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*European Communities and Certain Member States –
Measures Affecting Trade in Large Civil Aircraft*

(AB-2010-1/DS316)

**ORAL STATEMENT OF THE OF THE UNITED STATES OF AMERICA
AT THE SECOND HEARING**

December 9, 2010

TABLE OF REPORTS, OTHER DOCUMENTS, AND SUBMISSIONS

Short Form	Full Citation
Dorman Report	Gary J. Dorman, <i>The Effect of Launch Aid on the Economics of Commercial Airplane Programs</i> (Nov. 6, 2006) (Exhibit US-70)
EU Appellant Submission	Appellant Submission of the European Union, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (DS 316)</i> (August 16, 2010)
<i>Panel Report</i>	<i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, WT/DS316/R, 30 June 2010</i>
<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 – 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 (21.5)(AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008

Introduction

1. Mr. Chairman and Members of the Division, thank you for the opportunity to provide our statement on some of the issues you will be considering over the coming days. In this statement, we will focus on the EU's appeal of the Panel's findings that the Launch Aid/Member State Financing ("LA/MSF") and other subsidies provided by the EU, France, Germany, Spain, and the United Kingdom cause adverse effects to the interests of the United States.

2. An analysis of the effects of subsidies is a fact-intensive and economics-intensive exercise. The Appellate Body has found that panels have some discretion in how they conduct the effects analysis in a serious prejudice case.¹ In this dispute, the Panel immersed itself in the economics of large civil aircraft ("LCA") production and the LCA market for over five years, reviewing thousands of pages of documentary evidence and considering extensive legal and economic argumentation. The Panel Report rests on detailed findings regarding the nature of the subsidies given to Airbus and how those subsidies allowed Airbus to enter the LCA market and then develop a full family of competitive aircraft at a pace and in a way that would have been impossible otherwise.

3. Significantly, the EU does not challenge most of the core findings of fact or the Panel's assessment of the economics that govern the development, production, and sale of LCA. Both the United States and the EU recognize that to develop a new aircraft model requires billions of dollars in upfront investment years before any revenues can be generated. If the volume of sales or the prices the aircraft can command are lower than projected, or the production costs are higher than projected, an LCA program may never cover its sunk costs. At the same time, the success of a producer depends on its ability to offer a family of competitive LCA suitable for the needs of its customers.

4. This is the reality. The development of LCA is extraordinarily risky and massively expensive. Given this reality, subsidies that substantially lower a producer's development costs and shift a significant part of the risk of development from the producer to its sponsoring governments have a major impact on competition. The Panel found that over a 40-year period

¹ *US – Upland Cotton (21.5) (AB)*, para. 370.

Airbus received a steady stream of such subsidies. These subsidies were instrumental, the Panel found, to Airbus's ability to enter the LCA market and to develop, produce, and sell, one after another, the models comprising its family of LCA when and as it did. And, with that subsidized supply, the Panel found that Airbus captured market share and significant sales from the U.S. LCA industry.

5. On these facts, the Panel found that the subsidies provided to Airbus were the cause of adverse effects to the interests of the United States.² These findings should not be surprising. They reflect the realization of the long-standing, steadfast objective of the EU, France, Germany, Spain, and the United Kingdom to create a family of LCA that could take market share and sales away from the U.S. civil aircraft industry. As French Prime Minister Lionel Jospin pledged before the French Parliament, “{w}e will give Airbus the means to win the battle against Boeing.”³ As the Panel found, those subsidies did just that – they enabled Airbus to displace Boeing in key markets around the world and capture significant sales from Boeing.⁴

6. In the terms of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”), the Panel found serious prejudice to the interests of the United States in the form of the displacement of imports of U.S. LCA into the EU market, the displacement or threat of displacement of U.S. LCA to a number of third country markets, and significant lost sales.⁵

7. The EU's appeal does not challenge the core factual findings regarding the economics of the LCA industry and the impact of the subsidies provided to Airbus. Its appeal seeks to deconstruct the Panel's findings based on arguments that are at odds with the Panel's findings of fact, inconsistent with the SCM Agreement, and based on mischaracterizations of what the Panel actually said and did. We summarize here the core EU arguments and their flaws.

² Panel Report, para. 8.2(a)-(d).

³ French Prime Minister Lionel Jospin in a speech before the French Parliament, quoted in Jospin pledges to aid Airbus in fight against Boeing, Reuters (Mar. 8, 2000) (Exhibit US-1).

⁴ Panel Report, paras. 7.1993.

⁵ Panel Report, para. 8.2(a)-(d).

A. “The Airbus LCA family” as the “Subsidized Product”

8. While the EU appeals the Panel’s acceptance of the U.S. subsidized product and like product definitions for purposes of its adverse effects analysis, it does so on very narrow grounds. The EU does not argue that the SCM Agreement specifically defines the terms “subsidized product” or “product under consideration.” The EU does not argue that LCA is not an identifiable “product.” Nor does the EU dispute the Panel’s findings that “{a}ll Airbus LCA share particular characteristics, and certainly the same general uses.”⁶ The EU does not challenge the panel’s findings regarding Airbus’s emphasis on the “commonality” of its LCA models, the incorporation of technology across its LCA family, and that the reduction of the financial burden of developing one LCA model facilitated Airbus’s development of other models.⁷ Nor does the EU challenge the Panel’s findings that the subsidies in dispute built on one another over time and across models to benefit Airbus’s full LCA family.⁸ In other words, the EU does not challenge the core findings that led the Panel to conclude that “all Airbus LCA” is a coherent and reasonably defined “subsidized product” for purposes of the adverse effects analysis.⁹

9. Instead, the EU contends that the Panel concluded that “it had no discretion to divide a broad single ‘subsidized product’ as alleged in a complaining Member’s request for establishment and that it need not independently and objectively assess the scope of the ‘subsidized product’, as defined by the United States.”¹⁰ The EU characterizes the Panel’s findings as “ceding to the complaining Member . . . absolute and unreviewable discretion”¹¹ to define the subsidized and like products in a way that joins together in a single complaint very different subsidized products.

⁶ Panel Report, para. 7.1664.

⁷ Panel Report, para. 7.1665-7.1667.

⁸ Panel Report, paras. 7.1949, 7.1976.

⁹ Panel Report, para. 7.1670.

¹⁰ EU Appellant Submission, para. 298.

¹¹ EU Appellant Submission, para. 298.

10. This characterization misrepresents the Panel’s report. The Panel concluded that the terms “subsidized product” and “product under consideration” are not defined by the SCM Agreement. The Panel recognized that although the term “like product” is defined only by reference to the product under consideration, there is no linkage between the terms that suggests that the considerations used to define the scope of the like product must also be applied to determine the scope of the subsidized product.¹² The Panel concluded that it had no authority to change the “matter” before it into a different matter by changing the subsidized product defined by the United States and, by reference, the definition of the like product.¹³ At the same time, the Panel also concluded that a panel could review whether, under the SCM Agreement, a complaining Member has identified a “product” that is “subsidized.”¹⁴

11. In that context, the Panel tested the reasonableness of the U.S. subsidized product definition by examining the nature of the subsidies in dispute and the economics that govern the production and sale of LCA. The Panel found that success in the LCA market depends on a producer’s ability to offer a full family of competitive LCA capable of meeting airlines’ needs for different aircraft to service different routes.¹⁵ The Panel also found that the learning and technology associated with the development and production of any particular LCA flows to the development and production of other LCA models.¹⁶

12. The Panel made additional findings as well, including those regarding LCA product commonality. The Panel noted its importance to customers in terms of operating cost benefits and confidence in technologies proven on earlier models.¹⁷ The Panel also

¹² Panel Report, para. 7.1653.

¹³ Panel Report, paras. 7.1654, 7.1663.

¹⁴ Panel Report, para. 7.1655.

¹⁵ Panel Report, para. 7.1665.

¹⁶ Panel Report, para. 7.1666.

¹⁷ Panel Report, paras. 7.1665-7.1666.

found that Airbus developed, produced and marketed its LCA family with shared “commonality as an integrated whole.”¹⁸

13. Other considerations were that the United States alleged that the subsidies in dispute worked together over time and across models to give Airbus the full family of aircraft it needed to be competitive in the LCA market. Finally, the Panel found that the clear divisions that the EU insisted separated one model LCA from other LCA models were not supported by the evidence.¹⁹

14. In sum, the Panel undertook a detailed analysis of the reasonableness of the subsidized product definition proposed by the United States against the totality of the facts before it. The Panel confirmed it could, consistently with the SCM Agreement, assess the U.S. adverse effects claims on the basis of the subsidized product consisting of all “all Airbus LCA” and “all Boeing LCA” as the like product. The Panel’s findings are consistent with Articles 5(c) and Article 6.3 of the SCM Agreement, and Article 11 of the DSU.

B. The Relevant Geographic Market versus Multiple “Product Markets”

15. The EU appeals certain aspects of the Panel’s displacement findings. It argues that the Panel should have assessed the U.S. displacement claims by reference to disaggregated market share data for five distinct “product markets” for certain groups of LCA models rather than on the basis of what it calls a “single product market.”²⁰ The EU separately claims that the data do not support the Panel’s findings of the existence of displacement under Article 6.3(b) in some of the third country markets for which the Panel made displacement findings.²¹

16. The notion that a “product market” is relevant for purposes of Article 6.3 is wholly an invention of the European Union. The framework for a displacement analysis under Articles 6.3(a) and (b) is set by the definition of the “subsidized product,” the “like product,” and the

¹⁸ Panel Report, para. 7.1667.

¹⁹ Panel Report, para. 7.1668.

²⁰ EU Appellant Submission, paras. 318, 335-392.

²¹ EU Appellant Submission, paras. 319-334.

geographic market. The text is clear: where the effect of the subsidy is to displace imports of the like product in the market of the subsidizing member, or exports of the like product into markets of third countries, there is serious prejudice under the SCM Agreement. The Panel structured its analysis correctly according to the terms of Article 6.3(a) and (b). Again, it bears repeating, that the EU has not challenged the Panel’s findings that “all Airbus LCA” is a reasonable and coherent “subsidized product” or that “all Boeing LCA” is the product “like” that subsidized product.

17. The EU points to the Appellate Body’s findings in *US – Upland Cotton* for support, but in that case, the Appellate Body neither found nor implied that a “product market” is a requisite element of a displacement claim. Rather, the Appellate Body was considering factors to be considered in defining the scope of the “same” market for purposes of Article 6.3(c), which does not have a specific geographic scope. This exercise of defining the geographic “market” is not necessary in Article 6.3(a) and (b), which define the geographic area as the market of a Member. That is, in considering whether two products are in the same market for purposes of Article 6.3(c), the Appellate Body considered the nature of the product (the “subsidized product,” already defined), the homogeneity of the conditions of competition, and transportation costs to be factors that helped to identify the market in geographic terms.²²

18. Notwithstanding the incompatibility of the EU’s “product market” arguments with the text of the SCM Agreement, the Panel examined the EU’s claim that each country market had to be divided into discrete model-specific segments that operated independently of one another. The Panel found that “the clear dividing lines the European Communities argues exist between models and families of Boeing and Airbus LCA are not supported by the facts that are before us.”²³ In short, the Panel rejected the factual argument that there were distinct “product markets” as defined by the EU.

19. To restate, the complainant must make, and the Panel must objectively assess, a claim brought under Article 6.3(a) or (b) on the basis of the subsidized product, the like product, and

²² *US – Upland Cotton (AB)*, para. 407-408.

²³ Panel Report, para. 7.1742.

the geographic market identified in the claim. In this case, the United States argued that the effects of the subsidies in dispute were the displacement of Boeing LCA by subsidized Airbus LCA. The Panel considered the evidence and the arguments, including those raised by the EU related to individual LCA models and individual sales. The EU has demonstrated no legal error in the Panel’s interpretation of Article 6.3(a) or (b) or in its application of that interpretation to the facts that it found.

20. As for the EU’s other line of appeal, as the Panel noted, the EU did not dispute the accuracy of the data showing Boeing’s market share losses in the EU²⁴ and third country markets.²⁵ Even on appeal, the EU “does not request the Appellate Body to reverse the displacement findings in their entirety.”²⁶ Instead, the EU asks the Appellate Body to rearrange the data to coincide with its multiple product market theory and then find that the rearranged data do not support certain of the Panel’s displacement findings.

21. Yet, the EU makes this argument even as it recognizes that the evidence it cites in support of its five proposed “product markets” is so ambiguous that the Appellate Body could reasonably find fewer, broader product markets.²⁷ The EU also concedes that the Panel “need not have accepted the European Union’s argument that there were five different LCA markets.”²⁸

22. In short, the EU’s arguments in support of its proffered data reshuffling exercise are based on an interpretation of the SCM Agreement that is not only contrary to the text of Article 6.3(a) and (b), but also at odds with the facts found by the Panel, and should be rejected by the Appellate Body.

²⁴ Panel Report, para. 7.1741.

²⁵ Panel Report, para. 7.1775.

²⁶ EU Appellant Submission, para. 376.

²⁷ EU Appellant Submission, para. 375.

²⁸ EU Appellant Submission, para. 370.

C. The Panel’s findings regarding the demonstrated, actual effects of the subsidies

23. The EU argues that the Panel’s causation finding is incomplete because it does not consider whether Airbus, in the absence of subsidies, *could* have launched different aircraft at different times, and further, whether those aircraft could have won the same sales and market share during 2001-2006. Articles 5 and 6.3 are concerned with the effects of subsidies provided by Members. As the Appellate Body has found, the causation standard for a serious prejudice analysis is focused on establishing a chain of causation linking the impugned subsidy to the alleged adverse effect.²⁹ This is precisely what the Panel did in its analysis. The SCM Agreement does not require an additional inquiry into events that might have occurred in an alternate reality and might have caused similar effects. In any case, the alternate reality on which the EU’s argument is based is at odds with the Panel’s factual findings.

24. The Panel’s causation finding is rooted in key findings. First, that Airbus’s access to launch aid and other subsidies over a 40-year period allowed it to enter the market and bring a full family of competitive LCA to market at a pace and in a way that would have otherwise been impossible. Second, that Airbus’s ability to bring its LCA family to market and sell when and as it did was the fundamental cause of its market share gains and the significant sales it captured at Boeing’s expense between 2001-2006.³⁰

25. The Panel concluded that these subsidies caused the market displacement and lost sales that the Panel found within the meaning of Article 6.3 of the SCM Agreement. The Panel found a genuine and substantial link between the subsidies in dispute and the effects of market displacement and lost sales, and that no other factors in the market at the same time cut this causal link.³¹

26. For the launch of each aircraft in Airbus’s LCA family, the Panel looked at a variety of evidence to make its findings. It considered the nature of the LA/MSF, as confirmed by the

²⁹ *US – Upland Cotton (AB Article 21.5)*, para 372.

³⁰ Panel Report, paras. 7.1985, 7.1993.

³¹ Panel Report, paras. 7.1993.

structure of the LA/MSF measures.³² It also examined the modeling of the impact of LA/MSF on launch decisions done by Dr. Dorman.³³ The Panel further considered the magnitude of the subsidies, measured in terms of the percentage of development costs of each model, the degree of subsidization in the terms of each loan, and the cumulative impact of all of the subsidized development financing for each model.³⁴ It also concluded that the statements of Airbus and government officials demonstrated the need for subsidization in order to carry out Airbus's subsidized launches.³⁵ The Panel found that together this evidence demonstrated that the LA/MSF provided by the member State governments to Airbus had a decisive impact for each aircraft in Airbus's LCA family.³⁶

27. The Panel considered the EU's rebuttal arguments, and found them either unpersuasive, or, in the case of the A380 business study, that they actually confirmed the nature and impact of LA/MSF, and suggested the instrumental role of the subsidized financing.³⁷

28. The Panel's causation finding rests on compelling evidence:

- Over a 40-year period covering each of its LCA launches Airbus received a stream of LA/MSF and other subsidies in dispute;³⁸
- these subsidies were, by design, supply-creating, and their benefits flowed across Airbus's entire LCA product line;³⁹
- the subsidies shaped Airbus's participation in the market by allowing it to develop and bring to market its product line at a pace and in a way that it could not have done otherwise;⁴⁰ and

³² Panel Report, paras. 7.1879 -7.1881.

³³ Panel Report, paras. 7.1882 -7.1912.

³⁴ Panel Report, paras.7.1963-7.1972.

³⁵ Panel Report, paras. 7.1913-7.1920.

³⁶ Panel Report, paras. 7.1876-7.1993.

³⁷ Panel Report, para. 7.1934.

³⁸ Panel Report, paras. 7.1881, 7.1949, 7.1976, 7.1993.

³⁹ Panel Report, paras. 7.1881, 7.1949, 7.1976, 7.1993.

⁴⁰ Panel Report, para. 7.1949, 7.1976.

- the availability of Airbus’s subsidized LCA supply was the fundamental factor enabling Airbus to capture market share and sales at Boeing’s expense, and that no other factors in the market attenuated that causal link.⁴¹

29. In fact, the European Union now concedes, in its own words, “a central aspect of the Panel’s ‘product-launch’ causation findings – namely that, but for the MSF, Airbus would not have launched each of its LCA *at the time and in the form that it did.*”⁴²

30. This concession is striking. It recognizes the decisive impact of LA/MSF on Airbus’s launch of aircraft over a 40-year period. Without the subsidies in dispute, Airbus could not have acted when and as it did in the LCA market during that period. Indeed, where a stream of subsidies have worked together over a 40-year period and across Airbus’s LCA models to give Airbus the means to develop its LCA family in a way that would otherwise have been impossible, the cause and effect relationship between the subsidies and Airbus’s sales and market share gains, and Boeing’s sales and market share losses, is undeniable.

D. The EU advocates a causation standard that would compel a Panel to consider infinite possibilities of alternative realities

31. To be clear, the EU’s appeal of the Panel’s causation analysis is not an appeal of the finding that the actual effect of subsidies in dispute was to give Airbus the means to develop, produce, market and sell its LCA family when and as it did. The EU’s call for reversal of the Panel’s causation finding is based on the assertion that, under the SCM Agreement, a “but for” causation analysis requires a panel to go beyond the question of whether the subsidies in dispute allowed the recipient to act as it did.

32. The EU appeals the Panel’s failure to speculate in sufficient detail about whether Airbus, in the absence of subsidies, *might have*, at some *other* point in time, under *different circumstances launched different* aircraft that allegedly *might have* won some of the same sales or displaced Boeing from the same share of the market. Each of the EU’s formulations of

⁴¹ Panel Report, paras. 7.1985, 7.1993.

⁴² EU Appellant Submission, para. 412 (emphasis in original).

alleged Panel error in its causation finding is premised on this single argument.⁴³ With such an approach, the EU necessarily is forced to seek reversal of the Panel not on the basis of the Panel's findings as to what happened in the real world and why, but on the basis of an absence of "findings." The findings that the EU argues are missing from the Panel's analysis do not bear on the demonstrated effect of the subsidies in light of their impact on the recipient's behavior and in relation to other factors actually present in the market.

33. The entire line of the EU's argumentation fails and provides no basis for reversal.

34. *First*, it is based on an interpretation of Article 6.3 that is plainly inconsistent with the text, context, and object and purpose of the SCM Agreement. Article 6.3 requires a Panel to determine whether "the effect of the subsidy" is the alleged market displacement or lost sales. The focus of the analysis is on the actual effect of the actual subsidies, not on hypothetical effects of hypothetical other events. The interpretation advanced by the EU calls for a panel's counterfactual analysis to go beyond an analysis of the actual effects of the subsidy, to further inquiry as to *what else might have happened* that *might also* have produced the same effects that the subsidies did.

35. Article 5 imposes an obligation on Members not to cause through the use of a subsidy adverse effects to the interest of another Member. As an analytical device for assessing this obligation, a counterfactual analysis seeks to determine the actual effects of a subsidy. A counterfactual analysis examines what impact removing the subsidy would have on the recipient's behavior and the market. The Panel found that when the subsidy is removed from the facts of this case, Airbus would not have had the LCA it did, when it did. The Panel also found that Airbus's actual subsidized LCA supply was used to capture market share and significant sales from Boeing. The Panel also considered other factors present in the market at the same time as the subsidies and found that none of them cut the causal link it had found between the subsidies, the subsidized Airbus LCA supply, and Boeing's loss of market share and sales.⁴⁴

⁴³ EU Appellant Submission, paras. 400, 404, 409.

⁴⁴ Panel Report, paras. 7.1985, 7.1993

36. Additional hypothetical factors cannot be simply posited and thrust into a counterfactual scenario. To do so would transform the causation analysis from an analysis of the actual effects of the subsidies into endless speculation about *additional* possible effects of all hypothetical events that might have occurred. A counterfactual approach to analyzing causation is useful only insofar as it examines the obligation set out in Articles 5 and 6.3. That is, whether the effect of a subsidy provided by a Member was to cause serious prejudice to the interests of another Member.

37. *Second*, the EU's causation appeal also depends upon a factually baseless assertion that the Panel was required to engage in this speculation because it purportedly "*found*" that a non-subsidized Airbus "*would exist*."⁴⁵ The EU has gone so far as to create a nearly 40 page "Counterfactual Annex" based on this assertion.⁴⁶ However, the Panel made no such finding. The EU's arguments in this regard are predicated on mischaracterizations of the Panel's findings. The Panel Report contains no finding that Airbus *would* have been able to enter or remain in the LCA market absent the subsidies at issue. To the contrary, the key "finding" that the Panel made is that Airbus would not have been able to launch its LCA when and as it did absent the subsidy.⁴⁷ The EU has conceded this point.⁴⁸

38. And, as to the possibility that a non-subsidized Airbus could have entered and remained in the market, the Panel's review of the facts led it to the opposite conclusion: that this was "*unlikely*."⁴⁹ In this regard, the Panel did consider the EU's argument about how an unsubsidized Airbus might have been able to compete in the LCA market. The Panel addressed this issue in response to extensive arguments on the significance of competition in the economic analysis. The Panel's four hypothetical scenarios demonstrated that none of the competitive situations changed the ultimate outcome of the Panel's analysis regarding displacement and lost sales. To the extent that the EU considers these scenarios to be an independent counterfactual

⁴⁵ EU Appellant Submission, para. 401.

⁴⁶ EU Appellant Submission, Annex I: Counterfactual Annex, para. 3.

⁴⁷ Panel Report, paras. 7.1985 - 7.1993

⁴⁸ EU Appellant Submission, para. 412.

⁴⁹ Panel Report, para. 7.1984 (emphasis added).

analysis, the United States submits that this would be an error. The Panel’s obligation was to consider the actual effects of the subsidies in dispute, not the hypothetical effects of competition from an unsubsidized Airbus that never actually existed. However, given the Panel’s conclusion that an unsubsidized Airbus could not have captured the sales and market share that a subsidized Airbus was able to capture, the point was moot.

39. The EU nevertheless speculates that an unsubsidized Airbus could have launched different aircraft at different times that could have won the same sales as its subsidized A320 aircraft, and could have seized the same market share as was occupied by the subsidized A320, A330, and A380 series aircraft during the 2001-2006 period.⁵⁰ The European Union argues that “a non-subsidized Airbus could have launched a single-aisle LCA in or about 1987 and a 200-300 seat twin-aisle LCA in or about 1991” and the “A380 in 2000.”⁵¹

40. The Panel’s core factual findings directly contradict the notion that an unsubsidized Airbus could have financed, developed, and marketed a single-aisle aircraft without having the knowledge, experience, and market credibility it gained from the A300 and A310. The Panel’s findings demonstrate that the notion that Airbus could have financed, developed and marketed a four-engine 500 plus seat aircraft without the knowledge, experience, and market credibility it gained from the four-engine A340 and A340-500/600 is simply false. Indeed, this notion is inconsistent with the Panel’s finding regarding the significant barriers to market entry that the subsidies allowed Airbus to overcome,⁵² the essential spillover and learning effects across LCA models⁵³ and Airbus’s own recognition of the important learning gained on each of its LCA programs.⁵⁴

41. The Panel’s factual findings also contradict the notion that an unsubsidized Airbus that did not launch the A300 and A310 would be better financially situated than the actual subsidized

⁵⁰ See EU Appellant Submission, paras. 483-505, *see also generally* Annex I: Counterfactual Annex.

⁵¹ EU Appellant Submission, para. 500, *see also* Annex I: Counterfactual Annex, paras. 3-7, 58-67.

⁵² Panel Report, para. 7.1948.

⁵³ Panel Report, paras. 7.1717, 7.1976 (*citing, inter alia*, EC-98 (HSBI) and EC-362 (HSBI)).

⁵⁴ Panel Report, paras. 7.1717, 7.1976 (*citing, inter alia*, EC-98 (HSBI) and EC-362 (HSBI)).

Airbus to launch a single-aisle and 200-300 seat aircraft. This scenario too is contradicted by the Panel's findings that the LA/MSF financed almost 100% of the development costs of the A300 and A310.⁵⁵ A hypothetical decision to refrain from launching the A300 and A310 could not have put Airbus in a materially better financial position than having launched them with the subsidies it received. To the contrary, a non-subsidized Airbus would have been worse off because it would not have benefitted from the learning effects (including the learning of “working together” as a single entity) or the revenue stream gained from production and delivery of these aircraft.

42. Again, the fantasy world imagined by the EU⁵⁶ thus stands in stark contrast to the Panel's conclusions that such a world was in fact “*unlikely*.”⁵⁷ Even if, for the sake of argument, Airbus could have been able to enter the LCA market as a non-subsidized competitor, the Panel was “confident that it would not have achieved the market presence it did over the period 2001-2006” and “it would be a much different, and we believe, a much weaker LCA manufacturer during the period we examined, with at best a more limited offering of LCA models.”⁵⁸ In the EU's hypothetical, an unsubsidized Airbus is a stronger competitor in the 2001-2006 period, with fewer, but technically superior aircraft to those that it developed in the real world. If that were true, the subsidies at issue in this dispute hurt Airbus – a point that even the EU has never seriously advanced.

43. The Panel found a genuine and substantial link between the subsidies in dispute and the effects of market displacement and lost sales, and that no other factors in the market at the same time cut this causal link. The Panel concluded that, over the period 2001-2006, the effects of the subsidies were to allow Airbus to bring its LCA supply to market at the time and in a way that it could not otherwise have done.⁵⁹ The Panel further found that Airbus' subsidized LCA supply displaced imports of Boeing LCA into the EC market, displaced Boeing's exports to third

⁵⁵ Panel Report, para. 7.1934 and 7.1935.

⁵⁶ See generally EU Appellant Submission, Annex I: Counterfactual Annex.

⁵⁷ Panel Report, para. 7.1984.

⁵⁸ Panel Report, paras. 7.1984, 7.1993.

⁵⁹ Panel Report, paras. 7.1985, 7.1993.

country markets, and captured significant sales from Boeing.⁶⁰ The Panel also found that no other factors present in the market at the same time as the subsidies, including the EU's allegations relating to mismanagement of customer relations and geopolitical considerations, cut that causal link.⁶¹

44. The Panel had thus found serious prejudice within the meaning of Articles 6.3(a), 6.3(b) and 6.3(c) of the SCM Agreement.

E. Aggregation of the non-LA/MSF subsidies that complemented and supplemented the LA/MSF was appropriate

45. The EU also argues that the Panel incorrectly aggregated the non-LA/MSF subsidies for the purpose of its adverse effects analysis.

46. Articles 5 and 6.3 provide no specific methodological instructions regarding a causation analysis. The Appellate Body has found that there must be a genuine and substantial link between the subsidy and its effects, and that other factors present in the market not dilute that link.⁶² In *US – Upland Cotton*, the panel conducted an aggregated analysis of subsidies that shared a sufficient nexus with both the subsidized product and the particular effects-related variable under consideration.⁶³ That panel reasoned that “{t}o the extent a sufficient nexus exists among the subsidies at issue so that their effects manifest themselves collectively, we believe that we may legitimately treat them as a ‘subsidy’ and group them and their effects together.”⁶⁴ Although the specific finding was not directly challenged in the appeal of that report, the Appellate Body did affirm that Panel's overall causation finding in many respects, including its approach to grouping together certain subsidies for the purpose of assessing their effects.⁶⁵

⁶⁰ Panel Report, paras. 7.1985, 7.1993.

⁶¹ Panel Report, para. 7.1993.

⁶² *US – Upland Cotton (21.5)(AB)*, para. 375.

⁶³ *US – Upland Cotton (Panel)*, para. 7.1192.

⁶⁴ *US – Upland Cotton (Panel)*, para. 7.1192.

⁶⁵ *US – Upland Cotton (AB)*, para. 483-484; *see also US – Upland Cotton (21.5)(AB)*, para. 401.

47. Based on its review of an exhaustive record regarding the nature and circumstances of the provision of each subsidy, the Panel concluded that all of the non-LA/MSF subsidies “were granted during the period each succeeding model of Airbus LCA was being developed and brought to market,”⁶⁶ and that these subsidies “complemented and supplemented” the product effect of LA/MSF.⁶⁷ An aggregated analysis of the effects of the multiple subsidies at issue in this case thus satisfies the requirement of Article 6.3 because the Panel found that that each subsidy shares in common the causal link. Here, each of the challenged subsidies facilitated Airbus’s LCA launches.

48. The EU does not dispute that the SCM Agreement permits an aggregated analysis of subsidies, and in fact it explicitly “does not challenge the Panel’s combined assessment of the various MSF measures.”⁶⁸ The EU also recognizes that “the ability to combine the effects of various subsidies is necessarily tied to the particular theory or theories of causation being advanced by a party, and evaluated by a panel.”⁶⁹ In this case, the theory is that the subsidies enabled Airbus to launch LCA when and as it did, with the effect of displacing Boeing LCA and winning sales. The Panel found that all of the subsidies worked cumulatively along this causal chain to the same ultimate effect.⁷⁰

49. With respect to the *equity infusions and share transfer measures*, the Panel found that these measures “ensured the continued existence and financial stability of the respective national entities engaged in the Airbus enterprise” and “without their participation in the overall effort, Airbus would not have been able to continue to develop, launch and produce LCA in fulfillment of the goal of developing a full range of LCA for the market.”⁷¹ In particular, the Panel found that Aerospatiale required these subsidies to fund investments in “fixed assets and inventory, and

⁶⁶ Panel Report, para. 7.1956, n. 5692.

⁶⁷ Panel Report, para. 7.1956.

⁶⁸ EU Appellant Submission, para. 646.

⁶⁹ EU Appellant Submission, para. 647.

⁷⁰ Panel Report, para. 7.1993.

⁷¹ Panel Report, para. 7.1957.

advances to suppliers, in connection with the development of new aircraft.”⁷² The EU again confirms this point in its Appellant Submission regarding the A330/A340 when it states that the “ambitious investment program required additional equity capital as a base for further borrowing capacity; in addition to the initial design cost, the production of a new aircraft requires significant capital investment in specialized facilities and equipment.”⁷³

50. As for the *infrastructure subsidies*, the Panel found that they “provided essential support to the development and production of Airbus LCA, relieving Airbus of significant expenses in connection with the development of facilities for the production of, most particularly, the A380, and thus enabling it to continue with the launch of successive models of LCA.”⁷⁴ Regarding the *research and technological development funding subsidies*, the Panel found that these enabled Airbus to “develop features and aspects of its LCA on a schedule that it would otherwise have been unable to accomplish.”⁷⁵ The Panel thus found that each subsidy shares in common the alleged causal link. That is, each of the challenged subsidies impacted Airbus’s launch of LCA.

51. The EU mischaracterizes the Panel’s findings. In particular, it accuses the Panel of engaging in “causation by association” and argues that “the principal commonality” between the non-LA/MSF subsidies and the LA/MSF subsidies “is simply that they were received by entities linked to Airbus and that the United States chose to challenge all of them in the same dispute.”⁷⁶ In doing so, however, the EU ignores that the Panel’s aggregated analysis of the other subsidies in dispute is based on its finding that the nature and operation of each of the subsidies provided in respect of Airbus LCA enhanced Airbus’s ability to develop and bring to market its LCA family as it did, and when it did, and consequently allowed it to gain market share and significant sales at Boeing’s expense.⁷⁷

⁷² Panel Report, para. 7.1957.

⁷³ EU Appellant Submission, para 1094.

⁷⁴ Panel Report, para. 7.1958.

⁷⁵ Panel Report, para. 7.1959.

⁷⁶ EU Appellant Submission, paras. 642, 656.

⁷⁷ Panel Report, para. 7.1993.

52. Subsidies do not have to have identical structure in order to operate collectively, along the same causal pathway, to cause the same effect. As the Panel found, “we do not agree with the European Communities’ view that differences in the structure, operation, and design of the different subsidies at issue in this dispute preclude their being considered in the aggregate”⁷⁸ because all of the non-LA/MSF subsidies shared the one critical similarity that constituted a “shared nexus” between each of the subsidies and the displacement and lost sales.

53. Finally, the standard for an aggregated analysis implicit in the EU’s argument is too high. The EU appears to argue that the Panel erred in failing to establish additionally that each of the subsidies was “necessary” to bring about a particular product launch.⁷⁹ Acceptance of the EU’s argument would permit circumvention of the SCM Agreement disciplines simply by subdividing a program of subsidization into a series of smaller measures – none of which on its own would be found significant enough to cause adverse effects but which, in total, would have a significant distortive impact on competition in a manner inconsistent with Articles 5 and 6.3 of the SCM Agreement. The Panel’s finding that it could cumulatively assess the effects of measures operating by the same causal mechanism that “complemented and supplemented” each other is sufficient, even if certain of these measures might not, on their own, be of a sufficient magnitude to cause adverse effects.

F. Sale of A380s

54. The EU also challenges two aspects of the Panel’s findings regarding the sale lost by Boeing when Emirates Airlines ordered the Airbus A380.⁸⁰ The Panel properly found under Article 6.3(c) of the SCM Agreement that the Emirates Airlines order of A380s constitutes a significant lost sale that was an effect of the subsidies.⁸¹ The Panel did not err in finding that subsidies enabled Airbus to launch the A380, or that the sale was “lost” by Boeing, and therefore the European Union provides no basis for reversing the finding.

⁷⁸ Panel Report, para. 7.1955.

⁷⁹ EU Appellant Submission, paras. 646, 652.

⁸⁰ EU Appellant Submission, paras. 584, 600.

⁸¹ Panel Report, paras. 7.1828, 7.1832, 7.1845, 7.1993.

55. Contrary to the EU’s arguments,⁸² the Panel found that the evidence demonstrated that Boeing lost a sale to Emirates Airlines that it otherwise could have won, in accordance with Article 6.3(c) of the SCM Agreement.

56. First, the Panel found that Boeing marketed and sold LCA that competed with the A380. In particular, the Panel rejected the argument that the A380 had no competition. The EU’s own evidence supported this conclusion, as the Panel found “while it is clear that the A380 offered unique characteristics to these airlines, we do not agree that it did not compete with the 747. Information in the A380 business case contradicts the European Communities’ position in this regard.”⁸³

57. Second, the Panel recognized that customers in the LCA industry consider competing aircraft to fulfill their purchasing requirements. The Panel rejected the EU’s argument that a sale can be considered competitive only where both manufactures make a formal, binding proposal.⁸⁴

58. Third, the Panel noted that the EU “does not dispute that Boeing lost sales to Airbus, in the sense that the customer purchased Airbus rather than Boeing LCA.”⁸⁵ It still does not do so. Simply put, had Airbus not received subsidies that enabled it to launch the A380, Emirates Airlines would have bought another LCA to fulfill the need. This is precisely what Emirates Airlines did when its A380 deliveries were delayed. It purchased additional Boeing 777s to meet its demand.⁸⁶

59. The EU also advances a broader argument related to A380 sales – that the Panel erred in finding first that a non-subsidized Airbus could not have launched the A380 absent the subsidies it received. The EU asserts that the Panel, on that basis, also erred in its finding that an effect of

⁸² EU Appellant Submission, para. 584.

⁸³ Panel Report, para. 7.1832, citing Exhibit EC-362(HSBI); *see also* Panel Report, para. 7.1831.

⁸⁴ Panel Report, para. 7.1722.

⁸⁵ Panel Report, para. 7.1845.

⁸⁶ Panel Report, para 7.1831.

the subsidy was that the U.S. LCA industry lost the sales won by this aircraft within the meaning of Article 6.3(c).⁸⁷

60. Not only did the Panel find that the LA/MSF for the A380 was important, but it also recognized all of the essential financial and technical benefits that Airbus received from its subsidized launch of its earlier aircraft.⁸⁸ The Panel did not, therefore, base its finding solely on the effect of the LA/MSF for the A380 launch. Rather, the Panel found that the EU’s arguments that Airbus could have launched the A380 solely with commercial financing to be not only wrong, but also insufficient to rebut the U.S. claim. The EU’s arguments took no account of the essential enabling role that all of Airbus’s prior subsidized aircraft programs played in the launch of the A380. The Panel found that “but for LA/MSF provided for earlier models of LCA, we do not consider that it would have been possible for Airbus to be in a position to launch the A380 in 2000.”⁸⁹

61. As for the fantasy world in which Airbus launches the A380 without ever having received any subsidies, the Panel considered Airbus’s entry into the market as a non-subsidized competitor to be “unlikely” and to be contradicted by other record evidence.⁹⁰ Airbus itself recognizes the critical importance of the technical experience gained from each of its LCA.⁹¹

62. The EU’s arguments related to the A380 employ the same flawed premise as it did with its causation arguments – that in a speculative counterfactual an entirely unsubsidized Airbus could have launched fewer and different LCA at different times throughout its history, yet still could have ended up able to launch the A380 in 2000. This argument provides no basis for reversal.

⁸⁷ EU Appellant Submission, para. 600.

⁸⁸ Panel Report, paras. 7.1948-7.1949.

⁸⁹ Panel Report, para. 7.1948.

⁹⁰ See Panel Report, paras. 7.1922-7.1927, 7.1934-7.1935, 7.1943-7.1948.

⁹¹ Panel Report, paras. 7.1717, 7.1976 (*citing, inter alia*, EC-98 (HSBI)).

Conclusion

63. To conclude briefly, the Panel’s findings confirm, based on an extensive evidentiary record, that Airbus has been massively subsidized for decades, that but for these subsidies Airbus would have been unable to bring its aircraft to market when and as it did, and that during the 2001-2006 reference period Airbus used its supply of massively subsidized LCA to become the world’s largest LCA supplier by displacing sales of U.S. LCA in the EU and third country markets and capturing significant sales from Boeing.