# *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*

## (AB-2016-6 / DS316)

## OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SESSION OF THE ORAL HEARING

September 26, 2017

1. Thank you Mr. Chairman, members of the Division.

2. In this dispute, the original panel found, and the Appellate Body confirmed, that the European Union ("EU") provided massive Launch Aid/Member-State Financing ("LA/MSF") subsidies to every Airbus large civil aircraft ("LCA") from the A300 through the A380, and that absent these subsidies, Airbus and all of its products likely would not exist. The compliance Panel found that the EU continued its subsidization by providing billions of euros of more subsidized financing to the A350 XWB. Absent the LA/MSF subsidies, as of the end of the implementation period, neither Airbus nor any of its aircraft would have been in the marketplace.[1] Thus, as the compliance Panel found and the EU does not dispute, absent LA/MSF subsidies, all LCA sales during the relevant period would have been captured by the U.S. LCA industry.

3. Nevertheless, the EU contends on appeal that the SCM Agreement required the compliance Panel to find that LA/MSF subsidies do not cause adverse effects to the U.S. LCA industry. If this were the case, it would cripple the SCM Agreement. The EU could continue its uninterrupted subsidization of every Airbus LCA indefinitely and with impunity. Thankfully, the SCM Agreement does not require what the EU says it does.

4. The EU advances a multitude of arguments on appeal in an effort to reverse the Panel's adverse effects findings, but each one is either inaccurate, or based on a mischaracterization of the Panel's analysis, or both. We will discuss some of the most glaring and fundamental errors in the EU's appeal, focusing on the topics identified for this session by the Division, including product markets, causation, and displacement and impedance.

5. **For example, the EU argues that the Appellate Body adopted a "significant competitive constraints" standard for determining when two products compete in the same market. It did not.**

6. The Appellate Body in the original appeal framed the product market analysis in terms of "actual or potential competition in the market,"[2] which "would be the case when two products are 'sufficiently substitutable so as to create competitive constraints on each other'."[3] As the compliance Panel found, "there is no textual basis for interpreting the word 'market' that appears in Articles 6.3(a), (b), and (c) of the SCM Agreement in a way that would mean that 'serious prejudice' could only ever be found to exist in the context of product markets where there is vigorous ('significant' or 'close') competition."[4]

7. **The EU also argues that the compliance Panel adopted a product market standard according to which the nature or degree of competition is irrelevant and two products fall**

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[1] *See* Compliance Panel Report, paras. 6.1526, 6.1534-6.1535, 6.1778.

[2] *EC – Large Civil Aircraft (AB)*, para. 1122.

[3] *EC – Large Civil Aircraft (AB)*, para. 1120.

[4] Compliance Panel Report, para. 6.1211.

**into separate markets only where customers would buy no product at all in the absence of the subsidized product. It did not.**

8. In fact, the compliance Panel specifically acknowledged that "important competitive relationships may also exist between pairings or combinations of aircraft *across* two, or even all three, product markets."[5] The Panel also recognized the need to properly take into account whether a competitive relationship is "at most, indirect or remote."[6] Applying the Appellate Body's guidance to the total configuration of facts as demonstrated by voluminous evidence, the compliance Panel determined that single-aisle, twin-aisle, and very large aircraft (VLA) "represent the three segments within which most competitive interactions between the relevant aircraft will commonly take place."[7]

9. Accordingly, the compliance Panel properly adopted these three product markets, which served as the basis for the Appellate Body's findings in the original proceeding and were established by an extensive body of evidence concerning current market conditions, much of it Airbus's own documentation. In so doing, the compliance Panel also correctly rejected the EU's novel approach, which alleged that there were six different product markets, three of which were monopoly markets, and one "non-market" for the Boeing 767.

10. **The EU argues that the compliance Panel's "but for" approach to its causation analysis is impermissible. It is not.**

11. The compliance Panel undertook a unitary counterfactual analysis, which is the preferred approach according to past Appellate Body reports.[8] The compliance Panel's "but for" approach, which was not the mechanistic caricature of an inquiry the EU portrays, was upheld by the Appellate Body in the original proceeding in this dispute. Indeed, the Appellate Body has upheld the "but for" approach used by the compliance Panel in past disputes, including the original proceeding in this dispute.[9]

12. **The EU argues that the compliance Panel's "but for" approach precluded it from considering the passage of time. It did not.**

13. In fact, the compliance Panel explicitly considered the passage of time.[10] The compliance Panel made clear that the parties' disagreement was not whether the effects of LA/MSF may or will eventually dissipate with time, "but rather whether the passage of time, *as*

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[5] Compliance Panel Report, para. 6.1416 (emphasis original).

[6] Compliance Panel Report, para. 6.1169.

[7] Compliance Panel Report, para. 6.1416.

[8] Compliance Panel Report, paras. 6.1453, 6.1800.

[9] *See US – Large Civil Aircraft (AB)*, para. 1013; *EC – Large Civil Aircraft (AB)*, paras. 1234, 1264; *US – Upland Cotton (21.5 – Brazil) (AB)*, para. 375.

[10] Compliance Panel Report, paras. 6.1482-6.1515.

*a matter of fact*, resulted in those effects coming to an end in the period that is relevant for this compliance dispute."[11] After thorough consideration of the EU's arguments regarding the passage of time, the compliance Panel correctly concluded that, "in light of the adopted panel and Appellate Body causation findings confirming the fundamental and profound 'product-creating' nature of LA/MSF, we do not see how, as a factual matter, the *mere passage of time* could have brought the relationship of 'genuine and substantial' cause and effect between the pre-A350XWB LA/MSF subsidies and the A320, A330 and A380 to an end while those aircraft continue to be sold."[12]

14. Moreover, the counterfactual question in a compliance proceeding does not merely repeat the causation analysis from the original proceeding, as the EU seems to imply. In the compliance proceeding, the compliance Panel is not asking whether, but for the subsidies, the A380, for example, would have launched as and when it did in 2000. That question was already resolved in the original proceeding. The compliance Panel rightly noted that, in light of the findings from the original proceeding regarding the fundamental and profound product-creating effects of LA/MSF, "*in the absence of any reason to explain the ongoing market presence of the relevant aircraft*, those effects are likely to continue throughout the marketing lives of the different aircraft programmes into the post-implementation period."[13] And, of course, the EU did not even dispute that, absent LA/MSF, none of the Airbus LCA would have been in the market by the end of the implementation period in the absence of the subsidies. Thus, the compliance Panel found that, but for LA/MSF, none of the Airbus LCA would be in the market, not just as of the times of their respective actual launch dates, but presently. Therefore, the change in the counterfactual perspective does take account of the mere passage of time, and intervening events during that time that could, but did not, sever the causal link.

15. **The EU argues that the compliance Panel's "but for" approach precluded it from considering Airbus's non-subsidized investments in the A320 and A330 programs. It did not.**

16. The compliance Panel explicitly considered Airbus's own investments in the A320 and A330 programs.[14] However, it found that "the post-launch investments undertaken by Airbus for the purpose of the original A320 and A330 programmes are, at best, only part of the reason why Airbus is today present in the single-aisle and twin-aisle LCA markets with the current versions of the A320 and A330,"[15] and that "there is no doubt (and, indeed, the European Union does not deny) that the post-launch investments identified by the European Union would not have been

[11] Compliance Panel Report, para. 6.1486 (emphasis original).

[12] Compliance Panel Report, para. 6.1515 (emphasis original).

[13] Compliance Panel Report, para. 6.1515 (emphasis original).

[14] Compliance Panel Report, paras. 6.1516-6.1527.

[15] Compliance Panel Report, para. 6.1533.

made in the absence of the effects of the LA/MSF subsidies."[16] Accordingly, the compliance Panel correctly found that these non-subsidized investments did not sever any of the causal links.

17. **The EU argues that the compliance Panel created a "third unsubsidized new model" standard. It did not.**

18. In "envisag{ing} a number of different scenarios pursuant to which the 'product-creating' effects of the pre-A350XWB LA/MSF subsidies might well come to an end," the compliance Panel described as one "possibility" the situation in which the EU refrained from providing future LCA models with the massive subsidies that two panels and the Appellate Body have now found to be contrary to its WTO obligations.[17] It did not frame this as a test or requirement. It was merely one way the EU could potentially bring itself into compliance with its obligations, particularly with respect to the considerable indirect effects LA/MSF has on the creation of subsequent products.

19. **The EU argues that there was no basis for a finding of A380 LA/MSF direct effects. There was.**

20. The findings from the original proceeding conclusively settle that A380 LA/MSF produced direct effects on the launch and market existence of the A380. The EU adopts as a premise that no direct effects exist where LA/MSF to a particular model is not alone a necessary cause of that model's launch and market presence. This is incorrect. Direct effects refer to "the effects of any given LA/MSF loan on Airbus' ability to launch and bring to market the particular model of Airbus LCA specifically funded by that LA/MSF."[18]

21. Whether that LA/MSF alone is a necessary cause of a model's market presence relates to the *extent* of the direct effects. But legally whether the direct effects of LA/MSF to a particular model alone are a necessary cause is irrelevant, because the compliance Panel found that those direct effects should be aggregated with the indirect effects of preceding LA/MSF subsidies – that is, "the 'learning', scope and financial effects that any given LA/MSF loan provided for the specific purpose of one model of LCA may have on the ability of Airbus to launch and bring to market another model of LCA."[19] Therefore, even if the direct effects of A380 LA/MSF were not alone a necessary cause of the market presence of that model, it would not mean that there were no direct effects. And, in any event, neither the original panel, the Appellate Body, nor the compliance Panel found that A380 LA/MSF alone was *not* a necessary cause of the launch and market presence of the A380, as the EU suggests.[20]

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[16] Compliance Panel Report, para. 6.1533.

[17] Compliance Panel Report, para. 6.1529.

[18] Compliance Panel Report, para. 6.1492.

[19] Compliance Panel Report, para. 6.1492.

[20] *See* US Appellee Submission, paras. 479-481.

22. **The EU argues that the compliance Panel based its A350 XWB direct effects finding entirely on a single sentence of the report indicating that there was a "high likelihood" that, absent A350 XWB LA/MSF, but otherwise taking Airbus as it existed at the time, "Airbus would, to some degree, have had to make certain compromises with respect to the pace of the programme and/or the features of the aircraft." It did not.**

23. The single sentence the EU refers to was the final sentence in a five-paragraph "conclusions section," following over 170 paragraphs of analysis.[21] Concluding sentences by their nature do not cite evidence or other arguments – they rely on what has gone before, which in this instance was a painstaking analysis of every aspect of how LA/MSF affected the development of the A350 XWB. Moreover, the sentence in question was only made in the context of assessing the two "unlikely" counterfactual scenarios in which a much weaker Airbus would exist.

24. Because the parties focused on the extent of the direct effects of A350 XWB LA/MSF on Airbus as it actually existed at the time, rather than on a much weaker Airbus contemplated by the unlikely counterfactual scenarios, the compliance Panel first assessed the extent of the A350 XWB LA/MSF direct effects on Airbus as it existed at the time. It determined that Airbus likely would have needed to make compromises with respect to the timing and/or features of the A350 XWB. The compliance Panel then reasoned that a much weaker Airbus than the one that existed at the time certainly could not have launched the A350 XWB in the absence of A350 XWB LA/MSF – which was the relevant conclusion for the assessment of the unlikely counterfactual scenarios.

25. Not only was this correct, it was in any event superfluous, because the compliance Panel only needed to conduct its analysis in the context of the plausible scenarios in which, absent the subsidies, Airbus would not exist.[22] In the context of the plausible scenarios, it found that, absent the aggregated LA/MSF subsidies, including A350 XWB LA/MSF, "there is no doubt that the A350XWB could not have been launched and brought to market in the absence of LA/MSF."[23] The EU does not appeal this finding of direct effects from A350 XWB LA/MSF (as well as indirect effects from prior LA/MSF). Therefore, even if there were some issue with this single sentence in the compliance Panel's report about how A350 XWB affected Airbus as it existed at the time (which there is not), and even if that issue undermined the Panel's assessment of how A350 XWB LA/MSF would have affected a much weaker Airbus than the one that existed at the time (which it would not), there would still be a whole separate analysis in the context of the plausible counterfactual scenarios that would continue to serve as the basis for the compliance Panel's finding of A350 XWB direct effects.

[21] *See* Compliance Panel Report, paras. 6.1535-6.1717.

[22] *See EC – Large Civil Aircraft (AB)*, para. 1264; Compliance Panel Report, paras. 6.1466-6.1467, 6.1476-6.1479, 6.1536.

[23] Compliance Panel Report, para. 6.1776. *See also* Compliance Panel Report, para. 6.1535.

26. **The EU argues that the compliance Panel failed to refer to any evidence or provide any reasoning to support its finding regarding likely compromises to the A350 XWB timing and/or features. It did not.**

27. Even in the context of unnecessarily considering the "unlikely" counterfactual scenarios, the compliance Panel exhaustively analyzed a wealth of information, including seven alleged funding sources that the EU argued would have allowed it to fund the A350 XWB on market terms: (1) increased use of risk-sharing partners; (2) proceeds from the disposal of non-core assets; (3) increasing profitability and generating more cash flow; (4) reducing shareholder distributions; (5) issuing new equity; (6) spending EADS' cash reserves; and (7) increasing borrowing from commercial sources.[24]

28. After assessing each of these potential sources individually and in combination, the compliance Panel reached the unappealed finding that "EADS would have faced significant challenges when assembling and implementing a combination of the funding options that were potentially available to it for a programme with the risk profile of the A350XWB programme."[25] Thus, even taking Airbus as the highly subsidized company that it was at the time, it *still* would likely have been forced to compromise the timing or product features of the A350 XWB in the absence of A350 XWB LA/MSF. And, of course, a much weaker Airbus than the one that existed at the time could not have launched the A350 XWB at all in the absence of A350 XWB LA/MSF.[26]

29. **The EU argues that the compliance Panel's conclusion regarding likely compromises to the A350 XWB timing and/or features is inconsistent with the compliance Panel's findings elsewhere about the strategic importance of the A350 XWB program. It is not.**

30. Again, based on voluminous evidence and argumentation, the compliance Panel found that even taking Airbus as it existed at the time after LA/MSF to every previous LCA program, in the absence of A350 XWB LA/MSF, it could not have launched the program as and when it did, regardless of how much it desired to do so. Thus, contrary to the EU's assertions, the compliance Panel concluded that – *because of* the program's strategic importance, not without regard to it – Airbus likely would have compromised the aircraft's features and/or the program's timing rather than scrap the A350 XWB altogether. Therefore, if the EU's criticism were valid, it would simply mean that, taking Airbus as it existed at the time, absent A350 LA/MSF, the A350 XWB would not exist at all.

31. In other words, the extent of the direct effects would be even greater – the complete absence of the A350 XWB rather than just compromised features or timing. And the distinction is irrelevant anyway because the compliance Panel was assessing the direct effects of LA/MSF

[24] Compliance Panel Report, paras. 6.1539-6.1717.

[25] Compliance Panel Report, para. 6.1716.

[26] Compliance Panel Report, para. 6.1723.

on Airbus as it existed at the time, *i.e.*, following subsidization to every previous model, which it then used to assess the direct effects of A350 LA/MSF on "a much weaker Airbus" presented by the unlikely counterfactual scenarios. Based on the difficulties Airbus would have faced even as it existed at the time, the Panel concluded that the A350 XWB certainly would not exist if A350 XWB LA/MSF were withheld from a "much weaker Airbus."

32. **The EU argues that the compliance Panel treated displacement and impedance as interchangeable and indistinguishable concepts. It did not.**

33. The compliance Panel explicitly recognized that displacement and impedance are not interchangeable concepts, even though there may be some overlap.[27] It undertook a unitary counterfactual analysis with respect to the U.S. claims of both displacement and impedance,[28] focusing on the current effects of the challenged subsidies in the post-implementation period.[29] In so doing, the compliance Panel assessed the U.S. displacement and impedance claims simultaneously. The Appellate Body has noted that analyzing claims regarding displacement and/or impedance simultaneously does not mean that a panel considered these concepts interchangeable because the unitary counterfactual analysis is the same for both market phenomena.[30] Indeed, the simultaneous consideration of claims regarding both concepts was especially logical for assessing U.S. allegations that all serious prejudice under Articles 6.3(a) and (b) is caused by the subsidies that enabled the very existence of the Airbus LCA in the relevant markets, and that displacement and impedance were present in most of the relevant markets.

34. **The EU argues that the compliance Panel found displacement without engaging with the sales volume and market share data. It did not.**

35. The compliance Panel considered all relevant information before it, specifically "the entirety of the evidence put forward by the United States, and the full rebuttal evidence advanced by the European Union, including the most recent information where relevant and reliable."[31] Taking into account its prior findings regarding plausible counterfactual scenarios, the compliance Panel found the comparison of counterfactual levels of volumes of deliveries and market shares to actual levels indicated that, "in the absence of the 'product' effects of the challenged LA/MSF subsidies, the volumes of deliveries and market shares that would have been achieved by the U.S. LCA industry between 1 December 2011 and the end of 2013 would have been higher than its actual level in all relevant product markets."[32] Having considered the relevant data as well as the conditions of competition in this duopoly and the counterfactual

[27] Compliance Panel Report, para. 6.1799.

[28] Compliance Panel Report, paras. 6.1800, 6.1804.

[29] Compliance Panel Report, para. 6.1417.

[30] *See EC – Large Civil Aircraft (AB)*, para. 1163 (quoted at Compliance Panel Report, para. 6.1800).

[31] Compliance Panel Report, para. 6.1444.

[32] Compliance Panel Report, para. 6.1817.

absence of Airbus LCA, the compliance Panel's findings are wholly consistent with the SCM Agreement.

36. And these are just some of the inaccuracies and mischaracterizations, which we have detailed to a greater degree in our appellee submission.

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37. In conclusion, we would highlight that the compliance Panel extensively analyzed, over more than 700 paragraphs, the adverse effects caused by LA/MSF subsidies, despite that, after the original proceeding, the EU took zero affirmative LA/MSF-related compliance steps and provided massive new LA/MSF subsidies. The compliance Panel performed an exhaustive evaluation of the evidence showing that LA/MSF subsidies continue to cause adverse effects, and it carefully considered the EU's counterarguments. The compliance Panel's thorough and technical analysis confirmed exactly what common sense would predict: following historically market-distorting behavior with much more of the same will lead to the same results, only worse.

38. At base, all of the EU's claims on appeal boil down to the same proposition. The EU argues that the SCM Agreement does not discipline the uninterrupted provision of LA/MSF subsidies to every LCA model from the beginning of Airbus until the end of time. But it does.