU’s arguments.

672. Documentation provided by the EU supports the U.S. demonstration of adverse effects related to the A350 XWB, [[HSBI]]¹¹⁵¹ [[HSBI]]¹¹⁵² [[HSBI]]¹¹⁵³ [[HSBI]]¹¹⁵⁴ [[HSBI]]¹¹⁵⁵ LA/MSF mitigates the risks posed to Airbus by this uncertainty, by transferring a significant portion of the risks to the subsidizing governments.

E. The EU has Failed to Rebut the U.S. Demonstration of Significant Lost Sales.

673. The United States continues to experience significant lost sales. In its first written submission, the United States documented over one thousand lost sales, together worth tens of billions of dollars of lost revenues for the U.S. LCA industry.¹¹⁵⁶ This pattern has continued unabated from the original reference period through the end of the RPT, December 1, 2011, and on to the date of referral of this matter to the compliance Panel. Since that time the United States has also lost significant sales campaigns involving Hong Kong Airlines and Norwegian Air Shuttle, as demonstrated in the first written submission,¹¹⁵⁷ and also three additional sales

¹¹⁵⁰ United Kingdom House of Commons Business, Innovation and Skills Committee, *Full Speed Ahead*, p. 10 (Mar. 22, 2010) (Exhibit USA-44).

¹¹⁵¹ See, e.g., [[HSBI]].

¹¹⁵² See, e.g., [[HSBI]].

¹¹⁵³ See, e.g., [[HSBI]].

¹¹⁵⁴ See, e.g., [[HSBI]].

¹¹⁵⁵ See, e.g., [[HSBI]].

¹¹⁵⁶ See US FWS, Section VI.G.2; Summary Table of U.S. Significant Lost Sales (Exhibit USA-164).

¹¹⁵⁷ See US FWS, paras. 433-437, 496.

campaigns (discussed below) that have occurred since the filing of the U.S. first written submission.

674. This consistent pattern of continuing significant lost sales reflects the absence of any meaningful action by the EU to remove the adverse effects of the WTO-inconsistent subsidies at issue in this dispute. Indeed, the EU does not claim to have taken any steps on its own initiative to remove adverse effects in the form of lost sales. Rather, the EU points to the “delivery” of Airbus aircraft and Airbus’s termination of the A340 program as compliance “steps.”¹¹⁵⁸ These arguments are misplaced. The EU had an obligation itself to take appropriate steps to remove the adverse effects. In any event, Airbus’s completion of deliveries and the termination of the A340 program have not removed the adverse effects caused by LA/MSF.

675. Given the persistence of lost sales and the absence of meaningful compliance action, the EU has nothing to offer in rebuttal beyond erroneous arguments regarding purported “non-attribution factors.” For example, the EU argues that Airbus’s first sale to an airline customer generates a “strong disposition” to buy Airbus aircraft in the future and that this disposition is a “non-attribution factor,”¹¹⁵⁹ without explaining how Airbus could have offered any of the LCA it sold to that customer without LA/MSF. In addition, according to the EU if an airline customer purchases an Original A350, this is another “non-attribution factor” with respect to subsequent A350 orders.¹¹⁶⁰ These are not valid “non-attribution factors.” They in no way alter the fact that Airbus obtained these sales with aircraft that it would have been unable to offer in the absence of the LA/MSF and other subsidies. As the original Panel found, Airbus would most likely not even exist in the absence of WTO-inconsistent LA/MSF, and in the unlikely event that Airbus did exist, it would have been a smaller and weaker manufacturer with a different, narrower product line.¹¹⁶¹ Furthermore, the EU’s so-called non-attribution factors are *themselves* the effects of LA/MSF, as any incumbency advantages that Airbus enjoys by virtue of previously obtained sales are the direct result of earlier LA/MSF.

676. Below the United States first explains that the EU has failed to take appropriate steps to remove those adverse effects that take the form of lost sales. Second, the United States explains in greater detail that the EU’s so-called “non-attribution factors” do not eliminate the causal link between the EU’s WTO-inconsistent subsidies to Airbus and the evidence of lost sales that were documented in the U.S. first written submission. Third, the United States addresses issues regarding the 31 individual lost sales campaigns discussed in the U.S. first written submission.¹¹⁶² The EU largely fails even to confront – let alone contest – the facts underlying

¹¹⁵⁸ See, e.g., EU FWS, paras. 806, 807, 1036, 1216; see also EU Notification, Items 33-34 (Exhibit USA-1).

¹¹⁵⁹ See EU FWS, paras. 824, 930, 1045 (citing airline customers’ “strong disposition” to buy Airbus aircraft as a so-called non-attribution factor).

¹¹⁶⁰ See EU FWS, para. 930.

¹¹⁶¹ See *EC – Large Civil Aircraft (Panel)*, para. 7.1984.

¹¹⁶² See US FWS, Section VI.G.2.

these lost sales campaigns. To the extent that the EU refers to them at all, the EU advances no credible argument to rebut them or their probative value as evidence that the U.S. industry continues to experience significant lost sales. Finally, the United States provides evidence of additional lost sales that have occurred since the U.S. first written submission, which further rebuts the EU's arguments and further demonstrates the continuing adverse effects suffered by the U.S. LCA industry as a result of the EU's WTO-inconsistent subsidies to Airbus.

1. The EU took no action whatsoever to remove the adverse effects in the form of lost sales.

677. The EU repeatedly touts having “procured” the delivery of aircraft, and having “procured” the termination of the A340 program.¹¹⁶³ A more accurate description of each of these events is that Airbus sales led to Airbus deliveries and that Airbus terminated production of the A340 because of what Airbus Senior Vice President Christophe Mourey describes as “its inability to compete at high fuel prices.”¹¹⁶⁴ As Article 7.8 states, when the DSB determines that a Member's subsidy causes adverse effects and the subsidy remains unwithdrawn, “the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects,” making clear that the obligation rests on “the Member” to “take appropriate steps.” The actions by the subsidy recipient in this dispute are not actions by a Member and here they are not “appropriate steps” that a “Member granting or maintaining such subsidy “must” “take” for purposes of Article 7.8.¹¹⁶⁵

678. Perhaps an even greater disregard for Article 7.8 is reflected in the EU's claim to have cured lost sales by allowing Airbus to *deliver* airplanes. By the EU's logic, a subsidy causing serious prejudice that is the subject of an adopted DSB finding is only WTO-inconsistent *until* its concrete effects reach their apex in the marketplace. There is no basis for this view. The sole support cited by the EU for this proposition is paragraph 7.1812 of the panel report in *US – Large Civil Aircraft*, which describes the panel's rejection of a certain method of allocating the price effects of subsidies over a certain time period. In light of the particular characteristics of the subsidies at issue there, the panel considered that they had adverse effects at the time of the sale and through the time of delivery. However, the panel stressed that these were recurring subsidies, which is not the case for LA/MSF or the other subsidies at issue in this dispute. The EU does not even explain how this relates to compliance and steps to remove adverse effects.

¹¹⁶³ See, e.g., EU FWS, paras. 806, 807, 1036, 1216.

¹¹⁶⁴ Christophe Mourey, Statement on Current Competitive Conditions in the LCA Industry (July 4, 2012) at para. 136 (Exhibit EU-8) (BCI).

¹¹⁶⁵ The United States does not dispute that sales patterns or changes in a producer's product offerings may be relevant considerations in evaluating the “steps” a Member purports to have taken to satisfy Article 7.8. However, these developments are not themselves “steps” taken by a Member.

Indeed, the passage relied on by the EU does not address the question of what is required of a WTO Member to bring itself into compliance with a DSB recommendation.¹¹⁶⁶

679. The reality is that deliveries have in no way mitigated the massive adverse effects that the U.S. LCA industry continues to suffer, including in the form of lost sales. Nor has Airbus's termination of the A340 program "due to its inability to compete at high fuel prices"¹¹⁶⁷ abated the lost sales that the U.S. industry continues to experience. Airbus customers continue to place orders for Airbus's newer twin-aisle aircraft model, the A350 XWB. Moreover, the termination of the A340 program actually increased the amount of the subsidy to Airbus by essentially forgiving the outstanding amount of A340 LA/MSF, and boosting Airbus's net revenues by €406 million (€312 million net) – which eventually will lead to further adverse effects in the future.¹¹⁶⁸ In sum, if the EU's "procurement" of actions by Airbus is relevant in this dispute, it has only worsened the adverse effects.

2. The EU fails to identify any valid "non-attribution factors."

680. As the original Panel and Appellate Body found, in the absence of the subsidies Airbus would most likely not exist, and in the unlikely event that it did exist, it would be a smaller, weaker manufacturer with a narrower product line.¹¹⁶⁹ Against the backdrop of the duopolistic nature of competition in the LCA industry, the United States has adduced campaign-specific evidence demonstrating that sales by Airbus would have been captured by the U.S. LCA industry in the absence of the EU's WTO-inconsistent subsidies to Airbus.

681. The EU fails to rebut the U.S. *prima facie* case with respect to the 31 lost sales campaigns documented in the U.S. first written submission. In addition to the causation-related arguments discussed above,¹¹⁷⁰ the EU also puts forth two additional so-called "non-attribution

¹¹⁶⁶ Cf. *US – Large Civil Aircraft (Panel)*, para. 7.1812 ("As discussed in paragraphs 7.155-7.157 of this Report, the European Communities has allocated the full amount of the value of B&O tax subsidies estimated to be received by Boeing in 2007 – 2009 to the period 2004 – 2006 as part of ITR's allocation of subsidy amounts over time, to arrive at estimates of per-LCA subsidy "magnitudes." Although the Panel does not disagree with the general proposition that the expectation of the receipt of a subsidy may affect a recipient's behaviour, and thus give rise to a market effect prior to its actual receipt, the Panel does not consider that this should automatically lead to the mechanical allocation of amounts of recurring subsidies that reduce Boeing's marginal unit costs back in time by three years. The implication of such an allocation would be that the subsidy does not give rise to serious prejudice, within the meaning of Article 6.3, in the year of its receipt. As we have explained in paragraph 7.1685, the Panel does not accept this implication. Rather, the Panel considers that given the particularities of LCA production and sale, the effects of the subsidies should be understood to begin at the time at which an LCA order is obtained (or an order is lost) and to continue up to and including the time at which that aircraft is delivered (or not delivered).").

¹¹⁶⁷ Christophe Mourey, Statement on Current Competitive Conditions in the LCA Industry (July 4, 2012) at para. 136 (Exhibit EU-8) (BCI).

¹¹⁶⁸ See, e.g., US FWS, paras. 10-11.

¹¹⁶⁹ See *EC – Large Civil Aircraft (Panel)*, para. 7.1984.

¹¹⁷⁰ See Section VI.D of this submission.

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factors.” The EU points to the conversion of Original A350 orders to A350 XWB orders, and advances an argument anchored to the “strong disposition”¹¹⁷¹ of airline customers to place orders with the incumbent LCA manufacturer. However, neither of these factors eliminates the causal link between LA/MSF and the corresponding lost sales.¹¹⁷²

*a. Original A350 orders are not a “non-attribution factor.”*¹¹⁷³

682. In the absence of the LA/MSF subsidies at issue in this dispute, Airbus would not have had the financial or technological means to develop, offer, and promise to deliver the A350 XWB, as and when it has done.¹¹⁷⁴ Therefore, the EU has failed to rebut the U.S. demonstration of lost sales involving the A350 XWB. The analysis remains the same, regardless of whether particular A350 XWB orders were preceded by orders for the Original A350.

683. As discussed above, Airbus first launched the Original A350 in 2005, but this model was widely criticized as an inadequate response to the Boeing 787.¹¹⁷⁵ Consequently, Airbus revised the design of the A350 and re-launched it as the A350 XWB in December 2006.¹¹⁷⁶ According to the EU, US Airways and TAM had already placed orders for the Original A350, and after December 2006 they converted these orders to A350 XWB orders.¹¹⁷⁷

684. Be that as it may, Airbus would have had no A350 XWB to offer US Airways and TAM in the absence of LA/MSF for the A350 XWB. Furthermore, the EU fails to explain how the placement of an Original A350 order attenuates the causal link between LA/MSF and subsequent A350 XWB orders. According to the EU, “[w]ith the launch of the A350XWB, and the resulting cancellation by Airbus of the Original A350, Airbus was under particular contractual obligations vis-à-vis the customers of the Original A350, including to pay penalty payments for late delivery.”¹¹⁷⁸ This observation merely suggests that when the A350 XWB was launched in December 2006, US Airways and TAM were poised to be compensated for Airbus’s past failure to meet its contractual obligations. However, it does *not* suggest that US Airways and TAM were restricted in their *future* choice of whether to purchase an A350 XWB or a competing aircraft produced by the U.S. LCA industry.

¹¹⁷¹ See EU FWS, paras. 824, 930, 1045.

¹¹⁷² Airbus also cited the participation of Bombardier as a potential “non-attribution factor” for lost sales involving single-aisle aircraft. EU FWS, para. 822. However, as the EU itself admits (and the United States already noted), Bombardier and “other single-aisle market entrants do not, at present, ‘play a significant role in LCA competition . . . during the period at issue and are unlikely to do so in the immediate future’.” EU FWS, note 753 (quoting US FWS, para. 315).

¹¹⁷³ See EU FWS, para. 930.

¹¹⁷⁴ See Section IV.D.4 of this submission.

¹¹⁷⁵ See US FWS, paras. 109-111.

¹¹⁷⁶ See US FWS., paras. 112-114.

¹¹⁷⁷ See EU FWS, para. 1208.

¹¹⁷⁸ EU FWS, para. 1209.

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685. Moreover, there is a causal nexus between the placement of Original A350 orders and LA/MSF. In the absence of decades of past LA/MSF, Airbus would not have been in a position in 2005 to offer airline customers a reasonably competitive twin-aisle aircraft like the Original A350. Therefore, even if the EU were correct that US Airways' and TAM's A350 XWB orders were the causal effect of prior Original A350 orders – which the United States disputes – there is still a causal nexus between the corresponding A350 XWB orders and LA/MSF.

b. *Airline customers' "strong disposition"¹¹⁷⁹ to purchase aircraft from the incumbent LCA manufacturer is not a valid "non-attribution factor" in this dispute.*

686. The EU's provision of LA/MSF to Airbus has resulted in a steady stream of lost sales by the U.S. LCA industry from at least 2001 onwards. In some cases, those lost sales paved the way for further, additional lost sales involving the same airline customer. Indeed, because airlines can avoid switching costs by placing further orders from the incumbent, the customer has, in the EU's terms, a "strong disposition"¹¹⁸⁰ to continue buying from the same airline manufacturer. The initial lost sale and the benefits created by establishing incumbency are adverse effects, as are the entirely foreseeable and consequent follow-on sales involving the same airline customer. Thus, in its first written submission, the United States documented 432 follow-on lost sales from 2007-2011 that resulted from lost sales originally recognized by the Panel and the Appellate Body during the original proceeding.¹¹⁸¹

687. Contrary to the EU's assertion, follow-on sales that result from the benefits of incumbency obtained through subsidized financing are not a "non-attribution factor."¹¹⁸² The EU's view is contradicted by the original Panel's findings regarding the conditions of competition in the LCA industry:

Once an airline orders any particular LCA model from a given manufacturer, efficiencies in operating a fleet of similar aircraft . . . favour follow-on orders of the same models, as well as orders of other aircraft models from the same manufacturer, in order to take advantage of commonalities across an LCA fleet.¹¹⁸³

In other words, given the conditions of competition in the LCA industry, lost sales tend to be followed by further lost sales. Therefore, the follow-on lost sales documented by the United States are attributable to LA/MSF, just as first-order lost sales are.

¹¹⁷⁹ EU FWS, paras. 824, 825, 930, 1045.

¹¹⁸⁰ See EU FWS, paras. 824, 825, 930, 1045.

¹¹⁸¹ See Summary Table of U.S. Significant Lost Sales (Exhibit USA-164).

¹¹⁸² See EU FWS, paras. 824, 825, 930, 1045.

¹¹⁸³ EC – Large Civil Aircraft (Panel), para. 7.1720.

688. This includes situations where a customer had previously ordered Airbus LCA of a given type in a sale not specifically identified as a lost sale by the United States, and then ordered additional Airbus LCA of that type in sales that the United States does challenge. In such a case, LA/MSF causes the lost sale identified by the United States because, absent LA/MSF, Airbus would have been unable to offer the aircraft actually ordered and the U.S. LCA industry would have made the sale. Indeed, in its arguments about customers’ “strong disposition” to place follow-on orders with Airbus, the EU never explains how Airbus would have been able to fill those orders without the LCA that depended on LA/MSF for their availability.

3. The EU has not rebutted the U.S. evidence and argumentation concerning individual lost sales.

689. The EU does not contest – and barely even refers to – the facts of most of the specific lost sales set out in the U.S. first written submission. In detailed accounts of 31 such campaigns,¹¹⁸⁴ the United States demonstrated that LA/MSF has continually allowed Airbus to offer customers LCA that would have been unavailable otherwise,¹¹⁸⁵ capturing thousands of sales that should have gone to the U.S. industry.

690. The Korean Air and Malaysian Airlines lost sales campaigns, as well as lost sales claims involving the A330, are some of the few lost sales campaigns that the EU does mention, however briefly. Below, the United States demonstrates that the EU’s quibbles with these lost sales campaign narratives are unwarranted.

a. Korean Air

691. The U.S. first written submission documented that Korean Air placed five A380 orders in 2008 and 2009 that would have gone to Boeing’s 747-8I absent LA/MSF.¹¹⁸⁶ The United States also noted that these five A380 sales followed five previous A380 orders that had occurred in 2003.¹¹⁸⁷

¹¹⁸⁴ The EU erroneously claims that the United States should have excluded the South African Airways sales campaign, because the Appellate Body report does not refer to South African Airways in its rulings and recommendations. *See* EU FWS, para. 815. The EU’s argument is baseless. As the EU itself admits, the original Panel found that a 2002 South African Airways order of 11 A319s and 15 A320s constituted significant lost sales, and the EU did not appeal this finding. *See* EU FWS, para. 815. Therefore, the Panel’s finding of significant lost sales involving South African Airways stands as an unappealed finding of the original Panel. Furthermore, the EU has not even claimed to have taken any compliance steps with respect to the South African Airways lost sales. *See* EU Notification, item 34 (Exhibit USA-1) (listing “{c}ompleted deliveries” to several airline customers as compliance “steps,” but not making any reference to completed A319 and A320 deliveries to South African Airways). Therefore, the EU has failed to comply with the DSB’s rulings and recommendations with respect to these lost sales.

¹¹⁸⁵ *See* US FWS, Section VI.G.2.

¹¹⁸⁶ *See* US FWS, para. 492.

¹¹⁸⁷ *See* US FWS, para. 492.

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692. The EU erroneously suggests¹¹⁸⁸ that this 2003 order somehow prevents the United States from presenting the subsequent 2008 and 2009 orders as evidence of continuing lost sales. The United States satisfied its burden with respect to the lost sales for Korean Air in the same way it satisfied its burden with respect to the evidence of lost sales for all other airline customers: the United States demonstrated that in the absence of LA/MSF, the customers would have placed orders with Boeing rather than Airbus. The legal standard is the same for follow-on lost sales as for first-order lost sales. The United States has shown that each type is caused by the EU’s LA/MSF to Airbus, and the EU has not taken any steps to remove the adverse effects.

693. The EU also erroneously argues that the 2008 lost sales claim is precluded because they constituted [***].¹¹⁸⁹ According to the EU, “Nothing prevented the United States from challenging that order as a lost sale during the original proceedings.”¹¹⁹⁰ The EU is incorrect: [***].¹¹⁹¹ Most important, the EU is unable to explain how Airbus could have sold A380s to Korean Air in 2008 and 2009 when, absent LA/MSF, it would have had no A380s to offer the airline.

b. Malaysian Airlines

694. The U.S. first written submission documented post-2006 lost sales involving Malaysian Airlines, including 15 A330-300 orders and four A330-200F orders.¹¹⁹² As the United States noted, the A300-200F is an Airbus freighter that competes against the Boeing 767 for freighter orders.¹¹⁹³ The EU does not contest this fact – nor does the EU contest the fact that freighter aircraft are “large civil aircraft” as defined by the Panel in the original proceeding.¹¹⁹⁴

695. Nonetheless, the EU erroneously alleges that the four A330-200F orders by Malaysian Airlines should have been excluded from the U.S. lost sales claims.¹¹⁹⁵ The EU asserts that “These {A330-200Fs} compete in a market separate from passenger aircraft, and the United States has failed to identify a competing Boeing freighter aircraft” The EU is wrong. The

¹¹⁸⁸ EU FWS, para. 1046.

¹¹⁸⁹ EU FWS, para. 1046.

¹¹⁹⁰ EU FWS, para. 1046.

¹¹⁹¹ In addition, with respect to lost sales involving Singapore Airlines and Qantas that took place in 2006, the EU erroneously states: “The United States could have included {these orders} as evidence of its claim of significant lost sales, but chose not to.” EU FWS, paras. 1040, 1042. However, the United States did, in fact, include these orders as evidence of its claim of significant lost sales. See US FWS, paras. 480, 482 (listing the 2006 Airbus sales involving Singapore Airlines and Qantas as evidence of the U.S. claim of significant lost sales); see also Summary Table of U.S. Significant Lost Sales (Exhibit USA-164) (also listing the 2006 Airbus sales involving Singapore Airlines and Qantas as evidence of the U.S. claim of significant lost sales).

¹¹⁹² US FWS, paras. 470-472.

¹¹⁹³ US FWS, para. 270.

¹¹⁹⁴ See *EC – Large Civil Aircraft (AB)*, note 4.

¹¹⁹⁵ See EU FWS, para. 935.

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United States identified the 767 as a competing Boeing freighter aircraft, and the EU itself acknowledged during the original Panel proceeding that Boeing also makes a 777 freighter aircraft.¹¹⁹⁶ Furthermore, the A330-200Fs sold to Malaysian Airlines were part of a larger sale including passenger aircraft, and [[HSBI]].¹¹⁹⁷ The EU has thus failed to refute the U.S. demonstration that the U.S. industry lost these sales and the A330-200F orders (and the other Malaysian Airlines orders discussed in the U.S. first written submission) are sales that Airbus would not have won in the absence of LA/MSF.

c. The EU fails to undermine the U.S. lost sales claims involving the A330.

696. The U.S. first written submission supported its claims of significant lost sales with evidence that Airbus had taken orders of the A330 and its variants in sales campaigns involving six airline customers.¹¹⁹⁸ In response, the EU argues that the Panel should not consider this evidence because the United States, in the original proceeding, did not demonstrate lost sales or displacement involving the A330.¹¹⁹⁹

697. The EU is once again wrong. In the original dispute, the United States presented evidence and argumentation concerning displacement of all Boeing LCA by all Airbus twin-aisle LCA (including the A330), and the Appellate Body found that LA/MSF caused displacement of U.S. aircraft in the twin-aisle markets of the European Union, China, and Korea.¹²⁰⁰ These Appellate Body displacement findings were based in part on deliveries of A330s that occurred in these markets during 2001-2006.¹²⁰¹ Thus, A330 sales were the basis for some of the Appellate Body's displacement findings, and the EU errs in asserting that the A330 is somehow not covered by the serious prejudice findings in the original dispute.

698. In any event, even assuming *arguendo* that there were no lost sales or displacement findings involving the A330 during the original dispute, this would still not preclude the United States from providing as evidence of lost sales (or displacement) sales from 2007-2012 involving the A330 in order to demonstrate the EU's failure to remove adverse effects. The relevant issue

¹¹⁹⁶ See *EC – Large Civil Aircraft (Panel)*, para. 7.2096.

¹¹⁹⁷ See US FWS, paras. 470-472; Press release, *Malaysia Airlines orders 17 A330s: Order covers passenger aircraft plus new freighter model*, EADS (Mar. 31, 2010) (Exhibit USA-238).

¹¹⁹⁸ See Summary Table of U.S. Significant Lost Sales (Exhibit USA-164) (listing lost sales involving the A330 and its variants, in relation to AirAsia X, Cathay Pacific Airways, Hong Kong Airlines, Malaysia Airlines, TAM, and US Airways).

¹¹⁹⁹ See EU FWS, para. 861 (“Nor did the United States raise allegations of displacement based on deliveries of the A330.”); see also EU FWS, para. 952 (making the same point in the context of displacement/impedance).

¹²⁰⁰ See *EC – Large Civil Aircraft (AB)*, paras. 1182, 1186, 1192 (finding displacement with respect to (*inter alia*) the twin-aisle markets in the EU, China, and Korea).

¹²⁰¹ See Ascend aircraft database (Jan. 13, 2012) (Exhibit USA-112) (indicating that from 2001-2006, 63 A330 deliveries occurred in the EU, 20 A330 deliveries occurred in China, and 10 A330 deliveries occurred in South Korea).

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is whether the EU has removed the adverse effects of the subsidies at issue, which includes LA/MSF to the A330 and other Airbus LCA. Absent LA/MSF, the A330 would not have been available at any point from 2001 through the present. The EU's failure to remove LA/MSF's adverse effects encompasses all such effects, whether or not the A330 was involved the underlying serious prejudice findings. In fact, the A330 is covered by those findings, and nothing the EU has said changes this, or undermines the U.S. demonstration that the U.S. LCA industry continues to suffer lost sales because LA/MSF enables Airbus to offer the A330 to customers.

4. Since December 1, 2011, the U.S. LCA industry has continued to suffer significant lost sales.

699. As discussed above, the United States has presented evidence and argumentation concerning lost sales from 2001 onwards, to give the Panel a robust basis for assessing the continued effects of LA/MSF in causing lost sales over time, through the EU's December 1, 2011 compliance deadline, up to the date of referral of the matter to the compliance Panel and finally to the present. The EU's position that the Panel should not look to any facts that predate December 1, 2011¹²⁰² has no legal support and runs contrary to every past WTO subsidies dispute.¹²⁰³

700. That said, the United States did, and does, proffer evidence that post-dates December 1, 2011. Consistent with the absence of any meaningful compliance action on the part of the EU, the pattern of frequent, massive lost sales (and other adverse effects) caused by LA/MSF has continued unabated from December 2011 onwards. Although EU inaction and the large volume of lost sales evidence (both pre- and post- December 1, 2011) on the existing record provide a sufficient basis for the Panel to conclude that the EU has failed to remove the adverse effects, the United States provides additional confirmation of the continued existence of significant lost sales caused by the EU's failure to withdraw the subsidies or take appropriate steps to remove their adverse effects.

701. The U.S. first written submission already contained post-December 1, 2011 evidence of the EU's failure to comply. In particular, Airbus captured 10 A380 sales and 100 A320neo sales involving Hong Kong Airlines and Norwegian Air Shuttle, respectively. Both sets of lost sales occurred in January 2012.¹²⁰⁴

702. The U.S. LCA industry has suffered at least 48 additional lost orders in the period since the filing of the U.S. first written submission. These additional lost sales, themselves worth billions of dollars, involve three airlines: Cathay Pacific, Transaero Airlines, and China Aircraft Leasing Company (CALC).

¹²⁰² EU FWS, para. 7.

¹²⁰³ See Section VI.B.4 of this submission.

¹²⁰⁴ See US FWS, paras. 433, 496.

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a. *Cathay Pacific (10 A350 XWB-1000 orders and 16 conversions from A350-900)*

703. On July 10, 2012, Cathay Pacific announced an “agreement to place a new order for” 26 A350-1000s, the largest variant of the A350 XWB family of aircraft.¹²⁰⁵ This order included 10 new orders, as well as 16 conversions of previously placed A350-900 orders.¹²⁰⁶ The Cathay deal represented an important vote of confidence in the A350-1000, which had previously been criticized for its inferior range and payload capacity.¹²⁰⁷ It was also a lost sale to Boeing, whose [[HSBI]].¹²⁰⁸

704. Cathay Pacific first firmed up an order for 30 A350 XWB-900s on September 16, 2010 (following an initial announcement of August 4, 2010).¹²⁰⁹ However, [[HSBI]].¹²¹⁰

705. The press reported that this purchase would “boost airframer’s {sic} confidence in battle with Boeing’s 777.”¹²¹¹ Before 2011, “{s}ome Middle East airlines ha{d} complained about {the A350 XWB-1000’s} range and payload capacity, prompting Airbus and engine maker Rolls-Royce to bolster the engine design and relaunch the aircraft at the Paris Air Show” in 2011.¹²¹² However, even this “revamp{ed}” -1000 “drew sharp criticism from the Middle Eastern customers who had signed up to its predecessors. Barbed comments from the Gulf and a dearth of orders . . . hardly helped support Airbus’s conviction that its overhaul decision had been a good one. But the {July 2012} Cathay agreement puts Airbus back on the offensive,”¹²¹³ demonstrating that the -1000 has at least some modicum of market appeal. This victory prompted Airbus Chief Operating Officer John Leahy to boast that the A350 XWB-1000 is ““a much better airplane than we had before and it’s a much better airplane than the competition {Boeing 777-300ER}’.”¹²¹⁴ Thus in Airbus’s view, the July 2012 Cathay Pacific sale guarantees

¹²⁰⁵ See Press Release, *Cathay Pacific selects A350-1000: Airline to add largest version of all-new airliner to existing A350 XWB order*, EADS (July 10, 2012) (Exhibit USA-368).

¹²⁰⁶ See Press Release, *Cathay Pacific selects A350-1000: Airline to add largest version of all-new airliner to existing A350 XWB order*, EADS (July 10, 2012) (Exhibit USA-368).

¹²⁰⁷ See, e.g., Tim Hepher & Karen Jacobs, *Update 1-Airshow-Cathay seen front-runner to ease A350 drought*, Reuters (July 8, 2012) (Exhibit USA-369).

¹²⁰⁸ See [[HSBI]] (Exhibit USA-370 (HSBI)).

¹²⁰⁹ See US FWS, para. 459.

¹²¹⁰ See [[HSBI]] (Exhibit USA-370 (HSBI)).

¹²¹¹ *Cathay gives Airbus ‘big twin’ a big win*, Flight International (July 17, 2012) (Exhibit USA-381).

¹²¹² Tim Hepher & Karen Jacobs, *Update 1-Airshow-Cathay seen front-runner to ease A350 drought*, Reuters (July 8, 2012) (Exhibit USA-369).

¹²¹³ *Sharing the Spoils*, Flight International (July 17, 2012) (Exhibit USA-371).

¹²¹⁴ Aaron Karp, *Cathay becomes first to commit to modified A350-1000*, ATWOnline (July 10, 2012) (Exhibit USA-372).

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that Airbus will continue to garner these twin-aisle sales at the expense of Boeing for years to come.

b. Transaero (4 A380 orders)

706. On June 21, 2012, Transaero Airlines, a Russian customer, firmed up an order for four Airbus A380s,¹²¹⁵ following a Memorandum of Understanding signed in October 2011.¹²¹⁶ As Airbus Executive Vice-President Europe Christopher Buckley put it, this was the culmination of Airbus's efforts to break "into the Transaero market," representing "a historic moment for Airbus as this is the first contract in Russia and the CIS for the A380."¹²¹⁷ Transaero had previously operated only Boeing LCA (plus Tupolev Tu-214s),¹²¹⁸ and it will use the A380s to replace the Boeing 747-300s and 747-400s in its fleet, as well as for fleet expansion.¹²¹⁹ Transaero has also signed a memorandum of understanding to purchase four 747-8Is,¹²²⁰ but the availability of the A380 prevented the 747-8I from fulfilling all of the airline's requirements. Indeed, the magnitude of this loss for the U.S. LCA industry is likely to grow. As Airbus's Mr. Buckley puts it, "{w}e are very confident that the fleet will not stop at four aircraft and we are looking towards (adding) many more A380s to this first in Russia."¹²²¹

c. China Aircraft Leasing Company (36 A320 Family Aircraft)

707. On July 11, 2012, China Aircraft Leasing Company (CALC), a Hong Kong-based aircraft leasing company, signed a Memorandum of Understanding to purchase 36 A320 family aircraft, including 8 A321s.¹²²² **[[HSBI]]**.¹²²³

¹²¹⁵ See Press release, *Transaero Airlines firms up order for four A380s: First A380 customer in Russia, the CIS and Eastern Europe*, EADS (June 21, 2012) (Exhibit USA-373).

¹²¹⁶ See Press release, *Transaero Airlines commits to four A380s: First A380 customer in Russia, the CIS and Eastern Europe*, EADS (Oct. 28, 2011) (Exhibit USA-374).

¹²¹⁷ *Russia's Transaero signs deal for Airbus A380 jets*, Channelnewsasia.com/Agence France Press (June 21, 2012) (Exhibit USA-448).

¹²¹⁸ *Russia's Transaero signs deal for Airbus A380 jets*, Channelnewsasia.com/Agence France Press (June 21, 2012) (Exhibit USA-448); Paulina Borodina, *Transaero inks order for four 747-8Is*, Air Transport World (Nov. 8, 2011) (Exhibit USA-449).

¹²¹⁹ Cathy Buyck, *Transaero Airlines considers A380, 747-8 orders*, Air Transport World (August 18, 2011) (Exhibit USA-450).

¹²²⁰ Paulina Borodina, *Transaero inks order for four 747-8Is*, Air Transport World (Nov. 8, 2011) (Exhibit USA-449).

¹²²¹ *Russia's Transaero signs deal for Airbus A380 jets*, Channelnewsasia.com/Agence France Press (June 21, 2012) (Exhibit USA-448).

¹²²² See Press release, *China Aircraft Leasing Company commits to 36 A320 Family Aircraft: Operators can select Airbus' new fuel saving Sharklets*, EADS (July 11, 2012) (Exhibit USA-375).

¹²²³ See **[[HSBI]]** (Exhibit USA-376 (HSBI)).

708. [[HSBI]].¹²²⁴ However, CALC ultimately chose Airbus A320 LCA that would have been unavailable absent LA/MSF.

709. Finally, the United States observes that the pattern of significant lost sales shows no sign of abating. AirAsia, the Malaysian low cost carrier that became an Airbus customer in a lost sale found by the original Panel, is reportedly poised to place another large order for Airbus LCA, this time for 100 aircraft.¹²²⁵

F. The EU has Failed to Rebut the U.S. Demonstration of Displacement, Impedance, and Threat Thereof in the EU Market and Certain Third Country Markets

710. The U.S. LCA industry continues to suffer adverse effects in the form of displacement, impedance, and/or the threat thereof within the meaning of Article 6.3(a) and (b) of the SCM Agreement. The U.S. first written submission demonstrated that such adverse effects are presently occurring in the EU market and 11 third-country markets.¹²²⁶ These adverse effects have continued during the first half of 2012, and the continued existence of displacement and impedance underscores the EU's failure to take any meaningful steps to remove the adverse effects at issue in this dispute.

711. Below, the United States presents updated data demonstrating displacement, impedance, and/or threat thereof in the EU market and 11 third-country markets continuing through the date of referral of the matter to the compliance Panel and to the present. These data supplement the data tables in the U.S. first written submission for the time period 2001-2011, with the inclusion of additional market activity in the first half of 2012. Data for the first half of 2012 generally reinforce the conclusions drawn from the data in the U.S. first written submission.¹²²⁷

712. The use by United States of pre-December 2011 market data as evidence to demonstrate continuing displacement and impedance in no way implies that WTO remedies are “retroactive,” as the EU erroneously suggests.¹²²⁸ Rather, the data relied on by United States serves as evidence of present market displacement and impedance, as it demonstrates long-term market trends, and confirm that the U.S. LCA industry continues to suffer displacement and impedance during the 2001-2012 time period, as a result of LA/MSF. The Appellate Body has said that “the displacement or impeding of exports {should} be demonstrated “over an appropriately

¹²²⁴ See [[HSBI]] (Exhibit USA-376 (HSBI)).

¹²²⁵ Kevin Lim, AirAsia's plan to buy 100 Airbus jets headed to board-CEO (Update-1), Reuters (Sept. 21, 2012) (Exhibit USA-491).

¹²²⁶ See US FWS, Section VI.G.2, and para. 533.

¹²²⁷ The United States recognizes that partial year data, when viewed alone, may be of more limited usefulness, particularly in a business like the LCA industry with long time horizons. The Appellate Body has repeatedly cautioned against placing too much emphasis on the end points of the reference period used to support a claim of adverse effects under Articles 5 and 6 of the SCM Agreement. See, e.g., *EC – Large Civil Aircraft (AB)*, paras. 1166-1167.

¹²²⁸ EU FWS, paras. 841, 948.

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representative period” . . . so that “clear trends” in changes in market share can be demonstrated.”¹²²⁹ Again, the Appellate Body, in the context of this dispute, explained that “the assessment of the {U.S.} claims of displacement called for an examination of whether there were *trends* in the market shares during the reference period.”¹²³⁰ Therefore, the Panel should not ignore the evidence of long-term market trends, in its analysis of whether present market displacement continues, by excluding pre-December 2011 market share data. The Panel should consider the past market data offered by the United States as evidence of the presently existing displacement, impedance, or threat, as the case may be, as did the original Panel.¹²³¹

713. The EU does not dispute the accuracy of the data underlying the U.S. demonstration of presently continuing market displacement and impedance.¹²³² Separately, many of the EU’s arguments against the U.S. displacement and impedance claims are contradicted by points the United States made above and in its first written submission:

- the existence of three LCA product markets, in contrast to the seven now proposed by the EU;¹²³³
- the relevance of all market data from the original reference period through the present, notwithstanding the EU’s insistence that the Panel ignore all pre-December 2011 data;¹²³⁴
- the EU’s failure to demonstrate that the 767’s sales and market position would not have improved absent LA/MSF;¹²³⁵
- the absence of any meaningful EU action to withdraw the subsidies at issue in this dispute, in contrast to the EU’s assertion that the subsidies have been withdrawn mainly by the passage of time;¹²³⁶ and
- the fact that the EU’s purported “procurement” of the delivery of aircraft and termination of the A340 program are neither “non-attribution factors nor steps taken to remove the adverse effects.”¹²³⁷

¹²²⁹ *EC – Large Civil Aircraft (AB)*, para. 1166 (quoting *US – Upland Cotton*, para. 478) (ellipsis in original).

¹²³⁰ *EC – Large Civil Aircraft (AB)*, para. 1167.

¹²³¹ *See EC – Large Civil Aircraft (Panel)*, para. 7.1694 (“Of course, it is impossible to assess the ‘present’ situation, as immediate data is not available, and thus a review of the past is necessary to draw conclusions about present adverse effects.”).

¹²³² The U.S. and the EU both use the Ascend aircraft database. *See* Ascend Aircraft Database (Exhibit USA-112); Updated Ascend Aircraft Database (Exhibit USA-378).

¹²³³ *See EC – Large Civil Aircraft (AB)*, para. 1166; *see also* Section VI.C (Conditions of Competition and Product Markets).

¹²³⁴ *See* Section VI.B.4 of this submission.

¹²³⁵ *See* Section VI.C.

¹²³⁶ *See* Section IV of this submission.

¹²³⁷ *See* Section IV.E of this submission.

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714. The remaining so-called “non-attribution factor” suggested by the EU – “Boeing’s high market share” – is also an argument without merit.¹²³⁸ Nothing in the text of the SCM Agreement indicates that a WTO Member may not bring a claim for adverse effects resulting from WTO-inconsistent subsidies in markets where its industry enjoys a high market share. Equally important, the original Panel and Appellate Body found that displacement and impedance occurred in specific third-country markets where Boeing started in a strong position. For example, in the Australia single-aisle market, Boeing had a 100 percent market share from 2001-2003, and in the China twin-aisle market, Boeing had a 100 percent market share from 2001-2002.¹²³⁹ Neither the original Panel nor the Appellate Body considered that Boeing’s initial high market shares to be a “non-attribution factor” that precluded the claim. The Panel should adopt the same approach here.

715. This leaves the market data presented by the United States in its first written submission, and updated below. The data, viewed in the context of LA/MSF’s product effects, demonstrate that displacement and impedance continue as a result of the EU’s failure to take appropriate steps to remove the adverse effects of LA/MSF and other subsidies to Airbus. The EU contends that such data are insufficient and that independent narratives detailing evidence of lost sales campaigns are necessary to support these claims. To the contrary, such a requirement would effectively subordinate or convert displacement and impedance claims into lost sales claims, even though these explicitly are two separate and independent forms of serious prejudice under Article 6.3 of the SCM Agreement. Furthermore, in the original proceeding, the DSB adopted findings of displacement in China and Korea notwithstanding the lack of any specific findings of lost sales involving Chinese or Korean airline customers.¹²⁴⁰ There is simply no basis for the EU to challenge U.S. displacement and impedance claims because they may be unaccompanied by corresponding lost sales claims.¹²⁴¹ And finally, there is no dispute between the parties about the underlying data.

716. In any event, the United States *has also* demonstrated particular lost sales in:

- the EU single-aisle, twin-aisle, and Very Large Aircraft markets (*i.e.*, those of easyJet, Air Berlin/NIKI, Czech Airlines, Norwegian Air Shuttle, Iberia Airlines, Air France – KLM, and British Airways);
- the Australian single-aisle and very large aircraft markets (Qantas and Qantas Airlines/Jetstar Airways);
- the Korean twin-aisle and very large aircraft markets (Korean Air and Asiana Airlines);
- the Singaporean twin-aisle and very large aircraft markets (Singapore Airlines); and

¹²³⁸ EU FWS, para. 852 (discussing this purported “non-attribution factor” in the context of the Australian single-aisle market).

¹²³⁹ See *EC – Large Civil Aircraft (AB)*, Tables 4.2, 4.3.

¹²⁴⁰ See *EC – Large Civil Aircraft (AB)*, paras. 1414(m), (p); *EC – Large Civil Aircraft (Panel)*, para. 7.1845.

¹²⁴¹ See EU FWS, paras. 952, 956, 960, 964, 1068.

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- the United Arab Emirates very large aircraft market (Emirates).

Thus, the EU's argument would not have any bearing on the U.S. claims of displacement, impedance, and threat thereof, involving the markets listed above, even if it were appropriate (and it is not) to disregard the DSB-adopted displacement findings of the original Panel and the Appellate Body and embrace the EU's contention that a complaining Member must demonstrate individual lost sales to demonstrate displacement or impedance under Articles 6.3(a) or (b).

717. The data set forth in the U.S. first submission and as updated below lead to the same conclusion that the United States reached in its first written submission: the subsidies continue to cause displacement and impedance of U.S. LCA in the EU and 11 third-country markets.

1. The U.S. demonstration of displacement and impedance (and threat thereof) in the EU market under Article 6.3(a) of the SCM Agreement remains un rebutted.

718. Below, the United States presents updated market data through the first half of 2012, confirming that U.S. LCA industry continues to suffer displacement, impedance, and threat thereof, in the EU single-aisle, twin-aisle, and Very Large Aircraft markets.

719. In the *EU single-aisle market*, the EU's subsidies to Airbus presently impede imports of Boeing LCA. Absent the EU's subsidies to Airbus, the U.S. LCA industry would have won the orders placed by easyJet, Air Berlin, and CSA Czech Airlines for single-aisle LCA during the 2001-2006 period.¹²⁴² Because LA/MSF and other subsidies caused those orders to go to Airbus rather than Boeing, the Airbus deliveries pursuant to those orders have prevented Boeing's market share from increasing as it should have. Delivery volumes would have been at least 30 units higher in every year from 2007-2011, and they would have been 20 units higher in the first half of 2012 alone.

EU Single-Aisle Market: Impedance of Boeing LCA¹²⁴³

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H 2012
Airbus Single-Aisle Deliveries in EU Market Caused By Subsidies												
easyJet	-	-	5	21	33	32	16	22	37	18	25	15
Air Berlin	-	-	-	-	2	9	13	13	8	11	11	5
CSA Czech Airlines	-	-	-	-	-	3	5	4	1	1	1	0
Total	-	-	5	21	35	44	34	39	46	30	37	20
Impedance Resulting from These Subsidized Deliveries												
Boeing Deliveries (Actual)	56	50	54	59	43	47	82	59	74	69	84	38
Boeing Market Share (Actual)	38.4%	39.1%	39.1%	40.4%	33.9%	33.1%	42.5%	33.0%	35.7%	42.3%	46.7%	46.3%
Boeing Delivs. (Counterfactual)	56	50	59	80	78	91	116	98	120	99	121	58

¹²⁴² See US FWS, para. 513; EC – Large Civil Aircraft (Panel), para. 1414(p).

¹²⁴³ Updated Ascend aircraft database (Exhibit USA-378).

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	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H 2012
Change from Actual (Units)	-	-	5	21	35	44	34	39	46	30	37	20
Boeing Market Share (Counterfactual)	38.4%	39.1%	42.8%	54.8%	61.4%	64.1%	60.1%	54.7%	58.0%	60.7%	67.2%	70.7%
Change from Actual (Market Share Points)	0.0%	0.0%	3.6%	14.4%	27.6%	31.0%	17.6%	21.8%	22.2%	18.4%	20.6%	24.4%
Airbus Deliveries (Actual)	90	78	84	87	84	95	111	120	133	94	96	44
Airbus Market Share (Actual)	61.6%	60.9%	60.9%	59.6%	66.1%	66.9%	57.5%	67.0%	64.3%	57.7%	53.3%	53.7%
Airbus Deliveries (Counterfactual)	90	78	79	66	49	51	77	81	87	64	59	24
Airbus Market Share (Counterfactual)	61.6%	60.9%	57.2%	45.2%	38.6%	35.9%	39.9%	45.3%	42.0%	39.3%	32.8%	29.3%
Total Market Deliveries (Actual)	146	128	138	146	127	142	193	179	207	163	180	82

720. As indicated in the U.S. first written submission, should the Panel find that there is no impedance of Boeing single-aisle LCA based on the delivery data, the United States requests that the Panel conduct a threat analysis based on order data.¹²⁴⁴ The updated order data confirm that the EU's subsidies to Airbus have continued to displace and/or impede Boeing LCA, with Boeing's market share falling from a high of 70.8 percent in 2003 to zero percent in 2011 and the first half of 2012. In addition, Boeing's market share has fallen continuously every year from 2006 (49.9 percent) to the present (zero percent). The EU's subsidies have completely pushed Boeing out of the market.

EU Single-Aisle Market: Threat of Displacement and/or Impedance of Boeing LCA¹²⁴⁵

Order Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	15	104	34	20	165	173	76	62	38	17	0	0
Boeing Market Share	46.9%	41.4%	70.8%	25.0%	45.2%	49.9%	31.7%	30.7%	25.5%	12.3%	0.0%	0.0%
Airbus Volume (Units)	17	147	14	60	200	174	164	140	111	121	60	2
Airbus Market Share	53.1%	58.6%	29.2%	75.0%	54.8%	50.1%	68.3%	69.3%	74.5%	87.7%	100.0%	100.0%

721. Likewise, in the *EU twin-aisle market*, the EU's subsidies to Airbus continue impeding imports of Boeing LCA. Although Boeing previously enjoyed market shares in the range of 38-43 percent in 2003-2004, its market share has since dropped to 30 percent and below, reaching a low-point of 15.4 percent in 2008. Although Boeing enjoyed a temporary upswing in market share in 2011, the data from the first half of 2012 reverted to the longer-term trend of market shares at or below 31 percent. In the absence of LA/MSF subsidies, the Boeing 767 and 777 would have enjoyed much higher delivery volumes in this market.

¹²⁴⁴ See US FWS, para. 514.

¹²⁴⁵ Updated Ascend aircraft database (Exhibit USA-378).

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EU Twin-Aisle Market: Impedance of Boeing LCA¹²⁴⁶

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	12	11	10	13	5	9	10	4	20	9	11	5
Boeing Market Share	38.7%	29.7%	43.5%	38.2%	20.8%	28.1%	38.5%	15.4%	52.6%	47.4%	64.7%	31.2%
Airbus Volume (Units)	17	26	13	21	19	23	16	22	18	10	6	11
Airbus Market Share	54.8%	70.3%	56.5%	61.8%	79.2%	71.9%	61.5%	84.6%	47.4%	52.6%	35.3%	68.8%

722. In the *EU Very Large Aircraft market*, Airbus’s A380 has forced Boeing out of the market position it enjoyed from 2001–2008. From 2009 through the present, Boeing has failed to achieve more than 50 percent market share in any year, and it suffered zero market share in 2010 and the first half of 2011. Although Boeing was able to secure some deliveries in 2011 and the first half of 2012, its market share in the first half of 2012 remained at 50 percent – consistent with the long-term trend of displacement.

EU Very Large Aircraft Market: Displacement and Impedance of Boeing LCA¹²⁴⁷

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	10	6	5	4	2	1	4	3	1	0	5	4
Boeing Market Share	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	50.0%	0.0%	45.5%	50.0%
Airbus Volume (Units)	0	0	0	0	0	0	0	0	1	7	6	4
Airbus Market Share	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	50.0%	100.0%	54.5%	50.0%

723. Notably, this trend is supported by delivery data in every year since 2011. Therefore, the EU is wrong to assert, without explanation or substantiation, that “insufficient data is available”¹²⁴⁸ for a finding of displacement or impedance in this market.

724. In sum, the EU has failed to rebut the U.S. demonstration that LA/MSF continues to cause displacement and impedance in the EU single-aisle market, twin-aisle market, and very large aircraft market under Article 6.3(a) of the SCM Agreement.

2. The U.S. demonstration of displacement and impedance in certain third-country markets under Article 6.3(b) of the SCM Agreement remains unrebutted.

725. The United States provides updated market data confirming that the U.S. LCA industry continues to suffer displacement, impedance, and threat thereof, in the 11 third-country markets identified in the U.S. first written submission.¹²⁴⁹ These claims are confirmed by the up-to-date data set out below.

¹²⁴⁶ Updated Ascend aircraft database (Exhibit USA-378).

¹²⁴⁷ Updated Ascend aircraft database (Exhibit USA-378).

¹²⁴⁸ EU FWS, para. 1061.

¹²⁴⁹ See US FWS, Section VI.H.3.

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726. In the *Australia single-aisle market*, the Appellate Body previously found that the United States suffered displacement during the period 2001-2006 because Boeing’s market share fell 100 percent in 2001-2003 to 50-67 percent in 2004-2006.¹²⁵⁰ This trend has continued since 2006, with Boeing’s market share remaining below 100 percent, and reaching a low of 30 percent in 2010. This long-term trend confirms that the displacement previously identified by the Panel and the Appellate Body has persistent, as a result of the EU’s subsidies to Airbus:

Australia Single-Aisle Market: Displacement and Impedance of Boeing LCA¹²⁵¹

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	7	27	16	12	9	8	2	7	6	6	23	10
Boeing Market Share	100.0%	100.0%	100.0%	66.7%	50.0%	57.1%	40.0%	63.6%	42.9%	30.0%	88.5%	90.9%
Airbus Volume (Units)	0	0	0	6	9	6	3	4	8	14	3	1
Airbus Market Share	0.0%	0.0%	0.0%	33.3%	50.0%	42.9%	60.0%	36.4%	57.1%	70.0%	11.5%	9.1%

727. In discussing these market data, the EU erroneously emphasizes that there was only one Airbus delivery in the first half of 2012.¹²⁵² This approach places undue emphasis on the end-points of the period at issue,¹²⁵³ and it also improperly compares partial-year 2012 data to full-year data from prior years. Airbus’s deliveries in the remainder of 2012 may well rise, just as they did from the first half of 2011 to the second half of that year.

728. In the *Australia Very Large Aircraft market*, from 2001 to 2007, every single delivery was a Boeing aircraft. However, from 2008 onwards, each delivery has been an Airbus aircraft. Thus, in enabling Airbus to bring the A380 to market, LA/MSF has reversed the two aircraft manufacturers’ positions in this market, enabling Airbus to convert Qantas from a Boeing customer to an Airbus customer, as the United States previously demonstrated:¹²⁵⁴

¹²⁵⁰ See EC – Large Civil Aircraft (AB), paras. 1183-1184.

¹²⁵¹ Updated Ascend aircraft database (Exhibit USA-378).

¹²⁵² See EU FWS, para. 852.

¹²⁵³ Cf. EC – Large Civil Aircraft (AB), paras. 1166-1167 (criticizing “a mere comparison of market shares at the end points of {a} {time} period.”).

¹²⁵⁴ See US FWS, paras. 481-482.

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Australia Very Large Aircraft Market: Displacement and Impedance of Boeing LCA¹²⁵⁵

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	0	3	3	0	0	0	0	0	0	0	0	0
Boeing Market Share	0.0%	100.0%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Airbus Volume (Units)	0	0	0	0	0	0	0	3	2	2	5	0
Airbus Market Share	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	100.0%	100.0%	0.0%

729. The long-term trend could not be more clear: Airbus has completely pushed Boeing out of the market since 2008. Although the volume of data is lower in this market than in some single-aisle and twin-aisle markets, this is due to the nature of the very large aircraft market, and it should not prevent the Panel from finding that displacement and impedance of Boeing very large aircraft continue to occur in Australia. Delivery rates for very large aircraft tend to be lower due to the fact that LCA customers demand fewer numbers of such aircraft. However, these relatively low delivery rates should not bar a finding of displacement and impedance, as the EU erroneously argues,¹²⁵⁶ given that the market trends are “clearly discernable.”¹²⁵⁷ There is no mistaking what has happened in this market or any other VLA market: where Boeing once offered the only VLA, now Airbus dominates, thanks to LA/MSF.

730. In the *China single-aisle market*, Boeing’s market share declined from a level of 66-79 percent in 2001-2002, to 38.2 percent in 2011. This decline continued in the first half of 2012, with Boeing’s market share falling further to 35.8 percent. The EU attempts to characterize Boeing’s current declining market share as “stable,”¹²⁵⁸ while ignoring the fact that this “stable” market share is approximately half of what Boeing enjoyed from 2001-2002, and is well below even the near-50 percent levels that Boeing enjoyed from 2005-2009:

China Single-Aisle Market: Displacement and Impedance of Boeing LCA¹²⁵⁹

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	18	27	27	19	49	58	63	44	77	62	58	29
Boeing Market Share	66.7%	79.4%	58.7%	36.5%	48.5%	49.2%	56.3%	44.9%	49.7%	38.3%	38.2%	35.8%
Airbus Volume (Units)	9	7	19	33	52	60	49	54	78	100	94	52
Airbus Market Share	33.3%	20.6%	41.3%	63.5%	51.5%	50.8%	43.8%	55.1%	50.3%	61.7%	61.8%	64.2%

¹²⁵⁵ Updated Ascend aircraft database (Exhibit USA-378).

¹²⁵⁶ EU FWS, para. 1063 (erroneously arguing that the data for the Australian VLA market are “insufficient” for a finding of displacement/impedance).

¹²⁵⁷ EC – Large Civil Aircraft (AB), para. 1166.

¹²⁵⁸ EU FWS, para. 854.

¹²⁵⁹ Updated Ascend aircraft database (Exhibit USA-378).

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731. In the *China twin-aisle market*, Boeing previously enjoyed a 100 percent market share in 2001-2002, which has been eroded because of the EU subsidies. Since 2007 Airbus has accounted for nearly 80 percent of aircraft sales in this market, and Boeing's market shares has fallen steadily from 2009-2011, reaching a low of 36.8 percent in 2011, and 25.5 percent in the second half of 2012:

China Twin-Aisle Market: Displacement and Impedance of Boeing LCA¹²⁶⁰

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	4	2	1	1	0	2	0	0	2	7	7	3
Boeing Market Share	100.0%	100.0%	25.0%	33.3%	0.0%	11.1%	0.0%	0.0%	66.7%	41.2%	36.8%	25.5%
Airbus Volume (Units)	0	0	3	2	4	16	19	19	1	10	12	9
Airbus Market Share	0.0%	0.0%	75.0%	66.7%	100.0%	88.9%	100.0%	100.0%	33.3%	58.8%	63.2%	75.0%

732. The EU seeks to minimize the data by characterizing them as “at best sporadic.”¹²⁶¹ The data confirm, however, that Airbus has supplanted Boeing as the clear market share leader, having achieved a greater-than-half market share every year since 2003 (except for 2009, when there were only 3 deliveries in total).

733. In the *China Very Large Aircraft market*, Airbus has clearly displaced Boeing. Boeing deliveries filled the market from 2001-2008 but has yet to make any deliveries since then. Airbus has displaced Boeing as the sole provider of VLA to Chinese customers, accounting for all VLA deliveries in China since 2008 through the first half of 2012:

China Very Large Aircraft Market: Displacement and Impedance of Boeing LCA¹²⁶²

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	0	2	0	0	1	4	4	1	0	0	0	0
Boeing Market Share	0.0%	100.0%	0.0%	0.0%	100.0%	100.0%	100.0%	100.0%	0.0%	0.0%	0.0%	0.0%
Airbus Volume (Units)	0	0	0	0	0	0	0	0	0	0	2	1
Airbus Market Share	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%

734. Again, the EU attempts to minimize the import of these data by characterizing them as “insufficient,”¹²⁶³ but (as mentioned above) lower delivery volumes are an inherent characteristic of the very large aircraft markets. As with all other VLA markets identified by the United States, the long-term trend here is clearly discernible: Airbus has displaced Boeing, such that the U.S. LCA industry is no longer the sole supplier of very large aircraft to this market.

¹²⁶⁰ Updated Ascend aircraft database (Exhibit USA-378).

¹²⁶¹ EU FWS, para. 955.

¹²⁶² EU FWS, para. 1067.

¹²⁶³ Updated Ascend aircraft database (Exhibit USA-378).

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735. In the *India single-aisle market*, Airbus A320 series LCA have gradually pushed Boeing’s competing 737s out of the market: Boeing’s market share has fallen from a stable 100 percent in 2001-2004 to levels well below 50 percent from 2005 through the first half of 2012. After a brief upswing in 2006 to 44.7 percent, Boeing’s market shares fell steadily to 26.9 percent in 2010, and reached a low-point of 14.3 percent in the first half of 2012:

India Single-Aisle Market: Displacement and Impedance of Boeing LCA¹²⁶⁴

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	5	4	3	1	5	21	25	13	14	7	8	2
Boeing Market Share	100.0%	100.0%	100.0%	100.0%	23.8%	44.7%	43.1%	37.1%	34.1%	26.9%	36.4%	14.3%
Airbus Volume (Units)	0	0	0	0	16	26	33	22	27	19	14	12
Airbus Market Share	0.0%	0.0%	0.0%	0.0%	76.2%	55.3%	56.9%	62.9%	65.9%	73.1%	63.6%	85.7%

736. The EU has notably little to say about the clear trends of displacement and impedance of Boeing LCA in the India single-aisle market.¹²⁶⁵ Instead, the EU reverts to its general claim that “the United States cannot establish that its aircraft are displaced or impeded in an LCA market, without establishing that it has ‘lost’ sales in this market.”¹²⁶⁶ However, as the United States discussed above,¹²⁶⁷ the Appellate Body already confirmed that a *prima facie* case of displacement or impedance does not require a demonstration of lost sales. Indeed, such a requirement would effectively subordinate or simply convert displacement and impedance claims to claims of lost sales. There is no legal support for the EU’s position, and the text of Article 6.3 of the SCM Agreement directly contradicts the EU’s position.

737. In the *Korea twin-aisle market*, Boeing’s market share in 2011 remained where it was in 2006, which previously led the Appellate Body to conclude that the U.S. LCA industry was suffering displacement in this market.¹²⁶⁸ After a brief upswing in 2007-2008, Boeing’s market share remained at the 50-60 percent level from 2009-2011:

European Union Korea Twin-Aisle Market: Displacement and Impedance of Boeing LCA¹²⁶⁹

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	4	4	1	1	3	2	6	3	3	4	3	3
Boeing Market Share	66.7%	66.7%	50.0%	50.0%	60.0%	50.0%	85.7%	100.0%	60.0%	57.1%	50.0%	100.0%
Airbus Volume (Units)	2	2	1	1	2	2	1	0	2	3	3	0
Airbus Market Share	33.3%	33.3%	50.0%	50.0%	40.0%	50.0%	14.3%	0.0%	40.0%	42.9%	50.0%	0.0%

¹²⁶⁴ Updated Ascend aircraft database (Exhibit USA-378).

¹²⁶⁵ See EU FWS, para. 857.

¹²⁶⁶ EU FWS, para. 857.

¹²⁶⁷ Section VI.F of this submission discusses this issue in greater detail.

¹²⁶⁸ See *EC – Large Civil Aircraft (AB)*, paras. 1191-1192.

¹²⁶⁹ Updated Ascend aircraft database (Exhibit USA-378).

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738. Therefore, over the long-term, Boeing has failed to regain the two-thirds market share position that it originally enjoyed in 2001-2002, with the exception of brief upswings in 2008 and the first half of 2012 – where in each of these two periods there was low delivery volumes of only three aircraft. The EU emphasizes the partial year data from 2012 in its displacement and impedance analysis of this market,¹²⁷⁰ but this places undue emphasis on the end-point of the time period.¹²⁷¹ Particularly given the low delivery volumes in the second half of 2012, Boeing’s high market share appears aberrational, relative to the rest of the time period, which shows a clearly discernible trend over many years.

739. In the *Korea Very Large Aircraft market*, Airbus has replaced Boeing as the main supplier of very large aircraft. Boeing previously accounted for all deliveries from 2001-2006. However, from 2007-2011, every delivery has been an Airbus A380:

Korea Very Large Aircraft Market: Displacement and Impedance of Boeing LCA¹²⁷²

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	3	3	3	3	1	3	0	0	0	0	0	1
Boeing Market Share	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%
Airbus Volume (Units)	0	0	0	0	0	0	0	0	0	0	5	0
Airbus Market Share	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	0.0%

740. The delivery volumes in this market reflect an inherent characteristic of the VLA market (as discussed above), and not “insufficient” data, as the EU erroneously claims.¹²⁷³ Indeed, the U.S. lost sales campaign narratives related to Korean Air and Asiana Airlines confirm that the EU’s subsidies to Airbus have enabled Airbus to push Boeing to the margins of this market.¹²⁷⁴

741. In the *Singapore twin-aisle market*, Boeing enjoyed significant market share success from 2001 through 2008, including 100 percent market shares in six out of those eight years. However, in 2009, Boeing’s market share dropped precipitously to 11 percent in 2009, and then to zero percent in 2010, where it has remained through the first half of 2012:

¹²⁷⁰ EU FWS, para. 960.

¹²⁷¹ See EC – Large Civil Aircraft (AB), paras. 1166-1167.

¹²⁷² Updated Ascend aircraft database (Exhibit USA-378).

¹²⁷³ EU FWS, para. 1073.

¹²⁷⁴ See US FWS, paras. 492-495.

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Singapore Twin-aisle Market: Displacement and Impedance of Boeing LCA¹²⁷⁵

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	12	12	9	4	3	6	5	7	1	0	0	0
Boeing Market Share	100.0%	100.0%	69.2%	57.1%	100.0%	100.0%	100.0%	100.0%	11.1%	0.0%	0.0%	0.0%
Airbus Volume (Units)	0	0	4	3	0	0	0	0	8	11	0	0
Airbus Market Share	0.0%	0.0%	30.8%	42.9%	0.0%	0.0%	0.0%	0.0%	88.9%	100.0%	0.0%	0.0%

742. During the period 2009-2012, when Boeing's market share fell to a range of 0 - 11 percent, Airbus delivered a relatively large volume of 19 twin-aisle LCA to Singapore. Therefore, the EU is incorrect to assert that there is "no evidentiary basis" to find that displacement or impedance occurred during this time period.¹²⁷⁶

743. As in the Singapore twin-aisle market, Airbus also enjoys 100 percent of the *Singapore Very Large Aircraft market*. Until 2006, Boeing had 100 percent market shares every year from 2001-2006. However, starting in 2007 every single very large aircraft delivery has been an Airbus aircraft:

Singapore Very Large Aircraft Market: Displacement and Impedance of Boeing LCA¹²⁷⁷

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	5	1	2	2	1	1	0	0	0	0	0	0
Boeing Market Share	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Airbus Volume (Units)	0	0	0	0	0	0	1	5	4	1	3	3
Airbus Market Share	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

744. In the face of this clear trend of displacement and impedance, the EU repeats its "insufficient data" argument.¹²⁷⁸ However, if anything, the volume of deliveries in this market is relatively high, as there have been deliveries of very large aircraft every year since 2001, and also in the partial year 2012. Most important, there is no mistaking what is happening: LA/MSF-enabled sales of A380s to Singapore Airlines have led to the delivery of Airbus VLA into this market where, absent LA/MSF, the U.S. LCA industry would have continued to fill all VLA requirements.

745. Finally, in the *United Arab Emirates Very Large Aircraft market*, Boeing 747s have continued to be impeded, with Airbus accounting for all deliveries from 2008-2011:

¹²⁷⁵ Updated Ascend aircraft database (Exhibit USA-378).

¹²⁷⁶ EU FWS, para. 963.

¹²⁷⁷ Updated Ascend aircraft database (Exhibit USA-378).

¹²⁷⁸ EU FWS, para. 1077.

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U.A.E. Very Large Aircraft Market: Impedance of Boeing LCA¹²⁷⁹

Delivery Data	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	1H2012
Boeing Volume (Units)	0	0	0	0	0	0	0	0	0	0	0	1
Boeing Market Share	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	50.0%
Airbus Volume (Units)	0	0	0	0	0	0	0	4	3	8	5	1
Airbus Market Share	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%	100.0%	100.0%	50.0%

746. In this case, the EU focuses on one isolated delivery in the second half of 2012 as evidence that impedance has not occurred.¹²⁸⁰ Yet the EU’s argument improperly emphasizes the end-points, rather than focusing on the longer-term trend: Airbus’s sales have consistently shut Boeing out of this lucrative very large aircraft market. In addition, it is noteworthy that this one delivery was to a “private or corporate operator”¹²⁸¹ – and not to Emirates Airlines, which has ordered 90 A380s, and taken deliveries of 21 A380s, that would have been unavailable absent LA/MSF. There is no credible basis for questioning the displacement experienced by the U.S. LCA industry in this market.

747. In sum, the U.S. demonstration of displacement and impedance in third-country markets under Article 6.3(b) of the SCM Agreement remains unrebutted by the EU.

¹²⁷⁹ Updated Ascend aircraft database (Exhibit USA-378).

¹²⁸⁰ EU FWS, para. 1079 (arguing that the UAE VLA “market shares, if depicting any trend, depict an upward trend”).

¹²⁸¹ Updated Ascend aircraft database (Exhibit USA-378).

U.S. and EC Business Confidential Information (BCI) redacted

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VII. CONCLUSION

748. For the reasons described in the U.S. first written submission and in this submission, the United States respectfully asks the Panel to reject the EU arguments in their entirety and to make the findings requested by the United States in its first written submission and in this submission.