

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

**(AB-2017-4 / DS353)**

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OF THE UNITED STATES OF AMERICA**

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<i>China Parts – Auto (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS340/AB/R.
<i>China – Raw Materials (AB)</i>	Appellate Body Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R, WT/DS395/AB/R, WTDS398/AB/R, adopted 22 February 2012
<i>EC – Beef Hormones (AB)</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>EC – Large Civil Aircraft (21.5) (Panel)</i>	Panel Report, <i>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</i> , WT/DS316/RW, circulated 22 September 2016
<i>EC – Large Civil Aircraft (AB)</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>EC – Poultry (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998
<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
<i>Peru – Agricultural Products (AB)</i>	Appellate Body Report, <i>Peru - Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R, adopted 31 July 2015
<i>US – Carbon Steel (India) (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Appellate Body Report, United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014

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<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>US – Conditional Tax Incentives (Panel)</i>	Panel Report, <i>United States – Conditional Tax Incentives for Large Civil Aircraft</i> , WT/DS487/R, circulated 28 November 2016
<i>US – Large Civil Aircraft (Panel)</i>	Panel Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/R, circulated on 31 March 2011
<i>US – Large Civil Aircraft (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012
<i>US – Softwood Lumber IV (Panel)</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
<i>US – Softwood Lumber IV (21.5) (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004
<i>US – Softwood Lumber VI (21.5) (AB)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, 4865
<i>US – Upland Cotton (Panel)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R
<i>US – Upland Cotton (AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005
<i>US – Washing Machines (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R, adopted 26 September 2016
<i>US – Wool Shirts and Blouses (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R



## **I. INTRODUCTION AND EXECUTIVE SUMMARY**

1. This dispute began in 2004.<sup>1</sup> The original panel based its findings on evidence covering a period stretching from 1989 to 2006, which after review by the Appellate Body resulted in an ultimate finding that:

- aeronautics research and development subsidies consisting of financial contributions worth approximately USD \$2.6 billion conferred through NASA<sup>2</sup> procurement contracts and DoD<sup>3</sup> assistance instruments caused adverse effects in the market for 200-300 seat aircraft;<sup>4</sup> and
- FSC/ETI<sup>5</sup> tax concessions (USD 2.2 billion), the reduction in the Washington state B&O tax rate for aerospace manufacturing and retailing (USD 13.8 million), and tax advantages associated with City of Wichita IRBs (USD 476 million) caused adverse effects in the market for 100-200 seat aircraft.<sup>6</sup>

The Dispute Settlement body (“DSB”) adopted the panel report, as modified by the Appellate Body report, and recommended that the United States bring itself into compliance.

2. On September 23, 2012, the United States notified the DSB that it had taken numerous steps to comply with the DSB recommendations and rulings arising out of the original proceedings. The EU disagreed, and commenced a proceeding under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), which not only challenged U.S. compliance with respect to measures found to be WTO inconsistent, but also sought to reopen several findings that were in favor of the United States for several measures, and to add a number of claims regarding U.S. jurisdictions and agencies that it had not previously challenged. In all, it challenged 29 measures and groups of measures.

3. As the EU notes, it prevailed on significant parts of its claims.<sup>7</sup> But ultimately the EU failed to establish that, with the exception of the Washington B&O tax rate reduction, any of the 29 allegedly unwithdrawn subsidies that it challenged were inconsistent with Articles 5 and 6 of

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<sup>1</sup> Section I constitutes the executive summary for this submission. It contains 3,893 words. The remainder of the document contains 106,896 words.

<sup>2</sup> National Aeronautics and Space Administration.

<sup>3</sup> U.S. Department of Defense.

<sup>4</sup> *US – Large Civil Aircraft (AB)*, para. 1350(d)(i) and (ii); *US – Large Civil Aircraft (Panel)*, para. 7.1433.

<sup>5</sup> Foreign Sales Corporation/Extraterritorial Income.

<sup>6</sup> *US – Large Civil Aircraft (AB)*, para. 1350(d)(iii); *US – Large Civil Aircraft (Panel)*, paras. 7.254 and 7.1433. The original panel found that the value of the financial contribution conferred through DoD assistance instruments was “unclear.” It stated “if the Panel were to accept the various steps in the European Communities’ analysis” (which the panel did not do) it would set an upward bound of \$1.2 billion on the value of the financial contribution through DoD assistance instruments. This figure covered the period from 1992 to 2006. *Ibid.*, para. 7.1209, note 2800.

<sup>7</sup> EU Appellant Submission, para. 2.

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the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) after the implementation period:<sup>8</sup>

- The financial contribution through NASA procurement contracts was [BCI] million for 2007 to 2012, [BCI] lower than the amount alleged by the EU, and substantially lower on an annual basis than in the original proceeding.<sup>9</sup> (The EU does not appeal this finding.)
- The financial contribution through DoD assistance instruments was [BCI] million for 2007 to 2012, much lower than the amount alleged by the EU.<sup>10</sup> (The EU does not appeal this finding.)
- The two largest DoD procurement contracts, which accounted for 84 percent of the value challenged by the EU,<sup>11</sup> were outside the Panel’s terms of reference. (The EU does not appeal this finding.)
- The EU failed to meet its burden of proof with respect to demonstrating that the remaining DoD procurement contracts were joint ventures analogous to equity infusions that conferred a benefit.
- The Panel found that Boeing did not receive FSC/ETI subsidies after 2006, and that the Wichita IRBs had ceased to confer a specific subsidy by the end of the implementation period.<sup>12</sup>
- The Panel found that five of the challenged South Carolina measures were not received by Boeing, did not confer a financial contribution, or were not specific.<sup>13</sup> (The EU does not appeal these findings.)
- The acceleration effect of the pre-2007 R&D subsidies, which was the basis for the original panel’s finding of adverse effects, had ended by the end of the implementation period.

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<sup>8</sup> The compliance Panel rejected the EU’s claims under Article 3 of the SCM Agreement and Article III:4 of the GATT 1994. *See* compliance Panel Report, paras. 11.6, 11.9. The EU does not appeal these findings.

<sup>9</sup> Compliance Panel Report, paras. 8.243, 8.286.

<sup>10</sup> Compliance Panel Report, para. 8.496.

<sup>11</sup> Rumpf Report (Exhibit EU-23), Annex D, p. 2; DOD Subsidies to Boeing’s LCA Division, p. 2 (Exhibit EU-37).

<sup>12</sup> Compliance Panel Report, para. 8.611 and 8.637-8.638.

<sup>13</sup> Compliance Panel Report, para. 8.1077(d), (e), (f), (h), and (i).

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- Post-2006 R&D subsidies resulting from a financial contribution worth USD [BCI] million did not make a genuine and substantial contribution to any adverse effects through a price effects causal pathway. (The EU conceded that these measures had no technology effects.)
- Specific state and local cash flow subsidies found to be worth USD [BCI] million did not make a genuine and substantial contribution to any adverse effects through a price effects causal pathway.

The Panel ultimately found that only one of the measures challenged by the EU – a reduction of USD 325 million in Boeing’s B&O tax payments over the course of three years – was a financial contribution, conferred a benefit, was specific, and was a genuine and substantial cause of adverse effects. The U.S. other appellant submission explains why the EU’s arguments on that claim contained fatal flaws, and that the Panel erred in failing to recognize them.

4. The EU’s case suffers from several significant and indeed fatal flaws. First, the amounts of the financial contributions found to confer specific subsidies are small in the context of Boeing’s annual large civil aircraft revenue of USD 49-60 billion in the 2013-2015 period.<sup>14</sup> They are also significantly smaller than the amounts of the financial contributions found in the pre-2007 period, both in the aggregate and on an annual average basis. Second, the amounts of the financial contributions are substantially lower than those at issue in *EC – Large Civil Aircraft* for the same period. (A comparison of benefits is not possible because both compliance panels found that a quantification of the benefit was not necessary to an analysis of adverse effects.) Third, the EU never alleged, and certainly did not establish, that the post-2006 subsidies, either individually or in combination with previous subsidies, were critical to Boeing’s existence, the launch of any Boeing aircraft, or the company’s ability to price its products at profit-optimizing levels.

5. The EU does not challenge the Panel’s findings regarding the amounts of the subsidies, which are much lower than it had alleged. It does not challenge the validity of many of the Panel’s findings that Boeing did not receive subsidies alleged by the EU, or that the measures were not financial contributions, did not confer a benefit, or were not specific. With regard to those findings that it appeals, however, the EU has failed to identify any genuine error of interpretation or application of the SCM Agreement, nor any valid basis to question that the Panel conducted an objective assessment for purposes of DSU Article 11.

6. Below, the United States will discuss the Panel’s key findings and the EU’s claims on appeal, generally following the sequence of arguments raised in the EU’s Appellant Submission. Section II demonstrates that the Panel correctly found that DoD procurement contracts were purchases of services, and that the EU failed to make a valid showing that they conferred a

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<sup>14</sup> See Compliance Panel report, para. 9.392.

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benefit. The EU argues that the Panel’s assessments of three categories of evidence were not objective, but the EU fails to identify any basis for casting doubt on the Panel’s objectivity. In particular, first, the EU alleges that the Panel failed to recognize Boeing’s conduct of R&D activities independent of DoD as “contributions” to the contracts (which, in the EU’s view, should have led the Panel to find that the transactions at issue were akin to a joint venture rather than purchases of services). However, the Panel addressed the EU assertions and found that the contributions in question did not exist. Second, the EU argues that the Panel failed to consider evidence that, in the EU’s view, was contrary to the Panel’s findings regarding the allocation of the intellectual property rights arising from the performance of R&D under the contracts. But the evidence in question does not support the conclusions the EU sought to draw, or outweigh the more compelling evidence cited by the Panel in support of its conclusions. Finally, the EU argues that the Panel failed to consider evidence suggesting that, despite the primarily military nature of DoD’s research, the agency intended it to result in civil applications for Boeing’s large civil aircraft. But this evidence does not support the EU’s assertions and, in fact, indicates that (consistent with DoD’s military objectives) research under the DoD procurement contracts rarely produces results with civil applicability.

7. Section III shows that the Panel properly focused its analysis on the EU assertion that Boeing received FSC/ETI tax concessions that lowered its income tax payments in the post-2006 period, and correctly rejected those assertions when it found that Boeing did not use those tax benefits in that period. On appeal, the EU argues that the subsidy remains available as a legal matter, and therefore the Panel should have found that the United States has not withdrawn it. However, the Panel correctly focused on the absence of any subsidy *to Boeing*, which has been the focus of the EU’s claims since the original dispute, and was the subject of the DSB’s recommendations and rulings. The Panel found that after 2006, Boeing did not receive any FSC/ETI benefits. Accordingly, the EU fails to establish that the Panel erred in finding that the United States had withdrawn the FSC/ETI tax concessions.

8. Section IV shows that the Panel properly found that the subsidy provided through Kansas Industrial Revenue Bonds (“IRBs”) is no longer specific. The EU argues that the Panel erred in assessing *de facto* specificity on the basis of information that post-dates the implementation period, rather than information from 1979 to the present. However, the Panel’s approach enabled it to properly assess the U.S. argument that it achieved compliance by eliminating the IRBs’ *de facto* specificity; and also to take into account changes in the structure of Wichita’s economy that occurred during the 2007-2013 time period. Accordingly, the Panel properly interpreted and applied Article 2 of the SCM Agreement, contrary to the EU’s arguments.

9. Section V shows that the Panel properly found that two South Carolina subsidies – *i.e.*, those provided through Economic Development Bonds (“EDBs”) and the Multi-County Industrial Park (“MCIP”) job tax credit – are not specific. The Panel found that both subsidies were not *de jure* specific, and the EU does not contest these findings. In addition, the Panel found that South Carolina had authorized the issuance of EDBs for six recipients, only two of which were in the aerospace industry. It appears that all entities eligible for the benefit actually

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received it. With respect to the MCIP job tax credit, the EU argues that the Panel should have found that the subsidy is specific within the meaning of Article 2.2 of the SCM Agreement. However, the Panel found that the MCIP designation is readily available, based on (among other things) the fact that Charleston County had added property to one MCIP 18 times from 1995 to 2012. Accordingly, the Panel’s specificity findings were based on a correct interpretation and application of Article 2 of the SCM Agreement, as well as an objective assessment of the evidence, consistent with DSU Article 11.

10. Section VI shows that the Panel correctly rejected price suppression and lost sales claims in this proceeding with respect to aircraft ordered before the end of the implementation but delivered afterward. The EU alleges that the compliance Panel erred in interpreting Article 7.8 by finding that it does not obligate a complying party to “remove” deliveries resulting from transactions found to have resulted in lost sales or price suppression in the original proceeding. The Appellate Body does not need to decide this interpretive question to resolve this appeal because the relevant claims were rejected on other grounds that have not been appealed. In any event, the compliance Panel correctly found that the interpretation of Article 7.8 urged by the EU would improperly require the United States to remedy the specific instances of adverse effects found in the original proceeding, which cannot be reconciled with the prospective nature of Article 7.8. The EU also asserted that the Panel applied Article 7.8 incorrectly, but its arguments do not identify a disagreement with the Panel, and are otherwise erroneous and internally inconsistent.

11. Section VII shows that the Panel correctly limited its analysis of serious prejudice to competition within the markets it found to exist. Contrary to the EU’s assertion, the Panel did not err in its interpretation of the term “market” in Article 6.3. The Panel correctly found that that product markets must be objectively determined, and that an Article 6.3 breach can only be established if the subsidized product and product(s) alleged to suffer adverse effects are in the same market. The EU’s position is meritless for a variety of reasons. First, the EU’s position contradicts the Appellate Body’s findings that product markets must be objectively determined at the outset, and that an Article 6.3 breach can only be maintained if the subsidized product is *in the same market* as the products alleged to suffer adverse effects. Second, the EU draws a false distinction between the requirements for displacement, impedance, and price undercutting on the one hand, and price depression, price suppression, and lost sales on the other hand, that is unsupported and inconsistent with the Appellate Body’s findings. Third, the EU’s suggestion that, despite a panel’s delineation of product markets, separate attribution factors such as the nature and magnitude of a subsidy can support an Article 6.3 breach when the subsidized product and products alleged to suffer adverse effects are in *different* markets is entirely unsupported and contrary to the Appellate Body’s findings. Fourth, the EU’s suggestion that the Panel’s interpretation of Article 6.3 is contrary to the object and purpose of the SCM Agreement has no merit.

12. Section VIII shows that the Panel performed a proper collective assessment of the effects of the subsidies. The EU argues that the Panel erroneously interpreted Articles 5, 6.3, and 7.8 of

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the SCM Agreement to make aggregation and cumulation the only two ways of collectively assessing multiple subsidies. It urges the Appellate Body to complete the Panel’s analysis by applying a third approach to collective assessment under which all subsidies or groups of subsidies found to be a “genuine cause” of adverse effects would be grouped together without regard to whether they complemented or supplemented each other, or contributed to each other’s effects. The EU’s arguments do not provide a valid basis for reversing the Panel’s findings, or for completing the analysis in the event of a reversal. First of all, the Panel did not make the alleged legal finding that the EU appeals, that aggregation and cumulation are the only permissible forms of collective assessment. Second, this appeal is largely an academic exercise because, except for the Washington B&O tax rate reduction in the single aisle market, the Panel found that none of the other aggregation groups was even a genuine cause of adverse effects. Third, even if the Appellate Body were to find that there are multiple aggregation groups that are a genuine (but not substantial) cause of adverse effects in a product market, the EU’s third approach is too undemanding to provide a valid collective assessment of those groups.

13. Section IX shows that the Panel did not find that subsidies must be the sole cause of a lost sale and, therefore, did not err in the interpretation of Articles 5, 6, and 7.8 of the SCM Agreement. The compliance Panel properly assessed whether sales campaigns were price-sensitive on the basis of voluminous evidence, including evidence of the role that price and other non-subsidy factors played in the relevant sales campaigns. The EU asserts the Appellate Body analysis adopted by the Panel was not generally applicable, but was instead a methodology useful only to identify transactions for which the uncontested evidence was sufficient to complete the original panel’s analysis regarding causation of significant lost sales. However, the EU misreads the Appellate Body’s reasoning, which first identified general conditions of competition in the large civil aircraft industry, and on that basis set out the criteria under which a sales campaign was sufficiently price-sensitive to support an inference that Boeing used tied tax subsidies to lower its prices in that campaign. Furthermore, if the EU’s challenge were correct, the Appellate Body would necessarily be unable to complete the analysis in this appeal, as it would find itself in the exact position the EU claims the Panel erroneously placed itself in – which resulted in an absence of adverse effects findings on the basis of the sales campaigns at issue.

14. Section X shows that the Panel did not err in finding that the EU failed to establish that the untied subsidies cause price effects. The Panel correctly interpreted Articles 5 and 6.3 of the SCM Agreement as allowing a finding of serious prejudice only if a causal link exists between the subsidies and the alleged indicia. The EU asserts two errors with the Panel’s findings. First, it contends that the Panel interpreted (or applied) Articles 5 and 6.3 so as to allow a finding of adverse effects only if the complaining party could “trace the dollars” from subsidies to price reductions. But the Panel never did this. It simply examined whether the EU had met its burden to show that the subsidies contributed to the adverse effects, and found that the EU had failed to provide any theory or evidence whatsoever to support its assertion that the subsidies affected

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Boeing’s pricing, which the EU acknowledges<sup>15</sup> was only the first step in the causal pathway it alleged. Second, it asserts that the Panel failed failed to follow the Appellate Body’s guidance that supposedly required a finding of adverse effects as long as there is a “nexus” between the subsidy and Boeing’s LCA development, production, or sale, however superficial or divorced from Boeing’s pricing. The Panel rejected the EU’s argument, which it found overstretched the applicability of the Appellate Body’s findings, and followed Appellate Body guidance calling for an evaluation of the extent to which subsidies contribute to the adverse effects alleged by the complaining party.

15. Section XI shows that the compliance Panel carefully considered the evidence and argumentation submitted by the parties, and correctly concluded that the pre-2007 R&D subsidies had no technology effects after the end of the implementation period. Contrary to the EU’s claims, the Panel correctly applied Articles 5 and 6.3 of the SCM Agreement when it focused its counterfactual analysis on the date that Boeing would have launched the 787 in the absence of the pre-2007 R&D subsidies, while duly considering deliveries. The EU also errs in its criticism of the benchmarks used by the Panel in assessing how long it would take Boeing to launch the 787 in the absence of subsidies, because the correctly found that the Boeing Report was based on relevant, early-state R&D, and that other evidence conferred the estimate advanced by the United States. The EU’s argument that the Boeing Report failed to take account of the sequencing of R&D is based on a mistaken premise, and fails to recognize that the methodology accounted for technology maturation. The EU also asserts that the Panel placed an improperly heavy burden on it, but in actuality, the Panel performed its role by evaluating whether the EU met its burden of making a *prima facie* case and of responding to the evidence and arguments advanced by the United States. Finally, in the event that the Appellate Body reverses any of the Panel’s findings, the EU requests completion of the Panel’s analysis. However, the findings of the Panel and undisputed facts are insufficient for that purpose.

16. Section XII shows that the compliance Panel correctly found that the EU failed to demonstrate that pre-2007 R&D subsidies had “continuing” adverse effect to the A330 and A350 XWB after the implementation period. The EU’s appeal under DSU Article 11 fails because the compliance Panel adhered to the original panel’s legal reasoning, and applied it to the facts and arguments in this new proceeding. That this process in some instances produced different outcomes was not an impermissible “deviation,” but rather the result of an objective assessment that addressed the relevant new facts and arguments and did not mechanically replicate the original results. The EU also fails to establish that the Panel erred in applying Articles 5 and 6.3 of the SCM Agreement to the claim that A330 prices are significantly suppressed. The Panel explicitly acknowledged that a price suppression claim under Article 6.3(c) is counterfactual in

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<sup>15</sup> EU Appellant Submission, para. 646 (stating that “the Appellate Body has held that a complaining Member must establish a ‘genuine and substantial relationship of cause and effect’ between the subsidies at issue and the adverse effects claimed,” and that “{e}stablishing the existence of an effect from the untied subsidies at issue on Boeing’s pricing of LCA is one step in that analysis”).

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nature. It carefully examined the evidence and correctly found no basis for the EU’s argument that, absent unwithdrawn subsidies, counterfactual A330 prices in the post-implementation period would have been different, let alone that they would have “recovered” to their pre-2004 levels. The EU also asks that, in the event of reversal of the challenged Panel findings, the Appellate Body complete the legal analysis, it puts forward only generalized assertions, unsupported assumptions and a misreading of the original Panel’s findings in support of its request.

17. Section XIII shows that the the EU’s has failed to identify sufficient Panel findings or undisputed facts to support its request for completion of the analysis regarding alleged lost sales. The EU has requested that, in the event that the Appellate Body reverses the compliance Panel’s findings concerning the standard for finding whether a measure has resulted in significant lost sales within the meaning of Article 6.3(c) of the SCM Agreement, the Appellate Body complete the analysis, and in particular find the relevant subsidies caused two groups of alleged “additional significant lost sales”: (a) sales where the EU alleges additional lost sales caused only by the effects of the Washington State B&O tax rate reduction,<sup>16</sup> and (b) lost sales allegedly caused by the technology effects of pre-2007 aeronautics R&D subsidies, the B&O tax rate reduction, and “all of the untied subsidies.”<sup>17</sup> In reality, the EU is asking the Appellate Body to discard the Panel’s careful analysis of a complex factual record and undertake its own *de novo* analysis based on EU argumentation rather than on the basis of – and often in contradiction to – Panel findings of fact or undisputed facts on the record. This is not the role of the Appellate Body.

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<sup>16</sup> EU Appellant Submission, para. 997.

<sup>17</sup> EU Appellant Submission, para. 1036-1038.



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**II. THE EU ERRS IN ALLEGING THE PANEL FAILED TO PROVIDE AN OBJECTIVE ASSESSMENT FOR PURPOSES OF DSU ARTICLE 11 WHEN IT CONCLUDED THAT DOD PROCUREMENT CONTRACTS WERE NOT A SUBSIDY.**

19. The Panel described its task as being to “first examine the measures to determine their relevant characteristics, and then consider whether, in light of a proper interpretation of Article 1.1(a)(1), these measures, properly characterized, fall within the scope of that provision.”<sup>18</sup> It conducted an exhaustive evaluation of the evidence and arguments put forward by the parties, and “consider {ed} all of the relevant characteristics of the DOD procurement contracts in their totality and proper context.”<sup>19</sup> This process led to two conclusions. First, the Panel was “not persuaded . . . that DOD and Boeing can be considered to be parties with broadly aligned interests engaged in a collaborative enterprise.”<sup>20</sup> Second, the Panel concluded that “the interaction between DOD and Boeing under the DOD procurement contracts is fundamentally directed to DOD acquiring what *DOD* needs (independently of Boeing’s commercial interests), and to Boeing performing the work that meets DOD’s needs.”<sup>21</sup> As a result, the Panel found that these contracts “are most appropriately characterized as purchases of services.”<sup>22</sup>

20. The EU does not challenge the Panel’s interpretation of Article 1.1(a)(1), or its application of the law to the facts. Instead, it accuses the Panel of, variously, “failure to engage with key evidence,”<sup>23</sup> “disregard of evidence,”<sup>24</sup> “failure to provide a reasoned and adequate explanation,”<sup>25</sup> and “failure to . . . properly consider EU arguments.”<sup>26</sup> It argues that these alleged lapses meant that “the Panel failed to make an objective assessment of the matter” for purposes of DSU Article 11.<sup>27</sup> There is no merit to the EU’s assertions, which center on evidence that the EU considers relevant to three aspects of the challenged DoD procurement contracts. First, the EU alleges that the Panel failed to recognize Boeing’s conduct of R&D activities independent of DoD as “contributions” to the contracts. However, the Panel addressed the EU assertions and found that the contributions in question did not exist. Second, the EU argues that the Panel failed to consider evidence that, in the EU’s view, was contrary to the

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<sup>18</sup> Compliance Panel Report, para. 8.334.

<sup>19</sup> Compliance Panel Report, para. 8.371.

<sup>20</sup> Compliance Panel Report, para. 8.371.

<sup>21</sup> Compliance Panel Report, para. 8.372 (emphasis original).

<sup>22</sup> Compliance Panel Report, para. 8.376.

<sup>23</sup> EU Appellant Submission, paras. 56, 67, 84, and 91.

<sup>24</sup> EU Appellant Submission, paras. 56, 67, 81, and 90.

<sup>25</sup> EU Appellant Submission, paras. 56 and 67.

<sup>26</sup> EU Appellant Submission, paras. 67 and 91.

<sup>27</sup> EU Appellant Submission, para. 85; *accord* para. 92.

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Panel’s ultimate finding. But the evidence in question does not support the conclusions the EU sought to draw, or outweigh the more compelling evidence cited by the Panel in support of its conclusions. Finally, the EU argues that the Panel failed to consider evidence suggesting that, despite the primarily military nature of DoD’s research, the agency intended it to result in civil applications for Boeing’s large civil aircraft. But this evidence does not support the EU’s assertions and, in fact, indicates that (consistent with DoD’s military objectives) research under the DoD procurement contracts rarely produces results with civil applicability.

21. Therefore, there is no support for the EU assertion that the Panel failed to conduct an objective assessment for purposes of DSU Article 11.

**A. The Panel Made No Error in Finding that the DoD Procurement Contracts at Issue Were What Boeing and DoD Understood Them to Be – Purchases of Services.**

***1. Application of Article 1.1(a)(1) of the SCM Agreement involves scrutinizing the design, operation, and principal characteristics of the alleged subsidy measure; properly characterizing the measure; and only then addressing whether it is a financial contribution.***

22. The Appellate Body in *US – Large Civil Aircraft* emphasized the importance of properly characterizing an alleged subsidy measure before seeking to evaluate whether that measure is a financial contribution. It noted that generally, in applying the covered agreements, “a panel must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics.”<sup>28</sup> The Appellate Body added that:

In making its objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it, a panel must identify *all* relevant characteristics of the measure, and recognize which features are the most central to that measure itself, and which are to be accorded the most significance for purposes of characterizing the relevant {measure} and, thereby, properly determining the discipline(s) to which it is subject under the covered agreements.<sup>29</sup>

With regard specifically to subsidy claims, the Appellate Body found that “we consider that the Panel should first have examined the measures to determine their relevant characteristics, and

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<sup>28</sup> *US – Large Civil Aircraft (AB)*, para. 586, quoting *China – Auto Parts (AB)*, para. 171.

<sup>29</sup> *US – Large Civil Aircraft (AB)*, para. 586, quoting *China – Auto Parts (AB)*, para. 171 (emphasis original).

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then considered whether, in the light of a proper interpretation of Article 1.1(a)(1), these measures, properly characterized, fall within the scope of that provision.”<sup>30</sup>

23. In making these findings, the Appellate Body criticized the approach taken by the original panel, which in its view “embarked on an interpretative exercise based on the assumption that the measures are purchases of services.”<sup>31</sup> The Appellate Body characterized this approach as “odd,” finding that “{i}t would seem more logical to determine first the issue of the proper characterization of the measures at issue and, once the measures have been properly determined, to examine the question of whether such types of measures fall within the scope of Article 1.1(a)(1) of the SCM Agreement.”<sup>32</sup>

24. Based on this guidance from the Appellate Body, the Panel framed its task as being “to determine whether the DOD aeronautics R&D measures can properly be characterized as involving any of the particular forms of financial contribution identified in subparagraphs (i) through (iv) of Article 1.1(a)(1).”<sup>33</sup> The Panel found that to do this, “we must first examine the measures to determine their relevant characteristics, and then consider whether, in light of a proper interpretation of Article 1.1(a)(1), these measures, properly characterized, fall within the scope of that provision.”<sup>34</sup>

25. With regard to the DoD contracts in particular, the Panel observed that, in the original proceedings:

the Appellate Body referred to evidence suggesting that the relationship between NASA and Boeing in the particular context was one of “partnership”. Similarly, when discussing the DOD assistance instruments, the Appellate Body referred to the composite nature of the transactions (as involving a combination of funding and access to facilities), the collaborative nature of the transactions (as involving a pooling of monetary and non-monetary resources on the input side and a sharing of the fruits of the research on the output side) and crucially, that these transactions were undertaken in pursuit of a common goal for the benefit of both DOD and Boeing.

Based on this guidance, the Panel decided that it would:

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<sup>30</sup> *US – Large Civil Aircraft (AB)*, para. 589.

<sup>31</sup> *US – Large Civil Aircraft (AB)*, para. 585.

<sup>32</sup> *US – Large Civil Aircraft (AB)*, para. 585.

<sup>33</sup> Compliance Panel Report, para. 8.333.

<sup>34</sup> Compliance Panel Report, para. 8.334, *citing US – Large Civil Aircraft (AB)*, para. 589.

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examine the relevant characteristics of the DOD procurement contracts with a view to determining whether, like the NASA procurement contracts and DOD assistance instruments before the Appellate Body, the relationship between DOD and Boeing in the particular context is one of partnership, involving collaboration in pursuit of a common goal for the mutual benefit of DOD and Boeing.

26. The EU has not appealed the Panel’s interpretation or application of Article 1 of the SCM Agreement to the DoD procurement contracts.

**2. *The evidence cited by the Panel supports its findings as to the principal characteristics of the DoD procurement contracts, which in turn support the ultimate conclusion that they were purchases of services.***

27. The Panel conducted a searching analysis of the DoD procurement contracts challenged by the EU, including the texts of the contracts themselves, the descriptions of the program elements that funded the contracts, and other evidence of how DoD administered the contracts. It concluded that the military nature of the research conducted under the contracts, DoD’s objective of acquiring meeting military needs identified by DoD on the basis of strategic defense imperatives, and the nature of the relationship between Boeing and DoD indicated that the contracts were purchases of services.<sup>35</sup> A review of the Panel’s findings demonstrates not only the objectivity but indeed the strength of its ultimate conclusion.<sup>36</sup>

28. The Panel began by referring to its earlier discussion of the nature of the R&D activity funded through the measures challenged by the EU.<sup>37</sup> The Panel noted that under U.S. law, a procurement contract “is a legal instrument which ‘reflects a relationship between the Federal Government and . . . {an} other recipient when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal Government.’”<sup>38</sup> The Panel found that the EU challenge covered payments, facilities, equipment, and employees allegedly provided to Boeing under contracts funded through certain identified “program

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<sup>35</sup> Compliance Panel Report, paras. 8.364, 8.372, and 8.376.

<sup>36</sup> The United States notes that the EU’s ostensible summary of the Panel’s findings regarding DoD procurement contracts consists of three paragraphs that omit most of the evidence and explanation advanced by the Panel. EU Appellant Submission, paras. 40-42.

<sup>37</sup> Compliance Panel Report, para. 8.337.

<sup>38</sup> Compliance Panel Report, para. 8.298(c), *citing US – Large Civil Aircraft (Panel)*, para. 7.1142 (referring to the United States Code of Federal Regulations, Title 32, section 21.670); US RPQ 69, para. 42; and United States Code of Federal Regulations, Title 48, section 2.101 (Exhibit USA-452).

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elements,” which are budgetary categories within the broader DoD RDT&E program.<sup>39</sup> The Panel noted that the parties agreed that these program elements fell into two categories:

- (1) science and technology (“S&T”), which covers “basic research to gain knowledge and understanding, applied research to identify technologies that the knowledge might enable, and advanced technology development to evaluate how the technologies work together and perform in a relevant environment,”<sup>40</sup> and
- (2) systems acquisition, which seek to “develop specific new weapon systems or components.”<sup>41</sup>

29. The Panel found that the procurement process under these two types of programs differed. For S&T program elements, a DoD research organization identifies “user needs” based on “future missions and capabilities that war fighters will need in order to accomplish those missions.” It also considers “technology opportunities” as informed by the “state of the art” in all of the relevant fields, such as “aerospace systems, air vehicles, space vehicles, directed energy devices, in formation systems, materials and manufacturing process, munitions, and sensors.”<sup>42</sup> The Panel observed that, for the most part, “there is no reference in the objectives of the S&T/general aircraft program elements to the goal of promoting the competitiveness of the U.S. aeronautics industry.”<sup>43</sup>

30. The procurement process for the systems acquisition program elements involves “a three-step process of: (a) identifying the required weapon system; (b) establishing a budget; and (c) acquiring the system.”<sup>44</sup> The Panel summarized that “the acquisition of a weapon system is a large and complex engineering development project that occurs over many years, covers a multitude of technical and bureaucratic processes and phases and involves a wide variety of participants.”<sup>45</sup> It noted that systems acquisition begins with “a ‘requirements generation’ process for analysing the military’s capability needs and gaps,” resulting in “materiel solutions . . . that are determined to meet the military needs.” The Panel observed further that “the

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<sup>39</sup> Compliance Panel Report, para. 8.297.

<sup>40</sup> Compliance Panel Report, para. 8.301. The EU referred to this category as “general aircraft” research.

<sup>41</sup> Compliance Panel Report, para. 8.302. The EU referred to this category as “military aircraft” research.

<sup>42</sup> Compliance Panel Report, para. 8.306.

<sup>43</sup> Compliance Panel Report, para. 8.339. The Panel identified two exceptions to this observation – the Manufacturing Technology and Dual Use Science and Technology Program, which “have explicit dual-use objectives.” *Ibid.*, para. 8.346. The Panel observed that “these program elements have funded only assistance instruments with Boeing, so are irrelevant to our characterization of the DOD procurement contracts.” *Ibid.*

<sup>44</sup> Compliance Panel Report, para. 8.308.

<sup>45</sup> Compliance Panel Report, para. 8.337.

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technologies that are developed, matured, and tested are those that will be integrated into the weapon system.” It concluded that “these long-term, highly complex research and engineering projects are ultimately directed towards equipping the U.S. armed forces with highly specialized, technical items, for which DOD is the only buyer in the United States and the predominant buyer in the world.”<sup>46</sup>

31. Although the EU has brought an appeal under Article 11 of the DSU, it does not dispute the relevance, accuracy, or objectivity of these findings.

32. Based on its preceding analysis, the Panel identified six relevant characteristics of the DoD procurement contracts:

- (1) “{U}nder U.S. law, procurement contracts are used where the U.S. Government is acquiring property or services for its direct benefit or use.” All of the DoD procurement contracts presented in the original proceedings, and the vast majority of contracts in the compliance proceedings, provided for reimbursement of most costs and the payment of an additional “fee,” which allowed for an element of profit.<sup>47</sup>
- (2) “{T}here is nothing before us to suggest that the provision of facilities, equipment, and employees is anything but marginal” under the DoD procurement contracts.<sup>48</sup>
- (3) Nothing in the contracts specifies that Boeing must contribute non-reimbursed Independent Research and Development (“IR&D”) expenditures to the research effort.<sup>49</sup>
- (4) “{U}nlike the situation where NASA commissions aeronautics research, the R&D commissioned under DOD procurement contracts is solely directed to meeting DOD's military needs, independent of enhancing the competitive position of contractors such as Boeing. The interaction between DOD and Boeing therefore takes place in this different commercial context, and while it necessarily involves DOD and Boeing working together, the nature and purpose of this interaction is

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<sup>46</sup> Compliance Panel Report, para. 8.338.

<sup>47</sup> Compliance Panel Report, para. 8.360.

<sup>48</sup> Compliance Panel Report, para. 8.361.

<sup>49</sup> Compliance Panel Report, para. 8.363.

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not the same as when two partners work together to set research topics based on their aligned interests in the outcomes.”<sup>50</sup>

- (5) While Boeing and DoD share patent rights and rights in technical data resulting from Boeing’s performance of research and development under the contracts, the balance is less in Boeing’s favor than under NASA contracts or assistance instruments. The Panel observed that DoD’s military objectives “do not include, or align with, Boeing’s development of technologies applicable to LCA,” and that even if such technologies arose, Boeing’s legal right to use them “is in practice restricted,”<sup>51</sup> in particular by “U.S. legal restrictions on the use of military technologies and data.”<sup>52</sup>
- (6) Because the balance of the intellectual property rights skews in DoD’s favor, “{w}hile the outcome of R&D performed under many of the DOD procurement contracts (especially under S&T/general aircraft program elements) is uncertain, the risks and rewards are borne principally by DOD.”<sup>53</sup>

33. Based on these characteristics, the Panel concluded that “{w}e do not see enough in the relationship between DOD and Boeing under the DOD procurement contracts that points to it being one of ‘partnership’, ‘collaboration’ or ‘joint-venture’, in which both parties act in pursuit of a common goal for their mutual benefit.”<sup>54</sup> The Panel continued to find that “their relationship is principally one in which DOD acquires R&D services from Boeing.”<sup>55</sup> The Panel acknowledged that these contracts involved “complex processes of developing and maturing technologies . . . in various stages and over long periods of time,” which “in some respects obscure{s} what we see as the basic relationship between DOD and Boeing of buyer and seller.”<sup>56</sup> However, it reasoned that:

unlike the situation where NASA commissions aeronautics research, the R&D commissioned under DOD procurement contracts is solely directed to meeting DOD’s military needs, independent of enhancing the competitive position of contractors such as Boeing. The interaction between DOD and Boeing therefore takes place in this different commercial context, and while it necessarily involves

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<sup>50</sup> Compliance Panel Report, para. 8.364.

<sup>51</sup> Compliance Panel Report, para. 8.367.

<sup>52</sup> Compliance Panel Report, para. 8.422.

<sup>53</sup> Compliance Panel Report, para. 8.368.

<sup>54</sup> Compliance Panel Report, para. 8.369.

<sup>55</sup> Compliance Panel Report, para. 8.371.

<sup>56</sup> Compliance Panel Report, para. 8.372.

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DOD and Boeing working together, the nature and purpose of this interaction is not the same as when two partners work together to set research topics based on their aligned interests in the outcomes.<sup>57</sup>

The Panel accordingly concluded that the DoD procurement contracts are “most appropriately characterized as purchases of services.”<sup>58</sup>

**3. *The EU identifies no error or oversight in the Panel’s financial contribution analysis that casts doubt on the objectivity of its assessment within the meaning of DSU Article 11.***

34. As noted above in section II.A.2, the Panel conducted a searching inquiry into all aspects of the DoD procurement contracts to determine how DoD identified topics to research and chose contractors, and what those contracts involved. It examined how DoD conducts RDT&E activities in general, and also what it did under the program elements challenged by the EU. For the most part, the EU does not dispute the accuracy of the facts as set out in the Panel’s financial contribution analysis. Its DSU Article 11 appeal instead alleges that the Panel ignored additional evidence and facts that, in the EU’s view, contradict some of the Panel’s findings as to the relevant characteristics of the DoD procurement contracts. At the highest level, this appeal fails because the EU has not established any lack of an objective assessment by the Panel, but is instead quibbling over the weight assigned by the Panel to pieces of evidence, which is not the proper subject of an appeal under DSU Article 11. The EU’s DSU Article 11 appeal also fails at a more basic level because the evidence it cites was either considered and properly rejected by the Panel, or does not undermine the Panel’s findings.

*a. The “non-reimbursed IR&D expenditures” alleged by the EU do not exist, and if they did, they would not constitute a “contribution” by Boeing to DoD that would suggest the existence of a joint venture.*

35. The EU asserts that Boeing incurred “DOD-related IR&D expenditures that are *not* reimbursed”<sup>59</sup> and directed the results of the IR&D to work under its DoD procurement contracts,<sup>60</sup> and that the Panel erred in finding that this situation did not suggest the existence of a joint venture.<sup>61</sup> Each of these assertions is wrong.

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<sup>57</sup> Compliance Panel Report, para. 8.372.

<sup>58</sup> Compliance Panel Report, para. 8.376.

<sup>59</sup> EU Appellant Submission, para. 53.

<sup>60</sup> EU Appellant Submission, para. 52.

<sup>61</sup> EU Appellant Submission, para. 55.



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36. First, the EU’s assertion that Boeing incurred “unreimbursed” independent research and development (“IR&D”) expenses is contrary to the original panel’s findings regarding the operation of this allowance, which the EU did not appeal, and which the DSB accordingly adopted. To recall, the original panel found that IR&D is a U.S. contractor’s spending on research and development activities that it independently chooses to conduct, and which are not required to comply with a government contract.<sup>62</sup> The original panel explained that “U.S. law requires Boeing to allocate a share of the costs of any IR&D{ } projects benefiting both its military segment (IDS) and its commercial segment (Boeing’s LCA division) to each of those segments on a ‘*pro rata*’ basis.”<sup>63</sup> Within Boeing’s military segment, those costs are then allocated to each contract to which the costs relate, and “reimbursed” when DoD makes payments under the contract. Thus, to the extent that any Boeing IR&D activity is “DoD-related,” Boeing allocates it to the relevant procurement contracts, and DoD reimburses Boeing’s expenditures for that activity through the contracts.<sup>64</sup> Conversely, if IR&D activities do not relate to DoD contracts, their costs are not allocated to those contracts, and DoD does not reimburse Boeing’s expenditures. Thus, there are no “DOD-related IR&D expenditures that are not reimbursed.”

37. Second, the EU has cited no evidence that Boeing “contributed” IR&D expenditures to its work under DoD procurement contracts. Its sole argument is to assert that the Panel’s observation that the procurement contracts contain no specific reference to IR&D expenditures “cannot be considered sufficient reasoning.”<sup>65</sup> But, as the EU was the party asserting the proposition that Boeing contributed IR&D expenditures to work under DoD contracts, it bore the burden of proof, which it cannot meet by simply demanding that the Panel prove the proposition to be untrue. In the absence of such a showing, it was no error for the Panel to reject the EU’s assertions.

38. Third, and finally, in response to the Panel’s finding that Boeing’s use of its own intellectual property and know-how in work under DoD procurement contracts does not seem like a contribution to a joint venture,<sup>66</sup> the EU’s only criticism is that the Panel failed to explain its reasoning.<sup>67</sup> But the Panel did provide an explanation when it noted, in the same paragraph, that IR&D expenditures “are internal costs that contractors like Boeing incur in order to maintain the technological competence and expertise that enable them to provide the R&D services for

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<sup>62</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1316.

<sup>63</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1332.

<sup>64</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1334.

<sup>65</sup> EU Appellant Submission, para. 54.

<sup>66</sup> Compliance Panel Report, para. 8.363.

<sup>67</sup> EU Appellant Submission, para. 55.

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which they are contracted.”<sup>68</sup> While succinct, the Panel’s statement fully explains its thinking and justifies the conclusion. Background intellectual property and know-how are threshold qualifications to conduct aeronautics research for DoD, and not something that the contractor conveys as part of the effort.

39. Therefore, the EU has identified no error in the Panel’s analysis of its arguments regarding “DOD-related IR&D expenditures that are *not* reimbursed,” and has certainly provided no basis to conclude that the Panel failed to conduct an objective assessment in analyzing the question.

*b. The additional evidence cited by the EU is fully consistent with the Panel’s finding that Boeing is “restricted” and “limited” in its ability to make use of technologies developed under DoD contracts in civil applications.*

40. As noted above in section II.A.2, the Panel cited a number of factors that “limited” or “restricted” Boeing’s ability to use technologies developed under DoD procurement contracts for civil applications. Most importantly, DoD was seeking “to support the development of military systems for DOD’s own distinct purposes,” which “do not include, or align with, advancing Boeing’s development of technologies applicable to LCA.”<sup>69</sup> Thus, any civil application for a technology developed under a DoD procurement contract would be unintentional. The Panel recognized that patents with civil applicability “may arise from performing the R&D work for DoD,” and that Boeing has the legal right to exploit such technologies for commercial purposes.<sup>70</sup> However, the Panel considered that this right was “circumscribed” with respect to civil aircraft by U.S. export controls on military items and classification of national security information.<sup>71</sup> It considered that Boeing’s ability to commercially exploit any military application of a patent arising from work on a DoD procurement contract was “limited” by the fact that “DOD is the sole purchaser of modern air weaponry in the United States,” and had the right to authorize use of such patents by Boeing’s competitors.<sup>72</sup> These considerations led the Panel to conclude that, while Boeing and DoD shared rights in patents arising from R&D under procurement contracts, “the ‘balance’ of that sharing is substantially more in DOD’s favour and

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<sup>68</sup> Compliance Panel Report, para. 8.363.

<sup>69</sup> Compliance Panel Report, para. 8.367. Boeing has since undergone a reorganization, and its contracting with DoD is handled by the Boeing Defense Systems (“BDS”) division.

<sup>70</sup> Compliance Panel Report, para. 8.367.

<sup>71</sup> Compliance Panel Report, para. 8.422; *accord ibid.*, para. 8.368.

<sup>72</sup> Compliance Panel Report, para. 8.422.

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less in Boeing’s favour than under the DOD assistance instruments, or NASA procurement contracts.”<sup>73</sup>

41. For the most part, the EU does not dispute that the evidence cited in the Panel’s financial contribution analysis<sup>74</sup> supports the ultimate conclusion that Boeing’s ability to commercially exploit technologies developed under DoD contracts is “restricted” and “limited.” The EU argues instead that the Panel erred because it “failed to reference, let alone ‘engage’ with EU arguments and evidence” that “directly contradicts the Panel’s findings.”<sup>75</sup>

42. The EU cites only two types of evidence in support of this assertion: (i) alleged examples of situations in which the ITAR and classification rules did not preclude Boeing’s use of DoD-funded research in civil aeronautics, and (ii) information relating to Boeing’s sales of military aircraft to foreign governments.<sup>76</sup> However, this evidence does not detract in any way from the Panel’s ultimate findings.

43. First, the Panel found that U.S. export controls and the classification of national security information “restrict” and “limit” Boeing’s ability to commercially exploit the results of research conducted under DoD procurement contracts, implicitly recognizing that such exploitation is not completely impossible. Thus, it is unavailing for the EU to reference the original panel’s finding “reject{ing} the United States’ assertion that the ITAR make it ‘effectively impossible’ for Boeing to utilize any of the R&D performed under USDOD R&D procurement contracts assistance instruments towards LCA.”<sup>77</sup> This finding signified only that such cross-over is greater than zero, but took no position as to its frequency. It is accordingly completely consistent with the compliance Panel’s finding that commercial exploitation is “restricted” and “limited.” Indeed, the original panel pointedly accepted: (1) “that the ITAR restrict Boeing’s ability to use certain R&D performed for DOD towards its civil aircraft,” (2) “that Boeing complies with ITAR in general,” and (3) “that Boeing took steps to ensure that the 787 will be ‘ITAR free.’”<sup>78</sup>

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<sup>73</sup> Compliance Panel Report, para. 8.367.

<sup>74</sup> The financial contribution analysis cites numerous pieces of evidence, findings of the original panel and the Appellate Body, and findings made in sections 7.3.1, 7.3.2, 7.3.3, 7.3.6, 8.2.3.2.2 through 8.2.3.2.5, and 8.2.3.4.2.3 of the compliance Panel Report, all of which cite to still more evidence.

<sup>75</sup> EU Appellant Submission, para. 58.

<sup>76</sup> EU Appellant Submission, para. 58.

<sup>77</sup> EU Appellant Submission, para. 61 (EU emphasis omitted).

<sup>78</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1160. It is also worth noting that the primary evidence cited for the existence of civil applications of DoD research despite the ITAR controls was “R&D performed under assistance instruments entered into under the ManTech and DUS&T Programs, which . . . had the *explicit objective* of being applied towards civil aircraft.” *Ibid.*, para. 7.1160 (emphasis original). The compliance Panel found that “these program elements have funded only assistance instruments with Boeing, so are not relevant to our characterization of the DOD procurement contracts.” Compliance Panel Report, para. 8.346.

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Thus, the original panel’s findings with respect to U.S. export controls are fully consistent with the compliance Panel’s finding that any commercial exploitation in the civil sphere of research under DoD contracts is “restricted” and “limited.”

44. The EU’s reference to Boeing’s (accidental) use of ITAR-controlled information with respect to drilling holes in one of the 787 parts<sup>79</sup> simply documents one of the limited or restricted occasions in which such commercial exploitation occurred. The same is true of the EU’s observation that Boeing filed patents with respect to inventions developed during work under DoD procurement contracts, and that those patents are publicly available.<sup>80</sup> It is, in fact, quite rare for Boeing’s research under contract with DoD to result in a patentable invention – the evidence shows that in the 2007 to 2013 period, Boeing’s [BCI] contracts, task orders, or agreements with DoD resulted in only 169 patents – a rate of far fewer than one in 100.<sup>81</sup> Thus, these examples of situations in which the ITAR and classification rules did not preclude Boeing’s public disclosure of the results of research under DoD procurement contracts are consistent with the Panel’s conclusion that such use is quite restricted and limited.

45. Second, the EU notes that the Panel cited no evidence in support of its statement that “DOD is Boeing’s only customer for such {military} technologies,” and asserts that this statement is “contradicted by undisputed evidence.”<sup>82</sup> In fact, the evidence cited by the EU is quite weak, and does not support the EU’s assertion.

46. Specifically, the EU cites two sources as contradicting the Panel’s finding. The first indicates that DoD’s budget is somewhat smaller than the next 15 largest defense purchasers in the world combined. However, this fact indicates nothing about whether *Boeing* made sales to any of these entities. Indeed, some of the countries on the list are subject to the strictest U.S. export controls. The second source cited by the EU indicates that international sales made up 7 percent of the revenue of Boeing’s defense division in 2004, and 24 percent in 2013.<sup>83</sup> But as Boeing’s defense division also sells satellites and commercial satellite launch vehicles, these data do not support any firm conclusion about *Boeing’s* sales of *military* equipment to foreign governments.<sup>84</sup>

47. Moreover, even if taken at face value, the EU’s assertions address only the source of *revenues*, and do not establish that it was *Boeing* that sold military equipment to foreign

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<sup>79</sup> EU Appellant Submission, para. 59.

<sup>80</sup> EU Appellant Submission, para. 63.

<sup>81</sup> US FWS, paras. 372 and 377.

<sup>82</sup> EU Appellant Submission, para. 66.

<sup>83</sup> EU Appellant Submission, para. 65.

<sup>84</sup> Boeing 2012 10-K, p. 105 (Exhibit EU-407).

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purchasers. Under the U.S. export control statute, which the Panel cited, DoD has the authority to purchase military equipment from U.S. suppliers and sell it to foreign governments,<sup>85</sup> A type of transaction known as “foreign military sales.” The evidence before the Panel indicated that Boeing used this mechanism. Its 2012 financial statement reports that “{r}evenues from the U.S. government (including foreign military sales through the U.S. government), primarily recorded at BDS, represented 33%, 37% and 43% of consolidated revenues for 2012, 2011 and 2010, respectively.”<sup>86</sup> Thus, the existence of foreign government *purchases* of Boeing military aircraft and foreign-source revenue for Boeing’s military division does not contradict the Panel’s statement.

48. The evidence also shows that DoD is far and away the largest purchaser of Boeing military aircraft. Sales to DoD (excluding foreign military sales) accounted for 70 percent of BDS’s 2012 revenues, which include commercial and civil satellite sales.<sup>87</sup>

49. Therefore, the additional evidence cited by the EU is fully consistent with the Panel’s finding that a number of factors “limited” or “restricted” Boeing’s ability to use technologies developed under DoD procurement contracts for civil applications.

*c. The EU’s arguments do not identify any infirmity in the Panel’s conclusions that the nature and purpose of DoD procurement contracts is solely to meet military needs, and that this differentiates them from NASA procurement contracts and assistance instruments that are intended to develop civil applications.*

50. The Panel emphasized that in examining the characteristics of DoD procurement contracts, “it is important to consider both the program elements as well as the legal instruments which are the means through which the research goals of these programs are implemented.”<sup>88</sup> It began by referring to its earlier findings on the nature of the R&D activities conducted under the program elements subject to the EU claims. It noted that the procedures for choosing projects and contractors for systems acquisition projects “are ultimately directed towards equipping the

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<sup>85</sup> 22 U.S.C. § 2751 states that:

{T}his chapter authorizes sales by the United States Government to friendly countries having sufficient wealth to maintain and equip their own military forces at adequate strength, or to assume progressively larger shares of the costs thereof, without undue burden to their economies, in accordance with the restraints and control measures specified herein and in furtherance of the security objectives of the United States and of the purposes and principles of the United Nations Charter.

<sup>86</sup> Boeing 2012 10-K, p. 105 (Exhibit EU-407).

<sup>87</sup> Boeing 2012 10-K, p. 1 (Exhibit EU-407).

<sup>88</sup> Compliance Panel Report, para. 8.336.

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U.S. armed forces with highly specialized, technical items.”<sup>89</sup> It added that S&T program elements were also “directed toward the same objective of equipping the U.S. armed forces,” and that “there is no reference . . . to the goal of promoting the competitiveness of the U.S. aeronautics industry.”<sup>90</sup> The Panel contrasted this situation with NASA R&D activities and concluded that, while DoD research contracts “necessarily involve {} DOD and Boeing working together, the nature and purpose of this interaction is not the same as when two partners work together to set research based on their aligned interests in the outcomes.”<sup>91</sup>

51. The EU concedes that research under the challenged program elements “does, in fact, have a primarily military technological objective,”<sup>92</sup> and it does not dispute that the evidence cited by the Panel supports that conclusion. Instead, the EU argues that the Panel either “disregarded”<sup>93</sup> or misinterpreted other evidence allegedly showing that DoD expected its research projects to produce research applicable to large civil aircraft, and intended to provide benefits to Boeing’s civil aircraft division.<sup>94</sup> The EU is wrong. The evidence on which the EU seeks to rely are too general to establish that the challenged program elements would produce technology with civil applications. As discussed above, the EU’s citation to a small number of patents arising from research under certain DoD contracts, is unrepresentative, and to the extent it shows anything, demonstrates that DoD would expect its projects *not* to produce technology applicable to civil aircraft. The evidence that the EU cites with regard to DoD’s intent to provide commercial benefits to contractors is simply irrelevant. Thus, its assertions are insufficient to establish that the Panel failed to conduct an objective assessment of the nature and purpose of the DoD procurement contracts.

*i. The evidence cited by the EU is either irrelevant, or actually supports the Panel’s conclusion that DoD entered into the procurement contracts in question solely to meet military needs.*

52. Before discussing these particular EU assertions, it is important to recall that they address the Panel’s evaluation of the proper characterization, including the relevant characteristics, of the challenged measures, namely, DoD procurement contracts funded through certain RDT&E program elements. The EU concedes that these measures had a primarily military objective, but argues that they “can, and do, lead to commercial . . . technologies,” which created “some expectation that Boeing’s LCA (or other commercial) division would benefit despite the primary

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<sup>89</sup> Compliance Panel Report, para. 8.338.

<sup>90</sup> Compliance Panel Report, para. 8.339

<sup>91</sup> Compliance Panel Report, para. 8.364.

<sup>92</sup> EU Appellant Submission, para. 68.

<sup>93</sup> EU Appellant Submission, para. 67.

<sup>94</sup> EU Appellant Submission, paras. 68 and 83.

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military *objective*.<sup>95</sup> The EU argues that, if the Panel had taken account of this allegation, “it would have found that the R&D conducted under DOD procurement contracts had civil applications from which Boeing could practically benefit, similar to the NASA procurement contracts and DOD assistance instruments.”<sup>96</sup>

53. There should be no dispute that there is a fundamental difference between a program designed to achieve a given result (such as research applicable in civil aeronautics) and a program designed to achieve a *different* result (such as military aircraft technology). That is the point the Panel recognized in its analysis. The EU argues that this difference is “not determinative,” but does not dispute that it is a relevant consideration. The Panel did not consider the point “determinative,” either, but treated it as one factor among many supporting its ultimate conclusion that DoD procurement contracts were different from NASA procurement contracts and DoD assistance instruments.

54. Thus, the EU’s argument regarding the “nature of DOD procurement contracts” is best understood as asserting that these contracts have an additional characteristic – the “effect” of producing research with “civil applications” – that the Panel should have assessed, and found to be similar to NASA contracts and DoD assistance instruments. But the problem with this argument is that the evidence cited by the EU is insufficient to establish that the challenged procurement contracts had that effect to any meaningful degree, that DoD or Boeing “expected” research under the challenged DoD procurement contracts to produce “civil applications,” or that any such expectation is “similar to the NASA procurement contracts and DOD assistance instruments.”

55. The EU cites three types of evidence: (1) press accounts indicating that certain military research projects resulted in knowledge that Boeing used or is expected to use in civil aircraft; (2) two reports compiled by the EU’s consultants; and (3) patents for inventions developed by Boeing employees while conducting research under certain DoD contracts.

56. The four press accounts are strictly anecdotal.<sup>97</sup> Two of them discuss lessons learned in the B-2 and F-22 programs that Boeing applied to the 787 and 777, respectively. However, while the EU challenged the B-2 program element, that program element did not fund any relevant contracts during the period covered by the Panel’s inquiry, which makes evidence relating to the B-2 irrelevant to evaluation of the measures before the Panel. The F-22 was an enormous systems acquisition, such that a single example of cross-application indicates at best that such cross-overs rarely occur. A third story addresses research on a blended wing body design that the EU characterizes as “expected to be used for both military and civil applications,”

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<sup>95</sup> EU Appellant Submission, para. 68 (emphasis original).

<sup>96</sup> EU Appellant Submission, para. 78.

<sup>97</sup> EU Appellant Submission, paras. 69 and 74.

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but that is so far in the future as to be purely speculative. The final press account describes Boeing’s goal of sharing lessons between its military and civil divisions.<sup>98</sup> To the extent this initiative is successful, it suggests similarities between Boeing’s contracts with DoD and its relations with civil aircraft customers, which have never been alleged to be comparable to the company’s NASA procurement contracts, let alone a joint venture. Therefore, these press accounts do not provide any support for the EU’s assertion that DoD or Boeing expected that research under the challenged procurement would produce civil applications.

57. The EU also references two reports in which the EU’s consultants opine that public descriptions of the objectives of DoD program elements suggest that they could result in “technologies with potential applicability to LCA.”<sup>99</sup> The Panel addressed the more recent report in its evaluation of its terms of reference, and found that its “generalized allegations regarding the potential applicability to LCA of certain broad technology areas” were not “sufficient to demonstrate a close nexus between a new program element and the ones covered by the original proceeding.”<sup>100</sup> This observation applies to the entirety of the two reports, which provide broad assertions along the lines that topics covered in the challenged program elements “have diverse potential applications on LCA.”<sup>101</sup>

58. The United States expressed numerous concerns about the reliability of this analysis.<sup>102</sup> However, even assuming *arguendo* that the conclusions were accurate, the most they show is that certain observers (long after the fact) thought that certain research under the challenged program elements *could* produce results applicable to large civil aircraft. They indicate nothing about the likelihood of such results, whether DoD and Boeing *expected* such results at any point in time, or whether any civil applications actually resulted.<sup>103</sup> Thus, the reports do not support

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<sup>98</sup> EU Appellant Submission, para. 74.

<sup>99</sup> EU Appellant Submission, para. 70. The Panel noted that DoD uses the term “dual-use” to describe technology with known applications in both military and civil applications at the time of commissioning of a research project, but that the EU uses that term to refer to technologies “that the *European Union considers*, based on the opinions of its experts, have *potential* applicability to Boeing LCA.” Compliance Panel Report, para. 8.343. The EU does not dispute that this observation. EU Appellant Submission, para. 77. The Panel cautioned that these two meanings “should not be confused.” To avoid this confusion, the United States uses “with potential applicability to large civil aircraft” to describe what the EU characterizes as “dual-use.”

<sup>100</sup> Compliance Panel Report, para. 7.198.

<sup>101</sup> *E.g.*, Rumpf Report (Exhibit EU-23), Annex A, p. 5.

<sup>102</sup> US FWS, paras. 295-302; US SWS, paras. 315-323; US RPQ 78, paras. 68-71; and US Comment on EU RPQ 57, paras. 2-12.

<sup>103</sup> In fact, since the S&T program elements typically fund research by a large number of contractors, universities, and research instruments, there is no way of telling whether Boeing conducted any of the research that the authors of the reports considered to have potential civil applications.



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the EU’s assertion that “the R&D conducted under DOD procurement contracts had civil applications from which Boeing could practically benefit.”<sup>104</sup>

59. Finally, the EU reproduces text and drawings from ten patents that Boeing received for inventions made during research conducted for DoD under a variety of instruments and program elements. Four of the ten patents are irrelevant to the question before the panel, as the inventions in question resulted from research that was not funded by procurement contracts under the program elements challenged by the EU.<sup>105</sup> The EU’s challenge covers procurement contracts under 26 program elements<sup>106</sup> from 1992 to 2012, a period of 21 years. That means that all of the challenged procurement contracts taken together produced a patent that the EU considers relevant once every 3.5 years. Several other metrics are also instructive:

- In its submissions to the Panel, the EU indicated additional patents that in its view described inventions with potential civil applications, for a total of 31, including the 10 referenced in its appellant submission. Of those, 24 dated from the January 2007 to March 2013 period, during which Boeing received funding under [BCI] contracts, task orders, and agreements with DoD.<sup>107</sup> Thus, the chance of a given DoD procurement contract, task order, or assistance instrument producing an invention that the EU considered applicable to large civil aircraft was [BCI] – essentially zero.<sup>108</sup>
- The EU indicated that a search of the U.S. Patent and Trademark Office database showed that Boeing received 169 patents for inventions derived from research under instruments from 2007 to March 15, 2013.<sup>109</sup> (This includes all patents, including those for inventions with no civil application.) During that same period, Boeing was granted 3,736 U.S. patents. Thus, the research Boeing conducted for

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<sup>104</sup> EU Appellant Submission, para. 78.

<sup>105</sup> The research that led to Patent Numbers 8,376,337, 8,016,650, 7,861,411, and 7,773,885 was conducted under instruments that received no funding from the program elements challenged by the EU. US FWS, para. 371. Patent numbers 7,861,411 and 7,773,885 were not derived from research under procurement contracts. *Ibid.* (Use of a letter in the ninth digit of the contract ID number indicates a procurement contract. Use of a numeral indicates a non-procurement instrument. In addition, Patent 7,861,411 was invented under a contract to which Boeing was not a party. *Ibid.*

<sup>106</sup> Compliance Panel Report, paras. 8.301 and 8.302.

<sup>107</sup> US FWS, para. 372.

<sup>108</sup> The actual number is likely lower, as seven of these patents were related to contracts outside the scope of the EU claims, and ten more were related to research under assistance instruments. US FWS, para. 372.

<sup>109</sup> US FWS, para. 377.

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DoD was much less likely to result in patentable inventions than Boeing’s internally funded research.

Accordingly, the patents cited by the EU would have given Boeing and DoD no reasonable expectation that research under the challenged procurement contracts would produce inventions that the EU now considers to have civil applicability.

60. Therefore, the EU errs in asserting that the Panel disregarded evidence and argumentation contrary to its ultimate conclusion. The Panel explicitly considered the EU consultants’ reports, and found their assertions too “generalized” to reach conclusions about the work Boeing performed and its relation to the EU’s claims. The press articles cited by the EU were anecdotal, and indicated nothing about the actual measures challenged by the EU. And the patents actually contradict the EU’s assertion that DoD and Boeing expected research under DoD procurement contracts to produce technology applicable to large civil aircraft.

61. The EU is also mistaken in asserting that the Panel based its findings on “ cursory statements” and failed to explain its findings in light of the evidence.<sup>110</sup> The Panel made a number of initial findings, supported by extensive evidence submitted by both parties, and then referenced those findings in its ultimate conclusion. That is exactly the kind of “objective assessment” envisaged in Article 11 of the DSU.

*ii. The 1992 document cited by the EU does not contradict the Panel’s well-supported finding that DoD commissioned R&D services solely to meet DoD’s military needs, without regard to Boeing’s civil aeronautics needs.*

62. The Panel cited a mass of evidence in support of its conclusion that “the R&D commissioned under DOD procurement contracts is solely directed to meeting DOD’s military needs, independent of enhancing the competitive position of contractors such as Boeing.”<sup>111</sup> It observed that the processes for choosing research topics for S&T programs focused on fulfilling “future missions and capabilities that war fighters will need,”<sup>112</sup> and that systems acquisition involves “a multitude of technical and bureaucratic processes” to acquire weapon systems.<sup>113</sup> And it noted that these contain no reference to the goal of promoting the competitiveness of the

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<sup>110</sup> EU Appellant Submission, paras. 77-78.

<sup>111</sup> Compliance Panel Report, para. 8.364.

<sup>112</sup> Compliance Panel Report, para. 8.305.

<sup>113</sup> Compliance Panel Report, para. 8.338.

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U.S. civil aeronautics industry.<sup>114</sup> The Panel also noted that the ManTech and DUS&T programs “have explicit dual-use objectives,”<sup>115</sup> showing that DoD is explicit when it seeks to develop technology applicable to civil aircraft.

63. The EU argues that the Panel should have disregarded this evidence, and instead taken DoD’s 1992 decision to terminate its recoupment policy as proof of DoD’s “*intent* to provide commercial benefits to contractors.”<sup>116</sup> This argument is meritless.

64. The EU omits the facts, which are not in dispute. Under the recoupment policy, DoD required contractors to pay a fee if they made commercial sales of a product developed for DoD or a derivative of a DoD-developed product that “consists of common parts equal to, or more than 10 percent of the Defense item.”<sup>117</sup> DoD terminated the program in 1992, explaining that:

This final rule recognizes that requiring contractors to pay a fee to the Government for products and technologies sold to non-U.S. Government parties unnecessarily imposes a financial burden on U.S. industry and an administrative burden on both the Department of Defense and U.S. industry. This final rule will assist the U.S. defense industry to be more competitive on a global basis by reducing contracting costs through economies of scale, pricing incentives, and reduced administrative burdens.<sup>118</sup>

The EU never alleged that any of the Boeing products covered by this dispute would have given rise to fees under the policy, which DoD terminated in 1992. Indeed, given the Panel’s findings as to the amount of funding Boeing received under the challenged program elements, it is inconceivable that DoD procurement contracts would have led to such fees.

65. The Panel found that this decision recognized the “potential” for military-to-civil technology crossover, but “in very general terms and . . . not sufficiently linked to the DOD-sponsored R&D at issue in this proceeding.”<sup>119</sup> It accepted that there was insufficient evidence

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<sup>114</sup> Compliance Panel Report, para. 8.339. It is also worth noting that the original panel concluded that “the declared purposes of the DOD programmes at issue do not generally demonstrate that DOD aimed to transfer technology to Boeing and the wider U.S. aircraft industry.” *US – Large Civil Aircraft (Panel)*, para. 7.1147.

<sup>115</sup> Compliance Panel Report, para. 8.346.

<sup>116</sup> EU Appellant Submission, para. 83.

<sup>117</sup> 48 CFR §§ 271.004(c) and 271.001(Exhibit USA-315).

<sup>118</sup> Recoupment of Nonrecurring Costs on Sales of U.S. Items, 58 Fed. Reg. 16497 (Mar. 29, 1993) (Exhibit USA-400).

<sup>119</sup> Compliance Panel Report, para. 8.433.

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that Boeing large civil aircraft were derivatives of Defense items that would have triggered a recoupment payment.<sup>120</sup>

66. The EU does not dispute any of this. Instead, it argues that the Panel should have concluded that the *existence* of the recoupment policy 25 years ago proves that “DoD *could have* recouped its investment in commercial technologies.”<sup>121</sup> It does no such thing. The recoupment policy shows only that DoD once considered that it could effectively trace and recover fees when a product contained a significant level of DoD-derived content. Even then, it eventually concluded that the administrative and financial burdens were too high. The EU provides no reason to conclude that the evaluation would be any different for the DoD procurement contracts, which had a relatively small value compared to Boeing’s sales of commercial aircraft and an unproven relationship to the technology on those aircraft. Indeed, neither the original panel nor the compliance Panel found that DoD research was directly responsible for technologies actually used on Boeing aircraft. DoD’s regulations did not provide for recoupment fees for the type of acceleration effect that the original panel found to be the effect of the DoD assistance instruments.

67. Thus, the cancellation of the recoupment program in 1992 provides no relevant evidence as to DoD’s intent in the 1992-2012 period covered by the EU’s allegations, and certainly does not outweigh the other evidence cited by the Panel as to the purpose of DoD procurement contracts. The EU has accordingly failed to put forward any basis to question the objectivity of the Panel’s assessment for purposes of DSU Article 11.

**4. *The EU’s appeals under DSU Article 11 do not justify reversing the Panel’s ultimate conclusions that the DoD procurement contracts were purchases of services.***

68. The EU organizes its DSU Article 11 appeal as a series of challenges to some, but not all, of the intermediate findings that led to the Panel’s ultimate conclusion that DoD procurement contracts were purchases of services. It then asserts that “{p}roperly assessed, the evidence would have compelled the finding that the DOD procurement contracts establish a joint-venture type relationship,”<sup>122</sup> and asks the Appellate Body to complete the Panel’s analysis.<sup>123</sup> But before the Appellate Body proceeds to complete the Panel’s analysis, it would need to establish that the EU’s DSU Article 11 appeals, if granted, would lead to the reversal of the Panel’s financial contribution finding. Otherwise, there would be no missing analysis for the Appellate Body to complete. The EU makes no such showing. It simply assumes that in light of the

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<sup>120</sup> Compliance Panel Report, para. 8.433.

<sup>121</sup> EU Appellant Submission, para. 83 (emphasis original).

<sup>122</sup> EU Appellant Submission, para. 85.

<sup>123</sup> EU Appellant Submission, para. 93.

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intermediate findings favored by the EU, the Panel could not have sustained the conclusion that DoD procurement contracts were purchases of services. This is not the case.

69. The EU asserts that the Panel should have made three additional or alternative findings based on evidence cited by the EU:

- It argues that Boeing should be found to be “contributing” its background intellectual property to its transactions with DoD;<sup>124</sup>
- It argues that R&D activities funded under the DoD procurement contracts should be found to result sometimes in technologies with civil applications;<sup>125</sup> and
- It argues that DoD’s termination of its recoupment rules in 1992 demonstrates that DoD intended that Boeing’s military research would provide Boeing with commercial advantages.<sup>126</sup>

70. The EU never explains why these additional or alternative findings would cast doubt on the Panel’s conclusion that DoD procurement contracts were purchases of services. To do that, it would need to show that these findings were somehow inconsistent with what would occur in a purchase of services. But the EU never alleges, let alone establishes:

- that Boeing’s role vis à vis DoD procurement contracts is different from suppliers of services whose relevant expertise and intellectual property qualify them as suppliers of a service;
- that suppliers of services do not use lessons learned in one transaction to their advantage in later, unrelated transactions; or
- that purchasers of services intend that their suppliers enjoy no commercial advantage by reason of their transactions.

71. Therefore, even if taken at face value, the EU’s arguments provide no basis to conclude that the DoD procurement contracts were anything other than purchases of services.

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<sup>124</sup> EU Appellant Submission, paras. 52-56

<sup>125</sup> EU Appellant Submission, paras. 57-78.

<sup>126</sup> EU Appellant Submission, paras. 79-84.

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**B. The EU Assertions Regarding the Panel’s *Arguendo* Evaluation of Benefit Based Solely on the Allocation of Patent Rights Are Insufficient to Support an Appeal Under DSU Article 11.**

72. As the United States explained in its other appellant submission, the analysis of benefit under Article 1.1(b) of the SCM Agreement requires a holistic consideration of all of the terms that affect the value of the transaction.<sup>127</sup> The Panel acted in line with this principle in finding that its evaluation of DoD procurement contracts “requires a consideration of all of the terms of the transaction, including how much DOD paid in relation to the work that Boeing performed.”<sup>128</sup> It observed that the EU addressed only the allocation of ownership of inventions,<sup>129</sup> and eventually concluded that the EU had not discharged its burden of demonstrating that any alleged financial contributions conferred a benefit.<sup>130</sup>

73. The finding that the EU did not address all of the terms of the contracts was sufficient, by itself, to justify the Panel finding that the EU failed to establish the existence of a benefit. The Panel nevertheless provided what was essentially an *arguendo* analysis “if we were to assess whether the financial contributions assumed to be provided through the DOD procurement contracts confer a benefit on Boeing by focusing solely on the allocation of the intellectual property rights arising from the performance of the R&D, in isolation from the other terms of the transaction.”<sup>131</sup>

74. The Panel concluded that the government use license attaching to any patent derived from Boeing’s work under the procurement contracts “captures the economic value of the R&D for DoD” because:

- it allows DoD to use the inventions without paying royalties;
- third party contractors of DoD (including Boeing’s competitors) may use the invention without paying royalties;
- DoD is the sole purchaser of modern air weaponry in the United States; and

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<sup>127</sup> US Other Appellant Submission, paras. 182-190.

<sup>128</sup> Compliance Panel Report, para. 8.420.

<sup>129</sup> Compliance Panel Report, para. 8.419.

<sup>130</sup> Compliance Panel Report, para. 8.433.

<sup>131</sup> Compliance Panel Report, para. 8.421.

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- Boeing’s ability to exploit the patents for any applications is circumscribed by U.S. export controls and the classification of national security information.<sup>132</sup>

For these and other reasons, the Panel “disagreed” with the EU assertion that “the US Government systematically receives less than a commissioning party would in a market-based transaction, and Boeing systematically receives more than a commissioned party would in a market-based transaction.”<sup>133</sup>

75. Relying on many of the same arguments it made in its financial contribution appeal, the EU argues that “the government use license does not capture the full economic value of the R&D for DoD.”<sup>134</sup> The EU misses the point in two ways. First, the Panel’s conclusion does not rely on DoD capturing the “full economic value” of the inventions. It was focused on the “balance” in the allocation of patent rights under the DoD procurement contracts, which it found to be less favorable to Boeing than was the case with DoD assistance instruments or NASA procurement contracts. The EU points to no evidence that would contradict this finding, or the Panel’s conclusion that the EU had failed to show that the balance under DoD procurement contracts was more favorable to Boeing than in a market-based transaction.

76. Second, even if the EU were correct that *some* economic value accrued to Boeing, that would not cure the EU’s failure to address in its benefit arguments all of the terms of the transaction, including “how much DOD paid in relation to the work Boeing performed.”<sup>135</sup> Without some analysis of the payment terms, it would be impossible to tell whether what Boeing received was better or worse than it would have received in the market. In particular, if Boeing received more patent rights under DoD procurement contracts than in a market transaction, but received less money, any difference in money could still leave the DoD procurement contract, on whole, *less* favorable to Boeing than a commercial transaction.

77. Therefore, there is no basis to find that the Panel failed to make an objective assessment for purposes of DSU Article 11 in this regard.

**C. Assuming *Arguendo* That the Appellate Body Were to Reverse the Panel’s Financial Contribution or Benefit Findings, the Findings of Fact by the Panel and Uncontested Evidence Are Insufficient to Complete the Analysis.**

78. The EU asserts that if the Appellate Body were to reverse the Panel’s financial contribution or benefit analyses that it could complete the analysis and conclude that the DoD

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<sup>132</sup> Compliance Panel Report, para. 8.422.

<sup>133</sup> Compliance Panel Report, para. 8.425.

<sup>134</sup> EU Appellant Submission, para. 90.

<sup>135</sup> Compliance Panel Report, para. 8.420.

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procurement contracts conferred specific subsidies. The EU, however, omits steps in the analysis, ignores evidence contrary to the result it seeks, misconstrues the Panel’s findings, and overstates the extent to which evidence is uncontested.

**1. *Financial Contribution***

79. The EU argues that the Appellate Body can complete the analysis by analogizing certain aspects of the DoD procurement contracts to the characteristics that the Appellate Body considered relevant in characterizing NASA procurement contracts and DoD assistance instruments as joint ventures.<sup>136</sup> The EU frames its request for completion of the analysis around seven characteristics that, in its view, the Appellate Body considered relevant to treating transactions as joint ventures analogous to equity infusions. The EU is in most regards mistaken, and does not identify evidence sufficient to justify its argument that the DoD procurement contracts are best viewed as joint ventures.

*Whether both parties commit resources*

80. The EU asserts that Boeing “contributes” the work of its scientists and engineers, as well as its own background intellectual property.<sup>137</sup> As a supplier of services would also provide the work of its employees to the purchaser, this characteristic does not support the EU’s view that these transactions were not purchases of services. As for background intellectual property, even if the EU establishes as a legal matter that this *could* be a contribution, it cites no evidence that Boeing actually did make such contributions.

81. The EU also asserts that DoD “provides financial and other resources to Boeing,”<sup>138</sup> but the Panel found that there is no evidence that the provision of facilities, equipment, and employees is “anything but marginal.”<sup>139</sup> Thus, there is no basis to disturb the Panel’s conclusion that “DOD provides payments to Boeing, in return for which Boeing performs specific R&D work”<sup>140</sup> – what the Appellate Body called a “straightforward exchange of monetary resources for some kind of non-monetary consideration” as opposed to a joint venture.<sup>141</sup>

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<sup>136</sup> EU Appellant Submission, para. 94.

<sup>137</sup> EU Appellant Submission, para. 94, first bullet.

<sup>138</sup> EU Appellant Submission, para. 94, first bullet.

<sup>139</sup> Compliance Panel Report, para. 8.361.

<sup>140</sup> Compliance Panel Report, para. 8.361.

<sup>141</sup> *US – Large Civil Aircraft (AB)*, para. 596.



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*Whether the Parties share the fruits of the research*

82. The Panel found that Boeing’s practical ability to use any results of DoD procurement contracts is “circumscribed” by U.S. export controls and “limited” by the government use license in any patented inventions, which would allow use of those patents by any other defense contractor.<sup>142</sup> The evidence cited by the EU does not contradict this finding and, in fact, confirms that DoD research rarely yields results applicable in the civil sphere or provides meaningful business opportunities outside of sales to DoD. Although these limitations would apply also with respect to technologies with military applications derived from NASA research, the restriction is both stronger and more pervasive with respect to the results of DoD procurement contracts by reason of their explicitly military objectives.

*Whether subjects to be researched are determined collaboratively*

83. The Panel’s lengthy description of the processes for selecting research topics under S&T and systems acquisition program elements makes no reference to participation by – let alone “collaboration” with – defense contractors.<sup>143</sup> The only input by contractors that it describes is “to ensure that they are able to perform the work, and that the R&D will meet DoD’s requirements.”<sup>144</sup> This situation differs markedly from what the Panel found with respect to NASA procurement contracts.<sup>145</sup> The EU does not dispute these factual findings, but nevertheless asserts that the subjects of research under DoD procurement contracts “are often determined collaboratively.”<sup>146</sup> The only support it offers is to note that Boeing has the “input” described by the Panel (which does not go to choice of topics) and to cite a statement made in 1992<sup>147</sup> when DoD terminated the recoupment that makes no reference to the selection of research topics. As neither of these considerations addresses the selection of research topics, they provide no support for the EU assertion, which accordingly carries no weight. It is also important to note that the United States contested the EU’s characterization of the operation of DoD’s recoupment policy.<sup>148</sup>

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<sup>142</sup> Compliance Panel Report, paras. 422 and 425.

<sup>143</sup> Compliance Panel Report, paras. 8.303-8.310.

<sup>144</sup> Compliance Panel Report, para. 8.364.

<sup>145</sup> Compliance Panel Report, paras. 8.132-8.138.

<sup>146</sup> EU Appellant Submission, para. 94, third bullet.

<sup>147</sup> EU Appellant Submission, para. 94, third bullet.

<sup>148</sup> US SWS, paras. 325 and 397; US Comments on the EU Responses to Questions 13, 24 and 29, paras. 72, 124, and 164.

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*Whether funding is provided in expectation of some kind of return*

84. The EU’s reliance on whether DoD funds the procurement contracts in expectation of some kind of return is also in error. As the same might be said of a purchase of services, it is difficult to see how this characteristic of DoD procurement contracts supports characterizing them as a joint venture analogous to an equity infusion.

*Whether there is certainty that the research will be successful*

85. The EU asserts, without any support, that there is no dispute that the success of DoD-sponsored research is uncertain. However, the United States has consistently disagreed with this view, observing that for S&T program elements:

DoD seeks to evaluate whether particular technologies warrant further investment of its resources. A project that revealed that a particular approach would not achieve the desired research objective would be a success in that it forestalled further effort in that direction, and allowed focusing on more promising avenues of inquiry. Thus, the “return” on spending under the “general research” program elements is always a “sure thing,” because the “return” that DoD expects is the completion of research services.<sup>149</sup>

For systems acquisition contracts, the uncertainty is not about the outcome of the research:

A systems acquisition or upgrade contract starts with known scientific principles and technologies generally already advanced to TRL 6, and seeks to operationalize them in the form of a finished product. The risk at this stage is not whether the research will succeed, but rather whether the contractor can devise a product design and manufacturing process that will achieve the performance requirements. (There may, literally, be thousands of these on a complex project.) The fact that one technology does not work well in tandem with other candidate technologies on a particular weapons system (or conversely that it does work) provides little information as to whether it will work with a different set of technologies aimed at a different set of criteria.<sup>150</sup>

Thus, there is dispute regarding the success of research under DoD procurement contracts, and the Panel made no findings in this regard.

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<sup>149</sup> US FWS, para. 379.

<sup>150</sup> US FWS, para. 421.

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*Whether the funder’s risks are limited to the amount contributed*

86. This characteristic is true of both purchases of services and joint ventures, which makes it unhelpful in differentiating between them.

*Whether the funder makes non-monetary contributions*

87. The EU asserts that the United States considered that this characteristic “is not a necessary feature of the Appellate Body’s analysis.”<sup>151</sup> This is incorrect. As the United States explained with respect to DoD procurement contracts, “this balance of contributions – one side providing exclusively funding and the other engaging in services through the application of its own facilities, equipment, and employees, is characteristic of a purchase of services, and not ‘akin to a joint venture.’”<sup>152</sup> As the Panel found that DoD’s non-monetary contributions under procurement contracts were no more than “marginal”,<sup>153</sup> this factor indicates that they were a purchase of services.

*Additional consideration*

88. The Appellate Body did not limit its analysis to the seven characteristics highlighted in the EU appellant submission. It also noted that NASA officials repeatedly referred to the NASA-Boeing relationship in terms of a partnership, and that the DoD differentiated the “assistance” provided in an assistance instrument from “acquisition” under a procurement contract.<sup>154</sup> The EU points to no statement whatsoever that DoD procurement contracts involve a partnership, or were intended (or expected) to produce results with civil applications.

*Conclusion*

89. As the United States has shown, the factual statements the EU makes are either incorrect, supportive of the Panel’s conclusion, not probative, or contested by the United States. The EU has accordingly provided no valid support for its request that the Appellate Body complete the Panel’s analysis to find that the DoD procurement contracts create joint ventures analogous to an equity infusion.

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<sup>151</sup> EU Appellant Submission, para. 96, fourth bullet.

<sup>152</sup> US FWS, para. 375.

<sup>153</sup> Compliance Panel Report, para. 8.361.

<sup>154</sup> US – Large Civil Aircraft (AB), paras. 598-600 and 604.

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**2. Benefit**

90. The EU argues that DoD procurement contracts have the “same essential characteristics as NASA procurement contracts and DOD assistance instruments,” and asks the Appellate Body to find a benefit on the same basis as it found a benefit with respect to those instruments. Its request fails on three levels.

91. First, as the United States demonstrated in its other appellant submission, the Panel’s benefit analysis with respect to NASA reflected an incorrect application of Article 1.1(b) of the SCM Agreement, in that the Panel failed to consider all of the relevant terms of the transactions.<sup>155</sup> To complete the analysis of benefit correctly with respect to DoD procurement contracts, the Appellate Body would need to consider all of the terms of those contracts and any benchmark transactions. As the EU has not even attempted to do this, its request to complete the analysis fails.

92. Second, DoD procurement contracts do not have the “same essential characteristics” as NASA procurement contracts and DoD assistance instruments. The EU identified four such “characteristics,”<sup>156</sup> but they all indicate important differences between DoD procurement contracts as compared to NASA procurement contracts and DoD assistance instruments:

- *Boeing obtains intellectual property rights to any discoveries made.* The Panel found that Boeing’s ability to use intellectual property arising from DoD procurement contracts is “circumscribed” by U.S. export controls and “limited” by the government use license in any patented inventions.<sup>157</sup> These limitations play a much smaller role in NASA contracts.
- *Military technologies may have civil applications.* As shown above in section II.A.3, it is quite rare for military technologies developed under DoD procurement contracts to have civil applications. In contrast, research with civil applications is the entire point of the NASA research challenged by the EU.
- *Boeing is able to use technologies developed under DoD procurement contracts in civil applications.* Again, as shown above in section II.A.3, the evidence shows that in the rare instances in which DoD procurement contracts result in technology with civil applications, export controls limit Boeing’s ability to use those

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<sup>155</sup> US Other Appellant Submission, paras. 205-207.

<sup>156</sup> EU Appellant Submission, para. 99.

<sup>157</sup> Compliance Panel Report, paras. 422 and 425.

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technologies in large civil aircraft. These limitations would not apply to purely civil technologies developed by NASA.

- *The U.S. Government noted in 1992 that termination of the recoupment policy would “assist the U.S. defense industry to be more competitive on a global basis.”* In this now 25-year-old quotation, DoD was merely predicting one, among many, of the positive effects of termination, including a reduction in DoD’s own administrative burden. The EU has cited no similar subsequent statements, and the United States is aware of none. In contrast, the original panel and the compliance Panel cited many instances in which NASA referred to the positive effects of NASA research for large civil aircraft.<sup>158</sup>

As there is no basis for the EU’s assertion that DoD procurement contracts have the “same essential characteristics” as NASA procurement contracts and DoD assistance instruments, there is no basis to perform the same analysis to determine benefit.

93. Third, the United States demonstrated to the Panel that, by using competitive practices in awarding procurement contracts, DoD ensured that it did not accord Boeing terms more favorable than would be available in a market transaction.<sup>159</sup> The most telling example comes from outside the scope of the proceeding, but it is instructive. In 2007, DoD conducted a competitive bid for acquisition of KC-46 aerial refueling tankers. Boeing and EADS, Airbus’s corporate parent, submitted offers, with Boeing offering a total cost more than one percent lower than EADS’s. DoD awarded the contract to Boeing.<sup>160</sup> Thus, Boeing did not receive terms more favorable than those available in the market, as the terms that DoD applied to the procurement of the KC-46 from Boeing were less favorable to Boeing than the terms of Airbus’s offer with respect to the same aircraft. These types of practices, applied on essentially all of the procurement contracts at issue, ensured that the terms of the DoD procurement contracts were not more favorable to Boeing than would have been the case in a market transaction.

94. The Panel found that it need not address this point because the EU had failed to discharge its burden to demonstrate the existence of a benefit.<sup>161</sup> Assuming *arguendo* that the Appellate Body found that the Panel correctly applied Article 1.1(b) of the SCM Agreement, and that the allocation of intellectual property rights (considered in isolation) was more favorable than in a commercial transaction, the Panel’s reasons for setting aside consideration of competitive practices would not apply. Therefore, the Appellate Body would need to address the U.S.

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<sup>158</sup> *US – Large Civil Aircraft (Panel)*, paras. 7.985-7.1024; Compliance Panel Report, paras. 8.123-8.131.

<sup>159</sup> US Response to Panel Question 83, paras. 83-86 and 89-98.

<sup>160</sup> US FWS, paras. 451-453.

<sup>161</sup> Compliance Panel Report, para. 8.435.

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argument. However, as the EU contested many of the points made by the United States and the Panel made no findings, there is no basis to complete the analysis.

**3.     *Specificity***

95.     If the Appellate Body finds that DoD procurement contracts create a joint venture analogous to an equity infusion, and that they contain a benefit, that would trigger the contingent appeal in section III.B of the U.S. other appellant submission. The arguments in that conditional appeal apply equally with respect to DoD procurement contracts, and the United States incorporates them in this submission by reference. Therefore, the EU has provided no basis for the Appellate Body to complete the Panel’s analysis by finding DoD procurement contracts confer a subsidy that is specific.

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**III. THE PANEL CORRECTLY FOUND THAT THE EU FAILED TO MEET ITS BURDEN TO ESTABLISH THAT BOEING RECEIVED FSC/ETI BENEFITS.**

96. The EU appeal of the Panel’s findings regarding the FSC/ETI measures confuses two distinct issues: whether the FSC/ETI measures conferred a financial contribution in the abstract during the post-implementation period, and whether Boeing received FSC/ETI tax concessions in that period. The EU, as the party seeking to establish that use of FSC/ETI tax concessions by Boeing continued to cause adverse effects after the end of the implementation period, bore the burden to show both that a subsidy existed and that Boeing was a recipient of the subsidy. The Panel correctly recognized that if Boeing did not use FSC/ETI concessions, the question of the existence of the subsidy was not relevant to the EU’s claim. It carefully considered all of the evidence submitted by the parties. The Panel concluded that statements from Boeing’s Vice President of Tax that the company did not claim FSC/ETI benefits and did not intend to claim them in the future, supported by Boeing’s submissions to the U.S. Securities and Exchange Commission, demonstrated that Boeing did not, in fact, use FSC/ETI after 2006.<sup>162</sup> It rejected evidence submitted by the EU as not addressing this relevant question. That properly ended the inquiry.

97. On appeal, the EU argues that the Panel should have taken a different approach, first evaluating whether, after the U.S. Congress revoked the FSC/ETI measures in 2006, a memorandum issued by U.S. tax authorities preserved the concessions in certain limited circumstances.<sup>163</sup> The EU argues that the Panel should then have evaluated whether those circumstances existed or might exist with respect to Boeing at any point in the period covered by these proceedings or afterward.<sup>164</sup> It asserts that the Panel should have answered both of these questions in the affirmative, and on that basis, concluded that the “the FSC/ETI measures provide financial contributions to Boeing.”<sup>165</sup> According to the EU, evidence that Boeing did not use or intend to use the FSC/ETI tax concessions after 2006 was irrelevant to this inquiry.<sup>166</sup> The EU provides no valid support for this argument.

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<sup>162</sup> Compliance Panel Report, paras. 8.609-8.610.

<sup>163</sup> EU Appellant Submission, para. 133

<sup>164</sup> EU Appellant Submission, para. 135.

<sup>165</sup> EU Appellant Submission, para. 135.

<sup>166</sup> EU Appellant Submission, para. 133.

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**A. The Panel Properly Began, and Ended, Its Analysis with the Issue Central to the EU’s Claims – Whether Through the FSC/ETI Measures, “the United States Provides Financial Contributions . . . that Confer a Benefit to Boeing.”**

98. Through most of the history of these disputes, there has been no disagreement that the EU’s claims in these proceedings relate to the FSC/ETI tax benefits *that Boeing received*. The original panel noted “that these claims concern the FSC/ETI subsidies *as used by a particular entity, Boeing*,”<sup>167</sup> and concluded that “tax exemptions and tax exclusions *provided to Boeing* under the FSC and ETI legislation . . . constitute specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.”<sup>168</sup> The Appellate Body found that these measures caused adverse effects because they “lowered the taxes that Boeing paid in respect of revenue obtained on each LCA sale.”<sup>169</sup> In its panel request, the EU alleged that “the United States maintains tax exemptions and tax exclusions under FSC/ETI legislation and successor legislation *presently benefiting Boeing*.”<sup>170</sup> In its first written submission, the EU asserted that “at a minimum, the value of the financial contribution from the continuing FSC/ETI tax exemptions was \$11.7 million in 2012, and will be \$39.5 {million} from 2013-2018.”<sup>171</sup> And the EU argued that the subsidies affected Boeing’s pricing “by lowering the taxes . . . paid by Boeing on the production and sale of each individual LCA.”<sup>172</sup>

99. Thus, the Panel was plainly correct when it observed:

The European Union's claim is that the United States maintains tax exemptions and tax exclusions under FSC/ETI and successor legislation that benefit Boeing specifically. The European Union’s evidence and arguments are directed at demonstrating that Boeing has received eligible foreign income for which it continues to receive FSC/ETI tax benefits.<sup>173</sup>

As that was the EU’s claim, it bore the burden of proof with respect to each element, including that Boeing received FSC/ETI tax benefits after the implementation period. And, if it failed to establish each element, the EU’s claim would fail. Thus, the Panel proceeded correctly in focusing on whether “Boeing actually received FSC/ETI benefits after 2006.”<sup>174</sup> And once it

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<sup>167</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1394 (emphasis added).

<sup>168</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1406 (emphasis added). Neither party appealed this finding.

<sup>169</sup> *US – Large Civil Aircraft (AB)*, para. 1252.

<sup>170</sup> EU, Request for the Establishment of a Panel, WT/DS353/18, para. 19 (Oct. 12, 2012).

<sup>171</sup> EU FWS, para. 402.

<sup>172</sup> EU FWS, para. 1136.

<sup>173</sup> Compliance Panel Report, para. 8.599 (citations omitted).

<sup>174</sup> Compliance Panel Report, para. 8.596.



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concluded that this was not the case, that meant that the EU had failed to meet its burden of proof, and there was no need for the Panel to address other elements of the EU case, including whether FSC/ETI tax concessions as a general matter remained “available”.

100. The Appellate Body has observed that “[j]ust as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim.”<sup>175</sup> The Panel’s decision to address first the dispositive question of whether Boeing received the alleged subsidy, and not the subsidiary question of whether the FSC/ETI measure nonetheless was in some other sense “available,” was within this discretion.

**B. The Analytical Framework Used by the Panel in *US – Conditional Tax Incentives* Did Not Apply to the EU Arguments to the Compliance Panel.**

101. The EU argues that the Panel’s focus on whether Boeing actually received the FSC/ETI tax concessions was inconsistent with the finding of the panel in *US – Conditional Tax Incentives* that “a government presently foregoing an entitlement to collect revenue either now or in the future” may be a financial contribution for purposes of Article 1.1(a)(1)(ii).<sup>176</sup> However, the EU confuses two different questions: whether a tax measure constitutes a financial contribution in the abstract, as opposed to whether a particular taxpayer has used the tax treatment embodied in that measure. The EU’s own arguments in *US – Conditional Tax Measures* illustrate this difference, and support the compliance Panel’s decision in this proceeding to focus on whether Boeing actually received the subsidy challenged by the EU.

102. As the compliance Panel observed, the original panel in these proceedings addressed EU claims that the Washington state leasehold excise tax exemption and property tax exemption were actionable subsidies.<sup>177</sup> The original panel found that Boeing had not claimed these particular exemptions,<sup>178</sup> and explained that

the European Communities’ argument is not that a financial contribution exists in the abstract, by virtue of the existence of legislation providing for a tax abatement that has in fact never been used. Rather, the European Communities’ case is that there is a financial contribution to a specific entity, namely to Boeing. For these reasons, in circumstances where the sales and use tax exemption for construction services and equipment, the leasehold excise tax exemption and the property tax exemption have never been claimed by Boeing, and in fact Boeing has taken steps

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<sup>175</sup> *EC – Poultry (AB)*, para. 135 (emphasis original).

<sup>176</sup> *US – Conditional Tax Incentives (Panel)*, para. 7.54, quoted in EU Appellant Submission, para. 132.

<sup>177</sup> *US – Large Civil Aircraft (Panel)*, para. 7.68.

<sup>178</sup> *US – Large Civil Aircraft (Panel)*, para. 7.144.

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that suggest that it will not claim the exemptions, the Panel finds that there is no financial contribution to Boeing in relation to these three measures.<sup>179</sup>

103. In *US – Conditional Tax Incentives*, the EU challenged the Washington state sales and use tax exemption as an import substitution subsidy prohibited under Article 3 of the SCM Agreement. That panel noted that “the European Union distinguishes its claim from that made in *US – Large Civil Aircraft* as it argues in the present case ‘that a financial contribution exists in the abstract’ rather than being entity-specific.”<sup>180</sup> The *US – Conditional Tax Incentives* panel then rejected the U.S. argument that tax treatment confers a subsidy only if actually used, explaining that:

A finding that the aerospace tax measures result in government revenue being foregone, or that they cause government revenue to be foregone, be it currently or in the future, applies to the measures themselves. This foregoing of revenue would apply to taxpayers at any time during the entire period in which the measures are in force. The foregoing of revenue is constituted by the government’s promise to do so, and not only by particular instances of it being done.<sup>181</sup>

104. Thus, as the EU pointed out in *US – Conditional Tax Incentives*, and as logic dictates, the claims before a panel shape its analysis. A panel addressing a challenge to a measure “as such” will address different questions, and may structure its analysis differently, than a panel addressing a challenge to a subsidy recipient’s use of a subsidy. And, in light of the EU arguments in *US – Conditional Tax Incentives*, its “as such” claims against the sales and use tax exemption called for an examination of revenue foregone “currently or in the future.” In contrast, the EU’s claims in the original proceeding involved Boeing’s alleged use of the leasehold excise and property tax exemptions, and accordingly called for an evaluation of whether the company actually did use the exemptions. When the EU brought a claim in the compliance proceeding against Boeing’s alleged *use* of the FSC/ETI exemption to reduce its U.S. income taxes, the compliance Panel properly mirrored the approach taken by the original panel to evaluate the EU’s comparable claims.

105. The compliance Panel noted that, in its second written submission, the EU tried to recast its claim as directed at Boeing’s eligibility for the FSC/ETI tax concession, rather than its use of the measure.<sup>182</sup> However, the Panel examined the *substance* of those claims, and found the characterization in the EU second written submission to be inaccurate – that {t}he European

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<sup>179</sup> *US – Large Civil Aircraft (Panel)*, para. 7.151.

<sup>180</sup> *US – Conditional Tax Incentives (Panel)*, para. 7.41.

<sup>181</sup> *US – Conditional Tax Incentives (Panel)*, para. 7.54.

<sup>182</sup> Compliance Panel Report, para. 8.597.

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Communities’ evidence and arguments are directed at demonstrating that *Boeing* has received eligible foreign income for which it continues to receive FSC/ETI tax benefits.”<sup>183</sup> An analysis as in *US – Conditional Tax Incentives* as to whether the challenged tax treatment might apply to any taxpayer “at any time during the entire period in which the measures are in force” was not necessary to resolve this question.

106. Finally, the EU seeks to portray the Panel’s analysis as inviting responding parties to circumvent the recommendations and rulings of the DSB by allowing subsidy recipients to “stop using the available tax break for the short period between the end of the implementation period and the closing of the factual record in the compliance dispute.”<sup>184</sup> The facts of this case do not present that scenario – the Panel found that Boeing stopped using the FSC/ETI tax concessions in 2006, has not used them since, and had no intention to use them in the future. Nothing in the Panel’s reasoning would prevent a future panel from addressing the manipulations outlined by the EU if evidenced by the facts before it. Therefore, the EU’s circumvention concerns are unfounded.

**C. The Evidence Does Not Support the EU Request to Complete the Panel’s Analysis with Respect to the FSC/ETI Tax Concessions.**

107. The EU asks the Panel to reverse the Panel’s supposed interpretation of Article 1.1(a)(1)(ii), and complete the analysis placing “the focus . . . on whether an *entitlement* to a tax reduction has been conferred on the alleged recipient.”<sup>185</sup> Sections A and B explain why the EU’s appeal fails as a matter of law. However, even if the EU were to prevail on the legal issue, it has failed to identify findings of fact or undisputed evidence that would allow the Appellate Body to complete the analysis:

- The Panel found as a matter of fact that Boeing did not use FSC/ETI to reduce its tax burden for a period starting in 2007 and continuing to the date of the Panel’s findings. As the EU has not raised a claim under DSU Article 11, that finding of fact is not open to question in this appeal. Six years of Boeing consistently not listing receipt of FSC/ETI tax concessions suggests quite strongly that the company will not use the FSC program in the future.
- The memorandum on which the EU relies was a response by the tax authorities to a question from a taxpayer. It states explicitly that “{t}his legal advice responds to your request for assistance. This advice may not be used or cited as

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<sup>183</sup> Compliance Panel Report, paras. 8.598-8.599.

<sup>184</sup> EU Appellant Submission, para. 138 (emphasis original).

<sup>185</sup> EU Appellant Submission, para. 133 (emphasis original).

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precedent.”<sup>186</sup> Thus, it does not set out a binding interpretation of the 2006 act of the U.S. Congress that repealed the FSC/ETI measure, and provides no basis to reach a definitive conclusion as to Boeing’s eligibility to claim those concessions during or after the implementation period.

- The Updated Statement of James H. Zrust, Boeing’s Vice President for Tax, states that “it is Boeing’s view that any income recognized after 31 December 2006 is not eligible for FSC benefits.”<sup>187</sup> Thus, Boeing’s continued eligibility for the FSC/ETI tax concession is a fact disputed by the parties.<sup>188</sup>

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<sup>186</sup> Memorandum from Stephen Musher to Harry Singleton, No. AM 2007-001, p. 1 (December 22, 2006).

<sup>187</sup> Statement of James H. Zrust, para. 4 (Exhibit US-382).

<sup>188</sup> The EU asserts that “the United States did not dispute” the EU’s assertion that “TIPRA continues to allow Boeing to receive FSC/ETI benefits with respect to certain foreign income recognised after 31 December 2006.” EU Appellant Submission, para. 142, fourth bullet. This is false. The U.S. submissions cited by the EU state that Boeing did not use the subsidy after 2006. One of them cites the Zrust Statement and observes that “from Boeing’s point of view, there were no income-recognition events after December 31, 2006, that were eligible for FSC benefits.” US RPQ 34, para. 146.

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**IV. THE PANEL DID NOT ERR IN FINDING THAT THE SUBSIDY PROVIDED THROUGH KANSAS IRBS IS NO LONGER SPECIFIC.**

108. The EU claims that the Panel erred in assessing *de facto* specificity of the Kansas IRBs on the basis of information that post-dates the RPT, rather than information from the entire period of time during which the subsidy program has existed, *i.e.*, from 1979 to the present.<sup>189</sup> However, the Panel correctly based the specificity analysis on information post-dating the RPT, for at least two reasons.

109. First, the United States asserted that it had withdrawn the subsidy by eliminating the *de facto* specificity that had been the basis for the DSB’s recommendations and rulings regarding the Kansas IRBs.<sup>190</sup> In other words, the absence of *de facto* specificity after the expiry of the RPT was invoked as a measure taken to comply. Under Article 21.5 of the DSU, the Panel was required to assess whether this measure had indeed achieved compliance.<sup>191</sup> If the Panel had based its specificity determination on evidence from 1979 onward, then it would have ignored the very act that the United States asserted to be its compliance, the move to non-specific administration of the IRB tax measure. In other words, the Panel would have penalized the United States for the same specificity that was the subject of the DSB’s recommendations and rulings, while disregarding a compliance measure explicitly within its terms of reference. Thus, to address the issue before it, the Panel had to isolate post-implementation-period information regarding specificity to evaluate whether actions during the implementation period achieved compliance with the recommendations and rulings of the DSB.

110. Second, given recent changes in the structure of Wichita’s economy and the diminishing importance of the aerospace industry in Wichita, it would have been inappropriate for the Panel to assess specificity over the entire duration of the subsidy program. As the original panel stated:

it is arguable that when a subsidy programme has been in operation for a long period of time, such as the IRB programme, aggregating the data over the entire life of the subsidy may not always be appropriate. This may be the case where there has been a significant change in the structure of the economy and the importance of the subsidized activities in the economy over the life of the subsidy.<sup>192</sup>

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<sup>189</sup> EU Appellant Submission, para. 145.

<sup>190</sup> See *US – Large Civil Aircraft (AB)*, para. 1350(c)(ii).

<sup>191</sup> See compliance Panel Report, para. 8.634 (“the relevant financial contribution is that which was granted after the end of the implementation period.”).

<sup>192</sup> *US – Large Civil Aircraft (Panel)*, para. 7.757.

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Notably, the EU’s appellant submission quotes this interpretation of Article 2.1(c) approvingly.

111. In this case, there were indeed “significant change {s} in the structure of the economy and the importance of the subsidized activities in the economy.” In particular, after 2007, the proportion of IRBs granted to companies in the aerospace industry fell, due to the decreasing importance of those companies in Wichita’s economy.<sup>193</sup> The Wichita City Council stopped granting IRBs to Boeing in 2007. In addition, in 2012, Boeing announced that it would end defense operations in Wichita,<sup>194</sup> and shuttered all of its production operations there in 2013.<sup>195</sup> These are uncontested facts. Thus, the Panel was correct to assess specificity on the basis of the subsidies received by companies in the aerospace industry during the post-2012 time period.<sup>196</sup>

112. The EU attempts to undermine the Panel’s findings on three bases, none of which have any merit. *First*, the EU argues that the Panel interpreted the terms in Article 2.1(c) to “mean {} something different in a compliance proceeding than it does in an original proceeding.”<sup>197</sup> This is yet another invention of the EU, and not an accurate description of what the Panel did. The Panel did not change the meaning given to Article 2.1(c) – it simply applied the same meaning to a different data set because the facts had changed – most importantly, the structure of Kansas’ economy and the role of the aerospace industry in it. These facts supported the use of data from after the end of the implementation period to assess specificity.

113. By the EU’s logic, whether a subsidy causes adverse effects within the meaning of Article 5 should be assessed largely on the basis of the same information in an original proceeding as a compliance proceeding. In reality, the use of the present tense in Article 5 confirms that the relevant question is whether the subsidy causes *present* adverse effects.<sup>198</sup> Likewise, with respect to Article 2.1, the relevant question is whether a subsidy “is” specific, not whether it *was* specific at a prior point in time.

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<sup>193</sup> See compliance Panel Report, para. 8.627.

<sup>194</sup> See EU FWS, para. 420; Mayor Brewer’s Statement on Boeing Announcement (Exhibit EU-418).

<sup>195</sup> See US FWS, para. 15.

<sup>196</sup> The EU criticizes this approach because the Panel’s findings are supposedly “not based on this theory.” EU Appellant Submission, para. 179 & fn. 385.” However, the EU’s speculation on the Panel’s thought process is misguided. The question raised by the EU’s claim is whether the Panel made an error in its specificity analysis. Uncontested facts confirm that the answer is no.

<sup>197</sup> EU Appellant Submission, para. 181.

<sup>198</sup> Cf. *EC – Large Civil Aircraft (AB)*, para. 712 (“The text of Articles 5 and 6 of the SCM Agreement, and in particular the use of the present tense in these provisions, does not support the proposition that there must be ‘present benefit’ during the reference period.”).

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114. *Second*, the EU argues that the Panel’s approach would supposedly “permit easy circumvention of the SCM Agreement disciplines.”<sup>199</sup> According to the EU, this is because the relevant granting authority could “temporarily expand the group of subsidy recipients” after the implementation period, and then make it specific again following a finding of WTO consistency.<sup>200</sup> However, the EU’s circumvention concerns do not arise in this case, because the City of Wichita stopped granting IRBs to Boeing in 2007 and the company shuttered all production in Kansas in 2013. Even aside from whether such speculative, hypothetical scenarios are relevant, this is not a short-term change that can be quickly reversed to manipulate the appearance of *de facto* specificity.

115. Furthermore, the EU’s circumvention concern would, if taken to its logical conclusion, suggest that compliance in general ought to be impossible. All compliance measures can be undone. The fact that WTO panels are nonetheless able to determine that Members bring themselves into compliance confirms that the EU’s circumvention concerns are unfounded.

116. *Third*, the EU argues that the Panel failed to make an objective assessment under Article 11 of the DSU, because it assessed *de facto* specificity on the basis of data drawn from a shorter time period than the original panel.<sup>201</sup> In this regard, the EU quotes the Appellate Body’s statement that “doubts could arise” about a compliance panel’s objectivity if it were to “deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record.”<sup>202</sup> However, the EU fails to establish that any deviation occurred. On the contrary, as noted above, it was the *original* panel which recognized that specificity can be based on “a time period shorter than the life of the subsidy programme . . . if ‘there has been a significant change in the structure of the economy and the importance of the subsidized activities in the economy over the life of the subsidy’.”<sup>203</sup> It is the facts that changed, not the Panel’s analytical approach. Accordingly, the EU’s claim under Article 11 of the DSU fails, as do all of its other arguments related to the Kansas IRB program.

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<sup>199</sup> EU Appellant Submission, header before para. 1872.

<sup>200</sup> EU Appellant Submission, para. 183.

<sup>201</sup> EU Appellant Submission, para. 195.

<sup>202</sup> *US – Softwood Lumber VI (Art. 21.5) (AB)*, para. 103.

<sup>203</sup> EU Appellant Submission, para. 179 & fn. 385, quoting *US – Large Civil Aircraft (Panel)*, para. 7.757.

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**V. THE EU HAS IDENTIFIED NO ERROR WITH THE PANEL’S SPECIFICITY FINDINGS WITH RESPECT TO SOUTH CAROLINA SUBSIDIES.**

**A. The Panel Did Not Err in Finding That the Subsidy Provided Through South Carolina EDBs Is Not Specific.**

117. Before the Panel, the EU claimed that South Carolina conferred a subsidy to Boeing by providing it with the proceeds of South Carolina Economic Development Bonds (“EDBs”). The EU argued that this subsidy was *de facto* specific.<sup>204</sup> Thus, the EU had the burden to explain why, notwithstanding the appearance of *de jure* non-specificity, the subsidy was *de facto* specific in light of the factors identified in Article 2.1(c) of the SCM Agreement. However, the only supporting information that the EU provided was a list of six entities that received the EDB subsidies, along with the dates and amounts given. Four of the recipients, accounting for approximately one quarter of the total subsidy amount given,<sup>205</sup> are not in the aerospace industry.<sup>206</sup> Given the outsize role of aerospace in South Carolina, the Panel found that the EU failed to meet its burden, and rejected its *de facto* specificity argument.

118. Now the EU appeals this finding, arguing that the Panel misinterpreted Article 2.1(c). However, the interpretations that the EU criticizes are not ones that the Panel actually articulated or relied upon. Rather, they are the EU’s own inventions, used as a foil for attacking the Panel’s findings. This diversionary tactic should not obscure the fact that the EU had the burden to establish that the subsidy was *de facto* specific, which it failed to meet.

119. The EU also argues that the Panel failed to fulfill its duty under Article 11 of the DSU, because it supposedly did not properly take into account two particular facts: the total number of manufacturing establishments in South Carolina in 2012, and the year (2002) in which the EDB program started.<sup>207</sup> This argument is also unfounded. The total number of manufacturing establishments in South Carolina does not indicate the number of entities that were eligible for the subsidy, which had demanding investment- and employment-related eligibility requirements (discussed below). In fact, the EU itself did not cite the total number of manufacturing establishments in South Carolina in its own specificity arguments before the Panel, as the EU admits,<sup>208</sup> so the Panel can hardly be faulted for doing likewise. With respect to the length of

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<sup>204</sup> The EU also argued that the subsidy was *de jure* specific. The Panel rejected this argument, and the EU does not appeal the Panel’s finding. Compliance Panel Report, para. 8.835.

<sup>205</sup> *I.e.*, USD 126 million out of USD 506 million. Compliance Panel Report, para. 8.838.

<sup>206</sup> EU FWS, para. 585; EU SWS, para. 642; *see also* EU Response to Panel Question 110, para. 179 & fn.319.

<sup>207</sup> EU Appellant Submission, paras. 256, 259.

<sup>208</sup> *See* EU Appellant Submission, paras. 256.



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time that the EDB program has been in place: the Panel addressed this fact explicitly,<sup>209</sup> but did not consider that it warranted a finding of specificity. Nothing in its reasoning suggests a lack of objectivity.

**1. The EDB program**

120. Section 11-41-40 of the South Carolina Code (adopted in 2002) provides that EDBs can be used to fund financing for infrastructure, as part of an “economic development project” in South Carolina.<sup>210</sup> In such cases, South Carolina issues EDBs for sale to the public, and the proceeds from the sale are transmitted to the party engaged in the economic development project.<sup>211</sup> An “economic development project” generally requires an investment of at least \$400 million and the creation of at least 400 new jobs.<sup>212</sup> South Carolina law contains no explicit limitation on access to EDBs for any particular industry.<sup>213</sup>

121. Since 2002, South Carolina authorized the issuance of EDBs for six recipients: BMW (in 2003 for \$105 million), the Project Emerald companies (in 2004 for \$160 million), the City of Greenville (in 2005 for \$7 million), the City of Myrtle Beach (in 2005 for \$7 million), Trident Technical College (in 2005 for \$7 million), and Boeing (in 2010 for \$220 million).<sup>214</sup> Of these entities, only Boeing and the Project Emerald companies are in the aerospace industry.

122. BMW, the Project Emerald companies, and Boeing are among the largest employers in the State of South Carolina. As of early 2008, BMW employed 5,400 full-time equivalents in South Carolina.<sup>215</sup> The Project Emerald companies committed to invest \$450 million in Project Emerald and employ 745 people in South Carolina.<sup>216</sup> In addition, Boeing was the largest

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<sup>209</sup> See Compliance Panel Report, para. 8.838.

<sup>210</sup> See Compliance Panel Report, para. 8.832.

<sup>211</sup> See Compliance Panel Report, para. 8.694.

<sup>212</sup> Compliance Panel Report, para. 8.832; see also S.C. Code 11-41-30 (Exhibit EU-477).

<sup>213</sup> Compliance Panel Report, para. 8.835. The EU does not appeal this finding.

<sup>214</sup> See Compliance Panel Report, para. 8.838.

<sup>215</sup> *BMW in South Carolina: The Economic Impact of a Leading Sustainable Enterprise*, Douglas P. Woodward & Paulo Guimarães (Sept. 2008), pp. 2, 9, and 10 (Exhibit USA-188).

<sup>216</sup> See Project Emerald Agreement, Exhibit B (Exhibit EU-550).

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employer in South Carolina, with 6,000 employees<sup>217</sup> and Boeing had invested a total of [BCI] in infrastructure in the state.<sup>218</sup>

**2. The Panel correctly found that the subsidy conferred through the proceeds of EDBs was not specific**

123. As the party asserting that the EDBs were *de facto* specific, the EU had the burden to establish a *prima facie* case on that point. In particular, this required showing that, “notwithstanding {the} appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b) {of Article 2.1 of the SCM Agreement}, there are reasons to believe that the subsidy may in fact be specific.”<sup>219</sup> The EU failed to provide such reasons. Instead, the EU simply listed the entities that received the subsidy, which includes entities that are not in the aerospace industry. Accordingly – and in light of the fact that there is no explicit limitation on access to the subsidy for any particular industry<sup>220</sup> – the Panel did not commit any error in finding that the subsidy was not specific.

124. Article 2.1(c) states:

If, notwithstanding any appearance of non- specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, . . . . In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

125. In addition, the Appellate Body has explained that:

Article 2.1(c) proceeds where “there are reasons to believe that the subsidy may in fact be specific”. This means that, having reached the conclusion that there is an “appearance of non-specificity” following the application of the principles set out in Article 2.1(a) and (b), a panel must consider whether, in the light of the arguments and evidence submitted by the parties, there are “reasons” for it to

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<sup>217</sup> Data is for 2013. US SWS, para. 553; *Charleston S.C. MSA Largest Manufacturing Employers*, Charleston Regional Development Alliance (Feb. 2013) (Exhibit USA-335)

<sup>218</sup> Data is as of the fourth quarter of 2012. Boeing Investment in South Carolina (2010-3Q2012) (Exhibit USA-324((BCI)).

<sup>219</sup> Article 2.1(c) of the SCM Agreement.

<sup>220</sup> Compliance Panel Report, para. 8.835.

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consider that an assessment under Article 2.1(c) is warranted. The inquiry under Article 2.1(c) thus focuses on whether a subsidy, although not apparently limited to certain enterprises from a review of the relevant legislation or express acts of a granting authority, is nevertheless allocated in a manner that belies the apparent neutrality of the measure. This inquiry requires a panel to examine the reasons as to why the actual allocation of “amounts of subsidy” differs from an allocation that would be expected to result if the subsidy were administered in accordance with the conditions for eligibility for that subsidy.<sup>221</sup>

Thus, the question before the Panel was whether, notwithstanding any appearance of non-specificity resulting from the *de jure* specificity analysis, there were reasons to believe that the subsidy may in fact be specific, in light of the factors listed in Article 2.1(c). In addressing this question, the Panel had to consider whether the subsidy from EDBs was allocated in a way that was different from the one that would be expected to result if the subsidy were administered in accordance with the conditions for eligibility.

126. In this case, as noted above, BMW, the Project Emerald Companies, and Boeing were among the largest employers in the State of South Carolina. In addition, three public entities had received the subsidy. The EU presented no evidence indicating that from 2002 (when the legislation authorizing the EDB program was adopted) to 2012 (when the Panel was established), any other entity sought to invest in infrastructure in South Carolina at levels that met the investment and employment thresholds of the EDB program. Thus, it would appear that all entities eligible for the benefit actually received the benefit. Accordingly, there was no basis for the Panel to find that this allocation of the subsidy was different from the one that would be expected to result if the subsidy were administered in accordance with its conditions for eligibility.

127. The EU failed to provide any evidence or argumentation to the contrary. In the EU’s first and second written submissions, the only factual information provided in support of its *de facto* specificity arguments was a list of the entities that received the EDB subsidies, the dates of receipt, and the corresponding amounts.<sup>222</sup> It advanced no argumentation beyond these observations – no explanation as to why, in the context of the South Carolina economy, receipt of EDB benefits by the entities listed constituted specificity. The Panel was correct to find that this cursory analysis was insufficient to meet the EU’s burden of proof, and the EU’s appeal provides no legitimate basis to question that conclusion.

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<sup>221</sup> *US – Large Civil Aircraft (AB)*, para. 877.

<sup>222</sup> EU FWS, para. 585; EU SWS, para. 642; *see also* EU RPQ 110, para. 179 & fn.319.

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**3. *None of the legal interpretations criticized by the EU were put forward by the Panel***

128. The EU challenges the Panel’s rejection of its *de facto* specificity argument on the basis that the Panel supposedly misinterpreted Article 2.1(c). However, the interpretations criticized by the EU are in fact the EU’s own inventions – not interpretations that the Panel articulated or relied upon.

129. First, the EU argues that the Panel’s *de facto* specificity finding “*appears to reflect an interpretation of ‘limited number’ to mean ‘one’ – or at least, ‘fewer than three’.*”<sup>223</sup> However, the Panel did not make an absolute pronouncement that the phrase “limited number” in Article 2.1(c) could never refer to three. Rather, the Panel found that, in the circumstances of this case, the EU had failed to explain why the grant of the subsidy to three particular companies (in addition to three public entities) showed that the subsidy was *de facto* specific – given that one of the companies and all three public entities did not belong to the aerospace industry; the subsidy recipients were among the largest employers in South Carolina; and the legislation authorizing the issuance of EDBs had only been in place since 2002.

130. It is noteworthy that this case differs from prior cases involving a finding of *de facto* specificity by virtue of “use . . . by a limited number of certain enterprises {}”. In *US – Softwood Lumber IV*, the panel considered a finding by the U.S. Department of Commerce that the grant of a subsidy in the form of stumpage was *de facto* specific, because the only companies that could use such a subsidy were ““companies and individuals specifically authorized to cut timber on {Canadian} Crown lands” – *i.e.*, ““pulp and paper mills and the saw mills and remanufacturers which are producing the subject merchandise.””<sup>224</sup> In *US – Carbon Steel (India)*, the Appellate Body considered a U.S. Department of Commerce determination that the grant of a subsidy in the form of high-grade iron ore was *de facto* specific.<sup>225</sup> In both cases, the finding of *de facto* specificity was based on the fact that the subsidy took the form of an in-kind provision of goods that were usable only by companies in one particular industry or group of industries that qualified as “certain enterprises” within the meaning of Article 2.1.<sup>226</sup> By contrast, in this case, the subsidy took the form of cash, which is usable by companies in any industry.

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<sup>223</sup> EU FWS, para 226 (emphasis added).

<sup>224</sup> *US – Softwood Lumber IV (Panel)*, para. 7.118.

<sup>225</sup> See *US – Carbon Steel (India) (AB)*, paras. 1.6, 4.371.

<sup>226</sup> See *US – Carbon Steel (India) (AB)*, para. 4.393 (“anytime the financial contribution at issue consists of a discrete transfer of value from the government to a class of recipients, and the nature of the transfer makes the class of recipients more likely to be identified and circumscribed, this in turn makes it more likely that an investigating authority or panel may reach a conclusion that the subsidy is specific.”).

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131. *Second*, the EU argues that the Panel “*appears* to have interpreted the term ‘certain enterprises’ as encompassing public entities,” namely, the public entities that received the EDBs.<sup>227</sup> In reality, the panel did not find that the public entities that received the subsidy were “enterprises.” Rather, the Panel found that the receipt of the subsidy by three public entities “suggests that the scheme is not limited to ‘certain enterprises’ within the meaning of Article 2.1(c).”<sup>228</sup> In other words, if the subsidy is granted to entities that are not “certain enterprises” as defined in the chapeau to Article 2.1 – regardless of whether those entities are themselves enterprises – this weighs against a finding of *de facto* specificity. The EU fails to address this point.

132. *Third*, the EU argues that the Panel erred in finding that “predominant” is “a concept entirely distinct from ‘disproportionate’.”<sup>229</sup> This EU argument is based on the Panel’s statement that while the proportion of EDB subsidy users in the aerospace industry “could be relevant to an argument that a disproportionately large amount of subsidy has been granted to certain enterprises, this is not an argument that the European Union makes.”<sup>230</sup> The Panel made this statement to explain why it was not addressing whether the subsidy was *de facto* specific because of “the granting of disproportionately large amounts of subsidy to certain enterprises{.}” However, the Panel did not state that “predominant use” and “the granting of disproportionately large amounts” cannot rely on overlapping evidence, as the EU now suggests.

**4. The EU’s appeals under DSU Article 11 are baseless**

133. The EU claims that the Panel failed to make an objective assessment, because it supposedly “refus{ed} to engage with the evidence” regarding the level of diversification in the South Carolina economy and the duration of the EDB program.<sup>231</sup> Specifically, according to the EU, the Panel should have acknowledged and relied on a piece of information that the EU itself did not raise in its arguments related to the EDB program, namely, that in 2012 there were 3,867 manufacturing establishments in South Carolina.<sup>232</sup> However, in isolation, this information is irrelevant to the Panel’s analysis. The total number of manufacturing establishments in South Carolina does not indicate the number of companies that were eligible for the EDB program. The only companies that are eligible are those that establish a new economic development project in South Carolina, involving an investment of at least \$400 million and the creation of

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<sup>227</sup> EU Appellant Submission, para. 233.

<sup>228</sup> Compliance Panel Report, para. 8.841.

<sup>229</sup> EU Appellant Submission, para. 241.

<sup>230</sup> Compliance Panel Report, para. 8.840.

<sup>231</sup> EU Appellant Submission, para. 255; *see also ibid.*, para. 256.

<sup>232</sup> EU Appellant Submission, para. 256.

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400 new jobs. The Panel’s silence on a piece of irrelevant information that the parties had not highlighted in this context provides no basis to question its objectivity.<sup>233</sup>

134. In addition, the EU asserts that the Panel “failed to appropriately consider” the fact that the legislation authorizing the EDB program was adopted in 2002.<sup>234</sup> But the EU never explains why the Appellate Body should find that the Panel’s consideration of this fact,<sup>235</sup> which the EU admits that the Panel addressed,<sup>236</sup> was less than appropriate. It offers no reason to expect that, in light of the demanding eligibility requirements, more than six entities should have qualified for the EDB program during the period from 2002 to 2012. To the extent that the EU simply disagrees with the way the Panel weighed and interpreted the fact that the EDB program dates to 2002, this would be insufficient to establish that the Panel failed to provide an objective assessment for purposes of Article 11 of the DSU.<sup>237</sup>

135. Accordingly, the EU fails to identify any error in the Panel’s reasoning, let alone one that would rise to the level of a violation of DSU Article 11. That said, should the Appellate Body accept the EU’s claims under Article 11, then it would be unable to complete the analysis. This is because the extent of diversification of economic activities within the jurisdiction of the granting authority is a contested factual issue.

**B. The Panel Did Not Err in Finding That the Subsidy Provided Through the MCIP Job Tax Credit Is Not Specific.**

136. The Panel correctly rejected the EU’s argument that the Multi-County Industrial Park (“MCIP”) job tax credit is specific within the meaning of Article 2.2 of the SCM Agreement. In particular, the Panel found that although companies must be located in MCIPs in order to receive the subsidy, the MCIP designation is “readily available upon request”.<sup>238</sup> On appeal, the EU claims that the Panel failed to perform an objective assessment for purposes of DSU Article 11 in making this factual finding, and that the Panel misinterpreted Article 2.2.<sup>239</sup> Both claims are baseless, as discussed below.

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<sup>233</sup> It is worth noting that this piece of information appeared in one of more than two thousand exhibits submitted to the Panel.

<sup>234</sup> EU Appellant Submission, para 259.

<sup>235</sup> *E.g.*, Compliance Panel Report, para. 8.838.

<sup>236</sup> EU Appellant Submission, para. 259.

<sup>237</sup> *See EC – Large Civil Aircraft (AB)*, para. 1317 (“panels ‘are not required to accord to factual evidence of the parties the same meaning and weight as do the parties’.”).

<sup>238</sup> Compliance Panel Report, para. 8.931.

<sup>239</sup> EU Appellant Submission, para. 278.

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137. The MCIP job tax credit is a credit against South Carolina corporate income tax.<sup>240</sup> The amount of the credit is equal to \$1,000 per full-time job created in South Carolina by the company claiming the tax credit.<sup>241</sup> To be eligible, a company must be located in an MCIP in South Carolina.<sup>242</sup>

138. One such MCIP is the Charleston County-Colleton County MCIP, established by a September 1, 1995, agreement between the two counties.<sup>243</sup> This “Agreement, by its terms contemplate{d} the inclusion and removal of additional parcels within the Park from time to time{.}”<sup>244</sup> Charleston County issued 18 ordinances dating from 1995 to 2013, which amended the Agreement to add property to the MCIP.<sup>245</sup> This fact was uncontested.<sup>246</sup>

139. Article 2.2 of the SCM Agreement states:

A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. . . .

In considering whether the MCIP job tax credit is specific under Article 2.2, the Panel stated:

While it is true that MCIP job tax credits are available only to taxpayers within a multi-county industrial park, it does not follow that the measure is “limited” to certain enterprises located within a designated region. If a subsidy is provided only to enterprises located within a region that has a fixed geographic identity, such a subsidy is “limited” to certain enterprises within that region because it is not possible for enterprises not located within that “designated region” to have access to the measure. In such a situation, the location of an enterprise is the determining eligibility factor for the subsidy. In the case at hand, however, this reasoning does not apply. The location of an enterprise at any particular place in

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<sup>240</sup> Compliance Panel Report, para. 8.912.

<sup>241</sup> Compliance Panel Report, para. 8.912.

<sup>242</sup> South Carolina Income Tax Act, *S.C. Code*, Title 12, chapter 6 (Exhibit EU-509), section 12-6-3360(E)(1); *see* Compliance Panel Report, para. 8.912.

<sup>243</sup> *See* Charleston County Council Ordinance 1475 (Dec. 5, 2006) (Exhibit EU-555); Compliance Panel Report, para. 8.913 & fn. 2348.

<sup>244</sup> Charleston County Council Ordinance 1475 (Dec. 5, 2006) (Exhibit EU-555).

<sup>245</sup> *See* US RPQ 149, para. 18; Exhibit USA-555; *see also* Exhibit USA13-296 (detailing property added to and removed from the Charleston County-Colleton County MCIP).

<sup>246</sup> *See* EU Comment on US RPQ 149, para. 25 (declining to contest any factual assertions in the US RPQ 149).

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South Carolina does not prevent it from receiving MCIP job tax credits, because the MCIP designation itself is readily available upon request to any company. The availability of the MCIP designation upon request means that, while the MCIP job tax credits are available to enterprises located within a multi-county industrial park and not available to enterprises not located within such an industrial park, this cannot be meaningfully considered to amount to a limitation under Article 2.2. We therefore find that the European Union has failed to establish that the subsidy provided through the MCIP job tax credits is specific within the meaning of Article 2.2 of the SCM Agreement.<sup>247</sup>

140. On appeal, the EU claims that the Panel failed to make an objective assessment of the facts for purposes of DSU Article 11, by finding that the “MCIP designation is readily available upon request”.<sup>248</sup> However, this finding was supported by the fact that the Charleston County-Colleton County “Agreement, by its terms contemplate {d} the inclusion and removal of additional parcels within the Park from time to time {.”<sup>249</sup> Furthermore (as noted above), from 1995 to 2013, the Charleston County-Colleton County Agreement was amended 18 times to add property to the MCIP.<sup>250</sup> Furthermore, as the Panel noted, the EU failed to provide any evidence of instances in which applications for the receipt of the subsidy were rejected.<sup>251</sup> The EU does not contest any of this. Accordingly, there is no indication that the Panel’s finding regarding the availability of the MCIP designation lacked objectivity.

141. In addition, the EU claims that the Panel erred because it “applied Article 2.2 in such a way that the term ‘designated geographical region’ can encompass only a set-in-stone ‘fixed geographic identity . . . .”<sup>252</sup> However, this is yet another instance where the EU inaccurately ascribes a legal interpretation to the Panel that it did not rely upon. As discussed above, the Panel found that the subsidy is not “limited to certain enterprises located within a designated geographical region”<sup>253</sup> because the MCIP designation is readily available.<sup>254</sup> In other words, the MCIP designation does not operate as a genuine limitation on access to the subsidy because it is infinitely mutable. This does not somehow imply that a geographical designation must be immutable in order to fall under Article 2.2, as the EU erroneously argues.

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<sup>247</sup> Compliance Panel Report, para. 8.931.

<sup>248</sup> EU Appellant Submission, para. 293.

<sup>249</sup> Charleston County Council Ordinance 1475 (Dec. 5, 2006) (Exhibit EU-555).

<sup>250</sup> See US RPQ 149, para. 18; Exhibit USA-555..

<sup>251</sup> Compliance Panel Report, para. 8.928.

<sup>252</sup> EU Appellant Submission, para. 286.

<sup>253</sup> Article 2.2 of the SCM Agreement.

<sup>254</sup> Compliance Panel Report, para. 8.931.



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142. The EU relies heavily on the findings of the panel and the Appellate Body in *US – Washing Machines*, which affirmed a finding by the U.S. Department of Commerce that a subsidy was specific because it was *not* available in a particular geographic area of Korea.<sup>255</sup> However, the Appellate Body’s reasoning actually supports the conclusion of the compliance Panel in this proceeding. The Appellate Body agreed considered the ordinary meaning of the term “designate,” and concluded that “the identification of a region for purposes of Article 2.2 may be explicit or implicit, provided that the relevant region is clearly discernible from the text, design, structure, and operation of the subsidy measure at issue.”<sup>256</sup> The Panel found that the relevant subsidy measure is section 12-6-3360(E)(1) of the South Carolina Income Tax Act, which provides no way whatsoever of identifying the areas included within MCIPs, whether explicitly or implicitly. Thus, under the reasoning used by the Appellate Body, the MCIP tax credit is not specific within the meaning of Article 2.2.

143. Accordingly, the EU’s claims with respect to the MCIP job tax credit should be rejected. In addition, if the Appellate Body were to accept the EU’s claim under DSU Article 11, then it would be unable to complete the analysis, because the ease with which companies can obtain MCIP designations is a contested factual issue.

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<sup>255</sup> *US – Washing Machines (AB)*, para. 5.231 (“One way in which access to a subsidy may be limited on a geographical basis is by excluding portions of the territory of a Member's jurisdiction from that subsidy's scope of application.”).

<sup>256</sup> *US – Washing Machines (AB)*, para. 5.229.

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**VI. THE PANEL CORRECTLY REJECTED PRICE SUPPRESSION AND LOST SALES CLAIMS IN THIS PROCEEDING FOR AIRCRAFT ORDERED BEFORE THE END OF THE IMPLEMENTATION PERIOD BUT DELIVERED AFTER THE END OF THE IMPLEMENTATION PERIOD.**

144. Before the Panel, the EU argued that deliveries after the end of the implementation period (September 23, 2012) of aircraft resulting from transactions that occurred before, and in some instances long before, that date should be counted as causing lost sales or price suppression after that date. It based this view on a theory that a lost sale or price suppression is deemed to exist from the time of the transaction up until the date of the last delivery resulting from that transaction. The Panel found this view to be contrary to the Appellate Body’s analysis of lost sales, which referred only to the time of order, and not to the various times of delivery.<sup>257</sup> The Panel also considered the EU’s argument “problematic” in the context of Article 7.8 of the SCM Agreement, because deriving an obligation to remove the effects on the losing firm of a sale that was lost before the implementation period would be inconsistent with the prospective nature of Article 7.8.<sup>258</sup> Finally, the Panel concluded that, as a factual matter, the evidence did not support the EU’s assertion that the transactions in question actually had the effects that the EU alleged.<sup>259</sup>

145. The EU appeals these findings with respect to two groups of transactions: those that occurred during the original 2004-2006 reference period (which we will call the “2004-2006 transactions”) and those that occurred after the original reference period and, therefore, were not part of the original proceedings, but still before the end of the implementation period on September 23, 2012 (which we will call the “2007-2012 transactions”).<sup>260</sup>

146. The EU objects to the Panel’s interpretation of Article 7.8, but this appeal is moot. The EU itself concedes that this interpretation did not affect the outcome of the analysis of the 2007-2012 transactions,<sup>261</sup> and the Panel rejected the EU’s arguments with respect to the pre-2007 transactions for alternative, fact-based reasons. In any event, the Panel was correct that the EU’s

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<sup>257</sup> Compliance Panel Report, para. 9.309.

<sup>258</sup> Compliance Panel Report, paras. 9.313-9.314.

<sup>259</sup> Compliance Panel Report, paras. 9.316-9.331.

<sup>260</sup> EU Appellant Submission, paras. 311-312. The EU labels these two categories as “original lost or price-suppressed sales findings” and the “new lost sales findings.” The United States considers these terms to be incorrect and ultimately misleading. The EU places sales of the A350 XWB in the first category, but there were no “findings” of lost sales or price suppression with respect to the A350 XWB in the original proceeding. The label “new lost sales findings” does not properly distinguish between sales occurring after the original reference period before the post-implementation period, and sales occurring in the post-implementation period.

<sup>261</sup> EU Appellant Submission, para. 377, note 672.

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favored interpretation of Article 7.8 cannot be reconciled with the prospective nature of that provision.

147. The EU also argues that the Panel erred in its application of Article 7.8 by treating lost sales as occurring at the time of order, instead of continuously from the time of order through final delivery. However, as demonstrated below, the Panel’s findings comported with the adverse effects analysis in the original proceeding and in *EC – Large Civil Aircraft*. The EU argues on appeal that this approach was inconsistent with a statement by the original panel that the phenomena of lost sales and price suppression should be understood to start at the time of the order and continue through the time of delivery.<sup>262</sup> The Panel considered this argument, and found the statement did not accurately reflect the analysis performed by the original panel and the Appellate Body and, if applied in the manner advocated by the EU, would lead to an analysis inconsistent with Article 7.8.

148. Moreover, if lost sales were considered not to be consummated until the time of delivery, the lost sales actually found – which were made with respect to orders that occurred during the reference period for future deliveries not during the reference period – would be erroneous. And any attempt to regard a lost sale as arising at the time of the order and again at the time of the delivery – or, alternatively, as arising “continuously” at all points from the time of order until delivery of the final aircraft – would be improper double-counting, or infinite over-counting, respectively. Ultimately, the compliance Panel’s analysis was correct in light of the relevant arguments and evidence, and was entirely consistent with the adverse effects analysis in the original proceeding.

149. In addition, the EU alleges that the compliance Panel’s finding failed to provide an objective assessment for purposes of DSU Article 11 because it deviated from the original panel’s statement that lost sales and price suppression start at the time of order and continue through the time of delivery. This line of attack fails for the same reasons that the EU’s arguments regarding the same sentence failed when framed as an erroneous application of Article 7.8 of the SCM Agreement. Furthermore, the Panel explained that the statement cited by the EU did not describe what the Panel and Appellate Body did. In adhering to the analysis actually used, the Panel did not “deviate” from the findings of the original panel.

**A. The EU’s Arguments Regarding the Panel’s Interpretation of Article 7.8 of the SCM Agreement are Moot, and in Any Event, Do Not Identify Any Error in the Panel’s Reasoning.**

150. The EU alleges that the compliance Panel erred in interpreting Article 7.8 by finding that it does not obligate a Member concerned to “remove” deliveries resulting from transactions found to have resulted in lost sales or price suppression in the original proceeding. The

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<sup>262</sup> EU Appellant Submission, para. 357.

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Appellate Body does not need to decide this interpretive question to resolve this appeal because the relevant claims were rejected on other grounds that have not been appealed. In any event, the Panel was correct that the EU’s interpretation of Article 7.8 is erroneous.

***1. The Appellate Body does not need to address the interpretation of Article 7.8 of the SCM Agreement because the Panel rejected the EU’s significant lost sales and price suppression claims for pre-2007 sales on independent grounds.***

151. The Appellate Body does not need to decide the EU’s appeal of the Panel’s interpretation of Article 7.8 to resolve this dispute. The Panel found the EU’s interpretation to be “problematic” and difficult to reconcile with the prospective nature of that provision as part of its evaluation of allegations of significant price suppression of the A330, and significant lost sales and price suppression of the A350 XWB.<sup>263</sup> However, the Panel went on to consider whether, as a matter of fact, the EU had demonstrated that the lost sales or price suppression resulting from these transactions continued after the end of the implementation period, and concluded that the EU had failed. The EU has not challenged these findings, which provide an independent basis for the Panel’s ultimate conclusion that the transactions were not evidence of lost sales or price suppression for purposes of this proceeding.<sup>264</sup> Therefore, the EU’s appeal of the Panel’s interpretation of Article 7.8 is moot.<sup>265</sup>

152. First, the EU alleged that A330 price suppression found in the original reference period continues in the post implementation period.<sup>266</sup> The Panel found that, “even setting aside the problems with the European Union’s A330 price suppression arguments that arise due to the ‘historic’ nature of its case, we find that the European Union has failed to empirically demonstrate that the A330 is suffering significant price suppression in the post-implementation period.”<sup>267</sup> The EU did not challenge this finding. The EU also did not challenge any of the intermediate findings on which this conclusion was based, including the Panel finding that “there is no correlation in price movements between the A330 and the 787.”<sup>268</sup> The Panel also referred

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<sup>263</sup> See Compliance Panel Report, § 9.3.3. The compliance Panel also rejected in the same section of its report an EU claim that threat of displacement in the Australian 200-300 seat market found in the original proceeding continued into the post-implementation period as serious prejudice suffered by the A350 XWB. The Panel explained that there is no basis to treat the finding in the original proceeding based on a sales campaign involving the Original A350 as a finding of threat of displacement of the A350 XWB. Compliance Panel Report, para. 9.331. The EU does not include this threat of displacement claim in this part of its appeal.

<sup>264</sup> See Compliance Panel Report, § 9.3.3.

<sup>265</sup> See *US – Wool Shirts and Blouses (AB)*, p. 19; *US – Upland Cotton (AB)*, paras. 508-511

<sup>266</sup> See Compliance Panel Report, para. 9.300.

<sup>267</sup> Compliance Panel Report, para. 9.321.

<sup>268</sup> Compliance Panel Report, para. 9.320.

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to a number of other problems with the EU’s case, including a failure to demonstrate that prices would have been higher absent the subsidies, misplaced reliance on sales campaigns won by Boeing, and the EU’s own repudiation of its price trend data on the basis of methodological flaws.<sup>269</sup>

153. Therefore, even if the EU’s challenge to the Panel’s interpretation or application of Article 7.8 were valid, it still would not invalidate the Panel’s finding that the EU’s A330 price suppression claim fails. Furthermore, the United States recalls its other appeal in which it has demonstrated that the EU failed to make a *prima facie* case of A330 price suppression because it has insisted that the A330 is not in the same market with any allegedly subsidized Boeing product. This also means that the EU’s A330 price suppression claim cannot succeed. Accordingly, the Appellate Body does not need to decide the Article 7.8 interpretive issue to resolve this dispute with respect to A330 price suppression.

154. Second, the EU alleged that A350 XWB price suppression continued from the price suppression found in the original reference period. However, the findings from the original proceeding were with respect to the Original A350. As the compliance Panel noted, the original panel rejected the EU’s argument that suppression of Original A350 prices would necessarily lead to suppression of A350 XWB prices.<sup>270</sup> Because the EU attempted to base its A350 XWB price suppression claim on findings of price suppression regarding a different aircraft, it failed. Therefore, the EU’s A350 XWB price suppression claim fails without the need to resolve the Article 7.8 issue.

155. Third, the EU alleged A350 XWB significant lost sales during the post-implementation period based on nine sales campaigns from the original proceeding. Five of the nine sales campaigns were found in the original proceeding *not* to be lost sales attributable to the subsidies. The EU argued that these campaigns were left “unresolved,” but the compliance Panel correctly noted that the original panel rejected these allegations, and the EU did not appeal. Thus, the Panel found the EU’s contention that these were left unresolved to be “factually incorrect,”<sup>271</sup> and that there was no need to inquire whether lost sales continued into the post-implementation period when there were no findings of lost sales in the first place.<sup>272</sup>

156. The compliance Panel also rejected the EU’s assertions that deliveries resulting from four sales campaigns found to be lost sales in the original proceeding were lost sales in the post implementation period, explaining:

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<sup>269</sup> Compliance Panel Report, note 3182.

<sup>270</sup> Compliance Panel Report, para. 9.322.

<sup>271</sup> Compliance Panel Report, para. 9.329.

<sup>272</sup> Compliance Panel Report, para. 9.32.

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the European Union effectively argues that the significant lost sales that it alleges have continued to exist at present because the aircraft remain undelivered are significant lost sales of the A350XWB rather than of the A330 and A350 in respect of which the findings of significant lost sales were made in the original proceeding. The European Union does not request the Panel to make a finding of present adverse effects in the form of significant lost sales to the A330 and Original A350. In our view, the European Union has not provided a convincing explanation as to why “it is irrelevant whether or not the 787 orders found to be lost sales in the original reference period are lost sales for the A350XWB, rather than the A330 or Original A350”. The lost sales, which according to the European Union’s theory that lost sales continue until the aircraft are delivered, the United States failed to remove as a result of the fact that the deliveries of the Boeing 787 remained outstanding at the expiry of the implementation period, were lost sales of A330 and Original A350 aircraft. There is no logical basis to now treat those lost sales as lost sales of A350XWB LCA. We do not see how the fact that the 787 and the A350XWB now compete in the same product market can alter the fact that at the time the 787 sales were made, they caused lost sales of the A330 and Original A350, not the A350XWB, which had not even been launched at that time.<sup>273</sup>

157. Thus, the Panel correctly concluded that even if the EU’s legal interpretation were correct, the findings of lost sales with respect to the A330 and Original A350 provided “no basis to find any such present serious prejudice in relation to the A350XWB.”<sup>274</sup> Accordingly, there is no need to reach the Article 7.8 issue to resolve the EU’s claim in this respect.

158. In conclusion, the Panel provided alternative, fact-based grounds for rejecting the EU’s A330 significant price suppression and A350 XWB significant price suppression and lost sales claims based on a supposed continuation of adverse effects found in the original proceeding. Accordingly, there is no need to reach the Article 7.8 issue to resolve these claims.

***2. The Panel Correctly Rejected the EU’s Interpretation of Article 7.8.***

159. The compliance Panel found that the interpretation of Article 7.8 urged by the EU would improperly require the United States to remedy the specific instances of adverse effects found in the original proceeding. The Panel was correct that this interpretation cannot be reconciled with the prospective nature of Article 7.8.<sup>275</sup>

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<sup>273</sup> Compliance Panel Report, para. 9.325 (internal citations omitted).

<sup>274</sup> Compliance Panel Report, para. 9.326.

<sup>275</sup> EU Appellant Submission, para. 318.

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160. As the compliance Panel recounted:

The European Union has explicitly endorsed such a prospective reading of Article 7.8, arguing that “{t}he removal of adverse effects does not refer to the removal of adverse effects in the past. It refers to the withdrawal of adverse effects in the sense of *ensuring that there are no adverse effects arising in the new reference period*”.<sup>276</sup>

The EU’s argument is based on the notion that the delivery after the end of the implementation period of a previously ordered aircraft constitutes a lost sale arising in the new reference period. In this sub-section, the United States will explain why, in the factual context of this dispute, a lost sale arises at the time a sales campaign is decided, *i.e.*, at the time of order, and why the EU’s approach would erroneously over-count lost sales.

161. However, it is also important to emphasize the point made by the Panel – that the EU’s interpretation of Article 7.8 is fundamentally at odds with the prospective nature of that provision. Suppose aircraft were ordered in 2004, with some deliveries in 2013. In that case, the accelerated launch of the 787 allowed Boeing to win sales it otherwise would not have won. The United States must ensure that, as of the end of the implementation period, any unwithdrawn subsidies do not continue to cause adverse effects.

162. But deliveries pursuant to the very lost sales that served as the basis for the findings in the original proceeding are not new adverse effects arising in the post-implementation period. In the example, the sale was lost in 2004, when the future deliveries and payments were contractually set. The fact that some deliveries were scheduled for 2013 does not mean they represent a harm in 2013. They are simply a consequence of the lost sale that occurred in 2004, and to require action with respect to those deliveries would require the United States retrospectively to remedy the specific indicia of harm from the original proceeding. Therefore, the Panel was correct in finding the EU’s interpretation of Article 7.8 incompatible with the prospective nature of that provision.

163. In its arguments on appeal, the EU argues that the Panel’s interpretation of Article 7.8 is contrary to the applicable rules of treaty interpretation, as reflected in Article 31 of the Vienna Convention. These arguments are unavailing. The EU notes that Article 7.8 refers to an adopted report “in which it is determined that any subsidy has resulted in adverse effects,” and argues that the obligation to “take appropriate steps to remove the adverse effects” refers back to the adverse effects in that clause.<sup>277</sup> This is correct.

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<sup>276</sup> Compliance Panel Report, para. 9.313 (quoting EU FWS, para. 49) (emphasis added by the Panel).

<sup>277</sup> EU Appellant Submission, para. 334.

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164. However, the EU errs when it asserts that adverse effects are those “that have been found to be caused by the subsidy during the original reference period.”<sup>278</sup> Article 7.8 refers to the “adverse effects” determined to exist, but it does not equate these with the facts (such as specific transactions) that provided the *evidence* in support of that determination. Indeed, if the “adverse effects” in Article 7.8 referred to the facts, such as particular transactions, identified as evidence in the original reference period, then the obligation to “remove the adverse effects” would apply only to those facts, and not to events afterward that had not been determined to be adverse effects.

165. That is not the case. Article 6.3 defines serious prejudice (the relevant form of adverse effects in this dispute) as arising “where . . . the effect of the subsidy is . . .” one of several market phenomena, including significant lost sales. The use of the present tense is critical, signifying that the focus is on the current effect of the subsidy, and not on its past effects, at a given point. Thus, the “effects” that a complying Member must “remove” are those that result from the subsidies at the time of the obligation, and not those that resulted during the original reference period. For lost sales, that means sales after the end of the implementation, and not the subsidy recipient’s execution of the terms of a sale lost in the original reference period.

166. The EU seeks to use the reference in Articles 7.9 and 7.10 to countermeasures “commensurate with the degree and nature of the adverse effects determined to exist{ }” to support its interpretation,<sup>279</sup> arguing that, “{i}f these affects must be taken into account to calculate the amount of countermeasures in case of non-compliance (under Articles 7.9 and 7.10), they must logically also fall within the scope of compliance obligations under Article 7.8. The EU is mistaken. Calculating the amount of countermeasures requires measuring “the level of nullification and impairment.”<sup>280</sup> This exercise goes to the extent of the nullification and impairment being caused by the actionable subsidy, not some level that existed in the past. The task in this compliance proceeding is to determine whether subsidies are causing adverse effects in the post-implementation period, not to measure the extent of the harm caused by the breach found in the original proceeding. It simply does not follow, as a logical matter, that any effect relevant to the extent of the harm caused by the breach found in the original proceeding, must be treated as a new adverse effect arising after the implementation period for purposes of a compliance proceeding.

167. The EU argues that the obligation it envisages would not be retrospective because it would apply only to deliveries after the end of the implementation period.<sup>281</sup> There are two flaws with this argument. First, it ignores that the delivery of an aircraft after 2012 is not itself

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<sup>278</sup> EU Appellant Submission, para. 334.

<sup>279</sup> EU Appellant Submission, para. 336.

<sup>280</sup> *See* DSU Art. 22.6.

<sup>281</sup> EU Appellant Submission, para. 346.



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inconsistent with the SCM Agreement. Rather, it is the original transaction, which occurred in the past, that is the WTO-inconsistent lost sale. That the action against that past (and often long past) transaction takes place through the medium of the delivery does not make it any less a retrospective remedy for the transaction. Second, the EU’s argument ignores that Article 6.3 provides a different rubric for adverse effects existing by reason of deliveries – displacement and impedance under Article 6.3(a) and (b). To treat a delivery as a “lost sale” would blur the distinctions between the clauses of Article 6.3.

168. Thus, the EU has identified no error in the Panel’s interpretation of Article 7.8.

**B. Application of 7.8 of the SCM Agreement**

169. The EU also alleges that the compliance Panel erred in the application of Article 7.8 by finding lost sales to exist only with respect to orders made after the end of the implementation period. However, the EU devotes most of its attention to the question of the beginning and ending of “lost sales” and “price suppression,” terms that appear in Article 6.3, but not in Article 7.8. It also refers to the original panel’s statement in this regard, which occurred in an original proceeding and, therefore, cannot have represented an application of Article 7.8. The only reference the EU makes to Article 7.8 is to recall that it creates an obligation only with respect to adverse effects that exist after the end of the implementation period. As neither the United States nor the Panel disagreed with that proposition, it is difficult to see how that can form the basis for an appeal. As the EU’s arguments are unrelated to the topic of its notional appeal, that appeal fails.

170. Nonetheless, for the sake of completeness, the United States will address the legal errors and internal contradictions in the arguments raised by the EU. At the outset, the United States notes that this appeal notionally applies to both the pre-2007 transactions and the 2007-2012 transactions.<sup>282</sup> However, as explained in the preceding section, the compliance Panel rejected the EU arguments regarding the pre-2007 transactions on independent, fact-based reasons. Therefore, this appeal is relevant, at most, to the 2007-2012 transactions, which consist of two sales campaigns: Fly Dubai 2008 and Delta Airlines 2011.

***1. The compliance Panel did not err in rejecting the EU’s arguments based on the original panel’s statement regarding the beginning and end of lost sales and price suppression.***

171. The EU’s appeal regarding the application of Article 7.8 relies almost exclusively on the original panel’s statement regarding the beginning and ending of lost sales and price suppression associated with a large civil aircraft transaction. The compliance Panel carefully considered this statement and concluded that it did not reflect the analysis actually applied by the original panel

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<sup>282</sup> See EU Appellant Submission, para. 354.

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or the Appellate Body.<sup>283</sup> When it came time to evaluate the EU’s allegations of lost sales, it considered only transactions after the end of the implementation period, and not earlier transactions. However, the Panel did not, as the EU implies, ignore aircraft ordered before the implementation period but delivered afterward – it included such deliveries in its analysis of displacement and impedance under Article 6.3(a) and (b). The EU’s appeal provides no basis to consider this an improper application of Article 7.8.

172. The original panel made the statements cited by the EU in addressing two general issues: (1) “the time at which the specific serious prejudice phenomena can be said to exist” and (2) whether order data, delivery data, or both “is relevant to demonstrating the existence of specific serious prejudice phenomena.”<sup>284</sup> On the first point, it noted a number of factors supporting the EU’s view that the effects of lost sales “continue over a number of years commencing with the time of order, as Airbus’ revenues are affected by deliveries of aircraft at significantly suppressed prices, and lost revenues from aircraft that are not delivered due to lost, displaced and impeded sales.”<sup>285</sup> These led it to conclude that “given the particularities of LCA production and sale, these forms of serious prejudice 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).”<sup>286</sup>

173. These same factors prompted it to state, regarding the second issue, that “data pertaining to both LCA orders and to LCA deliveries will potentially be relevant to demonstrating the existence of significant price suppression and significant lost sales.”<sup>287</sup> This consideration of the statements in their context demonstrates that they reflected an understanding as to the duration of the follow-on effects on Airbus of losing a sale, rather than a view that the lost sale as such continued over an extended period.

174. In evaluating the significance of the statements cited by the EU, the compliance Panel examined whether the original panel’s findings of lost sales took deliveries into account. It found that this was not the case, and the EU does not dispute that fact.<sup>288</sup> The Panel accordingly

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<sup>283</sup> Compliance Panel Report, para. 9.308-9.309. The Panel also found that the analysis the EU advocated based on this finding was contrary to Article 7.8 of the SCM Agreement. Although the EU addressed these findings in its appeal of the Panel’s interpretation of Article 7.8, it does not address them in its appeal of the application of that Article.

<sup>284</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1684.

<sup>285</sup> *US – Large Civil Aircraft (Panel)*, paras. 7.1684-7.1685.

<sup>286</sup> *US – Large Civil Aircraft (Panel)*, paras. 7.1685.

<sup>287</sup> *US – Large Civil Aircraft (Panel)*, paras. 7.1686.

<sup>288</sup> In the original proceedings, all lost sales findings in the 200-300 seat market were specific to individual sales campaigns, and the Panel made no reference to deliveries after the orders. See *US – Large Civil Aircraft (Panel)*, § VI.F.2. The Appellate Body found that the original panel erred by failing to explain which sales it

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concluded that, whatever the significance of the statement in question, it did not signify a delivery of a large civil aircraft could be treated as a continuation of a previous lost sale.<sup>289</sup>

175. As noted, the EU does not argue that the original panel considered deliveries in its analysis of the existence of lost sales. It asserts instead that “the original panel could not have been more explicit formulating, analysing, and answering the question at issue.”<sup>290</sup> The EU misunderstands. The compliance Panel did not doubt the explicitness of the original panel’s statement. It questioned instead the relationship of that statement to the analysis of whether a particular transaction (or delivery) constitutes a significant lost sale. It accordingly examined what the original panel (and the Appellate Body) actually did and, upon finding that they did not base lost sales findings on deliveries, concluded that the statement did not support the EU’s view that deliveries necessarily constitute lost sales in and of themselves.

176. The EU’s final argument is that “it is necessary for panels to assess a sales contract as a whole over the period of time the contract is in force” and “the sales contracts at issue cannot be artificially divided up, temporally or otherwise.”<sup>291</sup> This argument confuses two different concepts: the lost sale itself, and the effects of a lost sale over time on the losing producer. The analysis challenged by the EU went to the question of which transactions could be considered lost sales in the post-implementation period. The assessment of a sales contract over its life goes to how the transaction affects the losing producer. In that regard, the compliance Panel never questioned that a lost sale might have far-reaching consequences on the producer, or that those effects might be relevant in evaluating the significance of a particular lost sale.<sup>292</sup> It simply rejected the view that those follow-on effects were themselves lost sales.

177. Finally, the EU’s argument results in a number of logical inconsistencies. The EU seems to regard lost sales of large civil aircraft as arising either at the time of the order *and* the time of delivery, or in some sense “continuously” from the time of order through the time of final delivery. This either double-counts, or infinitely over-counts, lost sales, as shown by the following hypothetical.

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regarded as evidence of significant lost sales in other product markets and, in completing the analysis, assessed the EU’s claims and made findings on a sales campaign-specific basis. *See US – Large Civil Aircraft (AB)*, paras. 1268-1272. This is also the approach taken in the original proceeding and by the compliance panel in *EC – Large Civil Aircraft*. *See EC – Large Civil Aircraft*, § VII.F.7(d).

<sup>289</sup> The United States does not exclude the possibility that, in a case where analysis of alleged significant lost sales proceeds on the basis of broad aggregate data, a combination of both order and delivery data may be useful. However, that is not the case here.

<sup>290</sup> EU Appellant Submission, para. 362.

<sup>291</sup> EU Appellant Submission, para. 364.

<sup>292</sup> Compliance Panel Report, § 9.3.3.

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178. Suppose an airline orders one aircraft in 2013 for delivery in 2017. This is indisputably a single lost sale. The approach taken in the original proceeding of this dispute and at all stages of *EC – Large Civil Aircraft* would consider that the lost sale occurred or arose in 2013, and if attributable to a subsidy, would have resulted in a finding of WTO-inconsistency despite the fact that delivery remained outstanding. However, under the EU’s approach, that transaction would be either a lost sale arising continuously at all points from 2013 through 2017, or at minimum, in 2013 and again in 2017. Even the less extreme interpretation of the EU’s position would result in double counting of what is indisputably a single lost sale.

179. For these reasons, the Panel did not err in treating lost sales as arising at the time an order is placed. This is when Boeing or Airbus wins the sale and the other fails to obtain the sale. Therefore, the Panel did not err in finding that the Fly Dubai 2008 and Delta Airlines 2011 sales campaigns were not lost sales in the post-implementation period. Accordingly, the EU’s argument that the Panel erred in its application of Article 7.8 of the SCM Agreement fails.

**2. *If the Fly Dubai 2008 and Delta Airlines 2011 sales campaigns were lost sales in the post-implementation period, the Panel’s findings of threat of impedance in the U.S. and UAE single-aisle markets must be reversed.***

180. The United States continues to dispute that the Washington B&O tax rate reduction caused Airbus to lose the Fly Dubai 2008 and Delta Airlines 2011 sales campaigns to Boeing. However, assuming *arguendo* that this was the case, if the Appellate Body found these sales campaigns to be lost sales in the post-implementation period, it would undo the compliance Panel’s findings of threat of impedance in the U.S. and UAE single-aisle markets.

181. Where sales campaigns in the post-implementation period led to a finding of significant lost sales under Article 6.3(c), the compliance Panel explicitly refrained from also making a finding of impedance or threat of impedance based on those same sales campaigns.<sup>293</sup> This is, at least in part, because the EU’s causation arguments for its displacement and impedance claims relied exclusively on its demonstration of lost sales with respect to particular sales campaigns, the same causal demonstration made to support the significant lost sales findings.<sup>294</sup> The EU did not appeal the Panel’s findings in this regard.

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<sup>293</sup> See Compliance Panel Report, paras. 9.437-9.438.

<sup>294</sup> See Compliance Panel Report, para. 9.428. As the compliance Panel found:

The European Union has not advanced an additional causal theory to support the alleged causal link between the Washington State B&O tax rate reduction benefiting the 737 MAX and the 737NG, and the phenomena of impedance, displacement and threats thereof, beyond that advanced and discussed comprehensively in connection with our evaluation of whether this subsidy was a genuine and substantial cause of significant lost sales. To the extent that the European Union relies on lost sales in the single-aisle market (as the effects of the Washington State B&O tax rate reduction) to support its claims of impedance and displacement (including threats thereof), it can

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182. However, because the Fly Dubai 2008 and Delta Airlines 2011 campaigns were found *not* to be significant lost sales in the post-implementation period, the Panel relied on its lost sales findings with respect to those campaigns to conclude that – based on deliveries from those orders in the post-implementation period – the Washington B&O tax rate reduction caused a threat of impedance in the U.S. and UAE markets.<sup>295</sup>

183. Therefore, if the Appellate Body found that those sales campaigns were significant lost sales occurring in the post-implementation period, the premise for the compliance Panel’s threat of impedance findings would disappear. Put differently, granting the EU’s lost sales appeal with respect to these transactions would result in double counting.

**C. The Panel Did Not Err Under Article 11 of the DSU by Deviating from the Findings of the Original Panel.**

184. The EU alleges that the Panel erred under DSU Article 11 by deviating from the findings of the original panel, relying yet again on the original panel’s statement regarding the beginning and end of lost sales and price suppression.<sup>296</sup> The EU bases this argument on the Appellate Body’s observation that

doubts could arise about the objective nature of an Article 21.5 panel’s assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record . . . .<sup>297</sup>

The EU’s arguments do not justify a finding on this basis.

185. As noted above in section B.1, the Panel carefully considered the statement highlighted by the EU and the analysis the original panel and the Appellate Body performed in finding the existence of lost sales. The actual adverse effects analysis in the original proceedings was based on sales campaign evidence and the resultant orders, not delivery data. The Appellate Body, in completing the analysis, also relied on sales campaign evidence regarding orders, did not

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only validly do so for the geographic markets related to the sales campaigns for which we find the Washington State B&O tax rate reduction was a genuine and substantial cause of Boeing’s lower prices, and of the lost sales to Airbus. For the other geographic markets, there is no basis for considering whether the effects of the Washington State B&O tax rate reduction are impedance, displacement or threats thereof because it has not been established that the subsidy in question affected Boeing’s prices and thus has any causal connection to Boeing’s share of orders or deliveries in those markets. Compliance Panel Report, para. 9.428 (internal citation omitted).

<sup>295</sup> Compliance Panel Report, paras. 9.435-9.438, 9.443.

<sup>296</sup> See EU Appellant Submission, § VI.D.2(b).

<sup>297</sup> *US – Softwood Lumber IV (21.5)(AB)*, paras. 102-103 (citations omitted).

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consider delivery data, and made findings specific to individual sales campaigns.<sup>298</sup> Thus, in applying in this proceeding an analysis of lost sales that did not refer to deliveries, the compliance Panel *followed* the reasoning of the original panel, and did not deviate from it.

186. Furthermore, the compliance Panel explicitly distinguished the relevant original panel statement. The compliance Panel’s explanation included much of the reasoning provided in the preceding paragraph. Therefore, the Panel’s analysis of pre-implementation sales campaigns where deliveries remained outstanding provided an objective assessment for purposes of DSU Article 11.

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<sup>298</sup> See *US – Large Civil Aircraft (AB)*, paras. 1268-1272.

**VII. THE PANEL CORRECTLY LIMITED ITS ANALYSIS OF SERIOUS PREJUDICE TO COMPETITION WITHIN THE PRODUCT MARKETS IT FOUND TO EXIST.**

187. Consistent with the Appellate Body’s guidance, the Panel carefully analysed the evidence and argumentation regarding the appropriate delineation of product markets for the serious prejudice analysis. The Panel found three product markets: single-aisle, medium-sized twin-aisle, and larger-sized twin-aisle. And, consistent with Article 6.3, the Panel conducted its analysis of serious prejudice based on competition within those markets.

188. The EU does not appeal the Panel’s assessment of the EU’s serious prejudice claims on the basis of three product markets, or the Panel’s definition of those markets. Instead, it appeals a consequence of those definitions – the Panel’s finding that, in the context of adverse effects, “a subsidized product can only cause serious prejudice to another product if the two products in question compete in the same market.”<sup>299</sup> The EU argues that the Panel incorrectly interpreted Articles 5, 6.3, and 7.8 of the SCM Agreement.

189. As discussed in the sections that follow, the EU’s challenges rely on erroneous and untenable interpretations of the Panel’s legal interpretations and findings. First, the United States shows that the Panel properly rejected the product market definitions proposed by the EU and correctly limited its analysis of serious prejudice to competition within the product markets it found to exist – consistent with Article 6.3 of the SCM Agreement and the Appellate Body’s guidance. Second, we explain that, contrary to the EU’s assertion, the Panel did not error in its interpretation of the term “market” in Article 6.3. The Panel correctly found that that product markets must be objectively determined, and that an Article 6.3 breach can only be established if the subsidized product and product(s) alleged to suffer adverse effects are in the same market. The EU’s claims that serious prejudice in the form price depression, price suppression, and lost sales can manifest under Article 6.3 even when the subsidized product and product(s) alleged to suffer adverse effects are in *different* markets is meritless and contrary to the text of Article 6.3 and the Appellate Body’s guidance.

**A. The Panel Acted Correctly in Rejecting the Product Market Definitions Proposed by the EU and Limiting Its Analysis of Serious Prejudice to Competition Within the Product Markets that It Found to Exist**

190. As we explain below, the Panel properly rejected the EU’s proposed product markets as unsupported by the evidence. Rather, the Panel correctly found the existence of three product markets and focused its analysis on competition between products within those markets, consistent with Article 6.3 of SCM Agreement and the Appellate Body’s guidance.

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<sup>299</sup> EU Appellant Submission, para. 379 (quoting Compliance Panel Report, para. 9.33) (internal quotations omitted).

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**1. *The Appellate Body has found that panels should conduct a broad analysis of all relevant factors in defining the relevant “market” for purposes of Article 6.3***

191. The Appellate Body in *EC – Large Civil Aircraft* clarified that a “market” for purposes of claims of displacement and impedance under Articles 6.3(a) and 6.3(b) should be understood as “a set of products in a particular geographical area that are in actual or potential competition with each other.”<sup>300</sup> In this vein, the Appellate Body has observed that “{s}ales can be lost ‘in the same market{,}’ within the meaning of Article 6.3(c), *only if the subsidized product and the like product compete in the same product market.*”<sup>301</sup> In *EC – Large Civil Aircraft*, the Appellate Body recalled its analysis in *US – Upland Cotton*, where it stated that “the subsidized product and the like product of the complaining Member will be in the same market ‘if they were engaged in actual or potential competition in that market{,}’” and, significantly, stated “that the phrase ‘in the same market’ applied to all four situations set forth in Article 6.3(c), including ‘lost sales{.}’”<sup>302</sup> In light of this analysis, for purposes of Articles 6.3(a), 6.3(b), and 6.3(c), the term “market” refers to products that are in “actual or potential competition” with each other.<sup>303</sup>

192. The Appellate Body also identified a number of factors to consider when 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 the conditions of competition and demand-side and supply-side substitutability.<sup>304</sup> It has further 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.”<sup>305</sup> Notably, the Appellate Body did not prescribe an

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<sup>300</sup> *EC – Large Civil Aircraft (AB)*, para. 1119.

<sup>301</sup> *US – Large Civil Aircraft (AB)*, para. 1052.

<sup>302</sup> *EC – Large Civil Aircraft (AB)*, para. 1214 (quoting *US – Upland Cotton (AB)*, paras. 407–408).

<sup>303</sup> Additionally, the Appellate Body clarified in *EC – Large Civil Aircraft* that applying the term “market” requires “{a}n assessment of the competitive relationship between products in the market{,}” which for claims of displacement under Articles 6.3(a) or (b) would be conducted to “determine whether and to what extent one product may displace another.” *EC – Large Civil Aircraft (AB)*, para. 1119. A panel is “required to make an objective assessment of the competitive relationship between specific products in the marketplace and to define the relevant product market in order to determine whether particular products can be treated as forming part of a single product market or several product markets for purposes of an analysis of displacement under Articles 6.3(a) and 6.3(b).” *EC – Large Civil Aircraft (AB)*, para. 1123. To discharge this duty, “a careful scrutiny of the competitive conditions of the market is required in order to draw conclusions as to whether the effect of the subsidy is displacement of competing products in a particular market.” *EC – Large Civil Aircraft (AB)*, para. 1129.

<sup>304</sup> *EC – Large Civil Aircraft (AB)*, paras. 1120–1123.

<sup>305</sup> *EC – Large Civil Aircraft (AB)*, para. 1120.



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exhaustive list of factors to be considered, particular methods of analysis, or a threshold for intensity of competition.

193. After reviewing the important implications of needing to identify product markets in serious prejudice disputes, the Panel recalled the Appellate Body’s guidance that the “concept of serious prejudice relates to, and arises out of, competitive engagement in a market {,}” – meaning, significantly, that “a subsidized product can only cause serious prejudice to another product if the two products in question compete in the same market.”<sup>306</sup> As such, to assess the EU’s claims regarding whether subsidies to Boeing LCA cause serious prejudice to Airbus LCA, “it is necessary to determine that the particular Boeing LCA identified by the European Union as the relevant ‘subsidized product’ in fact compete (or potentially compete) in the same product market as the Airbus LCA to which they are alleged to have caused serious prejudice.”<sup>307</sup> In evaluating if this competition exists, the Panel stressed the Appellate Body’s “guidance on how different product markets might be identified, explaining that ‘two products would be in the same market if they were engaged in actual or potential competition in that market {,}’” which “would be the case when two products are ‘sufficiently substitutable so as to create competitive constraints on each other {,}’”<sup>308</sup>

**2. *The Panel properly rejected the EU’s proposed markets as being inconsistent with the Appellate Body’s guidance.***

194. The original panel based its analysis of adverse effects on three product markets proposed by the EU, and neither of the parties objected to that approach. However, in the compliance proceeding, the EU argued that these markets had fragmented into additional markets as result of developments in the LCA industry since 2006, including rising fuel prices as well as increasing congestion and slot constraints at hub airports.<sup>309</sup>

195. In evaluating the EU’s proposal, the Panel thoroughly examined the evidence and argumentation regarding the alleged product markets.<sup>310</sup> Consistent with the Appellate Body guidance, the Panel considered the current conditions of competition in the LCA industry, including customer preferences and the role of technological innovation, in order to evaluate

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<sup>306</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.33 (citing *EC – Large Civil Aircraft (AB)*, para. 1119).

<sup>307</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.33.

<sup>308</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.33 (citing *EC – Large Civil Aircraft (AB)*, paras. 1120, 1122 (internal citations omitted)).

<sup>309</sup> *US – Large Civil Aircraft (21.5) (Panel)*, paras. 9.27-9.28 (citing EU FWS, paras. 889, 901-905, 910-914).

<sup>310</sup> See *EC – Large Civil Aircraft (21.5) (Panel)*, paras. 6.1213–6.1416.

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whether the product market delineations should be changed from the original proceedings.<sup>311</sup> It considered two principal issues in evaluating this issue:

whether current conditions of competition mean that existing and new technology aircraft of similar capacity, range and maximum take-off weight (MTOW) no longer exercise meaningful competitive constraints upon one another, and are more appropriately considered to occupy distinct product markets, and whether the trend towards larger variants of wide-body, twin-aisle LCA means that it is no longer meaningful to apply the 200-300 seat and 300-400 seat product market delineation that the original panel adopted.<sup>312</sup>

The Panel then discussed the “key features of the LCA markets” that remained largely unchanged from the original proceedings.<sup>313</sup> It explained the importance of “technological innovation” as a “crucial element of competition between LCA manufacturers {;}” the ways Boeing and Airbus design and differentiate their commercial LCA offerings; and the impact of sales campaigns.<sup>314</sup>

196. The Panel rejected the EU’s argument that product markets had to be divided between old and new technology products. It stressed that the only evidence relied on by the EU, the Mourey Statement, focused *solely* on the operating costs in comparing these aircraft. As the Panel recognized, factors such as “delivery availability and fleet commonality . . . significantly affect the value of a particular offer” and “offset a new technology aircraft’s operating cost advantage” – yet these factors are ignored by the EU.<sup>315</sup> Moreover, the EU’s position that “the value difference between existing and new technology aircraft cannot reasonably be offset by price concessions assumes a value advantage in which no factors other than operating costs are taken into account in a customer’s assessment of the value differential offered by the two types of aircraft.”<sup>316</sup> The Panel further noted how the EU’s position is divorced from reality in light of the sales campaign evidence that “Airbus and Boeing will often offer a mix of both old and new technology LCA in individual sales campaigns, wherein existing technology aircraft are operated as an interim solution, pending the delivery of new technology aircraft.”<sup>317</sup>

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<sup>311</sup> *US – Large Civil Aircraft (21.5) (Panel)*, paras. 9.16–9.18.

<sup>312</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.16.

<sup>313</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.17.

<sup>314</sup> *US – Large Civil Aircraft (21.5) (Panel)*, paras. 9.18–9.21.

<sup>315</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.37.

<sup>316</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.37.

<sup>317</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.38.

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197. As to the EU’s argument that the product markets for twin-aisle aircraft should no longer be distinguished based on a 200-300 seat market and a 300-400 seat market, the Panel reasoned that, as a consequence of the “general shift toward larger variants within aircraft families for both Airbus and Boeing LCA {,}” the “competition among wide-body, twin-aisle aircraft no longer obviously occurs within the confines of a 200-300 seat and 300-400 seat product market delineation.”<sup>318</sup> Rather, Boeing and Airbus “compete by differentiating their aircraft and optimizing new size variants to fill existing gaps in the market.”<sup>319</sup> Further, the Panel noted that “wide-body, twin-aisle families contain a number of variants that compete against variants from one or more competing wide-body, twin-aisle LCA families, depending on the particular size of the variants involved.”<sup>320</sup>

198. The Panel found that the Boeing 787-8 and 787-9 tend to compete with the A330 family and the A350XWB-800 as medium-sized, twin-aisle aircraft, while the Boeing 787-10, 777-8X, 777-9X, and 777 family tend to compete with the A350XWB-900 and A350XWB-1000 as larger-size, twin-aisle aircraft.<sup>321</sup> It accordingly found that these two categories represented separate product markets.

199. Consistent with the Appellate Body’s guidance, the Panel was attuned to differences in the degree of competition between products. It recognized that in making the three-market delineation, “it is not possible to draw a bright-line distinction {,}” explaining that “{w}ide-body, twin-aisle aircraft are differentiated products, and customers’ requirements in terms of size, routes to be served {,} and availability vary considerably.”<sup>322</sup> It acknowledged the possibility that a larger medium-sized aircraft (e.g. the 787-9) “could in some circumstances, depending on the particular needs of the customer in terms of capacity and routes to be served, exercise meaningful competitive constraints on a smaller larger-sized aircraft (e.g. the A350XWB-900).”<sup>323</sup> Despite these difficulties in drawing bright-line distinctions among products that are imperfect substitutes, the Panel took into account the different forces that contribute to market conditions compared to the original proceedings and selected “reasonable and adequate” market delineations based on the evidence.<sup>324</sup>

200. Neither the EU nor the United States has appealed these findings.

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<sup>318</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.42.

<sup>319</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.42 (emphasis omitted).

<sup>320</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.42.

<sup>321</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.43, Table 7.

<sup>322</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.44.

<sup>323</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.44 (emphasis added).

<sup>324</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.45.

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**3. *The Panel correctly applied Article 6.3 in basing its serious prejudice analysis on competition within the product markets it had defined.***

201. The Panel began its analysis of product market issues by recalling the Appellate Body’s guidance on the significance of markets to the analysis of serious prejudice. It focused on the following findings from *EC – Large Civil Aircraft*:

As we see it, displacement is a situation where imports or exports of a like product are replaced by the sales of the subsidized product. The mechanism by which displacement operates is, in our view, essentially an economic mechanism, the existence of which is to be assessed by reference to events that occur in the relevant product market. We construe the concept of displacement as relating to, and arising out of, competitive engagement between products in a market. Aggressive pricing of certain products may, for example, lead to displacement of exports or imports in a particular market. *This, however, can only be the case if those products compete in the same market.* An examination of the competitive relationship between products is therefore required so as to determine whether such products form part of the same market. We conclude therefore that a “market{,}” within the meaning of Articles 6.3(a) and 6.3(b) of the SCM Agreement, is a set of products in a particular geographical area that are in actual or potential competition with each other. An assessment of the competitive relationship between products in the market is required in order to determine whether and to what extent one product may displace another.<sup>325</sup>

The Appellate Body stated clearly that adverse effects findings require the subsidized product and products alleged to suffer from those effects to *exist in the same market*. Significantly, these findings are not limited to displacement and impedance alone. The Appellate Body in the original proceedings of this dispute made clear, in the context of lost sales, that “{s}ales can be lost ‘in the same market{,}’ within the meaning of Article 6.3(c), *only if the subsidized product and the like product compete in the same product market.*”<sup>326</sup>

202. The Appellate Body in both contexts emphasized, in no uncertain terms, that product markets must be defined based on an objective examination of the competitive relationship among products. Only once the product markets have been defined, and it is determined that two products are in the same market, can one then evaluate whether a subsidized product is causing adverse effects to the other product – whether because of displacement, impedance, lost sales, or another phenomenon. The EU’s submission seems to understand this point: “{g}iven the use of the term ‘market{,}’ in Article 6.3(a)-(c), in relation to all of the six forms of serious prejudice,

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<sup>325</sup> *EU – Large Civil Aircraft (AB)*, para. 1119 (emphasis added).

<sup>326</sup> *US – Large Civil Aircraft (AB)*, para. 1052 (emphasis added).

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the European Union considers that product market delineation is a prerequisite step in establishing each of these six forms of serious prejudice.”<sup>327</sup>

203. These findings comport fully with Article 6.3, which frames each of the indicia on serious prejudice in terms of the effects of subsidies on:

- imports into *the market* of the subsidizing Member;
- exports from *the market* of another Member;
- significant price undercutting *in the same market*; and
- significant price suppression, price depression, or lost sales *in the same market*.

Thus, the Panel was clearly correct in finding that each of the indicia of serious prejudice exists only when the subsidized product and its like product are in the same market.

**B. The EU’s Argument that the Panel Erred in its Interpretation of the Term “Market” in Article 6.3 of the SCM Agreement is Meritless.**

204. On appeal, the EU maintains that the Panel, in finding that the subsidized product must be “in the same market” as the relevant product of the complaining member to evaluate claims of adverse effects, erred in its interpretation of Article 6.3, as well as Articles 5 and 7.8, of the SCM Agreement.<sup>328</sup> The EU’s appeal is premised on its view of a distinction among the various adverse effects categories – with displacement, impedance, and price undercutting in one camp, while price suppression, price depression, and lost sales fall in another camp. It asserts that “serious prejudice in the form of price suppression, depression and lost sales (but not in the form of displacement, impedance or significant price undercutting) may manifest in products which are placed ‘in the same market,’ even when the subsidised product is not placed in that same market.”<sup>329</sup>

205. The EU’s position is meritless for a variety of reasons. First, the EU’s position contradicts the Appellate Body’s findings that product markets must be objectively determined at the outset, and that an Article 6.3 breach can only be maintained if the subsidized product is *in the same market* as the products alleged to suffer adverse effects. Second, the EU draws a false distinction between the requirements for displacement, impedance, and price undercutting on the one hand, and price depression, price suppression, and lost sales on the other hand, that is unsupported and inconsistent with the Appellate Body’s findings. Third, the EU’s suggestion

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<sup>327</sup> EU Appellant Submission, para. 421.

<sup>328</sup> EU Appellant Submission, para. 406. *See ibid.* at para. 381.

<sup>329</sup> EU Appellant Submission, para. 391.

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that, despite a panel’s delineation of product markets, separate attribution factors such as the nature and magnitude of a subsidy can support an Article 6.3 breach when the subsidized product and products alleged to suffer adverse effects are in *different* markets is entirely unsupported and contrary to the Appellate Body’s findings. Fourth, the EU’s suggestion that the Panel’s interpretation of Article 6.3 is against the object and purpose of the SCM Agreement has no merit.

**1. *Contrary to the EU’s argument, the Appellate Body’s findings in EC – Large Civil Aircraft apply to all forms of serious prejudice***

206. The EU begins its argument by criticizing the Panel’s reliance on the Appellate Body’s finding in *EC – Large Civil Aircraft* that “{a}ggressive pricing of certain products may, for example, lead to displacement of exports or imports in a particular market. This, however, can only be the case if those products compete in the same market.”<sup>330</sup> The EU contends that this reasoning applies only to displacement and impedance, but that is incorrect. As noted in section A.3, the Appellate Body also found that a transaction may be a lost sale only if the subsidized product and the like product compete in the same product market.”<sup>331</sup> Moreover, the Appellate Body’s reasoning rests not on some particular characteristic of displacement and impedance, but on the general economic principle that prices of one product can affect prices of another only if they are in the same market.

207. Therefore, the EU has identified no flaw in the Panel’s understanding that, under the Appellate Body’s reasoning, “a subsidized product can only cause serious prejudice to another product if the two products in question compete in the same market.”<sup>332</sup>

**2. *The EU’s distinction between the requirements for displacement, impedance, and price undercutting on the one hand, and price depression, price suppression, and lost sales on the other hand, is contrary to the text of the SCM Agreement and contrary to the Appellate Body’s guidance.***

208. At the outset, the EU properly recognizes that, for a finding of displacement and impedance under Article 6.3(b), “there must be competition between a subsidized product and a like product, resulting in changes in the relative ‘market’ share between the two products.”<sup>333</sup> The EU goes on to state that

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<sup>330</sup> EU Appellant Submission para. 410 (citing *EC – Large Civil Aircraft (AB)*, para. 1119).

<sup>331</sup> *US – Large Civil Aircraft (AB)*, para. 1052 (emphasis added).

<sup>332</sup> Compliance Panel Report, para. 9.33.

<sup>333</sup> EU Appellant Submission, para. 424.

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{i}t would be meaningless to rely on relative “shares of the market{,}” where two products are not in the same product market . . . {W}ere a complainant to allege that the subsidy to a product displaces or impedes another product situated in a different product market, it would be impossible for a panel to ascertain whether any observed trends in the market share of the latter product (relating to other products situated in the same product market) is attributable to the subsidy, or instead to non-attribution factors.<sup>334</sup>

209. The EU similarly recognizes that the context of price undercutting requires price comparisons and a “close competitive relationship between the products under comparison, revealed by meaningful competitive restraints between them{,}” and concludes on this basis that the subsidized and like products must be “in the same market” for a finding of significant price undercutting.<sup>335</sup> The EU ties this “close competitive relationship” to the Panel’s discussion of “meaningful competitive restraint{.}”<sup>336</sup>

210. Where the EU errs is in its strained attempt to draw a distinction between displacement, impedance, and price undercutting on the one hand, and price depression, price suppression, and lost sales on the other hand. The EU argues that Article 6.3 does *not* require the subsidized and like products to “be in the same market for a subsidy to be a cause of significant price suppression, price depression, or lost sales,”<sup>337</sup> even while it concedes that the subsidized and like products are *required* to be in the same market for displacement, impedance, and price undercutting to occur. However, the text of Article 6.2 does not support this reading, and guidance from past adopted reports confirms that serious prejudice exists only if the subsidized product and product(s) alleged to suffer adverse effects compete in the same market.

211. The EU argues that the “in the same market” requirement in Article 6.3 means “for a claim of {significant price suppression, price depression, or lost sales}to succeed, the *effects* of the subsidies must manifest in a group of adversely affected products that are found to be in the same product market . . . ” – and does not “require that the subsidised product that captures a sale or suppresses/depresses prices necessarily also be placed in the same market as the harmed products.”<sup>338</sup> The EU’s argument should be rejected.

212. The EU maintains that its interpretation of Article 6.3 is not inconsistent with the Appellate Body’s observations in *EC – Large Civil Aircraft*, which it claims are “limited to

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<sup>334</sup> EU Appellant Submission, para. 424.

<sup>335</sup> EU Appellant Submission, paras. 427–428.

<sup>336</sup> EU Appellant Submission, para. 430. *See US – Large Civil Aircraft (21.5) (Panel)*, para. 9.34.

<sup>337</sup> EU Appellant Submission, para. 439.

<sup>338</sup> EU Appellant Submission, para. 441.

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displacement under Articles 6.3(a) and 6.3(b), and do not apply, in particular, to significant price suppression, price depression or lost sales under Article 6.3(c).”<sup>339</sup> The EU ignores that the Appellate Body’s analysis in this dispute represented an application of the broader principle it established in *US – Upland Cotton*, as the compliance Panel recognized, that the term “market” in Article 6.3 refers to products “in actual or potential competition” with each other – just as the term “market” does in Articles 6.3(a) and (b). Moreover, the EU already acknowledged that “the textual requirement of ‘in the same market’ applies to all forms of serious prejudice listed in Article 6.3(c).”<sup>340</sup>

213. The EU attempts to distinguish price undercutting from price depression and suppression by arguing that the latter two categories are “not premised on a comparison of prices between two different goods {,}” and thus do not require a subsidized product and the product alleged to suffer adverse effects to be “in the same product market.”<sup>341</sup> This argument is entirely at odds with the plain text of Article 6.3(c), which explicitly references “significant price suppression, price depression, and lost sales *in the same market*.” The fact that the different adverse effects phenomena may depend on different factual evidence of their presence in no way eliminates the “same market” requirement. Beyond its general claim that price depression depends on a “review of historical price developments” and that price suppression requires a “comparison of the actual and counterfactual prices of the same good {,}” the EU does not further explain why these factors, even if true, justify reading “in the same market” to mean different things when applied to the different phenomena.

214. The flaw in the EU’s argument becomes even more apparent in its attempt to distinguish lost sales as not requiring a subsidized product and product alleged to suffer adverse effects to be “in the same market.”<sup>342</sup> The EU’s suggestion runs directly contrary to the Appellate Body’s finding in the original proceedings that “sales can be lost ‘in the same market’ within the meaning of Article 6.3(c) if the subsidized product and the like product are competing products in the same product market.”<sup>343</sup> The EU tries to argue that the use of “can” in this sentence raises a “telling” distinction from the Appellate Body’s discussion of displacement.<sup>344</sup> It is not clear how this distinction, even if true, in any way shows that lost sales do not require the subsidized product and like product to be in the same market. The passage in which the sentence quoted by the EU appears is telling, and not in a way that supports the EU’s position:

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<sup>339</sup> EU Appellant Submission, para. 411. *See ibid.* at paras. 391, 399.

<sup>340</sup> EU Appellant Submission, para. 440.

<sup>341</sup> EU Appellant Submission, para. 434.

<sup>342</sup> *See* EU Appellant Submission, paras. 434–435.

<sup>343</sup> *EC – Large Civil Aircraft (AB)*, para. 1214.

<sup>344</sup> EU Appellant Submission, para. 412.



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In *US – Upland Cotton*, the Appellate Body held that the phrase ‘in the same market’ applied to all four situations set forth in Article 6.3(c), including ‘lost sales’.<sup>345</sup> According to the Appellate Body, the subsidized product and the like product of the complaining Member will be in the same market ‘if they were engaged in actual or potential competition in that market.’<sup>346</sup>

The Appellate Body has further stated that “Article 6.3(c) is concerned with lost sales ‘in the same market.’”<sup>347</sup> Moreover, it has recognized that “lost sales” is “a relational concept that includes consideration of the behavior of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales.”<sup>348</sup> This comparison between the subsidized product and the product alleged to have suffered adverse effects is the focus of the “lost sales” comparative analysis.

215. The compliance Panel in *EC – Large Civil Aircraft* understood that product markets must be objectively determined at the outset, and that an Article 6.3 breach can only be maintained if the subsidized product is *in the same market* as the products alleged to suffer adverse effects. It explained that “when considering the merits of a serious prejudice claim under Articles 6.3(a), 6.3(b){,} and 6.3(c) of the SCM Agreement, a panel must make an objective assessment of the *competitive relationship* between specific products and thereby determine the extent to which a complainant has brought its case with respect to the correct product markets.”<sup>349</sup> To put this another way:

The Appellate Body findings reveal that in order to show that a “subsidized product” causes serious prejudice to a “like product” for the purpose of making out a claim under Article 6.3 of the SCM Agreement, it must first be demonstrated that the two products in question are in actual or potential competition. Thus, a key threshold question that will need to be addressed in serious prejudice disputes will be the extent to which the “subsidized product” and the “like product” compete in the same product market.”<sup>350</sup> Where a complainant cannot demonstrate that these two products compete in the same product market, it will be unable to substantiate a claim of serious prejudice. In

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<sup>345</sup> *EC – Large Civil Aircraft (AB)*, para. 1214 (citing *US – Upland Cotton (AB)*, para. 407) (emphasis added).

<sup>346</sup> *EC – Large Civil Aircraft (AB)*, para. 1214, citing *US – Upland Cotton (AB)*, paras. 407–408).

<sup>347</sup> *EC – Large Civil Aircraft (AB)*, para. 1217.

<sup>348</sup> *EC – Large Civil Aircraft (AB)*, para. 1214. See *US – Large Civil Aircraft (AB)*, para. 1052.

<sup>349</sup> *EC – Large Civil Aircraft (Panel) (21.5)*, para. 6.1160.

<sup>350</sup> *EC – Large Civil Aircraft (Panel) (21.5)*, para. 6.1161 (emphasis omitted).

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other words, a finding that the two products are in separate product markets will imply that those products are so distinct from one another, and that the competitive relationship between them is so remote that, as a matter of law, any degree or amount of subsidization of a respondent's product cannot logically cause serious prejudice to the complaining Member's interests through its effects on the complainant's product.<sup>351</sup>

The EU's argument undermines these principles by insisting that adverse effects for price suppression, price depression, and lost sales can be demonstrated irrespective of whether the subsidized products and products alleged to suffer adverse effects fall "in the same market."<sup>352</sup> This assertion is demonstrably at odds with the Appellate Body's findings. When two products are not "in the same market" under Article 6.3, then as a matter of law, the subsidized product cannot be found to cause adverse effects to the second product alleged to suffer from adverse effects.

216. For these reasons, the EU's attempt to distinguish price depression, price suppression, and lost sales is thin and unconvincing. Further, its conceptual argument upends the analytical approach established by the Appellate Body, based on the clear textual requirements of Article 6.3.

**3. *The EU's suggestion that despite a Panel's delineation of product markets, 'special' attribution factors such as the nature and magnitude of a subsidy can support a finding of an inconsistency with Article 6.3 when the subsidized product and products alleged to suffer adverse effects are in different markets is erroneous and inconsistent with the Appellate Body's findings.***

217. The EU suggests that there can be "special 'attribution' factors – including the nature and magnitude of the subsidy – that lead a subsidy to a product placed in one product market to be a genuine and substantial cause of these forms (or indicia) of serious prejudice to products that are placed in a separate product market."<sup>353</sup> The EU's attempt to create an elastic standard – such that effects on products in separate markets can still support a showing of serious prejudice through price depression, price suppression, or lost sales if there is a sufficient enough showing – flies in the face of the established analytical approach for evaluating serious prejudice. Consistent with Appellate Body guidance, the compliance Panel needed to make an "objective assessment of the *competitive relationship* between specific products" in the same market.<sup>354</sup> As the compliance Panel in *EC – Large Civil Aircraft* explained, "{w}here a complainant cannot

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<sup>351</sup> *EC – Large Civil Aircraft (Panel) (21.5)*, para. 6.1161 (emphasis original).

<sup>352</sup> See EU Appellant Submission, para. 432.

<sup>353</sup> EU Appellant Submission, para. 436.

<sup>354</sup> *EC – Large Civil Aircraft (Panel) (21.5)*, para. 6.1160 (emphasis in original).

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demonstrate that these two products compete in the same product market, it will be unable to substantiate a claim of serious prejudice.”<sup>355</sup> This is consistent with the Appellate Body findings in the context of lost sales, namely that they “can be lost ‘in the same market,’ within the meaning of Article 6.3(c), *only if the subsidized product and the like product compete in the same product market.*”<sup>356</sup>

218. The EU’s attempt to reverse this analytical framework undermines the entire purpose of making an objective determination of product markets *prior to* an evaluation of serious prejudice. The EU tries to backpedal away from this necessary conclusion to its premise, arguing that “it does not consider that the delineation of product markets is irrelevant to assessing claims of significant price suppression, price depression or lost sales.”<sup>357</sup> It first argues that the “product market requirement flowing from the term ‘same market’ serves to structure a panel’s assessment of claims of serious prejudice.”<sup>358</sup> This is true, and the EU properly recognizes that a panel must “examine whether the alleged forms (or indicia) of serious prejudice manifest themselves within the confines of any of the product markets identified.”<sup>359</sup> But the EU then argues that the evaluation of serious prejudice can cross markets based on the “nature and magnitude of the subsidy.”<sup>360</sup> It further asserts that the delineations of the product markets inform the “evidentiary burdens” such that “{w} here two products compete closely, a small degree of government intervention may have a large impact on the competitive relationship” and “where the competition between two products is more remote, it would take a larger degree of government intervention to skew the competitive relationship.”<sup>361</sup>

219. The United States does not dispute that the magnitude of a subsidy can impact whether a causal pathway between a subsidy and the alleged serious prejudice is genuine or substantial. But that says nothing about the proper method to evaluate serious prejudice *itself*. The EU correctly notes that the degree of competition informs that analysis. But it errs in suggesting that a subsidized product and product alleged to suffer adverse effects that compete in entirely different markets can sustain a finding of serious prejudice.

220. The EU further asserts that the delineation of product markets is relevant because it “is crucial in determining whether any price suppression, price depression{,} or lost sales are ‘significant{,}’ within the meaning of Article 6.3(c), and ultimately, amount to ‘serious’

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<sup>355</sup> *EC – Large Civil Aircraft (Panel) (21.5)*, para. 6.1161.

<sup>356</sup> *US – Large Civil Aircraft (AB)*, para. 1052 (emphasis added).

<sup>357</sup> EU Appellant Submission, para. 440.

<sup>358</sup> EU Appellant Submission, para. 443.

<sup>359</sup> EU Appellant Submission, para. 443.

<sup>360</sup> EU Appellant Submission, para. 443.

<sup>361</sup> EU Appellant Submission, para. 444.

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prejudice within the meaning of Article 5.”<sup>362</sup> In support, the EU claims that the Appellate Body findings in both *EC – Large Civil Aircraft* and *US – Large Civil Aircraft* show that the *significance* of lost sales are “rooted in the particular conditions of the LCA markets involved.”<sup>363</sup> That unremarkable observation does not extend, as the EU suggests, to the principle that a subsidized product can be found to cause serious prejudice to a product alleged to suffer adverse effects when those products do not exist in the same product market. The quoted portions of these Appellate Body reports do not support that principle either. In the cited portion of *US – Large Civil Aircraft*, the Appellate Body indicated that it needed to evaluate the significance of certain Airbus sales lost in two campaigns – and, in doing so, looked at the number of firm orders involved in the sales campaigns and the fact that those campaigns were “highly price-competitive, not only because of the direct consequence for LCA manufacturers in terms of revenue and production effects associated with the sale of multiple LCA, but also because of the strategic importance of securing a sale from a particular customer.”<sup>364</sup> Nor does the portion of the Appellate Body report in *EC – Large Civil Aircraft* that the EU cites offer any support for its assertion.<sup>365</sup>

221. Moreover, the EU highlights the contradiction in its argument when it emphasizes, after asserting its claim that a subsidy can cause serious prejudice to another product in a different market, that each affirmative finding of significant price suppression, price depression or lost sales needs to be made in respect of a group of products that impose meaningful competitive constraints on each other, such that they are appropriately placed in the “same product market.”<sup>366</sup> The only way the EU can reconcile these statements is by maintaining that the “group of products” it refers to only includes the products purported to suffer adverse effects, and not the subsidized product. Such a distinction is flatly contradicted by the Appellate Body’s clear findings that we have emphasized repeatedly: “the *subsidized product* and the like product {must} compete in the same product market”<sup>367</sup> to support a finding of serious prejudice.<sup>368</sup>

222. In sum, the EU offers nothing but conjecture in support of its claim that serious prejudice can be evaluated for products in entirely different product markets. Its suggestion is contrary to

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<sup>362</sup> EU Appellant Submission, para. 446.

<sup>363</sup> EU Appellant Submission, para. 447. See *EC – Large Civil Aircraft (AB)*, para. 1228; *US – Large Civil Aircraft (AB)*, para. 1272.

<sup>364</sup> *US – Large Civil Aircraft (AB)*, para. 1272.

<sup>365</sup> See *EC – Large Civil Aircraft (AB)*, para. 1228.

<sup>366</sup> EU Appellant Submission, para. 450.

<sup>367</sup> *US – Large Civil Aircraft (AB)*, para. 1052.

<sup>368</sup> *EC – Large Civil Aircraft (AB)*, para. 1119.

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the proper interpretation of Article 6.3, as discussed by the Appellate Body, and the EU’s arguments should be rejected.

**4. *Contrary to the EU’s assertion, the Panel’s interpretation of Article 6.3 is not at odds with the object and purpose of the SCM Agreement.***

223. The EU further maintains that the Panel’s interpretation of Article 6.3 is inconsistent with the “object and purpose of the SCM Agreement” because it “fails to account for the possibility that the very subsidy that the complaining Member challenges may be the reason that the non-subsidised product is no longer able to exercise ‘meaningful competitive constraints’ on the subsidised product.”<sup>369</sup> Contrary to the EU’s assertion, the Panel’s proper interpretation of Article 6.3 does not afford a subsidizing member “‘carte-blanche’ to evade any effective disciplines” of the SCM Agreement.<sup>370</sup> The EU’s argument misrepresents the Appellate Body findings as to Article 6.3, and cries foul over a circumstance that is, in fact, accounted for in the delineation of product markets.

224. The EU’s argument fails to acknowledge the need to assess competition among products. As the United States explained previously, the Appellate Body has interpreted the term “market” under Article 6.3 as referring to products that are in “actual or potential competition” with each other.<sup>371</sup> The Panel properly recognized, consistent with the Appellate Body’s guidance, that in assessing the EU’s claims regarding whether subsidies to Boeing LCA cause serious prejudice to Airbus LCA, “it is necessary to determine that the particular Boeing LCA identified by the European Union as the relevant ‘subsidized product’ in fact compete (or *potentially* compete) in the *same product market* as the Airbus LCA to which they are alleged to have caused serious prejudice.”<sup>372</sup>

225. In the situation described by the EU, where a product is eventually rendered uncompetitive through competition with a subsidized product, a finding can be made initially that two products are in “actual or potential competition” with one another – which will inform the Panel’s delineation of product markets. One way to assess whether competition exists is through consideration of whether there has been actual competition between the products in the past. When one product drives another out of the market, it is an observable phenomenon that the more dominant product is constraining the other product(s) – in fact, all the way to extinction. This all shows that the concern raised by the EU regarding products rendered non-competitive is, in fact, accounted for under the Panel’s delineation of product markets, which evaluates whether products are in “actual or potential competition” with each other and thus in

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<sup>369</sup> EU Appellant Submission, para. 454 (internal quotation marks omitted) (emphasis omitted).

<sup>370</sup> EU Appellant Submission, para. 454 (internal quotation marks omitted).

<sup>371</sup> See *EC – Large Civil Aircraft (AB)*, paras. 1052, 1119, 1214; *US – Upland Cotton (AB)*, paras. 407–408.

<sup>372</sup> *US – Large Civil Aircraft (21.5) (Panel)*, para. 9.33 (emphasis added).

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the same “market” for purposes of Article 6.3. This is consistent with the Appellate Body’s clear guidance that panels must make an objective examination and delineation of product markets. It further indicates that the EU’s criticism of the Panel’s approach as “not only allow {ing} circumvention, but actually encourage {ing} it {,}” is meritless.

226. The EU’s seeks to rely on the compliance panel report in *EC – Large Civil Aircraft*, but it misconstrues that panel’s finding. The EU claims that the Panel relied on the following excerpt from that report to show that “an overly narrow approach to product market delineation would make those subsidies causing the worst adverse effects non-justiciable”:

In this regard, it is important to recall that the fundamental purpose of identifying relevant product markets in a serious prejudice dispute is to determine whether certain specific trade effects have been caused by *the use of subsidies*. In our view, the fact that the competitive relationships examined for this purpose may have been shaped by the very subsidies that are claimed to cause adverse trade effects implies that it may be necessary, depending upon the circumstances, to account for the distorting impact of those subsidies in the assessment of relevant product markets. Otherwise, as already noted, the adverse trade effects of a subsidy that transforms an otherwise vigorous competitive relationship into one of no competition at all or competition that is insignificant could *never* be addressed under the disciplines of Articles 5 and 6 of the SCM Agreement; and WTO Members would be left without a remedy under the SCM Agreement against the use of subsidies to marginalize or completely eradicate the ability of a like product to compete in international trade.<sup>373</sup>

The *EC – Large Civil Aircraft* compliance panel did not set out this reasoning to suggest, as the EU does, that Article 6.3 permits competition *across* markets. To the contrary, that panel definitively found that Article 6.3 does not permit competition across product markets, but rather requires an “objective assessment of the *competitive relationship* between specific products and thereby determine the extent to which a complainant has brought its case with respect to the correct product markets.”<sup>374</sup> This in turn requires, as the Appellate Body recognized, a “demonstrate {ion} that the two products in question are in actual or potential competition.”<sup>375</sup> The panel relied on the reasoning quoted by the EU as a way of animating what a panel looks for in evaluating the presence of “actual or potential competition,” as well as the potential hazards of

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<sup>373</sup> EU Appellant Submission, paras. 456-457 (citing *EC – Large Civil Aircraft (21.5) (Panel)*, para. 6.1211) (emphasis original).

<sup>374</sup> *EC – Large Civil Aircraft (Panel) (21.5)*, para. 6.1160.

<sup>375</sup> *EC – Large Civil Aircraft (Panel) (21.5)*, para. 6.1161; *EC – Large Civil Aircraft (AB)*, para. 1119.

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relying on quantitative tools at the time of a dispute, in light of the possibility that a subsidy is distorting the product(s) being measured.

227. The EU cites the reasoning in the block quotation above as the basis for why a Panel must evaluate competition across product markets. That argument fundamentally misconstrues what the compliance panel found in *EC – Large Civil Aircraft*. Although that panel recognized a potential problem, it never found that this problem alone provided justification for a panel to consider adverse effects *across* product markets. Rather, this example of competition justified placing the subsidized product and the one it evicted into the *same* market for purposes of evaluating adverse effects. The EU's arguments in both *EC – Large Civil Aircraft* and the present dispute seek to upend established Appellate Body findings, and should be rejected.

228. For these reasons, the EU has not shown that the Panel's interpretation of Article 6.3 of the SCM Agreement is inconsistent with the object and purpose of that agreement.

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**VIII. THE PANEL PERFORMED A PROPER COLLECTIVE ASSESSMENT OF THE EFFECTS OF SUBSIDIES.**

229. The Appellate Body has found that when faced with multiple subsidies, a panel may assess their effects collectively *when appropriate*, and, in doing so, “enjoys a degree of methodological latitude in selecting its approach.”<sup>376</sup> It has noted two bounds on that discretion. First, “a panel must take care not to segment unduly its analysis such that, when confronted with multiple subsidy measures, it considers the effects of each on an individual basis only and, as a result of such an atomized approach, finds that no subsidy is a substantial cause of the relevant adverse effects.”<sup>377</sup> Second, “a panel must be careful not to combine multiple measures in such a way as to absolve a complainant of its burden of proving that each challenged measure is a genuine cause of, or genuinely contributes to producing, the market phenomena identified in Article 6.3 and that the challenged subsidies, taken together, are a genuine and substantial cause of such adverse effects.”<sup>378</sup>

230. The Appellate Body identified two analytical tools that “may be pursued” in this context: “aggregation,” which groups together “subsidy measures that are sufficiently similar in their design, structure, and operation,”<sup>379</sup> and “cumulation,” which pulls in other subsidies that “have a *genuine* causal connection to the same effects, and complement and supplement the effects of the *first* subsidy (or group of subsidies) that was found, alone, to be a *genuine* and *substantial* cause of the alleged market phenomenon.”<sup>380</sup> The Panel used these tools to aggregate the different subsidies at issue into four groups, consistent with the EU’s proposal.<sup>381</sup> It considered whether each aggregation group had a genuine and substantial relationship of cause and effect with adverse effects as alleged in each of the three relevant product markets, and found that to be the case for tied tax subsidies in the single aisle market.

231. The Panel did not find that any other aggregated group of subsidies was even a genuine cause of adverse effects. Therefore, although it indicated it would consider whether cumulation of the effects of multiple groups of aggregated subsidies was appropriate, no occasion to consider cumulation arose. In all of this, the Panel hewed closely to the guidance of the

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<sup>376</sup> *US – Large Civil Aircraft (AB)*, para. 1284.

<sup>377</sup> *US – Large Civil Aircraft (AB)*, para. 1284.

<sup>378</sup> *US – Large Civil Aircraft (AB)*, para. 1290.

<sup>379</sup> *US – Large Civil Aircraft (AB)*, para. 1285.

<sup>380</sup> *US – Large Civil Aircraft (AB)*, para. 1287.

<sup>381</sup> The four groups were R&D subsidies alleged to cause technology effects, R&D subsidies alleged to cause price effects, tied tax subsidies, and state and local cash flow subsidies. See Compliance Panel Report, paras. 9.63-9.64, 9.95



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Appellate Body, and stayed well within the methodological latitude to select an approach to analyze the collective effect of multiple subsidies.

232. The EU argues that in reaching these findings, the Panel erroneously interpreted Articles 5, 6.3, and 7.8 of the SCM Agreement to make aggregation and cumulation the only two ways of collectively assessing multiple subsidies. It urges the Appellate Body to complete the Panel’s analysis by applying a third approach to collective assessment under which all subsidies or groups of subsidies found to be a “genuine cause” of adverse effects would be grouped together without regard to whether they complemented or supplemented each other, or contributed to each other’s effects. (The EU confusingly refers to this approach as “collective assessment,” the term that the Appellate Body used to refer to the overarching concept of grouping subsidies together for purposes of analyzing causation. To avoid that confusion, the United States will refer to this as “the EU’s new approach.”)

233. The EU’s arguments do not provide a valid basis for reversing the Panel’s findings, or for completing the analysis in the event of a reversal. First of all, the Panel did not make the alleged legal finding that the EU appeals, that aggregation and cumulation are the only permissible forms of collective assessment. The Panel did find aggregation and cumulation to be potentially appropriate to the facts of this proceeding, and rejected application of the EU’s new approach to those facts, but it did not foreclose the possibility that different facts or arguments might justify a third (or fourth or fifth) approach to collective assessment.

234. Second, this appeal is largely an academic exercise because, except for the Washington B&O tax rate reduction in the single aisle market, the Panel found that none of the other aggregation groups was even a genuine cause of adverse effects.<sup>382</sup> Therefore, the juridical facts that (in the EU’s view) trigger the EU’s new approach – multiple subsidies (or groups of subsidies) that are a genuine (but not substantial) cause of adverse effects – did not arise. In other words, this appeal is moot unless the Appellate Body reverses the Panel’s adverse effects causation findings with respect to one or more of the aggregation groups and completes the analysis to find that one or more of those groups are genuine, but not substantial, causes of adverse effects.<sup>383</sup>

235. Third, even if the Appellate Body were to find that there are multiple aggregation groups that are a genuine (but not substantial) cause of adverse effects in a product market, the EU’s third approach is too undemanding to provide a valid collective assessment of those groups. In essence, the EU’s new approach is the same as cumulation, but without the criteria that ensure that collective assessment does not “absolve a complainant of its burden of proving

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<sup>382</sup> EU Appellant Submission, para. 479.

<sup>383</sup> See EU Appellant Submission, paras. 480, 508.

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. . . that the challenged subsidies, taken together, are a genuine and substantial cause of such adverse effects.”<sup>384</sup>

**A. The Appellate Body’s Description of Aggregation and Cumulation**

236. According to the Appellate Body, aggregation permits several subsidies to be treated as a single subsidy,<sup>385</sup> including by summing up the amounts of the different subsidies.<sup>386</sup> “A decision to aggregate subsidies that share a similar design, structure, and operation is both a useful tool that a panel can use to avoid having to repeat the same analysis for each and every measure and a substantive recognition that the measures in question are of such kind that they are likely to conduce the same result.”<sup>387</sup> As the Appellate Body further stated:

A decision by a panel to aggregate multiple subsidy measures represents an exercise of judgment by the panel that, given the degree of similarity among the subsidy measures, there is a reasonable likelihood that the examination of the causal relationship between each such subsidy and the alleged effects will be largely similar, and that it can be anticipated that the effects of the subsidy measures and their causal relationship to the serious prejudice alleged will be largely the same.<sup>388</sup>

Thus, while it can be a useful and appropriate tool, aggregation should only be undertaken “{t}o the extent a sufficient nexus with {possible interrelationships among subsidies} exists among the subsidies at issue so that their effects manifest themselves collectively.”<sup>389</sup>

237. The rigorous criteria to treat subsidies as a single subsidy through aggregation are necessary to ensure that a genuine and substantial relationship of cause and effect can be established between the impugned subsidies and the alleged market phenomena under Article 6.3, and that any such causal link is not diluted by the effects of other factors.<sup>390</sup>

238. As the EU correctly explains:

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<sup>384</sup> *US – Large Civil Aircraft (AB)*, para. 1290.

<sup>385</sup> *US – Large Civil Aircraft (AB)*, para. 1291, note 2615.

<sup>386</sup> *US – Large Civil Aircraft (AB)*, note 2595.

<sup>387</sup> *US – Large Civil Aircraft (AB)*, para. 1291.

<sup>388</sup> *US – Large Civil Aircraft (AB)*, para. 1291.

<sup>389</sup> *US – Upland Cotton (Panel)*, para. 7.1192.

<sup>390</sup> *See US – Large Civil Aircraft (AB)*, para. 1284.

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“Cumulation” applies when at least one of the subsidies at issue, or an aggregated group of subsidies, has already been demonstrated to be a “genuine and substantial cause” of adverse effects (the “anchor subsidy”); in those circumstances, other subsidies may be included in the scope of the adverse effects findings, provided they are found to be a genuine cause that supplements and complements the effects of the anchor subsidy.<sup>391</sup>

239. The concern about whether a subsidy that genuinely causes a certain market phenomenon is a *substantial* cause of that phenomenon is lessened when the subsidy’s effects supplement and complement the effects of a subsidy already found to be a genuine and substantial cause of the relevant phenomenon – hence, the less demanding standard for cumulation of subsidies. Thus, the Appellate Body in *US – Large Civil Aircraft* stated: “Once the Panel determined that LA/MSF subsidies were a substantial cause of the observed displacement and lost sales, it was not necessary to establish that non-LA/MSF subsidies were also substantial causes of the same phenomena.”<sup>392</sup>

240. Indeed, the Appellate Body has contrasted the differing scenarios in which aggregation and cumulation are appropriate. After discussing the facts to be considered when deciding whether or not to aggregate subsidies, the Appellate Body then turned to the separate concept of cumulation:

**In contrast**, a decision as to whether the *effects* of different subsidies can be cumulated can be taken only *after* there has been a determination, for **at least one subsidy** or group of aggregated subsidies, that it has a **genuine and substantial link** to the alleged market phenomena. **Once such a causal link has been established**, then a panel will have to address the question of whether **other subsidies** have a **genuine connection** to such phenomena.<sup>393</sup>

**B. The Panel Did Not Find that Aggregation and Cumulation are the Exclusive Forms of Collective Assessment in All Disputes Under the SCM Agreement.**

241. The EU argues that the Panel erred in the interpretation of Articles 5, 6.3, and 7.8 of the SCM Agreement by finding that aggregation and cumulation are the only two ways of collectively assessing multiple subsidies. The Panel did not adopt such a finding. Its discussion of the potential forms of collective assessment in this dispute focused on aggregation and

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<sup>391</sup> EU Appellant Submission, para. 473 (citing *US – Large Civil Aircraft (AB)*, para. 1292).

<sup>392</sup> *US – Large Civil Aircraft (AB)*, para. 1378.

<sup>393</sup> *US – Large Civil Aircraft (AB)*, para. 1292 (italics original, bold added).

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cumulation. However, the Panel never found that these are the exclusive mechanisms of collective assessment.

242. The EU’s assertion that the Panel found that aggregation and cumulation are the exclusive forms of collective assessment under the SCM Agreement is based on two sentences of the Panel report.

243. First, the EU notes<sup>394</sup> the Panel’s reference to aggregation and cumulation as “the permissible approaches that panels may take to collectively assessing the effects of multiple subsidies.”<sup>395</sup> The EU reads too much into the use of the definite article, “the.”

244. The Panel stated:

The Appellate Body said that, in selecting an appropriate approach to collectively assessing the effects of multiple subsidies, panels are confined in two ways: First, by the need not to “unduly segment” by considering the effects of each subsidy on an individual basis only (such that no subsidy is a “substantial” cause of the relevant adverse effects); and second, by the need not to combine multiple measures in such a way as to absolve a complainant of its burden of proving that each challenged measure is a “genuine” cause of, or “genuinely contributes to producing”, the market phenomena identified in Article 6.3.<sup>396</sup>

The Panel then outlined the two forms of collective assessment that the Appellate Body had already endorsed in the original proceeding of *this dispute*. At no point did the Panel suggest that these are the exclusive mechanisms for all disputes under the SCM Agreement. In this context, the Panel’s reference to “the” permissible approaches cannot be fairly construed as a finding that the two listed mechanisms are the only permissible forms of collective assessment.

245. Second, the EU points<sup>397</sup> to the Panel’s statement that, although it determined that the tied tax subsidies and the state and local cash flow subsidies should not be aggregated, “{t}his does not mean that the *effects* of these two distinct categories of aggregated subsidies cannot subsequently be *cumulated*, provided one category is found to be a *genuine and substantial* of adverse effects in the post-implementation period, and the other is a *genuine* cause, the effects of which ‘complement and supplement’ those of the first category.”<sup>398</sup>

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<sup>394</sup> EU Appellant Submission, para. 485.

<sup>395</sup> Compliance Panel Report, para. 9.62.

<sup>396</sup> Compliance Panel Report, para. 9.62 (quoting *US – Large Civil Aircraft (AB)*, paras. 1284, 1290).

<sup>397</sup> EU Appellant Submission, para. 489.

<sup>398</sup> Compliance Panel Report, para. 9.89 (emphasis original).

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246. As an initial matter, this statement accurately reflects the Appellate Body’s guidance on collective assessment. The Panel’s observation that the effects of one aggregation group can be subsequently cumulated with another in the circumstances identified by the Appellate Body – as a matter of logic and syntax – does not foreclose the possibility of other forms of collective assessment.

247. Because the EU’s appeal alleging that the Panel erred in its interpretation of Articles 5, 6.3, and 7.8 of the SCM Agreement challenges a “finding” that the Panel did not actually make, that appeal fails.

**C. The EU’s New Approach is Not a Permissible Basis on which to Complete the Analysis.**

248. The EU does not take issue with the Panel’s aggregation analysis or suggest a different form of collective assessment to displace the aggregation analysis. Indeed, the Panel analyzed the challenged subsidies according to the four aggregated groups proposed by the EU.<sup>399</sup> The EU’s new approach relates to the potential for collective assessment of the subsidies’ effects *after* evaluation of whether each of the aggregation groups is a genuine cause of adverse effects in any of the product markets.

249. As the EU acknowledges, the compliance Panel’s focus on aggregation and cumulation to the exclusion of the EU’s new approach was irrelevant in light of the Panel’s other findings.<sup>400</sup> Other than the Washington B&O tax rate reduction, the Panel did not find that any of the alleged subsidies challenged by the EU was a genuine cause of adverse effects in any of the product markets.<sup>401</sup> Therefore, although the Washington B&O tax rate reduction was found to be a genuine and substantial cause of certain adverse effects in the single-aisle market, there were no other subsidies to even consider for the EU’s new approach.

250. Therefore, consideration of the EU’s new approach would only be relevant if the Appellate Body reversed certain Panel findings, and then attempted to complete the analysis.<sup>402</sup> Specifically, the EU envisions a scenario in which multiple subsidies or aggregated groups of subsidies – which are not fit for further aggregation with one another – are found to be genuine, but not substantial, causes of the same market phenomena.<sup>403</sup> In this instance, with no subsidy or aggregated group of subsidies found to be a genuine *and substantial* cause of adverse effects,

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<sup>399</sup> See Compliance Panel Report, paras. 9.63-9.64, 9.95.

<sup>400</sup> See EU Appellant Submission, para. 479.

<sup>401</sup> See EU Appellant Submission, para. 479.

<sup>402</sup> EU Appellant Submission, paras. 480, 508, 547.

<sup>403</sup> See EU Appellant Submission, paras. 480, 508.

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cumulation would be impermissible.<sup>404</sup> The EU argues for application of its new approach, which would analyze the subsidies or aggregation groups together, providing cumulation in effect even though the criteria for cumulation were not met.

251. The EU’s approach is meant to solve the “problem” that collective assessment may not be available if subsidies do not meet the criteria for aggregation or cumulation.<sup>405</sup> The EU fails to realize that this is a feature, not a bug. The Appellate Body found aggregation and cumulation to be permissible analytical tools *because* when used in appropriate circumstances, they prevent undue atomization of subsidies, while also ensuring that a complaining party was not absolved of its burden to demonstrate a genuine and substantial causal link.<sup>406</sup> The criteria for cumulation were intended to define the appropriate circumstances for that analytical tool.

252. The EU argues that its new approach is required whenever subsidies or aggregation groups do not qualify for further aggregation or cumulation. This new approach is simply cumulation without any of the criteria for determining whether it is appropriate. If, whenever the cumulation criteria cannot be met, a supposedly separate analytical tool cumulates the subsidies’ effects anyway, then the first cumulation analysis in accordance with to the Appellate Body’s criteria is meaningless. A panel might as well just go straight to the EU’s new approach, which cumulates subsidies’ effects regardless of whether the cumulation criteria are met.

253. Therefore, in essence, the EU’s proposed new form of collective assessment is really just a challenge to the cumulation criteria set out by the Appellate Body. Because the criteria were designed, and are necessary, to strike the proper balance between preventing undue atomization and ensuring the requisite genuine and substantial causal link, they should not be discarded in favor of the EU’s proposed approach of cumulating all subsidies regardless of whether any genuine and substantial causal link has actually been established.

254. The EU attempts to rely on the reasoning of the panel in *US – Upland Cotton* to support its position. However, that reasoning reinforces the conclusion that the criteria for aggregation and cumulation are important to ensuring that a complaining party is not absolved of its burden to demonstrate a genuine and substantial causal link.

255. In *US – Upland Cotton*, the panel aggregated three types of payments to upland cotton producers. However, the panel also refused to aggregate other subsidies it determined to be insufficiently similar. With respect to the three subsidies the panel aggregated, it emphasized that:

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<sup>404</sup> See EU Appellant Submission, para. 508.

<sup>405</sup> See EU Appellant Submission, para. 508.

<sup>406</sup> See *US – Large Civil Aircraft (AB)*, paras. 1284-1287.

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- the “three subsidies {were} provided for in the same legal measure: the FSRI Act of 2002.”
- the three subsidies were price-contingent; and
- the three subsidies have a nexus with the subsidized product and the single effects-related variable – world price – that the panel was called upon to examine.<sup>407</sup>

256. By contrast, the panel refused to aggregate so-called PFC and DP payments, as well as crop insurance premiums paid by the government. The panel noted that:

- none of these subsidies were price-contingent;
- the PFC and DP payments were provided in the same legal measures as the three aggregated subsidies, but the crop insurance subsidies had a separate legal basis;
- the combination of elements indicated that these subsidies were more directed at income support; and
- this combination attenuates the nexus between these subsidies and the subsidized product and the single effects-related variable – world price.<sup>408</sup>

The panel concluded: “Because they are of a different nature and effect, we decline to aggregate them and their effects with those of the mandatory price-contingent subsidies in our price suppression analysis here. Rather, we must consider them separately.”<sup>409</sup>

257. Therefore, contrary to the assertions of the EU, the findings in *US – Upland Cotton* do not support collective assessment any time that subsidies are alleged to contribute to adverse effects to the same product. Rather, something more is necessary.

258. The errors in the EU’s argument are highlighted, and compounded, by its description of how its novel form of collective assessment would be applied in the factual context of this dispute. The EU recounts<sup>410</sup> its explanation to the compliance Panel that:

{T}he Panel should assess the collective effects of (i) all subsidies that affect the market through a “technology effects” causal pathway together with (ii) all

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<sup>407</sup> *US – Upland Cotton (Panel)*, para. 7.1303.

<sup>408</sup> *US – Upland Cotton (Panel)*, para. 7.1307.

<sup>409</sup> *US – Upland Cotton (Panel)*, para. 7.1307.

<sup>410</sup> EU Appellant Submission, para. 483.

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subsidies that affect the market through a “price effects” causal mechanism. For example, in a particular sales campaign, this involves assessing the genuine causal link between the US subsidies that (i) improve the quality and availability of Boeing’s LCA (for the US subsidies operating through a “technology effects” causal pathway) and (ii) lower the prices charged on Boeing LCA (for the US subsidies operating through a “price effects” causal pathway), and determining whether, collectively, these two sets of subsidies constitute a genuine *and* substantial cause of the significant lost sales at issue.<sup>411</sup>

259. As an initial matter, the EU asserts that the improved quality of Boeing’s LCA was among the “technology effects” of U.S. subsidies. But neither the original panel nor the compliance Panel found that any subsidy caused Boeing to possess technology it would not have developed in the absence of the subsidies.<sup>412</sup> Rather, the technology effects found in the original proceeding refer to the acceleration of the launch of the 787.<sup>413</sup>

260. In any event, the “technology effect” and “price effect” subsidies are not only different in their nature, structure, and operation, but also they act through entirely distinct causal mechanisms on different aspects of Boeing’s interaction with the market. Where both groups of aggregated subsidies fail to rise to the level of substantiality, there is no basis on which a panel or the Appellate Body could reliably conclude that collectively these insubstantial subsidies are a genuine *and substantial* cause of the relevant Article 6.3 market phenomena.

261. Indeed, that type of additive logic – that the substantiality of the subsidies’ collective causation will be equal to the sum of the parts – is a feature of aggregation, where the subsidies are sufficiently similar in their design, structure, and operation. It would be wholly inappropriate to apply that type of logic to the effects of subsidies that do not share a similar design, structure, and operation, and may not even share the same causal mechanism because doing so would create significant risk of finding a genuine and substantial causal link where none exists.

262. The unreliability of this type of analysis is underscored by the specific facts of this dispute. Where technology effects were found in the original proceeding, the absence of the 787 was alone sufficient for the Panel to find that, absent the subsidies, Airbus would have won the sales campaigns when the 787 would have been unavailable. In a scenario in which technology effects subsidies were a genuine, but not substantial, cause of the availability of the 787, it is difficult to see how subsidies that contributed in a genuine, but not substantial, way to price effects would constitute a genuine and *substantial* causal link.

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<sup>411</sup> EU RPQ 161, para. 91 (emphasis original).

<sup>412</sup> Compliance Panel Report, paras. 9.126-9.127.

<sup>413</sup> Compliance Panel Report, paras. 9.126-9.127.



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263. Accordingly, assuming *arguendo* that the Appellate Body reversed the compliance Panel’s findings and attempted to complete the analysis with respect to multiple groups of aggregated subsidies found to be genuine, but not substantial, causes of adverse effects, it would not be appropriate to apply the EU’s new approach. Rather, the appropriate approach to collective assessment is the one described by the compliance Panel. That is, regardless of whether other forms of collective assessment may theoretically be available depending on the circumstances of a particular dispute, aggregation and cumulation are the appropriate analytical tools for collective assessment in this dispute. Indeed, the Appellate Body described and endorsed them *in this dispute* with respect to allegations spread across the same basic causal mechanisms, *i.e.*, technology effects and price effects.

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**IX. THE PANEL DID NOT FIND THAT SUBSIDIES MUST BE THE SOLE CAUSE OF A LOST SALE, AND THEREFORE, DID NOT ERR IN THE INTERPRETATION OF ARTICLES 5, 6, AND 7.8 OF THE SCM AGREEMENT.**

264. The compliance Panel properly assessed whether sales campaigns were price-sensitive on the basis of voluminous evidence, including evidence of the role that price and other non-subsidy factors played in the relevant sales campaigns. It did so in conformity with Appellate Body guidance, based on the characteristics of the large civil aircraft industry, as to how to identify sales campaigns in which Boeing had the ability and incentive to use tied tax subsidies to lower prices. This was proper as a step in determining whether the requisite genuine and substantial causal link had been established.

265. The EU asserts on appeal that the Appellate Body analysis adopted by the Panel was not generally applicable, but was instead a methodology useful only to identify transactions for which the uncontested evidence was sufficient to complete the original panel’s analysis regarding causation of significant lost sales. As a result, according to the EU, the Panel misinterpreted Articles 5, 6.3, and 7.8 of the SCM Agreement when identifying the applicable causation standard.

266. However, the EU misreads the Appellate Body’s reasoning, which first identified general conditions of competition in the large civil aircraft industry, and on that basis set out the criteria under which a sales campaign was sufficiently price-sensitive to support an inference that Boeing used tied tax subsidies to lower its prices in that campaign. These were the criteria used by the compliance Panel. The Appellate Body subsequently considered the findings of the original Panel and the arguments of the parties, and on that basis enunciated different, more stringent criteria to evaluate whether the evidence regarding a transaction permitted it to complete the analysis. The Panel did not use that second group of criteria. Therefore, there is no support for EU’s argument on appeal that “the Panel erred in elevating the Appellate Body’s approach to completing the analysis . . . into the applicable legal standard” under Articles 5, 6.3, and 7.8 of the SCM Agreement.

267. Furthermore, if the EU’s challenge were correct, the Appellate Body would necessarily be unable to complete the analysis in this appeal, as it would find itself in the exact position the EU claims the Panel erroneously placed itself in – which resulted in an absence of adverse effects findings on the basis of the sales campaigns at issue.

**A. The Panel Did Not Apply a Standard Requiring that Subsidies Were the Sole Cause of Airbus Losing the Sale.**

268. The EU recognizes that “the Panel acknowledged the Appellate Body’s findings on the legal standard for assessing causation,” in particular that “a subsidy need not be the sole cause, or

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only substantial cause, of an effect in order for it to be found a genuine and substantial cause.”<sup>414</sup> However, it argues that the Panel erred by nonetheless taking “a different approach” that the Appellate Body endorsed solely for completion of the analysis. According to the EU, that different approach required the subsidies to be the sole cause of a lost sale. The EU misunderstands both the findings of the Appellate Body, and how the Panel used those findings in its analysis. The reasoning cited by the Panel applied generally to the large civil aircraft industry, and did not allow a finding of lost sales only where the subsidies were the sole cause of Airbus losing the sale.

269. It is useful to start with a review of the Appellate Body’s findings. It began its section on completion of the analysis by reviewing the nature of the tied tax subsidies and the relevant characteristics of the large civil aircraft industry. In paragraph 1260, which begins “Generally speaking,” the Appellate Body made some observations about how firms would in theory react to subsidies, and concluded:

In this dispute, we consider that, given the nature of the tied tax subsidies, their operation over time, their magnitude, and the competitive conditions in the LCA market, Boeing had both the ability and incentive to use the tied tax subsidies to lower prices, and that there was a substantial likelihood that this occurred in sales campaigns that were particularly competitive and sensitive in terms of price. On that basis, where it can be established that Boeing was under particular pressure to reduce its prices in order to secure LCA sales in particular sales campaigns, and there are no other non-price factors that explain Boeing’s success in obtaining the sale or suppressing Airbus’ pricing, we can conclude that the subsidies contributed in a genuine and substantial way to the lowering of Boeing’s prices.

...

Notwithstanding that we consider that this dynamic clearly manifested itself in LCA sales campaigns where price competition between LCA manufacturers was particularly intense, we are not persuaded that it can be assumed that this was so in each and every sales campaign in the relevant LCA markets.<sup>415</sup>

270. At this point, the Appellate Body had made general observations about the industry and relevant economic principles, and indicated how they inform the analysis of whether a particular aggregation group – tied tax subsidies – cause price effects in a particular campaign that in turn cause a lost sale. The above passage from the Appellate Body report recognizes that a sales campaign must be established as price-sensitive before it can be inferred that Boeing lowered its prices as a result of the tied tax subsidies. It finds that this is the case where two conditions are

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<sup>414</sup> EU Appellant Submission, para. 567.

<sup>415</sup> US – Large Civil Aircraft (AB), para. 1260.

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met: “Boeing was under particular pressure to reduce its prices” and “there are no other non-price factors that explain Boeing’s success.”

271. Before quoting the Appellate Body passage reproduced above, the Panel specifically explained:

{T}he Appellate Body also appeared to consider that, while the tied tax subsidies provided Boeing with the ability and incentive to lower its LCA prices, the competitive dynamics of the LCA markets are such that it would not actually do so unless it faced the commercial imperative, in the particular circumstances of the sales campaign. That imperative would arise only where the LCA sales campaigns were particularly price-sensitive, in the sense that Boeing was under pressure to reduce its prices, and there were *no other non-price factors* that explain the outcome of the sales campaign.<sup>416</sup>

This quotation makes clear that the compliance Panel too appreciated the need to establish that a certain commercial imperative existed in a particular sales campaign before it could be inferred that Boeing used the subsidy to lower its pricing in that campaign. Or as the Panel put it, “it would only be possible to reach a conclusion regarding the causal connection” between the subsidies and Boeing’s pricing if the sales campaign evidence established these conditions.<sup>417</sup> And, the compliance Panel used this approach to evaluate whether a particular sale after the end of the implementation period was sufficiently price-sensitive to support a conclusion that Boeing used tied tax subsidies to lower its prices in that sales campaign.

272. After describing in general how to evaluate the EU’s lost sales allegations, the Appellate Body then stated that it could “only reach a finding of serious prejudice *based on the above* if we can also identify uncontested facts on the Panel record that satisfy us that *the pricing dynamic described above* occurred in particular LCA sales campaigns.”<sup>418</sup> The “above” refers to that general standard. The Appellate Body next considered whether the findings and uncontested facts were sufficient to complete the analysis.<sup>419</sup> It noted the areas of agreement and disagreement between the parties, and in particular that “the United States identified a number of ‘other factors’ that, in its view, undermined a causal link between the tied tax subsidies and the market effects on Airbus’ LCA sales and prices.”<sup>420</sup> It noted that the original panel had failed to

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<sup>416</sup> Compliance Panel Report, para. 9.240 (emphasis original).

<sup>417</sup> Compliance Panel Report, para. 9.241. The Panel also noted the Appellate Body’s reiteration of this aspect of its reasoning. *Ibid.*, note 3062.

<sup>418</sup> *US – Large Civil Aircraft (AB)*, para. 1261 (emphasis added).

<sup>419</sup> *US – Large Civil Aircraft (AB)*, paras. 1261-1262.

<sup>420</sup> *US – Large Civil Aircraft (AB)*, paras. 1263-1264.

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address these factors and their potential impact on the transactions. The Appellate Body then concluded:

Where the United States advanced other factors in respect of particular sales campaigns that were *capable of explaining* the effects on Airbus' LCA sales and prices, we must treat as disputed whether or not the other factor or factors sufficed to attenuate a genuine and substantial relationship between the tied tax subsidies and those effects. Accordingly, in such circumstances, we will not be able to complete the analysis in respect of these sales campaigns.<sup>421</sup>

273. It is important to note that the general standard refers to the absence of other factors “that explain the outcome,” while the framework for determining whether there is undisputed evidence that meets that general standard refers to the absence of other factors advanced by the United States “capable of explaining” the outcome. With respect to the former, the Panel can and did weigh the voluminous evidence and determine whether other factors did, in fact, explain the outcome of a particular campaign. By contrast, the Appellate Body, in the context of completing the analysis, was not able to weigh evidence to determine whether other factors that were *capable of explaining* the outcome did, in fact, explain the outcome of a particular campaign.

274. The Appellate Body was limited in the context of completing the analysis because its role was not to weigh the relative importance of other factors advanced by the United States.<sup>422</sup> For that reason, where the United States advanced any other factor capable of explaining the effects, the Appellate Body was required to treat as disputed whether the other factor or factors sufficed to attenuate a genuine and substantial relationship between the tied tax subsidies and the effects.<sup>423</sup>

275. Therefore, the EU is wrong that the Panel applied a completion of the analysis standard instead of the proper causation standard when determining “whether the campaigns are ‘price-sensitive.’” Rather the Panel’s approach involved the weighing of evidence, with respect to both the appearance of pricing pressure and other factors, to make a factual finding as to whether each campaign was price-sensitive. This factual finding was a pre-requisite to inferring that Boeing had used the subsidy to lower its pricing in that particular campaign.

276. Moreover, as a factual matter, the Panel did not conduct the same analysis that the Appellate Body conducted. As mentioned above, the Appellate Body refrained from making a

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<sup>421</sup> *US – Large Civil Aircraft (AB)*, para. 1264 (emphasis added).

<sup>422</sup> See *EC – Beef Hormones (AB)*, para. 132 (“The determination of whether or not a certain event did occur in time and space is typically a question of fact and determination of the credibility and weight properly to be ascribed (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.” (internal quotations omitted)).

<sup>423</sup> *US – Large Civil Aircraft (AB)*, para. 1264.

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finding in any campaign in which the United States advanced a non-subsidy factor capable of explaining the outcome. By contrast, the Panel engaged in a detailed review of the voluminous sales campaign evidence to arrive at a factual determination as to whether a non-subsidy factor did, in fact, explain the outcome.

277. Thus, for example, in the Icelandair 2013 sales campaign, the United States argued that Boeing won the campaign because of **[[HSBI]]**.<sup>424</sup> The Panel weighed all of the evidence and determined that the 2013 Icelandair campaign was price-sensitive in the sense that Boeing was under particular pressure to reduce its prices in order to secure the order and there are no other non-price factors that explain Boeing's success in doing so.<sup>425</sup>

278. By contrast, in the Lion Air 2012 sales campaign, the Panel determined that **[[HSBI]]**.<sup>426</sup> It was therefore unable to conclude that this campaign was price-sensitive in the sense that Boeing was under particular pressure to reduce its prices in order to secure the order, and there are no other non-price factors that explain Boeing's success in doing so.<sup>427</sup>

279. The difference in the Panel's findings regarding price-sensitivity in these two campaigns despite the U.S. allegation that the same other factor explained both outcomes demonstrates that the Panel weighed the evidence and reached a determination that was consistent with its discretion as the trier of fact. (This also highlights that, contrary to the EU's characterization, explaining Boeing's success is not the same as contributing to Boeing's success.)<sup>428</sup> The Appellate Body, in completing the analysis, would have treated the facts as disputed and would have been precluded from reaching a finding of price-sensitivity in both campaigns. Indeed, the Appellate Body could not have reached findings of price-sensitivity in any of the three sales campaigns that were the basis for the Panel's finding of significant lost sales under Article 6.3(c).<sup>429</sup>

280. Thus, it is evident that the Panel did not conduct the same analysis undertaken by the Appellate Body in the context of completion of the analysis, which means that the EU's appeal based on this premise fails.

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<sup>424</sup> Compliance Panel Report, Appendix 2, para. 249.

<sup>425</sup> Compliance Panel Report, para. 9.478. *See also* Compliance Panel Report, Appendix 2, para. 251.

<sup>426</sup> Compliance Panel Report, Appendix 2, para. 222.

<sup>427</sup> Compliance Panel Report, para. 9.383, note 3281. *See also* Compliance Panel Report, Appendix 2, para. 223.

<sup>428</sup> *See* EU Appellant Submission, para. 549.

<sup>429</sup> *See* Compliance Panel Report, Appendix 2, paras. 249, 263, 270-271.

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**B. If the Panel Erred in Applying a Causation Standard, Then the Appellate Body Necessarily Could Not Complete the Analysis in this Appeal with Respect to Any of the Sales Campaigns at Issue.**

281. The United States demonstrated above that the compliance Panel applied the proper causation standard, as informed by the Appellate Body’s guidance. However, even if the EU’s allegation of error were accepted, it would necessarily mean that the Appellate Body could not complete the analysis with respect to any of these sales campaigns in this appeal.

282. The whole premise of the EU’s appeal is that the Panel did not make findings of adverse effects on the basis of certain sales campaigns because it erroneously adopted for itself the limitations on the Appellate Body in completing the analysis.<sup>430</sup> But while the limitations applicable to the Appellate Body in the context of completing the analysis did not apply to the Panel, they, by definition, would apply to the Appellate Body if it sought to complete the analysis in this appeal. Obviously if the Panel could not find adverse effects in light of those limitations,<sup>431</sup> the Appellate Body facing the same limitations would also be unable to find adverse effects.

283. Furthermore, the EU’s argument that the Panel adopted a standard requiring that the subsidy be the sole genuine and substantial causal factor, even if true, is on its face insufficient to allow the Appellate Body to find that the same subsidy is a genuine and substantial cause of these lost sales. The EU’s argument is that, even if the compliance Panel found that one or more non-subsidy factors was a genuine and substantial cause of Airbus losing the sale, that does not mean that the subsidy was not also a genuine and substantial cause. This is true as a matter of logic – leaving aside whether it is true as a matter of fact – but it is equally true that the Panel’s non-subsidy findings do not mean that the subsidy *was* a genuine and substantial causal factor.

284. Thus, at most, the EU would have shown that it is unclear whether the subsidy was a genuine and substantial cause of the lost sale. To go one step further and determine that a subsidy was a genuine and substantial causal factor would again require weighing voluminous evidence as to the relative causal significance of various factors in a particular campaign. This is precisely what the Appellate Body indicated it could not do in the original proceeding.<sup>432</sup>

285. Indeed, as the Appellate Body has recognized,

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<sup>430</sup> See EU Appellant Submission, paras. 550, 579-581.

<sup>431</sup> Here, as elsewhere in this sub-section, the United States is assuming *arguendo* that the Panel did in fact impose those limitations on itself.

<sup>432</sup> See *US – Large Civil Aircraft (AB)*, paras. 1264-1266.

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under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law in a panel report and the panel’s legal interpretations. Findings of fact are, in principle, not subject to appellate review. “The determination of whether or not a certain event did occur in time and space is typically a question of fact” and “{d}etermination of the credibility and weight properly to be ascribed (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.”<sup>433</sup>

Therefore, even if the Panel erred in its application of the causation standard, it is clear that the Appellate Body could not complete the analysis with respect to any of the sales campaigns at issue.

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<sup>433</sup> *EC – Beef Hormones (AB)*, para. 132.



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**X. THE PANEL DID NOT ERR IN FINDING THAT THE EU FAILED TO ESTABLISH THAT THE UNTIED SUBSIDIES CAUSE PRICE EFFECTS.**

286. The relevant considerations for assessing whether serious prejudice is the effect of the subsidy for purposes of Article 6.3 of the SCM Agreement are not in dispute – “the subsidies must contribute, in a ‘genuine’ and ‘substantial way, to producing or bringing about one or more of the effects or market phenomena, enumerated in Article 6.3.”<sup>434</sup> The use of the plural “subsidies” indicates that this analysis may take place at the level of a group of subsidies. There is also no dispute that other subsidies not part of such a group may be “cumulated” with it under certain circumstances, based on whether the subsidies in question have “a genuine connection to those phenomena.”<sup>435</sup> The Appellate Body has found that this connection “may be established in different ways,” including “to demonstrate that the subsidy or subsidies cause effects that follow the same causal pathway” or that the subsidies “meaningfully contribute to, and thereby complement and supplement, the adverse effects.”<sup>436</sup> Thus, the minimum criterion for one subsidy or group of subsidies to be combined with a second subsidy or group of subsidies causing adverse effects is a demonstration that the first subsidy or group of subsidies contribute to the adverse effects in some “genuine way.”

287. The compliance Panel recognized this guidance.<sup>437</sup> It adopted the EU’s proposal for aggregating the many challenged subsidies into four groups,<sup>438</sup> and evaluated the causal link between each group of subsidies and the adverse effects that the EU asserted in each of the product markets at issue. It did this by noting the causal pathway identified by the EU, typically consisting of an alleged effect on Boeing and an alleged follow-on effect on Airbus.<sup>439</sup> For two of the aggregation groups – the state and local cash flow subsidies and the post-2006 R&D subsidies – the EU alleged that they increased Boeing’s general cash flow by reducing its costs, that Boeing used the extra cash to reduce prices, and that those reduced prices resulted in Airbus losing sales (or corresponding market share).<sup>440</sup> The Panel rejected these allegations because “the European Union has failed to demonstrate any effect of the state and local cash flow subsidies on Boeing’s prices of the 787 or 777X in the post implementation period.”<sup>441</sup>

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<sup>434</sup> *US – Large Civil Aircraft (AB)*, para. 913.

<sup>435</sup> *US -- Large Civil Aircraft (AB)*, para. 1293.

<sup>436</sup> *US – Large Civil Aircraft (AB)*, para. 1293.

<sup>437</sup> Compliance Panel Report, paras. 9.59-9.63.

<sup>438</sup> Compliance Panel Report, para. 9.64

<sup>439</sup> *E.g.*, Compliance Panel Report, paras. 9.118, 9.236, 9.241, 9.255-9.256, and 9.279-9.280.

<sup>440</sup> *See* Compliance Panel Report, paras. 9.255 and 9.280.

<sup>441</sup> Compliance Panel Report, para. 9.276. It found that this same logic applied when the EU made the same arguments with respect to the post-2006

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288. On appeal, the EU argues both that these findings were inconsistent with Articles 5 and 6.3 of the SCM Agreement and that the Panel had failed to conduct an objective assessment for purposes of DSU Article 11 for two reasons. First, it asserts that the Panel had interpreted (or applied) Articles 5 and 6.3 so as to allow a finding of adverse effects only if the complaining party could “trace the dollars” from subsidies to price reductions.<sup>442</sup> But the Panel never did this. It simply examined whether the EU had met its burden to show that the subsidies contributed to the adverse effects, and found that the EU had failed to provide any theory or evidence whatsoever to support its assertion that the subsidies affected Boeing’s pricing, which the EU acknowledges<sup>443</sup> was only the first step in the causal pathway it alleged.

289. Second, the EU asserts that the Appellate Body, in completing the analysis with regard to subsidies associated with the Wichita IRBs in *US – Large Civil Aircraft*, concluded that untied subsidies *must* be found to have adverse effects as long as there is a “nexus between the subsidy and Boeing’s LCA development, production, or sale,”<sup>444</sup> however superficial or divorced from Boeing’s pricing.<sup>445</sup> The Panel considered that “{t}o interpret what the Appellate Body said in that particular context as setting forth an economic theory or legal ruling regarding the basis on which untied subsidies . . . should be considered to be a *genuine* cause of serious prejudice would, in our view, be overstretching the application of the finding.”<sup>446</sup> That is certainly the case, because the EU’s interpretation excises from the analysis any need to show the subsidies contribute to the alleged adverse effect – precisely the criterion that the Appellate Body identified in *US – Large Civil Aircraft* as a prerequisite for cumulating one subsidy or group of subsidies with another subsidy or group of subsidies.

**A. The Panel Correctly Interpreted Articles 5 and 6.3 of the SCM Agreement as Allowing a Finding of Serious Prejudice Only If a Causal Link Exists Between the Subsidies and the Alleged Indicia.**

290. The proper approach to analyzing causation for purposes of Articles 5 and 6.3 is not in dispute, as both parties and the Panel looked to the Appellate Body’s guidance in the appeals of

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<sup>442</sup> EU Appellant Submission, para. 587.

<sup>443</sup> EU Appellant Submission, para. 646 (stating that “the Appellate Body has held that a complaining Member must establish a ‘genuine and substantial relationship of cause and effect’ between the subsidies at issue and the adverse effects claimed,” and that “{e}stablishing the existence of an effect from the untied subsidies at issue on Boeing’s pricing of LCA is one step in that analysis”).

<sup>444</sup> EU Appellant Submission, paras. 586, 620, and 650. It is instructive that while the EU accuses the Panel of having failed to follow the Appellate Body’s guidance in *US – Large Civil Aircraft* in paragraphs 588,

<sup>445</sup> EU Appellant Submission, paras. 586, 620, and 650. It is instructive that while the EU accuses the Panel of having failed to follow the Appellate Body’s guidance in *US – Large Civil Aircraft* in paragraphs 588,

<sup>446</sup> Compliance Panel Report, para. 9.273.

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the original aircraft disputes. In *US – Large Civil Aircraft*, the Appellate Body summarized the relevant considerations:

When tasked with determining whether the causal link in question meets the requisite standard of a “genuine and substantial” causal relationship, a panel will often be confronted with multiple factors that may have contributed, to varying degrees, to that effect. Indeed, in some circumstances, it may transpire that factors other than the subsidy at issue have caused a particular market effect. Yet the mere presence of other causes that contribute to a particular market effect does not, in itself, preclude the subsidy from being found to be a “genuine and substantial” cause of that effect. *Thus, as part of its assessment of the causal nexus between the subsidy at issue and the effect(s) that it is alleged to have had, a panel must seek to understand the interactions between the subsidy at issue and the various other causal factors, and make an assessment of their connections to, as well as the relative importance of the subsidy and of the other factors in bringing about, the relevant effects.* 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. A panel must, however, take care to ensure that it does not attribute the effects of those other causal factors to the subsidies at issue, and that the other causal factors do not dilute the causal link between those subsidies and the alleged adverse effects such that it is not possible to characterize that link as a genuine and substantial relationship of cause and effect. The subsidy at issue may be found to exhibit the requisite causal link notwithstanding the existence of other causes that contribute to producing the relevant market phenomena if, having given proper consideration to all other relevant contributing factors and their effects, the panel is satisfied that the contribution of the subsidy has been demonstrated to rise to that of a genuine and substantial cause.<sup>447</sup>

291. The EU’s appeal involves the step of evaluating the relationship between the subsidy and the relevant effect, which is italicized in the quotation above. The Panel elaborated on this part of the analysis as follows:

The Appellate Body has consistently articulated the causal link required as “a genuine and substantial relationship of cause and effect”. The subsidies must contribute, in a “genuine” *and* “substantial” way, to producing or bringing about one or more of the effects, or market phenomena, identified in Article 6.3. The *genuine* nature of the causal link requires a complaining party to show that the nexus between cause and effect is “real” or “true”. The *substantial* component of

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<sup>447</sup> *US – Large Civil Aircraft (AB)*, para. 914.

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the causal relationship concerns the relative importance of the causal agent (i.e. the subsidies at issue) in bringing about the adverse effects in question.<sup>448</sup>

292. In addition, the Panel observed that “{t}his assessment of whether subsidies are a genuine and substantial cause of any of the market phenomena identified in Article 6.3 is a fact-intensive exercise and potentially there will be considerable differences in the ways complaining parties choose to demonstrate the links between the subsidies at issue and the effects, and in the nature of supporting evidence, in different cases.”<sup>449</sup>

293. By way of illustration, the Panel noted several instances from the aircraft disputes in which a measure found to confer a subsidy did not meet these criteria:

One example of a situation in which the nexus between cause and effect was not sufficiently *real* or *true* to justify a finding that the subsidy in question was a *genuine cause* of the Article 6.3 market phenomena is provided by the Appellate Body in *EC and certain member States – Large Civil Aircraft*. In that case, the Appellate Body found that the panel's generalized finding that the R&TD subsidies enabled Airbus to develop features and aspects of its aircraft faster than would otherwise have been possible was insufficient to justify “cumulating” the effects of the R&TD subsidies with the “product effects” of the launch aid/member State financing subsidies in enabling Airbus to launch particular models. Rather, in order to establish the requisite *genuine* causal link, the panel should have made specific findings that technology or production processes funded by the R&TD subsidies contributed to Airbus’ ability to launch and bring to market *particular models of LCA*. Another example is the four subsidies granted to Boeing in connection with the relocation of its corporate headquarters to the State of Illinois, which the European Communities in the original proceeding had argued may reasonably be deemed to benefit all of the company or the business unit's products. The Appellate Body found that there was no genuine causal link between these subsidies and the relevant market effects in the 100-200 seat LCA product market because these subsidies were not shown to have “meaningfully contributed” to Boeing's lowering of prices for the 737NG.<sup>450</sup>

294. The EU does not dispute that these passages accurately describe the proper analysis. Thus, there is agreement that causation exists for purposes of Articles 5 and 6.3 only if there is a

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<sup>448</sup> Compliance Panel Report, para. 9.59 (citations omitted) (emphasis original).

<sup>449</sup> Compliance Panel Report, para. 9.61 (citing *US – Large Civil Aircraft (AB)*, para. 915).

<sup>450</sup> Compliance Panel Report, para. 9.60.

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nexus between the subsidy and the adverse effect that is genuine (“real” or “true”) and substantial (sufficiently important).

295. The EU nonetheless argues that the Panel misinterpreted Articles 5 and 6.3 by reading into them a requirement to “trace the dollars from the subsidies to price reductions.”<sup>451</sup> This appeal fails on second levels.

296. First, the sections of the compliance Panel’s report addressing the “standard of causation” do not contain the finding that the EU challenges. They simply restate the guidance of the Appellate Body<sup>452</sup> with which, as noted above, both parties agree.

297. Second, the EU never identifies where the Panel adopted this supposed interpretation. It simply describes (incorrectly) the interpretation it believes the Panel adopted and cites to paragraphs in which it believes that the finding occurs.<sup>453</sup> But these passages do not interpret Articles 5 and 6.3 to impose a “trace the dollars” requirement, either by name or in substance. They simply hold the EU to its burden of proof, as the complainant, to demonstrate the “connections to, as well as the relative importance of the subsidy . . . in bringing about, the relevant effects.”<sup>454</sup>

298. Therefore, the EU has failed to show any error in the Panel’s interpretation of Articles 5 and 6.3.

**B. The Panel Correctly Applied Articles 5 and 6.3 by Evaluating Whether the EU Met its Burden to Show the Existence of a Causal Link between the Subsidies and the Alleged Adverse Effects.**

299. The EU’s appeal of the Panel’s application of Articles 5 and 6.3 consists of a four-paragraph sequence of unsupported assertions to the effect that the Panel considered that “the absence of evidence allowing the Panel to ‘trace the dollars’ was determinative of its assessment.”<sup>455</sup> Such an argument, on its face, fails to make a valid basis for appeal.

300. Nonetheless, it is useful to review what the Panel actually did, both because it reveals the fallacy of the EU’s application appeal, and provides background for evaluation of the other elements of the EU appeal.

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<sup>451</sup> EU Appellant Submission, para. 624.

<sup>452</sup> *E.g.*, Compliance Panel Report, paras. 9.57-9.61.

<sup>453</sup> EU Appellant Submission, para. 624.

<sup>454</sup> *US – Large Civil Aircraft (AB)*, para. 914.

<sup>455</sup> EU Appellant Submission, paras 628 and 629.

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***1. After assessing the subsidies’ impact on Boeing, the Panel found that the state and local cash flow subsidies affected the company’s cash flow, but made no finding with respect to the post-2006 R&D subsidies.***

301. The Panel evaluated the subsidies granted by Washington and South Carolina authorities, and observed that they either “applied against Boeing’s B&O tax liability,” exempted goods used in the development of commercial aircraft from sales and use tax, or “partially offset the costs of constructing certain facilities and infrastructure” in a manner “not contingent upon per-unit product or sale of LCA.”<sup>456</sup> Based on the evidence, the Panel concluded that these measures resulted in “savings” that “at most, operate in an indirect way to affect Boeing’s overall costs.”<sup>457</sup>

302. The Panel did not make a comparable finding with respect to the separately aggregated post-2006 R&D subsidies. The EU contended that these measures affected Boeing’s cash flow because it “can continue to mature the technologies it is researching without having to pay licence fees for the access to and use of the intellectual property generated by the subsidized R&D.”<sup>458</sup> The Panel responded that, “{r}egardless of whether we consider that argument plausible or substantiated, we note that the post-2006 aeronautics R&D subsidies are connected in an even more indirect and speculative manner to production of any existing LCA than the state and local cash flow subsidies.”<sup>459</sup> When it came to analyzing the adverse effects of these subsidies, the Panel exercised judicial economy with respect to whether the R&D subsidies affected Boeing’s cash flow.<sup>460</sup>

303. The EU does not appeal the finding regarding the state and local cash flow subsidies, or the Panel’s exercise of judicial economy with respect to the post-2006 R&D subsidies. Moreover, at no point in this analysis did the Panel fault the EU for failing to “trace the dollars” flowing from subsidy to effect.

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<sup>456</sup> Compliance Panel Report, paras. 9.76-9.78.

<sup>457</sup> Compliance Panel Report, paras. 9.78 and 9.82.

<sup>458</sup> Compliance Panel Report, para. 9.91

<sup>459</sup> Compliance Panel Report, para. 9.91.

<sup>460</sup> Compliance Panel Report, para. 9.289.

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**2. *The Panel rejected the EU’s argument that the state and local cash flow subsidies were linked to particular families of aircraft.***

304. In tandem with asserting that the Washington and South Carolina subsidies were “untied” and equivalent to cash, the EU contended that each was linked to particular Boeing aircraft families. The Panel found that these two arguments could not be reconciled.<sup>461</sup>

305. The Panel assessed the asserted links and its related assertion that the subsidies operate to reduce Boeing’s overall costs. The Panel found that the EU did “not explain {} beyond generalized assertions, how the individual state and local cash flow subsidies impact Boeing’s fixed costs of production *in relation to any of its LCA programmes.*”<sup>462</sup> It observed that there was no evidence either that savings from these subsidies were factored into Boeing’s accounting for any of the LCA programs or that Boeing otherwise applied the additional cash represented by these subsidies to its specific LCA programs.<sup>463</sup> Furthermore, where the EU alleged subsidies were linked to more than one aircraft, it did not even attempt an explanation as to whether that link might be stronger or weaker with respect to the multiple aircraft models at issue, further undermining the reliability of its assertions regarding supposed links.<sup>464</sup>

306. Therefore, the Panel found:

We do not consider that it is appropriate to allocate, from within the category of subsidies that the European Union identifies as state and local cash flow subsidies, certain amounts of particular subsidies to certain Boeing LCA programmes based on their asserted “links” to those programmes. These subsidies are not tied to production of Boeing LCA on a per-unit basis, and at most, operate in an indirect way to affect Boeing’s overall costs. *In our view, they represent the functional equivalent of additional cash to Boeing.*<sup>465</sup>

Indeed, the Panel’s willingness to aggregate the state and local cash flow subsidies was based on this factual determination.<sup>466</sup> The EU does not appeal this factual determination, or the aggregation of the state and local cash flow subsidies on this basis.

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<sup>461</sup> Compliance Panel Report, paras. 9.78-9.81.

<sup>462</sup> Compliance Panel Report, para. 9.270, note 3115 (emphasis original).

<sup>463</sup> Compliance Panel Report, para. 9.78.

<sup>464</sup> See Compliance Panel Report, para. 9.80.

<sup>465</sup> Compliance Panel Report, para. 9.82 (emphasis added).

<sup>466</sup> Compliance Panel Report, para. 9.82.



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307. It is significant that the Panel engaged in this evaluation because *the EU asserted that the state and local cash flow subsidies had effects on particular aircraft families*. It is hard to reconcile this unsuccessful argument by the EU with its insistence on appeal that the question of how Boeing used the subsidy funds it received was “irrelevant.”<sup>467</sup>

308. The Panel did not conduct a similar analysis with respect to the post-2006 R&D subsidies because the EU had not alleged that they affected particular families of aircraft. Quite to the contrary, its position was that these measures affected (unspecified) future aircraft families that Boeing had not yet launched.<sup>468</sup> The United States notes that the EU has advanced a new argument in this appeal that it did not make before the Panel alleging the existence of a link between the post-2006 R&D subsidies and current Boeing aircraft.<sup>469</sup> This belated attempt only underscores the EU’s failure before the Panel.

***3. The Panel found that the EU had not provided a credible explanation of how the state and local cash flow subsidies and post-2006 R&D subsidies affected Boeing’s prices.***

309. In line with the Appellate Body’s guidance that a panel must “must seek to understand the interactions between the subsidy at issue and the various other causal factors, and make an assessment of their connections to, as well as the relative importance of the subsidy and of the other factors in bringing about, the relevant effects,”<sup>470</sup> the Panel considered carefully the EU’s arguments as to how the subsidies affected Boeing. It considered their nature and operation as merely providing Boeing with additional cash (or potentially not even doing that, in the case of the post-2006 R&D subsidies), coupled with the absence of any other showing by the EU that would demonstrate that such subsidies had any effect on Boeing’s pricing. These considerations led to its finding that the EU failed to establish that either group of subsidies affected Boeing’s pricing.

310. In considering the state and local cash flow subsidies, the Panel recalled the Appellate Body’s conclusion with respect to tied tax subsidies, “that it is rational to expect that, where a subsidy is provided on a per-unit basis in respect of LCA produced or sold, the manufacturer would be inclined, in the appropriate market context, to pass on all or part of that subsidy to the purchaser because it is possible to do so without sacrificing profit margins.”<sup>471</sup> It contrasted this situation with the two groups of untied subsidies: “The calculus of the extent to which untied

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<sup>467</sup> EU Appellant Submission, para. 629.

<sup>468</sup> Compliance Panel Report, paras. 9.283-9.284.

<sup>469</sup> *Compare* Compliance Panel Report, paras. 9.283-9.284 with EU Appellant Submission, paras. 673-677.

<sup>470</sup> *US – Large Civil Aircraft (AB)*, para. 984.

<sup>471</sup> Compliance Panel Report, para. 9.274, citing *US – Large Civil Aircraft (AB)*, para. 1261.

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subsidies, which relate in a less direct way to production or sales than per-unit subsidies, potentially affect the profitability of an LCA sale in light of the competitive dynamics of the LCA markets, is far less clear.”<sup>472</sup> It noted that “the European Union does not advance an economic theory to support its argument,” and indicated that the Panel itself was unaware of any such argument.<sup>473</sup> The Panel noted further of the EU’s arguments, “nor did it attempt to demonstrate that Boeing’s LCA pricing would not be economically feasible absent the receipt of the state and local cash flow subsidies.”<sup>474</sup>

311. From the Panel’s perspective, this vacuum of economic reasoning was critical. It noted the Appellate Body’s admonishment in *US – Large Civil Aircraft* that “even where a panel considers its view to represent common sense or its own conception of economic rationality, it should at least explain the economic rationale that supports its ‘intuition’ and moreover, should test its intuitions empirically.”<sup>475</sup> The Panel also observed further that, in *EC – Large Civil Aircraft*, the Appellate Body found that “{w}ithout specific findings that technology or production processes funded by R&TD subsidies contributed to Airbus’ ability to launch and bring to the market particular models of LCA, the Panel did not have a sufficient basis to conclude that those subsidies ‘complemented and supplemented’ the ‘product effect’ of LA/MSF.”<sup>476</sup> Thus, the Panel found that the EU failed to establish that any of the state and local cash flow subsidies affected Boeing’s pricing.

312. The Panel found that because the EU made the same arguments with regard to the post-2006 R&D subsidies that it did for the state and local cash flow subsidies, “{t}his argument must therefore fail for the same reasons.”<sup>477</sup>

313. As can be seen from the Panel’s reasoning, it did not at any point fault the EU for failing to “trace the dollars.” Its concern was more fundamental – that the EU provided no economic framework or reasoning to justify its assertion that subsidies like the state and local cash flow subsidies and post-2006 R&D subsidies *would* affect a producer’s prices.

314. As an economic matter, the Panel’s reasoning is unassailable. Holding the strategic considerations attendant to a particular sale and other non-price terms constant, a producer can determine the lowest price it is willing to accept that will still contribute to long-term profitability. The United States has referred to this as the producer’s “reserve price.” Accepting

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<sup>472</sup> Compliance Panel Report, para. 9.274.

<sup>473</sup> Compliance Panel Report, paras. 9.274-9.275.

<sup>474</sup> Compliance Panel Report, para. 9.275.

<sup>475</sup> Compliance Panel Report, para. 9.274, note 3122 (citing *EC – Large Civil Aircraft (AB)*, para. 643).

<sup>476</sup> *EC – Large Civil Aircraft (AB)*, para. 1407 (cited in Compliance Panel Report, para. 9.274, note 3122.)

<sup>477</sup> Compliance Panel Report, para. 9.288

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any offer below that price would not be profitable, and thus the producer would not make the sale below that price. If additional cash were given to a producer, this would have no effect on the producer's pricing strategy. The producer keeps the additional cash regardless of whether it makes the sale, and there is no reason to make the sale at a loss if it cannot command its reserve price. Conversely, if cash is taken away from the producer – such as the expiration of a recurring subsidy – it will not increase its reserve price because a sale at that price is still in the interest of its long-term profitability.

315. There are exceptions where this may not be the case. The Panel gave examples of when subsidies that reduce fixed costs may be shown to impact prices in tandem with other considerations:

The Panel does not rule out the possibility that, in certain specific contexts, subsidies that reduce the fixed costs of a producer may be shown to impact prices. For example, if Boeing were facing capacity constraints (such that any additional sales would result in higher marginal costs), a subsidized expansion of production capacity could be demonstrated to allow for a reduction of marginal costs, and hence prices.<sup>478</sup> Nor is the situation before us one in which a subsidy enables an otherwise uncompetitive producer to remain in the market, distorting market prices by contributing to excess supply or capacity.<sup>479</sup> There is no evidence before us from which the Panel can conclude that, absent the state and local cash flow subsidies, Boeing would not have engaged, or would not have been financially able to engage, in the same pricing behaviour in which it engaged.<sup>480</sup>

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<sup>478</sup> This assumes that the addition of the new capacity does not adversely affect learning curve efficiencies. Aviation industry analysts have speculated that Boeing's decision to split its 787 production between two assembly sites on opposite coasts may have adversely affected the rate at which Boeing's 787 production costs have declined. (D. Gates, "Will 787 program ever show an overall profit? Analysts grow more sceptical", *The Seattle Times*, 17 October 2015, (Exhibit EU-1705), p. 9).

<sup>479</sup> The evidence before the Panel suggests that, if anything, there is greater demand for large civil aircraft in the product markets the subject of this proceeding than can currently be met. Evidence before the Panel indicates that, as of the end of July 2014, both Airbus and Boeing held record backlogs of orders for approximately 11,000 aircraft combined. The 787 was reported to be sold out through the end of the decade. Boeing was reported to have raised its prices by approximately 3.1 percent, which was almost twice the rate of price increases of the previous year. ("Boeing Raises Jet Prices 3.1 Per cent; 777-9X Costs Most", *Bloomberg*, 31 July 2014, (Exhibit EU-1447)). Both Airbus and Boeing were reported in late 2014 and 2015 to be considering increasing production targets for single-aisle large civil aircraft to meet anticipated demand which already exceeded capacity, with Boeing's reported backlog for the 737 family being reported as 4,008 orders as of September 2014; almost eight years of production at current rates. ("Boeing considering further boost in 737 production", *Chicago Tribune*, 17 September 2014, (Exhibit EU-1684); and "UPDATE 2 – Airbus debates new A320 output hike, suffers test glitch", *Reuters*, 28 May 2015, (Exhibit EU-1686)).

<sup>480</sup> Compliance Panel Report, para. 9.271 (internal citations original).

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316. However, exceptions like this are not present in this dispute. The EU explicitly made clear it was not alleging that, absent the subsidies, Boeing could not make the sales at the prices it actually accepted by virtue of its financial position.<sup>481</sup> Thus, the Panel found that there was no evidence before it that would allow it to conclude that, absent untied subsidies, Boeing would have been unable to offer the prices it actually accepted.<sup>482</sup> Therefore, for the purpose of this dispute, the general rule still holds that the mere provision of additional cash to Boeing will not affect its pricing.

317. This means that, for a subsidy to affect Boeing's pricing, it must somehow alter the profit-maximizing price of a particular sale. Otherwise, as in the example above, regardless of how cash was taken away from it, Boeing would still make the sale at the price it actually accepted because a sale at this price remains in the interest of its long-term profitability.

318. In other words, because Boeing *could* continue to offer the same price in the absence of a subsidy, the EU was required to demonstrate that it *would not* do so because sales at such prices would no longer be in the interest of Boeing's long-term profitability. There must be a reason why, absent the subsidies, Boeing would not still secure the sale by offering the same pricing it actually offered rather than lose the sale to Airbus by demanding a higher price. The mere provision of additional cash would not change the fact that a sale below Boeing's reserve price remains unprofitable. Conversely, if a sale is profitable at a given price, it remains profitable at that price if general cash used to cover fixed costs is removed (or if there is an increase in fixed costs). Accordingly, Boeing would prefer to make the sale at that profitable price rather than lose the sale.

319. Therefore, the EU needed to demonstrate that the untied subsidies it challenged affected Boeing's profitability calculus for sales of particular LCA models in a way that the mere provision of additional cash would not. Absent such a demonstration, there is no basis to find that untied subsidies would affect Boeing's pricing calculus. As discussed further in the next section, rather than demonstrating that any of the untied subsidies affected Boeing's profitability calculus for a particular sale, the EU specifically treated the untied subsidies as the equivalent of additional cash, and the Panel found these subsidies to be just that.

#### **4. Conclusion**

320. As this summary shows, at no point in its analysis did the Panel apply Articles 5 and 6.3 so as to make dispositive the lack of evidence showing Boeing's direct use of the money from subsidies to lower its prices. To the contrary, the Panel applied exactly the analysis approved by the Appellate Body. It considered the nature and operation of the subsidies, and how they

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<sup>481</sup> See Compliance Panel Report, paras. 9.271 and 9.275.

<sup>482</sup> See Compliance Panel Report, para. 9.271.

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affected Boeing, including whether there was an economic rationale supporting the EU's assertions in light of the factual evidence. Finding none, it rejected the EU's arguments, and concluded that the groups of untied subsidies had not been shown to affect Boeing's pricing.

**C. The EU's Appeal Under DSU Article 11 Fails Because the Appellate Body's Reasoning Regarding the Wichita IRBs Did Not Excuse the EU from Its Burden to Establish a Causal Link between the Relevant Subsidies and the Alleged Adverse Effects.**

321. Rather than demonstrate based on evidence and economic reasoning that the state and local cash flow subsidies or the post-2006 R&D subsidies affected Boeing's pricing, the EU sought to rely on the Appellate Body's finding that the Wichita IRBs supplemented and complemented the effects of tied tax subsidies in the 100-200 seat market. The EU's argument reads into the Appellate Body's analysis a finding that is not there, and is not correct: that any untied provision of additional cash necessarily affects Boeing's pricing. The Panel rightly rejected this approach as "causation through association," the type of an analytical short cut that the Appellate Body has criticized, and one it did not adopt in the original proceeding of this dispute.<sup>483</sup>

322. The EU argues that the Panel considered itself "not bound" by the Appellate Body's reasoning regarding the Wichita IRBs because it had found that those subsidies were no longer specific, and because it considered the reasoning to be "somehow lacking a sufficient basis."<sup>484</sup> Neither assertion is correct.

323. The EU begins by asserting that to the Panel, "the effect of this 'withdrawal' finding {regarding the Wichita IRBs} was that it considered itself not bound by the Appellate Body's findings in relation to the price effects from the Wichita IRBs."<sup>485</sup> But that is not the case. The paragraph that the EU cites as support for this characterization merely observes that the Appellate Body addressed a number of untied cash flow subsidies, and found that none of them (except the subsidy associated with the Wichita IRBs) "was a *genuine* cause of serious prejudice in the single-aisle market."<sup>486</sup> This is an accurate description of the Appellate Body's findings, and does not take a position on how those findings would affect its analysis with regard to those

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<sup>483</sup> Compliance Panel Report, para. 9.274, note 3122, (citing *EC – Large Civil Aircraft (AB)*, para. 1404).

<sup>484</sup> EU Appellant Submission, paras. 636 and 638.

<sup>485</sup> EU Appellant Submission, para. 636.

<sup>486</sup> Compliance Panel Report, para. 9.268 (emphasis original).

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same subsidies, or other subsidies, in the post-implementation period.<sup>487</sup> Thus, it provides no support for the EU’s assertion that the Panel “deviated” from the Appellate Body’s findings.

324. Second, the EU argues that the Panel “considered that the Appellate Body’s completion of the legal analysis in the original proceedings was somehow lacking a sufficient basis, making it unreliable.”<sup>488</sup> This is also incorrect. The Panel considered the Appellate Body’s findings and found that they were not what the EU portrayed them to be – a generalized finding that as a matter of law or economics, “any “subsidies that have a ‘link’ to the production of the relevant Boeing LCA, can be considered to have a *genuine* causal link to Boeing’s pricing of those aircraft.”<sup>489</sup> This is plainly correct. After all, despite EU allegations that each untied cash flow subsidy had some sort of link to particular aircraft families, the Appellate Body found only the Wichita IRBs to be a genuine cause of adverse effects.<sup>490</sup> Thus, the Panel did not “deviate” from the Appellate Body’s earlier findings – it found that they did not support the meaning that the EU sought to graft onto them.

325. The Panel’s evaluation in this regard was certainly correct. The Appellate Body’s findings cannot be read as setting out a legal standard because, if that were the case, it would have presented them as a matter of interpretation or application of Articles 5 and 6.3, and not as the completion of the Panel’s analysis. The Appellate Body’s reasoning cannot be read as setting out a generally applicable economic theory, either. Its finding in the context of completion of the analysis necessarily relied on the facts, not on any economic theory. Again, if it adopted a broadly applicable economic theory as the EU contends, it would have found that other untied subsidies to be a genuine cause of adverse effects. Instead, it found the opposite.<sup>491</sup>

326. Moreover, economic reasoning does not support the EU’s approach. As explained in section B.3, the EU alleged, and the Panel found, that the state and local cash flow subsidies and the post-2006 cash flow subsidies were the equivalent of additional cash to Boeing. Additional cash does not, absent some other factor such as cash constraints, affect a recipient’s profit-maximizing pricing behavior.

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<sup>487</sup> The EU asserts that, if the Appellate Body reverses the Panel’s finding that the subsidy associated with the Wichita IRBs is not specific, that it should find those subsidies to have price effects. EU Appellant Submission, para. 436. However, one of the factors that led the Appellate Body to its conclusion with regard to cumulation was that “{t}he IRBs cannot be considered trivial in terms of their overall magnitude or duration.” *US – Large Civil Aircraft (AB)*, para. 1348. As the magnitude of the subsidy associated with the IRBs had declined dramatically by the end of the implementation period, at least that factor would need to be revisited.

<sup>488</sup> EU Appellant Submission, para. 638.

<sup>489</sup> Compliance Panel Report, para. 9.272 (emphasis original).

<sup>490</sup> *US – Large Civil Aircraft (AB)*, paras. 1341-1346.

<sup>491</sup> *US – Large Civil Aircraft (AB)*, para. 1347.

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327. Elsewhere in its appellant submission, the EU makes much<sup>492</sup> of the Appellate Body’s statement that “both parties appeared to accept the proposition that, ‘where a subsidy is not tied to production of a particular product, the subsidy may still affect the behavior of the recipient of the subsidy in a manner that causes serious prejudice, depending upon the context in which it is used.’”<sup>493</sup> However, the EU ignores a critical word in the passage: “may.” That such subsidies “may” affect pricing signifies also that they “may” not. That, in turn, indicates that the existence of a cash flow subsidy does not dictate in and of itself that an effect on pricing occurred. There needs to be something more.

328. Thus, the reasons cited in the EU’s Article 11 appeal do not support its assertion that the Panel “deviated” from the Appellate Body’s reasoning.

**D. Contrary to the EU’s Arguments, there are Not Sufficient Panel Findings or Undisputed Facts for the Appellate Body to Complete the Analysis.**

329. The EU makes two requests for the Appellate Body to complete the Panel’s analysis, first by “reinstating” several findings, and then by using alleged findings by the Panel and undisputed facts to make findings with regard to alleged linkages between subsidies and families of aircraft. None of them support the outcome the EU seeks.

***1. The EU did not appeal the Panel’s exercise of judicial economy with respect to its argument that the post-2006 R&D subsidies had cash flow effects, and provides no support for its assertion that these effects exist.***

330. As the United States explained above in section B.1, the Panel considered EU assertions that the post-2006 R&D subsidies had cash flow effects, and took no position as to whether these were “plausible or substantiated.”<sup>494</sup> And, having rejected the EU’s adverse effects claims for other reasons, the Panel concluded that “{i}t is therefore unnecessary for us to address . . . whether the post-2006 aeronautics R&D subsidies should be analysed as representing additional cash flow to Boeing on the basis that they relieve Boeing from paying to licence intellectual property in its technology development activities and thereby lower Boeing’s costs.”<sup>495</sup> Thus, the Panel exercised judicial economy with respect to that aspect of the EU arguments. The EU did not appeal that exercise of judicial economy.

331. In its request to complete the analysis, the EU asserts that there is a nexus between the post-2006 R&D subsidies and the sales on specific Boeing large civil aircraft. However, it does

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<sup>492</sup> EU Appellant Submission, paras. 591 and 615.

<sup>493</sup> *US – Large Civil Aircraft (AB)*, note 2713 (quoting *US – Large Civil Aircraft (Panel)*, para. 7.1828).

<sup>494</sup> Compliance Panel Report, para. 9.91.

<sup>495</sup> Compliance Panel Report, para. 9.289.

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not ask for completion of the analysis as to the cash flow effects of the post-2006 R&D subsidies. Moreover, as noted above, the Panel declined to make a finding on this point. It also noted that the United States disputed the EU’s assertions that the R&D subsidies affected Boeing’s cash flow or costs.<sup>496</sup> Thus, there are no Panel findings or undisputed facts that allow the Appellate Body to complete the Panel’s analysis and find those subsidies created additional cash flow for Boeing. As all of the EU’s requests for completion of the analysis for the post-2006 R&D subsidies rely on the (unproven) existence of such a cash flow effect, they are incomplete, and do not support a finding in the EU’s favor.

**2. *There is no support for the EU request that the Appellate Body “reinstate” price effects findings made with respect to the original panel’s reference period.***

332. The EU requests that the Appellate Body complete the legal analysis in a way that “reinstates” the original panel’s findings that state and local cash flow subsidies and the post-2006 R&D subsidies contribute to adverse effects through a “price effects” causal pathway.<sup>497</sup> The EU provides no factual or legal basis for granting this request, and does not even indicate which particular findings of the original panel it wants to have “reinstated.” It is worth noting in this regard that the original panel found that the R&D subsidies did not operate through a price effects causal pathway, so there is no finding to “reinstate.”<sup>498</sup>

333. It is also worth noting that the EU’s proposal is legally incoherent. In the first place, the findings of the original panel could only be “reinstated” if they had somehow gone out of effect. They have not. They remain the adopted findings of the DSB. Second, the findings of the original panel relate to its reference period of 2004-2006. The compliance Panel, without disagreement from either party, identified its task as evaluating the existence of adverse effects in the period beginning on September 23, 2012.<sup>499</sup> Thus, even if the original panel’s findings could be transposed into the report of the compliance Panel, they would not address the relevant question. Therefore, there is no valid legal basis to grant the EU’s request to complete the compliance Panel’s analysis by “reinstating” the findings of the original panel.

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<sup>496</sup> Compliance Panel Report, para. 9.282.

<sup>497</sup> EU Appellant Submission, para. 642.

<sup>498</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1826.

<sup>499</sup> Compliance Panel Report, paras. 9.97 and 9.108.



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**3. *The Panel findings and undisputed facts are insufficient to complete the Panel’s analysis.***

*a. Conditions of competition*

334. The EU asserts that “the conditions of competition in the LCA markets demonstrate the existence of a genuine causal link between the untied subsidies and lower prices for Boeing.”<sup>500</sup> There is no support for this assertion, and the EU cites none. The most the conditions of competition can indicate is how the market operates. They cannot by themselves demonstrate how a particular subsidy will affect a particular recipient or whether the subsidy will have a “genuine” or “true” relationship with pricing for the subsidized product or the competing like product.

*b. The alleged nexus between subsidies and the research, development, production, and sale of large civil aircraft.*

335. EU asserted certain “links” between the state and local cash flow subsidies and certain Boeing LCA. According to the EU, the subsidies reduce certain of Boeing’s fixed costs. However, such allegations were highly generalized, and the EU provided no explanation for how the links were at all relevant to Boeing’s pricing. As the Panel found, “{t}he European Union {did} not explain {}, beyond generalized assertions, how the individual state and local cash flow subsidies impact Boeing’s fixed costs of production *in relation to any of its LCA programmes.*”<sup>501</sup> Thus, the Panel found that these generalized links were irrelevant in an economic sense with respect to Boeing’s pricing.<sup>502</sup> That finding should end the EU’s request for completion of the analysis, as it is a factual finding that the EU did not demonstrate the existence of the links it alleged between the subsidies and any Boeing aircraft family.

336. To the extent that the Appellate Body decides to pursue the analysis further, the EU’s arguments on appeal actually confirm what the Panel found – that the asserted links are meaningless and the subsidies operate no differently than any provision of additional cash to Boeing.<sup>503</sup> For example, as part of its complete-the-analysis argument, the EU provides a table summarizing the alleged nexus or link between each untied subsidy (or measure found not to be a subsidy) at issue and the corresponding Boeing LCA family or families.<sup>504</sup> A few pages later, the EU suggests that there is a nexus between each untied subsidy (or non-subsidy measure) and

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<sup>500</sup> EU Appellant Submission, para. 662.

<sup>501</sup> Compliance Panel Report, note 3115 (emphasis original).

<sup>502</sup> Compliance Panel Report, para. 9.270.

<sup>503</sup> Again, the United States assumes *arguendo* that the R&D subsidies generate additional cash flow. Of course, there are no findings to this effect.

<sup>504</sup> EU Appellant Submission, para. 678.

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all Boeing LCA families.<sup>505</sup> It is hard to square this argument with the Appellate Body’s careful consideration in *US – Large Civil Aircraft* of particular subsidies and strength of links between each type of subsidy and the recipient’s behavior.

337. Moreover, the two tables – which notionally reflect the same “undisputed” facts – cannot be reconciled, indicating how shallow and meaningless the EU’s alleged nexuses or links are. For example, the EU first suggests that the Washington B&O tax credit for preproduction/aerospace product development shares a nexus with the 737 MAX, the 777X, and the 787 only.<sup>506</sup> The EU then suggests a few pages later that this subsidy shares a nexus with all Boeing LCA.<sup>507</sup> Therefore, the EU is still unclear at this juncture whether that subsidy affects, for example, Boeing’s pricing of its 737NGs. If, as the EU argues, it established that this subsidy affected Boeing’s pricing of certain LCA models, it is hard to understand why the EU still does not know which model’s or models’ pricing it affected. It is equally hard to treat the identification of LCA family or families affected by a particular untied subsidy as an undisputed fact when a disagreement exists within the EU’s submission alone.

338. In addition, the EU’s presentation of which LCA families share a nexus with each untied subsidy is not even consistent with the EU’s allegations before the Panel. The EU states in its Appellant Submission that the Wichita IRBs are linked to the 737NG and 737 MAX, but not the 787 or 777X.<sup>508</sup> However, the Panel specifically and directly asked the EU whether it was alleging “that the tax abatements arising from the Wichita IRBs are a ‘genuine’ cause of the Article 6.3 market phenomena as regards the 737NG and 737MAX but not as regards the other models of Boeing LCA.”<sup>509</sup> The EU responded that it did “*not* mean that the tax abatements arising out of the Wichita IRBs are not also a genuine cause of serious prejudice with respect to other Boeing LCA models.”<sup>510</sup> The EU further stated that “the causal link between tax abatements arising out of the Wichita IRBs and adverse effects relating to the 737NG, 737 MAX and 787 that the EU has demonstrated in its submissions is ‘real’, ‘true’, ‘meaningful’ and ‘non-trivial’, so as to warrant characterising it as a ‘genuine’ causal link for adverse effects relating to the 737NG, 737 MAX and 787.”<sup>511</sup> Yet, on appeal, the EU indicates that the Wichita IRBs do not have any nexus with the 787.<sup>512</sup>

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<sup>505</sup> EU Appellant Submission, para. 688.

<sup>506</sup> EU Appellant Submission, para. 678.

<sup>507</sup> EU Appellant Submission, para. 688.

<sup>508</sup> EU Appellant Submission, para. 678.

<sup>509</sup> Panel Question 160.

<sup>510</sup> EU RPQ 160, para. 86 (emphasis original).

<sup>511</sup> EU RPQ 160, para. 89 (internal citation omitted).

<sup>512</sup> EU Appellant Submission, para. 678.

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339. Moreover, as the Panel noted, many of the state and local cash flow subsidies covered by the EU’s appeal were “challenged in the original proceeding and were argued by the EU to be untied subsidies that were not linked to production of particular families of Boeing LCA or to the production or sale of individual LCA.”<sup>513</sup> Yet, the EU asserts on appeal, as it did before the Panel, that these same subsidies are now linked to particular LCA programs. This effort fails because the purported links (or, to use the EU’s preferred term, “nexuses”) are superficial and, as the Panel observed, the EU did “not explain why it is now appropriate to analyse these same subsidy measures as reducing Boeing’s fixed costs of production of any particular LCA programme or programmes.”<sup>514</sup>

340. Thus, it is clear from the EU’s arguments and omissions that the highly generalized supposed nexuses or links offer no meaningful support for the view that the relevant untied subsidies affect Boeing’s pricing, and that its claims with respect to untied subsidies rely on the premise that any provision of additional cash to Boeing that can cover Boeing’s fixed costs will necessarily affect Boeing’s pricing of current LCA. At minimum, that was the Panel’s conclusion, which is within its discretion as the trier of facts.

*c. How subsidies affect Boeing’s pricing*

341. The omissions from the EU’s request to complete the analysis are just as damning as the weakness of the arguments it does make. In line with its faulty reading of the Appellate Body’s findings in *US – Large Civil Aircraft*, it considers that the only thing it needs to show to justify cumulation is that a subsidy has some sort of “nexus,” however superficial or divorced from Boeing’s pricing, with a product of the subsidy recipient. It accordingly makes no effort to show any relationship between the subsidy and the adverse effects it alleges.

342. But the Appellate Body has found that, for adverse effects within the meaning of Articles 5 and 6.3 to exist, the subsidies “must contribute, in a ‘genuine’ *and* ‘substantial’ way, to producing or bringing about one or more of the effects, or market phenomena.”<sup>515</sup> In the context of cumulation – the situation in which the EU’s request to complete the analysis applies<sup>516</sup> – “a panel will have to address the question of whether other subsidies *contribute to such {the alleged market} phenomena.*”<sup>517</sup> The Appellate Body recognizes that there may be several ways “in which the requisite causal connection may be established,” but the ones it describes involve a either showing that the other subsidies either “contribute to, and thereby complement and

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<sup>513</sup> Compliance Panel Report, note 3115 (emphasis original).

<sup>514</sup> Compliance Panel Report, note 3115.

<sup>515</sup> Compliance Panel Report, para. 9.59 (citations omitted) (emphasis original).

<sup>516</sup> EU Appellant Submission, para. 647.

<sup>517</sup> *US – Large Civil Aircraft (AB)*, para. 1293.

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supplement” the anchor subsidy or “operate along the same causal pathway” as the anchor subsidy.<sup>518</sup> In neither case would the type of superficial “nexuses” alleged by the EU be sufficient.

343. Moreover, there are no allegations – much less Panel findings or undisputed facts – with respect to what portion of the state and local cash flow subsidies are used to lower prices. Furthermore, there are no allegations – much less Panel findings or undisputed facts – with respect to how to allocate any such portion among the various aircraft. Therefore, even if the state and local cash flow subsidies were found to affect Boeing’s pricing, there is no basis to conclude that they are sufficient in magnitude to be a genuine and substantial cause of adverse effects.

*d. Conclusion*

344. Thus, the EU has failed to demonstrate that there are sufficient panel findings and undisputed facts for the Appellate Body to complete the analysis.

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<sup>518</sup> *US – Large Civil Aircraft (AB)*, para. 1293.

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**XI. TECHNOLOGY EFFECTS**

**A. Introduction**

345. The EU presents the Appellate Body with 11 separate claims of error concerning the Panel’s assessment of its “technology effects” allegations, plus an elaborate scheme for completely overhauling the Panel’s work under the guise of completing the analysis. This all boils down to the same thing: the EU’s disagreement with the Panel’s factual findings. The EU has no grounds for complaint. As the complaining Member, it bore the burden to establish that the pre-2007 aeronautics R&D subsidies, through their acceleration effects, caused serious prejudice in the post-implementation period.<sup>519</sup> The crucial counterfactual question was to determine when the 787 would have been launched absent the subsidies. The EU’s position on this issue before the Panel was unclear and unmoored from the technology effects found by the original panel, to say nothing of the evidence the EU adduced in an attempt to support its ambiguous position.<sup>520</sup> Only now, before the Appellate Body, has the EU finally unveiled its position that the 787’s counterfactual launch would have occurred “up to 2012”<sup>521</sup> – possibly before the end of the implementation period, but up to eight years later than the actual 2004 launch – and that other Boeing models would have been delayed until 2021. This revised approach is far too little, far too late, and in the wrong forum.

346. In contrast, the United States presented the Panel with specific, real-world benchmarks for its counterfactual 787 launch timing analysis. These benchmarks came from the Boeing Report, which was authored by Boeing engineers with first-hand knowledge of the relevant technologies. The benchmarks were on “other, *specific unsubsidized early-stage R&D activities* in the pre-launch development phase for the 7E7/787 that {the Boeing engineers} consider were either ‘comparable to, or more demanding’ than, the types of tasks that Boeing conducted under the relevant aeronautics R&D programmes.”<sup>522</sup> As explained by the Panel, the Boeing Report uses these time estimates “as a proxy” for how much time “Boeing would have needed in the counterfactual scenario to conduct the early-stage research that it actually conducted under the aeronautics R&D.”<sup>523</sup> The Boeing Report estimates a 787 launch delay of two years in the absence of the subsidies. The Panel corroborated the probative value of the report with its unappealed finding that Airbus progressed from a clean-sheet design for the A350 XWB to launch in less time than the U.S. estimate of counterfactual pre-launch R&D work for the 787.

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<sup>519</sup> See Compliance Panel Report, para. 9.165.

<sup>520</sup> See Compliance Panel Report, para. 9.153.

<sup>521</sup> EU Appellant Submission, para. 907.

<sup>522</sup> Compliance Panel Report, para. 9.162 (citing Boeing Engineers Statement, para. 7 (Exhibit USA-283(BCI))) (emphasis added).

<sup>523</sup> Compliance Panel Report, para. 9.162.

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347. The Panel found the U.S. timing estimate to be much more probative than the EU’s vague assertions. The Panel’s weighing of this evidence does not present any serious question of a lack of an objective assessment. Furthermore, the EU’s arguments under DSU Article 11 appear to be simply a recasting of its appeals under the SCM Agreement, which the Appellate Body has repeatedly explained is improper.<sup>524</sup> Indeed, the Panel’s technology effects analysis is an example of a complex set of factual determinations squarely within a panel’s discretion as the trier of fact. The EU is asking the Appellate Body to discard the Panel’s careful analysis of an exceedingly complex factual record and undertake its own *de novo* analysis based on EU argumentation. This is not the role of the Appellate Body.<sup>525</sup>

348. Below, the United States begins by summarizing the key findings and other considerations that arise repeatedly in the EU’s technology effects appeals (Section XI.B). We then refute each set of EU appeal claims, showing that the Panel

- correctly focused its counterfactual analysis on the 787’s launch timing (Section XI.C);
- properly relied on the Boeing unsubsidized R&D benchmarks, which reflected specific, early-stage R&D activity, not incomparable “near-term” R&D (Section XI.D);
- appropriately accounted for the sequencing of R&D activity (Section XI.E);
- did not impose an impossible standard of proof on the EU (Section XI.F); and
- properly construed an EU argument from the original proceeding concerning the 787’s counterfactual launch timing (Section XI.G).

The United States concludes this section by demonstrating that, even if the Appellate Body reversed some aspect of the Panel’s findings, the Panel findings and undisputed facts on the record do not allow completion of the analysis in the EU’s favor.

**B. Key Considerations for the Appellate Body’s Review of the EU’s Technology Effects Appeals**

349. Before turning to the EU’s specific appeals, it is useful to consider the key findings and concepts that should inform a review of the EU’s claims of error. To avoid repetition, the United

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<sup>524</sup> See, e.g., *China – HP-SSST (AB)*, para. 5.244; *Peru – Agricultural Products (AB)*, para. 5.66.

<sup>525</sup> See *EC – Beef Hormones (AB)*, para. 132.

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States presents these considerations in a single, integrated section, to which it will refer, as needed, in responding to the EU arguments.

***1. The original panel found that the pre-2007 aeronautics R&D Subsidies accelerated the launch of Boeing’s 787.***

350. As the compliance Panel noted, the original panel’s technology effects causation analysis focused on whether “the aeronautics R&D subsidies *accelerated* Boeing’s development of new, advanced technologies for the 787 and thereby caused serious prejudice to its interests in respect of competing Airbus aircraft in the 200-300 seat LCA product market.”<sup>526</sup> The original panel concluded that Boeing “most likely” would have either (1) developed a 767-replacement with the same technologies as the 787, but with a *launch* date “significantly later” than 2004 and without promised deliveries in 2008; or (2) launched a 767-replacement in 2004 that was not as “technologically innovative as the 787.”<sup>527</sup> The Appellate Body found the second scenario unsupported and concluded that “the aeronautics R&D subsidies *accelerated* Boeing’s development of technologies for the 787, which in turn enabled Boeing to launch the 787 earlier than otherwise would have been possible, thereby reducing Boeing’s time to market with the 787.”<sup>528</sup> As the compliance Panel explained, “{t}he Panel’s finding must be understood to mean that the NASA aeronautics R&D subsidies *accelerated the technology development process* by *some* amount of time, and, therefore gave Boeing an advantage in bringing its technologies to market.”<sup>529</sup> Thus, the aeronautics R&D subsidies affected *when* the 787 was launched, not whether it would be launched at all.

***2. The counterfactual question before the compliance Panel was whether the aeronautics R&D subsidies’ acceleration effects continued into the post-implementation period.***

351. The EU does not dispute that the compliance Panel is tasked with resolving whether, as the EU describes, the “pre-2007 aeronautics R&D subsidies continue to cause . . . adverse effects in the LCA markets *after the end of the implementation period*” in September 2012.<sup>530</sup> The compliance Panel noted that “the mere existence of 787 technologies . . . in the post-

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<sup>526</sup> Compliance Panel Report, para. 9.124 (citing *US – Large Civil Aircraft (Panel)*, paras. 7.1601–7.1604).

<sup>527</sup> Compliance Panel Report, para. 9.124 (citing *US – Large Civil Aircraft (Panel)*, para. 7.1775) (emphasis added).

<sup>528</sup> Compliance Panel Report, para. 9.126 (emphasis added).

<sup>529</sup> Compliance Panel Report, para. 9.126 (quoting *US – Large Civil Aircraft (Panel)*, para. 7.1775) (internal quotation marks omitted) (emphasis original).

<sup>530</sup> EU Appellant Submission, para. 693 (emphasis added).

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implementation period does not demonstrate that this effect continues.”<sup>531</sup> Instead, as the Panel explained:

The issue for our analysis under Article 7.8 of whether the United States has taken appropriate steps to remove the adverse effects is whether this acceleration of Boeing’s development of advanced LCA technologies that the aeronautics R&D subsidies were found to have in the original proceeding is still evident or whether it has ended by the end of the implementation period.<sup>532</sup>

352. To determine if “this acceleration effect continues to exist in the post-implementation period,” the compliance Panel needed to conduct “a counterfactual analysis of whether Boeing likely would have been in a different situation with respect to the timing of its 787-related technology development absent these aeronautics R&D subsidies.”<sup>533</sup> In other words, is it “likely that, absent these subsidies, the 787 technologies would still not have been developed by the end of the implementation period and thus the 787 would not have been present in the market by that time?”<sup>534</sup> As noted by the Panel, the answer to this question depends on

how much additional time Boeing would have required to develop the 787 absent these subsidies { , } because this would indicate whether it is likely that Boeing would have been in the market with an unsubsidized 787 prior to the expiration of the implementation period, in which case the pre-2007 aeronautics R&D subsidies can no longer be characterized as contributing in a genuine and substantial way to Boeing’s 787-related technology development.<sup>535</sup>

**3. *The original panel did not find that the pre-2007 aeronautics R&D subsidies had effects beyond acceleration of the launch of the 787.***

353. Given the EU’s pattern of argumentation concerning technology effects issues,<sup>536</sup> it is also important to be clear that about what the aeronautics R&D subsidies were *not* found to do.

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<sup>531</sup> Compliance Panel Report, para. 9.128.

<sup>532</sup> Compliance Panel Report, para. 9.127.

<sup>533</sup> Compliance Panel Report, para. 9.128.

<sup>534</sup> Compliance Panel Report, para. 9.128.

<sup>535</sup> Compliance Panel Report, para. 9.128

<sup>536</sup> In its submissions to the Panel, the EU framed the technology effects of the pre-2007 aeronautics R&D subsidies as the 787 technological developments *themselves*. See EU FWS, paras. 979, 983; EU Comments on US RPQ 156, para. 58. See also Compliance Panel Report, para. 9.123.



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354. First, while they accelerated the timing of technology development, the aeronautics R&D subsidies *did not* enable the very existence of the 787 technologies. As the Panel observed,

{T}he original panel did not consider that Boeing was not capable, based on its engineering and technological capabilities unrelated to the pre-2007 aeronautics R&D subsidies, and those of its suppliers, of developing such an aircraft. Consistent with these considerations, the European Union itself does not argue that the 787 technologies in question “would never have existed” absent the pre-2007 aeronautics R&D subsidies. Indeed, we would emphasize that in the original proceeding, the European Communities argued that in the absence of the aeronautics R&D subsidies at issue, Boeing would not have been able to launch the 787 or a comparable aircraft until mid-2006.<sup>537</sup>

355. Second, the aeronautics R&D subsidies *did not* constitute the sole cause of the technologies applied to the 787. The original panel found that “Boeing’s technology developments are clearly the product of a variety of factors,”<sup>538</sup> arising before, during, and after Boeing’s research under the R&D programs:

The Panel is not, of course, of the view that the technologies applied to the 787 are entirely and exclusively attributable to work that Boeing and McDonnell Douglas conducted for NASA and DOD pursuant to the aeronautics R&D subsidies. *The Panel is well aware that, from 2000 onwards, Boeing and its suppliers have made significant investments in R&D in the respective technology areas, first in the context of the development of the Sonic Cruiser, and subsequently, the 7E7/787.* Moreover, as regards the technologies on the 787 in particular, the Panel notes that, prior to performing the research under the aeronautics R&D contracts at issue in this dispute, Boeing had already developed expertise in the application of composites in secondary structures, as well as in primary structures such as the 777 empennage. It is also clear that during the 1990s, Boeing suppliers on the 787, such as Kawasaki Heavy Industries and Fuji Heavy Industries were developing expertise in the use of composites in primary aircraft structures contemporaneously with Boeing’s development efforts. The Panel acknowledges that Boeing had also derived valuable knowledge and experience from lessons learned over the course of the 777 and 737NG production programmes.<sup>539</sup>

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<sup>537</sup> See Compliance Panel Report, para. 9.156 (citations omitted).

<sup>538</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1758.

<sup>539</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1757 (emphasis added).

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356. Given the adopted findings on the first two points, the Panel rightly observed that “neither the panel nor the Appellate Body considered that the 787 technologies were themselves the effects of the aeronautics R&D subsidies. The aeronautics R&D subsidies were not found to have brought into existence any technology or product that would not otherwise exist.”<sup>540</sup>

357. Third, the aeronautics R&D subsidies *did not* affect the 787’s development beyond its launch. That is, the counterfactual duration of the 787’s post-launch development –from launch to actual entry into commercial service – would be the same as the actual duration. The EU failed to appreciate this in its argumentation before the Panel. As the Panel clarified,

The European Union's affirmative case regarding the amount of additional time that it would have taken Boeing to develop and launch the 787 proceeds on the basis that the relevant counterfactual question concerns the amount of additional time that it would have taken an LCA manufacturer like Boeing to research, develop, produce, certify, and deliver the 787. If we were to formulate the counterfactual question in the terms proposed by the European Union, the estimate of the time we arrive at *would also include time to undertake activities (internal R&D conducted by Boeing and its suppliers, production, certification and delivery) that were not found to have been effects of the pre-2007 aeronautics R&D subsidies in the original proceeding.* The original panel did not consider that Boeing’s technology development in relation to the 787 was solely the result of Boeing’s subsidized participation in NASA and DOD aeronautics R&D programmes. *Nor did it consider that the acceleration effect of the aeronautics R&D subsidies encompassed phases in the development of the 787 beyond its launch.* Therefore, by formulating the counterfactual question in terms of the amount of additional time it would have taken Boeing to research, develop, produce, certify and deliver the 787 absent the subsidies, *the European Union's estimate erroneously attributes to the pre-2007 aeronautics R&D subsidies aspects of the 787's development that were not found to have been accelerated by Boeing's participation in the relevant NASA and DOD aeronautics R&D programmes.*<sup>541</sup>

**4. *The parties presented the compliance Panel with very different counterfactual argumentation and evidence.***

358. As the complaining Member, the EU bore the burden of establishing that the aeronautics R&D subsidies, through their acceleration effects, cause serious prejudice in the post-

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<sup>540</sup> Compliance Panel Report, para. 9.127.

<sup>541</sup> Compliance Panel Report, para. 9.152 (emphasis added).

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implementation period.<sup>542</sup> However, the EU struggled to articulate counterfactual arguments that were consistent with the original findings.<sup>543</sup> Moreover, on the core counterfactual question of when the 787 would have been launched, the EU’s position was unclear. As the Panel observed,

A further difficulty with respect to the European Union's arguments is that the European Union has not provided a clear statement on its behalf, or supporting evidence, that the 787 would not have launched until after the end of the implementation period. Its affirmative case instead has referred to an estimate of the amount of time required to develop technologies and design tools (more than ten years), an estimate of the extent of the delay in delivering the 787 ([**HSBI**]), and a statement that the launch would have been delayed “by a similar amount of time”. *The Panel is uncertain whether it should infer from the foregoing that it is the European Union's position that Boeing, absent the aeronautics R&D subsidies, would not have been able to launch the 787 before September 2012.*<sup>544</sup>

359. The EU’s decision not to stake out a clear position on the central technology effects issue is problematic, particularly in light of the EU’s effort to introduce novel counterfactual R&D timelines in this appeal.<sup>545</sup> In any event, the EU’s ambiguity was not helpful to the Panel’s work. For the Panel to evaluate whether, absent the aeronautics R&D subsidies, Boeing still would have been able to develop the technologies necessary to launch the 787 before the end of the implementation period in September 2012, the Panel needed time estimates that addressed how much longer Boeing would have needed to launch the 787 in the absence of the subsidies. As such, the Panel expressed that it was “attempting to reach a reasonable estimate of how long it would have taken Boeing to undertake the subsidized R&D activities absent the pre-2007 aeronautics R&D subsidies and therefore, when the 787 would have launched absent those subsidies.”<sup>546</sup>

360. In contrast to the EU’s exceedingly vague approach, the United States provided evidence from eight Boeing engineers who worked on, and have “first-hand knowledge” of, the development of the 787, 777X, and/or 737 MAX.<sup>547</sup> These engineers are familiar with Boeing’s operations, the 787 technologies, the development of the 787, Boeing’s independent and unsubsidized R&D, and the Boeing research conducted with the U.S. government. Their

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<sup>542</sup> See Compliance Panel Report, para. 9.165.

<sup>543</sup> See, e.g., Compliance Panel Report, para. 9.152.

<sup>544</sup> Compliance Panel Report, para. 9.153 (emphasis added).

<sup>545</sup> See EU Appellant Submission, para. 907.

<sup>546</sup> Compliance Panel Report, para. 9.157.

<sup>547</sup> Compliance Panel Report, para. 9.136 (citing Statement of Boeing Engineers Regarding the Technologies and Development of the 787, 737 MAX, and 777X, June 2013 (Boeing Engineers Statement), para. 1 (Exhibit USA-283(BCI))).

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informed, reasoned, and supported conclusion was that, absent the R&D subsidies, Boeing would have launched the 787 no later than 2006, with promised first deliveries in 2010.<sup>548</sup>

361. As the United States explained to the compliance Panel, the Boeing Report was premised on the original panel’s findings, and concluded that “Boeing would have developed ‘key high-payoff technologies’ faster with the NASA R&D subsidies than without, yielding a 787 launch in 2004 in the former scenario.”<sup>549</sup> Consistent with the counterfactual question before the Panel, the Boeing Report assessed the complexity and extent of the relevant and subsidized R&D and estimated the timing advantage that the pre-2007 aeronautics R&D subsidies could have provided Boeing.<sup>550</sup> It did so, as the compliance Panel explained, according to assumptions that Boeing did not participate in the relevant NASA and DoD aeronautics R&D programs, and that Boeing’s degree of knowledge and technology attained from independent R&D activities, its suppliers, and the broader aeronautics community remained the same.<sup>551</sup>

362. In other words, the Boeing Report identifies the duration of the R&D subsidies’ acceleration effect by estimating the amount of time Boeing would have needed to expend in unsubsidized R&D work to obtain the knowledge and experience gained from participating in the subsidized R&D activities. As the compliance Panel recognized, to accomplish this task in their report, the “Boeing engineers seek to identify tasks that Boeing conducted under the challenged NASA and DOD aeronautics R&D programs and then { } assess the additional time that Boeing would have required to conduct that work using the internal resources of Boeing and its suppliers . . . .”<sup>552</sup>

363. The Boeing Report identifies benchmarks based on “other, *specific unsubsidized early-stage R&D activities* in the pre-launch development phase for the 7E7/787 that they consider were either ‘comparable to, or more demanding’ than, the types of tasks that Boeing conducted under the relevant aeronautics R&D programmes, and note the time that was required to conduct those unsubsidized tasks.”<sup>553</sup> As explained by the Panel, the Boeing Report uses these time estimates “as a proxy” for how much time “Boeing would have needed in the counterfactual scenario to conduct the early-stage research that it actually conducted under the aeronautics

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<sup>548</sup> Boeing Engineers Statement, paras. 3, 41 (Exhibit USA-283(BCI)).

<sup>549</sup> US SWS, para. 767.

<sup>550</sup> See Boeing Engineers Statement, paras. 3–41 (Exhibit USA-283(BCI)).

<sup>551</sup> Compliance Panel Report, para. 9.136 (citing Boeing Engineers Statement, paras. 4–5 (Exhibit USA-283(BCI))).

<sup>552</sup> Compliance Panel Report, para. 9.162.

<sup>553</sup> Compliance Panel Report, para. 9.162 (citing Boeing Engineers Statement, para. 7 (Exhibit USA-283(BCI))) (emphasis added).

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R&D.”<sup>554</sup> Further, the Boeing Report focuses on the starting time for the counterfactual analysis – 2002, when “Boeing undertook intensive pre-launch product development of two all-new aircraft, focusing first on the Sonic Cruiser and then the 7E7, which would come to be known as the 787.”<sup>555</sup>

364. The engineers relied on Boeing’s actual R&D experience on the 787 program as an indicator of the scale and risk of additional pre-launch R&D that Boeing would be willing to undertake under the counterfactual scenario, and compared that to the cost and effort involved with the relevant U.S. R&D programs.<sup>556</sup> As noted by the Panel, the Boeing Report “identif{ied} aspects of the development of key technological areas of the 787, including tasks related to material choice and design for the fuselage, the construction of early wing box designs necessary to develop the 787 composite wing, the development of CFD design tools, and of prototypes of generators and motor controllers for the 787 more-electric system architecture.”<sup>557</sup> Thus, the Boeing engineers used proxies based on a great deal of detail related to the findings from the original proceeding, which made them reliable.

365. The EU responded to the U.S. demonstration with the Airbus Report. That report does not put forward a competing timeline or benchmarks to estimate how long it would have taken Boeing to launch the 787 absent the relevant subsidies. As noted above, neither it nor other EU argumentation provides “a clear statement on its behalf, or supporting evidence, that the 787 would not have launched until after the end of the implementation period.”<sup>558</sup>

366. Instead, the Airbus Report is largely confined to criticizing the evidence put forward by the United States, based on vague and conceptual notions of how long research and development takes as a general matter. As explained by the Panel, the Airbus Report attempts to provide a response to and critique of the Boeing Report as well as a purported justification for why it would have taken Boeing more than ten years to develop, on its own, the 787 technologies and design tools obtained from the aeronautic R&D subsidies.<sup>559</sup>

367. The Airbus Report asserts that Boeing’s unsubsidized technology development efforts would have required a ten-year incubation period to allow for certification and testing related to

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<sup>554</sup> Compliance Panel Report, para. 9.162.

<sup>555</sup> Boeing Engineers Statement, para. 6 (Exhibit USA-283(BCI)).

<sup>556</sup> Boeing Engineers Statement, para. 10 (Exhibit USA-283(BCI)).

<sup>557</sup> Compliance Panel Report, para. 9.162 (citing Boeing Engineers Statement, paras. 22–23, 30, 32— (Exhibit USA-283(BCI))).

<sup>558</sup> Compliance Panel Report, para. 9.153.

<sup>559</sup> Compliance Panel Report, para. 9.132 (citing Airbus Engineers Statement, (Exhibit EU-1014(HSBI))).

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the development of LCA technologies and their integration into a final design.<sup>560</sup> Yet neither the EU nor the Airbus Report provided an intelligible counterfactual timeline for the 787’s pre-launch R&D activity and subsequent launch. As the Panel found, “the European Union does not *itself* enumerate the specific additional tasks that Boeing should have reflected in its assessment, and importantly, the European Union does not provide evidence of how long Boeing would have needed to conduct any of the R&D tasks that were actually performed under the NASA and DOD aeronautics R&D programmes.”<sup>561</sup> Unsurprisingly, the Panel concluded that the EU “failed to provide specific evidence to rebut the timing estimates that the Boeing engineers provide for the specific R&D tasks discussed in their statement.”<sup>562</sup>

368. Moreover, the Airbus Report hides behind vague notions regarding the complexity of technology development and effectively attributes all 787 technological advancements – including those achieved exclusively through the efforts of Boeing and its suppliers – to the R&D subsidies, rather than isolating the *additional* time needed to launch the 787. Additionally, the EU seeks to add extra time to Boeing’s counterfactual timing estimate for subsequent technology maturation, post-launch development, and aircraft production – extra time that the Panel stressed does *not* reflect the effects of the NASA and DoD subsidies. Adding extra time for these activities would erroneously attribute unsubsidized activities to the R&D subsidies, as noted above.<sup>563</sup>

369. For these reasons, the United States previously argued, as noted by the Panel, that the Airbus Report is “highly generalized;” “unsupported by reference to real-world experience in the specific technologies at issue;” and erroneously assumes that Boeing would have needed additional time to conduct work *not performed* under the R&D programs.<sup>564</sup> These criticisms all remain true. The Panel observed correctly that the counterfactual analysis “should only take into account the additional time required to attain the increased knowledge and experience to undertake the subsidized aspects of the technology development process of the 787 in order to fill the gap in knowledge and experience.”<sup>565</sup> Because the EU’s framing of the counterfactual takes into account *all* development, maturation, production, and certification of the technologies underlying the 787, the EU improperly attributes all non-subsidized development to the R&D

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<sup>560</sup> Compliance Panel Report, para. 9.132-9.133.

<sup>561</sup> Compliance Panel Report, para. 9.164.

<sup>562</sup> Compliance Panel Report, para. 9.164.

<sup>563</sup> *See* Compliance Panel Report, para. 9.161.

<sup>564</sup> Compliance Panel Report, para. 9.134 (citing US SWS, para. 782).

<sup>565</sup> Compliance Panel Report, para. 9.134.

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subsidies at issue – and thus “improperly double counts” the amount of time needed to develop the 787.<sup>566</sup>

370. From these insights, it is evident that the Panel, following a careful evaluation of the competing evidence, properly credited the Boeing Report, and properly identified the flaws in the EU’s attempted rebuttal through the Airbus Report. Accordingly, the Panel was correct – and certainly well within its discretion – in concluding that the EU failed to establish that “absent the aeronautics R&D subsidies, Boeing would not have launched the 787 by the end of the implementation period in September 2012.”<sup>567</sup> In fact, as the Panel correctly found, Boeing would have launched the 787 “well before (i.e. at least several years before) the end of the implementation period.”<sup>568</sup>

371. With these considerations in mind, the United States now turns to the EU’s specific claims of error.

**C. The Panel Correctly Focused Its Counterfactual Analysis on the Date Boeing Would Have Launched the 787 in the Absence of the R&D Subsidies.**

372. The EU asserts that the Panel’s counterfactual analysis only took into account the launch date of the 787, and not the delivery date.<sup>569</sup> The EU argues that this supposed failure was inconsistent with Articles 5, 6.3, and 7.8 of the SCM Agreement, and represents a failure by the Panel to conduct an objective assessment under Article 11 of the DSU. The EU’s claims are erroneous, for the reasons explained below.

***1. The Panel’s focus on the counterfactual launch date was proper and consistent with Articles 5, 6.3, and 7.8 of the SCM Agreement.***

373. The EU contends that the Panel erred in applying Articles 5 and 6.3 of the SCM Agreement because it focused exclusively on the counterfactual launch date of the 787, rather than on “both launch and deliveries.”<sup>570</sup> To the contrary, the Panel properly focused on the counterfactual launch date while duly considering deliveries.

374. First, as a threshold matter, the parties now agree that the Panel posed the correct counterfactual question: “whether it is likely that, absent these subsidies, the 787 technologies would still not have been developed by the end of the implementation period and thus the 787

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<sup>566</sup> Compliance Panel Report, para. 9.134.

<sup>567</sup> Compliance Panel Report, para. 9.176.

<sup>568</sup> Compliance Panel Report, para. 9.176.

<sup>569</sup> EU Appellant Submission, para. 722.

<sup>570</sup> EU Appellant Submission, para. 722.

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would not have been present in the market by that time.”<sup>571</sup> Upon the 787’s launch, it would unquestionably be “present in the market” because it would be competing for sales against Airbus LCA. The Panel therefore correctly focused on the 787’s counterfactual launch timing.

375. Second, the Panel’s focus on launch is consistent with the original panel’s analysis. In its central causation finding, the original panel found that Boeing “most likely” would have either (1) developed a 767-replacement with the same technologies as the 787, but with a *launch* date “significantly later” than 2004 and without promised deliveries in 2008; or (2) launched a 767-replacement in 2004 that was not as “technologically innovative as the 787.”<sup>572</sup> The Appellate Body found the second scenario unsupported,<sup>573</sup> and concluded that “the NASA aeronautics R&D subsidies accelerated the technology development process by some amount of time, and, therefore gave Boeing an advantage in bringing its technologies to market.”<sup>574</sup> The compliance Panel had the same understanding, finding that “the aeronautics R&D subsidies accelerated Boeing’s development of technologies for the 787, which in turn enabled Boeing to launch the 787 earlier than otherwise would have been possible, thereby reducing Boeing’s time to market with the 787.”<sup>575</sup> The common thread from the original panel, through the Appellate Body, to the compliance Panel is that launch date is the critical timing consideration for assessing the competitive effects of the aeronautics R&D subsidies. Thus, the Panel correctly focused on launch.

376. Third, in focusing on the counterfactual 787 launch timing, the Panel did not take the position that a delay in the 787’s launch would have no impact on the timing of promised first deliveries or actual first deliveries. To the contrary, the Panel relied on the U.S. counterfactual timing estimate that “the launch *and delivery* of the 787 would have been delayed by approximately two years absent the pre-2007 aeronautics R&D subsidies . . . .”<sup>576</sup> However, the Panel was careful to ensure that its counterfactual analysis, like the original panel’s, isolated the effects of the aeronautics R&D subsidies, which accelerated the 787’s launch and, through the knock-on effects of the launch delay, the date of promised first deliveries and actual first deliveries. The Panel correctly rejected the EU’s arguments that the counterfactual duration between post-launch events would be different from what actually occurred:

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<sup>571</sup> Compliance Panel Report, para. 9.128. *See also* EU Appellant Submission, para. 722 (stating that the quoted counterfactual question represents a proper interpretation of Articles 5 and 6.3 of the SCM Agreement).

<sup>572</sup> Compliance Panel Report, para. 9.124 (citing *US – Large Civil Aircraft (Panel)*, para. 7.1775) (emphasis added).

<sup>573</sup> *US – Large Civil Aircraft (AB)*, para. 1025.

<sup>574</sup> *US – Large Civil Aircraft (AB)*, para. 980.

<sup>575</sup> Compliance Panel Report, para. 9.126.

<sup>576</sup> Compliance Panel Report, para. 9.173 (emphasis added).



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The European Union's affirmative case regarding the amount of additional time that it would have taken Boeing to develop and launch the 787 proceeds on the basis that the relevant counterfactual question concerns the amount of additional time that it would have taken an LCA manufacturer like Boeing to research, develop, produce, certify, and deliver the 787. If we were to formulate the counterfactual question in the terms proposed by the European Union, the estimate of the time we arrive at would also include time to undertake activities (internal R&D conducted by Boeing and its suppliers, production, certification and delivery) that were not found to have been effects of the pre-2007 aeronautics R&D subsidies in the original proceeding. The original panel did not consider that Boeing's technology development in relation to the 787 was solely the result of Boeing's subsidized participation in NASA and DOD aeronautics R&D programmes. Nor did it consider that the acceleration effect of the aeronautics R&D subsidies encompassed phases in the development of the 787 beyond its launch. Therefore, by formulating the counterfactual question in terms of the amount of additional time it would have taken Boeing to research, develop, produce, certify and deliver the 787 absent the subsidies, the European Union's estimate erroneously attributes to the pre-2007 aeronautics R&D subsidies aspects of the 787's development that were not found to have been accelerated by Boeing's participation in the relevant NASA and DOD aeronautics R&D programmes.<sup>577</sup>

377. Accordingly, the Panel properly calibrated its counterfactual analysis. It focused on launch to isolate the effects of the subsidies, and it assigned probative weight to the U.S. counterfactual estimate of a two-year launch delay (from 2004 to 2006) accompanied by corresponding two-year delays in promised first delivery (from 2008 to 2010) and actual first delivery (from 2011 to 2013). At the same time, the Panel correctly rejected the EU's suggestion that, absent the subsidies, the time between post-launch events would change (namely, that the time between launch and promised first delivery would exceed four years, or that the time between launch and actual first delivery would exceed 7.5 years). To the extent that the EU now faults the Panel for rejecting such an approach, it is asking the Appellate Body to mistakenly attribute the effects of non-subsidy factors to the aeronautics R&D subsidies.

378. Fourth, the EU has never established that the Panel, in focusing on the counterfactual launch timing, has failed to properly capture the effects of the aeronautics R&D subsidies. For example, the EU never even attempted to demonstrate that, in a counterfactual featuring a 787 launch in 2006, promised first delivery in 2010, and actual first delivery in 2013, greater attention to the delivery dates would make any difference for the adverse effects analysis. Given

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<sup>577</sup> Compliance Panel Report, para. 9.152.

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this context, the EU has no basis for alleging that Articles 5 and 6.3 of the SCM Agreement somehow required the Panel to have examined delivery timing issues more closely.

379. Fifth, on appeal, the EU contends that greater attention to counterfactual deliveries would implicate “crucial questions” regarding the effects of the aeronautics R&D subsidies that were before the Panel – *i.e.*, the timing of 787-8 delivery positions in sales campaigns; supposedly delayed technological advancements that would spill over to the 787-9/10, 737 MAX, and 777X; and the timing of delivery positions in sales campaigns involving the 787-9/10, 737 MAX, and 777X.<sup>578</sup> As an initial matter, it is misleading for the EU to describe these as crucial questions before the Panel when it barely adverted to these issues, if at all. In any event, these questions are devoid of substance, since the EU never established that these represent pathways for adverse effects that would occur even with a counterfactual 787 launch well before the implementation period.

380. The lost sales findings from the original proceeding were based on the accelerated launch of the 787, and the finding that Airbus would have won additional sales between 2004 and the counterfactual date when Boeing would have launched the 787 in the absence of the subsidies. Therefore, in the counterfactual scenario, Boeing’s promised first delivery date (and actual first delivery, *i.e.*, entry into service), can be assumed to experience a delay equivalent to the counterfactual launch delay. But what cannot be assumed, and what the EU failed to establish, is that the delivery positions Boeing offered in any particular sales campaign would have been at all different, much less that the positions offered would have been less attractive *vis-à-vis* Airbus’s counterfactual offer in that campaign.

381. Where launch is delayed by some number of years, Boeing’s backlog of outstanding orders would also be reduced with respect to those years. Indeed, this is reflected in the findings of significant lost sales in the original proceeding.<sup>579</sup> Therefore, there is no basis to find that the delivery dates Boeing could offer a customer in a sales campaign after the end of the implementation period (or even before then) would be any different than the dates it actually offered.

382. Even if the delayed launch of the 787 caused a delay in the delivery positions Boeing could offer in a particular campaign, then the same would hold true for the delayed launch of the A350 XWB. The Panel considered it unlikely – and explicitly found that the EU did not establish – that the A350 XWB ever would have been launched before the 787.<sup>580</sup> Indeed, the EU concedes in its Appellant Submission that the A350 XWB was launched in response to the

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<sup>578</sup> See EU Appellant Submission, para. 728.

<sup>579</sup> See *US – Large Civil Aircraft (Panel)*, para. 7.1787.

<sup>580</sup> See Compliance Panel Report, para. 9.228.

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787.<sup>581</sup> Thus, Airbus too would not have been able to offer the delivery dates it actually offered. Accordingly, there is no basis to find that the counterfactual delivery positions Boeing could offer would be any less attractive vis-à-vis the counterfactual delivery positions Airbus could offer.

383. Therefore, the EU would have needed to establish that, for a particular sales campaign, the 787 delivery dates Boeing could offer would have been less attractive vis-à-vis the A350 XWB in the absence of the subsidies. Or, at minimum, the EU did not attempt to establish this, and the Panel made no findings to this effect.

384. The EU also failed to establish any linkage between 787 delivery timing and the development or delivery positions for the 787-9/10, 737 MAX, and 777X. In the first place, the Panel correctly found that the EU failed to “provide credible evidence” establishing any subsidy technology spillover effects from the 787 to those other Boeing LCA models.<sup>582</sup> Moreover, there is not a shred of support for the proposition that, in focusing on the 787’s counterfactual launch, the Panel missed technology spillovers to the 787-9/10, 737 MAX, and 777X that it would have detected through greater focus on counterfactual 787 deliveries.

385. Thus, the Panel’s focus on launch timing did not lead it to overlook “crucial” counterfactual questions.

***2. The Panel’s focus on counterfactual launch date is consistent with its other findings and the adopted findings from the original proceeding.***

386. The EU raises two grounds upon which it believes the Panel failed to make an objective assessment under Article 11 of the DSU. First, the EU claims that the Panel, in focusing on launch date in its counterfactual analysis, “exceeded the bounds of its discretion as the trier of fact by providing ‘internally inconsistent reasoning.’”<sup>583</sup> Second, the EU asserts that this focus improperly deviated from the findings adopted by the DSB in the original proceedings.<sup>584</sup> Both claims are meritless. We address each in turn.

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<sup>581</sup> See EU Appellant Submission, para. 969 (“Thus, with respect to prices for the A330 that were delivered after the end of the implementation period, this meant that the Panel was required to conduct a comparison of an observable factual situation (actual A330 prices) with a *counterfactual* situation (counterfactual A330 prices, absent the subsidies). The counterfactual situation with respect to prices for deliveries of the A330 after the end of the implementation period was that, in the absence of the US subsidies, neither the 787 (whose launch was much accelerated by the US aeronautics R&D subsidies) nor the A350 XWB (which was developed in reaction to the 787) would have been launched and delivered by the end of the implementation period.”).

<sup>582</sup> See Compliance Panel Report, paras. 9.184-9.185, 9.368.

<sup>583</sup> EU Appellant Submission, para. 730 (internal citations omitted).

<sup>584</sup> EU Appellant Submission, para. 737.

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- a. *The Panel’s counterfactual focus on launch date is consistent with its other findings.*

387. The question for an appeal under DSU Article 11 is whether the Panel’s reasoning contains “specific errors that are so material that, ‘taken together or singly’, they undermine the objectivity of the panel’s assessment of the matter before it.”<sup>585</sup> In arguing that the Panel provided “internally inconsistent reasoning,”<sup>586</sup> the EU cites other portions of the Panel report where the Panel purportedly noted the importance of “delivery positions” – both in the immediate context, and in “findings pertaining to the conditions of competition and product market.”<sup>587</sup> None of these arguments have merit and they do not cast doubt on the objectivity of the Panel’s assessment.

388. The EU first cites the Panel’s reference to “delivery availability” as a “critical factor” influencing a customer’s decision to buy Boeing LCA in lieu of Airbus LCA.<sup>588</sup> The EU fails to explain how this reference in its discussion of sales campaigns presents an inconsistency with the remainder of the Panel’s analysis. As explained in Sections XI.C.1 and XIII, the EU has not presented evidence showing that delivery positions for the 787 vis a vis the A350 XWB in the sales campaigns would have been any different under the counterfactual. The EU never established – and the Panel, as such, never made factual findings – that a delay in the *promised* first delivery date would make the delivery slots offered by Boeing for particular sales campaigns any less attractive, especially considering that the A350 XWB was a competitive response to the 787. Moreover, the EU’s assumption that the 787 needed to be delivered before the technologies can spill over to another aircraft has no basis in fact, and in no way reflects a failure by the Panel to conduct an objective assessment.<sup>589</sup>

389. As noted previously, the original panel’s analysis concerned how the pre-2007 subsidies accelerated the *launch* of the 787, which in turn would impact the promised delivery date. The original panel found that, absent the subsidies, Boeing’s launch of the 787 would have been later than 2004, which in turn means that it could not promise first deliveries in 2008.<sup>590</sup> The Appellate Body stressed that the acceleration effect of the pre-2007 subsidies on the 787

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<sup>585</sup> *Peru – Agricultural Products (AB)*, para. 5.66 (internal citations and quotations omitted)

<sup>586</sup> EU Appellant Submission, para. 730 (internal quotation marks omitted).

<sup>587</sup> EU Appellant Submission, para. 731.

<sup>588</sup> EU Appellant Submission, para. 732 (citing Compliance Panel Report, para. 9.247).

<sup>589</sup> The Panel in the portion of the report quoted by the EU recognized that customers’ decisions for selecting Boeing LCA over Airbus LCA in a general sense are impacted by other factors, which can include relative delivery availability. *See* Compliance Panel Report, para. 9.247. The Panel, after discussing a variety of factors that impact customers’ decisions, concluded that “in each case there are factors other than price that explain why Airbus either did not *win the sale . . .*” *Ibid.* (emphasis added).

<sup>590</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1775.

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technology “enabled Boeing to launch the 787 earlier than otherwise would have been possible, thereby reducing Boeing's time to market with the 787.”<sup>591</sup> The compliance Panel similarly stressed the advantage “in bringing technologies to market{,}”<sup>592</sup> and that the relevant counterfactual concerns, as the EU states, “whether it is likely that, absent these subsidies, the 787 technologies would still not have been developed by the end of the implementation period and thus the 787 would not have been *present in the market* by that time.”<sup>593</sup> This analysis focuses on the impact of subsidies on the 787 launch, not the actual delivery, as previously discussed.

390. Thus, the original panel and Appellate Body findings were focused on the impact to the 787 *launch* and promised delivery dates at the time of launch. And rightly so, because the pre-launch R&D focused on innovation and efficiency developments aimed at bringing the 787 technologies to the market (*i.e.*, through *launch* of the 787). The EU never established that the delivery slots Boeing would have offered in a particular campaign would have been less attractive, or even different at all, absent the subsidies. Therefore, the Panel appropriately was focused on the counterfactual consistent with the findings from the original proceeding – whether the 787 launch acceleration effect attributable to the subsidies had run its course by the end of the implementation period, such that the market presence of the 787 could no longer be attributed to the subsidies. The Panel also considered whether the 787 technologies would have been sufficiently developed in time to spill over to other Boeing LCA models, and correctly determined that there would have been more than enough time for such spillovers to take place. Accordingly, the launch of those aircraft could also not be attributed to the pre-2007 R&D subsidies.

391. Thus, the Panel’s finding that delivery availability was important in no way required that it also find that the counterfactual delivery positions Boeing would offer in particular campaigns would be less attractive vis-à-vis the counterfactual delivery positions Airbus would offer in that campaign.

*b. The Panel’s counterfactual focus on launch date is consistent with the adopted findings in the original proceeding.*

392. The EU argues that the Panel committed an error for purposes of Article 11 of the DSU because its reasoning was inconsistent with the original panel’s findings that, according to the

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<sup>591</sup> Compliance Panel Report, para. 9.126.

<sup>592</sup> Compliance Panel Report, para. 9.126 (quoting *US – Large Civil Aircraft (Panel)*, para. 7.1775) (internal quotation marks omitted) (emphasis original).

<sup>593</sup> EU Appellant Submission, para. 720 (emphasis original) (citing *US – Large Civil Aircraft (AB)*, para. 980) (internal quotation marks omitted).

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EU, suggest actual delivery must be taken into account in the analysis of technology effects.<sup>594</sup> These arguments are meritless.

393. The EU’s submission quotes portions of the original panel and Appellate Body reports, and summarily concludes that the Panel’s analysis deviated from those findings. It first cites the original panel’s statement in its price effects analysis that the “impact of the aeronautics R&D subsidies on Airbus’ {s} sales in {certain} { } country markets will not be reflected in delivery data until the 787 is delivered . . . .”<sup>595</sup> The EU fails to explain how this insight has any relevance to the counterfactual question before the Panel – let alone how the Panel’s counterfactual assessment would have been any different had it somehow it devoted greater attention to counterfactual delivery timing.

394. Furthermore, the EU ignores the context of the quoted statement, *i.e.*, its conclusion that, “*but for* the effects of certain of the aeronautics R&D subsidies, Airbus would have obtained additional orders for its A330 or Original A350 LCA from customers in third country markets in Australia, Ethiopia, Kenya, and Iceland, and thus would not have suffered the threat of displacement or impedance of its exports from third country markets within the meaning of Article 6.3(b) of the SCM Agreement.”<sup>596</sup> Of course, Boeing won these orders because the 787 had been launched and was thereby present in the market, even though it had not yet been delivered to any customers.

395. The EU next reproduces the following passage from the original panel report:

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).<sup>597</sup>

396. This should be familiar by now. The EU already alleged that the Panel erred in the application of Article 7.8 of the SCM Agreement and under Article 11 of the DSU on the basis of this statement. As the United States demonstrated in Sections VI.B-C above, the Panel did not err. It explicitly acknowledged this statement from the original panel report and explained why its analysis in the compliance proceeding was consistent with the analysis in the original proceeding, rather than deviating it. The U.S. rebuttal above is equally fatal to the EU’s reliance on that statement here.

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<sup>594</sup> See EU Appellant Submission, paras. 737–747.

<sup>595</sup> EU Appellant Submission, para. 739 (citing *US – Large Civil Aircraft (Panel)*, para. 7.1791) (emphasis omitted).

<sup>596</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1791.

<sup>597</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1812, quoted in EU Appellant Submission, para. 739.

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397. The EU also reiterates its argument that the compliance Panel’s counterfactual analysis is inconsistent with the original panel’s finding that the aeronautics R&D subsidies accelerated both the launch and first delivery of the aircraft.<sup>598</sup> As noted previously, the compliance Panel’s emphasis on launch date in conducting the counterfactual analysis is entirely consistent with the original panel’s finding that absent the subsidies, Boeing would not have launched the 787 in 2004 with promised deliveries in 2008. This finding in no way supports the EU’s argument that the compliance Panel failed to conduct an objective assessment by focusing on launch, rather than delivery dates, in evaluating whether the technology effects persist beyond September 2012. The Panel found that the counterfactual launch would have occurred at least several years before the end of the implementation period, but it did not fail to consider that this delayed launch would result in a corresponding delay in promised and actual first delivery. Indeed, the Panel relied on the U.S. counterfactual timing estimate that “the launch *and delivery* of the 787 would have been delayed by approximately two years absent the pre-2007 aeronautics R&D subsidies . . . .”<sup>599</sup>

398. Moreover, the EU misconstrues the Appellate Body’s reference to the subsidies allowing Boeing to “deliver the 787 earlier than would have otherwise been possible.”<sup>600</sup> The subsidies accelerated the launch of the 787, which in turn accelerated promised and actual first delivery by the same amount of time. But the time between launch and delivery was not accelerated by the subsidies. The acceleration effect took place with respect to pre-launch R&D. Thus, the Panel’s analysis is not even incorrect, much less so egregious as to rise to the level of being inconsistent with Article 11.

399. In sum, the EU has not established that the Panel, in considering launch and delivery of the 787, failed to conduct an objective assessment such that it acted inconsistently with Article 11 of the DSU.

**D. The Panel Used Appropriate Benchmarks in Assessing the Counterfactual Timing of the 787’s Launch Absent Aeronautics R&D Subsidies.**

400. The EU contends that the Panel addressed the proper counterfactual at issue, but “relied on facts that were not fit for {the} purpose” of conducting this assessment.<sup>601</sup> The EU asserts that the Panel erred in solely relying on the time estimates for R&D provided by the Boeing Report, which it claims focused on later stages of product development, and that the Panel

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<sup>598</sup> See EU Appellant Submission, paras. 744-745.

<sup>599</sup> Compliance Panel Report, para. 9.173 (emphasis added).

<sup>600</sup> EU Appellant Submission, para. 745 (citing *US – Large Civil Aircraft (AB)*, para. 1023) (emphasis omitted).

<sup>601</sup> EU Appellant Submission, para. 750.

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should have also considered early stages of fundamental R&D.<sup>602</sup> It claims that the Panel’s failure to account for fundamental pre-launch R&D in that assessment was inconsistent with Articles 5, 6.3, and 7.8 of the SCM Agreement, as well as failing to provide an objective assessment for purposes of Article 11 of the DSU.<sup>603</sup> The EU’s appeals fail, for the reasons explained below.

***1. The appellate process does not allow the EU to recast and relitigate factual findings made by the Panel.***

401. As an initial matter, the EU’s appeal must be rejected because it represents an attempt to have the Appellate Body re-weigh the factual findings of the Panel – to, in effect, get an unfair second chance to recast and reinforce factual arguments that the EU made, or failed to make, before the compliance Panel. It is not the role of the Appellate Body to consider the factual evidence anew and determine if it would have reached the same factual determinations made by the Panel.

***2. The Panel correctly applied Articles 5, 6.3, and 7.8 of the SCM Agreement in assessing the substance and timing of Boeing’s counterfactual pre-launch R&D efforts for the 787.***

402. The EU criticizes the Boeing Report, and the Panel’s reliance on it, as focusing solely on “later stage, near-term R&D” that it claims “bore no resemblance to the early stage technologies that the original panel and the Appellate Body found to have been accelerated by the U.S. subsidies.”<sup>604</sup> Based on this reasoning, the EU claims that the focus on these “near-term” technologies “did not answer the proper counterfactual question – which is, again, whether, absent the aeronautics R&D subsidies, the fundamental, early-stage technologies relevant to the 787 would have been developed by the end of the implementation period.”<sup>605</sup> As such, the EU claims that the Panel, by relying on the Boeing Report in conducting its counterfactual analysis, “erred in the application of Articles 5, 6.3, and 7.8 of the SCM Agreement.”<sup>606</sup>

403. The EU’s “early-stage R&D” argument is flawed for several reasons, detailed below. Most important, the EU’s argument, though styled as a challenge to the Panel’s application of SCM Agreement provisions, is actually a request that the Appellate Body re-weigh the complex evidentiary record. The Panel has already examined this evidence and found that the Boeing engineers’ estimate of the additional amount of time required for the counterfactual 787 launch is

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<sup>602</sup> EU Appellant Submission, para. 750.

<sup>603</sup> EU Appellant Submission, para. 751.

<sup>604</sup> EU Appellant Submission, paras. 767–768 (emphasis omitted).

<sup>605</sup> EU Appellant Submission, para. 768 (emphasis omitted).

<sup>606</sup> EU Appellant Submission, para. 769.



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based on relevant, unsubsidized “early-stage R&D activities.”<sup>607</sup> This is sufficient to dispose of the EU’s claim of legal error, but it is just one of many flaws in the EU’s arguments. Moreover, the EU either ignores or mischaracterizes key factors supporting the Panel’s counterfactual assessment: (a) Boeing’s strong commercial incentive to develop a replacement for the 767 that substantially increased in the early 2000s; and (b) the substantial, unsubsidized knowledge and experience of Boeing and its suppliers, which did not sit idle from the late 1980s through the early 2000s, but rather advanced along with technology related to the 787 and other LCA. Finally, the errors in the EU’s argument, and in its estimate of the counterfactual timing of the 787’s launch that it has offered for the first time in this appeal, is further confirmed by the Panel’s unappealed findings regarding the timing of Airbus’s development of the A350 XWB, which corroborates the Boeing Report’s time estimates and shows that the Panel’s reliance on the latter factual evidence was proper.

*a. The Panel based its findings on Boeing’s unsubsidized early-stage R&D activities, contrary to the EU’s arguments.*

404. The Boeing Report analyses specific, unsubsidized, early-stage R&D activities to estimate the additional amount of time Boeing would have needed to obtain the knowledge and experience it gained through the subsidized aeronautics R&D programs. The EU errs in characterizing those unsubsidized R&D activities as “later stage, near-term R&D” activities that are not probative for purposes of the counterfactual analysis.<sup>608</sup>

405. The Boeing engineers explained how their estimate that, absent the subsidies, launch and delivery of the 787 would have been delayed by approximately two years, in fact, allowed for iterative learning and trial-and-error because such processes occurred in the work that the Boeing engineers used as benchmarks:

Our analysis estimated the additional time it would take for Boeing to fill those parts on its own. It was based on the best available benchmarks: Boeing’s real-world experience on comparable R&D projects undertaken in connection with the 787 program. Contrary to the Airbus critique,<sup>609</sup> these benchmark experiences included iterative learning, “trials and errors,” and far more than a “paper design.”<sup>610</sup>

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<sup>607</sup> Compliance Panel Report, para. 9.162.

<sup>608</sup> See EU Appellant Submission, para. 767.

<sup>609</sup> Boeing Engineers Reply, para. 16 (Exhibit USA-359(BCI)), citing Airbus Engineers Statement, paras. 13–14, 27 (Exhibit EU-1014(BCI)).

<sup>610</sup> Boeing Engineers Reply, para. 16 (Exhibit USA-359(BCI)), citing Airbus Engineers Statement, paras. 13–14, 27 (Exhibit EU-1014(BCI)).

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The unsubsidized R&D activity analyzed in the Boeing Report represents “Boeing’s own R&D experience with early-stage technology problems that were at least as challenging (typically more so),” compared to the subsidized R&D activity at issue.<sup>611</sup> This is illustrated by Boeing’s R&D efforts concerning the 787’s composite barrel fuselage:

[BCI]<sup>612</sup>

406. Moreover, the EU’s suggestion that Boeing only knew that 787 technologies were feasible because of decades of participation in government-sponsored R&D programs is meritless because the Boeing engineers, in fact, took account of the uncertainty of R&D in the benchmarks they compared to the research subsidized by those programs.

Our analysis explicitly adopted the WTO Panel’s finding that, absent those programs, Boeing would have lacked the knowledge and experience to proceed with the 787 when it did. Our analysis then assessed how long it would have taken to acquire that knowledge and experience before proceeding with the subsequent stages of the 787 development program as we did. We did not assume that Boeing would be undertaking rote research exercises where the outcome was known in advance. In fact, we controlled for this by evaluating the types of research activities performed under the NASA and DOD programs against Boeing’s own R&D experience with early-stage technology problems that were at least as challenging (typically more so), and where the outcome of the research was similarly unknown at the outset.<sup>613</sup>

407. Based on its analysis of this and all other relevant evidence, the Panel found the EU’s critique of the Boeing engineers’ methodology to be “unpersuasive.”<sup>614</sup> In explaining this finding, the Panel found that the Boeing engineers had based their counterfactual timing estimate on benchmarks consisting of “specific unsubsidized early-stage R&D activities”:

The Boeing engineers identify aspects of the development of key technological areas of the 787, including tasks related to material choice and design for the fuselage, the construction of early wing box designs necessary to develop the 787 composite wing, the development of CFD design tools, and of prototypes of generators and motor controllers for the 787 more-electric system architecture. They derive their estimates by first identifying other, *specific unsubsidized early-stage R&D activities in the pre-launch development phase for the 7E7/787* that

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<sup>611</sup> Boeing Engineers Reply, para. 6 (Exhibit USA-359(BCI)).

<sup>612</sup> Boeing Engineers Reply, para. 17 (Exhibit USA-359(BCI)) (footnotes omitted).

<sup>613</sup> Boeing Engineers Reply, para. 6 (Exhibit USA-359(BCI)).

<sup>614</sup> Compliance Panel Report, para. 9.162.

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they consider were either “comparable to, or more demanding” than, the type of tasks that Boeing conducted under the relevant aeronautics R&D programmes, and note the time that was required to conduct those unsubsidized R&D tasks.<sup>615</sup>

408. The Panel observed that the Boeing engineers’ methodological approach “is in certain respects similar to the approach taken by the panel in the original proceeding”<sup>616</sup> and found that the EU “failed to provide specific evidence to rebut the timing estimates that the Boeing engineers provide for the specific R&D tasks discussed in their statement.”<sup>617</sup> Thus, the Panel based its counterfactual analysis on probative evidence concerning specific, unsubsidized, early-stage R&D activity related to the 787, and it considered but rejected as unpersuasive the EU’s highly generalized critique of that evidence. Thus, the Panel has complied with Articles 5 and 6.3 by basing its analysis on what *it* considered to be evidence regarding early-stage research. The EU’s belief that this evidence did not reflect early stage research is a question of weighing the evidence, rather than of applying Articles 5 and 6.3 of the SCM Agreement.

*b. The Panel’s counterfactual analysis is supported by evidence of Boeing’s compelling commercial incentive to develop the 787.*

409. The EU’s claim of legal error relies on an erroneous dichotomy between “early-stage technologies” corresponding to the aeronautics R&D subsidies and the so-called “near-term technologies” analyzed by the Boeing engineers, which supposedly bear “no resemblance” to the former.<sup>618</sup> The EU mistakenly assumes that early-stage R&D must always occur well before an LCA producer undertakes pre-launch R&D, and that the pace of early-stage R&D is unaffected by the broader commercial context. Such assumptions ignore the Panel’s findings, discussed above, confirming that the Boeing engineers’ counterfactual timing estimate was based on unsubsidized, “early-stage” R&D activity and therefore probative for purposes of the Panel’s counterfactual analysis. The EU also ignores Boeing’s substantial commercial incentives to develop a replacement for the 767 in the early 2000s, such that it could have and would have pursued the subsidized R&D through its own independent efforts at a faster pace than actually occurred through the subsidies. Below, the United States first discusses how these near-term commercial incentives are fully consistent with the DSB’s adopted findings regarding disincentives associated with long-term R&D activity. Second, we explain how the long-term disincentives to undertake riskier R&D diminished for Boeing as its near-term commercial priorities increased by the early 2000s. Finally, we explain why Boeing had strong commercial incentives to develop a 767-replacement in the early 2000s.

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<sup>615</sup> Compliance Panel Report, para. 6.162 (footnote omitted; emphasis added).

<sup>616</sup> Compliance Panel Report, para. 9.163.

<sup>617</sup> Compliance Panel Report, para. 9.164.

<sup>618</sup> See EU Appellant Submission, para. 768.

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- a. The reality that near-term commercial priorities incentivized Boeing to pursue internal R&D efforts at a faster pace is consistent with the adopted findings in the original proceedings.*

410. As explained previously, the EU argues that the Panel, in conducting its counterfactual analysis, needed to show that Boeing, absent the subsidies “would have been able to develop the specific technologies that the original panel found were accelerated by the U.S. subsidies by the end of the implementation period.”<sup>619</sup> The EU defines these “specific technologies” as including “the earliest, most fundamental, stages of research” and covering a lengthy period of time that “mostly occurred between 1989 and early 2000.”<sup>620</sup> It argues that the value in the subsidies comes from “the experience gained and lessons learned from doing the early-stage fundamental research . . . .”<sup>621</sup> From these observations, the EU attempts to draw an inconsistency between (1) the original panel’s findings that the NASA R&D programs accelerated the development of technologies that included fundamental R&D, and (2) the Boeing engineers’ observation, supported by specific examples, that its internal R&D proceeds at a faster pace when developing an aircraft of high priority to the company. The EU’s argument fails to account for Boeing’s substantial commercial incentives to develop the 787 by the mid-2000s, and the general advancement of aviation knowledge and technology.<sup>622</sup>

411. From the EU’s perspective, what it describes as “early stage” R&D is not subject to such factors, and remains equally long term and risky forever – such that, absent the subsidies, the benefits can never outweigh the disincentives to ensure the R&D would be performed, and the 787 would never be launched. This is a fundamentally flawed position, and decidedly at odds with the original panel and Appellate Body findings that the NASA and DoD research at issue *accelerated* the 787’s launch to a point in time earlier than when Boeing would have launched the program absent subsidies.<sup>623</sup> The original panel and the Appellate Body did not find that the research reflected the sole source for the technology. The compliance Panel properly recognized that there is no evidence, let alone findings from the original panel, supporting the “possibility that Boeing would have taken a commercial decision not to proceed with the development of the 787 with all of the technologies, absent the pre-2007 aeronautics R&D subsidies.”<sup>624</sup>

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<sup>619</sup> EU Appellant Submission, para. 762 (emphasis omitted).

<sup>620</sup> EU Appellant Submission, para. 763 (emphasis omitted).

<sup>621</sup> EU Appellant Submission, para. 765.

<sup>622</sup> Compliance Panel Report, para. 9.155.

<sup>623</sup> Compliance Panel Report, para. 9.156.

<sup>624</sup> Compliance Panel Report, para. 9.157.

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- ii. *The disincentives to conduct long-term riskier R&D diminish as near-term commercial priorities arise.*

412. The compliance Panel agreed with the original panel’s finding that Boeing developed certain technologies at a faster pace with the NASA R&D subsidies than without. The Panel also emphasized that it “agree{d} with the original panel’s general observations regarding disincentives inherent in conducting long-term, high-risk aeronautics R&D . . . .”<sup>625</sup> The Boeing Report similarly recognized that these disincentives exist in conducting “early-stage aeronautics research where the commercial payoff is highly uncertain, distant, and/or difficult to capture . . . .”<sup>626</sup>

413. But this does not mean, as the EU suggests, that these disincentives, and the resulting speed at which R&D is conducted and the 787 technology development is achieved, would be the same for Boeing in 2002 under the counterfactual as it was for Boeing in the decade-plus time period preceding the early 2000s, when the bulk of Boeing’s work under the relevant NASA programs occurred; when Boeing and its suppliers knew less about the technologies at issue; and before Boeing made replacing the 767 a top commercial priority.

414. The Boeing Report thoroughly addresses the incentives and disincentives to conducting early-stage research related to the 787. It stresses, as the Panel recognized, that the disincentives for this early-stage, long-term research “diminish significantly where an aircraft manufacturer identifies a compelling need to develop a new product requiring specific attributes that are difficult or impossible to offer using existing technology.”<sup>627</sup> The Panel likewise recognized that the “disincentives diminish as a practical matter as near-term commercial priorities arise.”<sup>628</sup> As the United States similarly explained to the Panel, the “disincentives diminish as the risk of undertaking the research declines with the growth in relevant knowledge, the commercial need for such research becomes more urgent, and the time for recouping the investment in research shortens.”<sup>629</sup> At some point the disincentives “cease to inhibit Boeing’s own R&D activity in the technologies covered by the underlying findings{,}” as the risks of conducting the R&D decline and the importance of the technology increases for Boeing.<sup>630</sup>

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<sup>625</sup> Compliance Panel Report, para. 9.155.

<sup>626</sup> Boeing Engineers Statement, para. 9 (Exhibit USA-283)(BCI).

<sup>627</sup> Compliance Panel Report, para. 9.138 (quoting Boeing Engineers Statement, para. 9 (Exhibit USA-283)(BCI)) (internal quotation marks omitted).

<sup>628</sup> Compliance Panel Report, para. 9.155.

<sup>629</sup> US SWS, para. 750 (citing US FWS, paras. 794–95).

<sup>630</sup> US SWS, para. 751.

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415. The Boeing engineers discussed this dynamic in their criticisms of the Airbus Report:

As the relevant knowledge base grows over time, a given R&D project becomes less risky. And when a company like Boeing faces the commercial imperative to bring to market a highly-efficient new aircraft, and commits the resources to do so, the payoffs of potentially relevant early-stage R&D become more concrete and the time to recoup R&D investment shortens.<sup>631</sup>

Upon considering this evidence, the Panel correctly found that Boeing’s commercial imperatives would impel it to take the necessary steps to develop a replacement for the 767.<sup>632</sup>

*iii. Boeing had substantial commercial incentives to develop the 787 technologies in the early 2000s.*

416. The circumstances described above explain precisely the situation that Boeing faced in the 2000s, when the company, as explained by its engineers, “determined that (a) a critical priority was developing a new, highly-efficient mid-sized twin-aisle aircraft to replace the 767 and serve anticipated demand for point-to-point long-haul travel, and (b) customers demanded significant breakthroughs in efficiency but were reluctant to pay more than the acquisition cost of the 787 and A330.”<sup>633</sup> As the original panel stated:

we are satisfied from the evidence that Boeing's assessment in the late 1990s that route fragmentation would lead to a larger number of lower-volume routes, best served by a mid-sized, extended range aircraft (a commercial assessment unrelated to the subsidies), along with the age of the 767, *likely meant that Boeing needed to develop an LCA to replace the 767 in the 200 – 300 seat wide-body product market, and that it would have done so in the early- to mid- 2000s.*<sup>634</sup>

417. The compliance Panel, upon considering the relevant evidence, correctly found that “the commercial imperatives in the early 2000s were such that a critical commercial priority for Boeing was to develop a new, highly-efficient mid-sized, twin-aisle aircraft to replace the 767.”<sup>635</sup> It emphasized the original panel’s finding that the evidence showed “Boeing would

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<sup>631</sup> Boeing Engineers Reply, para. 9 (Exhibit USA-359(BCI)).

<sup>632</sup> Compliance Panel Report, paras. 9.155-9.156.

<sup>633</sup> Boeing Engineers Statement, para. 10 (Exhibit USA-283(BCI)).

<sup>634</sup> *US – Large Civil Aircraft (Panel)*, para. 1774 (emphasis added), cited in US SWS, para. 755.

<sup>635</sup> Compliance Panel Report, para. 9.155. See also *US – Large Civil Aircraft (Panel)*, para. 7.1747 (“{W}e are satisfied from the evidence that Boeing's assessment in the late 1990s that route fragmentation would lead to a larger number of lower-volume routes, best served by a mid-sized, extended range aircraft (a commercial assessment unrelated to the subsidies), along with the age of the 767, likely meant that Boeing needed to develop an LCA to replace the 767 in the 200 – 300 seat wide-body product market, and that it would have done so in the early- to mid-

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have developed an LCA to replace the 767” and that the EU “did not object to this as it did not argue that Boeing would not have launched a new aircraft in the 200-300 seat LCA product market.”<sup>636</sup> The compliance Panel also found that Boeing had the capabilities to do so, “based on its engineering and technological capabilities unrelated to the aeronautics R&D subsidies, and those of its suppliers of developing such an aircraft.”<sup>637</sup>

418. The Panel’s findings are also consistent with the EU’s arguments before the original panel that Boeing could have launched the 787 technology in the absence of the R&D subsidies, but that the launch would have been delayed.<sup>638</sup> As the United States explained to the compliance Panel, the “technology effects attributed to the R&D subsidies were premised on the notion that the research would not have gone forward at the time and in the manner it did in the absence of the subsidies;” and “{t}he acceleration effect then results from the research being conducted earlier than it otherwise would (*e.g.*, in the late 1980s instead of the early 2000s).”<sup>639</sup>

419. As such, “{u}nder these circumstances, Boeing had ample incentive to, and would, undertake whatever additional early-stage research necessary to augment its ongoing R&D for the 787{,}” which is evidenced by the “risky, early-stage R&D Boeing actually conducted on a number of technologies during the 787 development program . . . .”<sup>640</sup> The Boeing engineers provided a series of specific, factually supported benchmarks for the subsidized activities showing that, in the context of a high-priority aircraft development program like the 787, Boeing conducts challenging, early-stage R&D activity in the pre-launch phase, and that this activity proceeds at a much faster pace than it would if it were not essential to satisfying a near-term commercial imperative.<sup>641</sup>

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2000s.”); *ibid.* at note 3704 (“One could presumably also argue that Boeing would not have launched a new aircraft in this product market and would have continued to offer the 767, however, even the European Communities does not argue this.”).

<sup>636</sup> Compliance Panel Report, note 2919 (*See US – Large Civil Aircraft (Panel)*, para. 7.1774, note 3704); Boeing Engineers Statement, paras. 9–10 (Exhibit USA-283(BCI)).

<sup>637</sup> Compliance Panel Report, para. 9.156.

<sup>638</sup> Compliance Panel Report, para. 9.156, note 2921 (quoting *US – Large Civil Aircraft (Panel)*, para. 4.280 (“{t}he European Communities argues that, had Boeing needed to develop the 787 using its own resources, the 787 would likely not have been launched any earlier than mid-2006, by which time Airbus would have been ready to compete with the A350XWB-800. Moreover, a non-subsidized 787, like the A350XWB-800, would have required a longer period before it could be delivered.”))

<sup>639</sup> US SWS, para. 768 (emphasis omitted).

<sup>640</sup> Boeing Engineers Statement, para. 10 (Exhibit USA-283(BCI)) (internal quotation marks omitted), quoted in Compliance Panel Report, para. 9.138.

<sup>641</sup> *See* EU SWS, para. 988 (quoting US FWS, para. 795 (quoting Boeing Engineers Statement, paras. 11–12 (Exhibit USA-283(BCI))).

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420. The above reasons further support the Panel’s counterfactual analysis and confirm that it did not err in applying Articles 5, 6.3, and 7.8 of the SCM Agreement.

*c. The Panel’s counterfactual analysis is supported by evidence that Boeing’s relevant knowledge and experience would have grown substantially over time absent the pre-2007 aeronautics R&D subsidies.*

421. The EU’s argument is strongly premised on its view that the aeronautics R&D subsidies contributed such substantial fundamental R&D through “experience gained and lessons learned” that Boeing, absent the subsidies, would have needed more than a decade beyond the 2002 counterfactual start date to make up that ground – implicitly assuming that Boeing’s expertise remained frozen in time.<sup>642</sup> The EU is wrong to imply that Boeing’s knowledge base and experience absent the subsidies would have been limited to the levels reached in the late 1980s or early 1990s.

422. Independent from the aeronautics R&D subsidies, Boeing’s base of relevant knowledge and experience grew substantially from the 1970s through the start of pre-launch R&D for the 787 in the early 2000s. For instance, the compliance Panel highlighted that “prior to starting work on developing the aircraft that became the 787, Boeing already had decades of composites experience, from its use of composites on the 757 and 767 in the late 1970s, to the 737 Classics in the mid-1980s and most importantly, the 777 in the late-1980s and early 1990s.”<sup>643</sup> This accords with the original panel’s findings regarding the non-subsidy sources of Boeing’s technological capabilities, including its finding that Boeing “derived valuable knowledge and experience from lessons learned over the course of the 777 and 737NG production programmes.”<sup>644</sup>

423. The United States presented the Panel with evidence that, during the 1990s, Boeing’s 787 suppliers “were developing expertise in the use of composites in primary aircraft structures contemporaneously with Boeing’s development efforts.”<sup>645</sup> This coincided with the fact that, “{f}rom 1995 to 2000, the use of composite materials in aerospace *trebled*.”<sup>646</sup> The Boeing engineers, in their reply to the Airbus Report, explained in detail the technological advances they made toward development of the 787 using Boeing’s internal resources:

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<sup>642</sup> EU Appellant Submission, para. 765. *See ibid.*, paras. 762–769.

<sup>643</sup> Compliance Panel Report, para. 9.140 (citing Boeing Engineers Statement, para. 14 (Exhibit USA-283(BCI)))

<sup>644</sup> *US -- Large Civil Aircraft (Panel)*, para. 7.1757.

<sup>645</sup> US SWS, para. 754 (quoting *US -- Large Civil Aircraft (Panel)*, para. 7.1757).

<sup>646</sup> US SWS, para. 754 (Bair Affidavit, para. 14 (Exhibit USA-311)).



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In each of the relevant technology areas, from composites to computational fluid dynamics (CFD) to noise reduction, the knowledge base of Boeing, its suppliers, and indeed the wider aeronautics community originated prior to the NASA and DOD programs and would grow over time regardless of whether those programs existed. The Airbus engineers fail to acknowledge this.

The relevant knowledge base available to Boeing in the early 2000s was significantly more advanced than in the late 1980s and early 1990s, when many of the NASA and DOD programs started. To take just a few examples from the area of composite materials, Boeing in the early 2000s:

- had already spent more than a decade developing and producing the 777's composite empennage and horizontal and vertical stabilizers, which included intensive work with the Toray T3900 prepreg material we would use on the 787;
- knew that Raytheon had launched and flown a business jet with a composite fuselage (the Premier 1);
- knew that Airbus would be using composites to build the A380's massive stabilizers and center wing box; and
- [BCI].

With these and other developments, separate and apart from Boeing's participation in the NASA and DOD programs, Boeing gained a much better understanding of what was possible and what was not.

Such developments help to explain why the disincentives that the WTO Panel found for "long term, high risk aeronautical R&D" are not constant for a given technology, even if such disincentives applied at the time the NASA and DOD R&D programs were undertaken.<sup>647</sup>

424. Moreover, Boeing's knowledge base by the early 2000s was significantly enhanced by other non-subsidy factors – including the dissemination of knowledge in the aerospace community through research by commercial entities, academic institutions, and unsubsidized NASA and DOD projects.<sup>648</sup> As the United States explained,

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<sup>647</sup> Boeing Engineers Reply, paras. 7–9 (Exhibit USA-359)(BCI), quoted in US SWS, para. 754.

<sup>648</sup> US SWS, para. 776.

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Boeing in the early 2000s was working from a much higher knowledge base than in the late 1980s and early 1990s, because of its own unsubsidized experience and advances in knowledge that were disseminated widely throughout the aerospace community (and were available to Airbus as it developed the A350 XWB).<sup>649</sup>

425. Boeing’s experience was not unique but rather reflected advances in the general state of knowledge and expertise in the aeronautics community in the 2000s. Airbus benefitted from these advances, as it was able to offer a composite wing on the A350 in December 2004, months after the 787 launch in April 2004.<sup>650</sup> Airbus was next able, from late 2004 to early 2006, to embark on a clean-sheet design for the A350 XWB, such that it could make customer commitments on the aircraft with a composite fuselage in July 2006, followed by launch in December 2006.<sup>651</sup> It strains reason to maintain that Airbus could accomplish all this, while Boeing’s level of technological expertise would remain stagnant in a counterfactual where it did not benefit from the government subsidies.

426. Boeing’s progressively improving knowledge and experience works in tandem with its commercial priorities discussed in the previous section. As Boeing accumulated knowledge and experience from non-subsidy sources throughout the 1990s and early 2000s, the risk posed by the relevant R&D declined, which “increased Boeing’s willingness to undertake the work needed to develop the 787.”<sup>652</sup> Market forces in the 1990s and early 2000s drove Boeing’s need for the *near-term* application of technologies to produce a highly efficient replacement for the 767 aircraft.<sup>653</sup> “Boeing’s willingness to engage in early-stage research is much greater when geared towards a near-term commercial priority, which Boeing faced in the early 2000s – as compared to the more generalized, ongoing interests in advancing *long-term* LCA technology that characterized Boeing’s R&D programs with the government as addressed by the original panel’s technology effects analysis.”<sup>654</sup> In other words, Boeing’s incentives to conduct early stage research changed dramatically between the 1989-2000 period in which the subsidized R&D occurred and the 2002-2006 pre-launch period covered by the counterfactual.<sup>655</sup> The original panel emphasized that it “is not, of course, of the view that the technologies applied to the 787

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<sup>649</sup> US FWS, para. 795.

<sup>650</sup> Compliance Panel Report, para. 9.168.

<sup>651</sup> Compliance Panel Report, paras. 9.168, 9.172.

<sup>652</sup> US SWS, para. 755.

<sup>653</sup> *See* US SWS, para. 756.

<sup>654</sup> *See* Boeing Engineers Statement, paras. 9–10 (Exhibit USA-283)(BCI), cited in US SWS, para. 756.

<sup>655</sup> *See* US SWS, para. 756.

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are entirely and exclusively attributable to the work that Boeing and McDonnell Douglas conducted for NASA and DOD pursuant to the aeronautics R&D subsidies.”<sup>656</sup>

427. Thus, the technologies actually applied on the 787 resulted from, among other things, *substantial, independently funded research by Boeing*, coupled by advancements by suppliers and increases in general knowledge.<sup>657</sup> Their development was not exclusively the result of the R&D subject to the DSB’s recommendations and rulings. In reality, the 787’s technologies are in many cases different from those studied under the R&D subsidies.<sup>658</sup>

428. These practical and commercial considerations underscore the error in the EU’s reliance on generic NASA technology readiness levels (“TRLs”) in an attempt to show that Boeing, in developing the 787 technology absent the subsidies to meet a critical need for a 767 replacement, would have progressed at the same pace of R&D activity as actually occurred from the late 1980s through the early 2000s.<sup>659</sup> The Panel found that the EU’s arguments concerning the time required to mature technologies are “highly generalized and do not speak to the contribution of the challenged aeronautics R&D subsidies in respect of Boeing’s overall development of the 787.”<sup>660</sup> The Panel also noted the EU’s agreement that “the precise timeframes” in the Peisen study (a 1999 NASA study of the average time taken to mature technologies from initial concept to marketable product) “are of lesser relevance to the compliance Panel’s assessment, because, as the original panel and the Appellate Body have themselves found, the study was based on a variety of different aircraft technologies with widely varying maturation times.”<sup>661</sup> These findings accord with the Boeing engineers’ statements that the “time required for a NASA project to advance from one TRL to the next is not indicative of the time required for Boeing to make similar progress in the context of a high-priority aircraft development program” because “Boeing pre- and post-launch R&D activity proceeds at a much faster pace than {the} NASA R&D programs” due to tight deadlines and increased internal resources to meet those deadlines.<sup>662</sup>

429. Thus, the Panel in its counterfactual analysis properly considered the relevant evidence concerning Boeing’s knowledge and experience absent subsidies, and how that know-how would

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<sup>656</sup> *US – Large Civil Aircraft (Panel)*, para.7.1757.

<sup>657</sup> *See US – Large Civil Aircraft (Panel)*, paras. 7.1629, 7.1757, 7.1760.

<sup>658</sup> *See US – Large Civil Aircraft (Panel)*, paras.7.1749–1750, 7.1753–7.1754.

<sup>659</sup> *See, e.g., EU Appellant Submission*, para. 757.

<sup>660</sup> Compliance Panel Report, para. 9.166.

<sup>661</sup> Compliance Panel Report, note 2932.

<sup>662</sup> Boeing Engineers Statement, para. 12 (Exhibit USA-283(BCI)).

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interact with Boeing’s pressing commercial incentives enable the development of technologies for the 787.

*d. The Panel’s counterfactual analysis is corroborated by its unappealed findings concerning the development timeline for the Airbus A350 XWB.*

430. The EU has not appealed the Panel’s findings that the development timeline for the A350 XWB corroborates and supports the Boeing Report’s counterfactual analysis of the 787. These unappealed findings further undermine the EU’s positions that the Boeing Report’s counterfactual timeline is unrealistic, and that Boeing could not have launched the 787 by the end of the implementation period under the counterfactual. Indeed, Airbus’s experience with the A350 XWB decisively refutes the EU’s argument that a proper counterfactual analysis would have resulted in an estimated 787 launch date more than 10 years later than what the Panel found.

431. The compliance Panel explained that, in conducting its counterfactual analysis, the A350 XWB can provide a real-world benchmark to evaluate the reasonableness of the Boeing Report’s two-year estimate by looking to the “time required to conclude the pre-launch development of the two aircraft.”<sup>663</sup> As the Panel explained, the A350 XWB example indicates how long it would take an established LCA producer that did not participate in the NASA and DoD R&D programs to progress from the beginning of pre-launch R&D activity to the launch of a composite fuselage twin-aisle LCA that is “technologically equal, if not superior, to the 787.”<sup>664</sup> The Panel noted that such a comparison is “consistent with the findings in the original proceeding, and avoids attributing to the subsidies aspects of the development that were not accelerated by Boeing’s participation in the relevant NASA and DOD aeronautics R&D programmes.”<sup>665</sup> Moreover, the EU and Airbus consistently represented that the A350 XWB and 787 are technologically comparable and competitors in the same market.<sup>666</sup>

432. The Panel found that, for the 787, the actual time gap between the start of intensive pre-launch R&D and formal launch was [BCI].<sup>667</sup> It further noted the Boeing Report’s counterfactual estimate that, absent receipt of the government subsidies, Boeing could have

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<sup>663</sup> Compliance Panel Report, para. 9.170. The Boeing Report looked at the pattern and pace of Airbus’s development of the A350 XWB since, considering that the fact that Airbus was able to announce orders in July 2006 and launch in December 2006 without utilizing the kind of subsidies at issue, it serves as a “useful reference point” for assessing the counterfactual timing of the 787 launch. *Ibid.*, para. 9.137 (quoting Boeing Engineers Statement, para. 8 (Exhibit USA-283(BCI)) (internal quotation marks omitted)).

<sup>664</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1793.

<sup>665</sup> Compliance Panel Report, para. 9.170.

<sup>666</sup> *See, e.g., US – Large Civil Aircraft (Panel)*, paras. 7.1779, 7.1793.

<sup>667</sup> Compliance Panel Report, para. 9.171.

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conducted all necessary research to launch the 787 before the end of April 2006, with promised deliveries in 2010.<sup>668</sup> Using the Boeing engineers' estimate of a two-year counterfactual delay results in a counterfactual-adjusted, non-subsidized 787 launch following [BCI] after the beginning of intensive pre-launch R&D.

433. By contrast, Airbus needed only [BCI] to launch the A350 XWB, which shows that the Boeing Report's estimate is conservative.<sup>669</sup> The Panel found, consistent with the Airbus Report's representation, that development of the A350 XWB commenced in December 2004, when Airbus began development of the composite wing for the original A350 – an aircraft launched in an attempt to compete with the newly launched 787.<sup>670</sup> Following the negative market reaction to the A350, Airbus undertook a “clean sheet” design via the A350 XWB, which retained that composite wing design but otherwise required a new design.<sup>671</sup> As its engineers indicated, Airbus could not begin development of the non-wing aspects of the A350 XWB until after “the market rejected the original A350.”<sup>672</sup> Nonetheless, Airbus unveiled the primarily-composite A350 XWB and entered into customer commitments in July 2006, with the official launch in December 2006.<sup>673</sup> As the Panel found,

the United States' estimate that the launch and delivery of the 787 would have been delayed by approximately two years absent the pre-2007 aeronautics R&D subsidies in fact results in a longer pre-launch development period for the 787 than the equivalent pre-launch development time-frame for the A350XWB. Adding two additional years for the counterfactual launch of an unsubsidized 787 in 2006, Boeing would have spent nearly [BCI] undertaking pre-launch R&D before launching the 787, compared to Airbus, which spent approximately [BCI] undertaking pre-launch R&D for the A350XWB.<sup>674</sup>

434. Thus, under the most conservative estimate, Airbus only needed two years “to go from the onset of intensive pre-launch R&D to official launch.”<sup>675</sup> The Panel properly recognized that, although the A350 XWB and 787 have different “design{s} and technical solutions, the fact that Airbus was able to proceed from a ‘clean sheet’ design of the A350XWB to a point where it had sufficient confidence to undertake the formal launch of the A350XWB, including Airbus’s

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<sup>668</sup> Compliance Panel Report, para. 9.171.

<sup>669</sup> Compliance Panel Report, para. 9.172.

<sup>670</sup> Compliance Panel Report, para. 9.168.

<sup>671</sup> Compliance Panel Report, para. 9.168.

<sup>672</sup> US SWS, para. 806 (quoting Airbus Engineers Statement, para. 50 (Exhibit EU-1014(HSBI))).

<sup>673</sup> US SWS, para. 806 (citing Airbus Engineers Statement, paras. 49-51 (Exhibit EU-1014(HSBI))).

<sup>674</sup> Compliance Panel Report, para. 9.173.

<sup>675</sup> US SWS, para. 807 (citing Airbus Engineers Statement, paras. 49-52 (Exhibit EU-1014(HSBI))).

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first-ever composite fuselage, in a period of roughly [BCI], provides, ‘a general sense of what range of estimates is reasonable’.”<sup>676</sup> This statement, if anything, understates what the A350 XWB timeline shows about the pace of aircraft technological development. A stark disparity exists between, on the one hand, the EU’s assertions about the nature and timing of additional R&D required under the counterfactual, and on the other, the rapid pace at which the Airbus launched the A350 XWB. The Boeing Report highlights this disparity:

As they admit, Airbus began with the “completely new” A350 XWB design when “the market rejected the original A350,” {which} we understand to mean sometime in late 2005 or early 2006 since this is when Airbus appears to have stopped making customer commitments for the original A350. Developing the A350 XWB involved “pre-launch research and development” and an “early study phase” that led to Airbus’ first-ever composite fuselage. Airbus publicly committed to the composite fuselage A350 XWB at the Paris Air Show in July 2006 when it announced launch order commitments from Singapore Airways. It officially launched the program in December 2006 – approximately one year after deciding to undertake a “clean sheet” design. To go from the start of pre-launch R&D to launch in this timeframe is remarkable, especially when it involved Airbus’ first composite fuselage. Yet the Airbus engineers’ criticisms of our counterfactual analysis – that is, the unvarying disincentives to long-term, high risk R&D, and the slow pace of such R&D in the event disincentives can be overcome – imply either that Airbus did not undertake any high-risk R&D in the A350 XWB’s pre-launch development phase, or that, if it did, such R&D proceeded at the same, slow pace as it would have a decade before Airbus had any intention of launching the program. Based on our experience with LCA development programs, neither proposition is credible.<sup>677</sup>

As the United States explained to the Panel, “{i}t is implausible that the counterfactual 787 pre-launch R&D phase would take more than six times as long as the A350 XWB pre-launch R&D phase.”<sup>678</sup> The Panel agreed, finding that the A350 XWB example corroborates its counterfactual estimate of 787 launch timing. The EU has not appealed this finding, further confirming that the EU’s appeal is unfounded.

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<sup>676</sup> Compliance Panel Report, para. 9.175. It also acknowledged that to the extent that other features of the 787 impact the “length of the aircraft development cycle, and in particular, the pre-launch development time, the United States’s counterfactual allows for [BCI] of pre-launch development, which means that the 787 pre-launch development period would exceed the A350XWB pre-launch development period by [BCI].” Compliance Panel Report, para. 9.175.

<sup>677</sup> Boeing Engineers Reply, para. 19 (Exhibit USA-359(BCI)).

<sup>678</sup> US SWS, para. 811.

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435. In conclusion, for all the reasons discussed above, the EU has not shown that the counterfactual analysis undertaken by the Panel was inconsistent with Articles 5, 6.3 and 7.8 of the SCM Agreement.

**3. *The Panel provided an objective assessment for purposes of DSU Article 11 by evaluating the nature of the relevant R&D activities in its counterfactual analysis.***

436. The EU contends that the Panel failed to make an objective assessment as called for by DSU Article 11 because it “failed to explain how the amount of time required to perform the late-stage R&D identified by the Boeing engineers provides a legitimate proxy for the amount of time it would have taken Boeing, without the aeronautics R&D subsidies, to conduct the early-stage, fundamental R&D underlying the recommendations and rulings in this dispute.”<sup>679</sup> This Article 11 claim relies on arguments very similar to its claim under Articles 5, 6, and 7.8 of the SCM Agreement, and also fails.

437. The Appellate Body has found that:

a panel is required to “consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence”. Within these parameters, “it is generally within the discretion of the {p}anel to decide which evidence it chooses to utilize in making findings.” A claim that a panel has failed to conduct an “objective assessment of the matter before it” is “a very serious allegation”. An appellant may not effectively recast its arguments before the panel under the guise of an Article 11 claim, but must identify specific errors that are so material that, “taken together or singly”, they undermine the objectivity of the panel's assessment of the matter before it.<sup>680</sup>

Consideration of whether the proxies chosen by the Boeing engineers are reliable and probative, as informed by their detailed explanations of how they chose the proxies, were factual determinations “within the discretion of the {p}anel to decide.” The EU’s improper attempt to relitigate these factual findings have no place under DSU Article 11. That should be the end of the matter. Nevertheless, for the sake of completeness, the United States will address the individual arguments raised by the EU.

438. As with its claim of error under the SCM Agreement, the EU contends that that the Boeing Report’s discussion of comparable R&D projects does not provide “a legitimate proxy” for the Panel’s counterfactual analysis. The EU reiterates its view that the Panel’s relied on

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<sup>679</sup> EU Appellant Submission, para. 770.

<sup>680</sup> *Peru – Agricultural Products (AB)*, para. 5.66 (citations omitted).

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“near-term R&D” from the Boeing Report’s benchmarks rather than early stage, fundamental R&D, and that this was in error and inconsistent with the adopted findings.<sup>681</sup> It repackages these allegations as a failure by the Panel to conduct an objective assessment under Article 11:

Given the critical differences between fundamental R&D and development-oriented, near-term R&D, the Panel failed to provide a reasoned and adequate explanation of how the amount of time needed to complete the unsubsidised near-term R&D tasks described in the Boeing engineers’ statement could constitute a “proxy to estimate the time that Boeing would have needed to conduct the *early-stage* research” absent the subsidies.<sup>682</sup>

439. The United States explained in the previous section why the EU’s approach is thoroughly flawed. Contrary to the EU’s effort to treat “near-term” as being mutually exclusive with “early-stage” research, the Panel recognized that one deals with the available time window, and the other with the *nature* of the subject matter. It assessed the extensive argumentation and evidence and found that the Boeing engineers had, in fact, based their estimate on the amount of time required to complete relevant, unsubsidized “early-stage R&D activities” comparable to the additional R&D it would have needed to conduct in the counterfactual.<sup>683</sup> The EU provides no basis to question that the objectivity of this assessment, relying instead on a string of unsupported assertions that the R&D referenced in the Boeing Report was near term, while the R&D in the counterfactual is not.

440. The Panel also provided a thorough explanation of why Boeing’s experience in the 787 development process was the best proxy for use in the counterfactual:

- Boeing had a strong commercial incentive to develop a replacement for the 767 that substantially increased in the early 2000s;
- Boeing and its suppliers did not sit idle from the late 1980s through the early 2000s, but rather advanced in knowledge and experience concerning technology related to the 787 and other LCA; and

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<sup>681</sup> Compare EU Appellant Submission, para. 775 (“{t}hese near-term R&D activities bear none of the characteristics and qualities of the fundamental early-stage research discussed by the original panel and the Appellate Body . . .”) with *ibid.* at para. 768 (arguing in context of its SCM Agreement claim that certain “*near-term* technologies bore no resemblance to the *early-stage* technologies that the original panel and the Appellate Body found to have been accelerated by the US subsidies” such that “they simply did not answer the proper counterfactual question.”).

<sup>682</sup> EU Appellant Submission, para. 776 (internal citations omitted).

<sup>683</sup> Compliance Panel Report, para. 9.162.



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- the Panel’s own unappealed findings regarding the timing of Airbus’s development of the A350 XWB corroborated the Boeing Report’s time estimates and shows that the Panel’s reliance on the latter factual evidence was proper.

Below, the United States elaborates on these and other issues undermining the EU’s Article 11 claim.

441. The Panel explained in great detail how the benchmarks in the Boeing Report constituted an adequate proxy for R&D of comparable difficulty to that performed in conjunction with the R&D programs. As noted by the Panel, the Boeing Report analyzed seven key 7E7/787 technology areas addressed by the original panel, in order to assess the “additional time required to replicate the work done by Boeing under the NASA and DOD programs using the internal resources of Boeing and its suppliers.”<sup>684</sup> The Panel correctly explained that, in deriving its time estimates for the development of certain 787 technologies, the Boeing Report identified “other, specific unsubsidized *early-stage R&D activities* in the pre-launch development phase for the 7E7/787 that they consider were either ‘*comparable to, or more demanding*’ than, the type of tasks that Boeing conducted under the relevant aeronautics R&D programmes.”<sup>685</sup> The Panel found that the Boeing engineers then used estimates to perform those “unsubsidized tasks as a proxy to estimate the time that Boeing would have needed in the counterfactual scenario to conduct the early-stage research that it actually conducted under the aeronautics R&D programmes.”<sup>686</sup>

442. The compliance Panel recognized and agreed with the “original panel’s general observations regarding disincentives inherent in conducting long-term, high-risk aeronautics R&D,” but properly understood that “those disincentives diminish as a practical matter as near-term commercial priorities arise.”<sup>687</sup> It found that the evidence established, consistent with the findings of the original panel, that “the commercial imperatives in the early 2000s were such that

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<sup>684</sup> Compliance Panel Report, para. 9.137 (quoting Boeing Engineers Statement, para. 7 (Exhibit USA-283(BCI)) (internal quotation marks omitted); *see also* Compliance Panel Report, para. 9.162.

<sup>685</sup> Compliance Panel Report, para. 9.162 (emphasis added).

<sup>686</sup> Compliance Panel Report, para. 9.162. As noted by the Panel, based on the fact that Boeing had the resources and finances to conduct the R&D research that had been supported by the subsidies, the Boeing engineers in their report

identify tasks that Boeing conducted under the challenged NASA and DOD aeronautics R&D programmes and then to assess the additional time that Boeing would have required to conduct that work using the internal resources of Boeing and its suppliers, *i.e.* they evaluate the time Boeing would have needed to conduct the tasks had Boeing not participated in the relevant aeronautics R&D programmes.

*Ibid.*

<sup>687</sup> Compliance Panel Report, para. 9.155.

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a critical commercial priority for Boeing was to develop a new, highly-efficient mid-sized, twin-aisle aircraft to replace the 767.”<sup>688</sup>

443. The Panel stressed that the Boeing engineers’ approach was in “certain respects similar to the approach taken by the panel in the original proceedings,” *i.e.*, by “consider{ing} the ways and degree to which the NASA and DOD aeronautics R&D subsidies contributed to the development of particular 787 technologies in its evaluation of whether and the extent to which the aeronautics R&D subsidies contributed to the development and launch of the 787.”<sup>689</sup> Although the original panel did not discuss every aspect of the 787’s technological development and did not draw conclusions as to the degree of competitive advantage obtained by Boeing through the subsidies, it did not need to – its focus was on determining whether Boeing would or would not have “been able to launch the 787 as early as it did in 2004 absent the subsidies”<sup>690</sup> in order to determine whether the subsidies had technology effects in the market during the period used by the EU to make its adverse effects arguments.

444. Moreover, the Panel had before it statements from Boeing engineers establishing that the R&D benchmarks were based on their actual experience and account for the fact that some research avenues will lead to dead ends, while others will prove fruitful:

Our analysis estimated the additional time it would take for Boeing to fill those parts on its own. It was based on the best available benchmarks: Boeing’s real-world experience on comparable R&D projects undertaken in connection with the 787 program. Contrary to the Airbus critique, these benchmark experiences included iterative learning, “trials and errors,” and far more than a “paper design.” They also involved early-stage, pre-launch R&D, whereas the 787 program delays cited by the Airbus engineers arose during the advanced stages of product development and manufacturing.<sup>691</sup>

Accordingly, the Boeing Report provides a concrete time estimate of two years additional counterfactual time to complete the R&D at issue in this proceeding and launch the 787. It does so by reference to Boeing’s real-world experience performing early-stage R&D on the 787 program – which, notably, involved technological challenges at least as demanding as those present in the subsidized aeronautics R&D activity. Notably, the Boeing engineers did *not* estimate how long it would take to reproduce only the fruitful research, with the benefit of

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<sup>688</sup> Compliance Panel Report, para. 9.155. *See US – Large Civil Aircraft (Panel)*, para. 7.1774. note 3704 (finding that Boeing would have developed a LCA to replace the 767 and that, significantly, the EU did not object to this finding, or to the fact that Boeing would have launched a new aircraft in the 200-300 seat LCA market)).

<sup>689</sup> Compliance Panel Report, para. 9.163.

<sup>690</sup> Compliance Panel Report, para. 9.163.

<sup>691</sup> Boeing Engineers Reply, para. 16 (Exhibit USA-359(BCI)) (internal citations omitted)

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hindsight such that it could bypass pitfalls and dead-ends. Rather, they assessed how much more time it would have taken to launch the 787 had Boeing not participated in the subsidized R&D at issue – including the wrong turns inherent in research.

445. The EU asserts that the Panel’s analysis is inconsistent with the findings in the original proceeding,<sup>692</sup> but this is not the case. The original panel viewed the technology studied by Boeing in the government-supported programs as part of a broader process of technological development that included Boeing’s *own*, self-funded work, in which “solutions to technological problems are developed.”<sup>693</sup> It found that without the subsidies, Boeing would have had gaps in knowledge that would have delayed the launch of the 787.<sup>694</sup>

446. Consistent with the original panel’s reasoning, the relevant issue before the compliance Panel was how much additional time Boeing would have needed to fill those knowledge gaps. By conducting this R&D, Boeing would accumulate the needed knowledge and experience, which, when combined with the non-subsidy sources of knowledge and experience recognized by the original panel, would put Boeing in a pre-launch technology position comparable to what it obtained through participation in the R&D programs examined by the original panel. As explained to the Panel in the context of the composite fuselage technology,

the original panel found Boeing’s research under the ATCAS contract to be important for the 787 fuselage because it entailed work – *i.e.*, a better understanding of separate composite panel sections and preliminary costing studies for barrel fuselage sections – that were preliminary steps to be taken before Boeing’s own subsequent work on the composite fuselage technology solution ultimately adopted for the 787. A proper counterfactual must focus on the time required to take those preliminary steps, to fill the gap in knowledge and experience, that were provided by the R&D subsidies. Boeing’s subsequent development, maturation, production and certification of the technologies actually used on the 787, which often were different from the technologies studied under the R&D programs, are not themselves the effects of the subsidies. The effect of the subsidies is that Boeing achieved these technologies earlier than would otherwise have been the case.<sup>695</sup>

447. In contrast, the approach advanced by the EU and Airbus engineers before the Panel rested on an inaccurate premise that, absent the subsidies, Boeing would have needed to develop the 787 technologies *from beginning to end* – not just to “fill the gaps,” but to duplicate

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<sup>692</sup> EU Appellant Submission, paras 771-775.

<sup>693</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1750.

<sup>694</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1750-7.1751, *cited in* US SWS, para. 827.

<sup>695</sup> US SWS, para. 831 (internal citation omitted) (citing *US – Large Civil Aircraft (Panel)*, para. 7.1751).

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technologies that Boeing or its suppliers developed independently. The EU’s approach was therefore contrary to the original panel’s findings that “Boeing’s technology developments are clearly the product of a variety of factors,”<sup>696</sup> arising before, during, and after Boeing’s research under the R&D programs:

*from 2000 onwards, Boeing and its suppliers have made significant investments in R&D in the respective technology areas, first in the context of the development of the Sonic Cruiser, and subsequently, the 7E7/787. Moreover, as regards the technologies on the 787 in particular, the Panel notes that, prior to performing the research under the aeronautics R&D contracts at issue in this dispute, Boeing had already developed expertise in the application of composites in secondary structures, as well as in primary structures such as the 777 empennage. It is also clear that during the 1990s, Boeing suppliers on the 787, such as Kawasaki Heavy Industries and Fuji Heavy Industries were developing expertise in the use of composites in primary aircraft structures contemporaneously with Boeing’s development efforts. The Panel acknowledges that Boeing had also derived valuable knowledge and experience from lessons learned over the course of the 777 and 737NG production programmes.*<sup>697</sup>

448. The Panel also explained *why* it accepted the Boeing engineers’ estimates and rejected those of the EU. It considered that the EU’s arguments were exceedingly vague and disconnected from the proper counterfactual analysis.<sup>698</sup> Whereas the United States presented specific benchmarks for early-stage R&D activity, the Panel found that the EU “does not *itself* enumerate the specific additional tasks that Boeing should have reflected in its assessment, and, importantly, the European Union does not provide evidence of how long Boeing would have needed to conduct any of the R&D tasks that were actually performed under the NASA and DOD aeronautics programmes.”<sup>699</sup> It found that the EU also “failed to provide specific evidence to rebut the timing estimates that the Boeing engineers provide for the specific R&D tasks discussed in their statement.”<sup>700</sup>

449. Thus, for all these reasons, the EU’s assertion that the Panel failed to explain why the Boeing Report’s benchmarks serve as an adequate proxy for the subsidized R&D is simply not

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<sup>696</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1758.

<sup>697</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1757 (emphasis added).

<sup>698</sup> *See, e.g.*, Compliance Panel Report, paras. 9.152-9.153, 9.162, 9.164.

<sup>699</sup> Compliance Panel Report, para. 9.164.

<sup>700</sup> Compliance Panel Report, para. 9.164.

credible – and falls far short of establishing that the Panel acted inconsistently with Article 11 of the DSU.

**E. The Panel Did Not Err Concerning the Sequencing of R&D Activity for the 787.**

450. The EU makes three claims of error concerning the Panel’s alleged failure to properly consider the sequencing of R&D activity in its counterfactual analysis, one under Articles 5 and 6.3 of the SCM Agreement,<sup>701</sup> and two under Article 11 of the DSU.<sup>702</sup> Each claim is essentially a repackaging of the same argument – that the Panel’s counterfactual analysis only accounted for the additional time necessary for fundamental R&D, but not for the subsequent maturation of the relevant technology. Each claim fails for essentially the same reasons: first, a mistaken premise that the subsidized R&D activities were gates on strictly linear technology development pathways leading to the technologies actually applied on the 787 program, and second, a mischaracterization of the Panel’s counterfactual analysis, which accounted for technology maturation and was corroborated by the timing of the A350 XWB’s development.

***1. The Panel’s counterfactual analysis does not contain a sequencing error and is entirely consistent with Articles 5 and 6.3 of the SCM Agreement.***

451. The EU contends that the Panel failed to account for the proper sequence of R&D in conducting its counterfactual analysis, and thus erred in its application of Articles 5 and 6.3 of the SCM Agreement.<sup>703</sup> The EU’s arguments are based on erroneous premise and ignore that the Panel’s counterfactual analysis accounted for technology maturation occurring *after* early-stage R&D work.

***a. The EU’s “sequencing” argument is based on an erroneous premise.***

452. The EU premises its “sequencing” argument on its view that the subsidized R&D activities at issue were essentially gates on strictly linear technology development pathways leading to the technologies actually applied on the 787 program. According to the EU, the Panel did not take into account the “proper sequence in which Boeing, like any other company, has to undertake R&D,”<sup>704</sup> and instead assumed that Boeing “under {took} the fundamental research that served as the *basis* for the technology maturation only after the technology maturation had already taken place.”<sup>705</sup> The Panel did no such thing.

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<sup>701</sup> EU Appellant Submission, para. 794.

<sup>702</sup> EU Appellant Submission, paras. 807, 811.

<sup>703</sup> EU Appellant Submission, para. 794.

<sup>704</sup> EU Appellant Submission, para. 795.

<sup>705</sup> EU Appellant Submission, para. 795.

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453. The EU’s fundamental error is to conceive of a given subsidized R&D activity as an initial gate blocking any progress towards the specific technologies applied on the 787. However, while the original panel found that the pre-2007 aeronautics R&D subsidies generated valuable knowledge and experience, it never found that subsidized R&D activity concerned the specific technologies incorporated into the 787 program. The EU therefore errs in assuming that those 787 technologies represent the culmination of a linear technology development process originating with the subsidized R&D activity. Moreover, the original panel made clear that “Boeing’s technology developments are clearly the product of a variety of factors,”<sup>706</sup> arising before, during, and after Boeing’s research under the R&D programs.<sup>707</sup> Notably, the original panel found that, “*prior to performing the research under the aeronautics R&D contracts at issue in this dispute*, Boeing had already developed expertise in the application of composites in secondary structures, as well as in primary structures such as the 777 empennage.”<sup>708</sup> This finding highlights the error of the EU’s simplistic conception of each subsidized R&D activity as a gate straddling a single technology development pathway. If the EU were correct – if the “fundamental” subsidized research into composite structures were necessary before Boeing could undertake any maturation or commercialization of composite structure technology – then the 777 empennage would never have existed. But the 777 composite empennage does exist, independent of any NASA research funds – a testament to the fallacy of the EU’s view.

454. In a related example, the Boeing engineers presented the Panel with evidence that, as of the early 2000s, Boeing “had already spent more than a decade developing and producing the 777’s composite empennage and horizontal and vertical stabilizers, which included intensive work with the Toray T3900 prepreg material we would use on the 787.”<sup>709</sup> The Boeing Report explains how Boeing’s experience with the already-commercialized 777 provided relevant knowledge and experience for the 787’s composite wing that was not contingent on first performing research under NASA’s AST program:

Boeing had already developed a composite horizontal stabilizer for the 777, which gave us critical experience in large composite structures of a comparable shape, and subject to comparable aerodynamic forces, as wings. The key pre-launch innovations for the 7E7 wing were to [BCI] and we received increased engineering and budgetary resources to do so.

As part of this effort, we spent [BCI]

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<sup>706</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1758.

<sup>707</sup> *See US – Large Civil Aircraft (Panel)*, para. 7.1757.

<sup>708</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1757 (emphasis added).

<sup>709</sup> Boeing Engineers Reply, para. 8 (Exhibit USA-359(BCI)).

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We are aware of the allegation that our 787 wing work benefited from the composite wing element of NASA’s AST program, which over the course of 5 years involved the construction and study of semi-span composite wing demonstrator using a stitched/resin filled infusion technology supplied by Cincinnati Milacron. This demonstrator [BCI] Nevertheless, to the extent that a construction and testing of AST-type wing box demonstrator would have been necessary to develop a composite wing for the 787, Boeing would have done so. We estimate such work would have taken us approximately 18 months, which is conservative in light of the [BCI.]<sup>710</sup>

455. Thus, the original panel’s findings and the evidence before the Panel contradict the EU’s view that all relevant technology maturation in the counterfactual situation would have been contingent on Boeing first performing the work necessary to obtain the knowledge and experience generated by the subsidized R&D activity. Indeed, the EU wrongly assumes, as it did in its “fundamental R&D” argument, that Boeing’s own knowledge, experience, and technological expertise would have stood still throughout the 1990s – such that Boeing’s efforts, beginning in 2002, to fill the gap in knowledge and experience left by the absence of the subsidies would have proceeded in the *exact same sequence and at the same pace* as occurred through the subsidized programs. This flaw is apparent from a comparison of the graphs provided in the EU’s submission. The first graph recognizes that “Boeing’s own R&D” and knowledge proceeded *alongside* the “NASA & DoD subsidies” from “1989 to {the} early 2000s.”<sup>711</sup> In fact, the EU describes the graph as “depict{ing} the ‘cumulative effect of Boeing’s decades-long participation in NASA and DOD programmes,’ and ‘the *complementarity and interdependence*’ with Boeing’s own internal R&D efforts.”<sup>712</sup> Yet when the EU presents its view, through a separate graph, of how the Panel should have conducted its counterfactual analysis, the EU completely disregards “Boeing’s own R&D” and knowledge development – and, instead, assumes that Boeing, as of the counterfactual start date in 2002, would have the same knowledge and experience base as it had in 1989, when it began development for the subsidized R&D.<sup>713</sup> The EU’s rigid view that the counterfactual R&D needed to be conducted in the same sequence and timeframe as occurred under the subsidies is highlighted throughout its submission. For instance, the EU claims that that Boeing needed to conduct “the *same type of fundamental R&D actually performed under {the} NASA and DOD R&D programs*, in order to

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<sup>710</sup> Boeing Engineers Statement, paras. 25-27 (Exhibit USA-283(BCI)).

<sup>711</sup> EU Appellant Submission, paras. 801-802 (graph between the paragraphs).

<sup>712</sup> EU Appellant Submission, para. 801 (quoting *US – Large Civil Aircraft (Panel)*, para. 7.1756 (emphasis added)).

<sup>713</sup> EU Appellant Submission, paras. 804-805 (graph between the paragraphs).

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“develop {}” the 787 technologies to a degree that would have allowed the “787 ... {to} have been present in the market by that time{.}”<sup>714</sup>

456. By ignoring the knowledge and experience relevant to future 787 development that Boeing would have gained throughout the 1990s, and assuming that Boeing operated from a blank slate of relevant knowledge in 2002, the EU inappropriately attributes all development of knowledge and experience by Boeing to the subsidies. In reality, Boeing’s base of knowledge and experience grew considerably throughout the 1990s – and to assume that Boeing would not have been able to harness this expanded knowledge base to fill the gap in knowledge and experience left by the absence of the subsidies is simply not credible.<sup>715</sup> These observations are entirely consistent with the adopted findings, for all the reasons explained previously. They are also corroborated by Boeing’s explanation of how it handles the “pre-launch development phase for a new aircraft program.”<sup>716</sup>

457. The EU also incorrectly assumes that Boeing would have pursued the subsidized R&D at the same slow and exploratory pace as was undertaken alongside the NASA and DOD subsidies. It ignores the reality that the long-term disincentives to conduct riskier R&D, as was the case in 1989, diminish as time progresses – and that in light of Boeing’s substantial and near-term commercial incentives by the early 2000s to develop the 787, there is no dispute that Boeing could have, and would have, pursued the subsidized R&D through its own independent efforts at a faster pace than the slow and exploratory pace that occurred under the NASA and DOD subsidies.

*b. The Panel’s counterfactual analysis properly accounted for technology maturation occurring after early-stage R&D activity.*

458. The EU maintains that the Panel considered “solely the *time* required to undertake fundamental R&D, and ignor{ed} the overall *timeline* in which that R&D fits.”<sup>717</sup> It also accuses the Panel of “simply” adding two years to the counterfactual start date, and delaying the

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<sup>714</sup> EU Appellant Submission, para. 796 (emphasis added) (internal citations omitted). *See ibid.* at para. 806 (same).

<sup>715</sup> *See* Boeing Engineers Reply, para. 8 (Exhibit USA-359(BCI)) (“The relevant knowledge base available to Boeing in the early 2000s was significantly more advanced than in the late 1980s and early 1990s, when many of the NASA and DOD programs started{.}”) Moreover Boeing engineers provided several examples of technological development and increased knowledge that Boeing had gained by the early 2000s that, “separate and apart from Boeing’s participation in the NASA and DOD programs,” helped the company gain “a much better understanding of what was possible and what was not.” *Ibid.* at para. 8.

<sup>716</sup> Boeing Engineers Reply, para. 11 (Exhibit USA-359(BCI)) (explaining the process in detail).

<sup>717</sup> EU Appellant Submission, para. 795 (emphasis original).



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counterfactual launch date of the 787 in a corresponding fashion.<sup>718</sup> The EU’s arguments badly misconstrue the Panel’s counterfactual analysis.

459. The EU’s assertion that the Panel “simply” added two years to the “pre-launch R&D phase for the 787”<sup>719</sup> ignores the Panel’s thorough review of the competing evidence as to what technology development activity Boeing needed to perform in order to fill the gap in knowledge left by the subsidies. Contrary to the EU’s suggestion, the Panel weighed the competing evidence and found that the proxies provided by the Boeing Report accurately accounted for the pre-launch R&D that Boeing would have needed to perform in order to launch the 787.<sup>720</sup>

460. The Boeing Report did not look solely at limited aspects of the pre-launch R&D, but rather sought to estimate the “amount of time that would have been required to obtain the technology learning benefits that the WTO Panel linked to certain NASA and DOD programs.”<sup>721</sup> The Boeing Report began from the WTO’s adopted findings that Boeing, absent the subsidies, would have had a gap in knowledge and experience needed to launch the 787 when it actually did – and, through the use of real-world benchmarks, analyzed how long it would have taken Boeing to fill that gap in knowledge and experience. As the Panel explained, the engineers who drafted the Boeing Report “derive their estimates by first identifying other, specific unsubsidized early-stage R&D activities in the pre-launch development phase for the 7E7/787 that they consider were either ‘*comparable to, or more demanding*’ than { } the type of tasks that Boeing conducted under the relevant aeronautics R&D programmes, and note the time that was required to conduct those unsubsidized R&D tasks.”<sup>722</sup> Critically, because the Boeing engineers’ used early-stage R&D activities as their benchmarks, and because those benchmark activities entailed the development of technologies from early-stage concepts to a level of maturity sufficient for Boeing’s actual launch of the 787 in April 2004, the Boeing counterfactual timing estimate *already accounts for technology maturation*.

461. The Boeing Report’s discussion of the 787 composite fuselage – perhaps the aircraft’s most innovative feature – illustrates this point. The Boeing engineers explained how Boeing was able to utilize its internal resources to make rapid progress in the development of a composite fuselage design:

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<sup>718</sup> EU Appellant Submission, para. 802 (internal citations omitted).

<sup>719</sup> EU Appellant Submission, para. 802 (internal citations omitted).

<sup>720</sup> Compliance Panel Report, para. 9.162.

<sup>721</sup> Boeing Engineers Reply, para. 5 (Exhibit USA-359(BCI)).

<sup>722</sup> Compliance Panel Report, para. 9.162 (emphasis added).

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In [BCI] a one-piece composite barrel design was [BCI] in April 2004, Boeing officially launched the 787. In other words, in the [BCI].<sup>723</sup>

This example demonstrates that the Boeing engineers’ timing benchmarks encompassed both early-stage work and the subsequent maturation of that technology, and it shows how quickly such technology developments could progress in the context of a high-priority aircraft program. It also shows that technology maturation [BCI].

462. Accordingly, the Panel correctly treated the Boeing Report as relevant and persuasive evidence in its counterfactual analysis.<sup>724</sup> The Panel accounted for technology maturation that follows early-stage R&D.<sup>725</sup> The Panel also recognized that the EU’s arguments concerning the time required to mature technologies are “highly generalized and do not speak to the contribution of the challenged aeronautics R&D subsidies in respect of Boeing’s overall development of the 787.”<sup>726</sup> Further, the Panel noted the EU’s agreement that “the precise timeframes” in the Peisen study (a 1999 NASA study of the average time taken to move between NASA technology readiness levels (“TRLs”)) “are of lesser relevance to the compliance Panel’s assessment, because, as the original panel and the Appellate Body have themselves found, the study was based on a variety of different aircraft technologies with widely varying maturation times.”<sup>727</sup> At bottom, the EU’s appeal improperly seeks to disturb the Panel’s careful weighing of the evidence, including the highly probative Boeing Report and the Airbus engineers’ exceedingly vague counterarguments.

463. Moreover, the reasonableness of the Panel’s counterfactual timing estimate is confirmed by the pre-launch development timeline of the A350 XWB, where Airbus was able to rapidly proceed from the start of pre-launch R&D to formal launch of an airplane with Airbus’s first-ever composite fuselage in no more than two years.<sup>728</sup> It is not credible for the EU to imply that Boeing could not have done likewise in the counterfactual situation, let alone for the EU to contend that the Panel’s thorough, corroborated counterfactual analysis is somehow a legal error in the application of Articles 5 and 6.3 of the SCM Agreement.

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<sup>723</sup> Boeing Engineers Statement, para. 23 (Exhibit USA-283(BCI)).

<sup>724</sup> Compliance Panel Report, para. 9.139–9.166.

<sup>725</sup> See EU Appellant Submission, para. 800.

<sup>726</sup> Compliance Panel Report, para. 9.166.

<sup>727</sup> Compliance Panel Report, note 2932.

<sup>728</sup> See Compliance Panel Report, paras. 9.172-9.175. See also Boeing Engineers Reply, para. 19 (Exhibit USA-359(BCI)) (internal citations omitted).

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**2. *The Panel conducted an objective assessment under DSU Article 11, contrary to the EU’s allegation of an “illogical” sequencing assumption.***

464. The EU argues that the Panel failed to make an objective assessment for purposes of DSU Article 11 because it “fail{ed} to provide a reasoned and adequate explanation for its approach to the progression of research that underlies its findings.”<sup>729</sup> Contrary to the EU’s accusation, the Panel’s analysis was thorough and complete.

465. The Appellate Body has found that:

a panel is required to “consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence”. Within these parameters, “it is generally within the discretion of the {p}anel to decide which evidence it chooses to utilize in making findings.” A claim that a panel has failed to conduct an “objective assessment of the matter before it” is “a very serious allegation”. An appellant may not effectively recast its arguments before the panel under the guise of an Article 11 claim, but must identify specific errors that are so material that, “taken together or singly”, they undermine the objectivity of the panel’s assessment of the matter before it.<sup>730</sup>

466. Consideration of whether the proxies chosen by the Boeing engineers are reliable and probative, as informed by their detailed explanations of how they chose them, are factual determinations that are left to the discretion of the Panel. The Appellate Body should not reconsider or disturb those findings.

467. The EU’s ‘sequencing’ argument under Article 11 rests on the same false premise and other errors as its argument under the SCM Agreement: that the Boeing Report does not address technology maturation.<sup>731</sup> We have already explained in the previous section why those arguments are specious, and we will not repeat them here. Further, the EU states that “assuming that technology maturation takes place before the research into fundamental R&D is performed is absurd and illogical.”<sup>732</sup> The premise of the EU’s argument is erroneous because the Panel Report never made such an assumption. As discussed in the preceding section, the Panel found persuasive the time estimates provided in the Boeing Report, and those estimates do, in fact, account for technology maturation.

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<sup>729</sup> EU Appellant Submission, para. 807.

<sup>730</sup> *Peru – Agricultural Products (AB)*, para. 5.66 (citations omitted).

<sup>731</sup> EU Appellant Submission, para. 808.

<sup>732</sup> EU Appellant Submission, para. 810.

**3. *The Panel conducted an objective assessment under Article 11 of the DSU, contrary to the EU’s allegation that it “deviated” from the adopted findings.***

468. The EU claims that the compliance Panel deviated from the original panel’s finding that the “US aeronautics R&D subsidies accelerated both fundamental research and, subsequently, the maturation of technologies, in a particular, logical order – *i.e.*, starting with “{b}asic scientific/engineering principles observed and reported’ (TRL 1)” “up to TRL 6 (prototype demonstration){.}”<sup>733</sup> As we explained previously, the Panel did not assume or imply that technology maturation precedes early-stage research of the same technology. Rather, the Panel’s counterfactual analysis properly (1) adheres to the original panel’s finding that Boeing’s technological capabilities are the result of a variety of factors – such that the subsidized R&D was not the only source of relevant technology that could be subsequently matured, and (2) accords significant weight to the Boeing Report, which accounts for the time necessary to mature early-stage technologies. The Panel’s findings in no way indicate that it failed to conduct an objective assessment.

469. For all these reasons, the EU’s “sequencing” arguments do not show that the Panel failed to conduct an objective assessment.

**F. *The Panel did Not Impose an Inappropriate Burden or Standard on the EU.***

470. The EU argues that that the Panel imposed on it a “requirement not foreseen by the applicable causation standard” and thus “erred in the application of Articles 5 and 6.3 of the SCM Agreement.”<sup>734</sup> It separately claims that the Panel failed to make an objective assessment because it purportedly required the EU to “demonstrate, with an impossible degree of certainty and with reference to evidence that was inaccessible to the European Union (and its participant in the LCA markets, Airbus), the precise amount of time that Boeing would have needed to perform each of a series of R&D tasks in a counterfactual, absent the US R&D subsidies.”<sup>735</sup>

471. However, the Panel never directed the parties to provide evidence in a particular form. Rather, as we explained previously, the Panel weighed the evidence presented before it, and found the evidence presented by the United States to be more convincing than that provided by the EU. We discuss each argument in turn.

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<sup>733</sup> EU Appellant Submission, para. 814.

<sup>734</sup> EU Appellant Submission, para. 819.

<sup>735</sup> EU Appellant Submission, para. 819.

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**1. *The Panel properly evaluated whether the EU met its burden of making a prima facie case and of responding to the evidence and arguments advanced by the United States, and did not impose an unforeseen or unduly heavy burden on the EU.***

472. The EU asserts that the Panel acted inconsistently with Articles 5 and 6.3 of the SCM Agreement by imposing on the EU a supposedly unforeseen requirement that it “demonstrate the precise amount of time needed to perform each of a series of R&D tasks on its own, in order to demonstrate that the aeronautics R&D subsidies continued to cause technology effects after the end of the implementation period.”<sup>736</sup> The EU’s argument lacks merit because the underlying premise is incorrect.

473. The Panel’s observations reflected the task before it: to weigh the competing evidence, and decide which was more persuasive. As discussed in detail previously, the Boeing Report sought to estimate the acceleration effect of the relevant subsidies. The Panel found that the Boeing Report identified timing benchmarks based on “other, specific unsubsidized early-stage R&D activities in the pre-launch development phase for the 7E7/787 that they consider were either ‘comparable to, or more demanding’ than, the types of tasks that Boeing conducted under the relevant aeronautics R&D programmes, and note the time that was required to conduct those unsubsidized tasks.”<sup>737</sup> The Boeing Report provided a well-reasoned and substantiated approach to evaluating the counterfactual delay of the 787 launch, whereas the Airbus Report offered only highly general observations *without any particularized evaluation of when the 787 would have launched absent the subsidies.*

474. It is within this context that the Panel criticized the evidence put forward by the EU. After noting the EU’s criticisms of the Boeing Report for not providing a “comprehensive, component-by-component timeline,” the Panel stated:

Despite these criticisms, the European Union does not itself enumerate the specific additional tasks that Boeing should have reflected in its assessment, and importantly, the European Union does not provide evidence of how long Boeing would have needed to conduct any of the R&D tasks that were actually performed under the NASA and DOD aeronautics R&D programmes.<sup>738</sup>

The context is important because it indicates why the U.S. evidence was more persuasive than that provided by the EU: the United States provided well-reasoned and substantiated evidence

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<sup>736</sup> EU Appellant Submission, para. 827.

<sup>737</sup> Compliance Panel Report, para. 9.162 (citing Boeing Engineers Statement, para. 7 (Exhibit USA-283(BCI))).

<sup>738</sup> Compliance Panel Report, para. 9.164, *cited in* EU Appellant Submission, para. 825.

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that could assist the Panel in answering the counterfactual question before it. The EU, by contrast, did not offer such evidence. The Panel made this even clearer in stating its finding, as the EU acknowledged, that “{i}t is difficult to accept the European Union's generalized criticisms of the United States's estimate in the absence of any clear estimate from the European Union as to how much additional time Boeing would have needed to conduct any of the R&D tasks that were actually performed under the NASA and DOD aeronautics R&D programmes.”<sup>739</sup> It was entirely appropriate for the Panel, when examining a counterfactual timing question, to consider the clear and well-reasoned U.S. estimate to be more probative than the EU's unclear counterarguments. It is telling that the EU, in its request for completion of the analysis, has submitted specific counterfactual timing estimates that it never presented to the Panel.<sup>740</sup>

475. None of these findings reflect an effort by the Panel to accord disparate treatment to the EU vis-à-vis the United States, or to impose an unforeseen or unrealistic evidentiary burden on the EU. Contrary to the EU's assertion, the Panel never “demanded that the European Union demonstrate the precise amount of time needed to perform each of a series of R&D tasks on its own.”<sup>741</sup> Rather, it was the EU's burden to demonstrate that the 787 would not have been present in the market after the end of the compliance period, and it was the EU's prerogative to decide how to satisfy that burden.

476. The EU makes much of the fact that original panel made findings about the 787's counterfactual absence from the market without requiring time estimates for R&D tasks.<sup>742</sup> This is a non-sequitur. It was sufficient for the original panel to find that, absent the pre-2007 aeronautics R&D subsidies, the 787 would not have been launched and present in the market during the original 2004-2006 reference period, because that finding allowed the original panel to find the requisite causal link between the subsidies and the indicia of adverse effects it identified for that period. It does not follow that, in this compliance proceeding, the Panel was bound to credit whatever the EU said about the 787's counterfactual availability in the post-implementation period, however unclear and unsubstantiated. Rather, the parties were free to make their cases as they saw fit, and the Panel acted well within its discretion when it weighed the evidence and concluded that the EU had “failed to establish that, absent the aeronautics R&D subsidies, Boeing would not have launched the 787 by the end of the implementation period in September 2012.”

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<sup>739</sup> Compliance Panel Report, para. 9.165.

<sup>740</sup> See EU Appellant Submission, para. 907.

<sup>741</sup> EU Appellant Submission, para. 827.

<sup>742</sup> EU Appellant Submission, paras. 829-830

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477. As a final point, the EU suggests that the United States never contested the evidence submitted by the EU in the Airbus Report.<sup>743</sup> This is incorrect. The U.S. submissions to the Panel and the Boeing Report itself provided detailed and substantiated time estimates based on comparable benchmarks for composite fuselage and wing designs, and explained why Airbus’s competing estimates were vague and entirely unsubstantiated.

478. For these reasons, the EU has not shown that the Panel acted inconsistent with Articles 5 and 6.3 of the SCM Agreement in weighing the competing evidence submitted by the parties.

**2. *The Panel did not fail to conduct an objective assessment under DSU Article 11 by imposing an ‘impossible burden’ on the EU to prove its case.***

479. The EU similarly fails to establish that the Panel imposed an “impossible burden” on the EU. The EU readily acknowledges that it “bore the burden of providing *prima facie* evidence that, absent the subsidies, Boeing would not have been able to launch or deliver the 787 before the end of the implementation period.”<sup>744</sup> The Panel recognized as much, as the United States had put forward evidence that explained the acceleration effect of the R&D subsidies as recognized by the original panel, showing that, in a counterfactual without the subsidies, Boeing would have launched the 787 well before the end of the implementation period.<sup>745</sup> The burden was on the EU to rebut this evidence, and show that the technology effects of the R&D subsidies persisted beyond the end of the implementation period.

480. The EU maintains that it could not meet this burden because it “could not have accessed internal Boeing documents.”<sup>746</sup> The EU cannot hide behind the fact that certain documents are proprietary and thus unavailable to it (or Airbus) as an excuse to escape its obligation to provide persuasive evidence. Most of the discussion in the Boeing Report as to the comparable benchmarks is not proprietary or business confidential information. Moreover, as discussed above, the EU was not restricted as to the kind of evidence it could submit to persuade the Panel. The EU could have attempted to offer expert evidence that, similar to the Boeing Report, provided substantiated findings based on comparable benchmarks from *Airbus’s experience developing its own aircraft*. The EU chose not to take the approach, and instead offered a report filled with highly generalized and unpersuasive assertions.

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<sup>743</sup> See EU Appellant Submission, para. 833.

<sup>744</sup> EU Appellant Submission, para. 838.

<sup>745</sup> See Compliance Panel Report, para. 9.165. We note that while the EU recognizes it bore the burden of providing *prima facie* evidence, it suggests later in its argument that the United States bore the burden of rebutting the EU’s evidence. See EU Appellant Submission, para. 841. Yet the EU cites nothing to support this assertion.

<sup>746</sup> EU Appellant Submission, para. 840.

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481. Moreover, the EU’s suggestion that the “Panel failed meaningfully to engage with the European Union’s criticisms of {the Boeing Report’s} estimate” is simply wrong.<sup>747</sup> The Panel discussed in painstaking detail the evidence presented by both parties, and found the U.S. evidence more persuasive for the reasons explained previously.

482. In sum, the EU has not established that the Panel failed to make an objective assessment in its consideration of the parties’ competing evidence. The EU has in no way shown that the Panel imposed a heavier evidentiary burden on the EU than the United States, or that it subjected the EU to an impossible burden.

**G. The Panel Did Not Misconstrue the EU’s Statement in the Original Proceeding Concerning the 787’s Counterfactual Launch.**

483. The EU asserts that the Panel failed to conduct an objective assessment because it misconstrued a statement made by the EU in the original proceedings that was noted by the original panel report, and that concerned “when Boeing would have developed the 787 absent the US aeronautics R&D subsidies.”<sup>748</sup> The compliance Panel noted that, in the “original proceeding, the European Communities argued that in the absence of the aeronautics R&D subsidies at issue, Boeing would not have been able to launch the 787 or a comparable aircraft *until mid 2006*.”<sup>749</sup> The EU maintains that the Panel misconstrued its “arguments before the original panel when finding that the European Union had accepted, before the original panel, that Boeing would have been able to launch the 787 *in 2006*.”

484. Contrary to the EU’s assertion, the Panel did not misinterpret the EU’s argument before the original panel. The compliance Panel, in noting this EU argument as cited above, included a footnote parenthetical to the actual statement made by the original panel:

The European Communities argues that, had Boeing needed to develop the 787 using its own resources, the 787 *would likely not have been launched any earlier than mid-2006*, by which time Airbus would have been ready to compete with the A350XWB-800. Moreover, a non-subsidized 787, like the A350XWB-800, would have required a longer period before it could be delivered.<sup>750</sup>

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<sup>747</sup> EU Appellant Submission, para. 845.

<sup>748</sup> EU Appellant Submission, para. 854.

<sup>749</sup> EU Appellant Submission, para. 856 (citing Compliance Panel Report, para. 9.156 (emphasis in original)).

<sup>750</sup> *US – Large Civil Aircraft (Panel)*, para. 4.280, cited in Compliance Panel Report, para. 9.156, note 2921 (emphasis added)



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A comparison between the original panel statement, and the compliance Panel’s rendition of that statement, reveals that there is no inconsistency. The compliance Panel did not state, as the EU suggests, that the EU “had accepted, before the original panel, that Boeing would have been able to launch the 787 in 2006.”<sup>751</sup>

485. The EU in pressing this argument misrepresents the compliance Panel’s findings and makes a mountain out of a mole hill. The compliance Panel did not represent that the EU had argued for a *precise date*. Rather, it recognized the EU’s assertion that Boeing would not have been able to launch the 787 absent the subsidies *until* mid-2006. This is entirely consistent with the original panel’s observation that the EU had argued absent the subsidies, the 787 “would likely not have launched any earlier than mid-2006.”<sup>752</sup> This statement implicitly recognizes that the launch, under any reasonable likelihood, could have been earlier than mid-2006. While the United States recognizes that the original panel’s reflection of the EU’s argument included a qualifier (“likely”) that is not explicitly referenced by the compliance Panel, that alone does not show that the compliance Panel represented the EU’s position as reflecting a *precise date* for the 787’s launch. Aside from the technicality of how the compliance Panel portrayed this argument made by the EU – let alone the relevance of this discussion at all – the EU certainly has not shown that the Panel, in describing the argument as such, failed to conduct an objective assessment.

486. For these reasons, the EU has not shown that the Panel acted inconsistently with Article 11 of the DSU.

**H. The Appellate Body Cannot Complete the Technology Effects Analysis.**

487. The Appellate Body has found that it may complete the analysis “‘only if the factual findings of the panel, or the undisputed facts in the panel record’ provide a sufficient basis for the Appellate Body to do so.”<sup>753</sup> No such basis exists here. Indeed, the EU is asking the Appellate Body to discard the Panel’s careful analysis of a complex factual record and undertake its own *de novo* analysis based on EU argumentation rather than undisputed facts or Panel findings. This is beyond the authority accorded to the Appellate Body by DSU Articles 17.12 and 17.13.<sup>754</sup>

488. If the Appellate Body were to reverse the Panel’s technology effects findings, the EU requests that the Appellate Body complete the analysis and find that “(i) the original technology effects of the pre-2007 US aeronautics R&D subsidies continue in the post-implementation

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<sup>751</sup> EU Appellant Submission, para. 857 (emphasis added).

<sup>752</sup> *US – Large Civil Aircraft (Panel)*, para. 4.280.

<sup>753</sup> See *US – Large Civil Aircraft (AB)*, para. 1250 (quoting *US – Hot Rolled Steel (AB)*, para. 235).

<sup>754</sup> See *EC – Beef Hormones (AB)*, para. 132.

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period, and have a present impact on the performance and/or availability of the 787; and (ii) the spill-over technology effects of the pre-2007 US aeronautics R&D subsidies in respect of the 787-9/10, 737 MAX, and 777X continue in the post-implementation period.”<sup>755</sup> The EU’s proposed path to each requested finding would require the Appellate Body to make multiple factual findings without sufficient basis, including because such findings would be contrary to the original findings, contrary to the Panel’s findings, and/or would assume a fact that the Parties dispute.

***1. The Appellate Body cannot complete the technology effects analysis regarding the 787-8.***

489. The EU’s arguments for completion of the technology effects analysis for the 787-8 are flawed in several respects.

490. First, the EU contends that:

{I}it is not necessary for the Appellate Body to identify the precise time at which the launch, and subsequent delivery, of the 787-8 would have occurred, in the absence of the non-withdrawn R&D subsidies. Rather, the Appellate Body would merely need to confirm, based on undisputed facts and the Panel’s factual findings, that the first delivery of the 787, absent the non-withdrawn subsidies, would have been delayed until after 2012, i.e., after the end of the implementation period.<sup>756</sup>

491. There is no support whatsoever for the notion that the R&D subsidies would cause current serious prejudice through a technology effects causal pathway merely because, absent those subsidies, the first delivery of the 787 would have occurred after the end of the implementation period (*e.g.*, in late 2012 or early 2013). This counterfactual scenario is consistent with a 787 launch date seven years earlier, in 2006 – *i.e.*, the same duration as the period between actual 787 launch in 2004 and actual first delivery in 2011. In such a scenario, the 787 would be present in the market throughout the entire post-implementation period, and the Appellate Body would have no basis for finding that the alleged indicia of serious prejudice identified by the EU, such as lost sales campaigns, would have different outcomes as compared to what actually occurred.

492. Second, the EU would have the Appellate Body “disregard the evidence provided in the Boeing engineers’ statement as not pertinent,”<sup>757</sup> but the Appellate Body cannot do this. Otherwise, the limitations on the Appellate Body’s authority to complete the analysis would be

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<sup>755</sup> EU Appellant Submission, para. 863.

<sup>756</sup> EU Appellant Submission, para. 866 (emphasis added).

<sup>757</sup> EU Appellant Submission, para. 877.

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meaningless – all manner of factual disputes could be simply disregarded by rejecting one party’s evidence as “not pertinent.”

493. Third, as a proxy for estimating the 787 launch delay, the EU relies on generic timeframes to progress from one NASA technology readiness level (“TRL”) to another, which were referenced in a 2010 Boeing presentation.<sup>758</sup> Reliance on this information would be contrary to the Panel’s unappealed finding that “statements made by Boeing engineers that the European Union has cited regarding the time that is required to develop and mature technologies are also highly generalized and do not speak to the contribution of the challenged aeronautics R&D subsidies in respect of Boeing’s overall development of the 787.”<sup>759</sup> Indeed, Boeing engineers, including one of the authors of the presentation at issue, made the same point. The EU selectively quotes the Boeing engineers’ statement on this issue,<sup>760</sup> but the full quotation makes clear that no basis exists for the Appellate Body to adopt an “up to 10 years” timeframe for the period between the start of pre-launch R&D and launch:

We used the NASA TRL scale as a familiar, generalized example for the audience. The slide refers to times to progress along the TRL scale, but these times are both *generic (they do not refer to a specific technology)* and *broad ranges (“up to 10 years” and “3 to 6 years”)*. It is true that, *as a general matter*, it may take up to 10 years to mature a major technology from TRL 1 to TRL 6, *but that is not inconsistent with the fact that it can take far less time in a particular instance*. We therefore consider that this slide does not undermine our counterfactual analysis estimating that Boeing would have conducted the additional R&D in approximately two years.<sup>761</sup>

494. The EU’s reliance on generic TRL timeframes would also be at odds with the EU’s position before the Panel. The Panel noted the EU’s agreement that “the precise timeframes” in the Peisen study (a 1999 NASA study of the average time taken to move between TRL levels) “are of lesser relevance to the compliance Panel’s assessment, because, as the original panel and the Appellate Body have themselves found, *the study was based on a variety of different aircraft technologies with widely varying maturation times.*”<sup>762</sup> In sum, there are no Panel findings or undisputed facts that would support reliance on generic TRL timeframes in determining counterfactual 787 launch timing or any other aspect of the 787’s development.

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<sup>758</sup> See EU Appellant Submission, para. 882-884.

<sup>759</sup> Compliance Panel Report, para. 9.166.

<sup>760</sup> See EU Appellant Submission, para. 883.

<sup>761</sup> Boeing Engineers Reply, para. 30 (Exhibit USA-359(BCI)) (emphasis added).

<sup>762</sup> Compliance Panel Report, note 2932 (emphasis added).

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495. Fourth, the EU offers an alternative estimate of 787 development timing based on information provided by Airbus engineers. This is nothing more than an invitation for the Appellate Body to weigh the evidence provided by the Boeing engineers against the critiques of the EU and Airbus engineers after the Panel already did so and found the latter to be “highly-generalized in nature, and ultimately unpersuasive.”<sup>763</sup> The Airbus engineers’ information is also conceptually flawed, as it concerns the full spectrum of aircraft development activities through first delivery, as opposed to the specific roles played by the pre-2007 aeronautics R&D subsidies.<sup>764</sup> As the Panel found, the EU/Airbus approach of considering “the entire development period of the 787 beyond its launch (including the time it would have taken Boeing to develop, mature, produce, and certify 787 technologies, and the time to integrate those components into a single aircraft, as the European Union argues)” is “inconsistent with the findings in the original proceeding.”<sup>765</sup>

496. Moreover, the EU errs in asserting that the United States “did not contest any of these facts” regarding the Airbus engineers’ counterfactual timing estimates for the 787.<sup>766</sup> The EU goes so far as to state that the United States “does not dispute” that the counterfactual 787 launch could be as late as 2015.<sup>767</sup> To the contrary, the United States submitted a reply by Boeing engineers refuting the EU/Airbus critiques and reaffirming the Boeing engineers’ original counterfactual timing estimate.<sup>768</sup> Thus, these facts are not undisputed.

497. Fifth, the EU’s counterfactual timing estimates are in direct conflict with the Panel’s unappealed findings regarding the development timing of Airbus’s A350 XWB. The Panel properly recognized that, although the A350 XWB and 787 have different “design{s} and technical solutions, the fact that Airbus was able to proceed from a ‘clean sheet’ design of the A350XWB to a point where it had sufficient confidence to undertake the formal launch of the A350XWB, including Airbus’s first-ever composite fuselage, in a period of roughly [BCI], provides, ‘a general sense of what range of estimates is reasonable’.”<sup>769</sup> In comparison, the EU’s

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<sup>763</sup> Compliance Panel Report, para. 9.162.

<sup>764</sup> See EU Appellant Submission, para. 891.

<sup>765</sup> Compliance Panel Report, para. 9.161.

<sup>766</sup> See EU Appellant Submission, para. 891.

<sup>767</sup> See EU Appellant Submission, para. 894.

<sup>768</sup> See, e.g., Boeing Engineers Reply, paras. 13-26 (Exhibit USA-359(BCI)).

<sup>769</sup> Compliance Panel Report, para. 9.175. It also acknowledged that to the extent that other features of the 787 impact the “length of the aircraft development cycle, and in particular, the pre-launch development time, the U.S. counterfactual allows for [BCI] of pre-launch development, which means that the 787 pre-launch development period would exceed the A350XWB pre-launch development period by [BCI].” Compliance Panel Report, para. 9.175.

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counterfactual 787 timing estimates – including a launch up to 11 years later than the actual 2004 launch<sup>770</sup> – are patently unreasonable.

**2. *The Appellate Body cannot complete the technology effects analysis regarding the 787-9/10, 737 MAX, and 777X.***

498. Given the barriers to completion of the analysis for the 787-8, the Appellate Body could not complete the so-called “spill-over” technology effects analysis regarding the 787-9/10, 737 MAX, and 777X. According to the EU’s spillover theory – which was vigorously disputed by the United States and rejected by the Panel<sup>771</sup> – “the launch and subsequent delivery” of the 787-9/10, 737 MAX, and 777X “would have been affected by the delayed launch and first delivery of the 787 . . . .”<sup>772</sup> Without any basis to find in the EU’s favour with respect to the counterfactual timing of the 787-8, the Appellate Body, for this reason alone, would lack a sufficient basis to find delays with respect to the other aircraft models.

499. The EU’s request would also require the Appellate Body to impermissibly re-weigh the evidence and, indeed, make wholly new findings about facts not in evidence. Most notably, the EU glosses over a crucial gap in its proposed “analysis” concerning the relationship between the counterfactual launch of the 787-8 and the launches of the other models. Before the Panel, the United States argued that a two-year delay in the launch of the 787 (which involved the simultaneous launch of the 787-8 and 787-9<sup>773</sup>) would still allow sufficient time for any technology spillovers to occur without delaying the launches of the 787-10, 737 MAX, or 777X.<sup>774</sup> The Panel found that the EU failed to “provide credible evidence that the 787 technologies that Boeing would have developed absent the aeronautics R&D subsidies could not have been adapted and developed into spill-over technologies for the 787-9/10 or 777X in sufficient time to enable their respective launches in 2013,”<sup>775</sup> and made essentially the same finding regarding the 737 MAX.<sup>776</sup> The EU cannot now fill this evidentiary hole with tortured interpretations of the “time gaps” between aircraft model launches,<sup>777</sup> including bare assertions that such gaps “reflect resource and engineering constraints Boeing faced when launching

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<sup>770</sup> See EU Appellant Submission, paras. 894-895.

<sup>771</sup> See, e.g., Compliance Panel Report, para. 9.186.

<sup>772</sup> EU Appellant Submission, para. 896.

<sup>773</sup> See EU Appellant Submission, para. 901.

<sup>774</sup> See Compliance Panel Report, para. 9.183.

<sup>775</sup> Compliance Panel Report, para. 9.185.

<sup>776</sup> See Compliance Panel Report, para. 9.354-9.355.

<sup>777</sup> See EU Appellant Submission, para. 899-904.

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several LCA models in close succession.”<sup>778</sup> To the contrary, the Panel in an unappealed finding disagreed with similar “simple” comparisons by the EU and stated that, “{c}ommercial priorities differ between different aircraft programmes and these differing priorities can influence the point in time at which an aircraft manufacturer decides to launch an aircraft programme.”<sup>779</sup> It would be wholly inappropriate for the Appellate Body to assume new, unsubstantiated facts in the EU’s favour.

500. In sum, the Panel’s assessment of the EU’s technology effects allegations is exceedingly fact-intensive and intricate. No basis exists to disturb it, but even if the Appellate Body were to disagree, it could not conduct the *de novo* factual assessment that the EU seeks.

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<sup>778</sup> EU Appellant Submission, para. 900.

<sup>779</sup> Compliance Panel Report, note 2947.

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**XII. THE PANEL CORRECTLY FOUND THAT THE EU FAILED TO DEMONSTRATE THAT PRE-2007 R&D SUBSIDIES HAD “CONTINUING” ADVERSE EFFECTS TO THE A330 AND A350 XWB AFTER THE IMPLEMENTATION PERIOD.**

501. In evaluating the EU’s assertions as to continuing adverse effects, the compliance Panel carefully analyzed the evidence concerning specific aircraft models.<sup>780</sup> It did this both because model-specific factors are an inescapable part of assessing allegations of serious prejudice in the large civil aircraft industry, and because the EU organized its arguments around individual models, namely the A330 and A350 XWB. Moreover, the compliance Panel used the adopted findings of the original panel and the Appellate Body as a starting point for its serious prejudice analysis. It engaged with the claims and arguments in this compliance proceeding. And, it accounted for developments and evidence arising since the original reference period. To the extent that the Panel’s analysis differed from the original panel’s analysis, it was because of differences in the claims, evidence, and argumentation, such as the EU’s failure to show any relationship between the market presence of the 787 and prices for the A330 in the post-implementation period.

502. The EU alleges two errors with respect to the Panel’s findings that the pre-2007 aeronautics R&D subsidies do not cause “continuing” adverse effects after the compliance period. First, the EU contends that the Panel’s findings of no continuing adverse effects for the A330 and A350 XWB are inconsistent with Article 11 of the DSU because they deviated from the original panel’s findings.<sup>781</sup> Second, the EU argues that, in assessing the EU’s price suppression allegation concerning the A330, the Panel erred in its application of Articles 5 and 6.3 of the SCM Agreement by supposedly failing to conduct a counterfactual analysis.<sup>782</sup> Underlying each appeal is the same simplistic, erroneous contention that the adverse effects found by the original panel inevitably continued after the implementation period because no relevant changes have occurred since the original reference period. This proposition is legally incorrect and contrary to the evidence.

503. The EU’s appeal under DSU Article 11 fails because the compliance Panel adhered to the original panel’s legal reasoning, and applied it to the facts and arguments in this new proceeding. That this process in some instances produced different outcomes was not an impermissible “deviation,” but rather the result of an objective assessment that addressed the relevant new facts

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<sup>780</sup> See *US – Large Civil Aircraft (AB)*, para. 1123 (“It is true that the Panel’s ultimate finding of price suppression was based upon its analysis of the A330 and the Original A350, and not upon evidence as to price effects on the A350XWB-800.”).

<sup>781</sup> EU Appellant Submission, para. 913.

<sup>782</sup> EU Appellant Submission, para. 914.

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and arguments and did not mechanistically replicate the original results. The EU’s dissatisfaction with the Panel’s findings is not a valid basis for a DSU Article 11 appeal.

504. The EU also fails to establish that the Panel erred in applying Articles 5 and 6.3 of the SCM Agreement to the claim that A330 prices are significantly suppressed. The Panel explicitly acknowledged that a price suppression claim under Article 6.3(c) is counterfactual in nature. It carefully examined the evidence and correctly found no basis for the EU’s argument that, absent unwithdrawn subsidies, counterfactual A330 prices in the post-implementation period would have been different, let alone that they would have “recovered” to their pre-2004 levels. While the EU may disagree with the Panel’s weighing of the evidence, it cannot demonstrate legal error.

505. The EU also requests that, in the event of reversal of the challenged Panel findings, the Appellate Body complete the legal analysis to find that the EU continues to suffer significant price suppression with respect to the “A330 family LCA,” significant lost sales in the “medium-sized twin-aisle aircraft market,” and threat of impedance or displacement of its exports to Australia “with respect to the Qantas order for 787 family LCA during the original 2004-2006 reference period.”<sup>783</sup> However, beyond generalized assertions and, again, unsupported assumptions and a misreading of the original Panel’s findings, the EU offers no evidence for the Appellate Body to complete the analysis and reach the findings that the EU requests.

506. In Section XII.A below, the United States establishes that, contrary to the EU’s assertion, the Panel made an objective assessment of the matter before it, consistent with DSU Article 11. In Section XII.B, the United States shows that the Panel properly applied Articles 5 and 6.3 of the SCM Agreement in conducting a counterfactual analysis. Finally, the United States demonstrates in Section XII.C that even if the Appellate Body reverses the Panel findings challenged by the EU, there are insufficient Panel findings and uncontested facts for the Appellate Body to complete the legal analysis.

**A. The Panel Performed an Objective Assessment of the EU’s Allegations of “Continuing” Serious Prejudice Regarding the A330 and A350 XWB.**

507. DSU Article 11 admonishes a panel 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” Article 11 does not require a Panel to refer to every piece of evidence or argumentation advanced by the parties,<sup>784</sup> and the Appellate Body has emphasized that the

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<sup>783</sup> EU Appellant Submission, paras. 977-995.

<sup>784</sup> *US – Large Civil Aircraft (AB)*, para. 722; *EC – Fasteners (AB)*, para. 442.



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weighing of evidence is within a panel’s discretion.<sup>785</sup> Here, the Panel considered the evidence cited by the EU, weighed it against evidence cited by the United States, and found that the evidence and argumentation did not support the EU’s assertions of continuing adverse effects to the A330 and A350 XWB. The EU provides no basis to question the objectivity of this assessment and, therefore, has failed to justify its appeal under DSU Article 11.<sup>786</sup>

***1. The Panel did not improperly deviate from the original panel’s findings.***

508. The EU alleges that the Panel improperly “deviated” from the original panel’s adopted findings with respect to significant price suppression, significant lost sales, and threat of displacement and impedance in the 200-300 seat LCA market. Specifically, the EU observes that the original panel’s ultimate findings “related to *the 200-300 seat LCA market as a whole*,” and that this market included the A350XWB-800 LCA.<sup>787</sup> From this premise, the EU asserts that the Panel committed “legal error” because rather than assess the 200-300 seat LCA market, which is essentially what is referred to as the medium-sized twin-aisle market in this proceeding, the Panel “focus{ed} its adverse effects assessment on *separate aircraft models . . .*”<sup>788</sup> The EU’s arguments fail in three critical respects.

509. *First*, the EU cannot fault the Panel for focusing on evidence and argumentation for specific aircraft models because the original panel *did the same thing*. Indeed, many of the original panel’s key findings regarding the effects of pre-2007 aeronautics R&D subsidies are model-specific. For example:

- “The evidence concerning the pricing trends for the A330, combined with the market share data, are consistent with what we would expect to occur from the introduction of a technologically-superior aircraft, offering operating cost advantages over older-technology aircraft, for around the same price. Clearly, one would expect that prices of the A330 would fall, and that it would lose market share, even in the face of significantly increased demand in that product market.”<sup>789</sup>
- “In several of the sales campaigns in which the European Communities argues that the customer favoured the 787 owing to its technological features or

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<sup>785</sup> *Korea – Dairy (AB)*, para. 137.

<sup>786</sup> The EU requests the Appellate Body to reverse the Panel’s findings in paragraphs 9.315, 9.321, 9.322, 9.326, 9.331, and 9.332, as well as the Panel’s application of Articles 5 and 6.3 of the SCM Agreement. EU Appellant Submission, para. 974.

<sup>787</sup> EU Appellant Submission, para. 955 (emphasis in original).

<sup>788</sup> EU Appellant Submission, paras. 957-57.

<sup>789</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1785.

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availability in 2008, it appears that factors other than the performance characteristics of the 787 over the A330 or Original A350, and the 2008 delivery date for the 787, played a significant part in the Boeing sale.”<sup>790</sup>

- “As we have already indicated, we are satisfied that the technologies applied to the 787 resulted in an aircraft that offered substantial operating cost reductions to its customers, and that the combination of the superior technology and lower operating costs of the 787 clearly affected the comparative value of Airbus’ A330 and Original A350, leaving Airbus no other option but to reduce the prices of its aircraft in order to compete. The evidence concerning the degree of price concessions that Airbus offered in order to secure sales of its A330 and Original A350 indicates that a further effect of the aeronautics R&D subsidies was significant price suppression with respect to the A330 and Original A350.”<sup>791</sup>

510. The original panel also separately analyzed the EU’s serious prejudice allegations regarding the A350 XWB-800, finding that the EU had failed to establish significant price suppression with respect to that model.<sup>792</sup> As the Appellate Body observed, “the Panel’s ultimate finding of price suppression was based upon its analysis of the A330 and the Original A350, and not upon evidence as to price effects on the A350XWB-800.”<sup>793</sup> Thus, to use the EU’s parlance, the original panel “focus {ed} its adverse effects assessment on *separate aircraft models*.”<sup>794</sup> Therefore, in doing likewise, the Panel was following the example of the Appellate Body, and not deviating from previous findings in the proceeding. Indeed, it was entirely appropriate that the Panel assessed the EU’s arguments based on evidence concerning the actual models in the relevant market, which allowed it to capture how competitive interactions (or the lack thereof)<sup>795</sup> evolved over time.

511. *Second*, the EU cannot fault the Panel for focusing on evidence and argumentation for specific aircraft models because the EU itself *did the same thing*. It framed its arguments in model-specific terms. Regarding the A330, the EU claimed that “the US R&D subsidies benefitting Boeing’s 787 family LCA presently cause present significant price suppression of A330 family LCA, within the meaning of Article 6.3(c) of the *SCM Agreement*,”<sup>796</sup> but it did not claim that the A330 experienced significant lost sales or displacement, impedance, or threat

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<sup>790</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1786.

<sup>791</sup> *US – Large Civil Aircraft (Panel)*, para. 7.1792.

<sup>792</sup> *See US – Large Civil Aircraft (Panel)*, para. 7.1793.

<sup>793</sup> *US – Large Civil Aircraft (AB)*, para. 1123.

<sup>794</sup> *Cf.* EU Appellant Submission, para. 958 (emphasis original).

<sup>795</sup> *See Compliance Panel Report*, para. 9.320.

<sup>796</sup> EU FWS, para. 1265.

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thereof. At the same time, the EU made *separate* claims of significant price suppression, significant lost sales, and impedance or threat thereof for the A350 XWB.<sup>797</sup>

512. It is also significant that the EU’s arguments and characterizations of the facts differed from the situation identified by the original panel. In contrast to the original panel’s findings, the EU in the compliance proceeding did not allege any serious prejudice experienced by the Original A350; it argued that the A330 and 787 do not presently compete in the same market; and it argued that serious prejudice to the A330 and Original A350 had been transmitted to the A350 XWB. While the Panel adopted product markets different from those the EU proposed, it cannot be faulted for engaging with the model-specific claims and arguments the EU made. Indeed, had it not engaged with claims on a model-specific basis, it is difficult to see how the Panel could have transposed the EU’s arguments based on the EU’s market delineations into the market definitions adopted by the Panel.

513. Third, although it asserts “an absence of any change in the relevant underlying facts,”<sup>798</sup> the EU does not support this assertion with any evidence. In fact, the Panel confronted different facts and evidence than the original panel did. Whereas the original panel found indicia of serious prejudice experienced by the Original A350, the Parties in the compliance proceeding agreed that, in the post-implementation period, the Original A350 was defunct and not experiencing serious prejudice. Whereas the original panel found that A330 price trends were consistent with price suppression caused by aeronautics R&D subsidies to the 787, the Panel was presented with very different price trend data.<sup>799</sup> And whereas the original panel found persuasive evidence that aeronautics R&D subsidies enabled Boeing to offer the 787 during the original reference period, the Panel found that the 787 would have been in the market during the post-implementation period regardless of subsidies.<sup>800</sup>

514. Accordingly, the EU is wrong to characterize the circumstances of this compliance proceeding as identical in all relevant respects to, and requiring the same result as, the situation before the original panel. The compliance Panel recognized this reality. It used the adopted findings of the original panel and the Appellate Body as a starting point for its serious prejudice analysis, it engaged with the claims and arguments in this compliance proceeding, and it accounted for developments and evidence arising since the original reference period. In doing so, it provided an objective assessment for purposes of DSU Article 11.

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<sup>797</sup> See, e.g., EU FWS, paras. 1266 (price suppression), 1567 (lost sales), 1580-1585 (impedance or threat thereof).

<sup>798</sup> EU Appellant Submission, para. 957.

<sup>799</sup> See Compliance Panel Report, para. 9.320.

<sup>800</sup> See Compliance Panel Report, para. 9.176.

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**2. *The Panel performed an objective assessment of significant price suppression, significant lost sales, and threat of displacement and impedance.***

515. From the erroneous premise that the Panel improperly deviated from the original panel’s findings, the EU argues that, under its duty to be consistent with the approach in the original proceeding, the Panel was bound to “confirm” significant price suppression, significant lost sales, and a threat of displacement and impedance in the post-implementation period. The EU takes as a given that there had been “no change” in the underlying facts or evidence to justify a change in the resulting findings concerning each form of serious prejudice.<sup>801</sup> Unlike the EU, however, the Panel could not simply assume the absence of relevant changes. To the contrary, the Panel had to carefully consider the evidence and argumentation concerning developments since the original reference period. In conducting this analysis, the Panel correctly found that the evidence did not support the EU’s claims. The Panel then explained why, in addition to the “legal and conceptual problems” they posed, the EU’s allegations of adverse effects were “contradicted by the evidence and/or inconsistent with the relevant findings made in the original proceeding.”<sup>802</sup>

516. *First*, as demonstrated in Section VI above, the Panel was not bound to treat orders placed during the original reference period as indicia of, or conduits for, adverse effects in the post-implementation period simply because deliveries pursuant to those orders remained outstanding. In particular, the Panel properly rejected the EU’s argument that aircraft deliveries during the post-implementation period pursuant to orders placed prior to the end of the implementation period constitute present lost sales or price suppression arising in the post-implementation period.<sup>803</sup> Accordingly, the EU errs in treating such outstanding orders as dictating serious prejudice findings.<sup>804</sup>

517. *Second*, the EU argues on appeal that the Panel “should have confirmed” the existence of significant price suppression because there had been “no change in the underlying evidence.”<sup>805</sup> But the evidence had changed. Most notably, the Panel had found that, absent subsidies, the 787 would be present in the market after the implementation period, meaning any effects of its competitive interplay with the A330 were not attributable to subsidies.<sup>806</sup> Accordingly, the Panel

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<sup>801</sup> See EU Appellant Submission, paras. 961,963, 964. See also *ibid.*

<sup>802</sup> Compliance Panel Report, para. 9.315. See also *ibid.*, paras. 9.316-9.331.

<sup>803</sup> Compliance Panel Report, para. 9.314.

<sup>804</sup> See EU Appellant Submission, paras. 960, 963, 964.

<sup>805</sup> See EU Appellant Submission, para. 961.

<sup>806</sup> See Compliance Panel Report, paras. 9.176-9.177.

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correctly rejected the EU’s argument that significant price suppression could be inferred from the failure of A330 prices to “recover” to pre-2004 levels.<sup>807</sup>

518. In addition, while the original panel had before it A330 price trend data that were consistent with a finding of price suppression due to competition from the 787, the compliance Panel considered a new analysis based on current information was necessary. The EU sought to do that, but the Panel found that the pricing data that the EU presented was not up to date and that the EU had failed to “empirically demonstrate” its allegation.<sup>808</sup> In contrast, the Panel was persuaded by the U.S. demonstration that “there is no correlation in price movements between the A330 and the 787.”<sup>809</sup> In sum, the Panel made an objective assessment of the EU’s price suppression arguments, and it was in no way bound to “confirm” the findings from the original proceeding.

519. *Third*, the EU’s arguments regarding the Qantas lost sale and threat of displacement and impedance in the Australian medium-size twin-aisle market rely on the same faulty premise – that serious prejudice that the original panel found was experienced by the A330 or Original A350 must now be found to be serious prejudice with respect to the A350 XWB. The Panel engaged with the EU’s arguments on these issues but found them unconvincing:

- “The European Union does not request the Panel to make a finding of present adverse effects in the form of significant lost sales to the A330 and Original A350. In our view, the European Union has not provided a convincing explanation as to why ‘it is irrelevant whether or not the 787 orders found to be lost sales in the original reference period are lost sales for the A350XWB, rather than the A330 or Original A350’. The lost sales, which according to the European Union’s theory that lost sales continue until the aircraft are delivered, the United States failed to remove as a result of the fact that the deliveries of the Boeing 787 remained outstanding at the expiry of the implementation period, were lost sales of A330 and Original A350 aircraft. There is no logical basis to now treat those lost sales as lost sales of A350XWB LCA. We do not see how the fact that the 787 and the A350XWB now compete in the same product market can alter the fact that at the time the 787 sales were made, they caused lost sales of the A330 and Original A350, not the A350XWB, which had not even been launched at that time.”<sup>810</sup>

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<sup>807</sup> See Compliance Panel Report, para. 9.319.

<sup>808</sup> Compliance Panel Report, paras. 9.318, 9.321.

<sup>809</sup> Compliance Panel Report, para. 9.320.

<sup>810</sup> Compliance Panel Report, para. 9.325.

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- “{W}e note that the original panel based its finding of a threat of displacement on a sales campaign involving the Original A350. There is no basis to treat this now as a finding of a threat of displacement in respect of the A350XWB. As in the case of the European Union’s argument that serious prejudice in the form of lost sales found to exist in the original proceeding in respect of the A330 and Original A350 continues as serious prejudice in respect of the A350XWB, we consider that the European Union does not offer a convincing reason to explain why a particular form of serious prejudice found to exist during the original reference period in respect of a particular aircraft should now be considered to continue to exist as a form of serious prejudice in respect of a different aircraft.”<sup>811</sup>

520. Thus, while the EU simply assumed that a lost sale or impeded exports for the A330 or Original A350 converts into the same harm to the A350 XWB, the Panel correctly identified the gaps in the EU’s logic and evidence. The EU’s arguments failed because they were unconvincing and unsupported, not because the Panel failed to conduct an objective assessment.

521. In sum, the EU has failed to justify its argument that the Panel’s careful analysis be overturned for failing to “confirm” the original panel’s findings. An Article 11 claim is a “very serious allegation,”<sup>812</sup> and requires the moving party to “clearly articulate and substantiate {the claim} with specific arguments”<sup>813</sup> and “explain why... {the} evidence is so material to its case that the panel’s failure to explicitly address and rely upon the evidence has a bearing on the objectivity of the panel’s factual assessment.”<sup>814</sup> The EU fails to provide specific arguments as to why the Panel’s findings fail to provide an objective assessment when, as explained above, the Panel did in fact weigh and balance the material evidence before it, taking into account the findings and recommendations from the original proceedings, and clearly explained the rationale behind its findings. The fact that the EU is dissatisfied with the Panel’s weighing of the evidence does not render it erroneous, much less lacking in objectivity.

**B. The Panel Correctly Applied Articles 5 and 6.3 of the SCM Agreement in Assessing the EU’s Price Suppression Claim Regarding the A330.**

522. The EU alleges that the Panel erred in its application of the legal standard under Articles 5 and 6.3 of the SCM Agreement because it did not conduct a “counterfactual analysis when assessing the price effects of US subsidies on the A330.”<sup>815</sup> However, any failures concerning

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<sup>811</sup> Compliance Panel Report, para. 9.331.

<sup>812</sup> *EC – Poultry (AB)*, para. 133.

<sup>813</sup> *China – Rare Earths (AB)*, para. 5.227.

<sup>814</sup> *China – Rare Earths (AB)*, para. 5.178 (emphasis added).

<sup>815</sup> EU Appellant Submission, para. 970.

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counterfactual analysis belong to the EU alone. The Panel clearly understood that a claim of significant price suppression under Article 6.3(c) of the SCM Agreement is counterfactual in nature:

{S}ince a claim of significant price suppression requires establishing where prices would have been in the absence of the subsidies, price trend data alone is not sufficient to demonstrate the existence of this market phenomenon; it is also necessary to present counterfactual argumentation demonstrating that, in the absence of the subsidies, prices would have been higher.<sup>816</sup>

523. The EU, however, did not present counterfactual argumentation and evidence beyond the simplistic argument that, because actual A330 prices have not recovered to pre-2004 levels, “something” must be holding down A330 prices, and that “something” must be the effect of subsidies to the 787.<sup>817</sup> This is not meaningful counterfactual argumentation. The EU’s argument, in reality, boiled down to a graph accompanied by an assertion that the line on the graph would have been significantly higher but for subsidies.

524. The EU asserted that A330 prices [BCI] absent the price-suppressing effects of “something.”<sup>818</sup> But the EU cited no evidence to substantiate its theory that a specific large civil aircraft model’s prices [BCI]. The EU just asserted that its theory was true.<sup>819</sup> Moreover, assuming *arguendo* that the line on the graph was too low, the EU failed to provide any valid reason to infer that the “something” suppressing the line was the effects of unwithdrawn subsidies to the 787, as opposed to other causes.

525. Moreover, the pricing evidence cited by the EU (including the actual A330 price trend data that the EU cites on appeal as “one benchmark” for assessing current A330 prices<sup>820</sup>) was plagued by empirical problems.<sup>821</sup> The Panel found the data submitted by the EU was incomplete, and that, despite the Panel’s request, “the European Union did not update much of the data on which it relies to demonstrate that the A330 has suffered significant price suppression in the post-implementation period.”<sup>822</sup> The Panel also found that “the European Union ultimately appears to repudiate its own price trend data on the basis of methodological flaws.”<sup>823</sup>

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<sup>816</sup> Compliance Panel Report, note 3182.

<sup>817</sup> See Compliance Panel Report, para. 9.319; EU Appellant Submission, para. 972.

<sup>818</sup> See EU First Written Submission, paras. 1247, 1249, 1251.

<sup>819</sup> See EU First Written Submission, paras. 1249-1251.

<sup>820</sup> EU Appellant Submission, para. 972.

<sup>821</sup> See Compliance Panel Report, para. 9.321, note 3182.

<sup>822</sup> Compliance Panel Report, para. 9.318.

<sup>823</sup> Compliance Panel Report, para. 9.321, note 3182.

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Thus, the Panel rightly found that the EU failed to adequately support its case with counterfactual argumentation.<sup>824</sup>

526. Moreover, the EU’s A330 price suppression allegation was critically flawed because the EU did not, and could not, demonstrate that the 787 (and, consequently, the A350 XWB) would have been absent from the market in the counterfactual situation during the post-implementation period. As discussed above in Section XI, the Panel correctly concluded that “it is simply not plausible, and the European Union has failed to establish that, absent the aeronautics R&D subsidies, Boeing would not have launched the 787 by the end of the implementation period in September 2012.”<sup>825</sup> Accordingly, the Panel had no basis to conduct a counterfactual analysis of A330 prices premised on the absence of the 787 from the market. Thus, it was appropriate for the Panel to consider the effect on A330 prices of the presence of the 787 and A350 XWB in the marketplace, which could not be attributed to the pre-2007 aeronautics R&D subsidies. As the Panel stated:

{I}t is not clear to us why Airbus could have legitimately expected A330 prices to ever "recover" to their pre-2004 levels, when the A330 was the technological market leader, given the reality that since then, the 787 and A350XWB have changed the competitive dynamics of this market. The A330 still has a place in the market and its sales still appear robust, but there is no reason to think it could command the sort of price it once did.<sup>826</sup>

527. This is not a failure to conduct a counterfactual assessment. Rather, it reflects a counterfactual evaluation that the prevailing prices would not have been different in the absence of the subsidies because the competitive dynamics driving those prices after the end of the implementation period would have been the same.

528. Thus, the EU failed to establish that counterfactual A330 prices would have been any different from actual levels, let alone different in a manner that would support a finding of significant price suppression within the meaning of Article 6.3(c). Therefore, the EU, as the complaining party, failed to meet its burden to establish that counterfactual A330 prices would have been higher than the observed prices. It was no error in application of Articles 5 and 6.3 for

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<sup>824</sup> Compliance Panel Report, para. 9.321, note 3182.

<sup>825</sup> The Panel further added that “{a}lthough it is more difficult for us to confidently predict exactly when Boeing would have been able to launch the 787 absent the pre-2007 aeronautics R&D subsidies, we have concluded that it would be well before (i.e. at least several years before) the end of the implementation period.” Compliance Panel Report, para. 9.176.

<sup>826</sup> See Compliance Panel Report, para. 9.319.



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the Panel to hold the EU to its burden of proof, and rule against the EU when it failed to meet that burden.<sup>827</sup>

529. Even if there were any reason to consider that the 787 would have been absent from the market in the counterfactual situation, the evidence contradicted the notion that counterfactual A330 prices would have been higher than actual prices. As the Panel found, “there is no correlation in price movements between the A330 and the 787.”<sup>828</sup> Indeed, the price trend data show that [BCI] A330 prices, as the EU’s price suppression theory would predict. Rather, [BCI]<sup>829</sup>

530. Thus, the Panel was not presented with any basis to find that the counterfactual absence of the 787 from the market, or any change in 787 prices, would result in higher – let alone significantly higher – A330 prices. Far from being irrelevant, as the EU contends,<sup>830</sup> this absence of a correlation in observed price movements undermines the EU’s attempt to link the 787’s market presence and pricing to A330 prices.

531. Thus, the failure of the EU’s A330 price suppression allegations resulted from the EU’s failure to satisfy its burden of proof at the most basic level. Cognizant of the counterfactual nature of a price suppression claim, the Panel considered all relevant evidence and correctly found no basis for the EU’s argument that, absent unwithdrawn subsidies, counterfactual A330 prices in the post-implementation period would have been different, let alone that they would have “recovered” to their pre-2004 levels. While the EU may disagree with the Panel’s weighing of the evidence, it cannot demonstrate legal error. The Panel was not obligated to assign dispositive weight to the EU’s vague and unsubstantiated assertions about what A330 pricing would look like absent subsidies to the 787, particularly where the relevant evidence contradicted those assertions. Accordingly, there is no merit to EU’s allegation that the Panel erred in applying Articles 5 and 6.3 of the SCM Agreement in its assessment of alleged significant price suppression regarding the A330.

**C. The Appellate Body Cannot Complete the Analysis to Find “Continuing” Adverse Effects.**

532. As the preceding discussion shows, the Panel did not err in assessing the EU’s allegations of continuing adverse effects regarding the A330 and A350 XWB. Accordingly, there is no basis to grant the EU’s request for reversal of the Panel’s findings,<sup>831</sup> and no need to engage with

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<sup>827</sup> See EU Appellant Submission, para. 971.

<sup>828</sup> Compliance Panel Report, para. 9.320.

<sup>829</sup> Compliance Panel Report, para. 9.320.

<sup>830</sup> See EU Appellant Submission, para. 972.

<sup>831</sup> See EU Appellant Submission, para. 974-975.

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the EU's consequential request that the Appellate Body complete the Panel's analysis to find continuing adverse effects. For the sake of completeness, this section addresses the EU's requests for completion of the analysis, and demonstrates that there are not sufficient findings by the Panel or uncontested facts to grant that request.

**1. *The EU's request to "reinstate" the adverse effects findings from the original proceedings.***

533. The EU first requests that the Appellate Body complete the legal analysis in a way that "reinstates" the original panel's findings of adverse effects experienced on the A330 and the Original A350.<sup>832</sup> The EU provides no factual or legal basis for granting this request – it simply lists findings made by the original panel and asks that they be "reinstated." The EU's proposal is legally incoherent. In the first place, the findings of the original panel could only be "reinstated" if they had somehow gone out of effect. They have not. They remain the adopted findings of the DSB. Second, the findings of the original panel relate to its reference period of 2004-2006. The compliance Panel, without dissent from either party, identified its task as evaluating whether any unwithdrawn subsidies cause adverse effects in the period beginning on September 23, 2012. Thus, even if the original panel's findings could be transposed into the report of the compliance Panel, they would not address the relevant question. Therefore, there is no valid legal basis to grant the EU's request to complete the compliance Panel's analysis by "reinstating" the findings of the original panel.

**2. *The EU's assertion that panel findings and undisputed facts allow completion of the analysis.***

534. The EU asserts that an alternative basis exists for the Appellate Body to complete the legal analysis "to the extent the Appellate Body considers that it cannot complete the legal analysis by reinstating certain findings from the original proceedings."<sup>833</sup> According to the EU, this additional basis "also applies if the Appellate Body reverses the Panel's findings on the basis of the error in application."<sup>834</sup> However, there are insufficient Panel findings and uncontested facts for the Appellate Body to complete the analysis.

**a. *No Significant Price Suppression Regarding the A330***

535. The EU points to two undisputed facts: that after the end of the implementation period some customers exercised options and purchase rights derived from orders, and that deliveries

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<sup>832</sup> The EU acknowledges that "this approach may not be available to the Appellate Body if it does not reverse the Panel's findings on the basis of the Article 11 error set out above." See EU Appellant Submission, paras. 975-77.

<sup>833</sup> EU Appellant Submission, para. 978.

<sup>834</sup> EU Appellant Submission, para. 978.

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pursuant to those orders occurred during the same period. It argues that these facts alone would allow the Appellate Body to complete the Panel’s analysis and find that the A330 was subject to significant price suppression in the post-implementation period. The EU is incorrect.

536. As an initial matter, these are not undisputed facts. The findings in the original proceeding with respect to A330 price suppression were based on price trend data, not on specific A330 sales. The EU simply asserted, without citation to any evidence, that “Airbus continues to make present deliveries under many of these orders, including through later exercises of options and purchase rights secured in the sales contracts that memorialised the suppressed prices.”<sup>835</sup> The EU has never identified which customers from the original reference period later exercised options or purchase rights, when such options or purchase rights were supposedly exercised, or at what prices and on what terms such options or purchase rights were supposedly exercised. Needless to say, it has not identified delivery dates associated with unidentified exercises of options or purchased rights.

537. Moreover, the original panel found that prices in campaigns that resulted in A330 orders in the 2004-2006 period were lower than they would have been absent the accelerated launch and entry into the market of the 787. The EU posits that options and purchase rights granted by Airbus in conjunction with those orders were also at lower prices than would otherwise be the case, and that those options and purchase rights were exercised after the end of the implementation period at the suppressed price. To depict the situation algebraically, the counterfactual price in the absence of subsidies would be  $P_{CF(2006)}$ , and the actual price would be lower by some unknown amount,  $X$ , which can be represented as  $P_{CF(2006)} - X$ . In the counterfactual, the option price would also be  $P_{CF(2006)}$ , while in actuality it was  $P_{CF(2006)} - X$ .<sup>836</sup> What the EU fails to recognize is that because it is making an allegation with respect to options, to complete the analysis, the Appellate Body would need to make findings both as to the value of  $P_{CF(2006)}$  and as to how an option at that level would operate in an unsubsidized counterfactual. There are not sufficient panel findings or undisputed facts to support such an exercise.

538. First of all, customers are not required to exercise options or purchase rights, and will do so only if the option price is more favorable than the prevailing market price. Thus, if in an unsubsidized counterfactual, the option price ( $P_{CF(2006)}$ ) is *higher* than the prevailing counterfactual market price (which can be represented as  $(P_{CF(2013)})$ , the customer will not exercise the option. (This would not represent a lost sale or price suppression because in the counterfactual, factors other than the subsidies would be depressing the price.<sup>837</sup>) As the EU has

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<sup>835</sup> EU Appellant Submission, para. 1238.

<sup>836</sup> The United States notes that this is not actually correct, as large civil aircraft sales contracts typically include escalation clauses so that prices of delivered aircraft actually increase over the life of a contract. However, assuming that the option price stays steady simplifies the analysis in a way favorable to the EU.

<sup>837</sup> The Panel’s findings indicate that this would likely occur in its technology effects counterfactual because the 787 and the A350 XWB would likely both be in the market before the end of the implementation period,

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identified no information that would allow either a valuation or a qualitative assessment of either **P<sub>CF(2006)</sub>** or **P<sub>CF(2013)</sub>**, it is impossible to determine how this would play out.

539. Second, the limitation that the prevailing market price places on a buyer's incentive to exercise an option has another implication. In the counterfactual, Airbus would receive the option price only if it were less than the counterfactual prevailing market price (**P<sub>CF(2013)</sub>**). Thus, the counterfactual price at which aircraft would be delivered subject to option is *at most* **P<sub>CF(2013)</sub>**. In a counterfactual, price suppression exists only if the actual price is lower than the counterfactual price. Thus, price suppression would exist only if the actual option price (**P<sub>CF(2006)</sub>-X**) were lower than the counterfactual prevailing market price (**P<sub>CF(2013)</sub>**). Again, the EU points to no findings or uncontested evidence that would allow a quantitative or qualitative evaluation of either of these figures.

540. In short, the EU's simplistic analysis does not allow the Appellate Body to complete the analysis with regard to the EU's price suppression claims with regard to the A330.

*b. No Significant Price Suppression Regarding the A350XWB*

541. With respect to its claim of "continuing" price suppression of the A350XWB, the EU asserts that it is "undisputed" that "through the conversion of [BCI] orders into orders for the A350XWB, the A350XWB was sold for [BCI] suppressed prices."<sup>838</sup> But the so-called "facts" that the EU refers to are far from "undisputed." The United States vigorously disputed the factual premise of the EU's allegation – that Airbus had no choice but to accept supposedly suppressed A350 XWB prices.

542. There are also no findings or undisputed facts that would demonstrate that the A350XWB was sold at suppressed prices. The only justification that the EU provides for its argument is that the "A350XWB is superior to the Original A350," and thus there is "no reason the [BCI] would be sold at [BCI] low prices but for the conversion of orders from the Original A350 at suppressed prices."<sup>839</sup> This does not constitute an "undisputed fact." It is an EU allegation in the form of economic reasoning, and it is flawed economic reasoning at that. There are many reasons why an improved product may not be able to command a premium for the improved features. In short, the EU is asking the Appellate Body to complete the analysis based on an unsupported EU allegation by mischaracterizing it as an undisputed fact.

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and the A330 would not maintain premium prices in the face of competition from superior aircraft. *See* Compliance Panel Report, paras. 9.176, 9.319.

<sup>838</sup> EU Appellant Submission, para. 984.

<sup>839</sup> EU Appellant Submission, para. 991.

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543. Moreover, as the United States noted in its submission before the compliance Panel, the original panel has already considered and rejected the EU’s argument that A350XWB prices were suppressed because Original A350 prices had been suppressed by the effects of subsidies to the 787.<sup>840</sup> Indeed, the United States vigorously disputed the EU’s assertions that the effects of pre-2007 aeronautics R&D subsidies affected pricing of the A350 XWB. The EU does not in any way explain how the Appellate Body can complete the analysis based on the EU’s factually unsupported claims that have already been rejected in the original proceedings and then again by the compliance Panel.

*c. No Significant Lost Sales*

544. The EU requests the Appellate Body to extend the finding of significant lost sales regarding the Qantas sales campaign that the original panel found to exist with respect to the A330 or the Original A350, to the A350XWB.<sup>841</sup> Again, the EU fails to provide a basis for transposing this lost sale to the A350 XWB. The EU asserts that “it is not important whether the sale at issue is considered a lost sale of an A350XWB model, the A330, or the discontinued A350” because they are all in the same “medium-sized twin-aisle LCA market.”<sup>842</sup> But this is just a bald assertion at odds with the Panel’s findings and the U.S. argumentation, not an undisputed fact. The EU’s argument thus is not that its claim is supported by undisputed facts, but rather that the Appellate Body should take a fiction that a lost A330 or Original A350 sale is now a lost A350 XWB sale and treat it as an undisputed fact. This type of argumentation does not provide a sufficient basis for the Appellate Body to complete the Panel’s analysis.

*d. No Threat of Impedance*

545. Again, the EU’s alleged “undisputed facts” are based on the same flawed premise that underlie the EU’s claims of error throughout its submission: that the original panel’s findings of adverse effects to the A330 and the Original A350 – in this case, concerning the threat of impedance – necessarily extend to the A350XWB. The EU contends that because there are outstanding deliveries of Boeing 787s to Qantas from a sale in the original reference period as well as from a follow-on order, that is somehow a sufficient basis for the Appellate Body to conclude that U.S. subsidies result in a threat of impedance to all Airbus aircraft competing with the 787 in the Australian market in the post-implementation period, including the A350XWB.<sup>843</sup> This is not an “undisputed fact.”

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<sup>840</sup> US FWS, para. 830 (citing *US – Large Civil Aircraft (Panel)*, para. 7.1793).

<sup>841</sup> See EU Appellant Submission, para. 987.

<sup>842</sup> EU Appellant Submission, para. 988.

<sup>843</sup> See EU Appellant Submission, para. 993.

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546. As the United States explained in its submissions before the Panel, the EU failed to substantiate its impedance claims with market data sufficient to show changes in relative market share, over a sufficiently representative period, to demonstrate clear trends, as required for such claims under Articles 6.3(a) and (b) of the SCM Agreement.<sup>844</sup> The EU also improperly relied upon evidence pertaining to the A330 and Original A350.<sup>845</sup> Now, the EU again relies on the same deficient and flawed factual allegations. Therefore, there is no basis in Panel findings or undisputed facts for the Appellate Body to complete the analysis to find that the EU suffers a threat of impedance in the Australian market.

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<sup>844</sup> See US FWS, para. 924 (citing *US – Large Civil Aircraft (AB)*, para. 1086).

<sup>845</sup> See US FWS, paras. 922-967.

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**XIII. THE APPELLATE BODY SHOULD REJECT THE EU’S REQUEST FOR COMPLETION OF THE ANALYSIS REGARDING ALLEGED LOST SALES.**

547. The EU has requested that, in the event that the Appellate Body reverses the compliance Panel’s findings concerning the standard for finding whether a measure has resulted in significant lost sales within the meaning of Article 6.3(c) of the SCM Agreement, the Appellate Body complete the analysis, and in particular find the relevant subsidies caused two groups of alleged “additional significant lost sales”: (a) sales where the EU alleges additional lost sales caused only by the effects of the Washington State B&O tax rate reduction,<sup>846</sup> and (b) lost sales allegedly caused by the technology effects of pre-2007 aeronautics R&D subsidies, the B&O tax rate reduction, and “all of the untied subsidies.”<sup>847</sup>

548. In reality, the EU is asking the Appellate Body to discard the Panel’s careful analysis of a complex factual record and undertake its own *de novo* analysis based on EU argumentation rather than on the basis of – and often in contradiction to – Panel findings of fact or undisputed facts on the record. This is not the role of the Appellate Body.<sup>848</sup>

549. Before turning to the individual sales campaigns, the United States will provide an overview of the deficiencies that plague the EU’s arguments.

***Price-Sensitivity of Particular Sales Campaigns***

550. In every one of the 18 sales campaigns for which the EU has requested that the Appellate Body find the relevant measure caused significant lost sales, the United States disputed that the campaign was price-sensitive. In each campaign, the United States demonstrated that pricing was not a substantial cause of Airbus losing the sale, but rather that one or more non-subsidy factors explained Airbus losing the sale.

551. The Panel considered voluminous evidence pertaining to each of the sales campaigns. This required nuanced analyses of Boeing’s and Airbus’s own internal communications to discern the dynamics of a campaign and the relative causal significance of various factors. In many instances, the Panel made factual findings about the role of pricing in the campaign, and the relevance of other non-subsidy factors to the outcome of the campaign. Based on the voluminous evidence, the Panel made a factual finding in each of the 18 instances that the sales campaign was not price sensitive.

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<sup>846</sup> EU Appellant Submission, para. 997.

<sup>847</sup> EU Appellant Submission, para. 1036-1038.

<sup>848</sup> See *EC – Beef Hormones (AB)*, para. 132.

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552. The EU is requesting that the Appellate Body ignore this finding, and instead adopt the opposite factual finding – that each sales campaign was price-sensitive. This already exceeds the proper role of the Appellate Body.

553. As an initial matter, the United States notes that, even if the EU’s appeal of the causation standard were accepted, it would be insufficient to establish that any of these campaigns were price-sensitive. The EU asserts that the Panel adopted an incorrect standard of causation, according to which a finding that a non-subsidy factor is a genuine and substantial cause of the outcome of a campaign precludes pricing from also being a genuine and substantial causal factor. The United States has demonstrated that the Panel did not do this. However, if the Appellate Body were to conclude otherwise, that finding alone would not suffice to establish that pricing was a genuine and substantial cause of the outcome.

554. Given the Appellate Body’s guidance that a subsidy-enabled factor need not be the sole cause and that there may be more than one genuine and substantial cause, it is a matter of logic that “{t}he mere presence of other causes that contribute to a particular market effect does not, in itself, preclude that subsidy from being found to be a ‘genuine and substantial’ cause of that effect.”<sup>849</sup> But it is equally true that the presence of other factors that substantially cause an effect does not *prove* that the subsidy *is* a genuine and substantial cause of that effect. Thus, there remain no Panel findings that, in light of the many factors relevant to the outcome of campaigns, pricing played a sufficiently substantial role in any of the campaigns at issue such that the any campaign can be found to be price-sensitive.

555. Finding that a sales campaign is price-sensitive necessarily requires weighing complex factual evidence to determine the relative causal significance of numerous factors. This is left to the discretion of the trier of fact, and dissatisfaction with the weight assigned to competing evidence and the ultimate factual conclusion that resulted is not a basis for the Appellate Body to re-weigh the evidence in the context of completing the analysis. Therefore, even if the Panel had erred in identifying the correct causation standard (and it did not), there is simply no basis in the Panel findings or uncontested facts for the Appellate Body to find that pricing *was* a sufficiently substantial factor in the campaign such that it can be found to be price-sensitive.

***Other Factual Findings by the Panel with Respect to  
Various Factors in Particular Sales Campaigns***

556. Furthermore, the EU often urges the Appellate Body to ignore the Panel’s factual findings with respect to the role that pricing played or the relevance of other non-subsidy factors.

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<sup>849</sup> EU Appellant Submission, para. 996. The United States also notes that the Panel found that non-subsidy factors explained the outcome of the campaigns, where it characterized the relevance of those factors, used phrasing such as “significantly explains” or “determined” or “pivotal.” It did not base its findings on a conclusion that other non-subsidy factors merely “contributed” to the outcome.



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The EU attacks many of the intermediate factual findings the Panel reached with respect to factors that potentially explain the outcome of the sale, findings that were made through a detailed assessment of complex factual evidence. In some cases, the Panel specifically found that pricing was immaterial to the outcome or not a central issue in the campaign. The EU, often by mischaracterizing these findings as legal characterizations, effectively requests that the Appellate Body ignore these findings and instead make new factual findings that directly contradict the Panel’s findings, or at a minimum, were not made by the Panel. Again, this goes well beyond the proper role of the Appellate Body in completing the analysis, which must be based on uncontested facts and Panel findings, not newly-made findings that in many instances contradict the Panel’s findings.

***Whether Price Effects Subsidies are a Genuine and Substantial  
Cause of Significant Lost Sales***

557. Even where a sales campaign is price-sensitive, the per-aircraft magnitude of subsidies alleged to cause price effects may be so small that it cannot be found to be a genuine and substantial cause of the lost sale. This is because, even assuming that Boeing lowered its per-aircraft price by the full amount of the subsidy, it simply is too small to make a difference in the outcome.

558. The United States has explained in its other appellant submission why the Panel erred in allocating the full amount of the B&O tax rate reduction to just three sales, which is contrary to the tied nature and operation of the subsidy.<sup>850</sup> But if this were not corrected, then there would be no subsidy amount to allocate to any of the sales campaigns subject to the EU’s completion request.

559. Moreover, the EU asks the Appellate Body to find that the state and local cash flow subsidies and post-2006 R&D subsidies affected Boeing’s pricing, contrary to the Panel’s findings. However, there are no Panel findings or uncontested facts – or even contested facts for that matter – about the magnitude of the supposed licensing fees. Consequently, there are no Panel findings about the portion of any such subsidies that would be used to lower prices of current LCA, nor any explanation of how that amount would be allocated to different aircraft in different campaigns. Therefore, even if the Appellate Body found that both groups of subsidies affected Boeing’s pricing, and even assuming a particular sales campaign were price-sensitive, there still would be no basis to find that either group of untied subsidies (or all of them) were a genuine cause of significant lost sales, much less a genuine and substantial cause.

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<sup>850</sup> US Other Appellant Submission, paras. 91-108.

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***Counterfactual Delivery Positions***

560. In many instances, the EU alleged that certain factors resulted from the pre-2007 R&D subsidies, but the Panel found that they were not subsidy-enabled technology effects. In the original proceeding, the delayed launch of the 787 meant that, in the campaigns at issue in the original reference period, Boeing would not have been able to offer the 787. Therefore, because the acceleration effects of the R&D subsidies enabled Boeing to offer a much better product sooner than it would have had that product available, the R&D subsidies were found to be a genuine and substantial cause of Airbus losing the sale.

561. By contrast, in this appeal, the EU argues that the pre-2007 R&D subsidies enabled Boeing to make a more attractive offer because, absent the subsidies, the delivery positions Boeing offered in the individual campaigns would have been less attractive. For the very first time, the EU alleges counterfactual promised first delivery dates and counterfactual actual first delivery dates.

562. However, as the United States has explained elsewhere, the EU has not established that the delivery positions Boeing offered in any particular sales campaign would have been at all different, much less that the positions offered would have been less attractive vis-à-vis Airbus's counterfactual offer in that campaign.

563. Where launch is delayed by some number of years, Boeing's backlog of outstanding orders would also be reduced with respect to those years. Indeed, this is reflected in the findings of significant lost sales in the original proceeding.<sup>851</sup> Therefore, there is no basis to find that the delivery dates Boeing could offer a customer in a sales campaign after the end of the implementation period (or even before then) would be any different than the dates it actually offered.

564. Even if the delayed launch of the 787 caused a delay in the delivery positions Boeing could offer in a particular campaign, then the same would hold true for the delayed launch of the A350 XWB. The Panel considered it unlikely – and explicitly found that the EU did not establish – that the A350 XWB ever would have been launched before the 787.<sup>852</sup> Indeed, the EU concedes in its Appellant Submission that the A350 XWB was launched in response to the 787.<sup>853</sup> Thus, Airbus too would not have been able to offer the delivery dates it actually offered.

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<sup>851</sup> See *US – Large Civil Aircraft (Panel)*, para. 7.1787.

<sup>852</sup> See Compliance Panel Report, para. 9.228.

<sup>853</sup> See EU Appellant Submission, para. 969 (“Thus, with respect to prices for the A330 that were delivered after the end of the implementation period, this meant that the Panel was required to conduct a comparison of an observable factual situation (actual A330 prices) with a *counterfactual* situation (counterfactual A330 prices, absent the subsidies). The counterfactual situation with respect to prices for deliveries of the A330 after the end of the implementation period was that, in the absence of the US subsidies, neither the 787 (whose launch was much

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Accordingly, there is no basis to find that the counterfactual delivery positions Boeing could offer would be any less attractive vis-à-vis the counterfactual delivery positions Airbus could offer.

565. Therefore, the EU would have needed to establish that, for a particular sales campaign, the 787 delivery dates Boeing could offer would have been less attractive vis-à-vis the A350 XWB in the absence of the subsidies. Or, at minimum, the EU did not attempt to establish this, and the Panel made no findings to this effect.

***Allegations that a Subsidized Product Injures a Product Not in the Same Market***

566. In **[[HSBI]]** of the campaigns, the EU is alleging that a subsidized product – either the 787-8 or the 787-9, both of which are in the medium-sized twin-aisle product market – is causing adverse effects to a product with which it was found not to compete in the same market – the A350 XWB-900 or -1000, which are in the larger-sized twin-aisle product market.<sup>854</sup> Indeed, this is demonstrated quite clearly in the chart in paragraph 1047 of the EU Appellant Submission entitled “Larger-Sized Twin-aisle Aircraft Sales Campaigns,” which lists the 787-8 and 787-9 – again, products in the medium-sized twin-aisle product market – as the relevant subsidized product. As the Appellate Body has already found, for a subsidized product to cause adverse effects, including in the form of significant lost sales, to another product, the products must compete in the same market.<sup>855</sup> The EU did not appeal the Panel’s product market findings. Therefore, as a matter of law, these claims fail.

***Sales Lost before the End of the Implementation Period***

567. In 13 of the campaigns, the EU asks the Appellate Body to make findings of significant lost sales in the post-implementation period, despite that the sales campaigns that would serve as the basis for these findings occurred prior to the end of the implementation period.<sup>856</sup> The United States demonstrated in Section VI that the Panel correctly rejected the EU’s request to do so.

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accelerated by the US aeronautics R&D subsidies) nor the A350 XWB (which was developed in reaction to the 787) would have been launched and delivered by the end of the implementation period.”).

<sup>854</sup> See Compliance Panel Report, Table 7. The **[[HSBI]]** campaigns are **[[HSBI]]**.

<sup>855</sup> *US – Large Civil Aircraft (AB)*, para. 1052 (“{s}ales can be lost ‘in the same market’ within the meaning of Article 6.3(c), only if the subsidized product and the like product compete in the same product market.”).

<sup>856</sup> See Compliance Panel Report, Table 7.

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***Conclusion***

568. In summary, the Panel found that the EU failed to establish as a factual matter that the state and local cash flow subsidies have any effect on Boeing's pricing. There is no Panel finding that the post-2006 R&D subsidies even generate cash flow, but the Panel found that, even if they did, the EU failed to establish as a factual matter that they had any effect on Boeing's pricing. And, consequently, there certainly is no finding of the magnitude of supposed licensing fee savings or how much of that would be used to lower prices and of which aircraft. The Panel found as a factual matter that the 787 would have launched at least several years before the implementation period, and that its competitive effects are not attributable to the subsidies. It also found as a factual matter that no 787 technologies spilled over to the 737 MAX or 777X and accelerated the launch of those aircraft as a result of the subsidies. There are no Panel findings or uncontested facts that Boeing's offer of delivery positions for any Boeing LCA in any particular campaign would have been later at all, much less that they would have been less attractive vis-à-vis Airbus's offer in the counterfactual. The Panel found, for each of these campaigns, that non-subsidy factors explained the outcome, and that none of these campaigns were price-sensitive.

569. The EU asks the Appellate Body to find as a factual matter, contrary to the Panel's findings, that state and local cash flow subsidies did affect Boeing's pricing. The EU asks the Appellate Body to find as a factual matter with respect to post-2006 R&D subsidies, that the R&D would have been conducted even in the absence of the subsidies, that it would have resulted in IP, and that Boeing would have had to license that IP – none of which are supported by Panel findings or undisputed facts. The EU asks the Appellate Body to find as a factual matter that these supposed licensing fee savings affect Boeing's pricing, contrary to the Panel's findings. The EU asks the Appellate Body to determine that these subsidies are genuine or genuine and substantial causal factors with no Panel findings or undisputed facts regarding the magnitude of such supposed savings or what portion of such savings would be applied to which aircraft and in what amounts. The EU asks the Appellate Body to find as a factual matter that each of these campaigns was price-sensitive, contrary to the Panel's findings.

570. In the process of doing so, the EU in many cases asks the Appellate Body to find that pricing was a sufficiently substantial factor in the outcome, despite that the Panel either made contrary findings or refrained from making such findings. The EU asks the Appellate Body, for each campaign where the pre-2007 R&D subsidies are alleged to cause technology effects, to find as a factual matter that, absent the subsidies, Boeing would have offered later delivery positions, Airbus would have launched and matured the A350 XWB exactly when it did, and Airbus would have offered the same delivery positions it actually did – none of which are supported by undisputed facts or Panel findings. Each of these requests goes beyond the role of the Appellate Body under DSU Articles 17.12 and 17.13 .

571. Then, according to the EU, the Appellate Body should cumulate the newfound effects of all of these subsidies, and determine that they collectively are a genuine and substantial cause of

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the alleged adverse effects in the post-implementation period, including for sales that were lost prior to the end of the implementation period.

572. In short, the EU is not asking the Appellate Body to complete the analysis based on Panel factual findings and undisputed facts. It is asking the Appellate Body to start over and make all of the findings that the EU asked the Panel to make, but which the Panel declined. In other words, the EU is asking the Appellate Body to re-do the Panel’s analysis, not complete it. The Appellate Body’s role is not to re-try a dispute *de novo*, and to the extent the EU seeks such a result under the guise of a request to complete the Panel’s analysis, it fails.

573. For the reasons discussed below, the EU has failed to establish that the Appellate Body can complete the analysis for additional lost sales with respect to *any* of the sales campaigns that it has identified. In every case, the EU is requesting that the Appellate Body act as though it were a new panel.

**A. “Additional Lost Sales” Allegedly Caused by the Washington State B&O Tax Rate Reduction**

574. The EU identifies three sales campaigns where, in its view, the Appellate Body should complete the analysis and find that the effects of the B&O tax rate reduction genuinely and substantially caused additional significant lost sales: (i) All Nippon Airways’ order of 20 Boeing 777-9X aircraft in 2014-2015; (ii) GOL’s 2012 order of 60 737 MAX aircraft; and (iii) United Airlines’ 2012 and 2013 orders totaling 100 737 MAX and 64 737NG aircraft.<sup>857</sup> The EU errs with respect to each sale, as demonstrated below.

*i. All Nippon Airways 2014/2015 – A350XWB, larger-sized twin-aircraft*

575. The Panel made a factual finding that the All Nippon Airways 2014/2015 sales campaign *was not* price sensitive. The EU requests that the Appellate Body reach the opposite factual finding – that it *was* price sensitive. This already exceeds the proper role of the Appellate Body in completing the Panel’s analysis.

576. In the All Nippon Airways 2014-2015 sales campaign, the United States advanced numerous factors that were not pricing that explained why Boeing won the sale, as the Panel

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<sup>857</sup> EU Appellant Submission, para. 997.

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acknowledged.<sup>858</sup> Indeed, the Panel found that Airbus **[[HSBI]]**.<sup>859</sup> The Panel further found that **[[HSBI]]** influenced the outcome.<sup>860</sup> Most importantly, the Panel found that **[[HSBI]]**.<sup>861</sup>

577. Even if the Appellate Body were persuaded that it should reverse the Panel’s findings regarding causation for significant lost sales, it cannot complete the analysis here. To do so would require that the Appellate Body discard the Panel’s findings and re-weight the voluminous evidence to determine the relative causal significance of the various factors, rather than merely rely on undisputed evidence and Panel findings. In essence, the Appellate Body would have to exercise the discretion reserved for the trier of fact, which is not the prescribed function of the Appellate Body.

578. The EU, in arguing for the weight it thinks the Appellate Body should give to evidence, asserts that the Panel found that pricing was an important variable in the All Nippon campaign.<sup>862</sup> But this is a mischaracterization. The Panel did not find that the pricing Boeing offered for the 20 777Xs was of particular importance. The Panel merely observed **[[HSBI]]**, and did not conclude that “pricing was an important variable.”<sup>863</sup> In fact, the Panel explained that **[[HSBI]]**.<sup>864</sup> The Panel found that **[[HSBI]]**.<sup>865</sup>

579. Because the actual Panel findings reach the opposite conclusion from that urged by the EU, the EU also asks the Appellate Body to essentially make its own new factual findings with respect to the importance of pricing in this campaign. The EU attempts to get around this improper request by mischaracterizing the Panel’s factual finding as a legal characterization, and then arguing that the Appellate Body is not “bound by a panel’s *legal characterization* of any given fact . . . .”<sup>866</sup> As an initial matter, the EU never even argued that the subsidy somehow causes Boeing to **[[HSBI]]**.

580. In any event, the Panel’s review of the evidence related to **[[HSBI]]** and its resultant findings are not legal characterizations. The Appellate Body cannot, in the context of completing the analysis, find that Boeing “used the vehicle of ‘**[[HSBI]]**’ to provide an indirect

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<sup>858</sup> Compliance Panel Report, Appendix 2, para. 155.

<sup>859</sup> Compliance Panel Report, Appendix 2, para. 158.

<sup>860</sup> Compliance Panel Report, Appendix 2, para. 158.

<sup>861</sup> Compliance Panel Report, Appendix 2, para. 158.

<sup>862</sup> See EU Appellant Submission, para. 1007.

<sup>863</sup> Compare EU Appellant Submission, para. 1007, with Panel Report Appendix 2, para. 158.

<sup>864</sup> Compliance Panel Report, Appendix 2, para. 158.

<sup>865</sup> Compliance Panel Report, Appendix 2, para. 158.

<sup>866</sup> EU Appellant Submission, para. 1009.

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concession on the price of the aircraft ordered.”<sup>867</sup> That is an EU factual assertion that is disputed, not supported by the facts, and contradicts a Panel finding.

581. Moreover, even if the Appellate Body reversed the Panel’s findings and made its own factual finding that this campaign was price-sensitive, it still would not be possible for the Appellate Body to complete the analysis and find the B&O tax rate reduction is a genuine and substantial cause of this lost sale. The EU has made no arguments regarding the per-aircraft magnitude of the subsidy. The Panel’s allocation, which the United States has shown to be erroneous, divided the entire subsidy amount by just three single-aisle sales campaigns. Therefore, that finding would have to be overturned before any subsidy amount could be allocated to this sale.

582. As the United States demonstrated in its other appellant submission, the nature and operation of the B&O tax rate reduction dictates the maximum effect it could have in a particular campaign. But even if the Panel adopted this correct approach, the EU has put forward no evidence to demonstrate that a reduction in pricing of this magnitude would have had any effect on the outcome of the sale. Indeed, it would not, as it is far too small to be a genuine and substantial cause of the lost sale. For the Appellate Body to complete the analysis, it would have to determine whether the maximum counterfactual price increase is large enough to have any consequence. If such a proposition cannot be dismissed on a horizontal basis, at the very least, there would need to be fact-finding regarding the pricing difference in this campaign. Because there are no undisputed facts or Panel findings to this effect, the Appellate Body cannot complete the analysis.

583. Thus, the EU asks the Appellate Body to make a finding regarding **[[HSBI]]** that contradicts the Panel’s findings; make a new finding that **[[HSBI]]** was important in this campaign, which **[[HSBI]]**; re-weigh the relative causal importance of other factors, including **[[HSBI]]** and find that this campaign was price-sensitive; determine whether the maximum counterfactual price increase could possibly have been relevant in the context of these products in this campaign; and then find on these factual bases that the subsidy was a genuine and substantial cause of Airbus losing the sale.<sup>868</sup> To put it mildly, this is well beyond what the Appellate Body is permitted to do in the context of completing the analysis.

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<sup>867</sup> EU Appellant Submission, para. 1010.

<sup>868</sup> Compliance Panel Report, Appendix 2, para. 158 (emphasis added).

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*ii. GOL 2012 – 737 MAX*

584. In the GOL 2012 sales campaign, the United States advanced numerous factors that were not pricing that explained why Boeing won the sale, as the Panel acknowledged.<sup>869</sup> Indeed, the Panel found that **[[HSBI]]**, which Airbus acknowledged in its own internal communications.<sup>870</sup>

585. Even if the Appellate Body were persuaded that it should reverse the Panel’s findings regarding causation for significant lost sales, it cannot complete the analysis here. To do so would require that the Appellate Body discard the Panel’s findings and re-weigh the voluminous evidence to determine the relative causal significance of the various factors, rather than merely rely on undisputed evidence and Panel findings. In essence, the Appellate Body would have to exercise the discretion reserved for the trier of facts, which is not its proper role.

586. Because the actual Panel findings reach the opposite conclusion urged by the EU, it also asks the Appellate Body to essentially make its own new factual findings with respect to the importance of pricing in this campaign. The EU attempts to get around this improper request by mischaracterizing the Panel’s factual finding as a legal characterization, and then arguing that the Appellate Body is not “bound by a panel’s *legal characterization* of any given fact . . . .”<sup>871</sup> But labeling a finding a “legal characterization” does not make it so; the Panel’s review of the evidence related to **[[HSBI]]** and its resultant findings are findings of fact.

587. The EU asserts that the Panel improperly characterized Boeing’s incumbency, *i.e.*, that Boeing’s **[[HSBI]]** was an element of incumbency.<sup>872</sup> But for the Appellate Body to find differently would require that the Appellate Body, first, disregard the Panel’s plain factual finding and, second, re-examine *de novo* the same, voluminous factual record that the Panel examined to reach the opposite conclusion. This is not within the Appellate Body’s discretion. The EU is attempting to confuse the Appellate Body’s analysis of its request for completion of the analysis by suggesting that the Panel made a legal characterization when, in fact, it made a factual finding. The Panel finding at issue concerns the relationship between Boeing’s **[[HSBI]]** and Boeing’s **[[HSBI]]**.<sup>873</sup> This is a factual finding concerning the relationship between two facts, not a legal characterization.

588. Thus, the EU asks the Appellate Body to make a finding regarding **[[HSBI]]** that contradicts the Panel’s findings; make a new finding that **[[HSBI]]** was important in this campaign, which **[[HSBI]]**; re-weigh the relative causal importance of other factors, including

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<sup>869</sup> Compliance Panel Report, Appendix 2, para. 209.

<sup>870</sup> Compliance Panel Report, Appendix 2, para. 210.

<sup>871</sup> EU Appellant Submission, para. 1019.

<sup>872</sup> EU Appellant Submission, para. 1020.

<sup>873</sup> Compliance Panel Report, Appendix 2, para. 210.



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[[HSBI]]; and find that the subsidy was a genuine and substantial cause of Airbus losing the sale.<sup>874</sup> To put it mildly, this is well beyond what the Appellate Body is permitted to do in the context of completing the analysis.

*iii. United Airlines 2012 and 2013 – 737 MAX and 737NG*

589. In the United Airlines 2012 and 2013 sales campaigns, the United States disputed the pricing was a substantial cause of Boeing winning the sale, including by advancing numerous factors that were not pricing that explained why Boeing won the sale, as the Panel acknowledged.<sup>875</sup> Indeed, the Panel found that [[HSBI]], which Airbus acknowledged in its own internal communications.<sup>876</sup>

590. Boeing won the United Airlines 2012 and 2013 sales campaigns because of several interrelated factors that were not price-dependent. As the Panel observed, [[HSBI]].<sup>877</sup> In fact, the Panel observed that, according to Airbus international communications, United Airlines was [[HSBI]].<sup>878</sup> Accordingly, not only was Boeing’s pricing not a genuine and substantial factor in this campaign, but Airbus’s own [[HSBI]].

591. The EU may not like these findings by the Panel, but it is not the Appellate Body’s role to disregard the factors recognized by the Panel as dispositive and re-weigh their relevance vis-à-vis pricing. Even if the Appellate Body were persuaded that it should reverse the Panel’s findings regarding causation for significant lost sales, it cannot complete the analysis here. To do so would require that the Appellate Body discard the Panel’s findings and re-weigh the voluminous evidence to determine the relative causal significance of the various factors, rather than merely rely on undisputed evidence and Panel findings. Essentially, the EU is requesting that the Appellate Body exercise the discretion reserved for the trier of fact, but this is not the Appellate Body’s proper role.

592. The EU asserts that the evidence demonstrates that that pricing played a “substantial role” in the United campaigns.<sup>879</sup> The Panel, on the other hand, explicitly found that, [[HSBI]].<sup>880</sup> Instead, the Panel explained that [[HSBI]].<sup>881</sup> This is an example of the Panel

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<sup>874</sup> Compliance Panel Report, Appendix 2, paras. 209-210.

<sup>875</sup> Compliance Panel Report, Appendix 2, para. 193.

<sup>876</sup> Compliance Panel Report, Appendix 2, para. 194.

<sup>877</sup> Compliance Panel Report, Appendix 2, para. 194.

<sup>878</sup> Compliance Panel Report, Appendix 2, para 194.

<sup>879</sup> See EU Appellant Submission, para. 1028.

<sup>880</sup> Compliance Panel Report, Appendix 2, para. 194.

<sup>881</sup> Compliance Panel Report, Appendix 2, para. 194.

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finding that more than one factor is a substantial cause of the outcome. It just so happens that neither of the determinative factors were pricing.

593. The EU is thus requesting that the Appellate Body reach the *opposite* factual conclusion than the Panel did concerning the relevance of **[[HSBI]]**.<sup>882</sup> The Panel did find that **[[HSBI]]**, but, in light of the **[[HSBI]]** and all of the other evidence that shed light on the dynamics of the campaign, the Panel went on to find that **[[HSBI]]**.<sup>883</sup> The **[[HSBI]]** of its importance before the Panel is not resolved, for the EU, through its argument that the Appellate Body is not “bound by a panel’s *legal characterization* of any given fact . . .”<sup>884</sup> Because the Panel’s finding was not a legal characterization. Nor did the Panel make a legal characterization when it found that **[[HSBI]]**.<sup>885</sup>

594. The EU contends that the Panel erred in applying a “sole” cause standard,<sup>886</sup> but this assertion is unsupported. Specifically, the EU argues that “the Panel did **[[HSBI]]** and that it explained what it meant when it concluded that **[[HSBI]]**.”<sup>887</sup> But the Panel found that pricing was **[[HSBI]]** not merely because there were other factors, but because those other factors were **[[HSBI]]**, and the evidence established, according to the Panel, that other factors were determinative while pricing was **[[HSBI]]**.<sup>888</sup>

595. In fact, not only were the other factors **[[HSBI]]**, but the Airbus **[[HSBI]]** would have actually **[[HSBI]]**.<sup>889</sup> The Panel’s analysis was not dependent on a finding that pricing was not the sole factor in the campaign, but on a finding, after reviewing a complex factual record, that it was **[[HSBI]]** and other factors were determinative. Moreover, even if the EU were right that Panel applied the wrong standard, the presence of other factors that substantially cause an effect certainly does not prove that the subsidy is a genuine and substantial cause of that effect.

596. The EU also argues that the Appellate Body should find that **[[HSBI]]** was a “subsidy-enabled price concession” that “actually had direct monetary value” to United Airlines. However, this is the EU’s own characterization of the facts. It is at odds with the Panel’s findings and the views of the United States. The Panel addressed the **[[HSBI]]** not in the context of analyzing whether it resulted in a “price concession” that was the result of subsidies, but (i) as

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<sup>882</sup> EU Appellant Submission, para. 1028 (citing Panel Report, Appendix 2, para. 194 (footnote 408)).

<sup>883</sup> Compliance Panel Report, Appendix 2, para. 194.

<sup>884</sup> EU Appellant Submission, para. 1032.

<sup>885</sup> Compliance Panel Report, Appendix 2, para. 194.

<sup>886</sup> EU Appellant Submission, para. 1027.

<sup>887</sup> EU Appellant Submission, para. 1027.

<sup>888</sup> Compliance Panel Report, Appendix 2, para. 194.

<sup>889</sup> Compliance Panel Report, Appendix 2, para. 194.

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a point of contrast with Airbus’s own **[[HSBI]]** and (ii) as consistent with **[[HSBI]]**.<sup>890</sup> The Panel’s finding concerning the **[[HSBI]]** addressed Boeing’s **[[HSBI]]**, which the Panel found, elsewhere, to be **[[HSBI]]**.<sup>891</sup>

597. Ultimately, the EU is requesting that the Appellate Body reverse the Panel’s factual findings, including those that specifically dismiss the notion that pricing was a **[[HSBI]]**. The EU is requesting that the Appellate Body overturn and, without any logical basis, treat as *legal characterizations*, the Panel’s findings that were purely factual, including concerning the relationship between Boeing’s **[[HSBI]]** and its **[[HSBI]]**. The Appellate Body cannot, in the context of completing the analysis, reverse the Panel’s factual findings, re-weigh the interrelationships of myriad, complex factors, and reach its own, new factual findings with respect to their relative causal significance. Accordingly, the Appellate Body should reject the EU’s request to complete the analysis of this alleged lost sale.

**B. “Additional Lost Sales” Allegedly Caused by Pre-2007 Aeronautics R&D Subsidy Technology Effects and Price Effects from Tied Tax and Untied Subsidies**

598. The EU identifies 15 sales campaigns where, in its view, the Appellate Body should complete the analysis and find that the effects of the technology effects of pre-2007 aeronautics R&D subsidies, the B&O tax rate reduction, and “all of the untied subsidies” – which includes the state and local cash flow subsidies and the post-2006 R&D subsidies – genuinely and substantially caused additional lost sales: (i) Qatar Airways’ 2007 order of 30 787-8 aircraft; (ii) British Airways’ 2007 order of 24 787 aircraft plus 18 options and 10 purchase rights; (iii) LAN Airlines’ 2007 purchase of 26 787-8/787-9 aircraft and lease of six additional 787-9 aircraft; (iv) ILFC’s 2007 order of 52 787 aircraft; (v) Etihad Airways’ 2008 and 2011 order of 41 787-9 aircraft; (vi) United Airlines’ 2010 order of 25 787-8 aircraft plus 50 options, its 2012 order of five 787 aircraft, and its 2013 order of 20 787-10 aircraft; (vii) British Airways’ 2013 order of 12 787-10 aircraft, plus firming up its 2007 order options for six 787-8/789-9 aircraft; (viii) Emirates’ 2013 order of 150 777X aircraft plus 50 purchase rights; (ix) Cathay Pacific’s 2013 order of 21 777-9X aircraft; (x) ANA’s 2014 order of 14 787-9 aircraft and 20 777-9X aircraft; (xi) American Airlines’ 2011 order of 100 787NG plus 40 options and 100 787 MAX plus 60 options; (xii) Southwest Airlines’ 2011 order of 150 787 MAX aircraft; (xiii) United Airlines’ 2012 and 2013 orders of 64 787NG and 100 787 MAX aircraft; (xiv) GOL’s 2012 order of 60 737 MAX aircraft; and (xv) Norwegian Air Shuttle’s 2012 order of 100 737 MAX aircraft.<sup>892</sup> The EU errs with respect to each sale, as demonstrated below.

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<sup>890</sup> Compliance Panel Report, Appendix 2, para. 194.

<sup>891</sup> Compliance Panel Report, Appendix 2, para. 194.

<sup>892</sup> EU Appellant Submission, para. 1047.

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599. The Panel found that **[[HSBI]]** was **[[HSBI]]**. Yet the EU urges the Appellate Body in each case to **[[HSBI]]** – that each campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

600. Moreover, even if these campaigns were assumed *arguendo* to be price-sensitive, the EU still has not established with respect to any one of them that any of the aggregated groups of subsidies was a genuine and substantial cause of adverse effects. The EU makes no argument, and there are no findings, as to the magnitude of the B&O tax rate reduction. Assigning it any non-zero magnitude would require correcting the Panel error raised in the U.S. other appeal of allocating subsidies to the 787 (and other aircraft) to just three single-aisle sales campaigns. This erroneous finding precludes the allocation of any of the B&O tax rate reduction to these 15 sales campaigns.

601. Even if the Panel correctly allocated the subsidy to determine the maximum counterfactual price increase for each campaign based on the subsidy amount tied to that sale, the Appellate Body could not complete the analysis because there are no undisputed facts or Panel findings regarding the price difference in any of these campaigns. Without a sense of the price difference, it is impossible to determine whether the subsidy is a genuine and substantial cause of the lost sale – even assuming *arguendo* that Boeing lowered its price by the maximum amount attributable to the subsidy.

602. In addition, the Panel found that the EU failed to establish that state and local cash flow subsidies affected Boeing's pricing of current LCA. The Appellate Body would have to reach the opposite factual conclusion, and, even if it did that, then establish the magnitude of the subsidy and its corresponding effect on Boeing's pricing in each of these campaigns. The EU has presented no facts to support such a conclusion and the Appellate Body cannot do this in the context of completing the analysis.

603. The EU also failed to establish that post-2006 R&D subsidies affected Boeing current LCA pricing. Whether these subsidies even generate additional cash flow is a factual proposition in dispute. As the United States explained, the notion that Boeing would pay IP licensing fees requires that the R&D would have gone forward in the absence of the subsidies, contrary to the findings regarding pre-2006 R&D subsidies; that the R&D would have generated IP; and that Boeing would have needed to license that IP. None of these is an undisputed fact and the Panel did not reach any such findings. The Appellate Body cannot make these findings in the context of completing the analysis. Therefore, because it is not established that these subsidies even generate additional cash flow, there can be no finding that the post-2006 R&D subsidies are a genuine and substantial cause of any lost sale – even if any of the sales campaigns identified by the EU in this section were found to be price-sensitive.

604. Finally, the Panel found that – assuming *arguendo* that the post-2006 R&D subsidies generated cash flow – the EU failed to establish that the additional cash flow had any effect on Boeing's current LCA pricing. The Appellate Body would have to reach the opposite factual

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conclusion, and even if it did that, establish the magnitude of the subsidy and its corresponding effect on Boeing's pricing in each campaign. Such actions would far exceed the role of the Appellate Body in the context of completing the analysis.

**1. *Qatar Airways 2007 – 787-8***

*a. Technology effects from pre-2007 R&D subsidies*

605. Even assuming for the sake of argument that the EU's technology effects claims had not failed, the Appellate Body is unable to complete the analysis. For it to do so, the Appellate Body would need to rely on the EU's conclusory and generalized statement about the potential impact of the absence of pre-2007 R&D subsidies.<sup>893</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU's evidence and the Panel's own findings.

606. Even if delivery timing and maturity of the program were important factors, that still would not be sufficient to support the factual conclusion that Boeing's offer in the counterfactual would have been less attractive vis-a-vis Airbus's offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that the A350 XWB program would have been equally mature as it was in reality, and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual assertions cannot just be assumed, and the Panel did not make any factual findings to support the EU's assumptions. The Appellate Body is not positioned to reach all of these factual findings in the context of completing the analysis.

607. First, the EU cannot assume, the Panel did not find, and it is not the Appellate Body's role to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. While promised first delivery and actual first delivery can be assumed to be pushed back in the counterfactual by the same amount of time as the counterfactual launch delay, the same is not true for delivery positions offered in a particular campaign. As the United States has explained, in the counterfactual, the promised first delivery date would be later, but the number of orders Boeing would need to fill would also be correspondingly fewer. Therefore, there is no basis to assume that counterfactual delivery positions in a particular campaign would have been later by a period equal to the length of the delay in the counterfactual launch.

608. Second, the EU cannot assume, the Panel did not find, and it is not the Appellate Body's role to now find, that in the counterfactual Airbus would have launched the A350 XWB at the time it actually did and the delivery positions Airbus offered would have been the same as in reality. The Parties agreed that the A350 XWB was at least in part a competitive response to

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<sup>893</sup> EU Appellant Submission, para. 1053.

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the 787.<sup>894</sup> Indeed, the EU conceded that the A350 XWB was a response to the 787 in its Appellant Submission.<sup>895</sup> Furthermore, the Panel found that the EU did not demonstrate that, absent the pre-2007 R&D, Airbus would have launched the A350 XWB prior to Boeing’s launch of the 787.<sup>896</sup> Indeed, the Panel found that this scenario was “unlikely on the evidence before {it}.”<sup>897</sup>

609. Furthermore, the EU’s case in this respect is further weakened by the undisputed fact that **[[HSBI]]**.<sup>898</sup> This means that **[[HSBI]]**.

610. Moreover, the Appellate Body cannot ignore or otherwise assign different weight to the Panel’s findings regarding other factors important to the outcome of this campaign. The Panel found that Airbus’ own **[[HSBI]]**.<sup>899</sup> Completing the analysis would require the Appellate Body to exercise the discretion reserved for the finder of fact to determine the relative causal significance of various factors.

611. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A350 XWBs is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on several other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

612. Nor can the Appellate Body complete the analysis with respect to price effects even if it were to disturb the Panel’s approach to causation for significant lost sales. To do so would require that the Appellate Body reverse the Panel’s unappealed factual finding concerning **[[HSBI]]** and its impact on the sales campaign. In particular, the Panel found that the EU states that “based on the Panel’s factual findings regarding the importance of pricing, that the price

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<sup>894</sup> See Compliance Panel Report, Appendix 2, para. 9.227.

<sup>895</sup> See EU Appellant Submission, para. 969.

<sup>896</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>897</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>898</sup> Compliance Panel Report, Appendix 2, para. 7.

<sup>899</sup> Compliance Panel Report, Appendix 2, para. 6.

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effect from the tied B&O subsidies and the untied subsidies is, at the very least, a ‘genuine’, cause of significant lost sales.”<sup>900</sup> However, this characterization is **[[HSBI]]**.<sup>901</sup>

613. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>902</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

614. The Panel found that **[[HSBI]]**<sup>903</sup> The EU argues, however, that “the Panel’s finding that pricing was not ‘**[[HSBI]]**’ in this campaign is reflective of its erroneous legal standard.”<sup>904</sup> This is nonsense. This is a factual finding based on the sales campaign evidence.

615. Of course, even if this finding did not exist, the absence of such evidence would not prove that pricing *was* a central issue. To attempt to solve this problem, the EU points to general findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>905</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel’s general findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>906</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel that would ignore or disregard the Panel’s specific factual findings in the sales campaign at issue. Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

616. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that pricing **[[HSBI]]**; make a factual finding that pricing was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. To put it mildly, this goes well beyond the Appellate Body’s discretion in the context of completing the analysis.

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<sup>900</sup> EU Appellant Submission, para. 1058.

<sup>901</sup> Compliance Panel Report, Appendix 2, para. 10.

<sup>902</sup> Compliance Panel Report, Appendix 2, paras. 10-11.

<sup>903</sup> Compliance Panel Report, Appendix 2, para. 10.

<sup>904</sup> EU Appellant Submission, para. 1055 (quoting Compliance Panel Report, Appendix 2, para. 10).

<sup>905</sup> EU Appellant Submission, para. 1056.

<sup>906</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.

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617. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

*c. Conclusion*

618. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

619. First, this sale was in 2007, five years before the end of the implementation period. Therefore, while all evidence can be considered, this cannot be the basis of a finding of lost sales in the post-implementation period.

620. Second, the EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This too is improper and impracticable.

621. Even if the Appellate Body were to somehow disregard the Panel’s unappealed finding concerning **[[HSBI]]**, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include **[[HSBI]]**, as well as other factors.<sup>907</sup>

622. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2007 Qatar Airways campaign is a lost sale caused in the post-implementation period by subsidies to Boeing.

**2. *British Airways 2007 and 2013 – 787-8 and 787-9***

*a. Technology effects from pre-2007 R&D subsidies*

623. Even assuming for the sake of argument that the EU’s technology effects claims had not failed, the Appellate Body is unable to complete the analysis with respect to the 2007 and 2013 British Airways sales campaigns. For it to do so, the Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007 R&D subsidies.<sup>908</sup> It would also need to assume facts, or make its own, new factual findings,

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<sup>907</sup> Compliance Panel Report, Appendix 2, paras. 6-8.

<sup>908</sup> EU Appellant Submission, para. 1066.



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concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

624. Even if Airbus had acknowledged that the **[[HSBI]]** was its emphasis during the campaign,<sup>909</sup> that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that the A350 XWB program would have been equally mature as it was in reality, and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is not in a position to reach all of these factual findings in the context of completing the analysis.

625. First, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. While promised first delivery and actual first delivery can be assumed to be pushed back in the counterfactual, the same is not true for delivery positions offered in a particular campaign. As the United States has explained, in the counterfactual, the promised first delivery date would be later, but the orders in Boeing’s skyline would also be correspondingly fewer. Therefore, there is no basis to assume that counterfactual delivery positions in a particular campaign would have been later by a period equal to the length of the delay in the counterfactual launch.

626. Second, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that in the counterfactual, Airbus would have launched the A350 XWB at the time it actually did and the delivery positions it offered would have been the same as in reality. The Parties agreed that the A350 XWB was at least in part a competitive response to the 787.<sup>910</sup> Furthermore, the Panel found that the EU did not demonstrate that, absent the pre-2007 R&D, Airbus would have launched the A350 XWB prior to Boeing’s launch of the 787.<sup>911</sup> Indeed, the Panel found that this scenario was “unlikely on the evidence before {it}.”<sup>912</sup>

627. Furthermore, the EU’s case in this respect is further weakened by the undisputed fact that the EU’s argument with respect to this sales campaign depends on “the notion that absent the

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<sup>909</sup> Compliance Panel Report, Appendix 2, para. 22.

<sup>910</sup> See Compliance Panel Report, Appendix 2, para. 9.227.

<sup>911</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>912</sup> Compliance Panel Report, Appendix 2, para. 9.228.

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subsidies, **[[HSBI]]**.<sup>913</sup> The Panel also found in this case that Airbus identified, as a weakness in its own campaign, **[[HSBI]]**.<sup>914</sup> But the **[[HSBI]]** even in the counterfactual.

628. Moreover, the Appellate Body cannot ignore or otherwise assign different weight to the Panel’s findings regarding other factors important to the outcome of this campaign. The Panel found that Airbus itself acknowledged **[[HSBI]]**.<sup>915</sup> Completing the analysis would require the Appellate Body to exercise the discretion reserved for the finder of fact to determine the relative causal significance of various factors.

629. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A350 XWBs is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on a number of other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

630. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel’s finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel’s unappealed factual finding that **[[HSBI]]**.<sup>916</sup> As the Panel concluded, **[[HSBI]]**.<sup>917</sup>

631. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>918</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

632. The Panel found that **[[HSBI]]**.<sup>919</sup> The EU argues, however, that the Panel’s finding concerning the relative unimportance of pricing in this campaign is “reflective of its erroneous

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<sup>913</sup> Compliance Panel Report, Appendix 2, para. 19.

<sup>914</sup> Compliance Panel Report, Appendix 2, para. 22.

<sup>915</sup> Compliance Panel Report, Appendix 2, para. 22.

<sup>916</sup> Compliance Panel Report, Appendix 2, para. 22.

<sup>917</sup> Compliance Panel Report, Appendix 2, para. 22.

<sup>918</sup> Compliance Panel Report, Appendix 2, para. 23.

<sup>919</sup> Compliance Panel Report, Appendix 2, para. 22.

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legal standard.”<sup>920</sup> This is nonsense. The Panel made a factual finding based on the sales campaign evidence.

633. Of course, even if this finding did not exist, the absence of such evidence would not prove that pricing *was* a central issue. To attempt to solve this problem, the EU points to general findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>921</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel’s general findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>922</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel that would ignore or disregard the Panel’s specific factual findings in the sales campaign at issue. Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

634. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that pricing **[[HSBI]]**; make a factual finding that pricing was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. This goes well beyond the Appellate Body’s discretion in the context of completing the analysis.

635. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

*c. Conclusion*

636. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

637. First, Boeing’s initial sale to British Airways in connection with this campaign was in 2007, five years before the end of the implementation period. Therefore, while all evidence can

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<sup>920</sup> EU Appellant Submission, para. 1068.

<sup>921</sup> EU Appellant Submission, paras. 1069-1070.

<sup>922</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.

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be considered, this cannot be the basis of a finding of lost sales in the post-implementation period.

638. Second, the EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This too is improper and impracticable.

639. Even if the Appellate Body were prepared to reverse the Panel’s finding concerning **[[HSBI]]**, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include **[[HSBI]]**, as well as other factors.<sup>923</sup>

640. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2007 and 2013 British Airways campaigns were significant lost sales caused in the post-implementation period by subsidies to Boeing.

**3. LAN Airlines 2007 – 787-8 and 787-9**

*a. Technology effects from pre-2007 R&D subsidies*

641. The Appellate Body lacks discretion to complete the analysis with respect to the 2007 LAN Airlines sales campaign, even assuming *arguendo* that the EU’s technology effects claims had not failed. For it to do so, the Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007 R&D subsidies.<sup>924</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

642. Even if the issue of delivery slots was among the **[[HSBI]]**<sup>925</sup>, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that the A350 XWB program would have been equally mature as it was in reality, and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the

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<sup>923</sup> Compliance Panel Report, Appendix 2, paras. 19-20.

<sup>924</sup> EU Appellant Submission, para. 1079.

<sup>925</sup> Compliance Panel Report, Appendix 2, para. 29.

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EU's assumptions. The Appellate Body is not in a position to reach all of these factual findings in the context of completing the analysis.

643. First, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. While promised first delivery and actual first delivery can be assumed to be pushed back in the counterfactual, the same is not true for delivery positions offered in a particular campaign. As the United States has explained, in the counterfactual, the promised first delivery date would be later, but the orders in Boeing's skyline would also be correspondingly fewer. Therefore, there is no basis to assume that counterfactual delivery positions in a particular campaign would have been later by a period equal to the length of the delay in the counterfactual launch.

644. Second, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that in the counterfactual, Airbus would have launched the A350 XWB at the time it actually did and the delivery positions it offered would have been have the same as in reality. The Parties agreed that the A350 XWB was at least in part a competitive response to the 787.<sup>926</sup> Furthermore, the Panel found that the EU did not demonstrate that, absent the pre-2007 R&D, Airbus would have launched the A350 XWB prior to Boeing's launch of the 787.<sup>927</sup> Indeed, the Panel found that this scenario was "unlikely on the evidence before {it}."<sup>928</sup>

645. Furthermore, the EU's case in this respect is further weakened by the undisputed fact that the EU's argument with respect to this sales campaign depends on "the notion that absent the subsidies, [[HSBI]]."<sup>929</sup> The Panel also found in this case that Airbus identified, as a weakness in its own campaign, [[HSBI]].<sup>930</sup> But the [[HSBI]] even in the counterfactual.

646. Moreover, the Appellate Body cannot ignore or otherwise assign different weight to the Panel's findings regarding other factors important to the outcome of this campaign. The Panel found that [[HSBI]].<sup>931</sup> Completing the analysis would require the Appellate Body to exercise the discretion reserved for the finder of fact to determine the relative causal significance of various factors.

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<sup>926</sup> See Compliance Panel Report, Appendix 2, para. 9.227.

<sup>927</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>928</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>929</sup> Compliance Panel Report, Appendix 2, para. 19.

<sup>930</sup> Compliance Panel Report, Appendix 2, para. 22.

<sup>931</sup> Compliance Panel Report, Appendix 2, para. 29.

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647. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A350 XWBs is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on several other factual premises for which the Panel made no Panel findings nor are there undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies, and post-2006 R&D subsidies*

648. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel’s finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel’s unappealed factual finding that **[[HSBI]]**.<sup>932</sup>

649. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>933</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

650. The Panel found that **[[HSBI]]**.<sup>934</sup> The EU argues, however, that the Panel’s finding concerning the relative unimportance of pricing in this campaign is “reflective of its erroneous legal standard.”<sup>935</sup> This is nonsense. The Panel made a factual finding based on the sales campaign evidence.

651. Of course, even if this finding did not exist, the absence of such evidence would not prove that pricing *was* a central issue. To attempt to solve this problem, the EU points to general findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>936</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel’s general findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>937</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel that would ignore or disregard the Panel’s specific factual findings in the sales campaign at issue.

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<sup>932</sup> Compliance Panel Report, Appendix 2, para. 29.

<sup>933</sup> Compliance Panel Report, Appendix 2, para. 30.

<sup>934</sup> Compliance Panel Report, Appendix 2, para. 29.

<sup>935</sup> EU Appellant Submission, para. 1081.

<sup>936</sup> EU Appellant Submission, paras. 1082-1083.

<sup>937</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.

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Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

652. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that pricing **[[HSBI]]**; make a factual finding that pricing was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. The Appellate Body clearly lacks the discretion to do so in the context of completing the analysis.

653. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

*c. Conclusion*

654. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

655. First, Boeing’s sale to LAN Airlines in connection with this campaign was in 2007, five years before the end of the implementation period. Therefore, while all evidence can be considered, this cannot be the basis of a finding of lost sales in the post-implementation period.

656. Second, the EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This too is improper and impracticable.

657. Even if the Appellate Body were willing to reverse the Panel’s finding concerning **[[HSBI]]**, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include **[[HSBI]]**, as well as other factors.<sup>938</sup>

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<sup>938</sup> Compliance Panel Report, Appendix 2, paras. 28-29.

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658. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2007 LAN Airlines campaign was a lost sale caused in the post-implementation period by subsidies to Boeing.

**4. *International Lease Finance Corporation 2007 – 787***

*a. Technology effects from pre-2007 R&D subsidies*

659. The Appellate Body is unable to complete the analysis with respect to the 2007 ILFC sales campaign, even assuming *arguendo* that the EU’s technology effects claims had not failed. For it to do so, the Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007 R&D subsidies.<sup>939</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

660. Even if delivery positions and “technology” were relatively important in this campaign, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that the A350 XWB program would have been equally mature as it was in reality, and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is certainly not in a position to reach all of these factual findings in the context of completing the analysis.

661. First, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. While promised first delivery and actual first delivery can be assumed to be pushed back in the counterfactual, the same is not true for delivery positions offered in a particular campaign. As the United States has explained, in the counterfactual, the promised first delivery date would be later, but the orders in Boeing’s skyline would also be correspondingly fewer. Therefore, there is no basis to assume that counterfactual delivery positions in a particular campaign would have been later by a period equal to the length of the delay in the counterfactual launch.

662. Second, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that in the counterfactual, Airbus would have launched the A350 XWB at the time it actually did and the delivery positions it offered would have been have the same as in reality. The Parties agreed that the A350 XWB was at least in part a competitive response to the

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<sup>939</sup> EU Appellant Submission, para. 1079.



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787.<sup>940</sup> Furthermore, the Panel found that the EU did not demonstrate that, absent the pre-2007 R&D, Airbus would have launched the A350 XWB prior to Boeing’s launch of the 787.<sup>941</sup> Indeed, the Panel found that this scenario was “unlikely on the evidence before {it}.”<sup>942</sup>

663. Furthermore, the EU’s case in this respect is further weakened by the undisputed finding by the original panel, noted by the Panel in discussing this campaign, that the 787 launch would have been delayed by only approximately two years.<sup>943</sup>

664. Moreover, the Appellate Body cannot ignore or otherwise assign different weight to the Panel’s findings regarding other factors important to the outcome of this campaign, especially where the Panel was unable to determine each factors’ weight from the record evidence.<sup>944</sup> Completing the analysis would require the Appellate Body to exercise the discretion reserved for the finder of fact to determine the relative causal significance of various factors.

665. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A350 XWBs is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on a number of other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

666. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel’s finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel’s unappealed factual finding that **[[HSBI]]** and improve, *de novo*, on the Panel’s assessment that **[[HSBI]]**.<sup>945</sup>

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<sup>940</sup> See Compliance Panel Report, Appendix 2, para. 9.227.

<sup>941</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>942</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>943</sup> Compliance Panel Report, Appendix 2, para. 38.

<sup>944</sup> Compliance Panel Report, Appendix 2, para. 39.

<sup>945</sup> Compliance Panel Report, Appendix 2, para. 39.

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667. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>946</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

668. The Panel found that **[[HSBI]]**.<sup>947</sup> The EU argues, however, that the Panel’s finding concerning the relative unimportance of pricing in this campaign is “reflective of its erroneous legal standard.”<sup>948</sup> This is nonsense. The Panel made a factual finding based on the sales campaign evidence.

669. Of course, even if this finding did not exist, the absence of such evidence would not prove that pricing *was* a central issue. To attempt to solve this problem, the EU points to general findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>949</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel’s general findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>950</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel that would ignore or disregard the Panel’s specific factual findings in the sales campaign at issue. Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

670. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that pricing **[[HSBI]]**; make a factual finding that pricing was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. This goes well beyond the Appellate Body’s discretion in the context of completing the analysis.

671. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

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<sup>946</sup> Compliance Panel Report, Appendix 2, para. 40.

<sup>947</sup> Compliance Panel Report, Appendix 2, para. 39.

<sup>948</sup> EU Appellant Submission, para. 1093.

<sup>949</sup> EU Appellant Submission, paras. 1094-1095.

<sup>950</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.

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*c. Conclusion*

672. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

673. First, Boeing’s sale to ILFC in this campaign was in 2007, five years before the end of the implementation period. Therefore, while all evidence can be considered, this cannot be the basis of a finding of lost sales in the post-implementation period.

674. Second, the EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This too is improper and impracticable.

675. Even if the Appellate Body were prepared to reverse the Panel’s findings, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include **[[HSBI]]**, as well as other factors.<sup>951</sup>

676. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2007 ILFC campaign was a lost sale caused in the post-implementation period by subsidies to Boeing.

**5. *Etihad Airways 2008 and 2011 – 787-9***

*a. Technology effects from pre-2007 R&D subsidies*

677. Even assuming for the sake of argument that the EU’s technology effects claims had not failed, the Appellate Body is unable to complete the analysis with respect to the 2008 and 2011 Etihad Airways sales campaign. For it to do so, the Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007 R&D subsidies.<sup>952</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

678. Even if Airbus’ view, as it argued to the Panel, was that it viewed delivery availability as among **[[HSBI]]**<sup>953</sup>, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the

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<sup>951</sup> Compliance Panel Report, Appendix 2, para. 36-37.

<sup>952</sup> EU Appellant Submission, para. 1103.

<sup>953</sup> EU Appellant Submission, para. 1102.

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counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that the A350 XWB program would have been equally mature as it was in reality, and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is certainly not in a position to reach all of these factual findings in the context of completing the analysis.

679. First, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. While promised first delivery and actual first delivery can be assumed to be pushed back in the counterfactual, the same is not true for delivery positions offered in a particular campaign. As the United States has explained, in the counterfactual, the promised first delivery date would be later, but the orders in Boeing’s skyline would also be correspondingly fewer. Therefore, there is no basis to assume that counterfactual delivery positions in a particular campaign would have been later by a period equal to the length of the delay in the counterfactual launch.

680. Second, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that in the counterfactual, Airbus would have launched the A350 XWB at the time it actually did and the delivery positions it offered would have been the same as in reality. The Parties agreed that the A350 XWB was at least in part a competitive response to the 787.<sup>954</sup> Furthermore, the Panel found that the EU did not demonstrate that, absent the pre-2007 R&D, Airbus would have launched the A350 XWB prior to Boeing’s launch of the 787.<sup>955</sup> Indeed, the Panel found that this scenario was “unlikely on the evidence before {it}.”<sup>956</sup>

681. Furthermore, the EU’s case in this respect is further weakened by the fact that **[[HSBI]]**.<sup>957</sup> As such, and as the United States argued, this makes it implausible that any successful Boeing sales **[[HSBI]]**.<sup>958</sup> As the Panel found, **[[HSBI]]**.<sup>959</sup>

682. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A350 XWBs is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on several other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel

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<sup>954</sup> See Compliance Panel Report, Appendix 2, para. 9.227.

<sup>955</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>956</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>957</sup> Compliance Panel Report, Appendix 2, para. 56.

<sup>958</sup> Compliance Panel Report, Appendix 2, para. 56.

<sup>959</sup> Compliance Panel Report, Appendix 2, para. 60.

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findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

683. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel’s finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel’s unappealed factual finding that **[[HSBI]]** or its finding that **[[HSBI]]**.<sup>960</sup>

684. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>961</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

685. The Panel found that **[[HSBI]]**.<sup>962</sup> The EU argues, however, that the Panel’s finding concerning the relative unimportance of pricing in this campaign is “reflective of its erroneous legal standard.”<sup>963</sup> This is nonsense. The Panel made a factual finding based on the sales campaign evidence.

686. Of course, even if this finding did not exist, the absence of such evidence would not prove that pricing *was* a central issue. To attempt to solve this problem, the EU points to general findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>964</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel’s general findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>965</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel that would ignore or disregard the Panel’s specific factual findings in the sales campaign at issue. Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

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<sup>960</sup> Compliance Panel Report, Appendix 2, para. 60.

<sup>961</sup> Compliance Panel Report, Appendix 2, paras. 61-62.

<sup>962</sup> Compliance Panel Report, Appendix 2, para. 39.

<sup>963</sup> EU Appellant Submission, para. 1093.

<sup>964</sup> EU Appellant Submission, para. 1105.

<sup>965</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.

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687. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that pricing **[[HSBI]]**; make a factual finding that pricing was a major factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. This goes well beyond the Appellate Body’s discretion in the context of completing the analysis.

688. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

*c. Conclusion*

689. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

690. First, Boeing’s sales to Etihad Airways in this campaign were in 2008 and 2011, four and one year before the end of the implementation period. Therefore, while all evidence can be considered, this cannot be the basis of a finding of lost sales in the post-implementation period.

691. Second, the EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This too is improper and impracticable.

692. Even if the Appellate Body were prepared to reverse or ignore the Panel’s factual findings, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include **[[HSBI]]**, as well as other factors.<sup>966</sup>

693. The Appellate Body likewise is unable to complete the analysis with respect to Etihad’s 2011 purchase of a further ten 787-9s. As the Panel found, **[[HSBI]]**.<sup>967</sup> These are uncontested factual findings by the Panel that may not be revisited by the Appellate Body.

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<sup>966</sup> Compliance Panel Report, Appendix 2, paras. 56-58.

<sup>967</sup> Compliance Panel Report, Appendix 2, para. 61.

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694. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2008 and 2012 Etihad campaigns were significant lost sales caused in the post-implementation period by subsidies to Boeing.

**6. *United Airlines 2010, 2012, and 2013 – 787***

*a. Technology effects from pre-2007 R&D subsidies*

695. Even assuming for the sake of argument that the EU's technology effects claims had not failed, the Appellate Body is unable to complete the analysis with respect to the United Airlines 2010, 2012, and 2013 sales campaigns. For it to do so, the Appellate Body would need to rely on the EU's conclusory and generalized statement about the potential impact of the absence of pre-2007 R&D subsidies.<sup>968</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU's evidence and the Panel's own findings.

696. Even if the issue of early delivery positions was a factor for United Airlines, that still would not be sufficient to support the factual conclusion that Boeing's offer in the counterfactual would have been less attractive vis-a-vis Airbus' offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that the A350 XWB program would have been equally mature as it was in reality, and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU's assumptions. The Appellate Body is certainly not in a position to reach all of these factual findings in the context of completing the analysis.

697. First, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. While promised first delivery and actual first delivery can be assumed to be pushed back in the counterfactual, the same is not true for delivery positions offered in a particular campaign. As the United States has explained, in the counterfactual, the promised first delivery date would be later, but the orders in Boeing's skyline would also be correspondingly fewer. Therefore, there is no basis to assume that counterfactual delivery positions in a particular campaign would have been later by a period equal to the length of the delay in the counterfactual launch.

698. Second, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that in the counterfactual, Airbus would have launched the A350 XWB at the time it actually did and the delivery positions it offered would have been have the same as in reality. The Parties agreed that the A350 XWB was at least in part a competitive response to the

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<sup>968</sup> EU Appellant Submission, para. 1116.

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787.<sup>969</sup> Furthermore, the Panel found that the EU did not demonstrate that, absent the pre-2007 R&D, Airbus would have launched the A350 XWB prior to Boeing’s launch of the 787.<sup>970</sup> Indeed, the Panel found that this scenario was “unlikely on the evidence before {it}.”<sup>971</sup>

699. Furthermore, the EU’s case in this respect is further weakened by the undisputed fact that the 2010 sales campaign was **[[HSBI]]**.<sup>972</sup> The Panel specifically observed in its discussion of this sales campaign the United States’ argument that the EU’s technology arguments **[[HSBI]]**.<sup>973</sup>

700. Moreover, the Appellate Body cannot ignore or otherwise assign different weight to the Panel’s findings regarding other factors important to the outcome of this campaign. For example, the Panel found that Airbus itself acknowledged **[[HSBI]]**.<sup>974</sup> Completing the analysis would require the Appellate Body to exercise the discretion reserved for the finder of fact to determine the relative causal significance of various factors.

701. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A350 XWBs is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on several other factual premises for which there are undisputed facts nor findings by the Panel, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

702. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel’s finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel’s unappealed factual finding that **[[HSBI]]**.<sup>975</sup>

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<sup>969</sup> See Compliance Panel Report, Appendix 2, para. 9.227.

<sup>970</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>971</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>972</sup> Compliance Panel Report, Appendix 2, para. 70.

<sup>973</sup> Compliance Panel Report, Appendix 2, para. 73.

<sup>974</sup> Compliance Panel Report, Appendix 2, para. 76.

<sup>975</sup> Compliance Panel Report, Appendix 2, para. 76.



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703. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>976</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

704. The Panel found that **[[HSBI]]**.<sup>977</sup> The EU argues, however, that the Panel’s finding concerning the unavailability of evidence concerning pricing in this campaign is reflective of its erroneous legal standard.<sup>978</sup> This is simply nonsense. The Panel made a factual finding based on the sales campaign evidence.

705. Of course, even if this finding did not exist, the absence of such evidence would not prove that pricing *was* a central issue. To attempt to solve this problem, the EU points to general findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>979</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel’s general findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>980</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel that would ignore or disregard the Panel’s specific factual findings in this particular sales campaign. Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

706. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that pricing **[[HSBI]]**; make a factual finding that pricing was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. This goes well beyond the Appellate Body’s discretion in the context of completing the analysis.

707. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax

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<sup>976</sup> Compliance Panel Report, Appendix 2, para. 80.

<sup>977</sup> Compliance Panel Report, Appendix 2, para. 22.

<sup>978</sup> EU Appellant Submission, para. 1120.

<sup>979</sup> EU Appellant Submission, paras. 1121-1122.

<sup>980</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.

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rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

*c. Conclusion*

708. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

709. First, Boeing’s initial sale to United Airways in connection with this campaign was in 2010, two years before the end of the implementation period. Therefore, while all evidence can be considered, this cannot be the basis of a finding of lost sales in the post-implementation period.

710. Second, the EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This too is improper and impracticable.

711. Even if the Appellate Body were able to reverse the Panel’s findings or succeed in establishing facts that the Panel concluded did not exist, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include **[[HSBI]]**, as well as other factors.<sup>981</sup>

712. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2010, 2012, and 2013 United Airlines campaigns were significant lost sales caused in the post-implementation period by subsidies to Boeing.

**7. *British Airways 2013 – 787-10***

*a. Technology effects from pre-2007 R&D subsidies*

713. Even assuming for the sake of argument that the EU’s technology effects claims had not failed, the Appellate Body is unable to complete the analysis with respect to the British Airways 2013 sales campaign. For it to do so, the Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007 R&D subsidies.<sup>982</sup> It would also need to assume facts, or make its own, new factual findings,

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<sup>981</sup> Compliance Panel Report, Appendix 2, paras. 70-71.

<sup>982</sup> EU Appellant Submission, para. 1130.

**BUSINESS CONFIDENTIAL INFORMATION (BCI) AND  
HIGHLY SENSITIVE BUSINESS INFORMATION (HSBI) REDACTED**

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concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

714. Even if delivery availability was an important factor, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that the A350 XWB program would have been equally mature as it was in reality, and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is certainly not in a position to reach all of these factual findings in the context of completing the analysis.

715. First, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. While promised first delivery and actual first delivery can be assumed to be pushed back in the counterfactual, the same is not true for delivery positions offered in a particular campaign. As the United States has explained, in the counterfactual, the promised first delivery date would be later, but the orders in Boeing’s skyline would also be correspondingly fewer. Therefore, there is no basis to assume that counterfactual delivery positions in a particular campaign would have been later by a period equal to the length of the delay in the counterfactual launch.

716. Second, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that in the counterfactual, Airbus would have launched the A350 XWB at the time it actually did and the delivery positions it offered would have been the same as in reality. The Parties agreed that the A350 XWB was at least in part a competitive response to the 787.<sup>983</sup> Furthermore, the Panel found that the EU did not demonstrate that, absent the pre-2007 R&D, Airbus would have launched the A350 XWB prior to Boeing’s launch of the 787.<sup>984</sup> Indeed, the Panel found that this scenario was “unlikely on the evidence before {it}.”<sup>985</sup>

717. Furthermore, the EU’s case in this respect is further weakened by the undisputed fact that the British Airways sales campaign was **[[HSBI]]**.<sup>986</sup>

718. Moreover, the Appellate Body cannot ignore or otherwise assign different weight to the Panel’s findings regarding other factors important to the outcome of this campaign. For

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<sup>983</sup> See Compliance Panel Report, Appendix 2, para. 9.227.

<sup>984</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>985</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>986</sup> Compliance Panel Report, Appendix 2, para. 111.

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example, the Panel found that Airbus itself acknowledged **[[HSBI]]**.<sup>987</sup> Completing the analysis would require the Appellate Body to exercise the discretion reserved for the finder of fact to determine the relative causal significance of various factors.

719. In conclusion, the determination that a later launch would have led Boeing's offer to be less attractive vis-a-vis Airbus' offer of A350 XWBs is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on a number of other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

720. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel's finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel's unappealed factual finding that **[[HSBI]]**.<sup>988</sup>

721. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>989</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

722. The Panel found that **[[HSBI]]**.<sup>990</sup> The EU argues, however, that the Panel's finding concerning the relative unimportance of pricing in this campaign is reflective of its erroneous legal standard.<sup>991</sup> This is simply nonsense. The Panel made a factual finding based on the sales campaign evidence.

723. Of course, even if this finding did not exist, the absence of such evidence would not prove that pricing *was* a central issue. To attempt to solve this problem, the EU points to general findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>992</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel's general

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<sup>987</sup> Compliance Panel Report, Appendix 2, para. 111.

<sup>988</sup> Compliance Panel Report, Appendix 2, para. 111.

<sup>989</sup> Compliance Panel Report, Appendix 2, para. 112.

<sup>990</sup> Compliance Panel Report, Appendix 2, para. 111.

<sup>991</sup> EU Appellant Submission, para. 1132.

<sup>992</sup> EU Appellant Submission, paras. 1133-1134.

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findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>993</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel that would ignore or disregard the Panel’s specific factual findings in this particular sales campaign. Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

724. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that pricing **[[HSBI]]**; make a factual finding that pricing was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. The Appellate Body simply does not have discretion, in completing the analysis, to proceed as the EU desires.

725. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

*c. Conclusion*

726. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

727. The EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This is improper and impracticable for the Appellate Body.

728. In addition, even if the Appellate Body were able to reverse the Panel’s findings or succeed in establishing facts that the Panel concluded did not exist, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include **[[HSBI]]**, as well as other factors.<sup>994</sup>

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<sup>993</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.

<sup>994</sup> Compliance Panel Report, Appendix 2, para. 110.

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729. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2013 British Airways campaign was a lost sale caused in the post-implementation period by subsidies to Boeing.

**8. *Emirates 2013 – 777X***

*a. Technology effects from pre-2007 R&D subsidies*

730. The Appellate Body lacks discretion to complete the analysis with respect to the 2013 Emirates sales campaign, even assuming *arguendo* that that the EU’s technology effects claims had not failed. For it to do so, the Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007 aeronautics R&D subsidies.<sup>995</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

731. The EU argues that delivery positions were “an important consideration” for Emirates.<sup>996</sup> In fact, as the United States argued, Emirates was driven by other factors: **[[HSBI]]**.<sup>997</sup> But even assuming *arguendo* that delivery positions were “important” to Emirates, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that the A350 XWB program would have been equally mature as it was in reality, and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is not in a position to reach the new factual findings that it would need to in the context of completing the analysis.

732. The EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. As the United States has explained, even if the 787 launch had been delayed, the counterfactual 777X development would still have occurred early enough for technology spillovers to have happened in advance of 777X launch as and when it did occur in fact. Therefore, there is no basis to assume that 777X delivery positions in this campaign would have been later in the counterfactual launch.

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<sup>995</sup> EU Appellant Submission, para. 1079.

<sup>996</sup> EU Appellant Submission, para. 1141.

<sup>997</sup> Compliance Panel Report, Appendix 2, para. 117.

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733. Moreover, the Appellate Body cannot ignore or otherwise assign different weight to the Panel’s findings regarding other factors important to the outcome of this campaign. The Panel found that **[[HSBI]]**.<sup>998</sup> Completing the analysis would require the Appellate Body to exercise the discretion reserved for the finder of fact to determine the relative causal significance of various complex factors.

734. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A350 XWBs is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on a number of other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

735. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel’s finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel’s unappealed factual finding that **[[HSBI]]**.<sup>999</sup>

736. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>1000</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

737. The Panel found that **[[HSBI]]**.<sup>1001</sup> The EU argues, however, that the Panel’s finding concerning the lack of evidence of pricing in this campaign is informed by the “backdrop” of its erroneous legal standard.”<sup>1002</sup> The EU has no basis for this assertion. The Panel made a factual finding based on the sales campaign evidence.

738. Of course, even if this finding did not exist, the absence of such evidence would not prove that pricing *was* a central issue. To attempt to solve this problem, the EU points to general

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<sup>998</sup> Compliance Panel Report, Appendix 2, para. 29.

<sup>999</sup> Compliance Panel Report, Appendix 2, para. 118.

<sup>1000</sup> Compliance Panel Report, Appendix 2, para. 119.

<sup>1001</sup> Compliance Panel Report, Appendix 2, para. 118.

<sup>1002</sup> EU Appellant Submission, para. 1144.

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findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>1003</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel’s general findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>1004</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel that would ignore or disregard the Panel’s specific factual findings in the sales campaign at issue. Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

739. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that **[[HSBI]]**; make a factual finding that pricing **[[HSBI]]** but was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. The Appellate Body clearly lacks the discretion to do so in the context of completing the analysis.

740. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

*c. Conclusion*

741. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

742. The EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This is improper and impracticable.

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<sup>1003</sup> EU Appellant Submission, paras. 1146-1147.

<sup>1004</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.



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743. Even if the Appellate Body were willing to reverse the Panel’s findings, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include the aforementioned **[[HSBI]]**, as well as other factors.<sup>1005</sup>

744. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2013 Emirates campaign was a lost sale caused in the post-implementation period by subsidies to Boeing.

**9. Cathay Pacific 2013 – 777X**

*a. Technology effects from pre-2007 R&D subsidies*

745. The Appellate Body lacks discretion to complete the analysis with respect to the 2013 Cathay Pacific sales campaign, even assuming *arguendo* that that the EU’s technology effects claims had not failed. For it to do so, the Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007 aeronautics R&D subsidies.<sup>1006</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

746. The EU argues that the timing of available delivery positions were of “importance” to Cathay Pacific.<sup>1007</sup> In fact, as the United States argued, Cathay Pacific was driven by other factors: **[[HSBI]]**.<sup>1008</sup> But even assuming *arguendo* that the timing of available delivery positions was of “importance” to Cathay Pacific, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-à-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that the A350 XWB program would have been equally mature as it was in reality, and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is not in a position to reach the new factual findings that it would need to in the context of completing the analysis.

747. The EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. As the

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<sup>1005</sup> Compliance Panel Report, Appendix 2, paras. 117-118.

<sup>1006</sup> EU Appellant Submission, para. 1155.

<sup>1007</sup> EU Appellant Submission, para. 1141.

<sup>1008</sup> Compliance Panel Report, Appendix 2, para. 133.

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United States has explained, even if the 787 launch had been delayed, the counterfactual 777X development would still have occurred early enough for technology spillovers to have happened in advance of 777X launch as and when it did occur in fact. Therefore, there is no basis to assume that 777X delivery positions in this campaign would have been later in the counterfactual launch.

748. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A350 XWBs is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on a number of other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

749. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel’s finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel’s unappealed factual finding that **[[HSBI]]**.<sup>1009</sup>

750. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>1010</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

751. The Panel found that **[[HSBI]]**.<sup>1011</sup> The EU argues, however, that the Panel’s finding concerning the lack of evidence of pricing in this campaign is informed by the “backdrop” of its erroneous legal standard.”<sup>1012</sup> The EU has no basis for this assertion. The Panel made a factual finding based on the sales campaign evidence.

752. Of course, even if this finding did not exist, the absence of such evidence would not prove that pricing *was* a central issue. To attempt to solve this problem, the EU points to general findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>1013</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel’s general

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<sup>1009</sup> Compliance Panel Report, Appendix 2, para. 133.

<sup>1010</sup> Compliance Panel Report, Appendix 2, para. 134.

<sup>1011</sup> Compliance Panel Report, Appendix 2, para. 133.

<sup>1012</sup> EU Appellant Submission, para. 1157.

<sup>1013</sup> EU Appellant Submission, paras. 1158-1159.

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findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>1014</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel that would ignore or disregard the Panel’s specific factual findings in the sales campaign at issue. Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

753. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that **[[HSBI]]**; make a factual finding that pricing **[[HSBI]]** but was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. The Appellate Body clearly lacks the discretion to do so in the context of completing the analysis.

754. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

*c. Conclusion*

755. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

756. The EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This is improper and impracticable.

757. Even if the Appellate Body were able to reverse the Panel’s findings, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include the aforementioned **[[HSBI]]**, as well as other factors.<sup>1015</sup>

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<sup>1014</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.

<sup>1015</sup> Compliance Panel Report, Appendix 2, para. 133.

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758. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2013 Cathay Pacific campaign was a lost sale caused in the post-implementation period by subsidies to Boeing.

**10. *All Nippon Airways – 777X and 787***

*a. Technology effects from pre-2007 R&D subsidies*

759. Even assuming for the sake of argument that the EU’s technology effects claims had not failed, the Appellate Body is unable to complete the analysis with respect to the All Nippon Airways 2014 sales campaign. For it to do so, the Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007 R&D subsidies.<sup>1016</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

760. The EU argues that the timing of available delivery positions was a substantial factor in this sales campaign. It cites its own response to the Panel’s questions, and characterizes this response – in which the EU insisted that early delivery positions were “important” – and characterizes this response as the Panel’s factual findings.<sup>1017</sup> In fact, the Panel made no such findings in its weighing of the various factors that contributed to All Nippon’s decision in this campaign.<sup>1018</sup>

761. But even if early delivery positions were an important factor, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that the A350 XWB program would have been equally mature as it was in reality, and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is certainly not in a position to reach all of these factual findings in the context of completing the analysis.

762. First, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. While promised first delivery and actual first delivery can be assumed to be pushed back in the

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<sup>1016</sup> EU Appellant Submission, para. 1168.

<sup>1017</sup> EU Appellant Submission, para. 1166.

<sup>1018</sup> See Compliance Panel Report, Appendix 2, para. 158.

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counterfactual, the same is not true for delivery positions offered in a particular campaign. As the United States has explained, in the counterfactual, the promised first delivery date would be later, but the orders in Boeing’s skyline would also be correspondingly fewer. Therefore, there is no basis to assume that counterfactual delivery positions in a particular campaign would have been later by a period equal to the length of the delay in the counterfactual launch.

763. Second, the EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that in the counterfactual, Airbus would have launched the A350 XWB at the time it actually did and the delivery positions it offered would have been the same as in reality. The Parties agreed that the A350 XWB was at least in part a competitive response to the 787.<sup>1019</sup> Furthermore, the Panel found that the EU did not demonstrate that, absent the pre-2007 R&D, Airbus would have launched the A350 XWB prior to Boeing’s launch of the 787.<sup>1020</sup> Indeed, the Panel found that this scenario was “unlikely on the evidence before {it}.”<sup>1021</sup>

764. The same is true with respect to the 777X. As the United States has explained, even if the 787 launch had been delayed, the counterfactual 777X development would still have occurred early enough for technology spillovers to have happened in advance of 777X launch as and when it did occur in fact. Therefore, there is no basis to assume that 777X delivery positions in this campaign would have been later in the counterfactual launch.

765. Moreover, the Appellate Body cannot ignore or otherwise assign different weight to the Panel’s findings regarding other factors important to the outcome of this campaign. The Panel found that **[[HSBI]]**.<sup>1022</sup> Completing the analysis would require the Appellate Body to exercise the discretion reserved for the finder of fact to determine the relative causal significance of various complex factors.

766. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A350 XWBs is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on a number of other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

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<sup>1019</sup> See Compliance Panel Report, Appendix 2, para. 9.227.

<sup>1020</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>1021</sup> Compliance Panel Report, Appendix 2, para. 9.228.

<sup>1022</sup> Compliance Panel Report, Appendix 2, para. 158.

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*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

767. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel’s finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel’s unappealed factual finding that **[[HSBI]]**.<sup>1023</sup>

768. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>1024</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

769. The Panel found that **[[HSBI]]**.<sup>1025</sup> The EU argues, however, that the Panel’s finding concerning the relative unimportance of pricing in this campaign is reflective of its erroneous legal standard.<sup>1026</sup> This is simply nonsense. The Panel made a factual finding based on the sales campaign evidence.

770. Of course, even if this finding did not exist, the absence of such evidence would not prove that the price effects of subsidies *were* a genuine and substantial cause. To attempt to solve this problem, the EU points to general findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>1027</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel’s general findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>1028</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel that would ignore or disregard the Panel’s specific factual findings in this particular sales campaign. Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

771. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that pricing **[[HSBI]]**; make a factual finding that pricing was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to

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<sup>1023</sup> Compliance Panel Report, Appendix 2, para. 158.

<sup>1024</sup> Compliance Panel Report, Appendix 2, para. 159.

<sup>1025</sup> Compliance Panel Report, Appendix 2, para. 111.

<sup>1026</sup> EU Appellant Submission, para. 1171.

<sup>1027</sup> EU Appellant Submission, paras. 1172-1174.

<sup>1028</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.

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determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. The Appellate Body simply does not have discretion, in completing the analysis, to proceed as the EU desires.

772. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

*c. Conclusion*

773. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

774. The EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This is improper and impracticable for the Appellate Body.

775. In addition, even if the Appellate Body were able to reverse the Panel’s findings or succeed in establishing facts that the Panel concluded did not exist, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include the aforementioned **[[HSBI]]**, as well as **[[HSBI]]**, and other factors.<sup>1029</sup>

776. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2013 All Nippon campaign was a lost sale caused in the post-implementation period by subsidies to Boeing.

**11. American Airlines 2011 – 737 MAX**

*a. Technology effects from pre-2007 R&D subsidies*

777. The Appellate Body lacks discretion to complete the analysis with respect to the 2011 American Airlines sales campaign, even assuming *arguendo* that that the EU’s technology effects claims had not failed. For it to do so, the Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007

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<sup>1029</sup> Compliance Panel Report, Appendix 2, paras. 155-158.

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aeronautics R&D subsidies.<sup>1030</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

778. Even if the early availability of delivery positions were “an important consideration” for American Airlines, as the EU argues, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is certainly not in a position to reach all of these factual findings in the context of completing the analysis.

779. The EU argues that the timing of available delivery positions was an “important consideration” to American Airlines.<sup>1031</sup> In fact, as the United States argued, American Airlines was driven by other factors: **[[HSBI]]**.<sup>1032</sup> And **[[HSBI]]**.<sup>1033</sup> But even assuming *arguendo* that the timing of available delivery positions was an “important consideration” to American Airlines, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that American Airlines would have necessarily ordered more A320neo, and that the delivery positions offered by Airbus would have been the same as they were in fact. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is not adequately positioned to reach the new factual findings that it would need to in the context of completing the analysis.

780. The EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. As the United States has explained, even if the 787 launch had been delayed, the counterfactual 737 MAX development would still have occurred early enough for technology spillovers to have happened in advance of 737 MAX launch as and when it did occur in fact. Therefore, there is no basis to assume that 737 MAX delivery positions in this campaign would have been later in the counterfactual launch.

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<sup>1030</sup> EU Appellant Submission, para. 1182.

<sup>1031</sup> EU Appellant Submission, para. 1181.

<sup>1032</sup> Compliance Panel Report, Appendix 2, para. 177.

<sup>1033</sup> Compliance Panel Report, Appendix 2, para. 177.



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781. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A320neos is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on a number of other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies, and post-2006 R&D subsidies*

782. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel’s finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel’s unappealed factual finding that **[[HSBI]]**.<sup>1034</sup> Indeed, the Panel found that **[[HSBI]]**.<sup>1035</sup>

783. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>1036</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

784. The Panel found that **[[HSBI]]**.<sup>1037</sup> The EU argues, however, that the Panel’s finding concerning the lack of evidence of pricing in this campaign is informed by the “backdrop” of its erroneous legal standard.”<sup>1038</sup> The EU has no basis for this assertion. The Panel made a factual finding based on the sales campaign evidence.

785. Of course, even if this finding did not exist, the absence of such evidence would not prove that pricing *was* a central issue. To attempt to solve this problem, the EU points to general findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>1039</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel’s general findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>1040</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel

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<sup>1034</sup> Compliance Panel Report, Appendix 2, para. 178.

<sup>1035</sup> Compliance Panel Report, Appendix 2, para. 179.

<sup>1036</sup> Compliance Panel Report, Appendix 2, para. 180.

<sup>1037</sup> Compliance Panel Report, Appendix 2, para. 179.

<sup>1038</sup> EU Appellant Submission, para. 1184.

<sup>1039</sup> EU Appellant Submission, paras. 1185-1186.

<sup>1040</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.

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that would ignore or disregard the Panel’s specific factual findings in the sales campaign at issue. Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

786. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that **[[HSBI]]**; make a factual finding that pricing **[[HSBI]]** but was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. This clearly goes far beyond the Appellate Body’s discretion in the context of completing the analysis.

787. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

*c. Conclusion*

788. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

789. First, Boeing’s sale to American Airlines in this campaign was in 2011, one year before the end of the implementation period. Therefore, while all evidence can be considered, this cannot be the basis of a finding of lost sales in the post-implementation period.

790. Second, the EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This too is improper and impracticable for the Appellate Body.

791. Even if the Appellate Body were able to reverse the Panel’s findings, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include the **[[HSBI]]** and other factors.<sup>1041</sup>

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<sup>1041</sup> Compliance Panel Report, Appendix 2, para. 178.

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792. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2011 American Airlines campaign was a lost sale caused in the post-implementation period by subsidies to Boeing.

**12. *Southwest Airlines 2011 – 737 MAX***

*a. Technology effects from pre-2007 R&D subsidies*

793. The Appellate Body lacks discretion to complete the analysis with respect to the 2011 Southwest Airlines sales campaign, even assuming *arguendo* that that the EU’s technology effects claims had not failed. For it to do so, the Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007 aeronautics R&D subsidies.<sup>1042</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

794. Even if the early availability of delivery positions were “an important consideration” for Southwest Airlines, as the EU argues, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later and that the delivery positions offered by Airbus would have been the same as they were in fact. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is certainly not appropriately positioned to reach all of these factual findings in the context of completing the analysis.

795. The EU argues that the timing of available delivery positions were an “important consideration” to Southwest Airlines.<sup>1043</sup> In fact, as the United States argued, Southwest Airlines was driven by other factors: **[[HSBI]]**.<sup>1044</sup> But even assuming *arguendo* that the timing of available delivery positions was an “important consideration” to Southwest Airlines, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that Southwest Airlines would have necessarily ordered more A320neo, and that the delivery positions offered by Airbus would have been the same as they were in fact. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the

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<sup>1042</sup> EU Appellant Submission, para. 1194.

<sup>1043</sup> EU Appellant Submission, para. 1193.

<sup>1044</sup> Compliance Panel Report, Appendix 2, para. 186.

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EU's assumptions. The Appellate Body is not appropriately positioned to reach the new factual findings that it would need to in the context of completing the analysis.

796. The EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. As the United States has explained, even if the 787 launch had been delayed, the counterfactual 737 MAX development would still have occurred early enough for technology spillovers to have happened in advance of 737 MAX launch as and when it did occur in fact. Therefore, there is no basis to assume that 737 MAX delivery positions in this campaign would have been later in the counterfactual launch.

797. In conclusion, the determination that a later launch would have led Boeing's offer to be less attractive vis-a-vis Airbus' offer of A320neos is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on a number of other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

798. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel's finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel's unappealed factual finding that **[[HSBI]]**.<sup>1045</sup>

799. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>1046</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

800. The Panel found that **[[HSBI]]**.<sup>1047</sup> The EU argues, however, that the Panel's finding concerning the lack of evidence of pricing in this campaign is informed by the "backdrop" of its

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<sup>1045</sup> Compliance Panel Report, Appendix 2, para. 187.

<sup>1046</sup> Compliance Panel Report, Appendix 2, para. 188.

<sup>1047</sup> Compliance Panel Report, Appendix 2, para. 187.

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erroneous legal standard.<sup>1048</sup> The EU has no basis for this assertion. The Panel made a factual finding based on the sales campaign evidence.

801. Even if this finding did not exist, the absence of such evidence would not prove that pricing *was* an important issue. To attempt to solve this problem, the EU points to general findings by the Panel about the nature of sales campaigns in the LCA industry.<sup>1049</sup> But these are general findings, not specific to this sales campaign. And, even then, the Panel’s general findings are that the significance of pricing, capacity, and direct operating costs “to any LCA sales campaign varies depending on the fleet and business plans of the customer, and its strategic goals.”<sup>1050</sup> The EU’s request is to have the Appellate Body rely on general findings of the Panel that would ignore or disregard the Panel’s specific factual findings in the sales campaign at issue. Indeed, if the finding of price-sensitivity could be assumed for all campaigns based on these generalized findings, there would be no need to review the sales campaign evidence at all.

802. In reality, the EU is asking the Appellate Body to ignore the Panel’s intermediate factual finding that **[[HSBI]]**; make a factual finding that pricing **[[HSBI]]** but was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel’s factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. This clearly goes far beyond the Appellate Body’s discretion in the context of completing the analysis.

803. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing’s current LCA pricing.

*c. Conclusion*

804. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU’s claim.

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<sup>1048</sup> EU Appellant Submission, para. 1196.

<sup>1049</sup> EU Appellant Submission, paras. 1197-1198.

<sup>1050</sup> Compliance Panel Report, Appendix 2, para. 9.17, 9.20.

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805. First, Boeing’s sale to Southwest Airlines in this campaign was in 2011, one year before the end of the implementation period. Therefore, while all evidence can be considered, this cannot be the basis of a finding of lost sales in the post-implementation period.

806. Second, the EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This too is improper and impracticable for the Appellate Body.

807. Even if the Appellate Body were able to reverse the Panel’s findings, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include **[[HSBI]]** and other factors.<sup>1051</sup>

808. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2011 Southwest Airlines campaign was a lost sale caused in the post-implementation period by subsidies to Boeing.

**13. United Airlines 2012 and 2013 – 737 MAX and 73NG**

*a. Technology effects from pre-2007 R&D subsidies*

809. The Appellate Body lacks discretion to complete the analysis with respect to these United Airlines sales campaigns, even assuming *arguendo* that that the EU’s technology effects claims had not failed. For it to do so, the Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007 aeronautics R&D subsidies.<sup>1052</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

810. Even if the early availability of delivery positions were “a substantial factor” for United Airlines, as the EU argues, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later and that the delivery positions offered by Airbus would have been the same as they were in fact. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is

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<sup>1051</sup> Compliance Panel Report, Appendix 2, paras. 186-187.

<sup>1052</sup> EU Appellant Submission, para. 1206.

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certainly not in a position to reach all of these factual findings in the context of completing the analysis.

811. The EU argues that the timing of available delivery positions were a “substantial factor” to United Airlines.<sup>1053</sup> In fact, as the United States argued, United Airlines was driven by other factors: **[[HSBI]]**.<sup>1054</sup> But even assuming *arguendo* that the timing of available delivery positions was a “substantial factor affecting United Airlines’ decision,” that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that United Airlines would have necessarily ordered more A320neo, and that the delivery positions offered by Airbus would have been the same as they were in fact. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is not appropriately positioned to reach the new factual findings that it would need to in the context of completing the analysis.

812. The EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. As the United States has explained, even if the 787 launch had been delayed, the counterfactual 737 MAX or 737 NG development would still have occurred early enough for technology spillovers to have happened in advance of 737 MAX or 737 NG launches as and when it did occur in fact. Therefore, there is no basis to assume that 737 MAX or 737 NG delivery positions in this campaign would have been later in the counterfactual launch.

813. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A320neos is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on a number of other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

814. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel’s finding on the applicable causation standard for

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<sup>1053</sup> EU Appellant Submission, para. 1205.

<sup>1054</sup> Compliance Panel Report, Appendix 2, para. 193.

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finding significant lost sales. To do so would require that the Appellate Body reverse the Panel's unappealed factual finding that **[[HSBI]]**.<sup>1055</sup>

815. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>1056</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

816. In reality, the EU is asking the Appellate Body to ignore the Panel's intermediate factual findings; make a factual finding that pricing **[[HSBI]]** but was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel's factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. This clearly goes far beyond the Appellate Body's discretion in the context of completing the analysis.

817. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing's current LCA pricing.

*c. Conclusion*

818. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU's claim.

819. The EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This is improper and impracticable for the Appellate Body.

820. Even if the Appellate Body were prepared to reverse the Panel's findings, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include **[[HSBI]]** and other factors.<sup>1057</sup>

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<sup>1055</sup> Compliance Panel Report, Appendix 2, para. 194.

<sup>1056</sup> Compliance Panel Report, Appendix 2, para. 195.

<sup>1057</sup> Compliance Panel Report, Appendix 2, paras. 193-194.



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821. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2012 and 2013 United Airlines campaigns represented any significant lost sales caused in the post-implementation period by subsidies to Boeing.

**14. GOL 2012 – 737 MAX**

*a. Technology effects from pre-2007 R&D subsidies*

822. Even assuming *arguendo* that that the EU’s technology effects claims had not failed, the Appellate Body lacks discretion to complete the analysis with respect to this GOL sales campaigns. The Appellate Body would need to rely on the EU’s conclusory and generalized statement about the potential impact of the absence of pre-2007 aeronautics R&D subsidies.<sup>1058</sup> It would also need to assume facts, or make its own, new factual findings, concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

823. Even if the timing of availability of delivery positions was “an important factor” for GOL, as the EU argues solely in reliance of its own past, failed arguments, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later and that the delivery positions offered by Airbus would have been the same as they were in fact. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is certainly not in a position to reach all of these factual findings in the context of completing the analysis.

824. The EU argues without adequate support that the timing of available delivery positions was an “important factor” to GOL.<sup>1059</sup> In fact, as the United States argued, GOL was driven by other factors: **[[HSBI]]**.<sup>1060</sup> But even assuming *arguendo* that the timing of available delivery positions was an “important factor affecting GOL’s decision,” that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that GOL would have necessarily ordered more A320neo, and that the delivery positions offered by Airbus would have been the same as they were in fact. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate

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<sup>1058</sup> EU Appellant Submission, para. 1219.

<sup>1059</sup> EU Appellant Submission, para. 1217.

<sup>1060</sup> Compliance Panel Report, Appendix 2, para. 209.

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Body is not in a position to reach the new factual findings that it would need to in the context of completing the analysis.

825. The EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. As the United States has explained, even if the 787 launch had been delayed, the counterfactual 737 MAX development would still have occurred early enough for technology spillovers to have happened in advance of 737 MAX launch as and when it did occur in fact. Therefore, there is no basis to assume that 737 MAX delivery positions in this campaign would have been later in the counterfactual launch.

826. In conclusion, the determination that a later launch would have led Boeing's offer to be less attractive vis-a-vis Airbus' offer of A320neos is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on a number of other factual premises for which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

827. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel's finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel's unappealed factual finding that **[[HSBI]]**.<sup>1061</sup>

828. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>1062</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

829. Essentially, the EU is asking the Appellate Body to ignore the Panel's intermediate factual findings; make a factual finding that pricing **[[HSBI]]** but was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel's factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in

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<sup>1061</sup> Compliance Panel Report, Appendix 2, para. 210.

<sup>1062</sup> Compliance Panel Report, Appendix 2, para. 211.

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dispute. This clearly goes far beyond the Appellate Body's discretion in the context of completing the analysis.

830. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing's current LCA pricing.

*c. Conclusion*

831. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU's claim.

832. The EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This is improper and impracticable for the Appellate Body.

833. Even if the Appellate Body were able to reverse the Panel's findings, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include not only the aforementioned **[[HSBI]]** and other factors.<sup>1063</sup>

834. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2012 GOL campaign resulted in a lost sale caused in the post-implementation period by subsidies to Boeing.

**15. Norwegian Air Shuttle 2012 – 737 MAX**

*a. Technology effects from pre-2007 R&D subsidies*

835. Even assuming for the sake of argument that the EU's technology effects claims had not failed, the Appellate Body is unable to complete the analysis with respect to the Norwegian Air Shuttle 2012 sales campaign. To do so, the Appellate Body would need to rely on the EU's conclusory and generalized statement about the potential impact of the absence of pre-2007 R&D subsidies.<sup>1064</sup> It would also need to assume facts, or make its own, new factual findings,

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<sup>1063</sup> Compliance Panel Report, Appendix 2, paras. 209-210.

<sup>1064</sup> EU Appellant Submission, para. 1229.

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concerning the counterfactual that are unsupported by the EU’s evidence and the Panel’s own findings.

836. Even if early availability of delivery positions was “an important consideration” for Norwegian, as the EU argues, that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later and that the delivery positions offered by Airbus would have been the same as they were in reality. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is certainly not in a position to reach all of these factual findings in the context of completing the analysis.

837. The EU argues without adequate support that the timing of available delivery positions was an “important consideration” to Norwegian.<sup>1065</sup> In fact, as the United States argued, Norwegian was driven by other factors: **[[HSBI]]**.<sup>1066</sup> But even assuming *arguendo* that the timing of available delivery positions was an “important consideration for Norwegian’s decision,” that still would not be sufficient to support the factual conclusion that Boeing’s offer in the counterfactual would have been less attractive vis-a-vis Airbus’ offer in the counterfactual. The EU assumes that, in the counterfactual, the delivery positions offered by Boeing would have been later, that Norwegian would have necessarily ordered more A320neo, and that the delivery positions offered by Airbus would have been the same as they were in fact. Yet, these factual findings cannot just be assumed, and the Panel did not make any factual findings to support the EU’s assumptions. The Appellate Body is not in a position to reach the new factual findings that it would need to in the context of completing the analysis.

838. The EU cannot assume, the Panel did not find, and the Appellate Body lacks the discretion to now find, that the delivery positions that Boeing would have offered in the counterfactual would have been later, and if they would have been, how much later. As the United States has explained, even if the 787 launch had been delayed, the counterfactual 737 MAX and 737NG development would still have occurred early enough for technology spillovers to have happened in advance of 737 MAX or 737NG launch as and when it did occur in fact. Therefore, there is no basis to assume that 737 delivery positions in this campaign would have been later in the counterfactual launch.

839. In conclusion, the determination that a later launch would have led Boeing’s offer to be less attractive vis-a-vis Airbus’ offer of A320neos is a factual proposition that is clearly in dispute. Moreover, that factual proposition is itself based on several other factual premises for

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<sup>1065</sup> EU Appellant Submission, para. 1228.

<sup>1066</sup> Compliance Panel Report, Appendix 2, para. 214.

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which there are no Panel findings or undisputed facts, and, in some cases, contradictory Panel findings. Therefore, there is no basis on which the Appellate Body can complete the analysis and find that the pre-2007 R&D subsidies are a genuine and substantial cause of Airbus losing this sale.

*b. Price effects from B&O tax rate reduction, state and local flow subsidies,  
and post-2006 R&D subsidies*

840. Nor can the Appellate Body complete the analysis with respect to pricing even if it were persuaded that it should reverse the Panel's finding on the applicable causation standard for finding significant lost sales. To do so would require that the Appellate Body reverse the Panel's unappealed factual finding that **[[HSBI]]**.<sup>1067</sup>

841. In addition, the Panel found that this campaign was not **[[HSBI]]** in any case.<sup>1068</sup> The EU urges the Appellate Body to **[[HSBI]]** – that this campaign was price sensitive. This is not the proper role of the Appellate Body, as it has consistently acknowledged.

842. Essentially, the EU is asking the Appellate Body to ignore the Panel's intermediate factual findings that **[[HSBI]]**; make a factual finding that pricing **[[HSBI]]** but that it was a significant factor in this and all campaigns, which is a factual proposition clearly in dispute; ignore the Panel's factual conclusion that this sales campaign **[[HSBI]]**; ignore or otherwise re-weigh the various factors to determine their relative causal significance; and then make its own factual finding that pricing was a substantial cause of Airbus losing the sale, which is also a factual proposition clearly in dispute. This clearly goes far beyond the Appellate Body's discretion in the context of completing the analysis.

843. As noted above, the EU has not established that any of the aggregated groups of subsidies is a genuine and substantial cause of adverse effects. Here and throughout this section, the EU makes no argument, and identifies no Panel findings, concerning the magnitude of the B&O tax rate reduction, the state and local cash flow subsidies, or the post-2006 R&D subsidies as they relate to Boeing's current LCA pricing.

*c. Conclusion*

844. The United States demonstrated above the Appellate Body cannot, in the context of completing the analysis, reach any of the technology effects or price effects conclusions urged by the EU. Still, there are more flaws in the EU's claim.

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<sup>1067</sup> Compliance Panel Report, Appendix 2, para. 216.

<sup>1068</sup> Compliance Panel Report, Appendix 2, para. 217.

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845. The EU has asked that the technology effects from pre-2006 R&D subsidies and the price effects of two other, distinct, aggregated groups of subsidies all be assessed collectively, with no way of ensuring that any one of the aggregated groups of subsidies is a genuine and substantial causal factor. This is improper and impracticable for the Appellate Body.

846. Even if the Appellate Body were able to reverse the Panel’s findings, it would still be required to reckon with a raft of complex facts not in dispute in this appeal, before it could complete the analysis. These include not only the aforementioned **[[HSBI]]** and other factors.<sup>1069</sup>

847. For all these reasons, the Appellate Body is not able to complete the analysis and determine, as the EU requests, that the 2012 Norwegian Air Shuttle campaign resulted in a lost sale caused in the post-implementation period by subsidies to Boeing.

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<sup>1069</sup> Compliance Panel Report, Appendix 2, para 216.