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EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

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US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
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US – Lamb	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R, DSR 2001:IX, p. 4107
US – Large Civil Aircraft (2nd complaint)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649
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US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton (Article 21.5 – Brazil)	Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW, DSR 2008:III, p. 997
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
1992 Agreement	Agreement between the European Economic Community and the Government of the United States concerning the Application of the GATT Agreement on Trade in Civil Aircraft on Trade in Large Civil Aircraft
2H1E; 2H/1E	2 hydraulic/1 electric
2H2E; 2H/2E	2 hydraulic/2 electric
737MAX	redesigned and reengineered Boeing 737
737NG	Boeing 737 Next Generation – -600, -700, -800, -900 variants
777-200ER	Boeing 777-200 aircraft – extended range variant
777-300ER	Boeing 777-300 aircraft – extended range variant
777-200LR	Boeing 777-200 aircraft – long range variant
A320neo	Airbus A320 "new engine option" aircraft
A320ceo	Airbus A320 "current engine option" aircraft
A350XWB	Airbus A350 "eXtra widebody" aircraft
A350XWB-800	Airbus A350 "eXtra widebody" aircraft – 800 seat capacity variant
A350XWB-900	Airbus A350 "eXtra widebody" aircraft – 900 seat capacity (baseline) variant
A350XWB-1000	Airbus A350 "eXtra widebody" aircraft – 1000 seat capacity variant
[***]	**[***]**
[***]	**[***]**
A380	Airbus A380 aircraft
AB	Appellate Body
AD Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement)
ADIRS	Air Data and Inertial Reference System
Aérospatiale	*Aérospatiale Société Nationale Industrielle*
AIC	Airbus Integrated Company (Airbus SAS)
ASM	*Aérospatiale-Matra*
BAE Systems	British Aerospace Systems
BATNA	best alternative to a negotiated agreement
BCI	business confidential information
[***]	**[***]**
B&O	Business and Occupation
B.V.; BV	*besloten vennootschap* (public limited liability company)
CAC 40	*Cotation Assistée en Continu*
CAR	*Convention d'avance récupérable*
CASA	*Construcciones Aeronáuticas S.A.*
CEO	Chief Executive Officer
CIBBF	Corrected Interpolated Bond-Based Figure
CFRP	carbon fibre reinforced plastic or polymer
CFO	Chief Financial Officer
CMO	Current Market Outlook
COMAC	Commercial Aircraft Corporation of China, Ltd.
COO	Chief Operating Officer
DARE	Develop And Ramp-up Excellence
DASA; Dasa	Deutsche Aerospace AG (from 1992), Daimler-Benz Aerospace AG (from 1995), DaimlerChrysler Aerospace AG (from 1998)
DCF	discounted cash flow
DCLRH	*DaimlerChrysler Luft- und Raumfahrt Holding AG*
DGAC	*Direction générale d'aviation civile*
DM	Deutsche Mark
DNA	Develop New Aircraft
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)
DTI	UK Department of Trade and Industry
EADS	European Aeronautic Defence and Space Company N.V.
EBIT	earnings before interest and taxes
EC	European Communities
EIB	European Investment Bank
EMTN	Euro medium-term note
EUR	euro
Euribor	European interbank borrowing rate
FAL	final assembly line
FF	French franc
FSS	flap support structures
FTE	full time equivalent
GBP	British pound
GDP	gross domestic product

Abbreviation	Description
GIE	*groupement d'intérêt économique*
GmbH	*Gesellschaft mit beschränkter Haftung*
GMF	Global Market Forecast
GRI	government-related issuer
GRE	government-related entity
GSM 102	General Sales Manager 102
HMT	hypothetical monopolist test
HSBI	highly sensitive business information
IMA	integrated modular avionics
IPO	initial public offering
IRR	internal rate of return
JRP	Jordan Risk Premium
KfW	*Kreditanstalt für Weideraufbau*
LA/MSF	Launch Aid/Member State Financing
LCA	large civil aircraft
Libor	London interbank borrowing rate
Ltd	Limited company
MBB	*Messerschmitt-Bölkow-Blohm GmbH*
MBE	Member of the Order of the British Empire
MHT	*Matra Hautes Technologies*
MG	Maturity Gate / Milestone Gate
MP	Member of Parliament
MRL	manufacturing readiness level
MSF	Member State Financing
MTOW	maximum take-off weight
NERA	National Economic Research Associates (NERA Economic Consulting)
MTN	Medium-term note
MY	Marketing Year
NASA	National Aeronautics and Space Administration
nm	nautical miles
NPV	net present value
NRC	non-recurring cost
n.v.; N.V.; NV	*naamloze vennootschap* (public limited liability company)
OECD	Organisation for Economic Cooperation and Development
Onera; ONERA	*Office National d'Études et de Recherches Aérospatiales*
Original A350	Airbus A350 aircraft design proposed between 2004-2006
Psi; PSI	pounds per square inch
PwC	PricewaterhouseCoopers
R&D	research and development
R&TD	research and technological development
RFP	Request for Proposal
RLI	Repayable Launch Investment / Reimbursable Launch Investment
ROCE	return on capital employed
RSP	risk-sharing partner
RSS	risk-sharing supplier
S&P	Standard & Poor's
SAL	sub-assembly line
SARS	Severe Acute Respiratory Syndrome
SAS	*société par actions simplifiées*
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SEPI	*Sociedad Estatal de Participaciones Industriales*
SL; S.L.	*sociedad limitada*
SSNIP	Small but Significant Non-Transitory Increase in Prices
SPOF	Supplier Pass-On Figure
SOGEPA	*Société de gestion de participations aéronautiques*
SOGEADE	*Société de gestion de l'aéronautique, de la défense et de l'espace*
TDM	Temporary Defence Mechanism
TPC	Technology Partnerships Canada
TRL	technology readiness level
UK	United Kingdom
US	United States
USD	United States dollar
USDOC	United States Department of Commerce
VFW	*Vereinigte Flugtechnische Werke GmbH*
VLA	very large aircraft
WACC	weighted average cost of capital
WRP	Whitelaw Risk Premium
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the United States

1.1. The United States' complaint in this dispute, initiated under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), concerns the alleged failure on the part of the European Union[1] and certain member States to implement the recommendations and rulings adopted by the Dispute Settlement Body (DSB) in the original proceeding *EC and certain member States – Large Civil Aircraft*.

1.2. In the original proceeding, the panel found that the United States had demonstrated that the European Communities (EC) and certain member States had caused adverse effects, in the form of certain kinds of serious prejudice to the United States' interests, within the meaning of Articles 5(c), 6.3(a), (b) and (c) of the Subsidies and Countervailing Measures Agreement (SCM Agreement), through the use of the following specific subsidies:

a. "launch aid" or "member State financing" (LA/MSF) for the A300, A310, A320, A330, A330-200, A340, A340-500/600, and A380 models of large civil aircraft (LCA)[2];

b. French and German government "equity infusions" provided in connection with the corporate restructuring of Aérospatiale and Deutsche Airbus[3];

c. certain infrastructure and infrastructure-related measures provided by German and Spanish authorities[4]; and

d. research and technological development (R&TD) funding provided by the European Communities and certain member States.[5]

1.3. The original panel also concluded that the United States had established that the German, Spanish and UK A380 LA/MSF agreements constituted prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.[6]

1.4. In relation to the findings made under Articles 5 and 6.3(a), (b), and (c) of the SCM Agreement, the original panel recommended that:

> {U}pon adoption of this report, or of an Appellate Body report in this dispute determining that any subsidy has resulted in adverse effects to the interests of the United States, the Member granting each subsidy found to have resulted in such adverse effects "take appropriate steps to remove the adverse effects or … withdraw the subsidy".[7]

1.5. As regards the findings made under Article 3.1(a) and footnote 4 of the SCM Agreement, the original panel recommended that:

> {T}he subsidizing Member granting each subsidy found to be prohibited withdraw it without delay and specify that this be done within 90 days.[8]

1.6. The original panel report was circulated to the Members on 30 June 2010. Both parties appealed certain issues of law and legal interpretations developed by the original panel.[9]

[1] The European Union replaced and succeeded the European Communities as of 1 December 2009.
[2] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.290(a)(i)-(vii), 7.482-7.496, and 8.1(a)(i).
[3] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1245-7.1249, 7.1302, 7.1323-7.1326, 7.1380-7.1384, 7.1414, and 8.1(c) and (d).
[4] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1049-7.1053, 7.1097, 7.1100-7.1101, 7.1134, 7.1137-7.1139, 7.1191, 7.1205-7.1211, 7.1244, and 8.1(b)(i)-(iv).
[5] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1427-7.1456, 7.1459-1480, 7.1608, and 8.1(e).
[6] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.689 and 8.1(a)(ii).
[7] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 8.7.
[8] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 8.6.

1.7. The Appellate Body *reversed* or *modified* several aspects of the original panel's findings.[10] Where the Appellate Body found sufficient factual findings or undisputed facts on the record in relation to the matters it had reversed, it went on to "complete the analysis". Thus, after "completing the analysis" with respect to certain aspects of the original panel's subsidization and adverse effects findings, the Appellate Body ultimately *upheld* the original panel's conclusion that the United States had established that the effects of the challenged LA/MSF measures caused serious prejudice to the United States' interests within the meaning of Article 6.3(a), (b) and (c) of the SCM Agreement[11], and that the effects of the challenged "equity infusions" and infrastructure measures the Appellate Body had found to constitute specific subsidies, "complemented and supplemented" the effects of the challenged LA/MSF measures.[12] The Appellate Body also attempted to "complete the analysis" after having reversed the original panel's finding that the German, Spanish and UK A380 LA/MSF measures constituted prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement. However, the Appellate Body found that it was unable to do so because there were insufficient factual findings or undisputed facts on the record.[13]

1.8. In the light of its findings, the Appellate Body concluded that:

> {H}aving reversed the Panel finding, in paragraph 7.689 of the Panel Report, that certain A380 LA/MSF contracts amounted to prohibited export subsidies, the Panel's recommendation pursuant to Article 4.7 of the *SCM Agreement*, in paragraph 8.6 of the Panel Report, consequently must be reversed; however, to the extent we have upheld the Panel's findings with respect to actionable subsidies that caused adverse effects, as set out in paragraph 8.2 of the Panel Report, or such findings have not been appealed, the Panel's recommendation pursuant to Article 7.8 of the *SCM Agreement*, in paragraph 8.7 of the Panel Report, that "the Member granting each subsidy found to have resulted in such adverse effects, 'take appropriate steps to remove the adverse effects or … withdraw the subsidy'", stands.[14]

1.9. The Appellate Body report and the report of the original panel, as modified by the Appellate Body report, were adopted by the DSB on 1 June 2011.[15]

1.10. On 1 December 2011, the European Union informed the DSB that it had taken "appropriate steps to bring its measures fully into conformity with its WTO obligations, and to comply with the DSB's recommendations and rulings".[16] The European Union explained that it had "adopted a course of action that addresses all forms of adverse effects, all categories of subsidies, and all models of Airbus aircraft covered by the DSB's recommendations and rulings".[17] The European Union provided "{i}nformation concerning the steps" it had taken to achieve compliance in a list containing 36 numbered paragraphs attached to its communication.

1.11. On 9 December 2011, the United States requested consultations with the European Union and certain member States, explaining in the same request for consultations, that it was of the view that "the actions and events listed in the EU Notification do not withdraw the subsidies or remove their adverse effects for purposes of Article 7.8 of the SCM Agreement and the EU has therefore failed to implement the DSB's recommendations and rulings".[18]

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[9] WT/DS316/12/Rev.1 and WT/DS316/13.

[10] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1414(a), (c), (d)(i)-(ii), (e)(ii), (g), (i), (j), (k), and (s), and 1415(b).

[11] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1414(e)(iv), (l), (m), (p), and (q).

[12] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1414(g) and (r). The Appellate Body reversed the original panel's finding that the R&TD subsidies "complemented and supplemented" the effects of the challenged LA/MSF measures.

[13] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1414(j) and 1415(b).

[14] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1416.

[15] WT/DSB/M/297.

[16] Communication from the European Union dated 1 December 2011, WT/DS316/17, 5 December 2011, (Compliance Communication), para. 1.

[17] Compliance Communication, para. 3.

[18] WT/DS316/19, p. 3.

1.12. The United States and the European Union held consultations on 13 January 2012, but the consultations failed to resolve the dispute.

1.2 Panel establishment and composition

1.13. On 30 March 2012, the United States requested the establishment of a panel pursuant to Article 21.5 of the DSU with standard terms of reference.[19] At its meeting on 13 April 2012, the DSB agreed, pursuant to Article 21.5 of the DSU, to refer the dispute to the original panel, if possible.[20]

1.14. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS316/23 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.15. In accordance with Article 21.5 of the DSU, the Panel was composed on 17 April 2012 as follows[21]:

Chairman: Mr Carlos Pérez del Castillo
Members: Mr John Adank
Mr Thinus Jacobsz

1.16. Australia, Brazil, Canada, China, Japan, and the Republic of Korea notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.17. The Panel held an organizational meeting with the parties on 1 May 2012.

1.18. After consulting the parties, the Panel adopted its Working Procedures[22] and timetable on 11 May 2012. The Panel twice suspended its timetable on 10 August 2012 and 28 November 2012 in the light of the United States' and European Union's respective requests for the Panel to exercise its right to seek information under Article 13 of the DSU. The Panel made various other modifications to its timetable throughout the proceeding. On 5 October 2015, the Panel informed the parties of the expected date of the issuance of the Interim Report.

1.19. The United States and the European Union filed their first written submissions on 25 May 2012 and 6 July 2012, respectively. Third parties filed their written submissions on 27 July 2012. The second written submissions of the United States and the European Union were filed on 19 October 2012 and 15 January 2013, respectively.

1.20. The Panel held one substantive meeting with the parties on 16-18 April 2013. A session with the third parties took place on 17 April 2013. At the request of the parties, the Panel's meeting with the parties was opened to the public by means of a delayed video showing. A portion of the Panel's meeting with the third parties was also opened to the public by means of a delayed video showing.[23]

[19] *EC and certain member States – Large Civil Aircraft*, Recourse to Article 21.5 of the DSU by the United States: Request for the establishment of a panel, WT/DS316/23, (dated 30 March 2012, circulated 3 April 2012).
[20] WT/DSB/M/314.
[21] WT/DS316/24.
[22] The Panel's Working Procedures are attached in Annex A-1.
[23] See Annex A-2 for the procedures for the conduct of the meeting. Australia, Brazil, Canada and Japan consented to having their statements videotaped for delayed showing. China and Korea did not consent.

1.21. The Panel posed questions to the parties and third parties on 23 April 2013, and additional questions to the parties on 23 August 2013 and 31 March 2014.

1.22. On 5 October 2015, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 11 December 2015. The Panel issued its Final Report to the parties on 11 March 2016.

1.3.2 Protection of Business Confidential Information and Highly Sensitive Business Information

1.23. At the organisational meeting, the parties requested the Panel to adopt additional procedures for the protection of confidential and highly sensitive business information, submitting a joint proposal. After considering the parties' request and their joint proposal, the Panel adopted the Additional Procedures to Protect Business Confidential Information and Highly Sensitive Business Information (BCI/HSBI Procedures) on 11 May 2012.[24]

1.3.3 Preliminary ruling on the Panel's terms of reference

1.24. In its first written submission, the European Union objected to the inclusion of certain United States *claims* and challenged *measures* within the scope of this compliance proceeding. In particular, the European Union objected to the United States' challenge to the LA/MSF agreements entered into between Airbus and France, Germany, Spain and the United Kingdom for the Airbus A350 "eXtra widebody" aircraft (A350XWB), as well as the United States' prohibited subsidy claims against the A380 LA/MSF measures, and the United States' threat of displacement and impedance of imports claims.[25] The European Union asked the "Panel to grant the relief requested … through a preliminary ruling, or failing that in its final report".[26]

1.25. On 27 March 2013, the Panel issued a preliminary ruling with respect to the European Union's objection to the United States' *claims*, finding that:

a. the United States' claim that the A380 LA/MSF measures are prohibited export subsidies within the meaning of Article 3.1(a) of the SCM Agreement, and the United States' threat of displacement and impedance of imports claims, are within the scope of this proceeding;

b. the United States' claim that the A380 LA/MSF measures are prohibited import substitution subsidies within the meaning of Article 3.1(b) of the SCM Agreement is outside the scope of this proceeding; and

c. the United States' claims of threat of displacement or impedance of imports pursuant to Article 6.3(a) of the SCM Agreement are within the Panel's terms of reference.

1.26. In the same communication, the Panel informed the parties that it would issue the reasons underlying its findings in due course.

1.27. The Panel's findings and underlying reasoning in relation to all of the objections raised by the European Union in its request for a preliminary ruling are set out in Section 6.4.

1.3.4 Information sought by the Panel

1.28. On 20 July 2012, the United States requested the Panel to exercise its right under Article 13 of the DSU to seek certain information that the United States considered to be necessary for the Panel to carry out its mandate. After considering the views of both parties, the Panel ruled on the United States' request on 4 September 2012, inviting the European Union to provide certain information. The European Union submitted information to the Panel on 5 October 2012.

[24] The BCI/HSBI Procedures were subsequently revised several times. The final version is attached in Annex A-3.
[25] European Union's first written submission, section III.
[26] European Union's first written submission, fn 184.

1.29. On 23 November 2012, the European Union also requested the Panel to exercise its right to seek information under Article 13 of the DSU. After considering the views of both parties, the Panel informed them on 14 December 2012 that it had decided to deny the European Union's request.

1.30. The Panel's rulings are reproduced in Annex E of this Report.

1.3.5 Procedural rulings

1.31. The Panel was asked to make numerous rulings in relation to procedural matters throughout this proceeding. The Panel's main rulings are reproduced in Annex F of this Report.

1.4 Product at issue

1.32. The product at issue in this dispute is the same as the product that was the subject of the original proceeding, i.e. LCA, as distinguished from smaller (regional) aircraft and military aircraft. LCA can generally be described as large (weighing over 15,000 kg) "tube and wing" aircraft, with turbofan engines carried under low-set wings, designed for subsonic flight. LCA are designed for transporting 100 or more passengers and/or a proportionate amount of cargo across a range of distances serviced by airlines and air freight carriers. LCA are covered by tariff classification heading 8802.40 of the Harmonized System ("Airplanes and other aircraft, of an unladen weight exceeding 15,000 kg").

2 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

2.1. The United States requests that the Panel find that the European Union and certain member States have failed to comply with the recommendations and rulings of the DSB by withdrawing the subsidies or taking appropriate steps to remove the adverse effects and, in particular, that:

a. with the exception of the Bremen Airport runway subsidy, the European Union and relevant member States have not withdrawn the subsidies covered by the DSB recommendations and rulings;

b. French, German, Spanish, and UK LA/MSF for the A350XWB is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement;

c. French, German, Spanish, and UK LA/MSF for the A380 and the A350XWB confers (1) an export subsidy inconsistent with Article 3.1(a) of the SCM Agreement, and (2) an import substitution subsidy inconsistent with Article 3.1(b) of the SCM Agreement;

d. the European Union and relevant member States have not removed the adverse effects covered by the DSB recommendations and rulings;

e. the United States continues to experience serious prejudice in the form of significant lost sales under Article 6.3(c) of the SCM Agreement, including sales where the customer ordered the A350XWB;

f. the United States continues to experience serious prejudice in the form of displacement and impedance, and/or threat thereof, of its LCA imports into the European Union market under Article 6.3(a) of the SCM Agreement;

g. the United States continues to experience serious prejudice in the form of displacement and impedance of its LCA exports to 11 third country markets under Article 6.3(b) of the SCM Agreement; and

h. all subsidies provided to Airbus LCA, including LA/MSF provided to the A350XWB, have a genuine and substantial causal relationship with the effects found.[27]

2.2. The European Union requests that the Panel reject the entirety of the United States' claims.[28]

[27] United States' first written submission, para. 533; and second written submission, para. 748.

3 ARGUMENTS OF THE PARTIES

3.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 12 of the Working Procedures adopted by the Panel (see Annexes B and C).

4 ARGUMENTS OF THE THIRD PARTIES

4.1. The arguments of the third parties are reflected in their executive summaries, provided in accordance with paragraph 12 of the Working Procedures adopted by the Panel (see Annex D).

5 INTERIM REVIEW

5.1 Introduction

5.1. The Panel issued its Interim Report to the parties on 11 December 2015. Both parties submitted written requests for review of precise aspects of the Interim Report on 22 January 2016, and written comments on each other's written requests on 12 February 2016. The parties also provided written comments on the treatment of certain information as BCI and/or HSBI in the Interim Report on 12 February 2016, with comments on each other's comments submitted on 26 February 2016. Neither party requested the Panel to hold an interim review meeting. Below we respond to the issues raised by the parties in the context of the interim review.

5.2. Due to changes as a result of our review, the numbering of the footnotes in the Final Report has changed from the Interim Report. The text below refers to the footnote numbers in the Interim Report, with the corresponding footnote numbers in the Final Report provided in parentheses for ease of reference. Apart from the specific changes described in the following section, we have also corrected a number of typographical errors and other non-substantive errors throughout the report, including those identified by the parties, which are not referred to specifically below.

5.2 The European Union's Compliance Communication

5.2.1 Paragraph 6.7, and sub-headings 6.2.1, 6.2.2, and 6.2.3 (now sub-headings 6.2.2, 6.2.3, and 6.2.4)

5.3. The European Union requests the Panel to explain the rationale for, and the implications of, the Panel's decision to discuss the European Union's "measures taken to comply" under the following three separate sub-headings: ("Actions taken *after* the adoption of the recommendations and rulings by the DSB"); ("Events that occurred *before* the adoption of the recommendations and rulings by the DSB"); and ("Alleged events that *overlapped* the adoption of the recommendations and rulings by the DSB"). The United States considers the sub-headings self-explanatory and further considers that the implications of the sub-headings are apparent from the remainder of the Interim Report. The United States, therefore, sees no reason for the Panel to provide the additional requested explanations.

5.4. The Panel chose to describe the European Union's alleged compliance "actions" under the three relevant sub-headings in order to better understand the nature of the European Union's responses to the United States' allegations of non-compliance, bearing in mind that the timing of the alleged compliance "actions" is pertinent to certain aspects of the European Union's refutation of the United States' claims. For example, the European Union argues that it has no compliance obligation at all in relation to subsidies that ceased to exist *prior to the adoption of the recommendations and rulings*. Considerations pertaining to the timing of the alleged compliance "actions" are also, more generally, a feature of other European Union arguments, including the submission that certain events that have taken place over the passage of time (including post-launch investments made in the A320 and A330 both *prior to and after the adoption of the recommendations and rulings*) have diluted the causal link established in the original proceeding such that the challenged subsidies are no longer a "genuine and substantial" cause of adverse effects. Thus, ultimately, the European Union's alleged compliance "actions" have been described under the relevant sub-headings as a *first step* in clarifying the arguments underlying the

[28] European Union's first written submission, para. 1242; and second written submission, para. 1696.

European Union's assertion of compliance, the full contours of which are fully explored and assessed in the remainder of the Report.

5.2.2 Paragraph 6.8

5.5. The European Union requests that the last sentence of paragraph 6.8 be revised to more accurately reflect the evidence submitted by the European Union and the United States in relation to the termination of certain LA/MSF agreements. The United States argues that one piece of evidence upon which the European Union relies in this context does not provide support for the European Union's requested language, and that another piece of evidence upon which the European Union relies was not supplied by the European Union, but by the United States. The United States asks the Panel to consider these factors when assessing the European Union's request.

5.6. Paragraph 6.8 has been modified to reflect the parties' positions in relation to the evidence submitted by the European Union regarding the termination of the French LA/MSF Agreements for the A310, A310-300, A330/A340, A330-200, and A340-500/600.[29] Consequential adjustments have also been made to paragraphs 6.9-6.12. The United States' evidence, which the European Union asserts demonstrates that the German LA/MSF Agreements for the A300B, A300B3/B4, A300-600, A310, A310-300, A320, and A330/A340 were terminated in 1997 and 1998, is discussed in paragraph 6.26.

5.2.3 Paragraphs 6.15, 6.16, 6.859, 6.869, 6.879, 6.895, 6.908, 6.918, and 6.928

5.7. The European Union requests that the Panel's characterization of the European Union's arguments in paragraphs 6.15, 6.16, 6.859, 6.869, 6.879, 6.895, 6.908, 6.918, and 6.928 be modified to reflect the fact that the European Union's submissions concerning the end of the "lives" of the relevant subsidy measures were focused on the *end* of the implementation period, not the *beginning* of the implementation period. The United States offers an alternative revision regarding paragraph 6.15, and argues that it is unnecessary to revise any of the other relevant paragraphs because they already accurately reflect the European Union's *factual* arguments regarding the time at which the "lives" of the relevant subsidy measures came to an end.

5.8. The relevant paragraphs have been amended to more accurately reflect the European Union's arguments.

5.2.4 Paragraphs 6.33-6.35

5.9. The European Union requests that paragraphs 6.33-6.35 be moved from sub-heading 6.2.2 (now 6.2.3) to sub-heading 6.2.3 (now 6.2.4), to reflect the fact the relevant post-launch investments occurred both *after* and *before* the adoption of the recommendations and rulings by the DSB. The United States did not comment on the European Union's request.

5.10. The text of paragraphs 6.33-6.35 now appears under sub-heading 6.2.4 (in paragraphs 6.36-6.38). A corresponding change has also been made to the title of sub-heading 6.2.4.

5.2.5 Paragraph 6.39

5.11. The European Union requests the replacement of the word "their" in paragraph 6.39 with the word "any", arguing that the wording "their present-day adverse effects", when applied to the challenged LA/MSF subsidies, appears to suggest that these subsidies do have present-day adverse effects, a question that the European Union considers the Panel is not pre-judging at this stage of the Interim Report. The European Union additionally requests the Panel to clarify the attribution of a quotation in the same paragraph to the European Union. The United States did not comment on the European Union's request.

[29] Although the letter of termination submitted in Exhibit EU-34 does not explicitly refer to the A310-300 programme, we are satisfied that when read together with Exhibit USA-396 (BCI), the information contained in Exhibit EU-34 demonstrates that the French A310-300 LA/MSF contract has also been terminated.

5.12. Paragraph 6.39 has been modified to address the European Union's concerns.

5.3 Scope of the compliance proceeding

5.3.1 Paragraphs 6.53 and 6.80

5.13. The United States requests that the description in paragraphs 6.53 and 6.80 of the findings made in the original proceeding in relation to the United States' claims against the alleged LA/MSF commitment for the Original A350 be modified to more accurately reflect the conclusions set out in paragraph 8.3 of the original panel report. The European Union objects to the United States' request insofar as it asks for the deletion of existing language in the Report, language that the European Union deems accurate. The European Union does not, however, object to the additional language proposed by the United States if the existing language is retained.

5.14. For the avoidance of confusion, the relevant passages of paragraphs 6.53 and 6.80 have been clarified.

5.3.2 Paragraphs 6.109 and 6.143

5.15. The European Union requests that the phrase "for the purpose of financing the development of each and every new model of Airbus LCA that has ever been launched and brought to market" in paragraphs 6.109 and 6.143 be replaced with the phrase "for the purpose of financing the development costs of Airbus LCA" in order to reflect the fact that: (i) no such agreements were entered into "for the purpose of financing the development of" the A321, A319 and A318 LCA; (ii) Germany, Spain and the UK did not enter into LA/MSF loan agreements for the A330-200; and (iii) Germany and the UK did not enter into LA/MSF loan agreements for the A340-500/600.

5.16. The United States considers that the European Union's objection to the wording of the Interim Report resembles an argument that the European Union made before the original panel. The United States recalls that the original panel, after considering that European Union argument, observed that: "{W}hile we understand that the Airbus governments did not provide LA/MSF for each and every model of LCA developed by Airbus, the evidence we have reviewed does show that whenever Airbus sought LA/MSF it was offered by each of the Airbus governments on the same four 'core terms', and in all but one case, the terms and conditions of that LA/MSF were agreed between the parties."[30] The United States has no objection to the Panel making conforming changes to paragraph 6.109 of the Interim Report.

5.17. Footnote 205 (now footnote 228) to paragraph 6.109 refers to a passage from the adopted panel report which, in our view, accurately reflects the relevant facts pertaining to the extent to which LA/MSF agreements were entered into by Airbus and the Airbus governments for the purpose of financing the development of every new model of Airbus LCA. Accordingly, we decline the European Union's request in relation to paragraph 6.109.

5.3.3 Footnote 224 (now footnote 247)

5.18. The European Union requests the Panel to insert the words "up to a maximum of" before the figure "33%" that appears in footnote 224 (now footnote 247) to accurately reflect the facts of the agreements at issue. The United States did not object to the European Union's request.

5.19. Footnote 224 (now footnote 247) has been modified to more accurately reflect the terms of the relevant LA/MSF agreements.

5.4 Whether LA/MSF for the A350XWB is a subsidy

5.4.1 Paragraph 6.229 et seq.

5.20. The European Union requests that the expression "successful aircraft delivery" that is used in various paragraphs of the Interim Report to denote the trigger of a repayment obligation, be

[30] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.530.

replaced with the expression "aircraft delivery". According to the European Union, modifying the term "aircraft delivery" with the adjective "successful" is confusing because it "inaccurately" suggests that not all aircraft deliveries trigger repayment obligations. The United States did not comment on the European Union's request.

5.21. Paragraphs 6.229, 6.232, 6.238, 6.251, 6.254, and 6.261 have been modified to address the European Union's concern.

5.4.2 Footnote 377 (now footnote 401) to paragraph 6.231

5.22. The European Union requests that the words "even now", which appear in the final sentence of footnote 377 (now footnote 401) to paragraph 6.231, be replaced with "as of today" in order to avoid the impression that the Panel considers that a financial instrument with an interest rate that depends in part on the timing of **[***]**, such as the French A350XWB LA/MSF contract, inherently confers a "benefit". The United States considers that the phrase "even now" does not have the connotation that the European Union believes that it has in this context, and that "even now" is synonymous with "as of today", rendering the European Union's request inutile.

5.23. Footnote 377 (now footnote 401) has been modified to address the European Union's concern.

5.4.3 Paragraphs 6.268-6.288

5.24. The European Union notes that paragraphs 6.268-6.288 describe how the A350XWB LA/MSF agreements compare with LA/MSF agreements provided for earlier aircraft programmes. The European Union requests that citations be added to the relevant paragraphs of the United States' submissions "from which the arguments reviewed in this comparative assessment were drawn".

5.25. The United States notes that paragraphs 6.268-6.288 contain detailed factual observations citing to the original panel report or derived by the Panel from evidence submitted by the parties in this proceeding. The United States observes that this passage represents the Panel's effort to organize facts that both parties have submitted as relevant to the evaluation of the matter before the Panel, rather than an attempt to capture the viewpoint of either party. Citation to "relevant paragraphs of the United States' submissions" is therefore, in the view of the United States, unnecessary. The United States also makes a general comment, detailed further below, that as a panel need not adopt the reasoning of one of the parties, and may rely on its own reasoning independent of the arguments put forward by the parties, its conclusions need not cite the arguments of the parties.

5.26. Paragraphs 6.268-6.288 are part of sub-section 6.5.2.3.1 of the Interim Report, in which the key features of the LA/MSF agreements for the A350XWB are described and factually assessed, first individually and then in comparison with the LA/MSF agreements challenged by the United States in the original proceeding. In performing this factual assessment, the compliance Panel found it useful to compare the A350XWB LA/MSF agreements with the LA/MSF agreements at issue in the original proceeding in order to develop a better understanding of their particular features.

5.27. We recall that the mandate of a panel is to make an objective assessment of the matter before it, including an objective assessment of the facts, in accordance with Article 11 of the DSU. In so doing, a panel must review the totality of the facts and evidence before it.[31] We are not aware of a rule that prevents a panel from setting out its own factual understanding of measures in this context, or that a panel's factual understanding of the measures at issue must necessarily proceed from the arguments made by one or another of the parties. Accordingly, we see no basis for the European Union's request for review and, therefore, make no change to the relevant paragraphs.

[31] Appellate Body Report, *US – Wheat Gluten*, paras. 150-151. See also Appellate Body Report, *Korea – Dairy*, para. 139.

5.4.4 Footnote 438 (now footnote 462) to paragraph 6.289

5.28. The European Union observes that footnote 438 (now footnote 462) to paragraph 6.289 reads:

> With regards to the UK contract, the European Union initially stated that **[***]**, as disbursements were scheduled to occur no earlier than **[***]**. However, the European Union later clarified that disbursements were made as follows: In **[***]**. Disbursements were scheduled and made by the UK Government in **[***]**.

5.29. The European Union asserts that the final sentence in this section of the footnote is factually inaccurate, alleging that the **[***]**, and that under the **[***]**, the earliest disbursement was scheduled for **[***]**. The European Union requests this Panel's relevant finding be reviewed "to ensure factual accuracy". The United States considers that the European Union's request should be rejected because the relevant language in the Interim Report already accurately reflects the facts.

5.30. The description in the footnote at issue is based on our assessment of: (i) the HSBI revised schedule of disbursements contained at paragraph 2 of the exhibit to which the European Union refers – which replaced the schedule of disbursements also contained at paragraph 2 of the **[***]**; and (ii) the remaining paragraphs of Exhibit EU-133/EU-(Article 13)-33. While paragraph 3 of that exhibit indicates that a disbursement was indeed scheduled to occur on **[***]** and a further disbursement on **[***]**, the same paragraph indicates those payments – as distinct from the earlier, scheduled disbursements – would be subject to additional conditions. This is further confirmed by the text of paragraph 4 of the exhibit.

5.31. We recall that the European Union was asked to clarify its submissions in this respect in Panel question Nos 86 and 128. In response to Panel question No. 86, the European Union provided an HSBI schedule of disbursements already made, and those to be made, confirming that payments would be made prior to **[***]**. In Panel question No. 128, the European Union was asked to reconcile this information with its submission at paragraph 276 of its second written submission that "**[***]**. Instead, amendments made to the **[***]**". In its response, the European Union "confirm{ed} that the information included in its response to Question 86 is accurate. The **[***]** does not, however, affect the overall EU argument". We note that Professor Whitelaw's calculations (for example in Exhibit EU-421 (HSBI)) also utilise figures involving disbursements made prior to **[***]**. The compliance Panel's understanding of the disbursements made and scheduled to be made is based on these submissions by the European Union.

5.32. Having reviewed the finding, and found it to be in accordance with the European Union's factual submissions, we accordingly make no change.

5.5 Programme risk for the A350XWB

5.5.1 Footnote 500 to paragraph 6.338

5.33. The European Union requests that the compliance Panel add a citation to the United States' submissions where the United States makes an argument which the European Union maintains is described in footnote 500. According to the United States, the footnote reflects the Panel's observation regarding the implications of an argument raised by the European Union, and a citation is unnecessary.

5.34. Footnote 500 of the Interim Report set out an observation made by the Panel about one of the possible implications of the European Union's decision not to provide certain pricing information. Our observation does not constitute an argument made by either of the parties. For the avoidance of confusion, the relevant footnote containing the observation has been deleted.

5.5.2 Paragraph 6.490

5.35. The European Union notes that the footnote to this paragraph appears to contain an erroneous attribution to the European Union. The European Union requests that the content of the footnote be corrected. The United States did not object to the European Union's request. The citation has been corrected to refer to the relevant part of the United States' submissions.

5.5.3 Paragraphs 6.496-6.500, 6.502, 6.505, 6.513, and 6.526

5.36. The European Union requests that citations be added to the United States' submissions where the United States asserts the relevance of "the context of the development of the A350XWB" to the question of the mitigation of risks that is referenced in paragraphs 6.496-6.500, and where "the United States makes" certain arguments, which the European Union maintains are set out in paragraphs 6.502, 6.505, 6.513, and 6.526.

5.37. The United States asks the Panel to reject the European Union's request, arguing that there is no need to include any such citations. The United States notes that the DSU does not require panels to adopt the view of one party or the other. The United States considers that Article 11 of the DSU presupposes that a panel may assess the facts and relevant legal provisions differently from one or both parties with respect to a matter in dispute.[32] The United States recalls that a panel may not "make the case" for a complaining party "which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it"[33], but that within these limitations, a panel has considerable latitude to formulate its conclusions. The United States comments that, as a panel need not adopt the reasoning of one of the parties, and may rely on its own reasoning independent of the arguments put forward by the parties, its conclusions need not cite the arguments of the parties. The United States considers that a panel is free to use such citations to explain its conclusions, either by comparison or contrast with the views expressed by one or both of the parties. However, absent some further additional consideration, a panel has no obligation or even reason to include citations to the arguments of a party even if it reaches conclusions favourable to that party. The United States considers that the European Union has not provided reasons why it is necessary or appropriate to include citations and asks that the Panel reject the European Union's requests in this regard.

5.38. The United States further observes that paragraphs 6.496-6.500 lay out the Panel's understanding of relevant facts as context for evaluating the European Union's argument that the risks associated with the A350XWB were mitigated. The United States observes that the passage contains numerous citations to documents submitted by both parties, and that the European Union does not dispute the accuracy of the Panel's observations or that the cited documents fully support them. The United States also observes that: in paragraph 6.502 the Panel was addressing an internal inconsistency within the arguments presented by the European Union; in paragraphs 6.503-6.504 the Panel evaluated evidence submitted by the European Union to determine whether it supported an inference that the European Union was seeking to draw; in paragraph 5.505 the Panel concluded that the evidence supported a different inference; paragraph 6.513 contains conclusions reached by the Panel after evaluating the European Union's arguments in light of the evidence submitted by both parties, and that in any event those conclusions agree in part with the European Union; and that paragraph 6.526 addresses matters relevant to evaluating the European Union's arguments. The United States considers that there is, accordingly, no need to include citations to United States arguments.

5.39. As the European Union appears to acknowledge in its request for review of paragraph 6.502, the paragraphs that are the focus of the European Union's request for review set out the compliance Panel's "respon{se} to the European Union's submissions on the mitigation of the risks associated with the A350XWB". These submissions were made as part of the European Union's rebuttal of the United States' arguments concerning the appropriate project-specific risk premium to use for the purpose of constructing the relevant market interest rate benchmark for the A350XWB LA/MSF measures. The European Union advanced two main arguments in this regard: First, that due to the technological challenges of the A350XWB, Airbus changed its development process, which significantly mitigated risks of the A350XWB compared with those of the A380; and second, that the later point in the development process at which the A350XWB LA/MSF contracts were concluded compared to the point when the A380 contracts were concluded also mitigated the risks associated with the A350XWB programme compared with the A380 programme. In our view, a full exposition of the context of the development of the aircraft was relevant to understanding whether the arguments made by the European Union with respect to risk mitigation were compelling. Thus, after summarising the European Union's submissions in

[32] The United States refers to Appellate Body Report, *US – Gambling*, para. 280 (in turn citing Appellate Body Report, *EC – Hormones*, para. 156); and Appellate Body Report, *US – Certain EC Products*, para. 123.
[33] The United States refers to Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

paragraph 6.493, the compliance Panel evaluated their merits in paragraphs 6.494-6.527, exploring and drawing upon evidence submitted by both parties.

5.40. Accordingly, we see the entire content of paragraphs 6.493-6.527 to be consistent with (and, indeed, required by) our mandate under Article 11 of the DSU, which is to make an objective assessment of the matter, including an objective assessment of the facts. In this respect, we note that it is well established that a panel must examine and consider the totality of the facts and evidence before it, not just evidence submitted by one or another party, and evaluate the relevance and probative force of each piece of evidence.[34] It is also equally settled that a panel is entitled to develop its own reasoning, and that evidence before the panel can be used in favour of either party, regardless of which party presented it. Moreover, while panels are inhibited from addressing legal claims outside of their terms of reference, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties to support its own findings and conclusions on the matter under its consideration.[35] Indeed, a panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute.[36] We have, therefore, left paragraphs 6.496-6.500, 6.502, 6.505, 6.513, and 6.526 unchanged.

5.5.4 Paragraphs 6.538, 6.546, 6.563, 6.570, and 6.579[37]

5.41. The European Union requests that citations be added "to the relevant paragraphs of the United States' submissions at which the United States makes" the arguments or comparison, which the European Union maintains are set out in paragraphs 6.538, 6.546, 6.563, 6.570, and 6.579.

5.42. The United States refers to its general comment, detailed above, in respect of the European Union's request to include citations to United States arguments. The United States also observes that: paragraph 6.538 sets out certain Panel conclusions in respect of United States arguments cited in an earlier paragraph; paragraph 6.546 contains analysis undertaken by the Panel to address European Union arguments in light of relevant evidence; in paragraph 5.563 – as well as paragraph 6.561 – the Panel compares A350XWB and A380 orders at the date of the respective LA/MSF contracts in response to an EU argument cited in paragraph 6.559; in paragraph 6.570 the Panel makes a finding in response to a United States argument cited in paragraph 6.545; and that paragraph 6.579 contains the conclusions of the Panel based on arguments from the European Union and United States, which the preceding paragraphs cite. The United States therefore considers that it is not necessary to add citations to the United States' submissions as the European Union requests.

5.43. The relevant passages identified by the European Union form part of our evaluation of the merits of the submissions of either one or both of the parties in relation to various elements of the project risk associated with the A350XWB as compared to that associated with the A380, in the light of the evidence submitted by both parties, consistent with our task to make an objective assessment of the matter. We can, therefore, see no basis to support the European Union's request and, accordingly, make no change to the relevant paragraphs.

5.5.5 Paragraph 6.563

5.44. The European Union suggests that the phrase "a part share" that is found in paragraph 6.563 is tautological and requests the deletion of either the word "part" or the word "share". The United States did not specifically comment on this aspect of the European Union's request. The word "part" has been deleted from the relevant paragraph.

[34] Appellate Body Report, *US – Wheat Gluten*, paras. 150-151: See also Appellate Body Report, *Korea – Dairy*, para. 139.

[35] Appellate Body Report, *EC – Hormones*, para. 156. See also Appellate Body Reports, *US – Certain EC Products*, paras. 122-123; and *Korea – Dairy*, para. 139.

[36] Appellate Body Report, *EC – Hormones*, para. 156.

[37] As observed by the United States, the European Union's comments refer to paragraph 6.759, but quote a passage that appears at paragraph 6.579. We therefore understand the European Union's comment to relate to paragraph 6.579.

5.6 Prohibited subsidy claims

5.45. The United States requests that the description of certain aspects of the A350XWB LA/MSF contracts in paragraph 6.774 be supplemented to include references to additional examples of "Domestic A350XWB Development Contingency" drawn from the evidence, and that the statements made in paragraph 6.776 concerning the United States' Article 3.1(b) claims be revised to better reflect certain pieces of evidence. The European Union asks the Panel to reject the United States' requests. Regarding paragraph 6.774, the European Union considers that the United States' requested revisions address issues that are sufficiently addressed elsewhere in the Report, and are thus unnecessary and would be inaccurate in this context. Regarding paragraph 6.776, the European Union considers that the United States' requested changes would improperly and unnecessarily create affirmative findings that the Panel currently does not make.

5.46. The United States' requested modifications to paragraph 6.774 would bolster the existing factual characterization and discussion of the A350XWB LA/MSF contracts; while the United States' requested amendments to paragraph 6.776 would introduce conclusions that the Panel does not currently make but instead assumes *arguendo*. In our view, the existing characterization and discussion of the relevant features of the A350XWB LA/MSF contracts set out in the Report are sufficient to resolve the United States' Article 3.1(b) claim. Moreover, insofar as the United States' requested modifications create conclusions that the Panel does not currently make but instead explicitly assumes *arguendo*, such changes are not only unnecessary, but would create confusion. Thus, we decline the United States' requests.

5.7 Expiry through the amortization of benefit

5.7.1 Paragraph 6.869, first bullet point

5.47. The European Union requests modification of the first bullet point to paragraph 6.869 to more fully reflect the European Union's submissions concerning the end of the "lives" of the relevant subsidy measures by means of amortization of "benefit". Specifically, the European Union requests that the phrase "before the end of the implementation period" be inserted immediately following the phrase "'Marketing life' of each of the financed LCA programmes would come to an end". The United States did not object to the European Union's request.

5.48. The first bullet point to paragraph 6.869 has been modified in response to the European Union's request.

5.7.2 Footnote 1496 (now footnote 1521) to paragraph 6.869

5.49. The European Union requests modification of footnote 1496 (now footnote 1521) to paragraph 6.869 to more clearly reflect the European Union's arguments concerning the dates by which the "benefit" of the subsidies mentioned in that footnote would amortize. The United States considers that the current text of the footnote, which the United States finds perhaps less precise than the revised text offered by the European Union, is nonetheless accurate, and therefore no change to the footnote is necessary.

5.50. We have modified the footnote to address the European Union's concerns.

5.7.3 Footnote 1497 (now footnote 1522) to paragraph 6.869

5.51. The European Union requests that the text of footnote 1497 (now footnote 1522) be moved to the body of paragraph 6.869 as a separate fourth bullet point to that paragraph in order to more clearly reflect the European Union's arguments. The United States did not comment on the European Union's request.

5.52. The bullet points to paragraph 6.869 identify the subsidy measures that the European Union maintains are demonstrated in the PwC Amortization Report to expire "prior to the end of the implementation period". The European Union does not argue that the "benefit" of the subsidies discussed in footnote 1497 (now footnote 1522) fully amortized "prior to the end of the implementation period". It would, therefore, be an inaccurate characterization of the

European Union's argument to transform the text of footnote 1497 (now footnote 1522) into a fourth bullet point to paragraph 6.869. Accordingly, we decline the European Union's request.

5.7.4 Paragraph 6.894

5.53. The European Union requests modification of paragraph 6.894 to more clearly reflect the facts concerning the number of regional development grants involving Spanish authorities. The United States did not comment on the European Union's request.

5.54. We have modified the paragraph to address the European Union's concerns and more clearly reflect the subsidies at issue.

5.7.5 Footnote 1574 (now footnote 1599) to paragraph 6.906, and paragraph 6.1076

5.55. The European Union requests that, in footnote 1574 (now footnote 1599) to paragraph 6.906, we insert an explicit finding that the European Union has demonstrated that the German subsidies for the Nordenham facility and that Spanish subsidies provided for the Sevilla facilities have fully amortized as of present day. The European Union further requests that conforming changes be made to paragraph 6.1076. The United States did not comment on the European Union's request.

5.56. Footnote 1574 (now footnote 1599) appears at the end of a passage in which the Panel determines that it is not necessary to express a definitive view on what would be the most appropriate methodology for determining the *ex ante* lives of the seven regional development grant subsidies because even accepting the European Union's arguments in full, the European Union has not established that the relevant subsidies expired by the end of the implementation period. Thus, no finding is made on the appropriateness of the methodology relied upon by the European Union to establish the dates on which, according to the European Union, the "benefit" of the German and Spanish regional development subsidies were fully amortized. Accordingly, there is no factual basis to grant the precise modification requested by the European Union to either paragraphs 6.906 and 6.1076.

5.7.6 Paragraphs 6.1067-6.1068

5.57. The European Union requests that paragraphs 6.1067-6.1068 be modified to capture what the European Union asserts is the fact that the United States did not contest the fact that full repayment of principal and interest was effected in respect of the relevant subsidies on the dates indicated by the European Union. The United States considers that the European Union misunderstands the relevant United States arguments in the context of these paragraphs. The United States explains that it does not accept the European Union's proposed repayment dates, in part because the European Union improperly defined repayment as occurring once principal and interest payments are complete, but before royalty payments stop (in cases where royalty payments are required). The United States rejects that definition, instead having arguing that true "repayment" cannot occur while royalty payments continue.

5.58. We consider the requested change unnecessary. In the two paragraphs at issue, the Panel summarizes the United States' response to the European Union's argument that the "lives" of relevant LA/MSF loans came to an end when Airbus fully repaid the principal and interest associated with those measures. The United States contested this argument by asserting that the repayment of LA/MSF on *subsidized* terms could not bring about the end of the LA/MSF subsidies' lives. The Panel concluded that it is unnecessary to make any definitive findings with respect to the merits of the European Union's arguments because, *inter alia*, even accepting that the principal and interest of the relevant LA/MSF measures had been repaid when the European Union claimed, it would not avail the European Union. The extent to which the United States did or did not contest the validity of the repayment dates is therefore immaterial. We thus decline to make the requested change.

5.7.7 Paragraphs 6.1074, 6.1076, and 6.1077

5.59. The European Union requests that footnotes identical or substantially similar to footnote 1522 (now footnote 1547) be added to paragraphs 6.1074, 6.1076 and 6.1077 to more

accurately reflect the entirety of the compliance Panel's findings on the expiry of the *ex ante* "lives" of the subsidies. The United States did not comment on the European Union's request.

5.60. Paragraphs 6.1074, 6.1076, and 6.1077 make and/or summarize findings on the extent to which the European Union has established that the challenged subsidies were "expired", "extinguished" or "extracted" *by the end of the implementation period*. On the other hand, footnote 1522 (now footnote 1547) simply confirms that we are satisfied that, on the basis of either of the methodologies advanced by the European Union, the *ex ante* "lives" of the LA/MSF subsidies for the A330-200 and A340-500/600 *did not* come to an end before the end of the implementation period, but rather in **[***]** and **[***]**. Thus, the finding made in footnote 1522 (now footnote 1547) is out of place in the findings made in paragraphs 6.1074, 6.1076 and 6.1077. It is also irrelevant to the question before the compliance Panel, namely, whether the fact that certain subsidies "expired" *before* the end of the implementation period means that those subsidies have been "withdrawn", within the meaning of Article 7.8 of the SCM Agreement. Accordingly, we decline to make the requested modifications.

5.8 Extraction of benefit

5.61. The European Union requests that the compliance Panel review the finding made in paragraph 6.927 where it concluded that it "will not consider the European Union's 'extraction' arguments any further in this dispute". The European Union asserts that "neither before the original panel, nor before the Appellate Body, did the European Union argue that the extraction events resulted in withdrawal of the subsidies, within the meaning of Article 7.8". Moreover, the European Union recalls that the Appellate Body found that "a determination as to whether any action taken to implement the recommendations made has actually resulted in the 'withdrawal' of subsidies and has brought about a Member's compliance with the SCM Agreement, is, if contested, best left to a compliance panel …". Thus, according to the European Union, no adopted findings exist on whether the "extraction" events achieved "withdrawal" of the subsidies, with the consequence that there are no such findings for the European Union to unconditionally accept under the terms of Article 17.14 of the DSU.

5.62. The United States asks the Panel to reject the European Union's request for two main reasons. First, the United States argues that the European Union's statement that it never argued before the original panel or Appellate Body that the relevant extraction events resulted in withdrawal of the subsidies within the meaning of Article 7.8 is factually incorrect. Rather, according to the United States, the European Union raised this precise argument and the Appellate Body explicitly rejected it. Second, the United States considers that European Union's argument that the relevant DASA and SEPI transactions resulted in "withdrawal" of the subsidies rests on the argument that, as a matter of law, they were "extractions" that affected the value of subsidies previously granted to those companies. As the Panel already notes in the Report, however, the Appellate Body rejected that argument.

5.63. In the Panel's view, contrary to the European Union's assertions, the European Union did argue in the original proceeding that the relevant "extraction" events constituted "withdrawals" within the meaning of Article 7.8 (and Article 4.7) of the SCM Agreement.[38] The original panel considered the European Union's arguments and dismissed them, explicitly finding:

> Finally, we reject the European Communities' argument that the retention of cash and cash equivalents of Dasa and CASA, by DaimlerChrysler and SEPI, respectively, constituted a "withdrawal" or "repayment" of subsidies previously provided to those entities within the meaning of Articles 4.7 and 7.8 of the SCM Agreement.[39]

5.64. The European Union appealed the original panel's finding.[40] The Appellate Body reviewed the European Union's appeal[41], concluding as follows:

[38] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.257, 7.262, and 7.278-7.279.

[39] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.289.

[40] Notification of Appeal by the European Union under Article 16.4 and Article 17 of the DSU and under Rule 20(1) of the Working Procedures for Appellate Review, WT/DS316/12/Rev.1, paras. 2 and 3.

> Accordingly, we *uphold* the Panel's ultimate finding, in paragraphs 7.283, 7.284, and 7.289 of the Panel Report, that the "cash extractions" did not result in the "withdrawal" of subsidies, within the meaning of Articles 4.7 and 7.8 of the *SCM Agreement*.[42]

5.65. Thus, we find no factual basis to support the European Union's submission that no findings were adopted in the original proceeding in relation to the question whether the "extraction" events achieved the "withdrawal" of subsidies, within the meaning of Article 7.8 of the SCM Agreement. Accordingly, we decline the European Union's request for review of our findings in paragraph 6.927.

5.9 Extinction of benefit

5.9.1 Paragraph 6.994

5.66. The European Union requests that the finding made in paragraph 6.994 on the "fair-market" value of the ASM transaction be reviewed in the light of what the European Union asserts is "evidence clearly indicating that the value of Lagardère's commitment to the French State formed part of the information assessed by the relevant investment banks in determining the relative value of MHT to the combined company". The United States did not comment on the European Union's request.

5.67. We understand the evidence the European Union relies upon to be the following description found in the Aérospatiale-Matra Offering Memorandum:

> In its role as a preferred strategic partner, Lagardère has made certain undertakings to the French State in respect of the trading price of Aérospatiale Matra's shares on the Paris Bourse as compared to the CAC 40 index for a period of two years. As a general matter, Lagardère has agreed to make a payment to the French State of up to FF 1.15 billion if the trading price of Aérospatiale Matra's shares underperforms the CAC 40 index by 8% or more during this period. If the trading price of Aérospatiale Matra's shares outperforms the CAC 40 index by 10% or more during this period, Lagardère will not be required to make any payment and its obligation will be terminated. If the trading price is between these two points a pro rata amount will be payable.[43]

5.68. While this passage describes the undertaking given by Lagardère concerning the share price of ASM following the Aérospatiale-MHT merger, it does not explain whether or the extent to which its *value* to the French State was taken into account by the relevant investment banks in their valuations. In this regard, we note that because of the conditional nature of Lagardère's undertaking, Lagardère's final liability could range from FF 1.15 billion to zero, depending upon how the ASM shares traded following the merger. Thus, in the absence of any evidence disclosing what the relevant investment bank valuations were, we see no reason to alter the finding made in paragraph 6.994. Nevertheless, in the light of the European Union's request for review, we have sought to clarify the finding made in paragraph 6.994 and made a related change to paragraph 6.995.

5.9.2 Paragraph 6.1008

5.69. The United States requests that the last sentence of paragraph 6.1008 be modified to provide greater clarity in the Panel's findings concerning the implications of ASMs corporate governance structure on the "economic reality" of the ASM transaction. The European Union asks the Panel to reject the United States' request. In the European Union's view, the existing language in this paragraph is accurate and succinct. Further, according to the European Union, the Panel has elsewhere discussed the relevant issues discussed in this paragraph, making the modification unnecessary.

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[41] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 750-759.
[42] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 759.
[43] Aérospatiale-Matra Offering Memorandum, 25 May 1999, (Exhibit EU-58), p. 24.

5.70. For the avoidance of confusion, the final sentence of paragraph 6.1008 has been reworded along the lines suggested by the United States.

5.9.3 Paragraphs 6.1009 and 6.1010

5.71. The United States requests that the first sentence of paragraph 6.1010 and the accompanying footnote be deleted, because according to the United States, the European Union did not deny the accuracy of the statements contained in the *BusinessWeek* report quoted at the end of paragraph 6.1009, but only the *United States'* assertions in paragraph 20 of the United States' response to Panel question No. 8. The United States argues that the United States' assertions in paragraph 20 were distinct from the underlying evidence. The European Union asks the Panel to reject the United States' request. According to the European Union, the Panel properly understood the European Union's statement referred to in the United States' comment as a denial of the entirety of the assertions, including a denial that the materials cited by the United States (e.g. the statements contained in the *BusinessWeek* report) in support of the United States assertions.

5.72. In paragraph 20 of its response to Panel question No. 8, the United States made a number of assertions including that the "French government set for itself the political goal to 'create a national champion' in the aerospace and defense industry, which would be better positioned to negotiate with its British and German counterparts". In the footnote to this sentence, the United States made the following additional assertions:

> Press reports also confirmed that the ASM merger plan was adopted in reaction to a prospective merger between Dasa and BAE, which would have resulted in the French industry being "clearly outgunned" and "threatened" its "traditional dominance of the Airbus partnership". … For this reason, "Prime Minister Jospin secretly endorsed a bold plan to privatize Aérospatiale and merge it with Matra, a large defense contractor controlled by Lagardère. Jospin reasoned that since the government would retain a large stake, it could still pretty much call the shots. 'We had to be as industrially strong as possible to stay in the game', remembers Frederic Lavenir, a key high-ranking Finance Ministry official who helped structure the merger."[44]

5.73. We do not read the contents of this footnote, which accompanied the second sentence of paragraph 20 of the United States' response to Panel question No. 8, to be merely a citation of evidence in support of the assertion made in that paragraph. In our view, the United States reference to Prime Minister Jospin's alleged views concerning the strategic importance and continued national control of ASM formed part of its assertion that the French government wanted to create a "national champion" for the purpose of the merger between Dasa and BAE. Thus, in denying the accuracy of the assertions set out in paragraph 20 of the United States' response to Panel question No. 8, we understand the European Union to deny them in their entirety, including those set out in the United States' footnote quoting from the *BusinessWeek* report. Such a reading of the European Union's position would be consistent with the European Union's general line of argument concerning the "qualitative change in control" that resulted from the ASM merger, which according to the European Union, left Lagardère (not the French State) with "effective control" over the company's key decisions. Accordingly, we find the characterization of the European Union's position concerning the assertions made in paragraph 20 of the United States' response to Panel question No. 8 to be accurate. We, therefore, decline the United States' request to delete the first sentence of paragraph 6.1010 and the accompanying footnote.

5.10 Requests for findings of the existence, and consistency with the covered agreements, of measures taken to comply regarding the Bremen Airport runway extension and the Mühlenberger Loch aircraft assembly site subsidies

5.74. The European Union requests that the Panel find that the two declared measures taken to comply concerning the Mühlenberger Loch aircraft assembly site and the Bremen Airport runway extension achieved "withdrawal" of the respective subsidies, within the meaning of Article 7.8 of

[44] United States' response to Panel question No. 8, fn 16 (quoting Jean Rossant, "Birth of a Giant: The inside story of how Europe's toughest bosses turned Airbus into a global star: EADS", *BusinessWeek*, 10 July 2000, (Exhibit USA-561), p. 170).

the SCM Agreement. The European Union asserts that the right of an original respondent to have a compliance panel assess the WTO consistency of a measure taken to comply was explicitly recognised by the Appellate Body in *US – Continued Suspension* and *Canada – Continued Suspension*, where it found that: "absent any rebuttal by the original complainant, the Article 21.5 panel will make its determination on the basis of a *prima facie* case presented by the original respondent that its implementing measure has brought it into compliance with the DSB's recommendations and rulings".[45]

5.75. The United States asks the Panel to reject the European Union's request. In doing so, the United States affirms that, as stated in its second written submission, it is not pursuing the claims included in its panel request with respect to the Mühlenberger Loch and Bremen runway measures. The United States neither seeks a finding that the European Union failed to comply with the recommendations and rulings of the DSB with respect to those measures, nor argues that those subsidies caused adverse effects after the end of the implementation period. Thus, there is no relevant disagreement between the parties for the Panel to resolve. The United States further argues that Appellate Body reports in *US – Continued Suspension* and *Canada – Continued Suspension* do not provide material support the European Union's request, and that the European Union's request is untimely.

5.76. We recall that the purpose of a panel established under Article 21.5 of the DSU is to make an objective assessment of whether a Member has complied with the rulings and recommendations adopted by the DSB in an original proceeding when there is a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply". As described in paragraph 2.1(a), and footnotes 33 (now footnote 53), 87 (now footnote 109), and 1820 (now footnote 1847), neither party presently disputes the existence of the European Union's notified measures taken to comply with respect to the Mühlenberger Loch or the Bremen Airport runway subsidies, and there is, furthermore, no present disagreement between the parties regarding whether such measures taken to comply are consistent with the SCM Agreement's relevant disciplines or whether they achieve compliance with the recommendations and rulings of the DSB. The explicit terms of Article 21.5 of the DSU imply that in the absence of any such "disagreement", there is no question of WTO-consistency to determine in relation to the measures taken to comply.

5.77. The Appellate Body reports in *US – Continued Suspension* and *Canada – Continued Suspension* do not compel a different resolution. The European Union quotes a passage from these two reports that appears in sections in which the Appellate Body described what a hypothetical Article 21.5 panel would be expected to do in the following specific procedural scenario: (a) an original *respondent* initiates an Article 21.5 proceeding; (b) the original *complainant* refuses to participate in that Article 21.5 proceeding; and (c) the original complainant had already *suspended* concessions *vis-à-vis* the original respondent in accordance with applicable provisions of Article 22 of the DSU. The Appellate Body stressed, however, that in this hypothetical scenario there would be a "disagreement" between the parties for the compliance panel to resolve, i.e. whether the ongoing suspension of concessions continued to be justified under Article 22.8 of the DSU. Thus, in such a scenario, the compliance panel would be called upon to "make its determination on the basis of a *prima facie* case presented by the original respondent that its implementing measure has brought it into compliance with the DSB's recommendations and rulings"[46] in order to address the "abnormal state of affairs"[47] of ongoing suspension of concessions, a situation that "must be brought back to normality as soon as possible".[48] No such disagreement or associated exigency exists in this proceeding. Suspension of concessions has not been approved or implemented, and, moreover, the original complainant, the United States, initiated the present Article 21.5 proceeding, in which both parties participated.

[45] Appellate Body Reports, *US – Continued Suspension*, para. 358; and *Canada – Continued Suspension*, para. 358.
[46] Appellate Body Reports, *US – Continued Suspension*, para. 358; and *Canada – Continued Suspension*, para. 358.
[47] Appellate Body Reports, *US – Continued Suspension*, para. 310; and *Canada – Continued Suspension*, para. 310.
[48] Appellate Body Reports, *US – Continued Suspension*, para. 348; and *Canada – Continued Suspension*, para. 348.

5.78. Thus, in the absence of any explicit refutation by the United States of the European Union's measures taken to comply with respect to the Mühlenberger Loch or the Bremen Airport runway subsidies, we find that there is no requirement under Article 21.5 of the DSU for the compliance Panel in this dispute to make any findings on the consistency of those measures with the covered agreements. Thus, it follows from the express terms of Article 22.2 of the DSU that the United States would not be entitled to request the suspension of concessions or other obligations under the covered agreements in relation the Mühlenberger Loch and the Bremen Airport runway measures. Accordingly, for all of the above reasons, we decline the European Union's request.

5.11 Adverse effects

5.11.1 Paragraph 6.1155 and footnote 1908 (now footnote 1935)

5.79. The United States requests that the last sentence of footnote 1908 (now footnote 1935) to paragraph 6.1155 be modified to more accurately reflect the United States' arguments and data submitted in relation to freighter aircraft. The European Union asks the Panel to reject the United States' request. In the European Union's view, the requested modification would reflect a claim regarding freighters that the United States did not substantiate during the course of the dispute.

5.80. We have modified footnote 1908 (now footnote 1935) to more accurately capture the scope of the United States' arguments.

5.11.2 Paragraph 6.1672

5.81. The European Union requests that the finding made in paragraph 6.1672 regarding the relevance of EADS' gross cash as a source of financing for part of the development costs of the A350XWB be modified, and for the Panel to consequently find that the gross cash figures further strengthen the finding in paragraph 6.1690 that "EADS had significant cash that it could have diverted to the A350XWB programme". The European Union argues that gross cash is relevant in this context "because, even though it would be reduced when a financial liability falls due, it can simultaneously be replenished thorough {sic} borrowing, such that EADS' overall cash and borrowing position does *not* change." As described in paragraph 6.1672, the European Union made the same argument in a footnote to its second written submission. The United States asks the Panel to reject the European Union's request. The United States considers that even if EADS could have issued debt to "replenish" its gross cash as financial liabilities fell due, this is a question of EADS' counterfactual ability to raise debt. Because the Panel already addresses that counterfactual ability elsewhere in the Report, there is no need to address that issue in the context of discussing gross cash.

5.82. We decline the European Union's request. As explained in the Report, the portion of any of EADS' gross cash positions (actual or projected) that must cover financial liabilities would be unavailable to divert to the A350XWB programme. Deducting that portion of the gross cash positions yields EADS' associated net cash positions. We therefore considered net cash to be a more reliable indicator of how much cash EADS had to divert to the A350XWB programme. This relationship between gross and net cash positions endures no matter how much debt EADS could raise or when EADS raised it. Insofar as EADS could have raised cash with which to help fund the A350XWB programme by selling debt, that is addressed − consistent with how the parties structured their arguments and presented their evidence − under our EADS-debt-capacity analysis. In other words, we have analysed the ability of EADS to fund the development costs of the A350XWB programme through debt, as a debt-capacity issue, rather than under the rubric of gross cash.

5.11.3 Paragraph 6.1788

5.83. The European Union requests that citations be added to the relevant paragraphs of the United States' submissions "at which the United States makes" the argument stated in the last two sentences of paragraph 6.1788.

5.84. The United States refers to its general comment, detailed above, in respect of the European Union's request to include citations to US arguments. The United States also observes

that the paragraph contains the Panel's conclusions and is based on the Panel's preceding discussion of the parties' arguments and the evidence, including the parties' agreement as to the observed failure of the several new entrants to play a significant role in LCA competition and the likelihood that this situation would continue in the immediate future. The United States considers that citations to the United States' submissions are, accordingly, unnecessary.

5.85. The two sentences that are the subject of the European Union's request for review are found in a passage of the Interim Report where the merits of the parties' positions in respect of the conditions of competition that would exist after the end of the implementation period, in the light of the two "plausible" counterfactual scenarios, are evaluated. The two sentences form part of our objective assessment of the conditions of competition that we believe would exist in the "plausible" counterfactual scenario in which Boeing would have been a monopoly producer of LCA. Accordingly, we see no basis for the European Union's request for review and, therefore, make no change to the relevant paragraph.

5.12 Designation of certain information as BCI

5.86. The United States requests that certain specific information appearing in seven paragraphs of the Interim Report be designated as BCI in order to prevent the disclosure of non-public information in the Final Report that could cause harm to the originators of the information. The European Union did not object to the United States' requests.

5.87. The United States' requests have been granted, and the relevant information bracketed in the Final Report.

5.88. The European Union requests that certain specific information appearing in 59 paragraphs and 25 footnotes of the Interim Report be designated as BCI in order to prevent the disclosure of non-public information in the Final Report that could cause harm to the originators of the information. In its comments to the European Union's requests, the United States observes that two of the European Union's requests (concerning paragraph 6.561, and paragraphs 6.728 and 6.729) related to information appearing unbracketed in the European Union's first and second written submissions. The United States also notes that the information the European Union proposed should be bracketed in paragraphs 6.682 and 6.272 appeared unbracketed in paragraph 177 of the United States' first written submission and is based on publicly available information.

5.89. The information that is the focus of the European Union's request for BCI treatment in paragraphs 6.561, 6.728 and 6.729 is the date on which the first A350XWB LA/MSF contract was concluded. The European Union designated this date as BCI when it provided the LA/MSF contracts in response to the Panel's request for information pursuant to Article 13 of the DSU, after filing its first written submission. As the United States notes, however, the same date can be found explicitly identified in two paragraphs of the European Union's first and second written submissions in which it is *not* given a BCI designation. Apart from these few instances of disclosure, the European Union has generally sought to bracket the dates of the conclusion of all of the LA/MSF contracts for the A350XWB. We note, moreover, that neither party argues that the relevant information is within the public domain. In our view, these facts suggest that the European Union's disclosure of the relevant information in the paragraphs cited by the United States was unintentional. In this light, and given the voluminous submissions and extensive pieces of evidence that have been presented in this proceeding, we have decided to grant the European Union's request, bearing in mind that to do so would not prejudice the United States' due process rights in the resolution of this dispute.

5.90. Turning to the United States' observations concerning the European Union's requests in relation to paragraphs 6.682 and 6.272, we are unable to find any reference to the information that is the focus of the European Union's request in connection with paragraph 6.272 in paragraph 177 of the United States' first written submission. Moreover, on the basis of the information in paragraph 177 of the United States' first written submission, we understand the United States' second observation to be focused on paragraph 6.681 of the Interim Report, not paragraph 6.682. We have modified the text of paragraph 6.681 with a view to responding to both parties' comments on the confidentiality of the relevant information.

5.91. With respect to all other European Union requests for the treatment of certain information as BCI, we have either bracketed the specific text or otherwise modified the relevant passages to secure the level of protection requested by the European Union.

5.13 Designation of certain information as HSBI

5.92. The European Union requests that the Panel bracket various words and passages of text from the Interim Report as HSBI in order to avoid the disclosure of non-public information in the Final Report that could cause exceptional harm to the originators of the information. The United States does not object to the European Union's requests.

5.93. We have granted the European Union's requests for HSBI protection by either eliminating the relevant text or by modifying it in a way that does not reveal HSBI or make it possible to infer HSBI from the context in which it appears. In this respect, we recall that while, pursuant to paragraph 59 of the BCI and HSBI Procedures, HSBI is not to be disclosed in the Panel report, we are nevertheless entitled to "make statements or draw conclusions that are based on the information drawn from the HSBI". We have decided not to bracket the relevant words and passages that are the focus of the European Union's request, as we do not consider it would be necessary to create an HSBI version of the Final Report in order to fully respond to the European Union's requests for HSBI protection.

6 FINDINGS

6.1 Introduction

6.1. It is well established that the task of a panel established under Article 21.5 of the DSU is to make an objective assessment of whether a Member has complied with the recommendations and rulings adopted by the DSB directing it to bring one or more measures found to be WTO-inconsistent in an original proceeding into conformity with its obligations under the covered agreements. To this end, Article 21.5 contemplates that a panel may be required to examine two main compliance questions: (a) the "existence" of "measures taken to comply" with the rulings and recommendations; and (b) the "consistency with a covered agreement" of any such measures.[49] In compliance disputes involving actionable subsidies, such as the present, a panel's evaluation of these questions will be informed by Article 7.8 of the SCM Agreement.[50]

6.2. Article 7.8 of the SCM Agreement is one of the "special or additional rules and procedures on dispute settlement contained in the covered agreements"[51], which prevail over the general DSU rules and procedures to the extent that there is a conflict between them.[52] Article 7.8 specifies what an implementing Member must do following the adoption of a panel and/or Appellate Body report in which it is determined that any subsidy has caused adverse effects within the meaning of Article 5 of the SCM Agreement. In particular, Article 7.8 prescribes that any "Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy". It follows that in order to determine whether an implementing Member has complied with the recommendations and rulings adopted by the DSB in cases involving actionable subsidies, one of the questions that an Article 21.5 panel will have to evaluate is whether the Member concerned has acted in conformity with the requirement to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy".

6.3. In this proceeding, the United States maintains that the European Union and certain member States have failed to comply with the recommendations and rulings adopted by the DSB in the original proceeding for two main reasons. First, the United States claims that the European Union and certain member States have failed to act in conformity with the obligation in Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" because not only do the subsidies found to have caused adverse effects in the original

[49] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 40.
[50] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 235.
[51] Article 1.2 and Appendix 2 of the DSU.
[52] Appellate Body Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 235; *Guatemala – Cement I*, fn 55; and *US – FSC*, para. 159.

proceeding allegedly continue to cause adverse effects today[53], but also because by agreeing to provide Airbus with LA/MSF for Airbus' latest model of LCA, the A350XWB, the United States submits that France, Germany, Spain and the United Kingdom have "continued and even expanded"[54] the subsidization of Airbus' LCA activities, thereby causing "additional adverse effects"[55], within the meaning of Articles 5(c) and 6.3 of the SCM Agreement. Second, the United States claims that France, Germany, Spain and the United Kingdom have failed to comply with the recommendations and rulings adopted by the DSB because, according to the United States, the A350XWB LA/MSF measures are prohibited export and/or import substitution subsidies, within the meaning of Articles 3.1 and 3.2 of the SCM Agreement, claims that the United States also makes in relation to the A380 LA/MSF subsidies.

6.4. The European Union rejects the entirety of the United States' claims, arguing that the European Union and certain member States have fully implemented the recommendations and rulings adopted by the DSB. In particular, the European Union submits that the subsidies found to cause adverse effects in the original proceeding have either been "withdrawn" or no longer cause "adverse effects", thereby bringing the European Union and certain member States into conformity with their obligations under Article 7.8 of the SCM Agreement. Moreover, the European Union maintains that the United States' claims against the A350XWB LA/MSF measures and the prohibited subsidy claims the United States raises against the A380 LA/MSF subsidies are outside of the scope of this compliance proceeding or, in any case, are without merit.

6.5. The parties' positions raise essentially three broad sets of issues pertaining to: (a) the scope of the claims and measures that can be challenged in this proceeding; (b) the extent to which the A350XWB and A380 LA/MSF measures are prohibited subsidies, within the meaning of Articles 3.1 and 3.2 of the SCM Agreement; and (c) whether the European Union and certain member States have complied with their obligations under Article 7.8 of the SCM Agreement. Our Report evaluates the merits of the parties' submissions in relation to each of these matters in turn. However, before proceeding to this analysis, we first review the European Union's stated compliance "actions" and address the European Union's conviction that the United States has failed to make a *prima facie* case of non-compliance in this dispute[56] and, therefore, that the European Union and certain member States have "no case to answer".[57]

6.2 The European Union's Compliance Communication of 1 December 2011

6.2.1 Introduction

6.6. On 1 December 2011, the European Union informed the DSB that it had "taken appropriate steps" to bring its measures "fully into conformity with its WTO obligations", thereby ensuring "full implementation of the DSB's recommendations and rulings".[58] In its communication, the European Union declared that it had adopted "a course of action that addresses all forms of adverse effects, all categories of subsidies, and all models of Airbus aircraft covered by the DSB's recommendations and rulings".[59] The European Union described this "course of action" to include: (a) the repayment and/or termination of LA/MSF; (b) the imposition of increased fees and lease payments on infrastructure support in accordance with market principles; and (c) ensuring that capital contributions and regional aid subsidies have, "in the Appellate Body's words, 'come to an

[53] The United States' claims in this respect do not include the subsidy measures relating to the Mühlenberger Loch and the extension of the Bremen Airport runway that were found to cause adverse effects in the original proceeding. See below paras. 6.19-6.22.

[54] United States' first written submission, para. 1.

[55] United States' first written submission, para. 1.

[56] After recalling the exposition in its first written submission of the alleged "legal framework and the principles" that should guide the Panel's evaluation of the United States' non-compliance claims and *inter alia* drawing attention to "the highly laconic nature of the US First Written Submission, which in, substantial measure, simply sought to *presume* rather than *demonstrate* much of what is asserted by the United States", the European Union explained in its second written submission that "{t}o the extent that the United States might be successful in its attempts to induce the compliance Panel into error on these issues, the European Union will challenge the relevant findings and seek their reversal on appeal". (European Union's second written submission, paras. 14 and 17) (emphasis original)

[57] European Union's first written submission, paras. 44 and 200.

[58] Communication from the European Union dated 1 December 2011, WT/DS316/17, 5 December 2011 (Compliance Communication).

[59] Compliance Communication, para. 3. (emphasis original)

end' and are no longer capable of causing adverse effects".[60] The European Union provided "information concerning" the "steps that have been taken" and "other intervening market events" it considered to have enabled it to achieve compliance in a two-page document comprising 36 numbered paragraphs attached to its communication.[61]

6.7. When considered in the light of the explanations provided by the European Union during the course of this proceeding, it is apparent that the "course of action" the European Union relies upon to claim that it has fully implemented the recommendations and rulings of the DSB refers to not only "actions" taken *after* the adoption of the recommendations and rulings, but also "events" that occurred *before* the recommendations and rulings were adopted by the DSB (sometimes even before the United States' request for consultations in the original dispute), as well as "events" that allegedly occurred over a period of time that *overlapped* the date on which the recommendations and rulings were adopted by the DSB. In this part of our Report we describe our understanding of all three categories of European Union compliance "actions", as articulated in the European Union's Compliance Communication of 1 December 2011 and further explained and explored in the parties' submissions in this dispute.

6.2.2 Actions taken *after* the adoption of the recommendations and rulings by the DSB

6.2.2.1 Termination of French and Spanish LA/MSF agreements ("steps" 1-3, 7-11, 14-16, 18-19, and 21-24)

6.8. Two-thirds of the European Union's declared compliance "actions" took the form of the termination of LA/MSF agreements, the majority of which were terminated *after* the adoption of the recommendations and rulings by the DSB.[62] In its first written submission, the European Union presented evidence showing that the French LA/MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320, A330/A340 basic, A330-200, and A340-500/600 programmes and the Spanish LA/MSF agreements for the A300B, A300B2/B4, A300-600, A320, and A330/A340 basic had been terminated between September and November 2011.[63]

6.9. We note that in a number of instances, the formal termination of the French and Spanish LA/MSF agreements between September and November 2011 occurred many years *after* the European Union maintains the loaned principal had been "fully repaid" in accordance with the subsidized terms of the relevant agreements.[64] In three cases involving the French State, the LA/MSF agreements were terminated after a settlement was reached on Airbus' "outstanding payment obligations" as of November 2011, in accordance with the subsidized terms of the

[60] Compliance Communication, para. 4.

[61] Compliance Communication, para. 4. The 36 "steps" identified by the European Union are described and explained in more detail below at paras. 6.8-6.42.

[62] Fourteen of the 24 termination "steps" identified in the European Union's Compliance Communication concern "actions" taken *after* the adoption of the recommendations and rulings by the DSB. The European Union clarified during the interim review that seven of the 24 termination "steps", pertaining to the German LA/MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320, and A330/A340 basic programmes, were evidenced by the 1997 and 1998 settlement between the German government and DaimlerChrysler Aerospace AG (DASA) (see below paras. 6.25-6.26).

[63] Letter, French State to Airbus dated 24 October 2011 terminating A300 LA/MSF contracts, (French A300 LA/MSF contract Termination Letter), (Exhibit EU-25); Letter, Spanish State to Airbus dated 30 September 2011 terminating A300 LA/MSF contracts, (Spanish A300 LA/MSF contract Termination Letter), (Exhibit EU-31); Letter, French State to Airbus dated 24 October 2011 terminating A310 LA/MSF contract, (French A310 LA/MSF contract Termination Letter), (Exhibit EU-34); Letter, French State to Airbus dated 24 October 2011 notifying Airbus that A320 LA/MSF contract had terminated, (French A320 LA/MSF Letter notifying Airbus that contract had terminated), (Exhibit EU-36); Letter, Spanish State to Airbus dated 30 September 2011 terminating A320 contracts, (Spanish A320 contract Termination Letter), (Exhibit EU-40); Joint Letter, Spanish State and Airbus, dated 5 October 2011 terminating by common agreement LA/MSF contracts for A330/A340, (Spanish A330/A340 contract Termination Letter), (Exhibit EU-49); and Letter, French State to Airbus dated 22 November 2011 terminating, as of 8 November 2011, A330/A340 basic, A330-200, and A340-500/600 LA/MSF contracts, (French A330/A340 basic, A330-200, and A340-500/600 contract Termination Letter), (Exhibit EU-47).

[64] These terminations concern French LA/MSF for the A300B/B2/B4, A300-600, A310, A310-300, and A320, and Spanish LA/MSF for the A300B/B2/B4, A300-600 and A320, which according to the European Union had all been "fully repaid" between 1994-1999. (European Union's first written submission, paras. 168-178). The European Union's submissions with respect to the repayment of LA/MSF on its subsidized terms and the relevance of this fact to its compliance claims are addressed elsewhere in this Report at paras. 6.1066-6.1074.

relevant LA/MSF agreements.[65] We also note that the formal termination of the relevant A300 and A310 LA/MSF contracts occurred four years *after* the end of the respective aircraft programmes[66], with the termination of French LA/MSF for the A330/A340 basic and A340-500/600 coinciding with the termination of the A340 programme.

6.10. Thus, in essence, the French and Spanish LA/MSF termination "steps" the European Union relies upon and has provided evidence of involve instances where either a LA/MSF agreement has already run its course, in accordance with its subsidized terms and conditions, or in the case of French LA/MSF for the A330/A340 basic, A340-500/600 and A330-200, the remaining *outstanding* repayment obligations have been settled in accordance with their subsidized terms and conditions.

6.11. The United States describes the alleged terminations as "meaningless formalities without repayment of subsidies" that "appear to be no more than acts of a ministerial, formalistic nature" having "no impact on the adverse effects" they cause – namely, "the effects that flow from the market presence of Airbus LCA that could not have been launched as and when they were (if at all) without {LA/MSF}".[67]

6.12. The European Union acknowledges that the formal termination of a debt instrument that has run its course "does not by itself remove or take away the money that the debtor received under the agreement".[68] However, the European Union states that this is "beside the point", because, in its view, the operative question for the purpose of the compliance question before this Panel is whether or not the *subsidy has ended.*[69] In particular, the European Union maintains that the obligation in Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" applies only in relation to *subsidies* found to cause adverse effects in an original proceeding that *continue to exist* after the adoption of recommendations and rulings by the DSB. Furthermore, the European Union submits that the fact that a particular subsidy may have expired and, therefore, no longer exists, means that the European Union has procured its "withdrawal", also bringing it into compliance with its obligations under Article 7.8 of the SCM Agreement.[70] Thus, while the European Union accepts that the termination of a LA/MSF contract does not answer the question "whether or not the existence of the subsidy under WTO law has also ended"[71], it nevertheless argues that termination is "an additional piece of evidence, even if not necessary or sufficient in and of itself, constituting recognition by the parties of withdrawal (or cessation of adverse effects)".[72] Accordingly, the European Union does not accept that the termination events identified in its Compliance Communication "do not form part of the array of measures taken to comply in this dispute".[73]

6.13. Ultimately, therefore, we do not understand the European Union to argue that the formal termination of LA/MSF agreements already repaid or settled on their subsidized terms before the end of the implementation period brings it into compliance with the adopted recommendations and rulings of the DSB. Rather, the European Union relies upon the *formal* termination of such LA/MSF instruments as *part* of the configuration of facts, which it maintains demonstrates its full implementation of the adopted recommendations and rulings of the DSB.

6.2.2.2 Ensuring that subsidies have "come to an end" ("step" 26)

6.14. One of the 36 "steps" identified in the European Union's Compliance Communication is the "bringing 'to an end'" of *all* of the subsidies found to cause adverse effects in the original proceeding with the exception of the French, German, Spanish and UK A380 LA/MSF measures. The United States characterizes this "step" as "a legal argument" "based on contentions that the

[65] These terminations concern French LA/MSF for the A330/A340 basic and the A330-200. (European Union's first written submission, paras. 177 and 181)
[66] European Union's first written submission, paras. 168-172.
[67] United States' first written submission, paras. 39, 260, and 264.
[68] European Union's first written submission, para. 164 (citing United States' first written submission, para. 39).
[69] European Union's first written submission, para. 164.
[70] We examine the merits of both of the European Union's lines of argument below at paras. 6.794-6.1102.
[71] European Union's first written submission, para. 164.
[72] European Union's second written submission, para. 101.
[73] European Union's second written submission, para. 101.

passage of time" has "resulted in the subsidies or their adverse effects fading to insignificance". Recalling that the Appellate Body has explained that "when faced with a finding covered by Article 7.8 of the SCM Agreement, 'a Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own'", the United States argues that the European Union is not entitled to claim that it has achieved compliance in the absence of taking any "action" because, according to the United States, the European Union has "no basis to believe that the situation here deviates from what the Appellate Body has found would normally be the case". Accordingly, the United States submits that "the purported 'bringing to an end'" of subsidies does not achieve compliance with Article 7.8.[74]

6.15. The European Union clarified in its first written submission that what it meant when it referred to "bringing 'to an end'" the relevant subsidies was simply undertaking an exercise to determine whether, in the light of its own interpretation of certain findings made by the Appellate Body in the original proceeding, the *ex ante* "lives" of those subsidies came to an end before the end of the implementation period. The European Union engaged PricewaterhouseCoopers (PwC) to perform this assessment. Thus, in the light of the European Union's understanding of certain findings made by the Appellate Body in the original proceeding, PwC was asked to determine the period of time over which it was *anticipated* that certain subsidies would benefit Airbus at the time they were provided, and whether, on the basis of that time period, they were fully *amortized* as of 1 December 2011, using the following methodologies: (a) the anticipated repayment period under each of the LA/MSF agreements; (b) the anticipated marketing life of the subsidized model of LCA; and/or (c) the useful life of the tangible and intangible assets allegedly purchased with the relevant funding.[75]

6.16. According to the European Union, the conclusions reached by PwC demonstrate that the benefit conferred through all of the challenged subsidies *with the exception of* the French and Spanish A340-500/600 LA/MSF measures, the French, German, Spanish, and UK A380 LA/MSF measures, and a number of the Spanish Government regional development grants, was fully amortized *prior to the end of the implementation period*.[76] For the European Union, this result is significant because, as already noted, the European Union argues that the obligation in Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" applies only in relation to *subsidies* found to cause adverse effects in an original proceeding that *continue to exist* after the adoption of recommendations and rulings by the DSB. Therefore, to the extent that the results produced by PwC show that the relevant subsidies did not *exist* at the time that the recommendations and rulings in this dispute were adopted on 1 June 2011, the European Union submits that they prove that the European Union and certain member States have no compliance obligations at all with respect to those subsidies[77] or that the European Union has "withdrawn" those subsidies for the purpose of Article 7.8 of the SCM Agreement. Furthermore, and in any case, the European Union maintains that the fact that a particular subsidy may have expired and, therefore, no longer exists by the end of the implementation period, means that the European Union has procured its withdrawal, also bringing it into compliance with its obligations under Article 7.8 of the SCM Agreement.

6.17. Thus, ultimately, the European Union's reference to "bringing 'to an end'" certain subsidies, is not a reference to any specific action undertaken with respect to subsidies or the adverse effects found to have been caused by subsidies in the original proceeding. Rather, we understand the European Union to be referring to the analysis performed by PwC on the alleged amortization of the benefit of the relevant subsidies, and the assertion, on the basis of that analysis, that the *ex ante* "lives" of those subsidies have "come to an end".

[74] United States' first written submission, paras. 43, 260, and 267 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236).

[75] PricewaterhouseCoopers, "Analysis of the expected life of subsidies to Airbus conferred by Member State Financing Loans, Capital contributions and regional development grants as found in the WTO dispute DS316", 29 November 2011 and 2 July 2012, (PwC Amortization Report), (Exhibit EU-5) (BCI/HSBI).

[76] European Union's first written submission, paras. 205-223.

[77] European Union's first written submission, paras. 232-233 and 244; second written submission, paras. 98, 195, and fn 742; and response to Panel question No. 6.

6.2.2.3 Isolation of certain Spanish regional development grants from use in LCA activities ("step" 27)

6.18. In the light of the explanations provided by the European Union in its first written submission, we understand this "step" to have involved engaging PwC to undertake an assessment of the extent to which certain subsidized facilities owned by European Aeronautic Defence and Space Company N.V. (EADS)/Construcciones Aeronáuticas S.A. (CASA) in San Pablo, Spain, are used for the purpose of the production of Airbus civil or military aircraft.[78] The PwC report concludes that "there is no indication that the San Pablo site has been used or will be used for manufacturing, assembling or transforming civil aircraft".[79] Thus, we do not understand the European Union's reference to the "isolation of certain Spanish regional development grants" to describe any specific action undertaken after the adoption of the recommendations and rulings with respect to those subsidies. Rather, we understand the European Union to be simply referring to the analysis performed by PwC on the extent to which the San Pablo South site is used for the purpose of civil or military aircraft, with a view to substantiating its assertion that the subsidized facilities in question are not (and, indeed, have never been) used for civil aircraft purposes and, for this reason, cannot be the subject of the United States' "adverse effects" claims.

6.2.2.4 Imposition of additional fees for use of Bremen Airport runway extensions ("step" 28)

6.19. The European Union explained in its first written submission that the fee schedule for Airbus' right to use the Bremen Airport runway was revised to include the extensions with respect to which Airbus did not previously pay a fee. The European Union states that the revision took effect on 1 December 2011 and that the amount of the additional fee is proportionate to the length of the runway extension, compared to the length of the general runway.[80]

6.20. The United States' claims of non-compliance do not include the Bremen Airport runway extension measure.[81]

6.2.2.5 Revision of the terms of the Mühlenberger Loch lease agreement ("step" 29)

6.21. The European Union asserted in its first written submission that the Mühlenberger Loch lease agreement was amended on 30 November 2011 to include a premium of EUR **[***]** per square metre per year (paid monthly in the amount of EUR **[***]** per square metre).[82] According to the European Union, this change aligned the terms of the lease with the market so that it no longer conferred a "benefit" upon Airbus, within the meaning of Article 1.1(b) of the SCM Agreement, thereby procuring the withdrawal of the subsidy for compliance purposes.[83]

6.22. Although initially including the Mühlenberger Loch lease agreement within the scope of its challenge to the European Union's alleged compliance, the United States subsequently explained that it had decided not to pursue "its claim with regard to this measure" for the time being, after having reviewed the explanation of the European Union's "methodology for adjusting the rental for the Mühlenberger Loch site to a market rate, which the EU provided for the first time in its first written submission".[84]

6.2.2.6 Termination of the A340 programme ("step" 33)

6.23. The European Union identifies the termination of the A340 programme as one of its 36 compliance "steps". The European Union relies upon the termination of this programme to support

[78] European Union's first written submission, paras. 220-221.
[79] PricewaterhouseCoopers, "Assessment of the use of the San Pablo South industrial site relating to the WTO Dispute DS316", 30 November 2011, (Exhibit EU-6) (BCI/HSBI), p. 16.
[80] European Union's first written submission, paras. 194-195.
[81] United States' first written submission, paras. 5 and 35.
[82] European Union's first written submission, para. 192; and 14th Amendment to Mühlenberger Loch Land Lease Agreement, 30 November 2011, (Exhibit EU-53) (BCI), section 1.1.
[83] European Union's first written submission, para. 33.
[84] United States' second written submission, para. 265.

its submission that there can no longer be any present adverse effects related to the A340.[85] We note, however, that the United States makes no claims of "serious prejudice" in relation to any market displacement or impedance, or lost sales, involving the A340 in the post-implementation period. Nevertheless, the United States asserts that the termination of the A340 programme "had nothing to do with compliance", but rather reflected the fact that the A340 was "no longer competitive and had been replaced by newer, LA/MSF-funded Airbus LCA", in particular, the A350XWB-900 and A350XWB-1000. In addition, referring to a passage from EADS Financial Statements Q3 2011, the United States argues that termination of the A340 programme actually "gave Airbus a EUR 312 million boost to its earnings as LA/MSF liabilities were cleared off its books".[86]

6.24. We observe that the reason given for the termination of the A340 programme in the decision of the Airbus Shareholder Committee formally bringing the programme to an end on 19 October 2011 related to the fact that "**[***]**".[87] In particular, the decision of the Airbus Shareholder Committee explains that "**[***]**", with the members of the Shareholder Committee furthermore noting that "**[***]**".[88] Moreover, the European Union has explained in this proceeding that the A340 programme "fail{ed} because of its fuel-burn penalty compared to the 777."[89] Thus, it is apparent that the decision to terminate the A340 programme in October 2011 was not taken in response to the recommendations and rulings adopted by the DSB, but rather simply because of its commercial "failure".

6.2.3 Events that occurred *before* the adoption of the recommendations and rulings by the DSB

6.2.3.1 Payment by Airbus of outstanding LA/MSF obligations of EUR 1.7 billion ("step" 25)

6.25. The European Union's Compliance Communication describes one of its 36 alleged compliance "steps" as "{p}ayment by Airbus, other than on deliveries under previously existing contractual terms, with respect to outstanding MSF obligations in the amount of approximately EUR 1,704,775,000".[90] The United States asserts that this "step" refers to the payment made by DaimlerChrysler Aerospace AG (DASA[91]) to the German Federal Government pursuant to a debt settlement in 1997 and 1998. According to the United States, the same debt settlement was considered by the panel in the original proceeding.[92]

6.26. The European Union has not responded to the United States' assertions. Neither has the European Union further expanded upon what it was referring to in its Compliance Communication when it identified the EUR 1.7 billion "payment by Airbus" as one of its 36 alleged compliance "steps". Thus, we do not understand the European Union to continue to rely upon this "step" for the purpose of rebutting the United States' claims of non-compliance in this dispute. We note, however, that during the interim review, the European Union argued that information contained in United States Exhibit USA-105 demonstrates that the 1997 and 1998 debt settlement between DaimlerChrysler Aerospace AG (DASA) and the German government resulted in the termination of the German LA/MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320, and A330/A340 basic programmes. To this extent, we understand the European Union to rely upon

[85] European Union's first written submission, paras. 209 and 1216; and second written submission, para. 1205.

[86] United States' first written submission, paras. 60, 260, and 269-270 (citing EADS Financial Statements Consolidated for the nine-month period ended 30 September 2011, 9 November 2011 (EADS Financial Statements Q3 2011), (Exhibit USA-107), p. 14: "The release of the liabilities has positively affected the consolidated income statement before taxes by 192 M € in other operating income and by 120 M € in interest result.").

[87] Airbus Shareholder Committee Decision Taken by Resolution in Writing, 19 October 2011, (Exhibit EU-111) (BCI).

[88] Airbus Shareholder Committee Decision Taken by Resolution in Writing, 19 October 2011, (Exhibit EU-111) (BCI).

[89] European Union's first written submission, para. 1108.

[90] Compliance Communication, p. 3.

[91] The European Union explains that "DASA" stood for Deutsche Aerospace AG (from 1992), Daimler-Benz Aerospace AG (from 1995) and DaimlerChrysler Aerospace AG (from 1998). (European Union's first written submission, fn 351)

[92] United States' first written submission, paras. 40-42.

the description of the 1997 and 1998 DASA debt settlement in Exhibit USA-105 as evidence of "steps" 4-6, 12-13, 17, and 20, described in the European Union's Compliance Communication.

6.2.3.2 Share transactions and cash extractions involving subsidy recipients ("step" 30)

6.27. In its first written submission, the European Union clarified that the "subsequent share transactions and cash extractions involving subsidy recipients" referred to in its Compliance Communication were events that took place well before the adoption of the recommendations and rulings by the DSB. In particular, the European Union revealed that the alleged compliance "steps" were the following: (a) the partial privatization of Aérospatiale in 1999, the sale and issuance of EADS shares to the general public by the EADS partners in the context of the creation of EADS and its public float in 2000, the 2006 sale by British Aerospace Systems (BAE Systems) of its 20% ownership stake in Airbus SAS to EADS (as "extinction" events); and (b) two one-time removals of cash and cash equivalents by DaimlerChrysler and Sociedad Estatal de Participaciones Industriales (SEPI) from their respective subsidiaries, DASA and CASA, in the lead up to the creation of EADS in 2000 (as "extraction" events).[93]

6.28. In the original proceeding, the European Communities argued that the same events had "extinguished" and "extracted" all of the challenged subsidies. In this compliance dispute, the European Union makes the same submission, arguing in the light of its own interpretation of what it means to comply with the terms of Article 7.8 of the SCM Agreement, that the alleged "extinction" and "extraction" of the relevant subsidies means that they have been "withdrawn" or are no longer causing *present* "adverse effects".

6.29. The United States recalls that the panel and Appellate Body already examined and rejected the European Union's "extraction" arguments in the original proceeding, and submits that for this reason, the European Union's "claim that such extractions were an appropriate step to withdraw those same subsidies is an effort to reargue a point the EU lost … , and is not properly part of this proceeding under Article 21.5 of the DSU".[94] Moreover, recalling that the Appellate Body had stated in the original proceeding that it did "not consider that the sales transactions and 'cash extractions' resulted in the 'withdrawal' of subsidies within the meaning of Articles 4.7 and 7.8 of the SCM Agreement", the United States submits that the "extinction" events the European Union relies upon for a second time in this compliance dispute "cannot have withdrawn the subsidies in question for purposes of Article 7.8 of the SCM Agreement".[95]

6.2.3.3 Termination of A300 and A310 programmes ("steps" 31 and 32)

6.30. The A300 and A310 programmes were terminated on 31 July 2007.[96] The European Union relies upon the termination of these programmes to support its submission that there can no longer be any present adverse effects related to the A300 and A310.[97] We note, however, that the United States makes no claims of "serious prejudice" in relation to any market displacement or impedance, or lost sales, involving the A300 and A310. Nevertheless, the United States asserts that the termination of the A300 and A310 programmes "had nothing to do with compliance", but rather reflected the fact that the "terminated models were no longer competitive and had been replaced by newer, LA/MSF-funded Airbus LCA", in particular, the A330, A350XWB-800 and "sometimes" the A350XWB-900.[98]

6.31. Unlike the termination of the A340 programme, the European Union has not submitted any specific evidence attesting to a decision to terminate the A300 and A310 programmes on the part of Airbus' management, relying instead on the contents of an Airbus press release from March 2006. This document quotes the Airbus then-President and Chief Executive Officer (CEO), Gustav Humbert, as having stated:

[93] European Union's first written submission, paras. 197-354; and second written submission, paras. 117-268.
[94] United States' first written submission, para. 46.
[95] United States' first written submission, para. 47.
[96] Airbus Press Release, "A300, A310 Final Assembly To Be Completed by July 2007", 7 March 2006, (Exhibit EU-116); French A300 LA/MSF contract Termination Letter, (Exhibit EU-25); and French A310 LA/MSF contract Termination Letter, (Exhibit EU-34).
[97] European Union's second written submission, para. 1205.
[98] United States' first written submission, paras. 260 and 269-270.

> It is in Airbus' best interest to optimise the use of its resources at this time. We are implementing a major production ramp-up across our business as the A300/A310 programme nears completion. This is in response to growing demand from our customers for the newer Airbus products like the A321, the A330/A340 family and the new A350 aircraft, that cover or even go beyond the market segment of our original aircraft programme.[99]

6.32. In our view, this statement makes clear that, as with the termination of the A340 programme, the decision to terminate the A300 and A310 programmes was solely motivated by Airbus' commercial interests and, therefore, unrelated to the WTO dispute concerning the alleged subsidization of Airbus that was ongoing at the time between the United States and the European Union and certain member States.

6.2.4 Events and alleged events that *overlapped* the adoption of the recommendations and rulings by the DSB

6.2.4.1 Completed deliveries and performance of sales contracts ("step" 34)

6.33. Another alleged compliance "step" identified in the European Union's Compliance Communication is the completion of deliveries of "relevant LCA to markets for which displacement was found" in the original proceeding, and the completion of performance under sales contracts pertaining to orders for LCA found to constitute "lost sales" in the original proceeding.

6.34. The European Union explained in its written submissions that what it meant when it referred to the completion of performance of a sales contract, was the delivery of an LCA to a customer in accordance with the terms of the order found to constitute a "lost sale" causing serious prejudice to the United States' interests in the original proceeding. The European Union maintains that by delivering the LCA to its customer in this way, "the {lost} sales are … completed and cease to exist in the present".[100] For the European Union, this implies that the "United States has failed to demonstrate that significant lost sales … , as found in the original proceedings, have not been removed"[101] and, therefore, that the European Union and certain member States have not achieved compliance with respect to those specific transactions. In other words, the European Union submits that the delivery of an LCA under a sales contract that was the subject of a finding of "lost sales" in the original proceeding brings that "lost sale" to an end and, therefore, also ends the "serious prejudice" to the United States' interests.

6.35. The United States submits that the European Union's reliance on "completed deliveries" and "completed performance of sales contracts" suggests that "the EU views the very indicia of adverse effects (e.g. the deliveries in country markets that served as the basis for the Appellate Body's displacement findings) as something that it could cite to assert compliance". The United States argues that this is "untenable" because it "seems to ask the WTO to accept that the occurrence of adverse effects means that the EU has complied in this case".[102]

6.2.4.2 Post-launch investments in Airbus A320 and A330 programmes ("step" 35)

6.36. The European Union revealed in its first written submission that the post-launch investments identified in its Compliance Communication as the thirty-fifth compliance "step" were the, allegedly non-subsidized, investments Airbus has made into the A320 and A330 families of LCA since they were launched in, respectively, 1984 and 1987. In particular, the European Union explains that since the A320 and A330 were launched, Airbus has invested, respective to these two LCA, at least EUR **[***]** billion and EUR **[***]** billion into the following activities: (a) "Continuing Development"; (b) "Continuing Support"; (c) the design and manufacture of three non-subsidized variants (the A321, A319 and A318) between 1988 and 1999; and (d) the setting-up of three new A320 final assembly lines (FALs) in Hamburg (Germany) between 1993 and 2005, and one in

[99] Airbus Press Release, "A300, A310 Final Assembly To Be Completed by July 2007", 7 March 2006, (Exhibit EU-116).

[100] European Union's second written submission, para. 1212.

[101] European Union's first written submission, paras. 805-816, 1034-1042, and 1218-1219; and second written submission, para. 1212.

[102] United States' first written submission, para. 271.

Tianjin (China) in 2008. The European Union maintains that the value of these investments "dwarf{s}" the initial development cost of the A320 and A330/A340 programmes, and that it has resulted in significant technological advancements, enhanced production rates, improved lead-times and lower costs of production.[103]

6.37. According to the European Union, these facts demonstrate that the "genuine and substantial" cause of the ongoing market presence of the A320 and A330 families is not the challenged LA/MSF subsidies, but rather the above-mentioned, allegedly non-subsidized, investments. Thus, the European Union relies upon the post-launch investments in the A320 and A330 as events which it asserts have diluted the causal connection between the challenged LA/MSF subsidies and the present-day market presence of the A320 and A330.

6.38. For the United States, however, the European Union's reliance on Airbus' post-launch investments is "not at all a step to remove adverse effects, but an attempt by the EU to re-argue causation issues that it lost in the underlying proceeding". In particular, the United States recalls that the original panel and Appellate Body found that the challenged LA/MSF subsidies were a "genuine and substantial" cause of the market presence of the A320 and A330 in the 2000 to 2006 period, that is, after most of the relevant post-launch investments had been allegedly undertaken. Thus, the United States maintains that Airbus' post-launch investments "cannot attenuate the adverse effects caused through the presence of {the A320 and A330} on the market".[104]

6.2.4.3 "Attenuation" of "any causal link" through "further intervening events" ("step" 36)

6.39. Although the European Union does not explicitly refer to any particular "intervening events" in its Compliance Communication, in its written submissions the European Union identifies a number of important changes to the markets into which the different Airbus and Boeing LCA are sold, the "passage of time", and a number of non-attribution factors allegedly not related to subsidization, as events that have had the effect of attenuating the causal connection between the challenged LA/MSF subsidies and any present-day effects, such that those subsidies can no longer be found to be a "genuine and substantial" cause of the instances of serious prejudice that the United States continues to claim.[105]

6.40. According to the United States, the European Union's "attenuation" arguments do not amount to compliance "actions in even the most superficial sense, but reflect EU inaction and/or legal argumentation based on contentions that the passage of time and other intervening events have resulted in the subsidies or their adverse effects fading to insignificance". The United States submits that "attenuation of a causal link" is not something that a Member does, but rather "a legal conclusion that a Panel reaches based on the evidence as to what the responding Member has done". In the view of the United States, because the European Union's alleged compliance "steps" have not withdrawn the subsidies or removed the adverse effects, they "cannot have attenuated the causal link found by the original Panel and the Appellate Body".[106]

6.2.5 Conclusion

6.41. Overall, the United States submits that the "steps" described in the European Union's Compliance Communication "can be characterized as an 'inaction plan'" that "did essentially nothing to move toward WTO compliance".[107] Indeed, according to the United States, the European Union and certain member States have only "worsen{ed} … the compliance situation" by

[103] European Union's first written submission, paras. 731-798 and 876-924; and second written submission, paras. 743-821.

[104] United States' first written submission, para. 272; and second written submission, paras. 503 and 505.

[105] See e.g. European Union's first written submission, paras. 39, 486, 493, 500, 507, 511, 628, and 644-645; and second written submission, paras. 11, 502, 677, 1269, 1282, 1330, 1347, 1373, 1388, and 1585.

[106] United States' first written submission, paras. 260 and 274.

[107] United States' first written submission, paras. 242 and 257.

continuing to provide Airbus with "billions of dollars" of allegedly subsidized LA/MSF for the A350XWB, which the United States claims are causing "additional adverse effects".[108]

6.42. In our view, only two of the 36 "steps" notified by the European Union can be characterized as "actions" relating to the degree of *ongoing subsidization* of Airbus LCA – namely, "step" 28, the imposition of additional fees for the use of the Bremen Airport runway extension, and "step" 29, revision of the terms of the Mühlenberger Loch lease agreement.[109] On the other hand, the remaining 34 alleged compliance "steps" are not "actions" relating to the ongoing (or even past) subsidization of Airbus LCA, but rather merely the *assertion of facts* or *presentation of arguments* for the purpose of supporting the European Union's theory of compliance based on the following main contentions: (a) the adopted rulings and recommendations give rise to no compliance obligation at all, under the terms of Article 7.8 of the SCM Agreement, with respect to expired subsidies; (b) an expired subsidy means that it has been "withdrawn" for the purpose of Article 7.8 of the SCM Agreement; (c) an expired subsidy cannot cause adverse effects in the context of a proceeding initiated under Article 21.5 of the DSU; and (d) the passage of time, and events that have taken place over the passage of time, have diluted the causal link established in the original proceeding such that the challenged subsidies are no longer a "genuine and substantial" cause of adverse effects in the post-implementation period. Thus, ultimately, apart from the "actions" identified in "steps" 28 and 29, the European Union's affirmation of compliance is not grounded in any specific conduct on the part of the European Union and certain member States with respect to the subsidies provided to Airbus or the adverse effects those subsidies were found to have caused in the original proceeding. Fundamentally, the European Union's view that it has achieved full compliance is, rather, based on its understanding of the scope and nature of the obligations arising out of the adopted recommendations and rulings as well as its own interpretation of the applicable law and legal provisions, including Article 7.8 of the SCM Agreement.

6.43. With these observations in mind, we now proceed to examine the merits of the United States' non-compliance complaint.

6.3 Whether the United States has presented a *prima facie* case

6.44. The European Union maintains that the United States has failed to satisfy its burden of presenting a *prima facie* case of non-compliance and, therefore, that the entirety of the United States' complaint must be rejected.[110]

6.45. The European Union submits that in order to make a *prima facie* case of non-compliance in this dispute, the United States was required to "make a claim, assert fact, adduce evidence and develop argument"[111] in respect of each of its claims of WTO-inconsistency *in its first written submission*. However, according to the European Union, the United States' first written submission is "so deficient and so bereft of substance" that it falls short of this standard.[112] In particular, the European Union argues that the United States' first written submission not only neglected to address the need to establish the *existence* of subsidies *after* the end of the implementation period, taking into account the Appellate Body's guidance on *inter alia* the extent to which the "life" of a subsidy will come to an end[113], but it also failed to speak to the need to show that any existing subsidies are a "genuine and substantial" cause of *present* adverse effects, taking into account *inter alia* the properly determined "lives" of subsidies, an appropriate reference period and correctly defined product markets.[114] The European Union maintains that the United States' failure

[108] United States' first written submission, paras. 1-16 and 240-246.

[109] As already noted, the United States includes neither of these two measures in its claims of non-compliance against the European Union and certain member States in this dispute.

[110] European Union's first written submission, paras. 39-55; second written submission, paras. 3 and 12-17; and response to Panel question No. 1.

[111] European Union's first written submission, paras. 9-12; and second written submission, para. 12.

[112] European Union's first written submission, paras. 44-48 and 51-52.

[113] Specifically, the European Union submits that the United States' first written submission should have taken into account: "{R}epayments of principal and interest; modifications aligning measures with a market benchmark; amortisation of benefit; extinction; and extraction". (European Union's first written submission, paras. 36, 165, 198-199, 228, 246, and 293; and second written submission, para. 75)

[114] In particular, the European Union argues that the United States' first written submission should have taken into account: "{A} properly identified present reference period starting no sooner than the end of the implementation period; properly defined present product markets; properly delineated present geographic markets; properly defined temporal markets; a reasonable estimate of the present amounts of the alleged

to address these matters in its first written submission is "fatal" to the United States' complaint, "a matter {that} cannot be rectified without infringing {the European Union's} due process rights".[115] Consequently, the European Union submits that, as a matter of law, the Panel must dismiss the entirety of the United States' claims of non-compliance.[116]

6.46. The United States rejects the European Union's contentions[117], arguing that the European Union's characterization of what is required to discharge its *prima facie* burden of proof seeks to force the United States into bearing the burdens of both establishing the European Union's non-compliance and addressing in advance the arguments that the European Union raised in its first written submission to attempt to establish compliance.[118] According to the United States, the burden that falls upon a complaining Member in an Article 21.5 compliance dispute requires it to advance a *prima facie* case that measures taken to comply do not exist or, if they do exist, that such measures are inconsistent with the covered agreements. In the specific context of Article 7.8 of the SCM Agreement, the United States argues that the burden of demonstrating that any declared measures taken to comply *do not exist* will have been satisfied if the complaining Member shows that those measures do not withdraw the subsidy or remove its adverse effects. Similarly, the United States submits that the burden of establishing that declared measures taken to comply are *inconsistent with the covered agreements* will have been met by a complaining Member if it demonstrates that those measures are insufficient to bring the implementing Member *fully* into conformity with its obligations under Article 7.8.[119]

6.47. As regards the "lengthy list" of matters the European Union argues the United States was required to address in its first written submission, the United States maintains that the issues the European Union identifies "might provide defenses to a claim under Article 5 of the SCM Agreement, in circumstances not present in this dispute", or "represent novel legal theories … that find no support in the SCM Agreement or WTO jurisprudence", or even be "potentially, but not necessarily, relevant to a finding under Article 5".[120] However, according to the United States, they have "little to do" with what is *required* to make out a *prima facie* case of non-compliance with Article 7.8 of the SCM Agreement.

6.48. We do not understand there to be any disagreement between the parties that it is for the United States to establish the European Union's non-compliance in this dispute, and that it is for the European Union to rebut any *prima facie* case advanced by the United States, including by raising and substantiating its own affirmative defences. Not surprisingly, however, when it comes to understanding exactly *what* the United States must demonstrate in order to discharge its *prima facie* burden of proof, the parties have presented diverging positions, in large part, due to the different views expressed about the scope of this compliance dispute, how the notion of compliance should be given effect under the terms of Article 7.8 of the SCM Agreement and the substance and implications of the legal and factual findings made by the panel and the Appellate Body in the original proceeding. For instance, one of the main reasons the European Union advances to support its contentions about the United States' failure to make a *prima facie* case is that the United States made no attempt in its first written submission to establish that subsidies *exist* in the post-implementation period. Yet, in order to accept that the United States' submissions were deficient in this regard, we must first of all be satisfied that the United States was legally required to make such a demonstration. According to the United States, it was under no such obligation. Similarly, the European Union maintains that the United States' causation arguments should have taken into account *inter alia* the "present amounts of alleged subsidies". Again, however, the extent to which the United States was *required* to do so in order to establish a *prima facie* case is a matter in dispute between the parties.

6.49. Ultimately, therefore, the merits of the European Union's submission that it has "no case to answer" in this proceeding rests in large part upon the correctness of its own legal theory of

subsidies, taking into account withdrawal of the subsidy through the elimination of any financial contribution and … the alignment with a market benchmark, amortisation, extinction or extraction; and intervening events (non-attribution factors)". (European Union's first written submission, paras. 37-39)

[115] European Union's first written submission, para. 54.
[116] European Union's first written submission, paras. 44, 51-55, and 200.
[117] United States' second written submission, paras. 32-39.
[118] United States' second written submission, para. 37.
[119] United States' second written submission, para. 33.
[120] United States' second written submission, paras. 38-39.

compliance and understanding of the scope of this dispute, its own interpretation of the findings made in the original proceeding and its own views about the meaning and probative value of the facts and evidence the parties have, or allegedly should have, submitted. It follows that in order to address the European Union's allegations concerning the United States' failure to make a *prima facie* case, we must assess the merits of the parties' arguments with respect to all of these matters.

6.50. Finally, we recall that as we have previously noted[121], it is well established that a panel must not make a "*prima facie* case" for a party who bears the burden of proof in relation to a claim or a defence.[122] However, this does not mean that a panel must make a specific finding that a complainant has met its burden to establish a *prima facie* case in respect of a particular claim, or that a respondent has effectively rebutted a *prima facie* case.[123] Similarly, a panel is not required to make a finding as to whether a complainant has established a *prima facie* case before it examines the respondent's arguments and evidence.[124] Indeed, WTO dispute settlement proceedings do not involve any particular temporal sequence of proof. Both parties will adduce evidence in support of their own arguments or to rebut the arguments made by the other at various stages of a dispute, sometimes simultaneously, throughout the entirety of a proceeding.

6.51. Given the voluminous submissions and complex issues raised in this dispute, we have sought to conduct our evaluation of the merits of the parties' positions on the basis of a full appreciation of all of their arguments and the evidence adduced in support of those arguments throughout the course of this proceeding. To this end, three sets of questions were posed to the parties over a 12-month period following the substantive meeting with the parties and third parties in order to clarify their submissions and generally explore the legal and factual matters raised in this proceeding. We have also carefully assessed and responded to numerous requests for procedural rulings concerning the acceptability of certain pieces of evidence and arguments submitted for consideration at various stages. Needless to say, however, in performing our "objective assessment of the matter", we have at all times been guided by the basic requirement of due process that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. We have also been mindful of the fact that this due process interest must be balanced against other interests, including systemic interests such as those reflected in Articles 3.3 and 12.2 of the DSU[125] and that, ultimately, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU.[126]

6.52. We now turn to review the substance of the United States' complaint of non-compliance, starting by first of all addressing the parties' arguments concerning the scope of this compliance proceeding.

6.4 The scope of this compliance proceeding

6.4.1 The A350XWB LA/MSF measures

6.4.1.1 Introduction

6.53. We recall that in the original proceeding, the United States challenged the alleged provision of subsidized LA/MSF by the Airbus governments for the purpose of the Airbus A350 aircraft design proposed between 2004-2006 (Original A350) programme launched in December 2004. Although the original panel found that, by the time that its terms of reference had been set, the Airbus governments had committed to support the Original A350 through the provision of LA/MSF, the

[121] See Panel's Procedural Ruling of 12 June 2013 in relation to the European Union's requests of 28 May 2013 concerning: (i) the United States' Full HSBI Version Appendix and HSBI Exhibits submitted in conjunction with its answers to the Panel's first set of questions; and (ii) the United States' alleged violations of the BCI/HSBI Procedures. (Annex F-2)

[122] Appellate Body Reports, *Japan – Agricultural Products II*, para. 129; *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 300; *US – Wool Shirts and Blouses*, p. 14; and *EC – Hormones*, para. 104.

[123] Appellate Body Report, *Thailand – H-Beams,* para. 134.

[124] Appellate Body Report, *India – Quantitative Restrictions*, para. 142.

[125] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

[126] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

precise details and content of that LA/MSF had yet to be settled and remained subject to negotiation. Accordingly, the panel concluded that the United States had failed to demonstrate that a commitment to provide Airbus with LA/MSF for the Original A350 on *the specific terms and conditions* asserted by the United States actually existed, *as a matter of fact*, by the time of the panel's establishment on 20 July 2005.[127] In other words, the United States failed to establish the existence, as of July 2005, of a LA/MSF commitment measure for the Original A350 constituting a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement. As LA/MSF for the A350XWB did not exist during the relevant time, no findings were made and no specific DSB recommendations and rulings were adopted in the original proceeding with respect to any A350XWB LA/MSF measures.

6.54. Airbus abandoned the Original A350 programme less than two years after its launch, with key Airbus clients and industry analysts questioning its ability to compete effectively with the lighter, more fuel-efficient, Boeing 787.[128] Airbus publicly unveiled a "concept" for a substantially redesigned version of the Original A350 − the A350XWB − at the Farnborough Air Show in July 2006[129], formally launching it on 1 December 2006.[130]

6.55. As they did with respect to prior models of Airbus LCA, the governments of France, Germany, Spain, and the United Kingdom supported the A350XWB programme with LA/MSF. After publicly signalling their support for the new programme in July 2006[131], the Airbus governments formally entered into negotiations with Airbus for LA/MSF in late 2008, individually agreeing on its terms on different dates between **[***]**.[132]

6.56. The United States claims that the new A350XWB LA/MSF measures are subsidies, which either alone or in conjunction with the pre-A350XWB LA/MSF subsidies found to cause adverse effects in the original proceeding, continue to cause adverse effects today, thereby evidencing the relevant European Union member States' failure to comply with the recommendations and rulings adopted by the DSB. Accordingly, and despite not being identified as a "measure taken to comply" in the European Union's Compliance Communication, the United States maintains that the A350XWB LA/MSF measures fall within the scope of our terms of reference in this compliance dispute. We examine the merits of the United States' position in the following analysis.

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[127] Panel Report, *EC and certain member States − Large Civil Aircraft*, paras. 7.296-7.314.

[128] See e.g. Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006, (Exhibit USA-24); "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006, (Exhibit USA-28); "Airbus to decide by July on A350 design" *Seattle Post - Intel*, 16 May 2006, (Exhibit USA-356); and Gordon McConnell, Michel Lacabanne, Chantal Fualdes, François Cerbelaud and Burkhard Domke, A350XWB Chief Engineering and Future Projects Office, Airbus, "A350XWB Chief Engineering Statement", 3 July 2012 (A350XWB Chief Engineering Statement), (Exhibit EU-18) (BCI/HSBI), para. 6.

[129] See e.g. Ameet Sachdev, "Airbus redesigns its strategy for long haul: A350 line to carry bulk of the load", *Chicago Tribune*, 18 July 2006, (Exhibit EU-99); Goldman Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future, in our view*, 21 November 2006, pp. 20-22, (Exhibit USA-30), p. 20; and UK House of Commons Hansard, written answers for 24 July 2006, (Original Exhibit US-141), (Exhibit USA-31).

[130] Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.296; Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006, (Exhibit USA-24); EADS Press Release, "A350 XWB launch: EADS Gives Go Ahead for Airbus to Launch the A350 XWB", 1 December 2006, (Exhibit USA-569); "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006, (Exhibit USA-28); "Airbus to decide by July on A350 design" *Seattle Post - Intel*, 16 May 2006, (Exhibit USA-356); A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 6; and European Union's first written submission, para. 1113.

[131] UK House of Commons Hansard, written answers for 24 July 2006, (Original Exhibit US-141), (Exhibit USA-31); UK House of Commons Hansard Debates, Column 1692W, Colloquy of Mr. Gordon Prentice and Minister for Industry and the Regions Margaret Hodge, 23 October 2006, (Exhibit USA-35); UK House of Commons Hansard Debates, Column 82W-83W, Colloquy of Mr. Patrick Mercer and Minister for Industry and the Regions Margaret Hodge, 30 October 2006, (Exhibit USA-36); "Airbus to decide by July on A350 design" *Seattle Post - Intel*, 16 May 2006, (Exhibit USA-356); Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June, 2006, (Exhibit USA-357); and Hans Peter Ring, Chief Financial Officer, "Safe Harbor Statement", "Roadmap", and "Recent Press Quotes", slides 2, 11 and 12 from "A New Base for the Future", EADS presentation, Global Investor Forum, 19-20 October 2006, (Exhibit USA-358).

[132] Statement by Tom Williams, Executive Vice President, Programmes, Airbus SAS, 17 May 2013, (Exhibit EU-354) (BCI), para. 3; and European Union's response to Panel question No. 101.

6.4.1.2 Arguments of the United States

6.57. The United States argues that the alleged A350XWB LA/MSF subsidies fall within the scope of this compliance proceeding on the basis of three related grounds. The first, and we believe principal, line of argument advanced by the United States draws from the case law developed by panels and the Appellate Body concerning the question whether a measure that is *not* a declared "measure taken to comply" (i.e. an "undeclared" measure) may fall within a compliance panel's terms of reference. The United States submits that the relevant case law in this area establishes that an "undeclared" measure may properly fall within the scope of a compliance panel's terms of reference when it has a particularly close relationship (i.e. a "close nexus") to the *original measures* subject to DSB recommendations and rulings and the *declared* "measures taken to comply", based on a consideration of the *nature*, *effects* and *timing* of those measures and the *factual and legal background* against which any compliance measures are adopted.[133] The United States maintains that an examination of all of these factors confirms that, in the present instance, a "close nexus" exists between the alleged A350XWB LA/MSF subsidies, the LA/MSF subsidies found to cause adverse effects in the original proceeding and the European Union's alleged compliance measures, implying that the A350XWB LA/MSF measures must fall within the scope of this compliance proceeding.

6.58. In terms of the *nature* of the A350XWB LA/MSF measures, the United States argues that they have essentially the same nature as the LA/MSF measures found to cause adverse effects in the original proceeding because both sets of LA/MSF measures are: (a) loans; (b) concluded between the same parties; (c) with the same core success-dependent, levy-based, back-loaded and unsecured repayment terms; and (d) for the purpose of developing new models of LCA to compete against Boeing (and, specifically, in the case of A350XWB LA/MSF, a twin-aisle LCA product like A300, A310, A330 and A340 LA/MSF).[134]

6.59. The United States recalls that the Appellate Body has examined the *effects* of an undeclared measure in the context of a close nexus analysis by considering whether it "undermine{s}"[135] or "potentially negate{s}"[136] a valid compliance measure[137], and whether it "may have an effect on … whether the original measure, which was found to be inconsistent … has been brought into conformity".[138] The United States submits that applying this standard to the alleged A350XWB LA/MSF subsidies leads to the conclusion that their *effects* are such that they should be brought into the scope of this compliance proceeding. In particular, the United States argues that the alleged A350XWB LA/MSF subsidies have similar, or even identical, *effects* to the LA/MSF subsidies found to cause adverse effects in the original proceeding. The United States asserts in this regard that A350XWB LA/MSF enabled Airbus to launch the A350XWB as a new model of LCA intended to "fill the holes in the product line created by the A340's inability to compete with the 777 and the aging of A330 technology".[139] In other words, according to the United States, A350XWB LA/MSF was provided for the purpose of bringing one Airbus LCA product into existence with a view to replacing another subsidized Airbus LCA product in the same twin-aisle segment in which the United States was found to have suffered adverse effects in the original proceeding.[140] Thus, while denying that the measures declared in the European Union's Compliance Communication moved the European Union and relevant member States closer to achieving compliance, the United States considers that these effects of A350XWB LA/MSF would "directly negate" any valid compliance measures.[141]

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[133] United States' first written submission, paras. 4, 18, 30, and 146 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77 and citing Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 203); and second written submission, paras. 73 and 84.

[134] United States' first written submission, paras. 140, 143-144, and 147; and second written submission, paras. 85 and 89-101.

[135] United States' first written submission, para. 148.

[136] United States' first written submission, para. 149.

[137] United States' first written submission, para. 148 (heading 2), and para. 149 (citing Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 251).

[138] United States' first written submission, para. 149.

[139] United States' first written submission, para. 148.

[140] United States' second written submission, para. 61.

[141] United States' first written submission, paras. 148 and 151; and second written submission, para. 86.

6.60. The United States submits that a consideration of the *timing* of the relevant measures and the adopted recommendations and rulings "cements the conclusion" that a close nexus exists between them and, therefore, that the A350XWB LA/MSF measures fall within the scope of this compliance proceeding.[142] In particular, drawing from the case law in this area, the United States recalls that it has been previously held that measures pre-dating the DSB's adoption of recommendations and rulings, such as the A350XWB LA/MSF measures, may properly fall within the scope of a compliance proceeding.[143] The United States notes in this regard that the Appellate Body affirmed in *US – Zeroing (EC) (Article 21.5 – EC)* that a close nexus existed even when the "undeclared" measure was enacted one to two years *before* the DSB's recommendations and rulings.[144] The United States asserts that the timing of the negotiation, grant and disbursement of the A350XWB LA/MSF measures overlaps with the issuance of the original panel and Appellate Body reports, their adoption by the DSB and the European Union's declared compliance measures.[145] Thus, the United States argues that the "evolution of LA/MSF for the A350XWB has moved in tandem with this dispute" as well as the European Union's efforts to comply with the DSB recommendations and rulings, revealing the existence of a close relationship between the "most recent LA/MSF measures and the subsidized LA/MSF" measures found to cause adverse effects in the original proceeding.[146]

6.61. Finally, the United States argues that the close relationship existing between the alleged A350XWB LA/MSF subsidies, the LA/MSF subsidies found to cause adverse effects in the original proceeding and the European Union's alleged compliance measures is also apparent when the factual and legal background to the A350XWB LA/MSF measures is considered. In this regard, the United States points to, for example, "the more than 40 years of history of EU member State funding for all Airbus civil aircraft models" in the form of LA/MSF, the fact that EADS' financial statements account for A350XWB LA/MSF in the same way as all prior LA/MSF, and a statement in the preamble to the Spanish A350XWB LA/MSF contract noting the existence of a "system of refundable advances" that has been used to fund all previous Airbus LCA programmes.[147]

6.62. The second line of argument the United States advances to support its contention that the alleged A350XWB LA/MSF subsidies fall within the scope of this proceeding is that they *replace* the subsidies found to cause adverse effects in the original proceeding in respect of the same twin-aisle segment of the market for LCA. The United States recalls in this regard that the Appellate Body has found that "a Member would not comply with the obligation in Article 7.8 to withdraw the subsidy if it leaves an actionable subsidy in place, either entirely or partially, or replaces that subsidy with another actionable subsidy".[148] To this extent, the United States argues that the A350XWB LA/MSF measures would allow the European Union to "evade its obligations by replacing one WTO-inconsistent measure with another".[149]

6.63. Lastly, the United States maintains that the A350XWB LA/MSF measures should be considered in this compliance proceeding because excluding them would allow the European Union to *circumvent* its obligation to comply with the DSB recommendations and rulings with respect to LA/MSF for the A300, A310, A330 and A340. The United States argues that a measure that would allow a Member to circumvent the recommendations and rulings of the DSB may also fall within the scope of a compliance proceeding regardless of its nature and/or timing. Thus, according to the United States, LA/MSF for the A350XWB needs to be evaluated within the terms of reference of

[142] United States' first written submission, para. 154.

[143] United States' first written submission, para. 153 (citing Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 234-235).

[144] United States' second written submission, para. 110 (citing Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 234-235).

[145] United States' first written submission, paras. 141 and 154; and second written submission, paras. 87 and 106-112.

[146] United States' first written submission, para. 154.

[147] United States' first written submission, paras. 155-156 (quoting *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46); and citing UK Department for Business, Innovation and Skills, "The UK Strategic Investment Fund: Interim Report", October 2009, p. 15, (Exhibit USA-43); and EADS Financial Statements, 2010, (Exhibit USA-6), p. 63).

[148] United States' first written submission, paras. 32 and 158-162 (citing Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil*), paras. 237-238); and second written submission, paras. 115-118.

[149] United States' first written submission, paras. 161-162.

this dispute to properly determine if the European Union and relevant member States have complied. Otherwise, the distinction between the A350XWB and other models of subsidized Airbus twin-aisle LCA would provide the European Union with a mechanism to circumvent compliance with respect to the DSB recommendations and rulings concerning the A330 and A340 and their derivatives.[150]

6.4.1.3 Arguments of the European Union

6.64. The European Union submits that "implicit" in every Appellate Body report that has considered whether an undeclared measure may be properly determined to fall within the scope of a compliance proceeding is an "understanding" that any such measures "should be limited" to instances of the application of the same "overarching measure" at issue in the original proceeding and before the compliance panel.[151] The European Union notes that the United States failed to allege the existence of an "overarching measure" in its request for the establishment of the compliance panel, and submits that, for this reason alone, the A350XWB LA/MSF measures must be found to fall outside of the scope of this proceeding.[152] In any case, the European Union argues that the A350XWB LA/MSF measures and the pre-A350XWB LA/MSF measures at issue in the original proceeding did not result from the application of an "overarching measure". In this respect, the European Union maintains that the United States' arguments purporting to demonstrate the existence of a close nexus between these measures rest on the same submissions concerning the alleged existence of the LA/MSF Programme that were rejected by the panel in the original proceeding.[153] The European Union argues that, although the Appellate Body declared the original panel's findings with respect to the existence of the alleged LA/MSF Programme to be moot and of no legal effect, the reasoning underlying the panel's factual determinations is nevertheless instructive.[154] Accordingly, the European Union asks the Panel to "remain consistent with the findings of fact that it made sitting as the original panel in the original proceedings"[155] and conclude that the A350XWB LA/MSF measures are outside of the scope of this compliance dispute because no "overarching measure" was found to exist with respect to the pre-A350XWB LA/MSF measures in the original proceeding.[156]

6.65. The European Union argues that an examination of the relevant measures' *nature*, *effects* and *timing*, within the context of the application of the close nexus test, "serves to confirm" this conclusion.[157]

6.66. As to the *nature* of the relevant measures, the European Union argues that LA/MSF for the A350XWB targets a different product to the LA/MSF measures at issue in the original proceeding.[158] Moreover, even leaving aside the question whether the A350XWB is a similar product to prior Airbus twin-aisle LCA, the European Union argues that similar product coverage and country coverage, alone, are not enough to establish the requisite close nexus.[159] The European Union furthermore submits that the nature of A350XWB LA/MSF is significantly different from the nature of previous LA/MSF because it was provided more than two years *after* the first order was received for the A350XWB; whereas LA/MSF provided for other Airbus aircraft was "generally" entered into much closer to the launch of the relevant LCA.[160] Similarly, the European Union notes that, unlike the LA/MSF provided for certain older models of Airbus LCA, LA/MSF for the A350XWB was not provided pursuant to any intergovernmental agreement related

[150] United States' first written submission, para. 165; and second written submission, para. 120.
[151] European Union's first written submission, paras. 67-74 (citing Appellate Body Reports, *US – Softwood Lumber IV (Article 21.5 – Canada)*; *US – Zeroing (EC) (Article 21.5 – EC)*; and *US – Upland Cotton (Article 21.5 – Brazil)*); second written submission, para. 28; and response to Panel question No. 80.
[152] European Union's first written submission, para. 96.
[153] European Union's second written submission, paras. 20, 22, and 98 (citing Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.577). See also European Union's response to Panel question No. 80; and comments on the United States' response to Panel question Nos. 80, 81, 82, and 84.
[154] European Union's first written submission, para. 97.
[155] European Union's response to Panel question No. 80; and comments on the United States' response to Panel question No. 80.
[156] European Union's response to Panel question No. 80; and comments on the United States' response to Panel question Nos. 80, 81, 82, and 84.
[157] European Union's first written submission, para. 95; and second written submission, para. 23.
[158] European Union's first written submission, para. 108.
[159] European Union's first written submission, paras. 82 and 108.
[160] European Union's first written submission, para. 105.

to the development of the A350XWB.[161] The European Union also argues that the United States' reliance on the alleged similarity between the core terms of LA/MSF for the purpose of showing that the nature of the relevant measures is alike is misplaced. According to the European Union, the alleged similarity simply reflects the terms of long-term project financing, which is "ubiquitous in many Members".[162]

6.67. As to the *effects* of the various measures, the European Union argues that the United States has not put forward an adequate analysis of the relationship of the measures' effects, as it has not demonstrated that any of the A350XWB LA/MSF measures: (a) is a subsidy or (b) causes adverse effects.[163] For example, the European Union submits that the United States has not explained how financing that was provided several years *after* the launch of the A350XWB can be said to have the effect of enabling its *launch*.[164] In any case, the European Union submits that the questions that are the focus of the United States' arguments concerning the effects of the relevant measures go to the substantive issues that are before the Panel in this compliance dispute. The European Union maintains that such matters cannot properly be part of a jurisdictional analysis.[165]

6.68. As to the *timing* of the respective measures, the European Union submits that the terms and conditions of A350XWB LA/MSF were agreed to approximately **[***]** *prior* to the DSB's adoption of the recommendations and rulings in the original proceeding, and were not adopted "on or around" the time of adoption of the declared "measures taken to comply.[166]

6.69. The European Union also submits that neither of the two additional grounds the United States advances to support its contention that the A350XWB LA/MSF measures fall within the scope of this proceeding are independent or stand-alone bases for making such a determination. Rather, according to the European Union, both additional United States arguments are simply potentially relevant considerations for an application of the close nexus test.[167]

6.70. Finally, the European Union argues that the United States' position with respect to the A350XWB LA/MSF measures must be dismissed because it is ultimately premised on a view of the types of measures that may affect a Member's compliance with DSB recommendations and rulings that suggests that once a Member is found to have granted an actionable subsidy in a particular sector, any future alleged subsidy in the same sector may be a matter for a compliance proceeding. According to the European Union, this would represent an "extremely expansive notion" of the scope of a compliance proceeding, which would have significant implications for other areas of WTO law.[168]

6.4.1.4 Arguments of the third parties

6.4.1.4.1 Australia

6.71. Australia considers that LA/MSF for the A350XWB is within the scope of the compliance proceeding.[169] Australia considers that a Member that has successfully argued that its interests are adversely affected by payment of a subsidy should not be required to bring a fresh action with respect to financial contributions made on the same legal basis as those found to be WTO-inconsistent. In Australia's view, to find otherwise would oblige the complaining Member to become embroiled in a litigation loop of periodic challenges under the SCM Agreement and would

[161] European Union's first written submission, para. 106.
[162] European Union's second written submission, para. 33.
[163] European Union's first written submission, para. 109.
[164] European Union's first written submission, para. 111.
[165] European Union's first written submission, paras. 110 and 112.
[166] European Union's first written submission, para. 103; and second written submission, para. 37.
[167] European Union's first written submission, paras. 85-92.
[168] European Union's second written submission, paras. 33-35. For example, the argument would imply that once a fiscal measure is found to be inconsistent with Article III:2 of the GATT 1994, any future fiscal measure of the same type and touching the same sector, would be subject to compliance proceedings, for an indefinite period and without any requirement of continuity with respect to the measure.
[169] Australia's third-party response to Panel question No. 3.

deny that Member a remedy under Article 7.8 of that Agreement, a result contrary to the object and purpose of the WTO dispute settlement system, including DSU Articles 3 and 21.[170]

6.72. For Australia, a finding that only the original LA/MSF measures are within the scope of this Article 21.5 proceeding would lead to the compliance proceeding being restricted to the re-examination of the same measures at issue in the original proceeding, rather than the existence or consistency of measures taken to comply. Australia considers that such an unduly restrictive interpretation has previously been rejected by the Appellate Body, and ignores the fact that Article 21.5 proceedings often concern the consistency of a new measure taken to comply with the recommendations and rulings in the dispute.[171]

6.4.1.4.2 Brazil

6.73. According to Brazil, the principles of protecting the effectiveness of the WTO dispute settlement system and ensuring prompt compliance and an effective resolution of disputes suggest that LA/MSF for the A350XWB is within the scope of the compliance proceeding. Brazil considers that the Panel should not adopt an overly formalistic approach to its terms of reference, and rather approach the issue in terms of the context in which the measures taken to comply are being applied.[172] Brazil notes that, while it does not consider that just any measure that shares features with the original measure or the measure taken to comply could be challenged in an Article 21.5 proceeding, an overly narrow approach to a compliance panel's terms of reference would undermine the effectiveness of the dispute settlement process. In Brazil's view, a very similar type of subsidy, in support of a very similar product, produced by the same recipient company around that time that closely related subsidy measures were found to be WTO-inconsistent, is a measure that can and must be included in an examination of "measures taken to comply".[173]

6.74. In terms of the nature of the measures, Brazil considers that the subject matter of LA/MSF for the A350XWB − LA/MSF to support Airbus twin-aisle large civil aircraft − is sufficiently similar to the subsidies to Airbus twin-aisle large civil aircraft analysed in the original proceeding to warrant its inclusion in the scope of this compliance proceeding. Moreover, Brazil considers that, given the competitive overlap between the A350XWB and similar Airbus twin-aisle aircraft covered by the recommendations and rulings of the DSB, LA/MSF support for the A350XWB could affect implementation. Brazil considers that whether this is ultimately the case is a substantive issue to be demonstrated by the United States; however, the similarity in possible effects of LA/MSF for the A350XWB further reinforces the close nexus between the original LA/MSF measures addressed in the original panel and Appellate Body reports, the alleged measures taken to comply, and the LA/MSF measures for the A350XWB. Finally, Brazil refers to Appellate Body statements that measures that predate the adoption of the original panel and Appellate Body reports can be included in the context of an Article 21.5 proceeding as "measures taken to comply" so long as there is a sufficiently close nexus in terms of the nature and effects of the measures.[174]

6.4.1.4.3 China

6.75. China submits that, in order for a measure to be subject to review by a compliance panel, it must be either: (a) a declared "measure taken to comply", (b) a measure otherwise constituting a "measure taken to comply" because of its "express link" with the recommendations and rulings of the DSB in the original proceeding, (c) a measure not in itself a "measure taken to comply" but having a "particularly close relationship" to the declared "measure taken to comply" and to the DSB's recommendations and rulings, or (d) in a subsidy case, a replacement subsidy which replaces the one found to be WTO-inconsistent in the original proceeding.[175] China considers that LA/MSF for the A350XWB does not fall within any of these four categories, and is therefore not within the panel's terms of reference.

[170] Australia's third-party response to Panel question No. 3 (citing Australia's third-party submission in *US − Upland Cotton (Article 21.5 − Brazil)*).

[171] Australia's third-party response to Panel question No. 3 (citing Appellate Body Reports, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 89; and *Canada − Aircraft (Article 21.5 − Brazil)*, para. 36).

[172] Brazil's third-party submission, para. 23.

[173] Brazil's third-party submission, para. 31.

[174] Brazil's third-party submission, para. 28.

[175] China's third-party submission, para. 5.

6.76. China argues that there is no "declared" measure taken to comply with respect to the A350XWB, nor is there a measure that could be considered a "measure taken to comply" on the basis of an "express link" with the recommendations and rulings of the DSB. China notes that the panel in the original proceeding dismissed the United States' claim that an alleged commitment to provide LA/MSF for the Original A350 constituted a specific subsidy. Neither party appealed this finding, and the conclusion adopted by the DSB should be treated as a final resolution of that claim.[176] As there were no recommendations or rulings concerning the A350, the European Union bears no obligation to take any measure to bring about compliance in this respect. China considers that it is therefore not possible for any measure to have an "express link" to the non-existing DSB's recommendations and rulings concerning the A350. Because LA/MSF for each Airbus LCA model was considered to be separate and distinct, and because no LA/MSF Programme covering all Airbus LCA was found to exist, there is no basis for the United States to assert that LA/MSF for the A350XWB has a particularly close relationship to either LA/MSF for the A350 or other LA/MSF for twin-aisle LCA.[177]

6.77. China considers erroneous the United States' argument that A350XWB is a replacement subsidy for earlier LA/MSF measures that the European Union claims to have withdrawn. According to China, in *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body's conclusion that the marketing loan payments and counter-cyclical payments were properly within the scope of the compliance proceeding was made in the context where the payments were annual, recurring payments made under unchanged regulatory provisions.[178] China distinguishes this from the present proceeding, in which there are no findings on the existence of a LA/MSF Programme. Additionally, the disbursements of funds under each of the challenged LA/MSF measures are not recurrent. China considers there is no factual basis to establish that A350XWB LA/MSF is a "replacement subsidy" in relation to "any earlier WTO-inconsistent LA/MSF measures" which are actually all separate from and parallel to each other. Finally, China submits that there is no distinct ground for including a measure within the scope of a compliance proceeding according to whether its exclusion would permit circumvention of the DSB's recommendations and rulings. Rather, this is a factor to be considered as part of the integrated analysis of whether there is a "particularly close relationship" between the "undeclared" measure, the "declared" measures taken to comply and the recommendations and rulings of the DSB.[179]

6.4.1.4.4 Japan

6.78. Japan considers that the "close nexus" test should be applied in this and any compliance proceeding, to determine whether a measure is properly before the compliance panel.[180] In Japan's view, overly narrow terms of reference for an Article 21.5 panel would undermine the effectiveness of the dispute settlement process. Japan notes that the Appellate Body has found that a relatively wide range of measures not covered by the original proceeding were within the scope of Article 21.5 proceedings.[181] Japan considers that the concern expressed by the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)*[182] is sufficiently addressed by the criteria of the "close nexus" test. When properly applied, the requirements contained in the close nexus test, such as the timing, nature and effects of the contested measures, ensure the effectiveness of the disciplines of the SCM Agreement.

6.79. Japan has concerns with the European Union's "overarching measure" approach.[183] Japan does not deny that the presence of a common overarching measure may be a relevant factor in determining whether the undeclared measure at issue has a sufficiently "close nexus" with the

[176] China's third-party submission, para. 14; and third-party response to Panel question No. 3.
[177] China's third-party submission, paras. 25-26.
[178] China's third-party submission, paras. 30-31; and third-party response to Panel question No. 3.
[179] China's third-party submission, paras. 37-38.
[180] Japan's third-party response to Panel question No. 3.
[181] Japan's third-party response to Panel question No. 3 (citing Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*; and *US – Softwood Lumber IV (Article 21.5 – Canada)*).
[182] Panel question No. 3 referred to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 137 and 245.
[183] Japan's third-party response to Panel question No. 3 (citing European Union's first written submission, para. 76).

declared measure taken to comply, and the recommendations and rulings of the DSB.[184] However, Japan submits that the existence of a common overarching measure may be one of several factors to be considered in the assessment of whether there are sufficiently close links, in terms of timing, nature, and effects, between the undeclared measure at issue and the declared measure taken to comply and the recommendations and rulings of the DSB, and is neither a prerequisite nor a decisive factor as the European Union appears to posit.

6.4.1.5 Evaluation by the Panel

6.4.1.5.1 Introduction

6.80. The issue that is before us is whether the merits of the United States' claims with respect to the alleged adverse effects of the A350XWB LA/MSF measures may be properly considered in this dispute in order to determine whether the European Union and relevant member States have complied with the DSB recommendations and rulings adopted in the original proceeding. As already noted[185], the A350XWB LA/MSF measures did not exist and were not before the panel in the original proceeding. Moreover, the European Union did not identify the A350XWB LA/MSF measures in its Compliance Communication of 1 December 2011. Thus, the question we must resolve is whether a set of measures that were not expressly "declared" by the European Union to be "measures taken to comply" and were not the specific subject of the adopted DSB recommendations and rulings in the original proceeding may fall within the scope of this compliance dispute.

6.81. We note that whenever *any* measure reviewed in a proceeding initiated under Article 21.5 of the DSU is found to demonstrate a failure to comply with the recommendations and rulings of the DSB in an original proceeding, a complaining Member would generally be entitled to request compensation or authorization to suspend concessions.[186] At this stage of a dispute, the DSU does not afford a responding Member with the right to a second "reasonable period of time"[187] to bring its measures into conformity with the covered agreements. A finding that a measure which is *neither* a declared "measure taken to comply" *nor* the subject of specific DSB recommendations and rulings (i.e. a so-called "undeclared" measure) falls within the scope of a compliance proceeding may, therefore, have important implications for a WTO Member's rights and obligations under the DSU and the covered agreements in general. Thus, as cautioned by the Appellate Body, characterizing an act by a Member as a "measure taken to comply" when that Member maintains otherwise "is not something that should be done lightly by a panel".[188]

6.82. Nevertheless, there may well be situations when a measure that a responding Member argues falls outside of the scope of a compliance proceeding operates to undermine or effectively nullify the declared "measures taken to comply" or otherwise circumvent that Member's compliance obligations. To require that a complaining Member in these circumstances initiate a new proceeding under Article 6 of the DSU in order to challenge such an undeclared measure, may not only be at odds with the very notion of compliance that is advanced under the DSU but it might also be perceived as an inefficient use of the WTO's dispute settlement procedures, particularly if the undeclared measure is intrinsically linked to the WTO-inconsistent measures subject to the relevant recommendations and rulings of the DSB. One approach that we believe panels and the Appellate Body have developed to come to terms with such situations in a way that

[184] Japan's third-party response to Panel question No. 3 (citing Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77). See also Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 203).

[185] See above para. 6.53.

[186] Article 22.1 of the DSU prescribes that "{c}ompensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time". Furthermore, Article 22.2 provides that a "request for authorization from the DSB to suspend … concessions or other obligations granted under the covered agreements" cannot be made unless the responding Member fails to comply with the adopted recommendations and rulings "within the reasonable period of time determined pursuant to paragraph 3 of Article 21".

[187] Article 21.3 of the DSU provides that a responding Member "shall have a reasonable period of time" within which to comply with the recommendations and rulings adopted by the DSB.

[188] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 74.

respects the limited nature of the types of claims that can be brought in WTO compliance proceedings is referred to as the "close nexus" test.

6.83. Under the "close nexus" test, as elucidated by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*, any undeclared measure with a "particularly close relationship" to the declared measure taken to comply, and to the recommendations and rulings of the DSB, may be susceptible to review by a compliance panel. Determining whether this is the case requires panels to "scrutinize these relationships" in the context of the "factual and legal background" against which a declared measure taken to comply is adopted, which may, depending on the particular facts, call for an examination of the timing, nature and effects of the various measures. A compliance panel must on this basis determine whether there are "sufficiently close links" between the relevant measures and the DSB recommendations and rulings such that it would be appropriate to characterize the undeclared measure as a "measure taken to comply" and, consequently, to assess its consistency with the covered agreements in a proceeding initiated under Article 21.5 of the DSU.[189]

6.84. Although the close nexus test may not be the *only* basis for resolving the general question that is before us[190], we note that it has been the main focus of the parties' arguments. Accordingly, we begin our evaluation of the parties' positions with respect to the question whether the A350XWB LA/MSF measures fall within the scope of this compliance dispute by examining the merits of their submissions concerning the application of the "close nexus" test, starting by, first of all, assessing the European Union's arguments with respect to the relevance and relationship of the existence of an "overarching measure" to this analysis.

6.4.1.5.2 The relevance and relationship of the existence of an "overarching measure" to the close nexus test

6.85. In its first and second written submissions, the European Union argued that as part of the analysis of the relevant "factual and legal background" that informs the application of the close nexus test, a panel must, as a *threshold matter*, consider whether there is an "overarching measure". According to the European Union, where a complaining Member cannot make this "*requisite threshold showing*", there would be no need for a panel to proceed to examine the "additional factors" of the close nexus test, and the relevant undeclared measure could not be brought into the scope of the compliance dispute.[191] The clearest example of this line of argument is, in our view, captured by the following passage from the European Union's first written submission:

> Beyond the "particular factual and legal background" that must be considered in applying the "close nexus" test (including the threshold issue of whether there is an overarching measure, as discussed above), the Appellate Body has stated that determining jurisdiction over an alleged undeclared measure taken to comply "*may*, *depending on the particular facts*, call for an examination of the timing, nature, and effects of the various measures". In other words, these elements of "timing", "nature", and "effects" are additional factors that may be considered, depending on the facts. As explained above, if a complaining Member can not make the requisite threshold showing that the alleged undeclared measure taken to comply is an application of the overarching measure at issue in the original proceedings, or an application of the declared measure taken to comply, then there is no need for a compliance panel to proceed with any additional steps of the "close nexus" analysis.[192] (emphasis original; footnote omitted)

6.86. However, in its comments on the United States' responses to the Panel's questions following the substantive meeting, the European Union clarified that it does not argue "there must always be an overarching measure"[193], recognizing "the possibility that close nexus might be demonstrated

[189] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

[190] We do not exclude that there may be situations where the factual circumstances and legal provisions at issue in a particular compliance dispute call for a different approach to be taken.

[191] European Union's first written submission, paras. 70, 76, and 77; and second written submission, paras. 22, 25, and 36.

[192] European Union's first written submission, para. 76.

[193] European Union's comments on the United States' response to Panel question No. 85.

without expressly referring to an overarching measure".[194] Nevertheless, for the European Union, "the alleged existence of an overarching measure derived from the identification of an alleged pattern in instances of the application of such measure" and the close nexus test are "two ways of approaching what is essentially the same issue"; and, according to the European Union:

> {T}his issue, under the heading of whether or not there is an overarching measure (*i.e.*, an unwritten MSF Programme), was vigorously argued before the original panel in this particular dispute, and the United States lost. All the European Union is asking is that, now that the United States is pursuing essentially the same issue under the heading of whether or not there is a close nexus, the compliance Panel should remain consistent with the findings of fact that it made sitting as the original panel in the original proceedings. In short, in the original proceedings there was no overarching measure (because the measures were so different), and likewise there is no close nexus (because the measures are still different).[195]

6.87. In the light of these clarifications, we understand the European Union's argument to be essentially based on the following submissions: (a) an affirmative close nexus analysis and the existence of an overarching measure are two ways of showing that an undeclared measure may be found to be sufficiently connected with the "measures taken to comply" and the recommendations and rulings of the DSB, such that it may be brought into the scope of a compliance dispute; (b) the fact that the original panel found that the United States had failed to demonstrate the existence of an unwritten LA/MSF Programme means that there is no overarching measure and, therefore, no close nexus between the A350XWB and pre-A350XWB LA/MSF agreements and the adopted recommendations and rulings in this dispute; and (c) the findings of every Appellate Body report that has considered whether an undeclared measure may properly fall within the scope of a compliance proceeding support its approach. We are not persuaded by the European Union's submissions.

6.88. First of all, we detect an unexplained tension in the European Union's arguments. On the one hand, the European Union accepts that a complaining Member is *not required* to demonstrate the existence of an overarching measure in order to demonstrate that an undeclared measure may fall within the scope of a compliance dispute. On the other hand, the European Union maintains that, *in the present instance*, the United States' failure to identify the existence of an unwritten LA/MSF Programme (the alleged overarching measure) implies that the panel is *ipso facto* precluded from having jurisdiction over the United States' substantive claims against the A350XWB LA/MSF measures. The European Union "can only agree with the United States that the assessment must 'depend on the facts' about whether or not there is a 'close relationship' or whether or not the measures are different".[196] Yet, according to the European Union, the mere fact that an unwritten LA/MSF Programme (the alleged overarching measure) does not exist should be decisive in determining the merits of the United States' scope claims, notwithstanding the multiple other factors the United States relies upon to demonstrate the existence of the requisite "close relationship". In our view, the European Union has failed to adequately explain why the non-existence of an unwritten LA/MSF Programme must necessarily direct us to reject the United States' scope claims with respect to the A350XWB LA/MSF, given that: (a) it believes there is, in principle, *no requirement* to demonstrate the existence of an overarching measure, and (b) it recognizes that *all relevant facts* must be taken into account when assessing whether an undeclared measure falls within the scope of a compliance proceeding. In other words, we are unable to find merit in the European Union's submissions because we do not understand the European Union's reasons for believing that the principles it accepts should apply in general have no application on the basis of the facts of the present dispute.

6.89. Second, we do not understand the Appellate Body's findings in the disputes the European Union relies upon to support its position. The European Union maintains that an overarching measure was *implicitly* at the centre of the Appellate Body's findings and analyses in three compliance disputes: *US – Softwood Lumber IV (Article 21.5 – Canada)*; *US – Zeroing (EC) (Article 21.5 – EC)*; and *US – Upland Cotton (Article 21.5 – Brazil)*. In our view, however, and as we explain in more detail below, no overarching measure of the kind described in the

[194] European Union's comments on the United States' response to Panel question No. 80.
[195] European Union's comments on the United States' response to Panel question No. 80.
[196] European Union's comments on the United States' response to Panel question No. 84.

European Union's submissions existed in the first two disputes; and although it could be argued that an overarching measure was present in the *US – Upland Cotton (Article 21.5 – Brazil)*, it was certainly not because of this fact alone that the Appellate Body found the relevant undeclared measures to fall within the scope of the compliance dispute. Rather, in this latter dispute, the existence of what could be argued to be an overarching measure was one of several facts that became important considerations in the light of the Appellate Body's interpretation of the United States' compliance obligation under Article 7.8 of the SCM Agreement.

6.90. The European Union asserts that the overarching measure in *US – Softwood Lumber IV (Article 21.5 – Canada)* was the *final countervailing duty order*, pursuant to which the European Union alleges the United States "adopted": (a) the measure at issue in the original proceeding (a final countervailing duty determination made by the United States Department of Commerce (USDOC)); (b) the declared measure taken to comply (a revised determination of the final countervailing duty determination at issue in the original proceeding pursuant to Section 129 of the US Uruguay Round Agreements Act); and (c) the undeclared measure found to be a "measure taken to comply" (the first administrative review conducted in the same countervailing duty proceeding).[197] However, contrary to the European Union's assertions, the declared "measures taken to comply" and the undeclared measures in *US – Softwood Lumber IV (Article 21.5 – Canada)* were *not* "adopted" pursuant to the same legal provision or by means of the application of the same measure. Rather, as explained by the Appellate Body:

> {The} two distinct measures were taken under two separate legal provisions: (i) a determination under Section 129, which is the United States' legal framework for issuing new determinations to comply with recommendations and rulings of the DSB; and (ii) an administrative review determination, which was required to be issued in the ordinary course of the application of the United States' countervailing duty laws.[198]

6.91. Moreover, the Appellate Body articulated the logic underpinning its ruling in *US – Softwood Lumber IV (Article 21.5 – Canada)* in the following terms:

> Because the administrative review determination had the effect of undermining compliance with the DSB's recommendations and rulings, and because both measures concerned the same analysis of subsidies for softwood lumber production, the Appellate Body found that the administrative review determination was so "inextricably linked" and "clearly connected" to the Section 129 determination as to fall within the scope of the Article 21.5 panel's mandate. … The dispute in *US – Softwood Lumber IV (Article 21.5 – Canada)* concerned the identification of closely connected measures so as to avoid circumvention.[199] (footnote omitted)

6.92. Thus, it was not because the relevant measures at issue in *US – Softwood Lumber IV (Article 21.5 – Canada)* resulted from the application of any "overarching measure" that the Appellate Body ultimately found the undeclared measure to fall within the scope of the compliance proceeding, but rather because the undeclared measure "had *the effect of undermining compliance* with the DSB's recommendations and rulings" and because, in addition, both the declared *and* undeclared measures "concerned *the same analysis of subsidies* for softwood lumber production". While this latter fact was a point in common between the declared "measure taken to comply" and the undeclared measure, it did not result from the *application* of the "overarching measure" the European Union asserts existed in this dispute – namely, the *final countervailing duty order*. Indeed, the only place in the Appellate Body's findings where the final countervailing duty order is referred to is when the United States' request for a preliminary ruling in the compliance panel proceeding is quoted in the introduction to the Appellate Body's analysis.[200] The alleged "overarching measure" is neither relied upon nor discussed anywhere else in the Appellate Body's findings.

6.93. Likewise, the European Union argues that multiple "overarching measures" arose in the *US – Zeroing (EC) (Article 21.5 – EC)* dispute. In its first written submission, the European Union

[197] European Union's first written submission, paras. 72 and 80.
[198] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 205.
[199] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 205.
[200] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 56.

identifies the relevant "overarching measures" to be the *anti-dumping duty orders* pursuant to which the United States allegedly "adopted": (a) the measures at issue in the original proceeding (16 original anti-dumping investigations and 15 administrative reviews); (b) the declared "measures taken to comply"[201]; and (c) the undeclared measures found to be "measures taken to comply" (determinations made in subsequent reviews, changed circumstances reviews and sunset reviews conducted under the various anti-dumping proceedings).[202] In its second written submission, the European Union appears to suggest that there was another "overarching measure" in *US – Zeroing (EC) (Article 21.5 – EC)*, namely, the "zeroing" "instruction in a computer programme", as evidenced by "a general computer programme designed to be adapted and used in particular cases" and various instances of the computer programme's application.[203]

6.94. We are not convinced that the European Union's reliance on *US – Zeroing (EC) (Article 21.5 – EC)* is based on an accurate characterization of the relevant facts or the analytical approach adopted by the Appellate Body. In *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body considered the extent to which a number of administrative, changed circumstances and sunset review determinations that followed the 15 original anti-dumping investigations and 16 administrative reviews challenged in the original proceeding fell within the scope of the compliance proceeding. All of these measures were, in fact, adopted in the ordinary course of the application of the United States' anti-dumping regime and, to this extent, closely connected to the relevant anti-dumping duty orders the European Union argues were the "overarching measures" in this case. However, as in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the United States' declared compliance measures, which we understand to be the focus of the European Union's arguments, were "Section 129 Determinations" adopted under the United States Uruguay Round Agreements Act[204] and, therefore, enacted under a *different* legal basis to the undeclared measures at issue. Thus, the European Union errs when it asserts that the United States' declared "measures taken to comply" in *US – Zeroing (EC) (Article 21.5 – EC)* were "adopted" pursuant to the same anti-dumping duty orders that provided the legal basis for the measures challenged in the original proceeding *and* the undeclared measures.

6.95. It is true that the anti-dumping duty orders the European Union argues were the "overarching measures" in *US – Zeroing (EC) (Article 21.5 – EC)* were in fact considered by the Appellate Body in the context of determining whether the relevant nexus existed between the "*nature* or subject matter" of the relevant measures and the DSB recommendations and rulings. The existence of the anti-dumping duty orders enabled the panel and the Appellate Body to link each of the *undeclared measures* with the measures challenged in the original proceeding and the rulings and recommendations adopted by the DSB. To this extent, the anti-dumping duty orders were clearly part of the relevant "factual and legal background" against which the declared measures had been adopted. However, it was the *use of zeroing* that was explicitly found to be the point in common between the undeclared measures and the *declared* "measures taken to comply":

> In our view, the use of zeroing in the excluded subsequent reviews provides the necessary link, in terms of *nature* or subject matter, between {the undeclared} measures, the declared measures "taken to comply", and the recommendations and rulings of the DSB. All the excluded subsequent reviews were issued under the same respective anti-dumping duty order as the measures challenged in the original proceedings, and therefore constituted "connected stages … involving the imposition, assessment and collection of duties under the same anti-dumping order". Moreover, as the Panel correctly noted, the issue of zeroing was the precise subject of the recommendations and rulings of the DSB, the only aspect of the original measures

[201] We note that the European Union did not specifically identify the relevant *declared* "measures taken to comply" in its first written submission, citing Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 212. In our view, this citation discusses the relevant *undeclared* measures that were ultimately found to be "measures taken to comply", but not the declared "measures taken to comply".

[202] European Union's first written submission, para. 73.

[203] European Union's second written submission, para. 29. It is not clear to us whether the European Union refers to the "zeroing" "instruction in a computer programme" as an "overarching measure" or as an example of the *commonality* between the "overarching measures" (the relevant anti-dumping duty orders) and the declared and undeclared "measures taken to comply".

[204] Other declared "measures taken to comply" in this dispute included: (a) the United States' termination of the use of "model zeroing" in original investigations in which the weighted average-to-weighted average comparison methodology is applied; and (b) the revocation of anti-dumping duty orders in four cases. (Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 209)

> that was modified by the United States in its Section 129 determinations, and is the only aspect of the excluded subsequent reviews challenged by the European Communities in these proceedings. These pervasive links, in our view, weigh in favour of a sufficiently close nexus, in terms of *nature* or subject matter, between the excluded subsequent reviews, the declared measures "taken to comply", and the recommendations and rulings of the DSB, insofar as the use of zeroing is concerned.[205] (emphasis original; underline added; footnotes omitted)

6.96. Thus, while the Appellate Body relied upon the fact that the undeclared measures could all be linked to the relevant underlying anti-dumping duty orders to establish the necessary close nexus in terms of "*nature* and subject matter", we do not understand the Appellate Body's findings to have *implicitly* elevated the existence of those anti-dumping duty orders to be a determinative element of the overall close nexus test. Indeed, it is apparent that the existence of the anti-dumping duty orders was simply one relevant fact in the context of scrutinizing the relationships between the *undeclared* measures and the measures examined in the original proceeding with respect to which the DSB adopted recommendations and rulings. Moreover, we note once more that, as in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the anti-dumping duty orders *did not* connect the undeclared measures or the DSB recommendations and rulings with the *declared* "measures taken to comply". Rather, the one critical point in common between the declared "measures taken to comply", the undeclared measures *and* the DSB recommendations and rulings was the use of zeroing.

6.97. The Appellate Body relied upon a very similar line of reasoning to dispose of the United States' "other appeal" to the original panel's close nexus analysis in *US – Zeroing (EC) (Article 21.5 – EC)* with respect to two administrative reviews in which the USDOC had adopted a different zeroing methodology to the zeroing methodology applied in the original investigation and found to be WTO-inconsistent in the original proceeding. The United States argued that the original panel had erred in finding that "successive determinations of different types in the context of a single trade remedy proceeding {that is, under the same anti-dumping duty order} 'form part of a continuum of events and measures that are all inextricably linked'". According to the United States, "a 'closer connection between the declared measure taken to comply and the alleged additional measure' must exist for the latter to fall within the scope of Article 21.5 proceedings, because *by definition administrative reviews will usually have the same product and country coverage as the original investigation*".[206] The Appellate Body agreed with the United States that "identity in terms of product and country coverage alone would be an insufficient basis for" establishing the necessary close nexus, recalling that in *US – Softwood Lumber IV (Article 21.5 – Canada)* it had recognized that "not 'every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel'."[207] However, in the light of the particular factual circumstances of the case at hand, the Appellate Body considered that:

> *{T}he use of zeroing* in the 2004-2005 administrative reviews {(the relevant undeclared measures)} … establishes a link in terms of nature or subject matter between those reviews, the recommendations and rulings of the DSB, and the declared measures "taken to comply" – that is, the Section 129 determinations … .[208] (emphasis added)

6.98. The Appellate Body once again relied upon the existence of *anti-dumping duty orders* underlying the relevant administrative reviews to connect the nature and subject matter of the administrative reviews (the undeclared measures) with the investigations at issue in the original proceeding[209], observing furthermore that:

> Each of these proceedings involved the calculation of a margin of dumping, either for the purposes of establishing the existence of dumping and the initial cash deposit rate of the estimated dumping duty liability, or for the final assessment of dumping duty liability on past entries. In each instance, the *use of the zeroing methodology* arose in

[205] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230.
[206] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 237. (emphasis added; footnote omitted)
[207] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 239. (footnote omitted)
[208] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 239.
[209] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 240.

> the context of calculating estimated margins of dumping for particular exporters, or assessment rates for particular importers.[210] (emphasis added; footnote omitted)

6.99. Indeed, the Appellate Body found it:

> {S}ignificant that the *use of zeroing* was the only aspect of the original measures at issue that was corrected by the United States in response to the recommendations and rulings of the DSB. Indeed, the Section 129 determinations in Cases 1 and 6, which are the United States' declared measures "taken to comply", simply recalculated—without zeroing—the margins of dumping calculated in the original proceedings. This, in our view, tends to confirm the close nexus, in terms of subject matter and nature, between the declared measures "taken to comply", the recommendations and rulings of the DSB in the original proceedings, and the use of zeroing in the 2004-2005 administrative reviews in Cases 1 and 6 {the undeclared measures}.[211] (emphasis added)

6.100. Finally, the Appellate Body recalled that it had determined in *US – Continued Zeroing* that the use of zeroing in "successive determinations" under the same anti-dumping duty order constitutes *a measure that is challengeable in WTO dispute settlement*. For the Appellate Body, it followed from its findings with respect to the existence of this *unwritten zeroing norm* that "the subsequent reviews at issue in this case, in which that zeroing methodology is applied, are sufficiently connected in nature or subject matter so as to fall within the scope of these Article 21.5 proceedings".[212]

6.101. Thus, while it is apparent that the existence of the anti-dumping duty orders underlying the United States' undeclared measures (the two administrative reviews) was a consideration that informed the Appellate Body's evaluation of the United States "other appeal" in *US – Zeroing (EC) (Article 21.5 – EC)*, we do not understand the Appellate Body to have considered it to be anything more than one of features of the relationship between the *undeclared* measures and the *original* measures that were the subject of the adopted DSB recommendations and rulings. The Appellate Body *did not* rely upon the anti-dumping duty orders to establish a relevant relationship with the United States' *declared* "measures taken to comply", which were instead found to be connected to the undeclared measures and the DSB recommendations and rulings because of the use of zeroing.

6.102. Turning finally to *US – Upland Cotton (Article 21.5 – Brazil*), we note that the European Union characterizes the subsidy programme that was the legal basis for the subsidy measures challenged in the original proceeding *and* the undeclared measures – in both cases, marketing loans and counter-cyclical payments – as the "overarching measure".[213] We find the European Union's reliance on *US – Upland Cotton (Article 21.5 – Brazil)* to be misplaced. The relevant scope question in this dispute was whether certain "marketing loan and counter-cyclical payments" made under a subsidy programme that was the same legal basis for the marketing loan and counter-cyclical payments found to be WTO-inconsistent in the original proceeding, could be challenged in the compliance proceeding. The European Union maintains that the Appellate Body's approach in this appeal is "a specific example of the close nexus test in operation".[214] While this might be one way to characterize the Appellate Body's approach in *US – Upland Cotton (Article 21.5 – Brazil)*, as already noted, it was not because of the existence of the relevant subsidy programme that the Appellate Body found the relevant undeclared measures to fall within the scope of the compliance dispute. Rather, the existence of what could be argued to be an overarching measure was *one of several facts* that became important considerations in the light of the Appellate Body's interpretation of the United States' compliance obligation under Article 7.8 of the SCM Agreement.[215]

6.103. In confirming the panel's finding that the United States' undeclared subsidy measures could be brought within the scope of the compliance proceeding, the Appellate Body relied heavily

[210] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 240.
[211] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 242.
[212] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 245.
[213] European Union's first written submission, para. 74; and response to Panel question No. 81.
[214] European Union's response to Panel question No. 81.
[215] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 247.

on its interpretation of the text, context and object and purpose of Article 7.8, as well as considerations related to the effectiveness of the actionable subsidies disciplines of Articles 5 and 6 of the SCM Agreement and various provisions of the DSU.[216] While the Appellate Body's analysis also referred to the fact that the undeclared measures had been adopted pursuant to the same subsidy programme as the subsidy measures challenged in the original proceeding[217], it is apparent that this was only one of a constellation of facts and considerations the Appellate Body used to support its reasoning. Ultimately, the Appellate Body decided to uphold the panel's findings, not because of the existence of the subsidy programme as the "overarching measure", but rather because it found that that the undeclared subsidy measures fell within the scope of the United States' compliance obligation under the terms of Article 7.8:

> {I}n the case of recurring annual payments, the obligation in Article 7.8 would extend to payments "maintained" by the respondent Member beyond the time period examined by the panel for purposes of determining the existence of serious prejudice, as long as those payments continue to have adverse effects. Otherwise, the adverse effects of subsequent payments would simply replace the adverse effects that the implementing Member was under an obligation to remove. Such a reading of Article 7.8 would not give meaning and effect to the term "maintain", which is distinct from the term "grant", and has also been included in that Article. Indeed, it would render the term "maintain" redundant. In addition, it would fail to give meaning and effect to the obligation to "take appropriate steps to remove the adverse effects" in Article 7.8, and to the requirement under Article 21.5 to "comply" with the DSB's recommendations and rulings, including the requirement to take the remedial action foreseen in Article 7.8 as a consequence of a finding of adverse effects.
>
> Our interpretation of Article 7.8 is consistent with the context provided by Article 4.7 of the *SCM Agreement*, which applies in cases involving prohibited subsidies. In *US – FSC (Article 21.5 – EC II)*, the Appellate Body stated that, "if, in an Article 21.5 proceeding, a panel finds that the measure taken to comply with the Article 4.7 recommendation made in the original proceedings does not achieve *full* withdrawal of the prohibited subsidy—either because it leaves the entirety or part of the original prohibited subsidy in place, or because it replaces that subsidy with another subsidy prohibited under the *SCM Agreement*—the implementing Member continues to be under the obligation to achieve full withdrawal of the subsidy". Similarly, a Member would not comply with the obligation in Article 7.8 to withdraw the subsidy if it leaves an actionable subsidy in place, either entirely or partially, or replaces that subsidy with another actionable subsidy.[218] (emphasis original; footnotes omitted)
>
> {T}he approach advocated by the United States would have serious implications for a complaining Member's ability to obtain relief against adverse effects of actionable subsidies. Under such an approach, a complaining Member that has demonstrated that subsidies provided by another Member have resulted in adverse effects would obtain relief only with respect to any lingering effects of the subsidies provided during the period examined by the panel. As Australia notes, such panel findings would essentially be declaratory in nature, because there would be no impact on subsidies granted or maintained after the panel made its finding. The complaining Member would have to initiate another dispute to obtain relief with respect to payments made after the period examined by the panel, even if those subsidies are recurring payments or otherwise of the same nature as those found to have resulted in adverse effects. Even if the complaining Member were to succeed in its claims a second time, the subsidizing Member could provide further subsidies after the second panel's ruling, and the complaining Member would have to initiate yet another dispute, and this cycle could continue. As Brazil and several of the third participants have warned, the inability of a complaining Member to obtain relief against subsidies that result in

[216] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 236-248.

[217] Indeed, at the beginning of its analysis, the Appellate Body stated that it had "difficulty accepting the notion that a subsidy programme and the payment provided under that programme can be assessed separately". (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 234)

[218] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 237-238.

> adverse effects to its interests would seriously undermine the disciplines contained in Articles 5 and 6 of the SCM Agreement.[219] (footnotes omitted)

6.104. Thus, our reading of the facts and findings made in the three compliance disputes the European Union relies upon leads us to conclude that, contrary to the European Union's assertions, countervailing and anti-dumping duty orders were not overarching measures pursuant to which the declared "measures taken to comply" *and* the undeclared measures were "adopted" in the *US – Softwood Lumber IV (Article 21.5 – Canada)* and *US – Zeroing (EC) (Article 21.5 – EC)* proceedings. Moreover, although the relevant subsidy programme that was at issue in *US – Upland Cotton (Article 21.5 – Brazil)* could be characterized as an overarching measure, as conceived by the European Union, we do not understand the Appellate Body to have considered the relationship between the subsidy programme and the undeclared subsidy measures as anything more than one of several factors upon which to base its finding. In the two former trade remedy compliance disputes, the Appellate Body used the "factual and legal background" of the declared "measures taken to comply" to inform its analyses of the relationships between the various measures and the DSB recommendations and rulings; whereas in the latter dispute (the only one of the three dealing with actionable subsidies), the Appellate Body's analysis focused primarily on understanding the extent to which the undeclared subsidy measures fell within the scope of the compliance obligation prescribed in Article 7.8 of the SCM Agreement. The fact that the undeclared measures in *US – Upland Cotton (Article 21.5 – Brazil)* were subsidy payments made under the same subsidy programme at issue in the original proceeding became an important consideration because of the Appellate Body's finding that the United States' compliance obligation extended to subsidies that it continued to "maintain".[220] In other words, the existence of the alleged overarching measure (the subsidy programme) was used to show that the United States had "maintained" the same subsidies.

6.105. Finally, we note that apart from the *US – Softwood Lumber IV (Article 21.5 – Canada)* and *US – Zeroing (EC) (Article 21.5 – EC)* disputes, there have been two other compliance disputes in which panels have found undeclared measures to fall within the scope of their terms of reference in the absence of the existence of an overarching measure of the kind described by the European Union. At issue in the first of these two cases, *Australia – Salmon (Article 21.5 – Canada)*, was whether the compliance panel could examine an import ban on salmon that had been adopted by the Australian state of Tasmania shortly after the Australian federal government had notified a number of steps that it had taken in order to remove the inconsistencies identified by the original panel regarding its treatment of imported salmon. In reaching the conclusion that it could examine this ban, the panel looked at the timing of the ban, in particular, the fact that it was introduced "subsequent to the adoption on 6 November 1998 of DSB recommendations and rulings in the original dispute—and within a more or less limited period of time thereafter"[221]; as well as the nature of the ban, which was, like the measures challenged in the original proceeding, "a quarantine measure … that applies to imports of fresh chilled or frozen salmon from Canada".[222]

6.106. In the second dispute, *Australia – Automotive Leather II (Article 21.5 – US)*, Australia withdrew from a company a grant that had been found to be a prohibited subsidy. At the same time, Australia granted a loan on non-commercial terms to a related company. The loan was specifically conditioned on repayment of the original subsidy. Although Australia argued that the loan was "not part of the implementation of the DSB's ruling and recommendation" and did not, therefore, fall within the scope of the Article 21.5 proceeding[223], the panel disagreed. It found that the loan fell within the scope of its terms of reference because, *inter alia*, the loan at issue was "inextricably linked" to the measure that Australia itself stated it had taken to comply, "in view of both its timing and its nature".[224] The panel in *Australia – Automotive Leather II (Article 21.5 – US)* also explained that, to have excluded the new loan offered by Australia from its mandate,

[219] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 245.

[220] As already noted, however, the Appellate Body had also earlier stated that it had "difficulty accepting the notion that a subsidy programme and the payment provided under that programme can be assessed separately". (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 234)

[221] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subparagraph 22.

[222] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subparagraph 22.

[223] Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.1.

[224] Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.5.

would have "severely limit{ed its} ability to judge, on the basis of the United States' request, whether Australia ha{d} taken measures to comply with the DSB's ruling."[225]

6.107. In both *Australia – Salmon (Article 21.5 – Canada*) and *Australia – Automotive Leather II (Article 21.5 – US*), there was clearly no overarching measure, as conceived by the European Union. Neither were there any measures akin to the countervailing and anti-dumping duty orders that were part of the relevant "factual and legal background" in *US – Softwood Lumber IV (Article 21.5 – Canada*) and *US – Zeroing (EC) (Article 21.5 – EC).* Yet the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada*) explicitly endorsed the panels' findings, describing them as "useful illustrations" of when it would be appropriate to conclude that an undeclared measure falls within the scope of a compliance proceeding.[226]

6.108. We conclude, therefore, that there is no basis in the relevant WTO case law to accept the European Union's contention that the existence of an overarching measure and an affirmative close nexus analysis are "two ways of approaching what is essentially the same issue".[227] Rather, as we see it, the existence of an overarching measure as conceived by the European Union may be one fact – one piece of evidence – that could be used to support the existence of a relationship between an undeclared measure, a "measure taken to comply" and the recommendations and rulings of the DSB, that is sufficiently close to bring the undeclared measure into the scope of a compliance proceeding. Thus, ultimately, in our view, the appropriate place to consider the merits of the European Union's submissions concerning the non-existence of an overarching measure in this dispute (namely, the unwritten LA/MSF Programme), is in the context of our analysis of the parties' arguments with respect to the application of the close nexus test. We evaluate the merits of the parties' submissions in the following subsection.

6.4.1.5.3 Application of the close nexus test

6.4.1.5.3.1 Nature

6.109. We do not understand the European Union to deny that the A350XWB LA/MSF measures and the pre-A350XWB LA/MSF measures were all *loan agreements* entered into by essentially *the same parties* (Airbus and the Airbus governments) for the purpose of *financing the development of each and every new model of Airbus LCA* that has ever been launched and brought to market.[228] The European Union does, however, contest the United States' assertion that there are similarities in the "core" terms of all LA/MSF measures and that such alleged similarities support the view that the A350XWB LA/MSF agreements have essentially the same nature as the pre-A350XWB LA/MSF measures. According to the European Union, the United States' submissions with respect to the "core" terms of LA/MSF were already rejected by the panel in the original proceeding "because of the *differences* between the various measures and the fact that there is nothing that inherently binds them together as necessarily involving subsidies."[229] Indeed, the European Union recalls that in analysing the United States' allegations concerning the existence of an unwritten LA/MSF Programme in the original proceeding, the panel found that:

> {T}he vast majority of terms and conditions of each LA/MSF contract are different, reflecting not only the individual characteristics of the Airbus entity and LCA

[225] Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.5.
[226] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 74.
[227] European Union's comments on the United States' response to Panel question No. 80.
[228] The panel found in the original proceeding that "{s}ince its establishment in 1970, the governments of France, Germany, Spain and the UK have to varying degrees entered into LA/MSF agreements with Airbus for the purpose of funding the development of six new models of LCA (the A300, A310, A320, A330, A340 and A380) as well as three variants (the A330-200 and A340-500/600). The proportion of development costs financed through LA/MSF has diminished over the years, from close to 100% for the early projects (the A300 and A310) down to a maximum of 33% of development costs for LCA projects financed after the entry into force of the 1992 Agreement (the A330-200, A340-500/600 and A380)." (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.369) (footnotes omitted)
[229] European Union's second written submission, para. 32. (emphasis original; footnotes omitted)

development project being funded, but also the policy objectives, legal culture and particular demands of the relevant EC member State funding the project.[230]

6.110. The European Union also points to the original panel's conclusion that "below-market interest rates are not an explicit feature of LA/MSF contracts" and that there is "nothing inherent in the LA/MSF contracts which, in and of itself, renders them a form of financing that by definition will always involve below-market interest rates".[231] For the European Union, these original panel findings demonstrate that the United States errs when it argues that all of the LA/MSF measures have similar "core" terms and that this implies that they all have essentially the same nature. We are not convinced by the European Union's submissions.

6.111. The European Union characterizes the United States' arguments with respect to the similarities in the "core" terms of the LA/MSF agreements to be focused on the allegation that their repayment terms are all success-dependent, back-loaded, levy-based, unsecured *and on interest rate terms that are more favourable than would be available on the market*. However, in our view, the United States' submissions have been consistently focused on only the first four of these five allegedly common features of the LA/MSF measures, namely, success-dependent, back-loaded, levy-based and unsecured repayment terms. The United States does not rely upon the allegedly below-market interest rates associated with the A350XWB LA/MSF measures *for the purpose of substantiating its assertions with respect to the similarities in the nature of all of the LA/MSF measures*.[232]

6.112. Neither do we believe that the United States was required to demonstrate that the A350XWB LA/MSF measures are provided at below-market interest rates (as all pre-A350XWB LA/MSF) in order to establish that all of the LA/MSF measures have essentially the same *nature*. We agree with the European Union that whether the A350XWB LA/MSF measures are provided at below-market interest rates is a question of substance that is outside of the boundaries of the jurisdictional matter with which we are concerned in this part of our Report, namely, whether the A350XWB LA/MSF measures fall within the *scope* of this compliance proceeding. It is only if this question is answered affirmatively that the United States would be entitled to have us consider its claims concerning the alleged subsidization of the A350XWB. Thus, the fact that the original panel found that there is "nothing inherent in the LA/MSF contracts which, in and of itself, renders them a form of financing that by definition will always involve below-market interest rates", does not undermine the United States' scope arguments. Indeed, to require that undeclared measures share the same WTO legal characteristics as the original measures in order to be within the scope of a compliance panel's terms of reference, and then to decline to exercise jurisdiction on the grounds that such a legal question is outside a compliance panel's jurisdiction, would be to place complainants in a Catch-22 situation.

6.113. Moreover, contrary to the European Union, we do not understand the United States' assertions concerning the allegedly success-dependent, back-loaded, levy-based and unsecured repayment terms of all LA/MSF measures to be "tantamount to reasserting"[233] the unsuccessful submissions it made in the original proceeding with respect to the alleged existence of an unwritten LA/MSF Programme. We recall that in the original proceeding, the United States argued that the governments of France, Germany, Spain, and the United Kingdom had maintained "a formal and institutionalized industrial policy towards Airbus, a central part of which {was} the 'systematic and coordinated' provision of LA/MSF subsidies to assist Airbus develop a family of LCAs" evidencing "the existence of {an unwritten} LA/MSF Programme".[234] According to the United States, the existence of the unwritten LA/MSF Programme could be established on the basis of several alleged facts, which considered together demonstrated that "the Airbus governments have systematically provided Airbus with a significant portion of the capital needed and sought by Airbus to develop each and every new LCA model through unsecured loans granted on back-loaded

[230] European Union's first written submission, para. 99 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.525).

[231] European Union's first written submission, para. 98 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.531).

[232] See e.g. United States' first written submission, paras. 106, 140, and 147; and second written submission, para. 89.

[233] European Union's first written submission, para. 107.

[234] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.498.

and success-dependent repayment terms, at below-market interest rates".[235] The alleged facts the United States relied upon for this purpose were: "(i) the existence of institutional apparatus established under various inter-governmental agreements to support the systematic application of LA/MSF; (ii) the provision of LA/MSF on essentially the same terms and conditions in respect of each new model of LCA developed by Airbus; (iii) statements by officials of the Airbus governments expressing their alleged commitment to the continuity of the LA/MSF Programme, (iv) statements by executives of Airbus and EADS allegedly evidencing reliance on LA/MSF; and (v) the perceptions of LA/MSF held by different credit rating agencies."[236] Thus, it is apparent that the arguments advanced by the United States in the original proceeding with respect to the alleged existence of the unwritten LA/MSF Programme were very different to the submissions the United States makes in this compliance dispute with respect to the four "core" terms of LA/MSF and, in particular, with respect to the relevance of these terms to showing that all LA/MSF measures are of essentially the same nature.

6.114. We note, furthermore, that although the original panel rejected the United States' assertions concerning the existence of the unwritten LA/MSF Programme, this was *not* because the United States had failed to establish that the "core" terms of LA/MSF were similar. On the contrary, the findings made by original panel confirmed that while the terms and conditions of no two LA/MSF agreements were identical, they all could be said to contain the same "core" repayment terms:

> As to the differences that exist between the terms and conditions of the various LA/MSF contracts, it is true that the EC member States did not adopt a standard approach or apply the same contractual template when entering into LA/MSF agreements. Overall, the vast majority of terms and conditions of each LA/MSF contract are different, reflecting not only the individual characteristics of the Airbus entity and LCA development project being funded, but also the policy objectives, legal culture and particular demands of the relevant EC member State funding the project. For instance, the financing provided under the first series of LA/MSF contracts represented a much larger proportion of development costs compared with the LA/MSF contracts entered into after the entry into force of the 1992 Agreement. Not all of the EC member State governments required the payment of royalties; and when royalties were called for, they were envisaged in different forms and over varying periods of time. Moreover, the structure of the back-loaded and success-dependent repayment terms found in each contract was not always the same; and in terms of interest rates, where these were identified in the contracts, they were usually set at different levels, at times through the application of different formulas. There are other terms and conditions that vary between the contracts. *However, in the light of our findings in respect of the individual LA/MSF measures, there is no doubt that all of the challenged LA/MSF contracts may be characterised as unsecured loans granted to Airbus on back-loaded and success-dependent repayment terms,* at below-market interest rates, *for the purpose of developing various new models of LCA.* While not demonstrating that the LA/MSF Programme described by the United States actually exists, the contracts do show that *every time LA/MSF was provided in the past, it involved the four "core terms" the United States identifies.*[237] (emphasis added; footnotes omitted)

6.115. Indeed, the United States' characterization of the "core" terms of the pre-A350XWB LA/MSF subsidies is also supported by more specific findings made by the original panel with respect to each of the relevant LA/MSF measures. Thus, for example, the original panel found:

> Repayment of LA/MSF takes essentially the same form under each contract. In almost all cases, Airbus is required to *reimburse all funding contributions, plus any interest at the agreed rate, exclusively from revenues generated by deliveries* of the LCA model that is financed. Such repayments are made in the form of *per-aircraft levies* and follow a pre-established repayment schedule. Usually, repayments start with the delivery of the first aircraft. However, in some instances, repayment begins only after

[235] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.499.
[236] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.499.
[237] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.525.

> Airbus has made a specified number of aircraft deliveries. Although the amount of the per-aircraft levies varies between the different contracts, it appears in all cases to be *graduated, such that repayment amounts at the beginning of the repayment period are lower than at the end*. In addition, for **[***]** of the contracts, royalty payments on a per-aircraft basis are called for on deliveries made in excess of the number needed to secure repayment of the disbursed principal plus any interest.
>
> LA/MSF is provided *without any guarantee of repayment* in the event that Airbus fails to make the number of deliveries needed to reimburse the full amount of financing obtained from the EC member States. In other words, the scheduled repayments are not secured by any lien on Airbus assets nor are they guaranteed by any third party. The European Communities points out that the governments' claims on revenues generated from the delivery of LCA are, in some cases, guaranteed by one of the companies forming part of the Airbus economic entity. However, notwithstanding this form of guarantee there is no obligation on Airbus (or any company forming part of the Airbus economic entity) to fully (and sometimes even partially) repay LA/MSF in the event that the delivery targets stipulated in the contractual repayment schedules are not achieved. Thus, we agree with the United States that Airbus' obligation to fully repay the loans provided under the challenged LA/MSF measures is *entirely dependent upon the success* of the particular LCA project. The fact that it is possible, under certain contracts, for Airbus to make voluntary repayments notwithstanding the number of sales achieved, does not, in our view, alter this conclusion.[238] (emphasis added; BCI brackets original; footnotes omitted)

6.116. Turning to the "core" terms of the A350XWB LA/MSF measures, we note that apart from asserting that the original panel had rejected the United States' contentions with respect to the similarities in the "core" terms of the *pre-A350XWB LA/MSF* measures, the European Union has not specifically responded to the United States' allegation that the repayment terms of *A350XWB LA/MSF* are success-dependent, back-loaded, levy-based and unsecured just like all other LA/MSF measures. Thus, we do not understand the European Union to contend that the repayment terms of the A350XWB LA/MSF measures are *not* overall success-dependent, back-loaded, levy-based and unsecured.[239] Indeed, for the reasons we explain elsewhere in this Report where we evaluate the merits of the United States' claims of subsidization[240], it is clear to us that although each of the relevant A350XWB loan contracts has its own particular characteristics and features (not unlike all other LA/MSF measures), each contract also contains the same "core" repayment terms identified by the United States.

6.117. The European Union advances three additional grounds which it considers demonstrate that the *nature* of the A350XWB LA/MSF measures and the pre-A350XWB LA/MSF measures are "significantly different".[241]

6.118. First, the European Union points out that the A350XWB LA/MSF measures were concluded more than **[***]** years *after* the launch of the A350XWB programme, explaining that, in contrast, the pre-A350XWB LA/MSF measures were all "generally entered into much closer in time to the launch of the related aircraft", on average **[***]** *after* launch.[242] For the European Union, this difference shows that "the A350XWB does indeed make a significant departure from previous programs".[243] Relying upon its own analysis of the period of time between the launch of an Airbus LCA and the conclusion of a related LA/MSF agreement[244], the United States argues that "the EU

[238] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.374-7.375.

[239] We note, in this regard, that the European Union did not object to the United States' assertion that "the parties both agree that LA/MSF for the A350XWB was granted by France, Spain, Germany and the UK to Airbus, for the purpose of developing a new model of large civil aircraft, on unsecured, success-dependent, levy-based, and back-loaded terms". (United States' second written submission, para. 90 and fn 138)

[240] See below paras. 6.225-6.287.

[241] European Union's first written submission, para. 104.

[242] European Union's first written submission, para. 105; second written submission, para. 37; and PricewaterhouseCoopers, "Analysis Addressing the United States' Comments on PwC's Report on the Expected Life of Subsidies to Airbus", 30 November 2012, (PwC Rebuttal Report), (Exhibit EU-120) (BCI), table 2.

[243] European Union's second written submission, para. 37.

[244] The United States explains that its analysis "may not be exhaustive, since the EU has not accounted for all past LA/MSF contracts with Airbus in a transparent manner" recalling that in the original proceeding,

member States frequently issued documents granting LA/MSF after (and in some cases, long after) the formal launch of the relevant aircraft".[245] The United States recalls that "these past differences in timing did not prevent the conclusion that LA/MSF enabled Airbus to bring the aircraft to market when and as it did". Accordingly, the United States maintains that the fact that A350XWB LA/MSF was provided after the launch of the A350XWB does not differentiate it "in any meaningful way" from the pre-A350XWB LA/MSF measures.[246]

6.119. We note that the data the parties have used to substantiate their assertions concerning the period of time between the launch of an Airbus LCA and the conclusion of a related LA/MSF agreement are not identical. Nevertheless, on the basis of the information presented by the European Union, it is apparent that over two-thirds of the pre-A350XWB LA/MSF agreements were entered into *after* the launch of an Airbus LCA. Thus, a first conclusion it is possible to draw from the European Union's data is that, in general, the pre-A350XWB LA/MSF agreements were concluded *after* launch, as were all four of the A350XWB LA/MSF contracts.

6.120. The information the European Union relies upon also reveals that of the pre-A350XWB LA/MSF measures entered into *before* the launch of a relevant Airbus LCA, the vast majority of these concerned Airbus' earliest models of LCA (the A300, A310, and A320), at a time when Airbus had little or no experience with twin-aisle or single-aisle aircraft and little or no revenue from LCA sales. Thus, of the nine LA/MSF agreements reported in the European Union's data as having been concluded *before* or *at the same time as* the launch of a financed Airbus LCA, seven related to the A300, A310, and A320. Moreover, it is apparent from the same data that the pre-A350XWB LA/MSF agreements were, on average, concluded much closer in time to the launch date of Airbus' three earliest models of LCA compared with its three subsequent models of LCA (the A330, A340, and A380), when Airbus would have had relatively more LCA experience and sales revenue. In particular, whereas 13 out of the 17 LA/MSF measures for the A300, A310, and A320 were entered into either *before* or *within 10 months* of the launch of the relevant LCA, eight of the 11 LA/MSF agreements concluded for the purpose of the A330, A340, and A380 were entered into only *12 months or more after* launch.

6.121. In our view, these facts suggest that the provision of pre-A350XWB LA/MSF has followed an evolving pattern of financing that has seen the Airbus governments and Airbus enter into LA/MSF agreements, on average, later in time relative to the launch of a particular Airbus LCA *as Airbus' position in the LCA sector has matured*. In this regard, we see a parallel between the evolution of the timing of the conclusion of the pre-A350XWB LA/MSF agreements and the gradually decreasing amounts of principal loaned under each of the pre-A350XWB LA/MSF agreements[247] and, in general, the progressively lower levels of subsidization granted by the Airbus governments over time[248], as Airbus has emerged as a credible and increasingly sophisticated player in the LCA industry. In this light, the fact that all four of the A350XWB LA/MSF measures were entered into *several years after* the launch of the A350XWB might well be considered to be simply another step in the evolution of LA/MSF that reflects Airbus' own, by now well-established, position in the LCA industry. Thus, rather than demonstrate that the *nature* of A350XWB LA/MSF is different to all other LA/MSF measures, the data concerning the timing relative to launch of the various LA/MSF measures which the European Union relies upon could, to this extent, be interpreted to suggest that, *not unlike all other LA/MSF*, the conclusion of the A350XWB LA/MSF contracts was timed in a way that reflected Airbus' status as a mature producer of LCA in 2006 and the years that immediately followed.

6.122. In any case, even excluding these considerations, we do not see how the difference in the timing of the conclusion of the A350XWB LA/MSF contracts compared with the pre-A350XWB

"the EU refused to provide the German A330/A340 contract even though the Panel had specifically asked the EU for it". (United States' second written submission, fn 144)

[245] United States' second written submission, para. 91.

[246] United States' second written submission, para. 92.

[247] The development costs covered by the principal provided under the respective LA/MSF agreements were: close to 100% for the A300; between 90% and 100% for the A310; between 70% and 90% for the A320; between 60% and 90% for the A330 and A340 basic; and up to a maximum of 33% for the A330-200, A340-500/600 and A380. (See e.g. Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.369)

[248] See e.g. Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.482-7.490; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 923-929.

LA/MSF measures demonstrates that they have a "significantly different" *nature*, given that they are all: (a) *loan* agreements; (b) containing the *same four "core" repayment terms*; (c) entered into by essentially *the same parties* (Airbus and the Airbus governments); and (d) for the purpose of *financing the development costs of Airbus LCA.* The European Union does not deny that the A350XWB LA/MSF agreements challenged by the United States are intended to finance part of the development costs of the A350XWB. Yet, according to the European Union, the fact that the A350XWB LA/MSF agreements were concluded much later in time relative to the launch of the A350XWB compared with pre-A350XWB LA/MSF means that the former must be found to have a "significantly different" nature. In our view, the European Union has failed to explain and substantiate its position. The pre-A350XWB LA/MSF measures were found in the original proceeding to have financed from 33% to 100% of the *development costs* of each and every model of Airbus LCA[249], thereby enabling Airbus to "launch, develop, and introduce to the market" its full range of LCA.[250] As the United States points out, the fact that a number of the pre-A350XWB LA/MSF agreements were concluded only *after* the relevant Airbus LCA were launched did not preclude the panel from making those findings, which were left undisturbed by the Appellate Body. Moreover, we note that in several instances, part of the principal loaned under the pre-A350XWB LA/MSF contracts could be used to cover costs incurred *prior to the conclusion of the relevant LA/MSF contract*.[251] The same possibility is made available under the French and UK A350XWB LA/MSF agreements.[252] To this extent, the fact that any such LA/MSF agreement *postdates* the launch of a relevant LCA does not render its nature any different to a LA/MSF agreement that *predates* the launch of an LCA, as in both cases, they are intended to finance the development costs of Airbus LCA.

6.123. Thus, we are not convinced that the differences in the mere timing of the conclusion of the A350XWB LA/MSF measures compared to the pre-A350XWB LA/MSF measures means that they are "significantly different" in terms of their *nature* for the purpose of the close nexus test.

6.124. The second additional ground the European Union appears to raise in support of its view that A350XWB LA/MSF and other LA/MSF measures have a different *nature* is that the former were not entered into pursuant to an intergovernmental agreement.[253] We note, however, that not all of the pre-A350XWB LA/MSF measures were provided under intergovernmental agreements, with French LA/MSF for the A330-200, French, and Spanish LA/MSF for the A340-500/600 and all four of the A380 LA/MSF measures concluded under separate national level contracts, not unlike (in this sense) the A350XWB LA/MSF measures.[254]

6.125. The third additional submission the European Union appears to make to substantiate its position concerning the difference in the *nature* of A350XWB LA/MSF compared with other LA/MSF is a response to an argument we do not understand the United States to be making. In particular, the European Union argues that in attempting to demonstrate that A350XWB LA/MSF is of the same nature as previous LA/MSF, the United States maintains that "a critical aspect of the 'nature' element is whether a measure targets 'the same products and the same parties'".[255] The European Union goes on to state that:

> Beyond the fact that the A350XWB is simply <u>not</u> the "same product" as the A300, A310, A330, or A340, this argument is unavailing as a legal matter, as the Appellate Body, in both *US – Softwood Lumber IV (Article 21.5 – Canada)* and *US –*

[249] See above fn 247.
[250] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1949.
[251] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.373.
[252] See discussion below at paras. 6.227 and 6.259-6.260.
[253] Although the European Union raises this argument in the context of its discussion of the *nature* of the A350XWB LA/MSF contracts for the purpose of the close nexus test, it is not clear to us whether the European Union advances it for this purpose or simply to show that the United States has failed to identify any "overarching measure" and, therefore, failed (for this reason alone) in its attempt to bring A350XWB LA/MSF within the scope of this compliance dispute. To the extent that the European Union intended the latter, we recall that we have previously found that the United States is under no obligation to identify an "overarching measure" in order to make out its claims. Thus, the fact that the A350XWB LA/MSF agreements may have been concluded in the absence of any intergovernmental agreements does not undermine the United States' claims.
[254] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.371 and 7.534-7.548.
[255] European Union's first written submission, para. 108 (quoting United States' first written submission, paras. 143-144).

> *Zeroing (Article 21.5 – EC)*, made it clear that identity of the product and country coverage … does not suffice to establish a close nexus.[256] (underline original; footnote omitted)

6.126. However, the United States does not argue that the A350XWB LA/MSF is of the same nature as other LA/MSF because it finances the development of a product that is *identical* to the A300, A310, A330, or A340. Rather, the United States' contention is that A350XWB LA/MSF is of the same *nature* to other LA/MSF because it finances the development of a *twin-aisle LCA product* – that is, a product which the United States argues is sold into the same twin-aisle product market – with respect to which pre-A350XWB LA/MSF was found to be a "genuine and substantial" cause of serious prejudice to its interests in the original proceeding.[257] Although we recognize that the fact that two measures may have the same product scope will not necessarily imply that they should be considered (for that reason alone) to be of the same *nature* for the purpose of a close nexus analysis, the fact that the A350XWB is the latest version of Airbus *twin-aisle LCA*, in our view, supports the United States' submissions concerning the close connection between the *nature* of the A350XWB LA/MSF measures and the LA/MSF measures at issue in the original proceeding.

6.127. Finally, we agree with the United States that several other pieces of evidence[258] provide strong support for the view that the pre-A350XWB LA/MSF measures and A350XWB LA/MSF have a similar *nature*. One such piece of evidence comes from the preamble of the Spanish A350XWB LA/MSF contract, in which the following statement is made:

> Our country, similar to France, Germany, and the United Kingdom, which host the other national subsidiaries of Airbus SAS, has been supporting the development of earlier models of Airbus aircraft through refundable advances given to the current subsidiary of Airbus SAS established in Spain or earlier to the company Construcciones Aeronauticas, S.A. The system of refundable advances through which the state shares the risks of the project with the company has produced as a result the facilitation of financing for the companies without cost for the taxpayer.[259]

6.128. In our view, this statement very clearly demonstrates that the parties to the Spanish A350XWB LA/MSF agreement (i.e. the Spanish State and Airbus Spain) see A350XWB LA/MSF to be part of the same "system of refundable advances" used to fund the development of Airbus' previous LCA programmes, in this way revealing that both Airbus Spain and the Spanish State recognize that A350XWB LA/MSF is, to this extent, of essentially the same *nature* as pre-A350XWB LA/MSF.

6.129. A similar recognition is, in our view, found in certain HSBI evidence from a document prepared by a different Airbus government in the first half of 2009 concerning the A350XWB project.[260] As we read them, the statements contained in the relevant passage quoted by the United States very clearly reveal that one of the Airbus governments considered that A350XWB LA/MSF could be affected by the outcome of the ongoing WTO dispute because of its similarity with pre-A350XWB LA/MSF, again, in our view, implying that this government also considered A350XWB LA/MSF was of the same *nature* as previous LA/MSF.

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[256] European Union's first written submission, para. 108.

[257] United States' first written submission, para. 147.

[258] The United States also points out that the EADS financial statements report the funding of A350XWB as an undifferentiated component of the broader historic total of LA/MSF. In our view, this fact reveals that, at least for accounting purposes, EADS considers that A350XWB LA/MSF to be of the same nature as pre-350XWB LA/MSF. (United States' first written submission, para. 156 and fn 233 (citing EADS Financial Statements, 2010, (Exhibit USA-6), p. 63))

[259] United States' first written submission, paras. 155-156 (quoting *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (United States' English Translation), (Exhibit USA-46), pp. 93091-93092; and citing UK Department for Business, Innovation and Skills, "The UK Strategic Investment Fund: Interim Report", October 2009, p. 15, (Exhibit USA-43); and EADS Financial Statements, 2010, (Exhibit USA-6), p. 63).

[260] United States' second written submission, para. 100 (quoting HSBI evidence in the same paragraph and fn 194).

6.130. In conclusion, therefore, we find that the United States has established that the challenged A350XWB LA/MSF measures have essentially the same *nature* as the LA/MSF measures found to cause adverse effects in the original proceeding. As we have noted above, A350XWB LA/MSF and pre-A350XWB LA/MSF are of a very similar *nature* because of at least the following four important commonalities – they are all: (a) *loan* agreements; (b) containing the *same four "core" repayment terms*; (c) entered into by essentially *the same parties* (Airbus and the Airbus governments); and (d) for the purpose of *financing the development costs of Airbus LCA (in particular, a new model of Airbus twin-aisle LCA).*

6.4.1.5.3.2 Effects

6.131. The parties agree that one of the questions that is relevant to the assessment of the *effects* of an undeclared measure for the purpose of applying the close nexus test is whether that measure undermines a responding Member's compliance with the recommendations and rulings of the DSB.[261] In essence, the United States argues that to the extent that LA/MSF was found in the original proceeding to cause adverse effects, in the form of certain types of serious prejudice to the United States' LCA industry in the market for twin-aisle LCA, new LA/MSF for Airbus' latest version of twin-aisle LCA, the A350XWB, undermines any compliance that the European Union might have otherwise achieved with respect to the adopted recommendation calling upon "the Member granting each subsidy found to have resulted in … adverse effects"[262] to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy".[263] The European Union, on the other hand, submits that there is no support for the United States' contentions concerning the effects of A350XWB LA/MSF because, in its view, they are based on the United States' unsubstantiated claim that the A350XWB LA/MSF measures are "subsidies" that cause "adverse effects" within the meaning of the SCM Agreement. The European Union emphasizes that whether the challenged measures are "subsidies" that cause "adverse effects" is a substantive question beyond the scope of the jurisdictional matter that is before this compliance Panel. Thus, according to the European Union, it would not be appropriate for a compliance panel to accept jurisdiction over a measure on the basis of that panel's actual or anticipated ultimate finding on the merits of the alleged violation at issue.[264]

6.132. As already noted, the question that is before us in this part of our Report is a jurisdictional one, i.e. whether the A350XWB LA/MSF measures fall within the *scope* of this compliance proceeding. Whether the A350XWB LA/MSF measures are "subsidies" that cause "adverse effects" within the meaning of the relevant provisions of the SCM Agreement is a contested matter of substance, which the United States would be entitled to have us examine only if the United States were able to demonstrate that A350XWB LA/MSF is within our jurisdiction. To this extent, we agree with the European Union that it would be inappropriate to evaluate the United States' submissions concerning the scope of this proceeding on the basis of any "actual or anticipated" findings with respect to the merits of the United States' substantive adverse effects claims.

6.133. We note, however, the United States maintains that it has "never taken the position that the 'effects' examined in the close nexus test are the same as the 'adverse effects' described in Articles 5 and 6 of the SCM Agreement". Furthermore, the United States asserts that the "effects" of A350XWB LA/MSF that are the focus of its close nexus analysis are limited to the financing made available to Airbus through A350XWB LA/MSF, which the United States submits enabled Airbus to launch and develop the A350XWB as and when it did.[265] According to the United States, these effects are "not in and of themselves adverse effects" within the meaning of Articles 5 and 6 of the SCM Agreement.

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[261] United States' first written submission, paras. 148-150 (citing Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 247, 250, and 251; and *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 71 and 87); and European Union's first written submission, para. 83.

[262] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1416.

[263] United States' first written submission, paras. 148, 379, and 395; and second written submission, paras. 61, 104-105, and 548-551. The United States also argues that the effects of pre-A350XWB LA/MSF subsidies *alone* enabled Airbus to launch the A350XWB as and when it did.

[264] European Union's first written submission, paras. 109-112 and 1083-1204; and second written submission, paras. 37 and 870-1202.

[265] United States' second written submission, paras. 61 and 105.

6.134. Although we find the United States' submissions concerning the effects of A350XWB LA/MSF for the purpose of the close nexus test to be, at times, difficult to separate from the arguments it has advanced to support its subsidization and adverse effects claims, a number of the effects of A350XWB LA/MSF which the United States identifies can, in our view, be established without having to determine the merits of its substantive non-compliance complaint. Before proceeding to examine these effects, we note the Appellate Body's guidance that it may not always be possible for a compliance panel exploring the effects of an undeclared measure for the purpose of the close nexus test to determine whether it "*actually* undermine{s} the compliance otherwise achieved by the implementing Member".[266] This is because:

> {A}t the time of the jurisdictional inquiry into its terms of reference, a panel might not be in a position to determine whether this is the case, because it will not be possible to determine whether the "connected" measures potentially undermine compliance *without determining first whether the declared measures "taken to comply" fully achieved compliance with the recommendations and rulings of the DSB*. … To find otherwise would limit compliance proceeding{s} to examining whether closely connected measures affect compliance achieved by the declared measures "taken to comply"; situations where a Member has taken measures achieving only partial compliance, or has omitted to take measures, would be excluded from scrutiny. As we have found earlier, the scope of Article 21.5 proceedings is not limited in such a way.[267] (emphasis added)

6.135. Consistent with this line of reasoning, and in the light of the United States' request that the Panel find that the European Union's alleged compliance "steps" have not brought the European Union and relevant member States into conformity with their obligations under the covered agreements, we will proceed with our analysis of the effects of A350XWB LA/MSF with a view to understanding the extent to which A350XWB LA/MSF *could* undermine any compliance that the European Union might otherwise have achieved with the adopted recommendations and rulings in this dispute.[268]

6.136. Turning to the effects of A350XWB LA/MSF, we recall that the A350XWB is a redesigned version of the Original A350, which was the subject of the United States' unsuccessful claims of adverse effects in the original proceeding because no commitment to provide LA/MSF for the Original A350 was found to exist at the time of the establishment of the original panel.[269] According to Christophe Mourey, Airbus Senior Vice President for Contracts, the Original A350 was launched "as a significantly improved version of the A330".[270] Similarly, Mourey explains that the smaller versions of the A350XWB are considered to be "eventual replacement{s} of the A330"[271], with the largest version of the A350XWB expected to bring an end to the alleged "effective" monopoly that Boeing experienced with the 777 for "several years" due to the relatively poor performance of the A340 and the ultimate termination of that programme in 2011.[272] Numerous other pieces of evidence are consistent with these views, revealing that there is a close relationship between not only the general design, physical characteristics and end-uses of the A350XWB and, in particular, the A330, A340 and A380, but also how Airbus chose to position the A350XWB on the market relative to the A330 and A340.[273] Such evidence includes the A350XWB Business Case itself as well as an explicit statement by Airbus in **[***]**, which clearly establish

[266] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 256. (emphasis original)

[267] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 256.

[268] We note in this regard that the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)* found that the undeclared measures at issue in that dispute "could" or "may" have undermined the United States' implementation of the recommendations and rulings of the DSB, to the extent they involved the use of zeroing. (Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 250, 251, 252, and 256).

[269] See above para. 6.53.

[270] Christophe Mourey, Senior Vice President Contracts, Airbus, "Statement on Current Competitive Conditions in the LCA Industry", 4 July 2012, (Mourey Statement), (Exhibit EU-8) (BCI), para. 89.

[271] Mourey Statement, (Exhibit EU-8) (BCI), para. 89.

[272] Mourey Statement, (Exhibit EU-8) (BCI), para. 116.

[273] See e.g. Ameet Sachdev, "Airbus redesigns its strategy for long haul: A350 line to carry bulk of the load", *Chicago Tribune*, 18 July 2006, (Exhibit EU-99); Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27); "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006, (Exhibit USA-28). This and other evidence is examined and discussed in various parts of our Report, including below at paras. 6.1296-6.1369 and 6.1724-6.1760.

that the A350XWB family was originally conceived and designed by Airbus to win sales against a range of Boeing LCA that includes aircraft falling within the market for twin-aisle LCA in which the pre-A350XWB LA/MSF subsidies were found to cause adverse effects in the original proceeding.[274] While the European Union argues that the A350XWB today competes in its own separate "product market" with only the Boeing 787, the United States contests the European Union's assertions, submitting that all twin-aisle Airbus and Boeing LCA continue to compete in the same product market.[275] In any case, even accepting the European Union's submissions in full would imply that any A350XWB sales won by Airbus would be lost sales of the 787 for Boeing.[276]

6.137. Finally, we recall that A350XWB LA/MSF was intended, has been and is being used, to finance part of the development costs of the A350XWB in a similar proportion to the development costs financed by the pre-A350XWB LA/MSF agreements concluded after the 1992 Agreement.[277] Thus, it is apparent that, as the United States argues, one of the effects of A350XWB LA/MSF was the financing of a significant portion of the development costs of a new twin-aisle LCA[278] that Airbus anticipated would effectively replace the two models of twin-aisle LCA (the A330 and A340) that had been: (a) launched, developed and brought to market with the assistance of pre-A350XWB LA/MSF; and (b) sold into a customer space in which the United States' LCA industry was found to have suffered serious prejudice in the original proceeding. Recalling that the adopted recommendation in this dispute called upon the European Union and relevant member States to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy", we find that this effect, when considered in the light of the *nature* of A350XWB LA/MSF compared with the pre-A350XWB LA/MSF subsidies, *could* undermine the European Union's compliance actions.

6.4.1.5.3.3 Timing

6.138. In evaluating the compliance panel's analysis of the *timing* of the undeclared measures at issue in *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body agreed with the parties (the European Communities and the United States) that the timing of a measure "cannot be determinative" of whether it bears a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB so as to fall within the scope of a proceeding initiated under Article 21.5 of the DSU.[279] Thus, the Appellate Body explained that the relevant inquiry for the purpose of determining whether an undeclared measure may fall within the scope of a compliance proceeding is not whether it was taken *after* the adopted recommendations and rulings with the intention to comply, but rather whether despite being "issued before the adoption of the recommendations and rulings of the DSB, {that measure} still {bears} a sufficiently close nexus, in terms of *nature*, *effects*, and *timing*, with those recommendations and rulings, and with the declared measures 'taken to comply', so as to fall within the scope of Article 21.5 proceedings".[280]

6.139. After examining the *nature* and *effects* of the undeclared measures relative to the adopted recommendations and rulings, and the declared measures "taken to comply", the Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)* went on to find that the undeclared measures fell within

[274] "Presentation to the EADS Board", 7 November 2006 (slides 1-45) and "A350XWB Business Case: Assumptions, Sensitivities and Limitations, Presentation to EADS BoD – status", 2 November 2006, (slides 46-68), (A350XWB Business Case Presentation), (Revised), (Exhibit EU-130) (HSBI), slides 11, 21, 51, 92, and 93; and Letter, Airbus **[***]**, **[***]** (Exhibit EU-393) (HSBI).

[275] We evaluate the merits of the parties' submissions with respect to the relevant "product markets" for LCA below, starting at para. 6.1155.

[276] By referring to Boeing lost sales of the 787, we are simply highlighting that were the European Union's product market arguments to be correct, the A350XWB would be in competition *only* with the 787, necessarily implying that *as a matter of fact*, Boeing would lose sales of the 787 to the A350XWB, the development costs of which are partly financed by A350XWB LA/MSF. Thus, our reference to Boeing lost sales in this passage is not a reference to "lost sales" within the meaning of Article 6.3(c) of the SCM Agreement.

[277] Agreement between the European Community and the Government of the United States concerning the Application of the GATT Agreement on Trade in Civil Aircraft on Trade in Large Civil Aircraft (the 1992 Agreement). See also Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.66-7.69.

[278] In making this factual finding, we are not saying that Airbus could not have launched and developed the A350XWB without A350XWB LA/MSF. We are merely noting that one of the undisputed effects of A350XWB LA/MSF was that it financed part of the development costs of the A350XWB. The merits of the United States' submissions concerning the extent to which Airbus could have launched and brought to market the A350XWB in the absence of LA/MSF are examined below at paras. 6.1535-6.1723.

[279] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 224.

[280] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 226. (emphasis original)

the scope of the compliance dispute because the fact that their issuance predated the adoption of the recommendations and rulings of the DSB was "not sufficient to sever the pervasive links that {were} found to exist, in terms of nature and effects".[281] In our view, a similar conclusion is warranted with respect to the A350XWB LA/MSF measures.

6.140. The A350XWB LA/MSF measures were formally concluded between **[***]**[282], that is, approximately between **[***]** *before* the recommendations and rulings in the original proceeding were adopted. Likewise, while some of the European Union's alleged compliance "steps" took place *after* the recommendations and rulings were adopted[283], others relate to events that occurred over a period of time that either ended well *before* the recommendations and rulings were adopted (indeed, in some cases, even before the United States' made its request for consultations in this dispute) or *overlapped* with the adoption of the recommendations and rulings.[284] Thus, the conclusion of the A350XWB LA/MSF measures as well as most of the European Union's alleged compliance "actions" took place *prior to* the adoption of the recommendations and rulings by the DSB.

6.141. We recall that among the different events pre-dating the adopted recommendations and rulings of the DSB, which the European Union maintains have brought it into conformity with its obligations under the SCM Agreement, is the alleged "amortization of benefit" of the LA/MSF subsidies provided for the A330/A340 and A330-200 by virtue of the end of the anticipated marketing lives of these LCA. As already noted, the European Union considers that these events, which in terms of their timing are closely connected with the launch of the A350XWB and the conclusion of the four A350XWB LA/MSF agreements[285], demonstrate that the relevant LA/MSF subsidies have been "withdrawn", within the meaning of Article 7.8 of the SCM Agreement and, therefore, that it has complied with the recommendations and rulings of the DSB. We examine the European Union's submissions concerning the relevance of the alleged "amortization of benefit" for the purpose of compliance with Article 7.8 of the SCM Agreement elsewhere in this Report. However, for the purpose of the close nexus test, we note that the events the European Union relies upon to demonstrate compliance are consistent with our finding, based on evidence including Airbus' own stated views, that the A350XWB was anticipated to be a *replacement for the A330 and A340*. In particular, to the extent that the timing of the launch of the A350XWB reflected Airbus' own expectations about *when the marketing lives of the A330 and A340 would come to an end* and, therefore, when it would need to launch a replacement LCA model, it could be argued that the timing of the A350XWB LA/MSF measures, to the extent that they are intended to fund part of the A350XWB's development costs, is related to the same essential considerations motivating the European Union's claim that it has "withdrawn" A330/A340 and A330-200 LA/MSF subsidies − that is, the anticipated end of the relevant aircraft's marketing lives.

6.142. The United States maintains that the timing of the A350XWB LA/MSF measures can be connected with the adoption of the recommendations and rulings by the DSB because all four agreements were concluded *after* the panel issued its interim report to the parties in September 2009. Moreover, according to the United States, certain HSBI evidence from a document prepared by one of the Airbus governments in the first half of 2009 concerning the A350XWB project demonstrates that "the A350XWB grew from a deliberative process that took place in the shadow of the DSB's future rulings and recommendations".[286]

6.143. We recall that Airbus launched the A350XWB as a redesigned version of the Original A350 at a time when it must have been aware that the original panel was considering the merits of the United States' challenge to the WTO-consistency of: (a) the LA/MSF agreements entered into between Airbus and the Airbus governments with respect to each and every new model of Airbus

[281] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 234.

[282] The precise dates on which the various legal instruments making up the A350XWB LA/MSF measures are set out below at paras. 6.226, 6.236, 6.249 and 6.257-6.258 where we evaluate the merits of the United States' claims of subsidization.

[283] See above paras. 6.8-6.24.

[284] See above paras. 6.25-6.40.

[285] The European Union asserts that the anticipated marketing lives of the A330/A340 and A330-200 came to an end in **[***]** and **[***]**, respectively. We examine the European Union's submissions in more detail below at paras. 6.872-6.879.

[286] United States' second written submission, para. 108 (quoting HSBI evidence in the same paragraph and footnote 205).

LCA ever brought to market; (b) an alleged commitment on the part of the Airbus government to provide LA/MSF for the Original A350; and (c) an alleged unwritten LA/MSF Programme. The A350XWB Business Case reveals that Airbus launched the A350XWB in December 2006 contemplating that the Airbus governments would provide financial assistance of a different kind to LA/MSF. In April 2007, the UK Minister for Industry and the Regions, Margaret Hodge, revealed in the House of Commons Trade and Industry Committee, that the UK Government was in "discussions" and "negotiations" with Airbus on "the support that might be required with developing" the A350XWB, explaining further that it would "have to be very conscious of the WTO rules and constraints in the support" eventually provided.[287] At the same Committee meeting, it was also disclosed that in terms of "launch investment or something equivalent to launch investment, given the WTO issues, so far they {i.e. Airbus} have been non-specific".[288]

6.144. In January 2008 it was reported in the *New York Times* that Airbus executives had said that they expected to "begin discussions with European governments in the second half of {2008} about providing some of the initial financing for its new widebody jet, the A350-XWB".[289] Airbus commenced *formal* negotiations with the Airbus governments for A350XWB LA/MSF in **[***]** after the launch of the A350XWB.[290] Three of the four A350XWB LA/MSF agreements were finally concluded *shortly after* the issuance of the interim report by the panel to the parties; and although the "framework" agreement of the fourth LA/MSF agreement had been entered into *shortly before* the original panel's interim report was issued to the parties, the "implementing" legal instrument under this contract was concluded, like the other three LA/MSF measures, *shortly after* the original panel issued its interim report.[291]

6.145. While we do not believe the coincidence in the timing of the conclusion of the A350XWB LA/MSF contracts and the issuance of the panel's interim report to the parties demonstrates that the former was tied to the latter, the facts described in the previous paragraphs strongly suggest that Airbus and the Airbus governments were considering their options with respect to how to finance the A350XWB, including by means of LA/MSF, in the light of the ongoing WTO dispute. This understanding is, in our view, confirmed by the statements contained in one of the HSBI documents referred to by the United States, which we believe reveals not only that it was the opinion of one of the Airbus governments that A350XWB LA/MSF could be affected by the outcome of the WTO dispute because of the fact that it was of the same *nature* as previous LA/MSF, but also that this particular government was proceeding in negotiations with Airbus with these considerations in mind.[292]

6.146. Finally, the European Union observes that the United States could have requested the establishment of a new panel to review the WTO consistency of the four A350XWB LA/MSF measures several years ago[293], suggesting that this fact should also weigh against bringing the A350XWB LA/MSF measures into the scope of this proceeding. We disagree. In our view, the fact that it may have been possible for a party to challenge an undeclared measure in an original proceeding initiated under Article 6.2 of the DSU does not preclude it from bringing a claim against the same measure in an Article 21.5 compliance proceeding if it considers it has a "particularly close relationship" to the adopted DSB recommendations and rulings, and the measures declared to be "measures taken to comply". Provided that an undeclared measure satisfies the close nexus test, we do not see why a complaining Member should be barred from having recourse to the original panel in an Article 21.5 proceeding to determine whether that measure affects a

[287] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume II: Oral and written evidence, 25 July 2007, (Exhibit EU-177), pp. 4-5.

[288] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume II: Oral and written evidence, 25 July 2007, (Exhibit EU-177), p. 5.

[289] Nicola Clark, "Airbus to seek government aid for A350 in second half", *The New York Times*, 16 January 2008, (Exhibit USA-434).

[290] European Union's response to Panel question No. 101 (citing Statement by Tom Williams, Executive Vice President, Programmes, Airbus SAS, 17 May 2013, (Exhibit EU-354) (BCI), para. 3; Meeting agenda, **[***]**, (Exhibit EU-392) (BCI); Letter, Airbus **[***]**, **[***]**, (Exhibit EU-393) (HSBI); and Letter, Airbus Operations GmbH, **[***]**, (Exhibit EU-394) (HSBI)). See also UK Department of Trade and Industry Annual Report 2006-2007, p. 107, (Exhibit USA-38) in relation to the receipt of an application for launch investment for the Airbus A350.

[291] See above fn 282.

[292] United States' second written submission, para. 108 (quoting HSBI evidence in the same paragraph and fn 205).

[293] European Union's first written submission, para. 103.

responding Member's compliance with the adopted recommendations and rulings, regardless of whether it could have been challenged in an original proceeding prior to the end of the compliance period.

6.147. Moreover, in the context of the present dispute, we note that the United States' claims with respect to A350XWB LA/MSF are not only focused on the alleged effects of those measures considered in isolation, but also their effects considered together with the effects of the pre-A350XWB LA/MSF subsidies. In this light, the fact that the United States chose to pursue its claims against the A350XWB LA/MSF measures in a compliance dispute in which the alleged continued effects of the pre-A350XWB LA/MSF will be determined (instead of an original panel), not only avoids the parties having to address essentially the same questions in two separate proceedings, but it also reflects the nature of one part of the United States' claims of *non-compliance with respect to the effects of the pre-A350XWB LA/MSF measures*, which could only be resolved by an evaluation of the parties' submissions concerning the effects of the pre-A350XWB LA/MSF and A350XWB LA/MSF *together*.

6.148. In conclusion, therefore, although we can find some similarities and common connections between the timing of the A350XWB LA/MSF measures and the European Union's alleged compliance "actions", as well as the recommendations and rulings adopted by the DSB, we are not convinced that the evidence conclusively demonstrates that the *timing* of A350XWB LA/MSF, in and of itself, is such that the A350XWB LA/MSF agreements must be considered to be "closely connected" measures for the purpose of this compliance dispute. Nevertheless, in the light of the above facts and considerations, we are of the view that the fact that the A350XWB LA/MSF measures predate the adoption of the recommendations and rulings by the DSB in this dispute, does not sever the links we have found to exist, in terms of *nature* and *effects*.

6.4.1.5.4 Conclusion

6.149. We have found above that the A350XWB LA/MSF measures have a similar nature to the pre-A350XWB LA/MSF measures, which are, of course, the subject of both the adopted DSB recommendations and rulings and most of the European Union's alleged compliance actions, because they are all: (a) *loan* agreements; (b) containing the *same four "core" repayment terms*; (c) entered into by essentially *the same parties* (Airbus and the Airbus governments); and (d) for the purpose of *financing the development costs of Airbus LCA (in particular, a new model of Airbus twin-aisle LCA).* In addition, we have concluded that to the extent that A350XWB LA/MSF was intended to be used to finance part of the development costs of a model of Airbus LCA that was anticipated to replace the A330 and A340 (both of which had been: (a) launched, developed and brought to market with the assistance of pre-A350XWB LA/MSF; and (b) sold into a customer space in which the United States' LCA industry was found to have suffered serious prejudice in the original proceeding), the *effects* of A350XWB LA/MSF *could* undermine the European Union's compliance. Finally, although there are indications that the *timing* of A350XWB LA/MSF may have taken account of the outcome of the original panel proceeding, the evidence is not conclusive in this respect, confirming only that Airbus and the Airbus governments were considering their options with respect to how to finance the A350XWB, including by means of LA/MSF, in the light of the ongoing WTO dispute. Accordingly, we have found that the fact that the A350XWB LA/MSF measures were concluded *before* the recommendations and rulings were adopted by the DSB does not sever the link we have found to exist in terms of their *nature* and *effects* with those recommendations and rulings and the European Union's alleged compliance "actions".

6.150. For these reasons, we find that the United States has established that the A350XWB LA/MSF measures satisfy the close nexus test and, therefore, that they are "closely connected" with the adopted DSB recommendations and rulings and the European Union's alleged compliance "actions", such that they should be brought within the scope of this proceeding. We find additional support for this conclusion in two considerations.

6.151. First, we note that the European Union has stated in this proceeding that, in the light of the guidance provided by the Appellate Body in *US – Large Civil Aircraft (2nd complaint)*, it does not generally disagree with the view that *all* of the LA/MSF measures challenged in this dispute, from A300 LA/MSF to A350XWB LA/MSF, "may be aggregated for purposes of assessing their alleged present causal link to the launch of a particular product" provided that they are "*shown to*

exist at present and thus not withdrawn".[294] In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body explained that:

> {A} panel may group together subsidy measures that are *sufficiently similar in their design, structure, and operation* in order to ascertain *their aggregated effects in an integrated causation analysis* and determine whether there is a genuine and substantial causal relationship between these multiple subsidies, taken together, and the relevant market phenomena identified in Article 6.3 of the *SCM Agreement … .*[295] (emphasis added)

6.152. Because the European Union maintains that the only limitation on the aggregation of all of the LA/MSF measures at issue in this dispute is that they currently exist and, therefore, that they have, to this extent, not been "withdrawn", it seems to us that, ultimately, the European Union itself does not deny that all of the LA/MSF measures are "similar in their design, structure, and operation", or that, for this reason, it would be appropriate to consider "their aggregated effects in an integrated causation analysis". In our view, the European Union's position with respect to the permissibility of the aggregation of the effects of the LA/MSF measures supports our conclusion with respect to the close nexus that exists between the A350XWB LA/MSF measures and the pre-A350XWB LA/MSF measures.

6.153. Second, as already noted, the United States' non-compliance claims with respect to pre-A350XWB LA/MSF is partly based on its view that these subsidies continue to cause adverse effects in the post-implementation period *when considered in conjunction with the alleged effects of the A350XWB LA/MSF measures*. In our view, were the A350XWB LA/MSF measures excluded from the scope of this compliance proceeding, this aspect of the United States' non-compliance complaint with respect to the pre-A350XWB LA/MSF measures could not be fully resolved. This is an additional reason why we believe that, in the light of the close nexus that exists between the A350XWB LA/MSF measures, the pre-A350XWB LA/MSF subsidies and the adopted recommendations and rulings, the A350XWB LA/MSF measures fall within the scope of our terms of reference.

6.154. Finally, having found that A350XWB LA/MSF falls within the scope of this compliance proceeding, we consider it unnecessary to pursue the United States' additional independent arguments that A350XWB LA/MSF falls within our terms of reference solely on the grounds that it: (a) replaces an original actionable subsidy with a new subsidy; or (b) circumvents the European Union's compliance by negating or undermining a "measure taken to comply".

6.155. We now turn to examine the European Union's three other objections to the scope of the United States' claims in this dispute.

6.4.2 Whether certain claims made by the United States are within the scope of this compliance proceeding

6.4.2.1 Introduction

6.156. The European Union submits that the United States' prohibited subsidy claims against the A380 LA/MSF subsidies, and the United States' threat of serious prejudice claims in relation to the market for LCA in the European Union, are outside of the scope of this compliance proceeding. In its first written submission, the European Union requested that the Panel issue a preliminary ruling to this effect or grant the requested relief in its final Report.[296] The Panel communicated its decision in relation to the European Union's requests on 27 March 2013, finding that the United States' prohibited export subsidy claims under Articles 3.1(a) and 3.2 of the SCM Agreement and the United States' threat of serious prejudice claims were within the scope of the compliance dispute, but excluding the United States' prohibited import substitution claims under Articles 3.1(b) and 3.2 of the SCM Agreement. In the communication informing the parties of its decision, the Panel announced that it would issue the reasoning motivating its findings in due course. This reasoning is set out in the following subsections.

[294] European Union's response to Panel question No. 38, para. 105. (emphasis original)
[295] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1285.
[296] European Union's first written submission, para. 161, fn 184.

6.4.2.2 The United States' claims under Article 3.1(a) of the SCM Agreement

6.4.2.2.1 Arguments of the European Union

6.157. The European Union argues that the United States' claims under Article 3.1(a) of the SCM Agreement against the A380 LA/MSF measures are outside of the Panel's terms of reference because, in the absence of any adopted recommendations and rulings pursuant to Article 4.7 of the SCM Agreement, the relevant European Union member States had no compliance obligation in relation to the United States' original Article 3.1(a) claims against the same LA/MSF measures. According to the European Union, this means that there is no basis for the Panel to accept jurisdiction over the United States' renewed Article 3.1(a) claims under Article 21.5 of the DSU and, consequently, that those claims should be excluded from the scope of this compliance proceeding.[297]

6.158. The European Union finds support for its position in *inter alia* the *EC – Bed Linen (Article 21.5 – India)* case, which the European Union maintains stands for the proposition that a complainant in an Article 21.5 dispute should not "ordinarily" be entitled to bring a claim against an unchanged measure that was unsuccessfully challenged (in the sense that there were "no relevant recommendations and rulings" in relation to the same claim) in an original proceeding.[298] Moreover, the European Union submits that the United States errs when it relies upon the panel and Appellate Body findings in *US – Upland Cotton (Article 21.5 – Brazil)* and *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* to substantiate its view that a compliance panel is entitled to "re-consider the *same claims* against the *same unchanged measure* whenever the Appellate Body was unable to complete the analysis in the original proceedings".[299] According to the European Union, the facts of both disputes relied upon by the United States can be distinguished from the present set of circumstances as they each involved "measures taken to comply" within the meaning of Article 21.5 of the DSU. The European Union emphasizes that the same cannot be said for the situation that is before the Panel in the present proceeding.[300]

6.159. The European Union furthermore argues that by seeking to have its Article 3.1(a) claims re-heard, the United States is attempting to use the present compliance dispute as if it were established to provide an opportunity for "remand" back to the original panel to complete the analysis that could not be completed by the Appellate Body, regardless of whether jurisdiction over those claims could independently be established under Article 21.5 of the DSU.[301] The European Union maintains that the United States is not entitled to use Article 21.5 proceedings in this way; and that should the United States want to pursue Article 3.1(a) claims against the A380 LA/MSF subsidies, the United States would need to initiate a new original panel proceeding.[302]

6.160. Finally, the European Union submits that accepting the United States' Article 3.1(a) claim regarding the A380 LA/MSF subsidies would undermine the European Union's due process rights. According to the European Union, if the United States were permitted to renew its claims under Article 3.1(a), the European Union would be deprived of a compliance period to remedy any Article 3.1(a) violation before the United States pursues countermeasures.[303]

6.4.2.2.2 Arguments of the United States

6.161. The United States submits that its Article 3.1(a) claims against the A380 LA/MSF measures are properly within the scope of this compliance proceeding. The United States recalls that in the original proceeding, the Appellate Body overturned the panel's findings but was unable to complete the analysis in relation to the Article 3.1(a) claims against the A380 LA/MSF measures. The United States submits that where a Member raises a legal issue before the original panel, but the panel and the Appellate Body make no findings on that issue, the party may raise the issue again

[297] European Union's first written submission, paras. 115, 119-120, 125-129, and 131-133; and second written submission, paras. 40-45.
[298] European Union's first written submission, paras. 124-125.
[299] European Union's second written submission, para. 43. (emphasis original)
[300] European Union's second written submission, paras. 45-47.
[301] European Union's first written submission, para. 132.
[302] European Union's first written submission, para. 115.
[303] European Union's first written submission, para. 133; and second written submission para. 42.

under Article 21.5.[304] The United States recalls that an Article 21.5 proceeding does not allow parties to re-litigate claims that the DSB has already decided.[305] However, according to the United States, a compliance panel may properly reconsider a claim against an unchanged measure when the Appellate Body was unable to complete the analysis in the original proceeding and that such claims are not precluded from the scope of a subsequent compliance proceeding.[306]

6.162. The United States argues that preventing a complaining party from raising claims in a compliance proceeding that were left unresolved on appeal in the original proceeding would mean that complaining parties would always have to begin new proceedings in order to obtain a ruling on their merits. The United States argues that such a result would make it impossible to make efficient use of the original panelists and their relevant expertise and, thereby, undermine the purpose and effect of compliance proceedings.[307]

6.163. The United States submits that the mere absence of adopted recommendations and rulings with respect to its Article 3.1(a) claims from the original proceeding does not preclude it from properly raising the same claims again in this compliance dispute.

6.4.2.2.3 Evaluation by the Panel

6.164. In this compliance proceeding, the United States seeks to raise claims under Article 3.1(a) of the SCM Agreement against the same unchanged A380 LA/MSF measures it challenged on the same legal basis in the original proceeding.

6.165. We recall that in the original proceeding the panel found that the United States had substantiated its Article 3.1(a) claims with respect to the German, Spanish and UK A380 LA/MSF measures, but not the French A380 LA/MSF measures.[308] On appeal, the Appellate Body reversed the original panel's findings, concluding that the panel had erred in interpreting and applying Article 3.1(a) and footnote 4 of the SCM Agreement.[309] After articulating the correct interpretation of these provisions, the Appellate Body found itself unable to "complete the analysis" due to a lack of sufficient factual findings or undisputed facts on the panel record.[310] Thus, the Appellate Body reversed the original panel's recommendation under Article 4.7 of the SCM Agreement that "the subsidizing Member granting each subsidy found to be prohibited withdraw it … within 90 days"[311], leaving the United States' claims unresolved.

6.166. As we see it, the main question raised by the parties' arguments is whether the United States is entitled to have its unresolved Article 3.1(a) claims settled in this compliance dispute, given that no specific recommendations and rulings were adopted by the DSB in relation to those claims in the original proceeding.

6.167. The European Union finds support for its position in *EC – Bed Linen (Article 21.5 – India)*.[312] We note, however, that in that dispute, India was not allowed to bring its claims against a particular measure in the compliance proceeding because India had failed to make out a *prima facie* case in relation to exactly the same claims in the original proceeding. Thus, the Appellate Body ruled that a complainant who had failed to make out a *prima facie* case in the original proceeding regarding an element of the measure that remained unchanged since the original proceeding was not entitled to re-litigate the same claim with respect to the unchanged

[304] United States' first written submission, para. 33.
[305] United States' first written submission, para. 33 (citing Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210).
[306] United States' first written submission, para. 33; and second written submission, paras. 124-131 (citing Appellate Body Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 149-150; and *US – Zeroing (EC) (Article 21.5 – EC)*, para. 424).
[307] United States' second written submission, para. 131.
[308] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.689.
[309] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1102-1103.
[310] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1104 and 1415(b).
[311] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1104 and 1416.
[312] European Union's first written submission, paras. 124-125 (citing Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 87-88).

element of the measure in the Article 21.5 proceeding.[313] In the same vein, in *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body ruled that a complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be WTO-consistent in the original proceeding.[314] The claims that the complainant sought to re-argue had been definitively rejected in the original proceeding.

6.168. In our view, both *EC – Bed Linen (Article 21.5 – India)* and *US – Shrimp (Article 21.5 – Malaysia)* may be distinguished from the present dispute. As already noted, the reason why no recommendations and rulings were adopted in respect of the United States' original Article 3.1(a) claims is that those claims were left unresolved on appeal. The United States is not attempting to re-litigate claims with respect to which it failed to make out a *prima facie* case or that were otherwise definitively rejected in the original proceeding. The United States' reassertion of the Article 3.1(a) claims made in the original proceeding against the unchanged A380 LA/MSF measures thus materially differs from the situations in *EC – Bed Linen (Article 21.5 – India)* and *US – Shrimp (Article 21.5 – Malaysia)*.

6.169. Questions concerning unresolved claims with respect to which there were no DSB recommendations and rulings also arose in the *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* and *US – Upland Cotton (Article 21.5 – Brazil)* disputes.

6.170. In *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina*) Argentina attempted to re-argue a claim against an aspect of the original measure. Not unlike the United States' position in the present dispute, Argentina sought to raise a claim that was heard in the original proceeding but that was left unresolved and that did not give rise to the adoption of any specific recommendations and rulings, and, therefore, the imposition of a specific compliance obligation on the United States. In the original proceeding, Argentina had challenged the volume of imports analysis undertaken in the USDOC's original sunset review determination. The claim was left unresolved due to the panel's exercise of judicial economy. In the compliance proceeding, Argentina raised the same claim. The volume of imports analysis from the USDOC's original sunset review determination had been relied upon by the USDOC in the "Section 129 Determination" that implemented the United States' compliance obligations. The compliance panel concluded that because the USDOC's original volume of imports analysis had become an "integral part" of the Section 129 Determination (the "measure taken to comply"), Argentina could properly pursue the same claim that was left unresolved in the original proceeding.[315]

6.171. The Appellate Body upheld the compliance panel's ruling, relying on a similar line of reasoning. The Appellate Body recalled that the volume of imports analysis that Argentina sought to challenge in the compliance dispute had formed part of the factual basis of the USDOC's original likelihood of dumping determination that was found to be inconsistent with Article 11.3 of the AD Agreement for other reasons. The Appellate Body then explained that the DSB's adoption of this ruling of inconsistency meant that the United States had an obligation to bring its measure into conformity with Article 11.3 of the AD Agreement, and that it was up to the United States to decide how best to achieve that conformity. The Appellate Body found that the analysis had become "an integral part" of the "measure taken to comply", and could therefore be challenged on the basis of the same claims left unresolved in the original proceeding.[316]

6.172. We note that the Appellate Body's findings in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina*) addressed a number of more systemic concerns that the

[313] In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body found that a complainant who had failed to make out a *prima facie* case in the original proceeding regarding an element of the measure that remained unchanged since the original proceeding was not entitled to re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceeding. (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93)

[314] In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body ruled that a complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be WTO-consistent in the original proceeding. (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 96-97)

[315] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 7.91 and 7.97.

[316] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 142-152.

United States argued weighed in favour of excluding Argentina's claims. In particular, the United States submitted that allowing Argentina to pursue a claim with respect to which there were no specifically adopted rulings and recommendations would place it in the position of having to guess what the original panel might have thought were the WTO-inconsistencies in USDOC's original volume of imports analysis. Moreover, were USDOC's analysis to be found WTO-inconsistent at the compliance stage, the United States would not be able to benefit from a "reasonable period of time" to bring itself into conformity. The Appellate Body rejected the United States' concerns, ruling that because the original panel had found that USDOC's original likelihood of dumping determination had lacked a proper factual basis, "USDOC could not assume that its findings regarding the alleged decline in the volume of imports were WTO-consistent". Furthermore, the Appellate Body noted that the parties had made arguments and counter-arguments on the volume of imports analysis in both the original and compliance proceedings, and that this was not a situation where Argentina was unfairly getting a "second chance", as would be the case where the measure had been found to be WTO-consistent in the original proceeding, or where the complainant had failed to make out a *prima facie* case.[317] Finally, the Appellate Body pointed to the aim of Article 21.5 of the DSU, which it explained was to promote "prompt compliance … by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists and their relevant experience". For the Appellate Body, these considerations supported the compliance panel's finding that the volume of imports analysis was properly before it.[318]

6.173. The question that arose in *US – Upland Cotton (Article 21.5 – Brazil*) was whether Brazil was entitled to re-argue a claim against one specific aspect of the United States' "measure taken to comply", with respect to which the Appellate Body had reversed the original panel's findings, but failed to "complete the analysis" because of insufficient factual findings or undisputed facts on the record. Again, not unlike the United States' position in the present dispute, Brazil sought to re-litigate a claim that was left unresolved and did not give rise to the adoption of any specific recommendations and rulings, or, therefore, the imposition of a specific compliance obligation on the United States.

6.174. In the original proceeding, Brazil had claimed that the United States' export credit guarantees provided under the General Sales Manager 102 (GSM 102) programme for a number of agricultural products (including pig and poultry meat) circumvented the United States' export subsidy commitments under the Agreement on Agriculture. The panel dismissed Brazil's claim as it related to the application of the programme to pig and poultry meat. However, on appeal, the Appellate Body reversed the panel's finding, but was unable to "complete the analysis" because there were insufficient factual findings or undisputed facts on the record. Thus, Brazil's original claim concerning the WTO-consistency of the United States' export credit guarantees for pig and poultry meat under the GSM 102 programme was left unresolved. The GSM 102 programme was found to be WTO-inconsistent for other reasons, and was ultimately subject to adopted recommendations and rulings calling on the United States to bring its measures into conformity with its WTO obligations.

6.175. In implementing the adopted rulings and recommendations, the United States revised the GSM 102 programme with respect to all agricultural products, including pig and poultry meat. In the compliance proceeding, Brazil renewed its claim that the export credit guarantees provided for pig and poultry meat under the revised programme were inconsistent with the Agreement on Agriculture. The United States, however, argued that Brazil's claims were outside of the scope of the compliance proceeding because the export credit guarantees for pig and poultry meat were individual measures that were not subject to the DSB's recommendations and rulings in the original proceeding.

6.176. While recognizing that the provision of export credit guarantees for pig and poultry meat had not been the subject of specific rulings and recommendations in the original proceeding, the compliance panel found that Brazil was nevertheless entitled to pursue its claim on the basis of a number of considerations, including the particularly close relationship between the export credit

[317] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 150.

[318] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 151.

guarantees and the revised GSM 102 programme, which was itself the "declared measure taken to comply".[319]

6.177. The Appellate Body agreed with the compliance panel's conclusions, but relied upon a somewhat different line of reasoning. The Appellate Body's evaluation of the matter proceeded in two parts. First, the Appellate Body determined whether Brazil's claims concerned the properly identified "measure taken to comply"; and second, the Appellate Body assessed whether there were any limitations on the claims that Brazil was entitled to raise in respect of that measure.

6.178. The Appellate Body began the first of its two inquiries by stating that while "the DSB's recommendations and rulings are a relevant starting point for identifying the 'measures taken to comply' … they are not dispositive as to the scope of such measures."[320] The Appellate Body then explained that it could "not see why the scope of the DSB's recommendations and rulings should necessarily limit the scope of the 'measures taken to comply' … when the measures actually 'taken' … are broader than the DSB's recommendations and rulings".[321] Thus, after recalling how the revised GSM 102 programme applied to all eligible commodities (including pig and poultry meat) in the same way, the Appellate Body found that it was appropriate to consider the revised GSM 102 programme in an "integrated manner" and, accordingly, find the totality of the new programme (including its coverage of pig and poultry meat) to be a "measure taken to comply". The Appellate Body thereby concluded that the changes made to the export credit guarantees provided for pig and poultry meat could be challenged in the compliance proceeding, even though they were not the subject of any specific recommendations and rulings in the original proceeding.[322]

6.179. Turning to the limitations on the claims that Brazil was entitled to raise against the "measure taken to comply", the Appellate Body found that Brazil was not precluded from renewing the claim it had made in the original proceeding with respect to the export credit guarantees for pig and poultry meat because the merits of that claim had not been resolved. Thus, the Appellate Body distinguished Brazil's situation from that of India in *EC – Bed Linen (Article 21.5 – India)*, finding that to permit Brazil to raise its claim in the compliance proceeding would not mean that it is "unfairly getting a 'second chance' to make a case that it failed to make out in the original proceeding such that the finality of the DSB's recommendations and rulings would be compromised".[323]

6.180. Finally, as it did in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the Appellate Body found support for its conclusions in the purpose of Article 21.5 proceedings, which it recalled it had previously described to be the promotion of "prompt compliance … by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists and their relevant experience".[324]

6.181. We understand the panel and Appellate Body findings in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina*) and *US – Upland Cotton (Article 21.5 – Brazil)* to stand for the proposition that where a particular claim has been left unresolved in an original proceeding for reasons of judicial economy or because of the Appellate Body's inability to "complete the analysis", a complainant will not ordinarily be precluded from pursuing that claim against the same aspect of the originally challenged measure in an Article 21.5 compliance dispute when it forms an "integral part" of the "measure taken to comply".[325] In such circumstances, the fact that an

[319] The compliance panel's main considerations were that: (a) the revised GSM 102 export credit guarantees as applied to pig and poultry meat were measures with a "particularly close relationship to the declared measure taken to comply and to the recommendations and rulings of the DSB"; (b) Brazil's claim against the original GSM 102 programme as applied to pig and poultry meat was left unresolved in the original proceeding; and (c) the Appellate Body had "recently" found in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* that "a claim relating to an aspect of a measure on which the panel in the original proceeding had exercised judicial economy was properly within the scope of Article 21.5 of the DSU". (Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 9.25-9.26).

[320] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 202.

[321] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 202.

[322] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 202-207.

[323] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210.

[324] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 212 (citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 151).

[325] We understand the Appellate Body's guidance in *EC – Fasteners (Article 21.5 – China)* to accord with this reading. See Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.15 and fn 90 thereto.

original claim may not have given rise to any specific recommendations and rulings adopted by the DSB will not prevent a compliance panel from bringing it within its scope of consideration. Indeed, to allow a complainant to bring such a claim would be an efficient use of WTO dispute settlement procedures and consistent with the goal of achieving prompt compliance with the covered agreements.

6.182. In our view, the circumstances in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina*) and *US – Upland Cotton (Article 21.5 – Brazil)* are similar to the situation in this dispute. Like the complainants in those cases, in this compliance proceeding the United States attempts to re-argue claims that: (a) were left unresolved in the original proceeding; and (b) were not subject to any specific recommendations and rulings adopted by the DSB.

6.183. As the European Union observes, one difference between the current proceeding and *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina*) and *US – Upland Cotton (Article 21.5 – Brazil)* is that, in those disputes, the question of the permissibility of the complainants' renewed claims arose in the context of the existence of a "measure taken to comply" that incorporated or covered a particular aspect of an original measure whose WTO-consistency was challenged (but left undecided) in the original proceeding. In contrast, there is no dispute between the parties that the A380 LA/MSF measures are neither "measures taken to comply" within the meaning of Article 21.5 of the SCM Agreement, nor part of, or covered by, any one or more other "measures taken to comply".

6.184. We do not consider this distinction to mean that we must exclude the United States' claims from the scope of this compliance proceeding. In this regard, we note that it is common ground between the parties that the A380 LA/MSF measures are properly before us for the purpose of evaluating the merits of the United States' claims concerning the European Union's compliance with the requirements of Article 7.8 of the SCM Agreement. Thus, by raising claims against the A380 LA/MSF measures that were left unresolved in the original proceeding, the United States is not asking the Panel to review the consistency with the covered agreements of a measure that does not already fall within the scope of this compliance proceeding, albeit not as a "measure taken to comply". Moreover, by allowing the United States' to pursue its unresolved claims it would not be "unfairly getting a 'second chance' to make a case that it failed to make out in the original proceeding such that the finality of the DSB's recommendations and rulings would be compromised".[326]

6.185. In these circumstances, we can see no reason why we should be prevented from considering the United States' claims simply because the A380 LA/MSF measures are neither "measures taken to comply" within the meaning of Article 21.5 of the SCM Agreement, nor part of, or covered by, any one or more other "measures taken to comply". As we see it, to accept that the United States' unresolved Article 3.1(a) claims should be excluded because of the absence of any relevant "measures taken to comply", in a situation where the A380 LA/MSF measures are already properly before us would unduly elevate form over substance.

6.186. The European Union argues that accepting the United States' Article 3.1(a) claim would undermine its due process rights, and, in particular, its right to a "reasonable period of time" to remedy any Article 3.1(a) violation before the United States pursues countermeasures.[327] Essentially the same argument made by the United States in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* was dismissed by the Appellate Body on the grounds that *inter alia* the parties to that dispute had made extensive arguments and counter-arguments in relation to the relevant claims, and that it would be consistent with the purpose of Article 21.5 disputes to allow the complainant to pursue those claims.[328] In our view, the same reasoning can be used to dismiss the European Union's due process concerns in the present dispute.

[326] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210. See also Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.15 and fn 90.

[327] European Union's first written submission, para. 140 (citing Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.72 and 7.76).

[328] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 150-151.

6.4.2.2.4 Conclusion

6.187. Thus, for all of the above reasons, we find that the United States' claims under Articles 3.1(a) and 3.2 of the SCM Agreement concerning the A380 LA/MSF subsidies are within the scope of this compliance proceeding.

6.4.2.3 The United States' claims under Article 3.1(b) of the SCM Agreement

6.4.2.3.1 Arguments of the European Union

6.188. The European Union submits that the United States' claims under Article 3.1(b) of the SCM Agreement against the A380 LA/MSF subsidies are outside the scope of this compliance proceeding for a number of reasons. First, as argued in relation to the United States' claims against the same measures under Article 3.1(a), the European Union submits that the United States' Article 3.1(b) claims must fall outside of the scope of this compliance proceeding because no relevant recommendations and rulings were adopted by the DSB and, therefore, no "measures taken to comply" exist in relation to the United States' particular claim.[329]

6.189. According to the European Union, the United States' allegations under Article 3.1(b) constitute new claims, which the United States could have been pursued in the original proceeding against the same A380 LA/MSF measures, but which the United States chose to abandon.[330] The European Union maintains that there is nothing in Article 21.5 of the DSU or any considerations in equity that would justify allowing a complaining Member to abandon a claim during the original proceeding, only to then attempt to revive it during the compliance proceeding.[331] Indeed, the European Union recalls that "a complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceeding, but did not".[332]

6.190. The European Union does not accept that the United States should be permitted to pursue its Article 3.1(b) claims against the A380 LA/MSF subsidies in this dispute because of the United States' alleged lack of awareness of the relevant facts at the relevant time. According to the European Union, a Member cannot pursue a new claim in a compliance proceeding on the basis that at the time it submitted its original panel request, it was not aware of facts that serve as the basis for that new claim.[333] The European Union submits that the jurisdiction of a compliance panel cannot turn on assertions by a complaining Member about the facts it allegedly did not know at a particular point in time. Moreover, the European Union submits *arguendo* that even if such a justification were acceptable, at the time the United States submitted its original panel request, the United States *was* already aware of the facts on which it relies in support of its Article 3.1(b) claims, as shown by the explicit reference to these facts in some of the documents identified by the United States as available evidence during the original consultation process.[334] The European Union submits that relevant information with respect to the A380 LA/MSF measures was communicated to the United States pursuant to the transparency provisions of the "1992 Agreement" between the United States and the European Union.[335] Thus, the European Union argues that nothing was preventing the United States from raising its 3.1(b) claims in the original proceeding.[336]

6.191. The European Union also argues that the United States' right to raise its Article 3.1(b) claim lapsed with the authority of the panel established under the United States' second panel

[329] European Union's first written submission, paras. 143-144 and 150; and second written submission, paras. 50 and 57.
[330] European Union's first written submission, paras. 134-140, 146, and 150; and second written submission, para. 53.
[331] European Union's first written submission, para. 140.
[332] European Union's first written submission, paras. 145 and 146 (citing Appellate Body Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211; and *US – Zeroing (EC) (Article 21.5 – EC)*, para. 432); and second written submission, para. 50.
[333] European Union's second written submission, para. 55.
[334] European Union's second written submission, para. 55, and fns 49 and 50.
[335] Referring to the Agreement between the European Economic Community and the Government of the United States of America concerning the application of the GATT Agreement on Trade in Civil Aircraft on Trade in Large Civil Aircraft.
[336] European Union's first written submission, paras. 141, 147, and 148.

request against the alleged subsidization of Airbus LCA in DS347. The European Union recalls that the United States' April 2006 panel request in DS347 included an Article 3.1(b) claim against the A380 LA/MSF measures. Thus, according to the European Union, since the DSB's authority for the establishment of that second panel lapsed on 7 October 2007, the United States is not permitted to nullify the effect of that lapse by raising the same claims anew in this compliance proceeding.[337]

6.192. Finally, the European Union submits that allowing the United States to raise claims under Article 3.1(b) during this proceeding would violate principles of due process, as it would deprive the European Union of its entitlement to a compliance period.[338] The European Union adds that should the United States choose to pursue these claims it must request the establishment of a new panel.[339]

6.4.2.3.2 Arguments of the United States

6.193. The United States accepts that in a compliance proceeding, complainants are ordinarily precluded from bringing claims against unchanged measures if "they could have been litigated before the original Panel, but were not".[340] However, the United States argues that when it submitted its original panel request in 2005, it was not aware that French, German, Spanish and UK LA/MSF subsidies for the A380 were contingent on the use of domestic over imported goods, and that such information was not publicly available.[341] The United States argues that it could not have raised its Article 3.1(b) claims in 2005.[342] According to the United States, it should therefore be permitted to raise those claims in this compliance proceeding.

6.194. The United States additionally argues that its Article 3.1(b) claim is closely related to the claims the United States did bring in the original proceeding as well as the corresponding recommendations and rulings of the DSB. Thus, the inclusion of this claim in this proceeding would promote the prompt compliance of those rulings and recommendations as well as the efficient use of the original panelists and their relevant experience.[343]

6.195. Finally, the United States submits that the fact that it included the same Article 3.1(b) claim in its second panel request (i.e., in DS347), and that the authority for the constitution of the panel in that dispute lapsed in 2007, does not preclude the possibility of raising this claim once again in this compliance proceeding.[344]

6.4.2.3.3 Evaluation by the Panel

6.196. The key question that lies at the centre of the parties' disagreement about whether the United States' Article 3.1(b) claims against the A380 LA/MSF subsidies fall within the scope of this proceeding is whether the United States is entitled to raise a claim in this compliance dispute against an unchanged measure that was challenged in the original proceeding on the basis of other legal provisions – in other words, can the United States bring a claim against the A380 LA/MSF subsidies that it did not bring in the original proceeding?

6.197. We recall that the Appellate Body indicated in *US – Upland Cotton (Article 21.5 – Brazil)* that "{a} complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceeding, but did not".[345] A complainant may not ordinarily use a compliance proceeding to raise, for the first time, a new claim about an unchanged measure, as this may improperly provide a "second chance" to that complainant to make a claim, jeopardizing the principles of fundamental fairness and due process.

[337] European Union's first written submission, para. 142; and second written submission, para. 52.
[338] European Union's first written submission, para. 149; and second written submission, para. 51.
[339] European Union's second written submission, para. 56.
[340] United States' second written submission, para. 133.
[341] United States' second written submission, para. 135.
[342] United States' second written submission, para. 136 (citing Appellate Body Reports, *US – Upland Cotton (Article 21.5 – Brazil)*; and *EC – Bed Linen (Article 21.5 – India)*).
[343] United States' second written submission, para. 137.
[344] United States' second written submission, para. 137.
[345] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211.

6.198. Both parties agree with this principle[346], and the United States does not contest that it would not ordinarily be permitted to introduce Article 3.1(b) claims against the A380 LA/MSF measures.[347] However, the United States maintains that it was unable to raise the relevant claim in 2005 due to insufficient information. According to the United States, it was not at that time aware that the French, German, Spanish and UK LA/MSF agreements for the A380 were each allegedly contingent on the use of domestic over imported goods because the relevant information was not public.[348] The United States argues that in these circumstances, it may properly introduce claims under Article 3.1(b) in this compliance proceeding that it did not raise in the original proceeding.

6.199. We are not convinced that, as a matter of law, the United States is entitled to introduce a claim under Article 3.1(b) against the unchanged A380 LA/MSF contracts in this compliance proceeding on the basis that it did not have sufficient information at the time of the original panel request. We note that it is generally accepted that a complainant may not amend its panel request to include new claims, nor cure defects in its panel request in subsequent submissions to the panel[349], including in situations where new information may come to light for either of the parties once the panel request has been filed. That being so, we find it difficult to see how the acquisition of new information could alone justify a complainant pursuing a new claim about an unchanged measure in a compliance proceeding.

6.200. Moreover, even if the acquisition of new information could, as a matter of law, justify a complainant pursuing a new claim in a compliance proceeding, we are not convinced that the facts before us support the United States' contention that it was unaware of facts that could potentially be relevant to its present Article 3.1(b) claim when it submitted its original panel request.[350] For example, in its submissions concerning Article 3.1(b) in this compliance proceeding, the United States emphasizes how "{t}he governments are open about the *quid pro quo*, … this means that Airbus must use domestic components instead of imports"; that all "of the parties are open about how this system operates"[351]; and that "the parties openly tout how the workshare agreements allocate parts of the production process to particular countries and sites within those countries."[352] The United States also refers to evidence "{a}s of 2001".[353] Other evidence the United States relies upon also appears to have been publicly available by the time the United States filed its first panel request in this dispute.[354] It is furthermore apparent that by the time the United States submitted its first panel request on 31 May 2005, it did in fact already have other information that was potentially relevant to a claim that the A380 LA/MSF contracts were inconsistent with Article 3.1(b) of the SCM Agreement. As noted by the European Union, such

[346] European Union's first written submission, paras. 145 and 146; and United States' second written submission, para. 133.

[347] United States' second written submission, para. 133 (referring to Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 210-211, as qualified by the Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 426-432).

[348] United States' second written submission, paras. 135 and 136.

[349] See e.g. Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 642; and *EC – Bananas III*, para. 142.

[350] European Union's second written submission, para. 55 and fn 49.

[351] United States' first written submission, para. 203. (underline added)

[352] United States' first written submission, para. 205. (underline added)

[353] United States' first written submission, para. 205 and fn 317 (citing "Integrated Airbus building up for A380", *Interavia Business & Technology*, Vol. 5, Issue 654, 1 June 2001, (Exhibit USA-304); and Pierre Sparaco, "Airbus Thinks Bigger, Not Faster: A symbol of Europe's transformation, the manufacturer – now a unified company – is offering a complete product line from narrowbodies to an aircraft larger than a 747", *Aviation Week & Space Technology*, 18 June 2001, (Exhibit USA-305)).

[354] "Integrated Airbus building up for A380", *Interavia Business & Technology*, Vol. 5, Issue 654, 1 June 2001, (Exhibit USA-304); M. Portilla, "*El Estado aportará hasta 406,5 millones hasta 2013 para el desarrollo de Airbus A380*", *ABC Periódico Electrónico S.A.*, 3 October 2003, (Exhibit USA-89); "*Renégotiation du Programme A3XX*", Response from the Ministry of Economy, Trade and Industry to Question n. 21523 from M. Louis Souvet, published in the JO Sénat, 22 June 2000, p. 2227, (Exhibit USA-90); "*Le gros-porteur d'airbus pourrait créer 10.000 emplois en Midi-Pyrénées en 2008: Le lancement de l'Airbus 380 soutient l'activité aéronautique*", *Les Echos*, p. 50, n. 18765, 21 October 2002, (Exhibit USA-91); "*Airbus A380: Jacques Chirac se fait le chantre de la coopération transatlantique*", *Les Echos*, p. 10, n. 18698, 17 July 2002, (Exhibit USA-92); "*Avec l'A3XX, la nouvelle société Airbus accentue la pression sur Boeing*", *Les Echos*, p. 12, n. 18180, 26 June 2000, (Exhibit USA-93); "EADS agrees to raise Spanish share of A380-report", Reuters, 22 January 2004, (Exhibit USA-308).

information was identified in the Statement of Available Evidence attached to the United States' consultations request in the original proceeding.[355]

6.201. In our view, the above considerations suggest that the United States was, or should have been, aware of information potentially relevant to an Article 3.1(b) claim when it requested the establishment of the original panel. Thus, even if it were possible for a complainant in an Article 21.5 proceeding to raise a claim that it did not pursue in the original proceeding in relation to an unchanged measure in a situation where it was unaware of potentially relevant facts at the moment of filing its original panel request, we consider that the facts and circumstances of the present dispute would not support the United States' submission that it is entitled to raise such a claim in this proceeding.[356]

6.202. Finally, the United States argues that its Article 3.1(b) claims against the A380 LA/MSF subsidies should be brought into this compliance proceeding because they are allegedly "closely related" to both the Article 3.1(a) claims the United States did raise in the original proceeding and the adopted recommendations and rulings, and finding that they fall within the compliance Panel's terms of reference would promote prompt compliance with the adopted recommendations and rulings and the efficient use of the original panel's experience.[357] We recall that the Appellate Body has clarified that certain measures that are closely related to the declared measures to comply, based on their respective nature, timing and effects, may fall within the scope of an Article 21.5 proceeding. However, we observe that this principle applies to the *measures* at issue, not the *claims* that may be raised against them. Moreover, we must bear in mind that Article 21.5 of the DSU strikes a balance between, on one hand, the promotion of "prompt resolution of disputes" and the "efficient use of the original panel and its relevant experience", and on the other hand, the "limitations on the types of claims that may be raised in Article 21.5 proceedings".[358] In the light of the availability to the United States, at the time of the original proceeding, of the information it now relies on for this claim in this compliance proceeding, allowing the United States to introduce new claims under Article 3.1(b) against the unchanged A380 contracts would, as we see it, upset this balance.

6.4.2.3.4 Conclusion

6.203. Thus, for all of the above reasons, we find that the United States' claims under Articles 3.1(b) and 3.2 of the SCM Agreement concerning the A380 LA/MSF measures are outside the scope of this compliance proceeding.

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[355] Statement of Available Evidence, Panel Report, *EC and certain member States – Large Civil Aircraft*, annex A. The exhibits identified by the European Union as potentially having relevance are: *Boletín Oficial de las Cortes Generales, Congreso de los Diputados, Contestaciones del Gobierno, Serie D, Núm.* 547, 5 June 2003, (Original Exhibit US-38); Collin (Yvon), Senate Report No. 73 (2003-2004), (Original Exhibit US-120); Collin (Yvon), Senate Report No. 87 (2001-2002), (Original Exhibit US-121); French Ministry of Transport Press Release, "*Accord pour le Financement de l'Airbus A380*", 15 March 2002, (Original Exhibit US-45); House of Commons, Minutes of evidence taken before the Welsh Affairs Committee, testimony of Mr. Fleet (BAE), 11 February 2004, (Original Exhibit US-227); "*Le président de la République a inauguré hier le chantier de construction du site d'assemblage de L'A380*", *Les Echos* No. 18.698, 17 July 2002, (Original Exhibit US-220); "Lending Support: Modernising the Government's Use of Loans, A Performance and Innovation Unit Report", March 2002, (Original Exhibit US-102); Press Release, Ministry of Science and Technology, "*El Ministerio Aportará al Desarollo {de A380} 376 Millones de Euros Hasta 2013*", 2 October 2003, (Original Exhibit US-126); Welsh Enterprise Institute, "Reaching for the Skies or Waiting for the Wings to Fall off? The Welsh Assembly, Grant Aid and British Aerospace", Paper 8, November 2000, (Original Exhibit US-228).

[356] The Panel observes that on 23 September 2005, four months after the United States submitted its request for the establishment of the first panel (DS316), the DSB agreed to initiate procedures for developing information concerning serious prejudice under Annex V of the SCM Agreement. On 24 February 2006, less than two months before the United States submitted its second panel request, i.e. DS347, which already included Article 3.1(b) claims, the Facilitator in the Annex V procedures submitted his report to the Panel. (See Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 1.7, 1.8 and annex C). We do not fail to see that the information contained in that report could have improved the United States' knowledge of the measures at issue in the original proceeding, including the specific terms of the A380 financing agreements. However, in light of the evidence submitted by the United States itself in this and the original proceedings, we consider that sufficient information was accessible to the United States to formulate claims under Article 3.1(b) of the SCM Agreement when it filed its first panel request.

[357] United States' second written submission, para. 137.

[358] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 72.

6.4.2.4 The United States' claim of threat of displacement or impedance under Article 6.3(a) of the SCM Agreement

6.4.2.4.1 Arguments of the European Union

6.204. The European Union submits that claims concerning the alleged threat of displacement and impedance of imports are outside the Panel's terms of reference.[359] The European Union submits that a claim of threat of serious prejudice is distinct from a claim of actual, present serious prejudice.[360] The European Union asserts that, contrary to the requirements of Article 6.2 of the DSU, it was not clear from the United States' compliance panel request which "problem" the United States was alleging was caused by the measures at issue.

6.205. The European Union contrasts the United States' compliance panel request with its panel request in the original proceeding. The European Union points out that in that panel request, the United States specifically referred to subsidies "causing or threatening to cause serious prejudice to the interests of the United States through displacement and impedance of imports".[361] The European Union considers that the "clear contrast" between the wording of the claims in the panel request in the original proceeding, and the wording of the claim in the Article 21.5 compliance panel request "must be given meaning".

6.206. The European Union argues that the plain meaning of the claims under Article 6.3(a) in the United States' compliance panel request, interpreted in the light of the different language used in the panel request for the original proceeding, suggests that the panel request in the compliance proceeding refers only to actual, rather than threatened, displacement and impedance of imports.[362] The European Union submits that the United States thus failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, pursuant to Article 6.2 of the DSU. The European Union argues that the United States cannot broaden the scope of the compliance proceeding by introducing a separate claim of threat of displacement and impedance of imports after the filing of its compliance panel request.

6.4.2.4.2 Arguments of the United States

6.207. The United States rejects the European Union's contentions that its compliance panel request does not comply with the requirements of Article 6.2 of the DSU and that its claims under Article 6.3 (a) of the SCM Agreement are outside the Panel's terms of reference. The United States considers that the European Union misinterprets both the SCM Agreement and the panel request in this proceeding.

6.208. The United States observes that the SCM Agreement explicitly states that "the term 'serious prejudice' … includes threat of serious prejudice".[363] The United States considers that the interpretations set out in past panel and Appellate Body reports confirm that "serious prejudice" includes the threat of serious prejudice.[364] The United States points out that in *Indonesia – Autos*,

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[359] European Union's first written submission, paras. 58, 151, 157, and 159-161.

[360] European Union's first written submission, para. 159 (citing Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 244 ("{A} threat of serious prejudice claim does not necessarily capture and provide a remedy with respect to the same scenario as a claim of present serious prejudice")).

[361] European Union's first written submission, paras. 158-159 (comparing WT/DS316/23, (dated 30 March 2012, circulated 3 April 2012), para. 8(c)(i), with WT/DS316/6, (dated 10 April 2006, circulated 11 April 2006), para. 8, subpara. 3, point 2 (we note this second document is in fact the lapsed second panel request, also numbered WT/DS347/3, although the relevant wording does not differ to the first panel request, WT/DS316/2 (dated 31 May 2005, circulated 3 June 2005) – both provide that the United States claims that the measures at issue "are causing or threatening to cause serious prejudice to the interests of the United States through displacement and impedance of imports of large civil aircraft of the United States into the EC", within the meaning of Article 6.3 of the SCM Agreement).

[362] European Union's first written submission, para. 159 (citing Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 244).

[363] United States' second written submission, para. 72 (citing footnote 13 to Article 5(c) of the SCM Agreement, which reads: "The term 'serious prejudice to the interests of another Member' is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice").

[364] United States' second written submission, paras. 69-71 (citing Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 7.1493 and fn 1555; and Panel Report, *Korea – Commercial Vessels*, para. 7.589

neither the United States nor the European Communities referenced "threat of serious prejudice" in their panel requests[365], yet both made specific threat claims in their written submissions, and the panel ultimately made findings on those claims[366]; similarly, in *Korea – Commercial Vessels*, the European Communities made no specific threat claims in its panel request[367], yet the panel itself raised the question of threat of serious prejudice, indicating that it saw no need to differentiate claims of actual and threatened prejudice.[368] The United States refutes the European Union's reliance on the Appellate Body's statement that "a threat of serious prejudice claim does not necessarily capture and provide a remedy with respect to the same scenario as a claim of present serious prejudice".[369] The United States considers that this statement merely indicates that a *threat* of serious prejudice claim may not encompass an *actual* serious prejudice claim – it says nothing about the reverse situation, arising here, in which a serious prejudice claim encompasses a threat of serious prejudice claim.[370]

6.209. The United States argues that its compliance panel request does not refer to either actual serious prejudice *or* threatened serious prejudice, but refers to "subsidies … inconsistent with Articles 5(c), 6.3(a), 6.3(b), and 6.3(c)".[371] The United States notes that the original panel request described the relevant violation as consisting of subsidies that "appear to be causing adverse effects to U.S. interests within the meaning of … Articles 5(c), 6.3(a), 6.3(b), and 6.3(c) of the SCM Agreement because the measures … are causing or threatening to cause serious prejudice to the interests of the United States".[372] Thus, referring to the original panel request, which the United States "emphasizes is unnecessary", would suggest that the inconsistency with Articles 6.3(a) and (b) is the same: serious prejudice *and* threat of serious prejudice.[373]

6.4.2.4.3 Evaluation by the Panel

6.210. The question before the Panel is whether the United States' panel request, in referring to a claim of displacement and impedance of imports within the meaning of Article 6.3(a), but not explicitly to a *threat* of displacement and impedance, satisfies the requirements of Article 6.2 of the DSU such that the *threat* of displacement and impedance of exports is within the Panel's terms of reference and may properly be considered by this Panel.

6.211. Article 6.2 of the DSU provides, in relevant part, that "{t}he request for the establishment of a panel shall … provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". If the measures or the claims are insufficiently identified, the "matter" is outside the panel's terms of reference. The Appellate Body has indicated that to satisfy the requirements of Article 6.2, the panel request should explain succinctly how or why the measure at issue is considered by the complaining party to be violating the WTO obligation in question. While the identification of the relevant treaty provision claimed to have been violated is always *necessary* for meeting the standard of clarity required by Article 6.2 of the DSU, it may not always

("{T}he concept of serious prejudice includes threat of serious prejudice (just as the term 'injury' in the *SCM Agreement* includes 'threat of material injury')")).

[365] United States' second written submission, para. 71 (citing *Indonesia – Autos*, United States' request for the establishment of a panel, WT/DS59/6, 12 June 1997; and *Indonesia – Autos*, European Communities' request for the establishment of a panel, WT/DS54/6, 12 May 1997).

[366] United States' second written submission, para. 71 (citing Panel Report, *Indonesia – Autos*, paras. 8.445 and 8.448).

[367] United States' second written submission, para. 71 (citing Panel Report, *Korea – Commercial Vessels*, European Communities' request for the establishment of a panel, WT/DS273/2, 11 June 2003).

[368] United States' second written submission, para. 71 (citing Panel Report, *Korea – Commercial Vessels*, paras. 7.529 and 7.589).

[369] United States' second written submission, para. 69 (citing Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 244).

[370] United States' second written submission, para. 69.

[371] United States' second written submission, para. 69 (citing WT/DS316/23, (dated 30 March 2012, circulated 3 April 2012), para. 8).

[372] United States' second written submission, para. 69 (citing WT/DS316/6, (11 April 2006), para. 8 (We note this document is in fact the lapsed second panel request, also numbered WT/DS347/3, although the relevant wording does not differ to the first panel request, WT/DS316/2 (dated 31 May 2005, circulated 3 June 2005) – both provide that the United States claims that the measures at issue "are causing or threatening to cause serious prejudice to the interests of the United States through displacement and impedance of imports of large civil aircraft of the United States into the EC", within the meaning of Article 6.3 of the SCM Agreement).

[373] United States' second written submission, para. 69.

be *sufficient*. The Appellate Body has stated that the simple listing of an article of an agreement may, in some circumstances, be sufficient. However, there may also be circumstances where this would not satisfy the standard of Article 6.2 – for example, where an article sets out not one distinct obligation, but rather multiple obligations, the listing of articles of an agreement may fall short of the standard required by Article 6.2.[374]

6.212. The United States' panel request states in relevant part:

> 8. The subsidies listed in paragraph 5 also result in the following inconsistencies with the SCM Agreement:
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> ...
>
> (c) all of the subsidies listed in paragraph 5 are inconsistent with Articles 5(c), 6.3(a), 6.3(b) and 6.3(c) because they are specific subsidies within the meaning of Articles 1 and 2, and result in
>
> (i) displacement and impedance of imports of large civil aircraft of the United States into the market of the EU within the meaning of Article 6.3(a).[375]

6.213. In its first written submission, the United States alleges that it continues to experience serious prejudice in the form of displacement and impedance, *and/or threat thereof*, in its LCA imports into the EU market under Article 6.3(a) of the SCM Agreement.[376]

6.214. While actual, or present serious prejudice is a distinct phenomenon from threatened serious prejudice, and the evidence required to demonstrate each is necessarily different[377], we note that as a legal interpretative matter, the term "serious prejudice to the interests of another Member" as used in the SCM Agreement explicitly includes the threat of serious prejudice. The obligation with respect to serious prejudice is contained in Article 5(c) of the SCM Agreement. Article 5(c) of the SCM Agreement provides, in footnote 13, that: "The term 'serious prejudice to the interests of another Member' is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and *includes threat of serious prejudice*".[378] Article 6.3(b) of the SCM Agreement provides that "{s}erious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where … the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market".

6.215. The United States' panel request did not refer only to the article of the SCM Agreement, but also identified the obligation and the specific form of serious prejudice it was alleging. By referring to inconsistency with Article 5(c) of the SCM Agreement, the United States indicated the obligation in question was the obligation not to cause serious prejudice to the interests of another Member, including the threat of serious prejudice. As the threat of serious prejudice is expressly included in the definition of serious prejudice in the SCM Agreement, the European Union could have anticipated that the United States' concern might cover both actual and threatened serious prejudice. The reference to "displacement or impedance of imports of large civil aircraft of the United States into the market of the EU within the meaning of Article 6.3(a)" put the European Union on notice as to the particular form of serious prejudice alleged, and the particular

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[374] Appellate Body Report, *Korea – Dairy*, para. 124.

[375] *EC and certain member States – Large Civil Aircraft*, Recourse to Article 21.5 of the DSU by the United States: Request for the establishment of a panel, WT/DS316/23, (dated 30 March 2012, circulated 3 April 2012).

[376] United States' first written submission, para. 247. See also United States' first written submission paras. 276, 279, 359, 514, 519, and 533.

[377] See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 244 ("A claim of serious prejudice may relate to a different situation than a claim of threat of serious prejudice. A claim of *present* serious prejudice relates to the existence of prejudice in the past, and present, and that may continue into the future. By contrast, a claim of *threat* of serious prejudice relates to the prejudice that does not yet exist, but is imminent such that it will materialize in the near future. Therefore, a threat of serious prejudice claim does not necessarily capture and provide a remedy with respect to the same scenario as a claim of present serious prejudice."). (emphasis original)

[378] (emphasis added)

market in which it was alleged to have occurred. Whether that displacement or impedance is actual or threatened could then be elaborated and appropriately developed through argumentation and evidence in the parties' submissions.[379]

6.216. We consider that, on balance, the reference to an alleged inconsistency with SCM Agreement Article 6.3(a) in the form of "displacement or impedance of imports … within the meaning of Article 6.3(a)" as set out in the United States' panel request, in these circumstances encompasses the threat of displacement or impedance such that it satisfies the requirements of Article 6.2 in this regard.

6.217. As to whether this conclusion should be altered in light of the different wording used by the United States in its panel request in the original proceeding and in the panel request for this compliance proceeding, we note that the two panel requests are distinct procedural documents. We are aware of situations where, within the same proceeding, panels have examined the terminology used in requests for consultations to confirm the interpretation of terms in the related panel request.[380] However, in this instance the separate panel requests relate to separate proceedings. There does not, in our view, appear to be a basis for treating the language of the United States' original panel request as probative of the meaning to be attributed to the compliance panel request.

6.4.2.4.4 Conclusion

6.218. For all of the above reasons, we find that the United States' panel request adequately provides a summary of the legal basis of the complaint in satisfaction of the requirements of Article 6.2 of the DSU, and that the United States' claim of threat of displacement or impedance under Article 6(3) of the SCM Agreement is within the Panel's terms of reference in this compliance proceeding.

6.5 Prohibited subsidy claims

6.5.1 Introduction

6.219. We now proceed to address the second of the three sets of issues raised by the parties in this compliance dispute, namely, whether the United States has demonstrated that the A380 and A350XWB LA/MSF measures are prohibited subsidies within the meaning of Articles 3.1 and 3.2 of the SCM Agreement. We start by examining the merits of the United States' allegation that the A350XWB LA/MSF measures constitute specific subsidies under the terms of Article 1.1 of the SCM Agreement.

6.5.2 Whether LA/MSF for the A350XWB is a subsidy

6.5.2.1 Arguments of the United States

6.220. The United States claims that France, Germany, Spain and the United Kingdom each contractually agreed to provide LA/MSF of, in total, EUR 3.5 billion[381] to Airbus entities for developing the A350XWB aircraft, and that each of the relevant agreements is a specific subsidy. The United States argues that LA/MSF is a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement, which confers a benefit pursuant to Article 1.1(b) of the

[379] We note that in this dispute, particular features of the facts may imply present and future effects; given the ordinary time lag between orders and deliveries of LCA, in certain situations, order data may be indicative to some degree of future displacement or impedance when those aircraft are eventually delivered. (Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1783-7.1784. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1199; and United States' first written submission, para. 514 ("Notwithstanding the arguments and data above, should the Panel find that there is no impedance of Boeing single aisle LCA based on the delivery data, the United States requests that the Panel conduct a threat analysis based on order data. The order data demonstrates that Boeing LCA are also threatened with displacement and/or impedance in the EU single-aisle market")).

[380] See e.g. Panel Report, *US – Lamb*, para. 5.36.

[381] See, for example, United States' first written submission, para. 8. We note that the sum of the amounts to be provided under the contracts appears to be in the order of EUR **[***]** when the amounts denominated in GBP are converted to EUR at historical conversion rates as at the date of the UK contract.

SCM Agreement because it is provided on terms more favourable than the market would provide.[382] In support of this position, the United States refers to various government statements and media reports, which it argues demonstrate that LA/MSF was provided on non-commercial terms, and compares the alleged rates of return anticipated in the relevant LA/MSF contracts to a constructed market benchmark; a comparison which the United States considers demonstrates that LA/MSF is provided at below-market rates of return.

6.5.2.2 Arguments of the European Union

6.221. The European Union agrees that the A350XWB LA/MSF agreements are each financial contributions within the meaning of Article 1.1(a)(1) of the SCM Agreement, but considers that the United States has failed to demonstrate that those measures confer a benefit pursuant to Article 1.1(b) of the SCM Agreement. While the European Union agrees that the proper question regarding "benefit" is whether each of the relevant LA/MSF measures is provided at below-market rates of return[383], it submits that the United States understates the rates of return expected under the contracts, and overstates the market benchmark rates of return.[384] The European Union disagrees with the United States with respect to the risks involved with both the form of financing and the project in question, and the implications of those risks for what returns a market lender would likely have sought in return for providing financing of a comparable project on comparable terms and conditions. The European Union states that, for various reasons, the approach proposed by the United States "is a methodology that lacks financial and economic robustness and that does not withstand scrutiny".[385]

6.5.2.3 Evaluation by the Panel

6.222. We recall that the existence of a subsidy is to be determined pursuant to Article 1.1 of the SCM Agreement.

6.223. Article 1.1 of the SCM Agreement provides that:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement a "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); …
>
> and
>
> (b) a benefit is thereby conferred.

6.224. Thus, there is a subsidy where: (a) a financial contribution by a government or public body within the territory of a Member (b) confers a benefit.[386] Before turning to evaluate the merits of the parties' arguments with respect to these two elements of the definition of a subsidy, we first set out our understanding of the terms and conditions of LA/MSF for the A350XWB.

6.5.2.3.1 Key features of LA/MSF for the A350XWB

6.225. The terms under which the French, German, Spanish and UK LA/MSF measures were agreed and provided for the A350XWB are set out in separate national-level contracts or other legal instruments entered into by each relevant European Union member State government or government body and the various Airbus entities. The European Union provided the relevant

[382] United States' first written submission, paras. 8, 105, 106, 113, 136-138, and 366-368.
[383] European Union's second written submission, para. 280.
[384] See e.g. European Union's second written submission, paras. 280, 291, 294-304, and 305-352.
[385] European Union's second written submission, para. 293.
[386] SCM Agreement Articles 1.1(a)(1) and 1.1(b).

contracts on 5 October 2012 following our decision to agree to the United States' request of 20 July 2012 to seek this information in accordance with Article 13 of the DSU. The key features of the LA/MSF measures as described in the documents submitted by the European Union are set out in the following subsections.

6.5.2.3.1.1 French A350XWB LA/MSF

6.226. The terms of French government LA/MSF for the A350XWB are set out in two legal instruments: a *Protocole d'accord* (French A350XWB *Protocole*) dated **[***]**[387]; and a *Convention d'avance recuperable* (French A350XWB *Convention*) dated **[***]**.[388] Airbus SAS and the French State were parties to both instruments, with no other Airbus entity being involved.

6.227. Under the terms of the French A350XWB *Protocole*, the French Government agreed to provide Airbus with **[***]**.[389] Eligible expenses are defined as technical feasibility studies and validation work for the A350XWB programme up to the date of Aircraft Type Certification[390] **[***]**.[391] The French A350XWB *Protocole* envisages that such expenses would cover **[***]**[392], including: **[***]**.[393]

6.228. Annex 4 of the French A350XWB *Protocole* contains an anticipated schedule of disbursements which reveals when and in what amounts the parties envisaged the government funding would be provided over a period of years. The same schedule of disbursements is affirmed in the French A350XWB *Convention*. The French A350XWB *Protocole* provides that in the event of **[***]**.[394]

6.229. The amounts of funding disbursed by the French Government are to be repaid with interest through **[***]** levies charged on revenues generated from aircraft deliveries.[395] The obligation to repay the LA/MSF is therefore triggered only if there is an aircraft delivery. Thus, both the reimbursement of principal and the payment of interest are dependent upon the success of the A350XWB programme.

6.230. The French A350XWB *Protocole* provides for **[***]** levies in the following amounts: **[***]**[396] **[***]**.[397] However, the French A350XWB *Protocole* specifies that the final levies to be charged are to be determined on **[***]** depending on whether **[***]**.[398] If, as of that date, **[***]**. After **[***]**, levy amounts will only be re-calculated if there are delays or if deliveries are not made according to the anticipated schedule. Moreover, in the event of either: (a) a

[387] *Protocole d'accord entre l'État et la Société Airbus relatif au programme A350XWB* **[***]**, (French A350XWB *Protocole*), (Exhibit EU-(Article 13)-01) (BCI), and annexes (Exhibits EU-(Article 13)-02 to EU-(Article 13)-13) (BCI/HSBI).

[388] French A350XWB *Convention d'avance récupérable (CAR)* **[***]**, (French A350XWB *Convention*), (Exhibit EU-(Article 13)-11) (BCI).

[389] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 3.1.

[390] Annex 2 to the French A350XWB *Protocole*: *Liste des dépenses éligibles* **[***]**, (Annex 2 to the French A350XWB *Protocole*), (Exhibit EU-(Article 13)-03) (BCI), para. 1. See also French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 2.3. Aircraft Type Certification is determinative of certain airworthiness and noise requirements.

[391] See Annex 1 to the French A350XWB *Protocole*: *Définition du programme et de la famille d'avions A350XWB* (Annex 1 to the French A350XWB *Protocole*), (Exhibit EU-(Article 13)-02) (BCI).

[392] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 2.3; Annex 2 to the French A350XWB *Protocole*, (Exhibit EU-(Article 13)-03) (BCI), para. 1; and French A350XWB *Convention*, (Exhibit EU-(Article 13)-11) (BCI), art. 2.

[393] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), annex 2, para. 2. See also Exchange of Letters between Fabrice Brégier, Director General of Airbus, and French Director General of Civil Aviation (DGAC) **[***]** and **[***]**, (Exhibit EU-(Article 13)-10) (BCI).

[394] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), arts. 4.2, 4.3, and 3.2.

[395] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 6.

[396] The **[***]**. Neither the value of global sales nor the anticipated amount of the **[***]** is specified in the French A350XWB *Protocole,* nor is it specified in the French A350XWB *Convention*. (See French A350XWB *Protocole,* (Exhibit EU-(Article 13)-01) (BCI), art. 6.3).

[397] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 6.3. We note that no information on the anticipated sales price or amount of revenue is included in the LA/MSF contract.

[398] The A350XWB programme industrial launch on 1 December 2006 was for **[***]**, the A350-800, -900 (baseline variant), and -1000. **[***]**. (See e.g. Annex 1 to the French A350XWB *Protocole*, (Exhibit EU-(Article 13)-02) (BCI)).

rescheduling of disbursements, or (b) delays in deliveries, the precise amount of levies (as we understand it, for the next tranche of deliveries) are to be recalculated according to a formula, so as to achieve the required interest rate.

6.231. The French A350XWB *Protocole* states that the expected amount of interest payable will be **[***]**. The interest of **[***]** is expected to be realised upon delivery of **[***]** aircraft, which is less than the overall expected number of deliveries.[399] The French A350XWB *Protocole* states that once the last payment (we understand this to mean disbursement) has been effected and within three months, the definitive rate of return is to be determined, taking into account the disbursements made by the French State over the whole duration of the operation, as the average of the following two rates:

(i) **[***]**; and

(ii) **[***]**[400] **[***]**.[401]

6.232. Royalties are payable under the French LA/MSF contract. The obligation to pay a royalty is triggered if there is an aircraft delivery once the principal has been reimbursed, which the contract states is expected to be by delivery **[***]**, which is less than the overall expected number of deliveries.[402] The amount of the royalty is expressed as 1% of the **[***]**[403] **[***]**. The obligation to pay royalties **[***]**.[404]

6.233. An anticipated schedule of deliveries is included as an annex to the French A350XWB *Protocole*. It is the same as that included in the Spanish and UK LA/MSF contracts, and detailed in the document identified by the European Union as the A350XWB business case-related document seen by the member States.[405] The anticipated schedule includes **[***]**.

6.234. In the event of default on the obligations to make payments, there is no security over assets of the contracting company, or assets of any related company. There is no surety or guarantee implicating any other entity.

6.235. Finally, the French A350XWB LA/MSF contract does not make specific provision for what is to occur in the event of discontinuation of the A350XWB programme. However, as the obligations to pay levies, interest and royalties are dependent on successful deliveries, were the programme to be discontinued, no new payment obligations would be triggered (though Airbus would have a continued obligation to pay any levies or royalties due on any aircraft already delivered). The French State has **[***]**. Airbus may **[***]**.[406] Due to the success-dependent nature of the repayment obligations, programme discontinuation would not **[***]**.

6.5.2.3.1.2 German A350XWB LA/MSF

6.236. German LA/MSF is set out in the *Darlehensvertrag* (German KfW A350XWB Loan Agreement)[407] and annexes, dated **[***]**. The parties are the *Kreditanstalt für Wiederaufbau*

[399] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 6.3.

[400] **[***]**.

[401] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 6.5. We note that **[***]**. We also note that **[***]**. Thus, under the French contract, the ultimate rate remains, as of today, undetermined.

[402] The total number of expected deliveries is HSBI, but is included in the **[***]** at Annex 4 to the *Protocole* (Exhibit EU-(Article 13)-05) (HSBI).

[403] **[***]** is to be determined **[***]**. Neither the value of global sales nor the anticipated amount of **[***]** is specified in the agreement.

[404] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 7.4.

[405] **[***]** presentation, **[***]**, (Business case-related document), (Exhibit EU-(Article 13)-35) (HSBI), p. 12. This is also the same schedule as that included in the document the European Union refers to as the "business case", which the European Union asserts was never seen by the member States: that is, the A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 50-51.

[406] French A350XWB *Protocole* (Exhibit EU-(Article 13)-01) (BCI), art. 7.4.

[407] *Darlehensvertrag,* or Loan Agreement, between *Kreditanstalt für Wiederaufbau* (KfW) and Airbus Operations GmbH and Airbus SAS to grant a loan to part-finance the development costs of the Airbus A350XWB, **[***]** (German KfW A350XWB Loan Agreement), (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI).

(KfW) (a development bank of the German Government[408]); and Airbus Operations GmbH, Hamburg, which is identified as the borrower, and Airbus SAS, Toulouse, which is identified as a co-borrower.

6.237. Under the German KfW A350XWB Loan Agreement, KfW agreed to provide Airbus with **[***]** of eligible costs incurred by the borrower for the A350XWB programme, to a maximum of **[***]**. Three tranches of funding were envisaged: **[***]**.[409] Eligible costs include: **[***]**.[410]

6.238. Reimbursement of the principal is by per-aircraft levies. The obligation to make levy payments is triggered only if there is an aircraft delivery. Levy amounts are **[***]**: **[***]**.[411] Full repayment of the loan is envisaged to occur with the delivery of **[***]**. **[***]**. The agreement states that **[***]**.[412]

6.239. An HSBI anticipated delivery schedule is included in an annex. Unlike the other contracts, this schedule differs to that included in the A350XWB business case-related documents.[413] The German delivery schedule **[***]**. The European Union submits that overall deliveries were expected to be in line with the total stated in the Airbus base case for the A350XWB, and has explained that the schedule in the German LA/MSF agreement is different to the delivery schedule in the other agreements and in the business case because **[***]**.[414] The German delivery schedule **[***]**.

6.240. Periodic interest is payable on outstanding principal. This interest is charged separately to the levies. The interest is calculated from the date on which the first disbursement sum is debited from the KfW account, with a period of three months, and is payable for the first time on 30 September 2010. **[***]**.[415] Apart from the specific set of circumstances described below[416], the obligation to make periodic interest payments on the outstanding principal appears to continue for as long as the programme continues.

6.241. An annual **[***]** fee of **[***]**, and a semi-annual **[***]** fee of **[***]** are also charged.[417] Additionally, KfW will **[***]**.

6.242. Royalties are due on deliveries that occur once the principal has been reimbursed. Royalties are payable for **[***]** after the date on which the principal is repaid, which is expected to be by delivery **[***]**.[418] The payment of royalties is thus dependent on the programme's continuation past delivery **[***]**. The royalty is expressed as a percentage of the borrower's share of the sales price, and are **[***]**: **[***]**. The anticipated sales price or the borrower's share of that sales price is not specified in the agreement.

[408] See Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1248.

[409] German KfW A350XWB Loan Agreement, (EU-(Article 13)-14) (English translation) (BCI/HSBI), section 3.2. The European Union submits that **[***]**. (See Statement of Airbus Operations GmbH Account with KfW as at 31 August 2012, dated 8 September 2012, (Exhibit EU-(Article 13)-36) (BCI)).

[410] Annex 1.4(b)(ii) to German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-19) (English translation) (BCI), para. 2.

[411] German KfW A350XWB Loan Agreement, (EU-(Article 13)-14) (English translation) (BCI/HSBI), sections 6.1-6.3.

[412] German KfW A350XWB Loan Agreement, (EU-(Article 13)-14) (English translation) (BCI/HSBI), section 6.7.

[413] Compare: German KfW A350XWB Loan Agreement, (EU-(Article 13)-14) (English translation) (BCI/HSBI); with Business case-related document, (Exhibit EU-(Article 13)-35) (HSBI), p. 12; and A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 50-51.

[414] European Union's response to Panel question No. 131, paras. 93-95.

[415] The United States' expert, Dr Jordan, applies these terms and using historical data provides an estimate of 3.34%, to which the European Union does not object, and which the European Union's expert, Professor Whitelaw, subsequently uses in his own calculations.

[416] See below para. 6.245.

[417] Annex 13.1(a) to German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-26) (English translation) (BCI), arts. 4.1 and 4.4.

[418] This is **[***]** deliveries referenced in the German KfW A350 Loan Agreement **[***]**. (German KfW A350XWB Loan Agreement, (EU-(Article 13)-14) (English translation) (BCI/HSBI), section 1.1).

6.243. In terms of **[***]**, the contract refers to: **[***]**[419], **[***]**. In a letter from EADS N.V., annexed to the loan agreement, dated **[***]** and titled **[***]**, EADS **[***]**.[420] **[***]** and **[***]** guarantee the performance of Airbus' payment obligations but do not ensure repayment of the loan in the event that the programme is not as successful as anticipated and deliveries are not made in accordance with the expected schedule. Default interest is payable where either the borrower (Airbus Operations GmbH), or Airbus SAS, fails to make payments (except for interest payments). The applicable default interest rate is a rate set out in the German Civil Code.

6.244. In addition, the German Federal Government has provided **[***]**[421], **[***]**.[422]

6.245. If the programme is discontinued, **[***]**.[423] Further, **[***]**. Additionally, **[***]**. The European Union states that fees are non-refundable, and that Airbus would not get back sums it paid out as fees.

6.246. There are a number of conditions to Airbus' release from obligations on discontinuation of the programme. The programme **[***]**. **[***]**.

6.247. The contract also includes a **[***]**.[424] **[***]**.

6.248. The contract is not time limited; rights and obligations under the contract continue until Airbus' obligations have been discharged in full.

6.5.2.3.1.3 Spanish A350XWB LA/MSF

6.249. The LA/MSF agreement with Spain is formalised in a *Convenio de Colaboración*[425] (Spanish A350XWB *Convenio*) dated **[***]**, between the Spanish Ministry of Industry, Tourism and Commerce and Airbus Operations S.L. A prior *Real Decreto*[426] dated 6 November 2009 and published 9 November 2009 indicated the government's commitment to provide the sums and, broadly, some conditions of LA/MSF.

6.250. Under the Spanish A350XWB *Convenio*, Spain agreed to provide a maximum of EUR 332,228,670[427] for eligible expenses for non-recurrent costs for the participation of Airbus Operations S.L. in the A350XWB development programme, corresponding to preliminary design, engineering design, wind tunnel tests, structural tests, wing tests, certification documentation, and cost of fabrication of prototype and trial aircraft, including modifications, tools and equipment.[428]

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[419] European Aeronautical Defence and Space Company (EADS). The company is now called the Airbus Group. We primarily use the title EADS in this proceeding, reflecting its name during the relevant time-period.

[420] Annex 13.1(a) to German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-26) (English translation) (BCI).

[421] European Union's comments on the United States' response to Panel question No. 161, para. 10 (citing German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), sections 4.4 and 12.5(b)(ii)).

[422] European Union's comments on the United States' response to Panel question No. 161, para. 10.

[423] German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), section 8.8.

[424] Annex 13.1(a) to German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-26) (English translation) (BCI), **[***]**.

[425] *Convenio de Colaboración entre el Ministerio de Industria, Turismo y Comercio y la Empresa Airbus Operations S.L relativo a su participación en el programa de desarrollo del avión Airbus A350XWB* **[***]** (Spanish A350XWB *Convenio*), (Exhibit EU-(Article 13)-29) (BCI/HSBI).

[426] *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46).

[427] Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29) (BCI/HSBI), *Tercera*, p. 3; *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46), art. 6.1.

[428] *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46), art. 4.2.

The Spanish A350XWB *Convenio* and the *Real Decreto* envisage EUR 41,493,300 being disbursed in 2009.[429] The schedule of remaining disbursements is HSBI.

6.251. As we understand it, under the terms of the Spanish agreement **[***]**. The obligation to make levy payments is triggered only if there is an aircraft delivery.

6.252. Levy amounts are **[***]**: **[***]**[430] **[***]**. The rate of interest, set by reference to the interest rate of 10-year government bonds, is **[***]**.[431]

6.253. The contract on the Panel record does not include a delivery schedule. However, the Spanish contract anticipates payments in line with the delivery schedule anticipated by business case-related documents[432] and included in the French and UK A350XWB contracts.

6.254. Royalties are due on deliveries that occur once the principal has been reimbursed. The royalty amount is **[***]** per aircraft. The obligation to pay a royalty is triggered if there is an aircraft delivery once the principal has been repaid. The payment of royalties is dependent on the success of the program. The **[***]**.

6.255. In the event of default on obligations to make payments, there is no security over assets of the contracting company, or assets of any related company. There is no surety or guarantee implicating any other entity.

6.256. In the event that the participation of Airbus Operations SL in the A350XWB programme is cancelled by Airbus SAS, **[***]**. In the event of **[***]**. If, **[***]**.[433] **[***]**.

6.5.2.3.1.4 UK A350XWB LA/MSF

6.257. A Repayable Investment Agreement[434] dated **[***]** was concluded between the UK Secretary of State for Business, Innovation and Skills, and both Airbus Operations Ltd and the European Aeronautic Defence and Space Company (EADS) NV.

6.258. A **[***]** was set out in an exchange of letters dated **[***]**.[435] A **[***]** was set out in an exchange of letters dated **[***]**.[436] A **[***]** was set out in a letter dated **[***]**.[437] These **[***]**.[438] We refer to the UK A350XWB Repayable Investment Agreement and these **[***]** letters collectively as the "UK A350XWB LA/MSF contract".

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[429] The European Union submits that this disbursement occurred in **[***]**: European Union's response to Panel question No. 133, fn 182.

[430] "**[***]**": Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29) (BCI/HSBI), *Novena*, p. 5.

[431] *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46), art. 5.

[432] Business case-related document, (Exhibit EU-(Article 13)-35) (HSBI), p. 12. This schedule was included in the document the European Union refers to as the "business case", which the European Union asserts was never seen by the member States: that is, A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 50-51.

[433] Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29 (BCI/HSBI), **[***]**.

[434] Repayable Investment Agreement in relation to the Airbus A350XWB, **[***]**, (UK A350XWB Repayable Investment Agreement), (Exhibit EU-(Article 13)-30) (BCI/HSBI).

[435] Exchange of letters between the UK Department for Business, Innovation and Skills, and Airbus Operations Ltd and EADS NV **[***]**, (First set of **[***]** to UK A350XWB LA/MSF contract), (Exhibit EU-(Article 13)-31) (BCI/HSBI).

[436] Exchange of letters between the UK Department for Business, Innovation and Skills, and Airbus Operations Ltd **[***]**, (Second set of **[***]** to UK A350XWB LA/MSF contract), (Exhibit EU-(Article 13)-32) (BCI/HSBI)).

[437] Exchange of letters between the UK Department for Business, Innovation and Skills, and Airbus Operations Ltd **[***]**, (Third set of **[***]** to UK A350XWB LA/MSF contract), (Exhibit EU-(Article 13)-33) (BCI/HSBI).

[438] The first iteration of the agreement contains the material terms and conditions. The **[***]** did not materially modify those terms and conditions, **[***]**. However, the last **[***]**, occurring **[***]** after the initial agreement, provided that **[***]**. It provided an **[***]**, up to the total amount initially agreed. It may

6.259. Under each iteration of the contract, the United Kingdom agreed to finance **[***]** of costs incurred by Airbus Operations Ltd to a maximum of GBP 340,000,000.[439] **[***]**. This would cover design and development costs which Airbus either paid or incurred a commitment to pay. Eligible cost items include: **[***]**.[440]

6.260. Disbursements are only available during an "availability period", from **[***]**.[441] **[***]**. Further changes to the disbursements schedule **[***]**. The final disbursements schedule is HSBI.

6.261. Reimbursement of the principal is envisaged by per-aircraft levies. The obligation to make levy payments is triggered only if there is an aircraft delivery. **[***]**.[442] **[***]**.[443] In the UK agreement, **[***]**.[444] The agreement contains a clause stating that **[***]**.[445]

6.262. The agreement contains an HSBI anticipated delivery schedule, which is the same as that included in the A350XWB business case-related documents provided by the European Union[446], and in the French contract. It differs to that included in the German contract.

6.263. Periodic interest is payable on outstanding principal, due **[***]** at a rate of **[***]**.[447] The obligation to pay periodic interest only applies either **[***]**, or **[***]**, whichever is later.[448] Thus, while the interest falls due periodically and is not in this respect dependent on the success of the programme, as it is only payable for a period that is either **[***]**, payment of interest **[***]** is therefore dependent on the success of the programme **[***]**.

6.264. Royalties are due on deliveries that occur once the principal has been reimbursed. The first royalty payment is expected on **[***]**. The royalty amount is expressed as a percentage of actual revenue: **[***]**. The anticipated actual revenue is not specified in the agreement. The obligation to pay a royalty ends on delivery **[***]**.

6.265. **[***]** is provided in the form of a **[***]**. If there is a change in control **[***]**. Additionally, while **[***]**, the contract expressly **[***]**. Airbus Operations Ltd **[***]**.

6.266. In the event that obligations are not performed, default interest is also due at **[***]** above the relevant interest rate, that is, **[***]**.

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thus be possible to characterize the UK LA/MSF as having been provided via **[***]**. However, both parties appear to agree that LA/MSF was provided by the United Kingdom in the form of a single instance of LA/MSF and under a single contract, albeit with some **[***]** at various stages. The UK LA/MSF is therefore treated as a single loan in this proceeding. (See **[***]** documents (First set of **[***]** to UK A350XWB LA/MSF contract, (Exhibit EU-(Article 13)-31) (BCI/HSBI); Second set of **[***]** to UK A350XWB LA/MSF contract, (Exhibit EU-(Article 13)-32) (BCI/HSBI); and Third set of **[***]** to UK A350XWB LA/MSF contract, (Exhibit EU-(Article 13)-33) (BCI/HSBI)); United States' response to Panel question No. 110, paras. 2-3; and European Union's comments on the United States' response to Panel question No. 110, para. 1.

[439] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clauses 2.1 and 4.3(c)(i).

[440] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), p. 43, schedule 3 (Eligible Cost Parameters).

[441] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), p. 2, section 1 (Interpretation: 'Availability period').

[442] **[***]**.

[443] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), p. 11, section 4 (Repayment, Prepayment and Cancellation), clause 5.3.

[444] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), p. 11, section 4 (Repayment, Prepayment and Cancellation), clause 5.5.

[445] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), p. 11, section 4 (Repayment, Prepayment and Cancellation), clause 5.4.

[446] Business case-related document, (Exhibit EU-(Article 13)-35) (HSBI), p. 12. This schedule was included in the document the European Union refers to as the "business case", which the European Union asserts was never seen by the member States: that is, the A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 50-51.

[447] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), p. 4.

[448] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), p. 4, section 1.1 **[***]** and p. 13, section 5, clauses 7.1 and 7.2 (Interest).

6.267. If the principal is not repaid by either **[***]**, or **[***]**, whichever is later, then the **[***]**.[449] Nor, if the programme effectively ends after **[***]**, is there any further obligation to pay interest. Therefore, in the event of programme discontinuation at a point beyond ten years after the date of the first drawdown, it appears Airbus has no further obligation to repay the principal, or to pay interest.

6.5.2.3.1.5 Similarities and differences between the A350XWB LA/MSF contracts and the LA/MSF measures examined in the original proceeding

6.268. The following section describes features in common and differences between the contracts at issue in this proceeding and the contracts at issue in the original proceeding.[450]

6.269. Disbursements operate via substantially the same mechanisms as in the original proceeding. Funds are either: (a) transferred in advance of actual development costs being incurred, or (b) disbursed up to the agreed amounts after actual costs have been incurred. As in the original proceeding, when funds are disbursed in advance, costs actually incurred may be subsequently audited or reviewed by the governments and the funding amounts adjusted to ensure that total borrowing does not exceed the level of development costs it was agreed would be financed.[451] In several of the contracts currently at issue (the French and Spanish contracts), provision is made for the **[***]**.

6.270. Like the contracts in the original proceeding, reimbursement of the loan principal in all four contracts currently at issue is by per-aircraft levies. The levy is charged upon aircraft delivery, and thus levies are expected to be paid according to a pre-determined anticipated aircraft delivery schedule. Repayment of the principal may thus be said to be *levy-based*. In the original proceeding, the levy-based nature of repayment obligations was an important aspect of the contracts. Because loan repayments and, in general, any additional returns (interest payments) were charged via levies, this made the loans essentially *success-dependent* – the obligation to make a levy-based payment was not triggered until a successful delivery was made.

6.271. In two of the current contracts (the French and Spanish A350XWB contracts), **[***]**, which will be achieved if deliveries are made in accordance with the anticipated schedule.

6.272. In two of the current contracts (the German and UK A350XWB contracts), interest payments are **[***]**. For those two contracts, while the **[***]**. The German A380 LA/MSF contract examined in the original proceeding also included a **[***]**.[452]

6.273. As in the original proceeding, repayments usually start with the delivery of the first aircraft.[453] In some instances, repayment begins only after Airbus has made a specified number of aircraft deliveries. Although the amount of the per-aircraft levies varies between the different contracts, it appears in nearly all cases to be **[***]**. In this way, the contracts are *back-loaded*. This is significant because the repayment structure puts off a significant proportion of expected payments until later in time. In principle, the further into the future returns are expected, the less certain are returns because, in general, there is less certainty regarding the occurrence of potentially negative effects of possible intervening events. Further, if the number of expected deliveries turns out to have been too optimistic, it is the latter payments that will not be made. If, then, it is with latter payments that the bulk of reimbursement was to be made, the lender stands to lose more than had the repayment schedule involved equal payments or if it had been front-loaded. The back-loaded nature of such a reimbursement schedule contributes to the overall risk associated with LA/MSF.

[449] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), p. 11, section 4 (Repayment, Prepayment and Cancellation), clause 5.4.

[450] See Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.373-7.375.

[451] See Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.373.

[452] See Loan Contract between the Federal Republic of Germany and Airbus Deutschland GmbH on the grant of an interest-bearing, conditionally repayable loan for the partial financing of the development costs for the Airbus A380, 19 March 2002, (German A380 LA/MSF contract), (Original Exhibit US-72), (Exhibit USA-83) (BCI), section 6.

[453] See Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.374.

6.274. The Spanish and UK A350XWB contracts, like some of the contracts at issue in the original proceeding, provide a "**[***]**"; **[***]**. However, the UK contract differs from those other contracts in that it **[***]**. Thus, the UK contract provides for interest payments for a period **[***]**. The UK LA/MSF contract is also the only one of the LA/MSF contracts that **[***]**, which is expected and required by delivery **[***]**. Although it provides a "**[***]**" during which **[***]** on initial deliveries and **[***]**, it: (a) nonetheless requires **[***]** during that time and so ensures at least **[***]**; and (b) because the levy amounts, once due, **[***]**, they are not weighted more heavily towards **[***]**. The UK agreement for the A350XWB therefore has some elements in respect of which it is not as back-loaded as the other contracts (**[***]** that are applied), and some elements in which it is more back-loaded than the French and German contracts (**[***]**).

6.275. Royalties operate via substantially the same mechanisms as in the original proceeding. Royalty payments on a per-aircraft basis are called for on deliveries made in excess of the number needed to secure repayment of the disbursed principal plus any interest. In all four A350XWB LA/MSF contracts, royalties become due once the principal has been repaid and upon the successful delivery of the remaining aircraft that are expected to be delivered under the business case and anticipated delivery schedule, and in some cases upon any aircraft deliveries that occur beyond those anticipated by Airbus. Royalties are thus also success-dependent. This was also the case under those of the contracts in the original proceeding that involved royalties. We note that the number of aircraft expected to generate royalties may be different under the four contracts because some contracts charge a different levy amount and so may achieve repayment of the principal sooner, thereby commencing generating royalty revenues earlier and over a longer period.

6.276. In the original proceeding, there was no form of security for the repayment of the loan principal and interest; no assets or collateral were nominated against which the lender could make a claim in the event that payment obligations were not met.[454] The loan was thus said to be *unsecured*. In the original proceeding, the governments' claims on revenues generated from the delivery of LCA were, in some cases, guaranteed by one of the companies forming part of the Airbus economic entity. The obligation to make a levy payment remained triggered by a successful delivery, and thus remained success-dependent. The guarantee of the performance of this obligation did not alter the fact that the loan was to be repaid only by the cash flows associated with the project (that is, the loan was levy-based and success-dependent) and no other form of security existed for the repayment of the loan principal and interest (that is, the loan was unsecured). Thus, in the original proceeding the panel noted that, notwithstanding this form of guarantee or surety, there was no obligation on Airbus or any company forming part of the Airbus economic entity to fully or partially repay LA/MSF in the event that the delivery targets stipulated in the contractual repayment schedules were not achieved.

6.277. Similarly, in this proceeding, no security or collateral is nominated or provided by another entity for repaying LA/MSF either if Airbus does not fulfil its obligations or in the event that delivery targets are not met or if the programme fails or is discontinued. While the UK contract **[***]**.

6.278. In this proceeding, other entities – **[***]**.[455] As in the original proceeding, **[***]** with respect to LA/MSF for the A350XWB do not ensure repayment of loan principal in the event that Airbus fails to make the number of deliveries needed to reimburse the full amount of financing obtained from the European Union member States. In this instance neither the **[***]** nor the **[***]** therefore overcomes the levy-based, success dependent and unsecured nature of the LA/MSF contracts. However, the **[***]** would provide some assurance of the payment of **[***]** under the two contracts in question, thus ensuring some return beyond the cash flows generated by the project itself.

6.279. As described above, three of the contracts currently at issue − the German, Spanish and UK contracts − make provision for what is to happen in the event of discontinuation of either the programme as a whole or the participation of the Airbus entity operating in the relevant EU

[454] See Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.375 ("{T}he scheduled repayments are not secured by any lien on Airbus assets").

[455] Both the UK and German A350XWB LA/MSF contracts directly **[***]** to ensure that payments that fall due (thanks to aircraft deliveries) are made. **[***]** A350XWB LA/MSF contracts **[***]**.

member State's territory. The Spanish contract's discontinuation provision confirms that no repayment must be made if the programme is discontinued.

6.280. The UK A350XWB LA/MSF contract provides that in the event the programme fails or is discontinued, then Airbus' interest payment obligation effectively ends on a date **[***]** years after the first disbursement.[456] Under the UK contract, the United Kingdom will receive cash inflows from interest payments for a period of **[***]** years from commencement of disbursements, even despite programme discontinuation.

6.281. The German A350XWB LA/MSF contract provides that in the event the programme fails or is discontinued, then Airbus may **[***]**, and that in that case Airbus will be **[***]**. It is our understanding that this therefore refers to **[***]**. This would mean that, barring some limited circumstances, Airbus **[***]**. Under the German A350XWB contract, Airbus' **[***]**.[457] This results in a **[***]**.

6.282. We note that without such **[***]** provisions in the German and UK contracts, there would have been **[***]**, despite a failure to make deliveries. That is, **[***]**. However, the inclusion of the **[***]**, renders the full repayment of these contracts more success-dependent.

6.283. As the French and Spanish contracts **[***]**, these two contracts would not require an explicit **[***]** to be success-dependent; they will remain success-dependent in any event because the entirety of the return is earned via successful deliveries. The Spanish **[***]** provision appears to merely confirm the full success dependency of Spanish LA/MSF for the A350XWB.

6.284. The French and Spanish A350XWB LA/MSF contracts **[***]** that are different to the contracts examined in the original proceeding. Neither do they incorporate provisions that **[***]**. Thus, while the French A350XWB LA/MSF contract **[***]** in the event of programme discontinuation, **[***]**.

6.285. In summary, we consider that though the German and UK contracts might differ to all other LA/MSF contracts in respect of the **[***]** provisions, the effect of this difference is to act as a counterpoint to the provisions on **[***]**, so that they remain effectively success-dependent (although under the UK contract, **[***]** is payable for **[***]** years after the first disbursements are made, **[***]**).

6.286. In the original proceeding, despite a number of variations in the terms and conditions of each of the legal instruments making up the contractual framework of the challenged LA/MSF measures, the panel ultimately agreed with the parties that numerous similarities in the type and form of financing could be found.[458] Overall, we consider that the LA/MSF contracts for the A350XWB resemble the contracts at issue in the original proceeding, based on the type of terms, including the similarity of disbursement mechanisms, the levy-based repayments of the principal along an anticipated schedule of deliveries and the imposition of royalties, the fact that no security is provided for the debt amount, and the existence of conditional guarantees that are limited only to the performance of obligations. There are some pertinent differences, including provisions regarding programme discontinuation, which may contribute to lessening the success-dependent aspect of the LA/MSF provided under the German and UK A350XWB contracts. However, as described above, we consider that this effect is limited in both instances, as in the case of the UK contract it is time limited, with a **[***]** on the interest that might be paid despite failure to make deliveries, and in the case of the German contract because we consider it is a rather narrow preservation of the KfW's right to continued interest payments on the principal. Despite these differences between the A350XWB contracts, we consider that, overall, the repayment of the LA/MSF is back-loaded, primarily levy-based, dependent on the sales of aircraft and unsecured. To this extent, the A350XWB LA/MSF contracts share the same core features as the LA/MSF measures considered in the original proceeding.

[456] Dr James Jordan, NERA, "Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks", 18 October 2012, (Jordan Report), (Exhibit USA-475) (BCI/HSBI), para. 11.

[457] See German KfW A350XWB Loan Agreement, (EU-(Article 13)-14) (English translation) (BCI/HSBI), section 8.8.

[458] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.374, 7.410, and 7.525.

6.287. Finally, we note that the European Union has at no stage argued that a project-specific risk premium should not be used in the construction of the appropriate market benchmark for LA/MSF. In our view, this recognises that the full repayment of the A350XWB LA/MSF contracts is, overall, dependent upon revenues from sales of A350XWB, like LA/MSF for other aircraft.

6.288. We now proceed to consider whether the A350XWB LA/MSF is a subsidy.

6.5.2.3.2 Financial contribution

6.289. The parties do not dispute the characterization of LA/MSF for the A350XWB as a financial contribution falling under Article 1.1(a) of the SCM Agreement.[459] The United States describes LA/MSF as "funding" and "financing" that shares characteristics of the LA/MSF measures at issue in the original proceeding.[460] The European Union characterises LA/MSF as a "loan" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement[461], explaining furthermore that while disbursements have begun, **[***]**.[462]

6.290. We recall that in the original proceeding, the panel found that despite the fact that some of the amounts due under the French, German and Spanish A380 LA/MSF contracts had not yet been disbursed, the fact that such disbursements represented part of the total (and maximum) amount of funding that it was agreed and planned would be transferred to Airbus for that programme, meant that the relevant LA/MSF measures involved a direct transfer of funds within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[463] In our view, the same conclusions can be reached in relation to the A350XWB LA/MSF measures. Thus, to the extent that some of the disbursements specifically envisaged under the A350XWB LA/MSF contracts are yet to be made, we do not consider that this should preclude the entirety of the envisaged LA/MSF measures from being characterised as a direct transfer of funds.

6.291. The European Union's characterisation of LA/MSF as direct transfers of funds in the form of "loans" is consistent with the approach taken by this panel in the original proceeding[464], and we see no reason to take a different approach in this compliance proceeding. However, we note that LA/MSF differs substantially from conventional loans involving the scheduled repayment of a loan's principal plus a pre-determined amount of interest.[465] For example, the success-dependent nature

[459] See European Union's first written submission para. 366; and United States' second written submission, paras. 98 and 279. Neither party questions whether LA/MSF is provided by a government or any public body within the territory of a member within the meaning of Article 1.1(a)(1) of the SCM Agreement. With respect to the French, Spanish, UK and German LA/MSF contracts, the entities providing the financing are, respectively: the French State, as represented by the Minister for Ecology, Energy and Sustainable Development, the Defence Minister, the Minister for the Budget, and the Secretary of State in charge of Transport, and the Management Unit of Aeronautical Armament Operations of the Defence Ministry; the Spanish State, as represented by the Spanish Ministry of Industry, Tourism and Commerce; the UK State, as represented by the UK Secretary of State for Business, Innovation and Skills; and the German *Kreditanstalt für Wiederaufbau* (KfW). The European Union has not contested KfW's status as a public body. We agree that LA/MSF is provided by a government or public body within the territory of a Member within the meaning of Article 1.1(a)(1) of the SCM Agreement.

[460] United States' first written submission, para. 147.

[461] European Union's first written submission, para. 366.

[462] European Union's second written submission, paras. 276-277. With regards to the UK contract, the European Union initially stated that **[***]**, as disbursements were scheduled to occur no earlier than **[***]**. However, the European Union later clarified that disbursements were made as follows: In **[***]**. Disbursements were scheduled and made by the UK Government in **[***]**. With respect to the **[***]**, the European Union stated that **[***]**. (See European Union's response to Panel question Nos. 47 (para. 157) (citing, *inter alia*, KfW bank account statement, (Exhibit EU-134) (BCI)), 86 (para. 335), 128 (para. 86); UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), section 1 and clause. 4.3(d); First set of **[***]** to UK A350XWB LA/MSF contract, (Exhibit EU-(Article 13)-31) (BCI/HSBI); Second set of **[***]** to UK A350XWB LA/MSF contract, (Exhibit EU-(Article 13)-32) (BCI/HSBI); and Third set of **[***]** to UK A350XWB LA/MSF contract, (Exhibit EU-(Article 13)-33) (BCI/HSBI)).

[463] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.378.

[464] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.379.

[465] With respect to how LA/MSF may differ to a conventional loan, we note that EADS does not appear to treat LA/MSF as a financial liability. (See CompetitionRx Report, "Supplementary expert report on the financial viability and funding of the A350XWB development programme", 19 September 2013 (Supplemental CompetitionRx Report), (Exhibit EU-420) (BCI/HSBI), paras. 99-102). EADS also represents its enterprise value to investors both "with" and "without" LA/MSF, indicating that it does not appear to treat LA/MSF as a

of LA/MSF means that, if Airbus fails to achieve a particular level of deliveries, it would not be required under the contracts to fully repay the principal, much less provide the lenders the stated rate of return. On the other hand, Airbus would be required to make payments beyond those necessary to reimburse the principal amount and achieve the stated rate of return if it achieves higher levels of deliveries. The significant differences between conventional loans and LA/MSF play an important role in our analysis of whether the financial contribution confers a benefit, below.

6.292. As the parties do not appear to dispute the characterisation of LA/MSF as a financial contribution, and as we have characterised LA/MSF to be a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, the remainder of our evaluation is concerned with the "benefit" element of the subsidy analysis pursuant to Article 1.1(b) of the SCM Agreement.

6.5.2.3.3 Benefit

6.293. The parties disagree as to whether LA/MSF for the A350XWB confers a "benefit" pursuant to Article 1.1(b) of the SCM Agreement. While there is no definition of "benefit" in the SCM Agreement, it is well established that a benefit is conferred if a "financial contribution" is offered on terms that are more advantageous than those that would have been available to the recipient on the market.[466] In this respect, the parties have advanced multiple lines of argument, various expert reports and considerable evidence in support of their respective positions.

6.294. The United States initially argued that the A350XWB LA/MSF measures conferred a "benefit" upon Airbus on the basis of various government statements and media reports adduced in its first written submission, which it submits reveal that the fundamental purpose of LA/MSF "is to provide financing that is not commercially available due to the enormous risks and costs associated with launching new models of LCA".[467] According to the United States, this evidence is enough, on its own, to establish "a *prima facie* case as to the existence of a subsidy, because it establishes the existence of a financial contribution, and that the market would not have provided Airbus with that financing on the terms that it obtained from the government".[468]

6.295. After receiving copies of the relevant A350XWB LA/MSF contracts following our decision to accept the United States' request to "seek information" in accordance with Article 13 of the DSU, the United States focused its submissions on demonstrating that the "rates of return" associated with each of the challenged LA/MSF measures were below the interest rates that would have been charged by a market lender for financing on the same terms and conditions as A350XWB LA/MSF. Recalling that the panel and the parties agreed in the original proceeding that the appropriate question was whether "the rates of return obtained by the member States {are} lower than a corresponding market benchmark"[469], the United States advances its own estimates of the "rates of return" associated with each of the four A350XWB LA/MSF measures as well as comparable market interest rate benchmarks, arguing that this evidence demonstrates that the A350XWB LA/MSF measures are subsidies.

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conventional debt instrument. (See Gerard Adsuar, Corporate Executive, EADS Finance and Treasury, "Cash Drivers and Enterprise Value", EADS presentation, Global Investor Forum, 1-2 April 2009, (Exhibit USA-33)).

[466] Panel Report, *Canada – Aircraft*, paras. 9.112 and 9.120; and Appellate Body Report, *Canada – Aircraft*, paras. 155 and 157-158 (affirming the panel in relevant respects).

[467] United States' first written submission, para. 137 (citing UK House of Commons Business, Innovation and Skills Committee, "Full Speed ahead: maintaining UK excellence in motorsport and aerospace", Sixth Report of Session 2009-10, Report, formal minutes, and oral and written evidence, 9 March 2010, (Exhibit USA-44), p. 10; "Repayable Launch Investment", UK Department for Business, Innovation and Skills website, accessed February 2012, (Exhibit USA-63); *Investissements d'avenir, convention 'opérateur ONERA' Action: 'recherche dans le domaine de l'aéronautique'*, 31 July 2010, (ONERA Agreement), (Exhibit USA-54), art. 3.1; and J. Hartmann and J. Hildebrand, "*Wie Airbus und Boeing um die Luftoheit kampfen*", *Welt* Online, 22 March 2010, (Exhibit USA-67)); second written submission, paras. 280-282; and HSBI version of the United States' second written submission, para. 281 (citing HSBI material in the UK Industrial Development Advisory Board memorandum, 16 April 2010, (UK Appraisal), (Exhibit EU-(Article 13)-34) (HSBI)).

[468] United States' second written submission, para. 282 (citing Appellate Body Report, *Canada – Aircraft*, para. 157). See also United States' first written submission, para. 137.

[469] European Union's second written submission paras. 282-283 (citing Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 834 and 838; and *Japan – DRAMs (Korea)*, para. 174); and United States' second written submission para. 283 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 873-874 and 924).

6.296. In relation to the first element of the comparison, the United States proposes to use the "rates of return" "cited in the LA/MSF Agreements".[470] However, because the United States argues that there is no funding instrument available on the market that offers all of the particular features of LA/MSF, the United States submits that, for the second element of the comparison, a proxy market interest rate benchmark should be used.[471]

6.297. The United States constructs its proposed market interest rate benchmarks on the basis of the interest rate that would have been offered to Airbus by a market lender for Airbus' general borrowing activities, plus a project-specific risk premium that represents the additional return that a lender would require for offering financing on the particular project-specific terms of LA/MSF.[472] The United States argues that a comparison of its estimated rates of return for each of the challenged A350XWB LA/MSF measures and the corresponding market interest rate benchmarks reveals that "the commercial benchmark rates are higher than the actual rates that France, Germany, Spain and the UK actually charged Airbus for LA/MSF for the A350XWB."[473] Thus, the United States concludes that the A350XWB LA/MSF measures confer a "benefit" upon Airbus within the meaning of Article 1.1(b) of the SCM Agreement.[474]

6.298. The European Union argues that the government statements and media reports which the United States relies upon are not sufficient to demonstrate that the A350XWB LA/MSF measures confer a "benefit" upon Airbus. In order for the United States to make out its case, the European Union submits that the United States must demonstrate that the rates of return achieved by the European Union member States are, in fact, below those that would have been obtained by a market lender for similar financing.[475] Moreover, the European Union adds that to the extent that the United States argues that the relevant evidence suggests that LA/MSF and its key features would never be available on the market under any circumstances[476], this is both: (a) contrary to the original panel's finding that certain features of LA/MSF do not inherently involve below-market rates[477], and (b) factually false: the European Union points to the existence of other market instruments as evidence against such a proposition.[478]

6.299. While the European Union agrees that the proper question regarding "benefit" is whether the LA/MSF is provided at below-market rates[479], it submits that the United States understates the rates of return expected under the contracts, and overstates market benchmark rates of return.[480] The European Union states that, for various reasons, the approach proposed by the United States "is a methodology that lacks financial and economic robustness and that does not withstand scrutiny".[481] In particular, the European Union disagrees with the United States with respect to what rates were anticipated under the contracts, the risks involved with both the form of financing and the project in question, and the returns a market lender would likely have sought for financing for the project under such terms and conditions.

6.300. Before turning to evaluate the merits of the parties' arguments, we first clarify our understanding of the United States' reliance on the government statements and media reports submitted with its written submissions.

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[470] United States' second written submission, para. 284.

[471] United States' first written submission, paras. 129-138, 365, and 389; and second written submission, paras. 283, 288, and 289; United States' opening statement (public), para. 37 ("{T}he benchmark advocated by the United States … uses a constructed benchmark precisely because there is no market analog for LA/MSF".)

[472] United States' second written submission, para. 285 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 860-62 and 874; and Jordan Report, (Exhibit USA-475) (BCI/HSBI), paras. 12-22).

[473] United States' second written submission, para. 286.

[474] E.g. United States' second written submission, paras. 286 and 413.

[475] European Union's first written submission, para. 370; and second written submission, para. 283 (citing Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 834 and 838; and *Japan – DRAMs (Korea)*, para. 174).

[476] European Union's first written submission, paras. 371-373, and 352 (third bullet point); and second written submission, paras. 284-289.

[477] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.531.

[478] European Union's second written submission, paras. 285-286.

[479] European Union's second written submission, para. 280.

[480] See e.g. European Union's second written submission paras. 291, 280, 294-304, and 305-52.

[481] European Union's second written submission, para. 293.

6.301. As already noted, the United States submits that certain government statements and media reports demonstrate that LA/MSF is not commercially available and, therefore, that the A350XWB LA/MSF measures confer a "benefit" to Airbus. In making this submission, we do not understand the United States to argue that LA/MSF-like financing instruments could never exist in the marketplace, but only that such measures would not be provided *on the terms and conditions* of the challenged LA/MSF contracts (including rates of return).[482] In our view, the United States' line of argument is not inconsistent with the original panel's approach to the question of benefit, because it pertains to the particular terms and conditions of the instruments, and does not imply that all LA/MSF, by definition, would necessarily involve below-market rates of return. Further, we consider that the government statements and media reports in question are not inconsistent with how we understand the United States to be arguing its case. The statements in question, as we understand it, concern not whether the market would provide funding for LCA on any terms whatsoever, but rather whether the market would provide financing – with the particular characteristics – on terms and conditions (including rates of return) that would make it functionally available to the borrower.

6.302. To the extent that the European Union's submissions imply that the only evidence relevant to the benefit analysis that we must perform in this dispute is a comparison of rates, we disagree. While the analysis of whether a financial contribution involving a direct transfer of funds confers a "benefit" would usually involve comparing rates of return with a market benchmark rate, we do not preclude that other evidence may be relevant as to whether or not a benefit is conferred.

6.303. With respect to whether the government and press statements offered by the United States are sufficient to establish a *prima facie* case in this dispute[483], we recall that these statements were primarily submitted with the United States' first written submission, before the actual A350XWB LA/MSF contracts were made available by the European Union in responding to our request for information pursuant to Article 13 of the DSU. As we see it, our evaluation of whether LA/MSF confers a benefit should proceed from a consideration of the entirety of the parties' arguments and evidence. In addition to the cited statements, the United States' case involves, *inter alia*, the use of rates of return under the A350XWB LA/MSF contracts as compared against a benchmark. We therefore do not consider that our evaluation of whether the United States has made its case should exclusively focus on the statements presented by the United States mainly in its first written submission.

6.304. In keeping with the treatment of similar evidence in the original proceeding, we will therefore take the cited government and press statements into account as relevant, making our own judgment as to their weight and probative value.[484] We will likewise take other evidence concerning the availability of funding into account as relevant.

6.305. We now turn to evaluate the evidence and arguments before us, following the approach developed by the parties in the course of their submissions. In the light of the parties' arguments, we will examine whether the rates of return expected by the relevant European Union member States under the A350XWB LA/MSF contracts are lower than what would have been required by a market lender for financing on similar terms. This is the same basic approach as that taken by the panel in the original proceeding.

6.5.2.3.3.1 Expected rates of return of the A350XWB LA/MSF contracts

6.306. We commence our benefit analysis by determining the rates of return[485] of the A350XWB LA/MSF contracts in order to compare these to a market benchmark. The parties' arguments in

[482] United States' first written submission, paras. 8, 106, 117, 129-38, and 330; and second written submission, paras. 278-293.

[483] We recall that the Appellate Body has defined a "*prima facie*" case in WTO proceedings as "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case". (Appellate Body Report, *EC – Hormones*, para. 104).

[484] See Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1919.

[485] The United States uses the terms "rate of return" and "interest rate" of the contracts, and refers to various rates, including a rate of periodic interest charged on outstanding principal. (See e.g. United States' second written submission, para. 284). The European Union refers to the "internal rate of return" (IRR) of the contracts. (See e.g. European Union's second written submission, paras. 291 and 294-304). For the sake of

relation to the different rates of return they have advanced raise the following main questions: (a) whether the expected rates of return of the LA/MSF contracts should include cash inflows expected from royalties; (b) whether the German contract's expected rate of return should include cash inflows from certain fees; and (c) issues concerning the accuracy of internal rates of return estimated by the European Union.

Whether rates of return should include cash inflows expected from royalties

6.307. The parties disagree about whether, in principle, revenue from royalty payments should be included in the cash inflows used to calculate the expected rates of return of the A350XWB LA/MSF contracts. The parties appear to agree that revenues from royalty payments should be treated in accordance with the original proceeding[486], but appear to differ in their interpretation of how royalties were treated in that proceeding.

6.308. According to the United States' expert, Dr Jordan, in the original proceeding the panel "validated" the approach of excluding royalties, and "doubted the legitimacy of interest rate calculations that factored in royalty payments".[487] The United States submits that:

> Although the {p}anel described this approach as not fully accounting for the effects of royalty payments, it discounted the importance of such royalty payments, saying "although *ostensibly* required by the terms of the LA/MSF agreements, royalty payments may never be made if attached to a number of aircraft sales, which … cannot realistically ever be achieved". Moreover, the {p}anel did not endorse the EU's methodology for determining the actual rates of return, instead describing it as "at most, the outer limit".[488] (emphasis added by the United States)

6.309. The United States adds, however, that "{s}ince the true rates of return lie somewhere between the approach used by {United States' experts} NERA and that used by the EU during the merits phase, NERA relies on its own approach for the purposes of this compliance dispute".[489]

6.310. The European Union argues that using the rates identified by the United States inappropriately excludes revenues from royalties on aircraft that are anticipated by the "base case" number of expected aircraft deliveries, and therefore underestimates the returns expected under the LA/MSF contracts.[490] The European Union submits that such an approach is, in fact, inconsistent with the panel's approach in the original proceeding.[491] The European Union provides its own estimates of the rates of return, in the form of internal rates of return (IRRs) including cash inflows from royalty revenues expected in the base case, calculated using certain aircraft price information.[492]

6.311. In addition, the European Union also states that even these figures "are conservatively low … because all four of the A350XWB agreements would require **[***]**".[493] That is, the IRRs offered by the European Union are stated to be a reflection only of the return to the member States that could be anticipated based on **[***]**. The European Union considers that "actual programme life deliveries can be expected to be higher than the conservative number of deliveries used for capital budgeting in the launch business case".[494]

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clarity, we use "rates of return" as a generic term, and refer to the European Union's proposed rates as "internal rates of return", or IRR estimates.

[486] European Union's second written submission, para. 297; and United States' response to Panel question No. 91, paras. 350-351.

[487] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 8.

[488] United States' second written submission, para. 284 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.412 and 7.414).

[489] United States' second written submission, fn 421.

[490] European Union's second written submission, paras. 291 and 294-304.

[491] European Union's second written submission, para. 297.

[492] The aircraft price information is not disclosed in the A350XWB contract documentation and has not been made available to the Panel or the United States in this proceeding.

[493] European Union's second written submission, para. 301.

[494] European Union's second written submission, para. 302.

6.312. We observe that the panel stated in the original proceeding, with regards to the contracts then at issue:

> As we understand it, the royalties foreseen under these contracts represent a share in the revenues generated from sales of the financed LCA after the full amount of LA/MSF has been repaid. In our view, the fact that such payments were expressly provided for in these contracts indicates that the EC member State governments to some degree anticipated they could enhance the rate of return that would otherwise be achieved on their investment.[495]

> … like the IRRs determined for contracts that did not provide for royalties, the IRRs established on the basis of royalty payments are inherently speculative and depend on achieving the number, timing, and (for some contracts) the forecast prices of deliveries projected in the relevant Airbus business case. Thus, while we recognize the inclusion of royalty payment provisions into the LA/MSF contracts is itself evidence of a certain expectation that royalties would be paid; we nevertheless consider that the IRRs established by the European Communities, taking royalty payments into account, could only represent, at most, the outer limit of what the EC member State governments could have reasonably expected at the time of concluding the contracts.[496]

6.313. While the original panel noted that the royalties due in accordance with the base case represented the "outer limit" of what the relevant member States could have expected at the time of concluding the contracts, the original panel did proceed with its analysis using IRRs that included royalty revenues. We therefore disagree with the United States' interpretation that the panel "validated" the approach of excluding revenues from royalties.

6.314. We consider that if there is no relevant factual difference in how royalties are envisaged under the LA/MSF contracts in this proceeding, royalties should, in principle, be included in the calculations determining the expected rates of return of the LA/MSF contracts in this proceeding, consistent with the original panel's approach.

6.315. The parties appear to agree that there are no relevant factual differences in how royalties are envisaged under the contracts that would necessitate a deviation from the panel's approach in the original proceeding.[497] In particular, the parties appear to agree that royalty payments for the A350XWB are **[***]**.[498] We are satisfied that royalties are generally expected under the A350XWB LA/MSF contracts in proportions that are similar to those for the A380 contracts.[499] For the A380 contracts, the panel accepted in the original proceeding to proceed using the royalty revenues expected on deliveries up to the level of deliveries anticipated in the base case.

6.316. Like in the original proceeding, we accept that royalties are more speculative than other payments because they are both success-dependent and premised on the deliveries forecast farther into the future, and are thus more subject to uncertainty compared with payments made

[495] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.410.

[496] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.414.

[497] European Union's second written submission, para. 297; and United States' response to Panel question No. 91, paras. 350-351.

[498] United States' comments on the European Union's response to Panel question No. 91, para. 250; European Union's comments on the United States' response to Panel question No. 91, paras. 799-800; and Percentage of aircraft deliveries forecast in program business case anticipated to fully repay MSF, (Exhibit EU-376) (HSBI).

[499] See Percentage of aircraft deliveries forecast in program business case anticipated to fully repay MSF, (Exhibit EU-376) (HSBI), p. 4. The contracts anticipate deliveries after repayment of principal as follows. French contract: Repayment of principal expected by delivery **[***]**, which is less than the overall expected HSBI number of deliveries included in the schedule. German contract: Repayment expected by delivery of the "first **[***]** aircraft". While the German payment schedule **[***]**, the German contract cites the HSBI base case as being relevant to the **[***]**. Spanish contract: Repayment of principal expected by delivery **[***]**. The contract **[***]**. The UK contract delivery schedule **[***]**, and thus expects royalties on that basis. (Annex 8 to the French A350XWB *Protocole*, (Exhibit EU-(Article 13)-09) (HSBI); German KfW A350XWB Loan Agreement, (EU-(Article 13)-14) (English translation) (BCI/HSBI), section 6.1; UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI). See also European Union's comments on the United States' response to Panel question No. 91, paras. 738-740).

for the purpose of repaying principal. We consider they are nevertheless relevant to include in order to reflect the maximum rates of return that the governments could expect if the base case number of deliveries were to occur in accordance with the anticipated schedules of deliveries expected under the contracts.[500] Uncertainties that are relevant to the risks that a market lender may take into account when determining the rate of return it would seek for financing a particular project, on particular terms, are dealt with further below in determining the project-specific risk premium a market lender might add for such financing.

6.317. Therefore, consistent with the panel's approach in the original proceeding, the value of royalty payments − up to the level of deliveries in the base case and anticipated delivery schedule − is relevant to establishing the rates of return the European Union member States could have expected, taking the A350XWB LA/MSF contracts and base case at face value. In this proceeding, we therefore include revenues from royalties expected on deliveries foreseen in the base case in determining the rates of return expected under the LA/MSF contracts.

6.318. With regard to the European Union's statement that including only royalties based on the total number of deliveries forecast by Airbus in its base case results in a "conservative" estimate because the A350XWB contracts provide for **[***]**, we do not agree. The European Union's submissions appear to rest on the premise that the actual outcome of the A350XWB programme may differ, that is, be more successful, than the projected outcome in terms of deliveries. This may be the case. However, there is no evidence that this is what was anticipated by the relevant European Union member States at the time that the relevant LA/MSF contracts were concluded. Thus, just as we accept the inclusion of royalties into the calculation of the rates of return, despite the possibility that the delivery forecast upon which they are based might never be achieved, so too do we find it unnecessary to qualify the European Union's member States' expectations as "conservative" because of the possibility that the A350XWB programme might be more successful than anticipated. Moreover, if the number of deliveries "used for capital budgeting in the launch business case"[501] is ordinarily understood to be "conservative", as the European Union suggests, such conservative nature of estimates would presumably be taken into account by a sophisticated lender such as a the relevant European Union member States when deciding upon the acceptability of a rate of return. We therefore do not agree with the European Union that the rates of return calculated on the basis of the base case delivery schedule and the relevant contractual repayment provisions would necessarily be "conservatively low".[502] Indeed, we note in this regard, that analyses conducted by Steer Davies Gleave and CompetitionRx suggest that the numbers of aircraft produced and delivered per year anticipated in the A350XWB base case scenario are, in historic terms, not conservative.[503]

6.319. Having recalled that the original panel accepted the inclusion of royalties in the calculation of the maximum returns under the relevant LA/MSF contracts, and given that the parties agree there is no relevant factual difference in this proceeding with respect to how royalties become due under the A350XWB LA/MSF contracts compared with the pre-A350XWB LA/MSF contracts, we conclude that, in principle, it would be appropriate to include revenues from royalties in accordance with the "base case" expectations and anticipated schedule of deliveries in calculating the rates of return of the A350XWB LA/MSF measures. We are therefore prepared to accept the European Union's IRRs to the extent that they reflect such anticipated revenues.

[500] Moreover, as will be discussed in greater detail in the section concerning an appropriate market benchmark below, the United States proposes to judge the A350XWB contracts' expected returns as being over a period of around 20 years. That time-frame would only be relevant if aircraft sales attracting royalty payments were accepted as contributing to the expected returns. (Repayment of the principal in full via levies is expected to occur **[***]**.) It appears that under this argument (which will be detailed later), the United States seeks to acknowledge the full amount of time over which anticipated cash outflows and inflows are expected to occur, including royalties.

[501] European Union's second written submission, para. 302.

[502] Only those royalties payable in accordance with the anticipated delivery schedule are included in Professor Whitelaw's estimation of the IRRs.

[503] Professor Thomas Hoehn, CompetitionRx, "Financial Viability and Funding Implications of the A350XWB Development Programme", 13 January 2013, (CompetitionRx Report), (Revised), (Exhibit EU-127) (BCI/HSBI), paras. 116 and 117. See also Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428), p. 5.

Whether rates of return should include cash inflows from fees

6.320. The parties disagree about whether cash inflows from certain fees should be incorporated into the estimate of the returns of the German A350XWB LA/MSF contract. In particular, the United States excludes, while the European Union includes, revenues from two types of fees charged by Germany in estimating the returns.[504] The United States further submits that if the fees are included in the calculation of the German contract's rate of return, then an amount should likewise be included for such fees for the benchmark[505], on the basis that they are normal fees for services that would have been charged by a market lender.[506] In addition, the United States proposes to add an amount to the benchmark for *all the other contracts*, whether or not administrative fees were considered in the contract, on the basis that such other amounts would have been incurred by Airbus in connection with market lending and that the waiver of such normal fees is an advantageous feature of the LA/MSF contracts.[507] We address in this section the question of whether to include each of the German fees in the IRR calculations.

6.321. Several fees are mentioned in the German A350XWB LA/MSF contract. A **[***]** is expressly mentioned in the contract as forming part of the **[***]** and is not at issue as it has been included by both the United States' expert, Dr Jordan, and the European Union's expert, Professor Whitelaw, in their reports setting out their estimations of returns under the A350XWB LA/MSF contracts.[508]

6.322. Two further fees are mentioned in the German A350XWB contract: an annual **[***]** fee, at the rate of **[***]** and a semi-annual **[***]** fee, at the rate of **[***]**, due in **[***]** and **[***]** each year.[509] The United States' expert, Dr Jordan, did not include these fees in estimating the German rate. The European Union's expert, Professor Whitelaw, responded that this was inappropriate and provided an estimate of the German IRR that purports to include the two fees.[510] The annual **[***]** fee appears to total approximately EUR **[***]** over the anticipated period of LA/MSF according to the German schedule of deliveries and Airbus' base case; and the semi-annual **[***]** fee appears to total approximately EUR **[***]** over the same anticipated period of LA/MSF.

6.323. In this section, we discuss the characterisation of the fees and whether revenues from those fees should be included in the IRR estimates. The parties make related arguments regarding an adjustment to a market benchmark rate of return. Those arguments are introduced here to provide context, but are dealt with in the section below concerning the market benchmark rate of return.

6.324. In response to Professor Whitelaw's addition of the fees to the IRR calculation, Dr Jordan opined that "the fees Professor Whitelaw includes, as well as the fee included in the Jordan Report, are fees for particular services. Such fees should be added as well to the market benchmark under

[504] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 7 and table 1; Professor Robert Whitelaw, "Response to Dr Jordan's report on the benefits of MSF", 13 December 2012, (Whitelaw Response to Jordan), (Exhibit EU-121) (BCI/HSBI), para. 4; Professor Robert Whitelaw, "Rebuttal of Dr Jordan's Reply to My Comments on His Initial Report", 21 June 2013, (Second Whitelaw Response to Jordan), (Exhibit EU-396) (BCI/HSBI), paras. 28-9.

[505] Dr James Jordan, NERA, "Reply to Professor Whitelaw's Response to Jordan Report", 20 May 2013, (Jordan Reply), (Exhibit USA-505) (BCI), para. 12 and fn 20.

[506] United States' response to Panel question No. 161.

[507] Jordan Reply, (Exhibit USA-505) (BCI), para. 12 and fn 20.

[508] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 7 and table 1, n 2; Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 4. This fee expressly comprises part of the periodic interest rate under the contract.

[509] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 7 and table thereto; Annex 13.1(a) to German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-26) (English translation) (BCI), arts. 4.1 and 4.4.

[510] Our review of Professor Whitelaw's submission leads us to believe that fee amounts used in the calculation of the IRR have not always been taken into account on the precise dates on which they are envisaged to occur. We note, however, that this apparent error does not make a significant difference to the overall IRR of the German A350XWB LA/MSF contract.

the assumption that market lenders would charge the same fees for the same services. Alternatively, the fees can be omitted from both LA/MSF rates and market benchmarks".[511]

6.325. The United States additionally argues that "by turning to the {member State} governments to finance the A350XWB program, Airbus avoided {underwriting fees, loan commitment fees, and administrative} fees. Accordingly, if the actual IRR for LA/MSF for the A350XWB is understood to include fees like the "**[***]**" and "**[***]**" fees in the German LA/MSF contract, then the corresponding Airbus corporate borrowing rates for all four governments also should include underwriting and other fees."[512]

6.326. As discussed below, the European Union considers that commercial fees – administrative and other fees charged on a commercial loan – would be properly included in a benchmark only if they are analogous to those charged by the relevant member State. Moreover, according to the European Union:

> To determine whether and what "analogous commercial fees" should be included in a benchmark, it is first necessary to understand the nature and characteristics of the fees included in the challenged instrument; without that understanding, it is impossible to know what "commercial fees" would be "analogous" and properly included in a benchmark.[513]

6.327. The European Union submits that the United States has failed to establish that the **[***]** fee and the **[***]** fee under the German contract are analogous to underwriting fees, loan commitment fees, and/or administrative fees and, thus, that the United States has failed to establish that those fees should properly form part of a suitable benchmark.[514]

6.328. The European Union argues that the **[***]** and **[***]** fees due under the German A350XWB LA/MSF contract are not charged "for the costs of issuing and administering" the loan, but are instead a part of the return earned by KfW, as the lender. The European Union submits that both fees "enhance the return to the lender".[515] The European Union considers that the cash inflows from fees should be added to the calculation of the expected internal rates of return.[516]

6.329. The European Union submits that the **[***]** *fee* "is merely another form of interest payment" that is "**[***]**".[517] The European Union asserts that there is nothing that Airbus receives in return for the **[***]** *fee*, other than the loan itself.[518]

6.330. In terms of the **[***]** *fee*, the European Union maintains that this fee is:

> {S}imilarly part of the return to the lender, as a form of interest payment. This element of the structure of KfW's return was designed to segregate a portion of the return that KfW would earn **[***]**. For convenience purposes, and to **[***]**, the loan agreement foresees Airbus paying KfW separately **[***]**. Collectively, these payments constitute the return to KfW, **[***]**. Obtaining that **[***]**.[519]

6.331. Accordingly, the European Union states that there is nothing that *Airbus* receives in return for the **[***]** *fee*, other than the loan itself.[520]

6.332. As regards the parties' characterisation of the **[***]** and **[***]** fees due under the German A350XWB LA/MSF contract, we observe that the nature of the fees is not entirely clear from the contract and is not expressly set out in the contract. Neither of these fees is described in the contract in terms of either reimbursing the loan principal or contributing to the amount of

[511] Jordan Reply, (Exhibit USA-505) (BCI), para. 12 and fn 20.
[512] United States' response to Panel question No. 161, para. 6.
[513] European Union's comments on the United States' response to Panel question No. 161, para. 6.
[514] European Union's comments on the United States' response to Panel question No. 161, para. 12.
[515] European Union's comments on the United States' response to Panel question No. 161, para. 3.
[516] European Union's comments on the United States' response to Panel question No. 161, para. 9.
[517] European Union's comments on the United States' response to Panel question No. 161, para. 9.
[518] European Union's comments on the United States' response to Panel question No. 161, para. 11.
[519] European Union's comments on the United States' response to Panel question No. 161, para. 10.
[520] European Union's comments on the United States' response to Panel question No. 161, para. 11.

periodic interest payable on the outstanding principal. By contrast, as already noted, the **[***]** – that is not at issue – is mentioned in the contract as forming part of the periodic interest rate.

6.333. With respect to the **[***]** *fee*, we note that the German contract's structure includes "**[***]**" versus "**[***]**" amounts. Different obligations apply to sums due in different forms. This lends some weight to the European Union's explanation that the **[***]** fee is only given the name of a "fee" to highlight that it is actually a **[***]** portion of the interest rate. We note the European Union's submission that both fees "enhance the return to the lender".[521] We note that commercial lenders may well include fee obligations in a loan contract as a means to enhance or secure revenues sought in return for providing the loan. We are willing to proceed with the remainder of the benefit analysis using an IRR that includes revenues from this fee as reflecting the returns to Germany under the contract.

6.334. With respect to the **[***]** *fee*, we consider that it would be appropriate to include cash inflows from this fee in the IRR estimates. The distinction applied for the **[***]** fee (in terms of "**[***]**" versus "**[***]**" rules) similarly applies to the **[***]** fee. However, we also recognise that the **[***]** fee is essentially a function of the fact that the loan is provided by KfW: the **[***]** and corresponding fee means that, functionally, the **[***]**. We note that the **[***]** makes the lending offered on essentially the same terms as for the other contracts (that is, **[***]**). In these circumstances, we do not distinguish between the Member and its public body, and the distinction between which State entity is the lender and which **[***]** is, in our view, immaterial. We therefore include the fee as part of the returns Airbus must pay in return for the transfer of risk to Germany, and as relevant to the question of what a market lender would require to assume the same risks.

6.335. In general, fees and charges associated with, for example, the administration, processing or management of a market loan might not form part of the returns on that loan *per se*, and may be intended to compensate the lender for the value of services that they perform for the recipient, but are ultimately revenue that comes to the lender in return for providing the loan. Such fees and charges could, in principle, vary depending on the lender and type of lending. However, in our view, this does not make them irrelevant for an analysis of whether a "benefit" has been conferred pursuant to Article 1.1(1)(b) of the SCM Agreement. We consider that in this proceeding it is appropriate to view such amounts as part of the borrowing rate, in order to see whether an advantage has been conferred on the recipient compared to what would have been available on the market. We therefore consider that the amounts charged by the member State should in any event be factored into a consideration of whether a benefit has been conferred.

6.336. Thus, it is in our view appropriate to include the amounts expected to be paid by Airbus in the form of fees due under the German A350XWB LA/MSF contract in the estimation of that contract's IRR.

Quality and accuracy issues and the European Union's failure to provide the panel with information

6.337. We now turn to highlight several quality and accuracy issues with the IRR estimates provided by the European Union. At the outset, we wish to note that, despite being requested, the European Union has not provided information and explanations that would have enabled us to resolve the quality and accuracy issues we have identified. This has impacted our ability to independently verify the European Union's estimates of the IRRs. The United States urges us to discard the IRR estimates because of the quality and accuracy issues, mainly because the revised estimates provided by the European Union cannot be verified.[522]

6.338. The first of the quality and accuracy issues we have identified primarily concerns undisclosed *aircraft pricing information* on the basis of which royalty amounts have been determined in three of the LA/MSF contracts, and repayment levies for one of the contracts.[523] The

[521] European Union's comments on the United States' response to Panel question No. 161, para. 3.

[522] See United States' comments on the European Union's response to Panel questions Nos. 163-165 (consolidated answer).

[523] For the **[***]** contracts, royalty payments are based on a percentage of actual aircraft prices. By contrast, in the **[***]** contract royalty amounts are not based on a percentage of aircraft prices but are

anticipated aircraft prices on which the value of these payments depend are not included in the contracts. It is therefore not possible to know the precise value of such payments from the terms of the contracts themselves. Anticipated aircraft prices do not appear in the presentation purportedly provided to the relevant European Union member States as the basis for their decision to provide LA/MSF.[524] Nor are anticipated aircraft prices included in, for example, the document identified by the European Union as the Business Case for the A350XWB.[525]

6.339. The European Union did not disclose the calculations or cash flow amounts underlying its estimated IRRs when it first submitted them.[526] Moreover, when specifically requested to provide the relevant calculations, the European Union submitted cash flow analyses in which the anticipated pricing and royalty revenue information had been redacted.[527] However, in the context of its arguments concerning the appropriate market interest rate benchmark to apply to the A350XWB LA/MSF measures, the European Union submitted calculations that included the anticipated royalty revenue information that had been used to determine the IRRs.[528] We reviewed this information and found several potential errors in the calculation of the IRRs (and the additional benchmark calculations).

6.340. A first error we discovered was a *failure to convert USD into GBP*, a mistake that was confirmed by the European Union[529] and had a material effect on the IRR estimates. The European Union provided recalculations of the IRRs, but with the revised expected royalty and levy revenue information fully redacted. This meant that no further verification could be made of the European Union's revision of the proposed IRRs. In respect of the redacted information, the European Union referred to the Panel's communication of 16 September 2013. That communication concerned recurring cost data redacted from an A350XWB business-case related document, and revenue data redacted from the CompetitionRx Report. In that communication, the Panel stated that:

> Given the exceptional nature of the European Union's acute sensitivities to disclosing the specified recurring cost and revenue data, the Panel has decided to grant the European Union's request to exclude this information from its answer to Panel Question 126. The Panel does so, however, without prejudice to further consideration of this matter at a later stage in these proceedings, should the Panel conclude that the information not provided by the European Union is necessary for it to complete its work.[530]

6.341. The European Union's request not to disclose certain information that had been sought in Question 126 was granted in the context of the exploration of a different issue: the viability of the A350XWB programme. Importantly, in our communication, we never excluded the possibility that we might need or that we might ask for the same, or other, information of a sensitive nature at a later stage in the course of this proceeding.

6.342. A second error we identified in the European Union's calculations is an inconsistency between *Professor Whitelaw's estimate* of the number of aircraft expected to repay the loan principal for the **[***]** A350XWB LA/MSF contract and the number stated *in the relevant contract*

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expressly set out and are independent of aircraft prices. With respect to the **[***]** contract, the value of the levy payments is also based on aircraft prices. However, as we understand it, under the **[***]** contract, returns are to be **[***]**. This makes the value of revenues due from levies under the **[***]** contract somewhat less dependent on aircraft prices.

[524] Business case-related document, (Exhibit EU-(Article 13)-35) (HSBI). Exhibit EU-(Article-13)-35 (HSBI) is a twelve-slide EADS presentation containing overviews of then-current A350XWB orders, anticipated air traffic growth worldwide, the A350XWB LCA family, and projected A350XWB deliveries.

[525] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 55. The implications of the lack of key information for the question whether the relevant European Union member States provided LA/MSF on non-commercial terms are discussed elsewhere in this report, following our market benchmark analysis.

[526] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 7.

[527] Professor Robert Whitelaw, "Internal rates of return anticipated under A350XWB EU Member State loans", Further Report, 19 September 2013, (Further Whitelaw Response), (Exhibit EU-421) (BCI/HSBI), tables 1-5.

[528] Professor Robert Whitelaw, "Calculation of the Macaulay Duration of the Financing Agreements for the A350XWB", (Exhibit EU-380) (BCI/HSBI).

[529] European Union's response to Panel question No. 163, paras. 2 and 4.

[530] Panel's communication of 16 September 2013, para. 4.

itself.[531] In response, the European Union and Professor Whitelaw first stated only that the error resulted from a misunderstanding concerning aircraft revenues.[532] Professor Whitelaw corrected the number of aircraft deliveries on which he based his conclusions for the French contract without providing further explanation or underlying calculations. Professor Whitelaw did not initially correct any other figures on the basis of such a misunderstanding.[533] Subsequently, when again asked what the mistake was[534], the European Union described, in a submission that is HSBI[535], how it related to the use of economic conditions from a different time-period than those used in the base case and contract. The European Union then stated that the same mistake would have affected the *German contract*.[536] We are unable to verify whether the apparent error has been satisfactorily corrected and whether it would affect the German contract's IRR as alleged by the European Union.

6.343. In addition, we also identified that Professor Whitelaw's calculation of the German contract's IRR appears to be based on the more ambitious schedule of anticipated deliveries that was included in the earlier-produced business case documents and in the other A350XWB LA/MSF contracts, rather than the **[***]** schedule of deliveries actually included in the German contract.[537] If Professor Whitelaw had used the schedule of anticipated deliveries and the detailed schedule of anticipated payments based on that anticipated schedule, which were both actually included in the contract, he would have estimated a different IRR. For example, Professor Whitelaw's calculations expect the amortization of the loan principal occurring in **[***]**, whereas the German schedule does not expect this until **[***]**. Professor Whitelaw's calculations of the levy, interest and royalty revenues would appear to have been affected by this error.[538] Additionally, Professor Whitelaw's calculation of the interest and the fees also do not appear to commence from the date of anticipated first drawdown, contrary to what is required under the contract, **[***]**.[539] However, based on our own interpretation of the schedule of expected revenues included in the German contract, we consider that the difference is not material enough to discard the IRRs proposed by the European Union.

6.344. The United States, in the context of our questions seeking to confirm the above errors and requesting accurate calculations, submits that the "numerous opportunities for inadvertent errors in these types of calculations … raises the possibility that the new calculations are themselves flawed." The United States argues that the inability to verify the IRRs should invalidate them altogether and that, instead, the rates initially proposed by the United States, which do not include royalty revenues, should be preferred and used as representations of the returns to the relevant European Union member States.[540]

[531] See Panel question No. 129.

[532] On 23 August 2013, the Panel asked the European Union, in Panel question No. 129(a): "Please explain how Professor Whitelaw derived this figure and why it differs from the relevant figure on page 4 of Exhibit EU-376 (HSBI) and in Article 6.3 of the French Protocole d'Accord (Exhibit EU(Article 13)-1 (BCI and HSBI))". The European Union responded that: "Professor Whitelaw **[***]**". (European Union's response to Panel question No. 129, para. 88).

[533] Further Whitelaw Response, (Exhibit EU-421) (BCI/HSBI), paras. 18-20.

[534] On 31 March 2014, the Panel asked the European Union in Panel question No. 164 (ii): "What was the mistake that Professor Whitelaw made in **[***]** provided by Airbus that caused him to initially **[***]** for the French A350XWB LA/MSF contract?". The European Union's response is in the HSBI version of the European Union's response to Panel question No. 164, para. 5 (lines 5-6 and 6-7) and HSBI version of European Union's response to Panel question No. 165, para. 11 (line 6).

[535] See HSBI version of the European Union's response to Panel question No. 164, para. 5 (lines 5-6 and 6-7), and the HSBI version of European Union's response to Panel question No. 165, para. 11 (line 6); we also note what is at A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 66; and CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), paras. 133-136.

[536] European Union's response to Panel question No. 164.

[537] Compare Professor Whitelaw's calculation of the Internal Rate of Return for the A350XWB LA/MSF contract with Germany **[***]** (Further Whitelaw Response, (Exhibit EU-421) (BCI/HSBI), table 2), with **[***]** (Annex 1.4(f) to German KfW A350XWB Loan Agreement **[***]**, (Exhibit EU-(Article 13)-23) (Original German version (Revised) and English translation) (BCI/HSBI)).

[538] This may also have affected Professor Whitelaw's calculation of the Macaulay duration of the German contract, discussed below.

[539] **[***]**.

[540] United States' comments on the European Union's response to Panel question Nos. 163-165, paras. 1-12 (consolidated answer).

6.345. The European Union's earlier provision of estimated revenues in the context of its submissions concerning the appropriate market benchmark[541] was followed by a choice to withhold the same or very similar information that would have enabled verification of its purported corrections to the IRR calculations. The European Union justified its failure to disclose the requested information on grounds of sensitivity.[542] We find this difficult to square with the European Union's provision of the same or similar information − from which we were able to identify errors and other inconsistencies − in order to corroborate its arguments concerning one aspect of the appropriate market benchmark. In the absence of the relevant information, we are unable to judge whether or not the initial errors have been corrected, and whether or not there are new ones.[543] Without the full information underlying the European Union's estimates, we cannot be certain that those expected IRRs are correct and are not overstated.

Conclusion on expected rates of return of the A350XWB LA/MSF contracts

6.346. In summary, we conclude that subject to the understanding that IRR estimates including the expected returns from royalties represent the complete return that could be expected under the relevant A350XWB LA/MSF contracts if the base case number of deliveries were to occur as forecast, it is in principle appropriate to include those revenues in the calculation of the maximum rate of return that the relevant European Union member States could have anticipated under the contracts. With respect to the fees due under the German A350XWB LA/MSF contract, we accept the inclusion of such fee revenues as cash flows that should be included in calculating the contract's estimated IRR, both in view of the probable nature of the fees in this proceeding − in particular involving the assumption of risks by the relevant member State − and so that any advantage conferred by the difference between what would have been available on the market and what was accepted by the member States, may be gauged.

6.347. We have noted some concerns about the European Union's IRR estimates, including that the **[***]** levies and the revenues from royalties for three contracts appear to have been subject to multiple errors deriving from the underlying aircraft pricing information, and the recalculations are unable to be verified, therefore not permitting us or the United States to know whether the identified errors persist or further errors have been made. However, we consider that it is preferable to proceed on the basis of the European Union's unvalidated IRRs than to use the rates of return advanced by the United States, which do not take into account: (a) expected royalty revenues up to the base case, and (b) revenues from fees and charges. We thus proceed with the remainder of our analysis on the basis of the IRR estimates presented by the European Union.

6.348. As a result of our conclusions above, the following IRRs will be used in our analysis to represent the expected rates of return of the A350XWB LA/MSF contracts, for the purposes of comparison with a market benchmark rate of return:

[541] Professor Robert Whitelaw, "Calculation of the Macaulay Duration of the Financing Agreements for the A350XWB", (Exhibit EU-380) (BCI/HSBI).

[542] Certain (subsequently impugned) information was provided, as HSBI, supporting the European Union's factual claims with respect to the Macaulay durations of the LA/MSF contracts. (Professor Robert Whitelaw, "Calculation of the Macaulay Duration of the Financing Agreements for the A350XWB", (Exhibit EU-380) (BCI/HSBI)).

[543] For example, it appeared from the initial calculations that a particular escalation rate had been applied to the royalty revenues, contrary to what is provided in HSBI contained in the A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), at slides 52 and particularly the HSBI at slide 66. We are unable to tell whether this was also the case in the revised calculations.

Table 1: European Union's proposed IRRs including royalties to base case and fees

Contract	Internal Rate of Return proposed by the European Union, which includes EU estimate of royalties to base case, and fees
French A350XWB LA/MSF contract	**[***]**
German A350XWB LA/MSF contract	**[***]**
Spanish A350XWB LA/MSF contract	**[***]**
UK A350XWB LA/MSF contract	**[***]**

6.5.2.3.3.2 Market benchmark rate of return

6.349. We now proceed with our evaluation of the parties' submissions concerning the rate of return that a market lender would have demanded for providing financing on the same or similar terms as LA/MSF for the A350XWB.

6.350. The United States argues that no market instrument exists that would offer all of the key features of LA/MSF on the terms and conditions accepted by the EU member State governments.[544] Accordingly, in seeking to show that the A350XWB LA/MSF measures are provided at below-market rates, the United States compares the LA/MSF rates of return with a constructed market benchmark rate. To this end, the United States proposes a market benchmark rate constructed from: (a) a general borrowing rate that the recipient (Airbus) would have to pay to a market lender, plus; (b) a project-specific risk premium that represents the additional return that a lender would require for offering financing on the particular terms of the relevant LA/MSF contracts.

6.351. We recall that the parties adopted a similar approach to derive the market benchmark rate of return used in the original proceeding, with the European Union disagreeing with the values proposed by the United States only as regards the project-specific risk premium.[545] In this dispute, however, the parties have expressed differing views about *both* the general corporate borrowing rate *and* the project-specific risk premium, disagreeing about not only what the values of the two components should be, but also from what bases these values should be derived. We examine the parties' positions in relation to both of these matters in the following subsections, starting with the parties' arguments concerning the general corporate borrowing rate.

General corporate borrowing rate

6.352. The parties' submissions concerning the appropriate general corporate borrowing rate that should be used for the purpose of constructing the market benchmark rate of return raise one initial threshold question − whether to use the rates derived from the data and regression models used in the original proceeding or evidence of EADS' actual general borrowing costs at the relevant times.

6.353. The general corporate borrowing rates proposed by the United States are based on the same data used to derive the general corporate borrowing rates applied in the original proceeding, updated to account for the timing of the conclusion of the relevant A350XWB LA/MSF contracts. We recall that in the original proceeding, the United States constructed a corporate borrowing rate for each of the four European Communities member States, using limited bond data then available regarding the relevant Airbus companies for the time periods in question, and regression models and other techniques to fill data gaps.[546] The constructed corporate borrowing rate for each of the four European Communities member States was the sum of a government borrowing rate (said to be a "risk free" borrowing rate) derived from government bonds and a "general corporate risk premium", or credit spread, derived from Aérospatiale and BAE Systems bond data for borrowing

[544] United States' second written submission, paras. 288 and 289.
[545] Panel Report, *EC and certain member States − Large Civil Aircraft*, paras. 7.433-7.434.
[546] A full explanation of the approach may be found in the Ellis-Jordan Report, 10 November 2006 (Exhibits USA-474 and 506) (BCI).

in France and the United Kingdom (that is, the spread between French and UK risk-free rates) and the performance of similarly-rated bonds. The corporate risk premium was applied over the relevant country-specific risk-free rate to arrive at a corporate rate for each contract.[547]

6.354. The United States maintains that this approach was "accepted by the Panel, the Appellate Body, and the parties to the dispute"[548] in the original proceeding. Thus, in this proceeding, the United States proposes to use the same data and regression models applied in relation to the bonds issued by BAE Systems and Aérospatiale, but to update the results on the basis of the recent performance of a selection of similarly-ranked but otherwise unrelated bonds.[549] The United States' expert Dr Jordan also updates the government bond-based risk-free rates.[550] Dr Jordan reports that he "also considered alternative methods for determining the Airbus corporate borrowing rate based on European and UK corporate bond markets". However, according to Dr Jordan, the use "of these methods would not change the overall conclusion that A350XWB LA/MSF is granted at below-market interest rates".[551]

6.355. The results of Dr Jordan's calculations to determine the Airbus corporate borrowing rate, during the relevant years[552] are as follows:

Table 2: United States' proposed Airbus corporate borrowing rate for [***]

EU member State	Government bond yield	Corporate credit spread	Airbus corporate borrowing rate (government bond yield + corporate credit spread)
France	3.65%	2.14%	5.79%
Germany	3.22%	2.14%	5.36%
Spain	3.97%	2.14%	6.11%
UK	3.65%	1.14%	4.79%

[547] See Ellis-Jordan Report, 10 November 2006 (Exhibit USA-474/506) (BCI), pp. 1 and 7.
[548] United States' second written submission, para. 285 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 860-862, and 874); and United States' opening statement (public), para. 38, first bullet point.
[549] The United States' expert Dr Jordan explains that he updates the government borrowing rates for each of France, Germany, Spain and the United Kingdom using 10-year government bond data for the years now in question, obtained from the OECD. To arrive at the updated general corporate risk premium, he uses "the regression models described in the Original NERA report" to extend the corporate risk premium analysis from the original proceeding to **[***]**. (Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 13, table 2, and n 2 thereto). The Original NERA report is exhibited in this proceeding as the Ellis-Jordan Report, 10 November 2006 (Exhibit USA-474/506 (exhibited twice)) (BCI).
[550] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 13, table 2, and n 1 thereto.
[551] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 13, table 2, and n 2 thereto.
[552] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 13 and table 2.

Table 3: United States' proposed Airbus corporate borrowing rate for [***]

EU member State	Government bond yield	Corporate credit spread	Airbus corporate borrowing rate (government bond yield + corporate credit spread)
France	3.12%	2.20%	5.32%
Germany	2.74%	2.20%	4.94%
Spain	4.25%	2.20%	6.45%
UK	3.61%	2.20%	4.75%

6.356. In the original proceeding, the European Communities did not reject the entirety of the United States' construction of the proposed interest rate benchmarks but sought to discredit only the project-specific risk premium component. The European Communities applied the same general government risk-free rates and corporate borrowing premium used in the United States' calculations when deriving its own proposed market-based benchmark rates of return.[553] However, in this proceeding, the European Union rejects the United States' approach, arguing that it is "exaggerated" when compared to the observed borrowing rate of the Airbus parent company, EADS – the availability of which, the European Union argues, is a relevant factual difference.[554]

6.357. The European Union considers that, unlike in the original proceeding, the borrowing history and bond data of Airbus' parent company, EADS, was directly observable at the time the A350XWB LA/MSF contracts were concluded.[555] The European Union concedes that the use of what it terms "surrogates" for the corporate rate was "arguably understandable" in the original proceeding because, prior to the formation of EADS in July 2000, there was no readily observable market indication of company-specific borrowing cost for all of the member companies of the four-company consortium that constituted Airbus.[556] However, "the situation had changed dramatically" by the time the A350XWB LA/MSF agreements were concluded. "{B}y that point in time Airbus was no longer a four-company consortium, and instead had become, many years earlier, an integrated company".[557] The European Union's expert, Professor Whitelaw, asserts that it "is possible to establish from market data the company's actual cost of long-term borrowing", that is, "EADS' actual, long-term borrowing rates at the date of the agreements, expressed as the yield on its longest-term bond".[558]

6.358. The European Union refers to the EADS Finance B.V. 5.5% coupon 03/18 medium-term note (MTN)[559], a bond issued 24 September 2003 and maturing 25 September 2018.[560] The European Union cites the relevant yield on this bond as a rate of 4.14% for EADS' actual cost of long-term debt for the agreements with France, Germany and Spain, and 4.69% for the agreement with the United Kingdom due to conversion from EUR to GBP.[561] The European Union considers that "there is no need, let alone justification, for Dr. Jordan to estimate, using a

[553] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.432-7.433.
[554] European Union's second written submission, paras. 309-310.
[555] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), paras. 10-11.
[556] European Union's second written submission, para. 309.
[557] European Union's second written submission, para. 310.
[558] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), paras. 8 and 11-12, and fns 10 and 13.
[559] EADS Finance B.V. 03/18 MTN 5.5% coupon Eurobond (effective interest rate 5.6%) maturing 25 September 2018, ISIN XS0176914579, traded on the Frankfurt Stock Exchange. It was swapped during 2005 into variable rate of 3M-Euribor + 1.72%. See EADS Financial Statements 2009, (Exhibit EU-163), p. 65.
[560] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), paras. 8 and 11-12, and fns 10 and 13.
[561] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 12.

surrogate approach, what can be *directly observed* as the premium the markets charge EADS for corporate debt".[562]

6.359. The results of Dr Jordan's calculations to determine the Airbus corporate borrowing rate, during the relevant years[563], compared to the rate cited by the European Union's expert, Professor Whitelaw, are as follows:

Table 4: Respective proposals for Airbus corporate borrowing rate for [***]

EU member State	US expert Dr Jordan's estimate of Airbus corporate borrowing rate (government bond yield + corporate credit spread)	EU expert Professor Whitelaw's estimate of Airbus corporate borrowing rate (based on EADS bond yield)
France	5.79%	4.14%
Germany	5.36%	4.14%
Spain	6.11%	4.14%
UK	4.79%	4.69%

Table 5: Respective proposals for Airbus corporate borrowing rate for [***]

EU member State	US expert Dr Jordan's estimate of Airbus corporate borrowing rate (government bond yield + corporate credit spread)	EU expert Professor Whitelaw's estimate of Airbus corporate borrowing rate (based on EADS bond yield)
France	5.32%	4.14%
Germany	4.94%	4.14%
Spain	6.45%	4.14%
UK	4.75%	4.69%

6.360. We agree with the European Union that while the corporate borrowing rate was derived in the original proceeding in the same way that the United States proposes in this proceeding, the integration of the Airbus entities and the availability of the EADS bond data are relevant factual differences between the original proceeding and this proceeding that justify a departure from the approach taken in the original proceeding.

6.361. As we see it, it is preferable to derive a market benchmark on the basis of data pertaining to the borrowing entities' own market-based borrowing, rather than generic estimates, where it is possible to do so.

6.362. We recall that it is well established that a "financial contribution" will confer a "benefit" upon a recipient when it places that recipient in a more advantageous position compared with the position of *that recipient* in the absence of the financial contribution.[564] We consider that a market

[562] European Union's second written submission, para. 311 (citing Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 12.) (emphasis original)

[563] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 13 and table 2.

[564] See Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1090-7.1091, 7.1123-7.1124, and 7.1181-1182 (citing Panel Report, *Canada – Aircraft*, para. 9.112), cited with approval in

benchmark should approximate as closely as possible lending on the same, or similar, terms and conditions *to the particular recipient*. We find support for this understanding in the context provided by Article 14(b) of the SCM Agreement, which provides that:

> A loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan, and the amount *the firm* would pay on a comparable commercial loan which *the firm* could actually obtain on the market. In this case the benefit shall be the difference between these two amounts. (emphasis added)

6.363. In our view, the actual market borrowing observable for the economic entity indicated as the recipient in the contract would appear to be a logical starting point. We consider that this is consistent with the panel's approach, albeit in a different context, in the original proceeding:

> In principle, we agree with the view that the returns associated with market financing actually provided to Airbus for the same project as LA/MSF would serve as an appropriate basis from which to derive the relevant project-specific risk premium. Indeed, such an approach would be preferable to the one used by the United States to calculate its own proposed project-specific risk premium.[565]

6.364. We consider that using relevant bond data directly observable at the time that the A350XWB LA/MSF contracts were concluded − to the extent that such data reflects borrowing by the relevant entities − would, in principle, be similarly preferable to a regression model estimate that uses data from a generic selection of bonds that are rated similarly to the old Aérospatiale and BAE Systems bonds. In this regard, we note that in the original proceeding, the United States' own experts also expressed a preference for using directly observable data in the methodology they used to derive the general corporate risk premium:

> In some of the more recent years, the credit spread has been directly observable for two of the Airbus operating companies, BAE Systems and Aerospatiale, as they issued publicly traded bonds. … Because BAE and Aerospatiale did not issue new bonds in each year since 1967, we developed a regression model to estimate what the credit spread for those issuers would have been in the years for which no data points are available.[566]

6.365. Thus, the United States' experts in the original proceeding used directly observable data where such data were available, relying on regression models only where directly observable data were not available for the relevant companies.

6.366. In this proceeding, however, the United States questions the extent to which the EADS bond data may be used to construct the relevant corporate borrowing rates, arguing that the data do not reflect the borrowing costs of the relevant national-level Airbus entities that were parties to the LA/MSF contracts. In any case, the United States considers that even if the EADS bond data were used, the LA/MSF measures would still constitute subsidies, if they were adjusted to properly account for the relevant dates of the A350XWB LA/MSF agreements and the differences in the maturity and duration of the EADS bond instrument compared with the LA/MSF contracts. We examine the United States contentions in the following subsections.

Whether the EADS bond reflects the identity of the borrower

6.367. The United States questions whether the bond representing the corporate borrowing of EADS − Airbus' parent company[567] − is a good reflection of the general corporate rate associated

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Appellate Body Report, *Canada − Aircraft*, para. 149. See also Appellate Body Report, *Canada − Aircraft*, paras. 157-158; and Appellate Body Report, *US − Countervailing Measures on Certain EC Products*, para. 102.

[565] Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.480.

[566] Ellis-Jordan Report, (Original Exhibit US-80), (Exhibit USA-474/506 (exhibited twice)) (BCI), p. 12.

[567] As the panel described in the original proceeding, EADS N.V. is the parent company of Airbus. In October 2006 EADS purchased BAE Systems' 20% interest in Airbus SAS, and Airbus SAS became a wholly-owned subsidiary of EADS. (See Panel Report, *EC and certain member States − Large Civil Aircraft*, section VII.E.1 Attachment: Corporate History of Airbus, p. 360, paras. 1-7 and fns thereto, and para. 7.183).

with the recipients or borrowers, which are principally Airbus entities or subsidiaries based in the territory of the member States with which the relevant contract is concluded.

6.368. The United States and Dr Jordan state that the assumption that EADS is the only company whose corporate risk must be considered is "a questionable and unexplained simplification".[568] In this regard, the United States observes that "**[***]**".[569] The United States appears to consider that this means the yield on the EADS bond reflects only the corporate borrowing rate of EADS and not the specific entities that are party to the contracts, and thus does not accurately represent the cost of corporate risk involved with each of the contracts at issue.

6.369. The European Union counters that "Professor Whitelaw's reference to EADS' corporate borrowing rate is entirely appropriate, because EADS **[***]**. Thus, the yield on the EADS bond he selected represents the cost of corporate risk for these instruments".[570] The European Union continues: "While certain of EADS' subsidiaries are also party to the loan agreements, that does not mean that the corporate risk of these loans could be any greater than the corporate risk of EADS, which **[***]**. If anything, adding an entity would lower the risk."[571]

6.370. In respect of the four contracts, the Airbus subsidiary operating in the relevant country is, as we understand it, the party that receives LA/MSF. There is no evidence before us of directly observable borrowing rates for those subsidiaries. In the German and UK contracts, Airbus SAS (Toulouse) is an additional obligor, incurring liability for obligations therein. There is no evidence of directly observable borrowing rates for Airbus SAS (Toulouse). In only one of the contracts − the UK contract − is EADS a party to the contract. As EADS is not the recipient, or a party to the remaining three contracts, we now consider whether its borrowing appropriately reflects borrowing for the recipient entities, given that entity-specific borrowing rates do not appear to be available.

6.371. As we understand it, the degree to which the borrowing risks, and therefore borrowing costs, for a firm will mirror those of its parent or a related entity may vary according to: (a) how closely the entities are linked, and (b) the degree to which the particular terms and conditions of a borrowing instrument implicate the related entity or assets of a related entity.[572] There is evidence before the Panel that credit rating agencies, on whose ratings bond-purchasers and other investors rely, view the debt of EADS and the other Airbus entities as closely related, so that the performance of one entity affects the risk associated with the other.[573] Some credit rating agencies appear to view the entities as interchangeable.[574] In practice, it appears that Airbus subsidiary entities would be rated no higher than the parent and their general corporate borrowing costs would consequently be the same, or higher.[575] In relation to a contract where there is an explicit

[568] United States' response to Panel question No. 105, para. 378.

[569] United States' response to Panel question No. 105, para. 378.

[570] European Union's comments on the United States' response to Panel question No. 105 (citing Second Whitelaw Response to Jordan, (Exhibit EU-396) (BCI/HSBI), paras. 4-10 and 31).

[571] Second Whitelaw Response to Jordan, (Exhibit EU-396) (BCI/HSBI), para. 31.

[572] Moody's Investors Service, Rating Methodology, *The Application of Joint Default Analysis to Government Related Issuers*, April 2005, (Exhibit EU-138/381 (exhibited twice)), p. 1. See also Moody's Investors Service, Special Comment, *The Incorporation of Joint-Default Analysis into Moody's Corporate, Financial and Government Rating Methodologies*, February 2005, (Exhibit USA-507).

[573] Moody's Rating Action, *Moody's confirms EADS A1 rating: Approximately €6 Billion of Debt Securities Affected*, Global Credit Research, Moody's Investors Service, 9 March 2007, (Exhibit EU-384).

[574] For example, in March 2001, when Airbus was still partly owned by BAE Systems and not fully owned by EADS, CreditSuisse/First Boston stated that "{w}e believe EADS is a proxy for Airbus". (CreditSuisse/First Boston, "European Aeronautic Defence and Space Company (EADS): Valuation remains inconsistent with risks", Equity Research, 14 March 2001, (Exhibit EU-405)).

[575] We note that Standard & Poor's describe how, even if a subsidiary is stronger, it will not be rated higher than its parent:

> A strong subsidiary owned by a weak parent generally is rated no higher than the parent. The key reasons {are}:
> The ability of and incentive for a weak parent to take assets from the subsidiary or burden it with liabilities during financial stress; and
> The likelihood that a parent's bankruptcy would cause the subsidiary's bankruptcy, regardless of its stand-alone strength.

(Standard & Poor's, Corporate Criteria: *Parent/Subsidiary Links; General Principles; Subsidiaries/Joint Ventures/Nonrecourse Projects; Finance Subsidiaries; Rating Link to Parent*, October 28 2004, p. 2). We also

joint obligation or guarantee by the parent, borrowing costs are closer to that parent's borrowing rate than if there is no explicit guarantee and only implicit support that might arise from a parent-subsidiary relationship.[576]

6.372. The borrowing rate is thus expected to be closest to the parent company's borrowing rate where the parent is explicitly a co-contractor **[***]**. The German and UK contracts implicate EADS directly as a co-contractor **[***]**.[577] We therefore agree with the European Union that the reference to EADS' corporate borrowing rate is appropriate for those two contracts.[578]

6.373. General borrowing rates may, however, be higher than the parent company rate where the parent does not expressly ensure performance of the contractual obligations.[579] With respect to the French and Spanish contracts, the extent to which EADS debt would reflect the borrowing costs of the subsidiaries might reflect only the implicit, uncertain support that might arise from the relationship. A market participant might thus demand a return under a similar agreement − where EADS does not guarantee performance − that is *higher than the yield on the EADS bond*. We therefore consider that the benchmark rate for borrowing by solely the French Airbus entity, Airbus SAS (Toulouse) or the Spanish Airbus entity, Airbus Operations SL, could be higher than the EADS borrowing rate. We agree with the United States that it may indeed be a simplification to use the unadjusted price of EADS debt as directly representing the quantified corporate risk associated with the Airbus entities' debt with respect to the French and Spanish contracts.

6.374. We note therefore that for the French and Spanish contracts the EADS bond may be an understatement of the corporate credit rate. However, we consider that using the EADS bond for all four contracts, on the understanding that it may well be an underestimate for at least the French and Spanish contracts, is preferable than the United States' proposed alternative. We proceed with the remainder of this analysis on the assumption that for the French and Spanish contracts the EADS bond may be somewhat low, and will evaluate the significance of this possible understatement once we are in a position to perform the comparison between the IRRs of the A350XWB LA/MSF contracts and the market benchmark, further below.

6.375. To the extent that the United States argues that country-specific rates are required only because the LA/MSF agreements were concluded in different countries, we do not consider this justifies using the Aérospatiale and BAE Systems bond data regression models rather than the EADS bond as a basis for the corporate rate for all recipient entities. While the contracts in question were negotiated with the member States and thus in different countries, that is no reason to assume that the relevant market on which financing would be available would be limited to the country within which in the present instance the LA/MSF agreements were concluded, particularly as regards financing that pertains to a transnational group of entities. There is no evidence that the market for finance is limited to single countries, particularly in a situation, like the present one, where the relevant firms are transnational and operating across a highly integrated market. EADS itself is an issuer incorporated in The Netherlands and the bond in question was traded on the Frankfurt stock exchange. In other words, we consider that in the present case financing from any country that would have been available to EADS or Airbus would be relevant. Thus, we see no reason why a country-specific rate would necessarily be preferable in this regard. Further, if we were to accept that EADS' borrowing would be stronger than that of the national Airbus entities, it

note that Moody's states that a "joint-default analysis" "formally incorporates the following principle: The risk that two obligors will both default should be less than or equal to the default risk of the stronger obligor". (Moody's Investors Service, Rating Methodology, *The Application of Joint Default Analysis to Government Related Issuers*, April 2005, (Exhibit EU-138/381 (exhibited twice)), p. 1). See also Moody's Investors Service, Special Comment, *The Incorporation of Joint-Default Analysis into Moody's Corporate, Financial and Government Rating Methodologies*, February 2005, (Exhibit USA-507)).

[576] See also Moody's Investors Service, Special Comment, *The Incorporation of Joint-Default Analysis into Moody's Corporate, Financial and Government Rating Methodologies*, February 2005, (Exhibit USA-507).

[577] See "Key Features of LA/MSF for the A350XWB" section, above.

[578] European Union's comments on the United States' response to Panel question No. 105 (citing Second Whitelaw Response to Jordan, (Exhibit EU-396) (BCI/HSBI), paras. 4-10 and 31).

[579] Standard & Poor's, *Corporate Criteria: Parent/Subsidiary Links; General Principles; Subsidiaries/Joint Ventures/Nonrecourse Projects; Finance Subsidiaries; Rating Link to Parent*, 28 October 2004, p. 2; Moody's Investors Service, Rating Methodology, *The Application of Joint Default Analysis to Government Related Issuers*, April 2005, (Exhibit EU-138/381 (exhibited twice)), p. 1. See also Moody's Investors Service, Special Comment, *The Incorporation of Joint-Default Analysis into Moody's Corporate, Financial and Government Rating Methodologies*, February 2005, (Exhibit USA-507).

does not necessarily follow that the spread between country-specific "risk-free" rates would be the measure of the difference in borrowing by the entities. We do not consider that the United States' preferred approach would necessarily address the United States' concerns. In sum, we consider that those concerns are not enough to reject the use of the EADS bond as an observable reference point for general borrowing rates for those entities, in this proceeding.

6.376. Having disposed of the United States' arguments for preferring its proposed constructed corporate borrowing rate, and having determined the threshold question in favour of using the EADS bond as the basis for the general corporate borrowing rate to be used in the construction of the market benchmark (subject to the understanding that it may well underestimate the cost of lending for the French and Spanish Airbus entities) we now turn to the United States' criticisms of the methodology used by the European Union to derive the relevant corporate borrowing rate from the EADS bond. The United States concerns relate to: (i) the proper point in time to observe the EADS bond yield; and (ii) whether the resulting corporate borrowing rates should be adjusted to reflect the differences between the structure and term of LA/MSF borrowing compared with the EADS bond. Finally, we deal with the point raised by the United States in the context of the inclusion of normal fees and charges in making an assessment of "benefit".

Relevant dates for observing the EADS bond yield

6.377. The first main issue presented by the United States concerning the EADS bond rate involves the relevant time at which the value of the EADS bond yield to maturity should be observed. There are two sub-issues that arise in this regard: first, whether the approach of the European Union's expert, Professor Whitelaw − which averages the yield over a period representing the time during which the contracts were concluded − is an appropriate way of determining the EADS bond rate; and second, which date is relevant for deriving the yield at the time of the French contract.

6.378. The European Union's expert, Professor Whitelaw, obtains the figures that he proposes as the relevant benchmark corporate borrowing rate by averaging the EADS bond's yield to maturity over **[***]** months. He takes as his start point **[***]** (the date of the French A350XWB *Convention*), and his end point is **[***]**, the date of the UK LA/MSF agreement **[***]**. Professor Whitelaw derives the average yield to maturity of the EADS 5.5% 03/18 MTN bond for the period of **[***]**. According to the European Union and Professor Whitelaw this is the period over which all four LA/MSF agreements were concluded. Professor Whitelaw reveals that the average yield to maturity (YTM) on the bond was computed for the **[***]** for each of the three euro denominated LA/MSF contracts, with an adjustment based on the average EUR to GBP swap rates being made for the UK LA/MSF contract.[580] Professor Whitelaw's results are a rate of 4.14% for EADS' actual cost of long-term borrowing for the French, German and Spanish LA/MSF agreements, and 4.69% for the UK LA/MSF agreement.[581]

6.379. Dr Jordan, the United States' expert, criticises the manner in which Professor Whitelaw derives the results for EADS' actual cost of long-term debt based on the EADS bond, submitting that the seven-month averaging period used by Professor Whitelaw is an "inconsistent approach to selecting a yield based on the signing dates of the agreements" and produces a downward bias in the selected yield.[582] In particular, Dr Jordan maintains that:

> Professor Whitelaw's corporate borrowing rates are based on yields that include time periods after the LA/MSF loan agreements were finalized. They also do not use consistent periods of time around the loan agreement dates, and they are affected by the downward trends in yields … the borrowing cost of EADS after **[***]** has no relevance for the analysis of the EADS corporate borrowing rate in the case of the French loan. Yet Professor Whitelaw's corporate borrowing rate is nonetheless based on later dates. The inclusion in Professor Whitelaw's seven-month average of irrelevant periods after the agreement dates also similarly occurs in the case of the

[580] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 12, fn 12 ("The methodology is as follows. Based on the average 10-year interest rate swap rates in EUR and GBP, I convert the EADS Euro yield to a multiplicative credit spread. I then apply this multiplicative credit spread to the GBP swap rate to get the GBP equivalent EADS yield. Source: Bloomberg.").

[581] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 12.

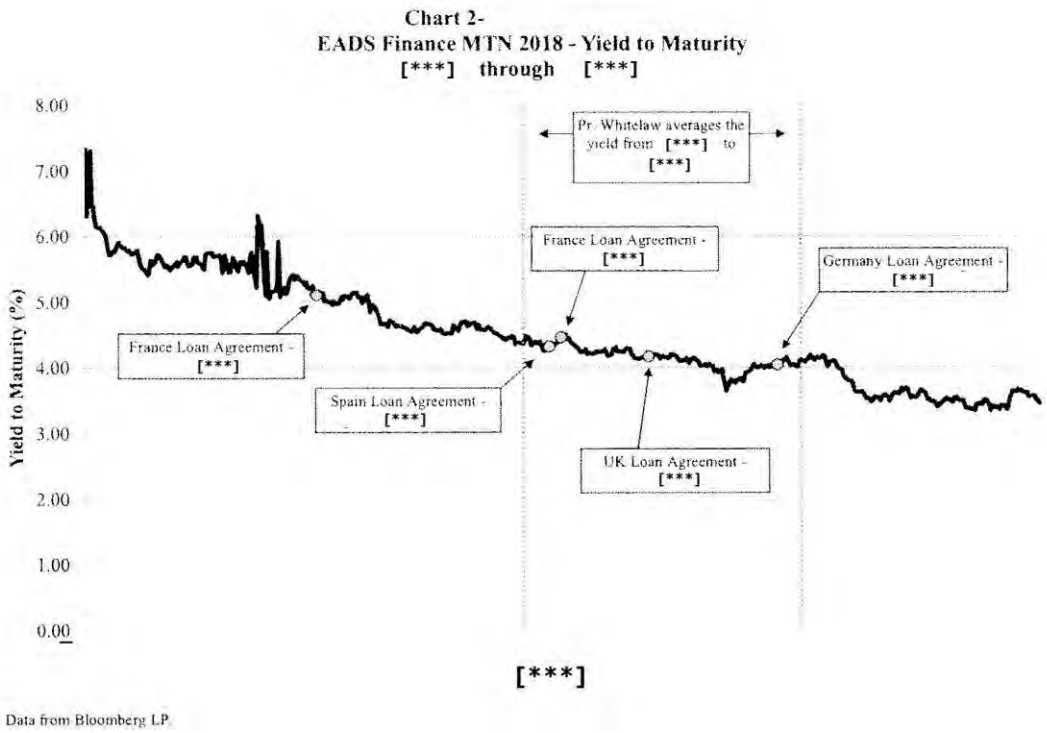
[582] Jordan Reply, (Exhibit USA-505) (BCI), para. 16. (footnote omitted)

[***] **[***]** Because the yield of the EADS Finance MTN was decreasing during **[***]**.[583]

6.380. The United States and Dr Jordan thus first criticise the approach of averaging the yield over a **[***]**-month period, and second, argue that the relevant date of the French contract is not **[***]** and that the **[***]** date should be used instead.

6.381. First, as regards the averaging approach, Dr Jordan presents the following chart to illustrate his arguments:

Figure 1: EADS bond yield to maturity during contracting period



6.382. Dr Jordan's observation of the EADS bond yield according to various dates[584] (with Professor Whitelaw's average for comparison) are illustrated in the following table:

[583] Jordan Reply, (Exhibit USA-505) (BCI), paras. 24-28.
[584] Jordan Reply, (Exhibit USA-505) (BCI), table 6; and Jordan Materials in Response to Panel Questions Nos. 110, 111, 112, and 114, (Exhibit USA-567) (BCI/HSBI), supplement to table 6.

Table 6: Respective proposals for EADS bond yield values

EU member State and relevant date of conclusion of loan agreement	6 month average prior to date of loan agreement	1 month average prior to date of loan agreement	Yield on day of loan agreement	Whitelaw average yield over 7 months starting [***]
France **[***]** (**[***]**)[585] **[***]**	**[***]** (**[***]**) **[***]**	**[***]** (**[***]**) **[***]**	**[***]** (**[***]**) **[***]**	**[***]**
Germany **[***]**	**[***]**	**[***]**	**[***]**	**[***]**
Spain **[***]**	**[***]**	**[***]**	**[***]**	**[***]**
United Kingdom **[***]**	**[***]**	**[***]**	**[***]**	**[***]**

6.383. This table shows the rates available for certain periods in the lead up to, and on the date of conclusion of the contract. For the French agreement, under Professor Whitelaw's averaging approach, the EADS yield is between 157 and 97 basis points lower than it would be under Dr Jordan's approach. For the German agreement, the EADS yield is between 0 and 17 basis points higher than under Dr Jordan's approach. For the Spanish agreement, under Professor Whitelaw's averaging approach the EADS yield is between 55 and 18 basis points lower than under Dr Jordan's approach. For the UK agreement, under Professor Whitelaw's averaging approach, the EADS yield is between 30 and 20 basis points lower than it would be under Dr Jordan's approach.

6.384. We recall that the Appellate Body has also explained that:

> Under a "benefit" analysis, a comparison is made between the terms and conditions of the financial contribution when it is granted with the terms and conditions that would have been offered on the market *at that time* … a panel's assessment of benefit should focus on the relevant market benchmark at the time the financial contribution is granted to the recipient. That benchmark entails a consideration of what a market

[585] In their submissions, the parties have referred to the date of the conclusion of the French A350XWB *Protocole* as **[***]**. We note that the French A350XWB *Protocole* is signed and dated **[***]**. **[***]** is the date of a cover letter enclosing copies of the French A350XWB *Protocole* sent to the Director General of Airbus. A subsequent letter from the *Direction générale de l'aviation civile* (DGAC) (French Civil Aviation Authority), dated 10 October 2009, Exhibit EU-(Article 13)-10, referring to the French A350XWB *Protocole,* describes it as "*le protocole du* **[***]** *entre l'Etat et Airbus relative au programme A350XWB*", and provides the French A350XWB *Protocole* in an annex. (Exchange of Letters between Fabrice Brégier, Director General of Airbus, and French Director General of Civil Aviation (DGAC) **[***]** and **[***]**, (Exhibit EU-(Article 13)-10) (BCI)). Additionally, the CompetitionRx Report states that "{t}he first RLI {repayable launch investment} funding agreement was signed on **[***]**" and uses this day for a relevant pinpoint reference date. (CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 84 and fn 2, p. 18). We consider the correct date for the French A350XWB *Protocole* to be **[***]**. Yields on both dates are shown in the tables of calculations for the sake of completeness.

> participant would have been able to secure on the market at that time.[586] (emphasis original)

The Appellate Body further stated that:

> The comparison is to be performed as though the {actual and benchmark} loans were obtained at the same time … the assessment focuses on the moment in time when the lender and borrower commit to the transaction[587]

6.385. Mindful of this guidance, we consider that borrowing costs should be observed at the time that each particular contract was concluded. Averaging the borrowing rate of contracts concluded over a time-period during which there were different market borrowing rates may lead to distortions. Professor Whitelaw's averaging approach could artificially lower a higher market borrowing rate, leading to a misplaced finding that there was no subsidisation. It could also artificially increase a lower market borrowing rate, and create a danger that a benefit might be found in a case where LA/MSF was really obtained at, or above, market rate. In such an instance there could be a misplaced finding of subsidisation.

6.386. As observed by Dr Jordan, Professor Whitelaw's averaging approach would result in the application of corporate borrowing rates derived over time periods that are different for the four LA/MSF contracts.[588] For example, in the present case, the market rate for the UK loan agreement, coming later, would be distorted upwards by higher yields from the time when the French agreement was concluded − some **[***]** earlier (according to Professor Whitelaw). The market rate for the French loan agreement, however, would *not* be judged against market rates from **[***]** prior to its conclusion, when the bond yields were even higher and would have likewise distorted the rates upwards. We do not see a justification for judging the four LA/MSF agreements by different standards in this respect. We are concerned that doing so would give unjustifiably inconsistent results for each of the agreements.

6.387. Professor Whitelaw's averaging approach would also incorporate data from after the conclusion of three of the four contracts. Market rates for debt *after* the conclusion of a contract do not seem to us to be a good measure of what the market would have offered *at the time* it was concluded. While market rates for debt in the lead-up to the conclusion of a contract could provide empirical evidence of the "going market rates" and may be indicative of what the market might have been willing to offer and accept, and may thus inform what is known and predicted about market rates at the time of conclusion, we find it difficult to see how what actually happens after the conclusion of an agreement is relevant for the purposes of establishing a market benchmark against which to assess whether a benefit is conferred pursuant to Article 1.1 of the SCM Agreement. Rather, the expectations of future performance may be relevant.

6.388. The Panel therefore considers that Professor Whitelaw's approach of observing the average daily yield to maturity over a **[***]**-month period during which the four contracts were signed, does not provide the yields "at the time" that the terms, and thus rates, of the individual contracts were negotiated and agreed. We are therefore unable to accept that Professor Whitelaw's approach is consistent with the Appellate Body's guidance that: (a) the benchmark entails a consideration of what a market participant would have been able to secure on the market at that time, and (b) that the assessment focuses on the moment in time when the lender and borrower commit to the transaction. We therefore reject the averaging approach in favour of the yields from a consistent time-period up to the date of the conclusion of the individual contract, as calculated by Dr Jordan.

6.389. In terms of which of the consistent periods provided by Dr Jordan − the average yield over the six months prior to the date of the relevant contract, the average yield over the month prior to the contract, and the yield on the day of the contract − we consider that the yield on the day of the signature of contract may reflect atypical fluctuations. Parties agreeing to a complex loan contract may rather set the rates in the lead-up to the conclusion of the contract, and prior to the

[586] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 706.
[587] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 835-836.
[588] Jordan Reply, (Exhibit USA-505) (BCI), para. 27. Professor Whitelaw's use of the **[***]** period gives an average yield for **[***]**.

actual day on which the contract is signed. To this extent, the one-month average would appear to be a reasonable proxy for the parties' expectations. This also seems consistent with the approach taken in the CompetitionRx Report in relation to finding the cost of EADS debt at the reference date of **[***]**.[589] The six-month average may be less likely to reflect expectations during the finalisation period, but may also be a helpful indication of market expectations. We therefore carry out our benchmarking assessment using the average yields one-month prior and six-months prior to the conclusion of the contract, in the form of a range.

6.390. We next address the second issue raised by the United States' criticism of how the European Union observes the EADS bond yield: the date used by Professor Whitelaw for the French LA/MSF contract. The United States argues that the date **[***]** (the date of the French A350XWB *Convention*) that is used by Professor Whitelaw is not the relevant date, and that, rather, the date of the French A350XWB *Protocole*, **[***]**, **[***]**, should be the relevant date.[590] The United States and its expert, Dr Jordan, consider that taking the **[***]** date is "arbitrary" and, when combined with Professor Whitelaw's averaging approach, "leads to a significant downward bias in the corporate borrowing rate".[591] Dr Jordan states that:

> **[***]**[592]

6.391. The European Union submits that the date of the French A350XWB *Convention*, **[***]**, should be used rather than the date of the French A350XWB *Protocole*. The European Union submits that the *Protocole* was a preparatory act to the *Convention*, and simply defines the financing agreement in broad terms, giving rise to only limited legal rights and obligations. According to the European Union, such rights and obligations were subject to, and entered into force only with, the conclusion of the French A350XWB *Convention*. The European Union adds that for previous Airbus financing, termination measures terminated the second instrument, which it views as confirmation that the operative document for establishing the entry into force of the relevant instrument is that of the second instrument.[593]

6.392. We note that in this proceeding, this would be a material issue only if Professor Whitelaw's averaging approach were used. Having rejected that approach, whichever of the dates, either **[***]** or **[***]**, is used, we note that there is not a material difference in the yields. However, for the sake of completeness, we lay out our analysis of the issue below.

6.393. We note again that the Appellate Body has stated that in the context of a benefit analysis under Article 1.1 of the SCM Agreement, "the assessment focuses on the moment in time when the lender and borrower commit to the transaction".[594]

6.394. Although it came earlier in time, the French A350XWB *Protocole* is in fact the substantive agreement. The French A350XWB *Protocole* sets out the terms and conditions, including the amounts to be disbursed to Airbus and the terms on which the sum was to be repaid, and any royalties paid, and including the anticipated schedule of deliveries − thus determining the returns that could be expected by the member State government. At that point in time, both parties had committed to the financial contribution's form and understood it to involve a particular anticipated rate of return (subject to our concerns about the royalty revenue, discussed above, which issues were not resolved by the French A350XWB *Convention* in any event). We note that a letter dated **[***]** provides that the amount "is to be attributed via the subsequent French A350XWB

[589] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 84 and fn 2 (p. 18).

[590] United States' comments on the European Union's response to Panel question No. 99, para. 275 and fn thereto. The United States also cites Jordan Reply, (Exhibit USA-505) (BCI), paras. 24-33; and CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 7, which refers to **[***]** as the date "when Airbus concluded the first funding agreement with a Member State".

[591] United States' response to Panel question No. 113, para. 10 (citing Jordan Reply, (Exhibit USA-505) (BCI), para. 25).

[592] Jordan Reply, (Exhibit USA-505) (BCI), paras. 26-27. As we have noted above, this appears to be a slight error: the date of the contract is **[***]**.

[593] European Union's comments on the United States' response to Panel question No. 105, paras. 890-891. (footnotes omitted)

[594] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 835-836.

Convention, according to the conditions detailed in the French A350XWB *Protocole* of **[***]**".[595] We consider that, as a factual matter, the earlier French A350XWB *Protocole* committed the sums on the particular terms, while the later French A350XWB *Convention* dealt with the practicalities of providing those sums to the recipient. In other words, the French A350XWB *Convention* was the means of carrying out the commitment made in the earlier French A350XWB *Protocole*, or the step that implemented the commitment made under the French A350XWB *Protocole*.

6.395. As we see it, this aspect of our benchmark analysis in this proceeding involves comparing the market rates at the time that the contracting parties agreed on the details that gave rise to the expected rates of return. It is our view that the relevant bargain that fixed these rates of return took place in **[***]**, whether or not the later French A350XWB *Convention* was solely an act by which the government provided the funds.

6.396. We also note that in its earlier submissions, the European Union expressly recognised that the earlier date is relevant:

> {T}he United States claims, again, that the 2006 "commitments" by France, Germany, Spain and the United Kingdom to support the A350XWB – in a yet unspecified form and on unspecified terms and conditions – are tantamount to a subsidy that causes adverse effects. The United States does so despite recognising that the terms of A350XWB MSF were agreed to between Airbus and each of the member States considerably later, and over a significant period of time, beginning in June 2009. Thus, MSF for the A350XWB could, at most, constitute a measure subject to challenge as an alleged subsidy after each of the four loans was brought into existence over a period of time beginning in June 2009 … .[596] (footnotes omitted)

6.397. In another example, the European Union stated in its submission:

> Each of these factors relates to the period after the launch of the A350XWB in December 2006, but before the conclusion of the first financing agreement in June 2009, and demonstrates that the financing agreement played no role in Airbus' commitment to the A350XWB.[597]

6.398. In addition, the CompetitionRx Report, submitted by the European Union, uses **[***]** as the "Reference Date" for "when Airbus concluded the first funding agreement with a member State"[598], and states that "{t}he first RLI {repayable launch investment} funding agreement was signed on **[***]**", using that date for a pinpoint reference date.[599]

6.399. In summary, we consider that the date of the French A350XWB *Protocole*, signed on **[***]**, copies of which were relayed with a cover letter dated **[***]**, should be used as the relevant point in time when the French Government committed to the terms and conditions of LA/MSF, rather than the date of the French A350XWB *Convention* signed on **[***]** that attributed the funds.

Whether to adjust the EADS bond yield: maturity and duration

6.400. We now evaluate the United States' argument that the EADS bond yield should be adjusted to account for the fact that its duration and repayment structure is different to the LA/MSF agreements.[600] The United States seeks to adjust the EADS bond yield based on similarly-rated bonds with a term of 20 years, on the grounds that the LA/MSF loans have a much longer term to maturity, or period, than the EADS bond. The European Union counters that the term to maturity is not determinative because LA/MSF and the EADS bond have similar exposure when payment

[595] Exchange of Letters between Fabrice Brégier, Director General of Airbus, and French Director General of Civil Aviation (DGAC) **[***]** and **[***]**, (Exhibit EU-(Article 13)-10) (BCI)).
[596] European Union's first written submission, para. 360.
[597] European Union's first written submission, para. 1105.
[598] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), paras. 7, 8, and 12 (pp. 8 and 9).
[599] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 84 and fn 2 (p. 18).
[600] United States' response to Panel question No. 102, paras. 368-369; and comments on the European Union's response to Panel question Nos. 163-165, para. 6 (consolidated answer). See also Jordan Reply, (Exhibit USA-505) (BCI), para. 3, p. 2, and fn 3.

structure is taken into account. The European Union considers this is shown when the "Macaulay duration" measure is used as a basis for comparison. For the European Union, this negates the need for the United States' proposed 20-year adjustment. The parties disagree as to whether the contracts' and bond's Macaulay durations appropriately reflect all relevant differences associated with the different terms of the instruments.

6.401. The EADS bond is a medium-term note (MTN) issued on 24 September 2003 and maturing 25 September 2018[601], and thus had a term to maturity of 15 years when issued. By the time the various contracts were concluded, the bond had a remaining term to maturity of between 8 and 9 years. The LA/MSF contracts are expected to reimburse the principal approximately **[***]** years after the commencement of disbursements and are expected to deliver a return, via levies and royalties, for **[***]** years after the commencement of disbursements.[602]

6.402. The United States and its expert, Dr Jordan, observe that, as a general principle, investors holding a longer-term instrument would typically require a higher yield − that is, annual return realized by holding the instrument to maturity − than investors holding a shorter-term instrument.[603] The United States argues that, "ideally, the corporate borrowing rate component of the benchmark rates of return would be based on a debt instrument with the same maturity as the actual loan under analysis. Otherwise, the comparison between the benchmark rate of return and the rate of return for the actual loan under consideration could be affected by the differences in maturities, and would thus distort the determination of the existence and/or magnitude of the subsidy".[604] The United States points out that while the EADS bond's term to maturity, or length of borrowing, would be 8-9 years, the LA/MSF borrowing period would be "much longer than 10 years".[605] The United States submits that using a debt instrument with a maturity of 8-9 years would artificially reduce, or understate, the corporate borrowing rate component of the benchmark rate.[606] The United States also submits that using 10-year instruments, as it did in its preferred approach to deriving a corporate rate, and before the original panel, is "quite conservative" and "by using 10-year financing to construct the commercial benchmark rate, the parties and the Panel have been underestimating the magnitude of the subsidies".[607]

6.403. The United States submits that in order to correct for the difference in maturities, the EADS yield should be adjusted. The United States' expert proposes to add the term spread (or term premium) of corporate bonds with 20-year maturities, and with the same credit rating as EADS' debt, to the yield of the EADS bond.[608] To support its proposal to adjust the bond yield for a 20-year term to maturity, the United States points to EU arguments made elsewhere in the current proceeding that LA/MSF should be amortized over a period of 21 years[609], and to evidence that the

[601] EADS Finance B.V. 03/18 MTN 5.5% coupon Eurobond maturing 25 September 2018, ISIN XS0176914579, traded on the Frankfurt Stock Exchange. Details of this bond issue are provided with Professor Robert Whitelaw, "Comments on Elements of the 'Responses of the United States to the Second Set of Additional Questions from the Panel'", 1 May 2014, (Whitelaw Comments on US Responses), (Exhibit EU-508) (BCI).

[602] According to the "corrected'" figures provided by the European Union, the French LA/MSF contract expects the loan principal to be paid off after a period of **[***]**, with the maximum life of the instrument with royalties expected to extend to a period of approximately **[***]**; the German LA/MSF contract expects the loan principal to be paid off after a period of **[***]**, with the maximum life of the instrument with royalties expected to extend to a period of approximately **[***]**; the Spanish LA/MSF contract expects the loan principal to be paid off after a period of **[***]**, with the maximum life of the instrument with royalties expected to extend to a period of approximately **[***]**; and the UK LA/MSF contract expects the loan principal to be paid off after a period of approximately **[***]**, with the maximum life of the instrument with royalties expected to extend to a period of approximately **[***]**. (See also Whitelaw Comments on US Responses, (Exhibit EU-508) (BCI), para. 10).

[603] United States' response to Panel question No. 95, para. 352.

[604] United States' response to Panel question No. 95, para. 353.

[605] United States' response to Panel question No. 95, paras. 353-354.

[606] United States' response to Panel question No. 95, paras. 353-354.

[607] United States' response to Panel question No. 95, para. 355.

[608] Jordan Reply, (Exhibit USA-505) (BCI), para. 20 (providing the following example at fn 30: "As an example of the use of term spreads to adjust maturity, suppose we take the maturity of the EADS note to be 9 years in January 2010 with a yield of 4.15%. Further suppose that the 10-year to 9-year yield spread is 0.15% and the 20-year to 10-year yield spread is 0.70%. The adjusted 20-year yield of the EADS note is then 5.00%, (i.e., 4.15% + 0.15% + 0.70%)").

[609] Jordan Reply, (Exhibit USA-505) (BCI), p. 3 and fn 8 (citing European Union's first written submission, para. 206).

UK Government's assessment used **[***]** as a basis for suggesting appropriate rates of return on the UK contract, consistent with a view that an instrument with a life of 20 years is appropriate to benchmark LA/MSF.[610]

6.404. The United States' proposal to correct for what the EADS bond yield would be if it had 20 years remaining until maturity would appear to add between **[***]** and **[***]**[611] basis points to the general corporate borrowing rate component of the benchmark.

6.405. With respect to the fact that it did not propose such an adjustment in the original proceeding, the United States points out that in the original proceeding it had noted that the use of a 10-year maturity would understate the actual maturity and therefore it had understated the actual credit spreads associated with the LA/MSF contracts, which were open ended or had a maturity that was significantly longer than 10 years.[612]

6.406. In response to the United States' proposal to adjust the yield to take into account the differences in the terms of the instruments, the European Union submits that if the Macaulay duration financial analysis measure is used to compare the EADS bond with the LA/MSF contracts, the instruments are in fact similar and no adjustment need be made. The European Union argues that the Macaulay duration measure is appropriate for comparing the relative risks to an investor relating to the remaining term of the EADS bond and the term of the LA/MSF contracts. The European Union states in this regard that:

> In assessing the comparability of two financial instruments, it is not their absolute maturity (i.e., the date of their final payment) that is decisive, but the average life of their cash flows, which adjusts for the characteristics of their cash flow profiles. For example, it is not meaningful to compare, without adjustment, (i) the maturity of a loan with periodic repayments of principal and interest to (ii) the maturity of a bond without periodic repayments. In fact, a bond, with principal due at maturity, will have a longer effective cash flow life than a loan with the same maturity that requires principal repayments throughout the life of the loan. To measure the effects of differences in the timing and magnitude of cash flows, financial analysts determine what is known as the "Macaulay duration" of a financing instrument, which is equivalent to its weighted average cash flow life.
>
> When available market instruments have a cash flow profile different in some respects from that of the financing agreements for the A350XWB, it is necessary to compare their respective Macaulay durations {– equivalent to their weighted average cash flow lives –} to assess the suitability of the market instrument. Indeed, to serve as the basis for an element of the benchmark for the A350XWB-related financing agreements, a bond should have approximately the same Macaulay duration as the expected repayment stream associated with the A350XWB financing agreements.[613]

6.407. The European Union submits that the Macaulay duration of the EADS bond, to its remaining term, is similar to the Macaulay durations of the LA/MSF contracts. To support its

[610] Jordan Reply, (Exhibit USA-505) (BCI), p. 3 and fn 8 (citing UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI). Additionally, we note that the contracts are expected to deliver the anticipated return over the projected life of the A350XWB programme, and that in a different context Professor Whitelaw has noted that "US estimates of programme life cycle for capital budgeting – 5 years of development followed by 15 years of deliveries – although not identical to, is consistent with the programme life assumed by Airbus in capital budgeting". (Professor Robert Whitelaw, "Comments on US and NERA's Discussion of MSF Benefit and Effects on Product Launch", 27 June 2012, (Exhibit EU-7) (BCI/HSBI), para. 25).

[611] Using the approach accepted by the Panel in the preceding sections, the adjustment would be between **[***]** and **[***]** basis points. (See Jordan Materials in Response to Panel Questions Nos. 110, 111, 112, and 114, (Exhibit USA-567) (BCI/HSBI), supplements to tables 6, 7 and 9 (pp. 2-7)). Using Professor Whitelaw's averaging approach the adjustment seems to be between **[***]** and **[***]** basis points for the individual contracts. (Jordan Reply, (Exhibit USA-505) (BCI), para. 20 and table 4; European Union's response to Panel question No. 166, para. 18; and United States' comments on the European Union's response to Panel question No. 166, para. 16).

[612] United States' response to Panel question No. 95, para. 355 (citing Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.432 and fn 2579). See also Ellis-Jordan Report, (Original Exhibit US-80), (Exhibit USA-474/506 (exhibited twice)) (BCI), pp. 7-8 and 11.

[613] United States' response to Panel question No. 92, paras. 351-352.

contention, the European Union provides a number of calculations by Professor Whitelaw[614], which it revised to take into account errors identified by the Panel but without providing revised underlying revenues to enable a verification of the updated results.[615]

6.408. The United States contends that the Macaulay duration measure is not a useful metric in this context for two reasons: because: (a) it "captures only one type of risk − interest rate changes − and does not account for others, such as the increased uncertainty associated with repayments scheduled for a more distant point in time", and "the maturity of a debt instrument is highly probative of general riskiness, because a longer time horizon increases the amount of time over which events can upset expectations"[616]; and (b) because a Macaulay duration "is an accurate tool only if the timing and amount of repayments are fixed in advance. … Where the repayment schedule is flexible, as with success-dependent, levy-based LA/MSF, that tool is not useful, and can be deceptive".[617] In respect of this latter point, the United States submits that LA/MSF is provided "without an actual maturity", is "open-ended borrowing" and involves "variability in the repayment stream that is undetermined *ex ante*"[618] which is more akin to a bond with embedded options.[619] The United States submits that the Macaulay duration measure is thus "a flawed measure of a bond's price sensitivity to interest rate changes for a bond with embedded options {and} misleads the user because it masks the fact that changes in the expected cash flows must be recognised for bonds with embedded options".[620]

6.409. The European Union counters that the Macaulay durations of the LA/MSF contracts are appropriate to measure interest rate risk, and would reflect the compensation that lenders require for bearing interest rate risk.[621] With respect to the variability of the cash flows under the LA/MSF contracts, the European Union considers that the United States' argument is based on principles that do not apply to LA/MSF (that is, the decision to exercise embedded options is itself dependent on interest rate risk), and that, in any event, "any variability of the repayment stream is reflected in the … project-specific risk premium".[622]

6.410. We note that the risk, and thus the rates of return, implied by the term and structure of a particular debt instrument is a complex matter. In our view, an instrument's maturity or term to maturity is relevant, as under normal circumstances borrowing via longer-maturity instruments costs more than borrowing via shorter-maturity instruments.[623] It is our understanding that this is due to, *inter alia*: the potential for intervening events (for example macroeconomic factors) to negatively affect returns; opportunity cost compared to other more favourable investment opportunities that arise and could have been pursued if one had invested in a shorter-term instrument; and the chance that future returns could be worth less − for example through inflation.

6.411. We note that experts' analyses submitted in this proceeding refer to the length of the term of the instrument as defining whether it is an appropriate basis for a comparison borrowing rate. The experts refer to the "longest-term" bond available as the best match for the LA/MSF

[614] Professor Whitelaw addresses the graduated nature of disbursements by generating a Macaulay duration for the disbursements too, and subtracting this from the initial estimate of the LA/MSF duration to arrive at a (shorter) final result. (See Professor Robert Whitelaw, "Calculation of the Macaulay Duration of the Financing Agreements for the A350XWB", (Exhibit EU-380) (BCI/HSBI); and Professor Robert Whitelaw, "Update on certain calculations of IRRs and Macaulay durations", 14 April 2014, (Whitelaw Updated Calculations), (Exhibit EU-507) (BCI/HSBI)).

[615] Professor Robert Whitelaw, "Calculation of the Macaulay Duration of the Financing Agreements for the A350XWB", (Exhibit EU-380) (BCI/HSBI); and Whitelaw Updated Calculations, (Exhibit EU-507) (BCI/HSBI). We note that we would expect the corrections would not be so significant as to change the basic arguments made by the parties.

[616] See United States' response to Panel question No. 166, paras. 36 and 41.

[617] United States' response to Panel question No. 166, para. 36. (footnotes omitted)

[618] United States' comments on the European Union's response to Panel question No. 92, para. 254.

[619] United States' response to Panel question No. 166, paras. 39-44.

[620] Frank J Fabozzi (ed.), *The Handbook of Fixed Income Securities*, (McGraw-Hill, 2005), p. 187; and Frank J. Fabozzi (ed.), *Fixed Income Analysis*, 2nd edn (Wiley, 2007), pp. 175-176, (Exhibit USA-589) (cited in United States' response to Panel question No. 166, 16 April 2014, para. 39).

[621] See Whitelaw Comments on US Responses, (Exhibit EU-508) (BCI), comment on Panel question No. 166, paras. 11-12.

[622] European Union's comments on the United States' response to Panel question No. 166, para. 166.

[623] Neither party has argued that the circumstances in question were anything other than normal, or that there was a relevant flat or inverted yield curve pattern prevailing in market borrowing rates.

instruments. For example, when initially proposing the EADS bond as a basis for the value of general corporate borrowing, the European Union's expert, Professor Whitelaw, asserts that "the company's actual cost of long-term borrowing" is shown by "EADS' actual, long-term borrowing rates at the date of the agreements, expressed as the yield on its longest-term bond".[624] CompetitionRx likewise chose the longest-term bond as the best basis for comparison rates.[625]

6.412. However, an instrument's structure is also relevant. The risk of lending long might be different depending on the rate at which a debt is amortised under the relevant instrument, because if the principal is reduced more quickly, then less is at stake into the future. While a debt might extend over the same period of time as another, an instrument that amortises more quickly reduces the sum that is exposed to the risks of lending long. Absolute maturities do not demonstrate how rapidly the loan principal will be amortised where payments are made throughout the life of the instrument, and thus how much of the debt is exposed to the risks of lending long.

6.413. As we understand it, a bond's Macaulay duration is derived from the weighted average time to each coupon or principal payment.[626] Both parties appear to agree that, "{i}n layman's terms, the more bond payments occur later in a bond's life, the higher the Macaulay duration".[627]

6.414. The Macaulay duration measure is typically used for a different purpose to the one for which the European Union is currently asking the Panel to use it. Macaulay durations provide information to a potential investor about certain risks involved with bonds. Bonds have assured payments, and the instrument's price as traded may vary when general interest rates rise or fall. The Macaulay duration measure is a tool that gives standardised information about the comparative interest rate sensitivity of the prices of bonds that make more than one coupon payment throughout the bond's life, compared to the interest rate sensitivity of the prices of zero-coupon bonds that only make one payment, due at maturity (where the full amount of the debt is exposed to risks).[628] The Macaulay duration measure is used most often to compare how volatile, responsive or sensitive are the prices of fixed-income securities (bonds) to changes in general interest rates.

6.415. We note that the instruments being compared in this proceeding are not two bonds, but a bond and a specific type of loan. There are differences between how the two types of instrument work.

6.416. Nevertheless, in our view, the Macaulay duration measure is useful for illustrating how an instrument's term structure − in addition to its maturity or term period − is relevant to its risk profile.[629] The measure illustrates the principle that an instrument that amortises more quickly reduces the sum that is exposed to the risks of lending long. For example, it can illustrate the difference between a 10-year loan, where the principal is due at year 10, compared to a loan with yearly repayments. For the latter loan, with part of the principal paid off each year, the lower

[624] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), paras. 8 and 11-12, and fns 10 and 13.

[625] See e.g. CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), paras. 72-74 and, in particular, para. 76.

[626] Zvi Bodie, Alex Kane, and Alan J. Marcus, *Investments*, 9th edn (McGraw-Hill/Irwin, 2011), pp. 509-518, (Exhibit EU-379), p. 513; and Frank J Fabozzi (ed.), *The Handbook of Fixed Income Securities*, (McGraw-Hill, 2005), pp. 206-207. We note commentary that while measures of duration are expressed in years, it is not useful to think of duration as a measure of time. Rather, "the proper interpretation is that duration has the price volatility of a zero-coupon bond with that number of years to maturity. Thus, when a manager says that a bond has a duration of four years, it is not useful to think of this measure in terms of time, but rather that the bond has the price sensitivity to rate changes of a four-year zero-coupon bond. … As a second example, consider the duration of an option that expires in one year. Suppose that it is reported that its duration is 60. … It simply means that the option tends to have the price sensitivity to rate changes of a 60-year zero-coupon bond". (Frank J Fabozzi (ed.), *The Handbook of Fixed Income Securities*, (McGraw-Hill, 2005), pp. 206-207.)

[627] United States' response to Panel question No. 166, para. 37; and European Union's comments on the United States' response to Panel question No. 166, para. 162.

[628] Frank J Fabozzi (ed.), *The Handbook of Fixed Income Securities*, (McGraw-Hill, 2005), pp. 206-207.

[629] As Professor Whitelaw noted in the original proceeding, "yields are a function of the combination of the probability of default and the expected loss given default". The Macaulay duration measure appears to give an indication of the expected loss given default, while term to maturity or term period bears on probability of default. (See Professor Robert Whitelaw Rebuttal Report, 24 May 2007, (Whitelaw Rebuttal Report), (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), para. 39).

Macaulay duration reflects the lower risk that the full amount of the principal will not be repaid over time. Thus, when assessing the comparability of a bond and a loan, the instruments' absolute maturity may not fully account for varying exposure due to their different repayment structures.

6.417. In principle, then, if an adjustment is made to take into account differences in maturity, account must also be taken of differences that may exist in term structure. Thus, we consider it would be an oversimplification to adjust the EADS bond yield solely by adding the term spread, or term premium, of similarly-ranked 20-year corporate bonds, given that the structure of the A350XWB LA/MSF contracts means the loan principal will not be exposed for the full length of that term.

6.418. However, we are not convinced that similarities in Macaulay durations render any differences in terms to maturity entirely irrelevant. The amount of time into the future over which an instrument is projected to exist has its own relevance. That is, the further into the future certain events are anticipated to take place, the more likely it is that one or more intervening events may occur to impede their fulfilment.[630] We agree with the United States that the Macaulay duration measure does not account for the increased uncertainty associated with repayments scheduled for a more distant point in time.[631] This contributes to the probability of default. Thus, while we do not believe it would be appropriate to adjust the EADS bond yield by adding the term spread, or term premium, of similarly-ranked 20-year corporate bonds, neither do we think that it would be appropriate to fully ignore the relevance of a longer term or loan period.

6.419. We additionally note that, comparing the instruments' Macaulay durations, it seems that several of the LA/MSF contracts' term structures involve more exposure than the EADS bond. Professor Whitelaw calculates the Macaulay duration of the EADS bond to be 7.42 "years". The (corrected) Macaulay durations of the contracts, as calculated by Professor Whitelaw, are: France: **[***]** "years", Germany: **[***]** "years", Spain: **[***]** "years", and the United Kingdom between **[***]** and **[***]** "years".[632]

6.420. Finally, with respect to the United States' submission that LA/MSF involves "variability in the repayment stream that is undetermined *ex ante*"[633] which is more akin to a bond with embedded options[634] and that Macaulay's duration is thus "a flawed measure"[635], we agree with the European Union that such variability of the repayment stream is to be reflected in the project-specific risk premium.[636]

6.421. The European Union has satisfied us that the United States' proposal to adjust the EADS bond by adding the term spread of similarly-ranked 20-year bonds is not appropriate. As the United States has not presented us with any alternative adjustment, we therefore proceed on the basis of the unadjusted EADS bond yields, noting that: (a) the increased uncertainty with respect to repayments scheduled for a more distant point in time means that the EADS bond yield likely gives a conservative estimate of the corporate borrowing rate component of the benchmark rate for *all four contracts*; and (b) the higher Macaulay durations of the **[***]** contracts, when compared to the Macaulay duration of the EADS bond, further suggests that the EADS bond yield would represent a conservative estimate for those *three contracts*.

[630] See Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.414.
[631] United States' response to Panel question No. 166, para. 36.
[632] See Professor Robert Whitelaw, "Calculation of the Macaulay Duration of the Financing Agreements for the A350XWB", (Exhibit EU-380) (BCI/HSBI); Second Whitelaw Response to Jordan, (Exhibit EU-396) (BCI/HSBI), para. 7; Whitelaw Updated Calculations, (Exhibit EU-507) (BCI/HSBI). We note that when questioned concerning the accuracy of the initial calculations, the European Union failed to disclose the underlying figures on which these calculations were based.
[633] United States' comments on the European Union's response to Panel question No. 92, para. 254.
[634] United States' response to Panel question No. 166, paras. 39-44.
[635] United States' response to Panel question No. 166, para. 39.
[636] European Union's comments on the United States' response to Panel question No. 166, para. 166; and Whitelaw Comments on US Responses, (Exhibit EU-508) (BCI), comment on Panel question No. 166, para. 13.

Whether to add to the corporate rate an amount for normal fees and charges associated with general corporate borrowing on the market

6.422. As a final matter, the United States proposes an adjustment to represent normal fees and charges that Airbus would incur for market financing. In response to Professor Whitelaw's addition of the fees to the calculation of the German contract's IRR, Dr Jordan, the United States' expert, opined that "the fees Professor Whitelaw includes, as well as the fee included in the Jordan Report, are fees for particular services. Such fees should be added as well to the market benchmark under the assumption that market lenders would charge the same fees for the same services. Alternatively, the fees can be omitted from both LA/MSF rates and market benchmarks".[637]

6.423. The United States additionally argues that "by turning to the {member State} governments to finance the A350XWB program, Airbus avoided {underwriting fees, loan commitment fees, and administrative} fees. Accordingly, if the actual IRR for LA/MSF for the A350XWB is understood to include fees like the "**[***]**" and "**[***]**" fees in the German LA/MSF contract, then the corresponding Airbus corporate borrowing rates for all four governments also should include underwriting and other fees."[638] Thus, the United States proposes to add to the corporate borrowing rates for all four governments a sum representing underwriting fees[639], loan commitment fees[640] and administrative fees.

6.424. The European Union maintains that to determine whether and what "analogous commercial fees" should be included in a benchmark, it is first necessary to understand the nature and characteristics of the fees included in the challenged instrument. Without that understanding, the European Union argues that it is impossible to know what "commercial fees" would be "analogous" and properly included in a benchmark.[641] The European Union submits that the United States has failed to establish that the **[***]** fee and the **[***]** fee under the German LA/MSF contract are analogous to underwriting fees, loan commitment fees and/or administrative fees and, thus, that they should properly form part of a suitable market benchmark rate.[642]

6.425. We note that the European Union does not reject the principle that it may be appropriate to include commercially charged fees as part of a market benchmark, and provides its own calculation of potentially relevant fee amounts, were we to decide to adjust the market benchmark for that purpose.[643]

6.426. In our view, it is not necessary that any fees charged for the lending at issue be "analogous" to the commercial fees charged by a market lender in order for it to be appropriate to include such fees into the relevant market benchmark. Indeed, such an approach would neglect the potentially advantageous waiver of any such fees that might be relevant to a benefit analysis.

6.427. As we see it, in this proceeding it is appropriate to have regard to fee amounts normally charged as part of the borrowing rate, in order to determine whether the A350XWB LA/MSF measures confer an advantage on Airbus to compared against what would have been available on the market. We therefore consider that, in principle, a difference between the sums that the

[637] Jordan Reply, (Exhibit USA-505) (BCI), para. 12 and fn 20.
[638] United States' response to Panel question No. 161, para. 6.
[639] United States' response to Panel question No. 161, para. 4 (arguing in the light of the results of a study concerning the underwriting fees associated with equity-linked securities and the incremental increase in underwriting fees for debt instruments with longer maturities and non-investment grade credit risk, that "the total underwriting fees for a complex, risky, and long-maturity debt instrument like LA/MSF likely would be even higher than 2.44 percent", referring to Enrique Schroth, "Innovation, Differentiation, and the Choice of an Underwriter: Evidence from Equity-Linked Securities", *The Review of Financial Studies* (2006), Vol. 19, No. 3, pp. 1041-1080, (Exhibit USA-585), p. 1049, table 3, and panel b).
[640] United States' response to Panel question No. 161, para. 5 and fn 8 (indicating that in 2001, banks would charge loan commitment fees on general corporate lines of credit which could include, on average, an upfront fee of 18.6 basis points, annual fees of 4.5 basis points, and usage fees of 19.6 basis points.) The United States also notes that other administrative fees including accounting and legal fees are charged by banks and other financial intermediaries but does not expressly offer a numerical estimate of the value of such fees.
[641] European Union's comments on the United States' response to Panel question No. 161, para. 6.
[642] European Union's comments on the United States' response to Panel question No. 161, para. 12.
[643] European Union's comments on the United States' response to Panel question No. 161, paras. 13-30, and especially para. 16.

market would have generally charged by way of normal fees and expenses for comparable financing to LA/MSF, and the amounts, if any, charged by the relevant member State for LA/MSF financing, should be factored into a consideration of whether a benefit has been conferred.

6.428. However, we have concerns about the applicability of some of the estimates provided by the United States. We agree with the European Union that the United States' underwriting fee estimate – more than 244 basis points[644] – derives from an analysis of complex, equity-linked, derivative and innovative instruments that it is not clear would match the kind of normal fees Airbus would face if it turned to the market for funding for the A350XWB.[645] While we note that there is evidence that underwriting fees for various types of debt instruments were on average 14 basis points over the 1975-2004 period[646], we are prepared to accept, in this instance, the underwriting fee for the EADS bond itself, estimated by the European Union to translate to an adjustment to the bond yield of approximately **[***]** basis points, calculated on 23 September 2003.[647] The United States offers estimates of average additional fees on corporate lines of credit such as upfront fees of 18.6 basis points, annual fees of 4.5 basis points, and usage fees of 19.6 basis points, as well as noting the existence of other fees for services including accounting and legal services, but not offering express estimates to be added in this instance.[648] We note that corporate lines of credit are different instruments to a bond or a success-dependent loan and it is thus not clear what types of fees would be appropriate to add to this particular benchmark instrument. In addition, the evidence provided by the United States dates from 2001.[649] In view of the different instrument types and potential market fluctuations between the time of the data on which the evidence is based and the time the contracts were concluded, we consider that it would be appropriate to use estimates that reflect the fees associated with the particular market benchmark. We therefore decline to use the estimates offered by the United States of fees additional to the underwriting fees, and use only the estimate of a fee for the EADS bond put forward by the European Union. We note, however, that were we to add further average fees, this would adjust that amount upwards.

Conclusion on the appropriate general corporate borrowing rate

6.429. In conclusion, we have determined to use the yield on the EADS bond identified by the European Union as the basis for the corporate borrowing rate. We consider, however, that the EADS bond yield may be lower than rates that would be required for borrowing by its Airbus subsidiaries alone (that is, the EADS bond yield may understate the corporate borrowing rate for the French and Spanish contracts). We have also determined that the EADS bond's yields should be observed over consistent time periods in the lead up to each of the four individual contracts, in the form of a range of the one-month and six-month average yields prior to the date of the individual contracts. We find that the United States' proposal to adjust the EADS bond yield for a 20-year maturity by adding the term premium of similarly-ranked bonds with a 20-year remaining term is not appropriate. However, we use the unadjusted yields of the EADS bond on the understanding that it is likely to be a conservative reflection of the corporate borrowing rate that should be used to construct the relevant market benchmark for the LA/MSF contracts given that: (a) the increased uncertainty with respect to repayments scheduled for a more distant point in time means that the EADS bond yield likely gives a conservative estimate of the corporate borrowing rate component of the benchmark rate for *all four contracts*; and (b) the higher Macaulay durations of the **[***]** contracts, when compared to the Macaulay duration of the EADS bond, further suggests that the EADS bond yield would represent a conservative estimate for those *three contracts*. Finally, we have also accepted, in principle, the addition of a sum representing

[644] United States' response to Panel question No. 161, (BCI), para. 4.
[645] European Union's comments on the United States' response to Panel question No. 161, paras. 14-16.
[646] See Kim Dongcheol et al, "The Impact of Commercial Banks on Underwriting Spreads: Evidence from Three Decades", *Journal of Financial and Quantitative Analysis* (2008), Vol. 43, No. 4, pp. 975-1000, (Exhibit USA-586), p. 976.
[647] European Union's comments on the United States' response to Panel question No. 161, para. 16 and fn 41; and Whitelaw Comments on US Responses, (Exhibit EU-508) (BCI), para. 16.
[648] The evidence on the panel record covers a sample period of 13 September 1996 to 3 October 1997. (See Arie Melnik and Doron Nissim, "Debt Issue Costs and Issue Characteristics in the Market for U.S. Dollar Denominated International Bonds", *European Finance Review* (2003), Vol. 7, pp. 277–296, (Exhibit USA-588), p. 281).
[649] O. Emre Ergungor, "Theories of Loan Commitments", *Cleveland Federal Economic Review* (2001), Q3, pp. 2-19, (Exhibit USA-587).

market based fees and, for the purposes of this proceeding, will use the amount proposed by the European Union.

6.430. The quantitative implications of our findings on the corporate borrowing rate are as follows:

Table 7: Corporate borrowing rate estimates

EU member State	Corporate borrowing rate as reflected by yield on EADS bond (range: between average yield 1-month prior, and 6-months prior, to date of individual contract)	Representative sum for normal market fees	Total corporate borrowing rate component of market benchmark rate
France	**[***]** to **[***]**	**[***]**	**[***]** to **[***]**
Germany	**[***]** to **[***]**	**[***]**	**[***]** to **[***]**
Spain	**[***]** to **[***]**	**[***]**	**[***]** to **[***]**
United Kingdom	**[***]** to **[***]**	**[***]**	**[***]** to **[***]**

Project-specific risk premium

6.431. The parties agree that the final component of a market interest rate benchmark against which to compare the rates of return anticipated under the A350XWB LA/MSF measures should be a project-specific risk premium reflecting the risk associated with providing financing on the same or similar terms as LA/MSF for the A350XWB programme.[650]

6.432. In the original proceeding, a premium was added to the price of general corporate borrowing to reflect the fact that LA/MSF involves more risk for a lender than such general corporate borrowing. This additional risk derived, in part, from the fact that rather than being repaid from the firm's general assets, the LA/MSF loans "are model-specific, that is, they are provided to fund the development of specific aircraft models and are to be repaid from the cash flows associated with the same specific model and so a commercial lending rate would reflect not only the riskiness of the borrower but also the riskiness of the individual projects."[651] The project-specific risk premium was thus added to reflect certain risks for the lender associated with the form of financing as well as the risks associated with the particular aircraft development project.[652]

6.433. The United States presents two alternatives for a project-specific risk premium in this proceeding. The first, and *preferred*, United States' project-specific risk premium is a figure calculated by its expert, Dr Jordan, which we call the Jordan Risk Premium (JRP).[653] The JRP is the average of two figures introduced by the parties in the original proceeding in relation to the risk associated with the A380 programme. *As a secondary argument*, the United States relies upon the risk premium proposed by Professor Whitelaw in the original proceeding for the A380 programme (the Whitelaw Risk Premium (WRP)[654]) on the understanding that it was found to be understated

[650] See e.g. European Union's response to Panel question No. 94, fn 578 ("As both Parties agree, the benchmark would also include a risk premium to reflect to {*sic*} risk-sharing features of the MSF loans").

[651] Ellis-Jordan Report, (Original Exhibit US-80), (Exhibit USA-474/506 (exhibited twice)) (BCI), p. 4.

[652] See Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.432 (citing Ellis-Jordan Report, (Original Exhibit US-80), (Exhibit USA-474/506 (exhibited twice)) (BCI), pp. 1-23). The project-specific risk was defined as the "risk that the particular project will fail to perform as originally forecast and, therefore, that repayments, if any, will be insufficient to cover the full investment and interest". (Ellis-Jordan Report, (Original Exhibit US-80), (Exhibit USA-474/506 (exhibited twice)) (BCI), p. 6 (cited in Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 860)).

[653] The JRP is a figure derived from two HSBI figures and is therefore itself HSBI. See Jordan Report, (Exhibit USA)-475)(BCI/HSBI), para. 14.

[654] The WRP is an HSBI figure. See Jordan Report (Exhibit USA-475) (BCI/HSBI), para. 15; and Jordan Reply, (Exhibit USA-505) (BCI/HSBI), para. 5, table 2, n 2.

or a "minimum" project-specific risk premium. The United States argues that even if the "too-low" WRP is used, this would bring the market benchmark above the internal rates of return of the A350XWB LA/MSF contracts, showing that there is a "benefit" and, therefore, that the A350XWB LA/MSF measures are subsidies.[655] Thus, both of the United States' proposed risk premia use figures that the United States argues were advanced as project-specific risk premia in the original proceeding.

6.434. The European Union has not proposed a project-specific risk premium of its own for the A350XWB programme, and rejects both of the risk premia advanced by the United States. According to the European Union, the JRP was not used as a project-specific risk premium in the original proceeding[656]; and the United States has not shown that the WRP is an appropriate risk premium for the A350XWB.[657]

6.435. The parties' arguments raise the following main questions: first, whether the JRP was applied for the A380 in the original proceeding or whether, even if not applied in the original proceeding, the JRP is sufficiently argued to be a relevant premium in this proceeding; and, second, whether the risks associated with the A350XWB and A380 aircraft development programmes are sufficiently similar such that the same "understated" project-specific risk premium applied for the A380 may be used to reflect the project-specific risk associated with the A350XWB.

6.436. We commence our evaluation by examining the United States' preferred alternative, the JRP.

United States' preferred project-specific risk premium

6.437. The United States' preferred project-specific risk premium, the JRP, is an HSBI figure calculated by its expert, Dr Jordan.[658] To derive the JRP, Dr Jordan explains that he uses "the average of two very similar risk premia"[659] introduced during the original proceeding and applied for the A380. The two figures that Dr Jordan averages to obtain the JRP are both HSBI numbers. The first we call the Supplier Pass-On Figure (SPOF); the second we call the Corrected Interpolated Bond-Based Figure (CIBBF).

6.438. The United States submits that the JRP is an appropriate project-specific risk premium for the A350XWB. The United States recalls that in the original proceeding the WRP was found to be an "understated" or "too low" premium for the A380.[660] The United States notes that the JRP is higher than the WRP. In the United States' view, this appropriately accounts for higher risks associated with the A350XWB project when compared against the A380.[661] However, according to the United States, the JRP is still "conservative" because its inputs, the CIBBF and the SPOF, continue to reflect the "understated" nature of the WRP.[662] The United States characterises the JRP

[655] Given United States arguments on the methodology of deriving the corporate general borrowing rate, discussed above. (Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 24; and Jordan Reply, (Exhibit USA-505) (BCI), p. 3 (para. 3)).

[656] European Union's first written submission, paras. 313-315 (citing Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 15); and Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), paras. 31-32).

[657] European Union's second written submission, para. 321.

[658] The JRP is **[***]** basis points above the HSBI figure that was introduced by Professor Whitelaw as a premium for LA/MSF for the A380 and other Airbus LCA projects and eventually applied, on the understanding that it was understated, by the panel and the Appellate Body in the original proceeding. See Jordan Report, (Exhibit USA)-475)(BCI/HSBI), para. 14.

[659] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 14.

[660] United States' second written submission, para. 285 (citing Jordan Report, (Exhibit USA-475) (BCI/HSBI), paras. 14-22).

[661] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 22.

[662] Dr Jordan states that the CIBBF and the SPOF "only sought to address issues raised by the United States and to confirm the original risk-sharing supplier analysis" and do "not address the flaws in the original risk-sharing supplier analysis pointed out by the Panel and Appellate Body". Hence, "the Panel and Appellate Body's criticism of Professor Whitelaw's first risk premium – i.e., that it is artificially depressed as the result of LA/MSF from the Airbus governments to Airbus for the A380 – continues to apply" to the JRP. (See Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 20 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 921)).

as based on "the method advanced by the EU and Professor Robert Whitelaw during the merits phase, further adjusted based on the specific criticisms of that approach reflected by the Panel and the Appellate Body".[663] Dr Jordan states that the SPOF and the CIBBF "were higher than the original Whitelaw risk premium, and they are remarkably consistent with each other", concluding that the "two risk premia were a valid (though still conservative) basis on which to assess the project-specific risk premium for LA/MSF for the A350XWB".[664]

6.439. The European Union rejects the suggestion that it proposed or accepted the JRP, the CIBBF or the SPOF as reflecting an appropriate risk premium in the original proceeding.[665] The European Union states that the JRP would be "an overstated benchmark for the A380" contracts[666], and questions the applicability of this "overstated benchmark" to the A350XWB contracts.[667] The European Union asserts that the United States has failed to properly substantiate its assertion that the risk associated with the A350XWB contracts should be higher than that for the A380 contracts, such that employing a premium applied for the A380 is "conservative" for the A350XWB.[668]

6.440. In our view, if the JRP inputs – the CIBBF and SPOF – were not accepted or even presented as an appropriate risk premium in the original proceeding, then the United States cannot rely on the JRP without further adequately explaining why it or its inputs can be used as a risk premium or the basis for a risk premium in this proceeding, and how it responds to any need for adjustment. In making our assessment of these matters we first review how the SPOF and CIBBF were treated in the original proceeding.

6.441. The SPOF was raised in the original proceeding in the context of using Airbus' risk-sharing supplier contracts to derive a market risk premium. The United States had argued that Professor Whitelaw's estimate of the risk premium charged by risk sharing suppliers to Airbus "was affected by the fact that **[***]** and that this reduced the suppliers' required rates of return"[669], implying that the returns on supplier contracts "cannot be viewed as fully commercial".[670] In response, Professor Whitelaw calculated the SPOF to represent the maximum premium that might be charged by a risk sharing supplier if the full benefits of any government funding had been passed on to Airbus[671], a prospect that he doubted, stating that he was "not aware of any evidence to suggest" it would happen, and that suppliers "may have considerable negotiating power and little incentive"[672] to act in this way. The European Union argued in the original proceeding that the United States "offered no evidence that government financing for the risk sharing suppliers affects the terms of the finance contracts agreed with Airbus. Moreover, … even if this were the case, the resulting change to the benchmark rate would be negligible".[673] It thus appears to us that neither Professor Whitelaw nor the European Union proposed the SPOF as an appropriate premium for the A380 but only used it in a comparative manner, to indicate that its own premium was sound. The United States did not propose or accept the SPOF or Professor Whitelaw's risk-sharing supplier-based premium.[674]

6.442. Moreover, we note that the Appellate Body questioned one of the assumptions on which the SPOF was based, noting that "from an economic perspective, any subsidies that the risk-sharing suppliers may have received need not have been necessarily passed on to Airbus in the form of a lower rate of return. Whether any subsidy given to the risk-sharing suppliers passed

[663] United States' second written submission, para. 285 (citing Jordan Report, (Exhibit USA-475) (BCI/HSBI), paras. 14-22).
[664] Jordan Reply, (Exhibit USA-505) (BCI), para. 37.
[665] European Union's first written submission, para. 315 (citing Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 15); and second written submission, para. 314 (citing Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), paras. 31-32).
[666] European Union's second written submission, paras. 316-318.
[667] European Union's second written submission, paras. 317-318.
[668] European Union's second written submission, para. 321.
[669] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 16 (citing Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), paras. 30-31).
[670] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.476.
[671] See European Union's second written submission, para. 314 (citing Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), paras. 31-32).
[672] Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), para. 30.
[673] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.478.
[674] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.475.

through to Airbus would have depended on Airbus' market power or negotiating leverage."[675] We note that the United States has not presented arguments to support the underlying assumptions of the SPOF in this regard.

6.443. We therefore consider that the SPOF was not presented, argued, agreed, or accepted as a basis for a risk premium for the A380 in the original proceeding, and that in this proceeding the United States must present additional argumentation and evidence to support its use as a basis for a premium for the A350XWB.

6.444. The CIBBF was an *arguendo* modification by the European Union of a cross-check advanced by the United States. The United States' expert, Dr Ellis, had used a statistical probability analysis of A380 project risk from the UK Department of Trade and Industry (DTI)'s critical project appraisal, as well as "market information, including bond ratings and yields"[676] to generate likely credit ratings for the A380 project. His analysis had generated B to CCC ratings, which are "low-grade junk bond credit classifications".[677] This confirmed the United States' risk premium in that proceeding.[678] The European Union's expert, Professor Whitelaw, then corrected the results of the analysis using certain original data[679], the source of which was apparently not available to the United States.[680] Professor Whitelaw's correction resulted in what he considered would be best matched by a BB rating for the A380 project, although in fact it was not quite within that category.[681] Professor Whitelaw then used the difference between yields on B-rated bonds and the yields on BB-rated bonds to derive a figure which he stated "compared favourably" with the WRP.[682] Professor Whitelaw then stated that "even if I were to interpolate between the BB and B categories", to account for the fact that his result was not quite within the BB category, this would give the CIBBF as a figure which, he noted, is "substantially lower than the … risk premium applied by Ellis".[683] Thus, the CIBBF results from the interpolation made by Professor Whitelaw.[684]

6.445. It appears that the CIBBF was not proposed as a premium by the European Union in the original proceeding. Professor Whitelaw advocated not the interpolation between BB and B bond yields, but only the BB bond yields, as "comparing favourably" with the WRP.[685] Professor Whitelaw criticised the bond-based approach of the United States' expert, Dr Ellis, because he stated that it would not take into account the difference in the repayment mechanisms of a typical corporate bond and LA/MSF[686], with which the panel agreed.[687] Further, the European Communities only relied on the underlying bond-based analysis as a cross-check.[688] The United States objected to the correction Professor Whitelaw made, on the grounds that it was

[675] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 915-916.

[676] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.441 and 7.449; Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 17; and Jordan Reply, (Exhibit USA-505) (BCI), para. 38.

[677] Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), para. 41. We note that these were stated to be based on Moody's credit rating methodology.

[678] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.441.

[679] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 17 (citing Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), paras. 36-45); and Jordan Reply, (Exhibit USA-505) (BCI), para. 38, fns 39 and 40.

[680] See Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.477.

[681] Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), paras. 41-44.

[682] Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), para. 43.

[683] Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), para. 41.

[684] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 17.

[685] Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), paras. 5 and 36. See also Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.449.

[686] See e.g. Whitelaw Rebuttal Report, (Original Exhibit EC-11), (Exhibit EU-123/USA-483 (exhibited twice)) (BCI/HSBI), para. 38; and Professor Robert Whitelaw, "Economic Assessment of Member State Financing", 3 February 2007, (Whitelaw Report), (Original Exhibit EC-11), (Exhibit USA-482) (HSBI), p. 8.

[687] See Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.466.

[688] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.474.

based on information of which the source was undisclosed, and consequently was not able to be verified.[689]

6.446. We therefore consider that the CIBBF was not accepted or even argued to be an appropriate risk premium for the A380 in the original proceeding, and that in this proceeding the United States must present additional argumentation and evidence to support its use as a basis for a premium for the A350XWB.

6.447. Having found that the JRP inputs − the SPOF and the CIBBF − were not accepted or even argued to be an appropriate risk premium for the A380 in the original proceeding, we now turn to evaluate whether the reasons that the United States offers for relying on the SPOF and the CIBBF could otherwise justify the use of the JRP as a premium in this proceeding.

6.448. The United States' expert, Dr Jordan, states that his reasons for using the CIBBF and SPOF numbers to derive the JRP were that "{t}hese calculations were higher than the original Whitelaw risk premium, and they are remarkably consistent with each other. Therefore, I concluded that these two risk premia were a valid (though still conservative) basis on which to assess the project-specific risk premium for LA/MSF for the A350 XWB".[690] Dr Jordan also notes that his average is "similar" to the **[***]**.[691]

6.449. In our view, the simple fact that the CIBBF and SPOF figures are higher than the original risk premium[692], and that they are similar to one or more other figures, does not demonstrate that an average of the CIBBF and SPOF is an appropriate risk premium in this proceeding. It appears that the United States considers that because the WRP was considered to be understated in the original proceeding, an appropriate figure would necessarily be higher − and because the CIBBF and SPOF are higher, then they are a good basis for a risk premium. We disagree. That a figure is higher than an understated figure is not of itself sufficient reason to accept it as an appropriate risk premium. Nor is any similarity between two or more figures, if none of those figures are convincingly argued to be a good reflection of the risks involved. Any project-specific risk premium would still need to have a valid basis that links it to the risks involved with the form of funding and the risks of the particular project.

6.450. The United States claims that the JRP is a preferable premium because it is "adjusted based on the specific criticisms ... reflected by the Panel and the Appellate Body".[693] As we see it, if the JRP were preferable because it was adjusted based on particular criticisms of the WRP, then the adjustment would need to correct for the reason or reasons the WRP was found to be understated. The main reason that Professor Whitelaw's original premium was, ultimately, found to be understated was that it was based on distorted risk perceptions.[694] Neither the SPOF nor the CIBBF appear to relate to this criticism. The SPOF does not correspond to the amount by which LA/MSF to Airbus reduces the perceived level of risk associated with financing the A380. Rather, it is an estimate of the additional benefit to suppliers from other government funding to them directly, if the full amount of that benefit were to be passed on to Airbus. Like for the SPOF, the United States does not link the CIBBF input to the main reason for the WRP being "too low" − its basis on distorted risk perceptions. The United States' justification for using the SPOF and the CIBBF appears limited to the fact that they are similar, and higher than the WRP.

[689] See Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.477. Dr Jordan appears to accept the correction made by Professor Whitelaw to the original bond-based analysis and thus the question of whether or not Professor Whitelaw's re-running of the statistical analysis is independently verifiable is, as we understand it, no longer an issue. (See Jordan Reply, (Exhibit USA-505) (BCI), para. 38 and fns 39 and 40).

[690] Jordan Reply, (Exhibit USA-505) (BCI), para. 37.

[691] See Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.453.

[692] We note that the CIBBF is 114 basis points above the WRP (Professor Whitelaw's project-specific risk premium from the original proceeding). The SPOF is 122 basis points above the WRP. The JRP is above the WRP by some 118 basis points.

[693] United States' second written submission, para. 285 (citing Jordan Report, (Exhibit USA-475) (BCI/HSBI), paras. 14-22).

[694] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 921 ("It was reasonable for the Panel to conclude that LA/MSF reduces the level of risk of an LCA project perceived by the risk-sharing suppliers").

6.451. We note that Dr Jordan states that the JRP is based on figures that "do not address the flaws" identified in the original proceeding.[695] Instead of rendering the proposed number "conservative", it simply seems to us that that the JRP is not connected to the original criticisms and so does not respond to them in a way that would make the JRP more valid than the understated WRP proposed by the European Union in the original proceeding. Rather than seeking to explain that the numerical difference between the JRP and the WRP corresponds to and accounts for the reasons the WRP was understated, the United States only observes that its inputs are "higher". To us, this is not sufficient reason to conclude that the JRP is a valid premium. Indeed, by such reasoning any number higher than the WRP would be appropriate: an approach which would be highly unlikely to accurately gauge the particular risks. Accordingly, we consider that this reasoning fails to show that the JRP is preferable to the WRP because it is "adjusted" based on the specific criticisms of the WRP made by the panel and the Appellate Body in the original proceeding.

6.452. Thus, the United States has not offered sufficient argumentation to explain why the JRP might be a good potential risk premium. The United States has not addressed criticisms made in the original proceeding about the reliability of the input figures as an accurate reflection of project risks.

6.453. Lastly, the United States submits that the JRP is confirmed by observing the spread, or difference, between rates of return on generic investment-grade and below-investment grade debt. According to the United States, the general corporate borrowing rate would correspond to investment-grade debt, and the project-specific LA/MSF would correspond to below-investment grade debt − therefore the difference between these two is a good match for the project-specific risk premium that would be charged by a general market finance participant.[696] In this regard, the United States submitted that:

> {T}he yield spread between investment-grade industrial companies and below-investment grade industrial companies between June 2009 and June 2010 indicates that the project-specific risk-premium for LA/MSF is approximately 3 to 5 percent.[697]

6.454. The JRP falls within this range. However, the United States has not explained why the general corporate borrowing rate would correspond to investment-grade debt, and the project-specific LA/MSF would correspond to below-investment grade debt. Nor has the United States addressed the criticism originally raised by the European Union regarding the different repayment structures of bonds and the relative risk associated with LA/MSF agreements, which the panel noted undermined the use of such a bond-based analysis in the original proceeding.[698]

6.455. In summary, as neither the CIBBF basis nor the SPOF basis for the United States' proposed JRP premium were proposed by either party, used, or accepted as a project-specific risk premium in the original proceeding, we consider that the United States should in this proceeding provide evidence and argument to demonstrate that the JRP nonetheless provides a good reflection of project risk for the challenged LA/MSF measures. In our view, the reasons that the United States advances to justify its reliance on the JRP, (namely that: (a) the JRP uses the method advanced by the European Union and Professor Whitelaw in the original proceeding, (b) the JRP responded to specific criticisms of the WRP made by the panel and Appellate Body in the original proceeding, (c) the two figures on which the JRP is based were "higher" than the WRP and (d) the two figures on

[695] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 20 (citing Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 921).

[696] United States' response to Panel question No. 114, para. 12 (stating that "investment grade debt can provide a good proxy for EADS' corporate borrowing rate, and non-investment-grade debt can provide a good proxy for EADS' project specific borrowing rate for the A350XWB. Therefore, the difference between them is a valid proxy for the project-specific borrowing rate for the A350XWB" and "these figures … confirm the conclusions of the Jordan Report.").

[697] United States' response to Panel question No. 116(b), para. 20. We additionally address the United States' arguments regarding the 3-5% yield spread in a different context − how it reflects lending conditions − further below.

[698] Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.466.

which the JRP is based are "similar" to one another) are not convincing and we are thus unable to accept the JRP in this proceeding.

6.456. We now turn to consider the United States' alternative line of argument, whereby it proposes that *even if* the original "understated" risk premium used for the A380 is applied, a subsidy will result.

United States' alternative argument for a project-specific risk premium

6.457. The United States argues that even if the "understated" risk premium proposed by Professor Whitelaw in the original proceeding in connection with the A380 (the WRP) is used, this would bring the market benchmark above the internal rates of return of the A350XWB LA/MSF contracts from **[***]**, resulting in a benefit and thus a subsidy; and that in the case of **[***]** LA/MSF, a subsidy would also result if the WRP were added to the general corporate borrowing rate component of the market benchmark adjusted to account for the differences between the EADS bond instrument and LA/MSF identified by the United States (discussed above).[699]

6.458. The European Union argues that in relying upon the WRP that was used in the original proceeding, the United States has failed to compare the risks associated with the A380 with those of the A350XWB. In particular, the European Union maintains that the United States advances argument and evidence on the risks associated with the A350XWB in the absolute, yet it fails to state what the risks were for the A380 in a way that could allow them to be measured against one another.[700] The European Union disagrees that the WRP would be an "understated" benchmark for the A350XWB programme, submitting that the A350XWB is a less-risky compared with the A380 programme and that the A350XWB LA/MSF contracts themselves involved relatively less risk compared with the A380 LA/MSF contracts. Thus, according to the European Union, the risk premium associated with the provision of LA/MSF for the A350XWB should be *lower than* that applied for the purpose of the A380 LA/MSF contracts.[701] Furthermore, the European Union considers that the terms of the different A350XWB contracts differ such that the application of at least two different risk premia could be justified.

6.459. In our view, the question that is at the centre of the parties' disagreement is whether the United States has demonstrated that the project-specific risks of the A350XWB programme are sufficiently similar to those of the A380 programme such that it would be reasonable to conclude that the WRP could be used as the project-specific risk premium for the A350XWB.

Risk differences that may affect the project-specific risk premium

6.460. The parties' arguments concerning the relative project-specific risks associated with the A380 and A350XWB programmes have focused on the following issues: (a) the risk that the A380 or A350XWB programmes would fail or not be as successful as anticipated, whether because of a failure to develop or sell the aircraft as expected (programme risk); (b) the extent to which market lenders were, as a general matter, willing to accept risk at the time of the provision of A380 and A350XWB LA/MSF (the price of risk); and (c) the risk associated with the different terms of the A380 and A350XWB LA/MSF contracts as well as the risks associated with the different terms of the four individual A350XWB LA/MSF contracts (contract risk).

Programme risk

6.461. An assessment of the relative risks associated with the two aircraft development programmes is a complex factual analysis, with respect to which the parties have submitted a significant volume of argumentation and expert evidence. The parties' submissions with regard to

[699] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 24, and Jordan Reply, (Exhibit USA-505) (BCI), para. 3, p. 3; United States' comments on the European Union's response to Panel question Nos. 163-165, para. 6 (consolidated answer).

[700] European Union's second written submission para. 321; and comments on the United States' response to Panel question No. 104, paras. 794-797.

[701] The European Union does not indicate whether it considers that the WRP could be used, as a "not understated" premium, for A350XWB LA/MSF.

programme risks have analysed the following two broad categories: "development" risk and "market" risk.

a Development risk

6.462. Development risk is defined by the European Union as "the risk that the manufacturer will fail to develop and secure certification for the new aircraft".[702] As we understand it, in this proceeding the parties consider that development risk relates to the likelihood that Airbus will not be able to deliver the aircraft as and when promised[703] and covers the development of the programme, from conceptualisation through to certification.

6.463. Before addressing the parties' arguments, we believe it is important to briefly explain the factual context within which the A350XWB programme was launched and developed. Airbus had originally planned to develop a new single-variant twin-aisle LCA with a metal fuselage, the Original A350[704], described as an "update of {the} successful A330".[705] The Original A350 did not use certain new technologies − being used by Boeing for the fuselage of the Boeing 787 − due to a "technological gap" between the two companies that led Airbus to lack confidence that it could apply those technologies.[706] The Original A350 was described as "the lowest investment, and lowest risk"[707] design that would fit with Airbus' plans. After key clients rejected the Original A350 as "merely a cheap derivative of the A330"[708], Airbus was "forced"[709] to redesign the A350 into a new family of more innovative aircraft. Rather than the Original A350, industry leaders "said Airbus should develop a new family 'that incorporates even more of the new technologies the {Boeing} 787 is doing'."[710] Airbus took the decision to end the Original A350 programme in favour of a redesigned aircraft in around the first to second quarter of 2006.[711]

6.464. In comparing the risk profiles of the A350XWB and the A380, with respect to the applicability of the WRP that was used to reflect the minimum risk premium for all aircraft in the previous proceeding, including the A380, the United States draws attention to particular aspects that it submits render the A350XWB at least as risky, if not more risky, than the A380. In particular, the United States contends that the A350XWB programme entailed unique and significant technology risks[712], incorporating "risky new technologies, such as the extensive use of carbon fiber reinforced plastic (CFRP)".[713] The United States submits that "while the use of composites on the A350 XWB depends on Airbus's prior experience in using composite-related technologies, the risks related to the high volume of usage of carbon fiber on the A350 XWB are

[702] European Union's second written submission, para. 322. The United States does not appear to have objected to this characterization of the issue, which we believe is consistent with our findings in the original proceeding. (See Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.356 (referring to "development risk, ie. the risk that Airbus will fail in its attempt to design and build the new aircraft").

[703] Issues concerning the *consequences* of development delays or failure appear to arise − in this proceeding − in discussions concerning market risk, further below.

[704] The Original A350 commercial launch and authorisation to offer was on 10 December 2004. EADS shareholders approved the Original A350 industrial launch on 7 October 2005. (See Panel Report, *EC and certain member States − Large Civil Aircraft*, paras. 7.113 and 7.296, and fn 2272 (citing, *inter alia*, Jean-Michel Belot and Tim Hepher, "Airbus A350 Unleashes New War with Boeing", Reuters, 10 December 2004, (Original Exhibit US-139))). See also Robert Wall, "Airbus Gets Go-Ahead for A350", *Aviation Week & Space Technology*, 9 October 2005, (Exhibit USA-47); and Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27).

[705] "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006, (Exhibit USA-28).

[706] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 15.

[707] Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27).

[708] Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27).

[709] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI).

[710] Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006, (Exhibit USA-24).

[711] See e.g. "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006, (Exhibit USA-28).

[712] Jordan Reply, (Exhibit USA-505) (BCI), para. 57.

[713] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 22.

greater than those associated with the previous generation technologies for large composite aerostructures, *i.e.*, the A380".[714]

6.465. The European Union argues that the United States does not put forward adequate evidence, and that the available evidence does not support the United States' arguments.[715] The European Union also states that it has difficulty reconciling the United States' arguments made in the context of its adverse effects claims − that the A350XWB built off A380 technology − with its arguments that the A350XWB would encounter new technological challenges and consequently greater risks.[716] The European Union denies that, in fact, the risk was higher for the A350XWB than for the A380[717], and puts forward several arguments in response to the United States' submissions. Among them, the European Union submits that actions pursued by Airbus mitigated technology-related risk for the A350XWB, and, in addition, that risks were already lower and certain maturity levels were reached, by the time that the A350XWB LA/MSF contracts were concluded.[718]

6.466. As we see it, the main factual questions in this proceeding as regards development risk relate to (i) technical or technology-related risks: that is, whether the development risks of the A350XWB, which used *new materials* very extensively, were greater than the development risks arising with respect to the A380, an aircraft of unprecedented *size*; and (ii) risk mitigating or attenuating factors: particularly: (a) whether actions pursued by Airbus such as those taken under the "DARE" programme (Develop And Ramp-Up Excellence, explained further below) reduced the A350XWB development risks in comparison to the A380 project; and (b) whether the fact that the development of the A350XWB was at a comparatively advanced stage when LA/MSF was provided means that the risks were relatively lower.

6.467. We commence our analysis below by evaluating the relative risks involved with new technology used in the A350XWB and the A380, the principal consideration raised by the United States.

i Technological risk

6.468. Evidence provided by both parties indicates that there were a number of technological leaps involved with the A350XWB.[719] These were primarily associated with new materials and structural concepts used to make a lighter and more efficient aircraft.

6.469. The A350XWB is a family of several aircraft variants which incorporate a high volume of lightweight carbon fibre reinforced plastic or polymer (CFRP, a type of composite material) compared to earlier aircraft designs. The A380 has a metal fuselage, and some composite components[720], comprising 25% of structure weight.[721] The Original A350 was planned to comprise

[714] United States' response to Panel question No. 104, para. 374 (citing United States' second written submission, paras. 568-575; and Declaration of Larry Schneider, Senior Vice President of Product Development, Boeing Commercial Aircraft, "The Relevance of Prior Commercial Aircraft Experience to Existing Model Improvements and New Aircraft Developments", 17 October 2012, (Schneider Declaration), (Exhibit USA-354) (BCI), paras. 22-29).

[715] European Union's first written submission, paras. 330-333; and comments on the United States' response to Panel question No. 104, paras. 794-797.

[716] European Union's comments on the United States' response to Panel question Nos. 91-107 ("overall comment"), para. 711.

[717] See European Union's second written submission, paras. 330-333.

[718] European Union's second written submission, para. 332 (citing A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 13-17 and 33-59); and first written submission, paras. 1110-1129.

[719] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI); Statement by Gordon McConnell, Michel Lacabanne, Chantal Fualdes, François Cerbelaud and Burkhard Domke, A350XWB Chief Engineering, 13 December 2012, (A350XWB Chief Engineering Rebuttal), (Exhibit EU-128) (BCI/HSBI); A350XWB Production Statement by Philippe Launay, 14 January 2013, (A350XWB Production Statement), (Exhibit EU-129) (BCI/HSBI); Schneider Declaration, (Exhibit USA-354) (BCI); Declaration of Michael Bair, Senior Vice President of Marketing, Boeing, "Products and Competition in the LCA Industry" 16 August 2012, (Bair Declaration), (Exhibit USA-339) (BCI).

[720] For example, a glass-reinforced aluminium composite material (see David Learmount, "A350 avionics to expand on A380 systems", *Flightglobal News*, 24 July 2007, (Exhibit USA-471)) and a composite inlet. (See A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 23; and "Airbus' "Silent Secret" to Engine Noise Reduction", *Netcomposites*, 2 September 2005, (Exhibit USA-464)).

some 39% composites[722] with an aluminium-lithium fuselage. The A350XWB uses new materials more extensively than both these earlier designs. The A350XWB is made of approximately 52-53% composite materials[723], and comprises more than 50% CFRP[724], including a fuselage that is over 50% CFRP.[725] Other componentry also uses composites. In addition to composites such as CFRP, the model uses other advanced materials, including advanced metals such as titanium and advanced aluminium alloys, some of which were new applications of such materials. These advanced materials are used in "over 70 per cent" of the airframe.[726] At the time of the A350XWB's launch, Louis Gallois, then-CEO of Airbus and co-CEO of EADS, stated: "Made from more than 60% new materials it will be a revolutionary step forward in the use of composites and advanced metals".[727]

6.470. In terms of the volume and extensive use of new materials, the United States has submitted evidence showing that the use of carbon fibre reinforced plastics and other new composites technology in the A350XWB, for example in over half of the fuselage and wings[728], passenger doors[729], and flap support structures (FSS)[730] in place of either metal, or fibreglass composites, is new and unprecedented. It appears that this novelty and its challenges were known at the time of the aircraft's launch, and thus would have informed the assessment of risk at the time of the conclusion of the contracts for LA/MSF for the A350XWB.[731] Indeed, Airbus itself has emphasized that it considers the A350XWB to be a "fundamentally new" aircraft.[732]

6.471. In particular, the Airbus Chief Engineering team emphasises that the design of a pressurized fuselage made out of carbon fibre reinforced plastic "is a *first* for Airbus ... {I}n previous Airbus aircraft programmes, CFRP had been used only in much smaller quantities and only on *non-pressurized* structures of the aircraft, such as the horizontal tail plane, vertical fin, moveable surfaces, and nacelles, or for the centre wing box".[733] In respect of the fuselage, Airbus "also used, for the first time, more advanced aluminium-lithium for some fuselage floor beams and fuselage frames of the A350XWB".[734]

6.472. With respect to the use of the carbon fibre reinforced plastics for the wing, there is evidence on the record that "the design of the composite A350XWB wing is a truly new, fully integrated structural and aerodynamic design"[735] and that while the A380 features a composite wing centre box and metal wings, the A350XWB features both a composite centre box and composite wings, which called for a completely new design of the structural interface between the

[721] Guy Hellard and Dr Roland Thévenin, "Composites in Airbus: a long story of innovations and experiences", Airbus presentation, Global Investor Forum 2008, (Exhibit EU-189/USA-440 (exhibited twice)), slide 6.

[722] Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27).

[723] Guy Hellard and Dr Roland Thévenin, "Composites in Airbus: a long story of innovations and experiences", Airbus presentation, Global Investor Forum 2008, (Exhibit EU-189/USA-440 (exhibited twice)), slide 6; A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 9 and diagrams at paras. 69 and 73.

[724] See e.g. CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 4.

[725] "A350XWB – Technology", Airbus website, accessed 3 October 2012, (Exhibit USA-427).

[726] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 9. See also Robert Wall, "Airbus Relaunches A350", *Aviation Week*, 10 December 2006, (Exhibit EU-98) ("On the materials split, the latest A350 iteration has 52% composites, up from less than 40% on earlier versions, with aluminium and aluminium-lithium making up 20%, titanium 14% and steel 7%").

[727] Speech by Louis Gallois, "Industrial launch of the A350XWB", Paris, 4 December 2006, (Exhibit EU-179).

[728] "A350XWB – Technology", Airbus website, accessed 3 October 2012, (Exhibit USA-427).

[729] The A350XWB passenger doors are the first commercial aircraft passenger doors to be made entirely out of carbon fiber reinforced plastic. (See Eva Riefer, EADS/Eurocopter Press Release, "Eurocopter delivers the first Airbus A350 XWB jetliner passenger door, highlighting its innovative capabilities in composite technology", 23 May 2012, (Exhibit USA-466)).

[730] European Commission, Decision C(2011) 6496 final, Aide d'État N414/2010 – Belgique – *Aide au projet de 'Flap Support Structures' de SABCA ('Projet FSS')*, 5 October 2011, (Exhibit USA-441).

[731] See A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 3.

[732] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 3 (citing Schneider Declaration, (Exhibit USA-354) (BCI)).

[733] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 10. (emphasis original)

[734] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 69.

[735] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 94.

centre box and the wing, the "wing root joint".[736] Further, the wing covers have a completely new design using new composite materials, and the wing's lower cover is "the biggest carbon fibre part ever produced in civil aviation".[737]

6.473. Due to the use of new materials with the A350XWB, other innovations were made in regards to new adaptations and integration. Airbus describes how "the choice of composites also had a knock-on effect on the choice (and integration) of systems in the composite fuselage".[738] New adaptations had to be made to the aircraft's fuel system, and Airbus developed a new landing gear integration concept not previously applied on its aircraft.[739] Other innovative technology was designed to be incorporated into and combined with the new composite structure, for example: an adaptation of the composite inlet developed for the A380, to be produced with different materials and a different design.[740] While several of these innovations had been successfully used on previous aircraft, they would need to be newly adapted to an aircraft built out of fundamentally different materials. The Airbus Chief Engineering team notes that "for every technology or component, Airbus (and Boeing) engineering has to expend significant engineering time, effort and resources to modify, adapt and integrate each technology into the aircraft in order to achieve an optimised aircraft structure. The modifications are even more significant if the technology has to be adapted to entirely different design solutions, from metallic aircraft {such as the A380} to composite aircraft like the A350XWB."[741]

6.474. Airbus statements on the record indicate that there were skills and resource challenges associated with the A350XWB's use of new materials and concepts. Airbus states that the choice of a completely new structural concept like a composite fuselage for the A350XWB also called for new skills and competencies in the Airbus workforce. Airbus gives the example of a design engineer specialized in a very specific aspect of systems installation for aluminium fuselage structures, that has to learn new requirements and design principles to perform design tasks on a CFRP composite fuselage. According to Airbus, such a fuselage "requires a completely different set of skills and know-how to be applied, including, for example, the design solutions for lightning strike protection and systems that are not required on aluminium structures."[742] EADS' 2006 Outlook identified one of the key risks that would be faced by Airbus in relation to the A350XWB was the "availability of trained personnel and other resources, particularly with respect to the industrialisation of certain composites".[743]

6.475. The use of new materials necessitated new testing and gathering of data: "{W}hile mechanical data on metallic materials are readily available, **[***]**".[744]

6.476. In addition, "the move from aluminium to composite materials has also necessitated many changes and adaptations to production facilities, at the level of component production, sub-assembly and final assembly". As a result, "the {final assembly line} and {sub-assembly lines} for the A350XWB differ significantly" from facilities for earlier Airbus programmes.[745] Indeed, it appears that Airbus had to invest "vast" sums in new facilities[746], and make substantial investments to developing new jigs and tools.[747] Jigs used in previous Airbus programmes were not able to be used for the new composite aircraft because composites "have very different properties, such as heat resistance, tensile strength, processing characteristics, different manufacturing concept and industrialization".[748] Tooling requirements were also significantly

[736] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 101.
[737] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 102.
[738] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 26.
[739] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 108-110.
[740] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 23. See also, concerning the Original A350 design, "Airbus' "Silent Secret" to Engine Noise Reduction", *Netcomposites*, 2 September 2005, (Exhibit USA-464).
[741] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 35.
[742] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 26.
[743] "Risk Factors", *EADS Financial Statements and Corporate Governance*, Book 2, 2006, pp. 8-13, (Exhibit USA-496), p. 13.
[744] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 16.
[745] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 11.
[746] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 13.
[747] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 22.
[748] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 23. See also Guy Hellard and Dr Roland Thévenin, "Composites in Airbus: a long story of innovations and experiences", Airbus presentation,

different to those for traditional metallic aircraft because of, *inter alia*, the emphasis on accuracy within tolerances and thermal stability. Further, the use of the new composites involves large single moulded pieces of componentry (as opposed to earlier aircraft that used multiple sections) and so large new moulds had to be fabricated.[749] The United States notes that the European Commission and at least one of the member States (Spain) noted that the development of large composite aerostructures requires designing a new manufacturing process, new tooling, new moulds and new machines.[750]

6.477. The United States also refers to statements by Dr Schneider, a Boeing engineering expert, to illustrate the kinds of technology challenges Boeing met with when developing the 787, an aircraft that used CFRP:

> The A350XWB is Airbus's first aircraft to utilize a composite fuselage and composite-metallic hybrid wing. Based on Boeing's experience making a similar technology leap for the 787 program, we appreciate that significant design and manufacturing work is required to resolve the design and manufacturing challenges created by the decision to use composite technology in these applications. But we also know − and have on many occasions explained − that our ability to undertake and resolve these challenges drew heavily on our prior experience designing and producing composites for our earlier commercial aircraft programs.[751]

6.478. In response, the European Union argues that Airbus' composite aircraft involved less technological development risk than the Boeing 787. According to the European Union, the United States "ignores evidence submitted by the European Union that Airbus is not attempting the riskier full-fuselage carbon-fibre barrel option Boeing is using on its 787, but instead has chosen a less risky four-panel solution for the fuselage of the A350XWB."[752] In our view, whether the A350XWB might have been even riskier than it was − had Airbus, for example, attempted a fuselage fully moulded from CFRP − does not affect how the A350XWB, in the design iteration attempted, compares to the A380 in terms of development risk. As the European Union itself insists[753], the relevant comparison here is between the A380 and the A350XWB, and not with Boeing's technological innovations. The United States' submissions regarding development risk do not appear to allude to delays experienced by Boeing in the use of carbon fibre plastics, as the European Union suggests[754], nor to submit that the consequences of composites technology risks would mimic delays experienced with respect to the Boeing 787, but rather indicate that there are significant risks associated with new and potentially unpredictable technology. We further note evidence that the four-panel design was, again, new and had not before been tried on other composite aircraft.[755] The panel-based design was also considered in contrast to an aluminium structure: "At the time the A350XWB was designed, we evaluated the relative merits of an aluminium structure compared to a possible CFRP structure − be it composite barrels or panels."[756]

Global Investor Forum 2008, (Exhibit EU-189/USA-440 (exhibited twice)), slide 10, citing Dr Roland Thévenin, "Composites in Airbus".

[749] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 24.

[750] European Commission, Decision C(2010) 6472 final, State aid N 4/2010 and N7/2010 − Spain − Individual R&D aid to Alestis Aerospace S.L., 29 September 2010, (Exhibit USA-157), paras. 56-57 (cited in United States' response to Panel question No. 104). See also Jordan Report, (Exhibit USA-475) (BCI/HSBI), fn 36.

[751] United States' response to Panel question No. 104; and Schneider Declaration, (Exhibit USA-354) (BCI), paras. 22-29.

[752] European Union's second written submission, para. 330 (citing A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 72-87).

[753] "{I}t is not clear what {Boeing's} Mr. Schneider's comparison of the 787 and the A350XWB, and his statement that both are risky, contributes to the required assessment of the relative risks of the A380 and the A350XWB". (European Union's comments on the United States' response to Panel question No. 104, para. 807).

[754] European Union's second written submission, para. 331.

[755] "A350XWB − Technology", Airbus website, accessed 3 October 2012, (Exhibit USA-427).

[756] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 20.

6.479. In addition to the greater amount of new materials used for the A350XWB compared to earlier aircraft, the United States submits that relatively low levels of technological maturity regarding those innovations was a main aspect of the risk associated with the A350XWB.[757]

6.480. We now turn to compare the A350XWB technological challenges to those associated with the A380. The A380 aircraft also represented a break with previous aircraft. However, this was mainly in terms of its unprecedented *size*.[758] This posed various technological challenges.[759] There were challenges in terms of aerodynamics[760] and issues related to structure[761], as well as, for example, how to meet noise and emissions limits, and ensure size compatibility with − that is, to fit within − airport infrastructure constraints.[762] Additionally, the A380 involved complex electrical systems.[763] The A380 also involved some composite materials and components. For example: a new aluminium-fibreglass composite used for panels in the upper fuselage[764], and the new composite inlet developed for the A380, which "required a brand-new, digitally-commanded machine to be created, developed and produced."[765] The use of the composites on the A380 was cited by the Appellate Body as likely involving elevated development risk for that model; this included requiring developing new fabrication processes and a need for new testing. In the original proceeding the Appellate Body noted evidence that, at the time the A380 development programme was commenced:

> "The A380 is the first fundamentally new Airbus to be developed since the A320". {Evidence on the panel record refers to} the A380 as the "biggest technology leap" in the history of Airbus … .[766]

6.481. However, as observed by the Appellate Body in the original proceeding, the Morgan Stanley report "explains that the A380 is not as technologically innovative in the use of materials,

[757] United States' response to Panel question No. 104 (citing European Commission, Decision C(2010) 6472 final, State aid N 4/2010 and N7/2010 − Spain − Individual R&D aid to Alestis Aerospace S.L., 29 September 2010, (Exhibit USA-157), paras. 56-57; and Jordan Report, (Exhibit USA-475) (BCI/HSBI), fn 36).

[758] European Union's comments on the United States' response to Panel question No. 104, para. 810 (citing "Weight Loss for Superjumbos: the A380 and the Aviation Engineering Dilemma", *Der Spiegel*, 21 March 2012, (Exhibit EU-412)). We note, however, that several issues described by the European Union in its submissions were in fact problems that only became apparent at a time-period that postdates the signature of the A380 LA/MSF contracts, meaning that it is not appropriate to import an *ex post* understanding of those risks to compare to those that would be subsequently understood, and priced, in the A350XWB context.

[759] "EADS: Results Analysed − A3XX Project Review − Recommendation Upgrade", Amro Aerospace & Defence Sector Research, 13 December 2000, (Exhibit USA-490), p. 12.

[760] See e.g. Robert Roedts, Ryan Somero, Chris Waskiewicz, "Airbus A380 Analysis", undated powerpoint presentation, (Exhibit EU-110) ("Quite difficult to design an airfoil factoring in transonic effects"); Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 892, fn 2029 ("A report by Morgan Stanley refers to the 'wake vortex' problem, which has to do with the distance required between airplanes and which some feared would affect the attractiveness of using the A380 in certain airports". (Morgan Stanley, "EADS, The A380 Debate" (5 September 2006) ({Original} Exhibit EC-409), p. 15) The critical project appraisal of the A380 performed by the UK Department of Trade and Industry refers to two technological challenges {that are HSBI}") and fn 2030.

[761] Axel Flaig, Head of Aerodynamics, Airbus, "Airbus A380: Solutions to the Aerodynamic Challenges of Designing the World's Largest Passenger Aircraft", Airbus presentation to Royal Aeronautical Society, Hamburg Branch, January 2008, (Exhibit USA-462).

[762] "Box Effects: A380 does not meet normal trends and was a major area of concentration during the design phase": Robert Roedts, Ryan Somero, Chris Waskiewicz, "Airbus A380 Analysis", undated powerpoint presentation, (Exhibit EU-110), slide 11.

[763] The complexity of electrical systems was related to the goal of enabling flexibility for airlines to customise the aircraft. (Mario Heinen, Airbus Senior Vice President A380, "The A380 Program", EADS/Airbus presentation, Global Investor Forum, 19-20 October 2006, (Exhibit EU-419), p. 13-17. See also European Union's comments on the United States' response to Panel question No. 104, para. 810).

[764] GLARE, "GLAss Reinforced aluminium, a sandwich material constructed from alternating layers of aluminium and glass fibre with bondfilm" externally developed and manufactured by a supplier in the Netherlands. ("GLARE", Fokker Aerostructures website, accessed 10 November 2012, (Exhibit USA-470)).

[765] "Airbus' "Silent Secret" to Engine Noise Reduction", *Netcomposites*, 2 September 2005, (Exhibit USA-464).

[766] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, fn 2029 (citing Airbus, Aircraft Families/Product Viewer, A340-300, A340-500, A340-600 (Original Exhibit EC-372), p. 12), see also para. 892 and fn 2030.

being constructed mostly of traditional metal and not using as much composites as the Boeing 787 and the planned A350XWB".[767]

6.482. The A380, while novel in size and design, was mainly made of traditional metal and fibreglass (albeit with some individually developed composite components such as the inlet). The more traditional materials would not have involved the same unknowns, or necessitated enhanced testing, as the new materials extensively used for the A350XWB. That is, "the A350XWB contains a large number of novel technologies that Airbus and its suppliers had to develop as a consequence of Airbus' choice to use CFRP on the aircraft's primary structures, the wing and the fuselage … this necessitated Airbus to screen, evaluate and qualify new materials and manufacturing processes which would not have been the case with a metal aircraft."[768] Traditional fabrication methods could be used for much of the materials used in the A380, and engineers were well versed in how the materials would perform. Airbus' engineers specifically contrast the new composites and how little is known about them, to "aluminium structures, where more than *six decades of experience* have resulted in highly-optimized structures with little margin for improvement".[769]

6.483. Further, the A350XWB programme involved the parallel development of several variants within the A350XWB "family" − the family would involve at least the A350XWB-900 baseline model, the A350XWB-800 and A350XWB-1000 **[***]**. The variants were, in their own right, novel and challenging. For example, it appears that "the A350-1000 … distanced itself from the family's system commonality, requiring … changes that will includes {*sic*} a beefed up fan structure, different materials and a fine tuned airflow in the engine's bespoke core. Additionally, Airbus has added an expanded wing trailing." **[***]** would be dependent on feedback from earlier versions.[770] While variants were, likewise, envisaged under the A380 programme, the evidence on the Panel record suggests that the parallel development of multiple variants in the A350XWB programme was more ambitious.[771]

6.484. We also note that the A350XWB was expected to have a higher relative programme *cost* than the A380, due to higher research and development (R&D) costs. Goldman Sachs noted in an analysis on 21 November 2006[772], just prior to the announcement that the launch of the A350XWB had been approved[773], that it expected the A350XWB to have a higher average and peak R&D cost than the A380 programme. In that analysis, Goldman Sachs prepared the following chart to explain its observations:

[767] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 892, and fns 2029 and 2030 (citing Morgan Stanley, "EADS, The A380 Debate", 5 September 2006 (Original Exhibit EC-409), p. 15).

[768] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 59.

[769] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 13. (emphasis original)

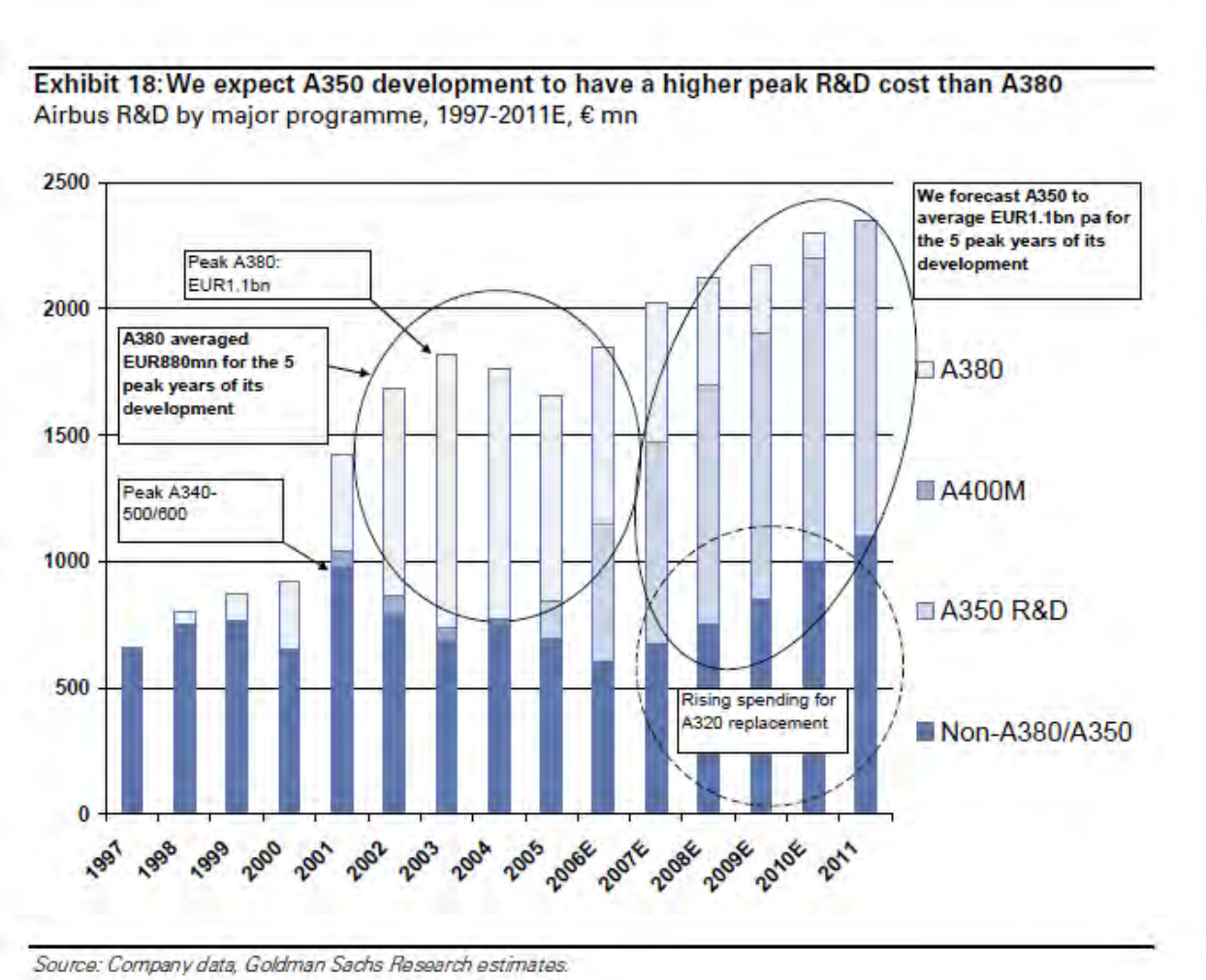
[770] David Pearson, "Supply chain continuity is main risk for Airbus A350 Program", *The Wall Street Journal*, 17 January 2012, (Exhibit USA-431).

[771] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428). See also Jens Flottau, "Déjà vu: More problems beset the A350 program, but schedule margins are now razor thin, a situation the manufacturer has faced before", *Aviation Week & Space Technology*, 15 February 2010, (Exhibit USA-515);and David Pearson, "Supply chain continuity is main risk for Airbus A350 Program", *The Wall Street Journal*, 17 January 2012, (Exhibit USA-431).

[772] Goldman Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future, in our view*, 21 November 2006, pp. 20-22, (Exhibit USA-30), p. 21.

[773] See EADS Press Release, "A350 XWB launch: EADS Gives Go Ahead for Airbus to Launch the A350 XWB", 1 December 2006, (Exhibit USA-569).

Figure 2: Goldman Sachs estimate of Airbus programme peak development costs



6.485. At launch, Louis Gallois, the then co-CEO of Airbus and EADS, confirmed that the development cost of the A350XWB programme would be about EUR 10 billion, and indicated that there would be additional capital expenditures of EUR 1.6 billion, some of which would be used for other future programmes.[774] Other sources, including a press release from the Spanish Government, indicate a cost estimate of EUR 12 billion (USD 17.8 billion) or more.[775] In our view, higher R&D costs, combined with the evidence of the extent to which the new design and use of new materials would necessitate the development of specialised equipment, expertise and testing, is consistent with a view that, from a lender's perspective, the A350XWB involved significant novelty, greater cost, greater investment, and therefore technology-related development risks that were *at least as high or higher* than the risk involved with the technology involved in the development of the A380.[776]

[774] Speech by Louis Gallois, "Industrial launch of the A350XWB", Paris, 4 December 2006, (Exhibit EU-179).

[775] *Ministerio de Industria, Turismo y Comercio, Nota de Prensa: El Gobierno autoriza préstamos por valor de 583 millones de euros para el desarrollo del Airbus A 350*, 11 December 2009, (Exhibit USA-58); Pilita Clark and Peggy Hollinger, "Deferrals to take toll on EAD's cash pile", *Financial Times*, December 2009, (Exhibit USA-153).

[776] That the A350XWB's industrialization of CFRP involves increased cost, relative to traditional materials, is supported by HSBI at slide 56, A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI).

6.486. Indeed, it appears that the Original A350's relative lack of innovation may have been attributable to a reluctance to incur such cost and involve such risk.[777] The lack of familiarity with the newer technology, the level of difficulty and cost of designing and building an aircraft with the degree of composite components and, in particular, the difficult shift from an aluminium-lithium based fuselage to a fuselage made with carbon fibre reinforced plastic appear to have been considerations that weighed against such features in the Original A350 and were considered a reason to avoid redesigning the Original A350 into the A350XWB.[778] This, to us, provides further support to the view that the A350XWB involved a high degree of R&D, and involved commensurate development risks.

6.487. As we see it, the A380 and the A350XWB projects involved different technological challenges. While building off certain expertise in aircraft construction and incorporating individual components that had been developed in relation to previous aircraft, it appears that both types of aircraft were technically very different to what had come before. However, we are satisfied that the technological risk associated with the A350XWB was *at least as high or higher* than the technological risk associated with development of the A380.

6.488. We now turn to the European Union's arguments in response to the United States' arguments concerning development risk. First, the European Union points out what it considers to be a logical inconsistency in the United States' line of argument.

ii Logical consistency of the United States' arguments

6.489. The European Union submits that it has difficulty reconciling the United States' arguments concerning the adverse effects of LA/MSF − for instance, the *indirect effects* of the A380 LA/MSF subsidies on Airbus' ability to launch and develop the A350XWB (examined elsewhere in this report) − with the United States' contention that the A350XWB involved a greater technological risk compared with the A380 and other Airbus LCA. In particular, the European Union argues that:

> {O}n the one hand, to establish a genuine and substantial causal link between EU member State financing for the A380 and the launch of the A350XWB, the United States alleges that Airbus overcame the technological hurdles to developing the A350XWB with its earlier development of the A380. On the other hand, to support its proposed benchmark for the A350XWB … the United States alleges that "the A350XWB program is at least as risky as the A380 program, and probably more so" because "the A350XWB program suffered from unique risks that did not beset the A380 program".[779]

The European Union submits that "{a} neutral, even-handed review cannot reconcile these two arguments".[780]

6.490. The United States maintains that "the fact that the A350XWB incorporates new applications of composites material" does not eliminate the "valuable lessons learned" or "critical technologies, processes and knowledge that Airbus applied" from its prior programme.[781] Indeed, according to the United States, many of the technologies and technical capabilities Airbus "derived

[777] For example, Udvar-Hazy described the Original A350, with its single variant, metal fuselage based on the A330, and only 39% composites as "the lowest investment, and lowest risk". (Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27)).

[778] "Going composite would cost more to build an airplane, this engineer told us". (Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27)).

[779] European Union's comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), para. 713.

[780] European Union's comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), para. 713.

[781] United States' second written submission, para. 565 (referring to European Union's first written submission, para. 1160).

from its experience in the development of earlier (metallic) LCA"[782] remain highly relevant today and are even directly applied on the A350XWB, despite it having a composite fuselage and wing.[783]

6.491. As we see it, the United States does not argue that the challenges involved with extensive use of composites mean that there were no significant learning effects from the A380, and indeed all earlier Airbus aircraft. In particular, as explained elsewhere in this Report, the United States identifies both general learning effects in aircraft manufacturing, and also carry-over of specific components including building on the use of composites in particular areas[784] and on-board systems[785] that likely benefitted from Airbus' prior LCA experience.

6.492. We do not consider that there is any logical reason why there cannot be incremental improvements from one aircraft to the next (for example, building on experience of the use of composites in various ways and in particular areas) and also a technology jump, such as the use of composites for more than half the materials in the fuselage and wings, with the enhanced risks such novelty represents. That something is a new, more extensive and at least as, or conceivably more, risky use of technology does not negate the value of the technology that preceded it as a platform for the new technological advance. For example, in other respects Airbus emphasises its composites experience gained during the development of prior models.[786] We note that Airbus states in business documents that it "evolved" its "step by step gain of composite experience"[787] in previous aircraft[788] and declares in evidence in this proceeding that the degree to which composites were used on the A350XWB aircraft involved very significant novelty. We do not consider that Airbus' positions are contradictory, nor do we consider that the United States' arguments are necessarily contradictory. We therefore do not find the European Union's difficulty in reconciling the United States' submissions to compel us to determine otherwise.

iii Mitigation

6.493. The European Union submits that two main factors mitigated the A350XWB risks as compared to the A380 risks. First, the European Union submits that, due to the technological challenges of the A350XWB, Airbus changed its development process, which significantly mitigated risks. Second, the European Union submits that the later point in the development process at which the A350XWB LA/MSF contracts were concluded compared to the point when the A380 contracts were concluded was also a risk mitigating factor.

6.494. Turning first to the change in the development process, the European Union states that:

> With respect to the A350XWB, Airbus was very conscious of the challenges posed by the extensive use of new materials, technologies and systems in developing and producing the aircraft, and of the consequential need to ensure the maturity of technology linked to the use of composite materials. As a result, the company implemented a strong and robust risk mitigation and management strategy … .[789]

[782] European Union's first written submission, para. 1166.
[783] United States' second written submission, para. 565.
[784] E.g. how Airbus concedes that the certain components of the A350XWB were at least in part derived from components on predecessor LCA models. (Schneider Declaration, (Exhibit USA-354) (BCI), para. 26; A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 23. See also "Airbus' "Silent Secret" to Engine Noise Reduction", *Netcomposites*, 2 September 2005, (Exhibit USA-464)).
[785] See e.g. David Learmount, "A350 avionics to expand on A380 systems", *Flightglobal News*, 24 July 2007, (Exhibit USA-471); and Bill Carey, "A350: Extra Wide Responsibility" *Avionics Magazine*, 1 June 2009, (Exhibit EU-406/USA-429 (exhibited twice)).
[786] Guy Hellard and Dr Roland Thévenin, "Composites in Airbus: a long story of innovations and experiences", Airbus presentation, Global Investor Forum 2008, (Exhibit EU-189/USA-440 (exhibited twice)), slide 5.
[787] Olivier Criou, "A350XWB Family and Technologies", Airbus Presentation at Hamburg University of Applied Sciences, 20 September 2007, (Exhibit USA-463).
[788] Olivier Criou, "A350XWB Family and Technologies", Airbus Presentation at Hamburg University of Applied Sciences, 20 September 2007, (Exhibit USA-463).
[789] European Union's comments on the United States' response to Panel question No. 104, para. 798.

6.495. The European Union states that "both Airbus' *internal* processes and its approach to integration of its *suppliers*"[790] in the context of the DARE programme mitigated A350XWB development risks due to technology, in comparison with the A380 programme.

6.496. The context of the development of the A350XWB has some bearing on our understanding of these issues. As noted above, Airbus was "forced"[791] to redesign the Original A350 into a new family of more innovative aircraft. The change from the Original A350 to the A350XWB, in the context of other aircraft being developed by Airbus, posed various challenges − including in terms of resources and in terms of development time. As we understand it, redesigning the Original A350 − already apparently in its fourth design iteration[792] − into a "radically different"[793] model, the A350XWB, required considerable effort. Normal lead times for the development involved with industrialisation of new materials and the development of new skills and expertise, it seems, would not deliver the model to market at the optimal time; and timing was important to both maintain market competitiveness[794] as well as to avoid harsher penalties for contracts and delivery promises that would be broken by the delay implicated with the redesign.[795]

6.497. As regards development time, on 8 May 2006 commentators noted that, aside from technology maturity challenges, even just shifting to implement the redesign would "inevitably delay the development schedule".[796] At least a two-year delay was likely to be encountered following the decision to pursue a new design.[797] The Original A350 aircraft was expected to enter into service in late 2010. By contrast, a redesigned aircraft was expected to be available no earlier than 2012.[798] Reportedly, "The new plan would call for the introduction of the -900 first, with the -800 following and the -1000 coming last in late 2013 or early 2014."[799] The shift to the redesign would also impact suppliers. For example, General Electric and Rolls-Royce, which "were already well-advanced on powerplants"[800], would have to change the engines to higher "thrust" (higher power) engines, implicating development schedules.

6.498. Both time challenges and resource challenges (worsened by the economic fallout of the A380's problems[801] as will be discussed further below) associated with the A350XWB programme were to be dealt with via two main initiatives[802]: (a) a "dramatic" restructuring of the Airbus entities (the Power8 programme)[803] and (b) a change to Airbus' product development process, previously termed "Develop New Aircraft" (DNA)[804], to implement a new way of designing and building aircraft called "Develop And Ramp-up Excellence" (DARE).

[790] European Union's comments on United States' response to Panel question No. 104, para. 798. (emphasis original)

[791] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI).

[792] Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27).

[793] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI).

[794] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 36.

[795] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 33.

[796] Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006, (Exhibit USA-26).

[797] Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27).

[798] Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006, (Exhibit USA-26).

[799] Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006, (Exhibit USA-26).

[800] Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006, (Exhibit USA-26).

[801] See e.g. "Thomas Enders: *'Je n'exclus aucun recours en justice pour protéger la réputation d'Airbus*'", *Le Monde*, 13 October 2007, (Exhibit USA-8); and Aaron Karp, "Airbus/EADS officials concede Boeing advantage, question A350 viability", *Air Transport World Daily News*, 6 October 2006, (Exhibit USA-9).

[802] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume I: Report and formal minutes, 19 June 2007, (Exhibit USA-562), p. 10; and A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 35.

[803] For example, in approving the launch, "the Board has assumed the full implementation of the Power8 competitiveness programme". (EADS Press Release, "A350 XWB launch: EADS Gives Go Ahead for Airbus to Launch the A350 XWB", 1 December 2006, (Exhibit USA-569)).

[804] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 40.

6.499. The DARE development process aimed "to reduce the time taken to design and build new aircraft from seven and a half years to less than six."[805] The Chief Engineering Statement appears to refer to an even more ambitious, compressed, DARE process timeframe.[806] The key distinction between the A350XWB development under the DARE process and earlier aircraft development under the DNA process was that, as Airbus' engineers state, "{w}hereas under DNA the aircraft, its technologies and systems, as well as its manufacturing technologies were developed **[***]**", the DARE programme followed an unprecedented, more ambitious approach to the development process.[807] With the A350XWB, especially in view of its new materials, which would each need to reach a certain level of maturity, Airbus had to develop the aircraft at a faster pace than previous programmes, to ensure full maturity at entry into service[808], and so that it could be ready in time to be competitive in its market slot. Airbus states that DARE required an enormous engineering effort.[809]

6.500. This rapid pace of development would be achieved, in part, by outsourcing a large amount of the plane's development to suppliers from quite early on.[810] Airbus would "increase outsourced value to 50% of the new A350XWB from the approximately 20%-30% level in existing aircraft programmes."[811] As well as the *value* of outsourcing being higher than in relation to prior programmes, the DARE programme involved a high *number* of risk sharing suppliers to whom key components were outsourced, who were geographically widely distributed.[812] With the A350XWB, "Airbus now monitors roughly 450 suppliers and subcontractors world-wide."[813] Additional evidence lists some 55 risk sharing suppliers contributing to the A350XWB's aerostructure, systems and cabin equipment[814], and notes that "Thales says its content on the A350 is 10 times its content on the long-range A330", "the A350 represents the most-ever content for Rockwell Collins on an Airbus platform … the company's content on the A350 is five times what it has on the A380" and "part of the system integration responsibility that Airbus designers had before is now transferred to Rockwell Collins".[815]

6.501. We consider that the involvement of suppliers in the context of the DARE process affected project risk in several ways. In addition to using increased outsourcing in a direct attempt to develop quickly, Airbus also sought to shift the financial burden to risk sharing suppliers. Airbus' strategy of relying more heavily than in the past on risk-sharing partners[816] was not only to develop the aircraft quickly, but also in a way that would reduce financial exposure.[817] While

[805] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume I: Report and formal minutes, 19 June 2007, (Exhibit USA-562), p. 10.

[806] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 40 (lines 5-6), and para. 41 diagram.

[807] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 40 (lines 4-5).

[808] Dr Lars Scheimann, Head Officer Supply Chain Quality, "E2E Integration of Risk Sharing Partners for smoother development & ramp-up", Airbus presentation, undated, (Exhibit EU-415), p. 14.

[809] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 33.

[810] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 40 (lines 4-5).

[811] Moody's Investors Service, Global Credit Research, *Credit Opinion: European Aeronautic Defence & Space Co. EADS*, 12 March 2007, (Exhibit USA-518). See also Daniel Michaels, "Airbus Tries New Way of Building Its Planes", *The Wall Street Journal*, 12 July 2012, (Exhibit EU-417), graphic on p. 12 ("Sharing the Load: Airbus has outsourced more of the A350{XWB} than its other planes", citing 35% outsourcing on the A320, 30% on the A330, 25-30% on the A380, and 50% on the A350{XWB}).

[812] Also Robert Wall, "Airbus Relaunches A350", *Aviation Week*, 10 December 2006, (Exhibit EU-98). See also Speech by Louis Gallois, "Industrial launch of the A350XWB", Paris, 4 December 2006, (Exhibit EU-179).

[813] Daniel Michaels, "Airbus Tries New Way of Building Its Planes", *The Wall Street Journal*, 12 July 2012, (Exhibit EU-417), p. 13.

[814] Bill Carey, "A350: Extra Wide Responsibility" *Avionics Magazine*, 1 June 2009, (Exhibit EU-406/USA-429 (exhibited twice)).

[815] Bill Carey, "A350: Extra Wide Responsibility" *Avionics Magazine*, 1 June 2009, (Exhibit EU-406/USA-429 (exhibited twice)).

[816] According to the European Union, the terms "risk-sharing partner" (RSP) and "risk-sharing supplier" (RSS) are synonyms. Risk-sharing partners are Airbus suppliers that assume all or a portion of the development costs for the work package outsourced to them, but are only reimbursed via revenues generated by sales of the aircraft on which they are working. (See European Union's response to Panel question No. 140, paras. 292-294).

[817] See A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), paras. 37-44, 56-69.

certain financial risks of delay or failure to develop aspects of the programme might have been shifted to suppliers[818], we consider that this would not mitigate the likelihood of failure or delay.

6.502. Rather, such a high number of suppliers working on a large share of the project would, itself, create a development risk for Airbus. It is our understanding that a large amount of supplier input in fact means a degree of loss of control, fragmented development and increased likelihood of development risks eventuating.[819] For example, the "heavy consequences at the end of the {supply} chain" were referred to in Airbus presentations noting bottlenecks and waste[820] that could result from heavy outsourcing. The European Union and Airbus also refer to how such outsourcing caused problems for Boeing, who "by 2007 had lost control of the {787} program".[821] Indeed, it appears that the amount of outsourcing and supplier involvement that Airbus used for the A350XWB was considered to be the maximum amount that could be used without losing control of the programme.[822] In other words, the amount of outsourcing and supplier involvement was at saturation.

6.503. Airbus states that the DARE process, a fast ramp-up scenario in which tasks are no longer "developed **[***]**"[823], but are developed significantly more quickly[824], itself involves enhanced risks: "{T}he product definition and design needed to be stabilized very early in the development process. This was necessary to limit the risk of late changes to the design, changes that would be disastrous in a fast ramp-up scenario due to their significant impact on aircraft being manufactured before the first entry into service".[825] The fact that Airbus sought to stabilise design choices relatively early is explicitly stated to be necessary due to the DARE process itself, as any late changes would be "disastrous". Due to the fast ramp-up scenario under DARE, it was necessary to "avoid radical redesigns at late stages of the development and assembly process".[826]

6.504. With larger numbers of suppliers, the newer technology, combined with the DARE process[827] additionally risked bottlenecks, delays, and failure to develop and deliver the aircraft as and when promised. If there were design or technological problems or changes, these would need to be resolved in more risk sharing suppliers' projects and with crucial timing implications.

6.505. Thus, it is apparent that the DARE process involved a very strong element of outsourcing, fragmentation of the supply-chain, and significant pressure to develop quickly, with potentially disastrous consequences for time schedules if one part of the supply chain were to experience problems. These aspects would have contributed to development risks associated with the A350XWB programme. This degree of risk did not exist with the A380 where there were fewer suppliers and more work was completed by Airbus.

6.506. The European Union argues that risk mitigation strategies deployed in the context of the DARE programme mitigated technology risks associated with the A350XWB in such a way that the risk would be less than that associated with the A380. The European Union cites "much more and

[818] European Union's first written submission, para. 1107 ("{M}ajor avionics vendors have been involved much earlier in the systems definition process than on previous aircraft, with deeper responsibility for design and integration. This closer participation entails greater risk for the suppliers"); Bill Carey, "A350: Extra Wide Responsibility" *Avionics Magazine*, 1 June 2009, (Exhibit EU-406/USA-429 (exhibited twice)). See also Robert Wall, "Airbus Relaunches A350", *Aviation Week*, 10 December 2006, (Exhibit EU-98).

[819] See e.g. Daniel Michaels, "Airbus Tries New Way of Building Its Planes", *The Wall Street Journal*, 12 July 2012, (Exhibit EU-417); and David Pearson, "Supply chain continuity is main risk for Airbus A350 Program", *The Wall Street Journal*, 17 January 2012, (Exhibit USA-431).

[820] Dr Lars Scheimann, Head Officer Supply Chain Quality, "E2E Integration of Risk Sharing Partners for smoother development & ramp-up", Airbus presentation, undated, (Exhibit EU-415), p. 5.

[821] Daniel Michaels, "Airbus Tries New Way of Building Its Planes", *The Wall Street Journal*, 12 July 2012, (Exhibit EU-417), p. 12.

[822] David Pearson, "Supply chain continuity is main risk for Airbus A350 Program", *The Wall Street Journal*, 17 January 2012, (Exhibit USA-431).

[823] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 40 (lines 4-5).

[824] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 37 (lines 7-8).

[825] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 37 (lines 7-12).

[826] European Union's comments on the United States' response to Panel question No. 104, para. 801 (citing Christopher Drew, "Aircraft Makers Shy Away From Risky Bets in Building New Planes" *New York Times*, 5 May 2013, (Exhibit EU-407), and Robert Wall and Andrea Rothman, "Airbus Says A350 Design Is 'Lower Risk' Than Troubled 787" Bloomberg, 17 January 2013, (Exhibit EU-408)).

[827] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 37 (lines 7-12).

earlier testing", "extensive use of digital and physical mock-ups and demonstrators", and "integrated risk analysis" to "avoid radical designs at late stages of the development and assembly process, which would have entailed significantly longer delays and significantly higher associated costs".[828] The European Union states that it had involved its suppliers much earlier, and resolved communications problems by sharing data with all teams on a common system.[829]

6.507. We note that in both the *internal processes* (such as undertaking earlier testing and physical rather than only digital mock-ups) and engaging with its *suppliers* in the way Airbus did, the risk-mitigation strategies to which the European Union refers appear to have been a direct attempt to avoid supply-chain management problems that would mirror those experienced with the A380. This is borne out by statements by the European Union that: "These and other changes for the A350XWB programme were the explicit result of a painstaking study of lessons learned from the A380 development process. Airbus' A350XWB programme team explicitly referred to 'missing integration & silo management' on the A380 programme, including 'no integrated planning and continuous rescheduling', 'no end to end visibility of data (especially for design changes)', 'no integration of processes and systems', 'no end to end responsibility and management on both sides', and 'no harmonized working methods', which led to 'heavy consequences' in terms of unachievable 'remain-to-do' tasks in the ramp-up to entry-into-service of the A380."[830] It appears that earlier testing and integration of components through physical, as well as digital mock-ups was an attempt to avoid certain issues and delays that arose with developing the A380.[831]

6.508. We consider that it is relevant to note here that: (a) at the time of the A350XWB contracts, the A380 suffered from various problems that appear to have been not, or only tangentially, related to its technological innovations, and were due more to problems of supply-chain integration; and (b) the extent of certain problems only became apparent at a time-period that postdates the signature of the A380 LA/MSF contracts, meaning that it is not appropriate to import an *ex post* understanding of those risks to compare to those that would be subsequently understood, and priced, in the A350XWB context.

6.509. The A380's most significant problems arose in 2006. Certain cables were "inches too short" because engineers handling cabin interiors used computer software that was reportedly "outdated".[832] Airbus had built a digital mock-up of the A380, but engineers in different locations using "different versions of CATIA produced mismatching wire bundles throughout the superjumbo, requiring early aircraft to be custom wired", a considerable remedial effort resulting in delivery delays.[833] On 13 June 2006, Airbus apparently "shocked investors when it said difficulties in installing the wiring would cut deliveries of the A380 to nine planes in 2007 from the 25 it had predicted".[834] The A380 was reported in July 2006 to be a "debacle which could cost EADS €2bn in profits over the next four years and bring costly cancellations of orders". By September 2006, the A380 "situation {had} worsened when construction and tests of the first A380s generated demands for structural changes that would affect the wiring. The changes in configuration had to be made manually because the software tools couldn't talk to each other".[835] The extent of the

[828] European Union's comments on the United States' response to Panel question No. 104, paras. 800-801.

[829] European Union's comments on the United States' response to Panel question No. 104, para. 804.

[830] European Union's comments on the United States' response to Panel question No. 104, para. 863 (citing Dr Lars Scheimann, Head Officer Supply Chain Quality, "E2E Integration of Risk Sharing Partners for smoother development & ramp-up", Airbus presentation, undated, (Exhibit EU-415), p. 8-10).

[831] John Ostrower, "A350 is a study in lessons learned by Airbus on A380", *Flightglobal News*, 11 May 2010, (Exhibit USA-432) ("Perhaps its most direct application of its lessons learned on A380, Airbus is building a physical mockup of the A350 in addition to the digital mock up (DMU) built with CATIA V5 to validate in reality what has been designed in virtual reality. When building the A380, differing versions of CATIA produced mismatching wire bundles throughout the superjumbo, requiring early aircraft to be custom wired.")

[832] Daniel Michaels, "Airbus Tries New Way of Building Its Planes", *The Wall Street Journal*, 12 July 2012, (Exhibit EU-417), p. 12.

[833] Andrea Rothman, "Airbus vows computers will speak same language after A380 delay", Bloomberg, 28 September 2006, (Exhibit USA-430); John Ostrower, "A350 is a study in lessons learned by Airbus on A380", *Flightglobal News*, 11 May 2010, (Exhibit USA-432).

[834] Andrea Rothman, "Airbus vows computers will speak same language after A380 delay", Bloomberg, 28 September 2006, (Exhibit USA-430).

[835] Andrea Rothman, "Airbus vows computers will speak same language after A380 delay", Bloomberg, 28 September 2006, (Exhibit USA-430).

software issue was because primarily digital, rather than physical, mock-ups were produced. It was not until the final assembly phase, when the aircraft entered industrialisation, that the issue came to light. The late stage of discovery of the problem was a reason that the delay and cost implications were so significant.

6.510. These delays and A380 problems were apparently not due to the size, weight, emissions and noise-related technological challenges of the A380, but were due to the issue of supply and manufacturing teams being dispersed and not integrated on the same software system.

6.511. We agree with the European Union that collaboration and support from Airbus for the A350XWB suppliers would likely have assisted with improving supply-chain management risks. In terms of how this reduced development risk in comparison to the A380, however, we have noted above that the A350XWB involved larger amounts of outsourcing and would have been more risky in this regard. In our view, had such measures to involve and support suppliers not been taken, the A350XWB would have been a riskier project than it actually was.

6.512. In contrast to the European Union, we consider that the risk-mitigation strategies cited by the European Union would *not* have specifically mitigated risk associated with the challenges posed by the extensive use of new materials, technologies and systems, but rather seek to address risks associated with high levels of outsourcing, supply-chain continuity, and risks of late changes that would be "disastrous in a fast ramp-up scenario"[836], in light of what was known by the time the A350XWB programme was undertaken. As we see it, those risks stem from the attempt to engage in very fast development, by not undertaking **[***]** development[837], and more heavily involving third parties − risk-sharing partners/risk-sharing suppliers − than had been the case with earlier aircraft development programmes. That is, the risk mitigation strategies deployed under DARE appear to mitigate risks stemming from the responses to the time and resource challenges, and only marginally mitigate the riskiness of trying to develop, additionally, an aircraft that used new materials, technologies and systems so extensively in that fast ramp-up scenario.

6.513. In our view, the attempts to improve supply-chain integration do not appear to have cancelled out the enhanced risks from complexity and technological novelty involved with the A350XWB. While it is reasonable to assume the earlier testing and physical mock-ups may have had some positive risk mitigating effect for the A350XWB programme, it appears that these changes addressed the amount of supplier input under the DARE programme, and Airbus' history of problems with integrated supply-chain management. They did not focus on mitigating risks involved with technological advances.

6.514. We now turn to the European Union's argument that much of the technology-related development risk had already been mitigated by the time that the A350XWB LA/MSF contracts were concluded more than **[***]** years into the development process of the A350XWB.[838] The European Union contrasts this to the A380 programme: "At the time the A380 financing agreements were concluded, Airbus was **[***]** the development process for the programme, with many technological challenges yet to be identified and addressed".[839] Before addressing this question, we briefly review record information concerning the development stage at which the A350XWB contracts were signed.

6.515. DARE defines certain milestones, called "Maturity Gates" (also referred to as "Milestone Gates") or MGs, "at which different aspects of the product development are measured and assessed independently for key decisions".[840] Under DARE, there are 16 such maturity gate milestones up to certification and full rate production. It appears that the maturity gates may also

[836] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 37 (lines 7-12).
[837] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 40 (lines 4-5).
[838] European Union's second written submission, para. 332 (citing A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 13-17, and 33-59). See also European Union's first written submission, paras. 1110-1129; and European Union's response to Panel question No. 100, para. 403.
[839] European Union's second written submission, para. 332 (citing A350XWB Chief Engineering Statement, (Exhibit EU-18) (HSBI), paras. 13-17, and 33-59); and European Union's first written submission, paras. 1110-1129.
[840] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 38.

take into account certain "technology readiness levels" and "manufacturing readiness levels".[841] Airbus appears to consider that the earliest part of the A350XWB's development (feasibility) – passing the first two maturity gates – was technically undertaken while working towards the Original A350 – from 2004 to 2006.[842] During this time Airbus "assessed the feasibility of various design options for the A350XWB."[843]

6.516. The MG3 is the "Entry into Concept" Maturity Gate, which culminates in the "concept" being "frozen".[844] According to the European Union, Airbus began the assessment process for that milestone at the time of the decision to pursue the redesign of the A350 (and at the same time that the DARE process was instituted).[845] This assessment process entailed certain design activities and also other preliminary decisions regarding the aircraft's manufacturing process.[846] The Airbus Chief Engineering Statement indicates that the MG3 milestone was concluded and the "concept" was "frozen" by the time the A350XWB design and business case-related documents were presented to the EADS Board[847], though we note that the business case presentation of 2-7 November 2006 provides contemporaneous evidence that contradicts that claim.[848] We cannot therefore be certain that the MG3 milestone had indeed been reached at that point. However, Airbus engineers state that:

> {R}eaching the point where we could launch the A350XWB in 2006 was the result of a two-year process of pre-launch research and development. After continuous development of composites-based technologies since 2004 (when we launched the Original A350), … Airbus had progressively developed more advanced technologies for the Original A350 during 2004-2006. By late 2006, Airbus was confident enough in its ability to apply these technologies that we could contractually commit to deliver a 787-comparable LCA by 2013. Such a decision was not possible in 2004 because of the technological gap between Airbus and Boeing at that time.[849]

6.517. In light of Airbus' decision to launch and enter into contractual commitments, while we cannot be sure that MG3 had been reached, it seems to us that by late 2006 assessment processes had taken place to allow Airbus to be confident it could commit to delivering a family of aircraft involving the extensive use of innovative composites technologies that the market demanded.

6.518. According to Airbus, the "key novelties that make the A350XWB so innovative were selected" between the end of concept (MG3) and the freeze of the aircraft's architecture (MG5).[850] If this is so, the new materials were chosen between the achievement of MG3[851] sometime around or after the A350XWB's launch, and the point when MG5 was reached, which (for the A350XWB-900 baseline variant) was between late 2008[852] and April of 2009.[853] The new materials were thus apparently selected between the programme's launch and the first stages of negotiations for the A350XWB LA/MSF contracts.

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[841] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 50-53 (footnote omitted). See also "Feature: Technology Readiness Levels Demystified", NASA, 20 August 2010, (Exhibit EU-97).

[842] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 43 (line 1).

[843] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 42.

[844] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 43 (lines 2-3).

[845] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 43; European Union's first written submission, para. 1118.

[846] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 24, 27, and 43 (identifying key issues Airbus addressed during MG3 assessment).

[847] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 43 (lines 2-3).

[848] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), HSBI at slides 47, 48 (See "Other considerations") and 55.

[849] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 15.

[850] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 60.

[851] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 43 (lines 2-3); compare with A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), HSBI at slide 47 and slide 55.

[852] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428).

[853] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 50-53. (footnote omitted)

6.519. There is some evidence on the Panel record about the stage of development that would have been reached by the MG5 milestone. The MG5 milestone, according to the head of the A350XWB programme in 2009, Didier Evrard, "is one of the most important gates in our new development process." [854] It represents the freeze of the aircraft's architecture[855], which means that "all the equipment is at its correct location and properly connected with each other".[856] With the MG5 milestone, Airbus has "defined all the detailed aero-lines for the fuselage, wings and empennage." Industrially, MG5 is important because "from here, we start committing to detailed design at all component levels", which enables long-lead items, tooling and jig production to be commenced.[857] By the end of MG5, "the feasibility of novel technologies is demonstrated through demonstrators and prototypes that were built in order to validate certain designs and/or raw materials."[858]

6.520. For the A350XWB programme, the Maturity Gate 5 (MG5) milestone was reached for the A350XWB-900 baseline variant in late 2008, prior to the finalisation of the terms of the LA/MSF contracts for the project.[859] In June 2009, Airbus stated it would move on to finalise detailed design for that variant by mid-2009. Also in June 2009, it was reported that "{a}fter the MG5 detailed definition freeze of the baseline -900, similar milestones must be achieved for the smaller -800 and -1000 stretch over the next two years". Airbus sought to achieve MG5 for the smaller A350XWB-800 by the end of 2009. However, the task was "not quite so straightforward for the -1000 stretch, which is due to reach MG5 in April 2011."[860]

6.521. By the time the A350XWB contracts were concluded, according to the Airbus Engineering Statement, Airbus had "conducted all necessary design reviews, and demonstrated technology readiness levels (TRL) up to TRL6. … TRL 6 means that the functioning of a particular technology or system has been successfully demonstrated in a relevant environment (e.g. prototype demonstration)."[861] In addition, "at this stage, Airbus demonstrated manufacturing readiness levels (MRL) **[***]**"[862] Tests for the wing "culminated in proving TRL5 and MRL5".[863]

6.522. As we see it, the question of whether technology risk had been mitigated because the A350XWB contracts were signed relatively later, compared to the A380 contracts, must be viewed in the light of the materials novelty described above and also the fact that multiple variants were in parallel development. At the point when the A350XWB LA/MSF contracts were signed, technology readiness levels (TRL) appear to have been reached involving (for example) *prototypes* of new materials, and the manufacturing readiness levels showing that industrialisation of the chosen raw materials would be *feasible*. In contrast, the A380 − as already noted − was conceptualised as using well-known and already-industrialised materials, particularly as regards its aluminium fuselage. The Airbus engineers state that "technical and manufacturing data is generally accumulated over decades … The structural design and analysis methods are refined with **[***]**," and engineers can take full advantage of the actual performance potential of a structural design solution. [864] As already noted, this is the case with aluminium structures − such as the A380

[854] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428).
[855] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428).
[856] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428).
[857] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428).
[858] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 50-53. (footnote omitted)
[859] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428), p. 1.
[860] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428), p. 4.
[861] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 50-53 (underline added; footnote omitted). See also "Feature: Technology Readiness Levels Demystified", NASA, 20 August 2010, (Exhibit EU-97), describing, for comparison, an example of a seven-year rise through TRLs 1-9 as "almost meteoric".
[862] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 50-53 (underline added; footnote omitted). See also US Department of Defense (DoD), "Manufacturing Readiness Levels (MRLs)", MRL Matrix Version 7.1, May 2009, (DoD Manufacturing Readiness Levels (MRLs)), (Exhibit EU-101).
[863] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 97.
[864] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 24-25.

– where "more than six decades of experience have resulted in highly-optimized structures with little margin for improvement".[865]

6.523. As an example, after the first A350XWB LA/MSF contract was concluded, but prior to the conclusion of the final contract, Airbus had been "forced to change some specifications of the composite fiber in order to make it more resistant to lightning strikes".[866] This was "just one major unforeseen change that added to what Bregier describes as the 'eating up schedule margins' situation".[867] To us, this example shows that the technological and manufacturing readiness levels achieved at MG5 were still far away from the "six decades of experience" that informed how the materials in the A380 were to be used.

6.524. We also note further factors that indicate that, even as the A350XWB LA/MSF contracts were being negotiated, significant development challenges remained. In June 2009, commentators noted that Airbus was to "undertake an intense development programme of the A350 XWB over the next 24 months, the likes of which it has not seen for decades. Between now and mid-2011, when final assembly begins, the A350 engineering teams must complete the detailed design lead variant, the -900, and prove the carbonfibre production plan for construction to begin, while firming up the baseline specification for the two derivatives."[868] The same commentators noted that a similar development process had not been undertaken with respect to the A380: "Not since it introduced the A330/A340 family of twin and quadjets in 1993 has the airframer undertaken such ambitious multi-variant parallel development".[869]

6.525. We thus observe that when the LA/MSF contracts were being negotiated, it appears that significant development tasks were not only still yet to be resolved, but were also ambitious and time-critical. To us, this means that the picture is more complicated than the European Union's submission that A350XWB development risk was mitigated, as compared to the A380, by the comparatively later point after launch at which A350XWB LA/MSF was concluded.

6.526. Moreover, we note that the member States do appear to have taken on certain risks associated with development prior to the signature of the contracts. At least one of the contracts provides that it would finance eligible development costs incurred from **[***]**[870], and another also provides that it would finance development costs incurred in the pre-**[***]** period: in its first iteration, the UK contract initially provided that eligible costs incurred **[***]** could be claimed up to an amount of GBP **[***]**.[871] This suggests that Airbus and the UK Government intended that the UK Government would take on the burden of providing finance for development costs incurred prior to **[***]** (that is, up to the end of **[***]**). This would, in our view, shift the risk of those already sunk costs to the government in question, who would bear the development risks if the materials that had been chosen, and for which only prototypes and feasibility had been demonstrated, proved to be inadequate and led to a failure to deliver the project as and when anticipated.

[865] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 24-25.

[866] Jens Flottau, "Déjà vu: More problems beset the A350 program, but schedule margins are now razor thin, a situation the manufacturer has faced before", *Aviation Week & Space Technology*, 15 February 2010, (Exhibit USA-515).

[867] Jens Flottau, "Déjà vu: More problems beset the A350 program, but schedule margins are now razor thin, a situation the manufacturer has faced before", *Aviation Week & Space Technology*, 15 February 2010, (Exhibit USA-515).

[868] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428).

[869] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428). See also Jens Flottau, "Déjà vu: More problems beset the A350 program, but schedule margins are now razor thin, a situation the manufacturer has faced before", *Aviation Week & Space Technology*, 15 February 2010, (Exhibit USA-515).

[870] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), annex 2 (para. 2). See also Exchange of Letters between Fabrice Brégier, Director General of Airbus, and French Director General of Civil Aviation (DGAC) **[***]** and **[***]**, (Exhibit EU-(Article 13)-10) (BCI).

[871] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI). See also UK Repayable Investment Agreement amending documents (First set of **[***]** to UK A350XWB LA/MSF contract, (Exhibit EU-(Article 13)-31) (BCI/HSBI); Second set of **[***]** to UK A350XWB LA/MSF contract, (Exhibit EU-(Article 13)-32) (BCI/HSBI); and Third set of **[***]** to UK A350XWB LA/MSF contract, (Exhibit EU-(Article 13)-33) (BCI/HSBI)).

6.527. In this regard, we consider that at least with respect to materials novelty, the fact that the A350XWB LA/MSF contracts were signed after the project's launch does not necessarily imply reduced development risk compared to the A380. We recognise, however, that at the time the corresponding A380 LA/MSF contracts were agreed, the A380 would not have been as advanced in its own development with regards to the challenges arising from its unprecedented size.

iv Risks associated with the A350XWB arising from A380 problems

6.528. The United States argues that the A380's problems "increased perceived riskiness of the A350 project in a way that has no analogue in the case of the A380".[872] Insofar as this relates to development risk, we consider the following issues: (a) whether the A380's problems had an effect, or a perceived effect, of diverting resources such as engineering resources and funds away from the A350XWB; and (b) whether the magnitude and repeated nature of the A380 problems would have implied systemic problems with Airbus' ability to undertake new development programmes that would have been taken into account by a market lender.

6.529. The United States describes how in October 2006 Airbus was "still mired in the "monumental task" of bringing the A380 into commercial service".[873] The A380 had reportedly been draining Airbus engineering and financial resources away from new projects[874], and the A350XWB in particular: in 2005, "a shortage of design engineers may be the more serious problem. With engineers still heavily involved on the A380 and the A400M, there isn't enough extra talent available to launch the A350 at this time".[875] The United States and Dr Jordan observe that in October 2006, while lowering EADS corporate credit ratings, Standard & Poor's (S&P) stated "the delay of the A380 program could have wider effects, such as delaying the introduction of the A350XWB, which is already scheduled for introduction years after Boeing Co.'s competing 787".[876]

6.530. We note evidence on the record that the A380's problems were considered a threat to the development of the A350XWB, and that close to launch, competition for resources devoted to repairing the A380's problems may have endangered the development of the A350XWB altogether.[877] The new aircraft programme would have to compete with the A380 for engineering and financial resources implicated by the initial A380 delays. Indeed, this was reportedly one reason Airbus originally preferred to design the cheaper, lower risk Original A350: "The development of the A380 has demanded the money, time and engineering resources to the point where many believe this to be an underlying reason why the A350 began as a cheap derivative of the A330".[878] During the redesign period, it was observed that "engineering and financial resources {for the A350XWB} will be stretched, as Airbus is still contending with manufacturing problems with its much-hyped A380 jumbo jet that have delayed deliveries by another six months".[879] By 2007, financial resources were implicated: Airbus was forecasting an IRR for the entire A380

[872] United States' comments on the European Union's response to Panel question No. 100, para. 277 (citing Jordan Reply, (Exhibit USA-505) (BCI), para. 43).

[873] United States' first written submission, para. 113 (citing "Thomas Enders: *'Je n'exclus aucun recours en justice pour protéger la réputation d'Airbus*'", *Le Monde*, 13 October 2007, (Exhibit USA-8)); Aaron Karp, "Airbus/EADS officials concede Boeing advantage, question A350 viability", *Air Transport World Daily News*, 6 October 2006, (Exhibit USA-9); and Mark Piling, "Dream date", *Airline Business*, 1 April 2004, (Exhibit USA-10)).

[874] Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006, (Exhibit USA-24).

[875] Robert Wall, "A350 Faces Busy Time Until Industrial Launch", *Aviation Week & Space Technology*, 20 June 2005, (Original Exhibit US-83), (Exhibit USA-23).

[876] Jordan Reply, (Exhibit USA-505) (BCI), para. 47.

[877] Aaron Karp, "Airbus/EADS officials concede Boeing advantage, question A350 viability", *Air Transport World Daily News*, 6 October 2006, (Exhibit USA-9).

[878] Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27).

[879] Ameet Sachdev, "Airbus redesigns its strategy for long haul: A350 line to carry bulk of the load", *Chicago Tribune*, 18 July 2006, (Exhibit EU-99).

project of 13%, compared to the 19% forecast in 2005.[880] Airbus would have to sell more aircraft to break even, and pay compensation and offer discounts on orders of the delayed A380.[881]

6.531. The A380's problems also implied systemic problems with Airbus' capacity to develop and secure certification for new aircraft as and when promised. During the time when the redesign of the Original A350 was being considered, the A380's problems were acknowledged to be harming Airbus' reputation and relationship with customers. For example, Airbus' then-CEO Christian Streiff reportedly acknowledged that the June 2006 "news about the {A380} delay harmed the company's credibility with customers and shareholders. … 'Yes, Airbus is in the middle of a serious crisis in our relationship with our customers'".[882] In 2007, it was reported that "the problems that have stemmed from the A380 are symbolic of Airbus as a company: poor product management, overly ambitious plans, fractionalisation and friction".[883]

6.532. At the time of the A350XWB contracts, Airbus was providing reassurance to the market that the A350XWB would not suffer the same problems as the A380. In press reports Airbus indicated that the problems had been caused by structural issues with the company and that increased integration, changes to Airbus' structure, as well as risk-mitigation strategies pursued under DARE were undertaken in a direct attempt to deal with the known effects of the A380's problems and to permit the A350XWB to go ahead.[884] Despite these mitigation measures, the A380's problems – and certain issues associated with the A400M[885] – were still reported as bearing on the A350XWB project at the time of the conclusion of the A350XWB contracts.[886] In June 2009, commentators opined that the "next two years are critical if Airbus is to avoid a repeat of the A380's production dramas".[887] In our view, risk mitigation efforts, even as they addressed structure and supply chains, were not generally considered to have entirely removed the risks of a repeat of the A380's problems.

6.533. The European Union appears to accept that the A380 problems posed challenges for the A350XWB, but counters that the A380 had had its own problems in this regard. The European Union states that "{a} review of just one analyst report from around the time of the A380 launch demonstrates that, like the A350XWB, the A380 programme was affected by challenges associated with other projects", amongst them "larger programmes such as Eurofighter, Tiger, and … NH90", and "the ramp-up in export production at MBD and Dassault Aviation", all of which were advancing at the same time as the A380, and all of which competed with the A380 for EADS working capital.[888] The European Union considers that the EADS offering memorandum, issued just before the launch of the A380, confirms that all of these projects, in addition to the A340-500/600, were simultaneously competing for resources with the A380 programme.[889]

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[880] "Noel Forgeard and the A380", *Commercial Aviation Report*, 15 January 2007, (Original Exhibit US-297), (Exhibit USA-148).

[881] "Noel Forgeard and the A380", *Commercial Aviation Report*, 15 January 2007, (Original Exhibit US-297), (Exhibit USA-148). See also Pilita Clark and Peggy Hollinger, "Deferrals to take toll on EAD's cash pile", *Financial Times*, December 2009, (Exhibit USA-153).

[882] Ameet Sachdev, "Airbus redesigns its strategy for long haul: A350 line to carry bulk of the load", *Chicago Tribune*, 18 July 2006, (Exhibit EU-99).

[883] "Noel Forgeard and the A380", *Commercial Aviation Report*, 15 January 2007, (Original Exhibit US-297), (Exhibit USA-148).

[884] See e.g. Keith Campbell, "Airbus determined to avoid A380 mistakes in the A350 project", *Engineering News Online*, 10 May 2010, (Exhibit EU-416).

[885] Jordan Reply, 20 May 2013 (Exhibit USA-505) (BCI/HSBI), para. 50 (citing Standard & Poor's Global Credit Portal Ratings Direct, *European Aeronautic Defence and Space Co. N.V.*, 14 October 2009, (Exhibit USA-514), p. 3).

[886] Jens Flottau, "Déjà vu: More problems beset the A350 program, but schedule margins are now razor thin, a situation the manufacturer has faced before", *Aviation Week & Space Technology*, 15 February 2010, (Exhibit USA-515).

[887] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428), p. 6.

[888] CreditSuisse/First Boston, "European Aeronautic Defence and Space Company (EADS): Valuation remains inconsistent with risks", Equity Research, 14 March 2001, (Exhibit EU-405), p. 41.

[889] European Union's comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), para. 762 (citing EADS Final International Offering Memorandum, 9 July 2000, (EADS Offering Memorandum), (Exhibit EU-55), pp. 68 (A340-500/600), 80 (Eurofighter), 82 (Tiger, NH90), 84-87 (Eurofighter), 101-103 (MBD), 110-111 (Dassault Aviation), and 125 (NH90)).

6.534. We note that independent analysis on the record indicates that the A400M, the Tiger and NH90 helicopter programmes were doing well at the time of the A380's industrial launch:

> Was the A3XX destined to be the hero or the villain of the piece {with respect to EADS' IPO offering}? What would form the supporting cast was also a little uncertain. In this respect, the news has been most encouraging, with major orders or commitments secured for the Airbus A400 M, the Tiger and NH 90 helicopters, and the Meteor beyond visual range missile.[890]

6.535. This suggests that those programmes were not suffering development problems, would not become a resource drain in the way that the problematic A380 would later affect the A350XWB at the time of the A350XWB LA/MSF contracts.

6.536. We therefore consider that the perception that engineering and financial resources would not have been available for the A350XWB due to the A380's problems, and the reputational damage caused by the A380 problems, would not have been encountered to the same degree at the time of the A380 contracts.

6.537. We believe that the A380's problems would have additionally affected how a market lender would have viewed risks involved with the A350XWB programme. In particular, the A350XWB's ambitious ramp-up schedule would, in our view, have been seen by a market lender in the light of the A380's failure to keep to what was described in 2007 as "an overly-ambitious plan" involving an "aggressive" turnaround time.[891] We consider that this would likely have coloured a market actor's views of the ramp-up and production schedule planned for the A350XWB, and increased perceptions of the risk involved with such a schedule. We also consider that supply-chain related A380 problems would affect a lender's perceptions of the risk involved with the higher proportion of sub-contracting on the A350XWB.

6.538. In our view, the A380's problems would have additionally affected how a market lender would have viewed risks involved with certain terms and conditions of the A350XWB contracts and, in particular, the risk that planned variants would not eventuate. In the A350XWB contracts, repayments appear to fall due on the delivery of **[***]**.[892] There is a risk that **[***]**. The French A350XWB LA/MSF contract appears to be the only contract that makes provision for this, providing that there will be **[***]**.[893] The A380 contracts were similarly based on a business case that comprised **[***]**.[894] Several variants were not developed or proved unacceptable to the market in view of the problems the programme experienced.[895] In our view, a market actor would likely have been less convinced that it would prove feasible to **[***]**, in the wake of such problems. Experiences with the A380's problems, then, would in our view inform a market lender's view of the risks involved with LA/MSF for the A350XWB programme.

6.539. In conclusion, as regards development risk overall, the sum of the evidence on the record indicates that the A350XWB was particularly technologically innovative. The A380 involved its own technological challenges, for example, the wake vortex problem, weight and structure, noise, and compatibility with aircraft infrastructure, the bulk of which risk came with producing an unprecedentedly large aircraft. However, the A380 was constructed mostly of traditional metal. In our view, from the evidence on the record, we consider that the extent to which the A350XWB's new materials had low levels of maturity at the start of development, and that these new materials would necessitate new data and extensive testing, new engineering and new skills, new facilities, new jigs and tools, and new production process, and new integration of earlier-developed systems,

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[890] "EADS: Results Analysed – A3XX Project Review – Recommendation Upgrade", Amro Aerospace & Defence Sector Research, 13 December 2000, (Exhibit USA-490), p. 5.

[891] "Noel Forgeard and the A380", *Commercial Aviation Report*, 15 January 2007, (Original Exhibit US-297), (Exhibit USA-148).

[892] See e.g. French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), annex 8; and Business case-related document, (Exhibit EU-(Article 13)-35) (HSBI), p. 12.

[893] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art 3.2.

[894] Airbus, "A380 Launch Business Case, **[***]**", December 2001, (A380 Business Case), (Exhibit EU-20) (HSBI), p. 9.

[895] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-2007, Volume I: Report and formal minutes, 19 June 2007, p. 8, (Exhibit USA-25) (citing "Last A380 freighter order scrapped", *Financial Times*, 3 March 2007).

all of which was expected to involve a higher peak R&D cost, means that on balance, the A350XWB's technological risk was *at least as high or higher* than the A380.

6.540. Aspects of the A350XWB development programme seem to have further increased development risks, relative to the A380: Under the ambitious DARE programme, the larger number of risk sharing suppliers meant that: (a) Airbus decreased control over the development of the aircraft; and (b) the ramped-up development schedule meant any problems would be "disastrous"[896]. We thus consider that the A350XWB faced *additional development risks* that were better understood in the wake of the A380's problems. In our view, actions taken to resolve communications and integration issues would have only partly offset these additional risks.

6.541. The fact that the A350XWB LA/MSF contracts were concluded at a relatively later point during the development programme would have had some risk-mitigating effect when compared against the A380, but we consider that this must be viewed in the light of the extensive use of new materials used on the A350XWB and the initial lower maturity of those materials compared to more traditional materials, and the increased outsourcing and faster development programme.

6.542. In our view, therefore, the mitigation factors identified by the European Union (i) would not have fully offset the increased and better understood risks associated with the ramped-up DARE development programme and high level of outsourcing, and (ii) would not have fully offset the technology risks associated with new materials and their lower maturity levels at the start of development. Taking the above facts into consideration, we consider that the development risks associated with the A350XWB were *at least as high as, or sufficiently similar to*, those associated with the A380.

b Market risk

6.543. In this section, we compare the "market risk" (also referred to by the parties as "marketing risk") associated with the A380 project against that associated with the A350XWB project. The European Union defines market risk as "the risk that the new aircraft will not sell as well as anticipated"[897], a definition to which the United States does not object.

6.544. The European Union argues that market risk must also be examined in determining the relative risks involved with the A350XWB and the A380 programmes.[898] The United States accepts that the A380 was "quite risky", in part due to "uncertainty about the size and nature of VLA demand", but considers that this "does not offset what had become certain and demonstrated risks for the A350 XWB program **[***]**".[899] The parties' arguments concern risks regarding: (a) predictions about the size of the respective markets for the two aircraft models; and (b) conditions of competition within that respective market.

i Risk related to market forecasts

6.545. The European Union submits that the aerospace industry has "considerably more experience in forecasting demand" for the middle to large wide-body aircraft market segment than for the very large aircraft (VLA) market segment.[900] The European Union states that the A380 was "designed to enter an untested market segment"[901], whereas the segment into which the A350XWB was to be sold was comparatively much better known. According to the European Union,

[896] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 37 (lines 7-12).

[897] European Union's second written submission, para. 322. This formulation differs slightly from the discussion in the original proceeding, where "market risk" was characterised as "the risk that Airbus will fail to deliver enough completed aircraft to repay principal and interest". (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.356). As the United States has not objected to the definition, we do not consider the different definition to be material.

[898] European Union's second written submission, paras. 318-322 and 329.

[899] United States' comments on the European Union's response to Panel question No. 100, para. 279.

[900] European Union's second written submission, para. 323-326 (citing Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 9). See also European Union's response to Panel question No. 100, 22 May 2013, para. 403; and comments on United States' response to Panel questions Nos. 91-107 ("overall comment"), paras. 686-687, 746-749 and 877.

[901] European Union's comments on the United States' response to Panel question No. 114, para. 50.

this is shown by diverging predictions of market demand for large aircraft[902] in the A380's category[903], in contrast to converging predictions regarding market demand for twin-aisle aircraft[904], the category to which the A350XWB belongs.[905] The European Union states that there was thus reduced general market risk for the A350XWB programme. The European Union also submits that the A350XWB business case was "conservative" and this reduced market risk compared to the A380.[906] Further, according to the European Union, more firm orders for the A350XWB at the time of the LA/MSF contracts indicates less market risk.[907] The United States submits that the global financial and economic crisis was likely to affect airlines, and thus the market for the A350XWB, in a manner not experienced at the time of the A380 LA/MSF contracts.[908]

6.546. We commence our consideration of these questions by comparing, below, the predictions of the A380 and the A350XWB markets at the times of the respective LA/MSF contracts.[909] Forecasts are generally given in terms of categories relating to capacity. The A380 appears to typically have 525 seats in a 3-class configuration. The relevant predictions for the A380, available on the Panel record, thus appear to be as follows:

[902] European Union's second written submission, para. 324 (citing Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), p. 29)); and Extract from Boeing Current Market Outlook 2000, Appendices, pp. 45-46, (Exhibit USA-81), p. 45); European Union's comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), paras. 746-749; and European Union's comments on the United States' response to Panel question No. 114, para. 50.

[903] The A380 was expected to have 555 seats at the time of its industrial launch. ("EADS: Results Analysed – A3XX Project Review – Recommendation Upgrade", Amro Aerospace & Defence Sector Research, 13 December 2000, (Exhibit USA-490), p. 11).

[904] European Union's second written submission, para. 324; and comments on the United States' response to Panel questions, paras. 746-749.

[905] We note that A350XWB passenger aircraft have between 270 and 350 seats. See e.g. François Caudron, Vice President, Head of A350 Customer and Business Development, "A350XWB Programme Update", Airbus presentation to Deutsche Bank, 1 July 2010, (Exhibit USA-443), p. 4.

[906] European Union's second written submission, para. 326.

[907] European Union's second written submission, para. 327.

[908] Jordan Reply, (Exhibit USA-505) (BCI), para. 63 (citing Standard & Poor's Global Credit Portal Ratings Direct, *European Aeronautic Defence and Space Co. N.V.*, 14 October 2009, (Exhibit USA-514), p. 3).

[909] This analysis does not pre-judge the issue of the relevant product market, discussed below.

Table 8: Comparative table of 20-year aircraft demand forecasts 1997 – 2002

	1997-2016	1998-2017	1999-2018	2000-2019[910]	2001-2020	2002-2021
Airbus						
Very large aircraft:[911]			1,208 [914]	1,235 [915]		
comprising:[912]						
500 seaters				575		
600 seaters				404		
800 seaters				223		
1,000 seaters				33		
Freighters (over 80t)[913]				315 [916]		
Total				**1,550 [917]**		
Boeing						
Large aircraft (747-400, and larger),	1,180 [918]	1,040 [919]	933 [920]	1,010 [921]	1,091 [924]	944 [925]
including:						
500+seats				800 [922]		
Total				**1,010** [923]		
Rolls Royce[926]						
Over 400 seats				980		
Freighters (over 60t)				550		
Total				**1,530**		

[910] Boeing's 2000 forecast is dated September 2000 and covers the period 2000-2019. (Extract from Boeing Current Market Outlook 2000, Appendices, pp. 45-46, (Exhibit USA-81)). Airbus' 2000 forecast is dated July 2000 and covers the period 1999-2019. (Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice))).

[911] We note that Airbus predicts demand for seats and demand for aircraft separately. (See Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), pp. 62-63 (appendix C), and pp. 74-75. See also Extract from Airbus Global Market Forecast 2000, July 2000, p. 74, (Airbus Global Market Forecast 2000), (Exhibit EU-71); and European Union's second written submission, paras. 388-390).

[912] Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), p. 6.

[913] 747 freighters are not over 80 tons and are thus seemingly excluded. ("EADS: Results Analysed – A3XX Project Review – Recommendation Upgrade", Amro Aerospace & Defence Sector Research, 13 December 2000, (Exhibit USA-490), pp. 16-17).

[914] Airbus Global Market Forecast 1999, (Exhibit USA-285), p. 29.

[915] Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), p. 6. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1092.

[916] Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), pp. 55 and 86.

[917] Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), pp. 6 and 54. See also Airbus Global Market Forecast 2000, (Exhibit EU-71), p. 74.

[918] Boeing Current Market Outlook 1997-2016, March 1997, pp. 1-14, (Exhibit EU-166), p. 3. This appears to include freighters ("cargo jets").

[919] Summary of Boeing Market Outlook 20-year forecasts 1998 to 2011, (Exhibit EU-73).

[920] Summary of Boeing Market Outlook 20-year forecasts 1998 to 2011, (Exhibit EU-73).

[921] Extract from Boeing Current Market Outlook 2000, Appendices, pp. 45-46, (Exhibit USA-81), p. 45. Includes freighters.

[922] CreditSuisse/First Boston, "European Aeronautic Defence and Space Company (EADS): Valuation remains inconsistent with risks", Equity Research, 14 March 2001, (Exhibit EU-405), p. 61.

[923] Extract from Boeing Current Market Outlook 2000, Appendices, pp. 45-46, (Exhibit USA-81), p. 45.

[924] Summary of Boeing Market Outlook 20-year forecasts 1998 to 2011, (Exhibit EU-73).

[925] Summary of Boeing Market Outlook 20-year forecasts 1998 to 2011, (Exhibit EU-73).

[926] "EADS: Results Analysed – A3XX Project Review – Recommendation Upgrade", Amro Aerospace & Defence Sector Research, 13 December 2000, (Exhibit USA-490), pp. 16-17.

6.547. As noted in the original proceeding, "{t}he A380 programme was launched in the face of basic disagreement between Airbus and Boeing about the size of the potential market for the aircraft."[927] By way of background, at the time the A380 was planned and launched, Airbus and Boeing had made different predictions of the future of air travel. Boeing in the late 1990s predicted that future air travel would be more fragmented, and that intermediate to large-sized twin-aisle aircraft would be needed to service more direct flights between regional centres. Airbus considered that future air travel would be between major cities, or "hubs"; it foresaw an expanded need for VLA that could enable many passengers to fly on few, well-travelled routes at a minimised cost.[928] Airbus foresaw significant demand for superjumbos with high seat capacity. Whilst Boeing predicted there would be some demand for VLA, and agreed that a market did exist for those aircraft, it steadily reduced its predictions of that demand, and thus disagreed with Airbus about the size of that market.

6.548. At the time of the A380 LA/MSF contracts, Airbus and Boeing did not use exactly the same methodology in making their predictions. Airbus differentiates between the 747-400 and the A380.[929] Boeing includes the 747-400 model aircraft in a "large aircraft" category which also includes a proposed 747X and the A3XX (the A380). It is not clear that the categorisation used in the manufacturers' respective forecasts, and thus the numbers they predicted within those categories, is entirely comparable. What is more, Airbus' predictions were, in part, based on a methodology that broke down demand in terms of neutral numbers of seats and used an algorithm to convert the seats in existing aircraft into neutral "seat" categories.[930]

6.549. In March 2001, CreditSuisse/First Boston noted that a divergence in demand predictions was in part attributable to a different definition of the aircraft category:

> Airbus and Boeing disagree over the exact number of aircraft that will be required in the very large category. For a start, Airbus and Boeing disagree over the definition of the category, with Airbus looking at all aircraft over 400 seats, with a forecast demand over 20 years of 1,500 aircraft. Boeing, on the other hand, defines the very large segment as those aircraft with more than 500 seats, and believes demand will be around 800 aircraft. Including demand for 400-500 seaters, Boeing forecasts demand for 1,010 aircraft. This has dropped from its own forecast of four years ago of nearer 1,500 aircraft.[931]

6.550. In addition to differing predictions, CreditSuisse/First Boston considered Airbus' predictions should be approached with caution: "{g}iven all {Airbus'} numbers are based on the most optimistic (internal) demand forecast in an as yet unproven market, in which new competition may well arise, we have to remain cautious about Airbus' forecast".[932]

6.551. However, as Amro Aerospace and Defence Sector Research noted, there appears to have been confirmation for Airbus' predictions from impartial, well-informed forecasts:

> Rolls-Royce {forecasts} are more likely to be seen as impartial than Airbus or Boeing. Given that Rolls-Royce supplies its Trent engines for the Boeing 777 and the Airbus A330 and will supply Trent engines for the Airbus A340-500/600 and the A3XX, there is no reason why Rolls-Royce should favour one sort of market development over another. … With regard to for {*sic*} large aircraft with more than 400 seats and for large freighter aircraft, Rolls-Royce forecasts a demand for 1,530 aircraft, Airbus

[927] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1927.

[928] See e.g. United States' first written submission, para. 139.

[929] Airbus includes the 747-400 model aircraft in the 400-seat category, along with the 777-300 and the A340-600, and classes two other 747s (747HD and 747SR) in the size category of 500 seats and over. (Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), p. 74).

[930] Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), pp. 62-63.

[931] CreditSuisse/First Boston, "European Aeronautic Defence and Space Company (EADS): Valuation remains inconsistent with risks", Equity Research, 14 March 2001, (Exhibit EU-405), p. 61.

[932] CreditSuisse/First Boston, "European Aeronautic Defence and Space Company (EADS): Valuation remains inconsistent with risks", Equity Research, 14 March 2001, (Exhibit EU-405), p. 63.

forecasts 1,550 (the freighter element being restricted to over 80t, hence excluding the Boeing 747) and Boeing forecasts 1,010 aircraft.[933]

6.552. Thus, in 2000, a point in time relevant to the A380 contracts, Boeing predicted demand for 800 aircraft in the "above 500 seats" category, and 1,010 VLA overall, a prediction which appears to include freighters and 747-sized aircraft.[934] In its 2000 forecast, Airbus predicted 1,235 large passenger aircraft, and 1,550 large aircraft overall, including 315 freighters over 80 t capacity.[935] Additionally, HSBI forecasts included in the A380 business case for a later period indicate a clear divergence between the two manufacturers.[936] Thus, at the time the A380 was launched, Airbus and Boeing's demand predictions diverged. We note, however that Airbus' 2000 demand predictions appear to converge somewhat with independent predictions of overall demand for large aircraft.

6.553. We now turn to compare market demand predictions relevant to the A350XWB and LA/MSF for the A350XWB. The A350XWB "family", with its several variants, appears to us to span several aircraft categories used in forecasting demand. The A350XWB-800 appears to be considered with other "small" widebody, twin-aisle aircraft.[937] The A350XWB-900 and A350XWB-1000 appear to be considered "medium" or "intermediate" widebody twin-aisle aircraft.[938] **[***]** are included in most demand predictions, but **[***]** may differ, making comparisons somewhat unclear. That is, the A350XWB is above 70 t, and may be considered a **[***]** depending on the weight category used by the forecaster.

6.554. The relevant predictions available from the Panel record appear to be as follows[939]:

[933] "EADS: Results Analysed – A3XX Project Review – Recommendation Upgrade", Amro Aerospace & Defence Sector Research, 13 December 2000, (Exhibit USA-490), pp. 16-17.

[934] Boeing's Current Market Outlook 2000-2019 states that categories are "based on 36-/32 inch mixed class configuration (includes freighter and combi airplanes in appropriate passenger category; …)". ("Demand for Air Travel", extract from Boeing Current Market Outlook 2000, pp. 20-27, (Exhibit EU-167), p. 45)

[935] We note that Airbus' relevant demand prediction includes an additional year of deliveries, as it appears to take into account the years 1999-2019, whereas Boeing's prediction at that time appears to be a prediction for the years 2000-2019. (Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), p. 74)

[936] See HSBI numbers included in A380 Business Case, (Exhibit EU-20) (HSBI), pp. 11-12.

[937] See Rolls Royce Market Outlook 2006-2025, August 2006, (Exhibit EU-184), p. 42. It appears that Boeing classifies twin-aisle aircraft with 180 to 250 seats in a three-class configuration as "small" twin-aisles. (See Declaration of Francisco-Javier Riaza-Carballo, Former Vice President, A380 Programme Business Directorate, Airbus, 25 May 2007, (Declaration of Francisco-Javier Riaza-Carballo), (Exhibit EU-15) (BCI/HSBI), para. 16 (citing Boeing Current Market Outlook 2006, p. 38 (not available on Panel record))). Boeing also classes the Boeing 767 in this category. (See Boeing Current Market Outlook 2005-2024, (Exhibit EU-159), pp. 33-35).

[938] See Rolls Royce Market Outlook 2006-2025, August 2006, (Exhibit EU-184), p. 42.

[939] The European Union submits comparisons, prepared by Steer Davis Gleave, in the CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), pp. 107-114. We note that in some instances the figures used in that comparison, including Airbus and Boeing figures, differ to those contained in the original documents on the Panel record. This may be due to the inclusion of **[***]** in predictions, or different aircraft categorisation. We have not included some figures from sources that do not relate to comparable categories, or cover a different time-period.

Table 9: Comparative table of 20-year aircraft demand forecasts 2004 – 2011

Forecasts:	2004-2023	2005-2024	2006-2025	2007-2026	2008-2027	2009-2028	2010-2029	2011-2030
Airbus								
Twin aisles			5,668[940]	5,944[944]		6,245[946]	6,240[950]	
Small, and **[***]**			3,868[941]			4,237[947]	4,330[951]	
Intermediate, and **[***]**			1,800[942]			2,008[948]	1,910[952]	
Large–Very Large, and **[***]**			1,665[943]	1,698[945]		1,729[949]	1,740[953]	
Boeing								
Twin aisles		5,620[956]	6,000+[961]			6,700[963]	7,100[966]	7,330[969]
Small[954]	3,500[955]	3,183[957]	3,450[962]					
Medium		2,437[958]						
Medium widebody **[***]**		178[959]				210[964]	210[967]	
Large aircraft		907[960]				740[965]	720[968]	820[970]

[940] Airbus Global Market Forecast 2006-2025, (Exhibit EU-158), p. 5 (sum of small twin-aisle and intermediate twin-aisle and long-range **[***]**). Steer Davis Gleave uses 5,267. (See CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), pp. 107-114). EADS refers to "some 5,700" aircraft in the A350XWB's category over 20 years from 2006: EADS Press Release, "A350XWB Family Receives Industrial Go-Ahead", 1 December 2006, (Exhibit USA-145).

[941] Airbus Global Market Forecast 2006-2025, (Exhibit EU-158), p. 5. Not including **[***]**, prediction is for 3,745 small twin-aisles. See also Declaration of Francisco-Javier Riaza-Carballo, (Exhibit EU-15) (BCI/HSBI), para. 16 (citing Airbus Global Market Forecast 2006-2025); and Steer Davis Gleave, in CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), pp. 107-114.

[942] Airbus Global Market Forecast 2006-2025, (Exhibit EU-158), p. 5. Steer Davis Gleave uses 1,522, which possibly excludes **[***]**.

[943] Airbus Global Market Forecast 2006-2025, (Exhibit EU-158), p. 5. Steer Davis Gleave uses 1,263.

[944] John Leahy, Chief Operating Officer, Customers, Airbus, "Global Market Forecast 2009-2028", 17 September 2009, (Airbus Global Market Forecast Presentation 2009-2028), (Exhibit EU-401), p. 14.

[945] Airbus Global Market Forecast Presentation 2009-2028, (Exhibit EU-401), p. 14.

[946] Airbus Global Market Forecast Presentation 2009-2028, (Exhibit EU-401), pp. 14 and 15. Airbus also stated that 5,802 new twin-aisles would be demanded in 2009-2028, excluding **[***]**. (François Caudron, Vice President, Head of A350 Customer and Business Development, "A350XWB Programme Update", Airbus presentation to Deutsche Bank, 1 July 2010, (Exhibit USA-443), p. 9)

[947] Airbus Global Market Forecast Presentation 2009-2028, (Exhibit EU-401), p. 14. Steer Davis Gleave uses 4,097. This accords with the sum of Airbus' 2009-2028 forecast for 250-and 300-seat categories, excluding **[***]**. (François Caudron, Vice President, Head of A350 Customer and Business Development, "A350XWB Programme Update", Airbus presentation to Deutsche Bank, 1 July 2010, (Exhibit USA-443), p. 9).

[948] Airbus Global Market Forecast Presentation 2009-2028, (Exhibit EU-401), p. 14. Steer Davis Gleave uses 1,705. This accords with the sum of Airbus' 2009-2028 forecast for 350-and 400-seat categories, excluding **[***]**. (See François Caudron, Vice President, Head of A350 Customer and Business Development, "A350XWB Programme Update", Airbus presentation to Deutsche Bank, 1 July 2010, (Exhibit USA-443), p. 9).

[949] Airbus Global Market Forecast Presentation 2009-2028, (Exhibit EU-401), pp. 14 and 15. Steer Davis Gleave uses 1,318, which possibly excludes **[***]**.

[950] John Leahy, Chief Operating Officer, Customers, Airbus, "Airbus Global Market Forecast 2010-2029", 13 December 2010, (Airbus Global Market Forecast Presentation 2010-2029), (Exhibit EU-403).

[951] Airbus Global Market Forecast Presentation 2010-2029, (Exhibit EU-403).

[952] Airbus Global Market Forecast Presentation 2010-2029, (Exhibit EU-403).

[953] Airbus Global Market Forecast Presentation 2010-2029, (Exhibit EU-403). Includes **[***]**.

[954] Boeing classifies twin-aisle aircraft with 180 to 250 seats in a three-class configuration as "small" twin-aisles. See Declaration of Francisco-Javier Riaza-Carballo, (Exhibit EU-15) (BCI/HSBI), para. 16 (citing Boeing Current Market Outlook 2006, p. 38 (not available on Panel record)). Boeing also classes the Boeing 767 in this category. (See Boeing Current Market Outlook 2005-2024, (Exhibit EU-159), pp. 33-35).

[955] Declaration of Francisco-Javier Riaza-Carballo, (Exhibit EU-15) (BCI/HSBI), para. 16 (citing Boeing 787 program fact sheet, 2007 (not available on Panel record)).

[956] Boeing Current Market Outlook 2005-2024, (Exhibit EU-159), pp. 3 and 33-35.

Forecasts:	2004-2023	2005-2024	2006-2025	2007-2026	2008-2027	2009-2028	2010-2029	2011-2030
Rolls Royce								
200–250 seats			2,017[971]					
300–350 seats			3,246[972]					
Large aircraft			1,024[973]					
Medium **[***]**			241[974]					
Large **[***]**			549[975]					
Pratt & Whitney[976]								
Small widebodies				2,920		2,985		
Medium widebodies				2,545		2,802		
Large aircraft				925				
Very large aircraft				375+		1,025		

[957] Boeing Current Market Outlook 2005-2024, (Exhibit EU-159), pp. 33-35.
[958] Boeing Current Market Outlook 2005-2024, (Exhibit EU-159), pp. 33-35.
[959] Boeing Current Market Outlook 2005-2024, (Exhibit EU-159), pp. 33-35.
[960] Boeing Current Market Outlook 2005-2024, (Exhibit EU-159), pp. 3 and 33-35. Appears to include **[***]**.
[961] Ameet Sachdev, "Airbus redesigns its strategy for long haul: A350 line to carry bulk of the load", *Chicago Tribune*, 18 July 2006, (Exhibit EU-99).
[962] Steer Davis Gleave, seemingly based on Boeing Industry Business Demand & Forecast, September 2006 (not on Panel record) and Boeing Current Market Outlook 2006 (not on Panel record). See CompetitionRx Report, (Exhibit EU-127), pp. 107-114.
[963] Extract from Boeing Current Market Outlook 2009-2028, p. 22, (Boeing Current Market Outlook 2009-2028), (Exhibit EU-402). Not broken down into seat category or size. Adding passenger twin-aisles and medium widebody **[***]** gives 6,430 aircraft. Steer Davis Gleave uses 6,220.
[964] Boeing Current Market Outlook 2009-2028, (Exhibit EU-402).
[965] Boeing Current Market Outlook 2009-2028, (Exhibit EU-402). Sum of large passenger and large **[***]** demand predictions is 1,010 aircraft. However, Boeing notes that these categories differ.
[966] Boeing Current Market Outlook 2010-2029, (Exhibit EU-404), p. 27. Not broken down into seat category or size. Adding passenger twin-aisles and medium widebody **[***]** gives 6,770 aircraft.
[967] Boeing Current Market Outlook 2010-2029, (Exhibit EU-404), p. 27.
[968] Boeing Current Market Outlook 2010-2029, (Exhibit EU-404), p. 27. Sum of large passenger and large **[***]** demand predictions is 1,050 aircraft. However, Boeing notes that these categories differ.
[969] "Long-Term Market – Overview", extract from Boeing Current Market Outlook 2011-2030, pp. 4-10, (Boeing Current Market Outlook 2011-2030), (Exhibit EU-74), pp. 4 and 10.
[970] Boeing Current Market Outlook 2011-2030, (Exhibit EU-74), pp. 4 and 10.
[971] Rolls Royce Market Outlook 2006-2025, August 2006, (Exhibit EU-184), p. 41. Steer Davis Gleave uses c. 2,920.
[972] Rolls Royce Market Outlook 2006-2025, August 2006, (Exhibit EU-184), p. 41. Steer Davis Gleave uses c. 4,200.
[973] Steer Davis Gleave also uses this figure.
[974] Rolls Royce Market Outlook 2006-2025, August 2006, (Exhibit EU-184), p. 41. A380F included as a large **[***]**.
[975] Rolls Royce Market Outlook 2006-2025, August 2006, (Exhibit EU-184), p. 41. A380F included as a large **[***]**.
[976] Steer Davis Gleave, in CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), pp. 107-114 (citing Pratt & Whitney Aircraft Industry Overview and Forecast Update (i) dated March 2007, containing delivery forecast for 2009-2028 (not on Panel record) and (ii) dated March 2009, containing forecasts for 2009-2028 (not on Panel record)).

Forecasts:	2004-2023	2005-2024	2006-2025	2007-2026	2008-2027	2009-2028	2010-2029	2011-2030
Snecma[977]								
Twin aisles						6,000		
JADC[978]								
Twin aisles			5,554			5,805		

6.555. Unlike with forecasts for the A380, Airbus and Boeing do not appear to have disagreed about the overall size of the twin-aisle market segment into which the A350XWB would be sold. Both manufacturers considered there was a sizeable market for twin-aisle aircraft. Commentary from June 2006, the time that Airbus was deciding to pursue the A350XWB redesign, reported converging demand predictions, for example: "Airbus, Boeing and analysts believe there is a market for between 4,000 and 5,000 airplanes in the medium-widebody line".[979] Then-co-CEO of Airbus and EADS, Louis Gallois, noted the agreement by both competitors about the large size and value of the market. At the announcement of the decision to launch the A350XWB, he said that, "when the market demand is as huge as forecasted by both competitors, we cannot but grab the opportunity".[980]

6.556. While the Panel record indicates converging predictions about the overall size of the twin-aisle market, we note some limitations in the available evidence. In particular, we note the absence of differentiation in Boeing's predictions, during key years, between smaller widebody twin-aisles and medium widebody twin-aisles.[981] It seems apparent from some forecasts, in which both Airbus and Boeing did differentiate between twin-aisles in terms of capacity, that Boeing and Airbus may have differed, with Boeing predicting slightly higher demand for intermediate or medium widebodies[982] (the category in which the bulk of A350XWB sales were expected). The manufacturers' overall converging predictions for twin-aisles may thus mask some divergences within that categorisation.

6.557. To the extent that diverging forecasts suggest that the most likely outcome may be in between the varying predictions, then Boeing's forecasts for slightly higher "medium" widebody demand, and less "large" aircraft demand, tend to support the European Union's argument that Airbus' A350XWB market demand forecast implied less risk than Airbus' A380 market demand forecast. However, if the convergence of Airbus' demand forecasts with other analysts' predictions is taken into account, the differences between the manufacturers' predictions for the A380's market segment may not be so significant from the perspective of a market lender.

6.558. The European Union submits that, in light of market forecasts available at the time, Airbus' anticipated sales of the A350XWB were "conservative"[983], further reducing market risks for the A350XWB.[984] As we understand it, Airbus' A380 business case also took a "conservative" approach compared with market forecasts: Airbus expected to repay principal and interest over fewer deliveries of A380 aircraft than even Boeing's demand predictions for aircraft with over 500 seats.[985] The project's breakeven point was at delivery of significantly fewer aircraft.[986] The market

[977] Based on either (a) Snecma Market Forecast 2006-2025, or (b) *SpeedNews* Aviation Industry Suppliers Conference March 2009 (neither report on Panel record). See CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), pp. 107-114.

[978] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), pp. 107-114 (citing Japan Aircraft Development Corporation Worldwide Market Forecast for Commercial Air Transport, for (i) 2006-2025 and (ii) 2009-2028) (not on Panel record).

[979] Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27).

[980] Speech by Louis Gallois, "Industrial launch of the A350XWB", Paris, 4 December 2006, (Exhibit EU-179).

[981] It appears that Boeing classifies twin-aisle aircraft with 180 to 250 seats in a three-class configuration as "small" twin-aisles. (See Declaration of Francisco-Javier Riaza-Carballo, (Exhibit EU-15) (BCI/HSBI), para. 16 (citing Boeing Current Market Outlook 2006, p. 38 (not available on Panel record)).

[982] Compare Airbus' 2006-2025 forecast of 1,800 medium twin-aisles, and Boeing's 2005-2026 forecast of 2,437 medium widebody passenger aircraft.

[983] European Union's second written submission, para. 326.

[984] European Union's second written submission, para. 326.

[985] See HSBI numbers included in A380 Business Case), (Exhibit EU-20) (HSBI), section 5.3 (p. 14).

share anticipated in the A380 business case was comparable to that anticipated in the A350XWB business case[987] – despite the fact that the A350XWB would face stronger relative competition from existing modern aircraft models in its market segment, as will be discussed further below. We also note that the European Union itself stated in the original proceeding that the A380 business case was the product of a "host of conservative assumptions and methodologies" and that the corresponding delivery forecast was "realistic and sober".[988] We consider that any risk-reducing effect that might be observed for the A350XWB project from the "conservative" nature of the base case as compared to market forecasts would have had a similar effect on the A380 project.

6.559. The European Union further submits that by the time the first A350XWB LA/MSF agreement was signed, there were relatively more firm orders for A350XWB aircraft.[989] The European Union contrasts this to the A380 project, which was "entering a less predictable market, with fewer firm orders in place when the agreements were concluded (and fewer orders, relative to the number of aircraft required to effect repayment of principal and interest)".[990] The European Union adds that "{a}t the time the UK loan agreement for the A380 was concluded, for example, Airbus had secured **[***]** necessary to effect full repayment of principal and interest".[991] The European Union submits that this lowers the marketing risks of the A350XWB relative to the A380.[992]

6.560. We note that at the time the A380 UK loan agreement was concluded in March 2000, the final business case for the A380 had not yet been produced, and the project had not yet proceeded to industrial launch, which would take place in December 2000. The Spanish A380 LA/MSF contract was dated 27 December 2001[993], by which time industry analysts had already opined that "{t}he good news is that the A3XX has got off to what we regard as a flying start", referring to commitments received from airlines for 42 passenger and two freighter A380 aircraft.[994] Airbus reportedly stated on 4 October 2001 that "so far it was on the right side of the average for orders to date (including Singapore Airlines)".[995] It was also observed that "Airbus wants a good base of orders and customers on which to formally launch the A3XX, but it does not want too many orders on launch terms".[996] By the time the French Government announced it had finalised its funding terms, in 2002, the A380's prospects were touted as "excellent", as evidenced by firm orders. The French transport ministry cited 85 firm orders and 12 intentions to buy, and considered this especially positive in view of the fact that the aircraft was not expected to enter into service for a further four years.[997] The German contract was concluded a few days later.

6.561. At the time of launch of the A350XWB, *Aviation Week* noted: "The Airbus A350XWB industrial launch without any firm orders suggests airlines are still evaluating whether the airframer can deliver what it's promising and that a difficult sales job could lie ahead".[998] Interest levels in the A350XWB appeared to have waned since the Original A350 was proposed to customers, though Airbus expected most of the Original A350 orders to carry over to the

[986] See HSBI numbers included in A380 Business Case), (Exhibit EU-20) (HSBI), section 2.1.

[987] Compare HSBI numbers included in A380 Business Case), (Exhibit EU-20) (HSBI), p. 5 (fourth bullet point, line 1), and section 5.3 (p. 14) with A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 51.

[988] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.340, 7.413, and 7.1926.

[989] European Union's second written submission, para. 327. See also European Union's response to Panel question No. 100, para. 403; and comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), paras. 686-687.

[990] European Union's second written submission, para. 327.

[991] European Union's comments on the United States' response to Panel question No. 114, para. 51 (citing UK A380 LA/MSF Contract, (Original Exhibit US-79), (Exhibit USA-87) (BCI); and United States' first written submission, para. 187 and fn 301).

[992] European Union's second written submission, para. 327.

[993] Panel Report, *EC and certain member States – Large Civil Aircraft*, fn 1507 (citing Original Exhibit US-73 (BCI)).

[994] "EADS: Results Analysed – A3XX Project Review – Recommendation Upgrade", Amro Aerospace & Defence Sector Research, 13 December 2000, (Exhibit USA-490), pp. 7-8.

[995] "EADS: Results Analysed – A3XX Project Review – Recommendation Upgrade", Amro Aerospace & Defence Sector Research, 13 December 2000, (Exhibit USA-490), p. 13.

[996] "EADS: Results Analysed – A3XX Project Review – Recommendation Upgrade", Amro Aerospace & Defence Sector Research, 13 December 2000, (Exhibit USA-490), p. 20.

[997] French Ministry of Transportation, Press Release, "*Accord pour le Financement de l'Airbus A380*", 15 March 2002, (Exhibit EU-141).

[998] See also Robert Wall, "Airbus Relaunches A350", *Aviation Week*, 10 December 2006, (Exhibit EU-98).

A350XWB. Delays due to the A380's problems were also assessed as likely to disrupt major airline expansion strategies, and to erode demand for Airbus widebodies.[999] The European Union's submissions show that **[***]** A350XWB aircraft were on order between December 2006 and **[***]**[1000], and by **[***]** Airbus had secured firm orders for **[***]** A350XWB aircraft.[1001] Other evidence indicates that there may have been two aircraft orders in 2006, 278 in 2007, 137 in 2008 and 27 in 2009, totalling 444 orders for A350XWB by the end of 2009.[1002] It appears that at the time the first A350XWB LA/MSF contracts were being negotiated[1003], Airbus had secured orders of around **[***]** to **[***]** aircraft, or between **[***]**[1004] and **[***]**[1005] of A350XWB deliveries needed to secure the repayment of principal and payment of interest. Airbus had secured between **[***]** and **[***]** of all deliveries anticipated under the delivery schedule expected to achieve the rate of return envisaged by the contracts.[1006]

6.562. At the time of the A380 LA/MSF contracts, between **[***]** and **[***]** A380 orders had been secured, or between **[***]** and **[***]** of A380 deliveries expected to repay principal and interest. Airbus had secured between **[***]** and **[***]** of all deliveries anticipated under the delivery schedule expected to achieve the rate of return envisaged by the contracts. It therefore appears that at the time the contracts were concluded for the two projects, there were proportionately more A350XWB orders than A380 orders.

6.563. In our view, the difference in orders at the time the LA/MSF contracts were being negotiated should be understood in the light of the overall structure of expected sales. Airbus did not expect to deliver many A380s during the years immediately after launch. Airbus was very clear that it anticipated most A380 demand to occur in the latter part of the project and toward the end of the 20-year forecast period: only 360 "very large and economical aircraft like the Airbus A3XX" would be demanded between 2000 and 2009, and the remaining 875 between 2010 and 2019.[1007] The **[***]** firm orders for the A380 reported to have been secured by 2002 would have represented **[***]** of the total large aircraft demand Airbus had forecast to 2009 (of which Airbus sought only a share). Thus, while in absolute terms Airbus had secured fewer A380 orders at the time of conclusion of the LA/MSF contracts, A380 orders should be viewed in the light of the A380's differently predicted demand pattern. In this regard, while we recognise that the A350XWB programme had achieved more orders than the A380 programme at the relevant time, it is apparent that orders for both projects were close in terms of projections.

[999] Jordan Reply, (Exhibit USA-505) (BCI), para. 44 (citing Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS Outlook Revised to Negative Due to A380 Delivery Disruption; 'A' Ratings Affirmed*, 14 June 2006, (Exhibit USA-508), p. 4).

[1000] European Union's first written submission, paras. 1106 and 1120 (citing Ascend database, Orders, data request as of 26 June 2012, (Exhibit EU-19)).

[1001] European Union's first written submission, para. 327; and United States' second written submission, para. 326.

[1002] Ascend database, Orders, data request as of 26 June 2012, (Exhibit EU-19). Another report states that "Airbus said Wednesday that it secured 290 orders in 2007 for the A350XWB". (See Nicola Clark, "Airbus to seek government aid for A350 in second half", *The New York Times*, 16 January 2008, (Exhibit USA-434)).

[1003] Information relating to the later contracts is not available on the Panel record.

[1004] That is, **[***]**.

[1005] That is, **[***]**.

[1006] European Union's comments on the United States' response to Panel question No. 91, para. 810. This includes versions not yet launched. (French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), annexes; German KfW A350XWB Loan Agreement, (EU-(Article 13)-14) (English translation) (BCI/HSBI); Annex 1.4(f) to German KfW A350XWB Loan Agreement **[***]**, (Exhibit EU-(Article 13)-23) (Original German version (Revised) and English translation) (BCI/HSBI); *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46); UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI); Further Whitelaw Response, (Exhibit EU-421) (BCI/HSBI); Professor Robert Whitelaw, "Calculation of the Macaulay Duration of the Financing Agreements for the A350XWB", (Exhibit EU-380) (BCI/HSBI)).

[1007] Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), pp. 6 and 74-86.

6.564. As a further factor, the United States' expert, Dr Jordan, considers that the 2007-2009 economic crisis would have had negative effects on the airline industry that would in turn negatively affect marketing conditions for the A350XWB project.[1008]

6.565. There is evidence on the Panel record that market demand in the commercial passenger aircraft industry is sensitive to general economic conditions, due in part to the sensitivity of passenger air travel demand to such conditions.[1009] At the time of the A350XWB LA/MSF contracts there were indeed significant predictions that client airlines, and therefore the market, would be hard hit by a negative financial and economic environment. In April 2009, during the period in which Airbus was negotiating terms for the LA/MSF contracts[1010], the *Financial Times* reported that the recession would affect airlines, Airbus' potential market:

> {A}irlines {are} deferring or cancelling orders for aircraft placed during the boom years. As in previous cycles, the first sector to suffer is demand for more expensive wide-body airliners. Qantas, China Southern and Cathay Pacific have all in recent days announced plans to delay delivery of some 93 mainly long-range aircraft, including nine Airbus A380 superjumbos. Air France-KLM a couple of weeks ago said it was planning to delay delivery of two A380s. … The problem {Airbus and Boeing} face is with deliveries next year and beyond. Cash-strapped customers will increasingly seek either to delay or cancel orders for aircraft they can no longer afford, or negotiate more favourable terms … The current cycle is proving more challenging than those in the past largely because of the credit crunch. Industry analysts estimate a $10bn-$30bn shortfall in funding … France has offered €5bn in loans to help airlines buy Airbus aircraft. Both manufacturers admit … they are bracing for more customer deferrals and cancellations. Yet they remain relatively optimistic that the cycle will turn and pick up in 2011 … Most industry watchers believe this is wishful thinking … the manufacturers will probably be forced to cut production by 20-30 per cent, if not by as much as 40 per cent, according to a recent UBS study.[1011]

6.566. In October 2009, credit agency Standard & Poor's likewise predicted that "Airbus' operating results and deliveries could be hit by the current negative economic environment, which has led to a significant drop in air traffic and airlines reducing capacity. In our view, this is particularly true for the years 2010 and 2011".[1012]

6.567. Downward trends in demand were also evident when the A380 contracts were being concluded. As the United States pointed out in the original proceeding, there was a downturn in the market for large civil aircraft in 2001−2003 following the events of 11 September 2001, exacerbated by the start of the war in Iraq and the outbreak of Severe Acute Respiratory Syndrome (SARS) in Asia.[1013] Indeed, this period was, up until then, the only time the aircraft industry had experienced negative growth. However, at that time the manufacturers appear to have taken into account such general market conditions in their predictions. For example, Airbus noted that:

> Compared with the 1999 {Global Market Forecast}, Airbus forecasters have increased their estimate of annual traffic growth for the first decade by 0.1 percentage points, and reduced that for the following ten years by 0.3 percentage points. This reflects a

[1008] Jordan Reply, (Exhibit USA-505) (BCI), para. 63 (citing Standard & Poor's Global Credit Portal Ratings Direct, *European Aeronautic Defence and Space Co. N.V.*, 14 October 2009, (Exhibit USA-514), p. 3).

[1009] "Risk Factors", *EADS Financial Statements and Corporate Governance*, Book 2, 2006, pp. 8-13, (Exhibit USA-496), p. 10.

[1010] European Union's response to Panel question No. 101 (citing Statement by Tom Williams, Executive Vice President, Programmes, Airbus SAS, 17 May 2013, (Exhibit EU-354) (BCI), para. 3); Meeting agenda, **[***]**, (Exhibit EU-392) (BCI); Letter, Airbus **[***]**, **[***]**, (Exhibit EU-393) (HSBI); and Letter, Airbus Operations GmbH, **[***]**, (Exhibit EU-394) (HSBI). See also UK Department of Trade and Industry Annual Report 2006-2007, p. 107, (Exhibit USA-38), in relation to the receipt of an application for launch investment for the Airbus A350.

[1011] Paul Betts, "Airbus and Boeing's plans fly in the face of sense", *Financial Times*, 21 April 2009, (Exhibit USA-504).

[1012] Standard & Poor's Global Credit Portal Ratings Direct, *European Aeronautic Defence and Space Co. N.V.*, 14 October 2009, (Exhibit USA-514), p. 3.

[1013] This was agreed by both parties in the original proceeding. (See Panel Report, *EC and certain member States − Large Civil Aircraft*, paras. 4.387, 4.390, 4.486, and 7.1987).

> change, following the faster-than expected recovery of the economies of several Asian nations, in the long term outlook of the independent economic forecasts used by Airbus as an input to its forecasting models. The result is a modest reduction by one-tenth of a percentage point of the average annual growth in {revenue passenger-kilometres} projected over the next twenty years.[1014]

6.568. To us this indicates that to the extent that there was a market downturn, it was apparently taken into account by Airbus when predicting demand for the A380. We thus consider that the economic environment appears to have been taken into account in predictions of market demand at the time the A380 LA/MSF contracts were concluded.

6.569. By contrast, by the time the A350XWB LA/MSF contracts were being negotiated, the *Financial Times* stated that "Airbus and Boeing look to be in denial" and that their plans "fly in the face of sense" in view of "the worst recession in decades, which has sent air traffic into a tailspin and many airlines into the red".[1015] Further, demand predictions used in the A350XWB LA/MSF contracts business case appear to be those prepared for the industrial launch of the A350XWB in 2006 − that is, predictions that predate the 2007-2009 financial and economic crisis.[1016] In 2006, Airbus had predicted that it would be delivering the A350XWBs into an "up" cycle.[1017]

6.570. We consider that the A350XWB market demand predictions were likely to be subject to a negative economic environment that would affect Airbus' clients, and which was known at the time the A350XWB LA/MSF contracts were concluded, but was not taken into account in the predictions of market demand on which the contracts appear to have been based. We consider that a market lender would have taken this into account in their market lending rate.

ii Risk related to conditions of competition within market segment

6.571. The European Union considers that conditions of competition between Airbus and Boeing were more favourable to Airbus for the A350XWB project than the A380 project[1018], due to delays in the entry-into-service of the Boeing 787.[1019] The European Union points to "the impact that the multi-year delays in the entry-into-service of the 787, known at the time the A350XWB financing agreements were concluded in **[***]**, have had on the market risk of the A350XWB"[1020] and states that the United States "points to no parallel development that offered the A380 a similar boost at the time the A380 MSF loan agreements were concluded".[1021]

6.572. We are not persuaded by the European Union's argument. The A380 was far larger than any existing aircraft, and its clearest competitor was the Boeing 747, a model near the end of its programme life which would likely need to be redesigned in order to improve its competitiveness.[1022]

6.573. This is in contrast to the A350XWB. The A350XWB family **[***]**[1023] was launched to compete directly in a market segment that already comprised several modern, successful

[1014] Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), p. 13.

[1015] Paul Betts, "Airbus and Boeing's plans fly in the face of sense", *Financial Times*, 21 April 2009, (Exhibit USA-504).

[1016] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 50-51.

[1017] See also Robert Wall, "Airbus Relaunches A350", *Aviation Week*, 10 December 2006, (Exhibit EU-98).

[1018] European Union's second written submission, para. 328; and comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), paras. 691-692.

[1019] European Union's second written submission, para. 328; and comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), paras. 752-753.

[1020] European Union's comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), para. 691 (citing Jordan Reply, (Exhibit USA-505) (BCI), para. 52).

[1021] European Union's comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), para. 691 (citing Jordan Reply, (Exhibit USA-505) (BCI), para. 52).

[1022] "EADS: Results Analysed − A3XX Project Review − Recommendation Upgrade", Amro Aerospace & Defence Sector Research, 13 December 2000, (Exhibit USA-490), pp. 9-10.

[1023] Some A350XWB variants overlap, and compete with either or both the Boeing 777 and 787.

competitor models: the already successful Boeing 777 and the new 787[1024] as well as Airbus' own existing twin-aisle aircraft, the A330 and A340.[1025] The A350XWB would also possibly encounter a potential updated 777.[1026] Boeing was doing well in the segment. The European Union asserts in another context that Boeing's launch of the 787 in 2004 caused the market share of the A330 to drop at a time when the A340 was already failing because it could not effectively compete with the more fuel-efficient 777.[1027] In 2005 Airbus reportedly sold only fifteen A340 aircraft whereas Boeing sold approximately ten times as many 777 aircraft. As of July 2006, Boeing had reportedly captured 75% of all new aircraft orders thus far that year.[1028] According to the European Union, such developments "clarified that Airbus aircraft within the twin-aisle market had lost their competitive edge to the Boeing 787".[1029] The A350XWB was perceived as a strategic necessity in order for Airbus to compete effectively in that valuable segment.[1030]

6.574. The Boeing 787 programme already had a head start of between two and three years at the time Airbus decided to pursue the A350XWB redesign.[1031] Prior to the A350XWB's launch, Airbus' then-CEO Christian Streiff reportedly "conceded that {Airbus} now is up to a whole decade behind rival Boeing … in terms of development and efficiency".[1032] The decision to pursue the A350XWB redesign, instead of the cheaper and less risky Original A350, also delayed Airbus' reinsertion into the segment, delaying the entry into service of a new widebody by another two years.[1033] As Dr Jordan notes, the "A350XWB {was} scheduled for introduction years after Boeing Co.'s competing 787"[1034], further extending the 787's head start. Dr Jordan points to reports that "Boeing had a jump-start on its rival, only to see its own development problems erode that enviable position".[1035] By February 2010, while A350XWB LA/MSF was still being negotiated, it was observed that as the A350XWB programme was experiencing delays (related to late design changes due to the new materials being used, and inability to provide data to suppliers so that they could start production of key parts), "Airbus' {A350XWB} woes may now be contributing to restoring some of Boeing's lead".[1036]

6.575. As we see it, the delays announced to the 787 programme would have, at most, put the competitor aircraft on a more level footing. The delays would not have enhanced the A350XWB's competitive edge in a way that would reduce its market risk compared to the A380. Nor would the delays negate the fact that the A350XWB was in direct competition with other modern aircraft, including the 777.

[1024] Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27); and Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006, (Exhibit USA-26).

[1025] Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006, (Exhibit USA-24).

[1026] European Commission, Decision C(2001) 6498 final, State aid N493/2010 − Spain − R&D aid to *Industria de Turbopropulsores,* S.A. (ITP) for Trent XWB LPT, 20 September 2011 (Exhibit USA-154), para. 55. See also Ameet Sachdev, "Airbus redesigns its strategy for long haul: A350 line to carry bulk of the load", *Chicago Tribune*, 18 July 2006, (Exhibit EU-99).

[1027] European Union's first written submission, para. 1108. See also "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006, (Exhibit USA-28).

[1028] "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006, (Exhibit USA-28).

[1029] European Union's first written submission, para. 1108.

[1030] Goldman Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future, in our view*, 21 November 2006, pp. 20-22, (Exhibit USA-30), p. 20.

[1031] Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006, (Exhibit USA-24).

[1032] Aaron Karp, "Airbus/EADS officials concede Boeing advantage, question A350 viability", *Air Transport World Daily News*, 6 October 2006, (Exhibit USA-9).

[1033] Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27).

[1034] Jordan Reply, (Exhibit USA-505) (BCI), para. 47.

[1035] Jordan Reply, (Exhibit USA-505) (BCI), para. 52 (citing Jens Flottau, "Déjà vu: More problems beset the A350 program, but schedule margins are now razor thin, a situation the manufacturer has faced before", *Aviation Week & Space Technology*, 15 February 2010, (Exhibit USA-515)).

[1036] Jordan Reply, (Exhibit USA-505) (BCI), para. 52 (citing Jens Flottau, "Déjà vu: More problems beset the A350 program, but schedule margins are now razor thin, a situation the manufacturer has faced before", *Aviation Week & Space Technology*, 15 February 2010, (Exhibit USA-515)).

6.576. In our view, the existence of several modern, already successful competitor aircraft in the A350XWB's market segment would mean that, even if market demand forecasts were accurate, Airbus would have more difficulty achieving its hoped-for market share in the case of the A350XWB than it would in the case of the A380.

6.577. Moreover, with those other aircraft available, customers would be more likely to favour a competitor aircraft in the event that there were delays, or failure to develop the A350XWB as and when promised. This is in marked contrast to the situation with the A380, where it was noted by commentators in 2007 that:

> {A}irlines can't cancel their orders easily. If airlines cancel they are stuck with having inadequate capacity, which would erode profit. If airlines were to select other aircraft they … wouldn't be available in the desired time-frame.[1037]

6.578. Thus, any A350XWB development risks would have had serious consequences in relation to market demand in view of the competition in the segment. We therefore consider that, at the time of the conclusion of the respective LA/MSF contracts, this competition was a factor that would have increased the market risks for the A350XWB relative to the A380's market risks.

6.579. In conclusion, therefore, our sense is that the A380 and A350XWB experienced market risks that were of a different nature. At the relevant points in time, the A380's market success or failure rested in large part on the correct identification of the existence and size of the market segment, whereas the A350XWB's success or failure would depend upon how it would be received by customers in a market segment that was already relatively well known and served by existing aircraft, including the 787. Moreover, the A350XWB would need to be competitive not only in terms of innovation but, crucially, in terms of timing. Competition within the sector would mean that the consequences of any delays could be very detrimental to market success. For these reasons, we consider that while the "market" or "marketing" risks experienced by the A380 and A350XWB were different in nature, they were overall comparable in importance.

Price of risk

6.580. This section deals with the issue of changed lending conditions and market appetite for risk. The main question in this regard is whether the financial environment – in particular the global financial and economic crisis prevailing at the time – meant that a market lender would have demanded a higher return at the time financing was being sought for the A350XWB than at the time it would have been sought for the A380, even if the aircraft development and marketing risks were similar. The parties consider that this issue corresponds to "risk acceptable to the finance industry at different moments of its own market cycle"[1038], a factor noted to be a relevant consideration by the panel in the original proceeding.[1039] The European Union terms this issue the "price of risk".[1040]

6.581. The United States submits that LA/MSF for the A350XWB "was finalised at a point in time when lending conditions were historically tight" with the implication that "the true A350XWB risk premium should likely be higher than the A380 risk premium".[1041] According to the United States, at the time of the A350XWB contracts, the effects of the 2008 global financial and economic crisis continued to linger and constrain the availability of credit, which would have affected lending conditions for the A350XWB project.[1042] The United States submits evidence presented by Dr Jordan concerning the yield spread between investment-grade and below-investment grade debt, showing the additional yield that investors demand to invest in the lower-rated debt. According to Dr Jordan, "because the risks related to providing project-specific financing for the

[1037] "Noel Forgeard and the A380", *Commercial Aviation Report*, 15 January 2007, (Original Exhibit US-297), (Exhibit USA-148).

[1038] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 22; European Union's second written submission, para. 344; Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 23.

[1039] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.468.

[1040] European Union's second written submission, para. 334; and Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 23. The United States appears to raise no objection.

[1041] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 22.

[1042] United States' comments on the European Union's response to Panel question No. 100, para. 277 (citing Jordan Reply, (Exhibit USA-505) (BCI), paras. 43-54).

A350XWB are undoubtedly much higher than th{o}se related to investment-grade debt, non-investment grade debt provides a better assessment of the effect of credit conditions on potential financing for the A350XWB".[1043] The United States points to Dr Jordan's statements that this yield spread remained high in **[***]** when the LA/MSF agreements were finalised, relative to pre-2007 ("pre-crisis") levels.[1044] Specifically, the United States notes Dr Jordan's evidence that the yield spread between investment-grade industrial companies and below-investment grade industrial companies ranged from 1% to 2% in a pre-crisis period (2006-2007), peaked at almost 7% during the financial crisis (late 2008-early 2009), and then remained elevated at 3.5% to 5% in the **[***]**.[1045]

6.582. The European Union rejects the evidence put forward by Dr Jordan that "yield spread remained high" in **[***]** when the A350XWB LA/MSF agreements were finalised, relative to their levels in 2006/2007 because, in the European Union's view, this does not show the price of risk was "at least" as expensive, or "more" expensive than it was at the time the A380 LA/MSF agreements were finalised, in **[***]**.[1046]

6.583. The European Union further argues that the United States' claim that "lending conditions were historically tight" is contradicted by a lack of change between certain credit spreads in 2001 and **[***]**.[1047] The European Union also submits that the United States' claim that in **[***]** financial markets were "still suffering from a historic crisis that severely constrained the availability of credit"[1048] is effectively rebutted by evidence showing there was appetite for debt during that period, including for EADS debt: "in January 2009, in the midst of the darkest days of the financial crisis, EADS issued a EUR 1 billion corporate bond, with an effective rate of a mere 4.6 per cent"[1049], that is, a relatively low rate, indicating market acceptance and demand for the particular debt. The European Union states that "in August 2009, EADS placed a EUR 1 billion 7-year bond on the capital markets, an issue that was nine times over-subscribed during its 30 minute offer period"[1050] and also observes that secondary bond yield curves show robust demand for EADS debt such that "its yield had fallen significantly by **[***]**".[1051] The European Union also points to opinions on the evidentiary record of "marked improvement in general market conditions evident from early 2009".[1052]

6.584. We turn first to the European Union's submission regarding the market's appetite for EADS debt in the form of bonds. While we note that this standard may be appropriate to gauge the market appetite for general corporate debt related to Airbus, we recall that the project-specific risk premium is intended to relate to the higher risks associated with the form of financing and key features of LA/MSF, in addition to the risks associated with the particular aircraft development programme. Under the terms of the LA/MSF agreements, LA/MSF is project-specific and repayment is to occur via the cash flows deriving from sales; likewise, achieving full returns are effectively dependent on the success of a particular project. This would mean it does not correspond to general debt with respect to which risk of default is diversified across the company's operations and follows the entity's overall financial position rather than the profits or losses of a single project undertaken by the entity. This is, after all, the reason for adding a project-specific

[1043] Jordan Reply, (Exhibit USA-505) (BCI), para. 62.
[1044] Jordan Reply, (Exhibit USA-505) (BCI), paras. 59-64.
[1045] United States' response to Panel question No. 103; and Jordan Reply, (Exhibit USA-505) (BCI), para. 62 and chart 4 (p. 35).
[1046] European Union's comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), paras. 716 and 786-790.
[1047] European Union's second written submission, para. 335; and Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 24.
[1048] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 22.
[1049] European Union's second written submission, para. 337 (citing Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 26 (in turn citing EADS Financial Statements 2009, (Exhibit EU-163), p. 65)).
[1050] European Union's comments on the United States' response to Panel question No. 103, para. 791 (citing CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 404).
[1051] European Union's second written submission, para. 337 (citing Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 26).
[1052] European Union's comments on the United States' response to Panel question No. 103, para. 791 (citing Hans J. Blommestein, Vincenzo Guzzo, Allison Holland and Yibin Mu, "Debt Markets: Policy Challenges in the Post-Crisis Landscape", *OECD Journal: Financial Market Trends* (2010), Vol. 2010, Issue 1, (Exhibit USA-521), pp. 10-11).

risk premium. The European Union's evidence of appetite for debt on bond markets in the crisis period, particularly appetite for EADS debt (indicated by the relatively low effective rate of an EADS bond issued in January 2009[1053] and apparent oversubscription of an EADS bond issued in August 2009[1054]), is less relevant for determining the risks attaching to the key features of LA/MSF.

6.585. Turning to the United States' submission, we tend to agree with the European Union that the high yield spread between investment-grade and below-investment grade debt in **[***]** when the A350XWB LA/MSF agreements were finalised, relative to levels in 2006/2007, does not show the price of risk was "at least" as expensive, or "more" expensive than it was at the time the A380 LA/MSF agreements were finalised, in **[***]**. The peak in the spread at the time of the A350XWB LA/MSF contracts provides information about how risk was priced at that point, but does not enable us to judge whether the spread was more marked than that existing at the time of the A380 LA/MSF contracts.

6.586. According to the information submitted by the European Union on European Union and world gross domestic product (GDP) from 1969 onwards, it is apparent that there was a dramatic drop in world GDP growth, and an even more dramatic drop in European Union GDP growth, in the second half of 2008.[1055] By comparison, a trough between the years 2000 and 2003 was not nearly as marked. According to the figures submitted by the European Union, between 2000 and 2001 world GDP growth dipped from 3.27% to 1.87%, before recovering to 3.87% by 2004. World GDP growth remained relatively stable for the next few years. In 2007 world GDP growth was at 3.47%, before dropping to an average of -0.69% in 2008, rising to an average of 0.22% in 2009 and recovering to 3.38% in 2010. From the chart submitted, it appears that it may have dropped to below -2% growth between 2008 and 2009. In Europe, this was apparently even more marked.[1056] This evidence of a general trend may indicate that, while not represented on Dr Jordan's graphs included in his report, the statement identifying the "pre-crisis" period is likely valid for the **[***]** period as well as the 2006-2007 period. However, it appears that there is no identifiable evidence on the Panel record linking the finance industry to the general market as indicated by such GDP data.

6.587. The United States has submitted various State Aid Decisions[1057] and relevant HSBI evidence in UK documents concerning the A350XWB.[1058] Neither the State Aid Decisions, nor the

[1053] European Union's second written submission, para. 337 (citing EADS Financial Statements 2009, (Exhibit EU-163), p. 65).

[1054] European Union's comments on the United States' response to Panel question No. 103, para. 791 (citing CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 404).

[1055] EU and World GDP table and graph, (Exhibit EU-72).

[1056] EU and World GDP table and graph, (Exhibit EU-72).

[1057] European Commission, Decision C(2001) 6498 final, State aid N493/2010 − Spain − R&D aid to *Industria de Turbopropulsores,* S.A. (ITP) for Trent XWB LPT, 20 September 2011, (Exhibit USA-154); European Commission, Decision C(2011) 995 final, State aid (SA.30282) N204/2010 − Sweden − R&D aid to Volvo Aero, S.A. (ITP) for Trent XWB ICC, 23 February 2011, (Exhibit USA-155); European Commission, Decision C(2010) 2141 final, Aide d'état N527/2009 − France − Daher-Socata *"Trappes de train principal A350 XWB" (projet MLGD)*, 14 April 2011, (Exhibit USA-156); European Commission, Decision C(2010) 6472 final, State aid N 4/2010 and N7/2010 − Spain − Individual R&D aid to Alestis Aerospace S.L., 29 September 2010, (Exhibit USA-157); European Commission, Decision C(2009) 6874 final, State aid N357/2009 − United Kingdom − Individual R&D aid to GKN ASL, 15 September 2009, (Exhibit USA-158); European Commission, Decision C(2011) 264 final, State aid (SA.30169) N3/2010 − Spain − State loan for R&D to AERNNOVA, 26 January 2011, (Exhibit USA-159); European Commission, Decision C(2010) 4937 final, State aid N5/2010 and N6/2010 − Spain − State loan for R&D to ARESA, 20 July 2010, (Exhibit USA-160); European Commission, Decision C(2009) 9960 final, State aid N296/2009 'F2F' and N297/2009 'Airducts', 2 Individual aeronautics R&D-aids to Diehl Aircabin GmbH, Germany, 15 December 2009, (Exhibit USA-161); European Commission, Decision K(2009) 5733, State aid N276/2009 − Germany − Aircraft Supplier Scheme, Aeronautics R&D Scheme, 15 July 2009, (Exhibit USA-162); European Commission, Decision C(2011) 6496 final, Aide d'État N414/2010 − Belgique − *Aide au projet de 'Flap Support Structures' de SABCA ('Projet FSS')*, 5 October 2011, (Exhibit USA-441); European Commission, Decision C(2010) 2140 final, Aide d'État N525/2009 − France − *Aide au projet de case de train principal de Sogerma (Projet MLGB)*, 14 April 2010, (Exhibit USA-444).

[1058] United States' second written submission (HSBI version), para. 281 (second sentence), and fn 55 (citing UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 11); and comments on the European Union's response to Panel question No. 100 (citing UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), paras. 11-12).

United States' HSBI evidence, however, provide a comparison to the time-period during which LA/MSF for the A380 was being negotiated.

6.588. Given the United States has not provided the yield spreads that would allow us to make a full evaluation of the merits of its submission, we are unable to accept its argument that a market lender would have demanded a higher return at the time financing was being sought for the A350XWB than at the time it would have been sought for the A380.

Contract risk

6.589. The European Union points to risk differences arising from: (a) the terms of the A350XWB contracts compared to the A380 contracts, and (b) the terms of the four individual A350XWB contracts. With respect to the first set of differences, the European Union submits that risk reducing terms of the A350XWB contracts should mean reduced risk, and hence a lower risk premium, than for the A380. With respect to the second set of differences, the European Union submits that these differences between the A350XWB contracts justify the application of at least two separate risk premia.

a Whether the terms of the A350XWB contracts reduce risk compared to the terms of the A380 contracts

6.590. The European Union argues that differences in the terms of the LA/MSF agreements for the A380 and the A350XWB reduce the risk for the A350XWB and, hence, the benchmark.[1059] The European Union argues that "in addition to differences between the risk profiles of the *projects* at issue, differences between the *financing instruments* at issue may also affect the riskiness – and, hence, the market price – of a financing agreement".[1060]

6.591. The European Union states that, "{f}or example, the **[***]**, whereas the **[***]**".[1061]

6.592. The United States submits, in response, that **[***]**.[1062] According to the United States, there is no basis for the European Union to conclude that the existence of **[***]** "may justify a significantly lower risk premium for the A350XWB financing agreements, as a whole, than for the A380 financing agreements, as a whole".[1063] According to the United States, in respect of "**[***]**", the A380 LA/MSF contracts and the A350XWB LA/MSF contracts are, as a whole, **[***]**.[1064]

6.593. We note that in the original proceeding, the project-specific risk premium was intended to be a premium that took into account both risk associated with the project itself, and risk related to the terms of, or the form of, financing. Indeed, the rationale for adding a project-specific premium was because, under the LA/MSF contracts, the repayment of the principal and most of the returns were dependent on deliveries and thus dependent on the success or failure of the project.

[1059] European Union's second written submission, paras. 339-340 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 890; and Appellate Body Report, *Japan – DRAMs (Korea)*, para. 174); and response to Panel question No. 100, paras. 404-405 (citing UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 4 (second to last bullet point), paras. 22-3 and annex A) (erroneously cited by the European Union as Exhibit USA-498 and by the United States as Exhibit EU-497)).

[1060] European Union's response to Panel question No. 100, para. 404. (emphasis original; footnotes omitted)

[1061] European Union's second written submission (BCI version), para. 340 (citing UK A380 LA/MSF Contract, (Original Exhibit US-79), (Exhibit USA-87) (BCI) (erroneously cited in European Union's submission as Exhibit EU-87, referring to schedule 3 – which we note does not appear to be fully included in that exhibit); and UK A350XWB Repayable Investment Agreement (Exhibit EU-(Article 13)-30 (BCI/HSBI) (European Union's submission erroneously referring to Exhibit USA-496), clause 7.2); and European Union's response to Panel question No. 100, para. 405.

[1062] United States' comments on the European Union's response to Panel question No. 100, paras. 276-280 (referring to German A380 LA/MSF Contract (Original Exhibit US-72), (Exhibit USA-83) (BCI), section 6).

[1063] European Union's response to Panel question No. 100, para. 405.

[1064] United States' comments on the European Union's response to Panel question No. 100, para. 280.

6.594. As identified by the European Union, under the **[***]** LA/MSF contracts for the A350XWB, **[***]** in the event that deliveries are not made (unless **[***]**[1065]); thus some returns may accrue to those member State governments even in the event of delays to the programme.

6.595. In the original proceeding, as the United States points out, **[***]**, which would likewise constitute "risk-reducing" terms, existed with respect to **[***]** LA/MSF at issue in that proceeding. At least one of the A380 contracts considered in the original proceeding − the German A380 contract − contained a mechanism that similarly "protected" returns. Professor Whitelaw's risk premium was nevertheless applied in that proceeding and, moreover, on the understanding that it was a minimum risk premium and would be understated for that contract.[1066] We therefore do not consider that such features in this proceeding should in and of themselves render the WRP inapplicable.

b Whether the different A350XWB contracts should have different risk premia

6.596. The European Union considers that differences between the terms of the four A350XWB LA/MSF agreements "could justify the application of, at least, two different risk premiums for those agreements"[1067] in this proceeding.

6.597. As legal support for its submission, the European Union points to Article 14(b) of the SCM Agreement[1068], which provides that the benchmark for a financial contribution in the form of a loan is "the amount the firm would pay for a *comparable* commercial loan".[1069] For the European Union, "Article 14(b), therefore, implies that, where two allegedly subsidised loans are not themselves 'comparable', they cannot be compared to the same market benchmark − at least not without further adjustment. Instead, each requires its own market benchmark in the form of a comparable commercial loan".[1070]

6.598. The European Union submits in this regard that the four individual A350XWB contracts involve different amounts of risk because the **[***]** contracts protect against risks related to **[***]**, whereas the **[***]** contract does not. In the case of **[***]** and **[***]** LA/MSF for the A350XWB, this is because "**[***]**".[1071] The European Union submits that in the case of **[***]**.[1072] The European Union argues that these mechanisms significantly reduce the member States' exposure to **[***]**.[1073] The European Union acknowledges that **[***]**.[1074]

6.599. The European Union also submits that, for those contracts that contain such "risk-reducing" features, *market risk* is more significant than *development risk*.[1075] In this respect, the European Union states:

[1065] **[***]**.
[1066] See Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.481; and Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 923.
[1067] European Union's response to Panel question No. 100, para. 406.
[1068] European Union's response to Panel question No. 100, para. 401.
[1069] (emphasis added)
[1070] European Union's response to Panel question No. 100, para. 401 (citing European Union's second written submission, paras. 1006-1007).
[1071] European Union's response to Panel question No. 93, paras. 360-361.
[1072] European Union's response to Panel question No. 93, paras. 360-361.
[1073] European Union's response to Panel question No. 100, para. 406.
[1074] European Union's comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), para. 684.
[1075] European Union's comments on the United States' response to Panel questions Nos. 91-107 ("overall comment"), para. 684.

> Development risk materialises either in the form of delays or programme termination. Both represent a risk to profit-dependent equity holders,[91] but are not a material risk for the EU member States as lenders. … the basic return to the EU member States on the A350XWB loans is dependent on deliveries, not profits, and **[***]**. Accordingly, although delays caused by technological problems would decrease Airbus' profits on the programme, they have no impact on the basic returns enjoyed by **[***]**.
>
> ——————————————
>
> [91] Although neither Airbus nor Boeing releases financial results by programme, the multi-year delays in the A380 and 787 programmes that resulted in billions of dollars of cost overruns and penalty payments make it conceivable that neither of these programmes will ever recover the cost of invested capital, even were deliveries to extend beyond their expected programme lives and, in the case of the A380, be sufficient to secure full repayment of principal and interest on the EU member State loans for the programme.[1076] (footnote original)

6.600. The United States points out that the WRP itself does not assign different risk premia for the four different A380 contracts[1077] even though the terms of those contracts exhibit the same types of variations that the European Union notes in the case of the A350XWB.[1078]

6.601. The United States further submits that the European Union's submission regarding periodic interest ensuring that the lenders will earn a return that **[***]** "is only accurate if by '**[***]**' the EU means **[***]**. Indeed, under Prof. Whitelaw's calculations of the IRRs, delays in the A350 XWB delivery schedule would tend to reduce the IRRs, because **[***]**".[1079]

6.602. We understand the European Union's argument regarding the effect of **[***]** to be very similar to its argument regarding the comparative risks of the terms of the A350XWB and A380 LA/MSF contracts, outlined above, namely that **[***]**. We note that for the German contract, the contractual terms that the European Union has identified as "risk reducing" apply in circumstances involving **[***]**. That is, if foreseen development risks, such as technology risks, were to eventuate, it appears that the "risk reducing" terms may not apply. In light of this we also find it difficult to agree that the importance of development risk, including technology risks, is eclipsed by market risk.

6.603. With respect to the European Union's claim that the **[***]**[1080], we have difficulty with this argument. We note that **[***]**. We agree with the United States in this regard.[1081] **[***]**.

6.604. We recognise that there are some differences between the risk profiles of the four A350XWB contracts, just as there were with respect to the contracts in the original proceeding − including between the four A380 contracts − for which the same premium (the WRP) was used. In the original proceeding, as the United States points out, **[***]**, which would constitute "risk-reducing" terms, existed in at least **[***]** A380 LA/MSF contract. Professor Whitelaw's risk premium was nevertheless applied in that proceeding as a *minimum* premium for all contracts, which allowed a finding with respect to "benefit".

6.605. We have difficulty with the European Union's assertion that for the three contracts containing "risk reducing" terms, market risks would be more important than development risks, including technological risks. As we understand it, the consequences of development risk are that there may be delays in the development programme and consequent delivery delays, or that the programme may be discontinued, and thus aircraft may not exist that could have repaid the principal and deliver a return. It is our understanding that delays or programme failure at the development stage could well exacerbate marketing risks, as there would be no, or fewer, aircraft

[1076] European Union's comments on the United States' response to Panel question No. 114, para. 46. (underline added)

[1077] United States' comments on the European Union's response to Panel question No. 100, para. 276.

[1078] See German A380 LA/MSF Contract, (Original Exhibit US-72), (Exhibit USA-83) (BCI), section 6.

[1079] United States' comments on the European Union's response to Panel question No. 93, para. 259. (emphasis original)

[1080] European Union's response to Panel question No. 93, paras. 360-361.

[1081] See United States' comments on the European Union's response to Panel question No. 93, para. 259.

to market. It is thus unclear to us how development risks − involving the risk that there would be no, or fewer, aircraft in existence − could be less important than risks that an aircraft may not sell as well as has been hoped, once it was in existence.

6.606. It is also our understanding that for the **[***]** contract, programme discontinuation would mean that the contractual terms that the European Union has identified as "risk reducing" would no longer apply, except for in narrow circumstances involving **[***]**. If foreseeable development risks, such as technology risks, were to eventuate, the risk reducing terms would no longer apply.

6.607. For these reasons, we are not persuaded that certain terms render the agreements significantly different so as to require the application of two or more different project-specific risk premia in this proceeding.

Conclusion on risk differences that may affect the project-specific risk premium

6.608. Having reviewed the risk differences that may affect the project-specific risk premium, our conclusions are as follows. With respect to development risks (the risk that Airbus will not be able to deliver the planned aircraft as and when anticipated), we consider that the risks associated with the A350XWB were approximately similar to, if not slightly higher than, the A380. With respect to market risk (the risk that the aircraft will not sell as well as anticipated), we consider that the A350XWB marketing risks would not have been much lower than A380 marketing risks. With respect to the price of risk (risk acceptable to the finance industry at different moments of its own market cycle), we are unable to accept the United States' arguments because it did not discharge its evidentiary burden. In summary, we consider that in principle, the overall project-specific risks are sufficiently similar to allow the risk premium applied for A380 LA/MSF in the original proceeding to be applied to A350XWB LA/MSF.

6.609. With respect to the differences between the terms of the A350XWB contracts compared with the terms of the A380 contracts, we consider that the A350XWB LA/MSF contracts containing such "risk-reducing" terms are no less risky than at least **[***]** A380 LA/MSF contract that also contained similar terms in the original proceeding. We recall that for that contract, Professor Whitelaw's risk premium was nevertheless applied in the original proceeding, on the understanding that it "understated" the risk associated with the A380 programme. Thus, we see no reason why the same risk premium cannot also apply to the A350XWB LA/MSF measures. Similarly, as regards the differences in the terms of the individual A350XWB contracts, we are not persuaded that the differences in certain terms affecting the respective contracts' risk profiles would require the application of two or more different project-specific risk premia in this proceeding. Once again, we recall that despite differences in the terms of the A380 LA/MSF measures examined in the original proceeding, the same WRP was applied.

6.610. Therefore, as regards project-specific risk, we consider that the risks would be sufficiently similar to allow a valid risk premium applied to the A380 in the original proceeding to be applied to the A350XWB. We thus consider that Professor Whitelaw's risk premium (the WRP) from the original proceeding could be applied to benchmark LA/MSF for the A350XWB. Thus, if the rates of return are below the market benchmark applying this understated risk premium, it would follow that there is a benefit and, therefore, a subsidy.

6.611. As a final issue, the parties have raised certain arguments regarding the potentially understated nature of the market benchmark. We now briefly address those arguments.

6.5.2.3.3.3 Whether LA/MSF affected or distorted the market benchmark rate

6.612. We now examine whether the proposed market benchmark may be affected by the provision of LA/MSF (either LA/MSF for other aircraft programmes or as expected to be provided for the A350XWB project). This issue arose in the original proceeding only with respect to the project-specific risk premium component of the market benchmark. The European Union's arguments raise a more complex set of questions in this proceeding, regarding the corporate borrowing as well the project-specific risk premium component of a market benchmark. For this reason, we address this in a separate section to either the project-specific risk premium or the corporate borrowing rate. The European Union argues that with respect to the extent to which the WRP is underestimated, in the view of the European Union, the Appellate Body could not have meant by its findings that the provision of LA/MSF distorted risk supplier perceptions and thus the

WRP. The implications of this argument would appear to be to negate a finding that the original WRP was indeed an understated premium. In particular, the European Union argues that: (a) LA/MSF affects only the corporate borrowing rate component of the benchmark and does not affect the project-specific risk premium; (b) the amount of any distortion is "negligible" as reflected in corporate credit ratings; and (c) LA/MSF enhances, rather than reduces, the risk-sharing suppliers' perceptions of risk.

6.613. By way of background, in the original proceeding, with regard to the potential effects of LA/MSF on the benchmark, the panel addressed arguments that:

i. *LA/MSF for a particular project* reduces the actual risk that the project will fail; and correspondingly LA/MSF for a project reduces market participants' perceptions of risk associated with their participation in that project; thus LA/MSF to Airbus for the particular project reduces the level of risk associated with risk-sharing supplier financing for the *project*, thereby limiting the comparability of risk-sharing supplier financing with LA/MSF[1082];

ii. *Prior LA/MSF* to Airbus reduces the actual risk associated with Airbus itself, and market participants' perceptions of risk associated with *Airbus and the project*; therefore, for this reason alone, LA/MSF distorts the risk-sharing supplier benchmark[1083];

iii. *Risk sharing participants* may have also received launch aid-like financing or other government subsidies which *reduces their cost of capital and therefore the returns required on contracts with Airbus*, implying that the returns on their contracts cannot be viewed as fully commercial.[1084]

6.614. The Appellate Body accepted that the risk premium proposed by Professor Whitelaw in the original proceeding was understated because, at least, expectations of LA/MSF for each project would have distorted risk sharing suppliers' perceptions of the project risk.[1085]

6.615. In this proceeding the United States argues that, as in the original proceeding, the effects of LA/MSF on the risk perception of risk sharing suppliers "lower{} the projected minimum returns necessary for them to participate in the program".[1086] The United States and its expert Dr Jordan state that the criticism of the basis for the risk premia introduced in the original proceeding continues to apply: those premia will be artificially depressed as the result of LA/MSF from the Airbus governments.[1087] The United States submits that "{t}he very fact that Airbus receives massive amounts of LA/MSF is at least one factor that substantially reduces the risk incurred by such risk-sharing suppliers".[1088] In the United States' view, as noted above, this renders its proposed risk premium (the JRP) "conservative", and its alternative, Professor Whitelaw's risk-sharing supplier-based premium (WRP) "too-low".

Whether effects on risk perception of LA/MSF are only relevant to the corporate rate or the project-specific risk premium

6.616. We now turn to the European Union's submission that if LA/MSF has an effect on risk perceptions, this is taken into account in the corporate rate, and does not affect the project-

[1082] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.476 and 7.480; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 899-903.
[1083] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.476 (citing the US adoption of Brazil's argument, US Second Confidential Oral Statement, para. 40); Appellate Body Report, *EC and certain member States – Large Civil Aircraft,* paras. 899-906.
[1084] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.476 and 7.480, and fns 2697 and 2713.
[1085] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 899-900.
[1086] United States' second written submission, para. 636.
[1087] Jordan Report, (Exhibit USA-475) (BCI/HSBI), para. 20; and United States' second written submission, para. 285.
[1088] United States' second written submission, para. 291.

specific risk premium.[1089] The implication of this argument would appear to be to negate a finding that the original WRP was understated due to the distorting effect of LA/MSF on risk perceptions of risk sharing suppliers. The European Union submits that LA/MSF might "enhance EADS' credit rating, thus reducing the perception of corporate risk and the company's resulting financial cost … this factor stems not from EADS loans, but from the importance of EADS to the States at issue".[1090]

6.617. The European Union submits that:

> In fact, and contrary to the US assertion, neither the original panel nor the Appellate Body found that EU member State financing affects *project risk*. The original panel found that "LA/MSF reduces the {overall} level of risk associated with risk-sharing supplier financing", specifically *declining* to tie that reduced risk to the *project risk premium* of the benchmark. Similarly, the Appellate Body held that "LA/MSF provided to Airbus results in a{n overall} *rate of return of the risk-sharing suppliers* that understates the level of risk that would be factored in by a market lender in the absence of LA/MSF". Again, this is a broad statement that carefully avoids tying the effect of EU member State financing to the *project risk premium*.[1091] (emphasis original; footnotes omitted)

6.618. We consider this to be an incorrect interpretation of the findings made in the original proceeding. We recall that the original issue of risk sharing supplier perceptions of risk was related to the fact that the suppliers are rational, profit-maximising entities. The Appellate Body noted that the terms that these suppliers negotiate with Airbus depend on how risky they perceive the *specific project* being undertaken to be. The Appellate Body stated that "LA/MSF reduces the risk that the *project* will fail (by, for example, reducing the risk that it will run into financial difficulties) and that it will not generate the revenues necessary to pay suppliers".[1092] The Appellate Body thus explicitly affirmed the general economic principle that both prior LA/MSF and LA/MSF for a particular project reduced the perceptions of risk sharing suppliers because it reduced actual risk associated with *the particular project*.[1093] The Appellate Body stated:

> The European Union asserts that LA/MSF cannot have altered the risk perception of risk-sharing suppliers. We are not persuaded by the European Union's argument. The very purpose of LA/MSF is to provide funding for the development of an LA/MSF model. LA/MSF provided the financial means to undertake the development of an LCA project. By providing funding for a significant share of the development costs, LA/MSF makes it more likely that the project will be developed, and the successful development of a project means that there will be an LCA to sell, thereby reducing the marketing risk of the project. Indeed, the European Communities expressly acknowledged before the Panel that the nature of LA/MSF is to reduce development and marketing risk.[1094]

6.619. We therefore consider that the European Union is wrong to the extent that it submits that the panel and the Appellate Body found in the original proceeding that LA/MSF for the particular project, or prior LA/MSF, has no effect on actual and perceived project-specific risk from the perspective of risk sharing suppliers. With regard to how prior and expected LA/MSF may affect the benchmark, the European Union has not presented any new facts or arguments that have persuaded us that the economic principles taken into account in the original proceeding should not apply in this proceeding.

[1089] European Union's comments on the United States' response to Panel questions Nos. 94 108 and 109 (collective comment), para. 779.

[1090] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), paras. 41-45.

[1091] European Union's comments on the United States' response to Panel question Nos. 94, 108 and 109 (collective comment), para. 778.

[1092] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 899. (emphasis added)

[1093] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 899-907.

[1094] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 904-905.

Whether the amount of any effect of LA/MSF is "negligible" as reflected in corporate credit ratings

6.620. The European Union further argues that risk sharing suppliers' perceptions of risk associated with, for example, the A380 project *would only have been distorted to a negligible degree by LA/MSF* as reflected in corporate credit ratings.[1095] The European Union's expert, Professor Whitelaw, stated that this was shown by the way it is factored into the "government related issuer" status accorded to EADS, the Airbus parent company, by certain credit rating agencies.

6.621. As we see it, the European Union in this proceeding seeks to recast the issue of the distorting effect of LA/MSF as a question regarding how credit ratings agencies take LA/MSF into account, and thus how corporate credit ratings might be distorted due to received and expected LA/MSF. As already noted, we do not consider that this was the issue in the original proceeding. Nevertheless, as the European Union has raised the issue, we consider that the credit agency attribution of government-related issuer/entity (GRI/GRE) status may have an additional, albeit limited, effect on the corporate borrowing rate component of the market benchmark rate, for the reasons explained below.

6.622. Prior, or anticipated, LA/MSF does not appear to be a consideration with relation to Moody's and Standard & Poor's definitions of a Government Related Issuer/Entity (GRI/GRE). Rather, an entity will be said to be a GRI/GRE due to the level of government ownership; whether it is tasked with performing a public function; and possibly the importance to the government of the goods and/or services it provides.[1096] Therefore it seems LA/MSF for particular projects would *not* be taken into account in the credit agencies' decision to define an entity as a GRI/GRE, which is the *first step* in rating such entities.

6.623. Prior LA/MSF, or expected ongoing LA/MSF, *is* likely taken into account by a credit rating agency in a *separate step*, that is, the entity's baseline credit assessment (for Moody's) or stand-alone credit profile (for Standard & Poor's). This step is essentially an assessment of how likely it is that an entity with GRI status will in fact *need* a "bail-out" by the government, as opposed to how likely that entity will *get* such a "bail-out". This assessment will include ongoing support (such as subsidies) as contributing towards the entity's overall financial position. It will not include bail-outs or extraordinary support. LA/MSF, in our opinion, would fall towards the end of 'ordinary, normal and predicted' on the spectrum of support because it is negotiated as part of involvement in a project, and is incorporated into the business operations and expectations of the entity with respect to its cash flows, rather than being an unexpected capital injection in response to crisis or extreme financial distress in order that the entity can meet its obligations to, for example, bondholders. It appears to us that the provision of such ordinary support is incorporated into the baseline credit assessment or stand-alone credit profile. Such ordinary support indeed affects whether the company is strong or struggling. The provision of such ordinary support makes it less likely that the entity is going to need a bail-out, or extraordinary support.[1097]

6.624. LA/MSF could conceivably be a factor considered in assigning the *level of support* that a GRI/GRE might enjoy. This *third step* is essentially an assessment of how likely it is that a government will in fact step in to assist an entity if it is in financial distress – that is, whether the entity will *get* a government bail-out if it needs it. Moody's considered in mid-2005 that EADS has a "medium" level of support: "European Aeronautic Defence & Space Co. ('EADS'), parent of Airbus

[1095] See European Union's second written submission, para. 345-347. (emphasis added)

[1096] Moody's defines a GRI as an entity with full or partial government ownership (20% or greater) or control, or a special charter/public policy mandate from the national or local government, and which does not have taxing authority. (Moody's Investors Service, Rating Methodology, *The Application of Joint Default Analysis to Government Related Issuers*, April 2005, (Exhibit EU-138/381 (exhibited twice)), pp. 1 and 2; and Moody's Investors Service, Special Comment, *Rating Government-Related Issuers in European Corporate Finance*, June 2005 (Exhibit USA-517), p. 2). Standard & Poor's states that "GREs are often partially or totally controlled by a government (or governments) and they contribute to implementing policies or delivering key services to the population. … some entities with little or no government ownership might also benefit from extraordinary government support due to their systemic importance or their critical role as providers of crucial goods and services". (Standard & Poor's, Global Credit Portal Ratings Direct, *General Criteria*, *Enhanced Methodology And Assumptions For Rating Government-Related Entities*, 29 June 2009 (Exhibit USA-519), p. 3).

[1097] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 906.

Industrie, was assigned medium support. EADS is widely recognized as a successful example of common European industrial policy. As a result, any possible support to EADS may be better positioned as in line with common European interest than other GRIs. Again, Moody's view is that the national security aspect of EADS' activities may also provide an incentive for additional support."[1098] In 2007, Moody's decided to − unusually − increase the level of potential support from medium-high to high "to reflect the accumulation of indices that Airbus is perceived as economically, socially and politically critical for a wide range of stakeholders".[1099] This was still an assessment of the likelihood of a bailout, but providing project-specific LA/MSF, and ensuring the terms by which EADS was a successful example of common European industrial policy, may have factored into assessing governments to have an elevated interest in the survival of the company, and the maintenance of its obligations to bondholders and debtholders.

6.625. We turn now to the *amount of distortion* that might be indicated by the ratings methodology. In terms of a quantification of the effect of LA/MSF, the European Union has stated that it considers the "the effect of the GRI status on EADS' cost of debt was negligible, based on estimates performed by two investment banks, Unicredit and Barkley's {*sic*} Capital, which found a decrease of 4 basis points and 5 basis points, respectively, for every one notch improvement in EADS' credit rating. Accordingly, at most, the existence of MSF could account for a fraction of the present 1-notch improvement in EADS' credit rating through its GRI status − *i.e.*, a fraction of 4 to 5 basis points. Even the three-notch difference in the GRI and baseline ratings during the period 2007-2012 resulted in an improvement of only 12 to 15 basis points in the cost of long-term debt; again, the existence of MSF could account for a fraction of that impact."[1100]

6.626. We note that the premise that the European Union's expert, Professor Whitelaw, uses to find the value of any allocation of GRI status appears to be faulty. Professor Whitelaw appears to claim that the (marginal) difference between Moody's and Standard & Poor's ratings will indicate the value of "GRI status". In this regard he claims that "{i}n any event, the effect of EADS' classification as a GRI on its bond yield is negligible … To measure the GRI impact, the banks varied the Moody's rating one and two notches, while holding the S&P rating constant (S&P does not have a GRI rating status). In its report, **[***]** estimates that the current bond yield would change **[***]** basis points for each notch change from Moody's A1 to A3. **[***]** estimates the current yield would change approximately **[***]** basis points per notch over the same credit designations."[1101] While not fully explained, this appears to be a claim that the reason the difference between Moody's and Standard & Poor's ratings could provide an estimate of the value of the GRI/GRE status is because Standard & Poor's "does not have a GRI rating status". To the extent that this is an assertion that Standard & Poor's has no methodology for taking into account the effect of government support on government related entities, we consider that this is incorrect, as Standard & Poor's has an equivalent method of according ratings based on "Government Related Entity" status.

6.627. We further note that the United States has submitted that:

> In general, there is no simple way to disentangle the effects of particular subsidies from the rating agencies' baseline credit assessments and stand-alone credit profile. To do so, it would be necessary (i) to isolate the effects of particular subsidies from the effects of other subsidies and others aspects of the company's relationship with the government, and (ii) to quantify the incremental change in credit rating due to those effects. Moody's and S&P do not provide sufficient information to reverse-engineer the unsubsidized baseline credit assessment accurately. Moreover, in this particular case, Airbus would most likely not exist at all in the absence of LA/MSF, as the original panel found. Therefore, unless one makes exceedingly forgiving assumptions about Airbus' condition absent LA/MSF, as Prof. Wessels does in the

[1098] Moody's Investors Service, Special Comment, *Rating Government-Related Issuers in European Corporate Finance*, June 2005, (Exhibit USA-517), p. 9.

[1099] Moody's Investors Service, Global Credit Research Announcement, *Moody's confirmation of EADS highlights government's role as odd rescuers*, 12 March 2007, (Exhibit EU-139).

[1100] European Union's response to Panel question No. 94, para. 373 (citing Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), paras. 43 and 45). See also European Union's second written submission, paras. 343-347.

[1101] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), paras. 41-45.

> adverse effects context, it is not possible to determine a credit rating for Airbus (or by extension, EADS) in the absence of LA/MSF.[1102]

6.628. We find this argument compelling. We note the limitations adverted to in the agencies' documentation, for example that the baseline credit assessment is a "precisely defined input" and should not be construed as a "stand-alone" rating, thereby limiting the relevance of the European Union's argument that the distorting effect of LA/MSF is captured in the difference between the baseline credit assessment and the purported value of the GRI status. We therefore consider the United States' argument that quantification is not possible on the basis of the information provided by the ratings agencies to be more persuasive than the European Union's quantification.

6.629. Overall, GRI/GRE status may have had an impact, albeit to a small degree, on the corporate credit rating of EADS. This might be attributable to the receipt of LA/MSF for aircraft prior to the A350XWB, as "regular, ongoing support", affecting the baseline assessment and, possibly, in factoring in the likelihood of the extension of extraordinary support. It is possible also, in our view, that LA/MSF had an effect on the ranking of the likelihood of support for a GRI/GRE (likelihood that EADS would *get* a bail-out) and a corresponding effect on the perceptions of bondholders. However, this is a *different issue* to whether the receipt of prior LA/MSF or the expectation of LA/MSF for the particular aircraft development programme contributed to an actual or perceived decrease in either general corporate borrowing risks, or risks involved with the A350XWB project from the perspective of risk sharing suppliers participating in the project.

Whether LA/MSF enhances, rather than reduces, perceptions of risk

6.630. As an additional issue, the European Union responds to the United States' submissions, and indeed to the Appellate Body's findings in this regard, by stating that there is no reason why the effect on perceived project risk of LA/MSF is any different to financing from a market-based source, and that "the effect of perceived project risk works both ways".[1103] By this, the European Union appears to mean that the existence of LA/MSF gives the member States a claim to cash flow associated with the delivery of an aircraft, which would make risk sharing suppliers see member States "as rival claimants" for cash flow on deliveries of aircraft, "a factor that *enhances*, rather than reduces, their perception of risk".[1104] This appears to be an argument that any distortion to the benchmark caused by LA/MSF would be to increase rather than decrease the perceptions of risk held by the risk-sharing suppliers.

6.631. Professor Whitelaw's argument is based on the premise that the only way in which the risk sharing suppliers would experience reduced perception of project risk is if Airbus could forego funding for LCA and rely on its own corporate funds, with participation by risk sharing suppliers.[1105] We do not find this argument compelling, and consider that it is at odds with the general economic principle articulated in the original proceeding, namely that, in particular, risk sharing suppliers participating in the aircraft development project perceive that there will be more funds with which to produce the aircraft. We consider that the European Union's argument is at odds with both: (a) the principle that LA/MSF for a particular project reduces the actual risk that project will fail; and correspondingly LA/MSF for a project reduces market participants' perceptions of risk associated with their participation in that project[1106]; and (b) the principle that prior LA/MSF to Airbus reduces the actual risk associated with Airbus itself, and market participants' perceptions of risk associated with Airbus and the project; therefore, for this reason alone, LA/MSF distorts the

[1102] United States' response to Panel question No. 115.
[1103] European Union's second written submission, paras. 345-346 (citing Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), paras. 34-35).
[1104] European Union's second written submission, para. 347. (emphasis original)
[1105] Whitelaw Response to Jordan, (Exhibit EU-121) (BCI/HSBI), para. 38.
[1106] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.476 and 7.480 ("{G}overnment support for the A380 in the form of LA/MSF reduces the level of risk associated with risk-sharing supplier financing, thereby limiting its comparability with LA/MSF"); and Appellate Body Report, *EC and certain member States – Large Civil Aircraft,* paras. 899-903).

risk sharing supplier benchmark.[1107] Accordingly, we are not persuaded by the European Union's arguments in this regard.

6.5.2.3.4 Conclusion on whether the IRRs of the A350XWB LA/MSF measures are lower than the relevant market benchmark rate

6.632. Considering the above, applying the WRP to give a benchmark rate for LA/MSF for the A350XWB gives the following results:

Table 10: Approximate difference between rates of return and market benchmark rate

EU member State	Expected Internal Rate of Return (IRR) of LA/MSF contracts A	Corporate borrowing rate as reflected by yield on EADS bond B	Normal market fees C	WRP[1108] D	Amount by which benchmark exceeds IRR (B+C+D)-A
France	**[***]**	**[***]** to **[***]**	**[***]**	WRP	(**[***]** +WRP)-**[***]** to (**[***]**+WRP)-**[***]**
Germany	**[***]**	**[***]** to **[***]**	**[***]**	WRP	(**[***]** +WRP)-**[***]** to (**[***]**+WRP)-**[***]**
Spain	**[***]**	**[***]** to **[***]**	**[***]**	WRP	(**[***]** +WRP)-**[***]** to (**[***]**+WRP)-**[***]**
United Kingdom	**[***]**	**[***]** to **[***]**	**[***]**	WRP	(**[***]** +WRP)-**[***]** to (**[***]**+WRP)-**[***]**

6.633. In view of these calculations, we find that the (likely understated) rate of return that a market lender would require for lending on similar terms and conditions to the A350XWB LA/MSF contract is in each case *higher* than the (likely overstated) IRR calculated by the European Union as representing the rates of return that the member States expected and accepted. We consider that Airbus paid a lower rate of return for LA/MSF for the A350XWB than would have been available to it on the market, that this constituted terms more advantageous than the market would provide, and that consequently a benefit has thereby been conferred pursuant to Article 1.1 of the SCM Agreement.

6.5.2.3.5 Additional evidence and considerations concerning whether LA/MSF was offered on better-than commercial terms

6.634. While we have already determined on the basis of a market benchmark analysis that the A350XWB LA/MSF measures confer a benefit, certain evidence on record, in our view, confirms that conclusion.

[1107] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.476 (referring to the US adoption of Brazil's argument, US Second Confidential Oral Statement, para. 40); and Appellate Body Report, *EC and certain member States – Large Civil Aircraft,* paras. 899-906.

[1108] The WRP (Whitelaw Risk Premium) is an HSBI figure from the original proceeding, as detailed in paragraphs 6.433 and 6.457 above. (See Jordan Report (Exhibit USA-475) (BCI/HSBI), para. 15.)

6.5.2.3.5.1 Absence of written project appraisals, analyses or evaluations of the A350XWB project, and other information

6.635. We recall that in response to the United States' request for the Panel to exercise its authority under Article 13 of the DSU to "seek information" in relation to the A350XWB LA/MSF measures, we asked the European Union to provide four categories of documents, including "project appraisals" relating to the "development and/or financing of the A350XWB" undertaken by the governments of France, Germany, Spain and the United Kingdom, and A350XWB "{b}usiness cases provided by EADS/Airbus" to the same governments, or to "any of Airbus' risk-sharing suppliers".[1109]

6.636. In terms of "project appraisals", the European Union submitted one project appraisal undertaken by the UK Government, and referred to the annexes of the French and German A350XWB LA/MSF contracts, asserting that these "address, *inter alia*, prospects for the A350XWB programme".[1110] The European Union subsequently explained that the governments of France and Spain did not prepare a "formal project appraisal when deciding to offer financing for the A350XWB", and that the government of Germany "relied upon" material contained in "many" of the "large number of appendices" to the German A350XWB LA/MSF contract "in deciding whether to provide financing for the project".[1111] In response to further questioning, the European confirmed that, like the French and Spanish governments, the German Government also did not "formulate" any independent appraisals, analyses or evaluations of the A350XWB project "when deciding whether to provide" LA/MSF for the A350XWB programme.[1112]

6.637. In terms of the A350XWB business case, the European Union provided "a business case-related document" that Airbus subsidiaries in France, Germany, Spain and the United Kingdom apparently "shared with the governments of France, Germany (including KfW), Spain and the United Kingdom, as well as, in substance, with various of its **[***]**".[1113] This document consists of twelve slides from an EADS presentation dated **[***]** containing information about then-current A350XWB orders and customers, anticipated air traffic growth worldwide, the models of LCA anticipated to form part of the A350XWB family, the market position and performance of the A350XWB relative to the 777 and the 787, and the projected number of A350XWB deliveries. The document contains no information or analyses regarding: (i) the amount, form and terms of the LA/MSF requested by, and/or offered to, Airbus; (ii) any IRR or net present value (NPV) analyses of the A350XWB project on the basis of different scenarios, as of the time of the LA/MSF request; (iii) any sensitivity analyses of the viability of the A350XWB project, in the light of different assumptions, at the time of the LA/MSF request; (iv) the risks associated with the A350XWB project at the time of the LA/MSF request; and (v) key information as to anticipated revenues that, given the structure of LA/MSF, would have been necessary in order to perform an IRR or NPV analysis.[1114]

6.638. A presentation of the A350XWB business case that was relied upon by the Board of EADS to launch the A350XWB programme was submitted by the European Union to substantiate arguments advanced in its second written submission.[1115] The European Union subsequently clarified that the A350XWB business case presentation had not been provided in response to our Article 13 DSU request for A350XWB "business cases" because it was "never presented either to the EU member States or to any of Airbus' risk-sharing suppliers".[1116] We note that other evidence

[1109] See United States' Article 13 request of 20 July 2012 (Panel ruling issued on 4 September 2012), para. 13, Annex E-1.
[1110] European Union's response to the Panel's request of 4 September 2012 pursuant to Article 13.1 of the DSU, para. 3.
[1111] European Union's response to Panel question No. 96(b).
[1112] European Union's response to Panel question No. 124(a).
[1113] European Union's response to the Panel's request of 4 September 2012 pursuant to Article 13.1 of the DSU, para. 4.
[1114] **[***]** presentation, **[***]**, (Business case-related document) (Exhibit EU-(Article 13)-35) (HSBI).
[1115] "Presentation to the EADS Board", 7 November 2006 (slides 1-45) and "A350XWB Business Case: Assumptions, Sensitivities and Limitations, Presentation to EADS BoD – status", 2 November 2006, (slides 46-68) ("A350XWB Business Case Presentation"), (Exhibit EU-130) (Revised) (HSBI).
[1116] European Union's response to Panel question 96(a).

indicates that **[***]**[1117], but no such document was introduced as evidence by the European Union or otherwise submitted in response to our questions.

6.639. According to the United States, the European Union's account of the facts surrounding the disclosure of the A350XWB business case to the relevant European Union member States "appears to be incomplete", suggesting that the European Union has withheld information.[1118] In this connection, the United States refers to a statement made to the UK Parliament by Ian Lucas, then-Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills, in June 2009, revealing that the UK Government performed a "detailed analysis of the company's business case"[1119] before finalizing the A350XWB LA/MSF agreement with Airbus.

6.640. The European Union dismisses the United States' contentions, explaining that when considered in context, the relevant "statement by a UK politician" refers to a "concept" not a "specific document".[1120] In particular, the European Union notes that the full statement at issue reads as follows:

> {a}s part of our usual due diligence process when considering launch investment requests, the Government have carried out a detailed assessment of the possible provision of support to Airbus for the A350XWB aircraft. This includes detailed analysis of the company's business case, technical viability of the project, the potential market, and anticipated benefits to the UK aerospace industry and the wider economy. As a result of this analysis we are proceeding with negotiations with the company.[1121]

6.641. According to the European Union, the reference to "the company's business case, technical viability of the project, the potential market, and anticipated benefits to the UK aerospace industry and the wider economy" is a reference to "the factors subject to the UK Government's 'assessment' and 'analysis', culminating in a document – i.e., the 'UK government document regarding A350XWB'" (the UK Appraisal).[1122] Indeed, the European Union submits that the "detailed analysis" mentioned by the UK Parliamentary Under-Secretary of State "*is* the analysis contained" in the UK Appraisal.[1123] In this regard, the European Union identifies, at most, eight sentences from four paragraphs of the UK Appraisal, which the European Union submits confirms that the "detailed analysis of the company's business case" referred to by the UK Parliamentary Under-Secretary of State was contained in that document.[1124]

6.642. In our view, the few sentences the European Union has quoted from four paragraphs of the UK Appraisal are not compatible with a "*detailed analysis* of the company's business case". The UK Appraisal was based in part on the "due diligence" undertaken in three analyses performed by three separate entities – **[***]** and the **[***]**. Indeed, the European Union explains that the UK Appraisal drew its conclusions on the basis of the analyses performed by those entities.[1125] Thus, it is possible that the UK Minister of State's reference to a "detailed analysis" of factors including "the company's business case" might well have been a reference to the work performed by these entities. We note, however, that the European Union did not provide a copy of the three separate analyses undertaken by **[***]** and the **[***]** in response to our explicit request for those documents.[1126] This makes it impossible for us to understand the source of the information used to reach the conclusions made in the UK Appraisal and, therefore, we are unable to verify the European Union's assertions concerning the meaning of the UK Minister of State's statement.

6.643. Thus, accepting the accuracy of the information provided by the European Union, it is apparent that when the governments of France, Germany and Spain agreed to provide, respectively, **[***]** to Airbus for the A350XWB project under the LA/MSF contracts (which, we

[1117] The European Union has not provided information described in HSBI material (A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 48 (lines 1 and 8-9)).
[1118] United States' comments on the European Union's response to Panel question No. 96(a).
[1119] UK House of Commons Hansard, written answers for 29 June 2009, (Exhibit USA-152), p. 4.
[1120] European Union's response to Panel question No. 123(a).
[1121] UK House of Commons Hansard, written answers for 29 June 2009, (Exhibit USA-152), p. 4.
[1122] European Union's response to Panel question No. 123(a).
[1123] European Union's response to Panel question No. 123(c). (emphasis added)
[1124] European Union's response to Panel question No. 123(c). (emphasis added)
[1125] European Union's response to Panel question No. 123(e).
[1126] European Union's response to Panel question No. 123(e).

recall, are unsecured and success-dependent loan agreements with generally back-loaded repayment terms), they each did not undertake their own independent written appraisal, analysis or evaluation of the A350XWB project. This contrasts with the approach taken by the United Kingdom, which performed "a detailed assessment of the possible provision of support to Airbus for the A350XWB aircraft" as "part of {the} usual due diligence process when considering launch investment requests".[1127] That the governments of France, Germany and Spain did not perform a written appraisal, analysis or evaluation of the A350XWB project is also a departure from the approaches taken by these European Union member States in relation to previous grants of LA/MSF, when they did prepare their own critical appraisals of the projects.[1128]

6.644. The European Union maintains that all four European Union member States possessed additional information about the A350XWB project that would have enabled them to undertake their own separate appraisals, analyses and evaluations.[1129] For example, the European Union explains that relevant information was disclosed to the European Union member States during the course of negotiations for LA/MSF, which Airbus' Executive Vice President for Programmes characterized as having been "difficult and intensive"[1130], following **[***]**.[1131] The European Union also specifically refers to certain information contained in a number of the annexes to the French and German LA/MSF Contracts, a letter from Airbus to **[***]** and the **[***]**.[1132]

6.645. We note that there is no record of the content of the **[***]**, with the European Union pointing to only one item on the agenda for that meeting – **[***]** – to substantiate its factual assertion. Moreover, the only details of note that are clarified in the one and a half page Airbus letter to **[***]** that were not already set out in the "business case related document" are the percentage of the **[***]** workshare in the A350XWB project and the amount of requested LA/MSF from the **[***]** Government.[1133] It is apparent, however, from the nature of the information contained in the relevant annexes to the French and German LA/MSF contracts that the Airbus governments received more information about the nature of the A350XWB project over the course of negotiations. We agree with the European Union that much of this information should have enabled the Airbus governments to analyse and form their own views about a number of important aspects of the A350XWB project relating to its costs and its anticipated commercial success. However, we see nothing in the relevant information that would have enabled the governments to analyse and form their own views about the development risks associated with the project or about the anticipated revenue streams necessary to determine the contractual rates of return and, therefore, the overall feasibility and attractiveness of the A350XWB programme.

6.646. The European Union argues that because of the sales-dependent nature of the returns the European Union member States expected to achieve from the LA/MSF contracts, the marketing risks associated with the A350XWB project were of "much greater importance" to the European Union member States than the "technological risk".[1134] On this basis, the European Union appears to suggest that there was, therefore, no need for Airbus to provide the European Union member States governments with any sensitivity analyses of the viability of the A350XWB project or information on the risks associated with the A350XWB at the time that LA/MSF was requested.[1135]

6.647. We recall, however, that the European Union accepts that one aspect of the project-specific risk associated with the provision of LA/MSF for the A350XWB is precisely the risk that Airbus would not be able to successfully develop the aircraft. Indeed, the fact that the parties' respective views on the development risk associated with the A350XWB have informed the identification of the appropriate project specific risk premium in the construction of the market

[1127] UK House of Commons Hansard, written answers for 29 June 2009, (Exhibit USA-152), p. 4.

[1128] The European Union points out that in the light of the United States' "abrogation" of the 1992 Agreement, "there was no requirement that any of the EU member States undertake a critical project appraisal before committing to provide financing for the A350XWB". (European Union's response to Panel question No. 96(b).)

[1129] European Union's response to Panel question Nos. 123, 124 and 125.

[1130] See European Union's response to Panel question No. 123, para. 54.

[1131] Statement by Tom Williams, Executive Vice President, Programmes, Airbus SAS, 17 May 2013, (Exhibit EU-354) (BCI), para. 3.

[1132] European Union's response to Panel question Nos. 123(a), 124 and 125.

[1133] Letter, Airbus **[***]**, **[***]**, (Exhibit EU-393) (HSBI).

[1134] European Union's response to Panel question No. 124.

[1135] European Union's response to Panel question No. 124.

interest rate benchmark for LA/MSF, implies that such considerations should normally be expected to form part of a market lender's due diligence. In this regard, we note that the "technical viability" of the A350XWB project was, in fact, part of the "detailed analysis" performed by the UK Government. This suggests that not only did the UK Government consider the development risk associated with the A350XWB to be an important part of its overall appraisal, but also that the UK Government possessed information enabling it to assess the technical risks associated with the project. As already noted, however, we find no such detailed information in the documents the European Union asserts were in the possession of the European Union member States. This implies that the UK Government undertook its analysis of the "technical viability" of the A350XWB on the basis of information that did not come from Airbus.

6.648. Moreover, we note that there is also no evidence that the European Union member States received any information from Airbus about the projected revenues of the A350XWB programme. Indeed, the European Union was unable to confirm that the European Union member States had that information at the time of concluding the LA/MSF contracts.[1136] Yet, in the absence of such information, there would have been no basis for the French, German and UK governments to accurately determine the IRRs of their respective LA/MSF contracts, *including royalties*, on the basis of the schedule of anticipated deliveries.

6.649. In the light of the above facts and considerations, we come to the following conclusions about the method and facts used by the European Union member States to inform their decisions to agree to provide A350XWB LA/MSF:

i. Despite having engaged in A350XWB LA/MSF negotiations **[***]** using the services of "multiple" "legal and financial advisors" and having apparently conducted their own "due diligence"[1137], the governments of France, Germany and Spain did not "formulate" or undertake any written appraisal of the A350XWB project;

ii. To the extent that France, Germany and Spain did undertake any appraisal, analysis or evaluation of the A350XWB project, there is no written record and, moreover, any such unwritten appraisal, analysis or evaluation was based on information provided by Airbus that did not address the development risks of the A350XWB project;

iii. The "detailed analysis" performed by the UK Government of the "technical viability" of the A350XWB project, which we recall we have found to pose the same or a greater challenge to Airbus than the A380 in terms of development risk, was based on information that was not provided by Airbus about the technical specifications and/or development risks associated with the A350XWB; and

iv. The information on projected revenue streams that would have been required for the governments of France, Germany and the United Kingdom to accurately determine the IRRs of their respective LA/MSF contracts, *including royalties*, on the basis of the schedule of anticipated deliveries was not provided to those European Union member States.

6.650. In considering the relevance of these findings to our previous conclusion that the governments of France, Germany, Spain and the UK provided A350XWB LA/MSF on below-market interest rate terms, we are guided by the following passage from the Appellate Body's report in the original proceeding:

> Because the assessment {of whether a loan confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement} focuses on the moment in time when the lender and borrower commit to the transaction, it must look at how the loan is structured

[1136] The Declaration sworn by **[***]**, Controller for the A350XWB programme at Airbus, indicates that the pricing information used to generate the IRRs provided in this dispute dates from **[***]**. (See Declaration by **[***]**, Controller, A350XWB Programme Airbus, 10 April 2014 (Exhibit EU-506) (HSBI)). However, neither Airbus nor the European Union is able to confirm that this information was known to the EU member State governments on signing the respective A350XWB LA/MSF contracts.

[1137] Statement by Tom Williams, Executive Vice President, Programmes, Airbus SAS, 17 May 2013 (Exhibit EU-354) (BCI), paras. 3 and 6.

> and how risk is factored in, rather than looking at how the loan actually performs over time.{} Such an *ex ante* analysis of financial transactions is commonly used and appropriate financial models have been developed for these purposes. The analysis from a financial perspective proceeds as follows. The investor commits resources to an investment in the expectation of a future stream of earnings that will provide a positive return on the investment made. In deciding whether to commit resources to a particular investment, the investor will consider alternative investment opportunities. The investor will make its decision to invest on the basis of information available at the time the decision is made about market conditions and projections about how those economic conditions are likely to develop (future demand and price for the product, future costs, etc.). The information will be, in most cases, imperfect. The investor does not have perfect foresight and thus there is always some likelihood, in some instances a sizeable one, that the investor's projections will deviate significantly from what actually transpires. Hence, determining whether the investment was commercially rational is to be ascertained based on the information available to the investor at the time the decision to invest was made.[1895]
>
> ———————————
>
> [1895] Such an ex ante approach is wholly consistent with the manner in which financial methods have been developed to test projections through sensitivity analysis and scenario building.[1138] (footnote original)

6.651. Although the Appellate Body's statement was made to emphasize that the "commercial rationality"[1139] of a loan must be judged on the basis of the parties' expectations existing at the time of the conclusion of the loan contract, it is apparent that it also recognizes that a commercial investor would be normally expected to perform a certain degree of due diligence in relation to the current and future "economic conditions" of a particular project before agreeing to enter into a loan contract. In our view, the conclusions we have reached about the method and facts used by the European Union member States to inform their decisions to agree to provide Airbus with approximately EUR **[***]** in A350XWB LA/MSF suggest that they have each, to differing degrees, fallen short of the standard that one would expect a commercial lender to normally satisfy. As we see it, this evidence suggests that the European Union member States entered into the A350XWB LA/MSF contracts in a manner that is inconsistent with that of a commercial lender, thereby confirming our finding of subsidisation.

6.5.2.3.5.2 Government evaluations and statements

6.652. The United States argues that a number of UK Government documents and statements, and one agreement between the French State and the *Office national d'études et de recherches aérospatiales* (ONERA), demonstrate that A350XWB LA/MSF was not provided on commercial terms. Among the documents the United States relies upon in relation to the UK A350XWB LA/MSF measures, are various public UK Government documents, which state that LA/MSF is "necessary to supplement market financial support" and that the fundamental rationale of launch investment is to address the apparent "unwillingness of capital markets to fund {LCA} projects with such high product development costs, high technological and market risks and such long pay back periods".[1140] We also note that the UK Appraisal (which was not made public) makes similar

[1138] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836 (footnote omitted).

[1139] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 836.

[1140] See UK House of Commons Business, Innovation and Skills Committee, "Full Speed ahead: maintaining UK excellence in motorsport and aerospace", Sixth Report of Session 2009-10, Report, formal minutes, and oral and written evidence, 9 March 2010, (Exhibit USA-44), p. 10 (para. 17); "Repayable Launch Investment", UK Department for Business, Innovation and Skills website, accessed February 2012, (Exhibit USA-63); and "Aerospace and Defence Industries Launch Investment", UK Department of Trade and Industry website, 2006 accessed 21 October 2006 (Original Exhibit US-106), (Exhibit USA-120).

statements that are HSBI.[1141] Another UK Government document refers to "a clearly identified need" for government funding.[1142]

6.653. While, as in the original proceeding, we recognise that having committed public monies, it is possible that public officials would be inclined to publicly describe government participation in Airbus projects as essential[1143], the internal documents echo those views, which suggests they are properly reflective of the UK Government's actual position. This provides further support for our conclusion that LA/MSF for the A350XWB − especially in the UK context − confers a "benefit".

6.654. While we are less certain that the ONERA Agreement[1144] provides relevant evidence of the French Government's non-commercial behaviour *vis-à-vis* A350XWB LA/MSF, not least because it postdates the A350XWB LA/MSF contracts and because the extent to which it governs the French grant of LA/MSF for the A350XWB is not clear, we consider that it provides a statement of the French Government's views in this regard, and that this also lends further support to our conclusion above.

6.5.2.4 Conclusion on whether A350XWB LA/MSF is a subsidy

6.655. LA/MSF is a financial contribution involving a direct transfer of funds, in the form of a loan, pursuant to Article 1.1(a)(1)(i) of the SCM Agreement.

6.656. With respect to the parties' dispute as to whether a benefit is conferred by such financial contribution pursuant to Article 1.1(b), the rates expected under the A350XWB LA/MSF contracts are lower than a relevant market benchmark. We therefore conclude that a "benefit" has thereby been conferred and the French, German, Spanish and UK LA/MSF agreements for the A350XWB each constitute a subsidy within the meaning of Article 1.1 of the SCM Agreement.

6.5.2.5 Specificity

6.657. The United States claims that the French, German, Spanish and UK A350XWB LA/MSF subsidies are specific within the meaning of Article 2 of the SCM Agreement.[1145] The European Union does not contest the United States' claims of specificity.

6.658. We note that each of the challenged financial contributions is negotiated with and provided to the relevant Airbus subsidiary, with the parent company (EADS) in some instances acting as a co-contractee or guarantor. It follows that the subsidies granted under each of the contracts are explicitly limited to "certain enterprises" within the meaning of Article 2.1(a) of the SCM Agreement. We therefore find that each of the subsidies granted pursuant to the challenged A350XWB LA/MSF contracts is specific within the meaning of Article 2.1(a) of the SCM Agreement, and can therefore be challenged under Part III of the Agreement.

6.5.3 Whether the LA/MSF measures for the A380 and A350XWB are prohibited export subsidies

6.5.3.1 Introduction

6.659. In this compliance proceeding, the United States claims that the LA/MSF subsidies granted by the European Union member States in connection with the A380 and A350XWB programmes

[1141] HSBI version of the United States' second written submission, para. 281 (citing HSBI material in the UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 4 (bullet point 3, lines 1-2)).

[1142] Such need "is usually founded in either market failure or where there are clear government distributional objectives that need to be met". (UK Treasury, "the Green Book: appraisal and evaluation in Central Government", 2003 edn, updated in July 2011, (Exhibit EU-352), para. 3.2).

[1143] See Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 1919.

[1144] "Reimbursable advances permit the State and industry to share the risk linked to the development of new aircraft. Taking account of the capital intensiveness required for such development operations, recourse to this system is generally necessary to supplement market financial support." (*Investissements d'avenir, convention 'opérateur ONERA' Action: 'recherche dans le domaine de l'aéronautique'*, 31 July 2010, (ONERA Agreement, (Exhibit USA-54), art. 3.1).

[1145] United States' first written submission, para. 533. See also United States' second written submission (HSBI version), para. 588.

are *de facto* contingent upon export performance and are, therefore, prohibited subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.[1146] We recall that the United States made the same claims in relation to the *A380 LA/MSF measures* in the original proceeding, with the panel finding that the United States had substantiated them with respect to the German, Spanish and UK A380 LA/MSF measures, but not the French A380 LA/MSF measures.[1147] On appeal, the Appellate Body reversed the original panel's findings, concluding that the panel had erred in interpreting and applying Article 3.1(a) and footnote 4 of the SCM Agreement.[1148] However, after articulating the correct interpretation of these provisions, the Appellate Body found itself unable to "complete the analysis" due to a lack of sufficient factual findings or undisputed facts on the panel record.[1149] We concluded earlier in this Report that the United States is entitled to pursue its Article 3.1(a) claims against the A380 LA/MSF measures in this compliance dispute, and we now proceed to examine their merits, together with the merits of the United States' Article 3.1(a) claims against the A350XWB LA/MSF measures, in the following subsections. We start by recalling the findings made by the Appellate Body in the original proceeding and exploring the guidance provided for how to determine whether a subsidy is *de facto* contingent upon export performance within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.

6.5.3.2 Findings of the original panel and Appellate Body

6.660. Before the original panel, the United States argued that each of the A380 LA/MSF contracts[1150] constituted a prohibited subsidy contingent in fact upon export performance within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.[1151] The original panel, citing footnote 4 of the SCM Agreement and the Appellate Body report in *Canada – Aircraft*, articulated three elements necessary to find a prohibited *de facto* export subsidy: (a) the "granting" of a subsidy (b) that is "tied to" (c) "actual or anticipated exportation or export earnings."[1152] The original panel found the first element satisfied because the original panel report had earlier concluded that the A380 LA/MSF measures were specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement granted to Airbus by the relevant European Union member States.[1153] The original panel then concluded that when the relevant European Union member States granted the A380 LA/MSF measures to Airbus the governments "anticipated exportation or export earnings" *vis-à-vis* the A380, thus satisfying the third element.[1154] The original panel considered that the second element, i.e. the "tied to" element establishing contingency between the granting of a subsidy and export performance, "may be demonstrated where the subsidy was granted *because* the granting authority anticipated export performance."[1155] Applying this legal standard, the original panel examined the evidence[1156] and concluded that the German, Spanish, and UK A380 LA/MSF subsidies were *de facto* contingent on export performance. The original panel

[1146] The United States does not argue that any such subsidy is *de jure* contingent on export performance.
[1147] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.689.
[1148] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1102 and 1103.
[1149] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1104 and 1415(b).
[1150] The United States also argued that LA/MSF measures regarding other Airbus LCA constituted prohibited export subsidies before the original panel, but such claims are not at issue in this compliance proceeding.
[1151] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.582. The United States also argued that the contracts were contingent in law upon export performance, but these claims were rejected by the original panel, were not at issue before the Appellate Body, and are not at issue in this compliance proceeding.
[1152] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.630.
[1153] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.650.
[1154] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.654.
[1155] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.644. (emphasis original)
[1156] This evidence "included not only evidence showing that compliance with the sales-dependent contractual repayment terms would necessarily involve exportation, but also evidence of the three governments' anticipation of export performance, the fact that they counted upon and expected Airbus to fully repay the loaned principal plus interest, as well as other contractual provisions and information advanced by the United States that revealed at least part of the respective government's motivation for entering into each contract". (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.690) (footnote omitted)

concluded, however, that the French A380 LA/MSF measure was not *de facto* contingent on export performance.[1157]

6.661. Both the European Union and the United States appealed certain aspects of the original panel's findings in this context. The Appellate Body report affirmed the original panel's findings that the A380 LA/MSF measures were specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement that had been granted to Airbus by the relevant European Union member States.[1158] The Appellate Body also upheld the original panel's findings that all four relevant European Union member State governments anticipated exportation or export earnings *vis-à-vis* the A380 when they granted Airbus the A380 LA/MSF subsidies.[1159]

6.662. The Appellate Body, however, found that the original panel had articulated the incorrect legal standard governing the evaluation of *de facto* export *contingency*. According to the Appellate Body, the correct legal standard was not whether the subsidy was granted *because* the granting authority anticipated export performance, but, rather, whether the granting of the subsidy was "geared to induce the promotion of future export performance by the recipient".[1160] We will refer to this test as the Export Inducement Test. In promulgating the Export Inducement Test, the Appellate Body articulated essential qualities of subsidies that the test − and, therefore, Article 3.1(a) of the SCM Agreement − is designed to discipline. In particular, the Appellate Body explained that the Export Inducement Test is satisfied "when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[1161] Moreover, the Appellate Body stated that "{e}xport-contingent subsidies will … favour a recipient's export sales over its domestic sales."[1162]

6.663. The Appellate Body also offered guidance concerning analytic tools with which a panel may attempt to detect such qualities. Specifically, the Appellate Body indicated that this inquiry could be based on a comparison of "the ratio of *anticipated* export and domestic sales of the subsidized product that would come about in consequence of the granting of the subsidy" and "the situation in the absence of the subsidy."[1163] We will refer to the former as the Anticipated Ratio, the latter as the Baseline Ratio, and the comparison and interpretation of these two ratios as the Ratios Analysis. The Appellate Body report stated that a Baseline Ratio could be derived from historic sales data concerning the "same product" (or, in this case, the "same LCA model") "before the subsidy was granted."[1164] This Report will refer to this as the Historic Baseline Method. The Appellate Body also stated that a Baseline Ratio could, alternatively, be based on "the hypothetical performance of a profit-maximizing firm in the absence of the subsidy".[1165] We will refer to this method as the Hypothetical Baseline Method.

6.664. Having concluded that the original panel had applied the incorrect legal standard governing *de facto* export contingency, the Appellate Body reversed the original panel's findings that the German, Spanish and UK A380 LA/MSF contracts were *de facto* contingent on export performance and that the French A380 LA/MSF contract was not.[1166] The Appellate Body then attempted to complete the legal analysis, but concluded that the original panel's findings and the undisputed evidence on the record only established that when the relevant member States granted Airbus the A380 LA/MSF measures they anticipated exportation or export earnings, and thus did not resolve the Export Inducement Test.[1167] The Appellate Body then attempted to perform a Ratios Analysis,

[1157] Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.689.
[1158] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 929.
[1159] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1080.
[1160] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1044. The Appellate Body explained that the legal standard espoused by the original panel improperly "equated the standard of export contingency with the reason(s) for granting a subsidy". (Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1063)
[1161] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1045.
[1162] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1053.
[1163] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1047. (emphasis original)
[1164] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 1047 and 1099.
[1165] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1047.
[1166] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 1083 and 1103.
[1167] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 1091 and 1097-1098.

but found that there was insufficient evidence on the record with which to do so. Unable to establish whether the requisite contingency existed between the granting of the A380 LA/MSF measures and export performance, the Appellate Body left the claim of whether the A380 LA/MSF measures constitute prohibited *de facto* export subsidies unresolved.[1168] We resolve this claim now along with the United States' claim that the A350XWB LA/MSF measures are also prohibited *de facto* export subsidies within the meaning of Article 3.1(a) of the SCM Agreement.

6.5.3.3 Arguments of the United States

6.665. The United States argues that the French, German, Spanish and UK LA/MSF contracts for both the A380 and A350XWB programmes are prohibited *de facto* export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement. Regarding the A380 LA/MSF contracts, the United States asserts that the original panel and the Appellate Body have already concluded that the these measures are subsidies granted to Airbus in anticipation of exportation or export earnings, and therefore the only unresolved issue is whether they were "tied to", i.e. contingent upon, export performance. The United States argues that a Ratios Analysis was the "single missing element {in the Appellate Body report} that prevented a successful demonstration that the {A380} LA/MSF measures were export contingent in fact"[1169], and that the A380 Baseline Ratio was the only part missing from the Appellate Body's Ratios Analysis.[1170] The United States then calculates an A380 Anticipated Ratio of 2:8[1171], calculates an A380 Baseline Ratio of 2:5, performs a Ratios Analysis, and concludes that the Ratios Analysis demonstrates that the A380 LA/MSF contracts are *de facto* contingent on export performance.[1172] Further, the United States, relying on both publicly available evidence and the A350XWB LA/MSF contracts themselves, argues that the A350XWB measures were granted in anticipation of exportation or export earnings.[1173] The United States then calculates an A350XWB Anticipated Ratio of 2:21[1174], calculates an A350XWB Baseline Ratio of 2:11[1175], performs a Ratios Analysis, and concludes that the Ratios Analysis demonstrates that the A350XWB LA/MSF contracts are *de facto* contingent on export performance.[1176] In other words, the United States concludes that these subsidies are *de facto* contingent upon export performance because the Ratios Analyses show that in the presence of the subsidies Airbus would export a greater proportion of A380s and A350XWBs than Airbus would in the subsidies' absence.

6.5.3.4 Arguments of the European Union

6.666. The European Union argues that neither the A380 LA/MSF measures nor the A350XWB LA/MSF measures are prohibited *de facto* export subsidies. The European Union pursues three main lines of reasoning in this context. First, the European Union asserts that even if the United States has established that the relevant measures are specific subsidies, that the member States granted them to Airbus in anticipation of export performance or export earnings, and has performed valid Ratios Analyses with respect to each set of measures, the record is still insufficient to demonstrate *de facto* export contingency. This is so because the United States insufficiently supports its demonstration of *de facto* export contingency with reference to terms in the *subsidies themselves* that make the subsidies contingent on export performance. Second, the European Union argues that the manner in which the United States calculates its Anticipated and Baseline Ratios in this context is fatally flawed. Third, the European Union argues that even if the United States has produced a viable Ratios Analysis with respect to either the A380 or the A350XWB that the United States interprets as indicating that the LA/MSF measures directed at these LCA are *de facto* contingent on export performance, the United States has misinterpreted that Ratios Analysis. This is so because any relevant "skewing" of the Ratios Analysis is not the result of any export-contingent qualities of the relevant subsidies, but is the result of changes in LCA demand patterns in the marketplace.

[1168] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1101 and 1104.
[1169] United States' second written submission, para. 304.
[1170] United States' first written submission, paras. 166 and 186.
[1171] This report will present Anticipated and Baseline Ratios as the ratio of domestic sales (the first number) to export sales (the second number).
[1172] United States' first written submission, paras. 183 and 187-188.
[1173] United States' first written submission, paras. 190-192; and second written submission, para. 298.
[1174] United States' first written submission, para. 195.
[1175] United States' first written submission, para. 196.
[1176] United States' first written submission, para. 199.

6.5.3.5 Arguments of the third parties

6.5.3.5.1 Brazil

6.667. Brazil considers that the Appellate Body's relevant guidance regarding export contingency indicates that a demonstration of export contingency with respect to a given subsidy does not require the construction of a Ratios Analysis.[1177] Rather, Brazil considers that a Ratios Analysis is one possible piece of evidence that could meaningfully inform an export-contingency inquiry regarding a particular subsidy. In this context, Brazil notes that demonstrating *de jure* export contingency requires no actual or potential trade effects test and thus, because a Ratios Analysis – the creation of which Brazil characterizes as "difficult and often uninformative"[1178] – is precisely that kind of test, Brazil argues that requiring the performance of a Ratios Analysis to demonstrate *de facto* export contingency would create two different legal standards regarding *de jure* and *de facto* export contingency.[1179] Brazil argues that such a result would contradict the Appellate Body's explicit guidance in its report in *Canada – Aircraft* that the standard for *de jure* and *de facto* export contingency is the same.[1180] Nevertheless, Brazil allows for the possibility that a Ratios Analysis, by itself, could demonstrate that a particular subsidy is export-contingent under certain circumstances.[1181]

6.5.3.5.2 Canada

6.668. Canada argues that the Appellate Body has established that the Export Inducement Test governs whether a subsidy is *de facto* contingent on anticipated exportation, and that a Ratios Analysis provides a "framework" under which to assess this test.[1182] Canada cautions, however, that a Ratios Analysis should not be assessed in isolation, but, rather, its relevance must be assessed in conjunction with consideration of the total configuration of relevant facts.[1183] Canada further argues that the United States has failed to demonstrate that either the A380 LA/MSF measures or the A350XWB LA/MSF measures are *de facto* contingent on export performance.[1184] Canada asserts that the United States has relied on faulty information when calculating the Anticipated Ratio for the A380 and has failed to demonstrate that the manner in which it calculates the Baseline Ratios with respect to the A380 and A350XWB accords with the Appellate Body's guidance regarding how to construct Baseline Ratios.[1185] Finally, Canada asserts that the United States fails to demonstrate that any alleged shift occurring in its Ratios Analyses that the United States argues indicates that the A380 and A350XWB LA/MSF measures are *de facto* contingent on export performance is not simply due to changes in market conditions rather than the grant of the A380 and A350XWB LA/MSF measures.[1186]

6.5.3.5.3 China

6.669. China considers that the Appellate Body's relevant guidance regarding export contingency indicates that the Export Inducement Test is the sole standard with which to determine *de facto* export contingency.[1187] China considers that a determination of *de facto* export contingency, which is governed by the Export Inducement Test, must further be inferred from the total configuration of the facts constituting and surrounding the grant of the relevant subsidy.[1188] It is therefore China's view that a Ratios Analysis may be relevant in resolving the Export Inducement Test, but cannot independently resolve the Export Inducement Test in the absence of an analysis regarding

[1177] Brazil's third-party submission, paras. 32-56.
[1178] Brazil's third-party submission, para. 54.
[1179] Brazil's third-party submission, paras. 49-51.
[1180] Brazil's third-party submission, paras. 41 and 56.
[1181] Brazil's third-party response to Panel question No. 2.
[1182] Canada's third-party submission, paras. 6-7.
[1183] Canada's third-party response to Panel question No. 2, paras. 9-11.
[1184] Canada's third-party submission, para. 9.
[1185] Canada's third-party submission, paras. 10-13.
[1186] Canada's third-party submission, paras. 14-17.
[1187] China's third-party response to Panel question No. 2, paras. 1-3.
[1188] China's third-party response to Panel question No. 2, para. 4.

the total configuration of the facts constituting and surrounding the grant of the relevant subsidy.[1189]

6.5.3.5.4 Japan

6.670. Japan asserts that an assessment of *de facto* export contingency must be based on evidence that the total configuration of the facts indicates that the granting of the subsidy provides an incentive to Airbus to export LCA to a greater extent than it would in the absence of the subsidy.[1190] A Ratios Analysis may be considered along with all other relevant facts.[1191] Japan has reservations about the reliability of the data that the United States uses to calculate its relevant Anticipated Ratios, and questions whether the manner in which the United States calculates Anticipated Ratios is consistent with Appellate Body guidance.[1192] Japan raises similar concerns regarding the United States' Baseline Ratios.[1193] Finally, Japan asks the Panel to consider whether any relevant rise in Airbus' export sales relative to domestic sales are caused by the grant of the A380 and A350XWB measures as opposed to other factors.[1194]

6.5.3.6 Evaluation by the Panel

6.671. Article 3.1(a) of the SCM Agreement reads:

> Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5]
>
> ——————————
>
> [4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision. (footnote original)
>
> [5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement. (footnote original)

6.672. Under Article 3.2 of the SCM Agreement, Members shall neither grant nor maintain such subsidies.

6.673. Footnote 4 provides a standard for determining when a subsidy is contingent in fact upon export performance. Footnote 4 clarifies that a *de facto* export subsidy may arise where the: (a) "granting of a subsidy"; (b) "is … tied to"; (c) "actual or anticipated exportation or export earnings"; the Appellate Body has referred to these as "three different substantive elements."[1195]

6.674. The meaning of "contingent" in Article 3.1(a) is "conditional" or "dependent for its existence on something else".[1196] In order to qualify as a prohibited export subsidy, therefore, the grant of the subsidy must be conditional or dependent upon export performance. Article 3.1(a) further provides that such export contingency may be the sole condition governing the grant of a prohibited subsidy or it may be "one of several other conditions". The Appellate Body has explained that footnote 4 uses the words "tied to" as a synonym for "contingent" or "conditional",

[1189] China's third-party response to Panel question No. 2, paras. 5-7.
[1190] Japan's third-party submission, para. 11.
[1191] Japan's third-party response to Panel question No. 2, paras. 6-12.
[1192] Japan's third-party submission, paras. 15-18.
[1193] Japan's third-party submission, paras. 19-25.
[1194] Japan's third-party submission, paras. 26-30.
[1195] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 346 (citing Appellate Body Report, *Canada – Aircraft,* para. 169).
[1196] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1037 (citing Appellate Body Report, *Canada – Aircraft*, para. 166).

and therefore a "tie" between the granting of a subsidy and actual or anticipated exportation meets the legal standard of "contingent" in Article 3.1(a) of the SCM Agreement.[1197]

6.675. The Appellate Body has explained that *de facto* export contingency "can be established by recourse to the following test: is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?", i.e. the Export Inducement Test.[1198] The Appellate Body has further explained that the Export Inducement Test is satisfied "when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[1199] This test "must be assessed on the basis of the information available to the granting authority at the time the subsidy is granted."[1200]

6.676. The standard for determining *de facto* export contingency "is an objective standard"[1201], the evidence of which "'must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy', which may include … : (i) the design and structure of the measure granting the subsidy; (ii) the modalities of operation set out in such a measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation."[1202] Thus, although the standard is "not satisfied by the subjective motivation of the granting government to promote the future export performance of the recipient"[1203], the reasons for which an authority grants a subsidy may still be a relevant consideration.[1204]

6.677. The Appellate Body has indicated that an assessment of *de facto* export contingency "could be based on a comparison between … the ratio of *anticipated* export and domestic sales of the subsidized product that would come about in consequence of the granting of the subsidy" and "the situation in the absence of the subsidy"[1205], i.e. a Ratios Analysis. Where the Ratios Analysis "shows, all other things being equal, that the granting of a subsidy provides an incentive to skew anticipated sales toward exports … this would be an indication" of *de facto* export contingency.[1206] The Appellate Body has also provided numeric examples illustrating when the Ratios Analysis would and would not evidence *de facto* export contingency.[1207]

6.678. With these legal standards in mind, we now turn to examine the United States' claims under Article 3.1(a) of the SCM Agreement regarding each of the challenged A380 and A350XWB LA/MSF measures. We do so in three parts. First, we discuss whether the United States has demonstrated the granting of relevant subsidies. Second, we consider whether the United States has established that such subsidies were granted in anticipation of exportation or export earnings.[1208] Third, we evaluate whether the United States has demonstrated that the granting of such subsidies was tied to, or contingent upon, such anticipation.

[1197] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2323 (citing Appellate Body Report, *Canada – Autos*, para. 107).

[1198] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1044.

[1199] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1045.

[1200] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1049.

[1201] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1050. The Appellate Body has also ruled that "'the export orientation of a recipient may be taken into account as *a* relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding'" of export contingency. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1052 (quoting Appellate Body Report, *Canada – Aircraft,* para. 173)) (emphasis original)

[1202] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1046 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167). (emphasis original; footnote omitted)

[1203] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1050.

[1204] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1050-1051 and 1063.

[1205] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1047. (emphasis original)

[1206] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1047.

[1207] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1048.

[1208] In the original proceeding, the United States limited its claims under Article 3.1(a) of the SCM Agreement regarding the A380 LA/MSF measures to alleged contingency based on anticipated, rather than actual, exportation or export earnings. Consistent with that approach, in this compliance proceeding, the United States appears to limit its claims under Article 3.1(a) with respect to both the A380 and A350XWB

6.5.3.6.1 Granting of a subsidy

6.679. The original panel, as affirmed by the Appellate Body, found that each of the A380 LA/MSF measures granted to Airbus by the relevant member States was a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement. Earlier in this Report, we found that each of the A350XWB LA/MSF measures granted to Airbus by the relevant member States is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement. The United States has therefore established the first of the three elements that it must demonstrate under Article 3.1(a) of the SCM Agreement with respect to both the A380 LA/MSF measures and the A350XWB LA/MSF measures.

6.5.3.6.2 Anticipated exportation or export earnings

6.5.3.6.2.1 A380

6.680. The original panel, as affirmed by the Appellate Body, found that each of the A380 LA/MSF contracts was granted in anticipation of exportation or export earnings.[1209] We detect nothing on the record of this compliance proceeding that calls this finding into question. The United States has therefore established the third of the three elements that it must demonstrate under Article 3.1(a) with respect to the A380 LA/MSF measures.

6.5.3.6.2.2 A350XWB

6.681. Neither the original panel nor the Appellate Body had occasion to make findings regarding whether the relevant European Union member States anticipated exportation or export earnings at the time such governments granted the A350XWB LA/MSF subsidies to Airbus. The United States, therefore, offers evidence in this compliance proceeding that it claims establishes such anticipation with respect to each European Union member State government. Such evidence takes two main forms, i.e. publicly available information and the terms of the A350XWB LA/MSF contracts themselves. We summarize this evidence here:

- The United States argues that by "the point at which the member States finalized their commitment to provide LA/MSF" for the A350XWB, Airbus' order book reflected that Airbus had received 505 orders for the A350XWB, "of which *462 were for non-EU sales*."[1210] The United States argues that such numbers "are public, and certainly were known to Airbus governments at the time of each decision {to grant A350XWB LA/MSF}."[1211]

- The United States claims that "Airbus executives regularly highlighted the *predominantly foreign customer base* for the A350 XWB in their slideshow presentations".[1212] In support of

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LA/MSF measures to alleged contingency based on anticipated, rather than actual, exportation or export earnings. (See United States' first written submission, paras. 178-201)

[1209] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.654; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1080 (affirming the original panel's finding). See also United States' first written submission, paras. 172-176 (citing materials upon which the original panel relied in this context, including Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)); Airbus, Briefing 3rd quarter, 1998, (Original Exhibit US-359), (Exhibit USA-69); "Airbus Launches A3XX Program, Sees Strong Demand in Asia", *Aviation Now*, February 2000, (Exhibit USA-70); "Airbus bets the company", *The Economist*, 16 March 2000, (Original Exhibit US-363), (Exhibit USA-71); Department of Trade and Industry Press Release, "Byers Announces £530 Million Government Investment in Airbus", 13 March 2000, (Original Exhibit US-360), (Exhibit USA-72); "Blair Says Airbus will Repay 530 Mln Stg UK Gvt Investment", *AFX.com*, 18 January 2005, (Original Exhibit US-361), (Exhibit USA-73); and Spanish A380 LA/MSF Contract, (Original Exhibit US-73), (Exhibit USA-88) (BCI)). The United States further claims that evidence it offers to calculate its A380 Anticipated Ratio further demonstrates the requisite level of anticipation of exportation by the relevant member State governments in this context. (United States' first written submission, fn 258)

[1210] United States' first written submission, para. 177 (citing Ascend database, Gross Orders and Year End Backlog A330, A350, 777 and 747, 1990-2011, as of 14 February 2012, (Exhibit USA-293) (summarizing raw Ascend database order information)) (emphasis original). See also Ascend database, Boeing and Airbus Deliveries in Units 2001-2011, Commercial Operators, data request as of 13 January 2012, (Exhibit USA-112) (providing raw Ascend database order information).

[1211] United States' first written submission, para. 194.

[1212] United States' first written submission, para. 177. (emphasis original)

this claim, the United States cites five slideshow presentations given by Airbus entities' officers and employees dated between 2007 and 2010, inclusive.[1213]

- The United States claims that "Airbus' parent company EADS trumpeted in its 'Vision 2020' long-term corporate strategy" in a publication that states, *inter alia*, "{t}oday, EADS exports about 75 % of its products; some 50 % of our revenues are generated outside Europe. While maintaining our European base we are fostering our footprint in the U.S. As a third pillar, we are spurring our presence in emerging countries so as to be part of their dynamic success story."[1214]

- The United States argues that "{b}y 2009, statements by the four Airbus member States also confirmed their anticipation that A350 XWB sales would be heavily skewed in favor of exports."[1215] The United States provides an example of such a statement made by UK Prime Minister Cameron "when he officially opened Airbus' new factory devoted to A350 XWB wings in Wales"[1216] where he stated that "{t}he Government is committed to building a more balanced economy with stronger manufacturing, exports and private investment, creating jobs and opportunities across the UK. I welcome the opening of Airbus's new state of the art facility which will contribute to this and support our programme to create sustainable economic growth."[1217]

- The United States also argues that the terms of the A350XWB LA/MSF subsidies demonstrate that their design, structure and modalities of operation establish that the relevant European Union member States anticipated exportation of the A350XWB at the time the governments granted the A350XWB LA/MSF measures. Indeed, the United States argues that "the contracts for this most recent set of LA/MSF have the same *de jure* features that previously led the Panel to conclude A380 LA/MSF was granted in anticipation of a large number of exports."[1218] Specifically, the United States argues that the A350XWB measures are success-dependent, levy-based, back-loaded, and unsecured, as were the LA/MSF measures regarding the A380.[1219] Moreover, the A350XWB LA/MSF measures "reflect{} an anticipation of a specific number of sales, many of which would necessarily have to be export sales. As with the A380, the LA/MSF contracts were … structured so that full repayment of the loan will be achieved after Airbus achieves a certain level of sales."[1220] The United States argues that the European Union market could not absorb such sales volumes, and therefore the relevant European Union governments must have anticipated "a large number of exports."[1221] Therefore, "{t}he EU member States would not have granted the financing unless they expected Airbus to actually meet the stated goals".[1222]

6.682. The European Union does not materially contest either the probative value of the United States' evidence regarding this issue or the United States' conclusion that the relevant European Union member States anticipated exportation or export earnings *vis-à-vis* the A350XWB

[1213] United States' first written submission, fn 275 (citing Fabrice Brégier, Chief Operating Officer, Airbus, "A350 XWB programme status", EADS presentation, North America Investor Forum 2010, 18 March 2010, (Exhibit USA-74); Barry Eccleston, President and CEO, Airbus North America, "Cowen and company 28th Annual Aerospace/Defence Conference", Airbus presentation, 6 February 2007, (Exhibit USA-75); Andy Shankland, Vice President Marketing, Airbus, "A350 XWB, Market update", Airbus presentation, Airbus Innovation days, 11−12 May 2009, (Exhibit USA-76); Nali Rafanimanana, A350XWB Product Marketing Manager, "A350 XWB, Shaping Efficiency", Airbus presentation, 9 June 2009, (Exhibit USA-77); and Colin Stuart, Vice President Marketing, Airbus, "Airbus commercial update", Airbus presentation, Aircraft Finance and Commercial Aviation 2007, 1 March 2007, (Exhibit USA-78)).

[1214] United States' first written submission, para. 177 (citing EADS, "EADS − Taking off into its second decade", undated, p. 2, (Exhibit USA-79)).

[1215] United States' first written submission, para. 177.

[1216] United States' first written submission, para. 177.

[1217] United States' first written submission, para. 177 (quoting Airbus Press Release, "British Prime Minister opens new Airbus wing factory for A350 XWB", 13 October 2011, (Exhibit USA-80)).

[1218] United States' second written submission, para. 310.

[1219] United States' first written submission, para. 190.

[1220] United States' first written submission, para. 191.

[1221] United States' second written submission, para. 310.

[1222] United States' first written submission, para. 191.

at the time the governments granted the A350XWB LA/MSF measures to Airbus.[1223] We furthermore detect no material reason to doubt the United States' conclusion on this score.[1224] Indeed, we recall that both the original panel and the Appellate Body considered that the European Union member States knew Airbus to be an export-oriented company[1225] and found that the A380 LA/MSF measures were granted in anticipation of exportation based upon substantially similar types of evidence that the United States offers here to demonstrate that the A350XWB LA/MSF contracts were granted in anticipated of exportation. We therefore conclude that the United States has established the third of the three elements that it must demonstrate under Article 3.1(a) with respect to the A350XWB LA/MSF measures.

6.5.3.7 "Tied to" anticipated exportation or export earnings

6.683. The United States submits that the granting of each of the A380 and A350XWB LA/MSF contracts was in fact "tied to", i.e. contingent upon, anticipated exportation or export earnings. The United States appears to rely on a combination of two general types of evidence to demonstrate such contingency. First, the United States relies on the evidence that it also uses to establish anticipation of exportation or export earnings. This includes purported aspects of the design, structure and modalities of operation of the contracts themselves, discussed in the preceding section above. Second, the United States performs two Ratios Analyses, one regarding the A380 and one regarding the A350XWB, both of which the United States argues indicate that the A380 and A350XWB LA/MSF measures are *de facto* contingent on export performance. The United States argues that these Ratios Analyses, when coupled with the evidence already discussed above demonstrating that the relevant European Union member State governments anticipated exportation or export earnings with respect to the A380 and A350XWB when they granted the A380 and A350XWB LA/MSF subsidies to Airbus, demonstrate that the subsidies were geared to induce the promotion of future export performance by Airbus, thereby satisfying the Export Inducement Test and establishing that the measures are *de facto* contingent on export performance.

6.684. The European Union responds that the United States' approach to demonstrating *de facto* export contingency with respect to the A380 and A350XWB LA/MSF measures is fatally flawed in three respects. First, the European Union argues that the United States has provided insufficient evidence to demonstrate *de facto* export contingency because a Ratios Analysis is incapable of resolving the Export Inducement Test even when combined with a finding of anticipation of exportation or export earnings. Second, the European Union argues that the United States has calculated invalid Anticipated Ratios and Baseline Ratios with respect to both relevant aircraft. Third, the European Union argues that the United States has misinterpreted the results of its offered Ratios Analyses, even assuming their technical validity. We consider such issues below.

6.5.3.7.1 Probative value of a Ratios Analysis

6.685. We begin by considering to what extent a Ratios Analysis can resolve the Export Inducement Test. We note that neither the United States nor the European Union argues that a Ratios Analysis is independently capable of resolving the Export Inducement Test in all cases as a matter of law. Rather, both parties appear to agree that a Ratios Analysis, if and when it can be performed, may constitute a material consideration in resolving the Export Inducement Test.[1226]

6.686. We recall that the Appellate Body report in the original proceeding established that the Export Inducement Test governs *de facto* export contingency inquiries under Article 3.1(a) of the SCM Agreement. Further, "{t}he existence of *de facto* export contingency … must be *inferred* from

[1223] We note that certain HSBI information, of which the European Union has explained the member States were aware when they granted the A350XWB LA/MSF measures, stresses non-EU demand for the A350XWB. (Business case-related document, (Exhibit EU-(Article 13)-35) (HSBI), slides 3-4 and 6-7)

[1224] The United States further claims that evidence that it offers to calculate its A350XWB Anticipated Ratio further demonstrates the requisite level of anticipation of exportation by the relevant member States governments in this context. (United States' first written submission, fn 258).

[1225] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.678; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1094.

[1226] See e.g. United States' second written submission, para. 304; and European Union's response to Panel question No. 21.

the total configuration of the facts".[1227] The word "must" signals that an examination of the total configuration of the facts is mandatory. The Appellate Body further explained that these facts "may include" the design, structure and modalities of operation of the challenged measure, and the facts surrounding its grant.[1228] That the Appellate Body specifically articulated these considerations signals their significance. The words "may include", however, suggest that other relevant considerations within the total configuration of the facts may exist.[1229] This suggestion appears to foreshadow the introduction of the Ratios Analysis in the Appellate Body report. The Appellate Body report then states that "where relevant evidence exists, *the assessment* could be based on" a Ratios Analysis.[1230] In this context, we understand the words "the assessment" to refer to the assessment of the Export Inducement Test.[1231] The phrase "could be" suggests that the assessment *need not be* based on a Ratios Analysis, even when a Ratios Analysis can be performed. The phrase "where relevant evidence exists" suggests that it may be possible to resolve the export-contingency issue on the basis of other evidence, such as the design, structure and modalities of operation of the challenged measure, in cases where the evidence required to perform a Ratios Analysis does not exist.

6.687. An initial question therefore emerges as to whether a panel can determine that a subsidy is *de facto* contingent upon export performance without first performing a Ratios Analysis. The answer to this question is clearly "yes", as demonstrated by the Appellate Body report's discussion of *Canada – Aircraft*, set forth below:

> {I}n *Canada – Aircraft*, the panel examined several pieces of evidence before determining that the subsidies granted to certain companies in the Canadian aerospace sector under the measure at issue – the Technology Partnerships Canada ("TPC") programme – were in fact tied to anticipated exportation. For example, the Terms and Conditions of the programme required that funding decisions be based on, *inter alia*, whether the funded projects would generate export sales and increase the international competitiveness of the funded companies. Moreover, applicants were required to indicate whether the project to be funded would increase exports, and to distinguish between domestic and export sales when reporting actual and future sales. *In our view, the design and structure of the TPC programme, as evidenced by various documents relating to the TPC programme, as well as the high export potential of the funded projects, demonstrated that the granting of subsidies under the programme was geared to induce applicants for funding to increase exports and, consequently, to promote export performance by Canadian companies*. In the subsequent Article 21.5 proceedings, the revised TPC programme, which removed the selection criteria relating to exportation as a basis for funding decisions, as well as the stated objectives of the programme to enhance exportation, was found not to constitute an export-contingent subsidy. In other words, the relevant evidence did not indicate that the revised measure was geared to induce the promotion of future export performance by the recipients.[1232] (emphasis added; footnotes omitted)

6.688. Thus, the Appellate Body concluded that the measure at issue in *Canada – Aircraft* would have satisfied the Export Inducement Test, even in the absence of any Ratios Analysis, due to its design and structure, considered in context with the high export potential of the funded projects. This conclusion clarifies that performing a Ratios Analysis is not necessary in order to resolve the Export Inducement Test, and further confirms that the design, structure and modalities of operation of a subsidy are powerful considerations in resolving the Export Inducement Test.

[1227] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1046. (emphasis original; underline added; internal quotation marks omitted)

[1228] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1046.

[1229] See Appellate Body Report, *Canada – Aircraft*, para. 169 ("We agree with the Panel that what facts *should* be taken into account in a particular case will depend on the circumstances of that case."). (emphasis original)

[1230] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1047. (emphasis added)

[1231] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1099 ("We recall our finding that, where such evidence exists, the assessment of whether the granting of a subsidy provides such an incentive could be made on the basis of a {Ratios Analysis}.").

[1232] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1055.

6.689. In this context, we take the opportunity to note another relevant dimension of the Export Inducement Test and Ratios Analysis. When elaborating on the consistency of the Export Inducement Test with relevant provisions of the SCM Agreement, and particularly its coherence with the Illustrative List of Export Subsidies in Annex I, the Appellate Body stated that "{e}xport-contingent subsidies will … favour a recipient's export sales over its domestic sales."[1233] Although the statement may leave open the question regarding the potential universe of products to which a panel may make reference when evaluating such relative favouritism[1234], this statement suggests that the Export Inducement Test is satisfied where a subsidy is geared to induce: (a) a particular recipient *company* (b) to *discriminate* against domestic sales in favour of export sales (c) in a *manner contrary to relevant market forces* of supply and demand. The presence of the discriminatory element appears particularly salient because many production subsidies may be anticipated to lead to the recipient increasing the *supply* of a relevant product, and therefore providing an incentive to that recipient to export that product in a way that is unreflective of the conditions of *supply* in the domestic market undistorted by the granting of the subsidy. The Appellate Body has, however, cautioned that such facts would not by themselves establish that the subsidy satisfies the Export Inducement Test: "The mere fact that such subsidies may increase the company's production sold in the export market does not bring them under the discipline of Part II of the SCM Agreement."[1235] The Appellate Body also explained that "we do *not* suggest that the standard is met merely because the granting of the subsidy is designed to increase a recipient's production, even if the increased production is exported in whole."[1236] Thus, whatever evidence a panel may use to evaluate the Export Inducement Test (e.g. a Ratios Analysis), the probative value of such evidence will largely depend on its capacity to meaningfully indicate whether a subsidy provides an incentive to the recipient firm to favour export over domestic sales.

6.690. With this in mind, a further question emerges as to what extent a Ratios Analysis, in cases where it has been performed, determines the outcome of the Export Inducement Test. Regarding this question, the Appellate Body's guidance that the assessment of the Export Inducement Test "could be based on" a Ratios Analysis suggests that a Ratios Analysis is not necessarily conclusive of the Export Inducement Test, but can rather form a significant part of that assessment. As if to underscore this point, the Appellate Body concludes a relevant paragraph in its report as follows:

> Where the evidence shows, all other things being equal, that the granting of the subsidy provides an incentive to skew anticipated sales towards exports … this would be *an indication* that the granting of the subsidy is in fact tied to anticipated exportation[1237] (emphasis added)

6.691. The following paragraph in the Appellate Body report is set out in full below. As indicated by the emphasized text, it contains apparently inconclusive language regarding the dispositive nature of the Ratios Analysis:

> The following numerical examples illustrate when the granting of a subsidy may, or may not, be geared to induce promotion of future export performance by a recipient. Assume that a subsidy is designed to allow a recipient to increase its future production by five units. Assume further that the existing ratio of the recipient's export sales to domestic sales, at the time the subsidy is granted, is 2:3. The granting of the subsidy

[1233] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1053.

[1234] The Export Inducement Test itself does not refer to any specific reference product. We therefore note that, in its explanation of why the measure in *Canada – Aircraft* would have satisfied the Export Inducement Test (but not on the basis of a Ratios Analysis, which references "the subsidized product", specifically), the Appellate Body explained that the relevant measure was "geared to induce applicants for funding to *increase exports* and, consequently, to *promote export performance by Canadian companies*." (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1055) (emphasis added). We also recall that one of the relevant considerations in *Canada – Aircraft* in this context was "TPC's record of funding in the export field". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2352). It is not entirely clear to us whether such language suggests that subsidies geared to induce future export performance of a WTO Member overall, or of a particular company across all its product lines (e.g. a subsidy programme under which benefits were made available only to inherently export-oriented sectors, or to companies in order to develop new, export-oriented products) may satisfy the Export Inducement Test.

[1235] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1054.

[1236] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1045. (emphasis added)

[1237] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1047.

> will *not* be tied to anticipated exportation if, all other things being equal, the anticipated ratio of export sales to domestic sales is not greater than the existing ratio. In other words, if, under the measure granting the subsidy, the recipient would not be expected to export more than two of the additional five units to be produced, then this is indicative of the absence of a tie. By contrast, the granting of the subsidy would be tied *to* anticipated exportation if, all other things equal, the recipient is expected to export at least three of the five additional units to be produced. In other words, the subsidy is designed in such a way that it is expected to skew the recipient's future sales in favour of export sales, even though the recipient may also be expected to increase its domestic sales.[1238] (emphasis original; underline added)

6.692. Two paragraphs later, however, the Appellate Body report recalls that *de facto* export contingency is:

> *{T}o be established on the basis of the total configuration of the facts, including the design, structure, and modalities of operation* of the measure granting the subsidy. Indeed, the conditional relationship between the granting of the subsidy and export performance must be objectively observable on the basis of such evidence in order for the subsidy to be geared to induce the promotion of future export performance by the recipient.[1239] (emphasis added)

6.693. Moreover, in the very next paragraph, when discussing the perceived deficiencies of the original panel report's analysis of the United States' Article 3.1(a) claim, the Appellate Body explained that the focus of the *de facto* contingency issue is on:

> *{W}hat* the government did, in terms of the design, structure, and modalities of operation of the subsidy, in order to induce the promotion of future export performance by the recipient. Indeed, whether the granting of a subsidy is conditional on future export performance must be determined by assessing *the subsidy itself*, in the light of the relevant factual circumstances … .[1240] (emphasis original; footnote omitted)

6.694. Later in its report, the Appellate Body again states that "{t}he issue of whether {the Export Inducement Test} is met must be assessed on the basis of an examination of the measure granting the subsidy and the facts surrounding the granting of the subsidy, including the design, structure, and modalities of operation of the measure."[1241]

6.695. The Appellate Body report, therefore, is consistent in its emphasis on examining the challenged measure's design, structure and modalities of operation when evaluating whether that measure is *de facto* contingent on export performance. In contrast, the Appellate Body report does not generally afford the Ratios Analysis equal stature. The Appellate Body report never states that a Ratios Analysis can independently resolve the Export Inducement Test or that the performance of a Ratios Analysis is a substitute for analysing either the total configuration of the facts or the relevant *subsidy itself* when attempting to detect whether that subsidy is contingent on export performance. This strongly suggests to us the primacy − indeed, necessity − of examining the *subsidy itself* when evaluating whether that subsidy is *de facto* contingent on export performance, and further suggests to us that, in the absence of such an examination, a Ratios Analysis should not independently resolve the Export Inducement Test.

6.696. In light of this observation, we find it helpful to more specifically articulate the nature of the relationship between the performance of an analysis of the design and structure of a subsidy

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[1238] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1048.
[1239] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1050.
[1240] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1051.
[1241] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1056. See also Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1052 ("Rather, where a subsidy is granted to a recipient that is expected to export, this fact must be considered *together with* other relevant factors, including the design, structure, and modalities of operation of the subsidy, as well as other relevant factual circumstances surrounding the granting of the subsidy, in order to determine whether the granting of subsidy is, as explained above, geared to induce the promotion of future export performance by the recipient, and therefore 'in fact tied to … anticipated exportation'."). (emphasis original; underline added)

itself and a Ratios Analysis. The Appellate Body separately described the analysis of a subsidy's design and structure, on the one hand, and a Ratios Analysis, on the other hand, in the context of discussing what evidence is material in a panel's evaluation of export contingency. The two analyses, thus, must be distinct, at least to some appreciable degree. In other words, the latter cannot be simply a method of expressing the former analysis *per se*. We therefore recall that a Ratios Analysis is, in essence, a comparison of the expected sales behaviour of a firm in the absence and presence of a subsidy. We further recall that the firm's relevant sales behaviour in the presence of the subsidy for purposes of conducting a Ratios Analysis is "the ratio of *anticipated* export and domestic sales of the subsidized product that would come about in consequence of the granting of the subsidy".[1242] The Appellate Body did not specify from what source such expectations should arise.[1243] In our view, however, such expectations must be formed in the presence of meaningful knowledge of a subsidy's terms including its design and structure (or perhaps demonstrated expectations of such aspects that ultimately prove accurate), or else it appears difficult to discern any meaningful manner in which a Ratios Analysis could assist in detecting whether that subsidy is export contingent. This reasoning further appears consistent with the Appellate Body's explanation that the Export Inducement Test − and, therefore, by extension, a Ratios Analysis − "must be assessed on the basis of the information available to the granting authority at the time the subsidy is granted"[1244] because, of course, a grantor will always have meaningful knowledge regarding a subsidy that it grants. We therefore conclude that from whatever source expectations regarding a firm's sales behaviours arise in the context of calculating a relevant Anticipated Ratio, such expectations must be formed in the light of an understanding of the subsidy's design and structure. In our minds, these observations underscore that a Ratios Analysis is not a substitute for analysing a subsidy itself, yet it may be material insofar as it can be interpreted as examining sales behaviours that reflect relevant influences of a subsidy.

6.697. Other aspects of the Appellate Body report, considered alongside the character of a Ratios Analysis, further resonate with this reasoning. We recall that the Appellate Body, citing the need to preserve distinct roles for Parts II and III of the SCM Agreement, has stressed that the discipline contained in Article 3.1(a) in Part II of the SCM Agreement is not effects-based, but must be activated by something in the "subsidy itself".[1245] In keeping with such guidance, the Appellate Body has stressed that:

> In setting out {the Export Inducement Test}, we do not suggest that the issue as to whether the granting of a subsidy is in fact tied to anticipated exportation could be based on an assessment of the *actual effects* of that subsidy. Rather, we emphasize that it must be assessed on the basis of the information available to the granting authority at the time the subsidy is granted.[1246] (emphasis added)

6.698. We recall that a Ratios Analysis is a comparison of "the ratio of *anticipated* export and domestic sales of the subsidized product that would come about in consequence of the granting of the subsidy" and "the situation in the absence of the subsidy."[1247] In other words, rather than examining a *subsidy itself*, a Ratios Analysis examines what effects a subsidy is anticipated to have on a recipient's sales behaviours. Hinging the outcome of the Export Inducement Test on such an effects-based inquiry appears in tension with the Appellate Body's explanation that the SCM Agreement's effects-based disciplines inhabit Part III, rather than Part II, of that agreement.

6.699. Additionally, there appears a related practical problem with using a Ratios Analysis as the sole tool with which to detect export contingency within a relevant subsidy. That is, such

[1242] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1047. (emphasis original)

[1243] Certain statements appear to suggest that such expectations should emanate from the granting authority. (See e.g. Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 1043 ("Consistent with this understanding, it is the granting authority that 'anticipates' that exportation will occur after the granting of the subsidy, and that grants a subsidy *on the condition* of such anticipated exportation.") (emphasis original); and 1049 (explaining that the Export Inducement Test "must be assessed on the basis of the information available *to the granting authority* at the time the subsidy is granted.") (emphasis added))

[1244] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1049.

[1245] See e.g. Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 1049, 1051, and 1054.

[1246] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1049.

[1247] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1047. (emphasis original)

ratification assumes that the presence or absence of shifts in a firm's sales behaviours upon which the Ratios Analysis focusses correlate with the presence or absence of *de facto* export contingency exhibited by a subsidy such that an examination of the *subsidy itself* becomes presumptively superfluous in the accurate resolution of the Export Inducement Test. In our view, this assumption is unreasonable. A Ratios Analysis compares a firm's sales behaviours regarding a specific product *vis-à-vis* the relevant domestic and export markets occurring in the presence and absence of a subsidy. As explained above, the manner in which a Ratios Analysis is constructed will likely ensure that it captures, in some manner and to some degree, the relevant subsidy's influence. The capacity of a Ratios Analysis, therefore, to *isolate* not only the impact of a subsidy on such sales behaviours, generally, but further isolate the impact of export-contingent aspects of that subsidy on such sales behaviours, specifically, is critical to its probative value. The Appellate Body appeared to appreciate this; we note that the Appellate Body used the phrase "all other things being equal" or "all other things equal" four times when discussing the probative value of a Ratios Analysis:

- "Where the evidence shows, *all other things being equal*, that the granting of the subsidy provides an incentive to skew anticipated sales towards exports, in comparison with the historical performance of the recipient or the hypothetical performance of a profit-maximizing firm in the absence of the subsidy, this would be an indication that the granting of the subsidy is in fact tied to anticipated exportation within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*."[1248] (emphasis added)

- "The granting of the subsidy will *not* be tied to anticipated exportation if, all other things being equal, the anticipated ratio of export sales to domestic sales is not greater than the existing ratio."[1249] (emphasis original; underline added)

- "By contrast, the granting of the subsidy would be tied to anticipated exportation if, *all other things equal*, the recipient is expected to export at least three of the five additional units to be produced. In other words, the subsidy is designed in such a way that it is expected to skew the recipient's future sales in favour of export sales, even though the recipient may also be expected to increase its domestic sales."[1250] (emphasis added)

- "Where the evidence shows, *all other things being equal*, that the granting of the subsidy provides an incentive to skew anticipated sales towards exports, in comparison with the hypothetical performance of a profit-maximizing firm in the absence of the granting of the subsidy, this would be an indication that the granting of the subsidy is in fact tied to anticipated exportation within the meaning of Article 3.1(a) and footnote 4 of the *SCM Agreement*."[1251] (emphasis added)

6.700. In our view, this phrase reflects the importance of isolating the effects of a subsidy on a firm's sales behaviours when performing a Ratios Analysis.

6.701. It appears, however, that there are significant reasons to doubt that a panel will be able to use a Ratios Analysis to isolate either the impact of a subsidy on a firm's relevant sales behaviours, generally, or the impact of export-contingent aspects of that subsidy on such sales behaviours, specifically, to a reasonably precise degree. For example, isolating the influence (or lack thereof) of a subsidy, generally, on a subsidy recipient's relevant sales behaviour appears to carry inherent and significant uncertainties. This is so because whatever data a panel may use to calculate relevant Anticipated and Baseline Ratios, all variables that may likely and materially affect the data sets underlying each ratio will never truly be equal, and controlling for them would appear a challenging proposition.[1252] Such variables include, for example, changes in demand,

[1248] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1047.
[1249] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1048.
[1250] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1048.
[1251] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1100.
[1252] We recall that an Anticipated Ratio focusses on expectations regarding a subsidy recipient's sales behaviours after the granting of the subsidy. We also recall that the Appellate Body described two methods for formulating a Baseline Ratio, i.e. the Historic Baseline Method and the Hypothetical Baseline Method. Thus, a comparison between the Anticipated Ratio and a Baseline Ratio will involve comparing either the same firm's sales behaviours at different times or different firms' sales behaviours at potentially the same or different times.

lawsuits, changing regulation of markets, and changes in the relevant firm's management and marketing strategies.[1253] Moreover, even if a panel can reasonably isolate the influence (or lack thereof) of a subsidy, generally, on a company's relevant sales behaviours in the context of performing a Ratios Analysis, the Ratios Analysis can still yield misleading results when attempting to detect export-contingent aspects of that subsidy. For example, assume that a government grants a production subsidy to a firm that already satisfies the small, static demand for its product in its home country. Further assume that the subsidy provides no incentive to the firm to favour export sales over domestic sales. On these facts, it can be anticipated that the firm's expanded production will be dedicated exclusively to exports, thus skewing the Ratios Analysis in a manner indicating the presence of *de facto* export contingency even though all other things − other than the grant of the subsidy − have been held equal. This situation, therefore, yields a false positive under the Export Inducement Test. In fact, the Appellate Body has stressed that this very scenario should not run afoul of the Export Inducement Test: "{W}e do *not* suggest that the standard is met merely because the granting of the subsidy is designed to increase a recipient's production, even if the increased production is exported in whole."[1254] Similar false positives could arise if a production subsidy allows a firm to lower prices across all sales of a specific product, and the company's export markets are known to exhibit higher elasticity of demand than does the relevant domestic market.[1255] Further, false negatives could arise if, for example, a subsidy is contingent on a recipient firm meeting certain export targets, but such a condition is not anticipated to meaningfully alter the recipient firm's historic sales behaviours for the foreseeable future.

6.702. In light of the above discussion, we conclude that a Ratios Analysis is incapable of establishing that a given subsidy is *de facto* contingent on export performance in the absence of any meaningful analysis regarding how a subsidy's design and structure contributes to the presence of an incentive for a recipient to favour export sales over domestic sales. In cases in which a Ratios Analysis has been performed, however, it may form a material aspect of the analysis of whether a subsidy is contingent on export performance. We consider that this conclusion accords with the great weight of the Appellate Body's guidance on this matter, and resonates with relevant considerations regarding the design and structure of the SCM Agreement and the inherent characteristics of a Ratios Analysis.

6.703. In so concluding, we note the United States' argument that examining the design, structure and modalities of operation of a subsidy transforms the *de facto* export contingency examination into a *de jure* analysis.[1256] Indeed, it is true that *de facto* contingency can exist where "a subsidy … is neutral on its face, or by necessary implication … does not differentiate between a recipient's exports and domestic sales".[1257] We agree that the Appellate Body's emphasis on examining the subsidy itself in this context indicates a potential degree of overlap between the evidence used to establish *de jure* and *de facto* export contingency. It is far from clear, however, that this potential overlap would make *de facto* and *de jure* export contingency inquiries indistinguishable. To the contrary, any logical analysis of export contingency, whether *de jure* or *de facto*, will start with an examination of the challenged measure in order to explore its relationship of conditionality with actual or anticipated exportation. Indeed, as discussed above, in *Canada − Aircraft*, far from forbidding examination of the subsidy's terms, the Appellate Body in that case ratified the panel's substantial examination of the subsidy programme's terms and conditions in determining that the subsidy was *de facto* export contingent.[1258] Thus, although "the evidence needed to establish *de facto* export contingency goes beyond a legal instrument and includes a variety of factual elements concerning the granting of the subsidy in a specific case"[1259], this does not amount to a directive to ignore the legal instrument in a *de facto* contingency inquiry.

[1253] Indeed, one need only examine the Risk Factors section of an LCA company's annual report to see the vast array of dynamic factors that can significantly alter relevant sales behaviours. (See e.g. Boeing Annual Report 2011, (Exhibit EU-105), form 10-K and pp. 6-15).

[1254] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1045. (emphasis original)

[1255] Such false positives may be particularly likely to arise if the relevant Anticipated Ratio was formed on the basis of expectations formed in light of knowledge of the relevant markets in which the recipient operates.

[1256] United States' second written submission, paras. 306-310.

[1257] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1056.

[1258] See Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1055 (citing the *Canada − Aircraft* analysis with approval).

[1259] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1038.

6.5.3.7.2 Sufficiency of the United States' evidence

6.704. Given our conclusion that a Ratios Analysis is incapable of independently resolving the Export Inducement Test and the prominence of the United States' relevant Ratios Analyses in its submissions in this proceeding, we believe it prudent at this stage to review what evidence the United States offers in support of its claims that the A380 and A350XWB LA/MSF measures are *de facto* contingent on export performance. We do so with an eye for determining whether the United States has offered sufficient evidence to potentially meet its burden of establishing a *prima facie* case that the subsidies in question are *de facto* export contingent. As discussed below, we conclude that the United States has not met its burden in this context with respect to any A380 or A350XWB LA/MSF measure.

6.5.3.7.2.1 A380

6.705. The United States describes the evidence that demonstrates *de facto* export contingency regarding the A380 LA/MSF measures as follows:

> The EU itself concedes the validity of the Panel's findings on "anticipation." In combination with the results of the numerical test {i.e. the Ratios Analysis}, as well as circumstantial evidence of de facto export contingency, including statements by EU member officials and Airbus executives' statements, this same evidence also demonstrates that LA/MSF for the A380 is de facto contingent on anticipated export performance.[1260] (footnotes omitted)

6.706. Thus, the United States purportedly relies on three types of evidence to support its argument that it has demonstrated that the A380 LA/MSF measures are *de facto* contingent on export performance at this stage of this dispute: (a) A Ratios Analysis indicating the presence of *de facto* export contingency; (b) the evidence underlying the original panel's and the Appellate Body's confirmation that the relevant European Union member States anticipated exportation or export earnings when they granted the A380 LA/MSF measures; and (c) other circumstantial evidence including statements by European Union member State officials and Airbus executives' statements. All of the pieces of "circumstantial evidence … including statements by EU member officials and Airbus executives' statements" that the United States cites with respect to the A380 in this context, however, were before and considered by the original panel during its assessment of anticipation of exportation[1261], an assessment that the Appellate Body subsequently affirmed. The United States thus effectively relies only on a Ratios Analysis and the evidence that was found to demonstrate anticipation of exportation to establish that the A380 LA/MSF measures are *de facto* contingent on export performance.

6.707. The issue, therefore, becomes whether the United States' A380 Ratios Analysis, assuming that it supports the reasoning that the A380 LA/MSF measures are *de facto* export contingent, would be sufficient to establish such contingency when paired with the evidence demonstrating anticipation of export performance. We answer this question in the negative. We have already concluded that a Ratios Analysis is independently insufficient to demonstrate that a subsidy is *de facto* export contingent. Rather, the United States must offer some analysis of the design, structure and modalities of operation of the A380 subsidies themselves and some explanation regarding how those subsidies provide an incentive to Airbus to favour export sales over domestic sales. The United States' offered evidence pertaining to anticipation of exportation does not, however, materially contribute to performing such tasks and establishing export *contingency*. We first note that a finding of anticipated exportation pertains to an entirely different substantive element of the Article 3.1(a) analysis and, therefore, such a finding cannot meaningfully underlie a finding of *de facto* export *contingency*. Indeed, the Appellate Body has emphasized that the issue of anticipated exportation is "quite separate from, *and should not be confused with*, the examination of whether the subsidy is 'tied to' actual or anticipated exports".[1262] Nevertheless,

[1260] United States' second written submission, para. 309.

[1261] See United States' second written submission, para. 309 (citing United States' first written submission, paras. 172-177 (describing such evidence)); and Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.651-7.654 (describing same evidence). We note that paragraphs 172-176 of United States' first written submission discuss the A380, while paragraph 177 discusses evidence with respect to the A350XWB.

[1262] Appellate Body Report, *Canada – Aircraft*, para. 172. (emphasis original)

despite the legal and conceptual distinctions between anticipation of exportation and export contingency, we cannot completely discount the possibility that the record evidence underlying a finding of the former cannot underlie a finding of the latter. In this vein we further recall that the Appellate Body has indicated that evidence underlying anticipation of exportation can be relevant to an export contingency inquiry.[1263]

6.708. Our attention therefore turns to considering whether the evidence underlying the finding of anticipation of exportation for the A380 supports a finding of *de facto* export contingency to any meaningful degree. We conclude that it does not. We discern no language in the Appellate Body report indicating that the evidence that assisted in establishing anticipation of exportation materially supported a finding of *de facto* export contingency. We further detect no language in the Appellate Body report indicating that such evidence materially helped populate the total configuration of the facts relating to *de facto* export contingency or in any way assisted in the identification of anything in the A380 LA/MSF subsidies themselves even potentially displaying export contingency. To the contrary, the Appellate Body stated that "the Panel's findings do not shed light on the question as to whether the fact that Airbus was anticipated to make a significant number of export sales under the LA/MSF contracts is not simply reflective of conditions of supply and demand undistorted by the granting of the subsidies."[1264] We similarly detect nothing in the record suggesting that the A380 LA/MSF measures provide an incentive to Airbus to favour export LCA sales over domestic LCA sales.[1265] In contrast, the record appears wholly consistent with the notion that Airbus would wish to sell as many A380s as it could, wherever demand for such LCA existed, even in the presence of A380 LA/MSF. Because the evidence underlying a finding of anticipation of exportation, therefore, does not meaningfully contribute to a finding of *de facto* export contingency, and the only remaining piece of evidence (i.e. an A380 Ratios Analysis) is independently incapable of demonstrating such contingency, we find that the United States' claim under Article 3.1(a) of the SCM Agreement regarding the A380 LA/MSF measures is unsupported by sufficient evidence, and therefore fails.

6.5.3.7.2.2 A350XWB

6.709. The United States also argues that the A350XWB LA/MSF measures are *de facto* contingent on export performance. Aside from offering a Ratios Analysis regarding the A350XWB, the United States supports this argument with the same evidence that the United States used to establish that the relevant European Union member State governments anticipated exportation when they granted the A350XWB LA/MSF measures.[1266] Such evidence consists of: (a) the A350XWB 2009 order book; (b) presentations highlighting Airbus' foreign customer base, Airbus' export orientation, and Airbus' intention to exploit emerging economies; (c) certain statements by officials of relevant European Union member State governments indicating a desire to strengthen the economies and exports of such member States and welcoming Airbus manufacturing facilities in the territories of such member States as part of that goal; and (d) that the repayment mechanisms contained in the A350XWB LA/MSF contracts indicated that the European Union member States must have been anticipating large numbers of exports of the A350XWB. We detect nothing in this evidence, however, that indicates that the A350XWB LA/MSF measures provide an incentive to Airbus to favour export sales over domestic sales. The United States has offered no

[1263] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1063.

[1264] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1091.

[1265] We note that the only way in which we discern that the A380 LA/MSF subsidies could be cast as being geared to induce the promotion of future export performance by Airbus (i.e. that the measures were granted to an export-oriented company because the grantor expected large numbers of exports, necessarily increasing Airbus' and the European Union's absolute export levels and likely the European Union's export orientation) has already been rejected by the Appellate Body as a basis upon which to find that the A380 LA/MSF measures are *de facto* export contingent.

[1266] See United States' first written submission, paras. 189 ("For the *same reasons* that A380 LA/MSF is *de facto* export-contingent, LA/MSF for the A350 XWB is as well. Namely, the nature, structure, and modalities of operation indicate that it was geared to induce exportation, and the comparison of ratios shows a higher share of anticipated exports with the subsidy than without.") (emphasis added), 190 (arguing that the A350XWB LA/MSF contracts display relevant similarities with the A380 LA/MSF measures, namely that repayment would be spread out over a large number of mainly export sales due to the success-dependent, levy-based, back-loaded, and unsecured nature of the contracts), and 191 (arguing that the A350XWB LA/MSF contracts were structured in anticipation of a large number of sales, many of which would necessarily have to be export sales given the size of the EU market); and second written submission, para. 310 (making similar arguments).

other relevant analysis how the design, structure and modalities of operation of the A350XWB subsidies do so. We further detect nothing in the evidence offered by the United States in this context, or anywhere else in the record, indicating that the A350XWB LA/MSF measures do so. Rather, the record appears wholly consistent with the notion that Airbus would wish to sell as many A350XWBs as it could, wherever demand for such LCA existed, even in the presence of A350XWB LA/MSF.[1267]

6.710. Thus, as it did with respect to the A380 LA/MSF measures, the United States relies on two types of evidence to demonstrate that the A350XWB LA/MSF measures are *de facto* contingent on export performance, i.e. a Ratios Analysis and evidence establishing anticipation of exportation that appears to offer no significant indication of the presence of *de facto* export contingency. We recall that such evidence failed to establish *de facto* export contingency with respect to the A380 LA/MSF measures. We see no reason to alter that conclusion with respect to the A350XWB LA/MSF measures. We conclude, therefore, that the United States' claim under Article 3.1(a) of the SCM Agreement regarding the A350XWB LA/MSF measures is unsupported by sufficient evidence, and therefore fails.

6.5.3.7.3 Validity of the United States' Ratios Analyses

6.711. Immediately above, we concluded that the United States has offered insufficient evidence in support of its claims that the A380 and A350XWB LA/MSF measures are *de facto* contingent on export performance. Nonetheless, given the novel nature of the Export Inducement Test, and certain ambiguities surrounding its relationship with a Ratios Analysis, we will proceed to consider the validity of the United States' Ratios Analyses regarding the A380 and A350XWB LA/MSF measures. This section proceeds in four parts. First and second, we examine the validity of the United States' Anticipated Ratios for the A380 and A350XWB, respectively. Third, we examine the validity of the United States' Baseline Ratios for the A380 and A350XWB. Finally, in light of those examinations, we consider the utility of further examining the United States' Ratios Analyses.

6.5.3.7.3.1 Anticipated Ratio: A380

6.712. Consistent with the Appellate Body's guidance, the A380 Anticipated Ratio is the ratio of anticipated export and domestic sales of the A380 that would come about in consequence of the granting of the A380 LA/MSF measures.[1268] The United States argues that the Appellate Body found that the A380 Anticipated Ratio could be calculated from the Airbus 2000 Global Market Forecast (the 2000 GMF), which the original panel had also considered.[1269] The United States argues that the 2000 GMF forecasts the sales of 1,235 very large aircraft (VLA) between 2000 and 2019, and all these deliveries were anticipated to be satisfied by Airbus LCA, and "in particular" the A380.[1270] Because the 2000 GMF forecasts that the "Europe" market will account for 20% of the projected 1,235 VLA deliveries, with 80% going to markets outside Europe[1271], the United States calculates the A380 Anticipated Ratio as 1:4 (or 2:8).[1272]

6.713. The European Union responds to the United States' offered A380 Anticipated Ratio on three fronts.[1273] First, the European Union argues that because the 2000 GMF was issued before the

[1267] We note that the only way in which we discern that the A350XWB LA/MSF subsidies could be cast as being geared to induce the promotion of future export performance by Airbus (i.e. that the measures were granted to an export-oriented company because the grantor expected large numbers of exports, necessarily increasing Airbus' and the European Union's absolute export levels and likely the European Union's export orientation) has already been rejected by the Appellate Body as a basis upon which to establish that a subsidy is *de facto* export contingent.

[1268] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1099 (describing the Anticipated Ratio).

[1269] United States' first written submission, para. 183; and second written submission, paras. 318-325.

[1270] See United States' response to Panel question No. 23, para. 63 (clarifying that the United States argues that all projected 1,235 VLA sales were projected to be A380 sales).

[1271] Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), pp. 36-37.

[1272] United States' first written submission, para. 183. The United States notes that this ratio may be understated because the "Europe" market used in the 2000 GMF is geographically larger than the European Union. (United States' first written submission, para. 184)

[1273] See generally European Union's first written submission, paras. 405-412; and second written submission, paras. 386-400.

conclusion of the challenged A380 LA/MSF measures, it cannot evidence the A380 Anticipated Ratio. Second, the European Union argues that the 2000 GMF is a demand, rather than sales, forecast, and thus cannot logically evidence the A380 Anticipated Ratio. Third, the European Union argues that the 2000 GMF does not segregate data regarding the A380 specifically enough to draw any conclusions regarding levels of anticipated sales for the A380.

The Airbus 2000 GMF: treatment by the Appellate Body

6.714. The United States argues that the Appellate Body concluded that the 2000 GMF provides a sufficient evidentiary basis upon which to calculate the A380 Anticipated Ratio. In support of this argument, the United States offers no evidence that the Appellate Body calculated an A380 Anticipated Ratio from the 2000 GMF, points to no explicit language in the Appellate Body report stating that the 2000 GMF provides a sufficient basis upon which to calculate the A380 Anticipated Ratio, and cites no language from the Appellate Body report indicating that the Appellate Body considered that it knew what the A380 Anticipated Ratio was. Nevertheless, the United States argues that the Appellate Body never found that it could *not* calculate the A380 Anticipated Ratio, finding only that it could not calculate the A380 *Baseline* Ratio, and therefore the 2000 GMF *must* have been sufficient to calculate the former.[1274]

6.715. We reject the United States' argument in this context. First, although it is true that the Appellate Body found that it lacked an evidentiary basis upon which calculate an A380 Baseline Ratio[1275], it also explicitly indicated that it could not calculate an A380 Anticipated Ratio based on the evidence before it: "{T}he evidence does not clearly indicate the proportion of export and domestic sales Airbus would be expected to make *under the LA/MSF contracts in question*."[1276] In fact, this statement appears in the very paragraph that discusses the 2000 GMF. Thus, even if the United States is correct that the Appellate Body report focused principally on the inability to calculate an A380 Baseline Ratio in this context, we cannot infer from this fact that the Appellate Body considered the A380 Anticipated Ratio to be a non-issue.

6.716. We therefore conclude that the Appellate Body report did not find that the 2000 GMF provides a sufficient evidentiary basis upon which to calculate the A380 Anticipated Ratio. To the contrary, we conclude that the Appellate Body found that the 2000 GMF provided an inadequate evidentiary basis upon which to calculate the A380 Anticipated Ratio. For this independent reason, we find that the 2000 GMF provides an inadequate basis upon which to calculate the A380 Anticipated Ratio.

The Airbus 2000 GMF: supply or demand forecast

6.717. The European Union argues that the 2000 GMF is a pure LCA demand forecast, and is therefore incapable of illustrating an Anticipated Ratio for A380 sales because demand for LCA is unaffected by supply-side financing instruments such as LA/MSF.[1277] The Appellate Body explained that the 2000 GMF is a forecast "based on an estimate of fleet development of airlines around the world, or of the regional distribution of global aircraft *demand*" and thus "relates to *only* the

[1274] United States' first written submission, para. 183; second written submission, paras. 318-319; and response to Panel question No. 32.

[1275] The Appellate Body concluded that the original panel's findings and the undisputed facts on the record were insufficient bases upon which to resolve the Export Inducement Test because they left open the following issues: (a) "At what level would Airbus be anticipated to sell in the domestic and export markets *undistorted by the granting of the subsidies* under the LA/MSF contracts in question", and (b) "the extent to which Airbus would be expected to export in the absence of the … subsidies." (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1098) (emphasis original). See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1099-1101 (discussing absence of evidence with which to calculate an A380 Baseline Ratio).

[1276] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1092 (emphasis added). See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1094 ("Moreover, as noted above, the {2000) GMF forecast of 1,235 sales globally and 247 sales in 'Europe' is reflective of conditions of supply and demand in an industry that is highly export-oriented.").

[1277] See European Union's second written submission, paras. 396-397.

existing condition of worldwide *demand* by airlines".[1278] Further, the Appellate Body states in the paragraph discussing the 2000 GMF that:

> *{T}he evidence does not clearly indicate the proportion of export and domestic sales Airbus would be expected to make under the LA/MSF contracts in question.* Thus, the evidence does not give an indication as to the proportion of its production that Airbus would be expected to sell in the domestic and export markets undistorted by the granting of the LA/MSF subsidies at issue. The evidence therefore does not help to show whether the LA/MSF subsidies were granted so as to give Airbus an incentive to skew its future sales in favour of export sales.[1279] (emphasis added)

6.718. Consistent with this treatment, the Appellate Body never describes the 2000 GMF as a supply forecast. Moreover, the 2000 GMF is consistent with the Appellate Body's description of it as a demand forecast. Most strikingly, the 2000 GMF explicitly states that it is "a pure demand forecast"[1280], and consistently refers to data regarding LCA deliveries as relating to "demand".[1281] We therefore conclude that the 2000 GMF is, at least principally, a demand forecast rather than a supply forecast, suggesting that it is of limited relevance for calculating the A380 Anticipated Ratio, which focusses on the anticipated numbers of export and domestic sales (i.e. supply) of the A380.

6.719. We recognize, however, the possibility that the 2000 GMF could function as both a demand *and* supply forecast for certain purposes. This would be so if it were anticipated that Airbus would supply its VLA (including, of course, the A380) to various markets in proportion to the relative VLA demand levels in those markets. The Appellate Body report suggests that the Appellate Body, to some extent, accepted this assumption: "The fact that demand by non-European airlines was projected at 988 {VLA} and demand by European airlines at 247 {VLA} simply shows that Airbus is an export-oriented company."[1282] This interpretation, however, critically undermines the United States' case in this context. This is so because if Airbus' VLA sales − including A380 sales − in the presence of the A380 LA/MSF measures were anticipated to occur in the domestic market and export market in accordance with demand distribution, then this is simply to say that the A380 LA/MSF measures do not induce Airbus to sell A380s contrary to relevant market forces at all. In other words, the 2000 GMF would constitute evidence that the A380 LA/MSF measures do not provide an incentive to Airbus to favour export sales over domestic sales, in turn strongly suggesting that even if the United States could produce a Ratios Analysis using the 2000 GMF that indicated skewing indicative of export contingency, such a result would be a false positive.

6.720. We therefore conclude that the 2000 GMF either cannot evidence the A380 Anticipated Ratio because it cannot logically evidence the anticipated *sales* of the A380 in the relevant domestic and export markets, or supports the conclusion that the A380 LA/MSF measures are not *de facto* contingent on export performance.

[1278] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1092 (emphasis added; footnote omitted). The Appellate Body report also states that "{a}mong the evidence examined by the Panel, the only piece that shows market conditions *undistorted* by the granting of the subsidies under the LA/MSF contracts at issue relates to the *demand* side, namely the projected demand for LCA by airlines worldwide", i.e. the 2000 GMF. (Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1098) (emphasis added)

[1279] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1092. We note that this statement as a whole is somewhat ambiguous. The first sentence references sales "under the LA/MSF contracts", or relating to the Anticipated Ratio. The second sentence references sales "in the domestic and export markets undistorted by the granting of the LA/MSF subsidies", or relating to the Baseline Ratio. It is therefore unclear how the second sentence follows from the first. The language in the third sentence, however, directly suggests that the 2000 GMF is generally unhelpful in this context.

[1280] Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), p. 11.

[1281] See e.g. Airbus Global Market Forecast 2000-2019, July 2000, (Exhibit USA-68/EU-160 (exhibited twice)), pp. 3 ("Demand for passenger aircraft deliveries"), 10 (caption of text box stating that "{d}emand is forecast in 19 categories {of LCA}"), 11 ("demand for aircraft deliveries"), and 27 (section heading reading "Demand for passenger aircraft deliveries").

[1282] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1092.

The Airbus 2000 GMF: anticipation of the A380 LA/MSF measures

6.721. The United States and European Union dispute whether the 2000 GMF can be properly said to reflect the anticipation of the receipt of the A380 LA/MSF measures because it was authored before the conclusion of at least certain such measures.[1283] We recall our earlier discussion in which we recognized that the expectations regarding a relevant firm's sales behaviour upon which an Anticipated Ratio is based must have been formed in the presence of meaningful knowledge of a subsidy's terms including its design and structure (or perhaps demonstrated expectations of such aspects that ultimately prove accurate). We appreciate, therefore, the parties' disagreement on this score. In our view, however, our discussion in the preceding section effectively moots this issue. Immediately above, we concluded that the 2000 GMF is a demand, rather than supply, forecast. We detect no logical way, therefore, in which the 2000 GMF can reflect the influence of supply-side financing, such as A380 LA/MSF, that may meaningfully assist in the formulation of an A380 Anticipated Ratio. The United States has further provided no basis upon which to reason that demand for LCA was somehow influenced by Airbus' receipt of A380 LA/MSF in a relevant manner. Under the circumstances, therefore, we decline to address this issue any further.

The Boeing 2000 CMO

6.722. The United States proposes that the Boeing 2000 Current Market Outlook (the 2000 CMO) may be used as "a potential alternative to Airbus's 2000 GMF for calculating the {A380 Anticipated Ratio}."[1284] The United States derives an A380 Anticipated Ratio of 1:4.84 from this document.[1285] The document is dated September 2000, and forecasts how many LCA deliveries will occur between 2000 and 2019 to certain geographic markets (e.g. Europe; Asia-Pacific) by type of aircraft (e.g. twin-aisle; 747 and larger).[1286] The aircraft types include both Boeing and Airbus LCA.

6.723. We detect two fundamental problems with the United States' attempts to use the 2000 CMO as a basis upon which to calculate the A380 Anticipated Ratio. First, the Boeing 2000 CMO appears to be an LCA *demand* forecast, and therefore suffers from the same flaws from which the 2000 GMF suffers in this context, discussed above.[1287] Second, the United States offers no evidence indicating that Boeing knew or anticipated the terms of any of the challenged A380 LA/MSF measures at the time Boeing produced the 2000 CMO. In our view, therefore, even if Boeing had produced the document with the knowledge or belief that Airbus had received and/or would receive member State financial assistance regarding the A380 programme, and further assuming that the document reflects Boeing's best guess regarding what Airbus' A380 sales behaviour was anticipated to be in the presence of member State financial assistance, such anticipation is of the wrong kind in this context. We again recall that the expectations regarding a relevant firm's sales behaviour upon which an Anticipated Ratio is based must have been formed in the presence of meaningful knowledge of a subsidy's terms including its design and structure (or perhaps demonstrated expectations of such aspects that ultimately prove accurate). We detect no evidence in the record, however, demonstrating that Boeing displayed any such knowledge or prescience regarding the A380 LA/MSF contracts in drafting the 2000 CMO.[1288] We therefore reject the 2000 CMO as a basis upon which to calculate an A380 Anticipated Ratio.

[1283] See e.g. United States' response to Panel question No. 24; and European Union's comments on the United States' response to Panel question No. 24.

[1284] United States' second written submission, para. 316.

[1285] United States' second written submission, para. 316.

[1286] Extract from Boeing Current Market Outlook 2000, Appendices, pp. 45-46, (Exhibit USA-81); and "Demand for Air Travel", extract from Boeing Current Market Outlook 2000, pp. 20-27, (Exhibit EU-167).

[1287] Extract from Boeing Current Market Outlook 2000, Appendices, pp. 45-46, (Exhibit USA-81), cover page ("World *demand* for commercial airplanes"). (emphasis added)

[1288] We note that even if Boeing had anticipated that the A380 would receive LA/MSF-type measures, no previously granted LA/MSF measure has been found to be contingent on export performance. We further note that, as discussed at length further above, that the aspects of the A380 LA/MSF subsidies themselves that the United States has identified in this context, which Boeing may have been able to anticipate to some degree had it anticipated that the A380 programme would receive member State financial support, do not materially contribute to any finding that the A380 LA/MSF measures are contingent on export performance.

Other supporting evidence offered by the United States

6.724. The United States offers three other pieces of evidence that it argues "*support* the use of an {A380} 'anticipated' ratio at least as high as {1:4}".[1289] The United States describes this evidence as follows:

> - In its 1999 GMF, Airbus predicted that large civil aircraft operators around the world would need to acquire a total of 1,208 new passenger aircraft with more than 400 seats during the 1999-2018 period. Airbus stated that the Asia-Pacific region was "dominating demand" for aircraft of that size, and that 55 percent of the orders for such aircraft would come from that region, including China. By contrast, Airbus predicted that the market in "Europe" (*i.e.* EU and also non-EU European countries) would represent only 23 percent of total demand for aircraft with more than 400 seats – implying an even smaller share for the EU alone.
>
> - Airbus repeated this assertion in its application for German LA/MSF for the A380, in which it forecast that **[***]**.
>
> - As noted above, in 1999 and 2000, Airbus published a series of "A3XX Briefings" that discussed the fact that most demand for the A380 would be outside Europe. For example, the Third Quarter 1999 edition stated: "The market for large { } aircraft will be **concentrated**: both geographically, with *over half the projected deliveries expected to go to airlines domiciled in the Asia-Pacific region*, and in terms of customers, with 20 airlines taking more than 7{0}% of aircraft."[1290] (emphasis original; bold original; footnotes omitted)

6.725. We emphasize that the United States never argues that we can use such evidence as a basis upon which to calculate a reasonably reliable A380 Anticipated Ratio that indicates the presence of *de facto* export contingency. We conclude, however, that even if the United States had asked us to do so, we cannot. The 1999 GMF[1291] was on the record before the Appellate Body, and the Appellate Body never indicated that this GMF materially contributed to the calculation of the A380 Anticipated Ratio.[1292] Further, the 1999 GMF appears to be a demand rather than supply forecast and therefore suffers from the same flaws from which the 2000 GMF suffers. The German A380 LA/MSF application was also on the record before the Appellate Body, and the Appellate Body only indicated that the document contributed to a finding of anticipation of exportation, rather than export contingency.[1293] Further, it does not appear to contain any specific information regarding into what geographic markets the A380, specifically, was expected to be sold.[1294] Like the 1999 GMF, the Third Quarter 1999 A3XX Briefing was on the record before the Appellate Body, and the Appellate Body never indicated that it materially contributed to the calculation of the A380 Anticipated Ratio.[1295] Moreover, the relevant excerpt from the Third Quarter 1999 Briefing, quoted above, refers only to markets for, and deliveries of, "large aircraft" with no indication what LCA comprise this category and no indication regarding what numbers of A380s were predicted to be

[1289] United States' first written submission, para. 185. (emphasis added)
[1290] United States' first written submission, para. 185. (Airbus, Briefing 3rd quarter, 1998, (Original Exhibit US-359), (Exhibit USA-69); Airbus Global Market Forecast 1999, (Exhibit USA-285); Daimler Chrysler Aerospace Airbus, "Launch aid application regarding the development project Airbus A3XX", request to the *Bundesministerium für Wirtschaft und Technologie*, 21 October 1999, (Original Exhibit US-357), (Exhibit USA-286) (BCI); and **[[**HSBI**]]** Exhibit USA-294 (HSBI)).
[1291] Airbus Global Market Forecast 1999, (Exhibit USA-285). In fact, the United States itself takes the position that the 1999 GMF is even less relevant than the 2000 GMF for purposes of calculating the A380 Anticipated Ratio. (See United States' second written submission, para. 320)
[1292] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1073.
[1293] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1073, 1079, and 1095.
[1294] Daimler Chrysler Aerospace Airbus, "Launch aid application regarding the development project Airbus A3XX", request to the *Bundesministerium für Wirtschaft und Technologie*, 21 October 1999, (Original Exhibit US-357), (Exhibit USA-286) (BCI), pp. 2 (indicating how many A380s were expected to be sold until 2021, but not indicating into what markets they were expected to be sold) and 15 (indicating that **[***]**).
[1295] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1073.

sold into what geographic markets.[1296] In our view, such deficiencies demonstrate that these additional documents cannot be used to determine a reasonably reliable A380 Anticipated Ratio.

6.726. We therefore conclude that we either cannot calculate an A380 Anticipated Ratio to any reasonable degree of accuracy from the relevant evidence offered by the United States, or that the evidence offered by the United States regarding the A380 Anticipated Ratio indicates that the A380 LA/MSF subsidies are not *de facto* contingent on export performance.

6.5.3.7.3.2 Anticipated Ratio: A350XWB

6.727. The United States uses Airbus' publicly available A350XWB order book data as from the end of **[***]**[1297] – the year in which Airbus and the member States began concluding the A350XWB LA/MSF contracts – to calculate the A350XWB Anticipated Ratio.[1298] The United States claims that such data were "certainly … known to {the relevant member State} governments at the time of each decision {to conclude the A350XWB LA/MSF contracts}, providing the best available proxy for the foreign versus domestic distribution of Airbus' future deliveries of A350 XWBs."[1299] The United States claims such data reveal an Anticipated Ratio of 1:10.7, or approximately 2:21 in whole numbers, in **[***]**.[1300] The United States asserts that this number is conservative. This is so because using Airbus order data as they existed at the beginning of **[***]**, the month in which Airbus concluded the first A350XWB LA/MSF contract, would result in a higher Anticipated Ratio of 1:21 instead of 2:21.[1301]

6.728. The European Union first argues that because the data that the United States uses from the Airbus A350XWB order book precede the conclusion of the A350XWB LA/MSF measures, they cannot evidence the A350XWB Anticipated Ratio[1302], and, therefore, the United States' argument suggests that "the ratios with and without the financing arrangements are the same".[1303] In response to the United States' claim that taking the data from Airbus' order book as of **[***]** yields a much higher A350XWB Anticipated Ratio, the European Union asserts that "simply varying the end of the relevant data period by six months (from the **[***]**) produces wild and arbitrary changes in the result achieved" and therefore "merely serves to illustrate that the whole approach adopted by the United States, and the data on which it seeks to rely, is misconceived, unreliable and arbitrary".[1304] Finally, the European Union argues that "the Appellate Body has already considered {the} type of evidence {upon which the United States relies in this context} and rejected it" because "this type of evidence relates *only* to the existing condition of worldwide demand by airlines and that it *does not help to demonstrate* that finance is granted so as to give Airbus an incentive to skew its future sales in favour of exports."[1305]

6.729. We conclude that we cannot use the Airbus **[***]** order book data to calculate an A350XWB Anticipated Ratio that advances the United States' claim to any reasonably reliable degree under the circumstances. At the outset, we note that it is somewhat unclear to us precisely how the United States wishes to cast the A350XWB order data as evidencing the A350XWB Anticipated Ratio. The A350XWB Anticipated Ratio is the ratio of anticipated domestic to export sales of the A350XWB that would come about in consequence of the granting of the A350XWB LA/MSF measures. We further note that the A350XWB order data that the United States offers in this context are not a forecast of anticipated A350XWB order levels, but actual order levels that

[1296] Airbus, Briefing 3rd quarter, 1998, (Original Exhibit US-359), (Exhibit USA-69).
[1297] Ascend database, Gross Orders and Year End Backlog A330, A350, 777 and 747, 1990-2011, as of 14 February 2012, (Exhibit USA-293).
[1298] The United States claims that examining backlog order data from 2006, when the A350XWB was launched, would be relevant as well, but claims that such relevant data are unavailable. (United States' first written submission, fn 309)
[1299] United States' first written submission, para. 194 (footnote omitted). See also United States' second written submission, paras. 326-327.
[1300] United States' first written submission, para. 195.
[1301] United States' second written submission, paras. 327-328 (citing European Union's first written submission, para. 1120 (in turn citing A350XWB orders that were taken "{b}y **[***]**" in Ascend database, Orders, data request as of 26 June 2012, (Exhibit EU-19))).
[1302] European Union's first written submission, para. 421; and second written submission, para. 412.
[1303] European Union's second written submission, para. 413.
[1304] European Union's second written submission, para. 413.
[1305] European Union's first written submission, para. 422 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1092). (emphasis original; footnotes omitted)

had accumulated up until a specific point in time. We therefore detect two conceptual ways in which the United States may attempt to use such actual order data to evidence the A350XWB Anticipated Ratio. Both methods rely on the notion that a snapshot of Airbus' A350XWB order book *vis-à-vis* certain geographic markets at a specific point in time will evidence Airbus' anticipated proportional levels of future A350XWB deliveries into, or future A350XWB orders with respect to, those geographic markets. First, the United States appears to suggest that, because Airbus expected to receive the A350XWB LA/MSF subsidies from the member States since the launch of the A350XWB in December 2006, all A350XWB orders that had accumulated up until either **[***]** evidence the Anticipated Ratio because such order data actually reflect Airbus' A350XWB sales behaviour *vis-à-vis* certain geographic markets in the presence of anticipation of receipt of the A350XWB LA/MSF subsidies. Airbus would, therefore, be expected to continue with such sales behaviour following the grant of the A350XWB LA/MSF subsidies.[1306] Second, Airbus may not have had relevant anticipation of the receipt of the A350XWB LA/MSF measures before **[***]**, but as of that month it did have such relevant anticipation going forward, and thus the A350XWB order book, beginning at that time, evidenced what Airbus' likely A350XWB sales behaviour would be moving forward.[1307]

6.730. The first method described above suffers from two fundamental flaws. We recall that the expectations regarding a relevant firm's sales behaviour upon which an Anticipated Ratio is based must have been formed in the presence of meaningful knowledge of a subsidy's terms including its relevant design and structure (or perhaps demonstrated expectations of such aspects that ultimately prove accurate). But, because the United States supports its export-contingency arguments without any reference to material aspects of the subsidies themselves that produce export contingency, and the first A350XWB LA/MSF contract was concluded in **[***]**, we lack any basis upon which to conclude that Airbus anticipated anything relevant regarding the subsidies at any point during which the A350XWB order data accumulated.[1308] Moreover, the nature of the order data is troubling for another reason. The A350XWB order book, at any given point in time, represents a snapshot of the geographic distribution of accumulated A350XWB sales, not the total number of anticipated sales into any given geographic market. We further note that all of Airbus' A350XWB sales will occur in one of the two relevant markets in this context (i.e. the domestic market and export market). This, of course, means that with each A350XWB order received the snapshot changes, in turn altering the A350XWB Anticipated Ratio, often to a significant degree. As the United States itself notes, the A350XWB Anticipated Ratio, calculated on the basis of the A350XWB order book, changes significantly from **[***]** to year-end **[***]**. The United States points to no reason why the A350XWB LA/MSF subsidies, or Airbus' anticipated receipt of such subsidies, can account for such dynamism. Neither does the United States point to any relevant range of domestic-to-export sales that the dynamic Anticipated Ratio operates within or upon what ratio such dynamic shifts may converge. In our view, we cannot use data that display such significant dynamism, in the absence of any explanation of how to control or account for it, to produce a reasonably reliable A350XWB Anticipated Ratio.

6.731. The second method described above supports the conclusion that the A350XWB LA/MSF measures are not *de facto* contingent on export performance. This is so because it compels the conclusion that Airbus would be expected to follow materially the same sales behaviour both in the presence and absence of the A350XWB LA/MSF measures.

6.732. We therefore conclude that we either cannot calculate an A350XWB Anticipated Ratio to any reasonable degree of accuracy from the relevant evidence offered by the United States, or that the evidence offered by the United States regarding the A350XWB Anticipated Ratio indicates that the A350XWB LA/MSF subsidies are not *de facto* contingent on export performance.

[1306] See United States' second written submission, para. 327.
[1307] See United States' first written submission, para. 194.
[1308] Even if Airbus had anticipated that the A350XWB programme would receive LA/MSF-type measures, no previously granted LA/MSF measure has been found to be contingent on export performance. We further note that, as discussed at length further above, that the aspects of the A350XWB LA/MSF subsidies themselves that the United States has identified in this context, which Airbus may have been able to anticipate to some degree had it anticipated the A350XWB programme would receive member State financial support, do not materially contribute to any finding that the A350XWB LA/MSF measures are contingent on export performance.

6.5.3.7.3.3 Baseline Ratios: A380 and A350XWB

6.733. The United States also offers A380 and A350XWB Baseline Ratios. The United States constructs these two ratios in a similar manner, relying upon historic sales data of the Boeing 747 from the 1997-2001 period for the A380 Baseline Ratio[1309] and historic sales data of the Boeing 777 from the 2004-2009 period for the A350XWB Baseline Ratio.[1310] The European Union raises multiple objections in relation to both Baseline Ratios.[1311]

6.734. We recall that the Appellate Body has articulated two permissible methods with which to construct Baseline Ratios, i.e. the Historic Baseline Method and the Hypothetical Baseline Method.[1312] The Historic Baseline Method involves the use of sales data of the "same product" or, in this case, the "same LCA model".[1313] It is apparent that sales data pertaining to the 777 and 747 do not satisfy this criterion with respect to the A350XWB or A380. These data, therefore, cannot be used to calculate Baseline Ratios for either the A350XWB or A380 under the Historic Baseline Method.[1314]

6.735. The Hypothetical Baseline Method should reflect "the hypothetical performance of a profit-maximizing firm in the absence of the subsidy".[1315] In our view, there are a number of reasons why the sales data the United States relies upon relating to the 777 and 747 cannot be used to construct the hypothetical sales performance of a profit-maximizing firm with respect to the A350XWB or A380 in the absence of the relevant subsidies.

6.736. First, we note that LCA are imperfect substitutes and display material differences that can affect customer preferences in the context of complex sales campaigns in which customers consider a multitude of factors. Moreover, as we explain in more detail elsewhere in this Report, the 777 does not only compete with the A350XWB, but also the A330 (and over the 2004-2009 period, also the A340). Similarly, the A350XWB competes with three families of Boeing twin-aisle LCA, the 767, 777 and 787.[1316] The variance between LCA products (or LCA models) and their relative competitive interactions are likely to lead to differences in sales behaviours regarding such products, including differences in relevant geographic sales distributions.[1317] It is also true that the territory in which an LCA is produced has important implications for the geographic spread of its sales.

6.737. The United States, however, argues that differences resulting from the fact that Airbus and Boeing produce LCA in different territories (having, therefore, different *domestic* and *export* markets), strengthen rather than vitiate, the validity of the 777 and 747 sales data. This is so because the record shows that Airbus and Boeing can each sell LCA into their respective *domestic* markets more easily than the other. Thus, according to the United States, adjusting the relevant sales data to control for this difference would "result in an even wider gap between the

[1309] United States' first written submission, paras. 186-187. The United States does not dispute that the Appellate Body determined that it could not calculate an A380 Baseline Ratio using the original panel's findings and the undisputed evidence on the record of the original proceeding. (See e.g. United States' first written submission, para. 186; and second written submission, para. 318).

[1310] United States' first written submission, para. 196.

[1311] See e.g. European Union's second written submission, paras. 401-422.

[1312] It is not entirely clear to us whether the United States considers the 777 and 747 Baseline Methods to be exercises of the Historic and/or Hypothetical Baseline Methods.

[1313] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1047 and 1099.

[1314] We note that if we were to treat the A350XWB order data that had accumulated up until **[***]** as evidencing the A350XWB Baseline Ratio, this would directly suggest the conclusion that the A350XWB LA/MSF measures are not *de facto* export contingent under a Ratios Analysis. This is so because the A350XWB Anticipated and Baseline Ratios would rely on the same order data, resulting in identical ratios.

[1315] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1047. We note that the original panel and Appellate Body left open the possibility that, without direct A380 LA/MSF, the A380 would not have been launched. Thus, this analysis appears to technically assume that, in the absence of A380 LA/MSF, the Baseline Ratio would be something other than 0:0. As discussed above, however, even adopting this assumption *arguendo*, we still must reject the United States' A380 Baseline Ratio.

[1316] See below paras. 6.1362-6.1370 and 6.1406-6.1410.

[1317] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1099 (explaining that historic sales of one Airbus LCA model would be of limited relevance in determining a Baseline Ratio for a different Airbus LCA model because, *inter alia*, "each … {Airbus} LCA model was … new, distinct and developed under a different project", a general concern that appears to apply equally as among Airbus and Boeing LCA).

{Anticipated and Baseline} ratios, and thus an even more pronounced pattern of *de facto* export contingency."[1318]

6.738. In our view, the United States' observation attempts to control for differences between the *geographic locations of LCA manufacturers* but not the relevant *products* themselves. Moreover, it suggests that there may well be differences beyond those relating to the LCA products themselves that may need to be factored into an assessment of the geographic locations in which a hypothetical profit maximizing LCA producer could sell the A380 or the A350XWB. For instance, Boeing and Airbus may have historic or political advantages in selling their LCA into different geographic *export* markets as well. All of these considerations suggest that the historic sales data concerning the 777 and the 747 would not be reliable proxies for a hypothetical profit-maximizing firm's sales of the A350XWB and the A380 in the absence of the subsidy.

6.739. Second, it is uncontested that Airbus and Boeing possess incumbency advantages of varying degrees with respect to different LCA customers (arising from, for example, the desire for commonality by LCA purchasers), making it easier for Airbus and Boeing to sell their LCA – including twin-aisle LCA – to those different respective customer bases. Because a hypothetical profit maximizing producer selling the A380 and the A350XWB would not, by definition, have the same incumbency advantages as Boeing, relying upon Boeing's historic sales data pertaining to the 777 and 747 would appear to be problematic.

6.740. Third, we note that one of the years for which the United States presents historic sales data in relation to the 747 is 2001, when it would have been facing competition from the subsidized A380. Likewise, the 777 competed against the subsidized A350XWB for orders in the latter part of the 2004-2009 period. Thus, the actual 747 and 777 sales data the United States relies upon are, at least in part, affected by sales of the very subsidized Airbus aircraft which the United States' proposed Baseline Ratios are supposed to approximate.

6.741. Finally, we note that because Airbus and Boeing are different companies, they are likely to possess other relative sales advantages (or disadvantages) and employ different marketing strategies. Thus, it does not necessarily follow that Boeing's sales experience would be an appropriate proxy for that of a hypothetical profit maximizing LCA producer trying to sell the A350XWB or the A380. This is not to say that data pertaining to the sales of an actual LCA product of an LCA company that is different to Airbus can never serve as a basis upon which to construct the hypothetical sales of the another competitive product in the absence of relevant subsidization. Nevertheless, such considerations illustrate that in order to be reliable, adjustments must be made to account for the complexities of the LCA marketplace. In our view, the United States has not done enough to account for these factors.

6.742. Thus, for all of the above reasons, we cannot accept the United States' Baseline Ratios with respect to either the A380 or A350XWB, and decline to further examine the parties' arguments on this subject.

6.5.3.7.3.4 Ratios Analyses: A380 and A350XWB

6.743. The United States claims that comparing its A380 and A350XWB Baseline Ratios and Anticipated Ratios yields Ratios Analyses that indicate that the A380 and A350XWB LA/MSF measures are *de facto* contingent on export performance. The European Union disputes these claims. Above, we have concluded that the United States has not provided Baseline Ratios or Anticipated Ratios with respect to either the A380 or the A350XWB that advance the United States' claim under Article 3.1(a) of the SCM Agreement. In the absence of such ratios, A380 and A350XWB Ratios Analyses are not possible and arguments concerning those analyses become effectively moot. Under such circumstances, we decline to further address the parties' arguments regarding the Export Inducement Test and Ratios Analyses.

[1318] United States' second written submission, para. 315. See also United States' response to Panel question No. 33 (arguing, incorrectly in our view, that it is the European Union's burden to demonstrate that differences between the relevant LCA detract from the relevance of the 777 and 747 sales data in this context).

6.5.3.8 Conclusion

6.744. We find that the United States has failed to demonstrate that any A380 LA/MSF measure or A350XWB LA/MSF measure is *de facto* contingent on export performance. We therefore reject the United States' claim under Article 3.1(a) of the SCM Agreement with respect to such measures.

6.5.4 Whether the LA/MSF measures for the A350XWB are prohibited import substitution subsidies

6.5.5 Introduction

6.745. The United States claims that each of the four A350XWB LA/MSF measures is contingent on the use of domestic over imported goods, and therefore each is a prohibited subsidy under Articles 3.1(b) and 3.2 of the SCM Agreement. The United States argues that this is so because each measure is contingent on Airbus producing certain LCA components – including but not limited to A350XWB components – in the territories of the member States granting the A350XWB LA/MSF measures, components that Airbus will then use in downstream LCA production activities.

6.5.6 Arguments of the United States

6.746. The United States argues that the French, German, Spanish, and UK A350XWB LA/MSF measures[1319] are *de jure* and/or *de facto* contingent on the use of domestic over imported goods, and are therefore prohibited subsidies under Articles 3.1(b) and 3.2 of the SCM Agreement.[1320] In so arguing, the United States refers to two types of relevant agreements among the member States and Airbus. First, the United States refers to so-called "workshare agreements" (the Workshare Agreements) between Airbus and the member States. In this context, the United States claims that Airbus has long pursued a decentralized but coordinated production strategy in which its LCA production activities occur, *inter alia*, within the territories of the relevant member States.[1321] The United States claims that the member States:

> {G}ranted LA/MSF for {the A350XWB} in exchange for a commitment by Airbus to locate a fixed share of the total production work for the aircraft in each country. These "workshare agreements" required Airbus to produce certain components in the territory of each of the relevant member States, and then use those subassemblies and components in the production of the finished aircraft. As the grant of LA/MSF was tied to these workshare agreements, it was contingent upon the use of domestic goods and, therefore, inconsistent with Article 3.1(b) of the SCM Agreement.[1322]

6.747. The United States submits press reports, government documents and statements of government officials that it claims demonstrate the existence of these Workshare Agreements.

6.748. Second, the United States refers to the A350XWB LA/MSF contracts themselves, which the United States argues reflect the Workshare Agreements and contain terms that display *de jure* and/or *de facto* contingency on the use of domestic over imported goods. The United States

[1319] The United States also claims that the A380 LA/MSF measures are prohibited subsidies under Article 3.1(b) of the SCM Agreement in this compliance proceeding. We recall our earlier finding in this Report, however, that that claim is outside the scope of this proceeding.

[1320] See generally United States' first written submission, paras. 202-216 and 230-239; and second written submission, paras. 331-356.

[1321] United States' first written submission, para. 203.

[1322] United States' first written submission, para. 202. See also United States' first written submission, paras. 203 ("These 'workshare agreements' amount to a requirement that, to receive LA/MSF, Airbus must manufacture certain components of the aircraft within the EU, which accordingly become domestic products of the EU, and then use those domestic products in its aircraft."), 204 ("The workshare agreements also specify where Airbus will produce certain components of its large civil aircraft. In other words, the workshare agreements determine not only *how much* of the work must take place in each EU member State, but they also require the conduct of certain manufacturing tasks in specific countries.") (emphasis original), and 230 ("Nonetheless, publicly available evidence confirms that France, Germany, Spain, and the UK granted LA/MSF for the A350 XWB in exchange for workshare commitments that required the company to produce components in each country and use them in the finished aircraft.").

asserts that such contingency arises from two types of provisions in the contracts.[1323] First, the United States asserts that all four A350XWB LA/MSF contracts are conditioned on Airbus producing specific Airbus LCA components in the relevant member States' territories.[1324] Those components, therefore, become domestic goods of the relevant member States, and are then used in downstream Airbus LCA production activity. Second, the United States asserts that the **[***]** A350XWB LA/MSF contracts are conditioned on Airbus maintaining certain minimum levels of domestic employment in connection with the A350XWB programme, levels that cannot be maintained without Airbus engaging in significant A350XWB production-related activities in those member States.[1325] Such activities will, therefore, produce Airbus LCA-related goods that then become domestic goods of those European Union member States and are then used in downstream A350XWB production activity.[1326] The United States concludes, therefore, that the contracts "effectively require{} Airbus to source a large part of its components" from domestic sources.[1327]

6.5.7 Arguments of the European Union

6.749. The European Union makes several arguments in support of its position that no A350XWB LA/MSF measure involves the granting of a subsidy contingent on the use of domestic over imported goods, whether in law or in fact. At times, the substance of these arguments appears to overlap somewhat. First, the European Union argues that the Panel must interpret Article 3.1(b) of the SCM Agreement in light of and in harmony with Article III:8(b) of the GATT 1994, which exempts the practice of providing subsidies exclusively to domestic producers from the national treatment disciplines of Article III of the GATT 1994. The European Union argues that consideration of these GATT provisions, especially given their jurisprudential relationship with Article 3.1(b) of the SCM Agreement, compels the conclusion that production subsidies given to exclusively domestic producers cannot violate Article 3.1(b) of the SCM Agreement.[1328] Second, the European Union appears to argue that Airbus only produces one relevant "good" in this context, finished LCA, and therefore the United States' argument is predicated on the erroneous assumption that Airbus is producing and "using" multiple distinct goods in its LCA production processes. Third, the European Union appears to argue that any "good" produced in one member State, if destined for use in another member State, is not a "domestic good" for purposes of Article 3.1(b) of the SCM Agreement.[1329] Thus, insofar as this geographic production and use pattern occur, Article 3.1(b) is immaterial. Fourth, the European Union characterizes the A350XWB LA/MSF measures as "production" or "development" subsidies that, although they may be contingent on the production of certain goods in the relevant European Union member States' respective territories, are not contingent on the use of domestic over imported goods. Fifth, the European Union asserts that the contracts do not use the words "contingent" or "conditional" in any material manner and therefore their text does not support the United States' Article 3.1(b) claim.[1330] Sixth, the European Union claims that because labour is not a "good", even if certain A350XWB LA/MSF contracts are conditioned on the maintenance of certain domestic employment levels, such requirements are not disciplined by Article 3.1(b). Finally, the European Union argues that certain provisions in the contracts related to employment levels are qualified in ways as to make them not contingent on such levels within the meaning of Article 3.1(b).[1331]

6.5.8 Arguments of the third parties

6.5.8.1 Canada

6.750. Canada argues that the A350XWB LA/MSF subsidies are not contingent on the use of domestic over imported goods. Canada argues that Article 3.1(b) of the SCM Agreement only

[1323] United States' first written submission, para. 209.
[1324] United States' second written submission, paras. 338-355.
[1325] United States' second written submission, paras. 338-355.
[1326] See United States' first written submission, paras. 214-216.
[1327] United States' first written submission, para. 239.
[1328] European Union's second written submission, paras. 428-444.
[1329] European Union's second written submission, paras. 463 (arguing in context of A380 components), 481 (apparently referencing same reasoning with respect to A350XWB components), 485 (same), 489 (same), and 496 (same).
[1330] European Union's first written submission, paras. 456, 464, 468, 470, and 475.
[1331] European Union's first written submission, paras. 457, 464, 468, 470, and 475.

covers situations where a subsidy requires a recipient to *purchase* goods, and does not cover situations, such as this one, where subsidies require a recipient to *produce* certain goods.[1332] Canada also notes that Article III:8(b) of the GATT 1994 allows WTO Members to provide subsidies only to their domestic producers.[1333] Further, because "the GATT and SCM Agreement do not limit a subsidizing Member's ability to define the level of production required for subsidy eligibility purposes" Members may explicitly or implicitly require the production of intermediate goods.[1334] However, because "most manufacturers produce intermediate goods as part of the production of their final goods, the United States' position would negate the right of a subsidizing Member to require a subsidy recipient to produce goods".[1335]

6.5.8.2 Japan

6.751. Japan considers that *de jure* contingency in the context of Article 3.1(b) of the SCM Agreement should be established on the basis of the words actually used in the measure and not on the basis of factors not linked to such words[1336], and that the same standard for establishing "implicit" *de jure* contingency should be applied under Article 3.1(a) and under Article 3.1(b).[1337] Thus, Japan considers that, when establishing *de facto* contingency under Article 3.1(b), the Panel should make its assessment on the basis of the total configuration of the facts constituting and surrounding the granting of the subsidy, including the design, structure, and modalities of operation of the measure granting the subsidy, and not on the government's motivation for granting the subsidy.[1338] Finally, Japan considers that because the United States apparently argues that the existence of Workshare Agreements was a condition for the A350XWB LA/MSF subsidies to be granted to Airbus, the Panel should examine whether the granting of the A350XWB LA/MSF measures is indeed conditioned on the existence of such Workshare Agreements, and whether the Workshare Agreements indeed required the use of domestic over imported goods.[1339]

6.5.9 Evaluation by the Panel

6.752. This section analyses the United States' claim under Article 3.1(b) of the SCM Agreement. It proceeds in three parts. First, it discusses the evidence upon which the United States relies to support its claim. Second, it reviews relevant legal provisions and considerations. Finally, it evaluates whether the United States has presented a valid claim under Article 3.1(b).

6.5.9.1 Factual background

6.753. The United States argues that two general types of evidence demonstrate that each A350XWB LA/MSF measure is contingent on the use of domestic over imported goods: (a) publicly available information regarding the existence of Workshare Agreements; and (b) the terms of each A350XWB LA/MSF contract. The sections below address each in turn.

6.5.9.1.1 Publicly available information

6.754. The United States offers the following publicly available information in support of its argument that each A350XWB LA/MSF contract is contingent upon the use of domestic over imported goods:

- A July 2006 Reuters article discussing, *inter alia*, the United Kingdom's expectations regarding its workshare regarding Airbus' LCA programmes.[1340]

[1332] Canada's third-party submission, para. 19.
[1333] Canada's third-party submission, para. 20.
[1334] Canada's third-party submission, para. 20.
[1335] Canada's third-party submission, para. 25.
[1336] Japan's third-party submission, para. 33.
[1337] Japan's third-party submission, para. 45.
[1338] Japan's third-party submission, para. 34.
[1339] Japan's third-party submission, paras. 57-58.
[1340] James Regan and Jason Neely, "Airbus ministers back company over A380, A350", Reuters, 16 July 2006, (Exhibit USA-310).

- A December 2006 statement by a French parliamentarian made in the context of discussing potential French government funding of the A350XWB programme, which he apparently envisioned would involve the development of complete product lines.[1341]

- A December 2006 record of statements made by UK Minister for Industry and the Regions Margaret Hodge to Parliament in which she underscored the general importance of Airbus production activities occurring within the United Kingdom for the United Kingdom economy, and especially with respect to securing work related to composites technology. She stated, *inter alia*:

> All the detailed negotiations are currently taking place. As soon as they have reached a conclusion, we will be able to talk about them more openly. Our aim is to secure Britain's best interest in the development of the new A350 XWB, and we are engaged in close negotiations on those issues with EADS and with the other Governments who have a stake in its development and production. I understand the hon. Gentleman's point that we want not only to secure the 20 per cent but to ensure that we maintain our research and production capabilities in respect of the wings.[1342]

- A February 2007 *Le Monde* article reporting, *inter alia*, that certain of the relevant member States were contesting the allocation of work for section 15/21 of the A350XWB.[1343]

- A February 2007 Airbus press release forecasting that France, Germany, Spain, and the United Kingdom would receive 35%, 35%, 10%, and 20% of work for the A350XWB, respectively.[1344]

- A March 2007 speech about Airbus by Peter Hintze, Parliamentary State Secretary in the German Ministry of Economics and Technology, at the Debate in the European Parliament in Strasburg, in which he states:

> Policymakers are responsible for setting the framework. And they should make sure that a fair balance of opportunities and burdens prevails among the participating European nations. We are talking here about jobs and technological capabilities. The fair sharing of opportunities and burdens among France, Spain, the UK, and Germany seems to be successful.[1345]

- A June 2007 UK House of Commons document discussing, *inter alia*, A350XWB work allocation:

> 14. The potential distribution of work across countries for the A350 XWB was of particular concern to the UK for both political and technological reasons. Traditionally, the allocation of work packages for Airbus planes has roughly reflected the shareholding of the original partners – that is, 35% each for France and Germany, 20% for the UK, and 10% for Spain. Following the sale of BAE Systems' 20% stake in the company to EADS, however, the UK was left with no share in the company, consequently reducing its negotiating position with EADS.

[1341] Statement of M. Michel Billout, Sénat, (session ordinaire 2006-2007), Séance du 13 décembre 2006, Compte rendu intégral des débats, *Journal Officiel de la République française*, pp. 10174-10176, (Exhibit USA-102).

[1342] UK House of Commons Hansard Debates, Column 104WH, Colloquy of Mr. Steve Webb and Minister for Industry and the Regions, Margaret Hodge, 6 December 2006, (Exhibit USA-303/USA-360 (exhibited twice)).

[1343] Dominique Gallois, "*Le marchandage franco-allemand bloque encore la réforme d'Airbus*", *Le Monde*, 21 February 2007, (Exhibit USA-22).

[1344] Airbus Press Release, "Power8 prepares way for 'new Airbus'", 20 February 2007, (Exhibit USA-94).

[1345] Peter Hintze, Parliamentary State Secretary, German Ministry of Economics and Technology, "The Future of the European Aviation Industry", speech to European Parliament, Strasburg, 14 March 2007, (Exhibit USA-101) (English translation).

> 15. An additional concern was that Germany and Spain in particular were in a position to make a case for some of the work usually undertaken by the UK, because of their growing competence in composite materials, some of it relevant to wing manufacture. …
>
> 16. The UK Government maintained a continuous dialogue with Airbus and its parent, EADS, up to the final announcement in February 2007. The outcome for Airbus UK was a positive one: a 20% share of the workload for the A350 XWB, in line with that which it had achieved for previous aircraft. Overall wing assembly will take place at Broughton. Design and manufacture of the trailing edge will happen at Filton. …
>
> …
>
> 18. Overall, both Airbus UK and the Government said they were pleased with the work packages allocated to the UK. The company's Managing Director, Iain Gray, told us that securing wing leadership for the A350 XWB was "a massive success". The DTI said this "represents a good outcome for the UK, and is the result of sustained action by the UK Government to achieve a position on the A350 XWB that provides the most positive platform for the future". It noted also that it should leave the UK well-placed to win future work on the anticipated replacement for the A320.[1346] (footnotes omitted)

- A February 2009 speech on aviation policy by Dr Heinz Riesenhuber, who the United States claims was a member of the German Bundestag at the time, stating, *inter alia*, that Germany should help secure the long-term success of German aviation industrial sites by conditioning the provision of financial assistance to the A350XWB on obtaining certain work allocations from Airbus.[1347]

- An August 2009 German Government report indicating that: "'The Federal Government will tie further measures to commitments by the company {i.e. Airbus} that it will maintain competencies in Germany.'"[1348]

- An August 2009 Bundestag report on federal finances stating:

> The Federal Government is prospectively prepared to support the financing of development costs of civil aerospace projects on a *pro rata* basis by providing interest-bearing, sales-dependent refundable loans. The government intends to subsidize the development costs of the Airbus A 350 XWB on a *pro rata* basis, by guarantees pursuant to European and international laws.[1349]

- An August 2009 article from *The Guardian* reporting that the United Kingdom would invest GBP 340 million in the A350XWB programme, and stating that:

> The loan will create and sustain more than 1,200 jobs at Filton and at Airbus UK's Broughton plant in north Wales. Ministers also hope it will help create and sustain more than 5,000 jobs within the supply chain across the UK.

[1346] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume I: Report and formal minutes, 19 June 2007, (Exhibit USA-562), pp. 10-11.

[1347] Dr Heinz Riesenhuber, "*Wir müssen alles daran setzen, den deutschen Luftfahrtstandort auch künftig international wettbewerbsfähig zu halten*", Speech on aviation policy, 2 July 2009, (Exhibit USA-99). See United States' first written submission, fn 352 (erroneously citing this document as Exhibit USA-100).

[1348] United States' first written submission, para. 236 (translating and quoting *Bundesministerium fur Wirtschaft und Technologie, Bericht des Koordinators fur die Deutsche Luft- und Raumfahrt*, August 2009, (Exhibit USA-100), p. 55). We note that Exhibit USA-100 is undated, but the European Union does not contest the United States' dating of the document to August 2009.

[1349] *Deutscher Bundestag, Unterrichtung durch die Bundesregierung, Finanzplan des Bundes 2009 bis 2013*, 7 August 2009, (Exhibit USA-97), p. 24. The United States interprets the term "*pro rata*" in this context as meaning that the German Government would fund the A350XWB in proportion to the work share it received on the programme. (United States' first written submission, para. 235).

...

> Ian Godden, chief executive of the Society of British Aerospace Companies, said: "The announcement {to give LA/MSF} is very welcome. The Airbus A350 XWB is an extremely important programme for the future of the UK aerospace industry and this investment secures vital work across the sector.
>
> "Over 5,000 jobs are created or supported across the UK supply chain by the A350 programme. The significant technological advances of the composite materials being used means that the importance of the A350 programme in developing the skills and technology for the future sustainability of the UK aerospace industry cannot be exaggerated."[1350]

- A September 2009 Reuters article reporting that France, Germany, Spain, and the United Kingdom had been allocated approximately 37.5%, 34%, 10%, and 18% of work for the A350XWB, respectively.[1351]

- A December 2009 Spanish Government document stating that Spain was set to grant EUR 332 million in financial assistance to the A350XWB programme, that Airbus Operations had been assigned certain responsibilities in connection with the programme and that Spain had obtained an approximately 11% work allocation for the programme.[1352]

- An entry in the 2011 German federal budget entry apparently regarding German A350XWB LA/MSF that states that the "funding is generally based on Germany's work-share regarding development and manufacture."[1353]

6.5.9.1.2 The A350XWB LA/MSF contracts

6.755. The United States asserts that the terms of the A350XWB LA/MSF contracts demonstrate that such measures are *de jure* and/or *de facto* contingent on the use of domestic over imported goods. We discuss these terms below. The terms cited below include those cited by the United States in its written submissions in support of its Article 3.1(b) claim. We also cite other terms in the contracts that we consider helpful in understanding the nature of the contracts as a whole in this context.

6.5.9.1.2.1 France

6.756. We recall that the French A350XWB LA/MSF measure is set out in two legal instruments, i.e. the French A350XWB *Protocole* and the French A350XWB *Convention*. Airbus SAS and the French State were parties to both instruments, with no other Airbus entity being involved.

6.757. The French A350XWB LA/MSF contract makes a **[***]** available to Airbus in connection with the A350XWB programme, which the measure envisions will be disbursed **[***]**. The French A350XWB *Protocole* states that "**[***]**"[1354], and further specifies that "**[***]**."[1355] "**[***]**".[1356] Annex 2 of the French A350XWB *Protocole* provides a list of "**[***]**" and specifies that "**[***]**."[1357] Paragraph 2 of annex 2 reads as follows:

[1350] "Airbus receives £340 m government boost to save thousands of jobs" *The Guardian*, 14 August 2009, (Exhibit USA-96).
[1351] Tim Hepher and Tracy Rucinski, "Spain to double share of work on Airbus A350", Reuters, 18 September 2009, (Exhibit USA-301).
[1352] *Consejo de Ministros: Referencia*, *Ministerio de la Presidencia, Secretaria de Estado de Comunicación,* 11 December 2009, (Exhibit USA-103), pp. 35-36.
[1353] *Bundesministerium für Wirtschaft und Technologie, "Bundeshaushaltsplan 2011, Einzelplan 09"*, (Exhibit USA-50), p. 50.
[1354] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 1.1. (emphasis added)
[1355] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 2.1. (emphasis added)
[1356] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 2.1. (emphasis added)
[1357] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), annex 2 (para. 1). (emphasis added)

[***].[1358] (emphasis added)

6.758. The French A350XWB *Protocole* and French A350XWB *Convention* also contain provisions creating mechanisms that allow the French state **[***]**. For instance, Airbus **[***]**[1359], **[***]**.[1360] Moreover, Annex 5 of the French A350XWB *Protocole* obligates Airbus to provide a **[***]** to the French state and provides that "{l}e montant définitif de la participation de l'Etat sera calculé sur la base de ce relevé. L'unité de management Aéronautique demandera, le cas échéant, **[***]**."[1361]

6.5.9.1.2.2 Germany

6.759. It will be recalled that the German LA/MSF measure is set out in the German KfW A350XWB Loan Agreement and annexes thereto. The parties are KfW and Airbus Operations GmbH, Hamburg, which is identified as the borrower, and Airbus SAS, Toulouse, which is identified as a co-borrower.

6.760. The German KfW A350XWB Loan Agreement makes **[***]** available to Airbus in connection with the A350XWB programme, which the agreement envisions will be disbursed to Airbus in **[***]**.[1362] Section 2.2 of the German KfW A350XWB Loan Agreement provides that "{t}he loan may be used solely for the purpose **[***]**."[1363] The **[***]**."[1364] Annex 1.4(b)(i) provides cost estimates with reference to certain categories of costs that appear to relate to the following categories of costs defined as "**[***]**" in Annex 1.4(b)(ii): "**[***]**".[1365] The enumerated categories of costs in Annex 1.4(b)(i) appear to be broken out in greater detail in Annex 1.4(a)(ii). Annex 1.4(a)(ii) "**[***]**", but the Annex also clarifies that this list "**[***]**".[1366] The **[***]** is HSBI but it contains language that appears to explicitly envision the **[***]** of certain A350XWB components in Germany.[1367]

6.761. The German contract also sets forth certain **[***]** in connection with the A350XWB programme for Airbus in Article 15.5:

[***][1368] **[***]**.[1369] (emphasis added; footnote added)

[1358] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), annex 2. In a subsequent exchange of letters, France and Airbus appeared to agree that the terms "**[***]**" and "**[***]**", as the terms are used in Article 2.1 of the French A350XWB *Protocole*, denote no preference for geographic location. (Exchange of Letters between Fabrice Brégier, Director General of Airbus, and French Director General of Civil Aviation (DGAC) **[***]** and **[***]**, (Exhibit EU-(Article 13)-10) (BCI)). Even if this is so, however, it less than clear to us that this understanding would void the language "**[***]**", "**[***]**" and "**[***]**", as used in Annex 2 of the *Protocole* (italicized in body text above), insofar as such language indicates the site at which the textually associated development/production activities must be performed. We consider it unnecessary to resolve this ambiguity, however, because even if such language does mandate the site at which the associated production activities must occur it would not change the manner in which we dispose of the United States' claim.

[1359] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), arts. 8.1-8.2; and French A350XWB *Convention*, (Exhibit EU-(Article 13)-11) (BCI), art. 3. The French A350XWB *Protocole* also provides in article 8.2 that if **[***]**.

[1360] French A350XWB *Convention*, (Exhibit EU-(Article 13)-11) (BCI), art. 3.2.

[1361] French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), annex 5. See also French A350XWB *Convention*, (Exhibit EU-(Article 13)-11) (BCI), art. 2 ("Le montant de la convention correspond à une *participation plafond* de l'Etat au financement des travaux."). (emphasis added)

[1362] German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), sections 2.1 and 3.2.

[1363] German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), section 2.2. (emphasis added)

[1364] German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), section 1.1.

[1365] German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), annex 1.4(b)(ii) (para. 1).

[1366] German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), annex 1.4(a)(ii) (p. 2).

[1367] See e.g. German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), annex 1.4(a)(ii), pp. 2, and 17-18.

[1368] **[***]**." (German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), section 1.1).

6.762. The German KfW A350XWB Loan Agreement also contains the following terms apparently relating to Germany's **[***]** in connection with the A350XWB programme:

> **[***]**.[1370]

6.763. The German contract further sets forth certain reporting mechanisms through which the grantor can **[***]** related to the A350XWB programme and its fulfilment of its **[***]** obligations.[1371] Further, the measure requires Airbus to submit a **[***]**, whenever that may be. If this document indicates that the loan amount **[***]**.[1372]

6.5.9.1.2.3 Spain

6.764. It will be recalled that the Spanish LA/MSF measure is formalised in the Spanish A350XWB *Convenio*, concluded between the Spanish Ministry of Industry, Tourism and Commerce and Airbus Operations S.L. (the Spanish Airbus affiliate). The prior *Real Decreto* indicated the government's commitment to provide the sums and, broadly, some conditions of LA/MSF. The stated purpose of the Spanish A350XWB *Convenio* is as follows:

> El objeto del presente Convenio es establecer un marco de colaboración entre el MITYC {i.e. the Spanish Ministry of Industry, Tourism, and Commerce} y la empresa Airbus Operations S.L para la participación de esta empresa en el programa de desarrollo del avión AIRBUS A350,XWB {*sic*}... .[1373]

6.765. The *Real Decreto* grants refundable advanced payments to Airbus that are intended to cover development costs of activities entrusted by Airbus SAS to Airbus Operations, S.L. for the development of the A350XWB.[1374] Under the Spanish A350XWB *Convenio*, Spain agreed to provide a maximum of EUR 332,228,670[1375] for eligible expenses for such non-recurrent costs, corresponding to preliminary design, engineering design, wind tunnel tests, structural tests, flight tests, certification documentation, and cost of fabrication of prototype and trial aircraft, including modifications, tools and equipment.[1376] The maximum total amount of the refundable advanced payments can be equivalent to either 36% of the expected non-recurrent costs of the project at the moment of submitting the request, i.e. EUR 332,228,670, or the real non-recurrent costs of the project if they were less than 36% of the expected costs.[1377] Moreover, the Spanish A350XWB *Convenio* provides:

[1369] German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), section 15.5.

[1370] German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), section 15.4.

[1371] See generally German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), sections 1.4 and 16.2-16.5, and annex 16.1(a).

[1372] German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), sections 1.1, 8.1, and 8.7.

[1373] Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29) (BCI/HSBI), p. 2.

[1374] *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46), art. 4.1.

[1375] Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29) (BCI/HSBI), p. 3; *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46), art. 6.1.

[1376] *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46), art. 4.2.

[1377] *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46), art. 5; and Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29) (BCI/HSBI), *Tercera*, p. 3.

> - El MITYC … contribuirá a la financiación de los trabajos responsabilidad de Airbus Operations S.L {*sic*} en el programa de desarrollo del avión A350 XWB mediante la concesión de anticipos reembolsables a un tipo de interés del **[***]** según se detalla en este Convenio.
>
> - Airbus Operations S.L. cumplimentará los trabajos que le han sido asignados para su participación en el programa de desarrollo del A350 XWB que se concretan en tareas de ingeniería no específica así como el desarrollo del revestimiento inferior del ala y la integración de los siguientes elementos, estabilizador horizontal, carena ventral, secciones 19 y 19.1 y que se detallan en la memoria presentada por la empresa … .[1378]

6.766. Moreover, the *Real Decreto* clarifies that:

> Airbus SAS ha concluido el proceso de reparto de los trabajos correspondientes al programa A350 XWB entre sus filiales nacionales por lo que no sería posible la realización de una convocatoria pública para la concesión de los anticipos reembolsables previstos en este real decreto ya que solo la entidad Airbus Operations S.L., tiene asignada esta responsabilidad y ninguna otra empresa establecida en España puede realizar estos trabajos.[1379]

6.767. The *Real Decreto* further explains:

> El desarrollo y su posterior producción se van a realizar de una forma novedosa en relación a anteriores modelos, Airbus SAS será el arquitecto e integrador del conjunto del avión, reservándose a través de sus filiales nacionales en Francia, Alemania, Reino Unido y España el desarrollo y producción de determinados elementos estratégicos del mismo. Otros equipos y grandes subconjuntos del avión se externalizan a unos pocos y selectos subcontratistas de primer nivel que se responsabilizan del diseño desarrollo y producción de determinados subconjuntos del avión.
>
> En este proceso de reparto de los trabajos correspondientes al programa del Airbus A350 XWB, Airbus Operations, A.L., tiene la responsabilidad en determinadas actividades de diseño no específico así como del desarrollo y posterior producción en serie de determinados subconjuntos del avión A350 XWB, como el revestimiento inferior del ala así como la integración y posterior suministro a la cadena de montaje final de este avión en Toulouse (Francia) del estabilizador horizontal del avión, la carena ventral, y las secciones 19 y 19.1.[1380]

6.768. Spain disbursed EUR 41,493,300 in **[***]** under the Spanish A350XWB LA/MSF measures.[1381] The schedule of remaining disbursements is HSBI. In this regard, the Spanish A350XWB *Convenio* imposes upon Airbus the obligation to demonstrate, by different means, the use of the refundable advanced payments, including the preparation of annual technical and economic reports on the activities that were financed using those payments.[1382]

[1378] Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29) (BCI/HSBI), p. 3. The United States asserts that Airbus S.L.'s operations include "Centres of Excellence" (i.e. factories) in Getafe, Puerto Real and Illescas, which specialize in the horizontal tail plane. (United States' second written submission, para. 349 (citing "Airbus In Spain" Airbus website, accessed 11 October 2012, (Exhibit USA-459) (stating that these centres "are responsible for the manufacture of the horizontal tail plane for all Airbus aircraft."))

[1379] *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46), p. 93092.

[1380] *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46), p. 93091.

[1381] European Union's response to Panel question No. 133, fn 182.

[1382] *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el*

6.5.9.1.2.4 United Kingdom

6.769. It will be recalled that the UK LA/MSF measure is formalized in the UK A350XWB Repayable Investment Agreement, concluded between the UK Secretary of State for Business, Innovation and Skills, and both Airbus Operations Ltd and EADS NV.

6.770. Under the agreement, and its **[***]**, the United Kingdom agreed to finance **[***]** of costs incurred by Airbus Operations Ltd in connection with the A350XWB programme to a maximum of GBP 340,000,000.[1383] The UK A350XWB LA/MSF measure states that "**[***]**."[1384] "**[***]**" are "the design and development costs in relation to the *Project* **[***]**."[1385] The "**[***]**" is defined as "**[***]**".[1386] The "**[***]**" is defined as "**[***]**".[1387] The "Equipment" "means **[***]** A350"[1388], which Schedule 5 describes in more detail. Schedule 3 states that "**[***]**".[1389]

6.771. Such terms thus indicate that Airbus must perform certain A350XWB-related production tasks in the United Kingdom in order to receive certain disbursements under the UK LA/MSF measure. We note, however, that the agreement also provides that "**[***]**."[1390]

6.772. The UK contract and subsequent amendments also set forth certain reporting mechanisms through which the United Kingdom can monitor Airbus' ongoing expenses related to the A350XWB programme.[1391] Further, the contract provides that any "**[***]**", and that following a drawdown, "**[***]**".[1392]

6.773. The UK contract further includes a section entitled "**[***]**", which we set out in substantial part below:

> **[***]**[1393] **[***]**[1394]
>
> **[***]**.[1395] (footnotes added; bold text original)

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programa de desarrollo de la nueva familia de aviones Airbus A350XWB, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46), art. 10.

[1383] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clauses 2.1 and 4.3(c)(i).

[1384] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clause 2.2. (emphasis added)

[1385] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clause 1.1. (emphasis added)

[1386] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clause 1.1. (emphasis added)

[1387] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clause 1.1. (emphasis added)

[1388] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clause 1.1. (emphasis added)

[1389] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), schedule 3.

[1390] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clause 19.7.

[1391] See e.g. UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clauses 4.3(a) and 18, and schedules 1 (para. 3) and 2 (para. 1); and First set of **[***]** to UK A350XWB LA/MSF contract, (Exhibit EU-(Article 13)-31) (BCI/HSBI), paras. 4 and 5.

[1392] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clauses 4.3(b)-4.3(c).

[1393] Schedule 4 provides this number for all years from **[***]**. The number varies over time but reaches a maximum of **[***]**.

[1394] "**[***]**" is defined as

> "**[***]**." (UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clause 1.1)

[1395] UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clauses 20-20.4.

6.5.9.1.2.5 Relevant contingencies in the A350XWB LA/MSF contracts

6.774. We recall that the United States argues that the A350XWB LA/MSF contracts contain terms that make them *de jure* and/or *de facto* contingent on the use of domestic over imported goods. The United States argues that this is so because the contracts require the recipients to produce LCA components in the grantors' territories, components that Airbus then uses to manufacture its LCA. After reviewing the contracts' terms, therefore, it would appear a logical next step to explore the extent to which the contingencies that exist within the contracts reasonably relate to the performance of activities that may result in the production of LCA goods in the respective territories of the grantors. We detect four such kinds of contingencies in the contracts' terms:

- First, we note that it appears that the only activities that the contracts subsidize are A350XWB development and production activities. That is, subsidy payments depend on the recipient incurring expenses arising from such activities, and the subsidy payments are intended to cover at least a portion of those specific expenses. It further appears that all four contracts contain terms that require some, if not all, such specific reimbursable expenses to arise from activities performed in the territory of the grantor.[1396] We refer to such contingencies as "Domestic A350XWB Development Contingency".

- Second, the **[***]** contracts appear to condition subsidy payments on the recipient **[***]** on the development and/or production phases of the A350XWB programme in the territory of the grantor (Domestic A350XWB Employment Contingency)[1397].

- Third, the **[***]** contract appears to condition subsidy payments on the recipient maintaining a **[***]** (Domestic A350XWB Workshare Contingency)[1398].

- Fourth, the **[***]** contract appears to condition subsidy payments on the recipient maintaining certain **[***]**[1399] (Domestic Non-A350XWB Workshare Contingency).

6.775. We detect no other types of contingencies in the contracts that could be understood to reasonably relate to the United States' claim under Article 3.1(b) of the SCM Agreement. We further note that no contingency identified above explicitly requires the use of domestic over imported goods. This does not mean, however, that they may not operate so as to amount to such a contingency, whether alone or in combination. We recall that the United States bases its argument that the A350XWB LA/MSF contracts are contingent on the use of domestic over imported goods on the presence of terms that require Airbus to produce "domestic" LCA components that Airbus will then use in downstream production activity. In order to properly and thoroughly understand how the United States' claim relates to the A350XWB LA/MSF contracts moving forward, therefore, we consider here to what extent these contingencies operate so as to result in the production of "domestic" goods.

6.776. In our view, all four types of identified contingencies may potentially be interpreted as supporting the United States' contention that the subsidies condition their receipt, at least in part, on the recipients producing LCA goods in the grantors' respective territories. Domestic A350XWB Development Contingency does this perhaps most explicitly. Insofar as the contracts require certain A350XWB development work involving A350XWB components to occur in the territory of

[1396] See e.g. French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), annex 2; German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), annex 1.4(a)(ii), pp. 2 and 17-18; Spanish A350XWB *Convenio*, (Exhibit EU-(Article 13)-29) (BCI/HSBI), p. 3; *Real Decreto* 1666/2009, *de 6 noviembre, por el que se regula la concesión directa de anticipos reembolsables a la filial española de Airbus SAS denominada Airbus Operations S.L para su participación en el programa de desarrollo de la nueva familia de aviones Airbus A350XWB*, *Boletín Oficial del Estado*, 9 November 2009, (Exhibit USA-46), p. 93091; and UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clauses 1.1, 2.2 and 20.2(b)(i), and schedule 3.

[1397] See e.g. German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), section 15.5; and UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clause 20.1.

[1398] See e.g. German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), sections 15.4(a)-15.4(c).

[1399] See e.g. UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clauses 20.2-20.3.

the grantor, such development work may likely be a precursor to the actual production of those components in the same member State's territory. Moreover, certain contracts appear to enumerate specific A350XWB components to be produced in the grantor's territory. Domestic A350XWB Employment Contingency may also result in the production of LCA goods in the territories of the relevant grantors if the **[***]** cannot practically be maintained without the associated **[***]** engaging in the production of LCA goods. This appears particularly likely to be the case given that both the **[***]** contracts appear to specifically contemplate such **[***]**, at least in part, being applied to the **[***]**.[1400] Domestic A350XWB Workshare Contingency may similarly result in the production of LCA goods in the relevant grantors' territories if such workshares cannot be practically maintained without the recipient engaging in activities leading to the production of LCA goods. This appears particularly likely to be the case given that the **[***]** contract appears to specifically contemplate a certain percentage of the **[***]**.[1401] Similarly, it appears likely that Domestic Non-A350XWB Workshare Contingency will lead to the production of LCA goods in the territory of the **[***]** given that the **[***]** specifically envisions that such workshares will involve, for example, the "**[***]**" of certain LCA components.[1402] In the light of these observations, we assume *arguendo* in the analysis that follows that all four contingencies identified above exist and, when satisfied, result in the manufacture of LCA-related goods in the territories of the respective grantors.

6.5.9.2 Legal provisions and considerations

6.777. Article 3.1(b) of the SCM Agreement reads:

> Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> ...
>
> (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

Under Article 3.2 of the SCM Agreement, a Member shall neither grant nor maintain such subsidies.

6.778. Like Article 3.1(a), Article 3.1(b) sets forth a single legal standard.[1403] That is, a subsidy must be "contingent, whether solely or as one of several other considerations, upon the use of domestic over imported goods." The Appellate Body has further explained that the word "contingent" means "conditional" or "dependent for its existence on something else".[1404] Unlike Article 3.1(a), however, Article 3.1(b) contains no reference to contingency "in law or in fact". Nevertheless, the Appellate Body has found that Article 3.1(b)'s scope covers both *de jure* and *de facto* contingency.[1405] The evidence used to demonstrate *de jure* and *de facto* contingency may differ. Contingency "'in law' is demonstrated 'on the basis of the *words* of the relevant legislation, regulation or other legal instrument.'"[1406] The Appellate Body has also explained that "such conditionality can be derived by necessary implication from the words actually used in the measure."[1407] Consistent with the Appellate Body's guidance regarding evaluations of *de facto*

[1400] See e.g. UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clause 20.1 and schedule 4 (providing time-frame for the **[***]** of the A350XWB, and allowing potential modification of such targets in case of improved "**[***]**"); and German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), section 15.5 (relating certain **[***]** of the A350XWB programme).

[1401] See German KfW A350XWB Loan Agreement, (Exhibit EU-(Article 13)-14) (English translation) (BCI/HSBI), section 15.4.

[1402] See UK A350XWB Repayable Investment Agreement, (Exhibit EU-(Article 13)-30) (BCI/HSBI), clause 20.3.

[1403] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1037 (explaining that "the legal standard for export contingency expressed in Article 3.1(a) is the same for both *de jure* and *de facto* contingency").

[1404] Appellate Body Report, *Canada – Aircraft*, para. 166.

[1405] Appellate Body Report, *Canada – Autos*, paras. 139-143.

[1406] Appellate Body Report, *Canada – Autos*, para. 123 (quoting Appellate Body Report, *Canada – Aircraft*, para. 167). (emphasis original)

[1407] Appellate Body Report, *Canada – Autos*, para. 123. (footnote omitted)

contingency under Article 3.1(a), we feel it appears reasonable to conclude that an evaluation of *de facto* contingency under Article 3.1(b) should be objectively assessed with respect to the total configuration of facts constituting and surrounding the granting of the subsidy which include (i) the design and structure of the measure granting the subsidy; (ii) the modalities of operation set out in such a measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation.[1408]

6.5.9.3 The United States' Article 3.1(b) claim

6.779. This section evaluates whether the United States has presented a valid claim under Article 3.1(b) of the SCM Agreement. It does so by considering whether the Workshare Agreements and the terms of the A350XWB LA/MSF contracts demonstrate that the granting of the A350XWB LA/MSF subsidies was contingent on the use of domestic over imported goods.

6.5.9.3.1 The Workshare Agreements

6.780. The United States claims that the relevant member States granted A350XWB LA/MSF to Airbus in exchange for commitments from Airbus to locate certain LCA production activities in the member States' territories and then use the LCA components made in such domestic production activities in downstream LCA production activities. The United States characterizes this exchange of commitments as Workshare Agreements. The United States appears to argue that both the publicly available evidence, discussed above, and the terms of the A350XWB LA/MSF contracts, also discussed above, evidence that the conclusion of the A350XWB LA/MSF contracts was contingent on the conclusion of the Workshare Agreements, and therefore the A350XWB LA/MSF contracts are contingent on the use of domestic over imported goods.

6.781. Insofar as the United States claims that the Workshare Agreements exist in a form distinct from the A350XWB LA/MSF contracts, we find that the United States' claim is not supported by sufficient evidence. In our view, the publicly available evidence discussed above is a vague and ambiguous foundation upon which to establish the existence of any material agreements between Airbus and the relevant member States regarding the domestic production and use of LCA components beyond what the A350XWB LA/MSF contracts themselves exhibit. Similarly, insofar as such publicly available evidence is simply meant to inform our interpretation of the A350XWB LA/MSF contracts' terms, we find such evidence either duplicative or too vague and ambiguous as to impart any further material meaning to the contracts' terms. Indeed, such evidence appears to generally pertain to speculation surrounding, discussions about, and/or references to the A350XWB LA/MSF contracts.[1409] Thus, we limit our analysis in this context to the terms of the A350XWB LA/MSF contracts, to which we now turn.

6.5.9.3.2 The A350XWB LA/MSF contracts

6.782. The United States claims that the terms of the A350XWB LA/MSF contracts demonstrate that the contracts are *de jure* and/or *de facto* contingent on the use of domestic over imported goods. The United States bases this claim on the alleged existence of a common element in each of the contracts. That is, each contract requires Airbus to produce Airbus LCA components in the territory of the member State granting the contract lest Airbus become ineligible to receive the subsidy, at least in part. In other words, at least in part, payment under each A350XWB LA/MSF measure is contingent on Airbus engaging in domestic LCA production activities. The United States then reasons that, because Airbus uses the LCA components produced in those domestic production activities in downstream LCA production, the contracts "effectively require{} Airbus to source a large part of its components" from domestic sources.[1410] In sum, the United States'

[1408] See European Union's first written submission, para. 434 (advocating the "total configuration of the facts" standard in the Article 3.1(b) context).

[1409] We note in this respect that, at the time it made its first submission, the United States did not yet have access to the LA/MSF contracts associated with the A350XWB. The European Union provided these contracts in response to the Panel's request under Article 13 of the DSU made after the first submissions of the parties. Panel's communication of 4 September 2012 (containing request for information from the European Union under Article 13 of the DSU). It is thus unsurprising that in its first submission the United States relies upon such publicly available evidence.

[1410] United States' first written submission, para. 239.

argument hinges on the question of whether, by conditioning the A350XWB LA/MSF subsidies' receipt on the *production* of "domestic" LCA goods, the A350XWB LA/MSF contracts are effectively contingent on the *use* of domestic over imported goods.

6.783. In evaluating the United States' claim, we begin by noting the European Union's assertion that a proper understanding of Article 3.1(b)'s disciplines should be formulated in light of an examination of Article III and, more specifically, Article III:8(b) of the GATT 1994. We detect nothing improper about the suggestion that we may consider provisions of the GATT 1994 as relevant context when interpreting provisions of the SCM Agreement. Indeed, that we may do so appears well established. The SCM Agreement cross-references the GATT 1994 on numerous occasions, and both the GATT 1994 and the SCM Agreement appear in Annex 1A of the WTO Agreement which the Appellate Body has emphasized "is a 'Single Undertaking'".[1411] Consistent with the principle of effective treaty interpretation, the Appellate Body has indicated that the SCM Agreement should not be considered in isolation from the GATT 1994.[1412] Moreover, the Appellate Body has more specifically indicated that because Article III of the GATT 1994 and Article 3.1(b) of the SCM Agreement both discipline subsidies that are contingent on the use of domestic over imported goods a degree of consistency is called for in their interpretation.[1413] We therefore turn to consider whether Article III of the GATT 1994 helps inform our present analysis.

6.784. Article III of the GATT 1994 enshrines the principle of national treatment. The "broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures".[1414] To this end, "Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products".[1415] The Appellate Body has explained that this purpose "must be remembered when considering the relationship between Article III and other provisions of the *WTO Agreement*".[1416] Article III:8(b) of the GATT 1994 provides, however:

> The provisions of this Article *shall not prevent the payment of subsidies exclusively to domestic producers*, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products. (emphasis added)

6.785. In effect, Article III:8(b) of the GATT 1994 confirms that, without more, the mere payment of subsidies to firms so long as they engage in domestic production activities should not be interpreted as imparting to such subsidies a discriminatory element as among domestic and foreign goods in a manner that Article III may discipline. Indeed, if this were not the case, then it appears that the only way for a WTO Member to avoid a payment of subsidies being prohibited under WTO law would be to offer the subsidy payments to firms worldwide. We recall that Article III:4 of the GATT 1994 – like Article 3.1(b) of the SCM Agreement – prohibits subsidies that are contingent on the use of domestic over imported goods, notwithstanding the presence of Article III:8(b) of the GATT 1994. This suggests that the act of granting subsidies to firms so long

[1411] Appellate Body Report, *Korea – Dairy*, para. 74 (quoting Panel Report, *Korea – Dairy*, para. 7.38).

[1412] Appellate Body Report, *Brazil – Desiccated Coconut*, pp. 14 (explaining that "{t}he relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis" and that "'the question for consideration is … whether Article VI creates rules which are separate and distinct from those of the SCM Agreement, and which can be applied without reference to that Agreement, or whether Article VI of GATT 1994 and the SCM Agreement represent an inseparable package of rights and disciplines that must be considered in conjunction'" (quoting Panel Report, *Brazil – Desiccated Coconut*, para. 227)), and 16 (concluding "that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the *GATT 1994*, taken together." (underline original)).

[1413] Appellate Body Report, *Canada – Autos*, para. 140 (supporting its conclusion that Article 3.1(b) of the SCM Agreement disciplines not only *de jure*, but also *de facto*, contingency with the fact that Article III:4 of the GATT 1994, which also disciplines subsidies contingent on the use of domestic over imported goods, disciplines both species of contingency).

[1414] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16. (footnote omitted)

[1415] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16. (footnote omitted)

[1416] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16.

as they engage in domestic production activities, without more, should not be equated to making those subsidies contingent on the use of domestic over imported goods and hence prohibited.[1417]

6.786. This suggestion accords with the manner in which subsidies have been found to be contingent on the use of domestic over imported goods in the past. Subsidies found to be so contingent have contained elements requiring firms to use certain amounts of domestic goods as production inputs, i.e. to *discriminate* between upstream sources of domestic and imported goods in favour of the former.[1418] We detect no GATT or WTO dispute settlement report, however, in which it was found, or in which it was even seriously suggested, that a subsidy could be characterized as being contingent on the use of domestic over imported goods simply because the subsidy was only available to a firm so long as it engages in domestic production activities. The lack of precedent on that score is unsurprising because the manner in which relevant consumption choices *vis-à-vis* domestic and imported goods may be altered as a result of only providing subsidies to firms engaged in domestic production activities is fundamentally different from the discriminatory dynamic described earlier in this paragraph. That is, rather than conditioning the availability of the subsidy on discrimination between upstream sources of goods, the practice of providing subsidies to firms only so long as they engage in domestic production activity can and will many times have an effect occurring downstream from the mandated domestic production activity, i.e. increased consumption of domestic goods due to quantitative and/or qualitative enhancements to the goods produced pursuant to the mandated domestic production activities. In this manner, such subsidies may limit competitive opportunities for relevant imported goods in certain markets.

6.787. Significant problems arise, however, if such alterations in the conditions of competition caused by a WTO Member only providing subsidies to firms so long as they engage in domestic production activities become the focus and determinant of whether a subsidy should be disciplined as being contingent on the use of domestic over imported goods. First, as the panel in *EC – Commercial Vessels* appeared to appreciate, if such effects were to form the basis upon which to discipline a subsidy under Article III:4 of the GATT 1994, "Article III:8(b) would be deprived of its effectiveness as production subsidies can have such an effect in many instances."[1419] Second, disciplining such effects under Article 3.1(b) of the SCM Agreement transforms the provision into an effects-based provision, thereby significantly blurring – and with respect to at least certain subsidies, potentially erasing – the line between the disciplines of Part II of the SCM Agreement and the effects-based disciplines on actionable subsidies contained in Part III of the SCM Agreement. The Appellate Body has explicitly cautioned against such blurring in recent jurisprudence.[1420] It follows, therefore, that such an interpretation of contingency on the use of domestic over imported goods cannot stand.

6.788. This interpretation, however, is the very one that we must adopt if we are to accept the United States' claim. That claim hinges on the question of whether, by conditioning the A350XWB LA/MSF subsidies' receipt on the *production* of domestic LCA goods, the A350XWB LA/MSF

[1417] To be clear, in noting this suggestion, we need not address, let alone resolve, the question of whether Article III:8(b) is an exemption, which clarifies that Article III is inherently inapplicable to subsidies paid exclusively to domestic producers, or an exception, which removes from the scope of Article III:4 measures that would otherwise be covered by that provision.

[1418] See e.g. Panel Reports, *Indonesia – Autos*; *US – Upland Cotton*; and Appellate Body Report, *Canada – Autos*, paras. 118-146 (finding itself unable to complete the legal analysis regarding whether the relevant subsidies were contingent on the use of domestic over imported goods, but indicating that if certain Canadian value added requirements in the relevant subsidies could not be satisfied without the recipients using domestic goods as production inputs then the requirements would be contingent on the use of domestic over imported goods). See also GATT Panel Report, *Italy – Agricultural Machinery*, paras. 5-16 (finding that an extension of credit facilities exclusively to *purchasers* of domestically produced agricultural machinery was inconsistent with Article III:4 of the GATT 1947 and indicating that Article III:8(b) of the GATT 1947 would have covered the practice of payment of subsidies to domestic *producers* of such machinery).

[1419] Panel Report, *EC – Commercial Vessels*, paras. 7.73-7.74 (reasoning that although the subsidy at issue, which was only available to domestic producers, might lower the price of the relevant domestic product and therefore "may adversely affect the conditions of competition between domestic and Korean products that effect is not relevant to whether Article III:8(b) applies to the aid.").

[1420] The Appellate Body, citing the need to preserve distinct roles for Parts II and III of the SCM Agreement, has stressed that the discipline contained in Article 3.1(a) in Part II of the SCM Agreement is not effects-based, but must be activated by something in the subsidy itself. (See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1049, 1051, and 1054). It appears reasonable to us that such guidance should apply equally to Article 3.1(b).

contracts are contingent on the *use* of domestic over imported goods. Given our discussion above, we must answer this question in the negative. It may well be that the contracts are contingent on the domestic manufacture of certain LCA-related goods. It may well be that the contracts, therefore, affect the domestic/import composition of a supply of inputs to which a downstream entity applies its business judgment at a given production stage when making input-sourcing decisions[1421], thereby displacing or impeding competitive opportunities for relevant substitute imported goods. Part III of the SCM Agreement is concerned with such event chains. Article 3.1(b) is not. Its discipline is narrow and specific, activated by a subsidy that appropriates an entity's judgment by conditioning its receipt on that entity discriminating among inputs with respect to their domestic or imported nature, whether in law or in fact.[1422] None of the contingencies in the A350XWB LA/MSF contracts identified above operate in this manner with respect to any entity.[1423] Rather, they ensure that the member States are subsidizing a domestic producer. Article 3.1(b), therefore, does not discipline them.

6.789. We note that this conclusion holds true with respect to all four contingencies identified in the A350XWB LA/MSF contracts despite certain differences they display. We recall that the A350XWB LA/MSF contracts' payments are aimed at reimbursing expenses arising from A350XWB development and/or production activities. We have earlier assumed *arguendo* that all four contingencies, when satisfied, result in the production of LCA-related goods in the territories of the respective grantors. Given their nature, Domestic A350XWB Development Contingency, Domestic A350XWB Employment Contingency, and Domestic A350XWB Workshare Contingency will result in the production of *A350XWB-related* goods in the territories of the relevant member States. Thus, the domestic production activities that these three contingencies mandate appear to be among the very activities that the A350XWB LA/MSF contracts aim to subsidize. Domestic Non-A350XWB Workshare Contingency differs because, by its nature, this contingency results in production of *non-A350XWB-related* goods. Such production is not what the A350XWB LA/MSF contracts aim to subsidize. The question may arise, therefore, as to whether this factual distinction affects the applicability of Article 3.1(b)'s legal discipline. It does not. For reasons explained above, Article 3.1(b) does not prohibit subsidies merely because they require the recipient to engage in domestic production activities. We detect no textual or logical reason to conclude that this principle should cease to apply merely because the subsidisation is aimed at something other than the required domestic production activities.

6.5.9.4 Conclusion

6.790. We find that the United States' claim that the A350XWB LA/MSF subsidies are prohibited subsidies under Articles 3.1(b) and 3.2 of the SCM Agreement because they are *de jure* and/or *de facto* contingent on the use of domestic over imported goods is unsupported by sufficient evidence and therefore fails.

6.791. Having articulated our findings with respect to the questions raised by the European Union concerning the scope of this proceeding, and the United States' prohibited subsidy claims against the A380 and A350XWB LA/MSF subsidies, we now turn to examine the third and final set of issues raised in this dispute, namely, the United States' claims that the European Union and certain member States have failed to comply with Article 7.8 of the SCM Agreement.

[1421] We recognize that, in this case, the recipient of the relevant subsidies, i.e. Airbus, is the same entity that we have assumed produces and uses the relevant "domestic" goods. This fact, however, is immaterial. The United States' Article 3.1(b) claim fails because Article 3.1(b) does not discipline *how* the relevant subsidies presumably result in the use of domestic over imported goods, whoever the user may be. This basic conceptual flaw endures whatever formal corporate architectures are superimposed over the events leading to such use.

[1422] Alternately stated, that a subsidy *in fact results in the use of domestic over imported goods* cannot by itself demonstrate that that subsidy *is contingent on the use of domestic over imported goods, whether in law or in fact*.

[1423] To be clear, we do not suggest that in order for a subsidy to be contingent on the use of domestic over imported goods the subsidy must actually result in an observable change a relevant entity's input-sourcing behaviour.

6.6 Whether the European Union and certain member States have complied with Article 7.8 of the SCM Agreement

6.6.1 Introduction

6.792. The difficult interpretative question that we believe lies at the centre of the United States' non-compliance claims in this dispute is how to give meaning to the requirement in Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" in the context of the substantive disciplines of Article 5 of the SCM Agreement, which focus not on the *existence* of a particular type of measure (as other disciplines found in the WTO covered agreements), but rather on the *trade effects* that may be attributed to a measure, *whether or not it continues to exist*. In grappling with this conundrum, the parties (and certain third parties) have expressed profoundly different views about not only whether the European Union and certain member States have complied with the terms of Article 7.8, but also, more fundamentally, the extent to which the European Union and certain member States have any ongoing compliance obligation at all with respect to subsidies found to cause adverse effects in the original proceeding that allegedly ceased to exist by the time of the DSB's adoption of the panel and Appellate Body recommendations and rulings on 1 June 2011.

6.793. In the subsections that follow, we begin our evaluation of the merits of the parties' arguments by focusing on this latter threshold question. After dismissing the European Union's contentions in this regard and concluding that the fact that a subsidy found to cause adverse effects in an original proceeding may no longer exist by the time of the DSB's adoption of recommendations and rulings does not *ipso facto* mean that a responding Member will have no compliance obligation with respect to that subsidy under the terms of Article 7.8 of the SCM Agreement, we examine the extent to which the United States has established that the European Union and certain member States have failed to comply with Article 7.8 of the SCM Agreement by failing to "withdraw the subsidy" or "take appropriate steps to remove the adverse effects".

6.6.2 Whether the European Union and certain member States have a compliance obligation with respect to subsidies that allegedly ceased to exist by 1 June 2011

6.6.2.1 Arguments of the European Union

6.794. The European Union argues that it follows from the express terms of Article 7.8 of the SCM Agreement that it has no obligation to adopt any compliance measures with respect to any of the challenged subsidies that ceased to exist prior to the beginning of the implementation period.[1424] The European Union points out that the language of Article 7.8 explicitly imposes the obligation to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" on the Member "*granting or maintaining*" the subsidy or subsidies found to have caused adverse effects in an original proceeding. For the European Union, this means that in order for the United States to prevail in this compliance dispute, one of the first things it must demonstrate is that the European Union and its member States are "*granting or maintaining*" the relevant subsidies – in other words, that the challenged subsidies continue to exist.[1425] Thus, according to the European Union, where the challenged subsidies have ceased to exist before the beginning of the implementation period, "the Panel should conclude that the corresponding subsidies are outside of the scope of the DSB recommendations and rulings and, therefore, that the European Union had no obligation to adopt 'measures taken to comply' with respect to those subsidies".[1426]

6.795. The European Union finds contextual support for its interpretation of Article 7.8 in Article 4.7 of the SCM Agreement and various provisions of the DSU. In addition, the European Union argues that its understanding of the scope of Article 7.8 is consistent with the Appellate Body's statement that the recommendations made by the panel in the original

[1424] European Union's first written submission, paras. 232-233 and 244; second written submission, paras. 98, 195, and fn 742; and response to Panel question No. 6.
[1425] European Union's first written submission, paras. 30, 33-34, 36-37, 225, and 244; and response to Panel question No. 6.
[1426] European Union's first written submission, para. 244; and response to Panel question No. 6.

proceeding "do not concern subsidies that have been 'extinguished' or 'extracted'".[1427] According to the European Union, the Appellate Body's statement confirms that subsidies that ceased to exist "prior to the adoption of DSB recommendations and rulings … , are simply not covered by those recommendations and rulings".[1428]

6.6.2.2 Arguments of the United States

6.796. The United States submits that the fact that one or more subsidies may have ceased to exist prior to the adoption of the rulings and recommendations in this dispute does not "excuse the EU from the Article 7.8 obligation triggered by its earlier violations of Article 5".[1429] For the United States, the findings of adverse effects made by the panel and the Appellate Body in the original proceeding define the European Union's compliance obligation. Because these were made notwithstanding the allegation that certain subsidies had ceased to exist, the United States submits that the same alleged events cannot now mean that the European Union and its member States have no compliance obligation.[1430] According to the United States, the European Union's argument "would nullify the findings under Article 5, at least insofar as they applied to subsidies that had expired before the reference period, by leaving them without a remedy under Article 7.8".[1431] Thus, the United States argues that in the light of the adopted rulings and recommendations, the European Union has an obligation to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" in respect of all of the challenged subsidy measures.[1432]

6.6.2.3 Arguments of the third parties

6.6.2.3.1 Brazil

6.797. Brazil argues that the focus of Article 7.8 of the SCM Agreement is to remedy the specific problem found to exist that nullified or impaired the benefits under the SCM Agreement accruing to the complaining Member. According to Brazil, the focus in Part III of the SCM Agreement on "actionable subsidies" is on the adverse effects caused by the use of a subsidy, not on the existence of the subsidy itself. Brazil maintains that this is also the focus of Article 7.8 of the SCM Agreement, which requires an implementing Member to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy". However this "option" may be interpreted, Brazil submits that in order to be correct, it should lead to bringing a Member found to have acted inconsistently with Article 5 back into conformity with its obligation not to cause adverse effects through the use of subsidies.

6.798. Brazil emphasizes that as clarified by the panel and the Appellate Body in the original proceeding, there is no need to demonstrate that the subsidy benefit continues to exist for a finding of current adverse effects. Therefore, Brazil submits that the fact that a subsidy was granted in the past, that the "benefit" has expired, and that the subsidy no longer exists does not prevent a finding of adverse effects caused by past subsidies. Brazil considers that this is particularly relevant for launch aid subsidies, which may continue to cause adverse effects long after they have been granted and repaid due to the presence of aircraft models that otherwise would not have been competing in the market.

6.799. Referring to various passages of the Appellate Body's findings in the original proceeding, Brazil argues that as long as there exists a genuine and substantial relationship of cause and effect between those (past) subsidies and the adverse effects found to exist after the implementation period ended, the measure cannot be understood as having been brought into conformity, as the appropriate steps would not have been taken to remove the adverse effects or to withdraw the subsidy in a manner that is consistent with the SCM Agreement's obligation not to cause adverse effects. Thus, in Brazil's view, the expiry or extinction of the benefit and more generally the fact that the subsidy can be considered as "terminated" because no new payments are due can only be

[1427] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 757.
[1428] European Union's first written submission, para. 232; and second written submission, paras. 98, 195, and fn 742.
[1429] United States' second written submission, para. 268.
[1430] United States' second written submission, paras. 265-273; and comments on the European Union's response to Panel question No. 6.
[1431] United States' first written submission, para. 140.
[1432] United States' first written submission, para. 17; and response to Panel question No. 5.

understood as constituting compliance if these intervening events can be demonstrated to be sufficient to break the causal link that existed between the subsidy and the adverse effects found to exist. According to Brazil, such "intervening events" do not constitute either "appropriate steps" or the "withdrawal" of the subsidy. However, they may be of such a nature that they render further implementation efforts moot, because the adverse effects no longer exist.[1433]

6.6.2.3.2 Canada

6.800. Canada submits that the only subsidies the effects of which must be assessed in compliance proceedings under Article 7.8 of the SCM Agreement are subsidies in existence at the end of the six-month implementation period within which a subsidizing Member must remove adverse effects. Thus, according to Canada, the proper counterfactual analysis to perform under Article 7.8 is as follows: in the absence of the subsidies that existed at the end of the implementation period, what would be the situation of the relevant producers? In Canada's view, that situation can then be compared to the actual situation of the relevant producers in order to determine whether the subsidies have caused serious prejudice.[1434]

6.6.2.4 Evaluation by the Panel

6.6.2.4.1 The scope of Article 7.8 of the SCM Agreement

6.801. We start our analysis of the parties' submissions by reviewing the text of Article 7.8 of the SCM Agreement, which reads as follows:

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

6.802. Article 7.8 specifies what an implementing Member must do following the adoption of a panel and/or Appellate Body report in which it is determined that any subsidy has caused adverse effects within the meaning of Article 5 of the SCM Agreement. In such a situation, Article 7.8 specifies that the "Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy". The fact that the reference to "granting or maintaining such subsidy" is made in the *present continuous* tense, could be taken to suggest that the obligation to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" was intended to come into play whenever an implementing Member *continues* to grant or maintain a subsidy found to have caused adverse effects in an original proceeding. Because a Member cannot be said to be "granting or maintaining" a subsidy that no longer exists, it could be argued that the obligation in Article 7.8 should only apply to a Member found to have acted in violation of Article 5, whenever the subsidies found to have caused adverse effects *continue to exist* during the implementation period. Thus, when read in isolation, the text of Article 7.8 may arguably be viewed to suggest that a Member found to have caused adverse effects through the use of a subsidy would have no obligation to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" if the subsidy at issue *no longer exists* at the time of the DSB's adoption of the adverse effects findings.

6.803. However, in our view, such an interpretation of Article 7.8 would be at odds with the provisions of the DSU that govern when and how compliance obligations are incurred and discharged and, therefore, cannot be reconciled with the context and object and purpose of Article 7.8, which as we discuss below, is intended to clarify how an implementing Member found to have caused adverse effects through the use of subsidies is to come into conformity with its obligations under Article 5 of the SCM Agreement. It is particularly this latter function of Article 7.8, when considered in the light of the *effects-based* nature of the disciplines of Article 5,

[1433] Brazil' third-party submission, paras. 13-21 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 709-712, fn 1644; and Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 223, 236, and 238); and third-party response to Panel question No. 1.

[1434] Canada's third-party submission, para. 29; third-party statement, paras. 10-17; and third-party response to Panel question No. 1.

that renders the interpretation of the scope of Article 7.8 advanced by the European Union problematic. Thus, as we explain in more detail in the sections that follow, a reading of Article 7.8 that takes its proper context and object and purpose into account reveals that the European Union's submission that it does not have an obligation to adopt any compliance measures in relation to subsidies that allegedly ceased to exist before 1 June 2011 cannot be sustained.

6.6.2.4.1.1 WTO compliance obligations are intended to bring about conformity with the covered agreements, thereby maintaining the balance of Members' rights and obligations

6.804. As already noted, Article 7.8 is one of the "special or additional rules and procedures on dispute settlement contained in the covered agreements" which prevail over the general DSU rules and procedures to the extent that there is a conflict between them.[1435] This does not, however, mean that Article 7.8 must be applied in isolation to the rules of the DSU. On the contrary, it is well established that the "special or additional rules and procedures contained in the covered agreements" must be applied in conjunction with the rules of the DSU. It is only where the two sets of rules "*cannot* be read as complementing each other that the special or additional rules are to *prevail*".[1436] Thus, a first important part of the context of Article 7.8 are the rules of the DSU governing when and how WTO compliance obligations are incurred and discharged.

6.805. A violation of WTO-law carries with it an obligation to bring the WTO-inconsistent measure into conformity with the covered agreement that is the basis of the infringement. The primary source of this obligation is Article 19.1 of the DSU. This provision prescribes that where a panel or the Appellate Body finds that a measure is inconsistent with a covered agreement, "it shall recommend that the Member concerned *bring the measure into conformity with that agreement*".[1437]

6.806. In discharging its obligations under Article 19.1 in this dispute, the panel recommended that the "Member granting each subsidy found to have resulted in … adverse effects 'take appropriate steps to remove the adverse effects or … withdraw the subsidy'".[1438] Similarly, after stating that the panel's recommendation calling upon the European Union and its member States to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" stood to the extent it had upheld the panel's adverse effects findings, the Appellate Body concluded by stating that:

> The Appellate Body recommends that the DSB request the European Union to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the SCM Agreement, *into conformity with its obligations under that Agreement*.[1439] (emphasis added)

6.807. Article 21.1 of the DSU places compliance with adopted recommendations at the forefront of the dispute settlement system, stipulating that "{p}rompt compliance with recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". It is clear from the text of Article 19.1 that such compliance will require the implementing Member to bring its WTO-inconsistent measure into *conformity with the covered agreement that is the source of the infringement of WTO law*.

6.808. That the conformity of an otherwise WTO-inconsistent measure with the relevant covered agreement defines the notion of compliance that applies in WTO dispute settlement is also apparent from the language of Article 21.5. Elsewhere in this Report, we have noted that this provision describes the process that disputing parties must follow in order to resolve any

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[1435] See above at para. 6.2.

[1436] Appellate Body Report, *Guatemala – Cement I*, para. 65. (emphasis original) In the same paragraph, the Appellate Body explained that a "special or additional provision should only be found to prevail over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a conflict between them."

[1437] (emphasis added)

[1438] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 8.7.

[1439] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1418.

"disagreement as to the existence or *consistency with a covered agreement* of measures taken to comply with the recommendations and rulings".[1440]

6.809. Thus, Articles 19 and 21 of the DSU provide that any violation of the covered agreements will attract an obligation to remedy that breach of WTO law[1441], and this remedy requires an implementing Member to bring its WTO-inconsistent measure into conformity with the covered agreement that was the source of the infringement.[1442] In other words, as both the United States and the European Union appear to accept, once a Member is found to have breached its WTO obligations, it will be under an obligation to cease its WTO-inconsistent conduct for as long as the violation of the covered agreement continues.[1443]

6.810. This understanding of how and when a compliance obligation will be incurred and discharged finds support in other aspects of the dispute settlement system, including its object and purpose. Article 3.2 of the DSU specifies that the WTO dispute settlement system "serves to *preserve the rights and obligations* of Members under *the covered agreements*" and that recommendations and rulings "*cannot add to or diminish*" these rights and obligations.[1444] Similarly, Article 3.3 reads as follows:

> The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under *the covered agreements* are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the *maintenance of a proper balance between the rights and obligation* of Members. (emphasis added)

6.811. Article 3.4 requires all adopted recommendations and rulings to be "aimed at achieving a satisfactory settlement of the matter in *accordance with the rights and obligations under {the DSU} and the covered agreements*".[1445] Moreover, Article 3.5 stipulates that all solutions to disputes "formally raised under the consultation and dispute settlement provisions of the covered agreements shall be *consistent with those agreements* and *shall not nullify and impair benefits accruing to any Member under those agreements*, nor *impede the attainment of any objective of those agreements*".[1446]

6.812. Finally, Article 3.7 identifies a preference for solutions that are "mutually acceptable to the parties … and *consistent with the covered agreements*", but explains that where this is not possible, "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be *inconsistent with the provisions of any of the covered agreements*".[1447]

6.813. Thus, it is apparent that the WTO dispute settlement system is intended to function in a way that maintains the balance of rights and obligations in the covered agreements; and one of the principal ways in which the system endeavours to achieve this balance is by directing Members to respect the provisions of the covered agreements throughout all stages of a dispute. In our view, this focus on securing conformity with the covered agreements implies that one of the fundamental objectives of Article 7.8 of the SCM Agreement must be to bring an implementing Member found to have caused adverse effects to the interests of another Member back into

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[1440] (emphasis added) See above para. 6.1.

[1441] Although Article 22 of the DSU envisages the possibility that an implementing Member may pay compensation to a complainant or have WTO concessions or other obligations suspended if it fails to comply with adopted recommendations and rulings within a reasonable period of time, Article 22.1 makes clear that such measures are only "temporary" and not to be "preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements". The temporary nature of compensation and the suspension of concessions is also confirmed in Article 3.7 of the DSU.

[1442] Article 22.2 envisages the possibility that compliance with rulings and recommendations might also be achieved in some "other" way. Article 26.1(d) of the DSU suggests that this possibility is reserved to disputes involving non-violation complaints, which as opposed to violation complaints, may be definitively settled through the payment of compensation.

[1443] United States' response to Panel question No. 5; and European Union's response to Panel question No. 5.

[1444] (emphasis added)

[1445] (emphasis added)

[1446] (emphasis added)

[1447] (emphasis added)

conformity with its obligations under Article 5 of the SCM Agreement. This suggests that the obligation to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" that is prescribed in Article 7.8 should be interpreted to operate in a way that secures an implementing Member's conformity with Article 5.

6.6.2.4.1.2 WTO case law supports the conclusion that the remedies envisaged in Article 7.8 are intended to restore conformity with an implementing Member's obligations under Article 5 of the SCM Agreement

6.814. That the remedies provided for in Article 7.8 of the SCM Agreement are intended to bring an implementing Member back into conformity with its obligations under Article 5 was among the considerations relied upon by the panel and Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* when determining the scope of the United States' compliance obligations at issue in that dispute.

6.815. One of the questions that arose in *US – Upland Cotton (Article 21.5 – Brazil)* was whether Brazil was entitled to pursue a claim that the United States had failed to comply with its obligations under Article 7.8 of the SCM Agreement by providing two kinds of recurring subsidies to cotton farmers after the end of the implementation period under the same subsidy programmes used to make the subsidy payments found in the original proceeding to cause adverse effects.[1448] The United States objected to Brazil's claim, arguing that the obligation that fell upon it as an implementing Member under Article 7.8 concerned only those subsidies that were the subject of the adopted rulings and recommendations in the original proceeding, and not any future subsidies with respect to which no adverse effects findings had been made. The panel explained the interpretative problem that arose as a result of this particular set of facts in the following terms:

> Under Article 7.8 of the *SCM Agreement* the United States was obligated, with respect to subsidies subject to the "present" serious prejudice finding of the original panel, to "take appropriate steps to remove the adverse effects or … withdraw the subsidy".
>
> It is clear from the context that the adverse effects that must be removed are *the adverse effects of the subsidy that has been determined to have resulted in adverse effects*. Since the original panel made a finding of present serious prejudice in respect of subsidies provided during MY 1999-2002, the question arises whether the obligation to take appropriate steps to remove the adverse effects *only applies to payments of subsidies made in those years*.[1449] (emphasis added)

6.816. In answering this question, a fundamental consideration for the panel was the need to ensure that Article 7.8 was interpreted in the light of the substantive obligation in Article 5 to avoid causing adverse effects through the use of subsidies. Thus, after recalling that similar "conformity-based" considerations had been taken into account by panels and the Appellate Body in previous Article 21.5 proceedings involving the question of compliance with the obligation to "withdraw the subsidy without delay" for the purpose of Article 4.7 of the SCM Agreement[1450], the panel opined as follows:

> Thus, the concept of "withdrawal" must in any event be interpreted to mean that a Member must cease to act in a WTO-inconsistent manner with respect to that subsidy.

[1448] Both parties agreed that the subsidies found to have caused adverse effects in the original proceeding were "the Step 2, market loss assistance, marketing loan and counter-cyclical payments made during the MY 1999-2002". All of these were recurring subsidies paid to cotton farmers once every marketing year (MY) for the purpose of supporting their harvesting, production and marketing activities in the same MY. However, the focus of Brazil's claim in the Article 21.5 dispute were marketing loans and counter-cyclical payments made to farmers in the period *after September 2005*.

[1449] Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 9.77-9.78.

[1450] See Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45; and Panel Reports, *Brazil Aircraft (Article 21.5 – Canada)*, para. 6.8; and *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.10. These cases stand for the proposition that in order to comply with the requirement to "withdraw the subsidy without delay" in Article 4.7 of the SCM Agreement, an implementing Member will have to ensure that its conduct with respect to the measure found to be a prohibited subsidy brings it into conformity with the substantive obligation that triggered the compliance obligation in the first place, namely, Articles 3.1 and 3.2 of the SCM Agreement. See further below, at paras. 6.1080-6.1085.

> If a failure to cease conduct inconsistent with a Member's obligations under Article 3 of the *SCM Agreement* is inconsistent with the obligation to withdraw the subsidy in Article 4.7 of the *SCM Agreement*, we see no logical reason why the same concept should not also apply to the obligation that arises under Article 7.8 of the *SCM Agreement* to withdraw the subsidy or to take appropriate steps to remove the adverse effects of a subsidy that has been determined to result in adverse effects. *In our view, the remedy under Article 7.8 must be viewed in its relationship to the obligation in Article 5 not to cause through the use of any subsidy referred to in Articles 1.1 and 1.2 of the SCM Agreement adverse effects to the interests of other Members. It must serve to restore conformity with the Member's obligation to avoid causing adverse effects through the use of any subsidy*. … The interpretation advocated by the United States, whereby the obligation under Article 7.8 of the *SCM Agreement* is limited to the removal of the adverse effects caused by subsidies granted in a particular period of time, implies that it would not be possible to review in an Article 21.5 proceeding whether a Member causes adverse effects by continuing to grant subsidies under the same conditions and criteria as the subsidies found to have caused adverse effects. *Such an interpretation fails to take into account the relationship between Article 7.8 and Article 5 of the SCM Agreement and thus fails to interpret Article 7.8 in its proper context.*[1451] (emphasis added)

6.817. The panel went on to conclude that the two kinds of recurring subsidy payments made to cotton farmers after the end of the implementation period were subject to the adopted recommendations and rulings and, therefore, that the United States had a compliance obligation with respect to those subsidies under the terms of Article 7.8 of the SCM Agreement.[1452]

6.818. On appeal, the Appellate Body upheld the panel's conclusions. In doing so, one of the reasons the Appellate Body used to reject the United States' contentions was that it could not accept an interpretation of Article 7.8 that would nullify the effectiveness of the disciplines in Article 5 of the SCM Agreement. The Appellate Body explained this particular concern in the following terms:

> Brazil and several of the third participants have cautioned that accepting the United States' approach would deny effective relief to WTO Members who successfully demonstrate that subsidies provided by another Member have resulted in adverse effects. …
>
> …
>
> … Under such an approach, a complaining Member that has demonstrated that subsidies provided by another Member have resulted in adverse effects would obtain relief only with respect to any lingering effects of the subsidies provided during the period examined by the panel. As Australia notes, such panel findings would essentially be declaratory in nature, because there would be no impact on subsidies granted or maintained after the panel made its finding. The complaining Member would have to initiate another dispute to obtain relief with respect to payments made after the period examined by the panel, even if those subsidies are recurring payments or otherwise of the same nature as those found to have resulted in adverse effects. Even if the complaining Member were to succeed in its claims a second time, the subsidizing Member could provide further subsidies after the second panel's ruling, and the complaining Member would have to initiate yet another dispute, and this cycle could continue. As Brazil and several of the third participants have warned, *the inability of a complaining Member to obtain relief against subsidies that result in adverse effects to its interests would seriously undermine the disciplines contained in Articles 5 and 6 of the SCM Agreement*.[1453] (emphasis added; footnotes omitted)

6.819. In our view, this passage of the Appellate Body's reasoning very clearly reveals that the need to secure the effectiveness of the subsidy disciplines in Article 5 was an important

[1451] Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.79.
[1452] Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.81.
[1453] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 241 and 245.

consideration for the Appellate Body when interpreting the scope of the United States' obligations under Article 7.8. As we understand it, the logic of the Appellate Body's ruling implies that the scope of Article 7.8 should not be interpreted in a way that would render adverse effects findings made in original proceedings merely "declaratory in nature", as this would preclude a complaining Member from obtaining relief from the adverse effects caused by a Member's use of subsidies in violation of its substantive obligations. In order to avoid such an outcome, it would be necessary to interpret the scope of an implementing Member's compliance obligations under Article 7.8 in a way that gives full effect to that Member's obligation under Article 5 of the SCM Agreement not to cause adverse effects through the use of subsidies found to have caused adverse effects in the original proceeding.

6.6.2.4.1.3 The effects-based disciplines of Article 5 imply that the non-existence of a subsidy found to cause adverse effects will not necessarily define the scope of an implementing Member's compliance obligations under Article 7.8

6.820. In exploring the merits of the European Union's interpretation of the scope of an implementing Member's compliance obligations under Article 7.8, it is important to recall that Article 5 of the SCM Agreement imposes an *effects-based* discipline on a Member's use of subsidies. In particular, Article 5 contemplates that a Member may be found to be in violation of its obligations, whenever it is demonstrated that a subsidy granted or maintained in the past causes or threatens to cause certain types of economic harm to the interests of another Member. The Appellate Body explicitly recognized the effects-based nature of Article 5 in the original proceeding when it confirmed that the fact that a subsidy granted in the past may no longer exist will not necessarily bring about the end of its effects. Thus, in upholding the panel's finding that there is no requirement in Article 5 of the SCM Agreement to demonstrate the existence of a "present" or "continuing" benefit in order to make out a case of adverse effects, the Appellate Body explained:

> In focusing on the causing of adverse effects through the use of any subsidy, Article 5 envisages that the use of the subsidy and the adverse effects may not be contemporaneous. … {T}he provision of subsidies and their effects need not coincide temporally and there may be a time lag. By its terms, Article 5 of the SCM Agreement imposes an obligation on Members not to cause adverse effects to the interests of other Members through the use of any subsidy as defined in Article 1. *We disagree with the proposition that this obligation does not arise in respect of subsidies that have come to an end by the time of the reference period. In fact, we do not exclude that, under certain circumstances, a past subsidy that no longer exists may be found to cause or have caused adverse effects that continue to be present during the reference period*.
>
> … We wish to emphasize, however, that *{the} effects of a subsidy will ordinarily dissipate over time and will end at some point after the subsidy has expired*. Indeed, as with a subsidy that has a finite life and materializes over time, so too do the effects of a subsidy accrue and diminish over time.[1454] (emphasis added; footnote omitted)

6.821. Similarly, in *US – Upland Cotton*, the Appellate Body explained that:

> *Whether the effect of a subsidy begins and expires in the year in which it is paid or begins in one year and continues in any subsequent year, and how long a subsidy can be regarded as having effects, are fact-specific questions*. The answers to these questions may depend on the nature of the subsidy and the product in question. *We see nothing in the text of Article 6.3(c) that excludes a priori the possibility that the effect of a "recurring" subsidy may continue after the year in which it is paid*. Article 6.3(c) deals with the "effect" of a subsidy, and not with the financial accounting of the amount of the subsidy.

[1454] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 712-713.

> … We do not agree with the proposition that, if subsidies are paid annually, their effects are also *necessarily extinguished annually*.[1455] (emphasis added; footnote omitted)

6.822. In our view, it follows from the *effects-based* nature of the disciplines in Article 5 and the role that Article 7.8 is intended to play in bringing an implementing Member into conformity with its obligations under the SCM Agreement, that there may well be particular factual circumstances when the obligation to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" will apply to subsidies found to have caused adverse effects in an original proceeding, *irrespective of whether those subsidies continue to exist* in the implementation period. In other words, because the remedies provided for under Article 7.8 are intended to bring an implementing Member into conformity with its obligations under Article 5, the fact that it is possible under these disciplines to find that a subsidy no longer being granted or maintained causes adverse effects, necessarily implies that the mere fact that a subsidy granted in the past no longer exists cannot *alone* exclude it from the scope of an implementing Member's Article 7.8 compliance obligations. Thus, contrary to the European Union's position, a subsidy found to have caused adverse effects in an original proceeding *need not always* continue to exist during the implementation period in order for an implementing Member to have a compliance obligation with respect to that subsidy under the terms of Article 7.8 of the SCM Agreement.

6.6.2.4.1.4 The Appellate Body's statements in the original proceeding concerning the scope of the panel's recommendations

6.823. The European Union draws support for its position that it does not have a compliance obligation with respect to subsidies that ceased to exist prior to 1 June 2011 from the following Appellate Body statements made in the original proceeding:

> {W}e understand the recommendations made by the Panel to be collective, in the sense that they concern all those subsidies ultimately found to be prohibited subsidies or actionable subsidies causing adverse effects. *They do not concern subsidies that have been "extinguished" or "extracted"*. Such recommendations request the European Union to withdraw those subsidies and/or remove adverse effects; *panels or the Appellate Body are not required to make recommendations pursuant to Articles 4.7 and 7.8 with respect to subsidy measures that are found to be "extinguished" or "extracted"*.[1456] (emphasis added)

6.824. We note that the Appellate Body's statements were made in the context of the Appellate Body's rejection of the European Union's argument that the subsidies challenged in the original proceeding had already been "withdrawn", for the purpose of Article 7.8 of the SCM Agreement, through a number of alleged "extinction" and "extraction" events that took place prior to the end of 2006. In particular, the statements the European Union relies upon were made *after* the Appellate Body had: (a) rejected the merits of the European Union's "extraction" arguments[1457]; and (b) found that it could not "complete the legal analysis" in respect of the European Union's "extinction" arguments.[1458] Thus, after concluding that it did not "need to decide whether the subsidies alleged … to have been extinguished or extracted were thereby 'withdrawn'" because of the absence of "affirmative findings that the sales transactions and 'cash extractions' resulted respectively in the 'extinction' or 'extraction' of subsidies"[1459], the Appellate Body set out three lines of argument that it considered would have led it to reject the European Union's "withdrawal" arguments "{e}ven if the European Union had been successful in its arguments on 'extinction' and 'extraction'".[1460] The above-quoted statements were part of the second of the three lines of argument presented by the Appellate Body.

6.825. It follows, therefore, that the statements the European Union relies upon were part of an *alternative line of reasoning* advanced by the Appellate Body on an *arguendo* basis. To this extent, they did not form part of the reasoning that was actually used by the Appellate Body to dispose of

[1455] Appellate Body Report, *US – Upland Cotton*, paras. 476 and 482.
[1456] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 757.
[1457] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 737-749.
[1458] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 718-736.
[1459] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 754.
[1460] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 755.

the European Union's appeal. In this light, we are not persuaded that the statements the European Union relies upon should be characterized as conclusive Appellate Body findings which support the European Union's submission that it does not have a compliance obligation with respect to subsidies that ceased to exist prior to the adoption of the recommendations and rulings in the original proceeding.

6.826. Furthermore, we note that while the Appellate Body states that the adopted recommendations in this dispute "do not concern subsidies that have been 'extinguished' or 'extracted'", it is in our view significant that in the very next sentence the Appellate Body does not proclaim that panels and the Appellate Body *must refrain* from making recommendations with respect to "extinguished" or "extracted" subsidies. Rather, the Appellate Body confirms only that "panels or the Appellate Body are *not required* to make recommendations"[1461] with respect to "extinguished" or "extracted" subsidies. Had the Appellate Body wanted the second last sentence of the relevant paragraph to be interpreted as an unequivocal finding that the adopted recommendations in this dispute establish no compliance obligation with respect to any "extinguished" or "extracted" subsidy, it is difficult to understand why the Appellate Body limited itself to stating only that a panel is "not required" to make recommendations with respect to "extinguished" or "extracted" subsidy measures.

6.827. Indeed, to the extent that the Appellate Body explicitly confirmed in the very same report that subsidies which no longer exist may be found to cause adverse effects within the meaning of Article 5, it would be odd, in the light of how compliance is defined and supposed to be achieved under the provisions of the DSU and Article 7.8 of the SCM Agreement, to interpret the Appellate Body's statements as *automatically* carving out any "extinguished" or "extracted" subsidies found to cause adverse effects in the original proceeding from the European Union's compliance obligations. In this respect, we find the following passages from the Appellate Body's consideration of the European Union's appeal against the panel's findings with respect to its arguments concerning the alleged "extinction" of subsidies instructive:

> In the present case, we are not in a Part V context where the question arises as to the rate of subsidization present in the product that is being countervailed. Nor do any of the sales transactions in this dispute amount to a full privatization of a previously state-owned company. Instead, the issue is whether, as alleged by the European Union, sales of shares between private entities, and sales conducted in the context of partial privatizations, eliminate all or part of past subsidies, *and whether this, in turn, results in a change that should be taken into account in assessing whether past subsidies are causing present adverse effects under Article 5 of the SCM Agreement.*
>
> Neither of the participants question that the past rulings in the privatization cases stand for the proposition that a presumption of extinction arises where there is a full privatization. We recall that, in both cases, the full privatizations involved sales at fair market value and at arm's length, and that there was a complete transfer of ownership and control. In a partial privatization as well as in private-to-private sales, not all of the elements of a full privatization are present. Therefore, consistent with the Appellate Body's guidance, a fact-intensive inquiry into the circumstances surrounding the changes in ownership would be required in order to determine the extent to which there are sales at fair market value and at arm's length, accompanied by transfers of ownership and control, and whether a prior subsidy could be deemed to have come to an end. *Moreover, a panel assessing claims under Part III of the SCM Agreement would have to examine whether the transactions are of a nature, kind, and amount so as to affect an adverse effects analysis and attenuate the link sought to be established by the complaining party under Articles 5 and 6 of the SCM Agreement between the alleged subsidies and their alleged effects.*[1462] (emphasis added)

[1461] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 755. (emphasis added)

[1462] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 724-725.

6.828. In the first of the above-quoted paragraphs, the Appellate Body appears to explain that the issue that is raised by the European Union's "extinction" arguments should be resolved on the basis of two questions: first, whether the relevant "sales of shares between private entities, and sales conducted in the context of partial privatizations, eliminate all or part of past subsidies"[1463]; and second, "whether this, in turn, results in a change that should be taken into account in assessing whether past subsidies are causing present adverse effects under Article 5 of the SCM Agreement". In our view, there would have been no need for the Appellate Body to identify the second line of inquiry had it considered that an "extinguished" subsidy may *never* cause adverse effects within the meaning of Article 5 of the SCM Agreement, and thereby attract a compliance obligation under the terms of Article 7.8.

6.829. The Appellate Body appears to elaborate and confirm this position in the second of the above-quoted paragraphs. In particular, after recalling that "a presumption of extinction arises where there is a full privatization", the Appellate Body explains that for the purpose of determining whether a "partial privatization" or any one or more "private-to-private" sales transactions extinguish a subsidy, "a fact-intensive inquiry into the circumstances surrounding the changes in ownership would be required in order to determine the extent to which there are sales at fair market value and at arm's length, accompanied by transfers of ownership and control, and whether a prior subsidy could be deemed to have come to an end". The Appellate Body then moves on to clarify that in cases involving claims made under Part III of the SCM Agreement, such a "fact-intensive inquiry" would not be enough to dispose of a claim of adverse effects against an "extinguished" subsidy. In this respect, the Appellate Body identifies what appears to be an *additional* requirement, namely, an examination of "whether the transactions are of a nature, kind, and amount so as to affect an adverse effects analysis and attenuate" the causal link between the alleged subsidies and their alleged effects. Again, we can see no reason why the Appellate Body would have introduced this additional analytical step had it considered that an "extinguished" subsidy may *never* cause adverse effects within the meaning of Article 5 of the SCM Agreement and, thereby, attract a compliance obligation under the terms of Article 7.8. On the contrary, we understand the Appellate Body's statement to mean that while the possibility that the "extinction" of a subsidy may bring about the end of its effects cannot be excluded, whether this may be the case for any given subsidy will ultimately be a question of fact. Indeed, such an understanding of the relationship between the "extinction" of a subsidy and its effects would be entirely consistent with the *effects-based* nature of the disciplines of Article 5.

6.830. The above considerations suggest that the Appellate Body statements relied upon by the European Union were not intended to indicate that "extinguished" or "extracted" subsidies found to cause adverse effects in an original proceeding can *never* be the subject of an implementing Member's compliance obligations. In our view, such an understanding of the relevant statements would not only be inconsistent with the Appellate Body's stated view about the importance of evaluating the merits of a claim of adverse effects against subsidies that no longer exist on a case-by-case and fact-specific basis, but it would also render the disciplines of Article 5 completely ineffective in cases involving adverse effects caused by "extinguished" or "extracted" subsidies that continue to be observed in the implementation period.[1464]

6.831. We also find the conclusions drawn by the European Union from the Appellate Body statements it relies upon to be at odds with how panels and the Appellate Body have given effect to the obligation under Article 19.1 of the DSU to make recommendations whenever a measure is found to be inconsistent with a covered agreement. Thus, for example, in *China – Raw Materials*, the Appellate Body was called upon to determine whether the panel had acted consistently with its obligations under the DSU when it made a recommendation in accordance with Article 19.1 that covered a number of expired (and non-expired) measures. The relevant passage from the Appellate Body's findings is set out below:

> We note that, in making its recommendations, the Panel was concerned about making recommendations on what it viewed to be "expired" measures. The Panel noted, for

[1463] We examine the Appellate Body's reversal of the original panel's findings with respect to the European Union's "extinction" arguments, and the implications of what this means in terms of how to determine whether a subsidy has been "extinguished" in more detail below at paras. 6.928-6.944 and 6.958-6.972.

[1464] While we do not exclude the possibility that the "extinction" or "extraction" of a subsidy may bring its effects to an end, whether this is so will be a fact-specific matter.

example, that previous panels had found that it would not be appropriate to make recommendations on measures that no longer exist. *The DSU does not specifically address whether a WTO panel may or may not make findings and recommendations with respect to a measure that expires or is repealed during the course of the panel proceedings. Panels have made findings on expired measures in some cases and declined to do so in others, depending on the particularities of the disputes before them*. In the present dispute, China takes issue with the recommendations made by the Panel, and not with its findings on particular measures. In *US – Upland Cotton*, the Appellate Body drew a distinction between the question of whether a panel can make findings with respect to an expired measure and the question of whether an expired measure is susceptible to a recommendation under Article 19.1 of the DSU:

> The Appellate Body in *US – Certain EC Products* confirmed that the 3 March Measure had ceased to exist. It noted that there was an obvious inconsistency between the finding of the panel that "the 3 March Measure is no longer in existence" and the panel's subsequent recommendation that the Dispute Settlement Body (the "DSB") request the United States to bring the 3 March Measure into conformity with its WTO obligations. Thus, the fact that a measure has expired may affect what recommendation a panel may make. It is not, however, dispositive of the preliminary question of whether a panel can address claims in respect of that measure. (footnote omitted)

Contrary to the Panel's approach in this dispute*, the Appellate Body indicated that the fact that a measure has expired "may affect" what recommendation a panel may make. The Appellate Body did not suggest that a panel was precluded from making a recommendation on such a measure in a particular case.* In general, in cases where the measure at issue consists of a law or regulation that has been repealed during the panel proceedings, it would seem there would be no need for a panel to make a recommendation *in order to resolve the dispute*. The same considerations do not apply, in our view, when a challenge is brought against a group or "series of measures" comprised of basic framework legislation and implementing regulations, which have not expired, and specific measures imposing export duty rates or export quota amounts for particular products on an annual or time-bound basis, as is the case here. *The absence of a recommendation in such a case would effectively mean that a finding of inconsistency involving such measures would not result in implementation obligations for a responding member, and in that sense would merely be declaratory.* This cannot be the case.

Article 3.7 of the DSU provides that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." This is affirmed in Article 3.4 of the DSU, which stipulates that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements." In our view, in order to "secure a positive solution to the dispute" and to make "sufficiently precise recommendations and rulings so as to allow for prompt compliance", it was appropriate for the Panel in this case to have recommended that the DSB request China "to *bring its measures into conformity with its WTO obligations such that the 'series of measures' does not operate to bring about a WTO-inconsistent result".*[1465] (emphasis added; footnotes omitted)

6.832. The above passage is particularly instructive for a number of reasons. First, the Appellate Body states that the DSU is silent about whether a panel may or may not make recommendations with respect to expired measures. Second, the Appellate Body recalls that WTO dispute settlement practice is varied in this regard, depending upon the "particularities of the disputes". Third, the Appellate Body confirms that it did not suggest in *US – Upland Cotton (Article 21.5 – Brazil)* that a panel is precluded from making a recommendation with respect to an expired measure. Fourth, it is apparent that at the heart of the Appellate Body's decision to uphold the panel's recommendation is the concern that, on the particular set of facts in *China – Raw*

[1465] Appellate Body Report, *China – Raw Materials*, paras. 263-265.

Materials, the absence of any recommendation with respect to the WTO-inconsistent measures (which included both expired and non-expired measures) would not have resolved the dispute between the parties because there would have been no implementation obligations with respect to WTO-inconsistent measures that, if maintained and applied, would have continued to breach WTO law. Such an outcome would have rendered the panel's findings of inconsistency "merely … declaratory", a result that the Appellate Body concluded could "not be the case".

6.833. Thus, not only does the above passage from *China – Raw Materials* reveal that the Appellate Body does not consider that a panel is precluded from making Article 19.1 recommendations with respect to expired measures, but it also suggests that a panel could be expected to make such recommendations whenever necessary to ensure that an effective remedy is made available to a complaining Member seeking to put an end to *ongoing* infringements of the covered agreements.

6.834. Indeed, it is evident from the disputes where panels and the Appellate Body have refrained from making recommendations with respect to measures that have ceased to exist, that the expiry of such measures has resulted in, or coincided with, the *non-existence or cessation of the violations caused by those measures*. Thus, in *US – Certain EC Products*, the Appellate Body found that the panel had erred when it recommended that the United States bring the measure at issue in that dispute (an increased bonding requirement on certain EC products) into conformity with its obligations, because the panel had itself found that the relevant bonding requirements no longer existed.[1466] There was therefore no factual basis to support a claim of violation against the United States with respect to the challenged measure. Similarly, in *EC – Approval and Marketing of Biotech Products*, the panel recommended that the European Communities bring the general *de facto* moratorium on approvals of biotech products into conformity with its obligations under the SPS Agreement "if, and to the extent that, that measure has not already ceased to exist".[1467] Again, the non-existence of the *de facto* moratorium would signal the cessation of WTO-inconsistent conduct.

6.835. On the other hand, in disputes where doubts have existed about whether the formal removal or amendment of a measure has actually resulted in bringing a violation of the covered agreements to an end, panels and the Appellate Body have been careful to frame their recommendations in a way that ensures they cover the WTO-inconsistency resulting from the allegedly expired or amended measure. Thus, in *EC – Commercial Vessels* the panel recommended that the European Communities bring one of the challenged measures in that dispute (the TDM aid scheme), which had formally expired soon after the panel's establishment, into conformity with its obligations under the DSU *to the extent that it was still operational*. Although it was clear to the panel "that where national aid schemes have expired, no new applications for TDM aid can be submitted", the panel could not "determine with certainty whether and to what extent it is possible that subsidies continue to be provided pursuant to applications made before the expiry of those schemes".[1468] Likewise, in *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body qualified its recommendation with respect to a challenged measure (a tax stamp requirement) that had been affected by an amendment to the general tax stamp regime between panel and Appellate Body proceedings in a way that appeared to remove the WTO-inconsistency found at the panel stage, by limiting its scope to the tax stamp requirement "if, and to the extent that, the said modifications to the tax stamp regime" did not already bring that measure into conformity.[1469]

6.836. The above examples appear to confirm what is suggested in *China – Raw Materials*, namely, that the principle guiding whether a panel or the Appellate Body should make an Article 19.1 recommendation (and thereby impose a compliance obligation) with respect to a WTO-inconsistent measure is whether the infringement of the covered agreements has ceased (or will cease) prior to the adoption of the respective reports. Where it is known that this will be the case, a recommendation should not be made (e.g. *US – Certain EC Products*). On the other hand, where this outcome cannot be definitively confirmed, it will be incumbent upon a panel and the Appellate Body to ensure that a recommendation (and therefore a compliance obligation) exists with respect to the WTO-inconsistent measure (e.g. *EC – Commercial Vessels*, *Dominican Republic – Import and Sale of Cigarettes*).

[1466] Appellate Body Report, *US – Certain EC Products*, paras. 81-82.
[1467] Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 8.16 and 8.36.
[1468] Panel Report, *EC – Commercial Vessels*, paras. 8.3 and 8.4.
[1469] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 129.

6.837. The common sense underlying this principle was perhaps most clearly articulated by the panel in *India – Autos* where it stated that "as a matter of logic, there can be no sense in making … a recommendation {under Article 19 of the DSU} if a Panel is of the view that *the violation at issue has ceased to exist* when its recommendation is being made".[1470] This is because Article 19 of the DSU "envisages a situation where a violation *is* in existence".[1471]

6.838. Thus, when the Appellate Body statements from the original proceeding that the European Union relies upon are considered in the light of the dispute settlement practice with respect to Article 19.1 of the DSU, it is difficult to agree with the European Union's submission that they should be understood to support the proposition that it has no compliance obligation under the terms of Article 7.8 of the SCM Agreement with respect to subsidies that ceased to exist prior to 1 June 2011. On the contrary, in the light of the *effects-based* disciplines of Article 5, our review of the dispute settlement practice surrounding Article 19.1 of the DSU suggests that the scope of the European Union's compliance obligations cannot be determined by simply looking at whether the subsidies found to cause adverse effects in the original proceeding ceased to exist prior to the beginning of the implementation period. It follows, therefore, that the European Union's contention that it has no compliance obligation at all with respect to subsidies found to cause adverse effects in the original proceeding, solely because they allegedly ceased to exist prior to 1 June 2011, cannot be accepted.

6.6.2.4.2 Conclusion

6.839. Although, when read in isolation, the text of Article 7.8 could arguably be understood to support the European Union's view that an implementing Member will have no obligation to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" when that Member *does not continue to grant or maintain* a subsidy found in original proceedings to cause adverse effects, a reading of this provision in its proper context (including in conjunction with Articles 19 and 21 of the DSU), and in the light of the object and purpose of the WTO dispute settlement system, suggests that the European Union's interpretation of Article 7.8 cannot be sustained.

6.840. Ultimately, we find the European Union's submission to be problematic because it is based on a conception of compliance that ignores the *effects-based* disciplines of Article 5. If accepted, it would mean that any Member able to demonstrate in an original proceeding that a subsidy, which has ceased to exist, causes adverse effects to its interests, would have no possibility of obtaining relief for that WTO-inconsistent conduct were it to continue into the implementation period and beyond. In other words, the European Union's interpretation of Article 7.8 would mean that a Member could be found to be in continued violation of WTO law, yet have no duty to redress the infringement of its obligations, thereby rendering any findings of adverse effects in an original proceeding purely declaratory. Needless to say, such an outcome would upset the balance of WTO rights and obligations and, thereby, frustrate the very purpose of the WTO dispute settlement system.

6.841. Thus, for all of the above reasons, we find that the European Union has failed to demonstrate that the mere fact that one or more of the challenged subsidies may have ceased to exist prior to 1 June 2011 *ipso facto* means that the European Union and certain member States do not have a compliance obligation under the terms of Article 7.8 of the SCM Agreement in respect of those subsidies.

6.842. With the above analysis and conclusions in mind, we now turn to evaluate the merits of the United States' claim that the European Union and certain member States have failed to comply with the requirement to "withdraw the subsidy" under the terms of Article 7.8 of the SCM Agreement.

[1470] Panel Report, *India – Autos*, para. 8.25. (emphasis added)
[1471] Panel Report, *India – Autos*, para. 8.15. (emphasis original; underline added)

6.6.3 Whether the European Union and certain member States have failed to "withdraw the subsidy" within the meaning of Article 7.8 of the SCM Agreement

6.6.3.1 Arguments of the United States

6.843. The United States argues that the European Union and its member States have failed to "withdraw the subsidy", within the meaning of Article 7.8 of the SCM Agreement, in relation to almost all of the subsidies found to have caused adverse effects in the original proceeding.[1472] In particular, the United States argues that the European Union and its member States have failed to take up this compliance option because: (a) they have failed to take any affirmative action to "remove" or "take away" any of the relevant subsidies from the Airbus recipients; and (b) the alleged "expiry", "extinction" and/or "extraction" events relied upon by the European Union to demonstrate "withdrawal" do not amount to the "withdrawal" of a subsidy for the purpose of Article 7.8 of the SCM Agreement.

6.844. The United States recalls that the ordinary meaning of the word "withdraw" suggests that the "withdrawal" of a subsidy for the purpose of Articles 4.7 and 7.8 of the SCM Agreement "refers to the 'removal' or 'taking away' of that subsidy".[1473] Drawing from the Appellate Body's findings in *US – Upland Cotton (Article 21.5 – Brazil)*, the United States maintains that the "withdrawal" of a subsidy for the purpose of Article 7.8 will "usually" involve "at least some affirmative step that terminates the subsidy on an on-going basis", recalling furthermore that an implementing Member would "normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own".[1474]

6.845. According to the United States, most of what is described in the European Union's compliance notification of 1 December 2011, as explained and elaborated by the European Union in this proceeding, involves *no affirmative action* at all on the part of the European Union or its member States, and relies merely on the alleged "expiry" of subsidies through the passage of time[1475], or their alleged "extinction" and "extraction". The United States maintains that the European Union's assertion of compliance on this basis is untenable because it is premised on the view that a subsidy may "expire", and thereby be "withdrawn" for the purpose of Article 7.8 of the SCM Agreement, by operation of "relatively short" amortization periods, "extinction" or "extraction" events effected "through non-governmental transactions", or the repayment of financial contributions "on subsidized terms".[1476] The United States submits that accepting such a position would mean that inaction on the part of a subsidizing Member will *always* be sufficient to withdraw subsidies, turning the "situation that the Appellate Body identified as 'usual' – affirmative action being necessary to withdraw subsidies – into an exception to a general rule that inaction is enough".[1477]

6.846. The United States recalls that the Appellate Body rejected the European Union's line of argument in the original proceeding when it found that, even assuming, *arguendo*, that the alleged "extinction" and "extraction" transactions had brought the subsidies at issue to an end prior to the beginning of the 2001-2006 period, this did not mean that the European Union had "withdrawn" those subsidies for the purpose of Article 7.8. For the United States, the logic behind the Appellate Body's ruling is "that an event cannot 'withdraw' a measure that has not yet been found to be a subsidy"[1478], implying that the alleged "expiry", "extinction" and/or "extraction" of subsidies prior to 1 June 2011 cannot amount to the "withdrawal" of subsidies for the purpose of

[1472] The United States does not challenge the European Union's alleged withdrawal of the subsidies relating to the Bremen Airport runway extensions and the Mühlenberger Loch aircraft assembly site that were found to cause adverse effects in the original proceeding. (United States' first written submission, fns 13 and 64; and second written submission, para. 265).

[1473] United States' first written submission, para. 19 (citing Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45 (cited in Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 754)).

[1474] United States' first written submission, para. 19 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236); and second written submission, para. 3.

[1475] United States' first written submission, paras. 5 and 34-104; and second written submission, paras. 40-48.

[1476] United States' second written submission, para. 40.

[1477] United States' second written submission, para. 40.

[1478] United States' second written submission, para. 272 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 756).

Article 7.8. The United States also recalls that both the panel and the Appellate Body in the original proceeding found that the subsidies provided to Airbus caused adverse effects, irrespective of whether those subsidies had actually expired before the start of the relevant reference period. The United States observes that it was this set of findings that defined the adopted rulings and recommendations which triggered the European Union's obligation to "withdraw the subsidy". In this light, the United States argues that the alleged "expiry", "extinction" and/or "extraction" of subsidies prior to the adoption of the rulings and recommendations cannot now be an automatic basis for concluding that the European Union has complied with the obligation to "withdraw the subsidy".[1479]

6.6.3.2 Arguments of the European Union

6.847. The European Union argues that all of the pre-A350XWB subsidies challenged by the United States have already been "withdrawn" for the purpose of Article 7.8 of the SCM Agreement, as a result of their "expiry", "extinction" and/or "extraction" prior to the end of the implementation period. According to the European Union, this conclusion necessarily follows from what it considers to be the fact that a subsidy can only be "withdrawn" for the purpose of Article 7.8 if it exists at the time that a compliance obligation is incurred.[1480] Thus, the European Union maintains that if a subsidy that was the subject of adopted adverse effects findings no longer exists after the end of the implementation period, the Member responsible for originally granting that subsidy will have procured its "withdrawal" and, thereby, be in full compliance with its obligations under Article 7.8 of the SCM Agreement.

6.848. Although the European Union acknowledges that it is possible to find that a subsidy causes present adverse effects even after it has expired, the European Union does not accept that this implies that expired subsidies that continue to cause present adverse effects cannot be found to have been "withdrawn" for the purpose of Article 7.8 of the SCM Agreement. In this respect, the European Union argues that the prohibition against the use of subsidies that cause adverse effects that is found in Article 5 of the SCM Agreement *does not* affect the determination that must be made in compliance proceedings, which in the case of actionable subsidies, are governed by Article 7.8.[1481] The European Union emphasizes in this regard that Article 7.8 explicitly identifies the "withdrawal" of the subsidy as one of two options available to an implementing Member to come into *full* compliance with its obligations, and thereby provide the complaining Member with the remedy it is due, not unlike the "withdrawal" of a subsidy required under Article 4.7 of the SCM Agreement and the "withdrawal" of a measure envisaged under Article 3.7 of the DSU.[1482] Thus, from a remedial perspective, the European Union argues that the explicit text of Article 7.8 does not require that the "withdrawal" of a subsidy achieve the removal of any continued adverse effects.[1483] Indeed, according to the European Union, such an interpretation of Article 7.8 would deprive an implementing Member of the choice of compliance options envisaged under the explicit terms of that provision, thereby rendering the possibility of "withdrawing" the subsidy "inutile".[1484]

6.849. The European Union does not deny that the "withdrawal" of a subsidy for the purpose of Article 7.8 of the SCM Agreement will "usually" or "normally" require affirmative action of some kind on the part of the implementing Member. However, according to the European Union, the "temporal circumstances" of this dispute, which include the existence of a recommendation to "withdraw" subsidies granted 43 years ago, are not "usual" or "normal", and therefore justify the conclusion that the expiry of the relevant measures through the "diminishment of the subsidy" over time has brought the European Union into compliance with its obligations.[1485]

[1479] United States' second written submission, paras. 266-274.
[1480] European Union's first written submission, paras. 30 and 36; and second written submission, paras. 75 and 77.
[1481] European Union's first written submission, para. 544 and fn 660; second written submission, para. 567 and fn 742; and response to Panel question No. 46(a).
[1482] European Union's second written submission, para. 97.
[1483] European Union's first written submission, paras. 30-31, 166 and 544; and second written submission, paras. 528-535.
[1484] European Union's first written submission, paras. 538-539 and 544; second written submission, para. 568; and response to Panel question Nos. 3-5 and 45.
[1485] European Union's second written submission, paras. 83-90.

6.850. Finally, the European Union considers that the United States errs when it argues that the Appellate Body's rejection of its "extinction" and "extraction" arguments in the original proceeding means that "an event cannot 'withdraw' a measure that has not been found to be a subsidy".[1486] This is because, according to the European Union, the Appellate Body has in previous disputes expressed precisely the opposite view: namely, that "'compliance with the recommendations and rulings of the DSB can be achieved before the recommendations and rulings of the DSB are adopted'".[1487] Indeed, the European Union notes that the United States relies upon this very line of jurisprudence to argue that the A350XWB LA/MSF measures, all of which predate the adopted recommendation and rulings in this dispute, are "measures taken to comply" for the purpose of Article 21.5 of the DSU.[1488] In this light, the European Union maintains that the Appellate Body's "extinction" and "extraction" findings in the original proceeding do not support the view that "pre-adoption measures" cannot secure compliance with Article 7.8 of the SCM Agreement. Rather, the Appellate Body's findings should be understood to stand for the proposition "that the determination {of} whether a measure or event achieves 'withdrawal' of a subsidy is 'best left to a compliance panel' charged with interpreting and applying Article 7.8 of the SCM Agreement".[1489]

6.6.3.3 Arguments of the third parties

6.6.3.3.1 Australia

6.851. Australia argues that the European Union is required to take affirmative action to withdraw all current subsidies to Airbus that had been found to be non-compliant, or take affirmative action to remove the adverse effects of those subsidies.[1490]

6.6.3.3.2 Brazil

6.852. Brazil recalls that Article 7.8 of the SCM Agreement is a "special and additional" procedural rule, which imposes a particular means to achieve the objectives of Articles 3 and 9 of the DSU of securing an effective resolution of the dispute and of brining the measure into conformity. According to Brazil, the goal of the "measure taken to comply" is to bring the inconsistent measure into conformity. In the context of actionable subsidy findings, Brazil argues that Article 7.8 provides that the means to do this consists of the taking of "appropriate steps to remove the adverse effects" or to "withdraw the subsidy". For Brazil, this objective of bringing the measure into conformity is important when assessing whether the steps taken by the implementing Member were "appropriate" or not. Similarly, the phrase "withdraw the subsidy" must be given meaning with this objective in mind.

6.853. Brazil argues that in the context of an actionable subsidy case, the alleged "withdrawal" of the subsidy must be appropriate to remove the adverse effects found to have been caused by the use of the subsidies. Otherwise, it is not a meaningful "withdrawal" for purposes of implementation of an actionable subsidies finding. Thus, according to Brazil, where the finding of present adverse effects was based on the use of a subsidy from the past which no longer existed at the time of the reference period for adverse effects, the "withdrawal" of the subsidy must be understood as more than the simple reiteration of the fact that the subsidy no longer exists. In such circumstances, "withdrawal" requires an additional action, which might consist of "taking away" that subsidy. Alternatively, the implication is that in cases of "dead subsidies" like LA/MSF that have long lasting effects in the marketplace, when it would no longer be possible to "withdraw the subsidy", the implementing Member is under an obligation to remove the adverse effects.[1491]

6.6.3.3.3 Canada

6.854. Canada argues that a subsidy may be "withdrawn" for the purpose of Article 7.8 of the SCM Agreement by removing either the financial contribution or the benefit. Moreover, according

[1486] European Union's second written submission, para. 91.
[1487] European Union's second written submission, para. 94 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 224).
[1488] European Union's second written submission, para. 93.
[1489] European Union's second written submission, para. 94.
[1490] Australia's third-party statement, para. 8; Australia's third-party response to Panel question No. 1.
[1491] Brazil's third-party submission, paras. 11 and 21; and third-party statement, para. 14.

to Canada, there are similarities between the situation where the benefit provided by a subsidy has expired and that where the benefit has been withdrawn. In both cases, a benefit is no longer being conferred on the recipient and, as a result, a subsidy no longer exists. Therefore, in Canada's view, if a subsidy has expired, the Member should also be found to have complied with its obligations.[1492]

6.6.3.3.4 China

6.855. China argues that the proposition that the correct interpretation of both "options" available under Article 7.8 of the SCM Agreement "must result in bringing a Member found to have acted inconsistently with Article 5 back into conformity with its obligation not to cause adverse effects through the use of subsidies" is at odds with the principle of effective treaty interpretation and the "legitimate expectations of the parties to a treaty {which} are reflected in the language of the treaty itself".[1493] Indeed, according to China, for the option to "withdraw the subsidy", a requirement "not to cause adverse effects through the use of subsidies" is not mentioned in Article 7.8. Reading that requirement into the option to "withdraw the subsidy" would not only impute "into a treaty words that are not there", but it would also reduce such an option to "redundancy or inutility" because that option would be effectively equal to the option to "remove the adverse effects".

6.856. Moreover, China maintains that if a subsidy were "withdrawn", however that word is interpreted, the Member concerned would no longer be in violation of Article 5 because the relevant Member could no longer be said to be causing adverse effects "through the use of subsidies". Since the subsidy is "withdrawn", it is no longer in existence, and the Member cannot be deemed to be "using" the subsidy anymore.[1494]

6.6.3.3.5 Japan

6.857. Japan submits that in order to understand whether the European Union has "withdrawn" the subsidies, the Panel should ask whether the benefit has been removed from the recipient. Japan recalls that the Appellate Body has explained in this regard that the determination of a benefit under Article 1.1(b) of the SCM Agreement is an *ex ante* analysis that does not depend upon how the particular financial contribution actually performed after it was granted. Furthermore, Japan observes that the Appellate Body has observed that "the nature, amount, and projected use of the challenged subsidy may be relevant factors to consider in an assessment of the period over which the benefit from a financial contribution might be expected to flow".[1495] Japan emphasizes, however, that the assessment of the period of the life of a benefit should focus on the projected period or sales amount properly anticipated by the granting Member when the subsidy is granted even though other relevant factors must be also considered.[1496]

6.6.3.4 Evaluation by the Panel

6.6.3.4.1 Introduction

6.858. The parties' submissions concerning the extent to which the European Union and certain member States have failed to "withdraw the subsidy" raise two broad questions: First, whether all of the pre-A350XWB subsidies challenged by the United States[1497], *as a matter of fact*, "expired" or were "extinguished" and/or "extracted" prior to the end of the implementation period, that is, before 1 December 2011; and second, whether the "expiry", "extinction" and/or "extraction" of any such subsidies means that the European Union and certain member States have "withdrawn" those subsidies for the purpose of Article 7.8 of the SCM Agreement. We examine each of these questions in turn.

[1492] Canada's third-party statement, paras. 34-39; and third-party response to Panel question No. 1.

[1493] China's third-party response to Panel question No. 1 (quoting Appellate Body Report, *EC – Computer Equipment*, para. 83).

[1494] China's third-party response to Panel question No. 1.

[1495] Japan's third-party statement, para. 14 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 707).

[1496] Japan's third-party statement, paras. 9-19.

[1497] By this we mean all of the subsidies the United States challenges in this dispute apart from the A350XWB LA/MSF subsidies.

6.6.3.4.2 The alleged "expiry", "extinction" and "extraction" of subsidies

6.6.3.4.2.1 Overview of the parties' arguments

6.859. Drawing from certain findings and observations made by the Appellate Body in the original proceeding, the European Union argues that the "lives" of almost all of the subsidies challenged in this proceeding came to an end by virtue of their "expiry", "extinction" and/or "extraction", prior to 1 December 2011. In particular, according to the European Union, the *ex ante* "lives" of all of the LA/MSF subsidies provided for the A300, A310, A320 and A330/A340[1498], and all of the capital contribution subsidies, came to an end by reason of the *amortization of benefit* well before the end of the implementation period.[1499] Separately, the European Union argues that the "lives" of the French, Spanish, and UK LA/MSF subsidies for the A300, A310, A320 and A330/A340 came to an end prior to 1 December 2011 when Airbus actually repaid of all of the outstanding principal plus interest due under those contracts, thereby *removing the financial contributions* provided by the relevant member States. Moreover, the European Union submits that the "lives" of all of the challenged subsidies predating the A350XWB LA/MSF subsidies were brought to an end through the following "intervening events": (a) two one-time removals of cash and cash equivalents by DaimlerChrysler and SEPI from their respective subsidiaries, DASA and CASA, in the lead up to the creation of EADS in 2000 (the *"extraction" of benefit*); and (b) the alleged partial privatization of Aérospatiale in 1999, the sale and issuance of EADS shares to the general public by the EADS partners in the context of the creation of EADS and its public float in 2000, and the 2006 sale by BAE Systems of its 20% ownership stake in Airbus SAS to EADS (the *"extinction" of benefit*).[1500]

6.860. The United States rejects the European Union's assertions and submits, on the basis of two main lines of argument, that none of the "lives" of the challenged subsidies in this dispute have come to an end.[1501] First, the United States asserts that the panel in the original proceeding framed its findings of subsidization "in the present tense", implying that the subsidies at issue were in existence during the 2001-2006 reference period. As the panel's findings were upheld by the Appellate Body and adopted by the DSB, the United States argues that the European Union is not entitled to now "reopen" them and argue in this compliance dispute that the "lives" of the very same subsidies expired during or before the original 2001-2006 reference period.[1502] Second, and in any case, the United States submits that the European Union errs when it argues that the "lives" of all of the challenged subsidies that predate the A350XWB LA/MSF subsidies have come to an end because of the alleged amortization, "extraction" or "extinction" of "benefit", or the repayment of "financial contributions". According to the United States, none of the particular methodologies or theories applied by the European Union to identify the "lives" of the challenged subsidies can be validly applied in this dispute because, in one way or another, each fails to properly account for the "trajectory" of the benefit of the relevant subsidies or is based on a misplaced understanding of the relevant facts and applicable legal principles.[1503]

6.861. Before evaluating the merits of the parties' submissions, we first set out our understanding of the findings and statements made by the Appellate Body in the original proceeding related to the notion of the "life" of a subsidy and its relevance to the matters raised in this compliance proceeding.

[1498] The European Union argues that the benefit associated with the French LA/MSF subsidies for the A330-200 and French and Spanish LA/MSF provided for the A340-500/600 would amortize at different moments between **[***]** and **[***]**. The European Union argues that this implies "there is some basis to conclude that {the subsidies provided under these agreements} will amortize before the end of these proceedings". (European Union's first written submission, paras. 208-209)

[1499] According to the European Union, all but **[***]** and **[***]** of the respective "benefit" associated with the German and Spanish regional development grants would amortize before the *end* of the implementation period. (European Union's first written submission, paras. 222-223).

[1500] European Union's first written submission, paras. 197-354; and second written submission, paras. 117-268.

[1501] United States' second written submission, paras. 175 and 398.

[1502] United States' second written submission, paras. 145-146, 174, 185 and 190.

[1503] United States' second written submission, paras. 138-265; and response to Panel question Nos. 143-145 and 150-152.

6.6.3.4.2.2 The "life" of a subsidy

6.862. In the original proceeding, the Appellate Body articulated its views on the relevance of the "life" of a subsidy to an adverse effects analysis in a number of places in its report. The Appellate Body first introduced and discussed the notion of the "life" of a subsidy in its review of the European Union's appeal against the panel's finding that there is no requirement in Article 5 of the SCM Agreement to demonstrate the existence of a "present" or "continuing" benefit in order to make out a case of adverse effects.[1504] We recall that the European Union had argued on appeal that the panel's rejection of its submissions concerning the need to demonstrate a "present" or "continuing" benefit was based on an erroneous interpretation and application of Articles 1, 5 and 6 of the SCM Agreement. The Appellate Body, however, did not accept the European Union's position, finding instead that "Article 5 envisages that the use of the subsidy and the adverse effects may not be contemporaneous", and that the "provision of subsidies and their effects need not coincide temporally".[1505] Moreover, the Appellate Body disagreed "with the proposition that {Article 5} does not {apply} in respect of subsidies that have come to an end by the time of the reference period", declaring that *it could not "exclude that, under certain circumstances, a past subsidy that no longer exists may be found to cause or have caused adverse effects that continue to be present during the reference period"*.[1506] Accordingly, the Appellate Body dismissed the European Union's appeal and upheld the panel's finding that the United States was not required to show that Airbus continued to benefit from the relevant subsidies at the time of the alleged adverse effects.[1507] The Appellate Body thereby clearly indicated that the "life" of a subsidy will not necessarily define the duration of its effects.

6.863. The Appellate Body was equally explicit about the importance to an adverse effects analysis of considering how the "life" of a subsidy has "materalized over time", suggesting that this would involve assessing the extent to which the "value" of the subsidy "projected" at the time of its grant may be "affected" by subsequent "intervening events". Thus, the Appellate Body explained that:

> *At the time of the grant of a subsidy, the subsidy will necessarily be projected to have a finite life and to be utilized over that finite period. In order properly to assess a complaint under Article 5 that a subsidy causes adverse effects, a panel must take into account that a subsidy provided accrues and diminishes over time, and will have a finite life.* The adverse effects analysis under Article 5 is distinct from the "benefit" analysis under Article 1.1(b) of the *SCM Agreement* and there is consequently no need to re-evaluate under Article 5 the amount of the benefit conferred pursuant to Article 1.1(b). Rather, *an adverse effects analysis under Article 5 must consider the trajectory of the subsidy as it was projected to materialize over a certain period at the time of the grant. Separately, where it is so argued, a panel must assess whether there are "intervening events" that occurred after the grant of the subsidy that may affect the projected value of the subsidy as determined under the ex ante analysis.* Such events may be relevant to an adverse effects analysis because they may affect the link that a complaining party is seeking to establish between the subsidy and its alleged effects.
>
> In sum, *a panel's analysis of the adverse effects must take into account how the subsidy has materialized over time.* As part of this analysis, a panel must assess how the subsidy is affected, both by the depreciation of the subsidy that was projected *ex ante* and the "intervening events" referred to by a party that may have occurred following its grant.[1508] (emphasis added; footnote omitted)

6.864. The Appellate Body further explained that:

> It is relevant, in our view, to *examine the trajectory of the life of a subsidy in order to determine whether a Member is causing, through the use of any subsidy, adverse*

[1504] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.218-7.221.
[1505] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 712.
[1506] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 712. (emphasis added)
[1507] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 698-715.
[1508] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 709-710.

> *effects* to the interests of another Member within the meaning of Article 5 of the *SCM Agreement*. Moreover, a panel should consider, where relevant for the adverse effects analysis, that the effects of a subsidy will ordinarily dissipate over time and will come to an end.[1509] (emphasis added)

6.865. Finally, the Appellate Body also made the following statements of note, which we believe provide varying degrees of guidance about how to determine the "life" of a subsidy:

> We understand the participants to agree with the basic proposition that a subsidy has a life, which may come to an end, either through the removal of the financial contribution and/or the expiration of benefit.[1510] (underline added)

> {T}he fact that a subsidy is "deemed to exist" under Article 1.1 once there is a financial contribution that confers a benefit does not mean that a subsidy does not continue to exist after the act of granting the financial contribution.[1511] (underline added)

> We also note that, in a Part V context, the Appellate Body has found that an investigating authority may presume, for purposes of an administrative review under Article 21.2 of the *SCM Agreement*, "that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution'", although this presumption is not irrebuttable.[1512] (underline added)

> The nature, amount, and projected use of the challenged subsidy may be relevant factors to consider in an assessment of the period over which the benefit from a financial contribution *might be expected* to flow. A panel may consider, for example, as part of its *ex ante* analysis of benefit, whether the subsidy is allocated to purchase inputs or fixed assets; the useful life of these inputs or assets; whether the subsidy is large or small; and the period of time over which the subsidy is expected to be used for future production.[1513] (emphasis original; underline added; footnote omitted)

> {I}n order properly to assess a claim under Article 5 of the *SCM Agreement*, a panel must take into account in its *ex ante* analysis how a subsidy is expected to materialize over time. A panel is also required to consider whether the life of a subsidy has ended, for example, by reason of the amortization of the subsidy over the relevant period or because the subsidy was removed from the recipient. Moreover, we have emphasized that the effects of a subsidy will generally diminish and come to an end with the passage of time.[1514] (underline added)

> Although we neither endorse nor reject the specific amortization methodology proposed by the European Union in this case, we see no reason to disagree with the notion that allocation of a subsidy over the anticipated marketing life of an aircraft programme may be one way to assess the duration of a subsidy over time.[1515] (underline added)

6.866. Taken together, we understand the above Appellate Body findings and observations to have clarified that: (a) a subsidy which no longer exists may be found to cause adverse effects; (b) understanding how the "life" of a subsidy has "materialized over time" will help to inform an assessment of its effects; and (c) the "life" of a subsidy may be determined by examining the extent to which its "projected value" at the time of grant has been altered by any one or more subsequent "intervening events". We note that, in its analysis, the Appellate Body at no point equated the end of the "life" of a subsidy with the "withdrawal" of a subsidy for the purpose of

[1509] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 714.
[1510] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709.
[1511] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 708.
[1512] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 1643 (quoting Appellate Body Report, *US – Lead and Bismuth II*, para. 62; and citing Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 84).
[1513] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 706-707.
[1514] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1236.
[1515] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1241.

Article 7.8 of the SCM Agreement. Indeed, the Appellate Body was not called upon to resolve such a question. Yet, in this compliance proceeding, the European Union has relied upon the Appellate Body's guidance in relation to the "life" of a subsidy principally for the purpose of demonstrating that it has complied with the obligation to "withdraw the subsidy".

6.867. With these points of clarification in mind, we now turn to evaluate the parties' submissions with respect to the alleged facts and events the European Union argues demonstrate that the "lives" of almost all of the challenged subsidies came to an end before the end of the implementation period.

6.6.3.4.2.3 Whether the European Union is precluded from asserting that the "lives" of the challenged subsidies came to an end before 1 June 2011

6.868. The United States argues that the European Union's submissions concerning the "lives" of the challenged subsidies must be dismissed on the grounds that the panel, in the original proceeding, found that the same subsidies were, as a matter of fact, in existence during the 2001-2006 reference period. We disagree with the United States' characterization of the original panel's findings. The panel's findings of subsidization in the original proceeding concerned the extent to which the relevant measures challenged by the United States constituted a subsidy *at the time* that they were provided. Apart from examining and rejecting the European Union's submissions concerning the alleged "extraction" of subsidies[1516], the panel made no specific findings related to the "lives" of the relevant subsidies that were upheld by the Appellate Body and adopted by the DSB.[1517] Accordingly, we see no merit in the United States' first line of argument in response to the European Union's assertions concerning the end of the "lives" of the challenged subsidies as it is premised on an incorrect reading of the original panel's findings.

6.6.3.4.2.4 "Expiry" through the amortization of benefit

Arguments of the European Union

6.869. The European Union argues that the "lives" of a number of the challenged subsidies came to an end, and therefore "expired", by virtue of the *amortization of "benefit"*. In particular, the European Union recalls that the Appellate Body found in the original proceeding that "the nature, amount, and projected use of the challenged subsidy" will be relevant to determining its *ex ante* life and that, for this purpose, a panel may consider, for example, "whether the subsidy is allocated to purchase inputs or fixed assets; the usual life of these inputs or assets; whether the subsidy is large or small; and the period of time over which the subsidy is expected to be used for future production".[1518] In the light of this and other Appellate Body guidance, the European Union asked PwC to determine the *ex ante* period of time over which the subsidies found in the original proceeding to cause adverse effects were expected to benefit Airbus, and whether, on the basis of that time period, they were fully amortized as of 1 December 2011.[1519] According to the European Union, the report produced by PwC, the "PwC Amortization Report", "is based on the actual terms of the measures at issue and consistent with the Appellate Body's guidance regarding the *ex ante* determination of the proper amortization of the benefit of a subsidy, taking into account the nature, amount, and projected use of the subsidy".[1520] The European Union maintains that the conclusions reached by PwC demonstrate that the benefit conferred through the following subsidy measures was amortized *prior to the end of the implementation period*:

[1516] We address the European Union's arguments concerning the same "extraction" events in the context of this proceeding below, at paras. 6.923-6.927.

[1517] The original panel also examined and rejected the European Union's arguments concerning the "extinction" of subsidies. These findings were overturned on appeal. However, the Appellate Body was unable to "complete the analysis" due to insufficient factual findings. We evaluate the merits of the European Union's reliance on the same "extinction" events for the purpose of this proceeding below, at paras. 6.928-6.1055.

[1518] European Union's first written submission, paras. 197 and 201 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 706 and 707).

[1519] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI).

[1520] European Union's second written submission, para. 185. The European Union explains that the PwC Amortization Report is also guided by the Report of the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures, as well as countervailing duty laws from different jurisdictions. (European Union's first written submission, para. 203).

- The French, German and Spanish LA/MSF subsidies for the A300, A310, A320 and A330/A340 and the UK LA/MSF subsidies for the A320 and A330/A340, because at the time they were provided, it was anticipated that the "Loan Life" of each of the LA/MSF agreements would come to an end before 1 December 2011 or, in any case, it was anticipated that the "Marketing Life" of each of the financed LCA programmes would come to an end before the end of the implementation period[1521];

- The French and German government capital contributions of 1987, 1988, 1989, 1992 and 1994, because the "Useful Life of Assets" in which Airbus invested the relevant capital came to an end before 1 December 2011 or, in any case, it was anticipated that the "Marketing Life" of each of the LCA programmes benefitting from the capital contributions would come to an end; and

- The German Government's capital contribution of 1992, because it was considered to be "inseparable" from the German Government's contribution of 1989, which was itself "related to the A320 aircraft program".[1522]

Arguments of the United States

6.870. The United States argues that the "lives" of the challenged subsidies cannot be determined on the basis of the *amortization of benefit* methodologies proposed in the PwC Amortization Report presented by the European Union. The United States submits that none of the three approaches to amortization used in the PwC Amortization Report submitted by the European Union are valid because in each case, they do not properly reflect the nature of the challenged subsidies and how they "materialize" over time. For instance, as a general matter, the United States argues that the type of straight-line amortization that appears to have been undertaken in the PwC Amortization Report does not reflect the "trajectory" of subsidies such as LA/MSF[1523], which the United States argues are best understood to involve "an arc rising as payments are made for commercial deliveries, and tailing off until the point at which a commercial entity would no longer receive some return from its original funding".[1524] Moreover, the United States explains that contrary to what is suggested by the European Union, the Appellate Body did not conclude that the amortization period for accounting purposes automatically defines the *ex ante* life of a subsidy. Rather, the United States recalls that the Appellate Body referred to amortization as only one "example" of a methodology that a panel might consider applying when evaluating whether the life of a subsidy has come to an end. Thus, according to the United States, "{w}here, as in the present instance, the amortization period for accounting purposes is not the best measurement of the life of a subsidy", it is merely an option and should not be relied upon.[1525]

6.871. More specifically, the United States argues that the "Useful Life of Assets" approach that is proposed in the PwC Amortization Report is inappropriate because it is an accounting tool used by companies in their financial reporting of tangible assets such as property, plant and equipment. However, the United States notes that the subsidies at issue "are not used to purchase such tangible assets, but rather to defray the risk associated with commercializing and producing new models"[1526] of LCA. Moreover, the United States maintains that the 21-year "Marketing Life" approach used by the European Union has "no value as an analytical tool" because it is premised on the view that the life of a subsidy should be gauged solely "by its primary effects" and should not include its "secondary effects". According to the United States, such an approach fails to reflect how a subsidy "materializes" over time. Similarly, the United States dismisses the "Loan Life"

[1521] The European Union argues that the benefit associated with the French LA/MSF subsidies for the A330-200 and French and Spanish LA/MSF provided for the A340-500/600 would amortize at different moments between **[***]** and **[***]**. The European Union argues that this implies "there is some basis to conclude that {the subsidies provided under these agreements} will amortize before the end of these proceedings". (European Union's first written submission, paras. 208-209)

[1522] According to the European Union, all but **[***]** and **[***]** of the respective "benefit" associated with the German and Spanish regional development grants would amortize before the *end* of the implementation period. (European Union's first written submission, paras. 222-223; and PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 116 and 118)

[1523] United States' response to Panel question No. 145, para. 63.

[1524] United States' response to Panel question No. 145, para. 69.

[1525] United States' second written submission, paras. 173 and 175; opening statement (public), para. 16; and response to Panel question No. 144, paras. 56-57.

[1526] United States' response to Panel question No. 144, para. 59.

approach used by the European Union because "it too ignores the secondary effects of LA/MSF, and the implications that such effects have for how the subsidy materializes over time".[1527] Thus, the United States argues that the amortization techniques applied in the PwC Report are "useless in the context of this dispute".[1528]

Evaluation by the Panel

LA/MSF

6.872. Relying upon the analysis and conclusions contained in the PwC Amortization Report, the European Union submits that the lives of a number of the challenged LA/MSF subsidies can be *most appropriately* determined by amortizing them over the period of time it was anticipated Airbus would take to fully repay the loaned principal plus interest.[1529] While appearing to acknowledge that the life of the relevant LA/MSF subsidies might also be determined by looking at the expected marketing life of each of the financed LCA programmes[1530], PwC explains that "the market life does not account for the fact that repayment of principal and interest brings the benefit to Airbus from the below market interest element of MSF to an end".[1531] Accordingly, the PwC Amortization Report applies the "loan life approach" (Loan Life) as the "primary methodology to determine the amortization of MSF"[1532], and then confirms its results by applying the "marketing life methodology" (Marketing Life).[1533] The results of PwC's calculations are set out in the following table.

Table 11: PwC *ex ante* "lives" analysis for LA/MSF

LA/MSF Agreement	Start Year of LA/MSF	Expected Repayment[1534] (Loan Life)	Expected Last Order[1535] (Marketing Life)	Expected Last Delivery
France				
A300B	1971	[***]	[***]	[***]
A300B2/B4	1974	[***]	[***]	[***]
A300-600	1981	[***]	[***]	[***]
A310	1980	[***]	[***]	[***]
A310-300	1984	[***]	[***]	[***]
A320	1987	[***]	[***]	[***]
A330/A340	1986	[***]	[***]	[***]
A330-200	1996	[***]	[***]	[***]
A340-500/600	1999	[***]	[***]	[***]

[1527] United States' response to Panel question No. 144, paras. 60-61. The United States also argues that each of the three proposed amortization methodologies "rests on inaccurate and/or unsupported factual assumptions, and therefore is unsound even as a matter of accounting". (United States' response to Panel question No. 144, para. 62)

[1528] United States' response to Panel question No. 144, para. 62.

[1529] European Union's first written submission, para. 205.

[1530] "We consider it particularly appropriate to allocate the benefit over expected market life, as the pricing and repayment profile of an MSF loan takes account of and reflects the anticipated and actual market success of the funded LCA program". (PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 36).

[1531] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 55.

[1532] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 53 and 56-62.

[1533] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 63-70.

[1534] Including, where relevant, royalties determined in accordance with the terms of the specific LA/MSF agreement and/or the contemporaneous forecast delivery schedule.

[1535] PwC based these dates on the "respective business case and therein contained expected delivery schedules … {subtracting} three years from the date of last delivery to arrive at the expected year of last order". Where "no business case {was} available, … the duration of a generic LCA market life of 18 years {was used} to obtain the expected end date of LCA market life". PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), annex 2.

LA/MSF Agreement	Start Year of LA/MSF	Expected Repayment[1534] (Loan Life)	Expected Last Order[1535] (Marketing Life)	Expected Last Delivery
Germany				
A300B	1971	[***]	[***]	[***]
A300B2/B4	1977	[***]	[***]	[***]
A300-600	1982	[***]	[***]	[***]
A310	1977	[***]	[***]	[***]
A310-300	1983	[***]	[***]	[***]
A320	1983	[***]	[***]	[***]
A330/A340	1987	[***]	[***]	[***]
Spain				
A300B/B2/B4	1974	[***]	[***]	[***]
A300-600	1982	[***]	[***]	[***]
A310	1979	[***]	[***]	[***]
A310-300	1983	[***]	[***]	[***]
A320	1984	[***]	[***]	[***]
A330/A340	1988	[***]	[***]	[***]
A340-500/600	1998	[***]	[***]	[***]
UK				
A320	1985	[***]	[***]	[***]
A330/A340	1988	[***]	[***]	[***]

6.873. The rationale behind the European Union's "Loan Life" approach appears to reflect the view that the "benefit" conferred upon Airbus by LA/MSF materializes with each repayment that is made out of the revenues obtained from delivered aircraft. Thus, according to the European Union, once Airbus has discharged all of its repayment obligations, the LA/MSF agreements will no longer confer a "benefit", and therefore no longer constitute subsidies under the terms of Article 1.1 of the SCM Agreement.

6.874. Despite its various criticisms of the European Union's arguments, the United States appears to accept that the *ex ante* lives of the LA/MSF subsidies will be dictated by the extent to which the contracting parties expected Airbus to continue to have outstanding repayment obligations.[1536] However, while the European Union argues that the contracting parties' repayment expectations were defined in the actual terms of the LA/MSF agreements, read alone or in conjunction with the expected delivery schedules, the United States maintains that the parties' repayment expectations should be determined on the basis of the repayment obligations that a hypothetical commercial provider of financing such as LA/MSF would have demanded Airbus to assume. According to the United States, because of the "product creating" nature of LA/MSF, a commercial provider of LA/MSF-like financing would ensure that any repayment terms included a "bonus" in the event that the programme "performed better than initial projections", thereby requiring Airbus to continue to make repayments over the entirety of "the actual commercial life of the aircraft, from launch until delivery of the last aircraft of the model in question".[1537]

6.875. The European Union maintains that the United States' submission that the life of the subsidies provided through LA/MSF is equivalent to the "actual commercial life" of the funded aircraft, is inconsistent with the Appellate Body's guidance and must be rejected.[1538] For the European Union, the United States' view that LA/MSF is a "creation subsidy", which must be amortized over the life of the product it creates, erroneously conflates the *effects* of the subsidy with its *benefit*.[1539] For the European Union, the United States' line of argument ignores the fact that the terms of the relevant LA/MSF agreements envisaged that repayment would continue over a defined period of time "**[***]**".[1540] Moreover, to the extent that the United States argues that the anticipated repayment period of the LA/MSF measures should be set on the basis of the alleged expectations of commercial investors and lenders, as opposed to the relevant member

[1536] United States' second written submission, paras. 175-178.
[1537] United States' second written submission, para. 178. See also United States' second written submission, paras. 176-183; and response to Panel question No. 149, para. 69.
[1538] European Union's second written submission, paras. 133-136.
[1539] European Union's second written submission, paras. 160-165; and closing statement (non-public), paras. 9-10.
[1540] European Union's second written submission, paras. 151-159.

State governments, the European Union submits that the United States "seeks to double-count the amount of any benefit" because the degree to which LA/MSF departs from market-based financing is already captured in the calculation of the "benefit" provided to Airbus.[1541] Furthermore, drawing upon an opinion expressed by its experts, PricewaterhouseCoopers[1542], the European Union argues that there are many possibilities for commercial investors and lenders to structure their finance relationships, including by using success-dependent, levy-based and back-loaded repayment terms, which inherently require the lender to agree to take on part of the risk of project failure. Thus, the European Union maintains that the United States is incorrect when it argues that, in order to reflect the expectations of market lenders, the proper amortization period should be the actual life of the funded LCA programme.[1543]

6.876. In our view, the United States' focus on the hypothetical commercial lender is misplaced because it reveals nothing about what the expectations of the *subsidizing governments* were at the time they agreed to the terms of the challenged LA/MSF measures. The expectations the United States relies upon to define the lives of LA/MSF subsidies are, in fact, not related to the provision of subsidies at all, but rather associated with the provision of *market-based financing*. While we can see how such expectations will play a role in identifying the market interest rate benchmark used to test the commerciality of LA/MSF, it is difficult to understand how they could be used to define the expectations of the subsidizing governments. Indeed, had the governments held the expectations described by the United States, the terms of LA/MSF would have been different, and there would have been no subsidization. Thus, by seeking to determine the lives of the challenged LA/MSF subsidies on the basis of expectations that were *not* used for the purpose of the original subsidy findings, the United States' line of argument does not appear to speak to the relevant question.

6.877. As we understand it, the "Loan Life" approach advanced by the European Union appears to be focused on the expectations surrounding the mere duration of the existence of a "financial contribution" – in the present instance, the LA/MSF loans. However, as already noted, the Appellate Body's discussion of the *ex ante* life of a subsidy in the original proceeding tended to focus on the projected uses to which a subsidy has been put, rather than the expected duration of a financial contribution. Thus, for example, the Appellate Body explained that:

> The nature, amount and projected use of the challenged subsidy may be relevant factors to consider in an assessment of the period over which the benefit from a financial contribution *might be expected* to flow. A panel may consider, for example, as part of its *ex ante* analysis of benefit, whether the subsidy is allocated to purchase inputs or fixed assets; the useful life of those inputs or assets; whether the subsidy is large or small; and the period of time over which the subsidy is expected to be used for future production.[1544] (emphasis original; underline added)

Moreover, arguably, the same logic applied to a "financial contribution" in the form of a grant, for example, could mean that its *ex ante* "life" would be over as soon as it was provided to the recipient. Yet, according to the Appellate Body:

> {T}he fact that a subsidy is "deemed to exist" under Article 1.1 once there is a financial contribution that confers a benefit does not mean that a subsidy does not continue to exist after the act of granting the financial contribution.[1545] (underline added)

6.878. Thus, it is unclear to us whether the "Loan Life" approach advocated by the European Union would be the most appropriate methodology for determining the "projected value" of the subsidies provided under the LA/MSF agreements. Given that it was expected that the nature, amounts and projected use of the LA/MSF subsidies would enable Airbus to develop and bring to market one or more of its LCA products, we believe that it would be at least equally appropriate to equate the *ex ante* lives of the relevant LA/MSF subsidies with the anticipated

[1541] European Union's second written submission, para. 155.
[1542] PwC Rebuttal Report, (Exhibit EU-120) (BCI).
[1543] European Union's second written submission, paras. 156-159 (citing the PwC Rebuttal Report, (Exhibit EU-120) (BCI), paras. 36 and 40).
[1544] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 707.
[1545] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 708.

marketing lives of the relevant LCA that it was expected would be developed and brought to market with LA/MSF. In other words, because of the anticipated "product creating" nature of LA/MSF, we see no reason why the *ex ante* lives of the challenged LA/MSF subsidies should not be defined by the expected marketing lives of the funded LCA programmes. In this respect, we recall that the Appellate Body found "no reason to disagree with the notion that allocation of a subsidy over the anticipated marketing life of an aircraft programme could be one way to assess the duration of a subsidy over time".[1546]

6.879. Ultimately, however, we believe it is not necessary for us to express any definitive views on which of the two methodologies relied upon by the European Union to determine the *ex ante* lives of the LA/MSF subsidies should be accepted, because it is apparent that under either methodology, the *ex ante* lives of most of the identified LA/MSF subsidies will have come to an end before the end of the implementation period. Indeed, in our estimation, the outcome would be exactly the same, were the "marketing life" defined in terms of the last *date of delivery*, and not the last date of order, as it has been in the PwC Amortization Report. Thus, we find that the European Union has demonstrated that the *ex ante* lives of the following LA/MSF subsidies "expired" before 1 June 2011 as a result of *the amortization of benefit*: the French, German and Spanish government LA/MSF for the A300B/B2/B4, A300-600, A310, A320, A330/A340; and the UK government LA/MSF for the A320 and A330/A340.[1547]

Capital contribution subsidies

6.880. The United States challenges the European Union's compliance with the adopted findings and recommendations in relation to the following capital contribution subsidies found to cause adverse effects in the original proceeding: (a) four French government equity infusions into Aérospatiale in 1987, 1988, 1992 and 1994; and (b) the German Government's acquisition of a 20% interest in Deutsche Airbus GmbH (Deutsche Airbus) in 1989, and the subsequent transfer of that interest to *Messerschmitt-Bölkow-Blohm GmbH* (MBB), the 100% controlling parent of Deutsche Airbus, in 1992.

6.881. Drawing from the work of its experts PwC, the European Union argues that the lives of five of the challenged capital contributions should be determined by amortizing their benefit over the Useful Life of Assets in which Aérospatiale and Deutsche Airbus respectively invested the relevant capital.[1548] It is argued in the PwC Amortization Report that this would be the most appropriate methodology to apply because, in the case of Aérospatiale, the capital contributions "enabled the company to finance increases in its fixed assets"[1549], while with respect to Deutsche Airbus, the relevant capital contribution coincided with a "substantial increase in intangible fixed assets" and "enabled the company to fund production".[1550] The following table sets out the results of PwC's analysis.

[1546] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1241.
[1547] Furthermore, we find that the European Union has also established that the *ex ante* lives of the French government LA/MSF subsidies for the A330-200 and the French and Spanish government LA/MSF subsidies for the A340-500/600 "expired", respectively, in **[***]** and **[***]** – that is, after the end of the implementation period.
[1548] European Union's first written submission, paras. 212 and 215.
[1549] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 83.
[1550] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 103-104.

Table 12: PwC *ex ante* "lives" analysis for capital contributions

Capital Contribution	Maximum Useful Life of Assets	Expected Amortization of Benefit	Expected Last Order (Marketing Life)	Expected Last Delivery
Aérospatiale				
1987	13.3 years	2002	**[***]**[1551]	**[***]**[1552]
1988	13.3 years	2003	**[***]**	**[***]**
1992	13.3 years	2006	**[***]**[1553]	**[***]**[1554]
1994	13.3 years	2008	**[***]**	**[***]**
Deutsche Airbus[1555]				
1989	15 years	2004	**[***]**	**[***]**[1556]
1990	15 years	2005	**[***]**	**[***]**
1991	15 years	2006	**[***]**	**[***]**

6.882. According to PwC, it would be inappropriate to amortize the benefit of the 1992 German government share transfer using the "Useful Life of Assets" method because "**[***]**".[1557] Thus, for this particular subsidy, the PwC Amortization Report amortized the benefit over the expected "marketing life" of the A320 programme, because it was considered to be "inseparable" from the German Government's contribution of 1989, which was itself "related to the A320 aircraft program".[1558] On this basis, the PwC Amortization Report concludes that the life of the 1992 German government capital contribution subsidy expired in **[***]**[1559], which reflects the expected marketing life of the A320 programme at the time of the German Government's A320 LA/MSF measure.

6.883. Alternatively, the PwC Amortization Report submits that the benefit of the 1987 and 1988 French government capital contributions and the 1989 German government capital contribution could also be amortized over the expected "Marketing Life" of the A320 programme because, in its assessment, both sets of contributions were utilized for the purpose of production of the A320.[1560] Likewise, and for similar reasons, PwC submits that the benefit of the 1992 and 1994 French government capital contributions could also be validly amortized over the expected "Marketing Life" of the A330/A340 programme.[1561] To this end, the PwC Amortization Report explains that:

> The financial statements of Aérospatiale and Aérospatiale Group disclose a rise in work-in-progress inventory and advances to suppliers due to new LCA programs and increasing production of those products Aérospatiale was in the process of bringing to market. … Aérospatiale launched the A320 program in 1984 with the first delivery in 1988 and the A330/A340 Basic program in 1987 with the first delivery in 1993. In our view, the capital contributions in {1987} and {1988} are attributable to the A320 program and the contributions in 1988 and 1989 are attributable to the A330/A340 Basic program. The substantial capital contributions enabled Aérospatiale to implement the programs successfully by serving as working capital to the firm and to manufacture and deliver the aircraft at issue. The large capital requirements reflected in the increase in assets and the comparatively smaller capital contributions can be linked to specific aircraft programs. We therefore consider that the market life of the

[1551] A320 programme.
[1552] A320 programme.
[1553] A330/A340 programme.
[1554] A330/A340 programme.
[1555] The 1989 Deutsche Airbus capital contribution was provided in three disbursements in 1989, 1990 and 1991. The PwC Amortization Report applies its amortization methodology to each of these disbursements, as shown in this table.
[1556] A320 programme.
[1557] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 108.
[1558] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 116 and 118.
[1559] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 118.
[1560] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 84, 106 and 116-117.
[1561] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 84. As already noted above, PwC determined that the expected "marketing lives" of the A320 and the A330/A340 programmes came to an end in, respectively, **[***]** and **[***]**.

> above programs could also serve as a valid method to determine the amortization period of the capital contributions.[1562]

6.884. Similarly, the PwC Amortization Report asserts that the 1989 German government capital contribution was "made in place of the outstanding balance on an approved A320 production loan", because of a change in the German Government's financing policy.[1563] The PwC Amortization Report explains that it was agreed that the DM 505 million capital contribution would be provided **[***]**.[1564] Thus, while preferring to "amortize" the life of the 1989 capital contribution over the Useful Life of Assets purchased with that funding, PwC nevertheless observes that:

> As described, the DM 505 m was disbursed **[***]**. As an accounting matter, the {1989 German government} capital contribution increased DA's available equity capital to DM 2 bn rather than specifically serving as operating capital for the A320 program. However, as an accounting matter, **[***]**. Yet, the fact that the disbursements under the equity infusion by way of share purchase **[***]**. Thus, although the form of the financial contribution changed, the dedication of funds to the A320 program persisted. The capital contribution of 1989 can therefore be tied to the A320 program and amortized over the expected market life of this program.[1565]

6.885. The United States' position with respect to the French and German government capital contributions and the German government share transfer is that they were all "product creating" subsidies. Thus, to the extent that each one was used by Airbus to develop and bring to market the A320, A330/A340, A340-500/600 and the A380, the United States argues that their respective lives should be determined on the basis of the *actual* commercial life of the aircraft they helped to create.[1566]

6.886. We recall that the panel in the original proceeding found that the impact of the relevant French and German government subsidies was to ensure "the continued existence and financial stability of the respective national entities engaged in the Airbus enterprise" and that "{t}hose entities were a necessary element of the overall Airbus effort, as it is clear … that without their participation in the overall effort, Airbus would not have been able to continue to develop, launch and produce LCA in fulfilment of the goal of developing a full range of LCA for the market".[1567] These findings suggest that all six of the challenged measures helped to secure the continued participation of Aérospatiale and Deutsche Airbus in the Airbus Consortium's efforts to develop a full range of LCA. In other words, the relevant subsidies worked to not only substantially improve the financial positions of the respective companies, but also to enable them to continue with their development and production of LCA. This conclusion finds additional support in the panel's more specific findings with respect to the challenged measures.

6.887. Starting with the four capital contributions to Aérospatiale, the panel found that the subsidies were provided at a time when Aérospatiale "required the additional equity to fund investments in fixed assets and inventory, and advances to suppliers, in connection with the development of new aircraft".[1568] In particular, Aérospatiale "required additional equity capital … in order to fund new investments, such as the ramp-up for manufacture of the A320 … and the launch of the A330/A340".[1569] Indeed, in its arguments to the panel, the European Union acknowledged that Aérospatiale could not have undertaken these investments without the government subsidies.[1570] Moreover, at all relevant times, the evidence reviewed by the panel

[1562] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 84.
[1563] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 97.
[1564] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 98.
[1565] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 106.
[1566] United States' response to Panel question Nos. 143 and 145. According to the United States, because "'Credit Lyonnais {which conferred the subsidy on behalf of France} considered the Aérospatiale investment to be a long term investment'", and in the light of the allegedly "'good prospects'" for the A330/A340 programme at the time of the 1992 capital contribution, "it is likelier that the 1992 and 1994 equity infusions helped launch the A380 in 2000, rather than the A340-500/600 in 1997". (United States' response to Panel question No. 143, fn 155 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1369))
[1567] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1957.
[1568] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1957.
[1569] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1364.
[1570] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1957.

revealed that Aérospatiale's financial condition was relatively poor, with only uncertain prospects for the immediate future.[1571] Thus, after carefully considering to totality of the evidence, the panel concluded that each of the four French government capital contributions were "inconsistent with the usual investment practice of private investors in France", implying that no market investor would have agreed to make the same equity infusions in Aérospatiale on the same terms as the French Government.[1572]

6.888. Turning to the German Government's 1989 capital contribution and subsequent share transfer, we recall that these took place in the context of the German Government's 1989 restructuring of Deutsche Airbus, which was prompted by Deutsche Airbus' near failure and the desire on the part of the German Government to "create a 'realistic chance of placing the Airbus program under full private industry responsibility over the longer term and thus reducing the level of state financial assistance for Airbus'".[1573] As part of the German Government's restructuring plan, it was agreed that Deutsche Airbus would, *inter alia*, receive a DM 505 million capital contribution from German KfW, and in return, KfW would hold a 20% interest in Deutsche Airbus for ten years, after which it would be sold to MBB.[1574] Moreover, for at least the first eight years of this investment, KfW agreed that any profits generated by Deutsche Airbus would be used first to build up Deutsche Airbus' capital base and to form a special reserve to compensate Deutsche Airbus for exchange rate losses. At the time, Deutsche Airbus "anticipated that it would require additional financing for the A320 programme, and the start-up of the A330/A340 programme"[1575], with its financial position being "exceedingly poor".[1576] Indeed, the European Union acknowledged that by 1989, Deutsche Airbus was on "the verge of bankruptcy".[1577] Thus, after carefully reviewing these and other relevant facts, the panel found that KfW's 20% equity interest in Deutsche Airbus was not "consistent with the usual investment practice of private investors in Germany".[1578]

6.889. As regards the 1992 transfer of KfW's 20% interest in Deutsche Airbus to MBB, the panel found that the earlier than expected (1992 instead of 1999) transfer was triggered by the German Government's decision to cancel the DM 4.1 billion exchange rate loss insurance scheme agreed under the 1989 restructuring plan. In essence, the early transfer of KfW's 20% interest was one of the measures designed to compensate Deutsche Airbus for the loss of this assistance, which had been anticipated to continue until 2000.[1579] Thus, it is apparent that the 1992 share transfer transaction was inherently connected with the 1989 restructuring plan, and in particular, the exchange rate insurance measure, which we understand was not limited to any one or more specific LCA products. After examining the prices paid by MBB for KfW's 20% interest in Deutsche Airbus, the panel concluded that the transfer had conferred a benefit, and was therefore a subsidy, because it had been made at "considerably less than its market value".[1580]

6.890. As we see it, in the light of the Appellate Body's guidance, the core question that must be answered when determining the *ex ante* life of a particular subsidy is what were the expectations of the parties to the subsidy transaction about how it would "materialize over time" *at the moment it was provided*. All of the above-mentioned subsidies involved one-off non-commercial substantial investments of financial resources of some kind. The panel's findings from the original proceeding reveal that, to differing degrees, each subsidy was provided in order to enable Aérospatiale and Deutsche Airbus to continue with LCA development and production activities, including (but not specifically limited) to the A320 and A330/A340 programmes. Furthermore, it is equally apparent that in continuing to support these activities, it must have also been expected that the relevant subsidies would make a significant contribution to the continued existence of the two Airbus entities, and therefore the Airbus Consortium. In this light, it would not, in our view, be unreasonable to consider that the parties' expectations at the time of the provision of the subsidies

[1571] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1363-7.1374.
[1572] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1360-7.1380.
[1573] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1247.
[1574] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1248.
[1575] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1247.
[1576] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1276.
[1577] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1276.
[1578] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1272-7.1288.
[1579] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1298.
[1580] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1299.

was that they would "materialize" over a period of time extending *beyond* the anticipated duration of the A320 and A330/A340 programmes.

6.891. In contrast, the European Union maintains that the "benefit" associated with these subsidies should be amortized over the "Useful Life of the Assets" that were allegedly purchased with the relevant funding. We note, however, that PwC appears to have based its preference for applying the "Useful Life of Assets" methodology on its *post facto* observations about how the subsidies *appear* to have been used on the basis of how the movement of certain unspecified amounts of cash were recorded in the relevant companies' accounts. We have been unable to find any evidence on the record to demonstrate that the parties held these expectations at the time that the subsidies were provided. Thus, we are not convinced that it would be appropriate to determine the *ex ante* lives of the challenged subsidies on the basis of PwC's "Useful Life of Assets" approach. In particular, we have doubts about the appropriateness of measuring the *ex ante* lives of subsidies that were expected to provide *critical* support to the ongoing LCA operations *and* existence of Aérospatiale and Deutsche Airbus (and therefore also the Airbus Consortium) on the basis of accounting conventions relating to how to amortize the book value of fixed assets, which *in the absence of contemporaneous evidence*, reveal very little, if anything, about the parties' expectations at the time of subsidization.

6.892. This does not, however, mean that we accept the United States' view that the *ex ante* lives of the challenged subsidies should be equated with the *actual* marketing lives of the LCA programmes they "create". First, we note that the United States has advanced very little argument to support its contentions concerning the *ex ante* lives of these measures, with its *specific* submissions on this point limited to two paragraphs in its response to Panel question No. 143. Second, the evidence before us provides little, if any, support for the view that the "projected value" of the relevant subsidies was expected to "materialize" over the *actual* marketing lives of the A320, A330/A340, A340-500/600 and A380 programmes. Indeed, as we understand it, the A380 programme had not even been conceived at the relevant times.

6.893. In the light of the above considerations, we believe that the *ex ante* lives proposed by the European Union *understate* what would have been the most likely expectations of the parties with respect to how the relevant subsidies would "materialize over time" at the moment they were provided. Nevertheless, for the purpose of evaluating the merits of the United States' non-compliance claims, we are willing to accept that the European Union's analysis demonstrates that the *ex ante* "lives" of these subsidies came to an end before 1 June 2011.[1581]

Regional development grants

6.894. The United States' non-compliance complaint concerns 11 regional development grants found to constitute specific subsidies in the original dispute. The specific grants were those made by: (a) authorities in Germany and Spain for the construction of manufacturing and assembly facilities in, respectively, Nordenham (Germany) and Tablada, San Pablo, La Rinconada, Illescas, Puerto Santa María and Puerto Real (Spain); and (b) the regional governments of Andalusia and Castilla-La Mancha to Airbus in Puerto Real, Sevilla (two grants) and Illescas (Spain).[1582]

6.895. The European Union does not argue that the *ex ante* lives of these subsidies came to an end *before* the end of the implementation period. Indeed, the European Union accepts that Airbus continued to "benefit" from these subsidies even *beyond the end of the implementation period*. However, in order to inform our further analysis of the United States' non-compliance claims, and in particular, the United States' allegation that the European Union and relevant member States have failed to "take appropriate steps to remove the adverse effects" we review the merits of the

[1581] According to the "Useful Life of Assets" methodology applied by PwC, the *ex ante* "lives" of the French government capital contributions provided in 1987, 1988, 1992 and 1994 would have come to end, respectively, nine, eight, five and three years before the beginning of the implementation period. Likewise, the three relevant German Government measures provided in 1989, 1990 and 1991 would have come to an end, respectively, **[***]** years before the beginning of the implementation period. Thus, our overall conclusion with respect to these measures is not undermined by our view that the European Union's submissions are likely to understate their *ex ante* "lives".

[1582] The specific grants and relevant amounts are described in Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1206-7.1211.

European Union's assertions concerning the end of the lives of these subsidies in the following paragraphs.

6.896. Relying upon the PwC Amortization Report, and in particular, the "Useful Life of Assets" approach to amortizing "benefit", the European Union argues that: (a) all but 8% of the value of the German regional development grant was amortized by the end of the compliance period; and (b) all but 34% of the value of the six other regional development grants, provided to EADS-CASA and Airbus Spain, were also amortized by the end of the compliance period.[1583] According to the European Union, the remaining four challenged regional development grants provided by Spanish authorities are no longer being used for civil aircraft purposes, and therefore, cannot be part of the Panel's evaluation of the United States' claims of continued serious prejudice in this dispute.[1584]

6.897. The United States rejects the European Union's submission that the four regional development subsidies allegedly used for military aircraft purposes do not benefit Airbus' civil aircraft facilities, arguing that the European Union has "not presented any evidence that this is the case".[1585] In addition, the United States argues that all of the regional development grants at issue were "product creating" subsidies necessary for the purpose of the development of the A380. As such, the United States maintains that their respective lives should be determined on the basis of the *actual* commercial life of the A380.[1586]

6.898. We do not understand the United States to contest the European Union's submission that four of the challenged regional development grants provided by Spanish authorities between 2001 and 2004 were directed to Airbus' military aircraft operations at EADS-CASA's facilities in San Pablo. Indeed, the United States has provided no specific response to the separate report prepared by PwC and submitted by the European Union − the PwC San Pablo South Industrial Site Report − which "assessed whether San Pablo South site is used exclusively for the manufacture, assembly and transformation of military aircraft".[1587] The 20-page report explains that the EADS-CASA site has three buildings that are used to: (a) assemble the A400M, the C-212, CN-235 and C-295 (all four military aircraft); (b) conduct testing activities relating to the A400M and other military aircraft; and (c) monitor test flights of military aircraft.[1588] It concludes that "there is no indication that the San Pablo South site has been used or will be used for manufacturing, assembling or transforming civil aircraft".[1589]

6.899. Thus, the United States' objection to the European Union's assertions with respect to these four regional development grants appears to be based on the alleged absence of any evidence demonstrating that Airbus' military aircraft operations at the San Pablo South Industrial Site did not meaningfully benefit Airbus' LCA activities. However, in our view, in the light of the United States' failure to contest the conclusions reached in the PwC San Pablo South Industrial Site Report, it was for the United States to advance such evidence, not the European Union. Therefore, in the absence of any argumentation or evidence presented on the part of the United States to show that the four regional development grants provided for Airbus' *military* aircraft activities, also contributed to Airbus' *LCA* activities, we cannot accept that they should be taken into account in our analysis, and consequently exclude them from our evaluation of the merits of the United States' non-compliance claims.

6.900. In this light, we will limit our assessment of the European Union's assertions about the "lives" of the regional development grant subsidies to the following seven measures: (a) the 2002 grant of EUR 6.14 million to Airbus Germany's facility in Nordenham; (b) the 2001 grant of

[1583] European Union's first written submission, paras. 222-223; and PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 121-145.

[1584] European Union's first written submission, paras. 220-221; second written submission, para. 187; and PricewaterhouseCoopers, "Assessment of the use of the San Pablo South industrial site relating to the WTO Dispute DS316", 30 November 2011, (Exhibit EU-6) (BCI/HSBI).

[1585] United States' first written submission, para. 103; and response to Panel question No. 143, fn 150.

[1586] United States' response to Panel question Nos. 143 and 145.

[1587] PricewaterhouseCoopers, "Assessment of the use of the San Pablo South industrial site relating to the WTO Dispute DS316", 30 November 2011, (Exhibit EU-6) (BCI/HSBI), p. 16.

[1588] PricewaterhouseCoopers, "Assessment of the use of the San Pablo South industrial site relating to the WTO Dispute DS316", 30 November 2011, (Exhibit EU-6) (BCI/HSBI), paras. 37-46.

[1589] PricewaterhouseCoopers, "Assessment of the use of the San Pablo South industrial site relating to the WTO Dispute DS316", 30 November 2011, (Exhibit EU-6) (BCI/HSBI), p. 16.

EUR 2.2 million to EADS-CASA for its facility in Sevilla; (c) the 2003 grant of EUR 13.1 million to Airbus Spain for its facility in Puerto Real; (d) the 2003 grant of EUR 37.9 million to Airbus Spain for its plant in Illescas; (e) the 2003 grant of EUR 5.9 million to EADS-CASA for a new facility in Puerto de Santa María; (f) the 2003 grant of EUR 17.5 million to Airbus' facilities in Puerto Real; and (g) the 2004 grant of EUR 7.6 million to Airbus Spain for it facility in Illescas.

6.901. Again, in the light of the Appellate Body's guidance, the core question that we believe must be answered when determining the *ex ante* life of a particular subsidy is what were the expectations held about how the subsidy would "materialize over time" *when it was provided*.

6.902. During the original proceeding, the panel found that the regional development subsidies were provided with respect to individual Airbus or EADS-CASA "facilities" or "plants" "in connection with the production of LCA".[1590] Furthermore, when combined with the infrastructure subsidies provided for the Mühlenberger Loch and the Bremen Airport runway projects, the original panel found that the regional development grant subsidies 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".[1591]

6.903. On appeal, the Appellate Body agreed with the European Union that "the Panel did not specifically refer to {the regional grant subsidies} in its causation analysis, thus making it difficult to discern on what basis it inferred that such regional grants complemented or supplemented LA/MSF and contributed to Airbus' ability to launch and bring to market its models of LCA".[1592] Nevertheless, the Appellate Body found the factual findings that were made by the panel to provide "a sufficient basis for concluding that such regional grants were used to expand Airbus' manufacturing sites or EADS-CASA's LCA-related activities, thus supporting the Panel's inference that such regional grants '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'"[1593] of LCA.

6.904. The PwC Amortization Report provides additional insights into the intended purpose of the regional development grants. In particular, it is apparent from PwC's review of "application documents" that the 2002 grant to Airbus Germany's facility in Nordenham was intended to purchase capital assets that would be used to contribute to the establishment of production facilities for the A380.[1594] Likewise, PwC's review of documents related to the six Spanish regional development grants reveals that each was intended to be spent on "some or all of four different" categories, namely: "land and property"; "constructions"; "capital assets"; and/or "planning, engineering and project management".[1595] Moreover, PwC's analysis explains that these grants "were used to establish *production facilities for LCA*", although it notes that "there is no link to the development of a *particular* product/aircraft program."[1596] We note, however, that other evidence before us suggests that Airbus' Illescas and Puerto Real sites − recipients of four of the six Spanish regional development grants totalling EUR 67.2 million[1597] − manufacture and/or contribute to the

[1590] Panel Report, *EC and certain member States − Large Civil Aircraft*, paras. 7.1206-7.1211 and 7.1218.

[1591] Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.1958.

[1592] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1399.

[1593] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1399.

[1594] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 122 and 131-132.

[1595] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 137-138.

[1596] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 131. (emphasis added) The PwC Report also states that the Illescas site − which received two of the regional development grants totalling EUR 45.5 million − "manufactures parts and components" for Airbus LCA. (PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 125)

[1597] This amount accounts for the clarifications provided in the PwC Amortization Report about the proportion of the 2003 grant of EUR 17.5 million for Airbus' facilities in Puerto Real, and the 2004 grant of EUR 7.6 million to Airbus Spain for its facility in Illescas, that were financed via the European Regional Development Fund and, therefore, "specific" within the meaning of Article 2.2 of the SCM Agreement. (PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), table 21 and fn 51. See also Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.1236 and fn 4276). The United States has not contested PwC's clarifications in this context.

production of parts and components for all Airbus LCA, including, specifically, the A330/A340, A350XWB and A380.[1598]

6.905. In this light, we are not convinced that choosing to amortize the "benefit" of the seven regional development grant subsidies over the "Useful Life of Assets" that were allegedly purchased with the relevant funds is the most appropriate method for determining their *ex ante* lives. Nevertheless, we consider the "Useful Life of Assets" approach advanced by the European Union to more closely mirror what the parties' expectations might have been about how the subsidies would "materialize over time" when they were provided than the methodology advocated by the United States, which is to allocate the relevant subsidies over the *actual* marketing life of the *A380*. We can find little, if any, support for the view that the *expectations* surrounding the relevant subsidies at the time they were provided was that Airbus would use them for the *actual* marketing life of the *A380*.

6.906. Ultimately, however, we believe it is not necessary for us to express a definitive view on what would be the most appropriate methodology for determining the *ex ante* lives of the seven regional development grant subsidies because even if we were to accept the European Union's contentions in full, the relevant subsidies would be continuing to "benefit" Airbus well beyond the end of the implementation period.[1599]

Conclusion with respect to the "expiry" of subsidies

6.907. Thus, in summary, our conclusions with respect to the European Union's submissions concerning the alleged "expiry" of subsidies are as follows:

- The European Union has demonstrated that the *ex ante* "lives" of the French, German and Spanish government LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, A330/A340, and the UK government LA/MSF subsidies for the A320 and A330/A340, "expired" before 1 December 2011 (and, therefore, before the end of the implementation period)[1600];

- The European Union has demonstrated that the *ex ante* "lives" of the capital contribution subsidies "expired" before 1 December 2011 (and, therefore, before the end of the implementation period); and

- Even accepting the entirety of the European Union's assertions, the *ex ante* "lives" of five of the regional development grant subsidies will not "expire" until sometime between 2054 and 2058, with the other two "expiring" around 2014 (and, therefore, *after* the end of the implementation period).

6.6.3.4.2.5 "Intervening events"

Introduction

6.908. The European Union argues that two kinds of events have brought the *ex ante* "lives" of some or all of the subsidies predating the A350XWB LA/MSF subsidies to an end before the end of the implementation period. These events are: (a) two one-time removals of cash and cash

[1598] "Airbus centres of excellence", Airbus website, accessed 21 May 2012, (Exhibit USA-306); and "Airbus In Spain" Airbus website, accessed 11 October 2012, (Exhibit USA-459). See further discussion of this evidence below at paras. 6.1843-6.1845.

[1599] In this respect, we note that the PwC Amortization Report envisages that: (a) the German subsidies provided for the Nordenham facility would eventually fully amortize by way of straight-line depreciation of the purchased fixed assets in **[***]**; (b) the Spanish subsidies provided for the Sevilla facilities would fully amortize by way of straight-line depreciation in **[***]**; and (c) significant portions of the Spanish government subsidies would eventually fully amortize by way of straight-line depreciation of the purchased "constructions" and "land & property" assets between **[***]** to **[***]** and **[***]** to **[***]**, respectively. PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), annex 3.

[1600] Furthermore, we find that the European Union has also established that the *ex ante* lives of the French government LA/MSF subsidies for the A330-200 and the French and Spanish government LA/MSF subsidies for the A340-500/600 "expired", respectively, in **[***]** and **[***]** – that is, after the end of the implementation period.

equivalents by DaimlerChrysler and SEPI from their respective subsidiaries, DASA and CASA, in the lead up to the creation of EADS in 2000 (the *"extraction" of benefit*); and (b) the alleged "partial privatization" of Aérospatiale in 1999, the sale and issuance of EADS shares to the general public by the EADS partners in the context of the creation of EADS and its public float in 2000, and the 2006 sale by BAE Systems of its 20% ownership stake in Airbus SAS to EADS (the *"extinction" of benefit*).

6.909. Apart from rejecting the European Union's assertions with respect to the existence and impact of these two kinds of alleged "intervening events", the United States submits that the *ex ante* "lives" of the A300/A310 and A340 LA/MSF subsidies have, respectively, *increased* as a result of the following two additional "intervening events": (a) the launch of the A330/A340 including derivatives; and (b) the termination of the A340 programme in 2011.[1601]

6.910. Below we evaluate the merits of the parties' arguments with respect to each of these alleged events. Before doing so, however, we briefly set out our understanding of what may constitute an "intervening event", in the light of the Appellate Body's guidance from the original proceeding and the parties' submissions in this compliance dispute.

What is an "intervening event"?

6.911. In the original proceeding, the Appellate Body described an "intervening event" to be one that "occurred after the grant of {a} subsidy that may affect the projected value of {that} subsidy as determined under the *ex ante* analysis".[1602] The European Union has similarly argued that an "intervening event" is one that triggers the end of the "life" of a subsidy at a point in time that is different to what would normally have been the case in the light of *ex ante* projections.[1603] As we understand it, an "intervening event" will be one that takes place after the grant of a subsidy and alters its *ex ante* "life" – that is, an event that changes how a subsidy has "materialized over time" relative to the expectations held at the time it was granted. It follows, therefore, that an "intervening event" cannot be an event that was contemplated and used to inform the expectations that shaped the *ex ante* life of a subsidy when first granted.

6.912. According to the United States, the Appellate Body's statements concerning the need to determine the "life" of a subsidy, in the light of "intervening events", suggest that an "intervening event" may not only decrease the "projected value" of a subsidy, but also "act to increase the value of the subsidy or prolong its life".[1604] While the European Union accepts that an "intervening event" may either decrease *or* increase the *ex ante* life of a subsidy, the European Union submits that in a compliance dispute, the latter kind of "intervening event" may only be included in an adverse effects analysis when it has been: (a) identified in the panel request in accordance with Article 6.2 of the DSU; and (b) established that it constitutes a "measure taken to comply", within the meaning of Article 21.5 of the DSU, which has extended the "projected value" of the relevant subsidy beyond the end of the implementation period.[1605]

6.913. In our view, there is no reason why an "intervening event" must be defined in terms of circumstances that will only ever *decrease* the *ex ante* "life" of a subsidy. We see nothing in the language used by the Appellate Body to describe an "intervening event" that would prevent the possibility of finding that an event occurring after the granting of a subsidy might *increase* the *ex ante* "life" of a subsidy. While the extent to which any one or more particular events may be characterized as such will, of course, ultimately depend upon the particular facts, one circumstance that might be considered to *increase* the *ex ante* life of a subsidized loan, for example, could be the unplanned adjustment of its terms in a way that increases the amount of subsidization. We therefore agree with the parties that an "intervening event" may either *increase* or *decrease* the *ex ante* life of a subsidy.

6.914. We have difficulty, however, accepting the European Union's argument that the only way an "intervening event" that is alleged to increase the *ex ante* life of a subsidy may be raised in a

[1601] United States' first written submission, paras. 180-183; and response to Panel question No. 150.
[1602] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709.
[1603] European Union's response to Panel question No. 7, para. 35.
[1604] United States' response to Panel question No. 150, para. 72.
[1605] European Union's response to Panel question No. 150, para. 315.

compliance dispute is by properly identifying it as a "measure taken to comply" in the complainant's panel request initiating the Article 21.5 DSU dispute settlement process.

6.915. We recall that the core issue that must be resolved in a compliance dispute is whether the implementing Member has complied with the DSB's adopted rulings and recommendations. In a case involving findings of adverse effects, an implementing Member must either "take appropriate steps to remove the adverse effects" or "withdraw the subsidy". Where a complainant believes that this requirement has not been satisfied, it may bring a dispute under Article 21.5 of the DSU, *identifying the subsidies* it considers place the implementing Member in non-compliance. Apart from identifying the specific legal basis under the SCM Agreement, the complainant need not, *in its request to initiate a compliance panel*, explain exactly how those subsidies continue to cause the particular form of adverse effects it believes it is suffering. Once the complainant clearly identifies the relevant subsidies and the legal bases supporting its claims with sufficient clarity and detail, the implementing Member will know what the dispute is about, and it will then be up to the complainant to justify its claims on the basis of arguments and evidence presented *during the panel process*. In our view, part of this justification may, where relevant and necessary, need to include an explanation of the extent to which the subsidies clearly identified in the request to initiate the Article 21.5 proceeding continue to exist *beyond* their *ex ante* "lives" as a result of an "intervening event".

6.916. Thus, as we see it, a complainant will not always be *required* to identify an "intervening event" that is alleged to increase the *ex ante* life of a subsidy that is clearly specified in its *request to establish a panel* in a compliance dispute under Article 21.5 of the DSU. In our view, such information would not normally be required to ensure that an implementing Member understands what the compliance dispute is about. However, where relevant and necessary, a complainant will need to identify and describe such an event in the process of presenting its arguments in order to justify its claims. In the present dispute, we do not believe that the nature of the alleged "intervening events" the United States relies upon was such that they should have been identified in its panel request in order for the European Union to have understood what the compliance dispute is about. We are therefore unable to agree with the European Union's submission placing a jurisdictional limit on the United States' ability to raise the existence of the two alleged "intervening events" which it argues *extend* the *ex ante* "lives" of the challenged subsidies.

6.917. With the above considerations in mind, we now proceed to review the parties' arguments concerning the different types of "intervening events" they allege have altered the *ex ante* "lives" of the challenged subsidies.

"Extraction" of benefit

Arguments of the European Union

6.918. The European Union argues that two "extractions" of cash and cash equivalents allegedly amounting to EUR 3.133 billion by DaimlerChrysler from DASA and EUR 342.4 million by SEPI from CASA in the year 2000, achieved the removal of the benefit of all subsidies previously received by these companies, and therefore brought the lives of those subsidies to an end before the end of the implementation period.[1606] While accepting that it raised the same two alleged cash "extraction" events before the panel and Appellate Body in the original proceeding, the European Union submits that the merits of its arguments were not decided upon by the Appellate Body. Rather, the European Union argues that the Appellate Body merely "took issue with the explanations provided by the European Union", in particular, finding that "the European Union had not sufficiently explained how the specific subsidies … were reflected in the value of those companies, and how cash removed or extracted represented the remaining or unused value of these subsidies".[1607] In addition, the European Union maintains that the Appellate Body found that "the assessment of whether the cash extractions constituted withdrawal of the subsidies in the sense of Article 7.8 of the SCM Agreement was not timely, and should

[1606] European Union's first written submission, paras. 248-291; and response to Panel question No. 13.
[1607] European Union's first written submission, paras. 256-257.

rather be made by an adjudicator in compliance proceedings".[1608] Thus, the European Union argues that the two alleged cash "extractions" are properly before this compliance panel.

6.919. The European Union furthermore argues that the United States' reliance on certain statements made by the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* to support its view that the European Union is legally precluded from making the same cash "extraction" arguments allegedly rejected during the original proceeding, is misplaced. In particular, the European Union argues that the statements relied upon by the United States stand only for the proposition that *complainants* are not entitled to "re-argue" claims that were settled during original proceeding.[1609] In contrast, as the respondent in this compliance proceeding, the European Union submits that it is legally entitled to argue any defence it considers appropriate, even if it was unable to "establish" this defence in the original proceeding.[1610] According to the European Union, the situation of a respondent is different to that of a complainant in a compliance proceeding because whereas a complainant may choose to re-argue a claim that was lost during original proceedings by "starting anew under Article 6 of the DSU", a respondent does not have this opportunity. Thus, for the European Union, a respondent's right to develop any facts and arguments it considers appropriate for its defence in a proceeding under Article 21.5 of the DSU "creates the necessary balance between the rights of complainants under Article 6 of the DSU and the due process rights of respondents".[1611] The European Union submits that it is also important that a respondent be allowed to raise any defence it considers appropriate in compliance proceedings in order to ensure that the "DSB would not risk authorizing suspension of concessions or other countermeasures where, in the language of Article 22.8 of the DSU, the WTO-inconsistency has been removed".[1612]

6.920. Turning to the substance of its arguments, the European Union argues that there are a number of factors establishing that the alleged cash extractions from DASA and CASA achieved the removal of the residual value of subsidies previously received by the two companies. In essence, the European Union argues that because of the way that subsidies affect the market value of a company, the transfers of cash to DaimlerChrysler and SEPI, "in effect, extracted the value of any residual benefits from prior subsidies – i.e. the present value of future increased cash flow generated by the benefits from those subsidies, up to the amount of the cash withdrawn".[1613] In addition, the European Union argues that the facts show that the cash extracted from DASA and CASA: (a) *could not* be "re-injected" into those companies, nor into EADS, because the two companies stopped being subsidiaries of DaimlerChrysler and the Spanish State (through SEPI); and (b) *would not* be "re-injected" because of the serious disincentive to reinvestment of the extracted funds caused by the change in the nature of the interests of DaimlerChrysler and the Spanish State in EADS and its LCA subsidiaries.[1614]

Arguments of the United States

6.921. The United States argues that the European Union's assertion that a series of alleged cash extractions by DaimlerChrysler from DASA and by SEPI from CASA in the year 2000 constituted "intervening events" that brought the "lives" of the residual value of subsidies received by DASA and CASA prior to 2000 to an end must be rejected. The United States recalls that the European Union made the same cash "extraction" arguments in the original proceeding, and that these were rejected by the panel, whose findings were upheld by the Appellate Body. Moreover, the United States notes that the acceptance of adopted panel and Appellate Body reports is unconditional for both parties. In this light, the United States submits that the European Union is

[1608] European Union's first written submission, para. 256.
[1609] European Union's first written submission, para. 261; and second written submission, paras. 199-200.
[1610] European Union's first written submission, para. 264.
[1611] European Union's first written submission, paras. 263-264.
[1612] European Union's first written submission, para. 265.
[1613] European Union's first written submission, paras. 277-282; and second written submission, paras. 202-218.
[1614] European Union's first written submission, paras. 286-289; and second written submission, para. 221.

precluded, as a matter of law, from making the same arguments once again in this compliance proceeding.[1615]

6.922. In any case, the United States advances a number of reasons to explain why the two alleged cash "extractions" did not result in the removal of the "benefit" and, therefore, the expiry of the relevant subsidies as argued by the European Union.[1616] To begin, the United States submits that the European Union has failed to satisfy the "minimum" threshold for its "extraction" argument to prevail in this proceeding. The United States recalls that the Appellate Body described this "minimum" standard, which reflected the first element of the test the European Union had itself advanced in the original proceeding, as requiring the European Union "to explain how the specific subsidies received by DASA and CASA were reflected in the balance sheets of those companies, and how the cash removed or 'extracted' represented the remaining or unused value of these subsidies".[1617] According to the United States, the arguments advanced by the European Union do not provide either of these explanations. First, the United States submits that the European Union's discussion of how European accounting principles, as applied by Airbus, treat subsidies to DASA and CASA, does not provide any information as to how the particular subsidies at issue in this proceeding were treated on their balance sheets. Second, the United States argues that the European Union has done nothing more than merely assert, without substantiating on the basis of evidence, that the alleged "extractions" actually removed the residual value of the relevant subsidies. The United States recalls that this was precisely one of the reasons for the Appellate Body's rejection of the European Union's "extraction" argument in the original proceeding.[1618] Finally, the United States also argues that the European Union has failed to show how the transactions at issue actually "extracted" any cash from the relevant companies, and thereby how they satisfied the second element of the test it had advanced during the original proceeding. According to the United States, the DASA and CASA transactions did not remove any cash from the relevant companies but simply shifted assets among corporate balance sheets for a net zero effect.[1619]

Evaluation by the Panel

6.923. The United States argues that the European Union's "extraction" of subsidies arguments were already reviewed and rejected by both the panel and the Appellate Body in the original proceeding and that, consequently, the European Union is legally precluded from advancing those arguments again in this compliance proceeding.

6.924. We agree with the United States. The European Union's argument that the two alleged cash "extractions" of EUR 3.133 billion by DaimlerChrysler from DASA and EUR 342.4 million by SEPI from CASA in the year 2000 achieved the removal of the benefit of all subsidies previously received by these companies was already considered and dismissed by both the panel and the Appellate Body in the original proceeding. As the United States points out, the Appellate Body's findings on this question were explicit:

> We are not persuaded by the arguments advanced by the European Union under the first ground of its "extraction" theory. … Beyond its general assertions, the European Union provides no persuasive evidence as to how the specific subsidies provided to Dasa and CASA increased the "incremental value" of those companies, and therefore how the cash "removed" could be deemed to remove that value. …
>
> …
>
> Given that the link between the subsidies and the cash "extracted" has not been sufficiently demonstrated by the European Union, we need not consider the European Union's further argument that the Panel improperly relied on the "joint

[1615] United States' first written submission, para. 46; second written submission, paras. 191-199; and opening statement (public), paras. 23-25 (citing, in particular, Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210).
[1616] United States' second written submission, paras. 200-215.
[1617] United States' second written submission, paras. 202 and 206 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 746).
[1618] United States' second written submission, paras. 206-211.
[1619] United States' second written submission, paras. 212-215.

> control" exercised through the Contractual Partnership to which both DaimlerChrysler and SEPI belonged …
>
> In the light of the foregoing, although we do not *a priori* exclude the possibility that all or part of a subsidy may be "extracted" by the removal of cash or cash equivalents, we *uphold* the ultimate finding by the Panel, in paragraphs 7.276 and 7.288 of the Panel Report, that the "cash extractions" from Dasa and CASA did not remove a portion of past subsidies.[1620] (emphasis original)

6.925. These Appellate Body findings and conclusions were adopted by the DSB, which means that pursuant to Article 17.14 of the DSU, the European Union must "unconditionally" accept them. As the Appellate Body has previously explained:

> As the Appellate Body found in *EC – Bed Linen (Article 21.5 – India)*, a complainant who had failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings. Similarly, a complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be *WTO-consistent* in the original proceedings. Because adopted panel and Appellate Body reports must be accepted by the parties to a dispute, allowing a party in an Article 21.5 proceeding to re-argue a claim that has been decided in adopted reports would indeed provide an unfair "second chance" to that party.[1621] (emphasis original; underline added; footnotes omitted)

6.926. The European Union argues that to deny it the possibility of raising for a second time its assertions about the alleged "extraction" of subsidies would create an imbalance "between the rights of complainants {to start a new original proceeding} under Article 6 of the DSU and the due process rights of respondents".[1622] However, were the European Union's position accepted, it would mean that a respondent (but not a complainant) would be entitled to re-argue in an Article 21.5 proceeding potentially the *entirety* of a case that was already ruled upon by the original panel and Appellate Body and adopted by the DSB. In our view, such a possibility would transform original panel and Appellate Body proceedings into *fora* for reviewing a respondent's draft arguments and defences, rendering them virtually meaningless, thereby undermining the effective operation of the WTO dispute settlement system. Moreover, contrary to what the European Union maintains, the fact that *both* parties in a dispute must "unconditionally" accept an adopted Appellate Body report suggests that a complainant would *not* be able to successfully re-litigate exactly the same case a second time in a new proceeding under Article 6 of the DSU. Rather, the fact that a complainant is required to "unconditionally" accept adopted Appellate Body findings suggests that a panel asked to entertain a re-litigated claim might well find, as we do in respect of the European Union's "extraction" arguments, that it had already been decided and, therefore, decline to review its merits.

6.927. Thus, we are not persuaded by the European Union's submissions concerning its right to raise and elaborate, for a second time, the same arguments about the alleged "extraction" of subsidies that were considered and dismissed by both the panel and the Appellate Body in the original proceeding. Accordingly, we will not consider the European Union's "extraction" arguments any further in this dispute.

"Extinction" of benefit

Arguments of the European Union

6.928. The European Union argues that the alleged partial privatization of Aérospatiale in 1999, the transactions leading to the creation of EADS in 2000, and BAE Systems' 2006 sale of its 20%

[1620] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 746 and 748-749. The same result was confirmed in the Appellate Body's findings and conclusions found at paragraph 1414(d)(iii) of its report.

[1621] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210.

[1622] European Union's first written submission, para. 264.

ownership stake in Airbus SAS to EADS, were "intervening events" that resulted in the "extinction" of the benefit of all of the subsidies at issue that were granted prior to these transactions, thereby bringing them to an end before the end of the implementation period.[1623]

6.929. The European Union submits that the Appellate Body confirmed, in the original proceeding, that partial privatizations and private-to-private sales for fair market value and at arm's length, accompanied by transfers of ownership and control, may have the effect of bringing the life of a prior subsidy to an end. According to the European Union, in making this alleged finding, the Appellate Body explained that an assessment of whether a subsidy has been "extinguished" requires a "fact-intensive inquiry into the circumstances surrounding the changes in ownership … in order to determine the extent to which there are sales at fair market value and at arm's length, accompanied by transfers of ownership and control, and whether a prior subsidy could be deemed to have come to an end".[1624] The European Union submits that the Appellate Body thus explained that the following three criteria must be evaluated in order to determine whether a subsidy has been extinguished: "(i) whether the transaction was for fair market value, (ii) whether it was at arm's length, and (iii) to what extent there was a transfer of ownership and control".[1625] For the European Union, in order to meet the Appellate Body's "transfer of ownership and control" standard, "the new owners' interest must be sufficiently substantial in order to allow the new private owner to ensure that the company is run on market terms".[1626]

6.930. The European Union maintains that the United States errs when it argues that a fourth criteria must be evaluated, namely, any "other factors" establishing that "a prior subsidy ha{s} come to an end". The European Union submits that, when read in its proper context, the Appellate Body's guidance requiring a panel to evaluate "whether a prior subsidy could be deemed to have come to an end", is simply intended to confirm that there is "a rebuttable presumption that a transaction that results in a change of control and which is done at arms' length and for fair market value extinguishes the residual value of the subsidy previously received by the recipient".[1627] Thus, the European Union argues that the legal test for extinction that is advanced by the United States misrepresents the Appellate Body report in the original proceeding.[1628]

6.931. Applying the three-criteria legal standard it believes was proclaimed by the Appellate Body, the European Union argues that all three of the relevant share transactions were "intervening events" that "extinguished" all pre-existing subsidies provided to the relevant companies.

6.932. First, the European Union submits that the 1999 partial privatization of Aérospatiale took place for fair market value because of *inter alia* the fact that: (a) 17% of the shares in the new entity Aérospatiale-Matra (ASM) were sold to institutional and public investors on the Paris Bourse; (b) the share price paid by Lagardère, the owner of a 33% share interest in ASM, was identical to the share price for the public offering; (c) five highly reputed investment banks assisted in the determination of the market value for the respective contributions to the ASM; and (d) the public offering was managed by legally-authorized financial institutions under strict disclosure and transparency requirements established under French law and regulation.[1629]

6.933. The European Union argues that the ASM transaction was at arm's length because the French State and Lagardère were independent entities and were independently advised by sophisticated advisors, which protected their respective client's interests in the transaction by ensuring proper, market-based valuation of their respective contributions to ASM.[1630]

[1623] European Union's first written submission, paras. 292-354.

[1624] European Union's first written submission, paras. 292-296 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 725).

[1625] European Union's first written submission, paras. 297-299.

[1626] European Union's first written submission, paras. 301-302; and second written submission, para. 244.

[1627] European Union's second written submission, para. 229.

[1628] European Union's second written submission, paras. 224-239.

[1629] European Union's first written submission, paras. 312-313 and 317; and second written submission, paras. 250-252.

[1630] European Union's first written submission, para. 318; response to Panel question No. 15; and comments on the United States' response to Panel question No. 8, paras. 25-33.

6.934. With respect to the transfer of ownership and control requirement, the European Union notes that the transfer of more than 50% of the ownership from the State to private owners brought about a qualitative change in control in Aérospatiale, which was apparent from the fact that the relevant Shareholder's Agreement made Lagardère a "privileged partner" allowing it to enjoy effective control over ASM through the ability to exercise extraordinary influence over the company's decision-making. Moreover, the French State was afforded a "golden share" to safeguard its national defence interests. The European Union argues that this special provision would not have been necessary had the merger not resulted in the loss of control by the French State. Finally, the European Union argues that the economic realities of the merger also support a finding that it resulted in a qualitative change in control in Aérospatiale Société Nationale Industrielle (Aérospatiale). In this regard, the European Union points to the fact that the French State owned only 47.7% of the shares, compared with at least 50% held by Lagardère and other newly created private shareholders.[1631]

6.935. Second, as regard the private-to-private share transactions leading to the creation of EADS in 2000, the European Union submits that all of the shareholders in EADS (with the exception of the employees entitled to 15% of the issued shares) paid a market price for their shares, which was established by reference to the value of the company as determined by independent investment banks. In addition, the European Union submits that the transactions were at arm's length because the founding companies were independent from each other and pursued their own interests, and the new private shareholders, by the very nature of acquiring publicly traded shares, acted as independent entities and in their own interests.[1632]

6.936. The European Union argues that the new ownership structure in EADS brought about a qualitative change to the way that the four founding companies exercised their influence over EADS' LCA-related activities. In particular, the European Union asserts that having paid a market price for their investments, the founding company shareholders, and especially those that were private companies (i.e. DaimlerChrysler and Lagardère), had an interest in managing EADS in a manner that would ensure market returns. Moreover, the European Union argues that, as a matter of economic reality, the collective of newly-created shareholders, which owned a 30% stake in EADS, pursued the same interest of obtaining market returns. Thus, for the European Union, over 60% of the ownership interest in EADS was in private hands (DaimlerChrysler, Lagardère via Société de gestion de l'aéronautique, de la défense et de l'espace (SOGEADE), and free float), and this fact meant that EADS "can but be managed in the same way as any privately owned, non-subsidized company".[1633] In addition, the European Union highlights that the creation of EADS resulted in DaimlerChrysler and Lagardère having joint-control of the newly created entity. At the same time, the Spanish State "lost control" of CASA, which became part of EADS, thereby falling under the joint-control of the former shareholders of ASM and DASA. Similarly, the creation of EADS allowed DaimlerChrysler to obtain indirect control over ASM, which became part of EADS; and Lagardère (through the French strategic shareholder) obtained indirect control over DASA, which also became part of EADS. This ownership and control structure did not exist prior to the creation of EADS.[1634]

6.937. Finally, as regards BAE Systems' sale of its 20% stake in Airbus to EADS in 2006, the European Union argues that the price established for this ownership interest reflects its market value because it was determined by private, independent investment banks and advisors, and was subsequently audited by PwC and found to be valid.[1635] Furthermore, the European Union submits that EADS and BAE Systems acted at arm's length, since neither company controlled the other, and both acted independently to advance its own interest.[1636]

[1631] European Union's first written submission, paras. 319-323; second written submission, para. 253; and response to Panel question No. 14.

[1632] European Union's first written submission, paras. 326-339.

[1633] European Union's first written submission, paras. 339-343; and second written submission, paras. 255-257.

[1634] European Union's response to Panel question No. 18, paras. 51-53 (explaining the implication of paragraph 10 of the European Commission, Merger Procedure, Case No. COMP/M.1745 – EADS, 11 May 2000, (EADS Merger Decision), (Original Exhibit US-479), (Exhibit USA-323)).

[1635] European Union's first written submission, paras. 346 and 351; second written submission, paras. 258-260; and response to Panel question No. 16.

[1636] European Union's first written submission, para. 351; and second written submission, para. 261.

6.938. On the question of transfer in ownership and control, the European Union maintains that the transaction brought about a qualitative change in control over Airbus, because by withdrawing from its position as a 20% shareholder of Airbus, BAE Systems was no longer able to exercise the "important influence" this ownership interest gave it over Airbus' business decisions. In particular, the European Union explains that through its 20% shareholding in Airbus, BAE Systems was not only entitled to nominate a number of representatives to Airbus' Shareholder and Executive Committees, but it also gave it **[***]** rights with respect to decisions taken on the basis of **[***]** in the Shareholder Committee, which included **[***]**. In addition, certain decisions which required **[***]** in the Shareholder Committee, were subject **[***]**, to BAE Systems' right to **[***]**. Thus, from EADS' perspective, the European Union argues that acquiring BAE Systems' stake in Airbus meant **[***]**, thereby allowing it to exercise full control over Airbus.[1637]

Arguments of the United States

6.939. The United States argues that the European Union errs when it submits that the transactions giving rise to the 1999 ASM merger, the creation of EADS in 2000, and the 2006 EADS acquisition of shares in Airbus held by BAE Systems, were "intervening events" that "extinguished" the benefit of all pre-existing subsidies, and thereby bring the "lives" of those subsidies to an end. According to the United States, the European Union's submissions are based on an erroneous understanding of the guidance provided by the Appellate Body in the original proceeding about how to perform an "extinction" analysis. When this guidance is correctly applied to the facts of the relevant transactions, the United States maintains that it must be concluded that they do not "extinguish" the benefit conferred to Airbus through the relevant subsidies. In any case, the United States is of the view that the same conclusion should be arrived at even applying the European Union's own interpretation of the Appellate Body's guidance to the relevant facts.[1638]

6.940. The United States submits that the Appellate Body explained that an assessment of whether a transaction involving the sale of shares "extinguished" subsidies requires "a fact intensive inquiry" into at least the following three matters: (a) whether the transaction was at fair market value and at arm's length; (b) whether the transaction involved a transfer in ownership and control; and (c) "whether a prior subsidy could be deemed to have come to an end".[1639] However, according to the United States, the three Members of the Appellate Body Division that served on the appeal could not agree on what *additional* factors were necessary, and in this regard, "took the unusual step of issuing separate views".[1640] In this light, the United States argues that the Appellate Body did not endorse a single "approach" to resolve the question, implying that the best way to evaluate the merits of the European Union's "extinction" arguments must be to test them separately against each of the three individual Appellate Body member opinions.[1641]

6.941. For the United States, Appellate Body "Member A" considered that partial privatizations and private-to-private transactions could not extinguish pre-existing subsidies. On this basis, the United States argues that the transactions giving rise to the 1999 ASM merger, the creation of EADS in 2000, and the 2006 EADS acquisition of shares held by BAE Systems in Airbus, cannot be found to "extinguish" the benefit of all pre-existing subsidies.[1642]

6.942. The United States notes that Appellate Body "Member B" found that a conclusion as to the "extinction" of subsidies would depend on the facts of the case, and that "{a}n important consideration in this context is to what extent the partial privatization or private-to-private transactions resulted in a transfer of control to new owners who paid fair market value for shares in the company".[1643] Focussing on the "important" question of control, the United States argues that none of the relevant transactions resulted in a transfer of control. According to the

[1637] European Union's first written submission, paras. 347-350 and 352-353; and second written submission, para. 262.
[1638] United States' second written submission, paras. 216-264; and response to Panel question Nos. 8 and 9.
[1639] United States' second written submission, paras. 217, 230 and 233 (citing Appellate Body Report, *EC and member States – Large Civil Aircraft*, para. 725).
[1640] United States' second written submission, para. 217.
[1641] United States' second written submission, paras. 228-236.
[1642] United States' second written submission, para. 238.
[1643] United States' first written submission, para. 50.

United States, the whole point of the transactions leading to the creation of EADS in 2000 was *not* to change control of Airbus.[1644] Likewise, the United States submits that BAE Systems had no "control" to transfer when it sold its shares in Airbus to EADS because it never "controlled" Airbus in the sense of determining policy or directing operations. Thus, the United States argues that the sale of BAE Systems' shares in Airbus resulted only in a transfer of shares by one (non-controlling) co-owner of Airbus to another (controlling) co-owner.[1645] As regards the ASM merger, the United States argues that while private shareholders did become new minority owners of the company, there was no transfer of control to Lagardère because the French State remained the largest shareholder and continued to name more members to the Supervisory Board than any other entity.[1646] Thus, the United States submits that the European Union's "extinction" arguments find no support in the views expressed by Appellate Body "Member B".

6.943. The United States recalls that Appellate Body "Member C" expressed "no small measure of doubt that an acquisition of shares, concluded at arm's length and for fair market value, constitutes relevant circumstances warranting the conclusion that an extinction of benefit has taken place". Moreover, the United States highlights that "Member C" found that "nothing about {share purchases on arm's length terms} extracts the value of any asset, including the benefit of any subsidy granted. That subsidy continues to benefit the recipient, even if the ownership of the recipient's shares changes from one day to another".[1647] The United States submits that the transactions alleged to give rise to the three "extinction" events all involved the sale and purchase of shares, and that in each case, the European Union has provided no basis to conclude that the changes in ownership and/or corporate re-organizations that took place changed the value of past subsidies to Airbus. Thus, in the light of the views expressed by Appellate Body "Member C", the United States argues that the European Union's "extinction" arguments must be rejected.

6.944. Finally, the United States argues that even if the test were as argued by the European Union, namely, whether the sales transactions at issue were made at arm's length for fair market value, resulting in a transfer of ownership and control, the European Union's case would still fail because, in the United States' view, the three alleged "extinction" events did not: (a) give rise to any economically relevant transfer of control or ownership[1648]; or (b) involve arm's length sales for fair market value.[1649]

Evaluation by the Panel

6.945. Before turning to evaluate the merits of the parties' submissions, we first describe the basic facts surrounding the transactions which the European Union maintains have "extinguished" the challenged subsidies, and then set out our understanding of the findings and observations made by the Appellate Body with respect to the original panel's findings concerning the European Union's "extinction" arguments in the original proceeding.

Factual background

6.946. In this dispute, all of the events which the European Union argues have "extinguished" the lives of the pre-A350XWB subsidies formed part of a chain of corporate transactions that resulted in the consolidation of the original Airbus partners' LCA-related activities under one single corporate entity, the European Aeronautic, Space and Defence Company (EADS), by 2006.

6.947. We recall that prior to 2001, the family of Airbus LCA was produced by a consortium of French, German, Spanish and (from 1979) United Kingdom aerospace companies (the Airbus partners), operating in a form of partnership arrangement through the French entity, Airbus GIE. The Airbus Industrie consortium was originally established in 1970 between the French aerospace

[1644] United States' second written submission, para. 239.
[1645] United States' second written submission, para. 240; and comments on the European Union's response to Panel question No. 18.
[1646] United States' second written submission, para. 240; response to Panel question No. 9; and comments on the European Union's response to Panel question Nos. 14 and 15.
[1647] United States' first written submission, paras. 50 and 54; and second written submission, para. 241.
[1648] United States' second written submission, paras. 257-260.
[1649] United States' second written submission, paras. 261-264; response to Panel question Nos. 8, 10 and 11; and comments on the European Union's response to Panel question No. 15.

manufacturer, Aérospatiale[1650], and the German aerospace manufacturer, Deutsche Airbus GmbH (Deutsche Airbus).[1651] The Spanish aerospace manufacturer, Construcciones Aeronáuticas S.A. (CASA) became a member of the consortium in 1971.[1652] British Aerospace Corporation, a United Kingdom aerospace manufacturer, subsequently joined the consortium in 1979.[1653] Through this partnership arrangement, the Airbus partners in France, Germany, Spain and the United Kingdom produced specific parts of Airbus LCA, which were then assembled in France by Aérospatiale.[1654] The entity Airbus *groupement d'intérêt économique* (GIE) did not carry out any production activities; rather, it coordinated the production efforts of the Airbus partners, allocated revenues and profits to each of the partners and assumed responsibility for areas such as marketing, sales, aircraft delivery and customer service.

6.948. In 2000, the Airbus partners consolidated their LCA-related activities under EADS. The first "step" in this consolidation involved each of the French, German and Spanish Airbus partners placing their Airbus-related design, engineering, manufacturing and production assets and activities (including their corresponding membership interests in Airbus Industrie GIE) into legal entities that would become wholly owned subsidiaries of the newly formed EADS, in return for shares in EADS representing the agreed values of the Airbus partners' corresponding

[1650] Aérospatiale was founded in 1970 through the merger of three French aerospace companies, Sud Aviation, Nord Aviation and Société d'Etudes et de Réalisation d'Engins Balistiques. It was owned directly and indirectly by the French Government until its merger with Matra Hautes Technologies in 1999 to form Aérospatiale-Matra S.A. (ASM). The French Government sold a portion of its shares in ASM in a public offering in 1999. In 2000, ASM joined with DASA and CASA to form EADS. In connection with the formation of Airbus SAS in 2001, the LCA business of ASM was transferred to an Airbus SAS subsidiary, Airbus France SAS. Therefore, from 1998 until its liquidation in 2001, the French Airbus partner was ASM. (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.183 and fn 2054).

[1651] Deutsche Airbus was founded in 1967 to assume work for the development of a European widebody aircraft that had originally begun in 1965 as a joint venture among five German companies: Blohm-Hamburger Flugzebau GmbH, Messerschmitt AG, Vereinigte Flugtechnische Werke (VFW), Siebel and Dornier. By 1969, the first three of these companies had merged to form Messerschmitt-Bölkow-Blohm GmbH (MBB). MBB originally held 60% of the interests in Deutsche Airbus, with Dornier and VFW each holding 20%. MBB took over VFW in 1981. Prior to Daimler-Benz AG acquiring control of MBB in 1989, the German federal states of Bavaria, Hamburg and Bremen held 52.3% of the capital stock of MBB. In late 1989, as part of the German Government's plans to restructure Deutsche Airbus, Daimler-Benz A.G. acquired control of MBB by merging its subsidiary Deutsche Aerospace AG (DASA) with MBB. Deutsche Airbus has been a wholly owned subsidiary of DASA since 1992. In 2000, DASA merged with ASM and CASA to form EADS. In 2001, EADS transferred DASA's LCA operations to an Airbus SAS subsidiary, Airbus Deutschland GmbH. (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.183 and fn 2055).

[1652] CASA was founded in 1923 and was Spain's largest aerospace and defence manufacturer. CASA was 99% owned by SEPI, a Spanish government holding company entrusted with the management and privatisation of certain Spanish government controlled companies. In 2000, CASA was merged into the EADS structure. In 2001, CASA's LCA activities were transferred to an Airbus SAS subsidiary, Airbus España SL. (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.183 and fn 2056).

[1653] British Aerospace Corporation was formed in 1977 as a Crown corporation without shares, wholly owned by the United Kingdom government. Its formation was the result of the merger of the United Kingdom aerospace companies Hawker Siddeley Aviation Ltd, Hawker Siddeley Dynamics Ltd, Scottish Aviation Ltd and the British Aircraft Corporation (Holdings) Ltd. In 1981, the assets and business of the British Aerospace Corporation were transferred to the newly incorporated British Aerospace PLC, a United Kingdom public limited company. The United Kingdom government sold 51.57% of its shares in British Aerospace PLC in a public offering in 1981 and, subject to retaining a share to ensure that the company remained under United Kingdom control, sold the remainder of its shares in British Aerospace PLC in 1985. In 1999, British Aerospace PLC merged with Marconi Electronic Systems to become BAE Systems PLC (BAE Systems). In 2001, BAE Systems placed its LCA business into Airbus UK Limited in exchange for a 20% share in Airbus SAS. (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.183 and fn 2057).

[1654] By 1999, Aérospatiale was the partner responsible for flight control systems, cockpits, power plant integration, ground and flight testing, complex structural sections, equipped subassemblies and technical publications. DASA produced the major fuselage sections containing hydraulic equipment, secondary flight control systems, wing assemblies and commercial furnishing, as well as equipping the wings furnished by BAE Systems. DASA also carried out final assembly of A321 and A319 aircraft, as well as some cabin outfitting and customization of the cabins of the A300/A310 and the A320 family. BAE Systems was the partner in charge of the wings for the entire Airbus product line, and equipped wings for the A320 family by installing hydraulic, electrical and environmental control system hardware. CASA's role in the Airbus consortium was to produce the carbon fibre horizontal tails used in all Airbus aircraft, including integrated fuel tanks. CASA also designed fuselage panels and interior panels for the A320 family and produced nose and landing gear doors for the A300/A310 family and passenger doors for the A330/A340 family. (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.183 and fn 2058)

contributions.[1655] In 2001, EADS and BAE Systems placed their Airbus-related assets and operations and their membership rights in Airbus GIE under the common control of a newly-created holding company, Airbus SAS.[1656] Finally, in 2006, EADS purchased BAE Systems' 20% interest in Airbus SAS, and Airbus SAS became a wholly-owned subsidiary of EADS.

a The 1999 merger of Aérospatiale and Matra Haute Technologies

6.949. In 1999, Aérospatiale merged with Matra Hautes Technologies (MHT) to form ASM. At the time of the merger, the French State directly and indirectly held a 99.98% stake in Aérospatiale. Matra Hautes Technologies was a private entity, active in the provision of design, construction and maintenance services for large-scale space, missile, telecommunications and information systems, and wholly owned by the Lagardère Group.

6.950. The decision of the French State to direct Aérospatiale into a merger with MHT followed the Airbus governments' declaration of 9 December 1997 calling for the consolidation of the European aeronautic and defence industries, and the French Government's approval of a project elaborated for this specific purpose by Aérospatiale and Lagardère in May 1998.[1657] The merger of Aérospatiale with MHT was a first "step" in this process of consolidation[1658], and was effectively launched when the French State transferred its 45.76% interest in Dassault Aviation to Aérospatiale in December 1998.[1659] Thus, in announcing the French Government's decision to transfer its interest in Dassault Aviation to Aérospatiale, the French Finance Ministry said that the agreement between Aérospatiale and Dassault Aviation was designed to promote a concerted strategy for the French aeronautics industry in the broader context of alliances that needed to be concluded in the near-term between the principal European actors.[1660] Shortly after the Dassault transfer, the French State and Lagardère entered into an agreement to merge Aérospatiale and MHT on 15 February 1999, in which they set out the initial financial terms and valuations of the deal.[1661] Subsequently, a shareholders' agreement was signed on 14 April 1999 confirming many of the previously agreed terms, including valuations. This agreement also prescribed specific aspects of the parties' relationship as the principal shareholders of ASM pursuant to which they undertook to **[***]**.[1662]

6.951. In exchange for MHT's assets, Lagardère obtained 31.45% of the shares of ASM. Lagardère acquired an additional 1.55% of shares from the French State, thereby obtaining a total interest of

[1655] These subsidiaries are Airbus France S.A.S., Airbus Deutschland GmbH and Airbus España SL.

[1656] Airbus SAS, a *société par actions simplifiée* (a joint stock or limited liability company) incorporated under French law, was created in 2001 in order to hold all of the LCA-related design, engineering, manufacturing and production activities of the former Airbus Industrie consortium located in France, Germany, Spain and the United Kingdom (organized into French, German, Spanish and British operating subsidiaries) and all of their membership interests of the Airbus partners in Airbus GIE.

[1657] Aérospatiale-Matra Shareholders' Agreement, 14 April 1999, (ASM Shareholders' Agreement), (Exhibit EU-59) (BCI), preamble ("A la suite de la déclaration des chefs d'Etat et de gouvernements du 9 décembre 1997 visant à la consolidation des industries aéronautiques et de défense européennes, le gouvernement de la République française a donné mandat, le 27 mai 1998, au président de la société Aérospatiale de conclure des alliances stratégiques et de lui faire des propositions d'ouverture du capital de cette société. La société Aérospatiale et le groupe Lagardère ont élaboré un projet industriel consistent à regrouper les activités de la société Aérospatiale et de la société Matra Hautes Technologies, ce rapprochement ayant vocation à être ultérieurement étendu aux autres acteurs nationaux et européens de l'industries aéronautique et de défense. Ce projet a recueilli l'accord de principe du gouvernement.").

[1658] ASM Shareholders' Agreement, (Exhibit EU-59) (BCI), art. 1.1 ("**[***]**").

[1659] We recall that the United States' challenged this transaction in the original proceeding, arguing that it amounted to a subsidy under the terms of Articles 1.1(a)(i) and 1.1(b) of the SCM Agreement. The Appellate Body reversed the panel's findings, which had accepted the merits of the United States' position. However, in the absence of sufficient factual findings and uncontested facts on the record, the Appellate Body was unable to complete the analysis. (Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1381-7.1414; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1013-1027).

[1660] Panel Report, *EC and certain member States – Large Civil Aircraft*, fn 4617 (citing French Finance Ministry, *Communiqué de presse*, 15 May 1998 and a number of other media reports submitted as evidence in the original proceeding).

[1661] See e.g. Sénat, No. 414 (session ordinaire 1998-1999), *Rapport d'information, au nom de la Commission des finances, du contrôle budgétaire et des comptes économiques de la Nation, sur la restructuration de l'Industrie aéronautique européenne*, pp. 144-145, 155, (Rapport du Sénat), (Original Exhibit US-573), (Exhibit USA-327), p. 155.

[1662] ASM Shareholders' Agreement, (Exhibit EU-59) (BCI), art. 1.1 ("**[***]**").

33% in the new venture. Simultaneous with its sale of these shares to Lagardère, the French State launched a public offering of ASM shares, selling a total of 17% of ASM shares to institutional and public investors on the Paris Bourse. An additional 2.3% of the allotted shares were purchased by ASM itself and resold to its employees on preferential terms. This left the French State owning 47.7% of the shares in the newly merged company.

6.952. The European Union characterizes the above series of transactions as the "partial privatization" of Aérospatiale, and argues that this event "extinguished" the relevant subsidies. Accordingly, we understand the European Union's "extinction" arguments to be focused on the following transactions, which transformed the French State's almost 100% interest in Aérospatiale into a 47.7% stake in ASM: (a) the agreement between the French State and Lagardère on the valuation of the merging entities' respective assets, pursuant to which the French State would hold 68.55% of the nominal shares and Lagardère 31.45%; and (b) the transfer of 18.55% of the French State's interest to private shareholders. The same series of transactions was the subject of the European Union's "extinction" arguments in the original proceeding.[1663]

b The "overall EADS transaction"

6.953. The EADS was incorporated under the laws of The Netherlands as a public limited liability company (*naamloze vennootschap,* n.v.) in December 1998 to *inter alia* "hold, co-ordinate and manage participations or other interests in … the aeronautic, defense, space and/or communication industry".[1664] Following the conclusion in 1999 of "Business Combination Agreements" between the owners of ASM, DASA and CASA[1665], and the subsequent regulatory approval of the European Commission on 11 May 2000[1666], the aeronautic, space and defence activities of the French, German and Spanish partners in Airbus Industrie GIE were consolidated into EADS on 10 July 2000.[1667] The Business Combination Agreements envisaged that the assets contributed by each of the merging entities would be exchanged for 56.46% of the shares in EADS in the case of ASM, 37.29% of the shares in EADS for DaimlerChrysler, and 6.25% of the shares in EADS for SEPI. These relative asset valuations were agreed by reference to the net book value shown in the accounts of ASM, DASA and SEPI for the financial year ending 31 December 1999.[1668]

6.954. At the same time as the completion of the merger, a "global offering" of EADS shares was organized involving the issuance of new shares by EADS and the sale of a portion of EADS shares held by the French State, Lagardère and BNP Paribas and AXA.[1669] The shares made available through the "global offering" were issued to three categories of purchasers on the following basis: (a) 6.47% of total EADS shares to institutional investors (at a price of EUR 19.00 per share); (b) 9.95% of total EADS shares to individuals purchasing via the retail market (at a discounted price of EUR 18.00 per share); and (c) 1.5% of total EADS shares to "qualifying employees of the EADS group" (at a price of EUR 15.30 per share − a 15% discount from the retail offering price).[1670] It was expected that EADS' shares would be listed on the Paris, Frankfurt, Madrid, Bilbao, Barcelona and Valencia stock exchanges. The following diagram shows the ownership structure of EADS following the above transactions:

[1663] See Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.204.

[1664] EADS Reference Document, Financial Year 2000, (Exhibit EU-61), pp. 8 and 10; EADS Offering Memorandum, (Exhibit EU-55), p. 145.

[1665] EADS Offering Memorandum, (Exhibit EU-55), p. 140.

[1666] EADS Merger Decision, (Original Exhibit US-479), (Exhibit USA-323).

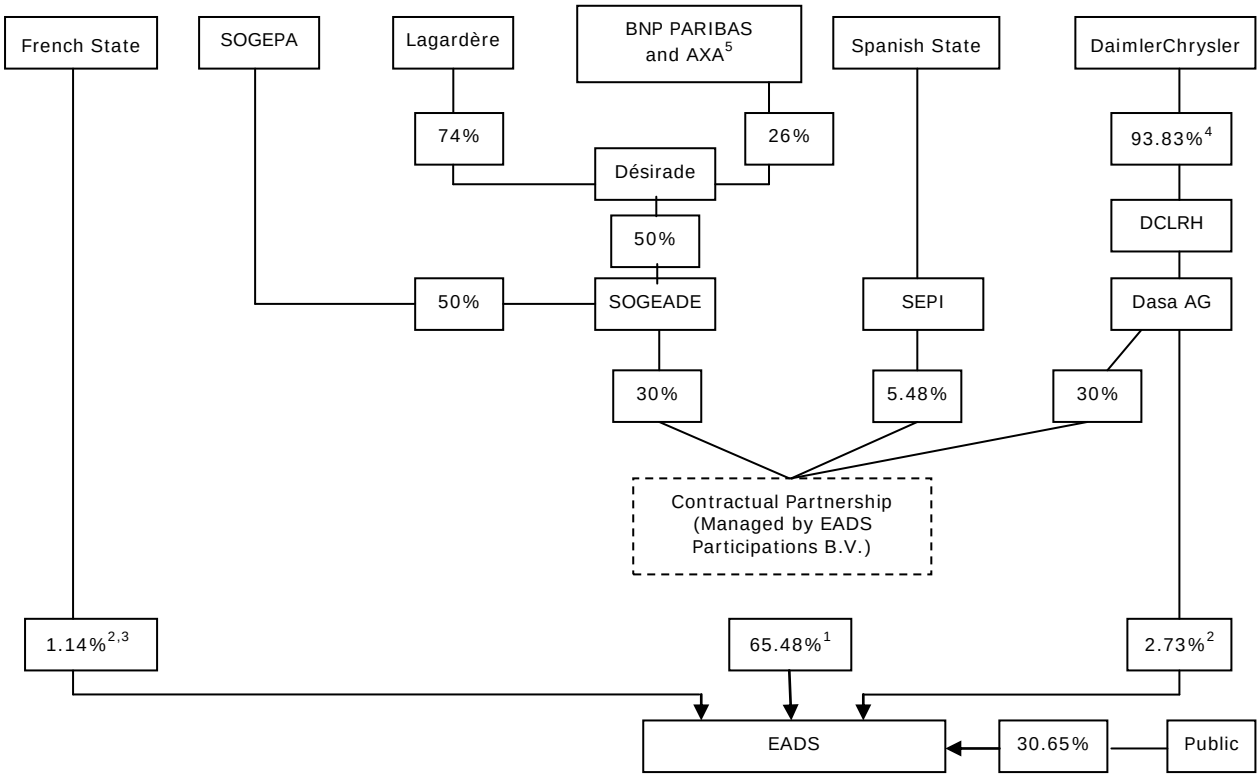
[1667] A description of the relevant contributions (which in the case of ASM, Dasa and CASA included 100% of their LCA activities related to the Airbus Industrie Consortium) and the internal restructuring that preceded the merger can be found in EADS Offering Memorandum, (Exhibit EU-55), pp. 140-144.

[1668] EADS Offering Memorandum, (Exhibit EU-55), p. 144.

[1669] EADS Offering Memorandum, (Exhibit EU-55), p. 11. BNP Paribas and AXA are described as the joint owners of Istroise de Particiations "the French Financial Institutions". Istroise de Participations would ultimately hold an indirect shareholding in EADS through its 26% participation in Désirade and the latter's 50% participation in SOGEADE, which after the "global offering" was expected to hold a 30% interest in EADS. (See further EADS Ownership Structure Diagram below).

[1670] EADS Offering Memorandum, (Exhibit EU-55), pp. 11-12.

Figure 3: EADS Ownership Structure Diagram[1671]



(1) EADS Participations B.V. will exercise the voting rights attaching to these EADS shares pledged by SOGEADE, DaimlerChrysler and SEPI, who will retain title to their respective shares.

(2) The French State and DaimlerChrysler will exercise the voting rights attaching to these EADS shares (in the case of the French State such shares being placed with *Caisse des Dépots et Consignations*) in the same way that EADS Participations B.V. will exercise the voting rights pooled in the Contractual Partnership.

(3) Shares to be distributed without payment of consideration by the French State to certain former shareholders of Aerospatiale Matra as a result of the privatization of Aerospatiale Matra in June 1999.

(4) Almost all the balance is held by the City of Hamburg.

(5) Acting through a jointly organized company, Istroise de Participations.

6.955. Separately, in June 2000, the EADS founding partners and BAE Systems announced the combination of their respective Airbus activities into Airbus Integrated Company (Airbus SAS). Under the Combination Agreement, all of the Airbus-related design, engineering and manufacturing assets located in France, Germany, Spain and the United Kingdom would be transferred to Airbus SAS, which transfer was expected to be completed on 1 January 2001. EADS would hold an 80% interest in Airbus SAS, with the remaining 20% held by BAE Systems.[1672]

6.956. In its submissions, the European Union has not specifically identified which of the many transactions that were involved in and, indeed indispensable to, the events described above allegedly "extinguished" the relevant subsidies.[1673] Rather, the European Union's arguments have repeatedly referred to "the creation of EADS", "the overall EADS transaction", "the transaction"

[1671] Reproduced from EADS Offering Memorandum, (Exhibit EU-55), p. 132.
[1672] EADS Offering Memorandum, (Exhibit EU-55), p. 123.
[1673] A description of the many transactions that were necessary in order to merge the relevant entities into EADS and undertake the "global offering" is provided in various parts of the EADS Offering Memorandum, (Exhibit EU-55). Several of these transactions can be found explained in summary form at pages 132-145 of this Exhibit.

and "the EADS transaction"[1674], suggesting that its position is based on the impact of all of the transactions considered together. We note, however, that because of the inter-related and inter-dependent nature of many of the relevant transactions, it is difficult to fully assess the extent to which the overall "EADS transaction" "extinguishes" the relevant subsidies without a proper understanding of each of the individual transactions that made the events described above possible. In this regard, we recall that in the original proceeding, the Appellate Body faulted the panel for having "failed to explain or provide any citations to precisely which of the {EADS} sales transactions were on the stock exchange".[1675] In light of the European Union's arguments, we understand the European Union to have based its "extinction" contentions on the following: (a) the agreement between the Airbus partners to combine their activities on the basis of the valuations of the merging entities' respective assets, pursuant to which, at least initially, 56.46% of the shares in EADS would be held by the ASM shareholders, 37.29% of the shares in EADS would be held by DaimlerChrysler, and 6.25% of the shares in EADS would be held by SEPI; and (b) the issuance and sale of all of the shares that were part of the "global offering". We do not understand the European Union's "extinction" arguments to pertain to the transfer of Airbus' LCA assets into Airbus SAS. We will evaluate the merits of the European Union's "extinction" arguments concerning the "overall EADS transaction" with the first two of these three sets of transactions in mind.

c The 2006 sale of BAE Systems' 20% interest in Airbus SAS

6.957. As already noted, in 2001, EADS and BAE Systems placed their Airbus-related assets and operations and their membership rights in Airbus GIE under the control of a newly-created holding company, Airbus SAS, with EADS owning 80% of Airbus SAS and BAE Systems owning the remaining 20%.[1676] As part of this transaction, BAE Systems negotiated a Shareholders' Agreement with EADS that included a "put" option, which it exercised in 2006, selling its 20% interest to EADS for EUR 2.75 billion.[1677] The European Union argues that this sale "extinguished" a portion of all pre-existing relevant subsidies.

Findings made in the original proceeding

6.958. In the original proceeding, the European Union had argued that a series of transactions, including those briefly described above[1678], "extinguished" all or part of the challenged subsidies, and therefore, could not be found to cause adverse effects to the interests of the United States under Part III of the SCM Agreement. The European Union's submissions were, in essence, based on its interpretation of the findings made by the panels and Appellate Body in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* (the "privatization cases"), which the European Union argued had established a "principle" that the sale of a company at arm's-length and for fair market value presumptively "removes any benefit of prior subsidies" to the purchaser of that company.[1679]

6.959. For the original panel, the European Union's submissions raised a threshold question as to "whether a subsidy which is found to exist must additionally be found to confer a present, or continuing, benefit on the recipient firm producing the subsidized product in order for that subsidy to be potentially capable of causing adverse effects for purposes of Article 5 of the SCM Agreement."[1680] The panel answered this question in the negative, disagreeing with the

[1674] Throughout its submissions, the European Union refers to "the creation of EADS", "the overall EADS transaction", "the transaction", "the EADS transaction", without specifying exactly which of the many transactions that resulted in the creation of EADS actually "extinguished" the relevant subsidies. (See e.g. European Union's first written submission, paras. 325, 332 and 334; and second written submission, para. 255).

[1675] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 730.

[1676] See above paras. 6.948 and 6.955.

[1677] European Union's first written submission, paras. 345-346 (citing, *inter alia*, BAE Systems Interim Report, 12 September 2006, (Exhibit EU-64), p. 10; and BAE Systems Press Release, "BAE Systems completes disposal of its Airbus Shareholding", 13 October 2006, (Exhibit EU-65)).

[1678] In the original proceeding, the European Union argued that a fourth set of transactions also "extinguished" the challenged subsidies. The European Union does not repeat these allegations for the purpose of this compliance dispute. (See Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.204).

[1679] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.202-7.204.

[1680] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.214.

European Union and finding that there is no requirement in Article 5 of the SCM Agreement to demonstrate the existence of a "present" or "continuing" benefit in order to make out a case of adverse effects.[1681] Nevertheless, the panel proceeded to make *alternative findings* on whether, as the European Union had argued, "in the context of a claim under Part III of the SCM Agreement, the existence of a benefit conferred by a financial contribution provided to a recipient is presumptively extinguished by the subsequent sale of the recipient to an arm's-length purchaser for fair market value."[1682] The panel concluded that the European Union's position was unfounded.

6.960. Noting, *inter alia*, that the Appellate Body had indicated in *US – Countervailing Measures on Certain EC Products* that the findings of the panel in that dispute should be confined to the "very precise set of facts and circumstances" of that case, the panel considered that it would not be appropriate to recognize the "principle" of extinction argued by the European Union.[1683] Rather, according to the panel:

> {T}o the extent that prior reports of the Appellate Body support the conclusion that, in a dispute under Part III of the SCM Agreement, changes in the ownership of a subsidized producer give rise to a rebuttable presumption that the benefit conferred by prior subsidies is extinguished … this would only be where (i) benefits resulting from a prior nonrecurring financial contribution, (ii) are bestowed on a state-owned enterprise, and (iii) following a privatization at arm's length and for fair market value, (iv) the government transfers all or substantially all the property and retains no controlling interest in the privatized producer.[1684]

6.961. The panel then turned to examine whether the sales transactions at issue possessed these four characteristics, finding that the European Union had not demonstrated that they "fulfil{led} all of the above criteria".[1685] The European Union appealed the panel's findings.

6.962. The Appellate Body upheld the panel's conclusion that there is no requirement to demonstrate that a subsidy confers a present, or continuing, benefit in order to establish that it causes adverse effects within the meaning of Article 5 of the SCM Agreement. However, the Appellate Body reversed the panel's alternative findings concerning the alleged "extinction" of subsidies.[1686]

6.963. The Appellate Body faulted the panel's evaluation of the European Union's "extinction" arguments because it considered that the panel had failed to sufficiently examine the circumstances surrounding the transactions at issue. In particular, the Appellate Body found that the panel had not made sufficient factual findings with respect to whether the relevant sales transactions were at arm's length and for fair market value, or the extent to which the change in ownership transferred the control in the companies concerned.[1687] Moreover, in the light of the absence of sufficient factual findings and undisputed facts on the record, the Appellate Body explained that it was unable to "complete the analysis".[1688]

6.964. Thus, in contrast to the European Union's arguments concerning the alleged "extraction" of subsidies, the European Union's submissions in relation to the "extinction" of subsidies were left unresolved at the end of the original proceeding. It is therefore incumbent upon us to review the merits of the European Union's contentions, as they have been presented and debated by the parties in this compliance dispute, in the light of the Appellate Body's guidance. In this respect, however, we note that although ultimately reversing the original panel's findings, the

[1681] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.218-7.221.
[1682] Panel Report, *EC and certain member States – Large Civil Aircraft,* para. 7.224.
[1683] Panel Report, *EC and certain member States – Large Civil Aircraft,* para. 7.239 (citing Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 117).
[1684] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.248.
[1685] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.249.
[1686] While the Appellate Body agreed with the panel's finding that Article 5 does not require a showing, by the complainant, of a "continuing benefit" during the reference period, the Appellate Body proceeded to examine the European Union's appeal against the panel's rejection of its "extinction" arguments "in the light of {its} finding … that 'intervening events' are relevant under an adverse effects analysis". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 1655)
[1687] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 735.
[1688] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 727-736.

Appellate Body Division serving in the original dispute issued three separate opinions on the question that lies at the centre of the European Union's arguments, namely, whether "partial privatizations and private-to-private sales" transactions, such as those at issue in this proceeding, can extinguish prior subsidies.

6.965. The United States maintains that the three separate opinions demonstrate that the Appellate Body did not endorse a single approach to resolve the question, implying that the best way to evaluate the merits of the European Union's "extinction" arguments would be to test them separately against each of the three opinions.[1689] The European Union, however, points out that elsewhere in its report, the Appellate Body explicitly stated that "in order to properly address the relevance of these transactions … the Panel should have assessed whether each of the sales was on arm's length terms and for fair market value, and to what extent they involved a transfer in ownership and control to new owners".[1690] For the European Union, the Appellate Body's separate opinions can be reconciled in a manner that is consistent with this statement, implying that the Appellate Body not only accepted that it is possible for "partial privatizations and private-to-private sales" transactions to "extinguish" a subsidy, but also that this could be demonstrated by showing that the relevant sales transactions: (a) were made at "arm's length"; (b) were for "fair market value"; and (c) resulted in a transfer of ownership and control from the State to new private owners.

6.966. The Appellate Body report reveals that the three separate opinions were issued because the Appellate Body Division serving on the appeal was unable to reach a "common view" about whether "partial privatizations and private-to-private sales" transactions may extinguish a prior subsidy.[1691] Despite this lack of common ground, the Appellate Body nevertheless proceeded to reverse the panel's dismissal of the European Union's arguments, judging that the panel had failed to make sufficient factual findings. However, in the absence of a single clearly articulated Appellate Body view about the extent to which "partial privatizations and private-to-private sales" transactions may extinguish a prior subsidy and, therefore, the legal standard that should have guided the original panel's factual analysis, it is not apparent to us exactly what elements must or must not be established in order to accept or reject the European Union's "extinction" arguments in this compliance dispute. In this light, we have decided to examine the merits of the European Union's "extinction" arguments through the logic of each of the three separate opinions. Unlike the European Union, we do not believe that the three separate opinions can be reasonably reconciled. Indeed, as already noted, the Appellate Body itself revealed that the reason why three separate opinions had to be expressed was because it was unable to reach a "common view" on the matter.

6.967. The first of the three Appellate Body Members was clear about the extent to which the principles emerging from the "privatization cases" could be extended to the relevant transactions, explicitly finding that "this rule does not apply to partial privatizations or to private-to-private sales".[1692] The European Union, however, argues that this Appellate Body member used the words "'partial privatizations or private-to-private sales' to cover transactions which involve *less than* a complete or substantial transfer of ownership and control". The European Union understands this statement to mean that the first Appellate Body member recognized that "the {privatization} rule *does* cover transactions that involve a *substantial* transfer of ownership and control", implying that "partial privatizations or private-to-private sales" involving a substantial transfer of ownership and control may be found to have extinguished a subsidy.[1693]

6.968. The full statement made by the first Appellate Body member reads as follows:

> Noting that the Appellate Body has previously ruled in privatization cases that a full privatization, conducted at arm's length and for fair market value involving a complete or substantial transfer of ownership and control, "extinguished" prior subsidies, one

[1689] United States' second written submission, para. 235.
[1690] European Union's second written submission, para. 225 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 733).
[1691] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 726.
[1692] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 726(a).
[1693] European Union's second written submission, para. 236. (emphasis original)

> Member is of the view that this rule does not apply to partial privatizations or to private-to-private sales.[1694]

6.969. In our view, this opinion simply recognizes that the "privatization" line of cases will apply in factual circumstances where there is a "full privatization, conducted at arm's length and for fair market value involving a complete or substantial transfer of ownership and control". It follows, therefore, that by finding that "this rule" does not apply to "partial privatizations or to private-to-private sales", the first Appellate Body member must have rejected the possibility that such transactions could have the characteristics of a "full privatization". Had this Appellate Body member considered that "partial privatizations or private-to-private sales" could potentially involve "a substantial transfer of ownership and control", in the way asserted by the European Union, there would have been no need for this Appellate Body member to state that the "privatization" line of cases could *not* be extended to "partial privatizations or private-to-private sales", as quite clearly, under this line of thinking, they could. We are, therefore, not persuaded by the European Union's interpretation of the first Appellate Body member's separate opinion. As already observed, we understand this Appellate Body member to have expressed a very clear and simple view: the privatization line of cases does not apply to "partial privatizations and to private-to-private sales" transactions. Applying this logic to the case at hand would lead us to reject the European Union's "extinction" arguments.

6.970. The third Appellate Body member to articulate a view expressed "no small measure of doubt that an acquisition of shares, concluded at arm's length and for fair market value, constitutes relevant circumstances warranting the conclusion that an extinction of benefit has taken place".[1695] This Appellate Body member went on to explain *inter alia* that:

> A subsidy granted to a recipient company contributes to the net asset value of that company. The value of that asset permits the recipient to enjoy an enhanced stream of future earnings over the life of the asset. The asset is the property of the recipient. The recipient's shareholders enjoy the right to the dividends that may be declared by the recipient and to any capital gains that arise from the enhanced earnings attributable to the recipient. When shares change hands on an arm's-length basis and for fair market value, the buyer pays a price that, in the estimation of the buyer, places a proper value on the future earnings of the recipient. Those earnings derive from all the assets of the recipient, including the benefit of any subsidy paid to the recipient. One shareholder may not accurately value or properly manage the assets of the recipient. Precisely for this reason, sales of shares take place: the buyer believes that the assets, properly managed, will be worth more over time than the price paid, and the seller believes the opposite. Time will tell who is correct. *The central point is that a sale of shares, whether or not it conveys control, transfers rights in the shares to a new owner. The assets of the company, to which the shares attach, do not change at all. Nor could it be otherwise, because the buyer would then not acquire the full benefit of the bargain: the buyer would pay for an asset (the subsidy) that had in the very sales transaction been "extinguished".* Shares in listed companies are traded on stock exchanges with great frequency and without any fear that sales on the market diminish the underlying value of the assets owned by these companies. The changing price of listed securities reflects the different valuations that buyers and sellers place upon companies and their underlying assets. *However, nothing about these trades extracts the value of any asset, including the benefit of any subsidy granted. That subsidy continues to benefit the recipient, even if the ownership of the recipient's shares changes from one day to another.* Given that the Appellate Body in this case does not need to come to any final view on the issue of extinction in the context of a partial privatization or private-to-private sales, these matters do not require more definitive determination.[1696] (emphasis added)

6.971. In our view, the third Appellate Body member's opinion all but rejected the possibility of finding that a transfer of shares for fair market value and at arm's length may extinguish a pre-existing subsidy. Nevertheless, it is difficult for us to understand how it left any room to accept the

[1694] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 726(a).
[1695] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 726(c).
[1696] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 726(c).

European Union's "extinction" arguments. In this regard, we note specifically that the third Appellate Body member considered that "*nothing*" about a share transfer "extracts the value of any asset, *including the benefit of any subsidy granted*. That *subsidy continues to benefit the recipient, even if the ownership of the recipient's shares changes from one day to another*". As we see it, applying this logic to the case at hand would lead us to reject the European Union's "extinction" arguments.

6.972. Finally, in contrast to the first and third separate opinions, the second Appellate Body member accepted that the "*rationale*" of the "privatization cases" *may* equally apply in situations of a partial privatization or private-to-private share transfers. However, this Member recalled that there is "'no inflexible rule' that a 'benefit' derived from pre-privatization financial contributions expires following privatization at arm's length and for fair-market value". For this Member, the particular facts of the case at hand would be the key, and an "important question in this context {would be} to what extent the partial privatization or private-to-private transactions resulted in a transfer of control to new owners who paid fair market value for shares in the company".[1697] Thus, the second Appellate Body member appears to have cautiously advocated for a fact-specific approach to determining whether the *rationale* of the "privatization cases" may apply to "partial privatizations or private-to-private" sales transactions. As we understand it, this logic implies that the merits of the European Union's "extinction" arguments should be determined by assessing whether the relevant sales transactions: (a) were made at "arm's length"; (b) were for "fair market value"; and (c) "resulted in a transfer of control" from the State to new private owners.[1698] In the remainder of this subsection, we examine the extent to which this was the case with respect to each of the three alleged "extinction" events.

The 1999 merger of Aérospatiale and Matra Haute Technologies

a Were the relevant transactions made at "arm's length"?

6.973. In the original proceeding, we recalled that although the "concept of 'arm's length' is not defined in the SCM Agreement", the "compliance panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* considered various dictionary definitions of the term, all of which highlighted the independence of parties in arm's length transactions".[1699] Consistent with this standard, we will examine the European Union's assertions regarding the relevant transactions by determining the extent to which they involved two independent, unrelated, parties acting in their own interests. Both the European Union and the United States appear to have broadly accepted this definition for the purpose of this dispute.[1700]

6.974. According to the European Union, the arm's length nature of the merger between Aérospatiale and MHT is evidenced by the fact that the French State and Lagardère were independent entities, "independently advised by sophisticated advisors, which protected their respective client's interests in the transaction".[1701] The United States, on the other hand, argues that the merger was not an arm's length transaction because it was "uniquely tailored to Lagardère", suggesting that the French State did not pursue its own independent interest with respect to the relevant transactions.[1702] The United States finds support for this allegation in a number of documents, including a report by the "Production and Exchanges" Commission of the French National Parliament, which the United States maintains expresses "strong disapproval for the terms that Lagardère was able to obtain":

[1697] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 726(b).

[1698] It is unclear to us whether the second Appellate Body member's emphasis on the fact-specific nature of the analysis of these three elements means that, as the United States argues, other factors might also need to be considered. However, given our ultimate conclusions with respect to the merits of the European Union's "extinction" arguments, we believe it unnecessary for us to express any views on this matter.

[1699] Panel Report, *EC and certain member States – Large Civil Aircraft*, fn 2175 (citing Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.133-7.134).

[1700] European Union's first written submission, para. 298; comments on the United States' response to Panel question No. 8; and United States' response to Panel question No. 8.

[1701] European Union's first written submission, para. 318; second written submission, para. 251; and comments on the United States' response to Panel question No. 8.

[1702] United States' second written submission, para. 261; and response to Panel question No. 8.

> It would seem that the terms of the merger are quite favorable to Lagardère SCA. According to M. Elie Cohen, a member of the Council of Economic Analysis, a realistic valuation would give 20% of Aérospatiale's capital to Lagardère SCA. In such circumstances, one has to wonder about a possible undervaluation of Aerospatiale in the merger. Your rapporteur {i.e. the author of the report} deplores this situation, which has resulted in a "lagardization" of a public company … .[1703]

6.975. Similarly, the United States points to an article appearing in *The Economist*, which *inter alia* commented that the merger was "{a} botched privatization at a bargain price", described by "Airbus alumni … as the hold-up of the century".[1704] Moreover, the United States argues that the fact that the ASM merger was undertaken as part of a "French government plan 'to promote a concerted strategy for the French aeronautics industry in the broader context of alliances that need{ed} to be completed … between the principal European {aerospace} actors'" means that the parties to the merger "were not acting independently, but rather the French State was attempting to promote the very companies it was buying".[1705]

6.976. We recall that the French State's motivation for entering into the merger was explicitly to strengthen the position of the French aeronautics and defence industry in the European-wide consolidation that was agreed between the Airbus governments on 9 December 1997.[1706] The ASM merger was, therefore, not a "partial privatization" for the purpose of partly disengaging the French State from the LCA business, but rather it was intended from the very beginning to create a larger French aeronautics and defence company for the purpose of participating in the planned European-wide consolidation. Because Matra-Haute Technologies was an important player in the French aeronautics and defence industry, it is apparent that the objectives pursued by the French State must have extended beyond those of its own economic interests in the specific transaction, overlapping with those of Lagardère. We are, therefore, not persuaded that the French State, although independently advised by "highly reputed investment banks", acted solely in its own *independent* interests. Rather, in choosing to merge Aérospatiale with Matra Haute Technologies for the purpose of enabling the French aeronautics and defence industry to be better placed in the European-wide industry consolidation, the French State also naturally advanced at least part of the interests of Lagardère.[1707]

6.977. Thus, on the basis of the evidence that is before us, we find that the European Union has failed to demonstrate that the 1999 merger of Aérospatiale with Matra Haute Technologies was an "arm's length" transaction.

b Were the relevant transactions for "fair market value"?

6.978. The European Union argues that the transactions involved in the merger of Aérospatiale with Matra Haute Technologies were all made at a "fair market price". The European Union asserts that in the lead up to the merger, both Aérospatiale and Matra Haute Technologies were valued by independent investment banks, and that the share price established on the basis of those evaluations reflected market value and was applied to all shareholders of the newly merged entity (with the exception of the 2.3% stake sold to employees). Furthermore, the European Union explains that, as required by French law, the merger was reviewed by the Commissaires à la Scission, which it describes as a panel of independent experts appointed by the Paris Commercial Tribunal.[1708] For the United States, however, the valuations used to establish the price of the share sale transactions did not reflect the "fair market value" of Aérospatiale's assets relative to those of

[1703] United States' response to Panel question No. 8 (translating and quoting *Assemblée Nationale, Avis No. 1866, au nom de la Commission de la Production et des Échanges sur le projet de loi de finances pour 2000 (No. 1805)*, 14 October 1999, (Original Exhibit US-593), (Exhibit USA-328). See also United States' second written submission, para. 261 (citing same exhibit)).

[1704] United States' response to Panel question No. 8 (quoting "Airbus: The Making of a Jumbo Problem", *The Economist*, 9 November 2006, (Exhibit USA-522)).

[1705] United States' response to Panel question No. 8 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1410 and fn 4617).

[1706] See above para. 6.950. The strategic nature of the ASM merger transaction for the French State is also further discussed in the following subsections.

[1707] We recall in this regard that the ASM Shareholders' Agreement prescribed specific aspects of the parties' relationship as the principal shareholders of ASM pursuant to which they undertook to **[***]**. See above para. 6.950.

[1708] European Union's first written submission, paras. 312 and 317.

MHT. In particular, the United States argues that the total number of shares Lagardère received as part of the merger "dwarfed" the value of the MHT assets contributed to the transaction, suggesting that the French State overly compensated Lagardère for its participation, and undervalued Aérospatiale. According to the United States, this conclusion finds support in the statements and assertions made in a number of documents.[1709]

6.979. First, the United States refers to the above-quoted statement made by the rapporteur of the "Production and Exchanges" Commission of the French National Parliament as well as a report of the French Senate, in which the author expresses the view that "from a patrimonial and strategic perspective, it would have been desirable to value the new {ASM} group more highly".[1710] According to the United States, both documents reveal that "Lagardère and those who purchased shares following the partial flotation" received a "sweetheart deal".[1711] The European Union, however, dismisses the relevance of the two reports, asserting that they express the political "views of Members of the French Parliament that were opposing the French government".[1712]

6.980. Turning first to the statement made in the French Senate report, we note that the passage quoted by the United States does not express the view that the French Government undervalued Aérospatiale relative to a *market benchmark*, but only that a higher valuation would have been *desirable* from a patrimonial and strategic perspective. It is unclear to us whether declaring that a higher valuation would have been preferred from a *patrimonial and strategic perspective* is synonymous with saying that the agreed valuation was below "fair market value". Indeed, the strategic concerns for which a higher valuation would have been preferred are identified in the report to be the risks associated with publicly disclosing Aérospatiale's value at a time when restructuring efforts in the European aerospace industry were stumbling in the face of diverging valuations of aerospace companies.[1713] Nevertheless, it is apparent from another statement made in the French Senate report that its author considered it was important to verify that the assets contributed by Aérospatiale relative to MHT had not been undervalued.[1714] However, it is also clear that one of the reasons why the author ultimately concludes that the French Government could have achieved a better result in the ASM merger was because of the strong demand for participation in the public float.[1715]

6.981. The valuation doubts raised in the extract the United States relies upon from the "Production and Exchanges" Commission report are premised on an assessment made by "M. Elie Cohen, a member of the Council of Economic Analysis". However, the details of M. Cohen's assessment are neither specifically discussed in the extract of the report submitted as evidence, nor otherwise presented in this proceeding. In this light, the statement at issue cannot be viewed to represent anything more than the opinion of the Commission's rapporteur, which we recall the European Union asserts was a Member of French Parliament that opposed the French Government. Thus, when considered in isolation, the two reports the United States relies upon do not appear to be particularly convincing or probative in relation to the question at issue.

[1709] United States' second written submission, paras. 261-262; and response to Panel question Nos. 8 and 10.

[1710] United States' response to Panel question No. 8 (quoting Rapport du Sénat, (Original Exhibit US-573), (Exhibit USA-327), pp. 144-145 and 155).

[1711] United States' second written submission, para. 261; and response to Panel question No. 10 (in both places citing Rapport du Sénat, (Original Exhibit US-573), (Exhibit USA-327), pp. 144-145 and 155; and *Assemblée Nationale, Avis No. 1866, au nom de la Commission de la Production et des Échanges sur le projet de loi de finances pour 2000 (No. 1805)*, 14 October 1999, (Original Exhibit US-593), (Exhibit USA-328)).

[1712] European Union's comments on the United States' response to Panel question No. 8.

[1713] Rapport du Sénat, (Original Exhibit US-573), (Exhibit USA-327), p. 144 ("À l'heure où la structuration de l'industrie aéronautique européenne bute en particulier sur des divergences d'évaluation des entreprises, une telle évaluation consiste à dévoiler ses cartes aux partenaires").

[1714] Rapport du Sénat, (Original Exhibit US-573), (Exhibit USA-327), p. 145 ("En outre, et surtout il importe de vérifier que la valorisation de l'actif public n'a pas été minorée par rapport à celle de l'actif apporté par Lagardère SCA ce qui serait synonyme de perte sèche pur l'Etat").

[1715] Rapport du Sénat, (Original Exhibit US-573), (Exhibit USA-327), p. 155 ("{L}es conditions de la mise sur le marché … laissent penser que l'État n'a pas tiré le parti des perspectives d'une entreprise dont le potentiel devrait être mieux exploité à l'avenir. … La sur-souscription du placement réservé aux institutionnels … , le bond du titre le premier jour de sa cotation … en témoignent").

6.982. The United States submits that the below-market return achieved by the French State from its sale of shares in the ASM merger is also evidenced by the statements made in two media reports, the first of which was published by Reuters only four days before the French State and Lagardère agreed upon the initial terms and valuations of the merger. The Reuters report asserted that:

> Analysts and industry sources have said the deal has been held up by big differences in the valuations put forward by the Lagardère group and the treasury.
>
> Union officials said on Thursday they feared Lagardère may receive preferential treatment on the merger terms and would only pay a small amount of cash to get a third of the new group.
>
> Bernard Devert, a CGT union official for the aerospace branch, told reporters that Lagardère may pay only about 1.2 billion francs to win a third of the Aérospatiale-Matra group.
>
> He did not give a source for the figure, which is lower than the two to five billion Francs reported in the French press and which market analysts estimate Lagardère may have to pay.
>
> ...
>
> The unions fear that for political reasons the government will give in to Lagardère's demands for a 33 percent stake and accept only a minimal cash payment.
>
> "They cannot admit that, to achieve a political agreement, Aérospatiale might be deliberately undervalued," Aérospatiale CFDT union official Jacques Debesse told reporters.
>
> In a letter made available to Reuters, Aérospatiale's CGT board member Christian Saulnier wrote to Prime Minister Lionel Jospin charging that valuations of 40 billion francs for the aerospace group seriously underestimated its worth.
>
> "This undervaluation puts the national company at an extreme disadvantage compared to Bae (British Aerospace) and DaimlerChrysler Aerospace on the European chessboard" the letter said.[1716]

6.983. The second media report the United States relies upon was published in *The Economist* in 2006. This particular report made the following comments of note:

> {The Aérospatiale-Matra merger} was completed in June 1999 once all the formalities had been gone through. Part of this process was a review of the deal by court-appointed accountants. Their job was first to ascertain whether the MHT shares were worth at least their value of {EUR} 618m in Lagardère's books. This they had no trouble doing, and their report is a matter of public record. The trickier task was to justify the one-third share of the much bigger company allotted to Lagardère. Their full report on this aspect is not a matter of public record, but their findings are contained in a document, a copy of which was obtained by The Economist, that Aérospatiale Matra had to file with the French stock exchange before the sale of shares to the public.
>
> The experts clearly found themselves in a difficult position, as they noted. The document talks of "three key limiting factors" in their assessment process which "could affect the exchange value to an extent that is difficult to put into figures". One factor was "limited or late access to certain important information". Another was "uncertainties beyond the normal range of forecasting" and a third was "assumptions underlying the preparation of cash-flow projections". The basic justification for

[1716] "FOCUS – *Aérospatiale-Matra* merger in weeks – official", Reuters, 11 February 1999, (Original Exhibit US-596), (Exhibit USA-329).

> handing over as much as one-third of the shares to Lagardère was the strategic importance of the transaction for the French aerospace and defences industries and "risks for the Lagardère group".
>
> One leading Paris analyst, Jean Gatty, put a value on MHT in the range of {EUR} 750m-1.4 billion. After the first day of dealing in the shares of Aérospatiale Matra, the one-third stake that Lagardère got in return for MHT was worth {EUR} 2.8 billion. No wonder that at a recent aviation conference in Monte Carlo, attended by the legendary former Airbus boss, Jean Pierson, an Aérospatiale man to the core … , Airbus alumni were calling it "the hold-up of the century". Airbus veterans are bitter at what "the Lagardère boys", as they are known within the aircraft maker, have done to the organization they built up to take on Boeing.[1717]

6.984. The European Union does not appear to have specifically responded to the United States' reliance on the 1999 Reuters report. However, the European Union dismisses the relevance of the report appearing in *The Economist*, saying that the statements reporting the views of unnamed "Airbus alumni" at an unspecified "aviation conference" would probably amount to "unfounded 'hearsay'" in the national courts of the United States.[1718]

6.985. Considered in isolation, the above two media reports, in our view, at best reveal that certain individuals close to Aérospatiale or connected with the ASM merger were of the view that the French State would not, and did not, achieve "fair market value" for the sale of its shares in ASM. However, in the absence of other corroborating evidence that is more closely tied to the actual valuations performed by the relevant investment banks, we are reluctant to accept this evidence as a basis to reject the European Union's assertions concerning the "fair market value" of the relevant transactions. In this regard, we note that the statements reported in *The Economist* about the findings of the so-called "court-appointed accountants" tasked with examining the valuation of MHT reflect those reported in the Aérospatiale Matra Offering Memorandum to have been made by "a panel of independent experts" appointed under French law to review the transaction. Although we suspect that the "panel of independent experts" cited in both these sources is what the European Union refers to as the Commissaires à la Scission, we cannot be certain because a copy of the Commissaires' report has not been submitted as evidence.

6.986. The Aérospatiale Matra Offering Memorandum quotes from the report of the "panel of independent experts" when describing the details of the contribution of MHT's assets to the merger transaction:

> In accordance with French law, a panel of independent experts was named for the purpose of examining the valuation of MHT shares and the fairness of the exchange ratio adopted by the parties.
>
> In rendering its report on March 27, 1999, the panel noted three qualifying factors regarding its examination. These factors are as follows (translated from the French):
>
> > *"(i) Limited or late access to certain significant items of information for reasons relating to time constraints or confidentiality and equally related to the inherent tension of negotiations of such importance;*
> >
> > *(ii) Cash flow forecasts are qualified by the assumptions made in their preparation: future dollar exchange rates, the prospects of the defense, space and aircraft activities, notably in a base case year; in addition, a certain number of future contracts (in the space and defense sector) were included in the forecasts on the basis of coefficients of probability which are necessarily subjective;*
> >
> > *(iii) the existence of specific uncertainties, going beyond the inherently difficult nature of all forecasts. In particular, the operation of the two partners is likely to be subject to the effects of off balance sheet*

[1717] "Airbus: The Making of a Jumbo Problem", *The Economist*, 9 November 2006, (Exhibit USA-522).
[1718] European Union's comments on United States' response to Panel question No. 10.

> *commitments, the ultimate disposition of which is by nature uncertain; this observation is notably applicable to the participation of Aérospatiale in the Airbus consortium, which has substantial off balance sheet commitments.*
>
> *These uncertainties may affect the exchange ratio parity retained in proportions which are difficult to quantify."*

With respect to the exchange ratio, the panel noted the following (translated from the French):

> *"the exchange ratio was established on the basis of two approaches:*
>
> *- one based on stock market comparisons;*
>
> *- the other relying on the cash flow forecasts of the two groups.*
>
> *(i) The comparative approach is, in this particular case, unreliable in its application given the absence of groups which are completely comparable to Aérospatiale and MHT and because of the low level of earnings generated by the Aérospatiale group in the past.*
>
> *(ii) the evaluation of the two groups by the discounted cash flow method seems to be the better approach, notwithstanding the difficulties of application described above.*
>
> *In a financial perspective, we note that the 31.45% exchange ratio retained falls within the range of evaluations put forth by the financial advisors. On a broader level, this transaction is of a strategic nature for the French aircraft and defense industries and presents risks to the Lagardère group which justify the exchange ratio retained.*
>
> *We have no other observations regarding the relative values attributed to the shares of the two companies participating in the transaction nor on the equitable nature of the exchange ratio … ."*[1719] (emphasis original)

6.987. Thus, in delivering their opinion on the ASM merger, the "independent experts" appointed under French law to review the valuations used in the merger transaction felt the need to highlight three "qualifying factors", which in our view, suggests that they had doubts about the reliability of the final 31.45% "exchange ratio" retained for MHT. In summary, these factors were: (a) limited or late access to "significant items of information"; (b) the assumptions underlying the cash-flow forecasts used for the purpose of making the valuations, including "subjective" probability coefficients relating to "a certain number of future contracts"; and (c) "specific uncertainties, going beyond the inherently difficult nature of all forecasts", including the effects of "off balance sheet commitments", in particular, as regards the operations of the Airbus consortium. Indeed, although the "independent experts" went on to note that from "a financial perspective", the "exchange ratio" fell "within the range of evaluations put forth by the financial advisors", they also made a point of explaining that "on a broader level", the "exchange ratio" could be *justified* by the strategic importance of the merger for the French Government and the risks that it posed to MHT's owner, Lagardère. Thus, the "panel of independent experts" clearly found that the public policy goals of the transaction for the French State could explain at least part of the "exchange ratio" that was finally agreed.

6.988. When considered in the light of the other statements reported in the Reuters article and in *The Economist*, as well as the opinion expressed in the "Production and Exchanges" Commission report, these conclusions suggest that there were reasons to believe that the valuation of MHT accepted by the French State was greater than what would have been acceptable in the absence of the strategic importance of the deal, and consequently, that Aérospatiale's relative contribution to the merger was probably undervalued.

[1719] Aérospatiale-Matra Offering Memorandum, 25 May 1999, (Exhibit EU-58), p. 25.

6.989. The final document the United States relies upon to support its arguments is a report prepared by its expert, Lauren D. Fox (the Fox Report).[1720] The same report was submitted by the United States in the original proceeding for the purpose of substantiating its claims of subsidization pertaining to the 1998 transfer of the French State's 45.76% interest in Dassault Aviation to Aérospatiale in the lead up to the creation of ASM. The United States maintains that, to the extent that the Fox Report concludes that the Dassault transfer to Aérospatiale resulted in a substantial loss in value for the French Government, it also demonstrates that the French State received less-than-fair market value for the shares sold in the ASM merger.[1721]

6.990. As part of its evaluation of whether the Dassault share transfer was on market terms, the Fox Report reviewed the valuations performed by three of the investment banks used by Aérospatiale and MHT to establish the value of their merger. Although the European Union submitted the relevant valuation reports in the original proceeding, it has not done so in this compliance proceeding, even though it asserts that the ASM merger was on market-terms because of, *inter alia*, the very fact that these three "internationally renowned" investment banks were involved in its valuation.[1722]

6.991. After explaining that corporate valuations of public and private companies are generally conducted using three standard analyses − discounted cash flow (DCF), comparable company analysis and comparable transaction analysis − the Fox Report notes that "the DCF valuation results achieved by the banks, using management financial projections, were more than 25% higher than the average of the comparable company and comparable transaction analyses conducted".[1723] The Fox Report reveals that this caused the banks to base their final valuations entirely on DCF analysis, excluding the comparables analyses. However, while Fox agrees that the group of comparable companies were not "strong on the basis of geography", she explains that:

> {S}uch a different result from 2 of the 3 methodologies should have also suggested that management figures for future years were over-optimistic, and that a critical review of the underlying assumptions driving future growth and profitability would have been appropriate. This was not done.[1724]

6.992. Moreover, on the basis of information provided by the European Union in the original proceeding, the Fox Report goes on to find that the:

> {O}perating projections for Aérospatiale and MHT appear to significantly overstate realistic long-term growth and profitability expectations by applying higher revenue and income growth rates and higher margins, beginning immediately, compared with ratios that had been achieved in the two prior years for which information has been made available.
>
> These projections appear particularly unrealistic in the context of contemporary media reports addressing the periodic financial distress of the French aeronautics industry, and particularly Aérospatiale. Even Aérospatiale-Matra's own banker, **[***]**, describes the year 1999 (in April 1999) as an historic lowpoint for the financial ratios of the two companies, particularly MHT.[1725]

[1720] Lauren D. Fox, "1998 Dassault Share Transfer Valuation Report", 21 May 2007, (Fox Report), (Original Exhibit US-595), (Exhibit USA-330) (HSBI). The United States submitted the same report in the original proceeding to substantiate its claim that the 1998 transfer of the French State's 45.76% interest in Dassault Aviation was a subsidy within the meaning of Article 1.1 of the SCM Agreement. (See Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.1388)

[1721] United States' second written submission, para. 262.

[1722] European Union's second written submission, para. 252.

[1723] Fox Report, (Original Exhibit US-595), (Exhibit USA-330) (HSBI), p. 4. Although this United States' exhibit is labelled HSBI, the quoted text does not appear as HSBI.

[1724] Fox Report, (Original Exhibit US-595), (Exhibit USA-330) (HSBI), p. 4. Although this United States' exhibit is labelled "HSBI", the quoted text does not appear as HSBI, in the same way that it did when the exhibit was submitted in the original proceeding.

[1725] Fox Report, (Original Exhibit US-595), (Exhibit USA-330) (HSBI), p. 5, including Exhibits 2, 2a and 2b thereto (footnotes omitted) (citing *inter alia*, the following reports: "France Demurs on DASA Deal for Aérospatiale", *Wall Street Journal*, 7 September 1999; "Aérospatiale on Creditwatch Negative − S&P", *Financial Times*, 29 May 1998; and "New Alliances Emerge from French Aerospace Shakeup", *Aerospace Media*

6.993. In our view, the concerns raised in the Fox Report (including in the HSBI sections of its Exhibit 5) about the valuation of the ASM merger closely reflect the qualifications made by the "panel of independent experts" in their own analysis. We note, however, that in criticising the operating projections used to arrive at a final valuation of ASM, the Fox Report challenges the reliability of the financial projections used for not only MHT's business, *but also Aérospatiale*.[1726] It follows, therefore, that the expert report the United States relies upon as evidence of the less-than-fair market value of the ASM merger, ultimately concludes that the valuation of the newly merged entity was overall *above* its "fair market value". In this light, in order to understand whether the return obtained by the French State for the contribution of Aérospatiale to ASM was below market, it would be necessary to know whether the French State's relative share of the newly (overly) valued company, was less than what it should have otherwise obtained compared with the contribution made by MHT. However, presumably, because the Fox Report was originally prepared for another purpose, it does not undertake this final step of the analysis.

6.994. Finally, we note that in responding to the United States' arguments in relation to the arm's length nature of the merger transaction, the European Union recalls that as part of the deal, Lagardère undertook to pay the French State up to FF 1.15 billion, if ASM underperformed the CAC 40 by 8% over a two-year period following the initial public offering (IPO). Although this obligation is noted in the Fox Report[1727], it is unclear whether its *value* to the French State was taken into account in the analysis that is presented in the Fox Report of the investment banks' transaction valuations. Furthermore, although the undertaking given by Lagardère concerning the share price of ASM following the Aérospatiale-MHT merger is described in the Aérospatiale-Matra Offering Memorandum[1728], there is no indication in this document of whether or the extent to which its value to the French State was taken into account in the relevant investment banks' valuations. In this regard, we note that because of the conditional nature of Lagardère's undertaking, Lagardère's final liability could range from FF 1.15 billion to zero, depending upon how the ASM shares traded following the merger. Thus, in the absence of any evidence disclosing how the relevant investment banks decided to account for Lagardère's undertaking[1729], we have no basis to determine the extent to which Lagardère's commitment impacted the transaction value.

6.995. In conclusion, therefore, it is apparent from the evidence we have reviewed that in the light of the explicit public policy goals that the French Government sought to pursue through the merger of Aérospatiale with MHT, and the perceived risks that an operation of this kind apparently posed to the Lagardère Group, significant doubts were raised about the agreed valuations by not only politicians that opposed the French Government's plans, but also individuals close to Aérospatiale (including Union officials) and the "independent experts" appointed to review the transaction under French law. We note, however, that the Fox Report concluded that the deal valuations were "inflated" based on an assessment of the individual valuations of *both* Aérospatiale and MHT. Moreover, it is unclear whether the Fox Report's analysis of the investment banks' transaction valuations accounted for Lagardère's undertaking in relation to the share price of ASM in the years following the merger. Thus, overall, we find that the evidence the United States relies upon does not establish a sufficient basis to conclude that the transactions at issue in the creation of ASM were not undertaken at "fair market value".

c Did the relevant transactions "result{} in a transfer of control"?

6.996. We recall that in this subsection of our Report, we are examining the extent to which the European Union has made out its claims of "extinction" on the basis of the separate opinion articulated by the *second* Appellate Body member concerning the extent to which "partial privatizations and private-to-private" share transfers may "extinguish" a subsidy. Thus, before proceeding to examine the merits of the parties' arguments in relation to the ASM transaction, we must first consider how the second Appellate Body member's reference to the "transfer of control" should be understood.

Publishing, 18 August 1996). Although this United States' exhibit is labelled "HSBI", the quoted text does not appear as HSBI, in the same way that it did when the exhibit was submitted in the original proceeding.

[1726] Fox Report, (Original Exhibit US-595), (Exhibit USA-330) (HSBI), p. 5 (citing Exhibits 2, 2a and 2b).

[1727] Fox Report, (Original Exhibit US-595), (Exhibit USA-330) (HSBI), p. 3.

[1728] Aérospatiale-Matra Offering Memorandum, 25 May 1999, (Exhibit EU-58), p. 24.

[1729] We recall that although presented by the European Communities in the original proceeding, the relevant investment banks' valuation reports have not been submitted as evidence in this compliance proceeding.

6.997. As already noted, the second Appellate Body member's separate opinion cautiously accepted that the *rationale* of the privatization cases could equally apply to "partial privatizations and private-to-private" sales transactions. However, for this Member, there is "no 'inflexible rule' that a 'benefit' derived from pre-privatization financial contributions expires following privatization at arm's length and for fair market value". All would depend upon the particular facts of the case at hand, and an "important question in this context is to what extent the partial privatization or private-to-private transactions resulted in a transfer of control to new owners who paid fair market value for shares in the company".[1730]

6.998. The European Union maintains that the correct focus of a panel's evaluation of the extent to which the requisite "transfer of control" has been established must be on the qualitative nature of the change in control that results from a change in ownership and, in particular, the extent to which that change in control allows the new owners to seek a profit. According to the European Union, this focus is "an important reflection of the rationale underlying the privatization cases".[1731] Thus, the European Union argues that in order to establish that an arm's length transfer of a government's interest in a State-owned company to a private entity for "fair market value" has "resulted in a transfer of control", and therefore "extinguished" all or a portion of existing subsidies, the "new owner's interest must be 'sufficiently substantial' in order to 'allow the new private owner to ensure that the company is run on market terms'".[1732]

6.999. As we understand it, the European Union's position implies that a State-owned entity that receives subsidies may be found to no longer benefit from those subsidies whenever the subsidizing government transfers a "sufficiently substantial" portion of its control and ownership interest, through an arm's length transaction for fair market value, to new private owners on terms that allow the company to be managed in a way that is profitable. In other words, the European Union considers that the extent to which the change in control associated with an arm's length sale on fair market terms of a State's "sufficiently substantial" interest in a previously State-owned and controlled enterprise allows a new owner to run that company on market terms will determine whether the benefit of past subsidies is "extinguished".

6.1000. In our mind, the European Union's position raises a number of significant questions, including the following: What would be the implication of applying the European Union's "qualitative change in control" standard to a situation where it is decided that a failing State-owned enterprise, which is restructured with the aid of subsidies[1733], will be managed in a way that seeks to make a profitable return on the market value of the subsidies provided by the government? Would the fact that a government tries to run such a company on market terms after infusing it with capital that would not have been provided by a private investor mean that those subsidies have been extinguished? Would the answer to this question be different if the government had sold a "sufficiently substantial" portion of the same restructured and subsidized company to a private entity that intended to make a market return on its investment? Our understanding of the European Union's position is that at least a portion of the subsidies would be extinguished in the latter circumstance; and we do not consider that the *rationale* of the "privatization" cases was intended to imply that the subsidies in the former scenario would be "extinguished". Yet, the only material distinction we can see between the two situations would be a decision taken by the subsidizing government to operate the relevant company on market terms instead of selling a "sufficiently substantial" portion of its interest to a private party so that it may do the same. The same subsidies would have been provided to the same company, which would be run, post-subsidization, according to the same market principles. The only difference would be the identity of the owners.

6.1001. We doubt whether the second Appellate Body member's separate opinion on the notion of the "transfer of control" was intended to have these implications. Nevertheless, even assuming that the European Union's position does reflect the second Appellate Body member's views on the matter, the evidence before us does not support a finding that the ASM transaction involved the degree of "transfer of control" necessary to "extinguish" the relevant subsidies.

[1730] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 726(b).

[1731] European Union's first written submission, paras. 299-302.

[1732] European Union's second written submission, para. 244. See also European Union's first written submission, paras. 301-302 (making same argument).

[1733] For example, the government may decide to provide a State-owned entity with equity capital in circumstances that would be inconsistent with the usual practice of private investors.

6.1002. According to the European Union, the "transfer of more than 50 percent of the ownership {of Aérospatiale} from the state to private owners" through the ASM transaction satisfies the "transfer of control" standard because it "brought about a qualitative change in the control of Aérospatiale", compelling ASM "to operate exclusively on market principles in order to seek the market return that the majority of its owners expected to achieve on their investment". For the European Union, this qualitative change in control came about by virtue of not only Lagardère's "privileged partner" status, which allegedly gave it the ability to enjoy "effective control" over the company's key decisions, but also the "economic realities" of the transaction, which created a majority of private shareholders and thereby assured the newly merged entity's market orientation.[1734]

6.1003. The United States, on the other hand, argues that the French State did not relinquish its control in ASM as a result of the relevant transactions, recalling *inter alia* that it retained a 48% interest, making it the largest shareholder, and that it obtained a "valuable 'golden share'" enabling it to "retain at least a certain amount of strategic control over ASM".[1735]

6.1004. We note that under the terms of the ASM Shareholders' Agreement, Lagardère became the French State's "Privileged Strategic Partner"[1736] and both parties' declared that they would "act in concert" *vis-à-vis* the company, within the meaning of article 356-1-3 of the Law of 24 July 1996.[1737] Both parties therefore agreed that the following decisions would be taken *jointly* with a view to giving effect to the principle of industry consolidation that was at the centre of the merger: (a) approval of multi-year strategic plans; (b) acquisitions or divestitures of assets having a value in excess of FF 1 billion; and (c) strategic alliances and strategic industrial and financial cooperation agreements.[1738]

6.1005. The same Shareholders' Agreement accorded Lagardère the right to appoint four members of the 16-member Supervisory Board, and to *jointly appoint* two other members with the French State, which itself was accorded the right to appoint six Supervisory Board members. Another four Supervisory Board members were to represent employees. The French State and Lagardère agreed to appoint Jean-Luc Lagardère as the President of the Supervisory Board.[1739] The French State and Lagardère were also empowered to *jointly appoint* the Management Board, taking into account proposals made by Lagardère[1740], and each held the same right to request the removal of any of its members, as well as the chair of the Supervisory Board.[1741] Finally, the French State retained a "golden share", pursuant to Decree No. 99-97 adopted on 15 February 1999, which entitled it to: (a) approve share purchases resulting in ownership interests exceeding 10% or any multiple thereof, (b) appoint a non-voting seat on the Supervisory Board for a member appointed by the Ministry for Defence, and (c) block any decision relating to the ballistic missile business.[1742]

6.1006. In our view, the above formal *indicia* do not show that the French State surrendered control of ASM to Lagardère or to any other shareholder. Rather, it is apparent that the French State moved from a position of complete control over Aérospatiale to *complete control* over ASM,

[1734] European Union's first written submission, paras. 319-324; and second written submission, para. 253.

[1735] United States' second written submission, para. 259; and response to Panel question No. 9.

[1736] ASM Shareholders' Agreement, (Exhibit EU-59) (BCI), preamble.

[1737] ASM Shareholders' Agreement, (Exhibit EU-59) (BCI), art. 11. The European Union explains that Article 356-1-3 of the Law of 24 July 1996 reads in relevant part: "Sont considérées comme agissant de concert les personnes qui ont conclu un accord en vue d'acquérir ou de céder des droits de vote ou en vue d'exercer des droits de vote pour mettre en oeuvre une politique commune vis-à-vis de la société ... Les personnes agissant de concert sont tenues solidairement aux obligations qui leur sont faites par la loi et les règlements". (European Union's first written submission, fn 404)

[1738] ASM Shareholders' Agreement, (Exhibit EU-59) (BCI), art. 7.

[1739] Aérospatiale-Matra Offering Memorandum, 25 May 1999, (Exhibit EU-58), p. 139 ("The French State and Lagardère have announced their intention to appoint Jean-Luc Lagardère to the post of President of the Supervisory Board").

[1740] ASM Shareholders' Agreement, (Exhibit EU-59) (BCI), art. 6.4 ("Les membres du directoire et le président du directoire de la Société sont désignés d'un commun accord par l'État et le Partenaire Stratégique Privilégié, compte tenu de propositions du Partenaire Stratégique Privilégié").

[1741] ASM Shareholders' Agreement, (Exhibit EU-59) (BCI), art. 6.5.

[1742] Aérospatiale-Matra Offering Memorandum, 25 May 1999, (Exhibit EU-58), p. 28; and ASM Shareholders' Agreement, (Exhibit EU-59) (BCI), preamble.

in respect of the matters covered by its "golden share", and *joint-control* with respect to all other matters. We do not see how the fact that Lagardère was given the right to make proposals in relation to certain issues means that Lagardère exercised "effective control" over ASM's business[1743], given that Lagardère was represented by fewer Board members than the French State and, at best, could take certain decisions only in concert with the French State. Moreover, to the extent that the French Government's strategic goals for the merger were recalled in various parts of the ASM Shareholders' Agreement, it is apparent that the French State (and not Lagardère) from the outset established the general direction that the company was expected to follow. These key features of the transaction appear to us to do anything but leave Lagardère free to manage the merged entity in accordance with only its *own* economic and strategic interests.

6.1007. The European Union argues that the "economic reality" of the deal, which resulted in the French State holding 47.7% of ASM, and private investors holding the remainder, created a "collective of shareholders whose common interest was that the company would maximise its profits so that they would obtain a market return on the share price they paid".[1744] According to the European Union, this majority private ownership "dictated a new economic reality for the company, the actions of which were required to adhere to the profit-maximising objectives of its private shareholders".[1745]

6.1008. We recognize that a private shareholder will want to seek a market-based return on its investment, and that this is no doubt what Lagardère and all those that participated in the ASM IPO had in mind. The fact remains, however, that these private shareholders did not have exclusive control over ASM, and they could not, therefore, "dictate" its operations. As already noted, the French State retained complete control over ASM in respect of the matters covered by its "golden share", and *joint-control* with Lagardère in respect to all others. In this context, the "profit-maximising objectives" of its private shareholders could only be pursued if they were shared by the French State. Thus, ultimately, the "economic reality" of the ASM transaction would be the one that could be agreed with the French State, with the exception of matters covered by the "golden share", where the "economic reality" would be determined exclusively by the French State.

6.1009. On this final point, we recall that the "independent panel of experts" report into the valuation of MHT and the fairness of the exchange ratio agreed between Lagardère and the French State observed that one element of uncertainty "going beyond the inherently difficult nature of all forecasts" was likely to be "the effect of {the substantial} off-balance sheet commitments" associated with "the participation of Aérospatiale in the Airbus consortium". At the very least, this statement suggests that ASM's business prospects would be intimately linked with the performance of the Airbus Industrie consortium.[1746] It is, therefore, instructive, in our view, to recall that the transfer of the French State's 45.76% interest in Dassault Aviation to Aérospatiale had been considered necessary in order to increase the chances that the planned "privatization" of Aérospatiale could occur as soon as possible, which was itself necessary to improve the French Government's position in its negotiations with other Airbus governments over the terms of the consolidation of the European aerospace industry.[1747] Likewise, the United States argues that "the French government set for itself the political goal to 'create a national champion' in the aerospace and defense industry, which would be better positioned to negotiate with its British and German counterparts".[1748] Moreover, according to the United States:

> Press reports also confirmed that the ASM merger plan was adopted in reaction to a prospective merger between Dasa and BAE, which would have resulted in the French

[1743] European Union's first written submission, para. 319.
[1744] European Union's first written submission, para. 323.
[1745] European Union's first written submission, para. 323.
[1746] At the time of the ASM merger, the Airbus Consortium was made up of CASA (a company wholly-owned and controlled by the Spanish State), and Deutsche Airbus and British Aerospace (both of which had been to different degrees previously owned and controlled by Germany and the United Kingdom), in addition to Aérospatiale. (Panel Report, *EC and certain member States – Large Civil Aircraft*, section VII.E.1 Attachment: Corporate History of Airbus, pp. 360-361).
[1747] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1409; United States' response to Panel question No. 8; and European Union's comments on the United States' response to Panel question No. 8.
[1748] United States' response to Panel question No. 8 (quoting "Aérospatiale-Matra Merger in Weeks – Official", Reuters, 11 February 1999, (Exhibit USA-560).

> industry being "clearly outgunned" and "threatened" its "traditional dominance of the Airbus partnership". … For this reason, "Prime Minister Jospin secretly endorsed a bold plan to privatize Aérospatiale and merge it with Matra, a large defense contractor controlled by Lagardère. Jospin reasoned that since the government would retain a large stake, it could still pretty much call the shots. 'We had to be as industrially strong as possible to stay in the game', remembers Frederic Lavenir, a key high-ranking Finance Ministry official who helped structure the merger."[1749]

6.1010. The European Union denies the accuracy of these reported assertions[1750], and there is no way for us to verify their correctness or give them more than only very limited probative value. Nevertheless, we believe that they are broadly in line with our own assessment of the deal that was actually struck in the light of the evidence we have reviewed. Accordingly, for all of the above reasons, we find that the European Union has failed to demonstrate that the nature of the "transfer of control" that resulted from the ASM merger enabled the new private owners to manage ASM on market terms, solely in pursuit of their own economic and strategic interests.

d Conclusion with respect to the 1999 merger of Aérospatiale and Matra Haute Technologies

6.1011. Thus, when considered in the light of each of the three separate opinions issued by the Members of the Appellate Body Division serving in the original appeal on the question whether "partial privatizations and private-to-private sales" transactions can "extinguish" prior subsidies, we find that the 1999 merger of Aérospatiale with MHT did not "extinguish" the relevant subsidies.

The "overall EADS transaction"

a Were the Relevant Transactions Made at "Arm's Length"?

6.1012. In this subsection of our analysis, we will examine whether the "overall EADS transaction" was made at "arm's length"[1751] by determining the extent to which the European Union has established that it involved two or more independent, unrelated, parties acting in their own interest. We recall that the European Union's submissions are based on only two of the three sets of transactions which we understand resulted in the creation of EADS, namely: (a) the agreement between the Airbus partners to combine their activities on the basis of the valuations of the merging entities' respective assets, pursuant to which, at least initially, 56.46% of the shares in EADS would be held by the ASM shareholders, 37.29% of the shares in EADS would be held by DaimlerChrysler, and 6.25% of the shares in EADS would be held by SEPI; and (b) the issuance and sale of shares part of the "global offering".[1752]

6.1013. The European Union argues that the "overall EADS transaction" was done at "arm's length" because each of the parties "retained reputed investment banks to assess the proposed deal and establish the relative value of the merging entities". The European Union's core submission in this regard appears to be that the French, German and Spanish parties were each independently advised by leading experts in the fields of investment, financing, accounting and law, in accordance with "common practice in high-stakes merger and acquisition transactions".[1753]

6.1014. The United States maintains that because of the "EADS transaction" involved only a corporate restructuring of pre-existing French, German, Spanish and UK corporate entities into a single entity known as EADS, "an inquiry into whether the consolidation was at arm's length … is not relevant".[1754] More specifically, the United States argues that the shares purchased by

[1749] United States' response to Panel question No. 8, fn 16 (quoting Jean Rossant, "Birth of a Giant: The inside story of how Europe's toughest bosses turned Airbus into a global star: EADS", *BusinessWeek*, 10 July 2000, (Exhibit USA-561), p. 170).
[1750] European Union's comments on the United States' response to Panel question No. 8.
[1751] See our initial discussion of the "arm's length" standard, above at para. 6.973-6.973.
[1752] See above para. 6.956-6.956.
[1753] European Union's first written submission, paras. 327-334.
[1754] United States' response to Panel question No. 11.

employees did not represent "arm's length" transactions because those purchasers were "related to the owners of and sellers of the shares, and whose interests were intertwined with them".[1755]

6.1015. We note that the EADS Offering Memorandum confirms that a number of investment banks, accounting and law firms were involved in advising the different owners of the French, German and Spanish Airbus partners in relation to their relative asset valuations and the "global offering". Thus, there is no evidence before us to suggest that the main actors were not independently advised. We recall, however, that in dismissing the European Union's "extraction" arguments in the original proceeding, we found that:

> Although the European Communities characterizes DaimlerChrysler as a "minority shareholder" in EADS following the contribution of Dasa's aerospace-related assets and activities to EADS, DaimlerChrysler and a grouping of the French government, Lagardère and French financial institutions were to jointly control EADS through a contractual partnership, to which the Spanish government, through SEPI, was also a party. The former "owners" of the aeronautics-related assets and activities of Dasa and CASA (*i.e.*, DaimlerChrysler and the Spanish government, respectively), were to jointly control the new "owner" of those assets and activities (EADS and subsequently Airbus SAS) through the EADS contractual partnership, to which both Dasa and SEPI were parties. Although the EADS transaction altered the legal ownership of the aeronautics-related assets and activities of Dasa and CASA, it was structured so as to maintain the overall interests of DaimlerChrysler and the Spanish government *in Airbus Industrie as a whole*.[2218] (emphasis original; footnotes omitted)
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> ———————————
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> [2218] Rather than holding and exercising their membership interests in Airbus Industrie directly through subsidiaries such as Dasa and CASA, DaimlerChrysler (through Dasa) and the Spanish government (through SEPI) were members of a contractual partnership that exercised voting rights in respect of 65.48 percent of the outstanding shares of EADS. As a practical matter, the nature of control that DaimlerChrysler and the Spanish government exercised over the LCA activities of Airbus through EADS was substantially the same as the control that they had previously exercised over the LCA activities of Airbus as members of the Airbus Industrie consortium."[1756] (footnote original)

6.1016. As we found in the original proceeding, and for the reasons we explain in more detail below[1757], the "overall EADS transaction" did not substantially alter the nature of the control over Airbus' LCA activities. Following the combination of the French, German and Spanish Airbus partners under the umbrella of EADS, the entities that controlled this portion of Airbus' LCA activities did not change. To this extent, we agree with the United States that, when it comes to Airbus' LCA activities, the "overall EADS transaction" is best characterized as a corporate restructuring and consolidation of activities previously undertaken by the same entities. Thus, unlike the ASM merger, which saw two economic actors operating in related fields merge what were essentially separate business activities, the combination of the LCA activities of ASM, DASA and CASA, simply modified the corporate structure through which pre-existing business activities would be pursued in the future. In this light, it might well be possible to argue (as we understand the United States does) that the Airbus partners in this aspect of the "EADS transaction" were related parties that did not pursue entirely independent interests with respect to all aspects of the transaction.[1758] However, in our assessment, the United States has not done enough to convince us that this is indeed what transpired in the present circumstance. Thus, while this aspect of the "EADS transaction" involved the consolidation of the French, German and Spanish Airbus partners' existing LCA activities under a new corporate but substantially unchanged control structure, this alone is not a sufficient basis to convince us that the related parties did not act independently in

[1755] United States' response to Panel question No. 11.
[1756] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.275.
[1757] See below paras. 6.1025-6.1035.
[1758] In this respect, we note that footnote 48 of the SCM Agreement stipulates that, in the context of a countervailing duty investigation, two entities may be deemed to be "related" for the purpose of defining a "domestic industry" when *inter alia* "together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers". The same text appears in footnote 11 of the Anti-Dumping Agreement.

pursuit of their own interests in agreeing to the valuations of their respective asset contributions or the issuance and sale of EADS shares through the "global offering".

6.1017. We are also unconvinced by the United States' argument that the EADS shares purchased by "employees" were not made at "arm's length" simply because of the existence of a shareholder-employer-employee relationship. Our understanding of this particular aspect of the "global offering" is that it did not involve a negotiation between the Airbus partners, EADS *and their employees*. Rather, it appears that the Airbus partners agreed on issuing a particular number of shares at a discounted price to qualifying employees *unilaterally* within the context of the "overall EADS transaction".

6.1018. Thus, on the basis of the evidence that is before us, we are unable to agree with the United States' contention that the transactions leading to the consolidation of the French, German and Spanish Airbus activities under the umbrella of EADS were not made at "arm's length". Accordingly, we find that the European Union has established that both the valuations and the resulting share transfers that formed part of the "EADS transaction" were undertaken at "arm's length".

b Were the relevant transactions for "fair market value"?

6.1019. The European Union maintains that the valuations of the assets contributed by the French, German and Spanish Airbus partners to the "EADS transaction" were set at "fair market value" because: (a) they were agreed in the light of the due diligence carried out by reputable finance, accounting and legal experts advising each of the relevant parties independently; and (b) they were approved (as far as the contribution of CASA and the French State's interests in ASM were concerned) by Spanish and French "privatization authorities".[1759] In addition, according to the European Union, the prices paid by institutional investors in the "global offering" were set at levels representing "fair market value" as they reflected the value attributed to EADS by the investment banks.[1760] While the European Union appears to have explicitly accepted that the price set for the shares sold to "employees" was not market-based[1761], it argues that this fact cannot "cast any doubt on the 'fair market value' … of the transaction as a whole".[1762]

6.1020. The United States argues that the "EADS transaction" is "not the type of transaction that qualifies as a candidate for an extinction event" because it merely involves a corporate restructuring. For this reason, the United States maintains that "an inquiry into whether the consolidation was … for fair market value is not relevant". More specifically, however, the United States submits that the fact that the "global offering" was made at different prices to three categories of purchasers implies that "as a matter of logic, at least two of the three categories of shares must have been at non-fair market value prices, because only one such price exists".[1763]

6.1021. In essence, the only reason the United States advances to support its contentions about the non-fair market value of the share sale transactions is that the "global offering" involved three different prices, instead of one. The United States makes no argument and introduces no evidence in respect of the valuations that were used to establish the EUR 19.00 per share price paid by institutional investors. Thus, the United States does not appear to contest the "fair market value" of the EUR 19.00 share price. The question before us is therefore whether the EUR 18.00 share price paid by "retail" investors and the EUR 15.30 share price paid by "employees" were "fair market" prices. The fact that these prices were *less than* the agreed "fair market value" of an EADS share suggests that they cannot also represent the "fair market value" of an EADS share, unless more than one "fair market value" of EADS exists. However, the European Union does not make this argument. Rather, after asserting that the discounting of shares offered to "retail" investors and "employees" is a common practice in IPOs, the European Union submits that this

[1759] European Union's first written submission, paras. 326-334 and 339.
[1760] European Union's first written submission, para. 339.
[1761] "All of the shareholders in EADS (with the exception of the employees), paid for their shares a market price established by reference to the value of the company as determined by independent investment banks". (European Union's first written submission, para. 339)
[1762] European Union's comments on the United States' response to Panel question No. 11.
[1763] United States' response to Panel question No. 11.

fact alone cannot "cast doubt on the 'fair market value' of the *transaction as a whole*".[1764] This suggests to us that the European Union accepts that the EADS share prices paid by "retail" investors and "employees" were not strictly consistent with the "fair market value" of EADS.[1765] Nevertheless, in the light of its view that such pricing practices are "typical" for IPOs, the European Union submits that the "fair market value" of the "EADS transaction" *overall* cannot be questioned.

6.1022. The European Union draws support for this latter proposition from the panel's "extinction" findings in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, which the European Union asserts involved "privatization transactions" on terms that were "almost identical with the terms of the EADS transaction in 2000". However, even assuming that the European Union's factual assertions were correct, we would be reluctant to accept the implications the European Union draws from the panel findings in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* for the purposes of this proceeding, because the specific question that is now before us was simply not at issue in that case. Indeed, the European Union has not pointed to any specific finding made by the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* on the question the United States' arguments have raised.

6.1023. Ultimately, however, we believe it is not necessary for us to come to any definitive view on this matter for the purpose of the "extinction" analysis that we must perform in respect of the "creation of EADS" because, for the reasons we explain in the following subsection, the relevant transactions do not involve the degree of "transfer of control" needed to establish the "extinction" of subsidies, in the light of our understanding of the views expressed by the second Appellate Body member's separate opinion.

6.1024. Thus, for all of the above reasons, we find that the European Union has established that the valuations of the assets contributed by the French, German and Spanish Airbus partners to the "EADS transaction" reflected their "fair market value" and that, consequently, the EUR 19.00 share price paid by institutional investors also reflected the "fair market value" of EADS. However, in the light of the findings we make in the following subsection of our analysis, we make no ruling on whether the European Union has established that the share prices paid by "retail" investors and "employees" were equally at "fair market" levels, and we express no views about what the consequences would be for the "fair market value" of the "overall EADS transaction", were those prices found to be below "fair market value".

c Did the relevant transactions "result{} in a transfer of control"?

6.1025. We recall that in this subsection of our Report, we are examining whether the European Union has made out its claims of "extinction" on the basis of the separate opinion articulated by the *second* Appellate Body member concerning the extent to which "partial privatizations and private-to-private" share transfers may "extinguish" a subsidy. In our analysis of the extent to which the 1999 merger of Aérospatiale and MHT resulted in the requisite "transfer of control", we expressed some misgivings about the European Union's interpretation of the second Appellate Body member's views on the concept of "control". In particular, we raised a number of questions about whether the "qualitative change in control" test laid out by the European Union was a correct interpretation of the second Appellate Body member's separate opinion. Nevertheless, we went on to evaluate the alleged "extinction" event by this standard, concluding that the evidence does not support a finding that the ASM transaction involved the degree of "transfer of control" necessary to "extinguish" the relevant subsidies. We now proceed to examine the "EADS transaction" on the basis of the same test – namely, whether the "new owner's interest {is} 'sufficiently substantial' in order to 'allow the new private owner to ensure that the company is run on market terms'".

6.1026. The European Union maintains that the "EADS transaction" brought about a qualitative change in the way that the "four founding companies exercised their influence over EADS' LCA-related activities". First, according to the European Union, the fact that these companies "paid a

[1764] European Union's comments on the United States' response to Panel question No. 11. (emphasis added)

[1765] As already noted, the European Union appears to have explicitly accepted that the price set for the shares sold to "employees" was not market-based. See above para. 6.1019.

market price for their ownership" meant that they "needed to manage EADS in a manner that would ensure a market return on their investment", particularly as regards DaimlerChrysler and Lagardère. Second, the European Union notes that in addition to DaimlerChrysler and Lagardère, the EADS transaction created an additional "collective of 30 percent of newly-created private shareholders, who equally pursued the interests of obtaining a market return on their investments". Thus, the European Union submits that "with a total of over 60 percent private ownership … EADS can but be managed in the same way as any privately owned, non-subsidised company".[1766]

6.1027. The United States, on the other hand, argues that the consolidation of the Airbus partner's LCA-related activities under EADS through the transactions at issue did not result in any transfer of ownership and control. Rather, according to the United States, the EADS consolidation was "carefully designed to preserve the pre-existing balance of ownership, responsibility for production, and workshare allocations that had already existed".[1767] The United States finds support for its assertion in *inter alia* the following statements appearing in the European Commission's Decision approving the combination of the Airbus partners under the European Communities' Merger Regulation:

> Most of the parties' activities in commercial aircraft are already integrated through Airbus (formed in 1967 as a *Groupement d'Interet Economique* (GIE) under French law), where each of Aérospatiale-Matra and DASA hold 37.9% of shares and where CASA holds 4.2% of shares, the remaining 20% of shares being British Aerospace Systems ("BAe Systems").
>
> After the operation, EADS will therefore own 80% of shares in Airbus. However, there is no indication that the operation will affect the quality or nature of control of Airbus. First the proposed transaction does not lead to a change from joint to sole control by EADS, because BAe Systems maintains its veto rights vis-à-vis all strategic decisions. Secondly, the remaining shareholders do not obtain additional veto rights or additional board members. And finally, the proposed transaction has no impact on the work share distribution between the Airbus Partners. Accordingly, there is no indication that the operation will after the competition position of Airbus.[1768] (emphasis original)

6.1028. As regards the combination between the EADS partners and BAE Systems that was announced in June 2000, the United States relies upon a press release issued by the European Commission on 18 October 2000 stating *inter alia*:

> The proposed transaction constitutes a restructuring and rationalisation of the existing legal partnership between the parties. EADS and BAES have agreed to contribute all of their Airbus activities to AIC. Upon completion of the transaction, EADS and BAES will hold respectively 80% and 20% of the shares in AIC, which in turn will hold all of the shares in the parties' Airbus operating companies, that is those in France, Germany and Spain which were already combined through EADS and those in the UK. EADS will have sole control over AIC.[1769]

6.1029. According to the European Union, the Commission's merger Decision supports its own submission that the EADS transaction resulted in a "significant change in control". In particular, the European Union argues that it follows from what is stated in paragraph 10 of the merger Decision that: "(a) EADS is a new company, which did not previously exist; and, (b) EADS would be under the joint control of the former shareholders of ASM and DASA, but would not be under the joint control of the former shareholders of CASA".[1770] For the European Union, these facts illustrate "a first 'change in control'", namely, "the Spanish state 'loses control' over CASA, which becomes part of EADS" and "through their joint-control over EADS, the French and German strategic shareholders indirectly acquire control over CASA, which they did not have before the

[1766] European Union's first written submission, paras. 340-343.
[1767] United States' second written submission, paras. 257-258; and response to Panel question No. 11.
[1768] EADS Merger Decision, (Original Exhibit US-479), (Exhibit USA-323), paras. 15-16.
[1769] European Commission Press Release, "European Commission Clears the Creation of the Airbus Integrated Company",18 October 2000, (Original Exhibit US-496), (Exhibit USA-324).
[1770] European Union's response to Panel question No. 18.

transaction".[1771] In addition, the European Union points out that following the EADS transaction, the "German strategic shareholder indirectly acquired control over ASM, which became part of EADS"; and likewise, the "French strategic shareholder indirectly acquired control over DASA, which became part of EADS".[1772]

6.1030. The United States argues that the European Union's statements are "irrelevant" to question at hand, which it sees as whether the EADS transaction resulted in the "transfer control over *Airbus* from the original owners to new owners". The United States notes that prior to the EADS transaction, ASM, DASA and CASA "affected control of Airbus only insofar as they were the mechanisms through which French, German and Spanish interests, respectively, exercised ownership and control over Airbus". Following the EADS transaction, the same interests exercised control of Airbus "directly through their ownership of EADS, so those instrumentalities were no longer needed".[1773]

6.1031. We note that the changes that occurred in the organization and control of Airbus' LCA activities before and after the EADS transaction are explained in the EADS Offering Memorandum in the following terms:

> *Current Organization and Control of Airbus Industrie*
>
> Airbus Industrie is currently organized under French law as a *groupement d'intérêt economique* (i.e., an economic industry grouping), which is a form of consortium. As such, it is an independent corporate entity whose primary purpose is to increase the economic activities of its Members, each of whom remains jointly and severally liable with the other Members for the obligations of Airbus Industrie. The current Members of Airbus Industrie are Aérospatiale Matra (with a 37.9% interest), Dasa (37.9%), CASA (4.2%) and BAE SYSTEMS (20%).
>
> Airbus Industrie is currently jointly controlled by Members and governed by its Members' Assembly, its Supervisory Board and its Executive Board. The allocation of voting rights corresponds proportionally to the Members' interests in Airbus Industrie and each of the Members has important rights relating to the determination of commercial policy. However, under the statutes and internal regulations, important decisions are to be reached unanimously and, if this fails, by a majority of 81% of the voting rights for certain decisions.
>
> *Effect on Airbus Industrie of EADS formation*
>
> *Airbus Integrated Company*
>
> All functions relating to Airbus aircraft programs are currently performed partly by the members under contractual arrangements with Airbus Industrie and partly within Airbus Industrie itself. The EADS Members have decided to place those functions carried out by the EADS Members under the common control of an integrated company, Airbus Integrated Company, so as to rationalize resources and facilities within a single organization, to overcome the limitations and drawbacks of the present form of consensual agreement and to implement a unified strategy with respect to research and development, manufacturing processes and purchasing. EADS Management believes that such integration will enable Airbus Industrie to manage its cost base more effectively, improve customer service and reach decisions more rapidly. …
>
> *Membership of Airbus Industries after the formation of EADS*
>
> The formation of EADS will reduce the number of Members ultimately controlling Airbus Industrie from four to two: EADS, holding 80% of the membership interests, and BAE SYSTEMS, holding the remaining 20%. Since BAE SYSTEMS will continue

[1771] European Union's response to Panel question No. 18.
[1772] European Union's response to Panel question No. 18.
[1773] United States' comments on the European Union's response to Panel question No. 18.

> *inter alia* to have veto rights relating to the business plan and the appointment of the senior management, it will continue to share in the control of Airbus Industrie.[1774] (emphasis original)

6.1032. In our view, this description of the impact of the "overall EADS transaction" on Airbus' LCA business does not support a finding that it resulted in a "significant change in control". On the contrary, as the European Commission itself found, the terms of the consolidation of the French, German and Spanish Airbus partners' LCA activities under EADS indicate that this aspect of the "EADS transaction" was not intended to "affect the quality or nature of control of Airbus".[1775]

6.1033. Prior to the EADS transaction, Airbus Industrie was "jointly controlled" by the consortium members, with each member having "important rights relating to the determination of commercial policy". After the transaction, Airbus SAS would be 80% owned by EADS and 20% owned by BAE Systems, with the latter having "veto rights" over certain decisions. In particular, while EADS' 80% shareholding meant that it would have "effective management control", BAE Systems' "specific minority rights" gave it the right to block certain "strategic decisions, such as acquisitions and divestitures valued at more than U.S.$500 million, approval of the three-year Business Plan (but not the annual budgets or the launch of new programs) as well as actions which would dilute" its own ownership interest.[1776] However, in relation to **[***]**, BAE Systems was entitled to **[***]**.[1777]

6.1034. The key decisions concerning the operations of EADS (including in relation to its participation in Airbus SAS) were to be taken by the EADS Board of Directors, which initially would comprise 11 members: four nominated by DaimlerChrysler; four nominated by SOGEADE; one by SEPI; and two Directors with "no connection with the DaimlerChrysler, SOGEPA {*Société de gestion de participations aéronautiques*} or Lagardère groups or the French State", nominated one each by DaimlerChrysler and SOGEADE. The initial Board of Directors also had two Chairmen, one each to be chosen from the DaimlerChrysler-nominated and SOGEADE-nominated Directors.[1778] All decisions of the Board of Directors would require a vote in favour of at least seven Directors, with the exception of decisions aimed at bringing about "any major change to the CASA Industrial Plan and/or its implementation" for a period of three years, which SEPI could block.[1779] The French State continued to maintain its veto right over decisions affecting the ballistic missiles business contributed through the assets of ASM.[1780] Thus, EADS' decision-making structure was such that DaimlerChrysler and SOGEADE held "joint control" over most decisions, with the exception of those affecting the "CASA Industrial Plan and/or its implementation". We do not understand the latter to have excluded CASA's Airbus LCA activities.

6.1035. Overall, we consider that, although not identical, the quality and nature of the control of Airbus' LCA activities after the "overall EADS transaction" remained substantially the same to what it was before, with all of the four Airbus Industrie consortium partners continuing, to varying degrees, to hold blocking rights over important decisions affecting their individual strategic and commercial interests. While the ownership structure of the Airbus business changed, introducing a new indirect "public" shareholding of 30%, its effective control remained in the hands of the same French, German, Spanish and UK strategic interests that owned and operated Airbus Industrie. In our view, these facts do not evidence the existence of "*new owners*" with a "sufficiently substantial" interest in the Airbus LCA business such that they are able "to ensure that the company is run on market terms". Thus, even by the European Union's own standard, we find that the EADS transaction did not result in the requisite "transfer in control" to "extinguish" a subsidy.

[1774] EADS Offering Memorandum, (Exhibit EU-55), pp. 73-74.
[1775] EADS Merger Decision, (Original Exhibit US-479), (Exhibit USA-323), para. 16.
[1776] EADS Offering Memorandum, (Exhibit EU-55), p. 123.
[1777] European Union's first written submission, para. 349 (citing the EADS – BAE Systems – Airbus SAS, Shareholders' Agreement, 11 July 2001, (Exhibit EU-70) (BCI), clause 7.2).
[1778] EADS Reference Document, Financial Year 2000, (Exhibit EU-61), p. 131; and EADS Offering Memorandum, (Exhibit EU-55), p. 126.
[1779] EADS Reference Document, Financial Year 2000, (Exhibit EU-61), pp. 18 and 131; and EADS Offering Memorandum, (Exhibit EU-55) p. 134.
[1780] EADS Reference Document, Financial Year 2000, (Exhibit EU-61), p. 21.

d Conclusion with respect to the "overall EADS transaction"

6.1036. Thus, when considered in the light of each of the three separate opinions issued by the Members of the Appellate Body Division serving in the original appeal on the question whether "partial privatizations and private-to-private sales" transactions can "extinguish" prior subsidies, we find that the "overall EADS transaction" did not "extinguish" the relevant subsidies.

The 2006 sale of BAE Systems' shareholding in Airbus SAS

a Were the relevant transactions made at "arm's length"?

6.1037. In this subsection of our analysis, we examine whether the 2006 sale by BAE Systems of its 20% interest in Airbus SAS was made at "arm's length"[1781] by determining the extent to which the European Union has established that it involved two or more independent, unrelated, parties acting in their own interest.

6.1038. The European Union recalls that EADS and BAE Systems did not control each other at the time of the relevant transaction, and for this reason were independent companies that pursued their own interests.[1782] The United States, however, submits that BAE Systems' sale of its 20% share interest was not an "arm's length" transaction because "the UK government orchestrated the transaction to protect its own political interests, at the expense of BAE's bargaining position". According to the United States, in the absence of the UK Government's alleged interference, BAE Systems "might have attempted to sell its stake … to a company other than EADS, thus attracting competitive bids and ultimately earning more money", or BAE Systems would have been able to sell its interest in Airbus without regard to the concessions EADS made to the UK Government in relation to: (a) the future location of work packages; (b) the future decision-making process of EADS; (c) the future establishment of a R&D centre in the United Kingdom; or (d) the appointment of a UK-government-approved Director to the EADS Board.[1783]

6.1039. The European Union rejects the United States' assertions, arguing first of all that the United States is wrong in suggesting that BAE Systems might have sold its stake in Airbus to a different purchaser because the EADS-BAE Systems Shareholders' Agreement afforded **[***]**.[1784] We do not agree with the European Union on this point of fact. In our view, **[***]**, but only that **[***]**. Moreover, we note that the specific Article of the Shareholders' Agreement the European Union relies upon stipulates that **[***]** elsewhere in the Shareholders' Agreement. Thus, **[***]** was not unqualified. However, because the copy of the Shareholders' Agreement submitted by the European Union as evidence is heavily redacted, neither we nor the United States can determine exactly what the cited **[***]** covered. In this light, we see no reason to reject the United States' assertion that it was possible for BAE Systems to have "attempted to sell its stake … to a company other than EADS". Nevertheless, we do not consider that this possibility is alone enough to demonstrate that the transaction was not concluded on an "arm's length" basis. Rather, in order to be persuaded of this point, we would have to accept that BAE Systems decided not to attempt to sell to a different purchaser because of the interference of the UK Government – in other words, that the BAE Systems decision to sell its interest in Airbus SAS to EADS (without attempting to explore a potentially different purchaser) was conditioned by the UK Government.

6.1040. Similarly, in order to accept that the four undertakings made by EADS to the UK Government at the time of the share transfer affected BAE Systems' bargaining position, and therefore the "arm's length" nature of the sale, we would have to be persuaded that they were a condition on the completion of the transaction or otherwise influenced the deal that was struck. The European Union argues that "the agreement through which BAE sold its shares to EADS does not include any such provisions", noting further that the United States "has not provided any references, or citations to that agreement in order to substantiate its assertion".[1785] It is unclear to us exactly what "agreement" the European Union refers to when it makes this submission, as the

[1781] See our initial discussion of the "arm's length" standard, above at para. 6.973.
[1782] European Union's first written submission, para. 351.
[1783] United States' second written submission, para. 263; and response to Panel question No. 8.
[1784] European Union's comments on the United States' response to Panel question No. 8 (citing the EADS – BAE Systems, Shareholder Agreement regarding Airbus SAS, Article 15, (Exhibit EU-411) (BCI)). In fact, the Shareholders' Agreement extends this right to both EADS and BAE Systems in respect of **[***]**.
[1785] European Union's comments on the United States' response to Panel question No. 8.

European Union has itself not supported its statements about the absence of any conditions in the "agreement" with reference to any particular piece of evidence. We note, however, that the EADS-BAE Systems Shareholders' Agreement (which we do not understand to be the "agreement" cited by the European Union) imposes an obligation on EADS to **[***]**. In particular, Article 7.7(e) of the Shareholders' Agreement reads as follows:

> **[***]**[1786]

6.1041. The United States argues that there was no commercial reason for BAE Systems or EADS to agree to these terms as they only favour the interests of the UK Government. Thus, by requesting EADS to enter into negotiations prior to the sale of BAE Systems' interest in Airbus, the United States maintains that the UK Government sought "**[***]**".[1787] In our view, this account of the UK Government's motivations finds reflection in the following statement contained in a report prepared by UK House of Commons Trade and Industry Committee:

> The potential political ramifications of the sale of BAE Systems' stake were also of concern to the DTI {UK Department of Trade and Industry}. Hence, prior to the sale, the Government actively engaged at ministerial and official level with EADS and Airbus in order to agree {*sic*} certain concessions from the parent company. In June 2006, the DTI announced that EADS had agreed to transfer to the Government the undertakings given to BAE Systems by EADS in 2000. The details of the undertakings are confidential, but essentially are designed to ensure that any decisions on the location of work packages affecting the UK are made on commercial grounds, without political influence or pressure. EADS also agreed to create a "transparency mechanism" with regard to decisions about location of work; to establish a UK research and development centre; and to appoint a non-executive director to the EADS board agreed by the UK government. EADS also said it would consider a secondary listing on the London Stock Exchange, although it has subsequently decided not to pursue this.[1788]

6.1042. The European Union submits that the United States reference to Article 7.7(e) of the Shareholders' Agreement is misplaced because "for example, it is not clear whether, under the law governing the Shareholders' Agreement, **[***]**".[1789] We note, however, that the European Union does not contend that the undertakings made by EADS in the Shareholders' Agreement were not enforceable by BAE Systems. Thus, even assuming *arguendo* that the UK Government could not actually **[***]** in its own capacity, it is apparent that BAE Systems could have compelled EADS' performance. Indeed, it is difficult to see why BAE Systems would have agreed to insert this and other provisions favouring the UK Government's interests into the Shareholders' Agreement[1790], if it did not consider that it had a right to compel EADS to perform its obligations. In this regard, we recall that the UK Government maintained a shareholding in BAE Systems at the relevant time, which interest was described by a member of UK House of Commons Trade and Industry Committee as a "golden share" "of strategic interest to the UK".[1791]

6.1043. Nevertheless, we agree with the European Union when it suggests that the fact that EADS undertook certain commitments for the UK Government in conjunction with the sale of BAE

[1786] EADS – BAE Systems – Airbus SAS, Shareholders' Agreement, 11 July 2001, (Exhibit EU-70) (BCI), art. 7.7(e).

[1787] United States' response to Panel question No. 8.

[1788] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume I: Report and formal minutes, 19 June 2007, (Exhibit USA-562), para. 32 and appendix 7 at p. Ev 55.

[1789] European Union's comments on the United States' response to Panel question No. 8.

[1790] Article 7.7 of the EADS-BAE Systems Shareholders' Agreement sets out a number of undertakings made by EADS in respect of **[***]**. (EADS – BAE Systems – Airbus SAS, Shareholders' Agreement, 11 July 2001, (Exhibit EU-70) (BCI))

[1791] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume I: Report and formal minutes, 19 June 2007, (Exhibit USA-562), p. Ev 20. We rely upon the existence of the UK Government's "golden share" in BAE Systems merely as evidence of the existence of a formal shareholding relationship between BAE Systems and the UK Government. As there is no evidence before us on the nature of the rights that the "golden share" afforded the UK Government, we make no finding about the extent to which it enabled the UK Government to control the general or any specific operations of BAE Systems.

Systems' interest in Airbus SAS does not automatically imply that the *sales* transaction was not done at "arm's length".[1792] As already noted, in our view, in order to accept the United States' contentions, we would have to be convinced that the sale of BAE Systems' shareholding was conditioned upon the relevant commitments undertaken by EADS *vis-à-vis* the UK Government or otherwise influenced by those commitments. On this particular point, however, we note that when asked directly by a member of the UK House of Commons Trade and Industry Committee what role was played by the UK Government in the sale of BAE Systems' interest in Airbus SAS to EADS[1793], the UK Minister of State (Industry and Region), Margaret Hodge MBE, MP, twice replied that in "the end the Government decided that this was a commercial issue for BAE."[1794] Moreover, in further discussions in the same Committee, it is suggested that the UK Government may have used its existing orders for the Airbus A400M as leverage in negotiations with EADS[1795], and that at least a part of the commitments obtained from EADS may have been sought by the UK Government within the context of its negotiations with EADS and Airbus in relation to the implementation of the Power8 programme.[1796]

6.1044. Thus, there is no doubt that the UK Government sought to protect its industrial interests once it discovered that BAE Systems had decided to sell its 20% shareholding in Airbus SAS. However, the evidence we have examined is, in our view, insufficient to demonstrate that the UK Government actually "orchestrated" the sales transaction or influenced its terms in such a way that compromised the independence of its two parties, EADS and BAE Systems. While EADS provided the UK Government with four commitments relating to its future operations in the UK following BAE Systems' divestment, it is not apparent from the evidence the United States has submitted that those commitments formed part of the deal that was struck in relation to EADS' acquisition of 100% ownership in Airbus SAS. Accordingly, we find that the European Union has established that BAE Systems' 2006 sale of its 20% interest in Airbus SAS was undertaken at "arm's length".

b Were the relevant transactions for "fair market value"?

6.1045. The European Union explains that the sales price for BAE Systems' 20% stake in Airbus SAS was established on the basis of a valuation prepared by an independent investment bank, Rothschild, jointly chosen by BAE Systems and EADS in accordance with the terms of the EADS-BAE Systems Shareholders' Agreement. Moreover, the European Union recalls that prior to the approval of the sale by BAE Systems' shareholders, BAE Systems also appointed PwC to conduct an audit of Airbus SAS to assess the adequacy of the sales price provided by Rothschild. Thus, according to the European Union, the EUR 2.75 billion sales price reflected the market value of BAE Systems' shareholding.[1797]

6.1046. The United States, on the other hand, argues that "real questions … exist" as to whether the BAE Systems–EADS share transfer was made for "fair market value". The United States finds support for this submission in a statement made by the BAE Systems' Chairman to its shareholders when he explained that "{t}he Price determined by Rothschild was significantly lower than had been expected by the general market", but the "terms of the Shareholders' Agreement preclude the Company from discussing with Rothschild the basis of Rothschild's determination of

[1792] European Union's comments on the United States' response to Panel question No. 8.

[1793] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume I: Report and formal minutes, 19 June 2007, (Exhibit USA-562), pp. Ev 19-20 ("Q114 Mr Hoyle: In the case of BAE did the Government support BAE in allowing it to go ahead with the sale or did they actually say 'We do not wish to see the sale proceed'?" and "Q115 Mr Hoyle: … so what role did we play and what influence have we got?'").

[1794] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume I: Report and formal minutes, 19 June 2007, (Exhibit USA-562), pp. Ev 19-20.

[1795] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume I: Report and formal minutes, 19 June 2007, (Exhibit USA-562), p. Ev 20 (Q116).

[1796] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume I: Report and formal minutes, 19 June 2007, (Exhibit USA-562), p. Ev 21 (Q120).

[1797] European Union's first written submission, paras. 346 and 351.

the Price".[1798] The United States also submits that HSBI contained in the Letter of Engagement between EADS, BAE Systems and Rothschild, suggests that the sales price did not reflect "fair market value".[1799] Finally, the United States maintains that a second valuation of BAE Systems' shareholding, which was apparently commissioned by BAE Systems prior to the Rothschild valuation, "may provide a more accurate valuation of Airbus near the time that BAE exercised its put option", and in light of the European Union's failure to provide this valuation when requested, the United States asks the Panel to draw the inference that it "indicates that the BAE share transfer was not priced at fair market value".[1800]

6.1047. As we understand it, one of the first steps in establishing the value of BAE Systems' stake in Airbus SAS was for EADS and BAE Systems to each appoint an investment bank to perform a separate valuation with a view to reaching a negotiated agreement on price.[1801] When EADS and BAE Systems could not find common ground, they appointed Rothschild to act as an "independent expert" and determine the final value that would be binding in the event that the sale went ahead. Rothschild made its determination after receiving information from EADS, Airbus and BAE Systems[1802], through a process (which is HSBI) defined in the Rothschild Letter of Engagement.[1803] The EADS-BAE Systems Shareholders' Agreement required that the price be determined following a set of specific instructions, including the following:

> **[***]**[1804]

6.1048. In our view, the fact that the valuation instructions agreed in the Shareholders' Agreement explicitly required consideration of the **[***]** of Airbus and the application of a **[***]** strongly suggests that the Rothschild valuation of BAE Systems' shareholding was market-based. Although it is true that the Chairman of BAE Systems at the time informed its shareholders that Rothschild's determination of price was "significantly lower than had been expected by the general market", we note that only three days after being informed of this price, BAE Systems announced its intention to audit the Airbus Group (in accordance with Article 10.6 of the Shareholders' Agreement) "in order to assist the Board in assessing its recommendation with regard to the Proposed Disposal".[1805] The results of this audit, which were conducted by PwC, led the Board of BAE Systems to conclude that:

> Airbus is facing a challenging short to medium term outlook, in particular with respect to certain of its principal programmes. The Board believes that a significant amount of management focus, time and investment will be required to address the issues currently facing Airbus to improve its operation and financial performance and thereby to increase its value. Inevitably, there are risks involved in such a recovery programme and, having reviewed the Audit, the Board is concerned about the possible cash requirements of the Airbus business in the medium term.
>
> The Board therefore believes that it is in the best interests of the Company to exit at the Price determined by the independent expert. In arriving at this judgement, it weighed with the Board that if it does not proceed with the Proposed Disposal, it may

[1798] United States' second written submission, para. 264 (quoting Dick Olver, BAE Chairman, Letter to BAE Shareholders, 11 September 2006, (Exhibit USA-331)).

[1799] United States' comments on the European Union's response to Panel question No. 16 (quoting a particular passage on page 2 and discussing other specific parts of the Rothschild Letter of Engagement, (Exhibit EU-351) (HSBI)).

[1800] United States' comments on the European Union's response to Panel question No. 16.

[1801] Article 14.6.2, EADS – BAE Systems – Airbus SAS, Shareholders' Agreement, 11 July 2001, (Exhibit EU-70) (BCI); Douglas Barrie and Robert Wall, "Divorce Proceedings: Investment institutions called in to resolve dispute of Airbus valuation", *Aviation Week & Space Technology*, 12 June 2006, (Exhibit USA-416); Dick Olver, BAE Chairman, Letter to BAE Shareholders, 11 September 2006, (Exhibit USA-331).

[1802] Dick Olver, BAE Chairman, Letter to BAE Shareholders, 11 September 2006, (Exhibit USA-331).

[1803] Rothschild Letter of Engagement, (Exhibit EU-351) (HSBI).

[1804] EADS – BAE Systems – Airbus SAS, Shareholders' Agreement, 11 July 2001, (Exhibit EU-70) (BCI), arts. 14.6.1 and 14.6.2.

[1805] Dick Olver, BAE Chairman, Letter to BAE Shareholders, 11 September 2006, (Exhibit USA-331).

> be necessary to retain BAE Systems' interest in Airbus for an extended period to be confident that it could be sold for materially more than the Price.[1806]

6.1049. We also note that less than one week after BAE Systems served upon EADS a formal notice of exercise of its put option, and *before* Rothschild was engaged to perform its valuation, Airbus announced delays to its A380 programme and as a result, anticipated shortfalls in earnings before interest and taxes (EBIT) for the years 2007 to 2010 of approximately EUR 500 million per annum relative to Airbus' original forecasts.[1807] It was reported that EADS share price fell 26% in one day as a result of these announcements.[1808] Indeed, such was the seriousness of the delays in the A380 programme, that Airbus' then-co-CEO, Noel Forgeard, and EADS then-co-chairman and the head of Airbus, Gustav Humbert, resigned on 2 July 2006 (the same day that Rothschild informed EADS and BAE Systems of its valuation).[1809]

6.1050. Having considered the above arguments and evidence, we find the United States' objection to the European Union's assertions concerning the "fair market value" of the price at which BAE Systems transferred its Airbus shareholding to EADS without merit. The main piece of evidence the United States relies upon to support its position is BAE Systems' opinion that the Rothschild price was "significantly lower than market expectations". However, the Board of BAE Systems ultimately appeared to accept this valuation, not because it was binding if it wanted to proceed with the sale, but rather because *inter alia* it felt that it would have to wait for an "extended period" to obtain a better deal. Furthermore, we find it difficult to accept that the valuation was not market-based in the light of the price calculation rules agreed in the Shareholders' Agreement, which presumably, BAE Systems could have argued had not been followed. Finally, the fact that the final valuation may have been less than initially anticipated by BAE Systems may be partly explained by the delays in the A380, which had a significant impact on Airbus' market value and market perceptions of its business. Thus, for all of the above reasons, we find that the European Union has demonstrated that the 2006 sale by BAE Systems of its 20% shareholding in Airbus SAS was for "fair market value".

c Did the relevant transactions "result{} in a transfer of control"?

6.1051. Once again, we recall that in this subsection of our Report, we are examining whether the European Union has made out its claims of "extinction" on the basis of the separate opinion articulated by the *second* Appellate Body member concerning the extent to which "partial privatizations and private-to-private" share transfers may "extinguish" a subsidy. In our analysis of the extent to which the 1999 merger of Aérospatiale and MHT resulted in the requisite "transfer of control", we expressed some misgivings about the European Union's interpretation of the second Appellate Body member's views on the concept of "control". In particular, we raised a number of questions about whether the "qualitative change in control" test laid out by the European Union was a correct interpretation of the second Appellate Body member's separate opinion. Nevertheless, we went on to evaluate the alleged "extinction" event by this standard, concluding that the evidence does not support a finding that the ASM transaction involved the degree of "transfer of control" necessary to "extinguish" the relevant subsidies. In the previous subsection we also found that by the measure of the same "qualitative change in control" test, the "overall EADS transaction" did not result in the requisite "transfer in control" that could "extinguish" a subsidy. We now proceed to examine the 2006 sale of BAE Systems' 20% interest in Airbus SAS to EADS on the basis of the same test − namely, whether the "new owner's interest {is} 'sufficiently substantial' in order to 'allow the new private owner to ensure that the company is run on market terms'".

6.1052. The European Union argues that EADS' acquisition of BAE Systems' stake in Airbus SAS, which resulted in EADS obtaining 100% control over Airbus' activities, meant that EADS could

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[1806] BAE Systems Press Release, "Board of BAE Systems PLC to recommend that shareholders vote in favour of proposed disposal of its Airbus shareholding", 6 September 2006, (Exhibit EU-66); and Dick Olver, BAE Chairman, Letter to BAE Shareholders, 11 September 2006, (Exhibit USA-331).

[1807] Dick Olver, BAE Chairman, Letter to BAE Shareholders, 11 September 2006, (Exhibit USA-331).

[1808] David Gow, "BAE's plan to sell Airbus stake in jeopardy", *The Guardian*, 3 July 2006, (Exhibit USA-415). We recall, in this regard, that part of the valuation rules set in the Shareholders' Agreement required the independent expert to use Airbus' "**[***]**" as one element in the construction of a price.

[1809] David Gow, "BAE's plan to sell Airbus stake in jeopardy", *The Guardian*, 3 July 2006, (Exhibit USA-415).

manage this business without any need to consider the rights that BAE Systems had negotiated under the EADS-BAE Systems Shareholders' Agreement. The European Union maintains that this brought about a "qualitative change in control" over Airbus SAS in the sense that EADS' ability to determine policy and direct the operations of Airbus increased.[1810]

6.1053. The United States argues that EADS' purchase of the BAE Systems' interest in Airbus resulted only in one (minority) co-owner of Airbus (BAE Systems) selling shares to another (majority and controlling) shareholder (EADS). As such, according to the United States, the transaction did not result in the transfer of ownership or control to a new owner. It simply resulted in the further consolidation of Airbus ownership within EADS.[1811]

6.1054. As already noted, prior to the 2006 sales transaction, EADS held an 80% ownership interest in Airbus SAS providing it with "effective management control", and BAE Systems a 20% interest with "specific minority rights", including "veto rights" over certain matters. At the completion of the 2006 sales transaction, Airbus SAS became a 100% owned and controlled subsidiary of EADS. To the extent that EADS was left to manage Airbus' activities without any need to consider the "specific minority rights" of BAE Systems, it is apparent that some "qualitative change in control" of Airbus did take place. However, we are not convinced that this change was as significant as the European Union claims, as EADS already held "effective management control" over Airbus' LCA activities prior to the transaction and, moreover, there is no indication that after the completion of the transaction, Airbus would be run by EADS in a manner that was dramatically different to how it had been operated when BAE Systems was involved. In any case, there is no doubt that the share sale transaction did not create a "new private owner". The ownership and control of Airbus SAS that changed hands was not transferred to a *new* private entity, but rather consolidated into the hands of the existing owner, EADS. We cannot see how these features of the transaction satisfy the elements of the "qualitative change in control" standard posited by the European Union, which we recall would require that the "new owner's interest {is} 'sufficiently substantial' in order to 'allow the new private owner to ensure that the company is run on market terms'". We find, therefore, that even by the European Union's own standard, the 2006 sale of BAE Systems' 20% interest in Airbus SAS to EADS did not result in the degree of "transfer in control" needed to "extinguish" a subsidy.

d Conclusion with respect to the 2006 sale of BAE Systems' 20% interest in Airbus SAS

6.1055. Thus, when considered in the light of each of the three separate opinions issued by the Members of the Appellate Body Division serving in the original appeal on the question whether "partial privatizations and private-to-private sales" transactions can "extinguish" prior subsidies, we find that the 2006 sale of BAE Systems' 20% interest in Airbus SAS to EADS did not "extinguish" the relevant subsidies.

Subsequent aircraft based on the design and technology of the A300 and the A310

Arguments of the United States

6.1056. The United States argues that even if the commercial life of a specific aircraft model ends, the life of a subsidy that contributed to its existence may extend to subsequent models that are based on the original. Thus, the United States argues that the end of the commercial lives of the A300 and A310 programmes in 2007 did not bring about the end of the lives of the respective LA/MSF subsidies, because Airbus originally envisioned two subsequent aircraft, the A330 and A340, as derivatives of the A300, and based the fuselages of both aircraft on those of the A300 and A310.[1812] According to the United States, these facts depict "intervening events" that show how the subsidies provided for the A300 and A310 "materialized over time", and therefore, in

[1810] European Union's first written submission, paras. 347-350 and 352-353; and second written submission, para. 262.

[1811] United States' second written submission, para. 260.

[1812] United States' second written submission, para. 182 (citing Guy Norris and Mark Wagner, *Airbus A340 and A330*, 1st edn (MBI, 2001), (Exhibit USA-320)).

keeping with the Appellate Body's guidance, demonstrate that the "lives" of the A300 and A310 LA/MSF subsidies continue with the A330 and A340.[1813]

Arguments of the European Union

6.1057. The European Union submits that there are at least three reasons why the Panel should dismiss the United States' argument concerning the alleged continuation of the "lives" of the A300 and A310 LA/MSF subsidies after the termination of the respective aircraft programmes. First, the European Union notes that the United States has failed to overcome the jurisdictional limitations which the European Union contends exist when a complainant alleges that the life of a subsidy has been extended because of an "intervening event".[1814] Second, the European Union maintains that the United States' position is inconsistent with the Appellate Body's conclusion that "as a matter of logic, … LA/MSF for the A300 and A310 are likely to cause minimal, if any, adverse effects during the 2001-2006 reference period".[1815] And, third, the European Union argues that the United States' allegations are inconsistent with the terms of the LA/MSF agreements, which in the case of the A300 and A310, did not require revenues from sales of the A330/A340 to be used for the purpose of making repayments under the respective LA/MSF agreements.[1816]

Evaluation by the Panel

6.1058. We understand the United States to argue that the launch of the A330/A340 amounted to an "intervening event" that extended the *ex ante* lives of the LA/MSF subsidies provided for the A300 and A310, because of the fact that the A330 and A340 were originally conceived as derivatives of the A300, with a fuselage based on those of the A300 and A310. In our view, the United States' position conflates the *life* of the A300 and A310 LA/MSF subsidies with their *indirect effects*.

6.1059. We have found above that it would be not unreasonable to equate the *ex ante* lives of the A300 and A310 LA/MSF subsidies to the expected "Marketing Lives" of the two specific LCA that were directly financed by those measures or to the expected "Loan Lives" of the relevant LA/MSF agreements. On either bases, the *ex ante* lives of the A300 and A310 LA/MSF subsidies were projected to come to an end somewhere between 1987 and 2004. While it is true that Airbus launched the A330/A340 at the beginning of this period in 1987, this does not mean that these later models of Airbus LCA *extended* the "lives" of the A300 and A310 LA/MSF subsidies beyond what was expected at the time the A300 and A310 LA/MSF agreements were concluded. There is simply no evidence before us to suggest that the "projected value" of the A300 and A310 LA/MSF subsidies was affected by the launch of the A330/A340. In contrast, there is considerable evidence and adopted panel and Appellate Body findings confirming that the *indirect effects* of the A300/A310 LA/MSF subsidies did in fact contribute to Airbus' ability to launch and bring to market the A330/A340 as and when it did.[1817] Thus, for example, the panel found in the original proceeding that the "learning", scope and financial effects of "LA/MSF provided for the previous LCA models, the A300, A310 and A320, played a significant role in placing Airbus in a position to be able to launch the A330/A340 project in 1987."[1818] Therefore, by arguing that the design commonalities of the A300/A310 and A330/A340 as originally launched evidence an "intervening event" that *extended* the "lives" of the A300/A310 LA/MSF subsidies, the United States conflates the "lives" of those subsidies with their "indirect effects". Accordingly, we are not persuaded by the United States' contentions concerning the "lives" of the A300/A310 LA/MSF subsidies.

[1813] United States' second written submission, para. 182.
[1814] European Union's comments on the United States' response to Panel question No. 150, para. 185.
[1815] European Union's second written submission, para. 169.
[1816] European Union's second written submission, para. 170.
[1817] A more detailed explanation and discussion of the *direct* and *indirect effects* of LA/MSF is set out below at paras. 6.1492-6.1514.
[1818] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1939 and fn 5654.

Termination of the A340 programme

Arguments of the United States

6.1060. The United States argues that the end of the A340-500/600 programme in 2011 was an "intervening event" that turned the subsidy that would have been provided through the below-market repayments outstanding at the time of the programme's termination into a subsidy paid in the form of a grant to Airbus equivalent to the amount of outstanding debt on the relevant LA/MSF loans. To the extent that this grant did not confer any advantage on the "defunct" A340-500/600, the United States argues that it should be considered to be a generalized subsidy to Airbus, whose life would reflect the life of productive assets or the average life of a generic aircraft programme, ending in approximately 2028.[1819]

Arguments of the European Union

6.1061. The European Union maintains that the United States errs when it argues that the premature termination of the A340-500/600 programme converted the benefit provided through this LA/MSF measure, from the below-market interest rates charged on the repayment of principal used to develop the A340-500/600, into a grant equal to the outstanding debt for the purpose of benefitting all Airbus LCA in general. According to the European Union, Airbus had no outstanding debt for the relevant members State governments to forgive when the A340-500/600 programme was terminated because like all other LA/MSF agreements, repayment obligations under the A340-500/600 LA/MSF measures were success-dependent, meaning that Airbus incurred debts only upon the sale of LCA. The European Union highlights that it is this characteristic of LA/MSF that gives it its risk-sharing qualities, recalling further that it was this very quality of LA/MSF that was captured in the project-specific risk premium used in the original proceeding to determine the existence of benefit. In this light, the European Union submits that to argue that a generalized subsidy was provided to Airbus following the termination of the A340-500/600 programme is like arguing that the same LA/MSF contract conferred a "second subsidy".[1820]

Evaluation by the Panel

6.1062. The United States characterizes the termination of the A340 programme as an "intervening event" that *extended* the *ex ante* lives of the LA/MSF subsidies provided for the A340-500/600, by essentially turning the outstanding debt owed under the relevant LA/MSF agreements into a cash grant that Airbus used for the purpose of its other LCA models. In our view, the termination of the A340 programme in or around November 2011 is not an event that can be said to have altered the expectations held at the time of the grant of the relevant LA/MSF subsidies about how the "projected value" of those subsidies would "materialize over time". It cannot, therefore, amount to an "intervening event".

6.1063. First, we note that the termination of the A340 programme only one year ahead of the expected duration of its marketing life did not prevent Airbus from using the relevant LA/MSF subsidies, *precisely as originally envisaged*, to develop and bring to market the A340-500/600 derivatives. Second, as suggested by the European Union, the fact that the repayment terms of the relevant LA/MSF agreements were unsecured and success-dependent reveals that the possible termination of the A340 programme before the full repayment could be achieved was an inherent feature of the LA/MSF agreements themselves. As we see it, this implies that the French and Spanish governments (and Airbus) must have included in their anticipated scenarios for the use of the LA/MSF subsidies, the possibility that the A340 programme may not have been as successful as planned. Indeed, it is precisely because the full repayment of the LA/MSF agreements could not be guaranteed and was dependent upon the fortunes of the A340-500/600 that both the European Union and the United States agreed that it was appropriate (and required) for the relevant European Union member States to charge a product-specific risk premium on their loans. It follows, therefore, that the possibility of the termination of the A340 programme before full repayment of the LA/MSF loans was not an unexpected event, and must have been contemplated

[1819] United States' second written submission, paras. 180-182, and 183; and response to Panel question No. 150, para. 72.

[1820] European Union's second written submission, paras. 173-181.

and used to inform the expectations about how the "projected value" of the relevant LA/MSF subsidies would "materialize over time" when they were granted.

6.1064. Thus, we do not agree with the United States when it argues that the termination of the A340 programme in or around November 2011 was an "intervening event" that extended the *ex ante* lives of the French and Spanish government LA/MSF subsidies provided for the A340-500/600.

Conclusion with respect to the alleged "intervening events"

6.1065. Thus, in summary, our conclusions with respect to the parties' submissions concerning the existence of the four kinds of "intervening events" analysed above are as follows:

i. the European Union is precluded from advancing, for a second time, the same arguments about the alleged "extraction" of subsidies that were considered and rejected by both the panel and the Appellate Body in the original proceeding and, therefore, the subject of the rulings and recommendations adopted by the DSB;

ii. the European Union has not established that the alleged partial privatization of Aérospatiale in 1999, the transactions leading to the creation of EADS in 2000, and BAE Systems' 2006 sale of its 20% ownership interest in Airbus SAS to EADS, "extinguished" the benefit of all of the subsidies at issue that were granted prior to these transactions;

iii. the fact that the fuselages of the original A330 and A340 were based on the A300/A310 does not render the 1987 launch of the A330/A340 an "intervening event" that extended the "lives" of the A300/A310 LA/MSF subsidies; and

iv. the termination of the A340 programme in November 2011 does not constitute an "intervening event" that extended the *ex ante* "lives" of the French and Spanish government LA/MSF subsidies provided for the A340-500/600.

6.6.3.4.2.6 Repayment of "financial contributions"

Arguments of the European Union

6.1066. The European Union makes one final argument to support its submission that the "lives" of a number of the relevant LA/MSF subsidies came to an end before the end of the implementation period. In particular, the European Union maintains that where the principal of a subsidized loan, plus any interest due under the terms of that loan, are repaid by the recipient, the financial contribution that was initially granted is returned to the government, and the subsidy ends. According to the European Union, the Appellate Body made an express finding to this effect in the original proceeding when it stated that "the removal of the financial contribution" results in the "life" of a subsidy coming "to an end".[1821] On this basis, the European Union argues that to the extent that Airbus has repaid the entirety of the principal and interest owed to the European Union member State governments under the subsidized terms of certain LA/MSF agreements, the financial contributions provided thereunder must have been removed, implying that the subsidy must have come to an end.[1822] The European Union submits that this conclusion should be reached with respect to the following LA/MSF measures: French LA/MSF for the A300B/B2/B4, A300-600, A310-300, A320, A330/A340 and A330-200; Spanish LA/MSF for the A300B/B2/B4, A300-600, A320 and A330/A340; and UK LA/MSF for the A320 and A330/A340.[1823]

[1821] European Union's first written submission, para. 162 (citing Appellate Body Report, *EC and member States – Large Civil Aircraft*, para. 709); and second written submission, para. 107 (same).

[1822] European Union's first written submission, para. 163; and second written submission, paras. 104-110.

[1823] European Union's first written submission, paras. 168-181.

Arguments of the United States

6.1067. The United States maintains that the European Union is wrong when it argues that full repayment of the principal loaned to Airbus plus interest on the basis of *the subsidized terms* of the LA/MSF agreements removes the "financial contributions" provided to Airbus in a way that results in the expiration of the LA/MSF subsidies. On the contrary, the United States submits that the full repayment of LA/MSF on terms found to confer a benefit conveys the *full amount of the subsidy* upon its recipient, and therefore cannot bring about the end of the life of those subsidies. For the United States, in order to achieve the expiry of a subsidy, any such repayment would have to take account of both the financial contribution *and* the subsidy element, namely, the below-market terms of the subsidy.[1824]

6.1068. The United States submits that, contrary to the position taken by the European Union, the Appellate Body did not find in the original proceeding that the "removal of the financial contribution" results in the expiry of a subsidy. According to the United States, the Appellate Body's statement that the life of a subsidy may come to an end "either through the removal of the financial contribution and/or the expiration of the benefit" does not support the European Union's position. In the United States' view, the Appellate Body's statement was simply "an analytical starting point" reflecting "a position on which the parties agreed", but which the Appellate Body did not endorse. Indeed, the United States asserts that the Appellate Body found that once a subsidy exists, there is no need to inquire as to whether the financial contribution also exists, recalling the Appellate Body's observation that "the fact that a subsidy is 'deemed to exist' … once there is a financial contribution that confers a benefit does not mean that a subsidy does not continue to exist after the act of granting the financial contribution".[1825]

Evaluation by the Panel

6.1069. The European Union submits that the lives of a number of the challenged LA/MSF subsidies came to an end when Airbus made its final repayment of principal plus interest to the relevant governments pursuant to the terms of the relevant LA/MSF agreements. Accordingly, the European Union argues that the lives of the following LA/MSF subsidies came to an end between 1994 and 2011:

Table 13: Expected vs actual repayment of LA/MSF

LA/MSF Agreement	Start Year of LA/MSF	Expected Repayment[1826] (Loan Life)	Actual Repayment
France			
A300B	1971	**[***]**	1994
A300B2/B4	1974	**[***]**	1994
A300-600	1981	**[***]**	1996
A310-300	1984	**[***]**	1995
A320	1987	**[***]**	1999
A330/A340	1986	**[***]**	2011[1827]
A330-200	1996	**[***]**	2011[1828]

[1824] United States' second written submission, paras. 150-156; and opening statement (public), para. 12.

[1825] United States' second written submission, para. 152 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709).

[1826] Including, where relevant, royalties determined in accordance with the terms of the specific LA/MSF agreement and/or the contemporaneous forecast delivery schedule.

[1827] Airbus and the French State agreed to a financial settlement of the "outstanding payment obligations" under the relevant LA/MSF agreement, which was verified through a "fairness opinion" issued by PwC, and executed on 3 November 2011. Under the terms of this settlement, "Airbus agreed to pay the French State the present value of the remaining payment obligations, including outstanding principal and interest" **[***]**. According to the European Union, the settlement "achieved full repayment" of French LA/MSF for the A330/A340. (European Union's first written submission, paras. 176-177)

[1828] Airbus and the French State agreed to a financial settlement of the "outstanding **[***]**" under the relevant LA/MSF agreement, which was verified through a "fairness opinion" issued by PwC, and executed on 3 November 2011. According to the European Union, full repayment of principal plus interest had already been

LA/MSF Agreement	Start Year of LA/MSF	Expected Repayment[1826] (Loan Life)	Actual Repayment
Spain			
A300B/B2/B4	1974	**[***]**	1994
A300-600	1982	**[***]**	1995
A320	1984	**[***]**	1999
A330/A340	1988	**[***]**	**[***]**[1829]
UK			
A320	1985	**[***]**	1999[1830]
A330/A340	1988	**[***]**	2010[1831]

6.1070. The European Union finds support for its submission that the repayment of the LA/MSF agreements has brought the subsidy to an end in the following statement made by the Appellate Body in the original proceeding:

> We understand the participants to agree with the basic proposition that a subsidy has a life, which may come to an end, either through *the removal of the financial contribution and/or the expiration of benefit*.[1832] (emphasis added)

6.1071. For the European Union, the full repayment of the LA/MSF agreements implies that the financial contributions provided to Airbus have been "returned"[1833] and, therefore, consistent with the Appellate Body's statement, no subsidies continue to exist. In our view, the European Union has misunderstood the totality of the Appellate Body's guidance on this point.

6.1072. First, we note that the Appellate Body statement relied upon by the European Union refers to the "removal" of a financial contribution. However, it is less than clear to us that the *repayment* of a loan on its *subsidized* terms amounts to the same thing. Rather, it could be argued that the full repayment of a subsidized loan implies that a subsidized financial contribution has been *provided* to the recipient in its entirety, not removed or "returned", as the European Union argues.

6.1073. Second, while it is true that the repayment of a loan on its subsidized terms would bring about the end of the financial contribution, in the sense that there would be no longer any financial contribution in existence, the Appellate Body explicitly recognized in the original proceeding that this, alone, will not necessarily mean that the relevant subsidy has ceased to exist. Specifically, in the paragraph immediately preceding the statement the European Union relies upon, the Appellate Body explained that:

> {T}he fact that a subsidy is "deemed to exist" under Article 1.1 once there is a financial contribution that confers a benefit *does not mean that a subsidy does not continue to exist after the act of granting the financial contribution*.[1834] (emphasis added)

6.1074. Finally, we note that even accepting that the lives of the relevant LA/MSF subsidies came to an end in accordance with the European Union's assertions, the implication for understanding the extent to which the relevant subsidies existed at the end of the implementation period would be not unlike the findings we have already made in relation to the European Union's submissions concerning their *ex ante* lives – namely, that the lives of the French and Spanish government LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, A330/A340; and the UK government LA/MSF subsidies for the A320 and A330/A340, came to an end before 1 June 2011. On this basis, we believe it is unnecessary to make any definitive findings in relation to the merits of the European Union's submissions concerning the extent to which the actual repayment of the

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achieved in **[***]**, with the delivery of the **[***]** aircraft. (European Union's first written submission, paras. 180-181)

[1829] Nominal amount of principal only.

[1830] Target rate of **[***]** return achieved, but royalties ongoing.

[1831] Target rate of **[***]** return achieved, but royalties ongoing.

[1832] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 709.

[1833] European Union's first written submission, para. 163.

[1834] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 708.

relevant LA/MSF measures on subsidized terms has brought about the end of the "lives" of the challenged subsidies.

6.6.3.4.2.7 Overall conclusion with respect to the "expiry", "extraction" and "extinction" of subsidies

6.1075. In this subsection of our Report, we have examined the European Union's assertions concerning the "lives" of the challenged subsidies as the first part of our analysis of the merits of the parties' arguments concerning the extent to which the European Union and certain member States have complied with the obligation to "withdraw the subsidy" for the purpose of Article 7.8 of the SCM Agreement.

6.1076. We have found that the European Union has established that the *ex ante* "lives" of the French, German and Spanish government LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, A330/A340, and the UK government LA/MSF subsidies for the A320 and A330/A340, all came to an end before the end of the implementation period. We have also concluded that the European Union has demonstrated that the *ex ante* "lives" of the French and German government capital contribution subsidies came to an end before the end of the implementation period. We are satisfied that the European Union has shown that the *ex ante* "lives" of these subsidies have "expired" *not* because they were somehow brought to a *premature* end by, for example, having been repaid or because of the alignment of their terms with a market benchmark. Rather, we have determined that the "lives" of these subsidies have come to an end because the total period of time over which their "projected value" was expected to "materialize" has *passively* transpired in the absence of any "intervening event". In other words, we have found that the *ex ante* "lives" of the relevant subsidies have "expired" simply because they have been fully provided to Airbus as originally planned and expected. With respect to all other subsidies at issue in this dispute, the European Union has failed to demonstrate that they "expired", or were "extinguished" or "extracted", before the end of the implementation period.

6.1077. We now turn to examine whether the fact that the *ex ante* "lives" of: (a) the French, German and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, A330/A340; (b) the UK LA/MSF subsidies for the A320 and A330/A340; and (c) the French and German capital contribution subsidies, all came to an end before the end of the implementation period means that the European Union and certain member States have "withdrawn" those subsidies for the purpose of Article 7.8 of the SCM Agreement.

6.6.3.4.3 Implications of the "expiry" of certain subsidies for determining whether they have been "withdrawn" for the purpose of Article 7.8 of the SCM Agreement

6.1078. We recall that elsewhere in this Report, we considered and rejected the European Union's submission that it did not have a compliance obligation in this dispute with respect to any subsidy found to have caused adverse effects in the original proceeding that ceased to exist prior to the DSB's adoption of the panel and Appellate Body rulings and recommendations on 1 June 2011. In doing so, we found that in the light of the provisions of the DSU governing when and how a compliance obligation may be incurred and discharged under the covered agreements, and consistent with WTO case law, including the reasoning used by the panel and Appellate Body to support their findings in respect of the scope of the United States' compliance obligations in *US – Upland Cotton (Article 21.5 – Brazil)*, one of the fundamental objectives of Article 7.8 of the SCM Agreement is to bring an implementing Member into conformity with its obligations under Article 5 of the SCM Agreement. In our view, the logical implication of these findings is that it cannot be concluded on the *sole* basis of the "expiry" of the relevant LA/MSF and capital contribution subsidies that the European Union and certain member States have *ipso facto* complied with the obligation to "withdraw the subsidy" with respect to those measures. Rather, in the light of the effects-based nature of the subsidy disciplines of Article 5, the extent to which these *passive* "expiry" events may be found to amount to the "withdrawal" of subsidies for the purpose of Article 7.8 will depend upon the extent to which they bring the European Union and certain member States into conformity with Article 5 of the SCM Agreement.

6.1079. According to the European Union, however, an interpretation of Article 7.8 of the SCM Agreement that fails to acknowledge that the "expiry", "extinction" and/or "extraction" events it relies upon in this proceeding will *always* amount to the "withdrawal" of subsidies for the purpose of Article 7.8, would not only be inconsistent with how similar language has been

interpreted and applied in the context of Article 4.7 of the SCM Agreement and Article 3.7 of the DSU, but it would also be at odds with the Appellate Body's recognition that the expiry of a subsidy may, in circumstances that are not "usual" or "normal", such as the present, be sufficient to bring an implementing Member into compliance with Article 7.8. Indeed, for the European Union, such an interpretation of Article 7.8 would be tantamount to reading an implementing Member's right to "withdraw the subsidy" out of Article 7.8 of the SCM Agreement because it would make the availability of this compliance option subject to the "removal of adverse effects", thereby rendering the specific treaty language *inutile*. We are not convinced by the European Union's submissions on all three of these points.

6.6.3.4.3.1 Article 4.7 of the SCM Agreement and Article 3.7 of the DSU

6.1080. Both parties draw support for their respective views about what it means to "withdraw the subsidy" for the purpose of Article 7.8 of the SCM Agreement from how the obligation to "withdraw the subsidy without delay" in Article 4.7 of the SCM Agreement has been interpreted and applied in previous disputes. Article 4.7 of the SCM Agreement describes the remedy available to a complaining Member in a dispute involving prohibited subsidies under Part II of the SCM Agreement. This provision prescribes that where a measure is found to be a prohibited subsidy, a panel shall recommend that the subsidizing Member "withdraw the subsidy without delay". Panels and the Appellate Body have had occasion to consider the meaning of this obligation in a number of proceedings, including in the *Brazil – Aircraft (Article 21.5 – Canada)* and *Canada – Aircraft (Article 21.5 – Brazil)* disputes.

6.1081. In *Brazil – Aircraft (Article 21.5 – Canada)*, the panel was asked to determine whether the continued provision of regional aircraft subsidies by Brazil under a subsidy programme (PROEX) that had been found to be inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement during the original proceeding meant that Brazil had not complied with its obligation to "withdraw the subsidy without delay" under the terms of Article 4.7 of the SCM Agreement. The panel concluded that Brazil's continued provision of a prohibited subsidy after the end of the implementation period was indeed inconsistent with Brazil's compliance obligations. Without venturing to define what it means to "withdraw the subsidy", the panel explained its reasons for arriving at this conclusion by opining that:

> *{A} Member cannot be deemed to have withdrawn prohibited subsidies if it has not ceased to act in a manner inconsistent with the WTO Agreement in respect of those subsidies.* We are therefore of the view that the DSB's recommendation that Brazil withdraw the prohibited subsidies in question clearly *includes an obligation on the part of Brazil to cease violating the SCM Agreement* by the end of the implementation period in respect of the measures in question.[1835] (emphasis added)

6.1082. The same question addressed by the panel was put to the Appellate Body on appeal. After observing that the ordinary meaning of the word "withdraw" has been defined as "remove" or "take away" and "to take away what has been enjoyed; to take from"[1836], the Appellate Body noted that Brazil continued to provide the WTO-inconsistent PROEX subsidies after the end of the implementation period, and concluded that "to continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to 'withdraw' prohibited export subsidies, in the sense of 'removing' or 'taking away'".[1837]

6.1083. In *Canada – Aircraft (Article 21.5 – Brazil)*, Brazil argued that Canada had failed to comply with its obligation under Article 4.7 to "withdraw the subsidy without delay" by continuing to provide regional aircraft subsidies under a subsidy programme (the Technology Partnerships Canada programme or TPC) that had been the object of prohibited subsidy findings during the original proceeding. Like the panel in *Brazil – Aircraft (Article 21.5 – Canada)*, the panel in *Canada – Aircraft (Article 21.5 – Brazil)* did not attempt to interpret the term "withdraw the subsidy". Instead, it simply noted that it was:

[1835] Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.8.

[1836] Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45 (citing *Concise Oxford English Dictionary* (Clarendon Press, 1995), p. 1609; and *Black's Law Dictionary* (West Publishing, 1990), p. 1602).

[1837] Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45.

> {S}ufficient to conclude … that a Member cannot be understood to have withdrawn a prohibited subsidy if it has not *ceased to provide* such a subsidy, as that Member therefore would not have ceased to violate its WTO obligations in respect of such a subsidy. In our view, therefore, Canada's obligation arising from the DSB's recommendation in this dispute includes the obligation to cease providing prohibited export subsidies to the regional aircraft sector under the TPC.[1838] (emphasis original; underline added)

6.1084. The panel then went on to examine whether the facts demonstrated that the TPC subsidies provided after the end of the implementation period were prohibited export subsidies, finding that this was not the case and, therefore that Canada had come into compliance with its obligations. Significantly, in our view, the panel's finding of compliance was based on the fact that the Canadian government had *modified the terms and objectives* of the TPC in a way that eliminated the export performance conditionality from the granting of those subsidies. In other words, Canada was found to have complied with its obligation under Article 4.7 to "withdraw the subsidy without delay" despite continuing to subsidize the regional aircraft sector.

6.1085. As we read them, the above panel and Appellate Body findings in the *Brazil – Aircraft (Article 21.5 – Canada)* and *Canada – Aircraft (Article 21.5 – Brazil)* disputes stand for the following two important propositions. First, compliance with the obligation in Article 4.7 to "withdraw the subsidy without delay" will be achieved when an implementing Member has ceased to violate the prohibited subsidy disciplines of Articles 3.1 and 3.2 of the SCM Agreement.[1839] In our view, this notion of what it means to comply with the obligation to "withdraw the subsidy" for the purpose of Article 4.7 is consistent with our conclusion that the requirement in Article 7.8 to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" will be satisfied when an implementing Member no longer causes adverse effects through the use of subsidies, within the meaning of Article 5 of the SCM Agreement.

6.1086. The second proposition that we believe is supported by the above cases is that a Member may "withdraw" a subsidy, for the purpose of Article 4.7, by *not only* "removing" or "taking away" a subsidy in the sense of bringing the "life" of a subsidy to an end, but *also* by modifying the terms of an otherwise prohibited export subsidy in a way that eliminates the export performance condition that is the source of the infringement of Articles 3.1(a) and 3.2 of the SCM Agreement. The European Union argues that the obligation to "withdraw the subsidy" in both Articles 4.7 and 7.8 of the SCM Agreement must be given the same meaning and that, therefore, the former possibility for achieving compliance with Article 4.7 must also be available to an implementing Member faced with a compliance obligation under Article 7.8.[1840] In our view, however, the fact that the "removal" or "taking away" of a subsidy, in the sense of bringing the "life" of a subsidy to an end, may suffice to bring an implementing Member into compliance with Article 4.7 does not undermine our interpretation of what is needed to "withdraw the subsidy" for the purpose of Article 7.8. This is because the availability of this particular compliance option under Article 4.7 results from the fact that the prohibition in Articles 3.1(a) and 3.2 is based on the mere *existence* of a particular type of subsidy, *irrespective of its trade effects*. Specifically, Article 3.2 prescribes that a Member "shall neither grant nor maintain subsidies" referred to in Article 3.1. In contrast, the subsidy disciplines set out in Article 5 of the SCM Agreement are expressed in terms that are very different, specifying that "{n}o Member should cause, through the use of any subsidy, … adverse effects to the interests of other Members". As explained elsewhere in this Report, this language has been interpreted to regulate a Member's use of subsidies on the basis of their *trade effects*, *not their continued existence*. Thus, in the light of the purpose of Article 7.8 and the effects-based disciplines of Article 5, it is only logical, in our view, to find that the "removal" or "taking away" of a subsidy, in the sense of bringing the "life" of a subsidy to an end, may not always *ipso facto* suffice to bring an implementing Member into compliance with its obligation to "withdraw the subsidy" for the purpose of Article 7.8 of the SCM Agreement.

6.1087. We find additional support for our interpretation of Article 7.8 in the language of Article 3.7 of the DSU, which reads in relevant part as follows:

[1838] Panel Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.10.

[1839] We find additional support for this proposition in Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 84.

[1840] See e.g. European Union's response to Panel question No. 5.

> In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the *withdrawal of the measures* concerned if these are found to be *inconsistent with the provisions of any of the covered agreements*. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending *the withdrawal of the measure which is inconsistent with a covered agreement*. (emphasis added)

6.1088. When the above language is considered in the light of the terms of Articles 19 and 21 of the DSU, as well as other provisions of the DSU[1841], it is in our view evident that the "withdrawal" of measures contemplated in Article 3.7 is intended to bring an otherwise WTO-inconsistent measure into conformity with the covered agreements, in the same way that the more specific obligation to "withdraw the subsidy" in Articles 4.7 and 7.8 of the SCM Agreement is intended to bring an implementing Member into conformity with, respectively, Articles 3.1, 3.2 and 5 of the SCM Agreement. In this regard, we understand Article 3.7 of the DSU to be a more general expression of the compliance objective that is articulated in Articles 4.7 and 7.8 for the purpose of Parts II and III of the SCM Agreement. It follows, therefore, that as is the case with the obligation to "withdraw the subsidy" under Articles 4.7 and 7.8, the "withdrawal" of measures that is referred to in Article 3.7 of the DSU should be understood in the light of the nature of the particular obligation(s) with respect to which an implementing Member must achieve conformity in any given dispute. Where pursuant to any such obligation a continued infringement of a covered agreement can only be established on the basis of the *existence* of a particular type of measure, the mere "removal" or "taking away" of that measure, in the sense of its termination, will be sufficient to conclude that the measure has been "withdrawn", thereby bringing the relevant Member into conformity with the covered agreements. On the other hand, where the relevant obligation imposes a prohibition or discipline that is based on the existence of certain *trade effects*, as opposed to the existence of a measure, the mere "removal" or "taking away" of the relevant measure, in the sense of its termination, may not bring an end to the undesired trade effects. In this latter situation, the mere "removal" or "taking away" of a measure would be insufficient to establish that the "withdrawal" of measures envisaged in Article 3.7 has been achieved.

6.1089. It follows from the above analysis that rather than supporting the European Union's submissions on the interpretation of the obligation to "withdraw the subsidy" in Article 7.8, the fact that the notions of compliance advanced through Article 4.7 of the SCM Agreement and Article 3.7 of the DSU are focused on achieving conformity with the covered agreements, suggests that the interpretation of the obligation in Article 7.8 to "withdraw the subsidy" that we have canvassed above fits squarely within the same logic. Thus, the reason why the "removal" or "taking away" of a subsidy, in the sense of bringing the "life" of a subsidy to an end, may have a different impact on the extent to which an implementing Member has complied with Article 4.7 compared with Article 7.8 is not because of any fundamental difference in the intellectual framework used to interpret the respective obligations to "withdraw the subsidy". Rather, the difference is due to the diverse nature of the obligations that give rise to the respective compliance obligation − the former being based on the *mere existence* of a prohibited subsidy, whereas the latter being focused on the *trade effects* of a subsidy, *irrespective of its continued existence*.

6.6.3.4.3.2 The Appellate Body's statements in *US – Upland Cotton (Article 21.5 – Brazil)*

6.1090. In examining the United States' appeal against the panel's finding concerning the measures falling within the scope of its compliance obligation in *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body reviewed the operation of Article 7.8 of the SCM Agreement, explaining *inter alia* that:

> Pursuant to Article 7.8, the implementing Member has two options to come into compliance. The implementing Member: (i) shall take appropriate steps to remove the adverse effects; or (ii) shall withdraw the subsidy. The use of the terms "shall take" and "shall withdraw" indicate that compliance with Article 7.8 of the *SCM Agreement* will usually involve some action by the respondent Member. This affirmative action would be directed at effecting the withdrawal of the subsidy or the removal of its

[1841] See above discussion, at paras. 6.804-6.813.

> adverse effects. *A Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own*.[1842] (emphasis added; footnote omitted)

6.1091. As we understand it, the thrust of the guidance provided by the Appellate Body in this passage is relatively clear: an implementing Member will not "usually" be able to come into compliance with the obligation in Article 7.8 to "withdraw the subsidy" without taking some form of affirmative action. Thus, an implementing Member may not "normally" be found to have "withdrawn" a subsidy, for the purpose of Article 7.8, by simply letting the life of that subsidy expire over time. Logically, therefore, it will only be in circumstances that are not "usual" or "normal" that the "withdrawal" of a subsidy may be achieved by leaving a subsidy to expire passively over the ordinary course of its expected life.

6.1092. According to the European Union, the Appellate Body's statements must be understood within the specific temporal context of the lives of the subsidies at issue in a particular dispute. In this respect, the European Union recalls that a number of the LA/MSF subsidies at issue in this proceeding were provided over 43 years ago, which for the European Union means that it "is fair to say" that the temporal circumstances of the current proceeding are not "normal" or "usual" compared with previous disputes. Moreover, the European Union asserts that it has demonstrated how the challenged subsidies have "accrued and diminished" over time, and the extent to which they have expired in accordance with their expected lives before the end of the implementation period. In this light, the European Union maintains that "it is perhaps not surprising, and certainly not precluded" that the "expiry" events it relies upon "would have an impact on the way in which the EU compliance is assessed against the requirements of Article 7.8". Thus, the European Union submits that the United States errs when it argues that the European Union "may not rely on the passage of time to establish withdrawal of a subsidy (because the benefit has expired, or the life of the subsidy has otherwise come to an end)."[1843]

6.1093. Contrary to what appears to be the European Union's position, we do not understand the above Appellate Body statements to support the proposition that the mere expiry of a subsidy at the end of its expected life *before the end of an implementation period* will *always* suffice to establish that an implementing Member has "withdrawn" the subsidy for the purpose of Article 7.8. Rather, as already noted, the logical implication of the Appellate Body's statement is that it will only be in circumstances that are not "usual" or "normal" that allowing a subsidy to expire passively over the ordinary course of its expected life will be sufficient to establish compliance.

6.1094. While it is true that the Appellate Body has declared that a subsidy has a "finite life", which "accrues and diminishes over time", and which "comes to an end"[1844], the Appellate Body has never equated the end of the life of a subsidy with the cessation of its effects. On the contrary, the Appellate Body has explicitly found that the effects of a subsidy may well persist beyond its expected life, and that ultimately, the extent to which this may be the case will be a fact-specific matter. Although the age of a subsidy will be an important factor to consider when making this assessment, it will not *alone* be determinative. Thus, the simple fact that the anticipated life of a subsidy may have expired before the end of the implementation period does not preclude that the subsidy may be continuing to cause adverse effects in the post-implementation period. Ultimately, therefore, we cannot accept the European Union's reliance on the Appellate Body's statements to support its contention that the passive "expiry" events it relies upon mean that it has complied with the obligation to "withdraw the subsidy" because, as already noted, equating these events with the "withdrawal" of subsidies for the purpose of Article 7.8 would render any findings of adverse effects made against such expired subsidies in original proceedings purely declaratory, and to this extent render the effects-based disciplines of Article 5 of the SCM Agreement *inutile*.

6.6.3.4.3.3 Article 7.8 envisages two different pathways to achieve the same compliance objective

6.1095. As already noted, Article 7.8 of the SCM Agreement provides an implementing Member with two options for coming into compliance with the adopted rulings and recommendations in a

[1842] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236.
[1843] European Union's second written submission, paras. 83-90.
[1844] Appellate Body Report, *EC and certain Member States – Large Civil Aircraft*, para. 709.

dispute involving findings of adverse effects. The implementing Member in such a dispute shall either "take appropriate steps to remove the adverse effects" or "withdraw the subsidy". The European Union argues that an interpretation of what it means to "withdraw the subsidy" that is informed by the need for an implementing Member to achieve conformity with Article 5 of the SCM Agreement would deprive this compliance option of any independent meaning from the option to "take appropriate steps to remove the adverse effects", effectively reading it out of the SCM Agreement contrary to the principle of effective treaty interpretation.

6.1096. In our view, however, finding that the two compliance options referred to in Article 7.8 must be interpreted in a way that brings an implementing Member into conformity with the effects-based disciplines of Article 5 of the SCM Agreement does not deprive them of independent meaning. In particular, we do not see how saying that either of the two options must be understood in a way that achieves the *same result* necessarily implies that they must have an *identical meaning*. Indeed, it is apparent from their express terms that they provide an implementing Member with potentially two *different* pathways to achieve the *same compliance objective*.

6.1097. Starting with the option to "withdraw the subsidy", it is apparent that this compliance avenue is intended to focus an implementing Member's efforts on the *subsidy* found to have caused adverse effects. Thus, an implementing Member found to have caused adverse effects through the use of a subsidy is given the option to come into conformity with Article 5 of the SCM Agreement by "withdrawing", i.e. "removing" or "taking away", the *subsidy that was found to cause adverse effects*. As already noted, the "withdrawal", "removal" or "taking away" of a *prohibited subsidy* for the purpose of Article 4.7 of the SCM Agreement may be achieved by not only bringing the "life" of a subsidy to an end, but also by simply modifying the terms of the relevant subsidy in a way that eliminates the prohibited export performance condition. Other ways of "removing" or "taking away" a *prohibited subsidy* in a manner that brings an implementing Member into conformity with Articles 3.1 and 3.2 of the SCM Agreement might also be possible and will, naturally, depend upon the particular facts of the case at hand.

6.1098. We see no reason why the option to "withdraw the subsidy" that is provided for in Article 7.8 should not be given a parallel meaning. Indeed, both parties argue that the same terms in Article 4.7 and 7.8 of the SCM Agreement must be given a consistent meaning. Thus, just as it is possible for an implementing Member to "withdraw", i.e. "remove" or "take away", a *prohibited export subsidy* by adjusting its terms to eliminate the prohibited export performance condition, so too should it be possible to find that an implementing Member has "withdrawn", i.e. "removed" or "taken away", a *subsidy found to cause adverse effects* when the terms or conditions of that subsidy have been modified in a way that ensures it no longer causes adverse effects. In this light, it follows that the option to "withdraw the subsidy" that is provided for in Article 7.8 should be understood to refer to any conduct on the part of an implementing Member *in relation to the subsidy* found to cause adverse effects, which brings that Member into conformity with its obligations under Article 5 of the SCM Agreement.

6.1099. In contrast, the fact that the option in Article 7.8 to "take appropriate steps to remove the adverse effects" *does not* explicitly refer to the *subsidy*, in our view, suggests that it is intended to refer to an approach to compliance that would see an implementing Member coming into conformity with its obligations under Article 5 of the SCM Agreement *without* taking any specific action *in relation to the subsidy* found to cause adverse effects, but rather through other more effects-based or market-focused solutions. Again, while the range of such compliance actions will vary and ultimately depend upon the facts of a particular case, one could envisage that in a particular market situation, an implementing Member might be able to take certain kinds of WTO-consistent regulatory, policy or other initiatives that would alter the effects of a subsidy in the marketplace, and thereby remove its adverse effects. In our view, the very existence of this possibility suggests that the drafters of the SCM Agreement had in mind that the option to "withdraw the subsidy" might not always be a desirable course of action for an implementing Member.

6.1100. It follows from the above analysis that finding that the two compliance options provided for in Article 7.8 must be interpreted in a way that brings an implementing Member into conformity with its obligations under Article 5 of the SCM Agreement does not render the option to "withdraw the subsidy" *inutile*. While the efforts of an implementing Member taking up the option to "withdraw", "remove" or "take away" the subsidy, will be focused on the *subsidy itself*; an

implementing Member wanting to "take appropriate steps to remove the adverse effects" may pursue a different course action that is *unrelated to the subsidy* measure itself. An implementing Member will, of course, be free to choose between any possible alternative means of pursuing these two compliance options. However, as the Appellate Body has emphasized, whatever approach an implementing Member finally decides upon must be "sufficient to bring that Member into compliance with its WTO obligations".[1845]

6.6.3.4.4 Conclusion with respect to whether the European Union and certain member States have "withdrawn" the subsidy for the purpose of Article 7.8

6.1101. As with the European Union's position with respect to the question whether it has any compliance obligation at all in this dispute, the European Union's interpretation of the obligation to "withdraw the subsidy" is, in our view, problematic because it is premised on a conception of compliance that disregards the effects-based disciplines of Article 5. The European Union argues that by showing that the "life" of a subsidy has "expired" before the end of the implementation period, an implementing Member will have "procured" the "withdrawal" of that subsidy for the purpose of Article 7.8 of the SCM Agreement. In such circumstances, the European Union argues that a complaining Member would have received a complete remedy in a compliance dispute involving adopted findings of adverse effects, even when the subsidy found to cause adverse effects in the original proceeding continues to cause adverse effects into and beyond the end of the implementation period. Thus, according to the European Union:

> {T}here may be market effects of offending measures even after their withdrawal – whether this concerns prohibited or actionable subsidies, or measures that are inconsistent with other covered agreements. Such measures may well result in the protection, creation, or growth of industries that would otherwise be less competitive, or result in significant changes to supply chains or customer relationships in response to these measures. In each case, the effects thereof may continue beyond the withdrawal of the offending measure. Nonetheless, the covered agreements, including in Article 7.8 of the *SCM Agreement*, stipulate that the offending measure's withdrawal is a complete remedy, and there is no additional requirement to remove any lingering effects of that withdrawn measure.[1846] (footnote omitted)

6.1102. If it is true, however, that Article 7.8 articulates a compliance rule that is intended to clarify how an implementing Member found to have caused adverse effects through the use of subsidies is to restore conformity with its obligations under Article 5 of the SCM Agreement, it must follow that the obligation to "withdraw the subsidy" should be interpreted in a way that does not undermine this intended outcome. This means that the *passive* "expiry" events the European Union relies upon as *the sole basis* to demonstrate that it has "withdrawn" the relevant subsidies for the purpose of Article 7.8 cannot be characterized as such, because the very same subsidies were found in the original proceeding to cause adverse effects over a period of time that *followed* the full or partial "expiry" of almost all of those subsidies. Indeed, we cannot see how the end of the *ex ante* lives of the relevant LA/MSF and capital contribution subsidies before 1 June 2011 could *alone* bring the European Union and certain member States into conformity with their obligations under Article 5 of the SCM Agreement when even the European Union does not argue that the "expiry" of those subsidies must have necessarily brought an end to their effects in the marketplace and, therefore, that their potential to *continue* to cause adverse effects has ceased to exist. In this connection, we recall that the *ex ante* "lives" of the relevant LA/MSF and capital contribution subsidies "expired" prior to 1 June 2011 *not* because they were, for example, repaid by Airbus to the relevant European Union member State governments or because their terms were aligned with a market benchmark, but rather simply because they were *fully paid out* to Airbus in accordance with the expectations held by Airbus and the subsidizing governments at the time they were granted.[1847] In our view, these facts and considerations cannot *alone* support a

[1845] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 206.
[1846] European Union's response to Panel question No. 46(a), para. 122.
[1847] The extent to which the full or partial repayment of a subsidy or the alignment of its terms with a market benchmark may amount to the "withdrawal" of a subsidy for the purpose of Article 7.8 of the SCM Agreement are questions that are not before us and we, therefore, make no specific findings as to whether such actions may suffice to bring an implementing Member into conformity with its obligations under the SCM Agreement. We note, however, that the United States does not challenge the European Union's alleged "withdrawal" of the subsidies in relation to the Bremen Airport runway extension and the Mühlenberger

finding that the European Union and certain member States have "withdrawn" the relevant subsidies for the purpose of restoring conformity with their obligations under Article 5 of the SCM Agreement. Thus, we find that the United States has established that the European Union has failed to "withdraw the subsidy" for the purpose of Article 7.8 of the SCM Agreement.

6.1103. We now turn to examine the extent to which the United States has demonstrated that the European Union and certain member States have failed to "take appropriate steps to remove the adverse effects" with respect to all of the subsidies the United States considers continue to cause adverse effects within the meaning of Article 5(c) of the SCM Agreement.

6.6.4 Whether the European Union and the relevant member States have complied with the requirement to "take appropriate steps to remove the adverse effects" under the terms of Article 7.8 of the SCM Agreement

6.6.4.1 Introduction

6.1104. In their submissions concerning the extent to which the European Union and relevant member States have complied with the obligation to "take appropriate steps to remove the adverse effects", the parties have advanced multiple lines of argument and adduced a significant volume of evidence, including numerous reports produced specifically for this proceeding by experts in the fields of economics, accounting and finance as well as LCA technology and production. While the parties' submissions have covered a wide variety of issues, their overall and principal focus has been on the question whether, in the light of the European Union's alleged compliance "steps", the challenged subsidies *continue* to cause serious prejudice to the interests of the United States after 1 December 2011, that is, after the end of the implementation period.[1848]

6.1105. In essence, the United States argues that the European Union's 36 alleged compliance "steps" are fundamentally based on "inaction" and the mere passage of time, and for this reason, in the light of the nature of the "profound" effects of the challenged subsidies, have done nothing to bring the European Union and its relevant member States into conformity with their obligations under the SCM Agreement. According to the United States, the subsidies at issue in this compliance dispute, not unlike the LA/MSF and other subsidies found to cause adverse effects in the original proceeding, continue to explain why Airbus has been able to develop and bring to market a full range of LCA, allowing Airbus to win sales and market share from the United States' LCA industry, thereby, causing serious prejudice to the United States' interests within the meaning of Article 6.3(a), (b) and (c) of the SCM Agreement.[1849]

6.1106. The European Union contests the entirety of the United States' claims, arguing, first of all, that the United States' claims concerning the *continued* adverse effects of the challenged subsidies fail to account for not only the alleged "withdrawal" of some or all of the challenged subsidies before the end of the implementation period, but also the alleged requirement that "present subsidization" must be shown to exist in the post-implementation period in order to find that the European Union has failed to "take appropriate steps to remove the adverse effects".[1850]

Loch aircraft assembly site, both of which were found to cause adverse effects in the original proceeding. According to the European Union, the terms of these subsidies were aligned to a market benchmark before the end of the implementation period.

[1848] Although the European Union had initially characterized its submissions concerning the United States' claims of continued serious prejudice as "alternative" arguments advanced solely for the purpose of consideration in the event that "the compliance Panel {were to} find that there are present subsidies", arguing explicitly that the Panel would be *legally entitled* to review the United States' claims *only* if it concluded that there are "present subsidies", the European Union subsequently clarified that the Panel should consider its arguments "if the Panel concludes that *some* of the subsidies have *not* been withdrawn". (European Union's first written submission, paras. 30, 476 and 492, and fn 639; second written submission, para. 500; and response to Panel question No. 45) (emphasis original). We recall that we found in the previous part of this Report that the European Union has failed to demonstrate that *any* of the subsidies challenged by the United States in this compliance dispute have been "withdrawn" for the purpose of Article 7.8 of the SCM Agreement.

[1849] United States' first written submission, paras. 240-532; and second written submission, paras. 357-747.

[1850] See e.g. European Union's first written submission, paras. 30, 476, 482, 484, 489, 492, 503, 506, 515-516, 537-551, 647-648, 715, 723, 801, 817, 827, 858, 868, 926, 937, 965-966, 974, 984-985, 990, 992,

Secondly, and in the alternative, the European Union argues that the United States' submissions fail to satisfy two threshold requirements for demonstrating non-compliance, namely, that Boeing's like LCA products: (a) are non-subsidized; and (b) compete with Airbus in the three relevant product markets with respect to which the United States claims to have experienced serious prejudice. Finally, the European Union submits that the United States has failed to substantiate its claims of *continued* serious prejudice because the United States' arguments *inter alia* ignore the impact of the passage of time and a number of non-subsidized Airbus investments on the causal link between the challenged subsidies and the instances of serious prejudice alleged to exist in the post-implementation period.[1851]

6.1107. We recall that in Section 6.6.2 of this Report, we evaluated and dismissed the European Union's submissions concerning the alleged "withdrawal" of the challenged subsidies and the purported requirement to demonstrate "present subsidization" in the context of Article 7.8 of the SCM Agreement. As the European Union's first line of argument in response to the United States' claims of non-compliance with the obligation to "take appropriate steps to remove the adverse effects" is premised on essentially the same submissions, we see no need to re-examine their merits here. In this light, we will begin our evaluation of the merits of the United States' continued adverse effects claims by examining the European Union's arguments concerning the United States' alleged failure to satisfy two purported threshold requirements for making out its case, namely, that: (a) the United States is required to demonstrate that Boeing's like LCA products are "non-subsidized"; and (b) the United States must show that it has brought its serious prejudice claims with respect to the appropriate product markets. After evaluating the merits of the parties' positions in relation to both alleged threshold matters, we turn to examine the parties' arguments with respect to the *continued* effects of the challenged subsidies and, therefore, the extent to which the United States has demonstrated serious prejudice to its interests in the post-implementation period.

6.1108. Before proceeding with this analysis, however, we first address the European Union's submission that the delivery of Airbus LCA ordered pursuant to "lost sales" found to have been caused by the challenged subsidies in the original proceeding means that the European Union and certain member States have "removed" those adverse effects and, therefore, complied with their obligations in relation to those "lost sales" under Article 7.8 of the SCM Agreement.

6.6.4.2 The delivery of Airbus LCA ordered pursuant to "lost sales" found in the original proceeding

6.1109. We recall that one of the 36 alleged compliance "steps" which the European Union argues has brought it into conformity with the adopted recommendations and rulings in this dispute is the completion of performance under sales contracts relating to orders for Airbus LCA found to constitute "lost sales" in the original proceeding. The European Union explains that what it means when it refers to the completion of performance of a sales contract, is the delivery of an LCA to a customer in accordance with the terms of the order found to constitute a "lost sale" causing serious prejudice to the United States' interests in the original proceeding. The European Union maintains that by delivering the LCA to its customer in this way, "the {lost} sales are … completed and cease to exist in the present". For the European Union, this implies that the United States cannot "demonstrate that significant lost sales … , as found in the original proceedings, have not been removed" and, therefore, that the European Union and certain member States have not achieved compliance with respect to those specific "lost sales".[1852]

6.1110. We note that underlying the European Union's submission is the premise that a "lost sale" is an ongoing event that *continues to exist* until the time of delivery and, consequently, also the notion that, in the light of the prospective nature of WTO remedies, the European Union has a compliance obligation with respect to that "lost sale" until it is delivered. According to the

1031, 1091, 1095-1099, 1132, 1156, and 1204; and second written submission, paras. 498-499, 523-577, 728, 734, 822, 863-864, 871, 873, 1203, 1208, and 1559.

[1851] European Union's first written submission, paras. 476-1242; and second written submission, paras. 497-1695.

[1852] European Union's first written submission, paras. 805-816, 1034-1042 and 1218-1219; second written submission, para. 1212; and response to Panel question No. 39.

European Union, the panel in *US – Large Civil Aircraft (2nd complaint)*, "recognised this when it explained that the delivery of an aircraft may bring the lost sale to an end".[1853]

6.1111. The particular passage from the panel report in *US – Large Civil Aircraft (2nd complaint)*, which the European Union relies upon reads as follows:

> {T}he Panel considers that given the particularities of LCA production and sale, the effects of the {Business and Occupation (B&O) tax} 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).[1854]

Elsewhere in its report, the panel in *US – Large Civil Aircraft (2nd complaint)* appeared to repeat this view when it stated that:

> {T}he phenomena of "price suppression" and "lost sales" do not begin and end at the time at which an LCA is ordered. Rather, 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). …
>
> … Because we regard price suppression and lost sales to exist from the time an order for LCA is made, up to and including its delivery, 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.[1855]

6.1112. In our view, the European Union's submission responds to an argument that the United States does not make. As already noted, the United States' position in this dispute is that the European Union and certain member States have failed to comply with the obligation in Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects" *not* because any of the "adverse effects" found to have been caused by the challenged subsidies in the original proceeding have not been "removed", but rather because the challenged subsidies *continue to cause* the same types of "adverse effects" today. Although, at times, the United States formulates this submission in different ways[1856], the very limited references the United States makes in this context to the *ongoing effects* of the "lost sales" found in the original proceeding have been consistently presented under headings or in sections of its written submissions that clearly indicate they are intended to form part of the United States' arguments concerning the *continuation* of the adverse effects in the form of "lost sales".[1857] Indeed, in its request for findings in this dispute, the United States asks the Panel to make only one finding in this regard – that "the United States *continues* to experience serious prejudice in the form of lost sales".[1858] In this light, we understand the very few United States' statements made in relation to the ongoing effects of the "lost sales" found by the panel in the original proceeding to be intended to highlight the

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[1853] European Union's first written submission, para. 806 (citing Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.1812).

[1854] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.1812.

[1855] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.1685-7.1686.

[1856] For instance, the United States submits that the European Union "has done nothing to remove the adverse effects found by the original panel in the form of lost sales", maintaining that those lost sales "have had on-going effects on sales in the form of options and purchase rights that the customers have exercised and may exercise in the future" thereby bestowing incumbency advantages on Airbus. (United States' first written submission, paras. 412-413 and 416) Similarly, referring to *one* instance of lost sales found by the original panel involving South African Airways, the United States argues that the "EU has done nothing to remove the adverse effects of this lost sale", noting that "Airbus has retained the revenues … and Boeing continues to have 'failed to obtain' this sale and has experienced the consequent loss of revenues and other benefits". (United States' first written submission, para. 441) We note that the United States makes no parallel arguments in relation to the findings of displacement made in the original proceeding.

[1857] See e.g. heading to Section VI.G.2 to the United States' first written submission ("U.S. LCA industry continues to experience significant lost sales"), and the argumentation in section VI.E of the United States' second written submission, which is clearly focused on the United States' allegation that it "continues to experience significant lost sales".

[1858] United States' first written submission, para. 533 (emphasis added). See also United States' second written submission, para. 748 (making same request).

United States' view that those "lost sales" have contributed to the *continuation* of the adverse effects of the challenged subsidies today by, for example, having "had on-going effects on sales in the form of options and purchase rights that customers have exercised and may exercise in the future"[1859] and by giving Airbus incumbency advantages over Boeing.[1860]

6.1113. It follows, therefore, that even if the European Union were correct in its assertion that the delivery of Airbus LCA ordered pursuant to "lost sales" caused by the challenged subsidies in the original proceeding means that the European Union and certain member States no longer have a compliance obligation with respect to those "lost sales", this would not lead us to dismiss the United States' claim that the European Union and certain member States have failed to comply with the adopted recommendations and rulings.

6.6.4.3 Whether the United States must demonstrate that the "like product" is non-subsidized

6.6.4.3.1 Arguments of the European Union

6.1114. The European Union submits that in order for the United States to make out its claims of displacement or impedance of exports within the meaning of Article 6.3(b) of the SCM Agreement, the United States must demonstrate, by virtue of Article 6.4, that the United States' product being allegedly displaced or impeded in any relevant third country market is a "non-subsidized like product". According to the European Union, the United States cannot make this demonstration in this compliance proceeding because of the adopted findings concerning the subsidization of Boeing LCA in *US – Large Civil Aircraft (2nd complaint)*.[1861]

6.1115. While acknowledging that the original panel already addressed and rejected essentially the same line of legal argument the European Union relies upon in this proceeding with respect to the interpretation of the relationship between Articles 6.3(b) and 6.4 of the SCM Agreement, the European Union maintains that the fact that there is now a multilateral determination that the United States' "like products" are subsidized means that the relevant factual circumstances have changed such that there is now a new "matter" before the compliance Panel that must be resolved.[1862] Furthermore, the European Union submits that there are also "cogent reasons" to review the original panel's interpretation of the relationship between Articles 6.3(b) and 6.4 of the SCM Agreement, namely[1863]: (i) the interpretation was not the subject of an exchange of arguments between the parties and third parties[1864]; (ii) the interpretation "extinguishes" or "diminishes" the "element of causation" that is present in Articles 5, 6.3(b) and 6.4[1865]; and (iii) the interpretation was based on considerations that were erroneous for other reasons.[1866]

6.1116. The European Union goes on to offer what it describes to be "an approach that is consistent with the principle of harmonious and effective interpretation", pursuant to which the European Union maintains that the "element of causation" remains present in all claims that can be made under Article 6, as opposed to the approach it asserts was taken by the panel in the

[1859] United States' first written submission, para. 412.

[1860] United States' first written submission, para. 413. We note, furthermore, that in arguing that there is no basis for the European Union's view that the delivery of an LCA found to have been the subject of the original panel's lost sales findings means that the European Union and certain member States have complied with their obligations under Article 7.8 of the SCM Agreement, the United States asserts *inter alia* that "{b}y the EU's logic, a subsidy causing serious prejudice that is the subject of an adopted DSB finding is only WTO-inconsistent until its concrete effects reach their apex in the marketplace", concluding that "the reality is that deliveries have in no way mitigated the massive adverse effects that the U.S. LCA industry *continues* to suffer, including in the form of lost sales". (United States' second written submission, paras. 678-679 (emphasis added))

[1861] European Union's first written submission, para. 696; and second written submission, para. 707.

[1862] European Union's second written submission, paras. 708-712.

[1863] European Union's second written submission, paras. 713 and 727.

[1864] European Union's second written submission, para. 714.

[1865] European Union's first written submission, paras. 658-679; and second written submission, paras. 716-717. The European Union also appears to submit that the same "cogent reasons" compel us to reconsider the original panel's findings with respect to the "non-subsidized like product rule" in Article 6.5 of the SCM Agreement, in the context of the United States' lost sales claims under Article 6.3(c). (European Union's first written submission, fn 856)

[1866] European Union's first written submission, paras. 680-686.

original proceeding.[1867] The European Union explains that its proposed interpretation would result in the application of a "non-subsidized like product rule" to all "price effects"[1868] claims made under Article 6.3(c) and all "volume effects"[1869] claims under Article 6.3(b), but not "volume effects" claims made under Article 6.3(a).[1870]

6.1117. The European Union justifies the application of a "non-subsidized like product rule" to "price effects" claims because, in its view, it would be "very difficult if not impossible" to make an "objective assessment" regarding which of two subsidized products (a subsidized product and a subsidized like product) caused serious prejudice in the form of "price undercutting". According to the European Union, both subsidized products will "be causing the same price effects" or, "in any event, both of the subsidies {will be} necessarily pushing in the same direction". The European Union submits that the application of a "non-subsidized like product rule" in this situation would avoid the "pointless deadlock and inefficiencies that would otherwise result, for all Members, if two Members were to pursue matters to the bitter end, and find themselves in a situation where both were subsidizing and both retaliating at the same time against each other".[1871]

6.1118. Similarly, the European Union submits that a "non-subsidized like product rule" should apply to claims of "volume effects" in third country markets in order to prevent what the European Union asserts would be "an imbroglio of subsidies, countervailing duties and retaliation" that would arise in the absence of such a rule. In particular, the European Union explains that without a "non-subsidized like product rule", it would be possible for a Member to make out a claim of serious prejudice in relation to sales of a subsidized like product into a third country market (and, thereby, ultimately be entitled to claim retaliation) even while the importing country could itself impose countervailing duties against imports of the same subsidized like product found to cause injury to its domestic industry. For the European Union, such an outcome would be "fundamentally contradictory".[1872]

6.1119. On the other hand, the European Union argues that a "non-subsidized like product rule" would not apply in the context of "volume effects" claims arising in the market of the subsidizing Member because "one of the essential purposes of WTO subsidies law is to preserve the market access afforded by tariff bindings". Moreover, the European Union argues that the fact that a complaining Member might itself be subsidizing "does not prevent an objective assessment of the existence of the volume effect because it will, if anything, tend to lead to an underestimate of such volume effect".[1873]

6.1120. Finally, the European Union maintains that the application of its legal interpretation to the facts of this dispute leads to the conclusion that the United States' serious prejudice claims made under Article 6.3(b) of the SCM Agreement must be precluded from this proceeding or otherwise rejected by the Panel.[1874]

6.6.4.3.2 Arguments of the United States

6.1121. The United States submits that the "non-subsidized like product" arguments advanced by the European Union in this compliance dispute were already addressed and rejected in the unappealed findings from the original proceeding that were adopted by the DSB, implying that the European Union is not entitled to reopen the matter.[1875]

[1867] European Union's first written submission, paras. 658-679; and second written submission, paras. 716-726.
[1868] The European Union defines "price effects" to be "price undercutting" and "price suppression/ depression". (European Union's first written submission, fn 875)
[1869] The European Union defines "volume effects" to be "displacement", "impedance" and "lost sales", including a "change in relative shares of the market". (European Union's first written submission, fn 876)
[1870] European Union's first written submission, paras. 687-698.
[1871] European Union's first written submission, para. 690.
[1872] European Union's first written submission, paras. 692-693; and second written submission, paras. 720-722.
[1873] European Union's first written submission, para. 691.
[1874] European Union's first written submission, paras. 699-708.
[1875] United States' second written submission, paras. 404, 405-406, 409, 410, and 412.

6.1122. According to the United States, the European Union's submission that there is a new "matter" before the compliance Panel in the light of the alleged "changed facts" is premised on a mischaracterization of the original panel's findings. In particular, the United States recalls that the original panel's rejection of the European Communities' arguments regarding the relationship between Articles 6.3(b) and 6.4 was based on a legal interpretation, rendering the factual question of the subsidization of the United States' like products "irrelevant in this case".[1876] Furthermore, the United States disagrees with the European Union that there are "cogent reasons" for the compliance Panel to review the original panel's findings, rejecting the European Union's criticisms of how the original panel understood "causation" in Article 6.4 as well as the relationship between Articles 6.3(b) and 6.4.[1877]

6.1123. The United States submits that the European Union's proposed alternative interpretation that would introduce a "non-subsidized like product rule" is "seriously flawed", including for the same reasons it was dismissed in the original case[1878], and that if the compliance Panel does entertain the European Union's argument, it should reach the same result.[1879] The United States argues that under the European Union's interpretation, complaining Members could never establish a claim under Article 6.3(b) if their products were even minimally subsidized or subsidized to a degree that did not create an action under the SCM Agreement[1880], for example if the subsidy was non-specific, or did not otherwise fall within the scope of Article 1 of the SCM Agreement.[1881] The United States also argues that the European Union's interpretation would create an incentive for successful complainants to start retaliating by providing unlimited subsidies to its like product, while the affected Member would have no recourse against the new subsidizing Member due to the alleged "non-subsidized like product requirement".[1882]

6.1124. Finally, the United States submits that the European Union does not explain why "a non-subsidized like product requirement would only apply to certain showings of serious prejudice under Article 6.3, but not others".[1883] As regards "price effects", the United States responds that if a complainant's like products can sell at lower prices due to its own subsidization, the price effects of the subsidization by the responding Member will be *less pronounced* or similarly *underestimated*.[1884] As regards "volume effects" the United States observes that "subsidization from the complaining Member and the responding Member will push in the same direction in terms of volume effects in the subsidizing Member market, just as they would in a third country market".[1885] The United States thus views the European Union's approach as containing a self-contradiction. As regards "volume effects" in third country markets, the United States considers that it is not clear that it would be fundamentally contradictory if a complainant could be countervailed by a third country Member and could make successful claim under Article 6.3(b), nor is it clear why a Member's domestic countervailing duty law is relevant.[1886]

6.6.4.3.3 Evaluation by the Panel

6.1125. Articles 6.3(b) and 6.4 of the SCM Agreement provide, in relevant part, that:

> 6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
>
> ...
>
> (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;

[1876] United States' second written submission, paras. 413-415.
[1877] United States' second written submission, paras. 417-420.
[1878] United States' second written submission, paras. 416 and 426.
[1879] United States' second written submission, para. 407.
[1880] United States' second written submission, para. 433.
[1881] United States' second written submission, para. 435-436.
[1882] United States' second written submission, paras. 433 and 434.
[1883] United States' second written submission, para. 427.
[1884] United States' second written submission, paras. 427-429.
[1885] United States' second written submission, paras. 430-431.
[1886] United States' second written submission, para. 430.

...

> 6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product ... .

6.1126. In the original proceeding, the European Communities advanced essentially the same line of argument that is relied upon by the European Union in this compliance dispute to support its submission that the United States' serious prejudice claims under Article 6.3(b) of the SCM Agreement must be rejected. In particular, the European Communities argued that by virtue of the operation of Article 6.4 (in particular, the "non-subsidized like product" language) the United States could only make out a case of displacement or impedance of exports from a third country market by demonstrating that the United States' like product was non-subsidized.[1887]

6.1127. The original panel started its evaluation of the merits of the European Communities' position by examining the parties' arguments concerning the meaning of the "non-subsidized like product" language appearing in Article 6.4, finding that it "may well require that a complaining Member demonstrate, in the circumstances of that provision, that its like product ... is not subsidized".[1888] The original panel then set about examining another question, namely, "whether Article 6.4 is the necessary or exclusive mechanism for demonstrating displacement or impedance of exports to a third country market under Article 6.3(b), or whether ... displacement and impedance under Article 6.3(b) can be demonstrated without reference to Article 6.4".[1889] The European Communities had argued that Article 6.4 was the "exclusive basis" on which a claim under Article 6.3(b) could be demonstrated. The United States disagreed, pointing to the "shall include" language in the first sentence of Article 6.4 in support of its view.

6.1128. The original panel recalled that the panel in *Indonesia – Autos* had previously considered the meaning of Article 6.4, quoting certain passages from that panel report and agreeing with that panel that:

> Article 6.4 describes a particular situation, where the like product of the complaining Member is not subsidized, in which situation a demonstration that market share of the subsidized product complained of increased suffices to make a prima facie case of displacement or impedance under Article 6.3(b).[1890]

6.1129. The original panel then noted that the United States was not relying upon Article 6.4, but rather seeking to demonstrate serious prejudice solely on the basis of the terms of Article 6.3(b). In this light, understanding the relationship between Articles 6.3(b) and 6.4 became decisive – were the original panel to find that Article 6.4 is the *exclusive* means through which Article 6.3(b) claims could be made out, the European Communities would have prevailed. However, the original panel agreed with the United States that Article 6.4 does not set out the "exclusive basis" on which to establish Article 6.3(b) serious prejudice claims. In particular, the original panel found "nothing in the text of Article 6.4, or in its object and purpose, ... {to} suggest that the analysis set out therein is the exclusive means of demonstrating displacement or impedance of exports for purposes of Article 6.3(b)".[1891] The panel explained that the use of the phrase "shall include" in Article 6.4 indicates that "there may be other circumstances not set out in Article 6.4, in which a Member could demonstrate displacement or impedance for purposes of Article 6.3(b)". Thus, the panel concluded that "{r}ather than limiting the circumstances in which Article 6.3(b) may be satisfied, we read Article 6.4 as simply setting out additional guidance for the application of Article 6.3(b) in certain particular circumstances".[1892]

[1887] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1761.
[1888] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1765.
[1889] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1766.
[1890] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1767.
[1891] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1763-7.1769.
[1892] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1769.

6.1130. While the original panel went on to express its own views about what those particular circumstances were, those opinions did not form part of the reasoning which it ultimately relied upon to dispose of the European Communities' arguments. This is apparent from the original panel's recognition that the United States did "not purport to rely on the special rule set out in Article 6.4, but rather, asserts that it has demonstrated that displacement or impedance of its exports from third country markets is the effect of the subsidies in dispute".[1893] Thus, the original panel's finding that the language of Article 6.4 did not prescribe the exclusive means through which a complaining Member could demonstrate displacement or impedance for the purpose of Article 6.3(b) was sufficient to dispose of the European Communities' argument.

6.1131. The European Union did not appeal the original panel's findings on this point; and the panel report, as modified by the Appellate Body in relation to other matters, was adopted by the DSB. Notwithstanding these facts, the European Union argues that the Panel in this compliance dispute should rule on what is essentially the same legal question that was resolved in the original proceeding and/or review and modify the original panel's legal findings. To this end, we understand the European Union's submissions to raise the following two threshold questions: (i) whether the fact that there has been a multilateral finding of subsidization in *US – Large Civil Aircraft (2nd complaint)* means that there is a new "matter" that must be addressed in this compliance proceeding; and (ii) whether there are "cogent reasons" to review the original panel's interpretation of the relationship between Articles 6.3(b) and 6.4 of the SCM Agreement that formed the basis of the relevant legal findings adopted by the DSB in the original proceeding.

6.6.4.3.3.1 Whether there is a new "matter"

6.1132. The European Union explains that it did not appeal the original panel's findings concerning the relevance of Article 6.4 to the United States' claims of serious prejudice under Article 6.3(b) of the SCM Agreement because, in its view, the panel's reasoning rested in part on the difficulty that a panel would have in determining that a "like product" is not subsidized[1894], and at that time, there were no adopted findings in the *US – Large Civil Aircraft (2nd complaint)* dispute in relation to the subsidization of Boeing's LCA.[1895] However, now that the DSB has adopted recommendations and rulings to this effect, the European Union considers that the relevant factual circumstances have changed because there is a multilateral determination that Boeing LCA are subsidized.[1896] The European Union maintains that these new factual circumstances mean that there is a new "matter" before the compliance Panel and, therefore, that the compliance Panel is not precluded from addressing the European Union's arguments concerning the interpretation of Articles 6.3(b) and 6.4 of the SCM Agreement.[1897] Thus, according to the European Union, even if this Panel were to consider "itself bound by the interpretation of the relevant provisions that it previously set out in the original panel report", all this would mean is that this compliance Panel would take that interpretation and apply it to the new set of facts placed before it by the European Union.[1898]

6.1133. The United States submits that the European Union mischaracterizes the panel's reasoning, as the original panel's interpretation of the relationship between Article 6.3(b) and Article 6.4 was a text-based legal interpretation.[1899] While, according to the United States, the original panel observed that the European Communities' interpretation was impractical and would enormously complicate the task of adjudicating claims brought under Article 6.3(b) because panels would have to consider whether the complainant itself provides any subsidy to a "like product"[1900], the United States asserts that this was a general observation relating to all panels and not reflective of any particular difficulty in this dispute that could be altered by a multilateral finding of subsidization. In this respect, the United States recalls that the United States relied on Article 6.3(b) and did not rely on Article 6.4 in the original proceeding. Thus, the United States maintains that the original panel's rejection of the European Union's position regarding the

[1893] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1768.
[1894] European Union's first written submission, para. 656.
[1895] European Union's first written submission, paras. 656-657; and second written submission, para. 710.
[1896] European Union's first written submission, para. 657.
[1897] European Union's second written submission, paras. 709-710.
[1898] European Union's second written submission, para. 710.
[1899] United States' second written submission, paras. 413-415.
[1900] United States' second written submission, para. 415.

relationship between Articles 6.3(b) and 6.4 rendered the factual question of the subsidization of the United States' like products "irrelevant in this case".[1901]

6.1134. The European Union's submission that the compliance Panel is not precluded from determining the merits of essentially the same legal arguments that were already considered and dismissed in the original proceeding is premised on its view that there is a new "matter" before the compliance Panel because: (a) the original panel's reasoning rejecting the European Communities' arguments was partly based on the original panel's difficulty in determining whether Boeing LCA were subsidized; and (b) with the adoption of the recommendations and rulings in *US – Large Civil Aircraft (2nd complaint)* there is now a multilateral determination that Boeing's LCA are subsidized. In our view, the European Union's position does not accurately reflect the original panel's findings.

6.1135. As already noted, the original panel dismissed the European Communities' submissions not only because the United States' serious prejudice claims were based on Article 6.3(b) *and not* Article 6.4, but also because it found that the "shall include" language in Article 6.4 indicates that this provision does not prescribe the *exclusive* means by which the United States was required to make out those claims. In other words, the original panel rejected the European Communities' arguments because it found that, *as a matter of law*, resort to Article 6.4 (and, therefore, the relevance of the "non-subsidized like product" language) is only one way of showing displacement and impedance in third country markets for the purpose of Article 6.3(b).[1902] Thus, it was the panel's interpretation of the relationship between Articles 6.3(b) and 6.4 that decided the matter. Moreover, while the original panel referred to the difficulties associated with having to determine that the "like product" was "non-subsidized", it did so only in general terms as part of its dismissal of the European Communities' legal interpretation of the relevant provisions. In particular, the original panel reasoned:

> We consider that the contrary interpretation suggested by the EC − that Article 6.4 is the exclusive basis for a finding of displacement or impedance for purposes of Article 6.3(b) − would lead to the absurd result that the SCM Agreement establishes a remedy for displacement or impedance of exports in third country markets **only** in situations where the complaining Member's product is demonstrated to be unsubsidized − effectively, a sort of "clean hands" requirement for complaining Members as a prerequisite to a claim under Article 6.3(b). Not only is there no basis in the text for such a requirement, but, *as a practical matter, such a requirement would enormously complicate the task of panels considering claims under Article 6.3(b)*. Not only would they have to consider whether the challenged measures at issue in the dispute constitute subsidies, but they would have to consider whether the Member challenging those measures itself provides any subsidy with respect to the exported like product. Moreover, while the European Communities states that it asserts only that the complaining Member's like product must not benefit from **specific** subsidies, there is nothing in the term "non-subsidized like product" which suggests such a limitation. Thus, to accept the European Communities' interpretation would leave open the possibility that a complaining Member would be precluded from pursuing a claim under Article 6.3(b) (and 6.3(c)), because its like product benefits from subsidies that do not fall within the definition of Article 1 of the SCM Agreement. We cannot imagine on what basis a panel might undertake to examine this question. We simply cannot accept that so much can be derived from the mere use of the term "non-subsidized like product" in Article 6.4. We therefore reject the European Communities' view that Article 6.4 is the exclusive basis for a finding of displacement or impedance under Article 6.3(b) of the SCM Agreement.[1903] (bold text original; italics added; footnote omitted)

6.1136. It is plain, therefore, that the original panel's reasoning rejecting the European Communities' arguments was *not* partly based on any difficulty in determining whether Boeing LCA were subsidized. Indeed, the extent to which Boeing LCA were subsidized played no role at all in the original panel's legal analysis, which was ultimately decisive.

[1901] United States' second written submission, paras. 413-415.
[1902] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1769.
[1903] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1770.

6.1137. Moreover, we note that while the European Union argues that the adopted recommendations and rulings in *US – Large Civil Aircraft (2nd complaint)* mean that there is now a multilateral finding of subsidization in relation to Boeing LCA, the European Communities had similarly argued in the original proceeding that the adopted recommendations and rulings in the *US – FSC* dispute and related proceedings demonstrated that the United States had subsidized Boeing LCA prior to the end of 2006.[1904] The original panel, however, did not have to determine the merits of the European Communities' assertion because, as already noted, the extent to which Boeing LCA were subsidized by the end of 2006 did not play a role in its disposal of the European Communities' submissions. The original panel's evaluation of the European Communities' arguments hinged on its interpretation of the relationship between Articles 6.3(b) and 6.4, not any findings of fact concerning the subsidization of Boeing "like products".

6.1138. Thus, we find that the adopted recommendations and rulings in *US – Large Civil Aircraft (2nd complaint)* in relation to the subsidization of Boeing LCA do not mean there is now a new "matter" before the compliance Panel as regards the European Union's reliance on Article 6.4 to reject the United States' claims made under Article 6.3(b).

6.6.4.3.3.2 "Cogent reasons"

6.1139. The European Union submits that there are "cogent reasons" for the compliance Panel to review the original panel's interpretation of the relationship between Articles 6.3(b) and 6.4 of the SCM Agreement, namely[1905]: (i) the interpretation was not the subject of an exchange of arguments between the parties[1906]; (ii) the interpretation "extinguishes" or "diminishes" the "element of causation" in Article 5[1907]; and (iii) the interpretation is erroneous for other reasons.[1908] The United States submits that the European Union's request amounts to an appeal of the original panel's findings, which the European Union is not entitled to reopen in this compliance proceeding because those findings were unappealed and were adopted by the DSB in the original proceeding.[1909]

6.1140. We note that the concept of "cogent reasons" has generally been raised in cases where panels have departed or been asked to depart from previous adopted *Appellate Body* findings in *different disputes*.[1910] In contrast, the European Union asks us in this compliance proceeding to depart from the *original panel's* adopted legal interpretation in the *same dispute*. In our view, the European Union is not entitled to have the compliance Panel review the merits of the original panel's unappealed and adopted findings. Article 17.14 of the DSU provides that adopted Appellate Body reports "shall" be "unconditionally accepted by the parties to the dispute". Moreover, as explained by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)*:

> {A}n *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular claim* and the *specific* component of a measure that is the subject of that claim.
>
> {I}t {is} abundantly clear that a panel finding which is not appealed, and which is included in a panel report adopted by the DSB, must be accepted by the parties as a final resolution to the dispute between them, in the same way and with the same finality as a finding included in an Appellate Body Report adopted by the DSB – with

[1904] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1762 and fn 5262.
[1905] European Union's first written submission, para. 657, and second written submission, paras. 713 and 727.
[1906] European Union's second written submission, para. 714.
[1907] European Union's first written submission, paras. 658, 674, and 698; and second written submission, para. 716.
[1908] European Union's second written submission, para. 716. The European Union also appears to submit that the same "cogent reasons" compel us to reconsider the original panel's findings with respect to the "non-subsidized like product rule" in Article 6.5 of the SCM Agreement, in the context of the United States' lost sales claims under Article 6.3(c). (European Union's first written submission, fn 856)
[1909] United States' second written submission, paras. 404, 405-406, 409, 410, and 412.
[1910] See e.g. Appellate Body Reports, *US – Stainless Steel (Mexico)*, paras. 160-162; *US – Continued Zeroing*, para. 362; Panel Reports, *China – Rare Earths*, paras. 7.55-7.61; *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.315-7.317.

> respect to the particular claim and the specific component of the measure that is the subject of the claim.[1911] (emphasis original)

6.1141. Furthermore, while the Appellate Body in *US – Stainless Steel (Mexico)* explained that "{e}nsuring 'security and predictability' in the dispute settlement system … implies that, *absent cogent reasons*, an adjudicatory body will resolve the same legal question in the same way in a subsequent case"[1912], in the same dispute the Appellate Body also stated:

> We note that the mandate of *an Article 21.5 panel* includes the task of assessing whether the measures taken to comply with the rulings and recommendations adopted by the DSB in the original proceedings achieve compliance with those rulings. Therefore, *panels established under that provision are bound to follow the legal interpretation contained in the original panel and Appellate Body reports that were adopted by the DSB*.[1913] (emphasis added)

6.1142. This latter statement, in particular, strongly suggests that a *compliance panel* would be committing a legal error if it were to review and reconsider the merits of a legal interpretation developed by the panel serving in the original proceeding of the same dispute, when that legal interpretation was left unappealed and ultimately the subject of recommendations and rulings adopted by the DSB.

6.1143. Thus, we are not convinced that the European Union is entitled to reopen the original panel's findings with respect to its arguments concerning the relevance of Article 6.4 of the SCM Agreement to the United States' claims under Article 6.3(b). In any case, even if it were legally permissible for a compliance panel to review a legal interpretation developed by an original panel that was unappealed and adopted by the DSB in the same dispute, we are of the view that the explanations provided by the European Union do not amount to "cogent reasons". We are guided in this regard by the discussion of the panel in *US – Countervailing and Anti-Dumping Measures (China)*, where after having identified and reviewed the considerations thought "to underlie the Appellate Body's conclusion that, absent 'cogent reasons', an adjudicatory body will resolve the same legal question in the same way in a subsequent case", the panel reasoned as follows:

> From the foregoing we conclude that a panel must take the Appellate Body's prior interpretation as a point of departure in its interpretative analysis. However, a panel may confront the issue, e.g. because it has been raised by a party, of whether there are any arguments or there is any evidence submitted to the panel that would provide "cogent reasons" to reach a different interpretation. In our view, bearing in mind the Appellate Body's particular function in the WTO dispute settlement system, reasons that could support but would not compel a different interpretative result to the one ultimately adopted by the Appellate Body would not rise to the level of "cogent" reasons. To our minds, "cogent" reasons, i.e. reasons that could in appropriate cases justify a panel in adopting a different interpretation, would encompass, *inter alia*: (i) a multilateral interpretation of a provision of the covered agreements under Article IX:2 of the WTO Agreement that departs from a prior Appellate Body interpretation; (ii) a demonstration that a prior Appellate Body interpretation proved to be unworkable in a particular set of circumstances falling within the scope of the relevant obligation at issue; (iii) a demonstration that the Appellate Body's prior interpretation leads to a conflict with another provision of a covered agreement that was not raised before the Appellate Body; or (iv) a demonstration that the Appellate Body's interpretation was based on a factually incorrect premise.[1914]

6.1144. Assuming that the principle of "cogent reasons" could even apply to the present situation, we find this exposition of the reasons that may lead a panel to take a different interpretative approach to a particular matter that was the subject of adopted recommendations and rulings to

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[1911] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93.
[1912] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160. (emphasis added)
[1913] Appellate Body Report, *US – Stainless Steel (Mexico)*, fn 309.
[1914] Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.315-7.317. See also Panel Report, *China – Rare Earths*, paras. 7.55-7.61 and fn 127.

be a useful description of the kinds of considerations that would be relevant to a determination of whether "cogent reasons" exist. In our view, the arguments the European Union has advanced in support of its request that we reopen the original panel's findings are of a fundamentally different nature to the types of considerations identified in *US – Countervailing and Anti-Dumping Measures (China).* Moreover, we are not convinced that the European Union has demonstrated that the same arguments should otherwise compel us to review the original panel's findings. We explain our views in the following subsections.

The Panel's interpretation was not debated between the parties and third parties

6.1145. The European Union asserts that the original panel's interpretation of Articles 6.3 and 6.4 was not the subject of an exchange of arguments between the parties and third parties in the original proceeding but rather emerged for the first time in the panel report.[1915] The European Union submits that when a panel's interpretation "has not been the subject of prior argument amongst the parties and third parties, it is entirely appropriate that such arguments should be carefully considered by a compliance Panel".[1916] The European Union emphasizes its view that the United States itself disagrees with the interpretation in the original panel report.[1917]

6.1146. We note that it is well established that panels are not obliged to follow the arguments and legal interpretations advanced by the parties in making an "objective assessment of the matter", and are free to develop their own legal reasoning within the bounds of their terms of reference. As the Appellate Body has observed on several occasions:

> {N}othing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration. A panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute.[1918]

6.1147. Thus, a panel is perfectly entitled to make an objective assessment of the matter on the basis of its own legal reasoning that does not necessarily follow the arguments of the parties and third parties. In our view, this conclusion suggests that the fact that the legal reasoning underpinning a panel's resolution of a particular matter may not have been based on the arguments advanced by the parties and third parties cannot be a "cogent reason" that would justify reviewing a panel's unappealed and adopted findings.

6.1148. In any case, we note that the legal interpretation relied upon by the panel in the original proceeding did, in fact, draw from and address the arguments presented by the parties. In particular, the European Communities had argued *inter alia* that Article 6.4 is the *exclusive* means of demonstrating displacement and impedance under Article 6.3(b), which would only be available if a complainant were able to demonstrate that its like product was non-subsidized.[1919] On the other hand, the United States had argued that Article 6.4 is *not* the exclusive means of demonstrating displacement and impedance under Article 6.3(b) but provides further guidance for the application of Article 6.3(b) in certain circumstances.[1920] The parties' views concerning the relationship between Articles 6.3(b) and 6.4 were further explored by the panel in one of its questions, with respect to which the parties were also given an opportunity to comment on each other's replies.[1921] It is apparent, therefore, that the parties were not denied an opportunity to present their views with respect to the very legal question that was at the centre of the original panel's analysis.

6.1149. The European Union considers it "highly significant" that the United States asks the compliance Panel to reconsider the arguments the United States advanced in the original

[1915] European Union's second written submission, para. 714.
[1916] European Union's second written submission, paras. 713, 714, and 727.
[1917] European Union's second written submission, para. 715.
[1918] Appellate Body Reports *EC – Hormones*, para. 156; and *US – Certain EC Products*, para. 123.
[1919] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1766.
[1920] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1766.
[1921] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1764 and 7.1766, fns 5261, 5263, 5266-5270, 5274, and 5275.

proceeding were the matter to be reopened.[1922] It is clear, however, that the United States does not request us to review the original panel's interpretation. Indeed, the United States submits that the original panel correctly rejected the European Union's proposed interpretation of Articles 6.3(b) and 6.4, and that "{t}he result should be the same in this compliance proceeding – if the {European Union's} non-subsidized like product argument is addressed at all".[1923] The United States request that the compliance Panel reconsider the interpretation the United States proposed in the original proceeding is made only on the *condition* that the compliance Panel allow the parties to re-argue the original panel's unappealed findings.[1924] Thus, we can see no support in the United States' position in this dispute for the European Union's request to reopen the original panel's findings.

The Panel's interpretation eliminates or diminishes the requirement to show "causation"

6.1150. The European Union argues that the original panel's legal findings "diminish" or "extinguish" the need to demonstrate "causation" for the purpose of establishing the "phenomena" described in Articles 6.4 and 6.5 of the SCM Agreement.[1925] In particular, the European Union maintains that "the original panel's interpretation stands for the proposition that a temporal coincidence between subsidy on the one hand and relevant volume changes in third country markets or price changes in any market on the other hand, will automatically result in a finding of inconsistency", thereby obviating the need to demonstrate causation.[1926] According to the European Union, such an interpretation has "extraordinary implications" for the application of the adverse effects disciplines in the SCM Agreement. For instance, the European Union asserts that "environmental subsidies" would be "in effect, prohibited", simply because "they happen to temporally coincide with one of the phenomena described in Articles 6.4 or 6.5".[1927]

6.1151. In our view, the European Union misinterprets the original panel's findings. We recall that the original panel determined that the United States was not required to show that its "like product" was unsubsidized to make out its claim under Article 6.3(b) because: (i) the United States did not rely upon Article 6.4; and (ii) the original panel rejected the European Communities' submission that Article 6.4 is the exclusive means through which to establish serious prejudice within the meaning of Article 6.3(b). In particular, the original panel found that the "shall include" language in the first sentence of Article 6.4 indicates that resort to Article 6.4 is only *one way* of showing displacement and impedance in third country markets. Thus, the original panel's observations concerning the content of Article 6.4 – i.e. the original panel's view that Article 6.4 describes "a particular situation … in which a demonstration that market share of the subsidized product … increased" would suffice to make out a *prima facie* case of serious prejudice under Article 6.3(b) – were ultimately irrelevant to the panel's disposition of the matter. Rather, as already noted, it was the original panel's interpretation of the relationship between Articles 6.3(b) and 6.4 that enabled it to decide the relevant question. In other words, the legal basis of the original panel's finding did not concern the issue of "causation", as the European Union argues, but rather the question whether Article 6.4 is the exclusive means through which to demonstrate serious prejudice within the meaning of Article 6.3(b).

The Panel's interpretation is erroneous for other reasons

6.1152. The European Union takes issue with several "other related matters referenced by the original panel".[1928] In particular, the European Union challenges the original panel's: (i) description of Article 6.4 as a "special rule"[1929]; (ii) conclusions, drawn from the "shall include" language in the first sentence of Article 6.4, about the relationship between Articles 6.3(b) and 6.4[1930]; (iii) concerns regarding the European Communities' original submission that any subsidy, no

[1922] European Union's second written submission, paras. 707 and 715.
[1923] United States' second written submission, para. 437.
[1924] United States' second written submission, para. 426.
[1925] European Union's first written submission, paras. 658-679; and second written submission, paras. 716-726.
[1926] European Union's second written submission, para. 716.
[1927] European Union's second written submission, para. 716.
[1928] European Union's first written submission, paras. 680-686.
[1929] European Union's first written submission, para. 681.
[1930] European Union's first written submission, para. 682.

matter how small or non-specific it was, would render Article 6.3 unavailable[1931]; (iv) reference to preparatory work[1932]; and (v) view of how its interpretation fits with the overall architecture of Article 6 of the SCM Agreement.[1933]

6.1153. In our view, the European Union's submissions articulate reasons why the European Union *disagrees* with the original panel's findings concerning the relationship between the relevant provisions and certain "other related matters referenced" in the panel report. We note that a number of the points made by the European Union were already raised and dismissed during the original panel proceeding.[1934] To the extent that they were not, the European Union's submissions appear to be arguments that a party might raise in an appeal of a legal interpretation before the Appellate Body − which this compliance Panel is not. The fact that a party disagrees with a legal interpretation developed by an original panel, that has not been appealed and was the subject of adopted DSB recommendations and rulings, cannot be a "cogent reason" for a compliance panel in the same dispute to reopen those findings.

6.6.4.3.3.3 Conclusion

6.1154. Thus, for all of the above reasons, we find that: (i) the adopted recommendations and rulings in *US − Large Civil Aircraft (2nd complaint)* in relation to the subsidization of Boeing LCA do not mean there is now a new "matter" before the compliance Panel as regards the European Union's reliance on Article 6.4 to reject the United States' claims made under Article 6.3(b); and (ii) even assuming that it is legally permissible for a compliance panel to review a legal interpretation developed by an original panel that was unappealed and adopted by the DSB in the same dispute, the European Union has failed to identify any "cogent reasons" for doing so. Accordingly, we dismiss the European Union's request for the compliance Panel to reject the United States' claims under Article 6.3(b) and (c) of the SCM Agreement in the light of the adopted recommendations and rulings in *US − Large Civil Aircraft (2nd complaint)* in relation to the subsidization of Boeing LCA.

6.6.4.4 Whether the United States brought its claims with respect to appropriate product markets

6.6.4.4.1 Arguments of the United States

6.1155. The United States submits that there are three separate product markets relevant to its claims of serious prejudice in this dispute: the market for single-aisle passenger aircraft; the market for twin-aisle passenger aircraft; and the market for very large passenger aircraft.[1935] According to the United States, the alleged aircraft markets reflect the following competitive relationships between different Airbus and Boeing LCA:

[1931] European Union's first written submission, paras. 683-684.
[1932] European Union's first written submission, para. 685.
[1933] European Union's first written submission, para. 686.
[1934] Panel Report, *EC and certain member States − Large Civil Aircraft*, paras. 7.1763, 7.1764, 7.1769-7.1770, and fn 5275.
[1935] The United States maintains that *freighter* aircraft are also properly characterized as "large civil aircraft". However, the United States argues that freighter aircraft do not compete in the same product markets as passenger aircraft, there being at present: (a) the market for medium-sized twin-aisle freighter aircraft (where the A330F and the 767F compete); and (b) the market for large or very large freighter aircraft (where the 777F and the 747F are sold). The United States has presented no separate data relating to Airbus sales or deliveries of freighter aircraft *in the post-implementation period*. (See, e.g. United States' response to Panel question Nos. 40 and 154). This is the period upon which we later focus in resolving the United States' claims under Article 6.3 of the SCM Agreement. (See below para. 6.1779 et seq.). Thus, we ultimately limit our examination of the United States' claims under Article 6.3 of the SCM Agreement to *passenger* aircraft.

Table 14: Competitive relationships between LCA according to the United States

Market of Competition	Subsidized Product	Like Product
Single-Aisle Aircraft	A318, A319, A319neo, A320, A320neo, A321, A321neo	737-600, 737-700, 737 MAX 7, 737-800, 737 MAX 8, 737-900ER, 737 MAX 9
Twin-Aisle Passenger Aircraft	A330-200, A330-300, A340-300, A340-500, A340-600, A350XWB-800, A350XWB-900, A350XWB-1000	767-300ER, 787-8, 787-9, 777-200ER, 777-200LR, 777-300ER
Very Large Aircraft	A380	747-8

6.6.4.4.2 Arguments of the European Union

6.1156. The European Union rejects the United States' characterization of the three alleged passenger aircraft markets. According to the European Union, there are currently more than three, and up to six or seven, passenger[1936] aircraft markets in the LCA industry. For the European Union, the potential aircraft markets reflect the following competitive relationships between different Airbus and Boeing LCA:

Table 15: Competitive relationships between LCA according to the European Union

Market of Competition	Subsidized Product	Like Product
Single-Aisle Aircraft		
Current versions, near-term delivery	A318, A319, A320, A321	737-600, 737-700, 737-800, 737-900ER
New generation, end of decade delivery	A319neo, A320neo, A321neo	737 MAX 7, 737 MAX 8, 737 MAX 9
Twin-Aisle Aircraft		
	None	767-300ER
Smaller, medium-range, near-term delivery	A330-200, A330-300	None
New generation, deliveries further into the future	A350XWB-800, A350XWB-900, A350XWB-1000	787-8, 787-9
Larger, longer-range, near-term delivery	None	777-200ER, 777-200LR, 777-300ER
Smaller, very large aircraft	None	747-8
Larger, new generation, very large aircraft	A380	None

[1936] The European Union does not dispute the United States' assertion concerning the existence of different product markets for freighter and passenger aircraft.

6.6.4.4.3 Evaluation by the Panel

6.6.4.4.3.1 Introduction

6.1157. During the original Appellate Body proceeding the parties appeared to accept (or at least did not object to the notion) that competition in the LCA industry could be viewed as taking place in three distinct passenger aircraft product markets, namely, the single-aisle, twin-aisle and VLA markets.[1937] However, in this compliance proceeding, the European Union argues that this portrayal of competition in the LCA industry is no longer justified. According to the European Union, passenger LCA are today bought and sold in up to six or seven distinct product markets, two of which are allegedly "temporal" monopoly markets where either Airbus or Boeing is at present the sole credible supplier. The European Union also appears to argue that there may be no product market at all in which the 767-300ER is currently sold.[1938] The European Union has made extensive submissions to support its view of present-day competition in the LCA sector, referring to multiple pieces of evidence including two separate declarations from an Airbus Senior Vice President[1939] as well as an expert report by a competition policy economist.[1940] The United States, on the other hand, submits that the same three passenger LCA product markets relied upon by the Appellate Body in the original proceeding to "complete the analysis" continue to exist today. The United States has also presented extensive arguments and referred to multiple pieces of evidence, including one declaration from a Boeing Senior Vice President[1941] and an expert report from a competition policy economist.[1942] Before turning to examine the merits of the parties' respective positions, we first recall the Appellate Body's findings with respect to the relevant product markets in the original proceeding, highlighting the extent to which these findings and the accompanying guidance provided by the Appellate Body on how to identify relevant product markets can assist the Panel's own task of determining whether the United States has properly framed its claims of serious prejudice.

6.6.4.4.3.2 Product market findings in the original proceeding

The need to identify relevant product markets in serious prejudice disputes

6.1158. In the original proceeding, the Appellate Body overturned the panel's ruling that the United States was entitled to bring its claims of serious prejudice on the basis of a single "subsidized product", finding that the panel erred in concluding that it was not required "to make an independent determination of the 'subsidized product', as opposed to relying on the United States' identification of the product".[1943]

6.1159. According to the Appellate Body, the original panel was required to make "an independent and objective assessment" of the serious prejudice claims put forward by the United States, *including* whether it was appropriate to examine all Airbus LCA as a single "subsidized product" and all Boeing LCA as a single "like product". This necessitated a determination of whether the "like product" and the "subsidized product" competed in the same product market or different product markets.[1944] In the Appellate Body's view, such an analysis called upon the panel to

[1937] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1177-1178. The European Union's main argument in the original proceeding was that there were, in fact, five relevant product markets. The Appellate Body explicitly declared that it had "not endorsed the five product market approach proposed by the European Communities". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1226).

[1938] The European Union seems to suggest that there is no market for the 767. (European Union's response to Panel question No. 70, para. 285 (citing Christophe Mourey, Senior Vice President Contracts, Airbus, Supplemental Statement on Current Competitive Conditions in the LCA Industry, 12 December 2012, (Supplemental Mourey Statement), (Exhibit EU-124) (BCI/HSBI), paras. 33-34))

[1939] Mourey Statement, (Exhibit EU-8) (BCI); and Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI).

[1940] Dr David Sevy, "Comment on the Declaration of Dr Chetan Sanghvi", 24 June 2013, (Sevy Declaration), (Exhibit EU-395).

[1941] Bair Declaration, (Exhibit USA-339) (BCI).

[1942] Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013, (Sanghvi Declaration), (Exhibit USA-530).

[1943] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1129, 1137 (citing Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1653), and 1174.

[1944] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1129.

analyse the nature and extent of actual or potential competition between different models of Airbus LCA by carefully scrutinizing "the *competitive conditions* of the market".[1945] This included evaluating the merits of the European Union's allegation that there were five distinct product markets of Airbus and Boeing LCA.[1946]

6.1160. The Appellate Body derived the panel's obligation from the language in Articles 6.3(a) and 6.3(b) of the SCM Agreement, and in particular, the focus of these provisions on the existence of displacement or impedance of imports and exports into or from a particular *market*. The Appellate Body interpreted this focus to mean that a "subsidized product" may only be found to displace or impede the importation or exportation of a "like product" if it is determined that the two products *compete in the same product market*.[1947] Thus, in order for a serious prejudice claim under Articles 6.3(a) and 6.3(b) of the SCM Agreement to succeed, the Appellate Body found that a complainant must ensure that it has correctly identified the relevant product market where any displacement or impedance is alleged to occur.[1948] Elsewhere in its report, the Appellate Body came to the same conclusion with respect to claims of serious prejudice in the form of lost sales within the meaning of Article 6.3(c) of the SCM Agreement − namely, that such lost sales can only exist in situations where the "subsidized product" and the "like product" *compete in the same market*.[1949] It follows, therefore, 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.

Implications of the need to identify relevant product markets in serious prejudice disputes

6.1161. 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. 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 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. Thus, the Appellate Body's ruling appears to imply that the identification of relevant product markets will be a critical, and potentially decisive, part of the analysis that will have to be undertaken in all serious prejudice disputes.

Product markets applied by the Appellate Body to "complete the analysis"

6.1162. Having concluded that in the absence of an objective determination of the relevant product markets the original panel's conclusion that there was a single "subsidized product" and a single "like product" could not stand, the Appellate Body reversed the panel's findings of displacement.[1950] The Appellate Body then considered whether it was able to "complete the analysis" regarding the existence of a single or multiple product markets.[1951] As it reviewed the undisputed factual findings made by the panel, the Appellate Body opined that it was not apparent that the panel had engaged "in a thorough and meaningful manner" with the evidence regarding the factors that the Appellate Body identified as being relevant to assessing the conditions of

[1945] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1129. (emphasis added)
[1946] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1131.
[1947] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1118-1119.
[1948] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1128-1130.
[1949] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1214.
[1950] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1174.
[1951] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1139-1147.

competition in the LCA market. The Appellate Body therefore considered that the panel's findings did not allow it to draw conclusions as to the proper scope of the relevant product market(s).[1952]

6.1163. Nevertheless, for two Members of the Appellate Body Division the particular circumstances of the dispute were such that they believed it was possible to "complete the analysis" with respect to the United States' claims of displacement.[1953] The particular circumstances that rendered this possible were the following:

a. The European Union's appeal of the panel's finding of displacement was "limited", since it did not request the Appellate Body to "reverse the displacement findings in their entirety".[1954]

b. The European Union acknowledged that "displacement could be assessed on the basis of either three or five product markets".[1955]

c. There was uncontested evidence of Airbus' and Boeing's volume of sales and market shares for each of the relevant markets at issue.[1956]

6.1164. The two Appellate Body Members therefore proceeded to "complete the analysis" on the basis of the following three product markets:

a. The product market for single-aisle LCA;

b. The product market for twin-aisle LCA; and

c. The product market for very large aircraft.[1957]

6.1165. The Appellate Body explained that by proceeding in this manner, it was examining the data from the perspective proposed by the European Union, to the extent that it was not contested by the United States. Importantly, the Appellate Body did not make *its own* finding that the above segments represented distinct product markets. Nevertheless, the fact that the parties did not object to the possibility of evaluating the merits of the United States' displacement claims on the basis of the above three product segments shows that the product market delineation the United States advances in the present dispute was, at the time, accepted by the European Union.

6.1166. Finally, in rejecting the European Union's appeal against the panel's findings of lost sales with respect to the Emirates A380 sales campaign, it is notable that the Appellate Body confirmed the original panel's view that the A380 and 747 were direct competitors in this sales campaign. Thus, after reviewing the factual basis of the panel's findings, the Appellate Body concluded that:

> In our view, the Panel's findings that there is competition between the Airbus A380 and the Boeing 747 and that Airbus and Boeing competed for the Emirates sale even though formal offers may not have been requested or made, provided a sufficient basis for the Panel's finding of lost sales.[1958]

6.1167. While the Appellate Body's apparent acceptance of the existence of competition between the A380 and the 747 during the Emirates sales campaign in 2000 is not dispositive of the question whether the same products compete in the alleged market for VLA for the purpose of the present dispute, the Appellate Body's conclusions strongly suggest that, at the time, the

[1952] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1142.
[1953] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1174 and 1205.
[1954] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1175. The European Union did not seek reversal of the findings of displacement in the single-aisle, 200-300 seat and 300-400 LCA (or twin-aisle) markets of China, Korea and the European Union, and the single-aisle LCA market of Australia.
[1955] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1176.
[1956] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1177.
[1957] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1178.
[1958] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1228.

Appellate Body was not willing to accept that the two LCA products were sold into different product markets.

Guidance for how to identify relevant product markets

6.1168. Although the Appellate Body explicitly declined to make any findings with respect to the relevant product markets for the purpose of the original proceeding, it does appear to have provided a degree of guidance on how such markets might be identified.

6.1169. The Appellate Body explained that "two products would be in the same market if they were engaged in actual or potential competition in that market".[1959] The Appellate Body clarified that this would be the case when two products are "sufficiently substitutable so as to create competitive constraints on each other".[1960] Although the Appellate Body did not explicitly qualify the nature or degree of competitive constraints that need to be present in order to conclude that two products are substitutable, it did refer with approval to the views of one particular commentator who explains that the relevant market for the purpose of competition policy should consist of "the set of products (and geographical areas) that exercise *some* competitive constraint on each other".[1961] Moreover, the Appellate Body also explained that where the evidence shows that the competitive relationship is not direct and "at most, indirect or remote", this must be properly taken into account in the analysis.[1962]

Demand-side substitutability

6.1170. The Appellate Body described demand-side substitutability as the situation when "two products are considered substitutable by consumers".[1963] According to the Appellate Body, the absence of demand-side substitutability between two products would suggest that they are likely to compete in two distinct markets, rather than in a single market.[1964] Thus, demand-side substitution will be an "indispensable"[1965] and "critical"[1966] criterion to consider when identifying product markets.

6.1171. In terms of the factors that should be considered when trying to determine the demand-side substitutability of two products, the Appellate Body noted that an examination of physical characteristics, general end-uses and consumer preferences could be useful. However, the Appellate Body emphasized that these "should *not* be treated as the exclusive factors" to consider when deciding whether two products exert competitive constraints on each other.[1967] The extent to which "customers procure a range of products to satisfy their needs" may also "give an indication that all such products could be competing in the same market".[1968] The Appellate Body also suggested that a test commonly used in the field of competition regulation to ascertain whether two products exercise competitive constraints on each other, the so-called "Small but Significant Non-Transitory Increase in Prices" test (the SSNIP test or hypothetical monopolist test), could be used to help guide the identification of relevant product markets[1969], explaining further that this test could be implemented through the use of cross-price elasticity and price correlation analyses.[1970]

[1959] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1122 (citing Appellate Body Report, *US – Upland Cotton*, para. 408).
[1960] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.
[1961] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2467. (emphasis added)
[1962] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1136.
[1963] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1121.
[1964] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1134.
[1965] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1121.
[1966] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1134.
[1967] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120. (emphasis added)
[1968] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.
[1969] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2468.
[1970] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2492 (citing G.J. Stigler and R.A. Sherwin, "The Extent of the Market", (1985) 28 *Journal of Law and Economics* 555).

Supply-side substitutability

6.1172. According to the Appellate Body, a consideration of substitutability on the *supply-side* may also be required in order to determine whether two products compete in the same product market. For example, the Appellate Body noted that "evidence on whether a supplier can switch its production at limited or prohibitive cost from one product to another in a short period" could be used to inform the question of whether two products are in a single product market.[1971]

6.6.4.4.3.3 Whether the United States has demonstrated the existence of three product markets for passenger LCA

6.1173. Mindful of the Appellate Body's guidance concerning the importance of identifying relevant product markets and the way in which this must be done, we now turn to examine whether the United States has established the existence of the three allegedly distinct passenger LCA product markets it has used for the purpose of bringing its serious prejudice complaint. We begin our assessment by answering what is essentially a fundamental threshold question raised by the European Union, namely, whether the United States has sought to substantiate the existence of the alleged single-aisle, twin-aisle and very large LCA product markets using the appropriate kind of evidence. After addressing the European Union's contentions on this point, we respond to a second general overarching criticism the European Union has made of the United States' product market arguments, namely, that they fail to support the existence of the three alleged LCA product markets because they do not demonstrate that "*significant* competitive constraints" exist between the full range of aircraft the United States maintains fall within the scope of the same relevant product market. Finally, we turn to evaluate the merits of the United States' product market submissions. After setting out our own understanding of the general conditions of competition that exist in the LCA industry today, we proceed to assess the arguments and evidence the parties have advanced and relied upon to support their different positions with respect to the existence of the three alleged LCA product markets.

Whether the United States has sought to establish the existence of the relevant product markets using the appropriate kind of evidence

6.1174. The European Union submits that the United States has failed to demonstrate the existence of the three separate passenger LCA product markets it relies upon to make its claims of serious prejudice, in part because the United States has not presented any *quantitative analysis* in support of its allegations of demand-side substitutability between the relevant LCA products. By not doing so, the European Union maintains that the United States has ignored the "requirement" to "perform the very analyses that the Appellate Body directed must be performed for the very same claims involving the very same sector at issue in this very dispute".[1972]

6.1175. The European Union recalls that, after noting that two products will be in the same product market when they are substitutable, the Appellate Body referred to and briefly explained how the SSNIP test is commonly used to ascertain whether two products exercise a competitive constraint on each other, and thereby, determine their substitutability.[1973] According to the European Union, the SSNIP test was cited by the Appellate Body as one example of the type of *quantitative analysis* that the United States was *required* to use to identify the relevant product markets *in the LCA industry*.[1974] The European Union acknowledges, however, that the SSNIP test would be an "imperfect tool" to use for this purpose, as its results would not be "meaningful" without "information on prices covering a significant period of time".[1975] Indeed, the European Union "recognizes that there may be instances where the requisite data is unavailable and thus quantitative tools may not provide a definitive answer".[1976] Nevertheless, the European Union argues that "{w}hatever the merits of a SSNIP test in the circumstances at hand",

[1971] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1122.
[1972] European Union's comments on the United States' response to Panel question No. 157, paras. 238, 241, 246 and 248.
[1973] European Union's response to Panel question Nos. 51 (para. 234) and 56 (para. 267).
[1974] European Union's response to Panel question No. 51, para. 239; and comments on the United States' response to Panel question No. 51, paras. 244 and 362.
[1975] European Union's comments on the United States' response to Panel question Nos. 51 (para. 363) and 157 (paras. 331 and 333).
[1976] European Union's response to Panel question No. 56, para. 269.

the United States is not entitled to "jettison any effort to apply an alternative quantitative market definition tool {or multiple quantitative tools}, in favour of a purely qualitative approach".[1977] Thus, the European Union argues that the lack of any quantitative analysis in the United States' relevant product market submissions means that they offer "no methodology or basis to draw lines between stronger competitive relationships that place products in the same market, and weaker relationships that are insufficient to do so"[1978], and must, therefore, be rejected.

6.1176. The United States maintains that the Appellate Body did not, as the European Union asserts, state that a complainant must advance "substantial evidence, rooted in *quantitative and analytical rigour*" when identifying the relevant product markets in a serious prejudice dispute.[1979] Rather, according to the United States, the Appellate Body's reference to the SSNIP test was a "passing reference in a footnote" made for the purpose of identifying a test commonly used to ascertain whether two products are in the same market.[1980] Thus, in the view of the United States, the Appellate Body's reference to the SSNIP test did not establish a "threshold legal requirement".[1981] Furthermore, the United States submits that a requirement that product markets "must be established with quantitative evidence would be illogical because there are situations where quantitative analysis is not possible or is simply not necessary because of the qualitative evidence available or for other analytical reasons".[1982] In this regard, the United States argues that "historical information on negotiated prices covering a significant period of time would be needed to conduct a *relevant* quantitative analysis of LCA markets".[1983] Moreover, even if available, the United States submits that such pricing information would not be sufficient in the present instance because: (a) the small number of sales transactions means there are insufficient data points to properly analyse the complicated products at issue; (b) LCA are differentiated products making any market definition derived from a SSNIP test relatively unreliable, particularly if measured from a limited data set; and (c) this dispute involves subsidies that "have already affected the products available in the market", implying that any quantitative analysis would need to be corrected for such pre-existing effects.[1984]

Did the United States have an obligation to present quantitative evidence?

6.1177. In asserting that the Appellate Body made "eminently clear" that "complainants must provide evidence, in the form of quantitative market definition tools such as the SSNIP test, of sufficient quantitative and analytical rigour to enable the assessment of products markets based on demand-side substitutability"[1985], the European Union refers most often to the following two paragraphs from the Appellate Body's report:

> Our interpretation is consistent with the fundamental economic proposition that a market comprises only those products that exercise competitive constraint on each other.[2467] This is the case when the relevant products are substitutable.[2468] Although physical characteristics, end-uses, and consumer preferences may assist in deciding whether two products are in the same market, they should *not* be treated as the exclusive factors to consider in deciding whether those products are sufficiently substitutable so as to create competitive constraints on each other. Indeed, whether two products compete in the same market is not determined simply by assessing whether they share particular physical characteristics or have the same general uses; 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,

[1977] European Union's response to Panel question No. 157; and comments on the United States' response to Panel question No. 157, para. 334.
[1978] European Union's comments on the United States' response to Panel question No. 157, para. 334.
[1979] United States' comments on the European Union's response to Panel question No. 157, para. 112 (quoting European Union's response to Panel question No. 157, para. 333). (emphasis original)
[1980] United States' comments on the European Union's response to Panel question No. 157, para. 113.
[1981] United States' comments on the European Union's response to Panel question No. 157, para. 113.
[1982] United States' comments on the European Union's response to Panel question No. 157, para. 113.
[1983] United States' response to Panel question No. 157, para. 114. (emphasis original)
[1984] United States' response to Panel question No. 157, paras. 115-121; and Sanghvi Declaration, (Exhibit USA-530), paras. 29 and 42.
[1985] European Union's comments on the United States' response to Panel question No. 56, para. 362; and response to Panel question No. 157.

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.

Demand-side substitutability—that is, when two products are considered substitutable by consumers—is an indispensable, but *not* the only relevant, criterion to consider when assessing whether two products are in a single market. Rather, a consideration of substitutability on the supply-side may also be required. For example, evidence on whether a supplier can switch its production at limited or prohibitive cost from one product to another in a short period of time may also inform the question of whether two products are in a single market. (emphasis original)

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[2467] The term "market" has been defined as "{g}enerally, any context in which the sale and purchase of goods and services takes place." (*Macmillan Dictionary of Modern Economics*, 4th edn, D.W. Pearce, J. Cairns, R. Elliot, I. McAvinchey, R. Shaw (eds) (Palgrave McMillan, 1992), p. 266) Another definition of the term "market" is "{a} collection of homogenous transactions. A market is created whenever potential sellers of a product are brought into contact with potential buyers and a means of exchange." (*Dictionary of Economics*, 2nd edn, G. Bannock, R.E. Baxter, E. Davis (eds) (The Economist Books, 1999), p. 262) See also European Court of Justice, Judgment, Case 27/76, *United Brands Company and United Brands Continental BV v. Commission* [1978] ECR 207; and US Supreme Court, *Brown Shoe Co., Inc. v. United States*, 370 US 294 (1962). The recently revised merger guidelines issued by the US Department of Justice and the Federal Trade Commission also provide a useful reference for understanding the word "market". (See US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, 19 August 2010) The term "market" has also been defined for purposes of EU competition law. (See European Commission Notice on the definition of relevant market for the purposes of Community competition law, published in the *Official Journal of the European Communities*, C Series, No. 372 (9 December 1997)) One commentator submits that a market definition, both from a product and geographical point of view, "is not of interest by itself, but only as a preliminary step towards the objective of assessing the market power of the firms under analysis." (M. Motta, *Competition Policy: Theory and Practice*, p. 101) Thus, since a market definition "is instrumental only to the assessment of market power, the relevant market should not be a set of products, which 'resemble' each other on the basis of some characteristics, but rather the set of products (and geographical areas) that exercise some competitive constraint on each other." (*Ibid*., p. 102) (footnote original)

[2468] Motta, *supra*, footnote 2647, p. 103. A test that is commonly used to ascertain whether two products exercise competitive constraint on each other, and thus "should guide the analysis of market definition in both the product and the geographic dimension", is the so-called "Small but Significant Non-Transitory Increase in Prices" test ("SSNIP", also described as the "hypothetical monopolist" test). (*Ibid*., p. 102) Put simply, this test asks whether or not a hypothetical seller of a certain product would find it profitable to raise the price of that product by a certain amount. If the price increase is found to be profitable, this would generally indicate that the product does not face significant competitive constraint from other products, and that it should therefore be considered to be in a separate market. Conversely, if the increase in price is found not to be profitable, this indicates that the product should not be considered to be in a separate market, as there exist other products that exercise competitive constraint on the seller. The test should, in such cases, continue to consider a wider market until a profitable hypothetical price increase is found, thus indicating the scope of the relevant market. (*Ibid.*, p. 105)[1986] (footnote original)

6.1178. In our view, there is nothing in the above Appellate Body statements to suggest that it believes a complainant bringing a serious prejudice complaint *must* identify the relevant product markets by using evidence that is "rooted in" *quantitative analyses*. In the above passage, the Appellate Body observes that any determination of the substitutability of two products cannot be limited to considerations of "physical characteristics, end-uses, and consumer preferences"; declaring that "it may also be relevant to consider whether customers demand a range of products or whether they are interested in only a particular type". Moreover, while emphasizing that considerations of demand-side substitutability will be "indispensable" to an analysis of relevant product markets, the Appellate Body explains that it may also be necessary to consider the extent to which two or more products are substitutable on the supply-side. Thus, as we understand it, the passage from the Appellate Body's report that is relied upon by the European Union simply stands for the proposition that in determining whether two products are sufficiently substitutable so as to create competitive constraints on each other, and therefore form part of the same product market,

[1986] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1120-1121.

it will be important to explore and analyse the particular characteristics and features of demand and, in certain situations, supply.

6.1179. Importantly, in setting out the above guidance on how to identify relevant product markets, the Appellate Body did not clarify whether the factors and criteria it chose to describe should be analysed using *quantitative or qualitative* methods. Indeed, the words "qualitative" and "quantitative" do not appear anywhere in the Appellate Body's explanation. This may have been because it is conceivable that the factors and criteria it chose to refer to could be analysed, assuming the availability of relevant and reliable data, using both methods of analysis. In this light, we see the Appellate Body's reference in footnote 2468 to the SSNIP test to represent the identification of one *example* of a quantitative tool of analysis that it considered *may* be usefully applied, depending upon the circumstances, to *inform* the determination of relevant product markets, without being decisive. The fact that the Appellate Body identified this test as one "that is *commonly* used to ascertain whether two products exercise competitive constraints on each other"[1987] is, in our view, a clear indication that the Appellate Body did not intend to declare that the SSNIP test, or by implication any other quantitative methods of analysis, *must* be applied in each and every serious prejudice dispute to identify relevant product markets. Thus, as we understand it, and contrary to the European Union's assertions, the Appellate Body did not in the above paragraphs establish a *rule* that complainants in serious prejudice cases must use the SSNIP test, or any other quantitative methods of analysis, when determining the existence of relevant product markets. Rather, as part of its effort to highlight the need to undertake an objective evaluation of all relevant factors bearing upon the extent to which two products are substitutable, and therefore place competitive constraints on each other, the Appellate Body referred to the SSNIP test as one tool that it considered *might* be usefully applied to *guide* the determination of relevant products markets.

6.1180. Our understanding of the Appellate Body's guidance is confirmed by its statements elsewhere in its report. In faulting the panel's decision during the original proceeding to evaluate the merits of the United States' serious prejudice claims on the basis of only one "subsidized product" and one "like product" that encompassed all LCA, the Appellate Body noted that the original panel had "failed to test, in any way, the scope of the market in particular countries by, for example, analyzing cross-price elasticity".[1988] In a footnote attached to this observation, the Appellate Body explained that cross-price elasticity is "one of the tools that can help when implementing the SSNIP test", together with the "price correlation tests favoured by Stigler and Sherwin".[1989] The Appellate Body concluded by saying that "{s}uch an analysis would have *assisted* the Panel in reaching *more solid* conclusions as to the extent of the relevant market in this case".[1990] Again, the Appellate Body did not conclude that the panel's findings in the original proceeding could not be upheld because of the absence of any analysis of cross-price elasticities. Rather, the Appellate Body found that our analysis with respect to the existence of one or more "subsidized products" and "like products" would have been "assisted" and our conclusions "more solid" had we performed such analysis. We are not convinced that in making this finding, the Appellate Body intended to establish a requirement that the United States, and by extension all complainants in serious prejudice cases, *must* use quantitative analyses to identify relevant product markets.

The importance of reliable pricing information

6.1181. In the present proceeding, the United States has sought to substantiate the existence of the three product markets it relies upon without using a SSNIP test or analysing cross-price elasticities or price correlations. The parties agree that in order to perform these kinds of analyses, a significant volume of historical price information would be necessary.[1991] Indeed, because the price of an LCA product will invariably depend upon the particular characteristics of any individual

[1987] (emphasis added)
[1988] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1134.
[1989] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2492.
[1990] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1134. (emphasis added)
[1991] European Union's response to Panel question No. 157; and United States' response to Panel question No. 157. While the United States submits that accurate historical price information covering a significant period of time would be necessary to produce *relevant* quantitative analyses of LCA markets, it argues that such price information would not alone be sufficient to produce *meaningful* quantitative analyses.

sales campaign or negotiation with a particular client, it is apparent that the prices that would be most informative and meaningful for the purpose of conducting a quantitative analysis of demand-side substitution in the LCA industry are those that are *actually* paid by customers, net of all discounts, rebates and other concessions, which in this sector are not only systematically applied but also **[***]** and variable.[1992] However, neither party has suggested that historical pricing data of this kind, which is among the most commercially sensitive information for both Airbus and Boeing (and no doubt many of their customers), is, or even could be made, readily available. Indeed, we note that when asked to disclose the anticipated A350XWB price information used by Professor Whitelaw to derive the internal rates of return of the four A350XWB LA/MSF contracts challenged by the United States in this proceeding, the European Union redacted the price data from its response.[1993] Similarly, no information was provided by the European Union concerning the price concessions used to interpret the results of the NPV analyses conducted in the Supplemental Mourey Statement.

6.1182. According to the European Union, limitations on the availability of the data needed to perform quantitative analyses do not render the use of such tools of no assistance to the task of identifying relevant product markets. In such circumstances, the European Union argues that the solution is to seek alternatives, or to employ multiple tools, rather than to abandon such tools entirely.[1994] The European Union finds support for this view in various passages of the Sevy Declaration. We note, however, that the one example that is cited in the Sevy Declaration of a quantitative study that managed to model demand using a "limited amount of data"[1995] and at the same time provide "significant insights into substitution", relied upon information on "*prices*, sales and physical characteristics of (essentially) all cars sold in five European markets during 1970-1999".[1996] Indeed, the Sevy Declaration identifies no *quantitative* tool of analysis that is commonly used by competition authorities to implement the "hypothetical monopolist test" that can be meaningfully applied *without* reliable information on prices.[1997] This is not surprising as consideration of marketplace responses to changes in prices[1998] lies at the heart of what is described in the Sevy Declaration as the "HMT logic".[1999] Thus, while asserting the fundamental importance of quantitative tools of analyses to the task of competition authorities to define relevant markets, including with respect to differentiated products, we do not understand the Sevy Declaration to suggest that any such analyses could be meaningfully undertaken without reliable information on prices.[2000] On the contrary, in a number of paragraphs, the Sevy Declaration

[1992] Mourey Statement, (Exhibit EU-8) (BCI), para. 67. See also below, paras. 6.1216-6.1217.

[1993] European Union's response to Panel question No. 132; and United States' comments on the European Union's response to Panel question No. 132.

[1994] European Union's comments on the United States' response to Panel question No. 51, paras. 361-363; and response to Panel question No. 157, paras. 331-334.

[1995] Sevy Declaration, (Exhibit EU-395), para. 46.

[1996] Frank Verboven, Catholic University of Leuven, "Quantitative Study to Define the Relevant Market in the Passenger Car Sector", Report commissioned by the Directorate General of Competition of the European Commission, 17 September 2002, (Exhibit USA-572), p. 16 (cited in the Sevy Declaration, (Exhibit EU-395), fn 34). (emphasis added)

[1997] The Sevy Declaration appears to identify "critical loss analysis" as one alternative to the SSNIP test. However, it is apparent from the description of this analysis included in the Sevy Declaration that information on prices will be fundamental to its implementation. (Sevy Declaration, (Exhibit EU-395), paras. 38 and 42, and fn 26). Moreover, the OECD describes "critical loss analysis" as "not an alternative to the {hypothetical monopolist test} but a way to implement this test". The OECD's description of how to perform a "critical loss analysis" also reveals that its proper implementation will depend upon the availability of price information that is very similar if not identical to that needed to determine cross-price elasticities of demand. (See also, United States Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, p. 12).

[1998] See general discussion of the "hypothetical monopolist test" in United States Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, pp. 8-13. See also European Commission, Commission Notice on the definition of relevant market for the purpose of Community competition law, *Official Journal of the European Communities*, C372/5, 9 December 1997, (Notice on Market Definition), (Exhibit USA-551), paras. 15-19, and in particular, para. 39, which identifies a number of different "quantitative tests that have been specifically designed for the purpose of delineating markets", all of which require pricing information.

[1999] Sevy Declaration, (Exhibit EU-395), para. 43 and fn 23.

[2000] That the types of quantitative analyses identified in the Sevy Declaration used to implement the "hypothetical monopolist test" (i.e. the SSNIP test and critical loss analysis) require reliable pricing data in order to be meaningfully applied is also apparent from the European Commission's Notice on Relevant Product Markets, which after identifying a number of different price-dependent "quantitative tests that have been specifically designed for the purpose of delineating markets", explains that the "Commission takes into account available quantitative evidence capable of withstanding rigorous scrutiny for the purposes of establishing

accepts that reliable information on LCA prices would be necessary to conduct the types of price elasticity analyses needed to implement the SSNIP test[2001], twice highlighting that leading competition authorities have the legal means to compel disclosure of such information.[2002]

6.1183. The European Union alleges that, unlike the United States, it has presented rigorous quantitative analyses in this dispute of the degree of demand-side substitutability between several pairings of Airbus and Boeing LCA in the form of the net present value (NPV) analyses contained in the Supplemental Mourey Statement.[2003] The Supplemental Mourey Statement calculates the NPVs of the revenue and cost streams generated by a number of different aircraft operating on, allegedly, typical missions over the course of a 15-year life-span with a commercial airline. The Supplemental Mourey Statement goes on to interpret the size of the NPV differences between each pair of examined aircraft in the light of their (alleged and undisclosed) individual pricing, and draws conclusions about the extent to which it would be feasible for the manufacturer of the disadvantaged aircraft to offset the NPV disadvantage through price discounting. Where it is considered not possible for the disadvantaged aircraft manufacturer to offset the NPV gap without resort to loss-making sales, the Supplemental Mourey Statement infers that this is a strong indication that the pair of aircraft in question do not exercise significant competitive constraints on one another, and therefore, that they are not in the same product markets.[2004] The European Union submits that the NPV analyses presented in the Supplemental Mourey Statement demonstrate that a rigorous quantitative approach to product market delineation, based on a comparison methodology routinely performed in the industry, is feasible.[2005]

6.1184. Although not entirely clear, a similar analytical approach to the one applied in the Supplemental Mourey Statement appears to have been contemplated in the Sevy Declaration, where it is described as a method that "examining authorities" might want to apply where "e.g., data limitations were to prevent the performance of a full-blown SSNIP test".[2006] We evaluate the probative value of the European Union's NPV analyses in the sections that follow.[2007] However, for present purposes, we note that despite being characterized as an approach that could be usefully applied to overcome data challenges, it is apparent that the NPV analyses contained in the Supplemental Mourey Statement, not unlike the other quantitative methods identified by the European Union that aim to inform the assessment of demand-side substitutability, require information on LCA prices in order to provide meaningful insights; and in the case of the analyses submitted by the European Union, the United States argues that the information on price concessions used to interpret their results is unsubstantiated.[2008]

The challenge of performing meaningful quantitative analyses of demand for LCA products

6.1185. Apart from having expressed strong reservations about the feasibility of the quantitative methods of analysis advocated by the European Union in the absence of reliable price information, the United States has advanced three other lines of argument to support its contention that it would be "virtually impossible"[2009] to perform the kinds of quantitative analyses the

patterns of substitution in the past". (Notice on Market Definition, (Exhibit USA-551)). It is difficult to imagine how the use of unreliable pricing information in this kind of quantitative analyses could withstand this standard of inquiry. (Notice on Market Definition, (Exhibit USA-551), para. 39)

[2001] Sevy Declaration, (Exhibit EU-395), paras. 48-49, 51, and 53.

[2002] Sevy Declaration, (Exhibit EU-395), paras. 39 and 43.

[2003] European Union's second written submission, para. 633; comments on the United States' response to Panel question No. 50, para. 335; and Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 32-61.

[2004] European Union's comments on the United States' response to Panel question No. 61, para. 439; and Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI).

[2005] European Union's comments on the United States' response to Panel question No. 61, para. 445.

[2006] Sevy Declaration, (Exhibit EU-395), fn 23 (describing an approach whereby consideration would be given to "the values attached by customers to particular goods, to assess the extent to which small or large price concessions would induce switching between these goods and whether these can be considered close substitutes. This assessment may form a basis for assessing whether a product exercises significant competitive constraints on another, in a logic that is comparable to that of a critical loss analysis").

[2007] See below paras. 6.1249-6.1276.

[2008] United States' response to Panel question No. 61, paras. 207 and 208.

[2009] United States' response to Panel question No. 60, para. 201. See also United States' response to Panel question Nos. 56 (para. 182) and 60 (paras. 199 and 203).

European Union submits the Appellate Body declared *must* be carried out in this dispute.[2010] The first two of these concern the alleged conceptual and practical difficulties associated with identifying an appropriate way to model LCA customer demand and gather the necessary data to derive reliable estimates of this demand. These arguments focus on the complicated multi-dimensional nature of LCA purchase decisions, the relative infrequency of LCA sales, and the fact that the LCA are differentiated products.[2011] The European Union rejects each of these United States explanations for not having submitted any quantitative analyses in this dispute, arguing that the fact there may be "some data challenges" associated with the proper application of particular quantitative methods, does not justify abandoning them altogether.[2012] According to the European Union, such difficulties may be overcome by making adjustments or by otherwise factoring them into the analysis, as is commonly done by national competition authorities, which apply the very same techniques to differentiated products even where data availability is limited.[2013]

6.1186. We agree with the European Union that the complicated dynamics surrounding the purchase and sale of LCA do not make it *impossible* to apply the SSNIP test or other quantitative methods of analysis implementing the "HMT logic" to the LCA industry. However, it is apparent that the multi-faceted nature of a customer's demand for LCA products does make the application of such methods a significant challenge. As we explain in more detail in the section that follows[2014], an LCA customer's purchase decision will be influenced by a host of non-price factors. According to the Mourey Statement, these include not only a range of factors affecting an aircraft's economic value to a customer's particular business model, but also subjective considerations involving "unquantifiable judgements" which "can be equally significant".[2015] Likewise, in the Sanghvi Declaration, LCA demand is described as spanning "multiple dimensions" with "subtle, unobserved, linkages across those dimensions that are idiosyncratic to each customer and model family at each point in time".[2016] Given the multiplicity of (sometimes "unquantifiable") factors shaping demand for LCA, any attempt to reliably measure the cross-price elasticities of the range of LCA products at issue in this dispute would, first and foremost, require building a model of demand that appropriately accounted for how all of these different considerations interact. The European Union has not ventured any suggestions about what such a model might look like. However, one economist who has endeavoured to undertake such analysis has recognized that "demand for aircraft is very complex, and estimating the demand for aircraft is a formidable research agenda in itself".[2017] In any case, even assuming that an appropriate model of demand could be devised, it is clear that a significant amount of reliable (price and non-price) data would be needed for it to be used to derive meaningful results.

6.1187. Even where econometric analyses are not used, and where, for example, the "HMT logic" is applied by simply asking the question whether customers would substitute away from one LCA product to another in the event of a SSNIP (*ceteris paribus*), it is apparent that the probative value of such analyses for the purpose of identifying the true boundaries of competition between LCA products would not be guaranteed. This follows from the fact that LCA are differentiated products, and as such, they are all imperfect substitutes with the degree of substitutability of any two products lying somewhere between no- and perfect-substitution.[2018] As explained by the Organisation for Economic Cooperation and Development (OECD), two particular problems can arise when seeking to identify a relevant product market in this context:

[2010] See above para. 6.1176.

[2011] United States' response to Panel question Nos. 56, 60 and 157; and Sanghvi Declaration, (Exhibit USA-530), paras. 33-34, 42, 47, and 50.

[2012] European Union's comments on the United States' response to Panel question No. 157, paras. 247-250.

[2013] European Union's comments on the United States' response to Panel question Nos. 51 (paras. 269-271 and 363) and 157; and Sevy Declaration, (Exhibit EU-395), paras. 35-55 and 66.

[2014] We describe the conditions of competition in the LCA industry in more detail in the following section, at paras. 6.1213-6.1222.

[2015] Mourey Statement, (Exhibit EU-8) (BCI), para. 65.

[2016] Sanghvi Declaration, (Exhibit USA-530), para. 42.

[2017] Benkard, C. L., *A dynamic analysis of the market for wide-bodied commercial aircraft*, NBER Working Paper No. 7710, NBER: Cambridge MA, 2000, p. 19.

[2018] United States' response to Panel question No. 50; and European Union's response to Panel question No. 50.

> Two problems with respect to market definition in the case of differentiated products can arise. The first concerns the continuity of the substitution chain in cases there are no clear gaps or stark distinctions between products or if suppliers are densely and evenly distributed in space. This renders the identification of the boundary of the market by the HMT difficult. In such instances, markets will tend to be defined broadly yielding small market shares that would understate market power.
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> The second problem is due to the binary nature of the market definition exercise that classifies products as either "in" the market or "out" of the market. It implies that all competitors in the market are effective competitors offering perfect substitutes while those outside the market do not impose any competitive constraints on the products in the relevant market at all. Such an approach will overstate the impact of imperfect substitutes in the relevant market and understate the competitive constraints posed by imperfect substitutes outside the relevant market. The market definition/market share approach gauges the competitive constraints that one product imposes on the others in the candidate market by the size of its market share and not by the intensity of competition. This is an acceptable proxy if market shares convey at least some information about the intensity or closeness of competition.[2019] (footnotes omitted)

6.1188. It follows, therefore, that the outcome of a market definition exercise in the context of differentiated products will not necessarily answer the question about where to draw the line between products that are sufficiently substitutable to form a separate product market and those that are not. As noted by the European Union in its submission to the 2012 OECD Competition Committee Roundtable on Market Definition, the answer to this question will not always be clear:

> Differentiated {product} markets are usually characterized by a continuum of substitution and a varying intensity of competition interaction between the products in question. This increases the challenge to identify precise boundaries of the relevant market. While much has been written in academic literature on how best to define markets, the fact is that in many differentiated product industries, there is no clearly right way to draw boundaries that are not to some extent inevitably arbitrary.
>
> The difficulties in establishing the precise relevant market are remedied by taking into account in the competitive assessment that the chosen market definition may be less informative than in other cases. Market shares are also less informative in the case of differentiated product markets than in homogeneous product markets. Indeed market shares may over- or underestimate the effects of a transaction depending inter alia on the closeness of substitution between the relevant products. However, although market shares might not fully reflect the competitive interaction, they can still give an indication of the market power of the party/parties in question. In addition, the definition of the relevant market helps to scope the competitive landscape and structure the subsequent competitive assessment.[2020] (footnotes omitted)

6.1189. Thus, not only would the task involved in undertaking an econometric analysis of demand in the LCA industry pose significant methodological and data challenges, it is also recognized that the probative value of any market definition exercise using the "HMT logic" for the purpose of understanding the degree of competition between any two LCA products might well be limited.

The extent to which the SSNIP test may be applied in serious prejudice disputes

6.1190. The third line of argument the United States advances in support of its submission that it would be "virtually impossible" to apply the SSNIP test in the present dispute is rooted in the different regulatory focus of merger analysis compared with an evaluation of adverse effects under the SCM Agreement. Simply explained, the United States' position is that because the SSNIP test, *as it is usually applied in merger cases*, is intended to guide the identification of relevant product markets for the purpose of determining the effects of the *future* conduct of a merged entity on

[2019] OECD Policy Roundtables, Competition Committee, Background Note on Market Definition, 2012, (Exhibit USA-549), p. 48.

[2020] OECD Policy Roundtables, Competition Committee, Background Note on Market Definition, 2012, (Exhibit USA-549), European Union submission, at pp. 337-338.

competition, it "starts with the assumption that the market before the {theoretical} price increase {i.e. the SSNIP} reflects competitive conditions".[2021] However, according to the United States, the same assumption cannot be maintained in a serious prejudice dispute because an evaluation of the merits of a serious prejudice claim is focused on the existence and nature of *past and present* competitive relationships, which may themselves be affected by the government subsidization alleged to cause adverse effects. Thus, the United States argues that any use of the SSNIP test to identify relevant product markets for the purpose of a serious prejudice dispute must account for the fact that the prevailing market prices used as the starting point for running the SSNIP test might be distorted by the effects of the very conduct that is being investigated.[2022] If no adjustments are made to account for this possibility, the United States argues that the resulting product market definition could be overly narrow, a potential outcome the United States describes with the aid of the following example:

> As an example, imagine several companies make identical products using the same manufacturing process and sell those products at identical prices. If one company later receives a significant subsidy that is used to lower prices, it will take sales away from its competitors. If the subsidy is very large, it may reduce its prices to such a degree that it captures all sales. Once that has occurred, a SSNIP test would identify a monopoly market, despite the fact that the products are identical, due to a complete lack of substitution between the subsidized product and any other products. Yet it would clearly be a mistake to treat these identical products as being in different markets, as the only difference between them is the subsidy itself. The proper benchmark is the market as it would have existed absent the disciplined conduct.[2023] (footnote omitted)

6.1191. According to the United States, this potential failing of the SSNIP test when applied in the context of an inquiry into serious prejudice is not unlike that already recognized to exist by competition authorities, including the European Commission, when applying the SSNIP test in the context of *non-merger* competition analyses. In this respect, the United States points out that the European Commission's Notice on Market Definition explains that:

> Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This may not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for the investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account.[2024]

6.1192. Similarly, the United States notes that the OECD has also acknowledged the same potential shortcomings, explaining the problem in the following terms:

> In merger cases, the usual benchmark price the analysis starts from is the prevailing price. This is because in merger analysis the question is whether a merger will create or increase market power. The analysis focuses on possible future effects of the merger as compared to the current situation and increases of prices above the currently prevailing level are considered. The analysis in merger cases therefore is in general prospective. In monopolisation cases or in cases of an abuse of a dominant position, the potential anticompetitive effects may already have occurred. As a result, the analysis may be retrospective and the prevailing price may already be higher as compared to the but-for price. A mechanical application of the HMT in retrospective harm cases, taking the prevailing price as the benchmark price could lead to overly broad markets and an underestimation of a firm's market power. This is known as the *cellophane fallacy*.
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> ...

[2021] United States' comments on the European Union's response to Panel question No. 51.

[2022] United States' response to Panel question Nos. 51 and 157; and comments on the European Union's response to Panel question No. 51.

[2023] United States' response to Panel question No. 51, para. 164.

[2024] Notice on Market Definition, (Exhibit USA-551), para. 19 (cited in United States' response to Panel question No. 51, fns 238 and 239).

> It could also happen that the prevailing price is below the competitive price. This could be the case if the firm receives subsidies. If these payments cause the prices of products and services to remain at a level below the competitive price, a "reverse cellophane fallacy" could occur. Due to the artificially low prices, consumers are not willing to consider alternative products, which they would have accepted as attractive substitutes at a higher, competitive price. In this case, there is a risk to define the relevant product market too narrowly, as important substitutes are not included in the market. This could lead to an overestimation of market power.[2025] (emphasis original; footnotes omitted)

6.1193. Thus, the United States argues that the only way the SSNIP test could be used to guide the identification of relevant product markets in the present dispute would be if it were applied to a price of Airbus LCA that were "adjusted to exclude the effect of the {challenged} subsidies"[2026], that is, in a counterfactual world without the challenged subsidies.[2027] For the United States, such an adjustment would need to be "enormous in scale" as "the subsidies at issue caused the products to enter the market".[2028] The Sanghvi Declaration posits that any such adjustment would need to be "sufficient to price the new Airbus model just high enough so that no one chooses to buy it."[2029] Even so, the United States maintains that in the specific context of this dispute, it would be "impossible" to accurately calculate this price because, as explained by Dr Sanghvi, it would be necessary to have "a detailed understanding of the demand curve, which … requires data of a sort that are not in evidence here due to the idiosyncrasies of the LCA marketplace".[2030]

6.1194. The European Union argues that the United States' position is "replete with fallacious logic and legally improper assumptions".[2031] The European Union's principle criticism of the United States' contentions is that they seek to reverse the sequence of analysis that it maintains was allegedly prescribed by the Appellate Body in the original proceeding. According to the European Union, the Appellate Body provided "unequivocal guidance, in this very dispute, that a proper market delineation is a 'prerequisite for assessing' whether adverse effects exist".[2032] For the European Union, this means that the United States was required, as a matter of law, to *first* identify the relevant product markets, and then only *after* such product markets were properly defined, examine in the "second step" of the analysis whether the alleged subsidies have *caused* serious prejudice.[2033] To the extent that they rely upon the alleged effects of the subsidies at issue on Airbus' ability to develop and market its LCA products, the European Union submits that the United States' product market arguments are inconsistent with the framework of analysis that was established by the Appellate Body and, for this reason, must be rejected.

6.1195. The European Union also maintains that the United States' approach to product market delineation cannot be accepted because it "simply assumes the causation that the United States has set out to prove – i.e. it assumes, based solely on the findings in the original proceedings, that

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[2025] OECD Policy Roundtables, Competition Committee, Background Note on Market Definition, 2012, (Exhibit USA-549), pp. 39-42 (cited in United States' response to Panel question No. 51, fn 266). The United States asserts that the Sevy Declaration also "acknowledges that 'adjustments to the SSNIP test … are usually undertaken to prevent the 'cellophane fallacy' or the 'reverse cellophane fallacy'' but concludes that because there are 'methodological issues' in calculating the proper adjustment in the LCA industry the Panel should rely on prevailing market prices anyway". (United States' response to Panel question No. 157 (quoting Sevy Declaration, (Exhibit EU-395), paras. 59 and 66)).

[2026] United States' response to Panel question Nos. 51, 60 (para. 199) and 157 (citing Sanghvi Declaration, (Exhibit USA-530), paras. 27-32 and 44-47, 54 and 79).

[2027] Similarly, the Sanghvi Declaration explains that "in competition economics, we recognize that past actions may already have impacted the marketplace so that currently observed marketplace conditions can no longer be taken as the representative benchmark. This is the case in this dispute, where decades of product-creating subsidies have so fundamentally distorted the marketplace in favor of Airbus that it is impossible to rely on current competitive conditions to define the market, as the EU attempts to do". (Sanghvi Declaration, (Exhibit USA-530), para. 11)

[2028] United States' response to Panel question No. 60, para. 199.

[2029] Sanghvi Declaration, (Exhibit USA-530), para. 46. (emphasis original)

[2030] United States' response to Panel question No. 60, para. 199 (citing Sanghvi Declaration, (Exhibit USA-530), para. 47).

[2031] European Union's comments on the United States' response to Panel question No. 157, para. 252.

[2032] European Union's second written submission, paras. 608-611 and 661-665; comments on the United States' response to Panel question No. 51 (para. 255) and 157 (para. 253); and response to Panel question No. 79, paras. 325-327.

[2033] European Union's comments on the United States' response to Panel question No. 51, para. 256.

EU subsidies exist at present and are a present genuine and substantial cause of present adverse effects". However, according to the European Union, this question of causation is at the very heart of this compliance dispute.[2034] The European Union submits that the United States is not entitled to make such assumptions, but must demonstrate that the challenged subsidies actually cause the alleged effects "under current factual conditions" on the basis of positive evidence. Thus, the European Union argues that the United States errs *as a matter of law* when it contends that the alleged effects of the subsidies at issue must be taken into account in identifying the relevant product markets.[2035]

6.1196. Finally, relying upon certain statements made in the Sevy Declaration, the European Union argues that the United States is wrong when it allegedly submits that quantitative market definition tools can only be applied when there is a "competitive 'clean slate'". According to the European Union, the Sevy Declaration makes clear that "market definition tools are regularly applied in the competition and antitrust law context, even where markets are distorted or otherwise exhibit imperfect competition − including in the case of abuse of dominant position, which is the closest analogue to the alleged competitive harm here."[2036] In any case, the European Union submits that the modifications to the SSNIP test that are proposed by the United States and presented in the Sanghvi Declaration on the premise that market delineation must be conducted in a counterfactual world without the alleged effects of the challenged subsidies, are based on unsound reasoning and radically different from the types of modifications which the Sevy Declaration submits are actually utilised in the competition regulatory context.[2037] In this regard, the European Union emphasizes that while the Sevy Declaration recognizes that it may be necessary to make adjustments when applying the SSNIP test in order to avoid the "cellophane fallacy" or the "reverse cellophane fallacy", it does not conclude that any such corrections would be warranted on the existing set of facts. Rather, the European Union argues that the Sevy Declaration criticizes "the very ability to make any such correction in a methodologically appropriate way"[2038], concluding that this could not justify a departure from "the use of rigorous quantitative market definition tools on the basis of the current market situation".[2039]

6.1197. We note that there is no disagreement between the parties about whether the fact that a firm's anti-competitive behaviour (or a subsidy) may distort a product's prevailing prices will, *as a general matter*, need to be taken into account when applying the SSNIP test for the purpose of identifying relevant product markets in *non-merger competition cases*. While the European Union asserts that its expert, Dr Sevy, has explained that "such distortions do not preclude"[2040] the use of market definition tools, we do not understand the Sevy Declaration to stand for the proposition that the application of the SSNIP test would invariably proceed *without* making any adjustments or consideration of additional factors, where there is a significant risk of the "cellophane fallacy" or the "reverse cellophane fallacy". Indeed, it is clear to us that Dr Sevy, like the European Commission and the OECD, accepts that in such circumstances it would be appropriate to qualify or adjust the results of a SSNIP analysis in a way that avoids these possible outcomes.[2041]

6.1198. Conceptually, we see no reason why the same considerations used to inform the application of the SSNIP test in the context of non-merger competition cases should not also be taken into account when applying the same test in the context of the serious prejudice disciplines of the SCM Agreement. As with non-merger competition analysis, the focus of an evaluation of serious prejudice is on conduct that is alleged to have taken place in the past for the purpose of drawing conclusions about the present.[2042] In other words, in both regulatory contexts, a

[2034] European Union's comments on the United States' response to Panel question No. 51, paras. 256-257, 263-264, and 356-357.

[2035] European Union's comments on the United States' response to Panel question No. 51, paras. 265, 346, and 358-359.

[2036] European Union's response to Panel question No. 51, paras. 266 and 355 (citing Sevy Declaration, (Exhibit EU-395), paras. 16-20).

[2037] See Sevy Declaration, (Exhibit EU-395), paras. 56-66.

[2038] European Union's comments on the United States' response to Panel question Nos. 51 (para. 360) and 157 (paras. 255-256) (citing Sevy Declaration, (Exhibit EU-395), paras. 56-66).

[2039] Sevy Declaration, (Exhibit EU-395), para. 66.

[2040] European Union's comments on the United States' response to Panel question No. 51, para. 355.

[2041] Sevy Declaration, (Exhibit EU-395), para. 59.

[2042] We recall that in the original proceeding, we explained that an adverse effects complaint requires a panel to make a finding about "whether there are 'present' adverse effects caused by the subsidies in dispute"

determination of the extent to which a firm is acting anti-competitively, or a government is, through the use of subsidies, causing adverse effects in the form of serious prejudice, will be based upon evidence of *past* competitive relationships. Thus, just as it is possible to arrive at an erroneous conclusion about the true nature of competition between two or more products in the context of non-merger analysis when the SSNIP test is applied to a prevailing price that is influenced by the very anti-competitive conduct that is being investigated, so too must the same potential for error exist when applying the SSNIP test to a prevailing price in an industry affected by subsidies in order to identify relevant product markets for the purpose of conducting a serious prejudice analysis. In both situations, the same dilemma arises because of the impact of the investigated conduct on the competitive relationships that define the prevailing market prices used as the starting point of the SSNIP test. Thus, *irrespective of the regulatory context*, the SSNIP test, as it is normally applied in merger analysis, suffers from the same potential deficiencies.

6.1199. In our view, the most striking example of the potential shortcomings of applying an unadjusted or unqualified SSNIP test in the context of a serious prejudice dispute arises when a subsidy transforms a formally vigorous competitive relationship into one of *no competition at all* or *competition that is insignificant* (i.e. competition incapable of inducing a degree of demand substitution that would prevent a profitable SSNIP from taking place).[2043] In such circumstances, the application of an unadjusted or unqualified SSNIP test would point in the direction of an absence of competitive constraints between the subsidized product and the like product. This in turn would imply that any adverse trade effects of the subsidized product on the like product could not be addressed under the terms of Articles 5 and 6 of the SCM Agreement, even if it were perfectly clear that the *lack of sufficient competition* was caused by the subsidy. We see nothing in the text of Articles 5 and 6 of the SCM Agreement that would support such a finding, which would leave WTO Members 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. In this regard, we note that the European Union appeared to advance precisely this view in the original *US – Large Civil Aircraft (2nd complaint)* dispute, where it claimed that one of the effects of the challenged subsidies to Boeing was to create an "absence of 'real' competition" between the 787 and the Original A350 and the A330, thereby causing "lost sales" to Airbus in a number of sales campaigns:

> In some sales campaigns, *US subsidies resulted in a "lack" of competition* between the original A350 and the 787. Due to the 787's *subsidy-based attributes* – innovative technology, earlier availability and low pricing … airlines either did not ask Airbus to offer its competing original A350, or did not seriously consider the Airbus proposal. This *absence of "real" competition is a direct effect of the 787 subsidies*. *Airbus was unable to compete* on an equal footing in many sales campaigns *because {of} US subsidies for the 787 programme* …
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> The technological features of the 787 played an important role in this campaign, particularly the fuel efficiency of the 787. … Airbus was thus faced with *a wide performance gap* between the A330/original A350 and the 787's *subsidy-based economics*.[2044] (emphasis added)

6.1200. The fact that the subsidized 787 imposed very strong competitive constraints on the Original A350 and A330 (which, for their part, allegedly imposed only very weak, if any, competitive constraints on the 787) did not prevent the European Union from claiming that it had suffered serious prejudice within the meaning of Article 6.3 of the SCM Agreement as a result of

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and that because "it is impossible to assess the 'present' situation, as immediate data is not available … a review of the past is necessary to draw conclusions about present adverse effects". (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1694)

[2043] While the ability to impose a *profitable* SSNIP on one product suggests an absence of competitive constraints between that product and other products, this does not necessarily mean that there is no substitution of demand away from the product subject to the SSNIP towards other products, but only that the degree of substitution between those products does not render the SSNIP unprofitable. Thus, the application of the SSNIP test may point to the absence of competition between two or more products, *even when a degree of demand-side substitution (that cannot prevent a profitable SSNIP) actually exists* between those products, signalling a competitive relationship that may be relatively insignificant.

[2044] *US – Large Civil Aircraft*, EC FWS, Annex D, (Exhibit EU-483) (HSBI), paras. 6 and 10. Similar statements and considerations are found throughout this exhibit in relation to specific sales campaigns, including in paragraphs 21, 31-32, and 76 (HSBI).

the United States' subsidization of the 787. Yet in this proceeding, the European Union maintains that such considerations are essentially irrelevant to the application of the SSNIP test. According to the European Union, taking the alleged distorting effects of the challenged subsidies into account when identifying relevant product markets would effectively prejudge the causation elements of the United States' serious prejudice claims. The European Union maintains that this would be not only inconsistent with the Appellate Body's alleged direction to identify relevant product markets *before* entertaining issues of causation in serious prejudice disputes, but it would also result in the identification of product markets on the basis of the assumed, and unsubstantiated, adverse effects of the challenged subsidies.

6.1201. We do not share the European Union's perspective. As already noted, the Appellate Body found in the original proceeding that a panel tasked with evaluating the merits of a claim of serious prejudice under the SCM Agreement has an obligation to independently determine "whether the alleged subsidized and like products compete in the same market or multiple markets".[2045] The Appellate Body characterized this assessment of the relevant product market or markets as "a prerequisite for assessing whether displacement within the meaning of Article 6.3(a) and 6.3(b) could be found to exist as alleged by the United States".[2046] In making these statements, we understand the Appellate Body to have declared that the identification of relevant product markets is a precondition for any finding of serious prejudice. However, the Appellate Body was careful not to pronounce that the SSNIP test *must* be applied as the *decisive* criterion for determining product markets in each and every serious prejudice dispute. Moreover, the Appellate Body gave no guidance at all about whether any potential application of the SSNIP test in a serious prejudice dispute should follow the same principles used by competition authorities when applying it in merger analysis and/or non-merger cases.

6.1202. In our view, the United States' reliance on the alleged product development and market presence effects of the challenged subsidies does not contradict the Appellate Body's guidance. This is because the United States does not call the relevance of the SSNIP test into question on the basis of the actual instances of *serious prejudice* that it alleges are caused by the challenged subsidies in this dispute. The United States does not, for example, argue that the utility of the SSNIP test should be doubted in this dispute because of its claim that the challenged subsidies have caused lost sales to Boeing within the meaning of Article 6.3(c) of the SCM Agreement. Rather, the United States argues that the application of a SSNIP test in this and all serious prejudice disputes should be guided by essentially the same principles used by competition authorities to inform the employment of the same test in non-merger competition investigations.[2047] As the evidence before us reveals, these principles include taking action to qualify or adjust the results or application of the SSNIP test when there is a significant risk that the prevailing market has been distorted by the investigated conduct. Thus, in the MasterCard case, the European Commission decided to "attribute higher value to evidence derived from product characteristics and past switching behaviour than the results of a SSNIP test" because of the *"significant" "risk of a cellophane fallacy"*.[2048] The European Commission did not decide to downplay the probative value of a SSNIP analysis in this investigation after having come to any *definitive conclusion* about whether the prices at issue were distorted by anti-competitive behaviour, but rather because it considered there was a *significant risk* that this could be the case. This, of course, reflects the European Commission's guidelines on market definition, which explain that "the fact that the prevailing price *might* already have been substantially increased will be taken into account" where it "has been determined in the absence of sufficient competition".[2049] That competition authorities may act to temper or modify the results of a SSNIP test in non-

[2045] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1128.

[2046] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1128.

[2047] See e.g. United States' response to Panel question No. 51, paras. 159, 161, and 163 (citing the Notice on Market Definition, (Exhibit USA-551) and the OECD Policy Roundtables, Competition Committee, Background Note on Market Definition, 2012, (Exhibit USA-549)).

[2048] Commission Decision of 19/XII/2007, relating to a proceeding under Article 81 of the EC Treaty, COMP/C.34.579 MasterCard, paras. 286-287 and fn 322 (cited in OECD Policy Roundtables, Competition Committee, Background Note on Market Definition, 2012, (Exhibit USA-549), European Commission submission, at p. 337). (emphasis added) The European Commission nevertheless "executed a SSNIP test in the acquiring markets … to verify some findings in the market studies submitted by MasterCard". The European Commission explained that while it did "not attribute decisive importance to it, it notes that the results (*28393 to 28395*) of its hypothetical analysis tend to confirm the findings based on product characteristics and on past behaviour of merchants".

[2049] Notice on Market Definition, para. 19 (Exhibit USA-551).

merger competition investigations on the basis of a *reasonable suspicion* of market power is also supported by the views of commentators, who have, *inter alia*, noted that:

> The {cellophane} fallacy is most likely to arise in cases where there is already a dominant company, *or more generally where it is suspected that the party or parties under investigation have already exercised some degree of market power. In any such case, competition authorities or claimants can, and often do, invoke the cellophane fallacy to refute attempts by the defendants to demonstrate a wider market based on a SSNIP … applied to prevailing prices*.[2050] (emphasis added)

6.1203. Again, for the reasons we have explained above[2051], we see no grounds for rejecting the equal relevance of the same principles when applying the SSNIP test for the purpose of identifying relevant product markets in a serious prejudice dispute. Thus, where there is a significant risk that the competitive relationships that define the prevailing market conditions have been impacted by a WTO Member's use of subsidies, the SSNIP test may not provide reliable results, and for this reason, such results should be qualified or adjustments should be made to account for the potential market distortions. Ultimately, however, in the light of our findings concerning the lack of any legal obligation upon the United States to advance quantitative evidence, as well as the practical difficulties and complex challenges that applying an accurate SSNIP test pose in this dispute, we believe it is not necessary for us to come to any definitive conclusion about the extent to which it would have been necessary to qualify or adjust the results of any SSNIP test in this proceeding.

Conclusion

6.1204. In evaluating the merits of the European Union's argument that the United States has failed to advance the appropriate type of evidence in this compliance dispute to substantiate its claims of serious prejudice, we have found that, contrary to the European Union's assertions, the Appellate Body did not in the original proceeding declare that the United States was *required* to rely upon evidence that is "rooted in" quantitative analysis when identifying relevant product markets. While the three quantitative methods of analysis the Appellate Body explicitly referred to in its report (the SSNIP test, cross-price elasticity of demand, and price correlation analysis) may serve to *inform* a determination of the extent to which different products are substitutable, we detect nothing in the Appellate Body's report to suggest that these or any other quantitative methods of analysis must, *as a legal matter*, always be used to inform a determination of relevant product markets in a serious prejudice dispute.

6.1205. As explained by the parties, in order to generate accurate and meaningful results for the purpose of identifying relevant product markets in this dispute, the three methods of quantitative analysis referred to by the Appellate Body would need to be implemented using a significant volume of historical information on the prices *actually* paid by LCA customers. Reliable pricing information would also be necessary to perform and/or interpret the results generated by the two other forms of allegedly relevant quantitative analysis identified by the European Union (namely, critical loss analysis and NPV analysis). While we have raised doubts about the availability of such actual pricing data, it is apparent that even with this information, the task of performing a reliable econometric analysis of the demand for LCA products would face a number of significant methodological and data challenges. These include deciding how to appropriately model demand for LCA products, which is itself highly complex and influenced by a multiplicity of factors that are sometimes subjective and "unquantifiable". When these and other particular characteristics of LCA demand are considered in the light of the recognized difficulties associated with identifying relevant product markets made up of differentiated products, it is apparent that producing accurate and reliable quantitative evidence of the degree of demand-side substitution between different LCA products would be a formidable task.

6.1206. We have also emphasized that because of its focus on *past* and *present* competitive relationships, the same considerations used to inform the application of the SSNIP test in the

[2050] G. Niels, H. Jenkins, J. Kavanagh, *Economics for Competition Lawyers* (Oxford University Press, 2011) p. 67. See also, M. Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2005), p. 105.

[2051] See above paras. 6.1198-6.1199.

context of *non-merger competition analysis* should be taken into account when applying the SSNIP test in the context of a serious prejudice dispute. On this basis, we have found that in order to apply the SSNIP test in a serious prejudice case, where the focus is on the *past* and *present* effects of actionable subsidies, it may be necessary to account for the risk that prevailing market prices may already have been distorted by the particular government conduct that is the subject of a WTO Member's complaint. Thus, in the same way that competition authorities will endeavour to adjust or modify the SSNIP test when it is applied in non-merger competition analysis when there is a risk of the "cellophane fallacy" or the "reverse cellophane fallacy", it makes sense, in our view, to ensure that any application of the SSNIP test in a serious prejudice dispute proceeds cautiously, in consideration of the risk of the potential distortive effects of the conduct alleged to have caused adverse effects on existing commercial relationships. We note, however, that because we have dismissed the European Union's objections to the United States' reliance on purely qualitative evidence on other grounds, we need not definitively determine the extent to which it would have been necessary to take any such considerations into account for the purpose of applying the SSNIP test in the present dispute.

6.1207. In conclusion, therefore, we find that, contrary to the European Union's assertions, the United States was not under an obligation to identify relevant LCA product markets using quantitative analysis. Moreover, on the basis of the evidence and arguments that have been presented, we do not see how, in the absence of, in particular, accurate pricing information, the United States could have generated *meaningful* results from the application of any of the allegedly relevant quantitative methods of analysis identified by the European Union for implementing the SSNIP test or the hypothetical monopolist test. In such circumstances, it is our understanding that competition authorities would not always choose to perform or rely upon the application of the SSNIP test to identify relevant product markets. Indeed, the European Commission will only take into account "available quantitative evidence" for the purpose of identifying relevant product markets when it is "capable of withstanding rigorous scrutiny"[2052]; a decision that will "depend{} to a large extent on the availability of the necessary data, the specificities of the case in question and the respective time constraint of the procedure".[2053] In fact, the "most common and more easily available evidence" that is used by the European Commission to identify relevant product markets in its competition practice is of a "qualitative nature", and includes evidence of substitution in the recent past ("normally … fundamental for market definition")[2054], as well as the views of customers and any relevant company documents (whether internally or externally produced) used as a basis to take price and marketing decisions.[2055]

6.1208. In this light, and bearing in mind that the United States was under no obligation to have advanced its serious prejudice complaint using quantitative analysis, we see no reason to fault the United States' decision not to use the SSNIP test or any other price-based quantitative analysis to substantiate its view that there are three relevant product markets in the LCA industry. In our view, the United States was entitled to advance its case using any and all evidence it believes establishes the existence of the three relevant products markets; and it is our task to make an objective assessment of the probative value of that evidence in the light of the European Union's submissions, irrespective of whether it was of a *quantitative* or *qualitative* nature.

The requisite degree or intensity of competition

6.1209. The European Union has repeatedly argued in this dispute that the United States has failed to establish the existence of the three alleged passenger LCA product markets because it has not shown that all of the aircraft that allegedly compete in each of the three distinct product markets exercise "*significant* competitive constraints" on each other.[2056] According to the European Union, the guidance for determining relevant product markets provided by the

[2052] Notice on Market Definition, para. 39 (Exhibit USA-551).

[2053] OECD Policy Roundtables, Competition Committee, Background Note on Market Definition, 2012, (Exhibit USA-549), European Commission submission, at p. 336.

[2054] Notice on Market Definition, para. 39 (Exhibit USA-551).

[2055] Notice on Market Definition, paras. 39-41 (Exhibit USA-551); OECD Policy Roundtables, Competition Committee, Background Note on Market Definition, 2012, (Exhibit USA-549), European Commission submission, at p. 336.

[2056] See e.g. European Union's second written submission, paras. 626-704 (emphasis added); and response to Panel question Nos. 48, 49, 50, 52-56, 70-71, 75, and 79, paras. 213, 215, 221-225, 227, 230, 232, 250, 253, 255, 258, 261, 277, 288-291, 303, and 327. (emphasis added)

Appellate Body in the original proceeding implies that "an aircraft that fails to exercise *significant* competitive constraints on another cannot be placed in the same product market with that other aircraft".[2057] Thus, the European Union submits that in the absence of evidence showing that all of the models of aircraft the United States maintains compete with each other in separate product markets are "closely competitive"[2058], the United States' product market arguments must fail. We disagree with the European Union and do not share its understanding of the Appellate Body's guidance.

6.1210. We recall that after explaining that "a market comprises only those products that exercise competitive constraint on each other", the Appellate Body declared in the original proceeding that two products should be considered to fall within the same product market whenever they are "sufficiently substitutable so as to create competitive constraints on each other".[2059] Contrary to what is suggested by the European Union, the Appellate Body did not qualify this statement by clarifying that the required competitive constraints must be "significant". Indeed, in the view of the commentator cited by the Appellate Body to support the above statements, a relevant product market "should" be comprised of the "set of products (and geographical areas) that exercise *some* competitive constraint on each other".[2060] While the same commentator is paraphrased by the Appellate Body as having explained how the results of the SSNIP test may reveal the absence of "significant competitive constraint" between two or more products, and therefore the existence of separate markets[2061], the same paraphrased explanation also highlights that another outcome of the SSNIP test could be that two or more products do, in fact, exert "competitive constraint" (without qualification) on each other, thereby forming part of the same product market.[2062]

6.1211. Thus, to the extent that the Appellate Body provided any guidance at all on the requisite degree or intensity of competition that must exist between two products in order to find that they fall within the same product market *for the purpose of applying the serious prejudice disciplines of the SCM Agreement*, it is apparent that the Appellate Body did not articulate a standard that *requires* showing that two products impose "significant competitive constraints" on each other or that those products are "closely competitive". Indeed, we can see no textual basis for interpreting the word "market" that appears in Article 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, as opposed to markets where competition between products is relatively weak or, in certain circumstances, even markets where strong competitive constraints are imposed by one product on one or more other products, which themselves impose little, if any, competitive constraint on the stronger competitor. 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.[2063] 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.

[2057] European Union's response to Panel question No. 50, para. 230.

[2058] European Union's response to Panel question Nos. 50, 55, 76, and 77, paras. 229, 264, 305, and 322.

[2059] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1120.

[2060] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2467 (citing M. Motta, *Competition Policy: Theory and Practice*, p. 102). (emphasis added)

[2061] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2468 ("If the price increase is found to be profitable, this would generally indicate that the product does not face *significant competitive constraint* from other products, and that it should therefore be considered to be in a separate market."). (emphasis added)

[2062] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2468 ("Conversely, if the increase in price is found not to be profitable, this indicates that the product should not be considered to be in a separate market, as there exist other products that exercise *competitive constraint* on the seller."). (emphasis added)

[2063] See above at paras. 6.1190-6.1203.

6.1212. With these considerations in mind, we now turn to explore the merits of the arguments and evidence the parties have advanced and relied upon to support their different positions with respect to the existence of the alleged single-aisle, twin-aisle and very large LCA product markets. We begin this assessment by describing the general conditions of competition in the LCA industry.

General conditions of competition in the LCA industry

6.1213. The parties' submissions concerning the general conditions of competition that are today observable in the LCA industry have on occasion drawn from, elaborated and built upon or confirmed the continued relevance of large parts of the description of the general conditions of competition in the LCA industry that was included in our report from the original proceeding.[2064] In our view, this description, which we note was not specifically appealed or otherwise disturbed by the Appellate Body, remains, on the whole, an accurate depiction of the general conditions of competition that exist in the LCA industry today, and we incorporate it *mutatis mutandis* into this Report. However, the parties' submissions in this dispute have also sought to describe and analyse a number of more recent developments in the LCA industry and the extent to which these might have altered the conditions of competition from those existing during the original proceeding. In this section of our Report, we set out our understanding of the current conditions of competition in the LCA industry in the light of both our previous findings as well as the parties' latest submissions, with a view to identifying the general context within which competition between Airbus and Boeing takes place.

6.1214. The defining features of the LCA industry today continue to be those we identified in the original proceeding: significant entry costs, strong learning effects and considerable uncertainty. Huge sunk costs must be invested into the development of an aircraft years before any revenues are obtained from customers, and such investments need to be made on a regular basis to enhance and/or expand a product offering in order to ensure a producer's long-term viability. These up-front investments, which it is generally accepted cannot be recouped without the sale of many hundreds of aircraft, make achieving significant economies of scale a critical part of the LCA business. Learning effects, which result primarily from a more experienced workforce, and imply that per unit production costs fall as output accumulates over time, represent dynamic scale economies. The static and dynamic ("learning curve") economies of scale achieved in the context of one model of LCA can influence the development and production costs of other models. These effects can be captured by economies of scope. A steady stream of orders and deliveries is therefore imperative. Yet the technical and design challenges associated with developing new aircraft, often at the cutting-edge of modern technology, coupled with the complexity of forecasting customer demand sometimes decades in advance, mean that the business environment of an LCA producer is characterized by considerable uncertainty.[2065] These fundamental features of the LCA industry give incumbent firms an important advantage over new entrants and set the parameters within which competition takes place.[2066]

6.1215. At present, Airbus and Boeing continue to be the world's only LCA producers offering a full range of aircraft.[2067] Several other companies, including Bombardier, Commercial Aircraft Corporation of China, Ltd. (COMAC), Mitsubishi Aircraft Corporation, Sukhoi and United Aircraft Corporation, are attempting to enter the LCA industry with single-aisle aircraft having around 100-150 seats. However, the parties have emphasized the relative weakness of these new potential entrants, with Boeing's Vice President for Commercial Airplanes, Michael Bair, asserting that "it will be several years before any of {their} products compete in a significant way with Airbus and Boeing single-aisle LCA"[2068], "as customers perceive significant, and often prohibitive, risks in

[2064] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1716-7.1728. See also United States' first written submission, paras. 295-300; Mourey Statement, (Exhibit EU-8) (BCI), paras. 45-46 (confirming the continued relevance of the Statement of Christian Scherer as well as the Statement of Rod P. Muddle (Original Exhibit EC-19), which we relied upon for parts of our description of the conditions of competition).

[2065] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1717, 7.1726-1727, and 7.1936.

[2066] For one example of how Airbus and Boeing have utilized their advantage as incumbent producers of LCA, see Glennon J. Harrison, "Challenge to the Boeing-Airbus Duopoly in Civil Aircraft: Issues for Competitiveness", US Congressional Research Services, 25 July 2011, (Exhibit USA-117), p. 25.

[2067] United States' first written submission, para. 298.

[2068] Bair Declaration, (Exhibit USA-339) (BCI), para. 9.

ordering {their} aircraft".[2069] Similarly, while noting the fact that Bombardier has offered a "fuel-efficient aircraft" in competition against the Airbus A320 "new engine option" aircraft (A320neo), Airbus' Vice President for Contracts, Christophe Mourey, explains that "the competition has not yet been significant or widespread".[2070] Thus, as it was during the original proceeding, the LCA industry continues to be characterized by what is effectively an Airbus-Boeing duopoly.

6.1216. Customers for LCA continue to be mainly airlines and aircraft leasing companies worldwide.[2071] As in the original proceeding, the parties have in this dispute emphasized the diversity and idiosyncratic nature of customer preferences as well as the complexity of their purchase decisions.[2072] The core of the parties' submissions on this topic reflect the following passages from our report in the original proceeding:

> Customers choose among the various LCA models available those they deem most suitable for their needs at the time of ordering. In making their purchase decisions, customers will consider such matters as the route structure to be served by the aircraft, the structure of the existing fleet, and operating costs, with a view to minimizing costs and maximizing revenues. Some airlines purchase a mix of LCA models to serve a variety of needs, while others may limit themselves to one LCA model because of the efficiencies generated by the operation of a single aircraft type. Once an airline orders any particular LCA model from a given manufacturer, efficiencies in operating a fleet of similar aircraft (including those related to spare parts, maintenance and training) favour follow-on orders of the same models, as well as orders of other aircraft models from the same manufacturer, in order to take advantage of commonalities across an LCA fleet.[5186] Leasing companies both purchase new LCA on a speculative basis for subsequent lease to airline customers, and act as intermediaries between airlines and manufacturers offering LCA financing or operating leases.[5187] ...
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> ...
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> When choosing aircraft, airlines evaluate the economics of the competing aircraft from both Airbus and Boeing, and the impact those factors will have on the revenues that the aircraft can be expected to generate over its economic life of approximately 30 years.[5198] In doing so, customers quantify and weigh numerous factors, including price, net of concessions such as cash discounts, scheduled pre-delivery payments, provisions for price escalation,[5199] and guarantees related to performance, maintenance, or residual value;[5200] financing, including consideration of elements such as direct financing support by the manufacturer; date of delivery; engine manufacturers; the make-up of existing LCA in the purchaser's fleet and cost of change and cost of diversifying,[5201] and direct operating costs, such as fuel efficiency.[5202] Each customer has different cost-related concerns, and so different aspects may be valued differently by different customers or at different times.[5203] Each of the technical, physical and economic characteristics of aircraft under consideration is translated by customers into a revenue or cost element that is included in their assessment of an offer and its net present value. Despite the complexity of the factors involved in a sales campaign, LCA customers, as well as LCA manufacturers, are generally able to account for these factors in assessing the economic value of a sales proposal.[5204] Thus, competition between Boeing and Airbus is driven by the performance characteristics of the aircraft that the two manufacturers have developed and the price (net of all concessions) and sales terms at which they offer their respective LCA. Since both Airbus and Boeing offer a range of competing LCA models suited for various customer needs, price is a significant factor in a customer's purchase determination, but not necessarily determinative.[5205]

[2069] Bair Declaration, (Exhibit USA-339) (BCI), para. 30.

[2070] Mourey Statement, (Exhibit EU-8) (BCI), fn 23. The European Union agrees that "other single-aisle market entrants do not, at present, 'play a significant role in LCA competition … during the period at issue and are unlikely to do so in the immediate future'". (European Union's first written submission, fn 753 (quoting United States' first written submission, para. 315))

[2071] There is no dispute between the parties that the geographical market for LCA is worldwide.

[2072] Mourey Statement, (Exhibit EU-8) (BCI), paras. 45-71; and Bair Declaration, (Exhibit USA-339) (BCI), paras. 5, 11, and 17.

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[5186] US, FWS, para. 712. For example, the United States notes that AirAsia purchased 40 Airbus A320s and took options on 40 more in December 2004 after a vigorous competition between Boeing and Airbus. Air Asia's subsequent orders – an additional 20 A320s in 2005, followed by a firm order for 40 more A320s in July 2006 (plus 30 additional options) – allegedly flowed directly from the choice the airline made in the 2004 campaign, rather than from a new competition between the producers. AirAsia Press Release: *AirAsia Firms Up Option for 40 More Airbus A320s and Signs Another 30 Options* (July 20, 2006), Exhibit US-378. The European Communities also recognizes this tendency to follow a purchase from one manufacturer with further purchases of that manufacturer's LCA. EC, FWS, para. 1421. (Footnote original)

[5187] Statement of Rod P. Muddle, Exhibit EC-19, paras. 18-26. (Footnote original)

[5198] Airbus North America Holdings Inc., Key Determinants of Competitiveness in the Global Large Civil Aircraft Market: An Airbus Assessment (March 2005) at 17-18 ("Airbus, Key Determinants"), Exhibit US-379 (BCI). (Footnote original)

[5199] Because LCA are often delivered years after the original order, both Airbus and Boeing generally apply a standard "price escalation" formula that adjusts the order price (in order year dollars) for inflation in aircraft manufacturing costs to determine the price payable for the aircraft on delivery (in delivery year dollars). (Footnote original)

[5200] Residual value refers to the value of the aircraft upon resale by the original customer. For example as part of its sale of 120 aircraft to easyJet in 2002, Airbus guaranteed the residual value of Boeing aircraft owned by easyJet by offering to purchase the Boeing aircraft itself, if necessary, at a predetermined minimum price. Airbus also guaranteed that the cost of maintenance would not exceed easyJet's cost of maintaining its existing Boeing aircraft. EasyJet, Proposed Purchase of Airbus Aircraft and Notice of Extraordinary General Meeting at 8-9 (25 February 2003), Exhibit US-380. (Footnote original)

[5201] Statement of Rod P. Muddle, Exhibit EC-19. (Footnote original)

[5202] Operating costs can be impacted by price concessions. For example, according to the United States, when Airbus determined that its four-engine A340 was losing sales to Boeing's more fuel-efficient two-engine 777 during recent periods of high jet fuel prices, Airbus announced that the additional fuel burn penalty could be "traded off" by financial compensation to A340 operators. Andrea Crisp, *Squaring Up*, Airline Business (1 April 2006), Exhibit US-381. (Footnote original)

[5203] The European Communities asserts that subjective factors can also be important in an airline's evaluation and final purchase decision, including the value of product features such as cabin width and aesthetics; the long-term viability of a supplier and product; long-term risks of new technology and materials; risks associated with a single engine choice; and operational risks of two-engined versus four-engined aircraft. *See,* Statement of Rod P. Muddle, Exhibit EC-19, para. 99. In our view, these subjective elements are encompassed by the general consideration of the characteristics of the various aircraft models for sale, and are not distinct elements. (Footnote original)

[5204] *See,* Statement of Rod P. Muddle, Exhibit EC-19, paras. 48-50. *See, also,* Statement of Christian Scherer, Exhibit EC-14 (BCI), paras. 69-77. (Footnote original)

[5205] Statement of Christian Scherer, Exhibit EC-14 (BCI), para. 60.[2073] (Footnote original)

6.1217. Thus, a customer's decision to acquire one or more LCA will depend upon its individual assessment of a multiplicity of factors bearing on the overall value of the aircraft package it is offered, in the context of its particular business model, strategic goals and any relevant subjective considerations at the time of purchase. Because no two customers will have exactly the same business model, strategic goals or subjective appreciation of a particular aircraft, their ultimate valuations of the same aircraft can vary widely. Nevertheless, it is possible to identify a number of factors, other than price, that will invariably play a significant role in any customer's purchase decision. Among these are the date of delivery, fleet commonality, range capabilities, seating and

[2073] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1720 and 7.1725.

cargo capacities, and operating costs (including fuel, spare parts, training and maintenance costs) of the particular LCA being considered.[2074]

6.1218. According to the European Union, a number of developments since the original proceeding have "in recent sales"[2075] elevated the importance of these factors in a customer's overall purchase decision. The European Union advances three reasons for this alleged phenomenon: rising fuel costs; increased air traffic demand; and delays in the availability of new generation aircraft. The European Union argues that rising fuel prices (which have translated into higher operating costs) have "incentivised airlines to update their older fleets with more fuel efficient aircraft and to focus on fuel efficiency in their expansion plans".[2076] Moreover, the European Union asserts that increased air traffic demand has "led to significant congestion and slot constraints at hub airports" and, in conjunction with rising fuel costs, has driven an increase in the attractiveness of larger aircraft (having a greater range and capacity) across all segments.[2077] The European Union also submits that delays in the availability of new generation models have "increased demand for current generation twin-aisle aircraft among customers requiring capacity in the short or medium term".[2078] The European Union argues that these events justify its seven-product-markets view of the LCA industry. The United States does not deny the existence of the trends that the European Union identifies. Indeed, in some instances, the United States appears to explicitly recognize them.[2079] However, for the United States, these developments do not justify a departure from the three-product-markets view of the LCA industry applied by the Appellate Body in the original proceeding.[2080] The parties' disparate views on this matter are reviewed in the section that follows.

6.1219. Faced with a continuum of customer preferences that are themselves shaped by changing economic conditions, and in the light of the multiplicity of factors affecting a customer's purchase decision as well as the particularly onerous costs and considerable risks associated with developing and bringing an LCA to market, Airbus and Boeing have sought to meet the demand for LCA by producing the fewest possible product lines to satisfy a wide array of requirements.[2081] In doing so, Airbus and Boeing have developed a comparable, but not identical, range of single-aisle and twin-aisle LCA products in the knowledge that the producer which satisfies the core performance demands of the largest number of customers will win more sales. However, in the same way that a customer's demands for a particular type of LCA will change over time, so too will the suitability of existing models of LCA to meet those requirements. Changes of this kind are not only driven by factors affecting demand, such as an increase in air traffic or a rise in fuel costs, but also the supply-side decisions taken by the producers themselves, for example, the introduction of a technologically superior offering. For Airbus and Boeing, these dynamics require them to continually assess and reassess their strategic supply choices, and in this sense, represent one critical dimension of their competitive interaction. Thus, as explained by the European Union, the decision to develop a new model of LCA or update an existing offering will be guided by each producer's individual perceptions about not only the "present and anticipated future customer demands and needs" and "the suitability of existing aircraft to meet those demands and needs",

[2074] Mourey Statement, (Exhibit EU-8) (BCI), paras. 51-54; and Bair Declaration, (Exhibit USA-339) (BCI), para. 17.

[2075] Mourey Statement, (Exhibit EU-8) (BCI), para. 71.

[2076] European Union's second written submission, para. 657; and Mourey Statement, (Exhibit EU-8) (BCI), paras. 15-21 and 31-38.

[2077] European Union's second written submission, para. 657; and Mourey Statement, (Exhibit EU-8) (BCI), paras. 22-38.

[2078] European Union's second written submission, para. 659; and Mourey Statement, (Exhibit EU-8) (BCI), paras. 39-43.

[2079] For instance, the United States attributes the commercial failure of the A340 to "sharply higher fuel prices". (United States' first written submission, paras. 307-308; and Bair Declaration, (Exhibit USA-339) (BCI), para. 40). Moreover, Boeing's 2012 Current Market Outlook identifies "fuel cost" and "environment" considerations as the "drivers" of its market forecast for the next 20 years. The same document also states that "older, less efficient airplanes will be replaced with more efficient, newer generation airplanes". (Randy Tinseth, "Current Market Outlook", Boeing presentation, July 2012 (Exhibit USA-337) p.18). Likewise, the United States recognizes that delays in bringing the 787 to market created additional opportunities for both companies to sell their current generation of mid-sized aircraft (albeit more so for Airbus). (United States' first written submission, paras. 304-305; and Bair Declaration, (Exhibit USA-339) (BCI), para. 38)

[2080] United States' response to Panel question No. 64.

[2081] United States' response to Panel question No. 48.

but also "the competitiveness of its various products, compared to the various products of its competitor".[2082]

6.1220. As in the original proceeding, technological innovation remains a key element of competition between Airbus and Boeing. An aircraft that is technologically superior to another will often force the competitor to respond with its own new or improved products.[2083] Thus it was that Airbus responded to Boeing's launch of the technologically advanced 787 in 2004 with the launch of the A350XWB in 2006 (after realising that the Original A350, which itself was launched in December 2004 "as a significantly improved version of the A330" and a rival to the 787, encountered limited sales success).[2084] Similarly, Boeing replied to Airbus' introduction of the fuel-efficient A320neo in December 2010 with its own fuel-efficient version of the 737NG, the 737MAX in August 2011.[2085] Likewise, in 1997, Airbus launched two derivatives of the A340, the A340-500/600, which Boeing responded to in 2000 by launching two enhanced versions of 777, the 777-200LR and the 777-300ER.[2086] And again, Boeing reacted to Airbus' launch of the A380 in 2000 with the introduction of a larger version of its 747, the 747-8I, in 2005.[2087]

6.1221. Another result of the focus of Airbus and Boeing on innovation is that existing LCA can become outdated or obsolete, sometimes ahead of original expectations. Thus, it is apparent that the new generation aircraft recently introduced by both producers were originally conceived, or are now anticipated, to eventually replace older aircraft: the 767 (by the 787), the A330 (by the A350XWB), the Airbus A320 "current engine option" aircraft (A320ceo) (by the A320neo) and the 737NG (by the 737MAX).[2088] Similarly, Airbus officially brought the A340 programme to an end in November 2011, after rising fuel prices rendered this family of aircraft a relatively less attractive option compared with Boeing's 777 family, which with two instead of four engines, performed better over similar missions.[2089] The demise of the A340 programme was also no doubt accelerated by Airbus' decision to launch the A350XWB.[2090] Similarly, Airbus terminated the A300/A310 programmes in 2007 when it became apparent that customers were switching to its newer, more technological advanced, products.[2091]

6.1222. Driven by this pattern of competitive interaction, Airbus and Boeing today offer a slightly different range of single-aisle and twin-aisle aircraft compared with the period examined during the original proceeding. The strategic choices that each company has made about the models of aircraft offered to potential customers represent each company's individual conclusions about the best placement of its products in the overall continuum of customer profiles that will maximize profits, in the light of the other producer's supply decisions.

6.1223. Thus, the LCA industry today continues to be an effective Airbus-Boeing duopoly, with each producer having a comparable range of aircraft to offer potential customers, and where competition takes place between these two players at different levels, including with respect to price, technology and the timing and availability of new and improved aircraft, reflecting the complex and often idiosyncratic nature of aircraft demand.

[2082] European Union's response to Panel question No. 48.

[2083] United States' response to Panel question No. 48.

[2084] Bair Declaration, (Exhibit USA-339) (BCI), paras. 38 and 41; and Mourey Statement, (Exhibit EU-8) (BCI), para. 89. See also Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.296.

[2085] Mourey Statement, (Exhibit EU-8) (BCI), paras. 78-79; and Bair Declaration, (Exhibit USA-339) (BCI), para. 25.

[2086] Bair Declaration, (Exhibit USA-339) (BCI), para. 40; and Mourey Statement (Exhibit EU-8) (BCI), para. 116.

[2087] Mourey Statement, (Exhibit EU-8) (BCI), para. 139; and Bair Declaration, (Exhibit USA-339) (BCI), para. 47.

[2088] Mourey Statement, (Exhibit EU-8) (BCI), para. 89; Bair Declaration, (Exhibit USA-339) (BCI), paras. 25 and 38; and United States' first written submission, para. 306.

[2089] Bair Declaration, (Exhibit USA-339) (BCI), para. 40; and Mourey Statement, (Exhibit EU-8) (BCI), para. 116.

[2090] Bair Declaration, (Exhibit USA-339) (BCI), para. 41; and Mourey Statement, (Exhibit EU-8) (BCI), paras. 89 and 116.

[2091] European Union's first written submission, paras. 168-172 and 1225. See also Airbus Press Release, "A300, A310 Final Assembly To Be Completed by July 2007", 7 March 2006, (Exhibit EU-116).

The three alleged product markets for passenger LCA

6.1224. In this section of our Report, we evaluate the extent to which the parties' arguments demonstrate the existence of the alleged single-aisle, twin-aisle and very large passenger LCA product markets. We begin our assessment by reviewing the evidence the United States and the European Union have advanced to show that Airbus and Boeing, as a general matter, do or do not view the LCA industry to comprise of the three separate product markets that are the subject of the United States' serious prejudice complaint. We then proceed to examine the merits of the parties' positions with respect to each of these alleged product markets individually. However, before embarking upon this analysis, we first address the European Union's request that the Panel reject a number of exhibits submitted by the United States with its responses to our first set of questions concerning the three alleged LCA product markets.

6.1225. In its comments on the United States' response to Panel question No. 63, the European Union requested the Panel to exclude the "newly-filed evidence cited in footnotes 338, 344, 348, 352, 353, 356, 357, 358, 358 {*sic*}, 363, 364, 365, 366, 367, 368, 369, and 370 as evidence that was *not* necessary for purposes of responding to questions, within the meaning of paragraph 15 of the Working Procedures, and by the express terms of the compliance Panel's question itself". The evidence cited in the relevant footnotes corresponds to the following 13 exhibits: Exhibits USA-492 and 532 (non-BCI); and USA-527 (HSBI), 530-531 (HSBI), 533-535 (HSBI), 537 (HSBI) and 539-542 (HSBI).

6.1226. We note that the United States relied upon all of the contested pieces of evidence and related arguments for the purpose of responding to more than just Panel question No. 63.[2092] In particular, the United States either specifically or in general referred to the very same exhibits and related arguments in its responses to Panel question Nos. 40, 48, 49, 50, 52 and 53, all of which focused on closely related, if not the same, aspects of the alleged competitive relationships between Airbus and Boeing LCA products for the purpose of identifying relevant product markets. The European Union did not object to the United States' reliance on the evidence submitted with its response to Panel question No. 63 for this purpose. Moreover, despite having challenged the United States submission of the 13 exhibits for the purpose of responding to Panel question 63, the European Union responded fully and extensively to the United States' responses to *all* of the above questions, including Panel question No. 63, in its own comments on the United States' responses to the Panel's questions.[2093]

6.1227. In the light of these facts and considerations, we decline the European Union's request to exclude the relevant evidence and find instead that the United States was entitled to rely upon Exhibits USA-532 (non-BCI) and Exhibits USA-527, 530-531, 533-535, 537, and 539-542 (HSBI) as "evidence necessary for purposes of rebuttals and answers to questions", within the meaning of paragraph 15 of the Working Procedures, and we will consider them accordingly.

Marketing materials and presentations

6.1228. According to the United States, because of the importance of the overall product lines to both customers and producers, Airbus and Boeing frequently use a single-market, or "all LCA", view to help analyse competition in the LCA industry and to plan future production and development.[2094] However, the United States submits that both producers also subdivide the

[2092] In addition, the United States first referred to Exhibit USA-492 in its opening public statement at the meeting of the Panel with the parties on 16 April 2012. See further, Panel's Decision of 28 June 2013 concerning the late submission of this exhibit, Annex F-4.

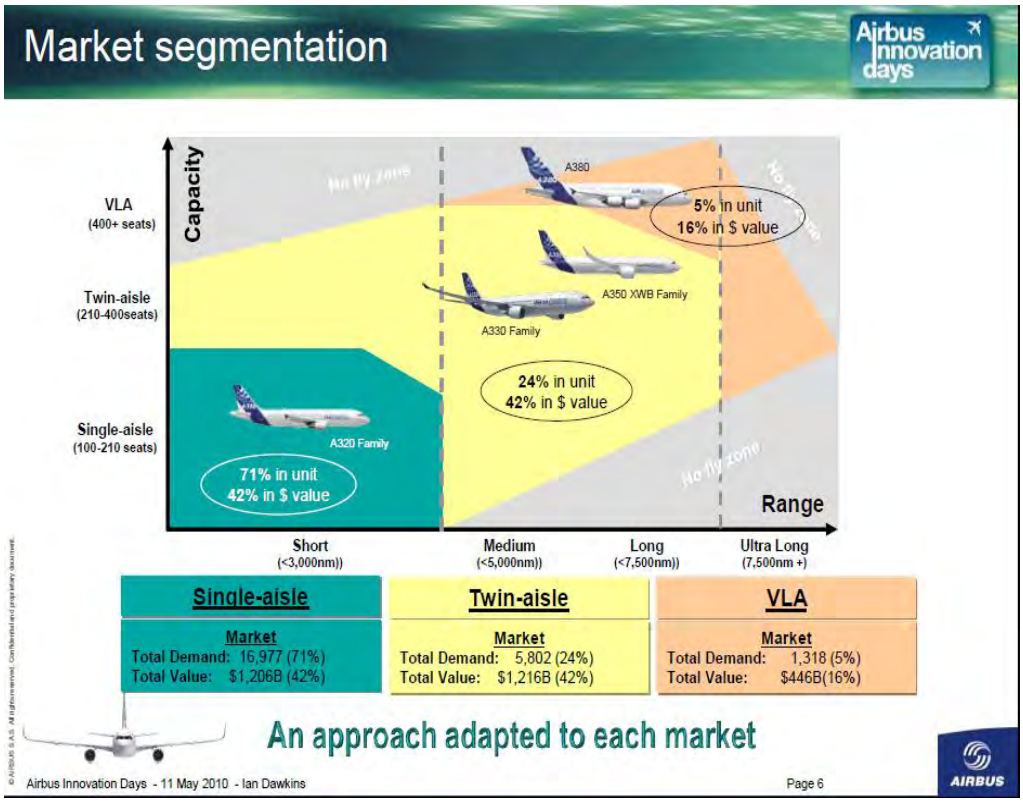
[2093] The European Union's comments on the United States' response to Panel question No. 63 spanned 17 pages (compared to the 8 pages used by the United States to respond to the same question). Similarly, the European Union's comments on the United States' response to Panel question Nos. 40, 48, 49, 50, 52, and 53 covered 51 pages (compared to the 20 pages used by the United States to respond to the same questions).

[2094] United States' second written submission, paras. 450-451 (citing three slides from a presentation made by John Leahy, Chief Operating Officer of Airbus, in 2012, which compare market shares, number of deliveries and revenues of Airbus and Boeing with respect to all LCA (John Leahy, Chief Operating Officer, Customers, Airbus, "Airbus and Boeing World Market Share" and "Delivery Comparison over the last 15 years", slides 7 and 18 from "Commercial Review" EADS/Airbus presentation, EADS New Year Press Conference, 16 January 2012, (Exhibit USA-12); and John Leahy, Chief Operating Officer, Customers, Airbus, "2011 gross market share", slide 8 from "Commercial Review", EADS/Airbus presentation, EADS New Year Press

overall market into sub-segments, and that when they do so, they commonly use the three product market segmentation applied by the Appellate Body in the original proceeding.[2095] To support this submission, the United States has presented a number of Airbus and Boeing marketing materials and presentations, which were not specifically prepared for the purpose of this dispute settlement proceeding.[2096]

6.1229. As regards Airbus, the United States presents two slides from two presentations made in 2010 and 2012. The first Airbus slide (Figure 4) identifies the total value of LCA demand by "market segmentation" in terms of a "single-aisle market", a "twin-aisle market" and a "VLA market". This slide indicates that in 2010 Airbus saw itself as having "an approach adapted to each market", with the A320 family operating in the single-aisle space worth "$1,206B", the A330 and A350XWB families falling within the twin-aisle market worth "$1,216B", and the A380 part of the very large aircraft segment worth "$446B".

Figure 4: Airbus Innovation Days Presentation, May 2010[2097]



6.1230. The second slide (Figure 5) the United States has introduced as evidence of Airbus' perception of the existence of three product markets shows Airbus' 20-year forecast for future demand in 2012 for passenger and freighter LCA, which once again, is divided into three segments "single-aisle aircraft", "twin-aisle aircraft" and "very large aircraft".[2098] For each segment, the slide reveals Airbus' expectations with respect to the number of aircraft it will take to fulfil the forecast demand.

Conference, 16 January 2012, (Exhibit USA-436)). See also Bair Declaration, (Exhibit USA-339) (BCI), para. 13.

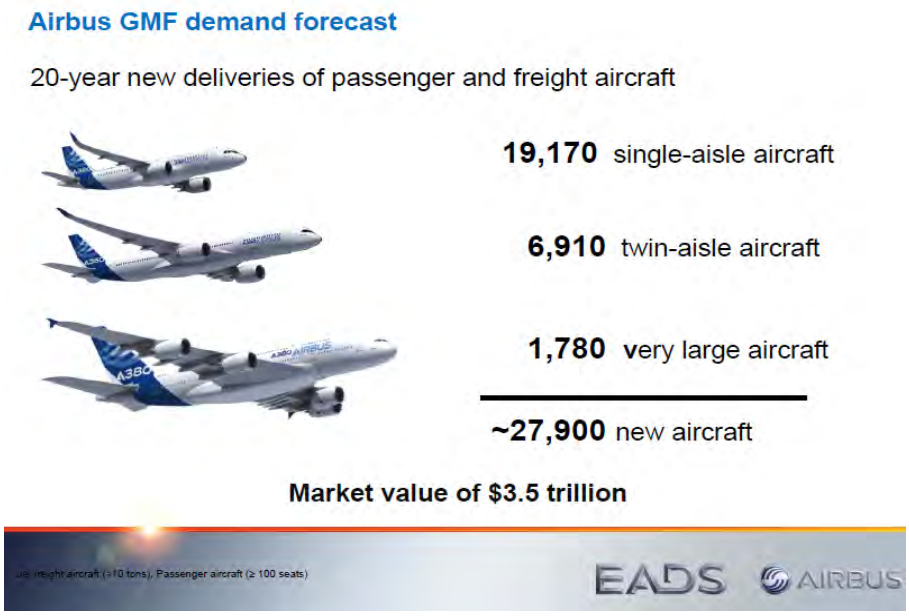
[2095] United States' second written submission, para. 452.

[2096] United States' second written submission, paras. 452-457.

[2097] Ian Dawkins, "Market Segmentation", slide 6 from "Airbus Innovation Days", Airbus presentation, 11 May 2010, (Exhibit USA-336).

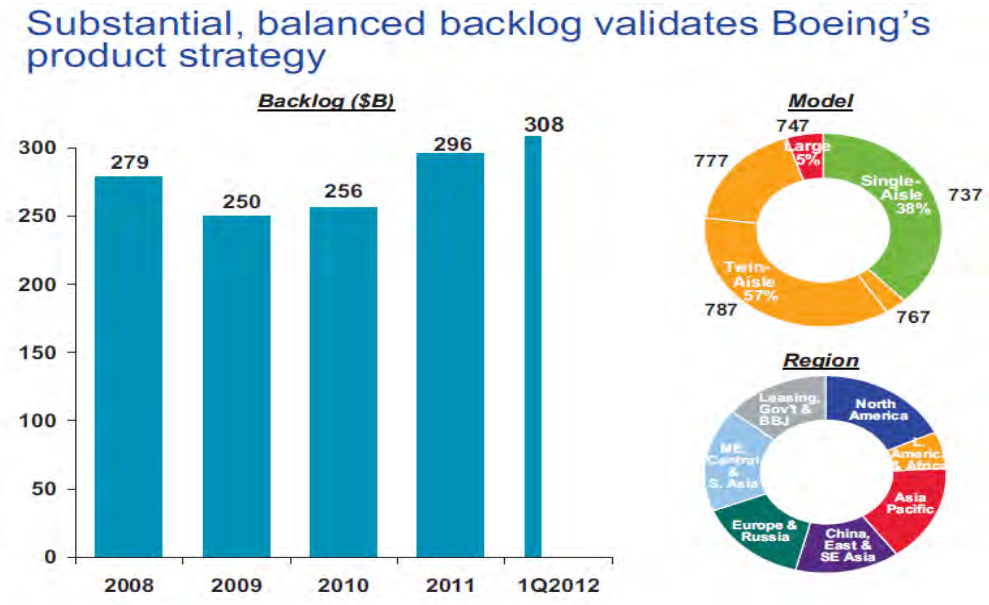
[2098] John Leahy, Chief Operating Officer, Customers, Airbus, "Airbus GMF demand forecast" slide 27 from "Commercial Review", EADS/Airbus presentation, EADS New Year Press Conference 2012, 16 January 2012, (Exhibit USA-335), slide 27. HSBI evidence suggests that Airbus split the market for LCA into the same three segments in 2006 (A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 87).

Figure 5: EADS Presentation, January 2012[2099]



6.1231. In addition to the statements of Mr Michael Bair, Boeing's Senior Vice President for Marketing, which explain how in Boeing's view, there are three competitive aircraft markets, the United States has submitted one slide from Boeing's 2012 Current Market Outlook presentation (Figure 6). This slide depicts the number of planes in Boeing's "backlog" in terms of models forming part of the "single-aisle" (737), "twin-aisle" (767, 787 and 777) and "large" (747) segments.

Figure 6: Boeing Current Market Outlook Presentation, July 2012[2100]



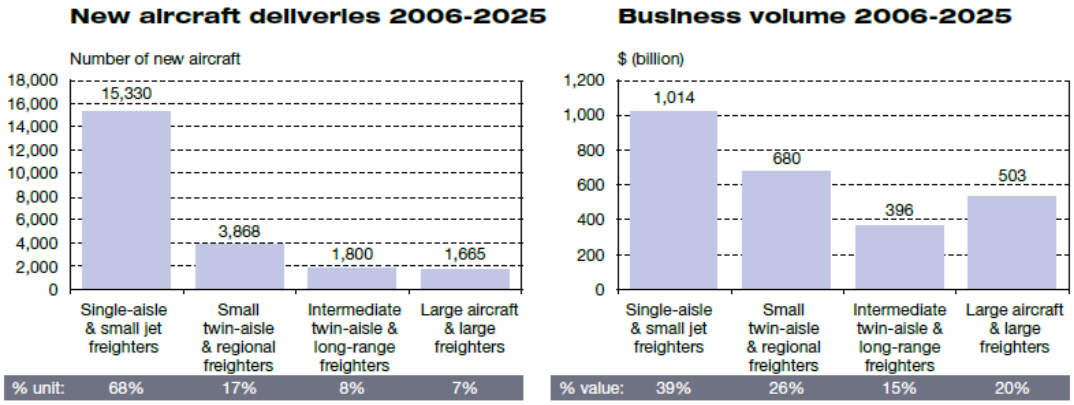
6.1232. The European Union responds to the United States' submissions by arguing that the materials at issue are irrelevant to the question of product markets because they provide no

[2099] John Leahy, Chief Operating Officer, Customers, Airbus, "Airbus GMF demand forecast" slide 27 from "Commercial Review", EADS/Airbus presentation, EADS New Year Press Conference 2012, 16 January 2012, (Exhibit USA-335).

[2100] Randy Tinseth, "Current Market Outlook", Boeing presentation, July 2012, (Exhibit USA-337).

insights into the extent to which competitive constraints exist between the relevant models of LCA falling within the alleged single-aisle, twin-aisle and VLA markets.[2101] In any case, the European Union argues that the United States has selectively chosen the materials it relies upon in order to best fit its case.[2102] In this respect, the European Union refers to the two Airbus and Boeing "Global Market Forecast" documents (Figures 7 and 8) which it argues show that both companies view the twin-aisle segment to be made up of two separate smaller and mid-sized twin-aisle product markets, as opposed to the unitary twin-aisle market asserted by the United States.

Figure 7: Airbus Global Market Forecast 2006-2025



6.1233. The information presented in Figure 7 reveals Airbus' 20-year forecast in 2006 of the expected volume and value of total new passenger and freighter aircraft deliveries worldwide. This is the same subject matter of the information presented in Figure 5, which dates from 2012. The tables in the Airbus 2006 document divide passenger and freight LCA into four segments: "single-aisle & small jet freighters"; "small twin-aisle & regional freighters", "intermediate twin-aisle & long-range freighters"; and "large aircraft & large freighters". We note, however, elsewhere in the same document, Airbus presents its forecast for new deliveries of *passenger only* LCA in India and China on the basis of only three product segments: single-aisle, twin-aisle and VLA.[2103]

Figure 8: Boeing Current Market Outlook 2006-2025

DELIVERIES BY SIZE[2104]

2006–2025	**Market value**	**Market share**	**Deliveries**	**Market share**
Size category	2005 $B	$ value	New airplanes	Units
Regional jets	**90**	**4%**	**3,450**	**13%**
Single aisle				
90 to 175 seats	890	34%	14,440	53%
More than 175 seats	190	7%	2,100	8%
Total single aisle	**1,080**	**41%**	**16,540**	**61%**
Twin aisle				
Small	520	20%	3,270	12%
Medium	650	25%	2,960	11%
Large	260	10%	990	3%
Total twin aisle	**1,430**	**55%**	**7,220**	**26%**
TOTAL >>	**2,600**	**100%**	**27,210**	**100%**

[2101] European Union's second written submission, para. 619.
[2102] European Union's second written submission, para. 619; and comments on the United States' response to Panel question No. 63.
[2103] Airbus Global Market Forecast 2006-2025, (Exhibit EU-158), pp. 13 and 17.
[2104] Boeing Current Market Outlook 2006-2025, (Exhibit EU-183), p. 40.

6.1234. The information set out in Figure 8 shows what Boeing's expectations were in 2006 with respect to the number of "new airplane deliveries" to 2025. The table presents "market value" and "market share" information by size of the relevant aircraft, distinguishing between three broad categories of aircraft: regional jets, single-aisle and twin-aisle. The single-aisle data is further divided into two segments by number of seats, namely, aircraft with 90-175 seats and aircraft with more than 175 seats. The information pertaining to the twin-aisle segment is split into small, medium and large aircraft. The same document presents data concerning "fleet size and development" in essentially the same way.[2105] However, when it comes to showing the number and market value of deliveries on a regional basis, Boeing's 2006 Current Market Outlook (CMO) divides the same data (i.e. the 27,210 total worldwide deliveries) into only four categories: "regional jets"; "single-aisle"; "twin-aisle"; and "747 and larger" aircraft.[2106] Similarly, Boeing's 2012 CMO presents the forecast number and market value of deliveries by four segments: "regional jets"; "single-aisle"; "twin-aisle"; and "large" aircraft.[2107]

6.1235. Finally, the United States argues that it is not only Airbus and Boeing that commonly divide the LCA market into three segments, but it is also frequently something that is done by their customers.[2108] To illustrate this assertion, the United States cites HSBI evidence concerning a communication between Boeing and an LCA customer where the latter indicates its intention to have separate procurement processes, one concerning narrow-body aircraft and one involving wide-body LCA.[2109]

6.1236. To the extent that the marketing materials, presentations and communications submitted by the parties in this dispute evidence the views held by Airbus and Boeing (and one customer) about the sources (and limits) of competition in the LCA industry, we believe they would be highly relevant to our task of determining the existence of relevant product markets.[2110] However, we are not convinced that the information we have reviewed presents a clear picture of the extent to which Airbus and Boeing consider competition takes place *exclusively* across the three passenger LCA product markets asserted by the United States. Nevertheless, on balance, the documents show that Airbus and Boeing will, more often than not, analyse and present their commercial LCA activities on the basis of one single-aisle, one twin-aisle and one VLA segment. To this extent, we believe that the documents we have reviewed lend a degree of support to the continued existence of the three LCA passenger markets relied upon by the Appellate Body to "complete the analysis" in the original proceeding, which the United States relies upon to make its serious prejudice complaint in this compliance dispute.

The alleged market for single-aisle passenger LCA

6.1237. The United States submits that all of the planes in Boeing's 737 family compete in one and the same LCA product market as all of the models of the Airbus A320 family. The European Union agrees that competition exists between Airbus and Boeing single-aisle products. However, in its view, this competition takes place in two separate product markets: one for airlines seeking *near-term delivery* of LCA products, where the current versions of the A320 family compete with the current versions of the 737NG family; and another for airlines that seek *delivery by the end of the decade*, where effective competition takes place solely between the new generation of Airbus and Boeing single-aisle products, namely, the A320neo and its derivatives versus the 737MAX and its derivatives.[2111] There is, therefore, no dispute between the parties about whether the A320ceo and its derivatives compete in one and the same product market as the 737NG and its derivatives. Neither do the parties have different views about whether their new generation of LCA products and derivatives compete with each other. The parties' disagreement is limited to the extent to which both producers' range of new generation single-aisle products compete with their current versions.

[2105] Boeing Current Market Outlook 2006-2025, (Exhibit EU-183), pp. 38-39.
[2106] Boeing Current Market Outlook 2006-2025, (Exhibit EU-183), pp. 38-39.
[2107] Randy Tinseth, "Current Market Outlook", Boeing presentation, July 2012, (Exhibit USA-337), p. 17.
[2108] United States' response to Panel question No. 48, para. 142.
[2109] Exhibit USA-184 (HSBI).
[2110] See above para. 6.1207.
[2111] European Union's first written submission, paras. 600-606; and Mourey Statement, (Exhibit EU-8) (BCI), paras. 75-84.

6.1238. In their submissions, the parties have overwhelmingly focused upon the question of *demand-side substitutability.* The parties' arguments have given little attention to considerations of *supply-side substitutability*, in relation to which they both agree that the full range of Airbus and Boeing single-aisle LCA products may be produced on the same assembly lines.[2112] Thus, the debate between the United States and the European Union has almost exclusively addressed the extent to which: (a) the physical and performance characteristics, end-uses and customers of the different Airbus and Boeing single-aisle aircraft; (b) the existence and nature of any pricing constraints between these aircraft; and (c) the evidence with respect to a number of sales campaigns, demonstrate a level of demand-side substitution between current and new generation single-aisle aircraft that is sufficient to confirm the United States' view that there is only one single-aisle LCA product market. We explore the merits of the parties' positions with respect to these matters in the sections that follow.

Physical and performance characteristics, end-uses and customers

6.1239. The data the parties have submitted in relation to the basic physical and performance characteristics of Airbus' and Boeing's range of single-aisle aircraft is reproduced in the following table:

Table 16: Basic physical and performance characteristics of Airbus and Boeing single-aisle LCA[2113]

Model	Typical Seats (Airbus / Boeing)	MTOW (t) (Airbus / Boeing)	Max Range (nm) (Airbus / Boeing)	Length (m)	Wing Span (m) (Airbus / Boeing)	2011 List Price (USD M)
A318	107	68 / 75	3,250 / 3,055	31.4	34.1 / 35.5	65.2
737-600	108 / 110	66 / 72.8	3,130 / 3,235	31.2	34.3	59.4
A319	124	75.5 / 83.2	3,700 / 3,130	33.8	34.1 / 35.5	77.7
737-700	124 / 126	70 / 77.2	3,150 / 3,445	33.6	35.8	70.9
A319neo	124 / 126	75.5 / 83.2	4,200 / 3,560	33.8	35.80 / 35.5	83.9
737 MAX 7	124 / 126	73 / 79.8	3,510 / 3,800	33.6	35.8 / 35.9	77.7
A320	150	78 / 86	3,300 / 2,880	37.5	34.10 / 35.5	85.0
737-800	159 / 162	79 / 87.1	3,070 / 3,085	39.5	35.8	84.4
A320neo	150	79 / 87	3,750 / 3,295	37.5	35.80 / 35.5	91.2
737 MAX 8	159 / 162	82 / 90.6	3,330 / 3,620	39.5	35.8 / 35.9	95.2
A321	185 / 183	93.5 / 103.1	3,200 / 2,345	44.5	34.10 / 35.5	99.7
737-900ER	173 / 180	85.1 / 93.9	3,210 / 2,845	42.1	35.8	89.6
A321neo	185 / 183	93.5 / 103.1	3,750 / 2,735	44.5	35.80 / 35.5	105.9
737 MAX 9	173 / 180	88.1 / 97.4	3,480 / 3,355	42.1	35.8 / 35.9	101.7

6.1240. The information in Table 16 reveals that the models of aircraft compared in each derivative pairing of Airbus and Boeing single-aisle LCA have very similar seating capacities, maximum take-off weights (MTOW), lengths and wing-spans, irrespective of whether they are current or new generation models. However, in terms of maximum flying range and 2011 list prices, Table 16 shows that there is overall a noticeable difference between new and current generation LCA.[2114] For the most part, this reflects the (approximately 15%-16%) superior fuel-efficiency of the re-engined new generation LCA compared with the current version aircraft[2115],

[2112] European Union's response to Panel question No. 78, para. 324 and fn 537; and United States' comments on the European Union's response to Panel question No. 78. In its response, the European Union argues, however, that "even though the A320ceo and A320neo, and the 737NG and 737MAX, may be produced on the same final assembly lines, that would not put them in the same product market given overwhelming evidence of the lack of competitive constraints that current technology single-aisle LCA exercise on new technology single-aisle LCA".

[2113] The data used in this table are sourced from the information provided by Airbus and Boeing in the Mourey Statement, (Exhibit EU-8) (BCI), tables 1 and 2; and Bair Declaration, (Exhibit USA-339) (BCI), para. 20. Where the parties have given different data for the same characteristic, both submissions have been included in the table.

[2114] Both parties have explained the differences in the maximum flying range figures furnished by Airbus and Boeing by suggesting that these result from the application of different calculation methodologies. (European Union's response to Panel question No. 159; and United States' response to Panel question No. 159)

[2115] European Union's second written submission, para. 682; and Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 13-24.

which allows the former to fly essentially the same take-off weights further and sell at a higher list price.

6.1241. Both parties agree that the new generation single-aisle LCA products have a clear fuel-burn advantage over Airbus and Boeing current version offerings. However, unlike the European Union, the United States does not accept that this superiority has created two distinct single-aisle LCA product markets. According to the United States, not only are the new generation and current version products physically very similar[2116], but the customers interested in the A320neo and the 737MAX will be mostly the same − namely, airline companies wanting to capture the fuel-efficiency benefits of the new generation products on routes already flown with the A320ceo and 737NG.[2117] Thus, the United States argues that when a customer opts for the A320neo, it selects an A320 with new engines to fly essentially the same missions it operates with current version aircraft. For the United States, this reality is also reflected in not only the fact that Airbus considers both the A320neo and A320ceo to form part of the same "A320 Family"[2118], but also Airbus' claim in a slide that compares the performance characteristics of the 737-800, the A320ceo and the A320neo, and concludes that the "A320 is the market leader".[2119]

6.1242. According to the European Union, none of the Airbus marketing materials and presentations the United States relies upon to support the existence of only one single-aisle LCA product market can be used to determine the existence of product markets because they in no way speak to the question of demand-side substitutability. The European Union asserts that the materials at issue only shed light upon the general physical characteristics of certain single-aisle product offerings, which it submits, is not enough to establish the existence of significant competitive constraints between those aircraft.[2120]

6.1243. In our view, the fact that the physical attributes of the current version and new generation of Airbus and Boeing single-aisle LCA products are very similar is a relevant and important consideration when evaluating the extent to which a customer may view those products to be substitutable. While similarities in the physical attributes of two or more products are not alone enough to determine whether they place competitive constraints on each other, the degree of commonality between two or more products may provide meaningful insights into the extent to which those products serve the same purpose and therefore, potentially, the same customers. Indeed, it is recognized that a high degree of similarity between two or more products may also signal negligible or insignificant switching costs, making it easier for customers to substitute between those products. Furthermore, we note that LCA "product homogeneity" and "seating capacities" are two physical attributes of LCA products that, together with "flight ranges", "prices, fuel efficiency, and other performance characteristics", were identified by the Appellate Body as factors that may be relevant to consider when determining the demand-side substitutability of different aircraft.[2121]

6.1244. In this light, it is instructive to find that Airbus has itself emphasized the high degree of commonality between the A320ceo and the A320neo in a number of publicly available presentations and documents. Thus, at the 2012 Airbus Innovation Days, Airbus described the A320neo as a "minimum change aircraft" having "maximum commonality with {the} A320ceo" and the "same Type Certification and Type Rating".[2122] Another (undated) slide from an Airbus presentation emphasizes the "high level of commonality" and "seamless operation of both current and future A320s", identifying, in particular, a greater than "95%" commonality in "spare parts", a

[2116] United States' second written submission, paras. 460 and 462-463.

[2117] United States' second written submission, para. 466.

[2118] United States' second written submission, para. 464 (copying a slide from John Leahy, Chief Operating Officer, Customers, Airbus, "2011 Airbus orders, deliveries and backlog" slide 13 from "Commercial Review", EADS/Airbus presentation, EADS New Year Press Conference 2012, 16 January 2012, (Exhibit USA-343), slide 13, which *inter alia* shows that Airbus counted its 2011 orders, deliveries and backlog for the A320neo as orders, deliveries and backlog for the "A320 Family").

[2119] United States' second written submission, para. 465 (copying a slide from "The A320 is the Market Leader", Airbus presentation slide, (Exhibit USA-478)). While this slide does not explicitly reveal any performance data with respect to the A320neo, it specifically concludes that the "A320neo is more efficient, flies farther".

[2120] European Union's second written submission, para. 686; and comments on the United States' response to Panel question No. 63, para. 501.

[2121] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1134.

[2122] "Programme Update", Airbus presentation, Williams Innovation Days, May 2012, (Exhibit USA-342).

"91%" commonality in "tooling and GSE", a difference of "5 days" when it comes to "maintenance training", and "just two hours of self-study for pilot familiarization training"[2123]. Similarly, two Airbus employees closely involved in the A320neo project explain in an article appearing in an industry journal that:

> The A320neo series … has a target of *95% spare parts commonality* with the *existing models*, enabling the new aircraft to fit seamlessly into *existing A320 Family fleets and customers' operations*. … The A320neo series is a programme which uses innovative new engine and aero-structural technologies to provide *a significant improvement in performance for the A319, A320 and A321 aircraft*. Whilst striving to deliver this benefit to the operators, Airbus is also keen on *minimizing the changes to a proven product*. Changing only what is necessary to integrate the new engines, *keeping the rest of the aircraft in harmony with the operators' existing economic and logistical models*, can ensure the future operators a simpler, lower cost service entry.[2124] (emphasis added)

6.1245. The same article goes on to explain that "{t}he 95% commonality of spare parts defined in Airbus' objectives is not just a marketing figure", but rather the result of a careful study of the spare parts that would be needed by an operator, on the basis of "key assumptions" "relating to the fleet size, aircraft utilisation, logistics and economics", which reflect the "*experience with all Airbus operators and represent the average A320 Family mission*".[2125] The article concludes, *inter alia*, that:

> {The A320neo programme} is a true demonstration of engineering excellence which is critical in *today's competitive 'single aisle' market*. Alongside the aircraft market leading performance, *the success of the A320 Family is also a recognition of Airbus' constant strive to improve the product with the customer in mind*.[2126] (emphasis added)

6.1246. In our view, the information and statements contained in the above-quoted presentations and documents submitted by the United States do more than merely identify a high degree of commonality between the physical attributes of the A320neo series and those of the A320ceo series. The evidence provided by the United States also suggests that Airbus relies upon this commonality as part of a commercial strategy that is focused upon marketing the new generation products as updated, more fuel-efficient, versions of its current single-aisle products for the purpose of serving essentially the same missions already operated by existing single-aisle customers. This is consistent with Boeing's own assessment of the commercial interest in the 737MAX, which is described in the Bair Declaration as coming mainly from operators that will "generally seek to capture benefits of greater fuel efficiency on routes already serviced by in-service A320s and 737s rather than trade that efficiency for greater range".[2127]

6.1247. The European Union submits that even if the marketing materials and presentations the United States relies upon could be understood to inform an evaluation of the substitutability of new generation and current version single-aisle LCA products, they could, at most, only be taken to represent the *producer and marketing teams'* perspectives on substitutability, which cannot,

[2123] "A320/A320neo: A High Level of Commonality", Airbus presentation slide, January 2012, (Exhibit USA-479).

[2124] Andrew Mason, Project Manager, New Programmes IP, Airbus Material, Logistics and Suppliers, and Graham Jackson, A320neo Operability Technical Integrator, Airbus Engineering, "Ensuring A320neo series commonality with the existing A320 Family", *Airbus Technical Magazine – FAST 49*, January 2012, (Exhibit USA-344), p. 2.

[2125] Andrew Mason, Project Manager, New Programmes IP, Airbus Material, Logistics and Suppliers, and Graham Jackson, A320neo Operability Technical Integrator, Airbus Engineering, "Ensuring A320neo series commonality with the existing A320 Family", *Airbus Technical Magazine – FAST 49*, January 2012, (Exhibit USA-344), p. 4. (emphasis added)

[2126] Andrew Mason, Project Manager, New Programmes IP, Airbus Material, Logistics and Suppliers, and Graham Jackson, A320neo Operability Technical Integrator, Airbus Engineering, "Ensuring A320neo series commonality with the existing A320 Family", *Airbus Technical Magazine – FAST 49*, January 2012, (Exhibit USA-344), p. 7.

[2127] Bair Declaration, (Exhibit USA-339) (BCI), para. 26.

alone, be used to understand how *customers* view the relevant aircraft.[2128] We note, however, that the United States is not advancing the above information as evidence of customers' preferences, but only Airbus' own perceptions of those preferences. In our view, this type of evidence may be highly relevant to the task of identifying LCA product markets, especially given Airbus' long-standing experience with the A320 in an industry that includes only one other effective competitor; and *a fortiori* when, as in the present instance, it appears that this competitor takes the same view of the single-aisle aircraft product space that we believe can be objectively inferred from the evidence the United States has advanced of Airbus' own perceptions. Thus, we see the publicly expressed views and opinions of Airbus of the commercial relationship between, and positioning of, the A320neo series and the A320ceo series to be an important part of the configuration of facts that we must consider in making our determination of relevant product markets.

6.1248. In the light of the above considerations, we find that the new generation and current versions of Airbus and Boeing single-aisle aircraft are not only physically very similar, but also that it is highly likely that they will be used by the majority of customers for the purpose of operating the same or similar missions. This implies that when seeking to purchase a single-aisle aircraft, the majority of customers will be faced with making a potential choice between at least two aircraft from each manufacturer, one from a current version and another from the new generation of products.

Pricing constraints

6.1249. Apart from the similarities in physical attributes, end-uses and customers, the United States argues that the existence of effective competition between the current and new generation of single-aisle LCA products is evidenced by the pricing pressures that the two sets of LCA place on each other.[2129] The United States' allegation concerning the existence of pricing pressure on current versions of Airbus and Boeing single-aisle aircraft by new generation models is primarily based on evidence from the 2011-2012 Norwegian Air Shuttle sales campaign. We consider the parties' arguments with respect to this evidence in the next subsection of our Report.[2130] As regards the existence of alleged pricing constraints imposed by current versions of single-aisle aircraft on new generation aircraft, the United States relies upon not only the views expressed by Boeing's Senior Vice President for Commercial Airplane Marketing in the Bair Declaration[2131], but also the following statements by Airbus' Chief Financial Officer (CFO) in 2011, as well as Airbus' Senior Vice President for Contracts in the Supplemental Mourey Statement:

> {Airbus} has sought to increase the A320neo price by approximately $7-8 million over the baseline A320, which is estimated to be one-half of the net present value of the lifetime fuel burn improvement.[2132]
>
> Airlines will be able to take the advertised and guaranteed fuel burn advantages of the new generation aircraft and apply what they know about fuel prices and their own operations to estimate these present values. This will allow them to quantify the advantage that operating new generation aircraft offers to the airlines' bottom line over current generation aircraft. In practice, Boeing and Airbus have had to "share" the cost-savings and value advantages from the new generation neo and MAX with single-aisle customers.[2133]

6.1250. The United States argues that these statements confirm that neither Airbus nor Boeing is able to increase the prices of their new generation single-aisle offerings by the entire NPV of their enhanced fuel efficiency because this would neutralize any operating cost advantage over current

[2128] European Union's comments on the United States' response to Panel question No. 63, paras. 481, 482, and 501.
[2129] Bair Declaration, (Exhibit USA-339) (BCI), paras. 27 and 29; and United States' response to Panel question No. 63.
[2130] See below starting at para. 6.1277.
[2131] Bair Declaration, (Exhibit USA-339) (BCI), para. 27.
[2132] John Ostrower, "EADS CFO confirms A320neo pricing premium", *Flightglobal News*, 11 August 2011, (Exhibit USA-346).
[2133] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 23.

models, thereby leaving customers with little incentive to switch to the new models.[2134] Thus, according to the United States, current versions of Airbus and Boeing single-aisle LCA products exert a constraint on both companies' pricing of their new generation models.

6.1251. Unlike the United States, the European Union argues that the current versions of Airbus and Boeing single-aisle LCA products do not place any significant pricing constraints on their respective new generation models.[2135] For the European Union, the only significant pricing constraints that affect the sale of Airbus and Boeing new generation aircraft result exclusively from the competitive pressures that the 737MAX and the A320neo place on each other. Thus, according to the European Union, the A320ceo and the 737NG do not significantly constrain the prices of the A320neo and the 737MAX. In our view, the European Union's submission does not accurately reflect the competitive pressures that we believe are faced by the new generation of Airbus and Boeing single-aisle LCA products.

6.1252. As already mentioned, the current versions and new generation models of Airbus and Boeing single-aisle aircraft are intended to perform largely the same missions[2136], implying that for any existing route currently served by a single-aisle aircraft, a customer will potentially have four different series of single-aisle aircraft to choose from. We recall that a customer's decision to purchase an LCA product will depend upon its individual assessment of a multiplicity of factors bearing on the overall value of the package it is offered, in the context of its particular business model, strategic goals and any relevant subjective considerations at the time of purchase. For a customer looking to purchase a single-aisle aircraft, this assessment will no doubt take into account the trade-offs that must be made between paying a higher price for an LCA with lower operating costs (new generation aircraft) and paying a lower price for an LCA with higher operating costs (current version aircraft). Where, all other factors being equal, the result of such an evaluation shows that the price of a new generation aircraft is at a level that erodes the benefits of its lower operating costs to a point where a particular customer would be left worse-off compared with the situation it would be in were that customer to buy a lower priced but less efficient current version aircraft, it would obviously not make economic sense for that particular customer to purchase the new generation product. The relatively high price of the new generation LCA would have tilted the customer's economic incentive in favour of purchasing a current version of LCA. It follows that in setting the price for new generation products, Airbus and Boeing will not only have to consider each other's pricing on the 737MAX and A320neo, but also the 737NG and A320ceo. This suggests that current versions of Airbus and Boeing single-aisle LCA do impose pricing constraints on their new generation models, a conclusion we believe can be supported by the following passages from the Bair Declaration and the Supplemental Mourey Statement:

> From customer's perspective, the only meaningful difference between the {current version and new generation aircraft} is an operating cost difference driven by the improved fuel efficiency of the new engines on the neo and the MAX. *Neither Airbus nor Boeing is able to increase prices for the newer models by the net present value of their enhanced fuel efficiency, since that would neutralize their operating cost advantage over earlier models and thereby leave customers with little incentive to adopt the newer models*. Indeed, pricing for the A320neo and 737MAX is generally constrained by the market presence of earlier models, as the value of the latter's fuel burn disadvantage tend to diminish on a dollar-for-dollar basis as neo and MAX prices increase.[2137] (emphasis added)
>
> Airlines will be able to take the advertised and guaranteed fuel burn advantages of the new generation aircraft and apply what they know about fuel prices and their own operations to estimate these present values. *This will allow them to quantify the advantage that operating new generation aircraft offers to the airlines' bottom line over current generation aircraft. In practice, Boeing and Airbus have had to "share"*

[2134] United States' second written submission, para. 466 (citing Bair Declaration, (Exhibit USA-339) (BCI), paras. 27-28).
[2135] European Union's comments on the United States' response to Panel question No. 63, paras. 509-510.
[2136] See above para. 6.1246.
[2137] Bair Declaration, (Exhibit USA-339) (BCI), para. 27.

> *the cost-savings and value advantages from new generation neo and MAX with single-aisle customers.*[2138] (emphasis added)

6.1253. According to the European Union, however, the performance differences of the re-engined new generation aircraft compared with current models of single-aisle LCA have such a dramatic impact on the value they offer customers that airlines able to wait until the end of the decade to take delivery of a single-aisle LCA will invariably choose from either Airbus' or Boeing's range of new generation products.[2139] In other words, as we understand it, the European Union argues that the fuel-burn superiority of new generation aircraft over current versions is so great that it would be highly unlikely for a customer to face a situation whereby the value of the operating cost advantages of the A320neo and 737MAX could be outweighed by a lower priced A320ceo or 737NG.

6.1254. The European Union finds support for its argument in the Supplemental Mourey Statement, which presents a NPV analysis of the revenue and cost streams generated from operating the A320neo and A320ceo on missions demanded by their "typical" customers over a 15-year life-span, assuming the same delivery date, but in the light of changing fuel prices.[2140] The analysis shows that the A320neo has a greater NPV than the A320ceo at all levels of fuel price, improving as the fuel price increases. The Supplemental Mourey Statement considers the size of the A320neo's NPV advantage and concludes that the price concessions that would have to be made to the A320ceo in order "to persuade a typical, economically rationale airline" to purchase that aircraft instead of the A320neo would be "**[***]**".[2141] The European Union maintains that these results, which it argues are derived from the application of a comparison methodology that is "standard practice" and "regularly used throughout the industry"[2142], demonstrate that the two series of Airbus and Boeing single-aisle aircraft do not fall within the same product market.

6.1255. The United States advances several criticisms of the European Union's NPV analysis, arguing in the light of these, that the European Union has failed to demonstrate that new generation and current versions of Airbus and Boeing single-aisle aircraft are in separate product markets. Indeed, to the extent that the United States considers the European Union's NPV analysis to be relevant at all to the question of identifying LCA product markets, the United States argues that the results of the Supplemental Mourey Statement *support* the existence of competition between all models of Airbus and Boeing single-aisle aircraft.[2143]

a Accounting for price and non-price factors in the NPV analysis

6.1256. The first alleged shortcoming the United States identifies in the European Union's NPV analysis is derived from its own understanding of how an appropriate NPV analysis should be undertaken and interpreted. According to the United States, a valid NPV analysis for LCA products should involve "determining the price of the two products {being compared} and quantifying the value advantage of all relevant non-price factors".[2144] The United States points out that the NPV analysis conducted in the Supplemental Mourey Statement takes neither of these two steps. In particular, the United States notes that aircraft prices were not used in the calculation of the NPVs for the A320neo and the A320ceo. Moreover, even when aircraft prices were taken into account to examine the extent to which discounting might overcome the NPV advantage of the A320neo over the A320ceo, the United States highlights that no data was disclosed to support the allegation that

[2138] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 23. See also, John Ostrower, "EADS CFO confirms A320neo pricing premium", *Flightglobal News*, 11 August 2011, (Exhibit USA-346), which reports that Airbus "has sought to increase the A320neo price by approximately $7-8 million over the baseline A320, which is estimated to be one-half of the net present value of the lifetime fuel burn improvement".

[2139] European Union's first written submission, paras. 605-606. The European Union explains that deliveries of the new generation products are scheduled to begin in 2015 (for the A320neo) and 2017 (for the 737MAX).

[2140] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 17-18; and European Union's comments on the United States' response to Panel question No. 61, para. 439.

[2141] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 24; and European Union's second written submission, paras. 682-683.

[2142] European Union's comments on the United States' response to Panel question No. 61, para. 445.

[2143] United States' response to Panel question No. 61, paras. 205-225; and Sanghvi Declaration, (Exhibit USA-530), paras. 86-90.

[2144] United States' response to Panel question No. 61 (citing Sanghvi Declaration, (Exhibit USA-530), paras. 42-50).

it would not be possible for the A320ceo to compete with the A320neo by making appropriate price concessions.[2145] Similarly, the United States notes that the NPV analysis conducted in the Supplemental Mourey Statement does not account for a number of important non-price factors that the United States argues "regularly drive LCA prices", such as delivery date and fleet commonality.[2146] For the United States, all of these alleged flaws undermine the probative value of the European Union's NPV analysis.

6.1257. Contrary to the United States, the European Union asserts that the NPV analysis contained in the Supplemental Mourey Statement did in fact take account of actual aircraft prices, by interpreting the results of the NPV comparisons in the light of the price concessions that would be necessary and commercially feasible to bridge the value advantage of new generation aircraft over current versions. According to the European Union, it was not necessary to incorporate aircraft prices into the cash flows used to make the NPV calculations themselves because the purpose of the analysis was to evaluate the differences in NPVs created by non-price factors.[2147]

6.1258. Similarly, the European Union argues that the United States' criticism about the lack of consideration of non-price factors in the NPV analysis is without merit. With respect to the absence of consideration of the effects of "fleet commonality", the European Union submits that "when performing general NPV comparisons on an aircraft-to-aircraft basis", "there is generally no basis on which to generate a meaningful value that could be included in the NPV comparisons for" fleet commonality because it is a customer-specific factor.[2148] While the European Union acknowledges that "fleet commonality" "will add significant cost advantage" in, particularly, the single-aisle aircraft segment, it asks how it would be possible to value this effect for the purpose of conducting a "generic" assessment of NPVs given that there will be airline customers with a mix of both Airbus and Boeing aircraft.[2149] Thus, according to the European Union, the fact that the effects of "fleet commonality" were not accounted for in the NPV analysis does not undermine those calculations.[2150]

6.1259. The European Union responds to the United States' criticism about the failure of the NPV analysis to take differences in the date of delivery into account by suggesting that this would not have been appropriate, or in any case, by arguing that it would not have shown that new generation and current versions of Airbus and Boeing single-aisle aircraft all compete in the same market. According to the European Union, the fact that an airline may decide to purchase a current version over a new generation aircraft because of its availability does not reflect the existence of competition between the two aircraft, but rather simply the customer's "need for quick delivery positions at which {time} new technology aircraft are not available".[2151] The European Union does not accept that this dynamic reflects the existence of effective competition between the two aircraft products.

6.1260. We agree with the European Union that it was not necessary to include the actual prices of the A320ceo and A320neo into the calculation of their respective NPVs in order to show the extent to which one aircraft will *outperform the other over the same distance flown by the same customer in the light of changing fuel prices*. However, in the absence of any consideration of aircraft pricing, it is difficult to see how the NPVs generated in the Supplemental Mourey Statement may be interpreted to demonstrate anything more than simply the mathematical results they produce, namely, that the A320neo has a sizeable operating cost advantage over the A320ceo, when delivered on the same date to a "typical" customer, and that this advantage will increase with higher fuel prices. Given the multiplicity of price *and* non-price factors that will have a bearing upon a customer's purchase decision, it does not necessarily follow that an aircraft with an operating cost advantage over another will not be considered by a customer to be potentially substitutable with the poorer performing aircraft. While operating costs (including fuel-efficiency) will invariably play a significant role in any customer's purchase decision, there are other factors

[2145] United States' response to Panel question No. 61, paras. 207-208; and Sanghvi Declaration, (Exhibit USA-530), paras. 86-87.
[2146] United States' response to Panel question No. 61, paras. 209-212; and Sanghvi Declaration, (Exhibit USA-530), paras. 6, 57, 66, and 76.
[2147] European Union's comments on the United States' response to Panel question No. 61, para. 452.
[2148] European Union's comments on the United States' response to Panel question No. 61, para. 454.
[2149] European Union's comments on the United States' response to Panel question No. 61, fn 796.
[2150] European Union's comments on the United States' response to Panel question No. 61, para. 454.
[2151] European Union's comments on the United States' response to Panel question No. 61, para. 446.

that will also play an important role. Among the most important of these are price, fleet commonality and date of delivery.[2152] Thus, in order to draw a meaningful conclusion about the extent to which the operating cost advantage of the A320neo over the A320ceo may influence a customer's purchase decision, it would in our view be necessary to ensure that all of the most important relevant factors that regularly affect a customer's decision to buy an aircraft are taken into account, including price.

6.1261. Moreover, we share the view expressed in the Sanghvi Declaration that *had prices been taken into account* in the NPV analyses, the only situation in which the A320neo would have been able to maintain the same NPV advantage over the A320ceo that is generated in the Supplemental Mourey Statement would be if the two aircraft were in close competition:

> {B}ecause Mr. Mourey fails to consider the import of his NPV calculations on pricing, his NPV calculations are only relevant to the purchasing decision in the case where customers reap the full benefit of the cash flow improvements induced by the improved features of the new Airbus models. Such a scenario implies that Airbus is unable to command a pricing premium for its new aircraft despite the maintained assumption that those aircraft yield more value to customers. What prevents a supplier from raising his price? Competition. Thus, the only circumstance in which Mr. Mourey's NPV calculations would be at all relevant actually implies that Airbus faces extremely tight and binding competitive constraints in the pricing of even its new models, such that it is unable to extract the value of its models to customers. But then this is hardly a monopoly. Thus, if his NPV work has any relevance, it is to show competition.[37]
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> ———————————
>
> [37] Alternatively, suppose that Mr. Mourey's conclusion is valid, so that Airbus enjoys monopoly power in its new models, and that the closest competing incumbent Boeing models are so inferior that they are located an "insurmountable" competitive distance from the Airbus models. Maintaining this assumption, Airbus, as a rational profit-maximizing monopolist, should raise the price of its new models to the point that the purchase of the new Airbus model leaves the customer just marginally better off than the purchase of the incumbent Boeing models. After all, that is why Airbus would have incurred the very substantial R&D costs (and why it obtained the subsidization of those launch costs) required to innovate an aircraft that offered such remarkable value. Thus, once Airbus prices optimally in the marketplace – i.e., prices commensurate to its assumed monopoly power and with knowledge of the immense magnitude of the incremental value proposition its new model offers a purchaser – that higher price would have to be deducted from the NPV of the cash flows associated with advantages in product characteristics. In other words, the NPV calculations as presented are an inaccurate representation of the competitive distances between the models he examines.[2153] (footnote original)

6.1262. Thus, the fact that the improved operating performance of the A320neo over the A320ceo generates a specific NPV advantage that allegedly cannot be overcome by price discounting implies that Airbus is unable to increase the price of its newer generation models to capture the full benefit of their enhanced fuel efficiency. As observed in the Sanghvi Declaration, such an outcome implies the exact opposite to the absence of competition.

6.1263. In terms of other important factors affecting a customer's purchase decision, we note that one of the key assumptions used in the NPV analyses is that new generation and current version A320s would be delivered on the same dates. Thus, the NPV advantage that is calculated in the Supplemental Mourey Statement does not test what the value difference might have been for a "typical" customer were the availability of the two aircraft to differ. Yet the Supplemental Mourey Statement recognizes the potentially decisive importance of delivery dates to an airline's purchase decision when it explicitly states that "depending upon the timing of the airlines' need and the relative delay in delivery positions between current and new generation aircraft, purchasing an A320ceo or 737NG could be the economically superior option".[2154] The same potentially critical

[2152] See above para. 6.1217.
[2153] Sanghvi Declaration (Exhibit USA-530), para. 87.
[2154] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 4 and 25. In the same way, the Supplemental Mourey Statement explains and shows how delivery dates may be decisive in a particular customer's decision to purchase a current generation twin-aisle aircraft (the A330 or the 777) *instead* of a

impact of delivery date differences to a customer's purchase decision is also described in the Mourey Statement, which explains that the "value of an earlier delivery slot to an airline may, in fact, be so high that it can make the difference between an airline purchasing Airbus or Boeing aircraft".[2155] The European Union, however, submits that this fact is not a sign that the current version and new generation models of Airbus and Boeing single-aisle aircraft are sufficiently substitutable such that they should be considered to fall within the same product market. We are unable to agree with the European Union's point of view.

6.1264. As we have previously observed, the available date of delivery of a particular aircraft will weigh heavily in the economic assessment that a potential customer will undertake of the value of that aircraft to its business model and strategic objectives.[2156] Thus, a customer that prefers to wait for a new generation model of single-aisle aircraft will decide not to buy a current version because, *having compared the economics of both options* (e.g. buying a relatively higher priced aircraft with relatively low operating costs that *is not* available in the near term *vs* buying a lower priced aircraft with higher operating costs that *is* available in the near term), the best value for its business model and strategic objectives, is the new generation aircraft. Conversely, a customer may decide to buy a current version over a new generation aircraft, notwithstanding the operating cost advantage of the latter, because as identified in the Supplemental Mourey Statement, the economics of waiting for a delivery date makes the new generation aircraft a worse business proposition than buying a current version.[2157]

6.1265. In our view, it would be misleading and incorrect to conclude that, in both of the above scenarios, there was no competition between the new generation and current version of Airbus and Boeing single-aisle LCA products simply because of the mere existence of differences in the economic values of the two product offerings to a particular customer. This is because the perceived differences in economic value may simply reflect the delivery date advantage (alone or in combination with other non-price factor advantages)[2158] that enabled one set of products to be *chosen by a customer ahead of the other products*. In this light, we would agree with the United States that the superiority of the new generation aircraft over current versions delivered on the same date does not establish that the two sets of LCA are not substitutable. Rather, to the extent that delivery dates may (alone or in combination with other non-price factors) play a decisive role in a customer's purchase decision, it is apparent that airlines wanting to purchase aircraft that can perform single-aisle missions are likely to view the current versions and new generation models of Airbus and Boeing single-aisle LCA to be potential substitutes. The Sanghvi Declaration describes this competitive dynamic in the following terms:

> The theme of the EU's argument is that more modern, fuel-efficient planes are in separate markets than older models with similar capacity and range characteristics. For example, in the single aisle space, Mr. Mourey suggests that no purchasers of the new Airbus A320neo or Boeing 737MAX models would consider purchasing the incumbent A320ceo or 737 models. Mr. Mourey declared that the new models were so popular in the marketplace that demand far outstripped developmental and productive capacity. Consequently, there was a prohibitively long backlog for delivery of the new models. But this development effectively removed the new models from customers' choice sets. What did they choose to purchase in the effective absence of the new models? Mr. Mourey declares that they flocked in droves to the incumbent models. In other words, Mr. Mourey has detailed a perfect natural experiment that establishes clearly that in the absence of the new models, customers purchase the old models with similar mission capabilities.[2159] (footnote omitted)

6.1266. Thus, unlike the European Union, we do not see a customer's delivery date preferences to signal the existence of different single-aisle aircraft markets. Rather, to the extent that delivery dates will play an important role in a customer's purchase decision, they would seem, in our view,

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better performing new generation twin-aisle aircraft (the A350XWB or the 787). (Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 45-48)

[2155] Mourey Statement, (Exhibit EU-8) (BCI), para. 54.

[2156] See above para. 6.1217.

[2157] See e.g. Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 4 and 25.

[2158] See e.g. below discussion concerning advantages of fleet commonality, paras. 6.1266-6.1269.

[2159] Sanghvi Declaration, (Exhibit USA-530), para. 76.

to represent a factor that Airbus and Boeing will take into account in devising the terms and conditions of their aircraft offers with a view to winning a sale.

6.1267. We come to a similar conclusion with respect to the absence of any consideration of the effects of fleet commonality in the European Union's NPV analysis. As with the absence of any consideration of different delivery dates, this omission does not invalidate the mathematical results of the NPV calculation *per se*, or the conclusion that the A320neo has an operating cost advantage over the A320ceo for a "typical" customer that will increase with higher fuel prices, when both aircraft are delivered on the same date. However, in our view, it does undermine the probative value of the NPV analysis to the European Union's submission that there are two separate single-aisle aircraft markets.

6.1268. We recall that the potential importance ("significant cost advantage") of fleet commonality to a customer's purchase decision in, particularly, the single-aisle aircraft segment, has been explicitly recognized by the European Union. Indeed, to the extent that fleet commonality will reduce spare parts, maintenance and training costs, it is apparent that it will decrease an aircraft's direct operating costs, which are among the most significant non-price factors that will be invariably considered by all customers when making their purchase decisions.[2160] Thus, as with delivery dates, the absence of any kind of consideration of the effects of fleet commonality in the NPV analysis undertaken in the Supplemental Mourey Statement undermines the conclusions that the European Union has drawn from its results with respect to the existence of two separate single-aisle aircraft markets.

6.1269. We note that the only reason the European Union has specifically advanced to justify not having conducted one or more NPV analyses using different assumptions for fleet commonality is that this factor is likely to differ with each and every customer. While we recognize this to be a potential complication, we do not believe that it would have been necessary for the European Union to conduct a different NPV analysis for each and every possible combination and mix of Airbus and Boeing aircraft fleets in order to test the conclusions reached on the basis of the NPVs that were in fact calculated in the Supplemental Mourey Statement. For instance, one approach that might have been explored could have involved calculating alternative NPVs for the A320neo, A320ceo, 737NG and the 737MAX assuming that the potential customer possessed: (a) a 100% Boeing aircraft fleet; or (b) a 100% Airbus fleet. The results of the NPV analysis using these two assumptions could then have been qualitatively assessed in the light of available information about the extent to which potential customers' fleet characteristics match or closely resemble those assumptions. In any case, the fact remains that the absence of any consideration of fleet commonality in the NPVs calculated in the Supplemental Mourey Statement undermines their probative value for the purpose of demonstrating the European Union's assertions concerning the nature of competition between single-aisle aircraft.

b NPV analyses for limited pairings of aircraft

6.1270. A second criticism the United States makes of the NPV analysis of the A320neo and the A320ceo set out in the Supplemental Mourey Statement is that it has an overly limited scope, because it does not compare the NPVs of the 737NG with the A320neo or the A320ceo with the 737MAX. The United States argues that this omission leaves the question whether the European Union's approach actually supports a conclusion that all of these models of aircraft fall within the scope of the same market unanswered.[2161] Similarly, the United States notes that the European Union did not carry out an NPV analysis of the 737MAX and the A320neo pairing or the 737NG and the A320ceo combination of aircraft. By not doing so, the United States argues that the European Union has failed to demonstrate that its NPV approach would have rendered the two sets of products in different markets. The United States characterizes this omission as significant because "it prevents any checking of the validity of {the European Union's} methodology".[2162]

6.1271. The European Union explains that "the role of Mr. Mourey's NPV comparisons is to demonstrate the flaws in the United States product market delineation"[2163], recalling that the

[2160] See e.g. Mourey Statement, (Exhibit EU-8) (BCI), para. 51.
[2161] United States' response to Panel question No. 61, para. 222.
[2162] United States' response to Panel question No. 61, para. 223.
[2163] European Union's comments on the United States' response to Panel question No. 61, para. 453.

burden to demonstrate the existence of the three alleged product markets the United States relies upon to bring its serious prejudice complaint is on the United States, not the European Union.

6.1272. We agree with the European Union that the burden of establishing the existence of the three alleged LCA product markets lies with the United States. However, as we understand it, the point being made by the United States is not that the European Union was *required* to have undertaken an NPV analysis for all pairings of single-aisle aircraft. Rather, the United States appears to be arguing that the failure to conduct NPV comparisons of, particularly, those pairings of LCA that the European Union argues compete in different product markets (737NG vs A320ceo; 737MAX vs A320neo) means that the probative value of the methodology and results of the Supplemental Mourey Statement cannot be tested by examining the extent to which they would have supported the European Union's own preferred market delineation.

6.1273. As we have explained above, the NPV analysis conducted with respect to the A320neo and A320ceo in the Supplemental Mourey Statement cannot *alone* demonstrate that new generation and current versions of Airbus and Boeing single-aisle LCA products compete in separate markets, because both the NPV analysis and the European Union's interpretation of that analysis, fail to account for a number of the important factors other than *fuel-burn efficiency* that will typically affect a customer's purchase decision. Moreover, to the extent that it is recognized in the Supplemental Mourey Statement that a typical customer may decide, in the light of differences in delivery dates, to purchase a current version of Airbus or Boeing single-aisle LCA over a new generation LCA, we believe that the Supplemental Mourey Statement actually supports the United States' contention that all single-aisle aircraft *are* potentially substitutable. Thus, had the European Union performed and interpreted the additional NPV analyses referred to by the United States on the basis of the same approach used in the Supplemental Mourey Statement, it is our view that they too would have suffered from the same flaws and therefore failed to substantiate the European Union's position that new generation and current version Airbus and Boeing single-aisle aircraft are not in the same market.

c The NPV analysis is distorted by subsidies

6.1274. The United States' final criticism of the NPV analysis conducted for the A320neo and A320ceo in the Supplemental Mourey Statement is that it does not "account for the fact that the LCA market has already been distorted by the subsidies at issue in this proceeding".[2164] According to the United States, any valid NPV analysis "would have to adjust the data to account for the distortionary effects of the subsidies through a counterfactual inquiry". By not doing so, the United States, quoting the Sanghvi Declaration, states that the European Union "has plunged head-long into the pitfall of the reverse cellophane fallacy: they utilize the qualitatively different substitution patterns observed in the post-conduct world to draw inferences regarding substitutability in the counterfactual world".[2165]

6.1275. The European Union argues that the United States' position is legally and factually flawed for the reasons which are essentially the same as those the European Union relies upon to respond to the United States' similar criticism of the utility of the SSNIP test in serious prejudice disputes.[2166]

6.1276. Having already determined that the NPV analysis of the A320neo and A320ceo that is conducted in the Supplemental Mourey Statement does not substantiate the conclusions the European Union has drawn from its results with respect to the existence of two separate single-aisle aircraft markets, we find that it is unnecessary to evaluate the merits of the United States' particular argument with respect to the alleged distortions caused by subsidies. We note, however, that in keeping with the market definition logic we have described above, it would be expected that in order to avoid the type of problem that is associated with the "reverse cellophane fallacy", some account of subsidies suspected of distorting the competitive relationships underlying the NPV comparison might well have been necessary.

[2164] United States' response to Panel question No. 61, para. 214.

[2165] United States' response to Panel question No. 61, para. 214 (quoting Sanghvi Declaration, (Exhibit USA-530), para. 79).

[2166] European Union's comments on the United States' response to Panel question No. 51, para. 444. See above paras. 6.1194 and 6.1195.

Sales campaigns

6.1277. The United States submits that the existence of competition between current and new generation Airbus and Boeing single-aisle aircraft can also be demonstrated by the evidence it has presented with respect to two particular sales campaigns − the 2011 American Airlines and 2011-2012 Norwegian Air Shuttle campaigns. In the 2011 American Airlines campaign, the United States asserts that "Airbus' offer of A320ceos and A320neos threatened to completely displace the Boeing 737NG as the airline's single-aisle aircraft".[2167] According to the United States, the threat of losing American Airlines, a long time all-Boeing customer, led Boeing to launch the 737MAX[2168], a move which resulted in American Airlines ultimately deciding to split the order, and purchase a combination of current and new generation aircraft from both Airbus and Boeing.[2169] Likewise, as regards the 2011-2012 Norwegian Air Shuttle campaign, the United States submits that certain HSBI evidence reveals that Boeing's offer of current and new generation aircraft was affected by Airbus' new generation of single-aisle aircraft, thereby showing that all models of Airbus and Boeing single-aisle LCA compete in the same market.[2170]

6.1278. The European Union, on the other hand, submits that the results of the 2011 American Airlines and 2011-2012 Norwegian Air Shuttle sales campaigns evidence the *absence* of competition between the relevant new and current generation of Airbus and Boeing single-aisle products. While acknowledging that the A320neo "replaced" the 737NG at American Airlines, the European Union maintains that this does not establish the existence of "significant competitive constraints 'under current factual conditions'", but rather only that the 737NG does not compete with the A320neo because of the latter's superior fuel-burn efficiency.[2171] Similarly, the European Union argues that the HSBI evidence concerning the Norwegian Air Shuttle campaign does not prevent a finding that current and new generation single-aisle LCA should be properly classified in separate product markets.[2172] We disagree with the European Union's characterization of the implications that can be drawn from these sales campaigns.

6.1279. The American Airlines 2011 sales campaign involved a "record order" of 460 different derivatives of current version and new generation Airbus and Boeing single-aisle aircraft. In particular, American Airlines entered into agreements to purchase 130 A320neos, 130 A320ceos, 100 737MAXs and 100 737NGs.[2173] There is no dispute between the parties that prior to this order, American Airlines had been a long-standing all-Boeing customer, a fact that would have given Boeing an important advantage in the competition against Airbus due to the synergies arising from running a fleet of all-Boeing aircraft.[2174] However, in the Bair Declaration, it is explained that the American Airlines sales campaign followed shortly after Airbus' launch of the A320neo, prior to which there had been "much debate amongst the producers, engine suppliers, and customers regarding the merits of re-engining existing models as compared to investing in all-new single-aisle LCA programs".[2175] **[***]**[2176], which was an important consideration for American Airlines during the 2011 sales campaign.[2177] Thus, at the end of August 2011, Boeing launched the re-engined 737MAX and offered it to American Airlines, which became one of its first customers.

[2167] United States' response to Panel question No. 63.
[2168] United States' first written submission, para. 314; and Bair Declaration, (Exhibit USA-339) (BCI), para. 25.
[2169] "Boeing launches new 737 'MAX' to take on A320neo", *Sydney Morning Herald*, 31 August 2011, (Exhibit USA-116).
[2170] United States' response to Panel question Nos. 49 and 50; comments on the European Union's response to Panel question Nos. 55 and 73; and Exhibit USA-531 (HSBI).
[2171] European Union's comments on the United States' response to Panel question No. 63, paras. 503-504.
[2172] European Union's comments on the United States' response to Panel question No. 63, paras. 505-507.
[2173] "Boeing launches new 737 'MAX' to take on A320neo", *Sydney Morning Herald*, 31 August 2011, (Exhibit USA-116).
[2174] As we noted in the original proceeding, "once an airline orders any particular LCA model from a given manufacturer, efficiencies in operating a fleet of similar aircraft (including those related to spare parts, maintenance and training) favour follow-on orders of the same models, as well as orders of other aircraft models from the same manufacturer, in order to take advantage of commonalities across an LCA fleet". (Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.1720). See also above, para. 6.1216.
[2175] Bair Declaration, (Exhibit USA-339) (BCI), para. 25.
[2176] Bair Declaration, (Exhibit USA-339) (BCI), para. 25.
[2177] "Boeing launches new 737 'MAX' to take on A320neo", *Sydney Morning Herald*, 31 August 2011, (Exhibit USA-116).

One reported account of the American Airlines order asserts that "Boeing's decision to offer {American Airlines} its best-selling 737 with a new engine, rather than building an all-new aircraft, was seen as forced by the competition from the Airbus A320neo".[2178]

6.1280. Rather than showing that the 737NG does not compete with the A320neo, the 2011 American Airlines sales campaign, in our view, represents a clear example of one aspect of the very essence of competition between Airbus and Boeing − namely, the introduction of technologically superior products for the purpose of winning the competition for single-aisle aircraft customers. Unlike the European Union, we do not believe that the acknowledged fuel-burn superiority of the new generation of Airbus and Boeing single-aisle LCA *necessarily* means that they do not compete with current versions of their single-aisle offerings. In this regard, we recall that both manufacturers' new generation aircraft are specifically intended to operate missions that will largely overlap those already serviced by current versions. This implies that, for each mission, the majority of customers will have a potential choice between at least two aircraft from each manufacturer, one from a current version and another from the new generation of products.

6.1281. However, for the European Union, it was precisely during the 2011 American Airlines campaign "that Boeing recognised that the 737NG was unable to compete with the A320neo in terms of fuel efficiency, which spurred Boeing to launch the 737MAX".[2179] The European Union makes a similar, albeit less developed, argument with respect to the 2011 Qantas/Jetstar, AirAsia, GoAir, IndiGo, Lufthansa, TAM and Cebu Pacific Air sales campaigns, where it submits the fact that Boeing had not yet launched the 737MAX at the time meant that "it could not offer a truly competitive product to the A320neo".[2180]

6.1282. As we understand it, the European Union's submission implies that *each and every time* Airbus or Boeing decide to introduce a technologically superior LCA into the market to perform largely the same missions already serviced by existing aircraft, the new superior offering would face no competition at all from existing models, thereby creating a monopoly market for the relevant producer until the other producer introduced an aircraft of equivalent or superior technology. We find this to be an overly simplistic proposition that is very difficult to reconcile with the conditions of competition in the LCA industry. As we have previously explained, technological innovation is a key feature of the competition that takes place between Airbus and Boeing for new and existing customers. Airbus and Boeing will introduce new LCA products that are technologically advanced precisely to *win the competition* against each other's existing aircraft, a dynamic that we believe is reflected in the 2011 American Airlines sales campaign, as well as the other 2011 sales campaigns referred to by the European Union.[2181]

6.1283. We come to a similar conclusion with respect to the 2011-2012 Norwegian Air Shuttle sales campaign. In January 2012, Norwegian Air Shuttle ordered 222 single-aisle aircraft, comprised of 100 A320neos, 100 737MAXs and 22 737NGs.[2182] Like American Airlines, prior to its 2012 order, Norwegian Air Shuttle had operated an all-Boeing fleet of aircraft.[2183] The 2012 order

[2178] "Boeing launches new 737 'MAX' to take on A320neo", *Sydney Morning Herald*, 31 August 2011, (Exhibit USA-116).

[2179] European Union's comments on the United States' response to Panel question No. 63, para. 503.

[2180] Mourey Statement, (Exhibit EU-8) (BCI), para. 82; Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 19. See also European Union's comments on the United States' response to Panel question No. 62.

[2181] We note that the United States has not specifically denied the European Union's contention that Airbus won orders in 2011 from GoAir, IndiGo, Lufthansa and TAM because of the superiority of the A320neo over the 737NG. Moreover, our understanding of the 2011 Qantas/Jetstar, AirAsia and Cebu Pacific Air orders suggests that the same reason can explain why Airbus made the respective sales.

[2182] EADS Press Release, "Norwegian commits to 100 A320 neo aircraft", January 2012, (Exhibit USA-189); and Boeing Press Release, "Boeing and Norwegian announce order for 100 737MAX, 22 Next-Generation 737s", January 2012, (Exhibit USA-191).

[2183] Boeing Press Release, "Boeing and Norwegian announce order for 100 737MAX, 22 Next-Generation 737s", January 2012, (Exhibit USA-191); and Andrew Parker, "Norwegian carrier aims high with 222 aircraft orders", *Financial Times*, January 2012, (Exhibit USA-192).

represented Airbus' first sale of aircraft to Norwegian Air Shuttle[2184], and at the same time, Boeing's largest ever sale to a European airline.[2185]

6.1284. In our view, the HSBI evidence submitted by the United States reveals information that supports the existence of a negotiating dynamic between Boeing and Norwegian Air Shuttle that is consistent with the existence of competition between the 737NG and the A320neo, as well as the 737MAX. Although the European Union describes parts of the information disclosed in the United States' HSBI evidence as "curious" and offers its own HSBI explanations for what is stated in the relevant Exhibit, it has not questioned the authenticity of the statements made by Boeing in that Exhibit, which we consider to be clear and unambiguous. Thus, while the European Union's alternative explanations are such that might elucidate what could have taken place in one or more *other sales campaigns*, we are not convinced on the basis of the evidence before us that they accurately reflect what happened in the 2011-2012 Norwegian Air Shuttle campaign. Indeed, given the nature of the HSBI document the United States submitted as evidence, it is difficult for us to understand the statements at issue as providing anything less than an accurate account of the actual dynamics and status of negotiations between Boeing and Norwegian Air Shuttle for the purpose of Boeing's decision-makers.

6.1285. Another criticism the European Union raises about the United States' HSBI evidence relating to the 2011-2012 Norwegian Air Shuttle campaign is that even if the Boeing statements relied upon by the United States are taken at face value, they do not prevent a finding that the A320neo and 737MAX are in a separate product market compared with the 737NG.[2186] We note, however, that in advancing this criticism, the European Union does not exclude the possibility that the same statements might also *support* the existence of competition between those models of LCA. Thus, the European Union's criticism does not undermine the relevance of the United States' HSBI evidence to its demonstration of the existence of only one single-aisle LCA product market.

Conclusion with respect to the alleged product market for single-aisle passenger LCA

6.1286. We recall that the parties' disagreement with respect to the existence and nature of competition between Airbus and Boeing single-aisle aircraft is limited to the question of whether both producers' range of new generation aircraft compete with their current version offerings. Our careful review of the parties' arguments and the evidence that has been submitted in this dispute has led us to conclude that the degree of demand-side substitution that exists between these two lines of single-aisle aircraft is sufficient to confirm the United States' contention that, for the purpose of the serious prejudice disciplines of the SCM Agreement, all Airbus and Boeing single-aisle aircraft compete in one and the same product market. We come to this conclusion on the basis of all of the above considerations, which we summarize as follows.

6.1287. First, there is a high degree of commonality in the physical attributes, end-uses and customers of all new generation and current versions of Airbus and Boeing single-aisle aircraft. In particular, all aircraft in both producers' range of single-aisle aircraft have very similar, if not identical, seating capacities, wing-spans, lengths and MTOWs. The one feature that clearly distinguishes new generation aircraft from current versions is their (15%-16%) superior fuel-burn efficiency, which enables them to fly the same take-off weights further. However, rather than taking advantage of these additional range capabilities for the purpose of servicing extended routes, a typical single-aisle aircraft customer will seek to exploit the fuel-burn advantage of a new generation aircraft in order to reduce operating costs *over the same routes and missions* already serviced by current version aircraft. Thus, the new generation of Airbus and Boeing single-aisle aircraft may be viewed as updated, more fuel efficient, versions of their current single-aisle offerings, principally intended to serve the same missions already operated by existing single-aisle customers. It follows that a typical customer wanting to purchase a single-aisle aircraft will have a *potential* choice between two aircraft from each manufacturer, one from a current version and another from the new generation of products.

[2184] Meera Bhatia, "Norwegian airlines order $21.5 Billion in Boeing, Airbus jets to Squeeze SAS", Bloomberg, January 2012, (Exhibit USA-193).
[2185] Andrew Parker, "Norwegian carrier aims high with 222 aircraft orders", *Financial Times*, January 2012, (Exhibit USA-192).
[2186] European Union's comments on the United States' response to Panel question No. 63, para. 508.

6.1288. Second, the superior fuel-efficiency of the new generation of Airbus and Boeing single-aisle aircraft does not mean they are impervious to competition from current versions. While the NPV analysis presented by the European Union in the Supplemental Mourey Statement demonstrates that the A320neo has a fuel-burn advantage over the A320ceo, *when the two aircraft are delivered on the same date*, both parties accept that this advantage may be overcome when a customer with a need for near term capacity finds that the cost of waiting for the availability of a new generation aircraft outweighs the benefits of its improved fuel-efficiency. Of course, this is possible because a customer's evaluation of the economic value of the terms and conditions of the aircraft package it is offered will not only depend upon the fuel-burn performance of the aircraft being considered, but also other factors such as price, operating costs (other than fuel-burn efficiency), seating, range and cargo capabilities as well as delivery dates. Thus, to the extent that the European Union's NPV analysis shows that the A320ceo cannot overcome the fuel-burn advantage of the A320neo by price discounting[2187] when *both aircraft are delivered on the same date*, it does not automatically follow that it will never be possible for the A320ceo to be offered at a price that, in the light of other potentially important terms and conditions such as delivery dates, will overcome the fuel-burn efficiency of the A320neo. In our view, these considerations not only demonstrate that current versions of Airbus and Boeing single-aisle aircraft compete with new generation models, but also that this competition will inevitably involve reciprocal pricing constraints, the degree of which will depend upon and vary with the particular characteristics of different customer requirements and sales campaigns.

6.1289. Third, we do not understand the 2011 AirAsia, Cebu Pacific Air, GoAir, IndiGo, Lufthansa, Qantas/Jetstar and TAM sales campaigns, in which Airbus won a significant number of orders for the A320neo, to be examples of situations where customers found new generation and current versions of Airbus and Boeing single-aisle aircraft not to compete. Rather, in our view, the fact that several airlines chose to purchase the A320neo *over the 737NG*, simply suggests that each of the relevant customers found the A320neo to be a better fit with its business model and strategic objectives, in the light of the economic value offered by *each aircraft,* including the proposed terms and conditions of sale. In order to accept that the 737NG did not compete with the A320neo in these sales, we would have to be convinced that in the absence of the A320neo, the same airlines would have preferred to purchase *no aircraft at all* – in other words, that at the time of the sales, the A320neo had a temporary monopoly. However, the little evidence that is before us with respect to these sales does not support such a proposition. Moreover, given the conditions of competition in the LCA industry and the other findings we have made above, it is difficult for us to accept that the A320neo was sold in a (temporary) monopoly market.

6.1290. Similarly, the fact that Airbus managed to win a considerable number of sales from all-Boeing customers, American Airlines and Norwegian Air Shuttle, in 2011 and 2012, suggests to us that the terms and conditions of the A320neo, considered in the light of its performance characteristics, were able to overcome the potentially "significant cost advantage" that Boeing would have had in these campaigns because of the all-Boeing fleets of single-aisle aircraft operated by these customers. In this light, the fact that Boeing launched the 737MAX during the latter stages of the American Airlines campaign in response to the presence of the A320neo illustrates the role that technological innovation plays in improving the *competitiveness* of Airbus' and Boeing's single-aisle offerings. In our view, this fact does not show that the 737NG did not compete sufficiently with the A320neo to conclude that the two aircraft are in different product markets, but only that the A320neo, on the terms and conditions it was offered in that sales campaign, was a very strong competitor.

6.1291. Thus, in both sets of sales campaigns, the success of the A320neo over the 737NG, with or without the 737MAX, does not imply that the relevant customers did not consider all of those aircraft to be substitutable, but only that the particular characteristics of the A320neo compared with the 737NG represented a better value proposition for their businesses, when considered in the light of the terms and conditions of the respective Airbus and Boeing aircraft offers. To the extent that the reason for the success of the A320neo can be attributed to its superior fuel-burn efficiency, the sales campaigns therefore demonstrate how Airbus and Boeing use technological innovation as a part of their strategy to *win the competition* for single-aisle aircraft customers.

[2187] We recall that the European Union has not disclosed the information on price concessions that was used in the Supplemental Mourey Statement to arrive at this conclusion. See above para. 6.1262.

6.1292. For all of the above considerations, and in the light of the totality of the evidence we have reviewed, we find that the United States has established that all Airbus and Boeing single-aisle LCA offerings exercise a sufficient degree of competitive constraint on each other such that they should all be considered to fall within the same product market for the purpose of the serious prejudice claims that it brings under the SCM Agreement.

The alleged market for twin-aisle passenger LCA

6.1293. The United States maintains that the Boeing 767, 777, and 787 families of passenger LCA compete in one and the same product market as the Airbus A330 and A350XWB families.[2188] While acknowledging that a wider variance exists between the basic features and characteristics of these aircraft compared with Airbus and Boeing single-aisle offerings, the United States argues that there is significant overlap across all models making them potentially attractive to a broad range of customers.[2189] The European Union, on the other hand, argues that there are a number of separate markets for these five families of Airbus and Boeing passenger LCA. In particular, the European Union submits that the A350XWB and the 787 closely compete in the same product market for technologically advanced and fuel-efficient new generation aircraft, and that the A330 and 777 are each sold in their own separate monopoly markets for smaller, medium-range aircraft (in the case of the A330) and larger, longer-range aircraft (in the case of the 777) that are available for near-term delivery. As regards the 767, the European Union maintains that its allegedly "outdated" and "inferior" technology means that it does not compete in the same product market as the A330 and that, in any case, it has been replaced by the 787.[2190]

6.1294. Not unlike the arguments made in relation to the alleged product market for single-aisle LCA, the parties' submissions with respect to the degree of competition between the 767, 777, 787, A330 and A350XWB have focused mainly on *demand-side substitutability*, with only very limited argumentation being advanced in respect of *supply-side substitutability*.[2191] Thus, the debate has centred on the extent to which: (a) the physical and performance characteristics, end-uses and customers of the 767, 777, 787, A330 and A350XWB; (b) the existence and nature of any pricing constraints between different pairings of these LCA products; and (c) the evidence concerning a number of sales campaigns, demonstrate that the 767, 777, 787, A330, and A350XWB are sufficiently substitutable from the customer's perspective to consider them to all fall within the same product market. We explore the merits of the parties' arguments regarding each one of these three areas in the following sub-sections.

[2188] The United States also argues that the alleged market for twin-aisle passenger LCA includes the A340. We note, however, that the market presence of this family of Airbus LCA came to an end before the beginning of the post-implementation period when Airbus terminated the A340 programme in November 2011. Accordingly, the A340 family of Airbus LCA is no longer available and cannot, therefore, fall within the scope of the alleged twin-aisle market for passenger LCA that exists today.

[2189] United States' second written submission, paras. 471-484.

[2190] European Union's first written submission, paras. 607-619; second written submission, paras. 626-628; and response to Panel question No. 70.

[2191] Although the parties agree that all Airbus and Boeing "minor models of a given twin-aisle family (e.g. the 777-200ER and 777-300ER) are produced on the same assembly lines, and {that} the same line can shift between minor models with little disruption to the production process", they draw different conclusions about what this implies for the purpose of demonstrating the existence of one or multiple twin-aisle product markets. (Bair Declaration, (Exhibit USA-339) (BCI), para. 32; European Union's response to Panel question No. 78; and United States' comments on the European Union's response to Panel question No. 78). In our view, the relevance and merits of the parties' positions will ultimately depend upon our findings with respect to the extent to which the five families of Airbus and Boeing twin-aisle LCA are sufficiently substitutable from the perspective of demand. Were we to accept the United States' view that all five families are sufficiently substitutable, then it would be unnecessary to examine the issue of supply-side substitutability, as we would have already found that the relevant products compete against each other. The fact that Boeing and Airbus may be able to "shift {their production activities} between minor models with little disruption" would add little to the analysis in terms of understanding the range of products falling within the scope of the relevant market. On the other hand, were we to agree with the European Union's submissions concerning the absence of the required demand-side substitutability between the relevant products, then the above facts pertaining to the degree of supply-side substitutability existing between the "minor models" of Airbus and Boeing LCA (and, in particular, the absence of any supply-side substitutability *between LCA families*), would not undermine the European Union's multiple product markets theory.

Physical and performance characteristics, end-uses and customers

6.1295. The following table contains the information provided by the parties in relation to some of the basic physical and performance characteristics of the 767, 777, 787, A330, and A350XWB:

Table 17: Basic physical and performance characteristics of Airbus and Boeing twin-aisle LCA[2192]

Model	Typical Seats (Airbus / Boeing)	MTOW (t) (Airbus / Boeing)	Max Range (nm) (full capacity) (Airbus / Boeing)	Length (m)	Wing Span (m) (Airbus / Boeing)	2011 List Price (USD M)
767-300ER	214/218	187/206	5,600/5,960	55	48	173.1
787-8	246/242	228/251	7,350/7,770	57	60	193.5
A330-200	246/245	238/262	6,850/6,890	59	60	200.8
A350XWB-800	276/256	259/286	8,200/7,750	61	65	236.6
787-9	280/280	247/277	7,600/8,155	63	60	227.8
A330-300	300/275	235/259	5,600/5,635	64	60	222.5
777-200ER	302/314	298/328	7,350/7,510	64	61	244.7
777-200LR	269/314	347/383	9,200/9,290	64	65	275.8
A350XWB-900	315/299	268/295	7,750/7,195	67	65	267.6
A350XWB-1000	369/344	308/340	8,000/7,775	74	65	299.7
777-300ER	360/386	351/388	7,650/7,825	74	65	298.3

6.1296. The data in Table 17 reveal that there is greater variation in the basic physical and performance characteristics of the 767, 777, 787, A330 and A350XWB families of Airbus and Boeing LCA compared with the differences existing between the A320 and 737 families. It is also apparent that relatively more variation exists not only across families but also between models within the same family. Nevertheless, it is apparent that there are also a number of overlaps and points of similarity between all 11 models of twin-aisle aircraft.

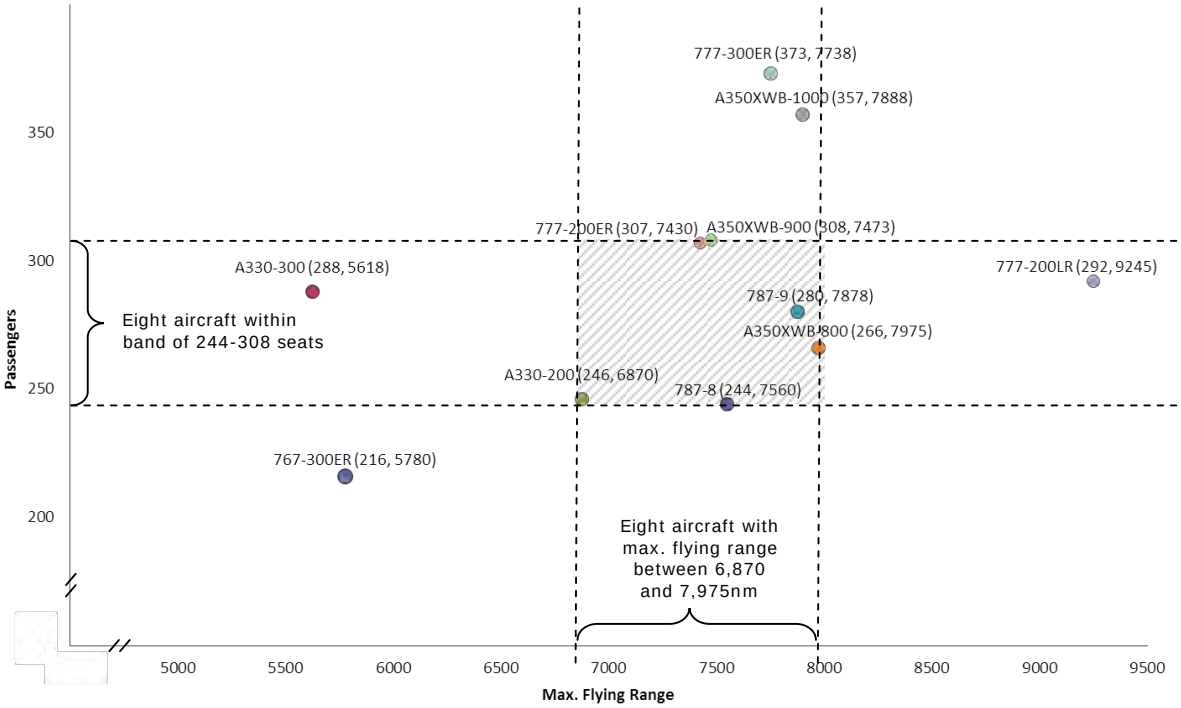
6.1297. In terms of typical seating capacity, the possibilities offered by Boeing's six aircraft range from 218 seats on the 767-300ER to 386 seats on the 777-300ER, with a difference of 81 seats between the smallest and largest models of 777 (using the average of Airbus and Boeing seating estimates). Likewise, Airbus' five aircraft can seat from 246 passengers on the A330-200 to 369 passengers on the A350XWB-1000, with a difference of 91 seats between the smallest and largest models of A350XWB (using the average of Airbus and Boeing seating estimates). When considered in terms of aircraft families, there is a clear and substantial overlap between the typical seating capacities offered by four of the five families, with the 767-300ER being only 27 to 31 and 42 to 56 seats smaller than the A330-200 and A350XWB-800, respectively.

6.1298. The maximum flying ranges of Boeing's aircraft stretch from 5,960nm (nautical miles) for the 767-300ER to 9,290nm for the 777-200LR. Again, Airbus' offerings operate within a flying range that overlaps these possibilities, extending from 5,600nm for the A330-300 to 8,200nm on the A350XWB-800. In terms of aircraft families, there is a clear and substantial overlap between the maximum flying ranges of the 777, 787 and A350XWB families, with the maximum range of the A330-200 coming within 500-900nm of the maximum flying ranges of the 787-8 and the 777-200ER, and 400-900nm of the maximum flying range of the A350XWB-900. The A330-300 and the 767-300ER share a very similar maximum flying range, with both aircraft capable of flying to within 900nm and 1,250nm, respectively, of the maximum flying range of the A330-200.

[2192] Not including the A380 and the 747-8I. The data used in this table are obtained from the Mourey Statement, (Exhibit EU-8) (BCI), table 6; and Bair Declaration, (Exhibit USA-339) (BCI), para. 31. As already noted, the parties have attributed the divergence in the figures they have provided to different sets of rules and assumptions used by Airbus and Boeing to derive the underlying data. (European Union's response to Panel question No. 159; United States' comments on the European Union's response to Panel question No. 159).

6.1299. The seating capacity and flying range options offered by the five families of Airbus and Boeing twin-aisle LCA can be represented graphically as follows[2193]:

Figure 9: Twin-aisle seating capacity and flying range options



6.1300. It is apparent from this chart that, depending upon whether a customer is most interested in seating capacity or flying range, it will have multiple combinations of Airbus and Boeing LCA possessing comparable physical and performance characteristics to consider, with eight different models available for customers interested in exploring the economics of aircraft that have *either* the ability to carry from 244 to 308 passengers[2194] *or* the potential to fly distances ranging from 6,870nm to 7,975nm.[2195] Moreover, six different models would be available for customers interested in aircraft having *both* the ability to carry from 244 to 308 passengers *and* a maximum flying range from 6,870nm to 7,975nm. Thus, in terms of seating capacity and maximum flying range, the five families of Airbus and Boeing twin-aisle LCA cover a broad spectrum of overlapping end-uses[2196], with four of these families being positioned relatively close to each other.

6.1301. Both parties agree that although relevant to a determination of product markets, overlapping end-uses alone are not enough to demonstrate that two or more LCA products place competitive constraints on each other.[2197] Nevertheless, in the light of the "high degree of overlap" between the potential uses of Airbus and Boeing twin-aisle aircraft, the United States argues that

[2193] For each aircraft, the seating and maximum flying range numbers used for the purpose of this chart represent the average of the values provided by Airbus and Boeing that are set out in the above table.

[2194] The three models that are situated outside of the two extremes of this seating range are: (a) the 767-300ER (216 seats); (b) the A350XWB-1000 (356 seats); and (c) the 777-300ER (373 seats).

[2195] The three models that are situated outside of the two extremes of these maximum flying ranges are: (a) the A330-300 (5,618nm); (b) the 767-300ER (5,780nm); and (c) the 777-200LR (9,245nm).

[2196] Bair Declaration, (Exhibit USA-339) (BCI), paras. 34-36; Mourey Statement, (Exhibit EU-8) (BCI), paras. 99, 107 and 115 (explaining that the "787 and the smaller versions of the A350XWB are about the same size as the A330, but with longer range. They can thus do the same missions for which the A330 is generally ordered", that the 767 and the A330 "are roughly the same size, though the 767 is a bit smaller, and they have a comparable range", and that the "777, like the largest version of the A350XWB … has a higher seating capacity than the A330. As a result, airlines generally use the 777 and the A330 for different missions").

[2197] European Union's response to Panel question Nos. 52 and 75-77; United States' comments on the European Union's response to Panel question Nos. 52 and 75; second written submission, para. 473; and Bair Declaration, (Exhibit USA-339) (BCI), para. 36.

when all of the factors affecting a customer's purchase decision are taken into account, the value of the various attributes of different aircraft to a customer's business may be reduced or eliminated through pricing concessions, making all five families of twin-aisle aircraft potentially substitutable.[2198]

6.1302. According to the European Union, however, Airbus and Boeing twin-aisle offerings "differ significantly in performance characteristics, and thus in their suitability to meet mission requirements demanded by customers to serve route networks".[2199] For certain pairings of aircraft, the European Union maintains that these differences are so great that they cannot be overcome or would be "very difficult" to overcome by price discounting.[2200] Thus, the European Union submits that the operating and maintenance cost advantages of the new generation of Airbus and Boeing twin-aisle LCA, the A350XWB and 787 families, are so great that customers able to wait for delivery positions do not consider them to be substitutable with any version of the A330, 767 or 777, leaving them to compete against each other in their own separate twin-aisle product market for technologically advanced LCA.[2201] On the other hand, for aircraft customers in search of additional capacity in the short-term (i.e. customers that cannot wait for delivery positions to become available for the A350XWB and 787), the European Union submits that a choice will be made between the A330 and 777 families, both of which it asserts offer superior performance compared to the 767.[2202] In this connection, the European Union maintains that the choice between the A330 and 777 families will be guided by the relative performance advantages of each aircraft over the other on missions for which they are *optimized*. In particular, the European Union argues that the "weak performance of the 777 for missions (in terms of medium-term range and number of passengers) that the A330 is optimised for" implies that a customer wanting to fly a relatively shorter route with fewer passengers will prefer the A330. Likewise, the "weak performance of the A330 on missions (longer range and more passengers) that the 777 was designed for (if the A330 is even capable of flying those missions at all)" demonstrates that airlines do not generally find the two models of LCA to be substitutable.[2203]

6.1303. The United States disagrees with the European Union, arguing that the implications of the relative performance advantages of the five families of twin-aisle aircraft are not so great as to demonstrate that they cannot all be considered to fall within the same product market. The United States emphasizes that the impact of relative performance advantages will vary depending upon the demand conditions faced by a particular airline in the context of its specific business model. Thus, according to the United States, where, for example, an airline operates a relatively short route for which there is strong passenger demand, it may make economic sense for it to use a longer-range twin-aisle aircraft with a greater seating capacity, than a smaller shorter-range twin-aisle aircraft that would normally be more efficient moving fewer passengers over the same distance. Conversely, an airline may want to operate at higher frequencies that better fit its network and thus choose smaller twin-aisles over larger twin-aisles that could also profitably serve the same routes.[2204]

6.1304. It is undisputed that the new generation of Airbus and Boeing twin-aisle LCA have operating cost and maintenance cost advantages over the 767, 777 and A330 families.[2205]

[2198] United States' second written submission, paras. 447 and 473; response to Panel question No. 48; comments on the European Union's response to Panel question No. 48; Bair Declaration, (Exhibit USA-339) (BCI), paras. 17 and 36; and Sanghvi Declaration, (Exhibit USA-530), para. 57.

[2199] European Union's second written submission, para. 649.

[2200] European Union's second written submission, paras. 633-643 (discussing the results of the NPV analyses conducted in the Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 32-63); and response to Panel question No. 158. We examine the merits of the NPV analyses in the next subsection.

[2201] European Union's first written submission, para. 612; and second written submission, paras. 628 and 636-637.

[2202] European Union's first written submission, para. 618; second written submission, paras. 634-635; response to Panel question No. 70; and Mourey Statement, (Exhibit EU-8) (BCI), paras. 107-114.

[2203] European Union's first written submission, paras. 614-615; second written submission, paras. 638-642; and Mourey Statement, (Exhibit EU-8) (BCI), paras. 115-128.

[2204] United States' second written submission, paras. 471-473; comments on the European Union's response to Panel question No. 75; and Bair Declaration, (Exhibit USA-339) (BCI), paras. 16-17 and 34-36.

[2205] United States' second written submission, paras. 477 and 483; Bair Declaration, (Exhibit USA-339) (BCI), paras. 39 and 41; European Union's first written submission, para. 612; Mourey Statement, (Exhibit EU 8) (BCI), paras. 129-135; and Sophie Pendaries, Head of A350XWB Marketing, Airbus, "Statement on the

However, as explained elsewhere in this Report, the technological superiority of one model of Airbus or Boeing LCA over others does not automatically mean that it will not be in a competitive relationship with other models of technologically inferior Airbus and Boeing LCA.

6.1305. We recall that the introduction of technologically advanced models of LCA plays a key role in the competition between Airbus and Boeing for new and existing customers. As the European Union recognizes "Airbus and Boeing compete to improve aircraft technology and apply new technologies to their existing and new product offerings to maximise the suitability of their products to meeting today's customer needs and those needs that customers and/or manufacturers anticipate for the future."[2206] Moreover, according to the European Union, "{t}echnological innovation that translates into a substantial customer value advantage for a manufacturer's product over the competitor's product will often force the competitor to respond with its own new or improved products".[2207] Of course, an aircraft producer will be "forced" to respond in this way when its older products consistently lose *potential sales* to the more modern, technologically advanced, offerings of its competitor. Thus, the very purpose of the technological innovation undertaken by Airbus and Boeing is to draw customers away from each other's existing range of LCAs and, thereby, *win the competition* for new sales. As explained in the Pendaries Statement:

> Generally speaking, for an aircraft programme *to be competitive in the market*, it is necessary that the aircraft incorporates state-of-the-art technology, *so that it offers customers significant benefits over older, similar-sized aircraft*. A manufacturer aims at achieving those levels of improvements − mainly in terms of lower operating costs and/or higher revenue potential − *that cannot normally be offset with price discounts on the older generation aircraft*. The lower costs or higher revenues are enjoyed, year after year, for the very long product life of the aircraft, resulting in a present value advantage that *a manufacturer of older generation aircraft cannot easily offset with price discounts*.[2208] (emphasis added)

6.1306. While it cannot be excluded that as a result of this competitive dynamic, Airbus and/or Boeing may be able to introduce an LCA that is so far advanced and/or specifically designed for a particular application compared to all others that it captures an entirely new segment of demand that did not previously exist (and, therefore, cannot be satisfied in any way by existing LCA), the fact that both Airbus and Boeing generally endeavour to produce aircraft to satisfy *multiple requirements* for the purpose of meeting *aggregate demand* (which is itself varied and influenced by a multitude of factors)[2209], suggests that it is likely that even the newest, most technologically advanced, models of LCA will be in a competitive relationship with older models of existing LCA. Certainly, the evidence we have reviewed concerning Airbus' original and ongoing sales and marketing expectations for the A350XWB suggests that this is, indeed, what Airbus anticipates will be the case for the A350XWB − namely, that it will have to compete with more than just the 787 in order to maximize sales.

6.1307. That the A350XWB family was originally conceived and designed by Airbus to win sales against more than just the 787 family finds support in a number of documents, starting with the A350XWB Business Case[2210], which we recall sets out the business rationale that informed the decision to launch the new development project. Similarly, another HSBI document, the letter from Airbus to the **[***]** provides explicit confirmation of this fact.[2211] Moreover, a slide from a PowerPoint presentation made by EADS at the A350XWB "launch briefing" in December 2006 compares various performance characteristics of the A350XWB-900 ("Seats (3-class), Design range, MWE per seat, Block fuel per seat, Cash Operating Cost per seat" and "Noise Classification

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Market Significance of Technological Innovations to the A350XWB Programme", 5 July 2012, (Pendaries Statement), (Exhibit EU-17) (BCI).

[2206] European Union's response to Panel question No. 48.

[2207] European Union's response to Panel question No. 48.

[2208] Pendaries Statement, (Exhibit EU-17) (BCI), para. 10.

[2209] See above paras. 6.1219-6.1222. See also European Union's response to Panel question Nos. 48 and 49; Mourey Statement, (Exhibit EU-8) (BCI), paras. 44-71; United States' response to Panel question Nos. 48 and 49; and Bair Declaration, (Exhibit USA-339) (BCI), paras. 10-12 and 16-17.

[2210] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 11, 21, 51, 92, and 93.

[2211] Letter, Airbus **[***]**, **[***]** (Exhibit EU-393) (HSBI).

at London") with those of the 787-9 *and the 777-200ER*.[2212] In our view, the fact that Airbus chose to highlight the alleged performance advantages of the A350XWB-900 over the 787-9 *and the 777-200ER* at the time of launch suggests that it must have expected potential customers to be interested in learning about the relative performance characteristics of *all three aircraft*. This understanding of Airbus' expectations is not only reflected in what was reported in the media around the time of A350XWB's launch[2213], but it is also confirmed in the statement made by Christian Scherer, Airbus Head of Future Programmes, in the original proceeding, where he explained that:

> The A350XWB-800 was designed to compete against the 787-8 and 787-9 while the A350XWB-900 and A350XWB-1000 were designed to compete against Boeing's 300-400 seat LCA, i.e., the 777 family.[2214]

6.1308. In the years since it was launched, Airbus has continued to market the A350XWB family as an alternative to both the 787 *and the 777*. Thus, for example, a slide from an Airbus PowerPoint presentation made in 2008 makes a side-by-side comparison of the A350XWB family with the 787 *and the 777*, describing the former as "One New Family of technically superior aircraft" and the latter as "Two aircraft types a generation apart".[2215] Similarly, on 22 June 2011, Airbus made a PowerPoint presentation to participants at the "EADS − Le Bourget Investor Breakfast Meeting" that included a slide showing the three versions of the A350XWB family directly opposite two boxes representing the 787 *and the 777* families. As with the 2008 presentation, the 2011 slide described the A350XWB family as "One New Family of technically superior aircraft" and the 787 *and the 777* families as "Two aircraft types a generation apart".[2216] More recently, in 2012, Airbus Chief Operating Officer (COO) for Customers, John Leahy, was quoted as saying:

> I've got to give (Boeing) credit on the 777; if you need lift in the long-range widebody market now, that's the plane. The day we deliver the first A350-1000, the 777-300ER will become obsolete.[2217]

6.1309. Likewise, in the Pendaries Statement, the "significance of the technological innovations applied to the A350XWB *in securing the aircraft's competitiveness in the marketplace*"[2218] is explained through a series of comparisons between the performance characteristics of the A350XWB and those of the 787, *the 777 and the 767*.[2219] For example, it is asserted in the Pendaries Statement that the innovations incorporated into the A350XWB have not only made it "competitive vis-à-vis other new generation aircraft, such as the 787 and potential future improved 777 models", but also "significantly better {in terms of performance and economics} compared to current, similar-sized aircraft, such as Boeing's current 777 and 767."[2220] In our view, the fact that the Pendaries Statement seeks to highlight the "*competitiveness*" of the technologically advanced A350XWB by focusing on its relative performance advantages over the 787, 777, and 767 is consistent with what is already suggested in the other evidence we have reviewed above, namely, that the A350XWB was developed for the specific purpose of *winning sales* from a range of customers that would otherwise be potentially interested in the performance

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[2212] "A350 XWB − xtra efficiency", slide 22 from "Taking the lead: the A350 XWB", EADS/Airbus presentation, 4 December 2006, (Exhibit USA-350), slide 22.

[2213] See also Robert Wall, "Airbus Relaunches A350", *Aviation Week*, 10 December 2006, (Exhibit EU-98); "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006, (Exhibit USA-28); Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27); Ameet Sachdev, "Airbus redesigns its strategy for long haul: A350 line to carry bulk of the load", *Chicago Tribune*, 18 July 2006, (Exhibit EU-99); and Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006, (Exhibit USA-26).

[2214] Statement by Christian Scherer, Executive Vice President and Head of Future Programmes, Airbus, "Commercial Aspects of the Aircraft Business from the Perspective of a Manufacturer", 5 February 2007, (Scherer Statement), (Exhibit EU-361) (BCI), para. 20.

[2215] "A350XWB Shaping efficiency", Airbus presentation slide, July 2008, (Exhibit USA-451).

[2216] Thomas Enders and Fabrice Brégier, "Le Bourget Investor and Analyst Breakfast Meeting", EADS/Airbus presentation, 22 June 2011, (Exhibit USA-114), p. 3.

[2217] Dominic Gates, "Boeing may overtake Airbus as No. 1 Jet-Maker in 2012", *The Seattle Times* quoting from Bloomberg News, 17 January 2012, (Exhibit USA-11), p. 2.

[2218] Pendaries Statement, (Exhibit EU-17) (BCI), para. 1. (emphasis added)

[2219] Pendaries Statement, (Exhibit EU-17) (BCI), paras. 2 and 11-48.

[2220] Pendaries Statement, (Exhibit EU-17) (BCI), paras. 11-12.

characteristics of, at least, all three families of Boeing aircraft. As we see it, there would be no need to assert that the A350XWB possesses "lower fuel burn, extended range and increased payload capabilities, lower maintenance costs, lower emissions and decreased noise generation" compared with "similar-sized aircraft such as Boeing's current 777 and 767" in order to demonstrate its "*competitiveness in the marketplace*", if the A350XWB were not intended to target customers *for whom such performance differences would, according to the European Union, be potentially decisive.*

6.1310. The evidence before us also suggests that Airbus intended to win sales away from the 787 not only using the A350XWB, *but also the A330*. Thus, in a slide from a PowerPoint presentation made by John Leahy in 2007, the performance of the A330 (the "super efficient twin") is compared to that of the 787, with the same slide concluding that the "787 fuel & maintenance cost advantage is more than offset by the A330s additional revenue".[2221] We agree with the United States that the "relevance of such a comparison is, of course, to suggest that a customer should order the A330 instead of the 787; in other words, it should win the competition between the two".[2222] Indeed, that the A330 was at the time in a competitive relationship with the 787 is also recognized in the Mourey Statement, which explains that "as a result of Boeing's launch of the 787 {in 2004}, for a number of years, the A330 saw its prices, orders and market share drop dramatically, with airlines ordering the 787 based on promised deliveries as of 2008".[2223] Information concerning the anticipated competitive relationship between the 787 and the A330 can also be found in the A350XWB Business Case.[2224] Ultimately, the European Union *does not* argue that "Airbus is presently unable to secure any A330 sales {from the 787}, or that it is impossible for Airbus ever to **[***]**", but only that:

> {W}here the A330 and 787 are offered with similar delivery timing, several factors have further increased the present gap between these two aircraft with respect to the value that they offer customers when performing typical missions, such that the A330 at present *is less able to compete* for such sales **[***]** than it was in the pre-2007 period.[2225] (emphasis added)

6.1311. Unlike the European Union, and for the reasons set out above and further elaborated below[2226], we do not understand the lack of near-term delivery positions for one aircraft compared to another to necessarily mean that they do not impose any competitive constraints on each other.

6.1312. Turning to the competitive relationship between the A330 and the 777, the European Union's position is that despite their somewhat overlapping end-uses these two families do not, at present, compete with each other because they offer markedly different economics for customers in need of aircraft to perform the range of missions for which each family is *specifically designed and optimized*. In our view, one of the implications of the European Union's line of argument is that there are only two types of customers interested in the A330 and 777 at present – either: (a) customers looking for an aircraft to move a relatively large number of passengers over relatively long routes (who would favour the 777); or (b) customers wanting an aircraft to fly a smaller number of passengers on medium-haul routes (who would choose the A330). We find this particular perspective to be overly simplistic and at odds with the European Union's own description of the core features of aircraft demand.

6.1313. As already noted, a customer's decision to purchase an LCA will be guided by the overall value of the aircraft package it is offered, in the light of a number of factors, including its particular business model; and one of the key determinants of an airline's business model will be the types of missions it intends to operate. This, of course, means that a customer's choice of aircraft will be largely driven by its own forecast of passenger demand and route structures over the anticipated commercial life of an aircraft. The Mourey Statement explains that passenger demand is a multi-faceted parameter that for any particular route will vary "at all times of the day or from one

[2221] John Leahy, Chief Operating Officer, Customers, Airbus, "Market Update", Airbus presentation, 20 June 2007, (Exhibit USA-348), p. 8.
[2222] United States' response to Panel question No. 63.
[2223] Mourey Statement, (Exhibit EU-8) (BCI), para. 88.
[2224] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 11 and 21.
[2225] European Union's response to Panel question No. 158.
[2226] See above paras. 6.1264-6.1266 and below paras. 6.1323-6.1326.

season or year to the next", not only between different airlines but also for an individual airline.[2227] Moreover, passenger demand conditions will "evolve over time", and consequently impact an airline's "fleet and route strategies as well as the aircraft developed to serve them".[2228] Thus, the process of forecasting required seating capacity and route structures over the commercial life of any particular aircraft for a potential LCA customer is likely to be highly complex, bringing with it a certain measure of risk. If an airline finds that it has over-estimated demand relative to the performance characteristics of the aircraft it has purchased, it will be unable to maximize the value of its investment, and potentially make a loss. Conversely, if demand is under-estimated, an airline will be short of capacity and therefore lose out on potential profits.[2229] In our view, these considerations suggest that:

i. LCA customers are likely to contemplate multiple possible manifestations of passenger demand in the business plans used for the purpose of evaluating the economics of a particular aircraft (which we recall will typically have a 15-20 year life cycle);

ii. LCA customers will be interested in exploring the economics of the largest possible range of LCA options capable of effectively servicing the greatest number of possible manifestations of contemplated demand[2230]; and

iii. an LCA customer's tolerance to the risk that its passenger demand forecast may turn out to be incorrect will play an important role in its purchase decision.

6.1314. Given these features of aircraft demand, we find it difficult to see how the simple fact that the A330 may be better suited than the 777 to perform the particular range of medium-range missions for which it is specifically designed necessarily implies that it will face no competition from the 777. If relative performance advantages over *optimized* missions were a sufficient basis to identify relevant product markets in the LCA sector, it seems to us that most, if not all, of the Airbus and Boeing twin-aisle families of LCA would be in separate, narrowly defined, monopoly markets because, in one way or another, all Airbus and Boeing twin-aisle LCA are differentiated in terms of their performance characteristics. Indeed, on this basis, it might even be argued that different models within the same family of twin-aisle LCA could be in separate product markets.

6.1315. That the potential customer base for the A330 is likely to at least overlap with the range of customers that will be interested in the 777 finds support in a number of Airbus' marketing materials. In particular, in a Market Update presentation made by Airbus' COO, John Leahy, in 2007, the order backlog of the A330 is compared to that of the 777 (as well as the 767), with the accompanying caption reading "{t}he A330 is the clear leader of its generation and the right choice for investors".[2231] Similarly, in a Market Update presentation made in November 2010 by Mark Pearman Wright, Head of Airbus Leasing and Investor Marketing, a slide compares the net orders obtained from December 2006 to October 2010 by the A350XWB and the A330 with those of the 777 and the 787. The same slide presents a pie chart showing that those net orders give Airbus a 60% "market share", leaving Boeing with a 40% "market share".[2232] Another Airbus PowerPoint presentation made in 2011 once again compares the order backlog for A330 with the 777 (and the 767), noting that the "A330 has a stronger order backlog" and that its "sales momentum {is} sustained by unique market attributes". The same presentation also contains a

[2227] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 91.
[2228] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 91.
[2229] Mourey Statement, (Exhibit EU-8) (BCI), para. 152; and United States' response to Panel question No. 61, para. 212.
[2230] In other words, all things being equal, it is likely that airlines will be most interested in aircraft that can be used to serve a range of different routes and missions that are compatible with its business model, not necessarily only those with respect to which an aircraft is optimised.
[2231] John Leahy, Chief Operating Officer, Customers, Airbus, "Market Update", Airbus presentation, 20 June 2007, (Exhibit USA-348), p. 8.
[2232] Mark Pearman Wright, Head of Leasing and Investor Marketing, Airbus, "Airbus Market Update", EADS/Airbus presentation, Redburn Aviation Conference, November 2010, (Exhibit USA-477).

slide showing photos of the A330s used by four different airlines, with the caption reading "A330-300: displacing 777-200 fleets" and "{l}ower costs, higher comfort".[2233]

6.1316. Evidence of the existence of at least an overlapping potential customer base for the A330 and the 777 can also be found in an article published by *aspireaviation.com* in 2012, which reports and examines the decision by Airbus to offer new, higher gross weight, variants of the A330-300. Among the points highlighted in this article is that according to Airbus' COO, John Leahy, the new "improved 240-tonne A330-300 will be able to cover 94% of the 777-200ER missions, versus the first 212 tonne A330-300 product examples which only covered 65% of the Boeing 777-200ER markets with a range of 3,900nm".[2234] It also states that as "the A330-300 is becoming more capable and more fuel efficient, Airbus is pitching the aircraft as a 'perfect 777-200ER replacement'", once again quoting a statement made by John Leahy.[2235] In addition, the article reveals that Malaysia Airlines announced that it intended to consider the new A330 as a potential replacement for its existing fleet of 777-200ERs:

> We'll be looking at Airbus' announcement to see if it can do the job of the 777s. We'd love to have new models like the 787 or the A350, and maybe one day we will, but right now we need to simplify the fleet and operate four types of plane instead of maybe six or seven.[2236]

6.1317. The European Union maintains that the marketing materials and presentations the United States relies could, at most, only be taken to represent the *producer and marketing teams'* perspectives on substitutability, which cannot, alone, be used to understand how *customers* view the relevant aircraft.[2237] We note, however, that the United States is not advancing the above information as evidence of customers' preferences, but merely Airbus' own perceptions of those preferences. In our view, this type of evidence may be highly relevant to the task of identifying LCA product markets, especially given Airbus' long-standing experience in an industry that includes only one other effective competitor; and *a fortiori* when, as in the present instance, it appears that this competitor takes the same view of the alleged competitive relationships between aircraft that we believe can be objectively inferred from the evidence the United States has advanced of Airbus' own perceptions. Thus, we see the publicly expressed views and opinions of Airbus of the commercial relationship between, and positioning of, its two families of twin-aisle aircraft relative to Boeing's aircraft to be an important part of the configuration of facts that we must consider in making our determination of relevant product markets.

6.1318. In addition to the above-mentioned evidence, the United States points to a number of examples of airlines having chosen to operate a range of different twin-aisle aircraft on the same routes, arguing that they support the view that there is a degree of overlap in the use of all twin-aisle aircraft and, therefore, that "one must be wary of narrowly defining bright lines to segment a product space with such complex patterns of customer demand and product uses".[2238] For instance, the United States observes that in 2009, Singapore Airlines flew 735 round trips with the 777-200ER and no round trips with the A330-300 on the Singapore to Taipei route. However, in 2011, Singapore Airlines operated 890 missions on the same round trip with the A330-300 and did not use the 777-200ER for this purpose. Similarly, the United States points out that in 2009, Malaysia Airlines flew 144 round trips with the 777-200ER on the Kuala Lumpur to Brisbane route and no round trips with the A330-300, but in 2011, Malaysia Airlines flew 175 round trips on that route with the A330-300 and no round trips with the 777.[2239]

[2233] Richard Carcaillet, Director, Airbus A380 Product Marketing, "Product Line Update", Airbus presentation, 2011, (Exhibit USA-340).

[2234] "Airbus is right on A330 improvement strategy", *Aspire Aviation*, 12 July 2012, (Exhibit USA-349), p. 1.

[2235] "Airbus is right on A330 improvement strategy", *Aspire Aviation*, 12 July 2012, (Exhibit USA-349), p. 3.

[2236] "Airbus is right on A330 improvement strategy", *Aspire Aviation*, 12 July 2012, (Exhibit USA-349), p. 2.

[2237] European Union's comments on the United States' response to Panel question No. 63, paras. 481, 482, and 483.

[2238] United States' comments on the European Union's response to Panel question No. 75.

[2239] Bair Declaration, (Exhibit USA-339) (BCI), para. 39.

6.1319. The European Union argues that Singapore Airlines' and Malaysian Airlines' replacement of the 777-200ER with the A330-300 on regional routes demonstrates the distinct role for which the two aircraft are suited, as well as the influence of Airbus' post-launch investments in the A330. According to the European Union, both Singapore Airlines and Malaysia Airlines originally ordered the 777-200ER in 1995 due to mainly its range and size advantage over other aircraft (as well as for reasons of twin-aisle fleet commonality, in the case of Singapore Airlines). The European Union asserts, however, that both airlines nonetheless started operating the aircraft on some regional routes "where its long range was not required". As far as Malaysia Airlines is concerned, the European Union submits that "over the years, the airline was forced to use the 777-200ER more and more for regional routes, as the airline's network to Europe diminished, while its network to Asia increased". Moreover, the European Union maintains that at the time, "Malaysia Airlines' old A330-300s were unable to fly the Kuala Lumpur-Brisbane route without uneconomical payload limitations". In 2010, Malaysia Airlines ordered a more modern version of the A330-300, capable of performing those missions more efficiently than the 777-200ER. Similarly, the European Union points out that Singapore Airlines decided to lease eight A330s in 2009 and 11 A330s in 2010 for the purpose of operating regional to medium-haul missions including the Singapore to Brisbane route.[2240] Thus, the European Union argues that after having operated the 777-200ER on the Singapore to Taipei and Kuala Lumpur to Brisbane regional routes for some time, both airlines replaced that aircraft with the A330-300, "in recognition of the fact that the latter was better suited for regional routes, being lighter and, therefore, more efficient on such routes". On this basis, the European Union concludes that "this evidence is inconsistent with the product market delineation proposed by the United States".[2241]

6.1320. We disagree with the conclusions the European Union draws from the evidence concerning the Singapore Airlines and Malaysia Airlines experience of using the A330-300 and the 777-200ER on the same regional routes. First, in relation to Malaysia Airlines, it is not entirely clear to us that the evidence substantiates one of the European Union's main contentions. We note, in particular, that the European Union maintains that one of the reasons why Malaysia Airlines flew the 777-200ER on the Kuala Lumpur to Brisbane route was because the version of the A330-300 it was flying at the time was "uneconomical" on that route.[2242] Yet the facts that are before us suggest that Malaysia Airlines would have been flying its *existing* "uneconomical" A330 fleet on the Kuala Lumpur to Brisbane route in 2011 because the new A330s *ordered only in 2010* could not have been delivered for service in 2011.[2243] Second, and in any case, even if the A330s flown by Malaysia Airlines on the Kuala Lumpur to Brisbane route in 2011 were newer versions of the A330-300 (as was the case for Singapore Airlines), we do not consider that the two airlines' choices of one LCA over the other means that they did not and cannot today exercise competitive constraints on each other.

6.1321. Although most suited to operate medium to long-haul missions, the 777-200ER was used by both Malaysia Airlines and Singapore Airlines until 2011 on regional routes that could also be serviced by the A330-300. This is not, however, an unusual occurrence because according to the European Union it is "commonplace" in the industry for airlines to operate the "777 on some shorter routes to maximise the use of the aircraft, reflecting operations constraints in the use of aircraft on long-haul routes".[2244] Moreover, in the case of Malaysia Airlines, the increased use of the 777-200ER on regional routes was also driven by a change in the pattern of demand. Faced with diminishing demand for its medium to long-haul missions and increasing demand on regional routes, Malaysia Airlines had to organize its fleet in such a way that would maximize its overall value to its business. This meant utilizing the 777 on sub-optimal missions, which nevertheless must have made more economic sense to Malaysia Airlines than using its existing fleet of A330s.

6.1322. The decision by Malaysia Airlines and Singapore Airlines to use the 777-200ER until 2011 on routes that could otherwise have been served by the A330-300 because of *inter alia* the

[2240] European Union's second written submission, paras. 1597-1598.
[2241] European Union's response to Panel question No. 75.
[2242] European Union's response to Panel question No. 75.
[2243] In 2010, the delivery backlog for the A330 was **[***]**. Crawford Hamilton, Head of A330 Marketing, Airbus, "Statement on the Market Significance of Technological and Production Improvements to the A330 Programme" 5 July 2012, (A330 Marketing Statement), (Exhibit EU-12) (BCI), para. 61 (figure 9). That Malaysia Airlines was flying its existing fleet of A330s in 2011 also appears to be supported by certain HSBI evidence. (See **[[**HSBI**]]** Exhibit EU-366 (HSBI), p. 2).
[2244] European Union's response to Panel question No. 75, fn 491.

A330-300's "uneconomical payload limitations" and older technology[2245] shows how, for the two airlines, the superior relative performance of the 777 (even on sub-optimal missions) made it a more attractive proposition than the A330 at the relevant time. However, when the A330's technology was updated, both airlines *replaced* the 777-200ER with the newer version of the A330-300 finding that it was a better fit to their operations than the previously superior 777. Thus, in our view, the Malaysia Airlines and Singapore Airlines switch away from the 777 to the A330 provides not only a clear example of demand-side substitutability between two differentiated products, but it also demonstrates the important and undisputed role that technological development plays in a customer's choice of aircraft, highlighting a key dimension of competition between Airbus and Boeing.

6.1323. Another important factor that will influence a customer's choice of aircraft and, sometimes, even be decisive, is the timeliness of its availability. Yet, despite recognizing this fact, one of the implications of the European Union's assertion that the A330 and the 777 are, at present, sold into their own separate "temporal" monopoly markets because of, *inter alia*, their near-term availability relative to the A350XWB and the 787[2246], is that Airbus and Boeing do not compete on the delivery terms they offer aircraft customers.

6.1324. Unlike the European Union, we do not understand the lack of near-term delivery positions for the A350XWB and the 787 to necessarily mean that they do not impose any competitive constraints on the A330 or the 777. Once again, we recall that a customer's choice of aircraft will depend upon its assessment of the economic value associated with the *totality* of the terms and conditions attached to the deal it is offered. Thus, a customer that prefers to wait for an A350XWB or the 787 to become available sometime in the future may decide not to buy the A330 or the 777 because, *having compared the economics of both options* (e.g. buying a relatively higher priced aircraft with relatively low operating costs that *is not* available in the near term *vs* buying a lower priced aircraft with higher operating costs that *is* available in the near term), the best value for its business model and strategic objectives, is the new generation aircraft. Conversely, a customer may decide to buy the A330 or the 777 *instead of* the A350XWB or the 787, notwithstanding the operating cost advantage of the latter because the economics of waiting for a delivery date makes the new generation aircraft a worse business proposition than buying a current version. The Mourey Statement describes this particular scenario (as it relates to the A330) in the following terms:

> The lack of available near-term delivery positions can make the purchase of a 787 commercially unviable, compared to an A330 that is available much sooner and delivers operating cost reductions soon − even if not to the same extent as the 787. With deliveries available only many, many years into the future, purchasing the 787 would entail having to continue to operate less efficient aircraft for a longer period of time, and thus bearing higher costs.
>
> The same logic applies to the A350XWB, the smaller models of which are of a similar size as the A330. These models have not entered into service yet, and production rates will be relatively low during the first few years. Given the already existing large order backlog, there is a similar lack of available near-term delivery status.
>
> ...
>
> Thus, in contrast to the 787 and the A350XWB, the A330 has been available for near-term delivery, and, due to production ramp-up, in numbers sufficient to meet demand. As a result, the A330 has been very attractive to airlines, not only as a replacement aircraft, to quickly reduce fuel costs, but also as aircraft for fleet expansion. The A330 has been an attractive offer in this context, as much later delivery positions for the 787 or A350XWB would mean to forego additional revenues and additional flights, and thus foregoing additional profits.[2247]

[2245] European Union's response to Panel question No. 75.

[2246] European Union's first written submission, paras. 505 and 613; response to Panel question No. 70; and Mourey Statement, (Exhibit EU-8) (BCI), paras. 39-43, 54, 101-102, and 106.

[2247] Mourey Statement, (Exhibit EU-8) (BCI), paras. 101-102 and 106.

6.1325. Indeed, it is precisely because of the important role that the availability of an aircraft may play in *comparing* the economic value of *different aircraft* that a potential customer may explicitly demand a particular delivery date or request Airbus and Boeing to compete on delivery terms during the course of a sales campaign.[2248] Fully aware that the timing of the availability of an aircraft may be potentially decisive for certain customers, Airbus and Boeing will endeavour to offset any known disadvantage in delivery terms by making other concessions or by offering "interim lift" solutions until the desired LCA are available.[2249] Moreover, where possible, they will also try to "ramp-up" production activities and thereby offer a greater number of near-term delivery positions, whenever they sense an opportunity to make more sales. As explained in the A330 Marketing Statement:

> {T}o make sure that we can offer airlines the delivery positions that they need, we have continuously ramped-up our A330 production, in an effort to keep our backlog under control … In our experience, striving for a backlog of around **[***]** years worth of production has allowed us to offer airlines the delivery positions that they need. The large increase in orders during 2007 to 2009, and the corresponding growth in the backlog, led us to increase production capacity, returning to a backlog with our preferred **[***]** year range.
>
> …
>
> {T}he advantage that available near-term delivery slots provide Airbus in terms of selling its aircraft is currently particularly strong in case of the A330. Other aircraft with similar (or better) range, payload capabilities and/or fuel efficiency that airlines would like to take delivery of, i.e., the A350XWB and the 787, are not available in the near-term. Thus, recently even more so than normally, Airbus' ability to offer attractive, near-term delivery positions has been a crucial factor in securing orders for the A330.[2250]

6.1326. Thus, rather than being an advantage that places the A330 and 777 in *"temporary" monopoly markets* of their own, we see the relative near-term availability of both aircraft compared with the current, longer-term, delivery prospects for the A350XWB and the 787, as a "temporary" advantage with respect to *one* of the factors that customers interested in aircraft capable of performing the range of overlapping missions covered by the four families of LCA will take into account in their purchase decisions.

6.1327. Finally, it is apparent that the range of missions and operating performance offered by the 767 are somewhat limited compared with the larger versions of the 787, and the 777 and A350XWB families. Nevertheless, it is recognized in the Mourey Statement that the 767 and the A330 "are roughly the same size" offering a "comparable range".[2251] Moreover, there is evidence before us suggesting that Boeing continues to consider the two LCA families to be in "competition"[2252], with the United States pointing out that the sales and marketing life of the 767-300ER has not come to an end, having achieved 49 orders in the five years since 2007.[2253] This fact is acknowledged in the Supplemental Mourey Statement, which similarly states that

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[2248] See e.g. **[[**HSBI**]]** Exhibit EU-362 (HSBI), and **[[**HSBI**]]** Exhibit EU-366 (HSBI); **[[**HSBI**]]** Exhibit USA-184 (HSBI).

[2249] According to the Scherer Statement, depending upon the particular circumstances of a sale, two possible examples of concessions that might be offered to overcome a disadvantage in delivery terms could be: (a) "a further net price discount"; or (b) assistance "with securing interim leases for additional aircraft". (Scherer Statement, (Exhibit EU-361) (BCI), para. 77). Other evidence showing that delivery dates are a point of competition in the LCA industry can be found in the following HSBI documents: **[[**HSBI**]]** Exhibit USA-196 (HSBI); **[[**HSBI**]]** Exhibit USA-204 (HSBI); **[[**HSBI**]]** Exhibit USA-219 (HSBI); **[[**HSBI**]]** Exhibit USA-220 (HSBI); **[[**HSBI**]]** Exhibit USA-221 (HSBI); **[[**HSBI**]]** Exhibit USA-227 (HSBI); and **[[**HSBI**]]** Exhibit USA-231 (HSBI).

[2250] A330 Marketing Statement, (Exhibit EU-12) (BCI), paras. 60 and 62. See also Mourey Statement, (Exhibit EU-8) (BCI), paras. 104-106.

[2251] Mourey Statement, (Exhibit EU-8) (BCI), para. 107.

[2252] "767 Overview", Boeing presentation, July 2012, (Exhibit USA-532) (comparing the "relative trip costs" of three versions of the 767 with the A330-200, and asserting that the "767 uses less fuel than the competition"); United States' response to Panel question Nos. 49 and 50.

[2253] United States' second written submission, para. 476; and Bair Declaration, (Exhibit USA-339) (BCI), para. 38. The European Union does not deny that the 767-300ER continues to be sold.

"Boeing continues to sell {the 767-300ER} in small quantities to a small number of airlines that each have their own specific reason to buy them in small numbers".[2254] In this light, it is instructive to note that the Mourey Statement asserts that sales of both the 767 and the A330 were significantly affected by the introduction of the 787 in 2004[2255], suggesting the possibility that customers were choosing Boeing's new generation aircraft over both the A330 *and the 767*. Other evidence shows that in 2007 Airbus was marketing the A330 by comparing its sales performance and operating characteristics against not only the 777 and 787, *but also the 767*.[2256] This is consistent with the assertions made in the Bair Declaration, where it is explained that Boeing launched the 787 in response to the relative success of the A330 *against the 767*, explaining, furthermore, that delivery delays for the 787 created additional sales opportunities for existing twin-aisle LCA, with the A330 capturing "the vast majority of these".[2257] It is common ground that the initial success of the 787 led Airbus to respond by launching the Original A350 "as a significantly improved version of the A330", followed by the A350XWB in December 2006 as "an eventual replacement of the A330".[2258] As an "eventual replacement" of an aircraft, which at the time, was considered by Airbus to be a better performing rival to the 767, it can only logically follow that the A350XWB would inevitably appeal to a range of customers including some of those that may have been interested in exploring the suitability of the 767 or the A330.

6.1328. Thus, although the 767 was clearly intended to serve a range of end-uses that are closest to those for which the A330 was specifically designed, the above summary of the inter-relationships between the launch, development and marketing of the five families of Airbus and Boeing twin-aisle aircraft suggests that the potential customer base of the 767 was (and today continues to be) credibly targeted by at least the smaller versions of the A330, A350XWB and 787.

6.1329. Ultimately, therefore, the arguments and evidence we have reviewed in this subsection lead us to conclude that in terms of end-use and potential customers, Airbus and Boeing have chosen to position their five families of twin-aisle aircraft in slightly different but comparable and sometimes overlapping positions on the continuum of customer needs and requirements, starting with the 767 and A330 at one end of the spectrum and the larger versions of the 777 and A350XWB families at the other extremity.

Pricing constraints

6.1330. The United States maintains that different combinations of Airbus and Boeing twin-aisle aircraft impose competitive constraints (including with respect to pricing) on each other such that "chains of substitution" are created linking all five families of LCA together into one and the same product market.[2259] Drawing from the Sanghvi Declaration and the practice of the European Commission, the United States explains the logic behind its "chains of substitution" line of argument in the following terms:

> To illustrate the chains of substitution analysis, the evidence of customer behavior may establish switching between products A and B, making them substitutes. The evidence may also establish that products B and C are substitutes, without establishing that A and C are substitutes. In such circumstances, as the European Commission observes, "{e}ven if products A and C are not direct demand substitutes, they might be found to be in the same relevant product market since their respective pricing might be constrained by substitution to B". This analysis may be repeated, leading to a "chain of substitution" in which *some products that do not directly*

[2254] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 32.
[2255] Mourey Statement, (Exhibit EU-8) (BCI), para. 88.
[2256] John Leahy, Chief Operating Officer, Customers, Airbus, "Market Update", Airbus presentation, 20 June 2007, (Exhibit USA-348), p. 8.
[2257] Bair Declaration, (Exhibit USA-339) (BCI), para. 38.
[2258] Mourey Statement, (Exhibit EU-8) (BCI), para. 89.
[2259] United States' second written submission, paras. 476-477 and 483; response to Panel question Nos. 48 and 49; Bair Declaration, (Exhibit USA-339) (BCI), paras. 38, 39 and 41; Sanghvi Declaration, (Exhibit USA-530), paras. 33-42 and 61-65.

compete may nevertheless constrain each other's pricing because of their shared relationship with other products.[2260] (emphasis added; footnotes omitted)

6.1331. According to the United States, the study undertaken in the Sanghvi Declaration of certain evidence that allegedly shows potential demand-side substitution between various pairings of aircraft demonstrates the presence of such "chains of substitution" across all five families of Airbus and Boeing twin-aisle LCA.

6.1332. The Sanghvi Declaration reviews 22 pieces of evidence "in the form of LCA sales campaign documents, Boeing and Airbus marketing materials, and the statements of Boeing and Airbus experts"[2261], and deduces from these that there is direct competition between: (a) the 767 family and the A330 family; (b) the A330 family and the 777 and 787 families; and (c) the 777 and 787 families and the A350XWB family.[2262] In the light of the "chains of substitution" theory, the Sanghvi Declaration concludes that these relationships "yield a single market for twin-aisle LCA".[2263] Thus, the United States explains that if "the 767 competes with the A330, and the A330 competes with the 787 and 777, and the 787 and 777 compete with the A350XWB, they must all be in the same market, even if there is little direct competition between models at the extreme ends of the spectrum".[2264]

6.1333. The European Union rejects the United States' submissions, arguing that the analysis conducted and conclusions reached in the Sanghvi Declaration are "severely flawed" for a number of reasons. First, the European Union maintains that the sources of evidence and information examined in the Sanghvi Declaration were "cherry-picked by Boeing counsel", unrepresentative and uninformative with respect to the nature of competition between the relevant aircraft, implying that they cannot be used to draw any "useful", "robust and meaningful" conclusions about market definition.[2265] Second, the European Union criticizes the analysis contained in the Sanghvi Declaration because of its alleged failure to reveal the criteria used to determine that two or more LCA products "appeared competitively" in the evidence under review. Moreover, the European Union submits that merely stating that two or more aircraft may have "appeared competitively" is insufficient to establish the strength of the competitive relationship between those products so as to enable a determination of whether they exercise significant competitive constraints on each other and, therefore, should be considered to fall within the same product market.[2266] Third, the European Union submits that the application of the "chains of substitution" theory "is not conceptually sound where, as in the LCA industry, prices are set with respect to individual customers through the process of bargaining (in contrast to markets with posted

[2260] United States' response to Panel question No. 49, para. 153 (citing Sanghvi Declaration, (Exhibit USA-530), paras. 36-38 and quoting Notice on Market Definition, (Exhibit USA-551), para. 57).

[2261] While acknowledging that substitution patterns "are measured by the cross-price elasticity of demand" when studied quantitatively, the Sanghvi Declaration asserts that the "market for LCA simply does not present us with a large set of data as do consumers' purchases of consumer packaged goods, where thousands or even millions of sales are individually tracked with all pertinent pricing and geographic information". Thus, in the light of the "highly complex, 'lumpy' purchases that are made infrequently, for delivery over many years" and the "multiple dimensions" of an LCA consumer's purchase decision, including the "subtle, unobserved, linkages across those dimensions that are idiosyncratic to each customer and model family and each point in time", the Sanghvi Declaration concludes that "one cannot perform reliably the types of econometric cross-price elasticity estimation that are often performed in competition analysis". (Sanghvi Declaration, (Exhibit USA-530), paras. 42 and 61). See further our own discussion of the challenge of performing meaningful quantitative analyses of demand for LCA products above, at paras. 6.1185-6.1189.

[2262] Sanghvi Declaration, (Exhibit USA-530), para. 65; "Examples in evidence of LCA Modern Competition, tables 1, 2 and 3" from Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013, (Exhibit USA-559) (HSBI), table 3. The Sanghvi Declaration also presents its conclusions by individual models (in table 2), finding direct competitive relationships to exist between: (a) the 767 and the "A330 and the A330-200"; (b) the A330, the "777, 777-200, 787 and 787-7"; (c) the 777 and the "A330-300, the A350-1000, and the A350XWB"; (d) the 777-200 and the A350-900; and (e) the 787-8 and the A350XWB-800.

[2263] Sanghvi Declaration, (Exhibit USA-530), para. 61.

[2264] United States' response to Panel question No. 61.

[2265] European Union's comments on the United States' response to Panel question No. 50, paras. 316-319; Sevy Declaration, (Exhibit EU-395), paras. 84-93.

[2266] European Union's comments on the United States' response to Panel question No. 50, paras. 321-326; and Sevy Declaration, (Exhibit EU-395), para. 86.

prices)".[2267] Drawing from the opinion expressed in the Sevy Declaration, the European Union explains that:

> {A} "chain of competition" works in markets with posted prices because, as "long as two products have an important (potential) customer overlap, it is expected that their prices will be related, through competition for overlapping customers". In other words, "if product A has a large customer overlap with product B, and B has a large customer overlap with product C", then one does not need to establish an overlap between the customers of A and C to reasonably assume a relationship between the prices charged {for} A and the prices charged {for} C, because those prices are "mediated by the price of product B, which applies jointly and similarly to all customers, including the ones overlapping with A and the ones overlapping with C" … .
>
> The same relationships do not apply in the LCA markets, however. Dr. Sevy explains that, *because prices are set individually in each transaction*, prices charged for B to customers which also buy A may have no relationship to prices charged for B to customers that also buy C. One cannot assume that prices will be overlapping or interdependent along the chain from A to B to C, and without confidence regarding this interdependence, the chain of substitution breaks down.[2268] (emphasis original; footnotes omitted)

6.1334. Finally, the European Union dismisses the conclusions reached in the Sanghvi Declaration, arguing that they are arrived at without any explanation of a methodology or basis to "draw lines between stronger competitive relationships that place products in the same market, and weaker relationships that are insufficient to do so". Thus, according to the European Union, if the logic of the "chains of substitution" theory as applied in the Sanghvi Declaration were applied to *all* LCA products, there would be grounds to find that there is only one LCA product market, rather than the three markets proposed by the United States. Specifically, the European Union argues that "by consistently applying his own assumptions and methodology to single-aisle and very large aircraft … Dr. Sanghvi {would be led} to conclude that single-aisle LCA and so-called 'very large aircraft' 'appear competitively' with twin-aisle LCA, and are thus within the same 'chains of substitution'".[2269]

6.1335. We are not convinced that the "chains of substitution" analysis presented in the Sanghvi Declaration is sufficiently robust to demonstrate that all five families of Airbus and Boeing LCA impose pricing constraints on each other. In order to accept the conclusions stated in the Sanghvi Declaration, one would have to be satisfied that a degree of pricing interdependence will always exist between the aircraft situated at either end of the "chains of substitution". Thus, for example, one would have to consider that the alleged pricing constraints imposed by the 767 on the A330 would generally be reflected in the pricing of the A330 in competitions against other Boeing LCA. However, as explained in *both* the Sevy Declaration and the Sanghvi Declaration, as well as the Mourey Statement and the Bair Declaration, pricing for LCA is determined through a process of bi-lateral bargaining between LCA suppliers and customers, with net prices, in particular, being highly confidential. Moreover, because of the important role that non-price factors may play in a potential customer's assessment of the economic value of a particular aircraft package, the net price that Airbus and Boeing will be prepared to offer for the same model of LCA is likely to vary between different customers, depending upon the extent to which they are able to satisfy the relevant customer's demands that are not price-related. Ultimately, therefore, the net price of an Airbus or Boeing LCA will be a function of the specific circumstances of a particular sales campaign and negotiation.

6.1336. Returning to the above example, our observations in relation to the "chains of substitution" analysis imply that the fact that Airbus may have offered the A330 at a certain price in a competition with the 767 does not *necessarily* mean that Airbus will offer the same A330 for the same price in a different competition with other Boeing aircraft. Indeed, the very nature of

[2267] European Union's comments on the United States' response to Panel question No. 50, paras. 327-335.

[2268] European Union's comments on the United States' response to Panel question No. 50, paras. 329-330 (quoting Sevy Declaration, (Exhibit EU-395), paras. 99-104).

[2269] European Union's comments on the United States' response to Panel question No. 50, paras. 336-343; and Sevy Declaration, (Exhibit EU-395), paras. 108-115.

price formation in the LCA industry is such that one cannot simply assume there is price interdependence between the extremities of any "chains of substitution". Rather, as emphasized in the European Commission's Notice on Market Definition:

> From a practical perspective, the concept of chains of substitution has to be corroborated by actual evidence, for instance related to price interdependence at the extremes of the chains of substitution, in order to lead to an extension of the relevant market in an individual case. Price levels at the extremes of the chains would have to be of the same magnitude as well.[2270]

6.1337. Thus, while a "chains of substitution" analysis may be a useful tool for identifying relevant product markets in a world of differentiated products, it is difficult to attribute anything more than only very low probative value to the exercise performed in the Sanghvi Declaration, in the absence of any evidence of price interdependence between the ends of the "chains of substitution" the United States asks us to accept. Ultimately, not unlike other methods of determining the demand-side substitutability of different Airbus and Boeing aircraft, the application of a "chains of substitution" analysis in the LCA sector suffers from the same significant methodological and data challenges (including with respect to the availability of reliable pricing information) that make producing accurate and reliable quantitative evidence of demand-side substitutability between different aircraft a formidable task.[2271]

6.1338. As it did in response to the United States' allegations concerning the existence of one single product market comprising of all Airbus and Boeing single-aisle aircraft, the European Union presents a number of NPV comparisons of different combinations of the five families of Airbus and Boeing twin-aisle offerings, arguing that they demonstrate that the United States' twin-aisle product market theory cannot be sustained. The Supplemental Mourey Statement performs eight such comparisons: one each between the A330-200 and the 767-300ER, and the A330-200 and the 787-8; and two each between the A330-300 and the 787-9, the A330-200 and the 777-200ER, and the A330-300 and the 777-200ER.[2272] According to the European Union, the results of these NPV comparisons reveal that "for many of the aircraft that the United States claims exercise significant competitive constraints on one another, price cannot realistically offset the differences in cost and revenues of operating the aircraft".[2273] Thus, the European Union argues that the NPV analyses set out in the Supplemental Mourey Statement confirm the absence of "any real competitive relationship, or significant competitive constraints" between: (a) the 767 and any Airbus (or Boeing) LCA; (b) the 787 and the A330; and (c) the 777 and the A330.[2274]

6.1339. The United States criticizes the European Union's NPV comparisons on the following four main grounds: (a) that they fail to account for aircraft *prices* and a number of *non-price factors* that regularly drive an airline's purchase decision; (b) that they apply certain operating *assumptions* that favour one or another manufacturer's LCA products without explanation or justification; (c) that they are conducted for *limited pairings* of aircraft only; and (d) that they ignore the fact that the LCA market has already been *distorted* by the subsidies at issue in this proceeding.[2275] The first, third and fourth of these alleged shortcomings are essentially the same as those advanced by the United States in response to the European Union's reliance on the NPV comparisons of the A320ceo and the A320neo. The European Union's response to the same three lines of criticism, as they relate to the existence of the alleged twin-aisle LCA product market, mirrors that which we have described elsewhere in this Report.[2276] We therefore incorporate our prior discussion and evaluation of the parties' arguments on these three points *mutatis mutandis* into this section of our Report, and proceed to examine the merits of the exchange of views concerning the operating assumptions used in the relevant NPV comparisons of the different pairings of twin-aisle aircraft.

6.1340. The United States' main objection to the *assumptions* used in the Supplemental Mourey Statement to generate the relevant NPV outcomes is that they reflect a set of customer

[2270] Notice on Market Definition, (Exhibit USA-551), para. 58.
[2271] See above paras. 6.1181-6.1189 and 6.1205.
[2272] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 32-63.
[2273] European Union's second written submission, para. 633.
[2274] European Union's second written submission, paras. 633-643.
[2275] United States' response to Panel question No. 61, paras. 205-225.
[2276] See above paras. 6.1257-6.1259 and 6.1275.

preferences that are very near to the optimized operating conditions for one or another of the two manufacturer's aircraft. While the United States accepts that customers whose preferences closely align with those conditions will view the relevant aircraft more favourably on a non-price basis, the United States asserts that "other customers (or even the same customer when considering other parts of its fleet network) will find themselves preferring a range of features that is in between available models". According to the United States, such other customers will view the NPV gap between models very differently, reducing the level of pricing concession required for the less favoured aircraft to offset the feature disadvantage, or in some cases even reversing which LCA model is most preferable.[2277]

6.1341. Thus, the United States submits that the results of the four NPV comparisons undertaken for the two pairs of A330 and 777 are simply a function of the particular assumptions used in respect of passenger demand and route distance. In the cases where the A330-200 and the A330-300 have a superior NPV over the 777-200ER, the United States maintains it is because the passenger demand and route assumptions applied in the analysis favour the particular characteristics of the A330, which has a smaller passenger capacity and shorter maximum flying range compared to the 777-200ER. On the other hand, the United States argues that in the situations when the 777-200ER has the NPV advantage, it is because the particular assumptions used in relation to passenger demand and routes are much closer to the larger carrying capacity and longer flying capabilities of the 777. The United States points out that these examples ignore the possibility that different customers may project demand somewhere in between the assumptions used in the Supplemental Mourey Statement, or that customers might want to use an aircraft for a shorter route now, but a longer route in the future. For these customers, the United States argues that the NPV gap will be different and, indeed, there will be a point where, in the light of the particular customer requirements, the NPVs may well be identical.[2278] The United States makes similar observations in relation to the NPV comparison of the A330-200 with the 767-300ER, arguing that the A330's advantage is a function of the passenger demand assumptions. According to the United States, this advantage is reversed when a different set of credible assumptions are used.[2279]

6.1342. The European Union responds to the United States' criticism by arguing that the analyses set out in the Supplemental Mourey Statement were "designed to compare NPVs generated by a pair of aircraft in performing *missions typically demanded by such aircraft*", that is, "missions for which such aircraft are routinely and typically operated".[2280] Moreover, according to the European Union, "aside from hypothesizing that there must be customers with" different needs, the United States offers no justification for its assertion that the results of the NPV comparisons are of little use to identifying relevant product markets because they do not explore the outcomes that would be generated on the basis of assumptions corresponding to other types of missions. In contrast, the European Union asserts that the assumptions applied in the Supplemental Mourey Statement are all carefully explained and justified. Thus, for example, the European Union asserts that the Supplemental Mourey Statement justifies the choice of applying a route assumption of 2400nm for the first of the two comparisons made between NPVs of the A330-200 and the 777-200ER on the grounds that it "is the average sector over which {the A330-200} is typically flown".[2281] Moreover, in the second comparison between the NPVs of these two aircraft, the assumptions are modified in order "to reflect typical missions for which the 777-200ER is preferred over the A330-200". Likewise, a route of 1800nm is used for one of the comparisons between the A330-300 and the 777-200ER "because this is the average sector over which {the A330-300} is typically flown".[2282] Yet again, the second comparison made between these two aircraft "considers a typical scenario in which the 777-200ER possesses a greater competitive advantage − where its greater performance at long haul ranges is put to use". Accordingly, the Supplemental Mourey Statement "'assum{es} a much longer 6000nm sector, typical of {the 777-200ER's} range

[2277] United States' response to Panel question No. 61, para. 216.
[2278] United States' response to Panel question No. 61, paras. 217-219.
[2279] United States' response to Panel question No. 61, para. 220.
[2280] European Union's comments on the United States' response to Panel question No. 61, paras. 457 (emphasis original) and 458.
[2281] European Union's comments on the United States' response to Panel question No. 61, para. 462 (citing Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 33 and 53).
[2282] European Union's comments on the United States' response to Panel question No. 61, para. 465 (citing Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 41).

advantage', and where 'the A330-300 is at the edge of its performance limits and therefore will be forced to trade payload/passenger capacity to reach the required range'".[2283]

6.1343. It is apparent from the European Union's own description of the methodology used to undertake the NPV analyses for the A330 and the 777 that the passenger demand and route assumptions were intended to mirror the *optimized operating conditions* with respect to which one of the two aircraft would generally be expected to have a competitive advantage over the other. It is not surprising, therefore, that the aircraft whose competitive advantage was reflected in the assumptions used in a particular comparison generated a superior NPV. The European Union argues that this approach makes sense because aircraft customers are "savvy" and "unlikely to consider an aircraft for a mission for which it lacks the appropriate performance and economics".[2284]

6.1344. We agree that it is unlikely that an aircraft customer will be interested in exploring the economics of an aircraft that obviously cannot service the range of missions it operates or would like to operate. However, in our view, to accept that the differences in NPVs of the A330 and 777 when performing *optimized missions* demonstrates that the two aircraft do not impose competitive constraints on each other would be akin to finding that only two types of customers are presently interested in considering the two aircraft − either: (a) customers looking for an aircraft to move a relatively large number of passengers over relatively long routes (who would favour the 777); or (b) customers wanting an aircraft to fly a smaller number of passengers on medium-haul routes (who would choose the A330). For the reasons we have already set out above, we find the European Union's position to be overly simplistic and at odds with even its own description of the core features of aircraft demand.[2285] In any case, to the extent that other factors such as price, delivery date and fleet commonality will invariably play an important role in a potential customer's evaluation of the economic significance of a particular aircraft to its business, merely showing that an LCA will have an NPV advantage over another on the basis of the assumptions applied in the Supplemental Mourey Statement would not, in our view, be enough to demonstrate the absence of demand-side substitutability between the two aircraft.

6.1345. Thus, not unlike our conclusions with respect to the NPV analyses presented for the purpose of showing that the A320neo and A320ceo do not exercise competitive constraints on each other, we find that the NPV comparisons presented in the Supplemental Mourey Statement for the eight relevant pairings of Airbus and Boeing twin-aisle LCA fail to demonstrate the absence of "any real competitive relationship, or significant competitive constraints" between: (a) the 767 and any Airbus (or Boeing) LCA; (b) the 787 and the A330; and (c) the 777 and the A330. In our view, in the light of the observations and findings we have made in this and the previous subsection of our Report, all that the NPV analyses ultimately demonstrate is that *excluding price, fleet commonality, delivery date and other non-price factors* that might be potentially relevant to a customer's purchase decision, one of the two twin-aisle LCA compared in seven of the eight analyses will have an NPV advantage over the other because of its superior performance on missions for which that aircraft has been specifically designed.[2286] However, for the reasons we have already explained, we are not convinced that such an advantage would be alone enough to demonstrate that the aircraft with the inferior NPV does not impose any competitive constraints on the other.

Sales campaigns

6.1346. The United States argues that the existence of the alleged competitive relationships between the A330 and the 787, and the A330, A350XWB and the 777, are also substantiated by the HSBI and other evidence it has introduced revealing Boeing's offers and strategic considerations, as well as the requests made by certain customers, in a number of sales

[2283] European Union's comments on the United States' response to Panel question No. 61, para. 466 (quoting Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 59).
[2284] European Union's comments on the United States' response to Panel question No. 61, para. 458.
[2285] See above paras. 6.1311-6.1322.
[2286] One of the comparisons shows how the NPV of the A330-200 will be greater than that of the 787-8 when the latter is delivered five years after the former, thereby allegedly showing how delivery dates may be decisive in a particular customer's decision to purchase a current generation twin-aisle aircraft (the A330 or the 777) *instead* of a better performing new generation twin-aisle aircraft (the A350XWB or the 787). (Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 45-48)

campaigns.[2287] The particular twin-aisle sales campaigns the United States refers to involved four airlines, resulting in: (a) US Airways ordering 92 Airbus aircraft, including 22 A350XWB-800s, 60 A320 family aircraft and ten A330-200s, in 2007; (b) TAM ordering 22 A350XWBs and four A330-200s in 2008; and (c) Cathay Pacific Airlines ordering 30 A350XWBs and 15 A330-300s between 2010 and 2011.[2288] The United States finds additional support for its position in HSBI evidence of Boeing's commercial considerations in two sales campaigns conducted in 2010 involving Thomas Cook (for single-aisle aircraft) and Malaysia Airlines (for twin-aisle aircraft).[2289]

6.1347. The European Union questions the probative value of the United States' sales campaign evidence for a number of reasons. First, while recognizing that the results of any sales campaign will reflect a particular customer's preferences between aircraft, the European Union submits that this does not necessarily mean that all of the aircraft considered by that particular customer are equally substitutable and, therefore, within the same product market. The European Union emphasizes that before coming to any conclusions about the demand-side substitutability of two or more aircraft offered for consideration in a particular sales campaign, it would be necessary to conduct a detailed examination of the underlying reasons for a purchase decision so that the competitive dynamic between the relevant products may be evaluated in its proper context. Thus, the European Union argues that sales campaign evidence must be considered cautiously, and ultimately used "solely as confirmation of a product market delineation made on the basis of other, including quantitative, evidence" because, on its own, evidence showing that two aircraft were offered in a sales campaign is legally and factually insufficient to establish general demand-side substitutability.[2290] Second, to the extent that the evidence the United States relies upon reveals only Boeing's view of the alleged competitive dynamics of a particular sales campaign, the European Union argues that it is "irrelevant" and "uninformative" for the purpose of establishing *demand-side substitutability* because it provides no indication of the perspective held by customers.[2291]

6.1348. In our view, evidence showing that Airbus and Boeing presented or formally offered one or more LCA products for consideration in a particular sales campaign will be highly relevant to our task of determining the existence of relevant product markets. As sophisticated players with long-standing experience in working with, understanding, influencing and anticipating, the needs of potential customers in an industry that has been an effective duopoly for at least a number of decades, it is difficult to believe that Airbus or Boeing would go to the expense of participating in a sales campaign if either company did not believe it had a reasonable chance of convincing a customer to purchase its own LCA products ahead of those of its rival or, at the very least, imposing some level of competitive constraint on its rival's offering. Indeed, in the light of these and other particular conditions of competition in the LCA industry, we found in the original proceeding that one would expect competition between Airbus and Boeing aircraft to exist even in situations where both manufacturers *do not make* or *are not requested to make* any formal offers:

> Given the importance of LCA costs to the customers' successful operations, we cannot accept the implication that customers knowledgeable about the market would not consider the competitive products available from the two producers in most cases, even if formal offers are neither requested nor made in a particular instance.[2292]

6.1349. We recall that the Appellate Body relied upon these factual findings to dismiss the European Union's appeal against the original panel's conclusion that an order for A380s made by Emirates Airlines in 2000 constituted "lost sales" to the United States' LCA industry,

[2287] United States' response to Panel question Nos. 49, 50 and 55.

[2288] United States' response to Panel question Nos. 49, 50, 67 and 68; **[[**HSBI**]]** Exhibit USA-204 (HSBI); EADS Press Release, "TAM airlines orders 20 A320 Family and five A350-900 aircraft", 8 June 2010, (Exhibit USA-210); **[[**HSBI**]]** Exhibit USA-213 (HSBI); **[[**HSBI**]]** Exhibit USA-219 (HSBI); EADS Press Release, "Malaysia Airlines orders 17 A330s", 31 March 2010, (Exhibit USA-238); Malaysia Airlines Press Release, "MAS and Airbus sign MOU for orders of up to 25 A330-300s", 22 December 2009, (Exhibit USA-239); **[[**HSBI**]]** Exhibit USA-370 (HSBI); **[[**HSBI**]]** Exhibit USA-527 (HSBI); **[[**HSBI**]]** Exhibit USA-533 (HSBI); and **[[**HSBI**]]** Exhibit USA-538 (HSBI).

[2289] United States' response to Panel question Nos. 49 and 50; **[[**HSBI**]]** Exhibit USA-534 (HSBI); and **[[**HSBI**]]** Exhibit USA-537 (HSBI).

[2290] European Union's response to Panel question No. 55, paras. 259 and 264; and European Union's comments on the United States' response to Panel question No. 53.

[2291] European Union's comments on the United States' response to Panel question No. 63 (HSBI).

[2292] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1722.

notwithstanding the absence of any formal aircraft offer having been made on the part of Boeing. In particular, the Appellate Body understood the original panel's factual findings to mean that, given "the conditions of competition in the LCA industry, it was not necessary for Boeing to have made a formal offer to Emirates Airlines – or 'turn up' to use the European Union's expression – for sales to qualify as sales that Boeing 'failed to obtain'" as "even in the absence of a formal offer from Boeing, Emirates could be expected to have considered products manufactured by Boeing before making its purchase decision".[2293] Thus, as we see it, evidence that both Airbus and Boeing *actually did participate* in the same sales campaign should, *a fortiori*, be interpreted to strongly suggest that the relevant customer's ultimate purchase decision would have been informed by its consideration of the relative strengths and weaknesses of both companies' aircraft compared to its own needs – in other words, evidence that, at the very least, would tend to support a finding that the products in question were in competition with each other for the relevant customer's sales.

6.1350. Similarly, while we accept that Boeing's views about the degree of competition that exists between its own aircraft and those offered by Airbus in a particular sales campaign cannot, alone, demonstrate the existence of *demand-side substitutability*, we consider that such views, when expressed in the context of analyses and/or statements made contemporaneously with a particular sales campaign, will be highly relevant to our task of identifying relevant product markets. Indeed, as already noted, the European Commission regularly takes such evidence into account in its own product market determinations in competition cases.[2294] Thus, we do not agree with the European Union when it argues that such evidence is "irrelevant" and "uninformative" to the analysis that must be performed.

6.1351. Turning to the specific sales campaigns, the European Union submits that, when properly interpreted, the HSBI evidence presented by the United States in relation to the US Airways, TAM and Malaysia Airlines campaigns demonstrates that the respective aircraft offered by Airbus and Boeing *are not* in the same product market. Because the substance of the parties' submissions concerning these sales campaigns is HSBI, it cannot be disclosed in this Report. Nevertheless, the crux of the European Union's argument is that the United States' evidence shows that even according to Boeing, the aircraft offered by Airbus and Boeing in these three sales campaigns generated substantially different NPVs for the relevant customers, which the European Union maintains is "hardly evidence" that the relevant product pairings are in the same product market.[2295]

6.1352. Likewise, the European Union argues that the evidence the United States has introduced in relation to the Cathay Pacific sales campaigns confirms that availability and operating cost differences between the relevant aircraft demonstrate that they are in separate product markets. Moreover, the European Union submits that the aircraft offered by Airbus and Boeing were evaluated by Cathay Pacific for the purpose of fulfilling *different* requirements as well as "to improve {Cathay Pacific's} leverage over the LCA manufacturers". The European Union also argues that the United States' evidence is contradicted by "all other evidence of the competitive dynamics in the sales campaign".[2296]

6.1353. Finally, the European Union submits that the United States misrepresents the contents of the HSBI evidence pertaining to the 2010 sales campaign involving Thomas Cook, asserting that it fails to demonstrate that *all* of the aircraft referred to by the United States were considered to be potential substitutes, but only Airbus and Boeing new generation aircraft.[2297]

6.1354. In October 2007, US Airways signed a contract to purchase 92 aircraft from Airbus, including 22 A350XWB-800s, 60 A320 family aircraft and ten A330-200 aircraft.[2298] The evidence submitted by the United States reveals that Boeing had offered US Airways one of the twin-aisle aircraft which the European Union argues does not compete with one of the two Airbus twin-aisle

[2293] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1223.

[2294] See above para. 6.1207.

[2295] European Union's comments on the United States' response to Panel question No. 63, paras. 490, 494, and 496 (HSBI).

[2296] European Union's comments on the United States' response to Panel question Nos. 63 (HSBI), 67, and 68; and second written submission, paras. 1352-1359.

[2297] European Union's comments on the United States' response to Panel question No. 63 (HSBI).

[2298] EADS Press Release, "US Airways firms up order for 92 Airbus aircraft: order includes 33 A350 XWBs", 5 October 2007, (Exhibit USA-201).

aircraft eventually ordered.[2299] Boeing's internal assessment of the NPVs offered by both aircraft showed that **[***]**.[2300] The European Union does not deny that Boeing participated in this sales campaign with the aircraft in question. However, according to the European Union, the NPV **[***]** demonstrates that the customer could not have considered both aircraft to be credible competitors for the sales. We are not convinced by the European Union's submissions.

6.1355. First, it is apparent that the HSBI evidence showing the NPV comparison was an internal document prepared by Boeing specifically for the purpose of informing its business decisions concerning the US Airways sales campaign. It is difficult to understand why Boeing would have wanted to make such a comparison if it did not believe that it had some relevance to the particular competition with Airbus in the US Airways sales campaign. This, of course, implies that Boeing must have considered that the same comparison would have been at least a potentially relevant consideration for the customer too. Second, it is accepted by both parties that the size of an aircraft's NPV advantage over another will vary (and, indeed, may sometimes reverse) depending upon the assumptions used in the calculation. This suggests that Boeing's assessment of the NPV **[***]** could only reflect the true competitive distance between the two products, if it accounted for all of the price and non-price factors expected to inform the US Airways' purchase decision. It is apparent, however, that this was not the case. Third, and as already explained, given the differentiated nature of LCA products, the simple fact that one aircraft may have a **[***]** NPV advantage over another does not necessarily preclude the possibility that the two aircraft may be competitors. Such an advantage may simply reflect the fact that the specific characteristics of one particular aircraft are a better match for a customer's needs, making it the superior choice *in the competition to win the relevant customer's sales*. Accordingly, to the extent that the HSBI evidence submitted by the United States reveals what Boeing's *actual* commercial considerations were at the time of the US Airways sales campaign, we find that it supports the contention that the twin-aisle aircraft presented by Airbus and Boeing compete in the same product market.

6.1356. TAM Linhas Aéreas ordered 22 A350XWBs and four A330-200s in January 2008.[2301] The HSBI evidence introduced by the United States consists of six pages of an internal presentation made by Boeing for the purpose of informing and devising its initial offer in this sales campaign. A number of pages in this presentation reveal how Boeing identified the key opportunities and defined the core of its campaign strategy by *inter alia* highlighting how different aircraft from two of its three families of twin-aisle LCA could compete against two families of Airbus twin-aisle aircraft. The same presentation also generated NPV comparisons under two different sets of assumptions for two pairings of Airbus and Boeing aircraft (which the European Union argues do not compete in the same product market) showing, **[***]**.[2302] Similarly, the HSBI evidence presented by the United States in respect of the 2010 Malaysia Airlines sales campaign reveals that Boeing considered that, under certain assumptions, its own twin-aisle offering would **[***]** the relevant Airbus aircraft (which the European Union argues does not compete in the same product market as the Boeing aircraft).[2303]

6.1357. Again, the European Union maintains that the disparity in the NPVs of the different aircraft presented in the United States' Exhibits demonstrates that the relevant product pairings do not compete in the same product market. However, for the same reasons expressed above, we are not persuaded by the European Union's arguments.[2304] In our view, the evidence presented in both the HSBI Exhibits relating to the TAM Linhas Aéreas and Malaysia Airlines sales campaigns supports the United States' submission that the relevant Airbus and Boeing LCA were competing for the same customer sales.

6.1358. In **[***]**, Cathay Pacific **[***]**. One of the HSBI documents the United States relies upon is an extract of **[***]**. This document explicitly states that **[***]** two families of Boeing

[2299] James Wallace, "Boeing seeking prize US Airways order", *Seattle Post*, 14 May 2007, (Exhibit USA-205); Daniel Michaels, L. Lynn Lunsford and Melanie Trottman, "Airbus seals US Airways order, in a big boost for A350 jetliner", *The Wall Street Journal*, 18 June 2007, (Exhibit USA-206); and **[[**HSBI**]]** Exhibit USA-533 (HSBI).

[2300] **[[**HSBI**]]** Exhibit USA-533 (HSBI).

[2301] EADS Press Release, "Brazilian carrier TAM to acquire 22 A350 XWBs and four additional A330-200s", 29 June 2007, (Exhibit USA-208).

[2302] **[[**HSBI**]]** Exhibit USA-538 (HSBI), pp. 2-6.

[2303] **[[**HSBI**]]** Exhibit USA-537 (HSBI), p. 2.

[2304] See above para. 6.1355.

twin-aisle aircraft and two families of Airbus twin-aisle aircraft in combinations which, according to the European Union, do not compete with each other in the same product market.[2305] A very similar presentation, also showing that **[***]**.[2306] In response **[***]**, Boeing offered the LCA that **[***]**, and conducted an analysis of the various strengths and weaknesses of its proposals *vis-à-vis* the relevant Airbus aircraft. The same analysis reveals that Boeing examined the NPVs of one particular pairing of Airbus and Boeing twin-aisle LCA (which the European Union argues do not compete in the same product market), showing that the Boeing aircraft **[***]**.[2307]

6.1359. According to the European Union, this evidence does not demonstrate that the relevant twin-aisle aircraft were in competition with each other because, at least as regards the A350XWB and the 777-300ER pairing, the European Union maintains that Cathay Pacific evaluated the two aircraft for different requirements. The European Union finds support for this assertion in the fact that Cathay Pacific ordered *both* the A350XWB and the 777-300ER in 2010.[2308] The European Union argues that the 777-300ER was ordered "because it met the airline's need for early delivery positions", with the A350XWB being ordered for later delivery when it would become available. Additionally, the European Union argues that **[***]** demonstrates that the two aircraft cannot compete "on this basis".[2309]

6.1360. In our view, the HSBI evidence submitted by the United States very clearly and explicitly demonstrates that Cathay Pacific was interested in considering different combinations of Airbus and Boeing twin-aisle LCA which the European Union argues do not compete in the same product market. While the HSBI evidence reveals that, like other customers, Cathay Pacific was interested in acquiring a specific number of aircraft over a range of different delivery windows, we do not see this to imply that Cathay Pacific intended to consider the relevant combinations of Airbus and Boeing LCA **[***]** for *different requirements*. Rather, the evidence suggests that Cathay Pacific was interested in seeing what combinations of aircraft each producer could offer to meet its delivery preferences. Thus, as we have already explained, the fact that one aircraft may have been chosen over one or more others because of its *availability* reflects its competitive advantage, not its position in a "temporal monopoly" market.

6.1361. Finally, the United States argues that HSBI evidence pertaining to an offer made by Boeing to Thomas Cook in 2010 shows that one pairing of twin-aisle aircraft which the European Union asserts do not place competitive constraints on each other, actually do compete in the same product market. The evidence the United States relies upon is a two-page extract from an internal Boeing presentation, the cover page of which suggests that it concerns an offer made by Boeing of *single-aisle aircraft*. The second page of the United States' exhibit (numbered page eight of the presentation) sets out Boeing's assessment of the value of one of its models of twin-aisle aircraft compared with existing Airbus and Boeing twin-aisle aircraft flown by Thomas Cook.[2310] The European Union argues that the United States misrepresents the contents of this evidence, which according to the European Union shows that the only Airbus and Boeing twin-aisle aircraft in actual competition were those that the European Union accepts impose competitive constraints on each other.[2311] In our view, the HSBI evidence suggests that Boeing expected there to be a sales opportunity for twin-aisle aircraft with Thomas Cook sometime in the near future, and that for this purpose, Boeing had identified its main competitor to be an Airbus aircraft which the European Union accepts falls within the same product market as the relevant Boeing aircraft. While there is discussion of other Airbus and Boeing twin-aisle LCA, it is apparent that this is not for the purpose of identifying the aircraft that are expected to compete for the future sales opportunity. Accordingly, we do not see this evidence to demonstrate that Boeing considered that Thomas Cook would be interested in more than one pair of Airbus and Boeing twin-aisle aircraft for the purpose of the sales campaign expected in the future. Nevertheless, the evidence does show (once again) the important role that technological innovation plays in a customer's choice of aircraft and, therefore, ultimately, the competition between Airbus and Boeing for sales.

[2305] **[[**HSBI**]]** Exhibit USA-527 (HSBI), pp. 3-4.
[2306] **[[**HSBI**]]** Exhibit EU-255 (HSBI).
[2307] **[[**HSBI**]]** Exhibit USA-536 (HSBI).
[2308] Cathay Pacific Press Release, "Cathay Pacific signs agreement with Boeing to purchase six more 777-300ER aircraft", 21 September 2010, (Exhibit EU-252).
[2309] European Union's comments on the United States' response to Panel question Nos. 63 and 68 (HSBI); and **[[**HSBI**]]** Exhibit EU-256 (HSBI).
[2310] **[[**HSBI**]]** Exhibit USA-534 (HSBI).
[2311] European Union's comments on the United States' response to Panel question No. 63 (HSBI).

Conclusion with respect to the alleged product market for twin-aisle LCA

6.1362. We recall that the parties' disagreement about the existence of one single product market for the five families of twin-aisle LCA is grounded on differences of views concerning: (a) the extent to which the new generation of technologically advanced Airbus and Boeing twin-aisle products compete with all others; (b) the extent to which the A330 and 777 are sold in their own separate "temporal" monopoly markets; and (c) the extent to which the 767 has any competitive relationship at all with the other four families of twin-aisle LCA. Our careful consideration of the parties' submissions and the evidence they have introduced leads us to conclude that the United States has demonstrated that, for the purpose of the serious prejudice disciplines of the SCM Agreement, all five families of Airbus and Boeing twin-aisle passenger aircraft may be considered to fall within the same product market. We come to this conclusion on the basis of the above considerations, which we summarize as follows.

6.1363. First, in terms of basic physical characteristics and end-uses, the five families of Airbus and Boeing twin-aisle LCA are, as a whole, able to satisfy a relatively broad spectrum of mission requirements starting with the regional routes serviced by the smaller 767 and A330 families of aircraft and ending with the larger capacity, long-haul, missions for which the bigger versions of the 777 and A350XWB were specifically designed. Compared with the high degree of commonality that exists between the physical attributes and end-uses of their single-aisle offerings, it is apparent that the five families of Airbus and Boeing twin-aisle aircraft exhibit greater differences, even as between models within the same family (e.g. the seating capacities of the 777-200LR vs 777-300ER or the A350XWB-800 vs A350XWB-1000). Nevertheless, within the range of potential customer needs that may be satisfied by the five families of LCA, there are notable overlaps, with six versions of four families (the A330-200, 777-200ER, A350XWB-900, 787-8, 787-9 and A350XWB-800) positioned relatively close to each other. This suggests that while the potential customer-base for Airbus and Boeing twin-aisle aircraft is likely to be more varied than the potential customer-base for their single-aisle aircraft, any individual customer is likely to have multiple combinations of relatively closely-matched Airbus and Boeing twin-aisle aircraft to choose from.

6.1364. Second, unlike the European Union, we do not consider the superior operating performance of the new generation of Airbus and Boeing twin-aisle aircraft compared with their current generation models signals that they are sold into separate product markets. While it is common ground that the A350XWB and the 787 will have a general operating cost advantage over existing models of Airbus and Boeing twin-aisle aircraft, it is equally accepted by both parties that the impact of this advantage on the aircrafts' respective NPVs will diminish and eventually reverse as, e.g. the delivery date of the new generation product is delayed relative to the current generation aircraft. Indeed, because of the important role that delivery considerations play in a potential customer's purchase decision, Airbus and Boeing will regularly compete with each other on the timing of the availability of their aircraft, including by "ramping up" production whenever possible and/or by offering "interim lift" solutions. Thus, rather than being an advantage that places the A330 and 777 in "temporary" product markets of their own, we see the relative near-term availability of both aircraft compared with the current, longer-term, delivery prospects for the A350XWB and the 787, as a "temporary" advantage with respect to *one* of the factors that customers interested in aircraft capable of performing the range of overlapping missions covered by the four families of LCA will take into account in their purchase decisions.

6.1365. Of course, the multi-faceted nature of aircraft demand means that non-price factors other than delivery terms (e.g. fleet commonality) might also serve to diminish the performance advantages of new generation aircraft over current generation aircraft, thereby creating more room for price discounting to play a greater role in a customer's purchase decision. In this respect, we recall that the European Union does not assert that the A330 does not compete at all with the 787, but only that "it is less able to compete" with the 787 when offered "with similar delivery timing" and "**[***]**". Likewise, the evidence we have reviewed concerning Airbus' original and ongoing sales and marketing expectations for the A350XWB suggests that Airbus anticipates that the A350XWB will have to compete with more than just the 787 in order to maximize sales, an expectation which we believe is confirmed in the sales campaign evidence we have reviewed to the extent that they reveal the presence of both generations of Airbus and Boeing twin-aisle aircraft. In our view, these and other considerations suggest that the 787 and the A350XWB do not merely face competitive constraints from each other, but also from other twin-aisle aircraft.

6.1366. Third, when it comes to the competitive relationship between the A330 and the 777, we see no merit in the European Union's submission that the two aircraft families do not impose any competitive constraints on each other to the extent that each one has an allegedly insurmountable NPV advantage over the other *when performing missions for which they were specifically designed*. As already noted, we have found the European Union's reliance on the NPV analyses conducted in the Supplemental Mourey Statement to be unconvincing for a number of reasons. To begin with, the allegedly insurmountable NPV advantages calculated for different aircraft in the Supplemental Mourey Statement are premised on either Airbus or Boeing passing on the full economic benefit of the operating cost advantage of one aircraft over another to the customer. Thus, for example, the allegedly insurmountable NPV advantage of the A330 over the 777 assumes that Airbus would pass on the full value of the operating cost advantage of flying the A330 on optimized missions over the 777 to the customer. In other words, the full amount of the allegedly insurmountable NPV advantage would exist only if Airbus chose not to capture all or part of it by raising prices.[2312] As pointed out in the Sanghvi Declaration, such an inability to raise prices implies competition. In any case, the conclusions the European Union draws from the NPV comparisons of the A330 and the 777 ignore the possibility that there may well be customers interested in exploring the economics of both aircraft for the purpose of a range of missions that are somewhere in between the missions for which they were specifically designed or, indeed, that any given customer will anticipate that the aircraft purchased will be used for a range of missions that may change over time. Likewise, because of the multi-faceted nature of aircraft demand, it cannot be excluded that the NPV advantage of the A330 over the 777 when flying optimized missions could be diminished (and perhaps even reversed) when non-price factors such as delivery terms and fleet commonality are taken into account. All of these considerations confirm what we believe is suggested in the marketing materials and sales campaign evidence we have reviewed, namely, that at least part of the potential customer base for both aircraft is likely to want to consider the economics of both aircraft, particularly as regards the A330-200 and the 777-200ER.

6.1367. Finally, we note that the evidence we have examined reveals that the competitive relationships between all five families of Airbus and Boeing twin-aisle aircraft have been constantly evolving, reflecting not only changing demand conditions but also the pace and nature of aircraft innovation. Thus, the introduction of the relatively fuel-efficient 787 at a time of increasing fuel prices drew interest away from existing, less-efficient, models of twin-aisle aircraft that would otherwise have been considered by potential customers, causing Airbus to respond with its own new generation aircraft, the A350XWB, which had a very similar impact on the market. Likewise, the improvements made to the A330 since it was launched have enhanced its competitive position *vis-à-vis* the 767 (once its main rival) as well as the 777 *and* the 787. However, in our view, to say that *every time* a newly introduced technologically advanced or more efficient aircraft wins sales against existing models means that it faces no competitive constraints from aircraft that were not chosen by those customers, would be incorrect and an oversimplification of the complicated dynamics of competition in the LCA industry.

6.1368. Airbus and Boeing invest in aircraft innovation precisely because they want to *win the competition* for sales against *existing models of LCA*. The multi-faceted nature of aircraft demand and the large number of sales that must be achieved in order to make a new aircraft programme successful, mean that Airbus and Boeing will generally endeavour to make those investments in aircraft that can satisfy multiple requirements for the purpose of meeting *aggregate demand*, suggesting that even the newest, most technologically advanced, aircraft are likely to face competitive constraints from existing models of LCA. In this competitive landscape, it is apparent that the oldest twin-aisle LCA, the 767, stands out as being, overall, the weakest competitor of all five families of Airbus and Boeing twin-aisle aircraft. Nevertheless, it is undisputed that the aircraft continues to win sales, albeit in small quantities and from relatively few customers.[2313] In the light

[2312] We recall that in the single-aisle segment, Airbus and Boeing have "shared" the operating cost advantages of the enhanced fuel efficiency of their new generation offerings by increasing their prices relative to current generation models by less than the full amount of the value of their operating cost advantages. As already explained, the fact that both manufacturers have not been able to capture the full amount of these benefits implies the existence of competitive constraints.

[2313] Data from the Ascend database indicates that in the six years from 2007 to 2012, Boeing sold a total of 75 767-300ERs to the following customers: LAN Airlines (Chile); ANA and Japan Airlines (Japan); Uzbekistan Airways (Uzbekistan); Azerbaijan Airlines (Azerbaijan); MIAT – Mongolian Airlines (Mongolia); Air Asthana (Kazakhstan); and one "unannounced commercial customer". (Ascend database, Boeing and Airbus Deliveries in Units 2001-2011, Commercial Operators, data request as of 13 January 2012, (Exhibit USA-112);

of what we know about the conditions of competition in the LCA industry, the fact that even a limited number of customers have chosen the 767 suggests that, under certain conditions, the 767 continues to be capable of imposing competitive constraints on other models of Airbus and Boeing twin-aisle LCA.[2314] Moreover, just as there are sales where the 767 has been successful, it is also likely that there will be sales where the 767 has not been purchased but where it might well have been considered and/or chosen by a customer, had the more modern aircraft not been presented. In these situations too, it is possible that the 767 will have imposed competitive constraints on the selected alternative.

6.1369. Ultimately, therefore, not unlike the competitive relationships existing between other versions of Airbus and Boeing twin-aisle LCA, the competitive relationship between the 767, as a stand-alone proposition[2315], and the four more modern families of Airbus and Boeing twin-aisle aircraft will differ in intensity depending upon the particular circumstances of a sales campaign or needs of the customer. Overall, however, it is apparent that apart from cases involving the smaller version of the A330, the 767 is likely to impose only relatively weak competitive constraints on the remaining versions of Airbus and Boeing twin-aisle aircraft, particularly the larger versions of the A350XWB and the 777 families. But, as we see it, the fact that the 767 is today a relatively weak competitor to its Airbus rivals, only confirms the strong competitive constraints which those aircraft have been able to impose on its ability to win sales, revealing the extent to which Airbus has the upper-hand in *the competition* with Boeing for certain sales. To find, in these circumstances, that the 767 should be considered to fall within its own separate product market would mean that we would be *legally* precluded to determine whether the cause of the 767's inability to win sales was any one or more of the subsidies the United States argues have brought about the market presence of *the very Airbus aircraft that impose those competitive constraints*. For the reasons already explained, we are unable to find any support for such an approach in the SCM Agreement.[2316]

6.1370. Thus, for all of the above considerations, and in the light of the totality of the evidence we have reviewed, we find that the United States has established that all five families of Airbus and Boeing twin-aisle LCA exercise differing but overall sufficient degrees of competitive constraints against each other such that they should all be considered to fall within the same product market for the purpose of the serious prejudice claims that it brings under the SCM Agreement.

The alleged market for very large passenger aircraft

6.1371. The United States argues that the A380 and the 747-8I compete in one and the same VLA product market. As the largest (although not identical) aircraft available in the market, the United States submits that the A380 and the 747-8I are imperfectly substitutable with each other as both may be used to cover essentially the same long-haul, slot-constrained and high passenger-demand missions.[2317] The European Union, however, submits that the A380 and the 747-8I are sold in two separate monopoly markets.[2318] In the European Union's view, the considerable differences that exist between these two LCA products, particularly as regards seating capacity and technologies, generate an insurmountable potential revenue and operating cost advantage in favour of the A380, thereby placing it in a different product market to the 747-8I.[2319]

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and Ascend database, Boeing and Airbus Deliveries in Units (2001-2013), Commercial Operators, data request as of 30 March 2014, (Exhibit USA-577))

[2314] We recall that the 767-300ER has the lowest list price of all Airbus and Boeing twin-aisle LCA, being approximately USD 50 million less expensive than the A330-300 (its nearest rival by maximum flying range) and approximately USD 30 million cheaper than the A330-200 (its nearest Airbus rival in terms of maximum seating capacity).

[2315] In considering whether the 767 should be found to fall within the same product market as other Airbus and Boeing twin-aisle LCA, we believe it is important to recall that LCA purchases can involve multiple models of LCA in bundled aircraft sales, in which case, other factors may come into play, bringing the combination of one or more 767s with other Boeing LCA into a stronger competitive position than would be the case if the 767s were presented in a competition on their own.

[2316] See above paras. 6.1209-6.1211.

[2317] United States' second written submission, para. 492; and response to Panel question Nos. 50 (para. 156), 52 (para. 166) and 63 (para. 247).

[2318] European Union's first written submission, para. 621.

[2319] European Union's first written submission, paras. 620-633.

6.1372. As with their previous discussions on market definition, the parties' arguments with respect to the degree of competition between the A380 and the 747-8I have focused on *demand-side substitutability*.[2320] In particular, the debate has centred on the extent to which: (a) the physical and performance characteristics, end-uses and customers of the A380 and 747-8I; (b) the existence and nature of any pricing constraints between the two LCA products; and (c) the evidence concerning a number of sales campaigns, demonstrate that the A380 and 747-8I are sufficiently substitutable from the customer's perspective to consider them to fall within the same product market. We explore the merits of the parties' arguments regarding each one of these three areas of discussion in the following sub-sections.

Physical and performance characteristics, end-uses and customers

6.1373. The following table contains the information provided by the parties in relation to some of the basic physical and performance characteristics of the A380 and the 747-8I:

Table 18: Basic physical and performance characteristics of Airbus and Boeing VLA[2321]

Model	Typical Seats (Airbus / Boeing)	MTOW (t) (Airbus / Boeing)	Max Range (nm) (full capacity) (Airbus / Boeing)	Length (m)	Wing Span (m) (Airbus / Boeing)	2011 List Price (USD M)
A380-800	525 / 555	560 / 633.9	8,500 / 7,870	72.72 / 72.70	79.75 / 79.80	375.3
747-8I	405 / 467	447.7 / 493.5	7,600 / 7,760	76.30	68.50	332.9

6.1374. When considered in the light of the information presented in Tables 16 and 17, the data in Table 18 show that the A380 and 747-8I are the largest civil aircraft produced by both manufacturers. Although the dimensions of these two LCA products are not identical, the lengths of their bodies are very close and wing spans similar. The A380 is a larger aircraft than the 747-8I, with its seating capacity spreading over two full decks, whereas the 747-8I has an upper deck that extends only part of the way along the length of its body. Reflecting its greater overall size and passenger carrying capacity[2322], the A380 has a noticeably higher MTOW. Moreover, based on the data provided by the European Union, the A380 is also able to fly up to 900nm further than the 747-8I. However, according to the United States, the maximum flying range of the A380 is only 110nm greater than that of the 747-8I.

6.1375. As already noted, Boeing launched the 747-8I in 2005 in response to Airbus' launch of the A380 in 2000.[2323] The 747-8I is one of several derivatives of the original 747-100, which was launched in 1966. It has a larger fuselage compared with the 747-400, with new engines and wings.[2324] As a derivative aircraft, the 747-8I was granted an Amended Type Certificate, which limits the extent of the modifications that can be incorporated into its design.[2325] The 747-8I has a lower overall per trip fuel-burn and greater cargo capacity than the A380.[2326] However, the A380

[2320] Again, the parties do not engage in any meaningful discussion of the *supply-side substitutability* of the respective LCA. Although certain statements in the Bair Declaration suggest that the development and production processes of the two LCA are broadly similar, neither party has at any stage in this proceeding even suggested that any degree of supply-side substitution exists between the 747-8I or the A380, respectively, and each manufacturer's other models of LCA. (Bair Declaration, (Exhibit USA-339), para. 44)

[2321] The data used in this table are obtained from the Mourey Statement, (Exhibit EU-8) (BCI), table 7 and the Bair Declaration, (Exhibit USA-339) (BCI), para. 43. With respect to certain characteristics, the parties have provided the Panel with differing information, as reflected in the table. As already noted, the parties have attributed the divergence in figures to different sets of rules and assumptions used by Airbus and Boeing to derive the data. (European Union's response to Panel question No. 159; and United States' comments on the European Union's response to Panel question No. 159)

[2322] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 71. See also, UK Advertising Standards Authority, ASA Adjudication on Boeing United Kingdom Ltd, 7 August 2013, (Exhibit USA-574), p. 3.

[2323] See above para. 6.1220. There are two versions of the 787-8; one for passengers, the 747-8I (Intercontinental), and one for cargo, the 747-8F (Freighter). The United States' serious prejudice claims concern only the 747-8I. The United States does not argue that the 747-8F is sold in the same product market as the A380 and the 747-8I.

[2324] United States' first written submission, para. 303.

[2325] Mourey Statement, (Exhibit EU-8) (BCI), para. 156.

[2326] Bair Declaration, (Exhibit USA-339), para. 45; Mourey Statement, (Exhibit EU-8) (BCI), para. 152; and Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 71.

has a lower per/passenger operating cost (when flying at maximum capacity) than the 747-8I.[2327] Moreover, while the 747-8I uses a predominantly mechanical system to control its flying operations, the A380 uses relatively modern "fly-by-wire" technology, which is considered to be lighter and more efficient.[2328] The A380 is also quieter than the 747-8I, achieving, for example, a "Quota Count" at the UK airports of London Heathrow and Gatwick of 0.5 for arrival and 2 for departure (compared to 1 and 2, respectively, for the 747-8I).[2329]

6.1376. The United States accepts that a number of distinguishing features of the A380 (including its greater seating capacity) may render it a more attractive option than the 747-8I in the eyes of certain customers.[2330] However, for the United States, such unique characteristics do not mean that the two LCA do not compete in the same product market.[2331] In this respect, the United States recalls that all LCA are differentiated products, and that despite their differences, the A380 and the 747-8I are the only two LCA specifically developed by Airbus and Boeing to serve the high-capacity (greater than 400 seats), slot-constrained, long-haul routes operated by commercial airlines.[2332] Consistent with this common end-use and potential customer base, the United States submits that Airbus and Boeing each "regularly attempts to develop customer interest in its very large aircraft by comparing its attributes to those of the other producer's VLA model".[2333] Thus, the United States argues that customers serving or wanting to operate high-capacity, slot-constrained, long-haul missions, can and do perceive the two LCA products to be the "closest substitutes for each other"[2334], a fact that, according to the United States, "became immediately evident when Air France, Singapore Airlines and Qantas" ordered the A380 to replace their respective fleets of older 747s.[2335]

6.1377. The European Union, however, argues that the larger passenger capacity and advanced technologies of the A380 mean that, for customers that are relatively confident about their ability to fill the A380, the A380 has an insurmountable per/seat operating cost advantage and generates higher revenues compared with the 747-8I, placing it in a separate product market.[2336] The European Union maintains that factors such as the growth in global passenger demand, slot constraints at congested hub airports, rising fuel costs and noise limitations have all "greatly magnified" this advantage.[2337] The European Union denies that the decisions of certain airlines to purchase the A380 ahead of the 747-X (subsequently designated as the 747-8I) for the purpose of operating the same routes once serviced by the 747-400 evidences that customers perceive the two aircraft to be substitutable.[2338] Rather, according to the European Union, such decisions can be explained by the change in the conditions of competition since the time that the 747-400s were purchased[2339] – conditions which, in the view of the European Union, have *inter alia* resulted in greater demand for larger aircraft such as the A380.[2340] Thus, the European Union argues that the

[2327] See below para. 6.1378.

[2328] Mourey Statement, (Exhibit EU-8) (BCI), para. 155.

[2329] Mourey Statement, (Exhibit EU-8) (BCI), para. 173. The Mourey Statement also asserts that the A380 has "proven to be very popular among air travellers", partly because of its "general appeal as the largest LCA, but mainly {due} to the cabin comfort that the A380 provides". (Mourey Statement, (Exhibit EU-8) (BCI), para. 170)

[2330] United States' second written submission, para. 488; response to Panel question No. 53, para. 175; comments on the European Union's response to Panel question No. 53; and Bair Declaration, (Exhibit USA-339) (BCI), para. 45.

[2331] United States' second written submission, para. 487; response to Panel question No. 53, para. 175; and comments on the European Union's response to Panel question No. 53.

[2332] United States' second written submission, para. 487; Bair Declaration, (Exhibit USA-339), paras. 44-47. A slot constrained route is described in the Bair Declaration as one that "involves at least one destination airport where aircraft landing slots are so scarce that it would be very difficult for an airline to increase passenger traffic by increasing the frequency of flights". (Bair Declaration, (Exhibit USA-339), fn 2)

[2333] United States' second written submission, para. 487.

[2334] United States' response to Panel question No. 53, para. 174.

[2335] United States' second written submission, para. 489.

[2336] European Union's first written submission, paras. 626-629; second written submission, para. 691; response to Panel question No. 49, para. 222; Mourey Statement, (Exhibit EU-8) (BCI), paras. 151-152, and 160; and Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 67-69.

[2337] European Union's second written submission, para. 693.

[2338] European Union's second written submission, para. 703; and Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 78, 89-90.

[2339] European Union's second written submission, para. 703.

[2340] Mourey Statement, (Exhibit EU-8) (BCI), paras. 140-144; and Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 90.

A380 and 747-8I serve different customer needs and, for this reason, are not considered by customers to be substitutable products.[2341]

6.1378. Although the European Union denies the existence of anything more than "weak or minimal" competition between the 747-8I and the A380[2342], the Mourey Statement recognizes that the two aircraft "are the closest to one another" in terms of size[2343], and moreover, "have similar range capabilities", meaning that they can both "generally be used for the same long-haul routes".[2344] The parties, therefore, seem to agree that the differences between the A380 and the 747-8I in terms of size and flying range do not preclude the possibility that, in general, the two aircraft may be used to serve the same long-haul routes. Moreover, we do not understand the parties to disagree with the proposition that, when seating capacity is determined on the basis of the same rules and assumptions[2345], the A380 offers customers lower per/seat operating costs and greater potential revenues than the 747-8I for missions requiring a seating capacity that approaches the A380's maximum; and conversely that the 747-8I offers lower per/seat operating costs than the A380 for missions requiring a passenger seating capacity that approaches its maximum.[2346] Thus, as we see it, the essential point of divergence between the parties is focused on the conclusions that can be drawn about the degree of demand-side substitutability that exists between the A380 and the 747-8I as a result of their relative performance advantages.

6.1379. As we have previously explained, a customer's choice of aircraft will be largely driven by its own forecast of passenger demand over the anticipated commercial life of an aircraft. The European Union's position is that the A380 is the only economically acceptable option for customers expecting passenger demand to be consistently close to its maximum seating capacity. For such customers, the European Union maintains that the 747-8I is not a viable alternative, leaving the A380 in its own separate monopoly market. Thus, as we understand it, the European Union's line of argument is premised on the view that the A380 will *only* ever be seriously considered by typical LCA customers for the purpose of flying routes or missions that cannot also be effectively serviced by the 747-8I.[2347] In our view, however, a number of features of the demand and supply of LCA products suggest that the potential customer base of the A380 is likely to be broader, encompassing not only airlines projecting consistently high levels of passenger demand, but also airlines with lower or varying projections of passenger demand overlapping the capacities of the A380 and the 747-8I.

[2341] European Union's second written submission, para. 691. See also, Mourey Statement, (Exhibit EU-8) (BCI), paras. 160-176.

[2342] See e.g. Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 65; and European Union's second written submission, para. 690.

[2343] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 79.

[2344] Mourey Statement, (Exhibit EU-8) (BCI), para. 149.

[2345] The parties have explained that the maximum three-class seating capacity figures provided for the A380 and the 747-8I were calculated on the basis of different assumptions, including with respect to the space between adjacent seats ("seat pitch"). (European Union's response to Panel question No. 159; and United States' comments on the European Union's response to Panel question No. 159). The figures furnished by the European Union are based on Airbus' "ground rules", and contemplate a greater seat pitch than those applied by Boeing, which were used to derive the figures presented by the United States. One industry analyst has described the latter as dating "from the 1980s", offering a "somewhat tight" fit for today's business class, and "more equivalent to business, premium economy and economy rather than first, business and economy". The same analyst has described the Airbus ground rules to be "more realistic" and "more reflective of today's capacity". (Leeham News and Comment, "Comparing the 747-8I and the A380 after the Advertising Battle Commenced", 28 November 2012, (Exhibit EU-172), p. 1). This information suggests that, in practice, the difference in seating capacity for potential customers may be closer to the European Union's estimates than those of the United States. However, ultimately, this will depend upon the specific layout and level of comfort chosen by individual customers in accordance with their particular business model.

[2346] United States' response to Panel question No. 53; European Union's first written submission, paras. 626-627; second written submission, paras. 694-695; Mourey Statement, (Exhibit EU-8) (BCI), paras. 152 and 160-165; Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 71 and 74-75. The European Union argues that when the seating capacity of a particular mission is expected to be "much lower" than necessary to warrant purchasing the A380, customers will opt for the 777-300ER or the A350XWB-1000 instead of the 747-8I, because of the smaller twin-aisle aircrafts' better per/seat economics compared with the 747-8I. We note, however, that this statement appears to rest on the assumption that the relevant customer would be looking for an aircraft with a much smaller "3-class" seating capacity than the 747-8I, as according to the European Union, the 777-300ER holds 100 seats less than the 747-8I.

[2347] If this were not the premise underlying the European Union's argument, the European Union would have to be arguing that the A380 competes with the 747-8I for the same customers, which would imply that both aircraft are sold into the same product market.

6.1380. We recall that passenger demand (and therefore required seating capacity) is a multi-faceted parameter that for any particular route will vary "at all times of the day or from one season or year to the next", not only between different airlines but also for an individual airline.[2348] Moreover, passenger demand conditions will "evolve over time", and consequently impact an airline's "fleet and route strategies as well as the aircraft developed to serve them".[2349] Thus, the process of forecasting required seating capacity over the commercial life of any particular aircraft for a potential LCA customer is likely to be highly complex, bringing with it a certain measure of risk. If an airline finds that it has over-estimated demand relative to the seating capacity of the aircraft it has purchased, it will be unable to maximize the value of its investment, and potentially make a loss. Conversely, if demand is under-estimated, an airline will be short of capacity and therefore lose out on potential profits.[2350] As already noted, these considerations suggest that:

i. LCA customers are likely to contemplate multiple possible manifestations of passenger demand in the business plans used for the purpose of evaluating the economics of a particular aircraft;

ii. LCA customers will be interested in exploring the economics of the largest possible range of LCA options capable of effectively servicing the greatest number of possible manifestations of contemplated demand[2351]; and

iii. an LCA customer's perception of, and tolerance to, the risk that its passenger demand forecast may turn out to be incorrect will play an important role in its purchase decision.

6.1381. In this context, it is instructive to find that "Airbus sales of the A380 lag behind original forecasts", with "certain airlines having been reluctant to increase their capacity, as they find it difficult to assess the risk of over-estimating passenger demand, and not being able to fill large aircraft such as the A380".[2352] Moreover, when combined with "very volatile" fuel prices, "the uncertain development of passenger demand makes it difficult for airlines to assess the extent of the advantage of the A380 in terms of fuel efficiency per seat, and the risk of its larger per-trip costs".[2353] In our view, this suggests that certain airlines today operating, or wanting to operate, long-haul missions are unable to forecast, with a sufficient degree of certainty, the increase in seating capacity that would be needed to make the A380 their *one and only* option.[2354] For such airlines, it is apparent that the demand conditions which the European Union argues would demonstrate the absence of "significant" competition between the A380 and the 747-8I have yet to materialize. These general and A380-specific features of LCA demand do not weigh in favour of the argument that the A380's potential customers will *only* ever seriously consider purchasing it for the purpose of missions that cannot also be serviced by the 747-8I. In our view, this implies that at present there are customers that will explore the economics of both the A380 and the 747-8I for the purpose of performing comparable missions.

6.1382. The existence of an overlapping customer base for the A380 and the 747-8I would also appear to be consistent with the pattern of competitive interaction that drives Airbus' and Boeing's supply decisions. We recall that Airbus and Boeing have sought to meet demand for LCA by developing the fewest possible product lines to satisfy a wide array of requirements. In doing so, both manufacturers have produced a comparable, but not identical, range of offerings in the knowledge that the producer that satisfies the core performance demands of the largest number of customers will win more sales. Inevitably, each company's strategic supply choices will reflect its conclusion about the best placement of its products in the overall continuum of customer profiles,

[2348] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 91.
[2349] Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 91.
[2350] Mourey Statement, (Exhibit EU-8) (BCI), para. 152; and United States' response to Panel question No. 61, para. 212.
[2351] In other words, all things being equal, it is likely that airlines will be most interested in aircraft that can be used to serve a range of different routes and missions.
[2352] Mourey Statement, (Exhibit EU-8) (BCI), para. 145.
[2353] Mourey Statement, (Exhibit EU-8) (BCI), para. 146.
[2354] However, Mourey describes the lack of demand as a "temporary phenomenon" and predicts that "the general growth in air traffic demand that has materialized over the last decade, and that continues to be projected for the future" makes Airbus "confident that {it} will sell a large number of A380s in the years to come". (Mourey Statement, (Exhibit EU-8) (BCI), para. 147)

relative to the products of the other company.[2355] Thus, in order to accept that the A380's relative performance advantage over the 747-8I places it in a monopoly market, we would have to accept that the A380 was developed to exclusively serve a particular customer space that the 747 (or indeed any other aircraft) could not attract.

6.1383. We note, however, that it is apparent from multiple references in the A380 Business Case that the **[***]**.[2356] Moreover, a number of Airbus presentations since the launch of the A380 consistently promote its attributes in comparison with those of the 747. Thus, for example, in a slide presentation titled "A380 Update: Four Years in Service", the A380's maximum take-off and landing weights are compared to those of the 747-400 and the 747-8I, with the accompanying narrative claiming "best in class" performance on the part of the A380.[2357] Two other Airbus "update" presentations from 2011 and 2012 claim that "airlines' preferred choice"[2358] and the "VLA of choice"[2359] is the A380 over the 747-8I. The 2012 "update" also presents the number of orders for the 747-8I in a pie-chart used to show the "existing VLA order book", forecasting an "open 20-year demand", and asserting that "the A380 will dominate this market".[2360] Likewise, in an earlier Airbus presentation from 2005, the number of airports expected to be ready for the larger A380 in 2006 and 2010 are identified in terms of the percentage of all worldwide 747 flights that are handled by the same airports.[2361] In our view, this information (some of which was already raised during the original proceeding)[2362] strongly suggests that, outside of the context of this proceeding, Airbus has consistently maintained the view that the potential customers of the A380 will also be likely to seriously consider the 747-8I in a segment of the LCA market that is covered by no other aircraft.

6.1384. Finally, and in any event, it does not automatically follow from the A380's distinct per/seat operating cost and potential revenue advantage on long-haul missions where passenger demand is consistently above the level that can be satisfied by the 747-8I, that airlines will not seriously consider both aircraft as potential alternatives in a sales campaign. It is important to recall that the A380's per/seat operating cost and revenue advantage over the 747-8I will decrease the closer the expected seating capacity of a particular mission is to the maximum seating capacity of the 747-8I. The smaller the difference, the greater is the possibility that the A380's advantage might be overcome by a combination of other factors informing a customer's purchase decision, including price, fleet commonality and/or delivery date.[2363] All this suggests that even on routes where it is anticipated that the required seating capacity is likely to exceed what is offered by the 747-8I, it may well make sense and be normal for a customer to consider both LCA, as each will be part of a sales package having its own advantages and disadvantages relative to the customer's business model. Moreover, as explained by the United States:

> {A} customer's best projection may be that it can fill a larger aircraft, but depending upon the finances and risk tolerance of the customer, {it} may decide to forgo potential profits it could earn with a larger aircraft and instead operate a smaller

[2355] See further, above, paras. 6.1219-6.1223.

[2356] For example, the A380 Business Case reveals that it was expected that the project would result in the "**[***]**". Thus, it was anticipated that the A380 family would "**[***]**. (A380 Business Case, (Exhibit EU-20) (HSBI), pp. 5, 7, 13, and 30)

[2357] "A380 Update: Four Years in Service", Airbus presentation, 15 October 2011, (Exhibit USA-353), pp. 1-2.

[2358] Richard Carcaillet, Director, Airbus A380 Product Marketing, "Product Line Update", Airbus presentation, 2011, (Exhibit USA-340), p. 5.

[2359] Richard Carcaillet, Director, Airbus A380 Product Marketing, "A380 Product Update", Airbus presentation, October 2012, (Exhibit USA-492), p. 1.

[2360] Richard Carcaillet, Director, Airbus A380 Product Marketing, "A380 Product Update", Airbus presentation, October 2012, (Exhibit USA-492), p. 2.

[2361] Andreas Sperl, Chief Financial Officer, Airbus, "Update on the A380 program", 20 June 2005, (Exhibit USA-111), p. 4.

[2362] See e.g. Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1226-1227 (citing, in addition to the A380 Business Case, (Exhibit EU-20) (HSBI), the EADS Offering Memorandum, (Exhibit EU-55)).

[2363] This would also be true taking into account the allegedly better "residual value" that the A380 is likely to have over the 747-8I. See e.g. Mourey Statement, (Exhibit EU-8) (BCI).

aircraft to ensure that it does not lose substantial amounts of money in the event demand is weaker than projected.[2364]

6.1385. It follows, therefore, that even in a situation where a potential customer forecasts levels of passenger demand that would bring the A380's performance advantage into play, that customer may prefer to purchase the smaller 747-8I, if it concludes that the risk of losing money were too high in the event that its demand forecast proved to be overly optimistic.

6.1386. Thus, in the light of the above considerations, we find that despite some appreciable differences in physical and performance characteristics, the A380 and 747-8I are sufficiently similar to be considered by airlines wanting to purchase an LCA to operate long-haul, slot-constrained missions requiring a maximum seating capacity in excess of 400 passengers. Not only are the two LCA the largest aircraft produced by Airbus and Boeing, but they were also specifically developed to serve, at the very least, an overlapping customer base. In our view, the fact that the A380 has an operating cost and potential revenue advantage over the 747-8I when the required seating capacity approaches its maximum, does not necessarily imply that it stands alone in a product market of its own. This is because given the complicated dynamics of a customer's purchase decision, the A380's advantage may simply reflect its ability to *out-compete* the 747-8I for customers falling within the outer-limit of the spectrum of airlines that will be interested in exploring the economics of both LCA for the purpose of operating the particular range of missions contemplated in their individual business plans.

Pricing constraints

6.1387. The United States submits that the existence of competition between the A380 and the 747-8I in one and the same product market is also evidenced by the pricing pressure that each aircraft imposes upon the other.[2365] The United States finds specific support for this view in certain pieces of HSBI, which allegedly reveal Boeing's NPV analyses and pricing considerations with respect to both aircraft in the 2007 Emirates and 2006 British Airways sales campaigns.[2366] In addition, the United States argues that the existence of reciprocal pricing constraints follows logically from the dynamics of sales negotiations in the LCA industry, where "companies bargain over prices based on the best alternative to negotiated agreement (BATNA) faced by each player".[2367] Thus, as we understand it, the United States argues that because the 747-8I will typically be the only potential BATNA to the A380 for customers wanting to purchase an aircraft to serve high-capacity, slot-constrained long-haul routes, it will naturally be used by those customers to obtain pricing concessions on the A380 (and *vice versa*).[2368] The United States submits that this is precisely what is recognized in the Mourey Statement, where it is stated that despite the purported advantages of the A380 over the 747, potential customers will attempt to convince Airbus that they are seriously considering the Boeing alternative in order "to put pricing pressure on Airbus", a dynamic which Mourey states is "usually facilitated by Boeing's offering of cheap 747-8s".[2369]

6.1388. While the European Union accepts that the A380's presence has caused significant pricing pressure on the 747-8I[2370], the European Union denies that the 747-8I constrains Airbus' pricing of

[2364] United States' response to Panel question No. 61, para. 212.

[2365] United States' second written submission, para. 488; response to Panel question Nos. 53 (para. 176 (HSBI)) and 54 (para. 177); and comments on the European Union's response to Panel question No. 54.
Bair Declaration, (Exhibit USA-339) (BCI), para. 45; United States' response to Panel question Nos. 53 (para. 176 (HSBI)) and 54 (para. 177); and comments on the European Union's response to Panel question No. 54.

[2366] United States' response to Panel question Nos. 53 (para. 176 (HSBI)) and 58; **[[**HSBI**]]** Exhibit USA-539 (HSBI); and **[[**HSBI**]]** Exhibit USA-557 (HSBI).

[2367] United States' response to Panel question No. 54, para. 177; and Sanghvi Declaration, (Exhibit USA-530), paras. 40-41. The Sanghvi Declaration explains that "each party's … BATNA is simply what that party can assure itself of without coming to terms with the other party, so that it constitutes the lower bound on what it must obtain in any bargain that is struck. Because even the EU's expert concedes that there are effectively only two LCA manufacturers, the typical BATNA … to Airbus is Boeing, and vice-versa (especially with regard to the sale of new LCA models)."

[2368] United States' comments on the European Union's response to Panel question No. 54, para. 187.

[2369] United States' comments on the European Union's response to Panel question No. 54, para. 187 (quoting Mourey Statement, (Exhibit EU-8) (BCI), para. 165).

[2370] See e.g. European Union's second written submission, para. 693.

the A380 in any substantial way.[2371] The European Union dismisses the probative value of the HSBI evidence relied upon by the United States with respect to the 2007 Emirates and 2006 British Airways sales campaigns, arguing that in both cases, the NPV calculations used to inform Boeing's analysis are based on fundamentally flawed assumptions and, thereby, depict an erroneous picture of the competitive interaction between the two aircraft.[2372] The European Union furthermore submits that the existence of alternatives or potential substitutes for a product "implies nothing about the intensity of the competitive relationship between products".[2373] For the European Union, the fact that alternative and substitute products may exist "merely begs − and cannot answer − the question of whether particular 'alternative' aircraft exercise significant competitive constraints on one another".[2374] Thus, that the 747-8I may be the "closest alternative" to the A380 does not, according to the European Union, reveal the degree of competition that exists between the two products, and for this reason, it is legally and factually insufficient to establish the requisite demand-side substitutability.[2375]

6.1389. Similarly, the European Union maintains that the simple fact that Airbus might decide to offer price concessions on the A380 in a sales campaign where Boeing has also offered the 747-8I does not necessarily imply the existence of price competition with the 747-8I, as some **[***]** will always be granted in a sales negotiation, irrespective of whether **[***]**.[2376] In this regard, the European Union notes that, contrary to what would normally be expected in a relationship of significant price competition, the availability of the 747-8I has not resulted in **[***]**.[2377]

6.1390. We agree with the European Union that the mere fact that one aircraft may be an "alternative" to another for the purpose of flying the same missions says little about the degree of competition that exists between those aircraft. However, given that the only two aircraft in the LCA industry capable of carrying more than 400 passengers on long-haul missions are the A380 and the 747-8I, it is difficult to disagree with the proposition that airlines looking for aircraft with such qualities will explore the economics of both offerings, including by seeking to obtain price concessions from Airbus and Boeing and, more generally, by playing one aircraft package off the other in negotiations with the two manufacturers. While the European Union asserts that this dynamic may not be the reason why Airbus would offer price concessions in sales campaigns involving the A380, it does not argue that Boeing's pricing of the 747-8I will never impact the level of price concessions granted on the A380. Likewise, the Mourey Statement does not deny that the pricing of the 747-8I may affect the concessions offered by Airbus on price of the A380. Rather, the Mourey Statement simply declares that Boeing's pricing of the 747-8 would never be enough to "convince an airline that needs an aircraft of the size of the A380 to switch and go for a sub-optimal aircraft".[2378]

6.1391. Turning to the NPV analyses and pricing considerations found in the HSBI evidence concerning the 2007 Emirates and 2006 British Airways sales campaigns, we agree with the European Union that certain of the assumptions used in Boeing's NPV calculations appear to favour the 747-8I over the A380, in the sense that they determine the potential economic values of the two aircraft on the basis of data that brings to light the relative strengths of the Boeing offering over the A380. Naturally, the use of these assumptions also impacts the price concessions considered in the analyses for the purpose of understanding the level of pricing that could potentially render the choice of one aircraft superior to the other. It is apparent, however, that the analyses contained in the United States' HSBI exhibits were, in fact, prepared contemporaneously with Boeing's participation in the two sales campaigns and, to this extent, used to inform Boeing's

[2371] European Union's first written submission, para. 631; second written submission, para. 693; response to Panel question No. 54, para. 258 and fn 434; and comments on the United States' response to Panel question No. 54, para. 392.

[2372] European Union's comments on the United States' response to Panel question Nos. 53 and 58 (HSBI).

[2373] European Union's comments on the United States' response to Panel question No. 54, para. 394.

[2374] European Union's comments on the United States' response to Panel question No. 54, paras. 281 and 394.

[2375] European Union's comments on the United States' response to Panel question No. 53, paras. 381-382.

[2376] European Union's first written submission, para. 629; and Mourey Statement, (Exhibit EU-8) (BCI), para. 166.

[2377] European Union's first written submission, para. 631; and Indexed A380 Revenue Evolution, 2001-2011, (Exhibit EU-75) (BCI).

[2378] Mourey Statement, (Exhibit EU-8) (BCI), para. 165.

own internal decision-making. Moreover, parts of the HSBI evidence relating to the Emirates campaign reveal that certain of the assumptions the European Union complains about were used because Emirates had apparently indicated that it would be willing to consider them.[2379] Nonetheless, there is nothing before us to suggest that the two analyses exhausted Boeing's considerations in both campaigns. Likewise, there is no indication as to whether Boeing considered the assumptions used in its NPV calculations to reflect the most probable mission scenarios for its potential customers. In this light, we see the HSBI evidence relied upon by the United States to represent no more than Boeing's view that at a certain point in time during the 2007 Emirates and 2006 British Airways sales campaigns, **[***]**.

6.1392. As it did with respect to a range of pairings of Airbus and Boeing twin-aisle aircraft, the European Union has submitted its own NPV analyses of the A380 and the 747-8I, specifically prepared and presented in the Supplemental Mourey Statement for the purpose of this dispute. The Supplemental Mourey Statement's analyses calculate the NPVs of the cost and revenue streams of each aircraft when used in a "typical" configuration to fly a route of 6000nm over 15 years, applying a 75% load factor, in the light of a set of seven operating assumptions that are all HSBI.[2380] The European Union submits that the results of this NPV comparison show that on "any mission where the greater capacity of the A380 is justified"[2381], the A380 has an NPV advantage over the 747-8I that is "so immense that it would be infeasible for Boeing to offset it with price discounts, and thereby induce customers not to select the A380".[2382]

6.1393. The United States criticizes the European Union's A380 and 747-8I NPV analyses on much the same grounds that it used to criticize the other NPV analyses presented by the European Union in this dispute, namely, that they: (a) fail to account for aircraft *prices* and a number of *non-price factors* that regularly drive an airline's purchase decision; (b) apply certain operating *assumptions* without explanation or justification; and (c) ignore the fact that the LCA market has already been *distorted* by the subsidies at issue in this proceeding.[2383] Likewise, the European Union's response to the United States' criticism mirrors that which we have described elsewhere in this Report.[2384] We incorporate our prior discussion and evaluation of the parties' arguments on these points *mutatis mutandis* into this section of our Report.

6.1394. Thus, not unlike the conclusions we have reached with respect to the NPV analyses presented for other pairings of aircraft, we find that the NPV comparison analysis conducted in the Supplemental Mourey Statement for the A380 and 747-8I fails to demonstrate that the two aircraft do not compete with one another in the same product market. In our view, all that the NPV analyses ultimately demonstrate is that, excluding price, fleet commonality, delivery date and other factors that might be potentially relevant to a customer's purchase decision, the A380 will have a significant operating cost and revenue advantage over the 747-8I on missions where the latter cannot satisfy the demand for seating capacity, which demand can only be met by one aircraft in the LCA industry − the A380. For the reasons we have already explained, we are not convinced that this advantage can alone demonstrate that the A380 and the 747-8I do not compete in one and the same product market.

6.1395. Finally, the European Union also argues that the fact that **[***]** evidences a lack of **[***]** from the 747-8I. In our view, however, there are at least two reasons to suggest that this may not necessarily be the case: first, our understanding is that **[***]**; and second, because, in any case, the existence of pricing pressure may be demonstrated not only by evidence of **[***]**. The evidence the European Union has presented reveals nothing about whether or not the latter has taken place.

[2379] **[[**HSBI**]]** Exhibit USA-247 (HSBI), pp. 2-3. However, no such evidence has been presented to suggest that the same was also true with respect to the British Airways campaign.

[2380] European Union's response to Panel question No. 53, para. 254; and Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 71.

[2381] European Union's response to Panel question No. 53, para. 255.

[2382] European Union's second written submission, para. 693.

[2383] United States' response to Panel question No. 61, paras. 205-225.

[2384] See above paras. 6.1256-6.1275 and 6.1342-6.1345.

Sales campaigns

6.1396. The United States has also specifically argued that the existence of demand-side substitution and effective competition between the 747-8I and the A380 is substantiated by evidence from the Emirates, Hong Kong Airlines, Asiana Airlines and Skymark sales campaigns which resulted in the respective airlines ordering 71 A380s between 2007 and 2012.[2385] For each of these sales campaigns, the United States submits HSBI evidence of Boeing's negotiating strategy, including value and pricing considerations, which the United States argues demonstrates that the A380 and the 747-8I actively competed against each other to win the relevant sales.[2386]

6.1397. As it did in relation to the United States' arguments concerning the relevance of sales campaign evidence for the purpose of demonstrating the existence of the twin-aisle product market, the European Union argues that evidence showing that two aircraft were present or offered in a particular sales campaign is legally and factually insufficient to establish general demand-side substitutability. Thus, according to the European Union, before coming to any conclusions about the demand-side substitutability of two or more aircraft presented in a sales campaign, it would be necessary to conduct a detailed examination of the underlying reasons for a purchase decision so that the competitive dynamic between the relevant products may be considered in its proper context. For the European Union, therefore, sales campaign evidence must be considered cautiously, and ultimately used "solely as confirmation of a product market delineation made on the basis of other, including quantitative, evidence".[2387]

6.1398. More specifically, the European Union maintains that the HSBI evidence advanced by the United States with respect to the Emirates sales campaign is unreliable or, in any case, inconsistent with the existence of competition between the A380 and the 747-8I, because it is based on flawed assumptions and/or inaccurately described in the United States' submissions.[2388] As regards the Asiana Airlines campaign, the European Union argues that information specific to Boeing's considerations that is revealed in the United States' HSBI evidence shows that the 747-8I could not compete with the A380. In any case, the European Union argues that evidence of Boeing's view about the degree of competition between the two aircraft in the Asiana Airlines sales campaign is insufficient to establish the requisite degree of demand-side substitutability.[2389] Likewise, the European Union argues that the United States' HSBI evidence concerning the Hong Kong Airlines campaign is also unreliable because it reveals nothing about the customer's views concerning the substitutability of the A380 and the 747-8I.[2390] Moreover, as with the Asiana Airlines campaign, the European Union submits that the HSBI evidence of Boeing's considerations in the Hong Kong Airlines campaign highlight the superiority of the A380 over the 747-8I, implying that the two aircraft do not fall within the same product market.[2391] Finally, the European Union argues that the United States' HSBI evidence concerning the Skymark campaign is incomplete and cannot, therefore, substantiate the entirety of the United States' assertions. Moreover, the European Union maintains that the HSBI evidence the United States did, in fact, submit is not informative and, when properly considered, only shows the extent to which the A380 is a superior aircraft to the 747-8I.[2392]

6.1399. As already explained, we do not share the European Union's reservations concerning the probative value of sales campaign evidence the United States relies upon. In our view, evidence of the participation of both Airbus and Boeing in a particular airline's sales campaign would strongly suggest that a customer's ultimate purchase decision will be informed by its consideration of the

[2385] United States' first written submission, paras. 483-486 and 493-503; and response to Panel question No. 49.

[2386] United States' response to Panel question Nos. 49, 50, and 53; **[[**HSBI**]]** Exhibit USA-539 (HSBI); **[[**HSBI**]]** Exhibit USA-540 (HSBI); **[[**HSBI**]]** Exhibit USA-541 (HSBI); and **[[**HSBI**]]** Exhibit USA-542 (HSBI).

[2387] European Union's response to Panel question No. 55, paras. 259 and 264; and comments on the United States' response to Panel question No. 53.

[2388] European Union's second written submission, paras. 1492-1494; comments on the United States' response to Panel question Nos. 53 (para. 389), 63 (paras. 516-518), and 67 (para. 573).

[2389] European Union's comments on the United States' response to Panel question No. 63, paras. 519-520.

[2390] European Union's comments on the United States' response to Panel question Nos. 63, paras. 66, 522, and 555.

[2391] European Union's comments on the United States' response to Panel question No. 63, para. 523.

[2392] European Union's comments on the United States' response to Panel question No. 63, paras. 524-526.

relative strengths and weaknesses of either company's respective offerings. Similarly, while we accept that Boeing's own views about the degree of competition between the A380 and the 747-8I in a relevant sales campaign cannot, alone, demonstrate the existence of demand-side substitutability, we do believe that such views, when expressed in the context of analyses and/or statements made contemporaneously with a particular sales campaign, will be highly relevant to our task of identifying relevant product markets.[2393]

6.1400. Turning to the specific sales campaigns at issue, we note that it is apparent from the United States' HSBI evidence, that Boeing offered the 747-8I as an alternative to the A380 to each of the relevant airlines. The same evidence reveals that Boeing framed its negotiating strategy, economic valuations and pricing considerations in the context of its own expectations about the likely advantages and disadvantages of the A380 to each of those airlines. Thus, the United States' HSBI evidence clearly shows that Boeing not only saw an opportunity to sell the 747-8I to each of the relevant airlines, but also that it would have to compete with the A380 to win those sales. These contemporaneous views about the existence of active competition between the A380 and the 747-8I are consistent with the evidence we have reviewed about Airbus' own original and current expectations (outside of this proceeding) for the A380's placement in the LCA market.[2394]

6.1401. The European Union does not question the authenticity of the United States' HSBI evidence, but only the fairness and accuracy of the analyses undertaken by Boeing or the conclusions that can be drawn from Boeing's statements and considerations with respect to the degree of competition that actually exists between the A380 and the 747-8I. Thus, the European Union does not dispute that Boeing genuinely offered the 747-8I with the intention of winning sales against the A380. In our view, when considered in the light of the considerations we have expressed in the previous paragraph, this fact strongly suggests that the relevant airlines must have been seriously interested in exploring the value of both company's offerings in each of the sales campaigns. In any event, we are not convinced by the European Union's specific criticisms of the United States' HSBI evidence. As we have previously explained, parts of the HSBI evidence relating to the Emirates sales campaign reveal that certain of the assumptions the European Union complains about were used because Emirates had apparently indicated that it would be willing to consider them.[2395] This suggests that this aspect of Boeing's analysis was not contrived to achieve a skewed outcome, but rather driven by the demands of the potential customer. Moreover, contrary to the European Union, we do not believe that the superior value proposition to a customer of one LCA over another necessarily signals the absence of competition. Thus, even assuming that the European Union were correct in arguing that the United States' HSBI evidence relating to the Asiana Airlines, Hong Kong Airlines and Skymark sales campaigns confirms the superior value proposition of the A380, this would not necessarily mean that it did not compete for those sales with the 747-8I. As we see it, such evidence might simply reflect the fact that the A380 was better placed to *win the competition* against the 747-8I for those sales.

6.1402. That the 747-8I and the A380 regularly compete for the same customers finds additional support in the Qantas and British Airways sales campaigns that resulted in the order of 20 A380s in 2006 and 2007. In our view, the arguments and evidence the United States has advanced with respect to these orders clearly demonstrate that Qantas and British Airways seriously considered both Airbus and Boeing offerings to be in active competition for their sales.[2396] The European Union does not contest the existence of competition between the A380 and the 747-8I in these sales campaigns. Rather, as it does with respect to the above-mentioned A380 orders made by Emirates, Asiana Airlines, Hong Kong Airlines and Skymark, the European Union maintains that the United States' submissions reveal only that the 747-8I and the A380 were one another's "best alternatives", without demonstrating that they exercised "significant competitive constraints" on

[2393] We recall that it is the practice of the European Commission to take such evidence into account in its own product market determinations for the purpose of competition policy. See above paras. 6.1207 and 6.1236.

[2394] See above para. 6.1383.

[2395] See above para. 6.1391.

[2396] United States' response to Panel question Nos. 58 (paras. 190-191) and 67 (paras. 304 and 307-308); EADS Press Release, "Qantas signs firm order for eight additional A380s", 21 December 2006, (Exhibit USA-246); EADS Press Release, "British Airways to buy 12 Airbus A380 aircraft for long haul fleet", 27 September 2007, (Exhibit USA-256); Angela Jameson, "Boeing and Airbus in BA fleet dogfight", *The Times*, 18 October 2006, (Exhibit USA-257); Pete Harrison and Jason Neely, "British Airways ditches Boeing jumbo for Airbus A380", Reuters, published in *USA Today*, 27 September 2007, (Exhibit USA-259); **[[**HSBI**]]** Exhibit USA-258 (HSBI); **[[**HSBI**]]** Exhibit USA-548 (HSBI); and **[[**HSBI**]]** Exhibit USA-557 (HSBI).

each other.[2397] We recall, however, that for reasons previously explained, the European Union's position with respect to the requisite degree of competition needed to show that two products fall within the same product market finds no support in the guidance provided by the Appellate Body in the original proceeding, nor in the text of the SCM Agreement.[2398] Moreover, in at least one of above sales campaigns, Airbus appears to have explicitly recognized the existence of "intense" competitive pressure, with its then-CEO, Tom Enders, describing the British Airways sales campaign as having involved "an intensive year-long competitive evaluation".[2399] Furthermore, it was reported in the press that in order to win the British Airways orders, Airbus was compelled to offer significant price discounts:

> Analysts said BA had probably received significant discounts as Boeing and Airbus battled for the high-profile orders.
>
> "With the A380 likely to have been heavily discounted, and a reasonable discount on 24 787s also applied, we'd estimate the real value of the order at around 3 billion pounds ($6 billion)", said analyst Andrew Fitchie at Collins Stewart.
>
> {British Airways Chief Executive, Willie} Walsh declined to discuss discounts, which are common in the industry, but said: "I'm very pleased with the way Boeing and Airbus approached this".[2400]

6.1403. We find the British Airways order also particularly instructive because it represented the first time that British Airways had selected an Airbus aircraft over a Boeing for the purpose of operating long-haul routes. In other words, British Airways chose the A380 over the 747-8I to fly routes that were previously flown by its older fleet of 747s, routes which could today be equally serviced by both the 747-8I and the A380 whenever demand conditions did not exceed the maximum seating capacity of the Boeing offering.

6.1404. Finally, the European Union submits that evidence from a number of sales campaigns where airlines purchased small quantities of both the A380 and the 747-8I, confirms that the two LCA products are not interchangeable, and therefore, in different product markets. In particular, the European Union refers to: (a) the orders made by Transaero within the space of two months in 2011 for four A380s and four 747-8Is; (b) the Korean Air A380 and 747-8I orders made in 2008 and 2009; and (c) the 2006 Lufthansa order for 20 747-8Is, which closely followed an order for the A380.[2401] According to the European Union, it would "make little sense" for these airlines to have purchased both aircraft within such a short period of time if they were considered to be interchangeable. Thus, the European Union concludes that "these purchases suggest that the airlines view the aircraft as serving different roles in their fleets − and, thus, as not substitutable".[2402]

6.1405. While we agree with the European Union that the evidence before us suggests that the three airlines purchased the A380 and the 747-8I to fill different capacity segments of their operations, we do not believe that this alone implies that the two LCA were sold to each customer in the absence of effective competition. The A380 and the 747-8I are not perfect substitutes. That the A380 and the 747-8I may have been ordered to serve different missions might therefore be explained by the fact that they are differentiated products with their own relative strengths and weaknesses depending upon the particular mission. Again, as we have stated already on a number of occasions, the fact that one LCA will have a superior economic value to another under certain demand conditions, does not render it impervious to competition. One aircraft's economic

[2397] European Union's comments on the United States' response to Panel question No. 67, paras. 572-577.

[2398] See above paras. 6.1209-6.1212.

[2399] EADS Press Release, "British Airways to buy 12 Airbus A380 aircraft for long haul fleet", 27 September 2007, (Exhibit USA-256).

[2400] Pete Harrison and Jason Neely, "British Airways ditches Boeing jumbo for Airbus A380", Reuters, published in *USA Today*, 27 September 2007, (Exhibit USA-259).

[2401] European Union's response to Panel question No. 55, fn 440 (citing information and statements made and reported in Boeing Press Release, "Korean Air Announce Order for New 747-8 Intercontinental", 4 December 2009, (Exhibit EU-322); and "Lufthansa orders Airbus, Boeing jets", Reuters, 6 December 2006, (Exhibit EU-360)).

[2402] European Union's response to Panel question No. 55, para. 263.

advantage over another might simply reflect that it is better placed to *win the competition* for sales between two imperfectly substitutable products. Thus, the evidence and argument the European Union has advanced with respect to the Transaero, Korean Air and Lufthansa orders of both A380s and 747-8Is are not necessarily inconsistent with finding that the two products fall within the same product market.

Conclusion with respect to the alleged product market for VLA

6.1406. We recall that the essential point of disagreement between the parties as to whether the A380 and the 747-8I should be considered to fall within the same product market for the purpose of this compliance dispute is centred on the conclusions that can be drawn about the degree of demand-side substitutability that exists between the two products as a result of their relative performance advantages. Our careful consideration of the parties' positions leads us to conclude that the United States has satisfied its burden of demonstrating that, for the purpose of this dispute, both the A380 and 747-8I may be considered to compete against each other in one single product market for VLA − a market space that is characterized by long-haul, slot-constrained missions requiring a carrying capacity that is generally above that which can be offered by other twin-aisle LCA, and therefore in excess of 400 passengers. We come to this conclusion on the basis of all of the above considerations, which we summarize as follows.

6.1407. First, the A380 and 747-8I are the largest civil aircraft produced by Airbus and Boeing, and can both be generally used to cover the same long-haul routes.[2403] While the A380's larger seating capacity and relatively modern technologies means that it has a per/seat operating cost and revenue advantage over the 747-8I, this advantage will decrease the closer the expected seating capacity of a particular mission is to the maximum seating capacity of the 747-8I. The smaller the difference, the greater is the possibility that the A380's advantage might be overcome by a combination of other factors informing a customer's purchase decision, including price, fleet commonality and/or delivery date.[2404] Thus, it is apparent from the conditions of competition in the LCA industry that the A380 and the 747-8I will have a potential customer base that will include airlines with mission requirements that overlap the capabilities of the two aircraft.[2405] Therefore, contrary to the European Union, we do not see the A380's operating cost and revenue advantage over the 747-8I on missions where passenger capacity is close to its maximum to demonstrate that it is sold in its own monopoly market. Rather, to the extent that the A380's advantage may be determinative in a particular sale, we believe that it shows how Airbus will be better positioned to *win the competition* against Boeing for a potential customer falling within the outer-limit of the spectrum of airlines that will be interested in exploring the economics of both aircraft for the purpose of operating the range of long-haul missions contemplated in its business plan.

6.1408. Second, as the only two aircraft capable of flying well over 400 passengers on long-haul routes, it is difficult to believe that airlines interested in purchasing LCA with capabilities such as those of the A380 and the 747-8I would not try to negotiate and obtain price discounts from Airbus and Boeing on the basis of the strength of each company's respective sales offer, even when the superiority of one aircraft over the other may be relatively apparent. The European Union does not deny that the A380 faces a degree of pricing pressure from the 747-8I; but for the European Union, any such pressure does not constrain Airbus' competitive behaviour *vis-à-vis* potential customers looking for an aircraft with a maximum seating capacity that approaches that of the A380. As already noted, however, the characteristics of LCA demand and supply suggest that the A380's potential customer base will be larger than simply airlines wanting to fly 525 passengers on long-haul missions. In any case, the fact that Airbus may face relatively less pricing pressure from the 747-8I when a potential customer is looking for an LCA with a seating capacity that approximates the maximum capacity of the A380 does not necessarily signal the absence of reciprocal pricing constraints. Rather, as we see it, such a situation might simply reflect what could be expected to occur naturally in a market for differentiated products that are imperfect substitutes. Indeed, given that there will be a range of customer demands for LCA with a passenger capacity exceeding 400 seats, one would expect to find differing degrees of reciprocal pricing constraints between the A380 and the 747-8I, depending upon how close a particular customer's needs reflect the relative advantage of one aircraft over the other. At either end of this

[2403] See above para. 6.1378.
[2404] See above para. 6.1384.
[2405] See above paras. 6.1379-6.1383.

range of customer needs, one aircraft will impose greater pricing pressure on the other. However, this does not imply the absence of competition, but only that the competitive constraints imposed by one LCA on the other will be more or less intense depending upon which product more closely satisfies the relevant needs of a potential customer.

6.1409. Finally, although we have no evidence before us of actual *customer* evaluations of the economics of the A380 and the 747-8I, the United States' HSBI evidence of Boeing's analysis of the competitive interaction between the two aircraft in the 2007 Emirates and 2006 British Airways sales campaigns suggests that, according to Boeing, at a certain point in time during those campaigns, **[***]**. This is consistent with not only the evidence showing that Airbus considered competition for the British Airways' sales to be "intense", but also the evidence we have reviewed from four other sales campaigns (Asiana Airlines, Hong Kong Airlines, Skymark and Qantas), in which it is apparent that Boeing presented the 747-8I as an alternative to the A380 with a view to winning sales from the relevant customers. Furthermore, that the A380 and the 747-8I will generally compete for the same potential customers also finds support in the multiple references made in a number of different Airbus documents, not specifically prepared for the purpose of this proceeding, which suggest that Airbus has consistently maintained the view that the A380's potential customer base will overlap 747-8I in a segment of the LCA market that is filled by no other aircraft.

6.1410. Thus, for all of the above reasons, we find that the United States has established that, for the purpose of evaluating its claims of serious prejudice under Article 6.3 of the SCM Agreement, the A380 and 747-8I may be considered to compete against each other in one single product market for VLA. We note that this conclusion reflects the Appellate Body's explicit confirmation of the original panel's finding that "there is competition between the Airbus A380 and the Boeing 747 and that Airbus and Boeing competed for the Emirates" Airlines A380 orders in 2000.[2406]

Overall conclusion with respect to the existence of three separate product markets for passenger LCA

6.1411. In this section of our Report, we have found that the United States has demonstrated that it would be appropriate to evaluate the merits of its claims of serious prejudice in this compliance dispute on the basis of the following three separate product markets: (a) the product market for single-aisle aircraft in which Airbus and Boeing sell the A320neo, A320ceo, 737MAX and 737ng families of LCA; (b) the product market for twin-aisle aircraft in which Airbus and Boeing sell the A330, A350XWB, 767, 777 and 787 families of LCA; and (c) the product market for VLA in which Airbus and Boeing sell the A380 and the 747.

6.1412. In coming to this conclusion, we have explained how the LCA industry today continues to be an effective Airbus-Boeing duopoly, with each producer having a comparable range of aircraft to offer potential customers, and where competition takes place between these two players at different levels, including with respect to price, technology and the timing and availability of new and improved aircraft in line with their responses to the complex, constantly evolving and often idiosyncratic nature of aircraft demand. From the perspective of aircraft customers, there are no perfect substitutes within this competitive landscape, only different degrees of imperfect substitution. Finding exactly where to draw a line between these relationships in order to define the *precise* boundaries within which relevant "product markets" may exist poses a number of significant evidentiary and conceptual challenges.[2407]

6.1413. Throughout this proceeding, the European Union has emphasized that its objection to the United States' delineation of three product markets does not mean that it considers there is only

[2406] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1227-1228.

[2407] See discussion above at paras. 6.1185-6.1189 where *inter alia*, we note that the European Union has itself recognized the difficulties associated with trying to divide the continuum of competitive relationships that exist between *differentiated products* into one or more separate product markets, stating in its submission to the 2012 OECD Competition Committee Roundtable on Market Definition that:

> While much has been written in the academic literature on how best to define markets, the fact is that in many differentiated product industries, there is no clearly right way to draw boundaries that are not to some extent inevitably arbitrary.

very minimal competition between Airbus and Boeing. On the contrary, according to the European Union, the vast majority of LCA orders are for aircraft that compete in three of the six (or seven) product markets it advances, with 87% of sales in the period 2007-2012 (92% in 2012) being for aircraft which the European Union alleges face significant competitive constraints from an aircraft of the other airframe manufacturer, namely, the 737NG and A320ceo families, the 737MAX and A320neo families, and the 787 and A350XWB families.[2408] The European Union does not deny that differing degrees of less-than-vigorous competition exist between other combinations of Airbus and Boeing aircraft or that, in some cases, an LCA product of one manufacturer may impose significant competitive constraints on another LCA product without having to face any or the same level of competitive constraint from that product itself. Thus, for example, the European Union accepts that there is at present "limited" or "very little" competition between the new and current generations of Airbus and Boeing single-aisle and twin-aisle aircraft, respectively[2409]; that there is "little" or "weak" competition between the A330 and all three families of Boeing twin-aisle LCA[2410]; and that there is "very limited" or "very weak" competition between the A380 and the 747-8.[2411]

6.1414. While we do not agree with the entirety of the European Union's assertions concerning the degree of competition that exists between these and other combinations of Airbus and Boeing LCA, it is apparent that, ultimately, the European Union's objection to the three product markets advanced by the United States is based on its view that two products can only ever be found to fall within the same product "market", within the meaning of Article 6.3(a), (b) and (c) of the SCM Agreement, when they impose *significant* competitive constraints on *each other*.[2412] However, as explained above, we do not understand the Appellate Body to have made any conclusive statements or findings in the original proceeding on the requisite degree or intensity of competition for this purpose.[2413] Moreover, we recall that even in the context of competition policy, decisions about whether an existing competitive constraint is sufficiently strong enough to find that two products fall within the same product market will at times need to account for the extent to which *existing* competitive relationships may have been distorted by subsidization. An existing competitive constraint that is weak may appear to be stronger when the effects of subsidization are taken into account.[2414]

6.1415. In any case, we see no textual basis to interpret the word "market" that appears in Article 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*, as opposed to markets where competition between products is relatively weak or, in certain circumstances, even markets where strong competitive constraints are imposed by one product on one or more other products, which themselves impose little, if any, competitive constraint on the stronger competitor. Accepting the European Union's contentions about the degree or intensity of competition that must exist in order to establish that two products fall within the same product market would imply that the adverse 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.

6.1416. In the light of these and other considerations, our careful assessment of the extensive arguments and evidence submitted by the parties, including multiple expert reports and HSBI

[2408] European Union's response to Panel question Nos. 48, 49, 54, and 71; and comments on the United States' response to Panel question Nos. 48, 63, and 64.

[2409] European Union's first written submission, paras. 491, 602, 604, and 718; second written submission, paras. 636, 639, and 677; Mourey Statement, (Exhibit EU-8) (BCI), para. 82; and Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 10, 13, 19 and 22.

[2410] European Union's first written submission, para. 860; Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), paras. 10, 26, 35, 43, 50-51, and 60.

[2411] European Union's first written submission, para. 629; second written submission, para. 690; response to Panel question No. 58; Mourey Statement, (Exhibit EU-8) (BCI), para. 176; and Supplemental Mourey Statement, (Exhibit EU-124) (BCI/HSBI), para. 65.

[2412] See e.g. European Union's first written submission, para. 580; and response to Panel question No. 50.

[2413] See above paras. 6.1209-6.1211.

[2414] The error that would arise in the absence of accounting for such distortive effects of subsidies is known in competition policy as the "reverse cellophane fallacy". See above paras. 6.1190-6.1203.

concerning marketing strategies and sales campaigns, leads us to conclude that it would be appropriate to examine the United States' claims of serious prejudice on the basis of the three separate product markets we have identified above. We wish to emphasize, however, that in making this finding, it is *not* our view that the degree of competition existing within each of these markets will be identical between all pairings or combinations of aircraft. There will be weaker and stronger competitive relationships within each market depending upon the particular circumstances of a sale. Moreover, important competitive relationships may also exist between pairings or combinations of aircraft *across* two, or even all three, of the product markets.[2415] Thus, while it is apparent that the three product markets the United States has chosen to rely upon to bring its complaint of non-compliance do not exhaustively capture how competition takes place between aircraft in the LCA sector at all times, we are satisfied that at present (as in the original proceeding)[2416] they represent the three segments within which most competitive interactions between the relevant aircraft will commonly take place.

6.1417. We now proceed to evaluate the merits of the United States' submissions concerning the alleged present-day effects of the challenged subsidies in the three relevant product markets.

6.6.4.5 The effects of the challenged subsidies

6.6.4.5.1 Arguments of the United States

6.1418. The United States argues that the European Union's 36 alleged compliance "steps" lay out "an 'inaction plan'"[2417] that, for the most part, relies upon formalities, legal arguments concerning the passage of time and events from the past that did not preclude the panel and the Appellate Body from making findings of adverse effects in the original proceeding. According to the United States, the European Union's predominantly "passive" approach to compliance does nothing to remove the adverse effects caused by the use of subsidies because it fails to address the profound supply-creating effects of the challenged subsidies, which continue to endure in the post-implementation period, causing serious prejudice to the United States' interests within the meaning of Article 6.3(a), (b) and (c) of the SCM Agreement.[2418]

6.1419. The United States submits that in conducting its analysis of these alleged effects, the Panel should proceed in the same way that it did in the original proceeding, that is, by: (a) aggregating the effects of all of the challenged LA/MSF subsidies and determining the extent to which they are a "genuine and substantial" cause of the claimed instances of serious prejudice; and (b) determining the extent to which the effects of the other non-LA/MSF subsidies "complement and supplement" the effects of the LA/MSF subsidies.[2419] According to the United States, these determinations should be made on the basis of a "unitary" analysis of causation that applies a counterfactual focused on understanding what the market situation would look like in the relevant reference period "but for" the effects of the challenged subsidies.

6.1420. The United States recalls that the adopted panel and Appellate Body findings confirmed that the aggregated effects of LA/MSF enabled Airbus to launch and bring to market a full range of LCA products at a time and in a manner that would otherwise have been impossible, thereby profoundly affecting Airbus' ability to compete with the United States' LCA industry in the

[2415] It is asserted in the Mourey Statement that the 747-8 may sometimes face competition from the smaller, but more "efficient", 777-300ER, as well as the A350XWB-1000. (Mourey Statement, (Exhibit EU-8) (BCI), paras. 152-176). According to the United States, there is "relatively little record evidence of substitution between single-aisle and twin-aisle LCA, or between twin-aisle LCA and very large LCA". (United States' response to Panel question No. 50). We note that different combinations of aircraft might also be sold in *bundles*, in this way competing with each other across two or even all three of the product markets.

[2416] We recall that during the original Appellate Body proceeding, the parties appeared to accept (or at least did not object to the notion) that competition in the LCA industry could be viewed as taking place in three distinct passenger aircraft product markets, namely, the single-aisle, twin-aisle and VLA markets. The Appellate Body went on to "complete the analysis" on the basis of the same three product markets. See discussion above, paras. 6.1157 and 6.1162-6.1167.

[2417] United States' first written submission, para. 257.

[2418] United States' first written submission, paras. 240-289 and 317-532; second written submission, paras. 357-403 and 494-747; response to Panel question Nos. 38-44, 154-159, and 162; and comments on the European Union's response to Panel question Nos. 38-39, 45-47, 147-153, and 157-159.

[2419] United States' first written submission, paras. 282-284; second written submission, paras. 383-386; and response to Panel question No. 38.

2001-2006 reference period. The United States emphasizes that these findings led the panel and Appellate Body to conclude that the very design, structure and operation of LA/MSF made it likely that Airbus would not have existed at all in the 2001-2006 reference period in the absence of LA/MSF and, therefore, that the LA/MSF subsidies were a "genuine and substantial" cause of various forms of serious prejudice to the United States' interests.[2420] In this light, the United States maintains that the European Union's alleged failure to take any steps to eliminate the "product effects" of LA/MSF means that the same effects of LA/MSF have endured to the present day, with Airbus' product offering still being composed of LCA models that the panel and the Appellate Body found in the original proceeding could not have been launched and brought to market without LA/MSF.

6.1421. Similarly, the United States argues that Airbus' newest model of LCA, the A350XWB, could not have been launched and/or developed as and when it was in the absence of LA/MSF because the programme could not have been viable or otherwise funded by Airbus without the provision of LA/MSF in **[***]** and **[***]**, and/or in any case, the significant learning and financial effects of the pre-A350XWB LA/MSF subsidies. In particular, the United States maintains that the conclusion of the A350XWB LA/MSF contracts after December 2006 does not imply that Airbus did not need the government subsidies to launch and/or develop the programme, as the formalization of LA/MSF agreements months or a few years after a programme's commercial launch is not unusual, and follows a similar pattern to the provision of prior LA/MSF. Moreover, according to the United States, evidence shows that the European Union member States had committed to providing A350XWB LA/MSF before it was launched. In any case, the United States submits that both from a technical and financial perspective, Airbus could not have launched and brought the A350XWB to market in the absence of *inter alia* the experience Airbus gained in designing, developing, managing and producing all of its other models of LCA that would likely not have existed without the pre-A350XWB LA/MSF subsidies.[2421] Thus, the United States argues that there is no basis to find that Airbus could have developed, produced and sold the full range of LCA that it currently offers in the absence of the challenged LA/MSF subsidies.[2422]

6.1422. The United States rejects the European Union's contention that the effects of the challenged subsidies have dissipated through the passage of time, recalling that the Appellate Body explained in *US – Upland Cotton (Article 21.5 – Brazil)* that a Member charged with complying with Article 7.8 of the SCM Agreement "would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own".[2423] According to the United States, the European Union's reliance on the passage of time fails to come to terms with the long-lasting and profound effects of the LA/MSF subsidies, without which the panel and Appellate Body in the original proceeding found that it would be likely that Airbus would not exist.[2424]

6.1423. The United States also disagrees with the European Union's view that certain post-launch investments in the A320 and A330 have eliminated the "genuine and substantial" causal relationship between the challenged LA/MSF subsidies and the claimed instances of serious prejudice.[2425] The United States argues, *inter alia*, that the incremental improvements in the two models that were funded by post-launch investments were only possible because of the effects of the WTO-inconsistent subsidies that enabled Airbus to develop and bring to market the original A320 and A330 in the first place.[2426] In any case, the United States maintains that the aircraft improvements at issue are not of the kind that could eliminate the "genuine and substantial" causal relationship between the LA/MSF subsidies and the presence of the A320 and A330 in the product market in the post-compliance period.[2427]

[2420] United States' first written submission, paras. 326-347; and second written submission, paras. 397 and 401.
[2421] United States' second written submission, paras. 550 and 559-672.
[2422] United States' first written submission, paras. 321-325 and 348-399; United States' second written submission, paras. 358, 401-402, 494, 548-672.
[2423] United States' second written submission, para. 395 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236).
[2424] United States' second written submission, paras. 397 and 400.
[2425] United States' second written submission, paras. 503-525.
[2426] United States' second written submission, paras. 511-515.
[2427] United States' second written submission, paras. 516-525.

6.1424. Thus, the United States argues that the aggregated effects of the challenged LA/MSF subsidies, including those provided for the A350XWB, have allowed Airbus to be present on the LCA market with a full range of aircraft models which Airbus continues to sell and deliver today, thereby constituting a "genuine and substantial" cause of serious prejudice to its interests in the form of: (i) displacement and impedance of imports of Boeing LCA into the European Union's single-aisle, twin-aisle and VLA markets, within the meaning of Article 6.3(a) of the SCM Agreement; (ii) displacement and impedance of exports of Boeing LCA from the single-aisle, twin-aisle and VLA markets in six third countries, within the meaning of Article 6.3(b) of the SCM Agreement; and (iii) significant lost sales, within the meaning of Article 6.3(c).[2428]

6.1425. Finally, according to the United States, the non-LA/MSF subsidies that it challenges in this dispute continue to contribute to the serious prejudice experienced by the United States' LCA industry in the same way they were found to cause serious prejudice to its interests in the original proceeding. In particular, the United States recalls that the French and German government equity infusions were found by the Appellate Body to have had "a genuine connection with Airbus' ability to develop and bring to market particular models of LCA, both by guaranteeing the continued existence and financial stability of Aérospatiale and Dasa, and by enhancing those companies' borrowing capacity in the wake of further investments in production and development of particular models of LA/MSF-financed Airbus LCA".[2429] Likewise, the United States notes that the Appellate Body reached a similar conclusion with respect to the challenged infrastructure-related regional development subsidies, which the United States asserts were found to have "a genuine causal link with the creation or expansion of production facilities for various models of Airbus LCA".[2430] In the light of the European Union's alleged failure to take any steps to eliminate the effects of these measures, the United States concludes that the same effects continue to endure today, thereby contributing to the forms of serious prejudice it claims under Article 6.3(a), (b) and (c) of the SCM Agreement.[2431]

6.6.4.5.2 Arguments of the European Union

6.1426. The European Union argues that the United States has failed to demonstrate that the challenged subsidies cause serious prejudice to the United States' interests in the post-implementation period and, therefore, that the European Union and certain member States have failed to comply with the requirement in Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects". Accordingly, the European Union asks the Panel to dismiss the entirety of the United States' non-compliance claims.

6.1427. The European Union maintains that the United States errs when it argues that the LA/MSF subsidies provided for the A350XWB were, alone or together with previous pre-A350XWB subsidies, essential to Airbus' ability to launch and bring to market the A350XWB. According to the European Union, the United States' position is untenable because the facts show that not only was the A350XWB launched three years *before* the relevant LA/MSF agreements were concluded, but also *inter alia* that Airbus had obtained more than 400 aircraft orders by that time and was committed to the programme and able to fund it regardless of any financing from the European Union member States. Similarly, the European Union asserts that the A350XWB programme did not benefit from any "spill-over" effects of the pre-A350XWB subsidies because the aircraft was a completely new design, distinguishing it from all other Airbus wide-body offerings. Thus, the European Union argues that the United States' allegations concerning the effects of the challenged subsidies on the launch and bringing to market of the A350XWB cannot be sustained.[2432]

[2428] United States' first written submission, paras. 348 and 407-533; second written submission, paras. 673-747; and response to Panel question Nos. 40, 154, and 162.

[2429] United States' first written submission, paras. 400-403 and 406 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1390).

[2430] United States' first written submission, paras. 400 and 404-406 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1397).

[2431] United States' first written submission, paras. 90-103 and 406; and second written submission, para. 385.

[2432] European Union's first written submission, paras. 1080-1204; and second written submission, paras. 870-1203.

6.1428. The European Union submits that the United States' arguments concerning the effects of the pre-A350XWB subsidies on all other relevant models of Airbus LCA are also flawed. At the heart of the European Union's objection, is the view that the United States' position is based on a mistaken counterfactual derived from an improper application of the "but for" causation standard utilized in previous serious prejudice disputes.

6.1429. Referring to certain Appellate Body statements made in the original proceeding and *US – Upland Cotton (Article 21.5 – Brazil)*[2433], the European Union recalls that the "but for" standard will not always be sufficient to demonstrate causation in an adverse effects dispute. According to the European Union, the fact that a "but for" analysis may reveal that a subsidy is a "*necessary*" cause of certain effects does not always mean that the same subsidy will also be a "*substantial*" cause of those effects.[2434] In this light, and given the time that has passed between the provision of the challenged subsidies, the end of the reference period used in the original proceeding and the post-implementation period, the European Union argues that the correct counterfactual in this dispute should not be whether Airbus would have been able to offer and sell the relevant LCA without the challenged subsidies (as the United States allegedly posits), but rather whether absent certain events that took place in that time interval, such as the non-subsidized investments in the A320 and A330, "'the product originally launched with subsidies {would} be competitive in the LCA markets today'".[2435] The European Union submits that it is only by adopting a counterfactual of this kind that the Panel will be able to properly account for how a "key non-attribution" factor in this dispute[2436], the passage of time, has attenuated the effects of the pre-A350XWB LA/MSF subsidies such that they no longer can be said to be a "genuine and substantial" cause of the instances of serious prejudice the United States claims to have suffered in the post-implementation period.[2437]

6.1430. The European Union argues that the United States' submissions are deficient in this regard because they fail to respect the Appellate Body's specific guidance, including the statement that "the effects of any subsidy can be expected to diminish and eventually come to an end with the passage of time".[2438] Consequently, given the unusually long periods of time at issue in this dispute – with certain LA/MSF subsidies being almost 45 years old – the European Union argues that the United States is not entitled to rely upon the counterfactual and "product effect" findings from the original proceeding and merely presume that the same effects and counterfactual are valid in the post-implementation period.[2439]

6.1431. Moreover, according to the European Union, Airbus' post-launch investments in the A320 and A330 are events that must be taken into account when considering the impact of the passage of time on the effects of the original LA/MSF subsidies. The European Union asserts that the ongoing need to match the competition's improved technology in the LCA industry means that the passage of time will have necessarily diminished the importance of all pre-A350XWB subsidies on the current market presence of the aircraft those subsidies originally financed and/or helped bring to market.[2440] The European Union asserts that this dynamic is reflected in the significant post-launch investments that Airbus made in the A320 and A330, which enabled Airbus to sustain and improve the two aircraft's competitiveness and better meet the changing conditions of demand.[2441] The European Union maintains that it is these later-in-time, non-subsidized investments, and not the challenged subsidies, that are "the" *substantial* cause of the A320 and A330 families' current sales and market shares. Thus, the European Union submits that the

[2433] See e.g. European Union's first written submission, para. 637 (quoting Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1233; and *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374).

[2434] European Union's first written submission, paras. 637-642 (quoting Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1233; and *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374); and second written submission, paras. 600-607.

[2435] European Union's second written submission, para. 603 (quoting United States' second written submission, para. 506).

[2436] European Union's first written submission, para. 727.

[2437] European Union's first written submission, paras. 554-557 and 640-651; and second written submission, paras. 584-598.

[2438] European Union's first written submission, para. 640 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1238); second written submission, para. 588; and comments on the United States' response to Panel question No. 42.

[2439] European Union's second written submission, paras. 594-595.

[2440] European Union's first written submission, para. 728.

[2441] European Union's first written submission, paras. 729 and 876.

non-subsidized investments in the A320 and A330 have severed the chain of causation between the pre-A350XWB subsidies and the claimed forms of serious prejudice to the United States' interest in the post-implementation period.[2442]

6.1432. In any event, the European Union argues that the United States has failed to demonstrate how and why any effects of the challenged LA/MSF and non-LA/MSF subsidies should be, respectively, aggregated and cumulated in the Panel's evaluation of the merits of the United States' serious prejudice claims. The European Union maintains that the United States' argument for aggregating the effects of the challenged LA/MSF subsidies is flawed because it ignores the distinct markets in which different subsidies allegedly cause adverse effects. The European Union submits that the United States' arguments fail because they disregard the need to aggregate the effects of the challenged LA/MSF subsidies on a market-by-market basis in order to follow the market-based logic of the serious prejudice analysis that must be performed in this compliance dispute.[2443] Moreover, the European Union argues that the United States has simply failed to present any arguments and evidence to substantiate its request that the Panel cumulate the effects of all of the remaining non-LA/MSF subsidies.[2444]

6.1433. Finally, and in the alternative to the above, to the extent that the Panel were to find that the effects of any of the challenged subsidies continue to support the launch, development and production of Airbus LCA[2445], the European Union argues for various, non-subsidy related reasons, that the United States has failed to demonstrate serious prejudice in the form of: (i) displacement and impedance of imports of Boeing LCA into the European Union's single-aisle, twin-aisle and VLA markets, within the meaning of Article 6.3(a) of the SCM Agreement; (ii) displacement and impedance of exports of Boeing LCA from the single-aisle, twin-aisle and VLA markets in six third countries, within the meaning of Article 6.3(b) of the SCM Agreement; and (iii) significant lost sales, within the meaning of Article 6.3(c).[2446]

6.6.4.5.3 Arguments of the third parties

6.6.4.5.3.1 Australia

6.1434. Australia argues that the European Union is required to take affirmative action to withdraw all current subsidies to Airbus that had been found to be non-compliant, or take affirmative action to remove the adverse effects of those subsidies. Moreover, according to Australia, where a complaining Member has shown a lack of appropriate action by the implementing Member, it will have established a *prima facie* case of non-compliance. The burden of demonstrating the intervening events which break the nexus between the non-compliant measures, the adverse effects, and bringing the measures into compliance should then rest with the implementing Member.[2447]

6.6.4.5.3.2 Brazil

6.1435. Brazil recalls that the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* stated that "compliance with Article 7.8 of the SCM Agreement will usually involve some action by the respondent Member" and that a "Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own".[2448] Thus, according to Brazil, an implementing Member will be generally expected to take an affirmative, appropriate, action and cannot be considered as having complied with Article 7.8 of the SCM Agreement if it does not actively intervene to remove the adverse effects.

[2442] European Union's first written submission, paras. 730-799 and 877-924; and second written submission, paras. 739-821.

[2443] European Union's second written submission, paras. 569-574; response to Panel question No. 38; and comments on the United States' response to Panel question No. 38.

[2444] European Union's first written submission, para. 714.

[2445] European Union's first written submission, paras. 716, 859, and 966.

[2446] European Union's first written submission, paras. 800-857, 925-964, and 1031-1079; second written submission, paras. 1207-1695; response to Panel question No. 39; and comments on the United States' response to Panel question Nos. 40, 43, 44, 154, and 162.

[2447] Australia's third-party statement, paras. 8-9; and third-party response to Panel question No. 1.

[2448] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236.

6.1436. Brazil submits that in determining whether the adverse effects of subsidies found in an original proceeding have been removed, the characteristics of the market and industries involved must be fully taken into account. Concepts such as "displacement and impedance", "price undercutting" and "increase in the world market share", referenced in Article 6.3 of the SCM Agreement, should be construed in a manner that incorporates the lasting effects of such market phenomena. Moreover, due attention must be paid to the particularities of the product concerned: the adverse effects of non-recurring subsidies granted to aircraft producers are likely to last much longer than the effects of non-recurring subsidies by producers of non-durable goods. In the case of aircraft producers, the adverse effects may last for a long period in the future even when the events mentioned in Article 6.3 take place in a well-defined period in the past.[2449]

6.6.4.5.3.3 Canada

6.1437. Canada argues that only subsidies that have neither expired nor been withdrawn by the end of the reasonable period of time provided to a Member to implement DSB recommendations should serve as the basis of the analysis of serious prejudice in compliance proceedings. According to Canada, there must be consistency between the two options available to a Member under Article 7.8 of the SCM Agreement, namely, a Member must either withdraw the subsidies that cause adverse effects or remove the adverse effects caused by those subsidies, by the end of the reasonable period of time it has to comply with the DSB recommendation. If a subsidy has been withdrawn or has expired, Canada maintains that a Member cannot be asked to remove the adverse effects of that subsidy.

6.1438. Canada submits that as is the case in initial proceedings, the proper method to make this assessment in compliance proceedings is to conduct a counterfactual analysis to determine what would be the situation in the absence of the subsidies at issue. In the single-aisle LCA product market, Canada argues that the Panel should determine the impact of any subsidies that continue to exist and whether this impact causes serious prejudice. With respect to the VLA product market, Canada disagrees with the European Union that the purpose of the Panel's counterfactual analysis should be to determine whether in the absence of LA/MSF for the A380 this aircraft would still have been launched. According to Canada, the proper counterfactual analysis consists of assessing what the situation would be if the European Union had withdrawn the subsidy by the end of the reasonable period of time by, for example, increasing the rate of return on the A380 LA/MSF subsidies.[2450]

6.6.4.5.3.4 Japan

6.1439. Japan submits that the removal of adverse effects for the purpose of Article 7.8 of the SCM Agreement would be established if the Member granting a beneficial financial contribution makes it no longer possible for the grantee enterprise to use the benefits conferred by the financial contribution to lower the sales price of its products, for example, by having the benefit returned to the grantor government. In such a situation, Japan argues that the adverse effects of the subsidies should be considered to have been removed. If a grantee enterprise in this circumstance is still commercially able to sell its products at a competitive price, it would be, by definition, more economically efficient to allow it to do that, rather than to disable it to do that. According to Japan, this interpretation of what it means to "remove" the adverse effects finds support in the Appellate Body's rulings in *EC and certain member States – Large Civil Aircraft* and *US – Upland Cotton (Article 21.5 – Brazil)*.[2451]

[2449] Brazil's third-party submission, para. 12; and third-party statement, para. 15.
[2450] Canada's third-party submission, paras. 42-50; and third-party statement, paras. 16-19.
[2451] Japan's third-party statement, paras. 20-26; and third-party submission, paras. 65-70 (citing Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 710, 713-714, and 744-745).

6.6.4.5.4 Evaluation by the Panel

6.6.4.5.4.1 Introduction

6.1440. Consistent with the panel's approach to evaluating the effects of the subsidies at issue in the original proceeding[2452], the United States' submissions in this compliance dispute have first of all sought to demonstrate that the challenged LA/MSF subsidies are a "genuine and substantial" cause of various forms of serious prejudice within the meaning of Article 6.3 of the SCM Agreement, before attempting to show that the effects of the non-LA/MSF subsidies may be cumulated with those of the LA/MSF subsidies, to the extent that they are, themselves, a "genuine" cause of the same forms of serious prejudice. We do not understand the European Union to have raised any objections to this general approach, which we intend to follow in evaluating the merits of the United States' claims. Thus, in the remainder of this subsection of our Report, we examine the parties' arguments concerning the effects of the challenged subsidies in essentially two parts: First, we focus on the parties' submissions with respect to the question whether the challenged LA/MSF subsidies are a "genuine and substantial" cause of serious prejudice to the United States' interests within the meaning of Article 6.3(a), (b) and (c) of the SCM Agreement. After answering this question in the affirmative, we examine the extent to which the non-LA/MSF subsidies can be said to be a "genuine" cause of the same forms of serious prejudice and, thereby, whether the United States is entitled to cumulate the effects of the non-LA/MSF subsidies with those of the LA/MSF subsidies. However, before turning to evaluate these substantive matters, we first address the parties' arguments with respect to the following two preliminary matters: (a) the relevant reference period that should be used for the purpose of assessing the merits of the United States' claims of serious prejudice; and (b) the extent to which the United States has demonstrated that it is entitled to aggregate the effects of the challenged LA/MSF subsidies.

6.6.4.5.4.2 The relevant reference period

6.1441. The United States maintains that a panel tasked with having to determine a responding Member's compliance with an original panel and/or Appellate Body recommendation made in accordance with Article 7.8 of the SCM Agreement, must consider all relevant data from a period of time that permits it to fulfil its prescribed mandate. For the United States, this means that a compliance panel called upon to determine whether a responding Member has acted consistently with the requirement to "take appropriate steps to remove the adverse effects", should consider all pertinent evidence relating to factors including the subsidies in question, the products at issue, the conditions of competition and the nature and timing of the responding Member's asserted compliance measures, as well as any measures that negate or undermine that Member's compliance with the adopted rulings and recommendations.[2453] Thus, in the light of the nature and timing of the European Union's alleged compliance "steps" (some of which date as far back as

[2452] The Appellate Body described the approach taken by the panel in, *inter alia*, the following terms:

> Having determined that each of the LA/MSF measures enabled launches of particular Airbus LCA models and therefore were a substantial cause of the displacement and significant lost sales of Boeing LCA, the Panel sought to determine whether non-LA/MSF subsidies "complemented and supplemented" the effects of LA/MSF measures, even if each of the non-LA/MSF subsidies, taken individually, would not have enabled launches of particular Airbus LCA models, and therefore would not have been a substantial cause of the displacement and significant lost sales. 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. … Given that the Panel had determined that LA/MSF subsidies were a substantial cause of the alleged market phenomena, it was permissible and sufficient for the Panel to assess whether a genuine causal connection between non-LA/MSF subsidies and the same market phenomena existed such that these non-LA/MSF subsidies complemented or supplemented the effects of LA/MSF. … {T}he Panel was not required, in those circumstances, to establish that non-LA/MSF subsidies were themselves a substantial cause or "necessary to enable a launch decision at a particular point in time".

(Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1378) (footnote omitted)

See also the description of the panel's approach in the original proceeding in Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1282 and 1287-1289.

[2453] United States' response to Panel question No. 34, para. 85.

1997 and many of which predate the original 2001-2006 reference period), the United States argues that it would be appropriate and particularly important for the Panel in this compliance dispute to take a long-term perspective.[2454] To this end, the United States submits that the Panel should evaluate the merits of its non-compliance claims on the basis of all relevant data and evidence, starting from 1997 through to the most recent period for which data are reasonably available, with a particular focus on the period from 2007 to the present.[2455]

6.1442. Although appearing to initially object to the United States' submissions concerning the consideration of evidence from a time-interval that starts before the end of the implementation period[2456], the European Union subsequently clarified that it sees "no legal reason for limiting the reference period, from which data is gathered, to after the end of the implementation period".[2457] Indeed, not unlike the United States, the European Union maintains that in order to assess whether "displacement" exists after the end of the implementation period, "it may be useful to look at the evolution of market shares and delivery volumes subsequent to the end of the reference period used in the original proceedings".[2458] The European Union cautions, however, that the Panel's analysis must ultimately place particular emphasis on data post-dating the implementation period, because a finding of non-compliance with the requirement to "take appropriate steps to remove the adverse effects" can only be made in respect of the market situation that exists after 1 December 2011.[2459]

6.1443. It is well established that a panel tasked with reviewing the merits of claims made under Article 6.3(a), (b) and (c) of the SCM Agreement must focus its efforts on determining the extent to which the challenged subsidies are a "genuine and substantial" cause of serious prejudice *in the present*[2460], or as the compliance panel in *US – Upland Cotton (Article 21.5 – Brazil)* termed it, "*under current factual conditions*".[2461] However, as we explained in the original proceeding, the unavailability of immediate data means that "it is impossible to assess the 'present' situation, … and thus a review of the past is necessary to draw conclusions" about the present.[2462]

6.1444. The parties agree that as far as the findings that must be made in this proceeding are concerned, it may be possible and even appropriate for the Panel to examine data from a historical period that predates the end of the implementation period. We share this view. Moreover, we see no need to make any *a priori* choice of reference period. In the absence of any specific guidance on this issue in the relevant legal provisions[2463], we consider that our duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU would be best served if we were to examine 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. Given the nature of the United States' arguments concerning the lasting effects of the challenged subsidies, the relatively long marketing lives of the subsidized LCA products, and the timing of some of the European Union's declared compliance measures, this approach we believe implies that parts of our analysis must be informed by developments over a relatively long period of time. Thus, rather than make *a priori* judgements as to a defined and limited reference period, we will consider all the relevant information that has been put before us, and assess it in the light of the parties' arguments. We will do so, however, recognizing that the United States will only succeed in its non-compliance claims if it can establish the existence of *present* serious prejudice to its interests within the meaning of Article 6.3(a), (b) and (c) of the SCM Agreement *in the post-implementation period*, that is, *present* serious prejudice in the period *after 1 December 2011*. For this reason, our ultimate conclusion on the extent to which the

[2454] United States' first written submission, para. 289; and second written submission, para. 390.
[2455] United States' first written submission, para. 289; and second written submission, paras. 387-394.
[2456] European Union's first written submission, para. 568 ("In short, the Panel must assess the existence of present adverse effects 'under current factual conditions' in a reference period that postdates the end of the implementation period on 1 December 2011"). (footnote omitted)
[2457] European Union's response to Panel question No. 34(c), para. 90.
[2458] European Union's response to Panel question No. 34(a), para. 85.
[2459] European Union's response to Panel question No. 34(a), para. 85; and comments on the United States' response to Panel question No. 34(c), para. 133.
[2460] Panel Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.18; and *EC and certain member States – Large Civil Aircraft*, paras. 7.1694 and 7.1714
[2461] Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.104 and 10.248. (emphasis original)
[2462] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1694.
[2463] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1693.

United States has established its claims of serious prejudice will be focused on the most recent market data presented by the parties in this dispute from the *post-implementation period*, as it is only with respect to the effects found to exist in the period *after* 1 December 2011 that the European Union and certain member States may be found to have failed to comply with its obligation to "take appropriate steps to remove the adverse effects" by the end of the implementation period.

6.6.4.5.4.3 Aggregation of the effects of the LA/MSF subsidies

6.1445. In the original proceeding, the panel undertook a collective assessment of the effects of the challenged subsidies through a process of "cumulation".[2464] As explained by the Appellate Body, this process involved an assessment of the extent to which the effects of the challenged LA/MSF subsidies were a "genuine and substantial" cause of serious prejudice, followed by a determination of whether the effects of the non-LA/MSF subsidies were a "genuine" cause of the same forms of serious prejudice, such that they could be "cumulated" with those of the LA/MSF subsidies. The Appellate Body upheld the panel's approach, finding that it was permissible under Article 6.3 of the SCM Agreement.[2465]

6.1446. The original panel began its evaluation of the effects of the challenged LA/MSF subsidies by focusing on Airbus' earliest LCA programme, the A300. After recalling its findings concerning the profit-enhancing and risk-reducing nature of LA/MSF[2466], and the significant level of risk associated with the A300, which was Airbus' first LCA programme, as well as the history and risks of developing LCA in general[2467], the panel concluded that "LA/MSF was necessary for Airbus to have launched the A300 as originally designed and at the time that it did".[2468] The panel went on to consider the effects of LA/MSF on each successive model of Airbus LCA, on a model-by-model basis. Not unlike its findings in respect of the A300, the panel's conclusions about the effects of LA/MSF on Airbus' subsequent models of LCA were informed by its evaluation of the content and probative value of various pieces of evidence adduced by the United States.[2469] The panel's analysis considered not only the *direct* effects of the LA/MSF subsidies provided for the purpose of one specific LCA programme, but also the *indirect* "learning", scope and financial effects of those subsidies on other Airbus LCA programmes.[2470] In the light of the panel's findings with respect to these two types of effects on Airbus' operations, the panel concluded that "Airbus' ability to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized

[2464] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1288.
[2465] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1378.
[2466] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1888-7.1912.
[2467] In order to establish the "background and context" for its adverse effects analysis, the panel set out its understanding of the "basic structure of the LCA industry overall, and the nature and conditions of competition for LCA products". In doing so, the panel observed that the production and bringing to market of LCA is an "enormously complex and expensive undertaking"; that entry into the industry "requires huge up-front investments"; and that "{e}conomies of scale arising from the huge sunk development cost give incumbent firms a considerable competitive advantage". The panel furthermore explained that "{l}earning effects induce dynamic economies of scale which reinforce incumbents' advantage" and that "{e}conomies of scope make it difficult to enter one market segment only". (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1717). The panel referred back to these considerations in its evaluation of the effects of the LA/MSF subsidies.
[2468] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1933-7.1934.
[2469] Apart from the Dorman Report, the United States sought to substantiate its arguments concerning the effects of LA/MSF by introducing evidence of number of Airbus or EC member State public statements, one EC State Aid Decision, and the Airbus business cases for the A380, A340-500/600, and the A330-200. (Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1913-7.1931)
[2470] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1935-7.1948. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1269, 1281, 1352, 1355, and 1356. Although the original panel did not specifically refer to these effects as "direct" and "indirect" effects, we believe that the "direct" and "indirect" effects nomenclature provides a useful way of understanding the panel's evaluation of the effects of the LA/MSF subsidies. In this regard, we note that the nomenclature used by the United States to describe what are essentially the same effects is "primary" and "secondary" effects. (See e.g. United States' second written submission, paras. 400-402). While the European Union accepts that LA/MSF can have "primary" and "secondary" effects, the European Union maintains that the United States errs when it argues that the original panel and Appellate Body recognized that such effects last as long as the benefitting LCA programmes remain in production. (See e.g. European Union's response to Panel question 46, paras. 114, 117, 119, and 123)

LA/MSF"[2471], and therefore, that the LA/MSF subsidies were a "genuine and substantial" cause of serious prejudice to the United States' interests.[2472]

6.1447. According to the United States, the original panel's evaluation of the effects of the challenged LA/MSF subsidies was conducted on an "aggregated" basis[2473], a characterization which the European Union does not dispute. In our view, the original panel's analysis of the effects of the challenged LA/MSF subsidies is largely consistent with the Appellate Body's subsequent guidance on when and how to aggregate subsidies.[2474] In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body explained that:

> {A} panel may group together subsidy measures that are sufficiently similar in their design, structure, and operation in order to ascertain their aggregated effects in an integrated causation analysis and determine whether there is a genuine and substantial causal relationship between these multiple subsidies, taken together, and the relevant market phenomena identified in Article 6.3 of the *SCM Agreement* … .[2475]

6.1448. That the original panel considered the challenged LA/MSF measures to share a similar "design, structure and operation" is apparent from *inter alia* the panel's description of the key features of the challenged LA/MSF measures, which were characterized as unsecured, non-commercial "loans" with back-loaded and success-dependent repayment terms provided to Airbus for the specific purpose of developing LCA.[2476] It is also apparent from the panel's causation analysis that it explored the effects of the LA/MSF subsidies on both an individual and integrated basis. As already noted, the panel's effects analysis identified two types of LA/MSF effects – direct and indirect effects. The panel examined the impact of these two types of effects on Airbus' operations on a model-by-model basis. In doing so, the panel explained the extent to which alone, and in combination, the direct and indirect effects of LA/MSF operated to enable Airbus to launch, develop and bring to market each model of LCA that existed in the 2001-2006 reference period.[2477] The panel's findings with respect to these effects ultimately led to the conclusion that the challenged LA/MSF subsidies were a "genuine and substantial" cause of serious prejudice to the United States' interests.[2478]

6.1449. By asking the Panel to aggregate the effects of the challenged LA/MSF subsidies in this proceeding, we understand the United States to be arguing that the Panel should follow essentially the same approach used to analyse causation in the original proceeding[2479], an approach that was

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[2471] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1949.

[2472] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1377-1378.

[2473] United States' first written submission, para. 282; second written submission, para. 383; and comments on the European Union's response to Panel question No. 38, para. 75.

[2474] We note that the Appellate Body did not characterize the original panel's approach to determining the effects of the challenged LA/MSF subsidies as involving "aggregation". However, in its subsequent description of the panel's analysis in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body appears to suggest that it may have considered the panel's approach to be broadly in line with an "aggregated" effects analysis. (See, in particular, Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1287-1288)

[2475] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1285.

[2476] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.367-7.375 and 7.1881.

[2477] Although the panel did not explicitly refer to indirect effects in its discussion of the impact of LA/MSF on the A300 programme, the panel's analysis of the effect of LA/MSF on the A310 programme cited evidence which clearly demonstrated that the development and bringing to market of the A300-600 was also impacted by the indirect "learning" effects resulting from the launch and development of the A310. (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1935 (citing a report in the 24 February 1986 edition of *Aviation Week & Space Technology*, quoting an Airbus executive as having stated that: "'In the 1980s, we were able to widen our family by launching the A310 that incorporated many systems and power plant improvements that had occurred in the years since the A300 was designed', … 'Then we turned around and put many of the A310 improvements back into the A300 and came up with an updated aircraft that we designated the A300-600. The same philosophy will be followed with our new aircraft. Additionally, there is a strong possibility that the A320/A330/A340 technology can be used as well to create an advanced A300 and/or A310 in the 1990s'.").

[2478] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1377-1378.

[2479] United States' first written submission, para. 282 ("{T}he United States considers that an integrated analysis of the effects of all of the LA/MSF is appropriate … This was the approach followed by the original Panel and affirmed by the Appellate Body"). See also United States' second written submission, para. 383.

affirmed by the Appellate Body.[2480] While generally not disagreeing with the view that LA/MSF subsidies "may be aggregated for purposes of assessing their alleged present causal link to the launch of a particular product and, subsequently, {any} *present* adverse effects"[2481], the European Union maintains that in this compliance dispute, the Panel may proceed to aggregate the effects of the challenged LA/MSF subsidies *only* if they are "*shown to exist at present* and thus not withdrawn".[2482]

6.1450. Having previously rejected the European Union's submissions concerning the alleged withdrawal of the LA/MSF subsidies and the purported requirement to demonstrate "present subsidization" in the context of Article 7.8 of the SCM Agreement[2483], we see no basis to support the European Union's objection to the United States' request to aggregate the effects of the LA/MSF subsidies. In our view, there is no impediment to conducting an evaluation of the effects of challenged LA/MSF subsidies in this proceeding in essentially the same manner as the panel in the original dispute. However, as both parties have emphasized, in this compliance proceeding, our evaluation of the effects of the LA/MSF subsidies must be undertaken with a view to determining the merits of the United States' claims of serious prejudice in three different product markets − the single-aisle, the twin-aisle and the VLA markets − rather than *one single LCA product market* (as the panel did in the original proceeding).[2484]

6.1451. In this respect, we recall that while the Appellate Body overturned the panel's "one single product market" finding in the original proceeding[2485], it nevertheless affirmed the panel's evaluation of the effects of the LA/MSF subsidies[2486], ultimately concluding that they were a sufficient basis to establish that the LA/MSF subsidies were a "genuine and substantial" cause of Boeing lost sales and displacement in the single-aisle, twin-aisle and VLA markets.[2487] Given our finding that it would be appropriate to consider the United States' serious prejudice claims in this dispute on the basis of the same three LCA product markets used by the Appellate Body to "complete the analysis" in the original proceeding[2488], we believe that the same approach used to assess the direct and indirect effects of LA/MSF in the original proceeding may be equally applicable to our task of determining the effects of the LA/MSF subsidies in the current proceeding. Thus, in this compliance dispute, we will follow the same analytical path affirmed by the Appellate Body in the original proceeding to determine the effects of the challenged LA/MSF subsidies. We will do so bearing in mind that in reviewing the parties' arguments with respect to the extent to which the LA/MSF subsidies provide a relevant and identifiable competitive advantage to Airbus, we must not combine the effects of multiple LA/MSF subsidies in a way that absolves the United States from its burden of demonstrating that the challenged LA/MSF subsidies are a "genuine and substantial" cause of serious prejudice in each of the relevant product markets.[2489]

6.6.4.5.4.4 The effects of the LA/MSF subsidies

Introduction

6.1452. In this part of our evaluation of the United States' submissions concerning the effects of the challenged subsidies, we examine the extent to which the United States has demonstrated that the *effects of the challenged LA/MSF subsidies* are a "genuine and substantial" cause of the forms of serious prejudice the United States alleges it continues to experience in the post-implementation period.

[2480] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1378.
[2481] European Union's response to Panel question No. 38, para. 105. (emphasis original)
[2482] European Union's response to Panel question No. 38, para. 105. (emphasis original)
[2483] See above paras. 6.839-6.841 and 6.1101-6.1103.
[2484] United States' response to Panel question No. 38, para. 99; comments on the European Union's response to Panel question No. 38, para. 75; and European Union's second written submission, paras. 569-574.
[2485] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1137.
[2486] See e.g. Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 1264-1266, 1269-1272, and 1377-1378.
[2487] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1414(l), (m), (o), and (p).
[2488] See above Section 6.6.4.4.
[2489] Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 1290.

6.1453. In keeping with how the parties have presented their arguments, our evaluation of the United States' serious prejudice claims will proceed on the basis of a "unitary" analysis of causation.[2490] The Appellate Body clarified in the original proceeding that when performing a "unitary" analysis, the effects of the relevant subsidies should be determined by conducting a counterfactual analysis, which "entails comparing the actual market situation that is before the adjudicator with the market situation that would have existed in the absence of the challenged subsidies".[2491] In this proceeding, the parties have advanced profoundly different views about what the appropriate counterfactual should look like, including the role that the counterfactuals used in the original proceeding should play in its identification. Accordingly, we begin our evaluation of the merits of the parties' arguments by addressing their disagreement with respect to the appropriate counterfactual.

6.1454. After finding that, consistent with the Appellate Body's guidance, the appropriate counterfactual should be "the market situation {in the post-implementation period} that would have existed in the absence of the challenged subsidies", and that its identification should be informed by the counterfactuals used in the original proceeding, we recall the panel and Appellate Body findings concerning the effects of the pre-A350XWB LA/MSF subsidies that are at issue in this compliance dispute, including the counterfactual scenarios that formed the basis of the adopted rulings and recommendations. We then turn to evaluate the merits of the parties' arguments concerning the effects of the pre-A350XWB LA/MSF subsidies on Airbus in the post-implementation period before moving onto examine the effects of LA/MSF on the launch and bringing to market of the A350XWB.

The appropriate counterfactual

6.1455. In the original proceeding, the Appellate Body clarified that when performing a "unitary" analysis of causation, the effects of the subsidies at issue in a serious prejudice dispute should be determined by conducting a counterfactual analysis, which "entails comparing the actual market situation that is before the adjudicator with the market situation that would have existed *in the absence of the challenged subsidies*".[2492] Moreover, the Appellate Body explained that "one possible approach to the assessment of causation is an inquiry that seeks to identify what would have occurred 'but for' *the subsidies*".[2493] In our view, it follows from this guidance that the appropriate counterfactual for the purpose of determining whether *the challenged LA/MSF subsidies* are a "genuine and substantial" cause of serious prejudice to the United States' interests in this dispute is the market situation that would have existed in the post-implementation period in the absence of *the challenged LA/MSF subsidies*. This is essentially what we understand the United States to argue when it asserts that "{t}he correct counterfactual analysis is … whether, but for LA/MSF, Airbus would have been able to offer and sell {for example} the A320 and A330 as it has" in the post-implementation period.[2494] The European Union, however, believes that a different counterfactual should be applied to determine the merits of the United States' claims.

6.1456. Although explicitly recognizing that in order to make out its claims of serious prejudice the United States "must establish a present 'genuine and substantial relationship of cause and effect' between the alleged subsidies and the alleged market phenomena"[2495], the European Union argues that the "proper counterfactual" for this purpose should be one that asks "for example, whether absent 'the non-subsidized investments, … the product originally launched with subsidies

[2490] The panel's serious prejudice findings in the original proceeding followed a "two-step" analysis, reflecting the United States' presentation of its claims. A "two-step" analysis first seeks to identify the market phenomena described in Article 6.3(a)-(d) of the SCM Agreement and then, as a second step, examines whether there is a causal relationship between the phenomena and the challenged subsidies. While the Appellate Body accepted the validity of this approach in the original proceeding, it explicitly stated that a "unitary analysis" would be preferable. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft (2nd complaint)*, paras. 1107 and 1109)

[2491] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1110.

[2492] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1110. (emphasis added)

[2493] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1233 (citing Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 374-375) (emphasis added). See also Appellate Body Report, *US – Upland Cotton*, paras. 435-438.

[2494] United States' second written submission, para. 506.

[2495] European Union's first written submission, para. 634.

{would} be competitive in the LCA markets today'".[2496] We are unable to accept the European Union's proposed line of inquiry. In our view, the correct counterfactual, *for the purpose of determining the effects of the challenged LA/MSF subsidies*, should not be focused on identifying the relevant market situation in the absence of Airbus' post-launch investments in the A320 and A330, or any other alleged non-attribution factors. Rather, as the Appellate Body has previously emphasized, when performing a "unitary" analysis of causation by means of a "but for" test, the appropriate counterfactual must be directed at identifying the market situation *in the absence of the challenged subsidies*, not the market situation in the absence of any events that, over time, have allegedly severed the causal link between the challenged subsidies and the alleged instances of serious prejudice. While we agree with the European Union that any such events must be taken into account in determining the market situation *in the absence of the challenged LA/MSF subsidies*, they cannot, by definition, be the sole focus of a counterfactual analysis that is intended to isolate the effects of the challenged LA/MSF subsidies.

6.1457. As we understand it, the United States' position appears to be that the *starting point* for identifying the counterfactual that should be used in this compliance proceeding should be the counterfactual that formed the basis of the adopted serious prejudice findings.[2497] Thus, for example, after recalling that the panel and Appellate Body found that LA/MSF caused Airbus to launch and bring to market each of its models of LCA at a time and in a manner that would otherwise have been impossible[2498], the United States asserts:

> Considering that, under the most likely counterfactual scenario, Airbus likely would not exist at all without LA/MSF as of 2006, there is no basis {in the light of the European Union's alleged failure to take any meaningful compliance steps} to posit that, since 2006, Airbus would have come into being, and then developed, produced and sold the A320, A330, A340, A350, and A380 LCA that it did during the 2007-2011 period.[2499] (footnote omitted)

6.1458. The European Union raises essentially two objections to the United States' line of argument. First, the European Union argues that the United States' position relies "solely on findings that relate to the original 2001-2006 reference period", thereby failing to "consider the impact of the passage of time on the reliability of these findings" for the purpose of identifying the market situation in the post-implementation period.[2500] The European Union submits that the United States is not entitled to merely "(i) … start with the adverse effects found in the original reference period; (ii) demonstrate that, allegedly, the European Union *has done nothing* to remove those past adverse effects; and (iii) conclude that it has demonstrated the existence of present adverse effects, including a causal link that exists at present".[2501] For the European Union, the United States' approach "overlooks that the passage of time, and events occurring during the time that passed, must, legally result in the dissipation of adverse effects".[2502] Thus, according to the European Union, the United States only presumes causation.[2503]

6.1459. Second, the European Union suggests that the United States would be entitled to use the adopted panel and Appellate Body findings as a relevant "baseline" for the appropriate counterfactual only "where no subsidies have been withdrawn and no changes have occurred in the markets".[2504] However, for the European Union, neither of these two conditions is satisfied in this proceeding.

6.1460. In our view, the European Union's description of the United States' submissions fails to account for the entirety of the United States' arguments, and in particular, the fact that the

[2496] European Union's second written submission, para. 603 (quoting United States' second written submission, para. 506). In the same paragraph, the European Union states that this "is the counterfactual formulated by the European Union".
[2497] United States' first written submission, paras. 335-352; and second written submission, paras. 367-373.
[2498] United States' first written submission, paras. 335-347.
[2499] United States' first written submission, para. 348.
[2500] European Union's second written submission, para. 587.
[2501] European Union's second written submission, para. 593. (emphasis original)
[2502] European Union's second written submission, para. 593. (footnote omitted)
[2503] European Union's second written submission, paras. 594-596.
[2504] European Union's second written submission, para. 597.

United States' allegation of non-compliance is based upon not only its position with respect to the nature and duration of the effects of the challenged LA/MSF subsidies, but also its rejection of each of the European Union's notified compliance "steps" and arguments, which include those relating to the events that have occurred during the passage of time, such as allegedly changing product markets and post-launch investments, as well as a number of non-attribution factors. Thus, by seeking to rely upon the adopted panel and Appellate Body findings from the original proceeding as a *starting point* for the counterfactual that must be applied in this proceeding, we do not understand the United States to have presumed causation. Rather, the United States has sought to rely upon these findings as evidence of the effects of the pre-A350XWB LA/MSF subsidies *in the 2001-2006 period*, and upon this basis, drawn conclusions about the effects of the LA/MSF subsidies *in the post-implementation period*, in the light of its own views about the nature and duration of the effects of the LA/MSF subsidies beyond 2006.

6.1461. We are also unable to find merit in the European Union's suggestion that the adopted findings of the original panel and Appellate Body may only serve as a "baseline" for the counterfactual analysis "where no subsidies have been withdrawn and no changes have occurred in the markets". First of all, we recall that we have previously rejected the European Union's assertions concerning the alleged withdrawal of the challenged subsidies.[2505] Therefore, we see no need to pronounce on the virtues of the European Union's position in this part of our Report as regards allegedly withdrawn subsidies (although we would, of course, take into account any relevant evidence about developments in respect of the subsidies to the extent it has implications for their continuing effects). Second, the fact that changes may have taken place in the relevant markets in the years that have passed since the adoption of the original panel and Appellate Body findings does not, in our view, preclude the relevance of those findings to the counterfactual analysis that must be performed in this compliance dispute. Irrespective of any changes that may have taken place in the relevant markets since the end of 2006, we see the original panel and Appellate Body findings on the effects of the pre-A350XWB LA/MSF subsidies in the 2001-2006 period to be highly relevant to the assessment that must be performed in this dispute. These adopted findings establish not only what the effects of the pre-A350XWB LA/MSF subsidies were in the 2001-2006 period, but they also describe the design, structure and operation of those subsidies, and therefore how LA/MSF impacted Airbus' operations until the end of 2006. Thus, not unlike the United States, we believe it is appropriate to consider the adopted panel and Appellate Body findings on the effects of the pre-A350XWB LA/MSF subsidies in the 2001-2006 period as the *starting point* of the counterfactual analysis that must be performed in this compliance proceeding.

6.1462. It is apparent, however, that the adopted panel and Appellate Body findings concerning the effects of the pre-A350XWB LA/MSF subsidies cannot be simply transposed into the post-implementation period and used as the basis for the United States to make out its claims. Rather, the counterfactual analysis that must be performed in this dispute requires consideration of the extent to which the design, structure and operation of the challenged LA/MSF subsidies (including the new LA/MSF subsidies for the A350XWB) is such that the same or similar effects found to exist in the 2001-2006 reference period continue to be present *in the post-implementation period*, in the light of the parties' submissions concerning the European Union's notified compliance "steps" and other related arguments, including *inter alia* those in respect of the impact of the passage of time, the post-launch Airbus investments in the A320 and A330, and other non-attribution factors.

6.1463. Thus, in exploring the merits of the parties' causation arguments in this dispute, we will seek to determine whether the United States has established that there is a "genuine and substantial relationship of cause and effect"[2506] between the challenged LA/MSF subsidies and the United States' claims of serious prejudice by performing a counterfactual analysis that is directed at identifying the situation in the relevant product markets in the absence of the challenged LA/MSF subsidies after 1 December 2011. We are mindful that this determination must be guided by the need to ensure that the effects of factors other than the challenged LA/MSF subsidies are not improperly attributed to those subsidies.[2507] Moreover, we recognize that the results of a "but for" analysis will not always suffice to demonstrate causation, particularly "where a necessary cause is too remote and other intervening causes substantially account for the market

[2505] See above paras. 6.1101-6.1103.
[2506] Appellate Body Report, *US – Upland Cotton*, para. 438.
[2507] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1232.

phenomenon"[2508] alleged to constitute a form of serious prejudice. Accordingly, in performing our counterfactual analysis, we will seek to "understand the interactions between the {challenged LA/MSF subsidies} and the various other {alleged} causal factors, and make an assessment of their connection to, as well as the relative importance of the {challenged LA/MSF subsidies} and of the other factors in bringing about, the relevant effects"[2509] in the post-implementation period. Our point of departure for this analysis will be the adopted panel and Appellate Body findings concerning the effects of the pre-A350XWB LA/MSF subsidies in the original proceeding. We turn to describe these findings in the next subsection of our Report.

The "product" effects of the pre-A350XWB LA/MSF subsidies in 2001-2006

6.1464. We recall that the panel in the original proceeding arrived at its ultimate causation findings after having: (a) determined that "Airbus' ability to launch, develop, and introduce to the market, each of its LCA models was dependent on subsidized LA/MSF"[2510]; (b) found that the "product" effect of LA/MSF was "complemented and supplemented" by the non-LA/MSF subsidies[2511]; and (c) considered two "plausible" and two "unlikely" counterfactual scenarios describing the market situation in the 2001-2006 period in the absence of the challenged subsidies.[2512] The Appellate Body carefully reviewed the panel's findings[2513], and concluded that the panel had properly established that the effects of the challenged LA/MSF, and certain of the non-LA/MSF, subsidies were, *respectively*, a "genuine and substantial" and a "genuine", cause of various forms of serious prejudice to the United States' interests within the meaning of Article 6.3(a), (b), and (c) of the SCM Agreement.[2514]

6.1465. On appeal, the European Union argued that the panel's causation findings were focused on the two "unlikely" counterfactuals it had posited, and that the panel had incorrectly applied these counterfactuals when establishing causation in respect of Boeing's displacement and lost sales in the relevant market segments.[2515] The Appellate Body disagreed with the European Union's characterization of the panel's findings, clarifying that "if one were to describe the Panel as having 'focused' on particular scenarios, it would have to be scenarios 1 and 2 – scenarios the Panel considered 'plausible'".[2516]

6.1466. All four counterfactual scenarios were posited by the panel after having carefully considered the history of LCA production[2517], the parties' arguments concerning the nature of competition and competitors that might exist in the absence of LA/MSF and, finally, eight separate articles from the economic literature about various aspects (including competition) of the LCA industry and industrial organization.[2518] The panel's "plausible" counterfactuals contemplated that

[2508] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1233.
[2509] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 914.
[2510] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1879-7.1949.
[2511] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1950-7.1961.
[2512] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1984. See also the description of the panel's assessment of causation in Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1242-1260.
[2513] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1242-1300 and 1306-1400.
[2514] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1300, 1377-1379, 1390-1391, 1400, 1410, and 1412. The Appellate Body found that the panel's causation findings with respect to the challenged R&TD subsidies could not stand because the panel had failed to establish "a genuine causal link between the R&TD subsidies and Airbus' ability to launch and bring to the market its models of LCA". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1411)
[2515] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 228-231 and 1262.
[2516] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1263.
[2517] We recall that prior to the Boeing merger with McDonnell-Douglas in 1997, a third United States LCA producer, Lockheed, had been an active producer of LCA until it exited in 1981, partly, according to the United States, because of competition from Airbus. (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1979 and fn 5754)
[2518] The relevant articles were: R. Baldwin & P. Krugman, "Industrial Policy and International Competition in Wide-Bodied Jet Aircraft", in R. Baldwin, (ed.), *Trade Policy Issues and Empirical Analysis* (National Bureau of Economic Research, 1988); P. Dasgupta and J. Stiglitz, "Learning-by-doing, market structure and industrial and trade policies", *Oxford Economic Papers*, 40, 246, 1988; Gernot Klepper, "Entry Into the Market for Large Transport Aircraft", *European Economic Review*, 34, 775, 1990; T. Breshnahan and P. Reiss, "Entry and Competition in Concentrated Markets", *Journal of Political Economy*, Vol. 95 (5), 1991,

a non-subsidized Airbus would have had no market presence in the 2001-2006 period, and that the LCA industry would have been characterized by the existence of either a Boeing monopoly, or a duopoly involving Boeing and another United States LCA producer (possibly, McDonnell Douglas).[2519] According to the Appellate Body, under either of these scenarios:

> {T}here was no need for the Panel to proceed further in its counterfactual analysis. Without the subsidies, Airbus would not have existed under these scenarios and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred. As Boeing (or the other US manufacturer envisaged by the Panel) would be the only supplier(s) of LCA, it (or they) would have made the sales instead. Thus, the conclusion under {the two "plausible" counterfactual} scenarios … satisfies, without more, the "genuine and substantial relationship" standard articulated by the Appellate Body in *US – Upland Cotton*. This chain of reasoning establishes that the subsidies are a sufficient cause of the lost sales and the displacement.[2520]

6.1467. Given that the panel had conducted its assessment of the effects of the challenged LA/MSF and non-LA/MSF subsidies separately[2521], and that only the LA/MSF subsidies were found to be a "genuine and *substantial*" cause of serious prejudice[2522], we understand the Appellate Body's statement that "the conclusion under {the two 'plausible' counterfactual} scenarios … satisfies, without more, the 'genuine and substantial relationship' standard", to mean that the Appellate Body accepted that the existence and market presence of Airbus in the 2001-2006 period was dependent upon the effects of the challenged LA/MSF subsidies, thereby causing serious prejudice to the interests of the United States. Indeed, as we explain in further detail below, the Appellate Body's ultimate conclusion in this part of its review of the panel's causation findings was *inter alia* that "the Panel's analysis sufficiently established a 'genuine and substantial' causal link between the LA/MSF subsidies and the displacement and lost sales".[2523]

6.1468. After affirming the panel's "plausible" counterfactuals and related causation findings, the Appellate Body went on to explore the basis for, and implications of, the panel's two "unlikely" counterfactual scenarios. Under the panel's two "unlikely" counterfactual scenarios, it was envisaged that a non-subsidized Airbus would be competing in the 2001-2006 period, as a "much weaker" company "with at best a more limited offering of LCA models", against either Boeing or Boeing and another US producer.[2524] While the Appellate Body did not explicitly find that the panel *should have* pursued these counterfactuals beyond what it actually did in its report, the Appellate Body agreed with the European Union that "the Panel could have provided a fuller analysis" under these scenarios.[2525] The Appellate Body noted, however, that an important consideration in determining the extent to which the panel was required to do more in its analysis was the fact that the panel had found the two "plausible" scenarios in which Airbus would not have

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pp. 977-1009; L. Cabral and M.H. Riordan, "The learning curve, market dominance, and predatory pricing", *Econometrica*, 62(5), 1115, 1994; Damien Neven and Paul Seabright, "European Industrial Policy: The Airbus Case", 1995; Thomas L. Boeder and Gary J. Dorman, "The Boeing/McDonnell Douglas Merger: The Economics, Antitrust Law, and Politics of the Aerospace Industry", *Antitrust Bulletin*, Spring 2000; and C. Lanier Benkard, "A Dynamic Analysis of the Market for Wide-Bodied Commercial Aircraft", *Review of Economic Studies,* 71, 581, 2004.

[2519] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1984.

[2520] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1264.

[2521] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1377-1378.

[2522] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1300, 1377-1379, 1390-1391, 1400, 1410, and 1412. We recall that as regards the non-LA/MSF subsidies, the Appellate Body found that the panel had properly established that their effects were a "genuine" cause of serious prejudice to the United States' interests. Indeed, according to the Appellate Body, having 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". Thus, in the light of the panel's causation findings with respect to the LA/MSF subsidies, the Appellate Body concluded that "it was permissible and sufficient for the Panel to assess whether a genuine causal connection between non-LA/MSF subsidies and the same market phenomena existed such that these non-LA/MSF subsidies complemented and supplemented the effects of LA/MSF". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1378)

[2523] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1300.

[2524] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1984 and 7.1993.

[2525] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1267.

entered the market in the absence of subsidies to be the "most likely" state of affairs in the 2001-2006 period.[2526] With this in mind, the Appellate Body explained that:

> Nonetheless, looking at the Panel's analysis as a whole, we understand the Panel to have concluded that, under {the "unlikely" counterfactual} scenarios … , a non-subsidized Airbus would have been significantly retarded in its efforts to develop LCA that were capable of competing in the market and that it would not have been able to overcome this competitive disadvantage by the end of the reference period.[2527]

6.1469. The Appellate Body then set about more closely examining the panel's causation findings as they related to the two "unlikely" counterfactual scenarios[2528], ultimately ruling that:

> {T}he Panel's conclusion that a non-subsidized Airbus would not have "achieved the market presence it did over the period 2001 to 2006", which followed from its views that a non-subsidized Airbus would be a "much weaker LCA manufacturer" with "at best a more limited offering of LCA models", provided enough of a basis to establish a "genuine and substantial relationship of cause and effect" in this case.[2529] (footnote omitted)

6.1470. Again, in the light of the panel's separate assessment of the effects of the challenged LA/MSF and non-LA/MSF subsidies, as well as the finding that only the LA/MSF subsidies were a "genuine and *substantial*" cause of serious prejudice, we understand the Appellate Body's confirmation of the panel's "unlikely" counterfactual analysis and related causation findings to mean that the Appellate Body accepted that, in the "unlikely" counterfactual scenarios, the challenged LA/MSF subsidies were indispensable to Airbus' ability to compete with a full range of quality LCA products against Boeing in the 2001-2006 period, and to this extent, the cause of serious prejudice to the interests of the United States.

6.1471. Having upheld all four of the panel's counterfactual scenarios and related causation findings, the Appellate Body continued its analysis and considered whether, as argued by the European Union, a "fuller examination of the {'unlikely'} counterfactual scenarios … along the lines of … five questions that the European Union asserts the Panel was required to examine to 'complete the counterfactual' would lead to a different conclusion".[2530] Before doing so, however, the Appellate Body noted that, in its written submissions, the European Union had accepted not only "'the Panel's finding that a non-subsidised Airbus would have had a smaller 'market presence' in 2001-2006 compared to the market share and sales that Airbus actually obtained'" but also that "'a non-subsidized Airbus would not have been able to launch the A300, A310, and A340 LCA projects by the 2001-2006 reference period'".[2531] Thus, the Appellate Body focused its evaluation of the merits of the European Union's remaining arguments concerning the panel's alleged failure to "complete the {'unlikely'} counterfactuals" on the question whether there were "'significant findings by the Panel and substantial evidence in the record supporting the conclusion that a non-subsidised Airbus could have launched, sold and delivered by 2001-2006, a single-aisle LCA and a 200-300 seat twin-aisle LCA, and launched and sold a 500+ seat LCA by 2001'."[2532]

6.1472. The Appellate Body reviewed the European Union's submissions and found that there was no basis to accept them, concluding as regards the potential launch of an A320-type and an A330-type aircraft by 1987 and 1991 that:

> We are not persuaded that the evidence on record should have led the Panel to conclude that a non-subsidized Airbus could have launched a single-aisle LCA with

[2526] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1266.
[2527] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1267.
[2528] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1267-1269.
[2529] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1270.
[2530] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1273.
[2531] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1273 (quoting European Union's appellant's submission, fn 456).
[2532] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1273 (quoting European Union's appellant's submission, fn 456). The Appellate Body considered the European Union's arguments concerning the launch an A380-type aircraft in a separate section of its report. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1273 and 1306-1356).

> 100-200 seats in or about 1987, and a twin-aisle LCA with 200-300 seats in or about 1991.[2533]

6.1473. Thus, after finding: (a) that "the {panel's} conclusion under {the 'plausible' counterfactual} scenarios … satisfies, without more, the 'genuine and substantial relationship' standard articulated by the Appellate Body in *US – Upland Cotton*"[2534]; (b) that the panel's conclusion pursuant to "unlikely" counterfactual scenarios "provided enough of a basis to establish a 'genuine and substantial relationship of cause and effect'"[2535]; and (c) that in any case, there was no evidence on record to support the European Union's view that a "non-subsidized Airbus could have launched a single-aisle LCA with 100-200 seats in or about 1987, and a twin-aisle LCA with 200-300 seats in or about 1991"[2536], the Appellate Body concluded as follows:

> Therefore, we *reject* the European Union's claims that the Panel "presumed causation" and failed to establish the required "chain of causation" in its assessment of whether the displacement and lost sales were the effect of the LA/MSF subsidies within the meaning of Article 6.3(a), (b), and (c) of the *SCM Agreement*. For similar reasons, we *reject* the European Union's allegations that the Panel failed to make an objective assessment of the facts under Article 11 of the DSU. Instead, we *find* that the Panel's analysis sufficiently established a "genuine and substantial" causal link between the LA/MSF subsidies and the displacement and lost sales.[2537] (emphasis original)

6.1474. Similarly, in a subsequent subsection of its report, the Appellate Body rejected the European Union's assertion that a non-subsidized Airbus could have launched and sold a 500+ seat LCA by 2001. In particular, the Appellate Body found that, *even assuming* Airbus could have launched a single-aisle and twin-aisle LCA in or about 1987 and 1991, respectively, there were no grounds to support the European Union's contention that "without LA/MSF", Airbus could have launched the A380 (i.e. a 500+ seat LCA) by 2000.[2538]

6.1475. In rejecting the European Union's appeal in the manner described above, we understand the Appellate Body to have affirmed the panel's causation analysis, and in particular, the panel's reliance on *either* the "plausible" or the "unlikely" counterfactual scenarios to establish the required "genuine and substantial" causal link between the effects of the *pre-A350XWB LA/MSF subsidies* and the United States' serious prejudice claims under Article 6.3(a), (b) and (c) of the SCM Agreement. It follows, therefore, that depending upon the (different) probabilities assigned to the relevant counterfactuals, the effects of the *pre-A350XWB LA/MSF subsidies* in the 2001-2006 period may be characterized as having been indispensable to:

a. the *very existence* of Airbus, implying that in the absence of the pre-A350XWB LA/MSF subsidies, Airbus would not have been present on the market (the "plausible" scenario); or

b. the ability of Airbus to offer *a full range of competitive LCA,* implying that in the absence of the pre-A350XWB LA/MSF subsidies, a "much weaker" Airbus "with at best a more limited offering of LCA models"[2539] would have been present on the market (the "unlikely" scenario).

6.1476. In considering how to rely upon these adopted findings for the purpose of the analysis we must perform in this compliance dispute, we recall that the Appellate Body concluded that the panel's "plausible" counterfactual findings "without more" satisfied the "genuine and substantial" causation standard.[2540] The Appellate Body emphasized that it could "not ignore" these findings, and indicated that "{o}n the contrary", the panel's findings that two of the four counterfactual scenarios were "plausible" and the other two only "unlikely", were "important considerations in

[2533] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1275.
[2534] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1264.
[2535] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1270.
[2536] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1275.
[2537] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1300.
[2538] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1273 and 1352-1355.
[2539] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1984 and 7.1993.
[2540] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1264.

determining the extent to which the Panel was required to further pursue the counterfactual analysis" beyond the "plausible" scenarios.[2541] Indeed, nowhere did the Appellate Body state that the panel *should have* pursued such further analysis, limiting itself to agreeing with the European Union that the panel "*could have* provided a fuller analysis" of the "unlikely" scenarios.[2542]

6.1477. As we see it, the Appellate Body's assessment of the panel's causation analysis reveals not only that the panel's "plausible" counterfactual findings were *alone* a sufficient basis to establish causation with respect to the effects of the pre-A350XWB LA/MSF subsidies, but also that the panel *did not* need to explore any other, less probable, counterfactual scenarios in order to carry out an "objective assessment of the matter". Indeed, on this latter point, we note that in a subsequent appeal, the Appellate Body clarified that a "panel is not required to identify and explore every possible hypothetical market scenario" in a serious prejudice dispute, "especially where the parties themselves have not elaborated upon, or substantiated the likelihood of, such possible scenarios".[2543] Moreover, according to the Appellate Body, the "extent to which a panel may or must elaborate upon the specific details of its constructed alternative will vary by case, but, having selected a reasonable scenario, a panel should pursue its counterfactual analysis in a coherent and consistent fashion."[2544]

6.1478. In the light of these considerations, we will proceed to evaluate the alleged "product" effects of the challenged LA/MSF subsidies in the present compliance dispute by using, as the *principal* starting point of our analysis, the adopted "plausible" counterfactual findings from the original proceeding. Indeed, given the Appellate Body's conclusion that these findings were "without more" sufficient to establish a "genuine and substantial" causal connection between the effects of the pre-A350XWB LA/MSF subsidies and the claimed instances of serious prejudice to the United States' interests in the 2001-2006 period[2545], we believe that our "objective assessment of the matter" in this compliance dispute could proceed solely on this basis.[2546] Nevertheless, in keeping with the approach adopted in the original proceeding to evaluating the merits of the United States' submissions concerning the alleged "product" effects of LA/MSF, we will also explore the parties' arguments concerning the effects of the challenged LA/MSF subsidies in the post-implementation period using the "unlikely" counterfactual scenario as the starting point of our analysis.

6.1479. Thus, in the subsections that follow we evaluate the merits of the parties' arguments concerning the "product" effects of the challenged LA/MSF subsidies in the post-implementation period, using the adopted findings with respect to the effects of the pre-A350XWB LA/MSF subsidies up until the end of 2006 as the starting point of our analysis. We begin this evaluation by first of all determining the effects of the pre-A350XWB LA/MSF in the post-implementation period, before examining the extent to which the challenged LA/MSF subsidies (including the pre-A350XWB LA/MSF subsidies) caused Airbus to launch and bring to market the A350XWB as and when it did.

[2541] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1266 and 1272.
[2542] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1267. (emphasis added)
[2543] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1020.
[2544] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1020.
[2545] We also take into account the guidance set out in Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1020.
[2546] Indeed, were we to find that the United States had failed to make out its case, using the "plausible" counterfactual scenarios (i.e. the non-existence of Airbus) as the starting basis of our inquiry, it is apparent that even relying upon the "unlikely" counterfactual scenarios (i.e. a "much weaker" Airbus) as the point of departure of our analysis, the United States' claims would also have to fail.

The "product" effects of the pre-A350XWB LA/MSF on the A320, A330 and A380 in the post-implementation period[2547]

Introduction

6.1480. We recall that the effects of the pre-A350XWB LA/MSF subsidies *in the 2001-2006 period* were found to have brought about either: (a) the very existence and market presence of Airbus, under the two "plausible" counterfactual scenarios; or (b) the ability of Airbus to offer a full range of competitive LCA products, pursuant to the two "unlikely" counterfactual scenarios. In our view, it follows from these findings that in order for the United States to succeed in its argument that the pre-A350XWB LA/MSF subsidies have essentially the same "product" effects *today*, we would need to be convinced that Airbus would *not*, in the absence of those subsidies, have developed and brought to market since the end of 2006 the same or comparable families of A320, A330 and A380 LCA that Airbus actually sold and delivered after 1 December 2011. In other words, using the "plausible" counterfactual scenarios as the starting point of our evaluation, we would have to be convinced that the United States has demonstrated that either: (a) a non-subsidized Airbus would not exist today; or (b) that any non-subsidized Airbus entity coming into existence after the end of 2006 would not have developed and brought to market the A320, A330 and A380 (or a comparable range of LCA products), within a period of approximately five to nine years thereafter.

6.1481. Given what we know about the complexities of LCA production and the dynamics and history of competition in the LCA industry[2548], we find it difficult to believe that any non-subsidized Airbus entity coming into existence after the end of 2006 could have developed a full range of the same or comparable LCA within such a short space of time. Indeed, the European Union has at no stage in this proceeding argued that, in the absence of the challenged LA/MSF subsidies, Airbus would have come into existence at any moment after 2006 and developed a full range of LCA by 1 December 2011 (or any time thereafter). Neither has the European Union argued that a "much weaker" non-subsidized Airbus, with "at best a more limited offering of LCA models"[2549] during the 2001-2006 period, could have developed the same or comparable range of LCA that it offers today. Rather, the European Union's core argument in response to the United States' allegations concerning the present-day "product" effects of the challenged LA/MSF subsidies is centred around its view that any effects found to exist up to the end of 2006 have today either: (a) dissipated over time; or (b) been significantly attenuated by a number of non-subsidized Airbus investments in the A320 and A330. Additionally, and in the alternative, the European Union submits that any lingering present-day effects of the challenged LA/MSF subsidies are not the cause of any present adverse effects because the United States' claims of Boeing lost sales and displacement in the various LCA product markets can be explained by a number of different factors that are unrelated to the effects of LA/MSF. We examine the first two of the European Union's responses to the United States' arguments in the subsections that follow. The merits of the European Union's alternative line of argument is considered in the final part of our analysis of the United States' claims of Boeing lost sales, impedance and displacement in the various LCA product markets.

The passage of time

6.1482. Recalling that the Appellate Body found in *US – Upland Cotton (Article 21.5 – Brazil)* that compliance with Article 7.8 of the SCM Agreement "will usually involve some action by the respondent Member"[2550], and that a responding Member "would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own"[2551], the United States argues that the European Union's reliance upon the passage of time to establish compliance in this dispute cannot be accepted, because it fails to come to terms with the long-lasting and profound nature of the effects of the

[2547] We examine the effects of LA/MSF on the launch and bringing to market of the A350XWB separately below at paras. 6.1535-6.1778.

[2548] See e.g. Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1623, 7.1717-7.1718, 7.1914-7.1916, and 7.1981-7.1984.

[2549] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1984 and 7.1993.

[2550] United States' second written submission, para. 3 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236).

[2551] United States' second written submission, para. 395 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236).

challenged LA/MSF subsidies.[2552] The United States submits that if, as the Appellate Body has found, abstaining from taking affirmative action is "normally" insufficient, it is particularly inadequate in the present circumstances, given that LA/MSF was found to cause adverse effects in an industry with long product life cycles. Thus, regardless of the alleged expiry of the oldest subsidies examined in the original proceeding, the United States claims that the challenged LA/MSF subsidies continue to cause serious prejudice to its interests, with Airbus' present product line still consisting of LCA created by LA/MSF; Airbus and Boeing continuing to compete for sales; and Airbus retaining its position as the world's largest producer of LCA. In this context, the United States submits that if the European Union were found to be in compliance with its obligations under Article 7.8 of the SCM Agreement in the absence of having taken any affirmative compliance action, "then the Appellate Body's guidance would be turned on its head, since there would be no principled reason why any responding Member with a compliance obligation under Article 7.8 could not follow the European Union's example".[2553]

6.1483. The European Union rejects the United States' position, arguing that the United States misunderstands the implications of the Appellate Body's findings for the purpose of this compliance dispute. The European Union observes that the Appellate Body's statements in *US – Upland Cotton (Article 21.5 – Brazil)* do not establish that affirmative action is *necessary* to conform with the prescriptions of Article 7.8 of the SCM Agreement, but only that affirmative action will be required under "usual" or "normal" circumstances. Moreover, the European Union maintains that the United States' arguments concerning the long-lasting nature of the effects of the challenged LA/MSF subsidies ignore the Appellate Body's guidance that "generally, the effects of any subsidy can be expected to diminish and eventually come to an end with the passage of time".[2554] According to the European Union, it follows from this and other Appellate Body guidance that the importance of the passage of time to a determination of compliance with Article 7.8 of the SCM Agreement will depend upon the specific temporal context of the relevant dispute. In this respect, the European Union submits that given the "length of time that has passed since the end of the original reference period" and "the 1969 grant of the first subsidies at issue in the original proceeding"[2555], the temporal circumstances of the present dispute are not "usual" or "normal"[2556], making the passage of time particularly important. Because, in the view of the European Union, the United States has failed to account for the impact of the passage of time on the effects of the challenged LA/MSF subsidies, the European Union submits that the United States has failed to establish the "genuine and substantial" causal link needed to substantiate its claims of serious prejudice.[2557]

6.1484. We agree with the European Union when it argues that there is no *obligation* to take affirmative action in order to comply with the requirement in Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects" in situations where it is alleged that the effects of a subsidy have dissipated over time. In our view, this conclusion necessarily follows from the effects-based disciplines of Article 5 of the SCM Agreement. Thus, to the extent that the United States argues that the European Union and certain member States have failed to comply with Article 7.8 *solely* because of the absence of any affirmative action on their part to "remove the adverse effects", the United States misinterprets Article 7.8 as well as the guidance provided by the Appellate Body in previous disputes.

6.1485. Having said that, however, we do not understand the United States to have failed to account for the passage of time in the arguments it has presented concerning the effects of the challenged LA/MSF subsidies. On the contrary, the United States has on a number of occasions explicitly recognized that the effects of the challenged LA/MSF subsidies will diminish over time

[2552] United States' second written submission, paras. 397 and 400.

[2553] United States' second written submission, para. 396.

[2554] European Union's first written submission, paras. 493, 507, and 554-557 (citing, *inter alia*, Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 709, 713, 714, 1236, and 1238); and second written submission, para. 593.

[2555] European Union's second written submission, paras. 590-591.

[2556] European Union's first written submission, para. 34; and second written submission, paras. 83, 88-89, and 1213.

[2557] European Union's first written submission, paras. 493, 507, 554-557, 640, 644, 645, 650, 727, 872, and 874-875; second written submission, paras. 590-593; response to Panel question No. 46; and comments on the United States' response to Panel question No. 42.

and eventually come to an end.[2558] As opposed to the European Union, however, the United States maintains that the passage of time *has not* brought about the end of the effects of the challenged LA/MSF subsidies. Rather, according to the United States, because of *inter alia* the design, structure and operation of LA/MSF, the magnitude of the LA/MSF subsidies and the long product life cycles of LCA, the effects of the challenged LA/MSF subsidies are of such a profound and long-lasting nature that, on the whole, the same "product" effects found to exist in the 2001-2006 period continue to be present today.[2559]

6.1486. Thus, as we see it, the disagreement between the parties is not about whether the effects of the challenged LA/MSF subsidies *may* or *will* eventually dissipate over time, but rather whether the passage of time has, *as a matter of fact*, resulted in those effects coming to an end in the period that is relevant for this compliance dispute.

6.1487. We recall that in the original proceeding, the Appellate Body emphasized the importance of the passage of time to the assessment of the effects of a subsidy on a number of occasions, including through the following statements:

> The Panel was of the view that the concept of "continuing benefit" may be relevant for purposes of assessing how the *effect* of a subsidy is to be analyzed over time, and considered this to be an aspect of the causation analysis to be undertaken pursuant to Articles 5 and 6 of the *SCM Agreement* and part of an assessment of the "effects" of a subsidy under these provisions. It is relevant, in our view, to examine the trajectory of the life of a subsidy in order to determine whether a Member is causing, through the use of any subsidy, adverse effects to the interests of another Member within the meaning of Article 5 of the *SCM Agreement*. Moreover, a panel should consider, where relevant for the adverse effects analysis, that the effects of a subsidy will ordinarily dissipate over time and will come to an end.[2560] (emphasis original; underline added; footnote omitted)
>
> In previous sections of this Report, we have found that a challenge to subsidies granted prior to 1 January 1995 is not precluded. We have also found, however, that, in order properly to assess a claim under Article 5 of the *SCM Agreement*, a panel must take into account in its *ex ante* analysis how a subsidy is expected to materialize over time. A panel is also required to consider whether the life of a subsidy has ended, for example, by reason of the amortization of the subsidy over the relevant period or because the subsidy was removed from the recipient. Moreover, we have emphasized that the effects of a subsidy will generally diminish and come to an end with the passage of time.
>
> Regarding the effects of subsidies over time, the Panel found that:
>
> > {w}hile *the effect of a single subsidy may well dissipate over time, … ,* the fact that the subsidies at issue in this dispute were repeatedly granted over the entire history of Airbus' LCA development with respect to that same product *has had rather the opposite effect*, through the learning and spillover effects, and production synergies that are inherent in this industry, which spread the effect of LA/MSF for the development of one model of LCA, and of other subsidies, to both subsequent and earlier models.
>
> We do not agree that it is only the effect of a "single subsidy" that would dissipate over time, while multiple subsidies may have the "opposite effect". To the contrary, in general, the effects of *any subsidy* can be expected to diminish and eventually come to an end with the passage of time. This is true for single as well as multiple acts of subsidization. The question of whether there are residual effects is a fact-specific

[2558] United States' second written submission, paras. 400-402; and comments on the European Union's response to Panel question 46, para. 89.

[2559] United States' second written submission, paras. 395-402; and comments on the European Union's response to Panel question 46.

[2560] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 714.

> matter that may have to be considered.[2561] (emphasis original; underline added; footnote omitted)

6.1488. Like the parties, we understand the Appellate Body's position to be that the effects of any subsidy will eventually come to an end with the passage of time. Moreover, it is also apparent from the Appellate Body's statements that the precise *duration* of the effects of a subsidy *will depend upon the specific facts of the case at hand*, including any pertinent facts shedding light on how the "life" of a subsidy has materialized over time. We note, however, that in emphasizing the importance to an adverse effects analysis of considering "the trajectory of the life of a subsidy", "how a subsidy is expected to materialize" and "whether the life of a subsidy has ended", the Appellate Body at no stage equated the end of the "life" of a subsidy with the complete dissipation of its effects. On the contrary, elsewhere in its report, the Appellate Body explicitly recognized that the "life" of a subsidy will not necessarily define the duration of its effects. For instance, in upholding the panel's finding on the temporal scope of Article 5 of the SCM Agreement, the Appellate Body explained:

> By its terms, Article 5 of the SCM Agreement imposes an obligation on Members not to cause adverse effects to the interests of other Members through the use of any subsidy as defined in Article 1. *We disagree with the proposition that this obligation does not arise in respect of subsidies that have come to an end by the time of the reference period. In fact, we do not exclude that, under certain circumstances, a past subsidy that no longer exists may be found to cause or have caused adverse effects that continue to be present during the reference period*.
>
> … We wish to emphasize, however, that *{the} effects of a subsidy will ordinarily dissipate over time and will end at some point after the subsidy has expired*. Indeed, as with a subsidy that has a finite life and materializes over time, so too do the effects of a subsidy accrue and diminish over time.[2562] (emphasis added)

6.1489. Thus, the extent to which the effects of a subsidy will dissipate with the passage of time and eventually come to an end will be a *fact-specific* matter that may be informed, but *not necessarily defined*, by how the "life" of that subsidy has evolved over time.

6.1490. Turning to the effects of the challenged LA/MSF subsidies in the post-implementation period, we recall that the *ex ante* lives of all of the A300, A310 and A320 LA/MSF subsidies came to an end before the conclusion of the 2001-2006 reference period.[2563] Yet the effects of the very same subsidies, together with the effects of all other challenged LA/MSF subsidies, were found in the original proceeding to be a "genuine and substantial" cause of serious prejudice to the interests of the United States. Thus, for example, the panel in the original proceeding found that the United States had substantiated its claims of significant lost sales to Boeing in the 2004 Air Berlin and 2005 Czech Airlines and Air Asia sales campaigns involving the A320, by which time the *ex ante* lives of the A300, A310 and A320 LA/MSF subsidies had already expired. The Appellate Body upheld these findings, concluding specifically that the very same "lost sales were the effect of the challenged LA/MSF measures".[2564]

6.1491. Of course, it was possible for the panel and Appellate Body to come to their respective conclusions because of the *nature* of the effects of LA/MSF. We see no reason why the logic that motivated these findings, which we explain and explore in more detail below, should not be equally applicable for the purpose of determining the extent to which the effects of the challenged LA/MSF subsidies in this compliance proceeding have dissipated and come to an end with the passage of time. Indeed, in this respect, we recall that the Appellate Body has previously stated that:

> {P}roceedings under Article 21.5 of the DSU do not occur in isolation, but are part of a "continuum of events", and "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

[2561] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1236-1238.
[2562] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 712-713.
[2563] See above paras. 6.879 and 6.1076.
[2564] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1414(p).

> the reasoning in the original panel report in the absence of any change in the underlying evidence in the record".[2565] (footnotes omitted)

6.1492. Once again, we recall that the effects of the pre-A350XWB LA/MSF subsidies were found in the original proceeding to have enabled Airbus to launch and bring to market the full range of Airbus LCA that was being sold and delivered in the 2001-2006 period. These findings were based on the existence of two types of effects attributable to the LA/MSF subsidies: (a) *direct effects* – namely, 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 loan; and (b) *indirect effects* – namely, 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.[2566]

6.1493. The United States maintains that the *direct effects* of LA/MSF will diminish over time as a specifically funded "model's competitiveness diminishes with the advent of new competing products and technologies, and as operators retire that model from their fleets". Accordingly, the United States acknowledges that the *direct effects* of any given LA/MSF loan will "decline significantly with the termination of any LCA programme".[2567] As for the *indirect effects* of LA/MSF, the United States submits that these will "persist as long as the subsequent, benefitting LCA programmes remain in production, although {their} significance … over time will vary according to the circumstances".[2568] Thus, the United States argues that the *indirect effects* of LA/MSF provided for a "relatively old model (for example the A300) will tend to diminish over time, particularly where its sales (and thus revenue generation) are modest or low, and where the technology and learning benefits … have more limited applicability on more recent models".[2569]

6.1494. The European Union disagrees with the United States' assertions concerning the duration of the direct and indirect effects of LA/MSF.[2570] According to the European Union, the United States' position ignores the implications of the Appellate Body's guidance on the importance of the passage of time to the identification of the effects of the challenged LA/MSF subsidies. For example, the European Union recalls that the Appellate Body found in the original proceeding that "LA/MSF for the A300 and A310 are likely to cause minimal, if any, adverse effects during the reference period 2001-2006".[2571] Moreover, the European Union maintains that the United States' assertions fail to account for the fact that "the last of the A300 and A310 {LA/MSF} loans … were provided around the same time that the A320 and A330/A340 basic {LA/MSF} loans were provided".[2572]

6.1495. We note that while arguing that the duration of the effects of the A300/A310 LA/MSF subsidies should be informed by the fact that "the last of the A300 and A310 {LA/MSF} loans … were provided around the same time" as the LA/MSF loans for the A320 and A330/A340 basic, the European Union has provided no explanation about the extent to which this temporal coincidence impacts how the direct and indirect effects of those subsidies found to exist in the original proceeding may have evolved since the end of 2006. The European Union recalls the Appellate Body's finding that the A300/A310 LA/MSF subsidies "are likely to cause minimal, if any, adverse effects during the reference period 2001-2006"; yet the European Union does not clearly explain the implications of this finding for determining the extent to which the effects of those subsidies may or may not continue to exist in the present.

6.1496. While it is true that the Appellate Body found in the original proceeding that the A300 and A310 LA/MSF subsidies were "likely to cause minimal, if any, adverse effects during the reference

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[2565] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 386 (quoting Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103; and *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121).

[2566] See further above, fn 2470.

[2567] United States' second written submission, para. 400.

[2568] United States' second written submission, para. 401.

[2569] United States' second written submission, para. 402.

[2570] European Union's response to Panel question No. 46, para. 120.

[2571] European Union's comments on the United States' response to Panel question No. 42 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1241).

[2572] European Union's comments on the United States' response to Panel question No. 42, paras. 213-215.

period 2001-2006"[2573], it is important to recall that the Appellate Body also upheld the entirety of the panel's causation findings with respect to the LA/MSF subsidies. As already explained, these findings were inextricably linked to the panel's conclusions concerning the direct and indirect effects of all of the LA/MSF subsidies, including those provided for the launch and development of the A300 and A310. In particular, we recall that the panel evaluated the effects of the pre-A350XWB LA/MSF subsidies on the launch and bringing to market of Airbus LCA on a model-by-model basis. In exploring the effects of the LA/MSF subsidies for the A310, the panel began its analysis by making the following observations about the importance of the experience gained in the development and production of one model of LCA in the development and production of subsequent models:

> That static and dynamic ("learning curve") economies of scope and scale achieved in the context of one model of LCA are an important part of the development and production of other LCA models has also been recognized by economists. It is undisputed that LCA projects involve complex development and production technology. Therefore, knowledge and experience gained in the development and production of one model of aircraft will tend to lower the costs of development and production of subsequent aircraft.[2574] (footnote omitted)

6.1497. With these considerations in mind, the panel stated that it was satisfied that the evidence demonstrated that "the A310 benefited from Airbus' earlier successful development of the A300". Thus, the panel found that "had Airbus not obtained LA/MSF for the A300, and therefore not launched, developed, and starting in 1974, sold the A300 as designed, we have little doubt that it would not have been able to launch the A310 as originally designed in 1978."[2575] In other words, the panel found that the launch and bringing to market of the A310 was not only dependent upon the *direct effects* of the A310 LA/MSF subsidies, but also the *indirect effects* of the A300 LA/MSF subsidies.

6.1498. In examining the effects of LA/MSF on the remaining models of Airbus LCA, the panel made the following findings with respect to the *indirect effects* of the A300/A310 LA/MSF subsidies:

As regards the A320 -

> There is little doubt in our minds that the launch of the A320 in 1984, as originally designed, was to a very large degree made possible by Airbus' successful launches of the A300 and A310 over the previous decade with the assistance of LA/MSF. Therefore, it is clear that the LA/MSF for these earlier models of LCA also benefited the launch of the A320. Moreover, as we have already noted, the cost of obtaining market financing for the A300 and A310, compared with LA/MSF, was significant. However, even assuming Airbus had been able to launch both LCA models as originally designed in 1969 and 1978, relying on market-based financing (something we consider would have been highly unlikely), it would have been extremely difficult, if not impossible, to launch the A320 in 1984 as originally designed, without access to LA/MSF.[5650]

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[5650] We note, in this regard, that while the A310 was launched in 1978, it was first put in service and delivered to a customer in 1985. Thus, the LA/MSF for the A310 project was still outstanding, and significant revenues were not yet being generated by that LCA at the time the decision to launch the A320 was being made and implemented. The A300 had only been in service since 1974, and we understand most of the LA/MSF for this project was also still outstanding at the time the decision to launch the A320 was made in 1984.[2576] (footnote original)

[2573] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1239-1241.
[2574] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1936.
[2575] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1936.
[2576] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1938.

With respect to the A330/A340 -

> Again, we consider that LA/MSF provided for the previous LCA models, the A300, A310 and A320, played a significant role in placing Airbus in a position to be able to launch the A330/A340 project in 1987.[5654] However, even assuming Airbus had been able to launch these earlier models without access to LA/MSF, (which we consider would have been even less likely than the launch of the A320, but for the earlier provision of LA/MSF for that model, as well as for the A300 and A310), it would have been extremely difficult, if not impossible, to launch the A330/A340 project in 1987 as originally designed, without access to LA/MSF.
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> [5654] Again, we note that while the A320 was launched in 1984, it was first delivered to a customer in 1988, after the launch of the A330/A340 in 1987. Thus, revenues were not yet being generated by this model LCA at the time the decision to launch the A330/A340 in 1987 was made, and repayment of LA/MSF received for the A320 had not yet begun.[2577] (footnote original)

Concerning the A330-200 and A340-500/600 -

> {A}s previously discussed, LCA have a complex production technology which results in strong learning effects. Knowledge and experience gained in the development and production of one model of aircraft will lower the costs of development and production of subsequent aircraft launches. This is particularly true for derivative aircraft, where the subsequently launched model is a variant of an existing model, as is the case with these LCA models.[5657] Consequently we consider that the economic viability and, indeed the very existence of the A330-200, is dependent on the aircraft which preceded it, including in particular the original A330 aircraft from which it is derived. The relatively small development costs of the A330-200 in our view are a function of the fact that it is a derivative of the A330/A340, the launch of which, as we concluded above, would not have occurred as and when it did but for the LA/MSF granted in respect of that aircraft. Thus, while the particular grant of LA/MSF specific to the A330-200 may not have been necessary to its launch, on the whole, we conclude that LA/MSF was necessary to the launch of the A330-200, as without the grant of LA/MSF for the development of the original model (and all models preceding that model), the A330-200 could not have been launched when it was without significantly higher costs. (footnote omitted)
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> [5657] "{S}ome production stages are not specific to a particular type of aircraft, such that learning effects which are realized in the production of a generic aircraft can influence marginal cost of producing another generic aircraft." Klepper, Exhibit US-377. The fact that such cross effects are strong for updated versions of an aircraft, the so-called derivatives, is illustrated for the Airbus A300 and its derivative the A310 in Klepper, Exhibit US-377, p. 778.[2578] (footnote original)
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> Like the A330-200, the A340-500 and 600 are derivative aircraft whose development was dependent upon the prior development and production of the original A340 model from which they are derived. For the reasons discussed above, in considering the impact of LA/MSF on the launch of such a derivative aircraft, we consider it appropriate not only to consider the LA/MSF directly linked to the particular aircraft model but also to consider the role that LA/MSF played in the launch of the aircraft on which it is based, as well as all other Airbus LCA launched before it.[2579] (footnote omitted)

[2577] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1939.
[2578] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1940.
[2579] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1941.

6.1499. In connection with the A380 -

> Finally, but for LA/MSF provided with respect to Airbus' launches of 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. We have found that the cost for Airbus of obtaining market financing for the A300, A310, A320 and A330/A340 would have been many percentage points greater than what it actually was because of LA/MSF in each instance. Given the amount of funding transferred to Airbus under the individual LA/MSF contracts, and in the light of the formidable risks associated with the LCA business and the learning curve effects that are necessary to successfully participate in this sector, we have found that it would not have been possible for Airbus to have launched all of these models, as originally designed and at the times it did, without LA/MSF. … Thus, while the A380 business case suggests, but by no means demonstrates, that as a stand-alone proposition the project might have been economically viable even without LA/MSF, in our view, that conclusion rests in part on the assumption that at the time of the launch, Airbus would have been in a position to not only design and manufacture the A380, *i.e.*, had the necessary development and production technologies available to it, but also would have been able to obtain all the necessary financing on market terms. However, Airbus' technical capabilities derived in part from its experience in the development of its earlier model LCA funded in significant part by LA/MSF. Moreover, because of the significant amount of debt that developing its previous models of LCA would have generated, we consider Airbus would not have been in a position to obtain market financing for the A380, had it not financed the development of its earlier model LCA in significant part through LA/MSF.[2580]

6.1500. The Appellate Body examined these panel findings, and explicitly referred to them in reviewing the basis of the panel's determination that a non-subsidized Airbus operating in the "unlikely" counterfactual scenarios would be a "much weaker manufacturer" with "at best a more limited offering of LCA".[2581] The Appellate Body identified no error in the panel's logic and rationale, and ultimately declared that:

> {T}he Panel's conclusion that a non-subsidized Airbus would not have "achieved the market presence it did over the period 2001 to 2006", which followed from its views that a non-subsidized Airbus would be a "much weaker LCA manufacturer" with "at best a more limited offering of LCA models", provided enough of a basis to establish a "genuine and substantial relationship of cause and effect" in this case.[2582] (footnote omitted)

6.1501. The Appellate Body also explicitly relied upon the panel's findings with respect to the "learning" and financial effects of LA/MSF in dismissing the European Union's argument that the panel had erred by failing to find that, in the "unlikely" counterfactual scenarios, a non-subsidized Airbus would have been able to launch an A320-type and an A330-type aircraft "in or about" 1987 and 1991, respectively.[2583] On this particular question, the Appellate Body made *inter alia* the following findings:

> We are not persuaded that the evidence on record should have led the Panel to conclude that a non-subsidized Airbus could have launched a single-aisle LCA with 100-200 seats in or about 1987, and a twin-aisle LCA with 200-300 seats in or about 1991. As noted earlier, the Panel found that LCA development is *"enormously complex and expensive" and "requires huge up-front investments"*. The Panel further described the *important economies of scope and scale, as well as learning effects*, that are characteristic of the LCA industry. Moreover, Panel also found that LA/MSF covered 90-100% of the development costs of the A300 and A310 at zero interest, up to 90% of the development costs of the A320, and 60-90% of the development costs of the

[2580] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1948.
[2581] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1269.
[2582] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1270.
[2583] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1274-1281.

A330/A340, and that *the cost of obtaining market financing for the A300 and A310 was significant compared to LA/MSF*. …

… As the Panel found, *"{e}conomies of scale arising from the huge sunk development cost give incumbent firms a considerable competitive advantage"* and "*{l}earning effects induce dynamic economies of scale* which reinforce incumbents' advantage." In the scenario advanced by the European Union, the A320-type aircraft would have been the first aircraft launched by a non-subsidized Airbus. As a new entrant to the market *with less experience*, it is not very plausible that a non-subsidized Airbus could find *similar financing conditions* as those that were available to Boeing as an incumbent LCA manufacturer. *The scenario is also difficult to reconcile with the Panel's finding that "{u}ncertainty is considerable, making it very difficult to finance the huge development cost on capital markets."*

… {W}e recall the Panel's finding that LA/MSF covered 90 to 100% of the development costs of the A300 and A310 at zero interest. The European Union does not indicate in its appellant's submission to what extent the 'losses incurred from the A300/A310 projects' went beyond the development costs, which, as noted above, were almost entirely covered by LA/MSF. Even assuming a non-subsidized Airbus would have suffered lower losses, *it would also have had lower revenues, as it would not have sold any A300 and A310 LCA*. The impact of this loss of revenue is not addressed by the European Union.[2584] (emphasis added; footnotes omitted)

{T}he Panel found that "{l}earning effects, both with respect to development, and in production, are significant", and that "static and dynamic ('learning curve') economies of scope and scale achieved in the context of one model of LCA are an important part of the development and production of other LCA models". … Indeed, the European Communities submitted, before the Panel, that "{t}he important role of R&D means that the learning curve is steep and even incremental technological innovation can translate into decisive competitive advantage in the market". Without the "incremental technological innovation" from the launch of the A300 and A310, it is not plausible that a non-subsidized Airbus would have made the same technological progress, or would have had as much know-how as Airbus did in the early 1980s after having launched two LCA models. We also fail to see evidence on the record that should have led the Panel to find that the same kind of technological progress and experience gained through Airbus' development of two LCA models could have been gained by merely delaying the launch of an A320-type LCA by three years. Thus, we are not persuaded that the evidence on the record would have permitted the Panel to conclude that, had a non-subsidized Airbus been able to launch an aircraft in the late 1980s and/or 1990s, it would likely be technologically superior to the A320 and A330.[2585] (emphasis added; footnotes omitted)

6.1502. Likewise, the Appellate Body drew from the panel's factual findings concerning "the importance of learning curve effects in the LCA industry"[2586] when it rejected the European Union's contention that a non-subsidized Airbus, operating in the "unlikely" counterfactual scenarios, could have launched the A380 in 2000, *even assuming that it could have launched an A320-type and an A330-type LCA in 1987 and 1991*.[2587] In particular, the Appellate Body explained:

In our view, the Panel's conclusion that Airbus would not have been able to launch the A380 in 2000 relying exclusively on market financing but for LA/MSF provided in relation to earlier models of LCA would hold even in the counterfactual scenario posited by the European Union, in which Airbus would have been able to launch a single-aisle LCA in 1987 and a twin-aisle LCA in 1991. While in this scenario Airbus' debt load would have been smaller in absolute terms, Airbus' revenues would also be smaller as a result of a narrower counterfactual product offering. *As a result, in the counterfactual scenario posited by the European Union, Airbus would not necessarily*

[2584] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1275-1277.
[2585] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1281.
[2586] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1355.
[2587] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1350-1355.

> *have been in a stronger financial position to launch the A380 in 2000 relying exclusively on market financing*. Thus, even if the Panel would have accepted the counterfactual posited by the European Union, this would not have invalidated its ultimate conclusion that but for LA/MSF provided with respect to Airbus' *earlier models of LCA,* it would not have been possible for Airbus to launch the A380 in 2000 relying exclusively on market financing.[2588] (emphasis added)
>
> In our view, the counterfactual scenario posited by the European Union does not invalidate the Panel's ultimate conclusion that *Airbus' technical capabilities were derived in large part from its experience in the development of earlier models of LCA*. Given the Panel's earlier factual finding concerning *the importance of learning curve effects in the LCA industry*, it can only follow that a counterfactual Airbus with a narrower product offering would have accumulated less technical experience than Airbus actually did in the development of its full range of LCA. *Following this logic, a non-subsidized Airbus that had developed fewer LCA models would have accumulated less technical experience than the subsidized Airbus actually did, which in our view supports the Panel's conclusion that the launch of the A380 would not have occurred in 2000 without LA/MSF.*[2589] (emphasis added; footnote omitted)

6.1503. Thus, the Appellate Body not only affirmed the panel's entire set of findings with respect to "product" effects of LA/MSF, but it also explicitly used the panel's conclusions and reasoning concerning the *indirect effects* of LA/MSF to dismiss the European Union's contentions about the market presence of a non-subsidized Airbus in the "unlikely" counterfactual scenarios. In our view, the Appellate Body's findings necessarily imply that it must have accepted that the *indirect effects* of the A300/A310 LA/MSF subsidies were more than "minimal" or non-existent in the relevant period. Indeed, given that the A300 and the A310 were the first two LCA ever brought to market by Airbus, and that LA/MSF covered close to 100% of the development costs of the former and 90% or 100% of the development costs of the latter, it could well be expected that, at the very least, the "learning" effects of the A300/A310 LA/MSF subsidies would have been quite strong and long-lasting.[2590] We therefore read the Appellate Body's statement that the LA/MSF subsidies for the A300/A310 were "likely to cause minimal, if any, adverse effects during the reference period 2001-2006"[2591], to have been focused on the *direct effects* of those subsidies. Moreover, having in this way effectively articulated separate findings with respect to the *direct* and *indirect effects* of the A300/A310 LA/MSF subsidies, we understand the Appellate Body to have also signalled that the *duration* of the direct and indirect effects of LA/MSF is likely to be connected in different ways to *the extent to which those effects contribute to the ongoing market presence of one or more particular LCA over time*. This characterization of the Appellate Body's findings is, we believe, supported by not only the *nature* of the effects of LA/MSF, but also the facts pertaining to the *market presence* of the relevant Airbus LCA.

6.1504. Starting with the nature of the *direct effects* of LA/MSF, we recall that LA/MSF for the A300 and A310 covered close to 100% and between 90% and 100% of their respective development costs and that, in the absence of this financing, Airbus could not have launched and brought to market the six different versions of the two models of LCA between 1969 and 2004.[2592] While the market presence of both models of LCA came about because of the direct *and* indirect effects of LA/MSF, it is apparent from the findings made in the original proceeding that the *direct effects* played a significant, if not critical, role.[2593] In other words, without the *direct effects* of the A300/A310 LA/MSF subsidies, the A300 and A310 would simply not have existed. Indeed, the European Union accepted during the original proceeding that even in the "unlikely" counterfactual

[2588] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1352.

[2589] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1355.

[2590] As the first two LCA produced by Airbus, it is apparent that Airbus' experience with the A300 and A310 would have enabled it to develop critical expertise and know-how that it would otherwise not have had in relation to *inter alia*: (a) the design, development and production of LCA; (b) the management of LCA projects and the significant risks and challenges such projects pose; and (c) the marketing and sales of LCA (including how to establish and manage LCA customer relationships). We discuss "learning" and other indirect effects of LA/MSF further below, at paras. 6.1510-6.1511.

[2591] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1241.

[2592] We recall that French, German and Spanish government interest-free LA/MSF loans were used by Airbus to fund the development costs of the following six versions of the A300 and A310: A300B, A300B2, A300B4, A300-600, A310-200, and A310-300.

[2593] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1933-7.1936.

scenarios where a non-subsidized Airbus would have existed, the A300 and A310 could not have been launched by the 2001-2006 period without LA/MSF.[2594] Thus, it is undisputed that the *direct effects* of the A300/A310 LA/MSF subsidies had a profound impact, bringing about the very existence and market presence of the A300 and A310. Logically, therefore, the duration of the *direct effects* of the A300/A310 LA/MSF subsidies must have endured for the entire *marketing lives* of the two aircraft models, as in the absence of those effects, the A300 and A310 would have simply never existed and therefore never been sold or delivered.

6.1505. The facts surrounding the market presence of the A300 and A310 suggest that this may have been what the Appellate Body had in mind when it found that the A300/A310 LA/MSF subsidies were "likely to cause minimal, if any, adverse effects during the reference period 2001-2006".[2595] During the 2001-2006 period, only one of the six versions of the A300 and A310 developed with LA/MSF, the A300-600, was actually present on the market and being delivered. With the last deliveries of all other versions of the A300 and A310 having been completed well before 2001[2596], the A300-600 was the only version of the A300/A310 capable of winning sales from Boeing in the 2001-2006 period. The marketing lives of all other LCA *specifically funded* with the challenged A300/A310 LA/MSF subsidies had, therefore, come to an end before the 2001-2006 period. Thus, when measured on the basis of *marketing lives*, the *direct effects* of the A300/A310 LA/MSF subsidies in the 2001-2006 period were only a fraction of what they were in the past. In our view, these facts support our understanding of the Appellate Body's findings concerning the "minimal, if any" adverse effects caused by the A300/A310 LA/MSF subsidies in the 2001-2006 period.

6.1506. The United States argues that the *direct effects* of all of the challenged LA/MSF subsidies should be measured in essentially the same way − that is, on the basis of the duration of the marketing life of the relevant LCA programme specifically funded by any given LA/MSF measure. In our view, however, whether the duration of the *direct effects* of LA/MSF should reflect the *entire* marketing life of a specifically funded LCA programme will depend upon the particular facts. Thus, for example, where, as in the case of the A300 and A310, it is clear that the very existence and ongoing market presence of a particular LCA programme is dependent upon a specific grant of LA/MSF, it would make sense, as a matter of logic, to consider that the *direct effects* of that LA/MSF would be likely to continue for the entire duration of the marketing life of the financed aircraft, as in the absence of those direct effects, no LCA would exist.

6.1507. On the other hand, where LA/MSF provided for the specific purpose of launching and bringing an aircraft to market is not critical to its very existence[2597], then the *direct effects* of the relevant LA/MSF funding could not normally be said to last for the entire marketing life of the relevant programme. Such a situation might arise, for example, where LA/MSF enabled Airbus to develop and bring to market a particular aircraft only a *few years in advance of what would have been the case without LA/MSF*. Thus, for example, assuming that a particular subsidized LA/MSF measure enabled Airbus to launch and bring to market an LCA five years ahead of when it would otherwise have been possible without that LA/MSF, it is likely that the *direct effects* of that LA/MSF would normally be felt for only five years. Because, in the absence of the specific LA/MSF subsidy, the same aircraft would exist five years later[2598], it is likely that the *direct effects* of the relevant

[2594] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1273.

[2595] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1241.

[2596] The final deliveries of the A300B, A300B2, and A300B4 took place in, respectively, 1974, 1983, and 1996, with the final A300-600 being delivered in July 2007. Similarly, the last deliveries of the A310-200 and A310-300 were made in 1989 and 1998, respectively. Airbus terminated the A300/A310 programme in 2007. (European Union's first written submission, paras. 168-172; Airbus Press Release, "A300, A310 Final Assembly To Be Completed by July 2007", 7 March 2006, (Exhibit EU-116); and Declaration of Andrew Gordon, Head of Airbus Market Analysis and Research, 31 January 2007, (Exhibit EU-432) (BCI), attachment B)

[2597] We recall that the panel in the original proceeding found that it was likely that "the A330-200 could have been launched even in the absence of the specific LA/MSF granted in respect of that programme" because it was a derivative of the A330 and, therefore, required a comparatively small amount of funding to develop. The original panel also found that the A380 business case suggested, "but by no means demonstrates", that as a stand-alone proposition, the A380 might have been economically viable even without the A380 LA/MSF. Ultimately, however, in respect of both models of LCA, the panel found that they could not have been launched and brought to market in the absence of the *indirect effects* of other LA/MSF subsidies. (Panel Report, *EC and certain member States − Large Civil Aircraft*, paras. 7.1940 and 7.1948)

[2598] This example assumes that no major modications or improvements would have been made to the original aircraft developed with LA/MSF in the five year period after its launch − in other words, that the

LA/MSF measure could no longer be said to be a "genuine and substantial" cause of its market presence in that subsequent period. It follows, therefore, that the *direct effects* of the relevant LA/MSF measure in this example would be likely to last for less than the entire marketing life of the specifically funded LCA programme.

6.1508. In the light of the above considerations, we believe that it follows from the findings made by the panel and the Appellate Body in the original proceeding, that the duration of the *direct effects* of any particular LA/MSF measure should be determined on the basis of the extent to which those effects support the market presence of the specifically funded aircraft over time. Where the facts show that the very existence and ongoing market presence of a particular aircraft programme is dependent upon specifically designated LA/MSF funding, then as a matter of logic, it is likely that the *direct effects* of that LA/MSF will continue to be felt throughout the marketing life of the specifically funded aircraft. On the other hand, where the very existence and ongoing market presence of an aircraft that was specifically funded with LA/MSF is no longer dependent upon that funding, in the sense that the same aircraft would have been developed and brought to market at some point in time without the specifically designated LA/MSF, then it would be highly unlikely for the *direct effects* of that LA/MSF funding to endure throughout the entire marketing life of the relevant LCA programme. Under such circumstances, it would be possible to explain the ongoing market presence of the particular aircraft on the basis of some other factor unrelated to the *direct effects* of LA/MSF, thereby signalling the dissipation of those effects and the end of the relationship of "genuine and substantial" cause and effect.

6.1509. Turning to the nature of the *indirect effects* of LA/MSF, we recall that the panel's causation findings in the original proceeding, which were entirely upheld and in large parts relied upon by the Appellate Body, were inextricably linked to the "learning", scope and financial effects of the LA/MSF subsidies across Airbus' different models of LCA.

6.1510. The "learning" effects of LA/MSF result from the extent to which LA/MSF enables Airbus to launch and bring to market one particular model of LCA, and thereby develop the knowledge, know-how and experience to support the launch and development of other models of Airbus LCA. The panel found in the original proceeding that "learning effects" were "significant" in the LCA industry, affecting both the development and production of LCA.[2599] Indeed, the panel considered such effects to be a fundamental feature of the industry, shaping the ability of any potential new entrant to compete with an incumbent producer.[2600] Likewise, the panel explained that economies of scope are an important part of the development and production of LCA[2601], making it difficult for a new producer to enter only one market segment.[2602] Economies of scope arise when, for example, basic aircraft design and components are shared across different models of LCA[2603], making it possible to share inputs (and therefore spread costs) between the production processes of different aircraft. The European Union recognizes that economies of scope were among the indirect effects found to have resulted from the pre-A350XWB LA/MSF subsidies challenged in the original proceeding.[2604]

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original aircraft is exactly the same as the aircraft developed five years later without LA/MSF. Where this is not the case, it is conceivable that the market presence effects of the LA/MSF subsidies might well continue beyond five years. However, this would be a fact-specific matter, depending upon *inter alia* the extent to which the major modifications and improvements made to the original aircraft could not have been made in the absence of its existence − for example, where the changes made resulted from "learning" experiences with that aircraft.

[2599] Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.1623.

[2600] Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.1717. Indeed, the notion of "learning" effects was first studied and explored in the economic literature specifically in relation to the aircraft sector. See discussion in C. Lanier Benkard, "Learning and Forgetting: The Dynamics of Aircraft Production", (2000) *American Economic Review*, pp. 1034-154.

[2601] Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.1936 (citing Damien Neven & Paul Seabright, *European Industrial Policy: The Airbus Case (1995)*, (Neven & Seabright), (Original Exhibit US-382)).

[2602] Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.1717 (citing Gernot Klepper, *Entry into the Market for Large Transport Aircraft*, 34 European Economic Review, 775 (1990), (Original Exhibit US-377).

[2603] Neven & Seabright, (Original Exhibit US-382), p. 15.

[2604] See e.g. European Union's response to Panel question No. 46, para. 115 ("Indeed, the so-called 'primary' and 'secondary' effects, as described by the United States, appear to cover *all* of the effects of the subsidies that were determined to cause adverse effects" in the original proceeding). (emphasis original)

6.1511. The financial impact of launching and bringing to market one particular LA/MSF-funded model of Airbus LCA on Airbus' ability to develop and market other models of LCA was also identified to be an important *indirect effect* of LA/MSF. The financial effects of LA/MSF result from not only the impact of the "learning" and scope effects on the cost of financing new models of LCA, but also the revenues generated from sales and deliveries of LCA that would not exist in the absence of LA/MSF, as well as the below-market interest rates charged on the repayment of LA/MSF. In terms of the first of these effects, the panel found in the original proceeding that the "knowledge and experience gained in the development and production of one model of aircraft will tend to lower the costs of development and production of subsequent aircraft".[2605] Such lower costs will naturally reduce financing requirements for ongoing and future projects, thereby keeping Airbus' debt below what it would otherwise be in the absence of LA/MSF. The effect of LA/MSF on Airbus' debt burden was also recognized by the panel when it concluded that the costs of market-based financing for the A300, A310 and A320 would have made it "extremely difficult, if not impossible" for Airbus to have launched, respectively, the A310, A320 and A330/A340 without LA/MSF.[2606] Likewise, the panel found that "because of the significant amount of debt that developing its previous models of LCA {on the basis of market-based financing} would have generated, … Airbus would not have been in a position to obtain market financing for the A380".[2607] Finally, in dismissing the European Union's arguments concerning the ability of Airbus to launch the A380 in 2000 on the assumption that Airbus could have already had an A320-type and an A330-type aircraft on the market, the Appellate Body recognized the positive effect of LA/MSF on Airbus' revenue streams, finding that Airbus "would not necessarily have been in a stronger financial position … relying exclusively on market financing", given that its "revenues would also be smaller as a result of a narrower counterfactual product offering".[2608]

6.1512. Given the "huge up-front investments" and "enormously complex" technologies involved in developing LCA, it is apparent that the "learning", scope and financial effects of LA/MSF must have played a significant, and in some cases, even critical, role in Airbus' ability to launch and bring to market all of its models of LCA after the A300. Indeed, it is undisputed that "learning" effects are fundamental to the very existence of any competitive LCA producer. This does not, however, mean that each and every LA/MSF subsidy had exactly the same indirect effects on all models of Airbus LCA. Rather, the extent to which one or more aircraft benefited from the indirect effects of LA/MSF depends upon how the "learning", scope and financial effects associated with the financing of one specific model of LCA impact the launch and bringing to market of one or more other models. Thus, for example, as we explain in the next subsection of this Report, the "learning" effects resulting from the A380 LA/MSF subsidies were overall relatively more important in the launching and bringing to market of the A350XWB compared with those resulting from any other individual LCA developed by Airbus with the assistance of LA/MSF.[2609] Indeed, given the very nature of "learning" effects, it is likely that they will be strongest between models of LCA that are launched, developed and/or produced during overlapping periods of time. It is, therefore, difficult to attribute the launch and bringing to market of the A350XWB to more than only relatively weak "learning" effects and minor, if any, scope and financial effects associated with the A300/A310 LA/MSF subsidies.[2610] This is because, as argued by the United States, the *indirect effects* of LA/MSF provided for a "relatively old model (for example the A300) will tend to diminish over time, particularly where its sales (and thus revenue generation) are modest or low, and where the technology and learning benefits … have more limited applicability on more recent models".[2611]

6.1513. In the light of the above considerations, we believe that it follows from the findings made by the panel and Appellate Body in the original proceeding, that the duration of the *indirect effects* of LA/MSF should be determined on the basis of the extent to which the "learning", scope and financial effects associated with any given LA/MSF measure provided for the purpose of one specific model of LCA support the market presence of one or more other models of LCA over time. Thus, where the very existence and ongoing market presence of an LCA is dependent upon the "learning", scope and financial effects resulting from one or more prior LA/MSF subsidies, it is

[2605] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1936.
[2606] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1936, 7.1938, and 7.1939.
[2607] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1948.
[2608] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1352.
[2609] See below paras. 6.1747-6.1760.
[2610] See below fns 3222 and 3248.
[2611] United States' second written submission, para. 402.

likely that the *indirect effects* of those prior LA/MSF subsidies will continue to be felt throughout the marketing life of the relevant aircraft programme.

6.1514. For all of the above reasons, we are therefore unable to agree with the European Union's arguments concerning the impact of the passage of time on the effects of the challenged LA/MSF subsidies in this dispute. The adopted findings from the original proceeding establish that the effects of LA/MSF were twofold and profound, bringing about the very existence of Airbus in the two "plausible" counterfactual scenarios and, therefore, its market presence with a full range of LCA in the 2001-2006 period. Even under the two "unlikely" counterfactual scenarios, it is apparent that the direct and indirect effects of LA/MSF were significant, because in their absence, Airbus would have been a "much weaker" company "with at best a more limited offering of LCA models" in the 2001-2006 period. Indeed, in the two "unlikely" counterfactual scenarios, the A300, A310 and A340 would not have been launched; and while an A320-type *and* an A330-type aircraft might have been launched sometime *after* 1987 and 1991, this would have been on the basis of no previous LCA experience at all with respect to the A320-type aircraft and considerably less experience and know-how than was the case with the original A330 with respect to the A330-type LCA. This strongly suggests that the non-subsidized LCA would have been of significantly inferior quality. Moreover, even assuming that an A320-type *and* an A330-type aircraft had been launched around 1987 and 1991, respectively, Airbus could not have also launched the A380 or any comparable LCA by 2000.[2612] Thus, even under the two "unlikely" counterfactual scenarios, it is clear that Airbus could not have had the same range and quality of aircraft on the market in the 2001-2006 period in the absence of LA/MSF. In other words, Airbus' presence on the market with the same or comparable range of quality aircraft would still be dependent upon LA/MSF even in the two "unlikely" counterfactual scenarios.

6.1515. Finally, in our view, the fact that under all four counterfactual scenarios posited in the original proceeding, the very existence and ongoing market presence in the 2001-2006 period of each individual model of Airbus LCA depended upon the direct and indirect effects of LA/MSF, necessarily implies that, *in the absence of any other 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. In other words, in the 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.

Post-launch investments in the A320 and A330 families

6.1516. The European Union submits that the United States errs when it argues that the effects of the challenged LA/MSF subsidies are the "genuine and substantial" cause of present serious prejudice to the United States' interests as a result of the market presence of the A320 and A330 families. According to the European Union, the "genuine and substantial" cause of the ongoing market presence of the A320 and A330 families is not the LA/MSF subsidies, but rather the "massive", allegedly, non-subsidized investments Airbus has made into the two families of LCA since they were launched in, respectively, 1984 and 1987. The European Union argues that these investments have turned the two aircraft families into different, significantly upgraded, products compared to those originally launched with the assistance of LA/MSF, thereby ensuring their continued attractiveness to customers and explaining their enduring competitiveness. For the European Union, this means that while the challenged LA/MSF subsidies were a *necessary* cause of the launch of the original A320 and A330, the effects of those subsidies are today too *remote* to be a "genuine and substantial" cause of any presently arising market effects.[2613]

[2612] We recall that in dismissing the European Union's contentions about the ability of a non-subsidized Airbus to compete effectively in the "unlikely" counterfactual scenarios, the Appellate Body found that *even assuming* that Airbus had launched an A320-type and an A330-type LCA by 1987 and 1991, respectively, Airbus would not have developed the necessary experience and expertise to also launch the A380 in 2000. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1355)

[2613] European Union's first written submission, paras. 728, 740, 768, 799, 865, 876, 885, and 904; and second written submission, paras. 735-738.

6.1517. The European Union explains that since the A320 and A330 were launched, Airbus has invested, respective to these LCA, at least EUR **[***]** billion and EUR **[***]** billion into the following activities: (a) "Continuing Development"; (b) "Continuing Support"; (c) the design and manufacture of three non-subsidized variants (the A321, A319 and A318) between 1988 and 1999; and (d) the setting-up of three new A320 FALs in Hamburg (Germany) between 1993 and 2005, and one in Tianjin (China) in 2008. The European Union maintains that the value of these investments "dwarf{s}" the initial development cost of the A320 and A330/A340 programmes, and that it has resulted in significant technological advancements, enhanced production rates, improved lead-times and lower costs of production.[2614]

6.1518. The European Union defines Airbus' "Continuing Development" investments to include "investments into product and performance improvements, continued airworthiness, flight test activities, the customisation of major items, hardware and software sustaining, and cost reduction initiatives".[2615] Among the notable investments made in this area with respect to the A320 were those that resulted in the introduction of the A320neo in 2011 and the development of "Sharklets".[2616] The European Union asserts that the A320neo, which incorporates "Sharklets" and is powered by new more fuel-efficient engines, was the "single-most significant technological innovation since the launch of the original A320 in 1984".[2617] The European Union explains that the introduction of the new engines was a complex endeavour, requiring Airbus engineers to address and resolve a number of significant challenges including the substantially increased loads and performance requirements resulting from the much larger, heavier and more powerful engines. Likewise, the European Union asserts that the development of "Sharklets", which the European Union describes as "wing-tip devices" that "significantly enhance the aircraft's aerodynamics and create fuel-burn savings of up to 3.5 per cent"[2618], required not only a "**[***]**" but also a new "**[***]**"[2619], including software changes. Thus, the European Union submits that the technological novelties associated with both the "Sharklets" and the introduction of the A320neo are more complex than a simple update of existing technologies, requiring significant innovation, testing and production efforts.[2620]

6.1519. The European Union maintains that the Airbus investments which brought about an increase in the maximum take-off weight (MTOW) of the A330 were among the most important non-subsidized technological improvements made to the A330. The European Union explains that an increase in the MTOW means that an aircraft can either carry additional cargo over a given distance or fly a longer-range with a given payload.[2621] According to the European Union, an increased MTOW extends the range of operations that can be performed by an aircraft, making it attractive to a wider range of customers. Another series of non-subsidized investments that made a significant improvement to the A330 focused on fuel-efficiency. The European Union describes

[2614] European Union's first written submission, paras. 731-798 and 876-924; and second written submission, paras. 743-821 (referring throughout to, *inter alia*, Mourey Statement, (Exhibit EU-8) (BCI); Frank Vermeire, Head of A320 Marketing, Airbus, "Statement on the Market Significance of Technological and Production Improvements to the A320 Programme", 5 July 2012, (A320 Marketing Statement), (Exhibit EU-9) (BCI); Roland Rischer, Christian Reitz and Michel Palomeque, A320 Chief Engineering, Airbus, "A320 Chief Engineering Statement", 3 July 2012, (A320 Chief Engineering Statement), (Exhibit EU-10) (BCI/HSBI); Daniel Baubil, Head of A320 Program/Single Aisle, Airbus, "Declaration Regarding Investments in and Changes to the Production of the A320 Family", 4 July 2012, (A320 Production Statement), (Exhibit EU-11) (BCI/HSBI); A330 Marketing Statement, (Exhibit EU-12) (BCI); Vincent Lebas and Bruno Ley, A330 Chief Engineering, Airbus, "A330 Chief Engineering Statement", 2 July 2012, (A330 Chief Engineering Statement), (Exhibit EU-13) (BCI/HSBI); Summary of Investments in A320 Programme, (Exhibit EU-76) (HSBI); Summary of Investments in A330/A340 Programme, (Exhibit EU-86) (HSBI); Statement by Roland Rischer and Christian Reitz, A320 Chief Engineering, 6 December 2012, (A320 Chief Engineering Rebuttal), (Exhibit EU-125) (BCI/HSBI); and Statement by Vincent Lebas and Bruno Ley, A330 Chief Engineering, 7 December 2012 (A330 Chief Engineering Rebuttal), (Exhibit EU-126) (BCI/HSBI)).

[2615] European Union's first written submission, fn 926.

[2616] European Union's first written submission, paras. 752-754.

[2617] European Union's first written submission, para. 754.

[2618] European Union's first written submission, para. 752.

[2619] European Union's first written submission, para. 753.

[2620] European Union's first written submission, paras. 745-760; and second written submission, paras. 753-759 (referring throughout to, *inter alia*, A320 Chief Engineering Statement, (Exhibit EU-10) (BCI/HSBI); A320 Chief Engineering Rebuttal, (Exhibit EU-125) (BCI/HSBI); Mourey Statement, (Exhibit EU-8) (BCI); and A320 Marketing Statement, (Exhibit EU-9) (BCI)).

[2621] European Union's first written submission, paras. 889-895; and second written submission, para. 791.

these to include investments made for the purpose of improving or replacing certain systems with newer, lighter systems, as well as changes made by engine manufacturers to their engines.[2622] The European Union maintains that all of these various design and system improvements involved significant engineering challenges and were achieved at significant cost.[2623] Thus, the European Union submits that, collectively, Airbus' investments into the continued development of the A330 had a "significant impact on the A330's continued market position".[2624]

6.1520. The European Union defines Airbus' investments into "Continuing Support" activities to include "investments into technical support, which are recurring activities linked to production; jigs and tools maintenance, to keep these usable for production, and; specific and non-recurring activities that relate to production and development aircraft maintenance".[2625] In this context, the European Union points to a number of Airbus investments into buildings, infrastructure, jigs, tools and productivity between 2005 and 2012 to be among the most important changes contributing to Airbus' ability to secure market share.[2626] For instance, in terms of the A320, the European Union explains that as a result of Airbus' investments into buildings and infrastructure, Airbus has been able to increase production capacity from **[***]** aircraft per month in 1990 at a single final assembly line (FAL) in Toulouse, to **[***]** aircraft per month at present at all three of its A320 FALs in Toulouse, Hamburg and Tianjin.[2627] Similarly, as regards the A330, the European Union explains that two important improvements in terms of production capacity involved the **[***]** and the flexibility added to the production process.[2628] According to the European Union, these and other investments into Airbus' "Continuing Support" activities for the A320 and A330 have not only brought about significant improvements to Airbus' production rates and lead-times, but they have also resulted in reductions to Airbus' costs of production.[2629]

6.1521. The United States submits that the "genuine and substantial" causal link found to exist between the LA/MSF subsidies and the market presence of the A320 and A330 in the original proceeding has not dissipated with the post-launch investments undertaken by Airbus. According to the United States, whatever the contribution of the improvements made to the A320 and A330 to their present-day competitive position, the fact remains that, both as a financial and technological matter, the current market presence of the two aircraft could not have been achieved without the original A320 and A330, which themselves could not have been launched and brought to market in the absence of LA/MSF. In this respect, the United States recalls the panel and Appellate Body findings concerning the important role that LA/MSF had on Airbus' ability to launch and bring to market successive LCA programmes, including derivative aircraft. For the United States, these findings imply that Airbus could not have been in a position to market the present-day versions of the A320 and A330, if it had not also developed the technical expertise and achieved the revenue streams from the original A320 and A330 that would not have existed in the absence of LA/MSF.[2630]

6.1522. The United States furthermore argues that while the post-launch investments made by Airbus to the original A320 and A330 may have had a meaningful impact on their respective performance, the relevant improvements did not require any fundamental changes to be made to their underlying design. In this respect, the United States notes that a significant proportion of the improvements identified by the European Union occurred prior to the end of 2006, and that this did not preclude the panel and the Appellate Body from finding in the original proceeding that the

[2622] Other technological improvements identified by the European Union affect the A330's "operational capabilities and navigation safety", the "use of lighter, corrosion resistant materials for certain parts of the A330's primary structures" and the introduction of a "fly-by-wire rudder" system. (European Union's first written submission, paras. 896-900)

[2623] European Union's second written submission, paras. 789-800.

[2624] European Union's second written submission, para. 798.

[2625] European Union's first written submission, fn 928.

[2626] European Union's first written submission, paras. 774 and 909.

[2627] European Union's first written submission, para. 776.

[2628] European Union's first written submission, para. 910.

[2629] European Union's first written submission, paras. 770-798; and second written submission, paras. 773-779 (referring throughout to, *inter alia*, A320 Production Statement, (Exhibit EU-11) (BCI/HSBI); and A320 Marketing Statement, (Exhibit EU-9) (BCI)).

[2630] United States' second written submission, paras. 507-515 (citing, *inter alia*, Panel Report, *EC and Member States – Large Civil Aircraft*, paras. 7.1940, 7.1941, 7.1984, and 7.1993; Appellate Body Report, *EC and Member States – Large Civil Aircraft*, paras. 1266-1300; and Schneider Declaration, (Exhibit USA-354) (BCI)).

market presence of the particular versions of the A320 and A330 that had benefited from those improvements was attributable to LA/MSF. Moreover, as regards the post-2006 improvements, the United States argues that the "Sharklets" introduced by Airbus to increase aerodynamic efficiency did not require any fundamental redesign of the A320, but only some additional engineering and optimization on the wing. Moreover, the United States asserts that the A320neo will retain 95% airframe commonality with the current A320 family, and that the investments that brought about the increased MTOW and range of the current A330 do not reflect any major new changes to that aircraft. Indeed, the United States maintains that many of the relevant production and technological improvements made to the A330 were imported from the A380 programme. Thus, for the United States, the current versions of the A320 and A330 are "overwhelmingly" based on the fundamental design of the original A320 and A330, which were launched and brought to market with LA/MSF; and for this reason, the United States argues that their existence continues to be dependent upon LA/MSF.[2631]

6.1523. In examining the merits of the parties' positions, we find it useful to start by recalling the following passage from the Appellate Body report in *US – Large Civil Aircraft (2nd complaint)*, which we believe provides important guidance for the causation analysis that we must perform in this compliance proceeding, including with respect to the issue of non-attribution:

> 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.[2632] (emphasis original; underline added; footnotes omitted)

6.1524. The relevant market phenomenon that is before us in this part of our analysis is the present-day market presence of the current versions of the A320 and A330. Having closely reviewed the parties' submissions and accompanying evidence, there is no doubt in our minds that the post-launch investments described by the European Union were significant and instrumental to Airbus' ability to upgrade the technologies and production processes associated with the original A320 and A330 programmes in a way that enabled Airbus to sustain their competitiveness. Nevertheless, we cannot see a basis for concluding that such investments have diluted the link between the pre-A350XWB LA/MSF subsidies and the market presence of the existing A320 and A330 aircraft families such that it is not possible or appropriate to characterize that link as "a genuine and substantial relationship of cause and effect".

[2631] United States' second written submission, paras. 516-524 (citing, *inter alia*, Schneider Declaration, (Exhibit USA-354) (BCI); Airbus Press Release, "A320neo Family: Maximum benefit, minimum change", January 2012, (Exhibit USA-355); and "A330 Family Technology" Airbus website, accessed 11 October 2012, (Exhibit USA-461)).

[2632] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 914. The Appellate Body repeated essentially the same statement in paragraph 984 of the same report.

6.1525. Once again, we recall that pursuant to the two "plausible" counterfactual scenarios, the effects of the pre-A350XWB LA/MSF subsidies were found to explain the very existence of Airbus in the 2001-2006 period. Given that a significant part of Airbus' post-launch investments took place *before* the end of 2006, it must logically follow that they too could not have been undertaken in the absence of the effects of the challenged LA/MSF subsidies. For instance, Airbus' launch of the A321, A319 and A318 derivatives in, respectively, 1988, 1993 and 1999, could not have taken place had Airbus not also launched and brought to market its other contemporary models of LCA, including, of course, the original A320, with the assistance of LA/MSF. Likewise, there would have been no reason to establish additional A320 FALs in Hamburg and Toulouse between 1993 and 2005, had Airbus not launched and brought to market the original A320 on the basis of direct and indirect effects of LA/MSF. Thus, the adopted findings from the original proceeding necessarily establish that the post-launch investments taking place before the end of 2006 and, therefore, the market presence of the upgraded versions of the A320 and A330, depended upon the effects of the pre-A350XWB LA/MSF subsidies.

6.1526. In our view, the same is true with respect to the post-launch investments the European Union identifies as having taken place *after* the end of 2006. First of all, as noted elsewhere in this Report, the European Union does not argue in this proceeding that a non-subsidized Airbus would have come into being some time after the end of 2006. Second, and in any case, it is difficult to contemplate how a non-subsidized Airbus entering the LCA market in only 2007 (at the earliest) would have been able to develop the technical know-how and have the financial strength to launch and bring to market two aircraft comparable to those with respect to which Airbus decided to undertake the post-2006 investments. Indeed, such a circumstance is difficult to envisage even under the "unlikely" counterfactual scenarios posited in the original proceeding, where Airbus would have existed as a "much weaker" competitor "with at best a more limited offering of LCA models". In this respect, we recall that the Appellate Body found that there was no factual basis to support the European Union's contentions in the original proceeding about the ability of Airbus to launch an A320-type and an A330-type aircraft by 1987 and 1991 respectively. Thus, even assuming *arguendo* that a non-subsidized Airbus could have launched such aircraft shortly after 1987 and 1991, it would not have had the same accumulated experience and financial strength that enabled it to undertake all of the post-launch investments identified by the European Union. It follows, therefore, that under any of the four relevant counterfactual scenarios, Airbus could not have developed the A320neo or undertaken the same improvements to the original A330's MTOW and fuel-efficiency in the absence of the direct and indirect effects of LA/MSF.

6.1527. Thus, we are unable to accept the European Union's arguments concerning the post-launch investments, and find that those investments although significant and instrumental to Airbus' ability to upgrade the A320 and A330 programmes, have not diluted the causal connection between the "product-creating" effects of the pre-A350XWB LA/MSF subsidies and the present-day market presence of the A320 and A330 families such that it is not possible or appropriate to characterize that link as "a genuine and substantial relationship of cause and effect". Accordingly, we find that the direct and indirect effects of the pre-A350XWB LA/MSF subsidies continue to be a "genuine and substantial" cause of the market presence of the current versions of the A320 and A330 families, although, clearly, not the only cause.

Conclusion

6.1528. The adopted findings and recommendations from the original proceeding establish that the direct and indirect effects of the pre-A350XWB LA/MSF subsidies on the market presence of the A320, A330 and A380 families of Airbus LCA were profound and long-lasting, explaining (under all four counterfactual scenarios) the very existence of the entire range of Airbus LCA that was actually sold in the 2001-2006 period. As we have articulated above, however, the direct and indirect effects of the pre-A350XWB LA/MSF subsidies will not endure forever, but rather diminish and eventually come to an end in different ways and degrees depending upon the extent to which the ongoing market presence of a particular model of Airbus LCA continues to be tied, through a genuine and substantial relationship of cause and effect, to a specifically designated grant of LA/MSF and/or the "learning", scope and financial effects associated with any one or more other LA/MSF measures. For each model of Airbus LCA, the substance of this connection will be defined by not only the nature of the particular direct and indirect effects of the LA/MSF subsidies supporting its market presence, but also the *events* which over time may dilute the impact of

those effects, in some cases, to a point where the "genuine and substantial" causation standard may no longer be satisfied.

6.1529. Ultimately, therefore, the extent to which the effects of the pre-A350XWB LA/MSF subsidies may dissipate over time will be a fact-specific matter. Nevertheless, it is possible to envisage 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. One such possibility could be through the launch of new *unsubsidized* models of Airbus LCA. The introduction of a new *unsubsidized* model of Airbus LCA would ensure that its market presence could not be attributable to the *direct effects* of LA/MSF. Yet because of the particular features of LCA production, it is highly unlikely that a new unsubsidized model of Airbus LCA could be launched today in the absence of the "learning", scope and financial effects associated with the LA/MSF subsidies provided for certain (but not necessarily all) previous models of LCA. Indeed, as already noted, it is undisputed that "learning" effects are fundamental to the very existence of any competitive LCA producer. However, were a *second* unsubsidized LCA model to be developed, it is possible that the *indirect effects* of the LA/MSF subsidies provided for the purpose of developing previous models of LCA would play a relatively minor role in its launch and bringing to market compared with the *first* unsubsidized new model of Airbus LCA. The impact of the same *indirect effects* on a *third* unsubsidized new model of Airbus LCA would be even smaller as its development would most likely be based on mainly the "learning", scope and financial effects generated from the *first* and *second unsubsidized* models of Airbus LCA.

6.1530. The withdrawal of a *subsidized* Airbus LCA from the market or a significant modification to its design or key operating features might also potentially diminish or, in some cases, bring about the end of, the "product-creating" effects of one or more of the pre-A350XWB LA/MSF subsidies. The termination of an LCA programme that would not have existed in the absence of the LA/MSF subsidies implies that other existing or future models of Airbus LCA would no longer benefit from the *additional* "learning", scope or financial effects that would have been generated by that programme had it continued. Thus, for example, the termination of the A300/A310 programmes by 2007 would have brought the *additional* indirect effects of those subsidies to an end, leaving Airbus' latest models of LCA to benefit from only those indirect effects generated in the past that continue to support their present-day market presence.[2633] Likewise, to the extent that an *existing subsidized* model of Airbus LCA may be modified and upgraded on the basis of innovations that are unrelated to Airbus' existing range of subsidized LCA (in the sense that such innovations would have been developed in the absence of the effects of the LA/MSF subsidies), it is also apparent that over time, the direct and indirect effects of the pre-A350XWB LA/MSF subsidies will gradually diminish to a point where they may no longer meet the "genuine and substantial" causation standard.

6.1531. However, as the findings we have made in this subsection of our Report indicate, we are not convinced that the causal connection between the pre-A350XWB LA/MSF subsidies and the current market presence of the A320, A330 and A380 has been reduced to one that is less than a genuine and substantial relationship of cause and effect. Unlike the European Union, we do not see how the arguments and evidence advanced in this proceeding demonstrate that the mere passage of time or the few events which the European Union has identified to have taken place since the beginning of 2007 (or even before then), have materially eroded the causal link that was found to exist in the original proceeding up until the end of 2006 as a result of the profound and long-lasting effects of the pre-A350XWB LA/MSF subsidies.

6.1532. First, we have found that the end of the *ex ante* "lives" of most of the pre-A350XWB LA/MSF subsidies did not bring about the end of their effects, a conclusion that is consistent with and follows logically from the adopted causation findings made in the original proceeding. Moreover, as we have explained in the previous paragraphs, the fundamental "product-creating" nature of the pre-A350XWB LA/MSF subsidies means that their effects are likely to endure for as long as the market presence of any model of Airbus LCA continues to be tied to those effects by means of a genuine and substantial relationship of cause and effect. Thus, in the absence of any event or development capable of breaking the genuine and substantial causal link that was found to exist in the original proceeding, the same causal connection between the direct and indirect

[2633] As regards the impact of the indirect effects of the A300/A310 LA/MSF on the launch and bringing to market of the A350XWB, see below at fns 3222 and 3248.

effects of the pre-A350XWB LA/MSF subsidies and the A320, A330 and A380, must continue to exist today. In this light, we see no factual basis to accept that the *mere passage of time* has reduced the "product-creating" effects of the pre-A350XWB LA/MSF subsidies to only a remote or insignificant cause of the ongoing market presence of these models of Airbus LCA.

6.1533. Second, although significant and instrumental to Airbus' ability to upgrade the technologies and production processes associated with the original A320 and A330 programmes, 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 made *in the absence of the effects of the LA/MSF subsidies*. Thus, for the reasons explained in more detail in our above analysis, 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. In our assessment, these investments have not diluted the genuine and substantial causal link between the pre-A350XWB LA/MSF subsidies and the present-day versions of the A320 and A330 because, ultimately, they were themselves intrinsically linked to the original, LA/MSF-dependent, A320 and A330 programmes and, therefore, the very existence of Airbus.

6.1534. Finally, it is plain that the ongoing market presence of the A320, A330 and A380 must be attributable to some factor or combination of factors. Producing LCA is a highly complex and expensive undertaking, requiring the investment of significant financial resources and, in order to be competitive and successful, years of accumulated knowledge and experience. The adopted causation findings from the original proceeding established that, under all four counterfactual scenarios, the market presence of the relevant models of Airbus LCA that were sold in the 2001-2006 period could be explained by the effects of the pre-A350XWB LA/MSF subsidies. Nothing the European Union has argued in this proceeding leads us to believe that any other factors can explain the present-day market presence of the A320, A330 and A380 in a way that diminishes the causal relationship found to exist in the original proceeding to one that does not today continue to satisfy the genuine and substantial causation standard. Indeed, we recall in this regard, that the European Union has not even argued that Airbus would have come into existence after the 2001-2006 period in the absence of the effects of the pre-A350XWB LA/MSF subsidies. Neither has the European Union argued that a "much weaker" non-subsidized Airbus, with "at best a more limited offering of LCA models"[2634] during the 2001-2006 period, could have developed the same or comparable range of LCA that it offers today. Rather, the European Union's core argument in response to the United States' allegations concerning the present-day "product" effects of the challenged LA/MSF subsidies is centred on its view that "the passage of time, and events occurring during the time that passed, must, *legally* result in the dissipation of adverse effects".[2635] We have carefully considered the European Union's arguments and the evidence it has introduced to substantiate its position, finding that, in the light of the nature of the effects of the pre-A350XWB LA/MSF subsidies, as described in the original proceeding and further elaborated in our analysis above, it is factually unpersuasive. Accordingly, for all of the above reasons, we find that the direct and indirect effects of the pre-A350XWB LA/MSF subsidies continue to be a genuine and substantial cause of the present-day market presence of the A320, A330 and A380 families. In other words, we find that in the absence of the pre-A350XWB LA/MSF subsidies, Airbus would not be selling those aircraft today.

The "product" effects of LA/MSF on the A350XWB

Introduction

6.1535. The parties have advanced extensive arguments concerning the question of whether LA/MSF enabled Airbus to launch and bring to market the A350XWB as and when it did, submitting a significant volume of evidence including multiple detailed and voluminous expert reports produced specifically for the purpose of this proceeding. The parties' submissions have addressed the effects of LA/MSF on the current market presence of the A350XWB by exploring whether this aircraft could have been launched in December 2006 and brought to market by Airbus in the absence of the individual and/or combined impacts of the *direct effects* of the A350XWB LA/MSF subsidies and the *indirect effects* of the pre-A350XWB LA/MSF subsidies. In our view, however,

[2634] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1984 and 7.1993.
[2635] European Union's second written submission, para. 593. (emphasis added; footnote omitted)

using the "plausible" counterfactual scenarios adopted in the original proceeding as the *starting point* of the effects analysis, a non-subsidized Airbus could not have launched the A350XWB at the end of 2006, simply because a non-subsidized Airbus would not have existed in 2006; and there is, furthermore, no evidence before us to suggest (and indeed the European Union does not argue) that a non-subsidized Airbus would have come into being any time thereafter. Thus, under the "plausible" counterfactual scenarios concerning the effects of the pre-A350XWB LA/MSF subsidies, there is no doubt that the A350XWB could not have been launched and brought to market in the absence of LA/MSF. We therefore agree with the United States when it argues that in the light of the "plausible" counterfactual scenarios adopted in the original proceeding, it would "as a matter of logic, … be impossible for a nonexistent … Airbus to launch the A350XWB in 2006".[2636]

6.1536. Although we consider our views on the merits of the parties' arguments in the context of the "plausible" counterfactual scenarios to provide a sufficient basis to resolve the relevant issues for the purpose of this part of our findings in this compliance dispute[2637], in keeping with the approach adopted in the original proceeding to evaluating the merits of the United States' submissions concerning the alleged "product" effects of LA/MSF, we will evaluate the effects of LA/MSF on the ability of Airbus to launch and bring to market the A350XWB also using the *"unlikely"* counterfactual scenarios to the end of 2006 as the starting point of our analysis. Thus, in the subsections that follow, we examine the extent to which the non-subsidized Airbus competitor that would exist in the "unlikely" counterfactual scenarios would have launched and brought to market an aircraft programme as expensive and technologically complex as the A350XWB. Before doing so, however, we believe it is important to clarify the analytical framework we intend to use to answer this question.

6.1537. The parties' arguments concerning the impacts of the LA/MSF subsidies on the A350XWB programme (and particularly those of the European Union) have overwhelmingly focused on showing the extent to which the *subsidized* Airbus company that *actually existed* in the years between 2006 and 2010 could have launched and brought to market the A350XWB in the absence of the individual and/or combined impacts of the *direct effects* of the A350XWB LA/MSF subsidies and the *indirect effects* of the pre-A350XWB LA/MSF subsidies. In other words, the parties' arguments have sought to explain the impacts of LA/MSF on the A350XWB programme in the light of a counterfactual that is different to the one that forms the basis of the question we have posed. Indeed, neither party has advanced any arguments in relation to the ability of the Airbus entity that would exist in the "unlikely" counterfactual scenarios to launch and bring to market the A350XWB. Nevertheless, by understanding the impacts of LA/MSF on the *subsidized* Airbus company that *actually existed* in the 2006 to 2010 period, inferences can be drawn about the extent to which the non-subsidized Airbus company that would exist in the "unlikely" counterfactual scenarios could have done the same. This is because the non-subsidized Airbus company operating in the "unlikely" counterfactuals would be, by definition, a "much weaker" competitor "with at best a more limited offering of LCA models" than the Airbus company that actually existed.[2638]

6.1538. With this analytical framework in mind, we now turn to evaluate the merits of the parties' arguments. Again, having already concluded that using the two "plausible" counterfactual scenarios as the starting point of our analysis, the A350XWB could not have been launched and brought to market as and when it was in the absence of LA/MSF, we proceed with the following analysis solely for the purpose of understanding whether the *non-subsidized* Airbus company that would have existed in the "*unlikely*" counterfactual scenarios could have launched and brought to market the same or a comparable aircraft. We start by evaluating the merits of the parties' submissions concerning the impacts of the *direct effects* of the A350XWB LA/MSF subsidies on the A350XWB programme.

[2636] United States' first written submission, para. 395.
[2637] See above paras. 6.1475-6.1479.
[2638] We describe certain features of the non-subsidized Airbus company that, in our view, would have existed in the "unlikely" counterfactual scenarios in more detail below at paras. 6.1718-6.1722.

Whether Airbus would have launched and brought to market the A350XWB in the "unlikely" counterfactual scenarios

The impact of the *direct effects* of A350XWB LA/MSF

6.1539. In this subsection we examine the impact of the *direct effects* of the A350XWB LA/MSF subsidies on the ability of the Airbus company that *actually existed* in the 2006 to 2010 period to launch and bring to market the A350XWB, as and when it did, as part of our inquiry into whether a "much weaker" non-subsidized Airbus company (that is, the Airbus company that would exist in the "unlikely" counterfactual scenarios) could have launched the same or a comparable aircraft.

6.1540. In advancing their respective positions on the impact of the *direct effects* of A350XWB LA/MSF, the parties have relied upon a large and complex array of evidence. Such evidence addresses events that occurred over several years in connection with the A350XWB programme, and certain pieces of evidence bear upon multiple topics. Thus, before examining the merits of the parties' submissions, we believe that it is helpful to first of all place all such evidence into a meaningful context. To this end, our analysis proceeds in two parts. First, using relevant record evidence, we set forth the factual background to the launch and bringing to market of the A350XWB in the form of a chronological narrative of the A350XWB programme running from its origins through to the period during which the A350XWB LA/MSF contracts were entered into (the Contracting Period). Second, based on our understanding of the A350XWB programme gleaned from that narrative, we evaluate the merits of the parties' arguments concerning the impact of the *direct effects* of A350XWB LA/MSF on the ability of the Airbus company that *actually existed* during the 2006 to 2010 period to launch and bring to market the A350XWB programme.

a Background

i The pre-launch period

6.1541. In this subsection we examine the events surrounding the A350XWB programme occurring before the A350XWB's launch, i.e. before 1 December 2006. In our view, the evidence from this period mainly pertains to three material topics: (a) the origins of the A350XWB programme; (b) the A350XWB programme's developmental status leading up to launch; and (c) Airbus' and EADS' financial situation leading up to launch.

A350XWB origins

6.1542. As explained elsewhere in this Report[2639], the A350XWB was not born in a vacuum. Rather, it is a redesigned version of the Original A350. We recall that, in the original proceeding, the United States challenged what it characterized as LA/MSF measures directed at the Original A350. The original panel found that the United States could not challenge such measures because they did not exist at the time that the panel was established.[2640] Before making this finding, however, the panel had explained that "Airbus launched … the {Original} A350, in December 2004" with press reports describing it "as a 'long-range, fuel-efficient version of Airbus' A330 airliner and a rival to the {Boeing} 7E7' (i.e. the Boeing 787)".[2641]

6.1543. The evidence reveals, and the parties agree, that by early 2006 the Original A350 had fallen into the market's disfavour. Press reports indicate that by the spring of 2006 major customers and industry analysts had determined that the Original A350 could not effectively compete with the Boeing 787, especially in terms of fuel efficiency. In fact, some critics judged the Original A350 as so plainly inadequate that they called for Airbus to scrap the programme in favour of a redesigned aircraft.[2642] The European Union itself acknowledges that "in response to

[2639] See above paras. 6.53-6.54.
[2640] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.314.
[2641] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.296. (footnotes omitted)
[2642] See e.g. Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006, (Exhibit USA-24); "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006, (Exhibit USA-28); "Airbus to decide by July on A350 design" *Seattle Post - Intel*, 16 May 2006, (Exhibit USA-356); and A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 6.

Boeing's launch of the 787 in 2004, Airbus had initially launched the Original A350. The Original A350 was supposed to have a composite wing, but was otherwise based on the aluminium fuselage of the A330. Customers rejected the design of the Original A350 as not being able to match the weight savings and fuel efficiency promised by the 787."[2643]

6.1544. Whatever twin-aisle LCA Airbus decided to pursue, however, it is apparent that time was of the essence. Sales of the A330 and A340 were suffering significant setbacks at this time due to competition from Boeing. The European Union has explained that Boeing's launch of the 787 in 2004 caused the market share of the A330 to drop at a time when A340 sales were already falling because the aircraft could not effectively compete with the more fuel-efficient 777.[2644] Indeed, the evidence indicates that in 2005 Airbus sold only 15 A340s whereas Boeing sold approximately ten times as many 777s.[2645] Such developments had significant implications for Airbus' overall sales performance as well; as of July 2006, Boeing had reportedly captured 75% of all new aircraft orders thus far that year.[2646] According to the European Union, this situation "clarified that Airbus aircraft within the twin-aisle market had lost their competitive edge to the Boeing 787"[2647] which, by 2006, would have a developmental head start of roughly two years on any Airbus LCA programme that might replace the Original A350.

6.1545. A decision to terminate the Original A350 programme in favour of a redesigned twin-aisle LCA that could effectively compete with Boeing's 787 and 777, however, was too expensive to be taken lightly. The record indicates that the Original A350 was forecast to cost roughly EUR 4 billion, or USD 5.06 billion.[2648] In March 2006, Mr Steven Udvar-Hazy, the chairman and chief executive of the world's second-largest airplane leasing company, warned that a decision to pursue a revised A350 design was "'probably an $8 billion to $10 billion decision'", or roughly twice the cost of the Original A350.[2649] In fact, such a strategy appeared so costly that in March 2006 it was reported that some "{a}nalysts … were doubtful that Airbus can afford to could {*sic*} pull off a complete new aircraft program".[2650] Nonetheless, as the spring and summer of 2006 wore on, signs increased that Airbus was considering abandoning the Original A350 programme. In May 2006, EADS then-co-CEO Noel Forgeard reportedly stated that such a decision "'should be made before the Farnborough Air Show in July {2006}.'"[2651]

6.1546. As foreseen by Mr Forgeard, Airbus publicly unveiled the A350XWB concept at the Farnborough Air Show in July 2006.[2652] Compared to the Original A350, the A350XWB was expected to have a wider and composite fuselage, larger composite wings, higher cruise speed, and more powerful engines, among other things.[2653] Press reports characterized the A350XWB as a

[2643] European Union's first written submission, para. 1113. (footnotes omitted)
[2644] European Union's first written submission, para. 1108.
[2645] "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006, (Exhibit USA-28).
[2646] "Time for a new, improved model: Airbus gets to work on its medium-sized aircraft, but deeper problems remain", *The Economist*, 20 July 2006, (Exhibit USA-28).
[2647] European Union's first written submission, para. 1108.
[2648] Robert Wall, "A350 Faces Busy Time Until Industrial Launch", *Aviation Week & Space Technology*, 20 June 2005, (Original Exhibit US-83), (Exhibit USA-23) (putting the cost at EUR 4.35 billion); Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June, 2006, (Exhibit USA-357) (putting the cost at EUR 4 billion); and Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.296 ("The development cost of the A350 was initially budgeted at approximately EUR 4 billion."). (footnote omitted)
[2649] Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006, (Exhibit USA-24). See also Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June, 2006, (Exhibit USA-357) (reporting that the A350XWB may cost twice as much as the Original A350 to develop).
[2650] Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006, (Exhibit USA-24).
[2651] "Airbus to decide by July on A350 design" *Seattle Post - Intel*, 16 May 2006, (Exhibit USA-356).
[2652] See e.g. Goldman Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future, in our view*, 21 November 2006, pp. 20-22, (Exhibit USA-30), p. 20; and UK House of Commons Hansard, written answers for 24 July 2006, (Original Exhibit US-141), (Exhibit USA-31).
[2653] Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006, (Exhibit USA-26).

"major"[2654] and "dramatic"[2655] redesign of the Original A350 that would principally compete with the Boeing 777 and the 787.[2656]

Pre-launch development progress

6.1547. Perhaps reflecting time pressure to produce a twin-aisle aircraft that could compete more closely with Boeing's then-twin-aisle offerings than could the A330 and A340, Airbus publicly unveiled the A350XWB in July 2006 without having yet achieved sufficient certainty that it had the technical expertise to build the A350XWB as envisioned − particularly as regards the A350XWB's heavy reliance on composite materials − so as to enable a launch decision.[2657] Airbus thus set out to finalize this determination before EADS made any formal launch decision regarding the aircraft.

6.1548. Airbus did so in the context of the DARE programme.[2658] The A350XWB Chief Engineering Statement explains that, before the advent of the A350XWB, Airbus used a design and production process called "Develop New Aircraft" (DNA).[2659] However, Airbus judged this process too slow to use for the A350XWB, which it intended to produce rapidly "in order to react as quickly as reasonably possible to the competitive threat posed by Boeing's 787."[2660] Thus, Airbus employed a new "front-loaded design and production process" for the A350XWB, i.e. DARE, that would ensure that the A350XWB had attained "a given level of maturity of the aircraft design much earlier than Airbus had achieved in previous aircraft developments."[2661]

6.1549. In order to control the accelerated DARE process, DARE defines certain milestones, called "Maturity Gates" (MGs), "at which different aspects of the product development are measured and assessed independently for key decisions".[2662] The Chief Engineering Statement explains that Airbus technically engaged in the earliest portion of the A350XWB's development from 2004 to 2006, during which time Airbus "assessed the feasibility of various design options for {what eventually became} the A350XWB."[2663] However, Airbus formally instituted the DARE programme on a later date that is HSBI.[2664] At that time, apparently building off the work it had done with the Original A350, Airbus began the so-called "MG3" assessment process.[2665] This assessment entailed certain design activities and also other preliminary decisions regarding the A350XWB's manufacturing process.[2666] The MG3 assessment concluded before the launch, on a date that is HSBI[2667], with the "Concept Freeze" of the A350XWB.[2668] Thus, the Chief Engineering Statement indicates that, by 1 December 2006, Airbus had determined to an apparently acceptable degree of certainty that it had the technical capability to produce the A350XWB, thereby readying the aircraft for launch.[2669]

[2654] Goldman Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future, in our view*, 21 November 2006, pp. 20-22, (Exhibit USA-30).

[2655] Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006, (Exhibit USA-26).

[2656] See e.g. Guy Norris, "Airline criticism of Airbus A350 forces airframer to make radical changes to fuselage, wing and engines", *Flight International*, 8 May 2006, (Exhibit USA-26); Scott Hamilton, "A350 Redesign Threatens Boeing 777; Boeing prepares 787 for Challenge", *Leeham.net*, 6 June 2006, (Original Exhibit US-141), (Exhibit USA-27); and Goldman Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future, in our view*, 21 November 2006, pp. 20-22, (Exhibit USA-30).

[2657] See e.g. A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 14-15 and 43.

[2658] For a discussion regarding the DARE programme, see above para. 6.498 et seq.

[2659] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 40.

[2660] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 36.

[2661] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 33.

[2662] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 38.

[2663] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 42.

[2664] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 43 (line 1).

[2665] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 43. See also European Union's first written submission, para. 1118.

[2666] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 24 (identifying key issues Airbus addressed during MG3 assessment), 27 (same), and 43 (same).

[2667] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 43 (line 3).

[2668] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 43.

[2669] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 43. See also European Union's first written submission, para. 1118.

Airbus/EADS financial position pre-launch

6.1550. Even if Airbus determined that it had the desire and technical capability to pursue the A350XWB programme, Airbus still had to be satisfied that it could fund the programme before it undertook a launch decision.[2670] As discussed above, the cost of launching a redesigned A350 that could effectively compete with Boeing was assumed to be significant, with one prominent industry analyst estimating the cost to be USD 8-10 billion, or roughly twice the forecast cost of the Original A350. Apart from the due caution that one would expect any profit-making company active in the LCA industry to normally exhibit when deciding whether to make such a costly investment, Airbus had to also factor into its considerations a number of financial difficulties it was experiencing at the relevant time.

6.1551. First, during the pre-launch period, it was reported that Airbus had been "struggl{ing} to complete the A380 and the military cargo A400M airplane."[2671] The situation surrounding the A380 appeared to be particularly serious. Problems associated with the A380's production have already been discussed earlier in this Report.[2672] For present purposes, we recall that Airbus first announced a six-month delay in the A380 delivery schedule in 2005.[2673] In June 2006 – the month before Airbus unveiled the A350XWB at the Farnborough Air Show – Airbus announced a second delay in the A380 delivery schedule of a further six months, which was reportedly expected to cost Airbus hundreds of millions of euros.[2674] Then, three months after unveiling the A350XWB, in October 2006, Airbus announced a third delay in the A380 programme of an additional year.[2675] The costs of such extensive delays took several forms. First, the production problems resulted in increased A380 development costs.[2676] Second, the problems led certain Airbus customers to cancel their A380 orders entirely and also caused Airbus to pay significant contractual penalties to A380 customers as a result of delivery delays.[2677] Third, because LCA customers generally pay a substantial portion of the sale price upon delivery of the purchased LCA[2678], such programme delays meant that Airbus would realize certain revenues from the A380 programme later than expected for A380s that Airbus did indeed ultimately deliver.[2679] EADS documents indicate that "EBIT at Airbus was also negatively affected by €2.5 billion in 2006"[2680], in part due to the A380 difficulties, and a 2007 UK Government report indicated that "{p}artly as a result of cost overruns

[2670] See Goldman Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future, in our view*, 21 November 2006, pp. 20-22, (Exhibit USA-30), p. 20 (reporting that "EADS has stated clearly that it will only agree to launch the A350{XWB} when it is satisfied that the development can be both funded and staffed.").

[2671] Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006, (Exhibit USA-24).

[2672] For discussions regarding A380 development and production problems, see above para. 6.509 et seq.

[2673] Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June, 2006, (Exhibit USA-357) (reporting that production problems in 2005 led to the A380's "initial six-month delay").

[2674] Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June, 2006, (Exhibit USA-357); and David Gow, "BAE's plan to sell Airbus stake in jeopardy", *The Guardian*, 3 July 2006, (Exhibit USA-415).

[2675] Aaron Karp, "Airbus/EADS officials concede Boeing advantage, question A350 viability", *Air Transport World Daily News*, 6 October 2006, (Exhibit USA-9).

[2676] See generally Mario Heinen, Airbus Senior Vice President A380, "The A380 Program", EADS/Airbus presentation, Global Investor Forum, 19-20 October 2006, (Exhibit EU-419), slide 18 (discussing increased A380 development tasks necessary to counter production problems).

[2677] See Exhibit USA-569: "For example, following the production difficulties that EADS encountered in 2006 in connection with its A380 programme … certain customers decided to cancel their A380 orders. In addition, EBIT at Airbus was also negatively affected by €2.5 billion in 2006, in part due to the contractual penalties to be paid to customers as a result of the delivery delays." (EADS Press Release, "A350 XWB launch: EADS Gives Go Ahead for Airbus to Launch the A350 XWB", 1 December 2006, (Exhibit USA-569)).

[2678] See e.g. Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1719 (explaining that "the bulk of the purchase price {for LCA} is generally paid upon delivery").

[2679] See also HSBI information contained on page 19, section 6.4 of the A380 Business Case, (Exhibit EU-20) (HSBI).

[2680] "Risk Factors", *EADS Financial Statements and Corporate Governance*, Book 2, 2006, pp. 8-13, (Exhibit USA-496), p. 12. An Airbus press release from February 2007 further indicates that Airbus reported a negative EBIT for 2006, and "following the A380 delays, faces significant cash needs and deteriorating profits in the future". (Airbus Press Release, "Power8 prepares way for 'new Airbus'", 20 February 2007, (Exhibit USA-94))

and late delivery payments to its customers, Airbus reported a loss of £389 million for 2006."[2681] In fact, the A380 problems were so severe for Airbus that they reportedly "precipitated a management crisis that saw the demise of two CEOs in less than four months".[2682]

6.1552. Other developments put further strain on Airbus' finances. A weakening US dollar, which had deteriorated by approximately 10% against the euro from November 2005 to November 2006, was impacting Airbus' profitability.[2683] A presentation given during this time by Mr Harald Wilhelm, then-Senior Vice President Airbus Controlling, noted that the weak US dollar along with "substantial" R&D costs, were contributing to Airbus' "crisis".[2684] Moreover, as already noted above, sales of the A330 and A340 were deteriorating under competitive pressure from Boeing. In the face of such circumstances, "Airbus CEO Christian Streiff admitted that {Airbus} now is up to a whole decade behind rival Boeing" "'in terms of development and efficiency'".[2685] EADS and Airbus then-CFO Mr Hans Peter Ring stated that "'the situation is very serious.'"[2686]

6.1553. Also during this time, EADS then-co-CEO Mr Tom Enders stated that "'{t}he crisis at Airbus is also a crisis for {Airbus' parent company} EADS.'"[2687] Indeed, as the European Union asserts and the United States does not contest, in 2006 Airbus accounted for roughly 65% of EADS' revenues[2688], meaning that EADS' and Airbus' financial fortunes were intertwined. The evidence demonstrates the significance of this relationship. Reportedly, the day after Airbus announced the second round of A380 delays in June 2006, Standard & Poor's downgraded EADS' credit rating outlook from stable to negative[2689] and "the EADS share price dropped by more than 30%".[2690] By late September 2006, EADS share prices had fallen 28% during that calendar year.[2691] A further downgrade of EADS' credit rating accompanied Airbus' announcement of a third round of A380 delays in October 2006[2692], with one Standard & Poor's report from this period indicating that the A380 delays were "expected to significantly adversely affect EADS' financial profile during the period 2006-2010".[2693] EADS apparently shared this opinion; at this time then-CFO of EADS and Airbus, Mr Hans Peter Ring, reportedly admitted that "'{c}compared to our old plan … the shortfall in terms of cash generation, in the timeframe until 2010, is slightly more than

[2681] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-2007, Volume I: Report and formal minutes, 19 June 2007, p. 8, (Exhibit USA-25).

[2682] Aude Lagorce, "Airbus refuses to rule out state loans on the A350XWB", *MarketWatch,* 4 December 2006, (Exhibit USA-359).

[2683] See "Historical Exchange Rates: Euro-Dollar, November 2005 to November 2006", OANDA website, accessed 4 October 2013, (Exhibit USA-497). A weak US dollar relative to the Euro affects Airbus' profitability because "although LCA are priced in US dollars, Airbus keeps its financial accounts, incurs much of its costs, and accounts for its profits, in Euros." (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 4.595)

[2684] Harald Wilhelm, Senior Vice President Airbus Controlling, "Power8 Update", Airbus/EADS presentation, 19-20 October 2006, (Exhibit USA-494), slide 5. The presentation further notes that Airbus' "{c}ash needs are huge" because the "A380 delays imply a €6bn cash shortfall" and "{c}ash needs to fund CAPEX and inventory beyond R&D".

[2685] Aaron Karp, "Airbus/EADS officials concede Boeing advantage, question A350 viability", *Air Transport World Daily News*, 6 October 2006, (Exhibit USA-9).

[2686] Aaron Karp, "Airbus/EADS officials concede Boeing advantage, question A350 viability", *Air Transport World Daily News*, 6 October 2006, (Exhibit USA-9).

[2687] Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June 2006, (Exhibit USA-357).

[2688] European Union's second written submission, para. 1116.

[2689] Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS Outlook Revised to Negative Due to A380 Delivery Disruption; 'A' Ratings Affirmed*, 14 June 2006, (Exhibit USA-508).

[2690] EADS Annual Review 2006, p. X, (Exhibit USA-418).

[2691] Andrea Rothman, "Airbus vows computers will speak same language after A380 delay", Bloomberg, 28 September 2006, (Exhibit USA-430).

[2692] "Credit ratings", EADS website, accessed 24 February 2012, (Exhibit USA-32); Moody's Investors Service, Global Credit Research, *Rating Action: Moody's places EADS' Ratings Under Review for Possible Downgrade*, 22 September 2006, (Exhibit USA-509); Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: 'A/A-1' Ratings Placed On Credit Watch Negative On Further A380 Delays*, 3 October 2006, (Exhibit USA-510); Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: S&PCORRECT: EADS Rating Cut To 'A-/A-2', L-T Still On Watch Neg, On Further Restructure Delay*, 12 October 2006, (Exhibit USA-511); and Screenshots from Bloomberg Terminal Regarding Credit Ratings, (Exhibit USA-568).

[2693] Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: 'A/A-1' Ratings Placed On Credit Watch Negative On Further A380 Delays*, 3 October 2006, (Exhibit USA-510), p. 2.

€6 billion ($7.62 billion)'".[2694] Such financial developments caused EADS to question whether it could afford to pursue the expensive new A350XWB programme. During this time Mr Enders reportedly "conceded that it no longer may be feasible to pursue the A350 XWB program" and that the company would "'discuss intensively whether we have the financial and engineering resources to actually take on this program.'"[2695]

6.1554. The evidence indicates that Airbus and EADS pursued three principal avenues to mitigate their financial problems. First, they cut costs. During this time EADS announced that Airbus would implement a "radical restructuring dubbed 'Power8' aimed at slashing overhead costs by 30%."[2696] In an interview in late 2007, Mr Tom Enders indicated that implementation of the Power8 programme was instrumental in allowing Airbus to proceed with the A350XWB project.[2697] The following passage from a Standard & Poor's report authored in the spring of 2007 summarizes the character of this programme as follows:

> EADS' Power8 restructuring program is extremely wide ranging and takes in important areas such as the integration of operations for maximum efficiency, the outsourcing of work, and transfer of risk to new partners. It also includes headcount reductions, which could raise tensions at a local level. Operational risk is accentuated by the fact that significant structural upheaval occurs at the same time as the group pursues multi-billion-euro investment programs … .
>
> The successful implementation of Power8 involves considerable risk given its depth and scale, but is necessary if the group is to successfully adapt to a harsher competitive environment and build a new industrial base to secure its future.[2698]

6.1555. Second, as discussed elsewhere in this Report, Airbus appeared to aggressively enhance its reliance on risk-sharing partners (RSPs) relative to its previous LCA programmes[2699], and

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[2694] Aaron Karp, "Airbus/EADS officials concede Boeing advantage, question A350 viability", *Air Transport World Daily News*, 6 October 2006, (Exhibit USA-9). See also Susanna Ray, "EADS's Enders says Airbus deliveries may rise in 2007", Bloomberg, 19 October 2006, (Original Exhibit US-144), (Exhibit USA-34) (putting cash shortfall figure at EUR 6.3 billion).

[2695] Aaron Karp, "Airbus/EADS officials concede Boeing advantage, question A350 viability", *Air Transport World Daily News*, 6 October 2006, (Exhibit USA-9). Moreover, in an interview conducted in late 2007, Mr Enders stated that in late 2006 EADS had seriously considered the question of whether it had the resources to proceed with the A350XWB programme. ("Thomas Enders: *'Je n'exclus aucun recours en justice pour protéger la réputation d'Airbus*'", *Le Monde*, 13 October 2007, (Exhibit USA-8) (" … mais fin 2006 nous nous posions sérieusement la question de savoir si nous avions les ressources suffisantes pour le faire.")). The United States and European Union disagree about whether the word "ressources" in this context means financial or engineering resources. (See European Union's second written submission, paras. 918-921 (disagreeing with the United States' interpretation of the exhibit)). Although this issue is unclear, we believe that, due to the time-frame to which Mr Enders is referring in the quotation (i.e. late 2006, when Airbus was facing mounting financial problems and securing guarantees of financial support for the A350XWB programme from the member States, as discussed further below) Mr Enders was referring at least in part to financial resources.

[2696] Aaron Karp, "Airbus/EADS officials concede Boeing advantage, question A350 viability", *Air Transport World Daily News*, 6 October 2006, (Exhibit USA-9). Another press reports indicated that "Airbus has a program aimed at reducing expenses by 2 billion euros by {2010}", which was presumably the "Power8" program. (Susanna Ray, "EADS's Enders says Airbus deliveries may rise in 2007", Bloomberg, 19 October 2006, (Original Exhibit US-144), (Exhibit USA-34) (also reporting that Mr Thomas Enders stated that the A380 delays "have carved 'huge holes out of our resources … {and} we have to take cost-cutting measures to compensate for this.'")).

[2697] "Thomas Enders: *'Je n'exclus aucun recours en justice pour protéger la réputation d'Airbus*'", *Le Monde*, 13 October 2007, (Exhibit USA-8).

[2698] Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS L-T CCR Cut to 'BBB+'; Off Watch Neg; Outlook Stable; Teleconf May 11 @ 2:30PM BST*, 10 May 2007, (Exhibit USA-513), pp. 2-3.

[2699] The use of RSPs in the A350XWB programme helped Airbus offload a portion of the programme's costs, at least until the programme began generating substantial revenues, and reduced Airbus' financial risk associated with the programme. (See European Union's response to Panel question No. 140, para. 293 (explaining that RSPs are Airbus suppliers that "assume all or a portion of the development costs for the work package outsourced to them" but only get reimbursed via revenues that are generated by sales of the aircraft on which they are working, and thus RSPs "finance development costs on the same risk-sharing basis as the EU member States providing MSF loans.")). We use the terms "RSP" and "risk-sharing supplier" synonymously.

appeared to employ RSPs to the maximum extent Airbus deemed feasible.[2700] We also note certain highly relevant HSBI statements in the A350XWB Business Case in this context[2701], along with other evidence indicating that RSPs took on approximately EUR 1.8 billion of the A350XWB's development costs.[2702] Further, a Moody's report authored shortly after the A350XWB's launch reported that EADS' "stated objective is to increase outsourced value to 50% of the new A350XWB from the approximately 20%-30% level in existing aircraft programmes."[2703] An Airbus presentation authored later indicates that this 50% outsourced value was to be borne by Airbus' RSPs, stating that Airbus had a "Make 50%/Buy 50%" strategy with its RSPs whereby "Critical Components are kept within Airbus."[2704] We also note certain highly relevant HSBI statements in the A350XWB Chief Engineering Statement in this context.[2705] We further note the presence of other evidence in the record indicating that enhanced use of RSPs would have been problematic from a general administrative standpoint.[2706]

6.1556. Third, Airbus engaged the member States in discussions concerning the potential grant of financial assistance in connection with the A350XWB programme. The origins of such discussions can be traced back to the Original A350 programme. We recall that the original panel explored evidence relating to the status of such discussions at the time of its establishment (i.e. October 2005). In doing so, the original panel examined relevant press articles, statements attributed to Airbus, the European Commission and government Ministers and officials, German Government documents, and EADS' financial statements. This evidence indicated that by October 2005, the member States had agreed to provide financial assistance to Airbus, in the form of LA/MSF, to support the Original A350 programme.[2707] However, the panel found that the precise terms of such LA/MSF measures were still under negotiation at that time. Thus, the original panel concluded that "at some point during 2005 … the relevant EC member State governments each agreed to support the development of the A350, but the precise details and content of this support

[2700] For a discussion regarding this subject, see above para. 6.500 et seq.

[2701] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 37, 44 (last line in text box) and 64 (second bullet, first sub-bullet).

[2702] See Nicola Clark, "Airbus to seek government aid for A350 in second half", *The New York Times*, 16 January 2008, (Exhibit USA-434) (reporting that, in October 2007, EADS then-CFO Mr Hans Peter Ring reportedly stated that RSPs were expected to bear EUR 1.8 billion of the A350XWB's development costs); Robert Wall, "Will It Fly? Eyes are on Airbus as it overhauls industrial setups and supplier relations to regain competitive footing, financial health", *Aviation Week & Space Technology*, 5 March 2007, (Exhibit USA-523) (reporting that "outside partners" were expected to contribute EUR 1.8 billion to the A350XWB project); and also Robert Wall, "Airbus Relaunches A350", *Aviation Week*, 10 December 2006, (Exhibit EU-98) (reporting that Airbus then-CEO and EADS then-co-CEO Louis Gallois explained that suppliers were expected to take on approximately EUR 1.8 billion in development costs). Certain HSBI information indicates that at least Mr Ring's statement was made after Airbus had made certain relevant decisions regarding its RSPs in connection with the A350XWB programme, and therefore further suggests that the EUR 1.8 billion figure is reliable. (See A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 45 and 47 (discussing by when Airbus made certain decisions regarding RSP involvement))

[2703] Moody's Investors Service, Global Credit Research, *Credit Opinion: European Aeronautic Defence & Space Co. EADS*, 12 March 2007, (Exhibit USA-518). See also Robert Wall, "Airbus Relaunches A350", *Aviation Week*, 10 December 2006, (Exhibit EU-98) (reporting that "Airbus will outsource about half of the A350{XWB} to suppliers").

[2704] François Caudron, Vice President, Head of A350 Customer and Business Development, "A350XWB Programme Update", Airbus presentation to Deutsche Bank, 1 July 2010, (Exhibit USA-443). See also Airbus Press Release, "Power8 prepares way for 'new Airbus'", 20 February 2007, (Exhibit USA-94) (explaining Airbus' core/non-core work vision in relation to its use of RSPs in the A350XWB programme).

[2705] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 55 (line 3 text following the full stop through the end of the paragraph).

[2706] A Moody's research report on EADS explained that "{o}ther industries have found that it takes years of effort and patience to develop the trust between supplier and customer necessary to achieve a consistently smooth and economically efficient integration of work flow. Attempting to achieve this change rapidly will, in Moody's opinion, be exceedingly difficult even with the global expertise now available to guide companies through this process." (Moody's Investors Service, Global Credit Research, *Credit Opinion: European Aeronautic Defence & Space Co. EADS*, 12 March 2007, (Exhibit USA-518)). Moreover, EADS itself recognized in a 2010 investor presentation that risk-sharing is "generally difficult to implement". (Marwan Lahoud, Chief Strategy and Marketing Officer, "What is the 'right business model' in Commercial? – the bet is still ongoing" slide 28, EADS presentation, Global Investor Forum, 15-16 November, 2010, (Exhibit USA-363), slide 28)

[2707] The European Communities appeared to concede that there was at least an agreement in principle to negotiate terms of LA/MSF between the member States and Airbus by October 2005. (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.300)

were still to be finalised in October 2005 and remained subject to negotiations."[2708] Airbus and the member States reportedly suspended such negotiations in October 2005 "in a 'good-will gesture' to Washington as talks to resolve the {WTO LCA} subsidy dispute got under way."[2709]

6.1557. The evidence indicates, however, that discussions between Airbus and the member States regarding financial assistance for the A350 programme were once again progressing as it became clear that Airbus would abandon the Original A350 in favour of the more expensive A350XWB. One press article from May 2006 reported that "Airbus is … considering asking European governments to help fund up to 33 per cent of the development costs of the A350", and also reported that "French officials said a final decision on seeking launch aid for the A350 should come before the start of the Farnborough Air show near London in mid-July."[2710] Further, by June 2006, it was reported that "{f}acing mounting problems … Airbus look{ed} set to request state aid for the development of {the A350}".[2711] Moreover, during this time an Airbus spokesman called member State financial assistance for the A350 "'indispensable' for establishing what he called a level playing field with Boeing", and stated that "'{l}aunch aid is the only available system right now'".[2712] Industry analysts appeared to agree with such assessments, with one stating that "'{t}his is no longer a mere product-development launch aid, it is a rescue package: This aid is absolutely essential'".[2713]

6.1558. The member States signalled their willingness to financially aid a redeveloped A350 programme. In June 2006, the member States were reportedly "signalling that such aid would be forthcoming".[2714] Moreover, the evidence indicates that representatives of France, Germany, Spain, and the UK attended the unveiling of the A350XWB at the Farnborough Air Show along with EADS officials where they reportedly "confirmed their commitment to support the European aerospace industry", "reaffirmed their agreement to support Airbus to continue to innovate and to develop programmes in the context of international competition", and stressed that their goal was "to ensure a level playing field" with Boeing.[2715] It was also reported during this period that "{a}fter a meeting between Airbus and the ministers of the European countries involved in the company, German representative Georg Wilhelm Adamowitsch said the possible redevelopment of the A350 was a main point of discussion, but that specifics on how it would be financed have not been finalized."[2716] Further, Spanish Prime Minister José Luis Rodriguez Zapatero stated that "'{w}e are willing, within logical limits, to give sufficient support to EADS to help it through these problems'" and, reportedly, "{a}t the French Transport Ministry, a spokeswoman, Laurence Lasserre, said the self-imposed freeze {on launch aid} could not be expected to last indefinitely".[2717] Meanwhile, the UK Minister for Industry and the Regions Margaret Hodge stated that "my department is in regular contact with {Airbus}. Airbus is assessing its options on how to recover its position. … The Government remain a strong supporter of Airbus."[2718] Ms Hodge

[2708] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.306. Neither party appealed the original panel's findings with respect to LA/MSF for the A350. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 15)

[2709] Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June 2006, (Exhibit USA-357).

[2710] "Airbus to decide by July on A350 design" *Seattle Post - Intel*, 16 May 2006, (Exhibit USA-356).

[2711] Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June 2006, (Exhibit USA-357).

[2712] Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June 2006, (Exhibit USA-357).

[2713] Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June 2006, (Exhibit USA-357).

[2714] Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June 2006, (Exhibit USA-357).

[2715] UK House of Commons Hansard, written answers for 24 July 2006, (Original Exhibit US-141), (Exhibit USA-31).

[2716] "Airbus to decide by July on A350 design" *Seattle Post - Intel*, 16 May 2006, (Exhibit USA-356).

[2717] Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June 2006, (Exhibit USA-357). See also Hans Peter Ring, Chief Financial Officer, "Safe Harbor Statement", "Roadmap", and "Recent Press Quotes", slides 2, 11 and 12 from "A New Base for the Future", EADS presentation, Global Investor Forum, 19-20 October 2006, (Exhibit USA-358), slide 12 (containing "Recent Press Quotes", one of which is an undated quote from French President Jacques Chirac stating that he would take "responsibility" to help Airbus overcome "its current difficulties" and that Airbus "will always find the State at its side").

[2718] UK House of Commons Hansard Debates, Column 1692W, Colloquy of Mr. Gordon Prentice and Minister for Industry and the Regions Margaret Hodge, 23 October 2006, (Exhibit USA-35).

reportedly further stated during this time that "{t}he Government are working hard to safeguard British interests and will remain in close contact with EADS and Airbus as they work through the implications of ensuring that Airbus remains competitive."[2719]

6.1559. Discussions between Airbus and the member States regarding A350XWB financial assistance appeared to come to a head by November 2006 as EADS readied itself for a launch decision. On 30 November 2006 the *Financial Times* reported that:

> The French government, which holds 15 per cent of EADS, was on Thursday night understood to have agreed to provide a state guarantee for part of the {A350XWB} financing plan.
>
> According to people close to the discussions, some €6bn of the A350's development cost will be funded by EADS internally and a further *€4bn through financing backed by state guarantees* from the four countries supporting Airbus: France, the UK, Germany and Spain. This could be a combination of bond issue, reimbursable loans or other measures.
>
> A person close to the talks said the structure of the €4bn component of the funding had yet to be decided and was likely to remain unresolved for some time. EADS and its shareholders are keen to avoid inflaming a trade dispute between the US and European Union over state aid to Airbus.
>
> Boeing, the European aircraft maker's US rival, has threatened strong action if the company relies on so called "launch aid" from the four governments for the A350 project. "The guarantee package will be adapted to the Boeing challenge," said one insider, adding that the company did not need to raise the additional financing until 2010.
>
> EADS is expected initially to fund the A350 from cash reserves, estimated by one insider at €4bn, and €2bn in cost savings due to be achieved by 2010 from a recently announced restructuring programme {i.e. Power8}. However, this will constrain overall group resources. EADS is understood to be *considering a state guaranteed, hybrid bond issue to increase financial flexibility*.[2720] (emphasis added)

6.1560. The United States argues that the evidence discussed above in this section demonstrates that, leading up to the A350XWB's launch, Airbus and EADS had come to understand that their financial position *moving forward* would eventually deteriorate to the point where they would ultimately be unable to fully fund the A350XWB programme in the absence of member State financial assistance. In our minds, the evidence discussed above certainly suggests this conclusion, albeit without demonstrating it to the degree of certainty the United States advocates. However, the European Union disputes this conclusion, and offers evidence allegedly indicating that at least EADS − but not necessarily Airbus − was in a strong financial position leading up to the A350XWB's launch, and furthermore expected to be in a strong enough financial position in the foreseeable future to independently fund the A350XWB programme in the absence of member State financial assistance.

6.1561. One of the main pieces of evidence that the European Union offers on this front is a report authored by Professor Thomas Hoehn of the Imperial College Business School and his colleagues at CompetitionRx (the CompetitionRx Report).[2721] The CompetitionRx Report examines two related issues in this context. First, the CompetitionRx Report, after a review of EADS' 2006 financial data, asserts that EADS was in a strong financial position when the A350XWB was launched.[2722] Second, the CompetitionRx Report asserts that EADS' financial projections in existence at the time of the A350XWB's launch indicated that EADS would have been able to carry

[2719] UK House of Commons Hansard Debates, Column 82W-83W, Colloquy of Mr. Patrick Mercer and Minister for Industry and the Regions Margaret Hodge, 30 October 2006, (Exhibit USA-36).

[2720] Peggy Hollinger, "Deal struck on Airbus A350 funding", *Financial Times*, 30 November 2006, (Exhibit USA-334).

[2721] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI).

[2722] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), pp. 58-65.

debt in excess of the monies received from the A350XWB LA/MSF measures in each of the years from 2007 through 2011, even assuming the occurrence of challenging economic conditions.[2723] The full implication of such analyses is that, at the time of launch, the Airbus and EADS companies that *actually existed* reasonably believed that they would be able to fund the entire A350XWB programme in the absence of member State financial assistance.[2724]

6.1562. The CompetitionRx Report's assertion that EADS was in a strong financial position in late 2006 is based on a snapshot of its financial indicators. Although certainly a relevant observation, it is important not to overstate its value. The issue before us is not limited to the question of whether EADS' financial position in late 2006 was strong or not, but rather whether EADS would have thought to a reasonable degree of certainty that its *projected future* financial position would be sufficiently healthy so as to enable it to fund the expensive and lengthy A350XWB programme in the absence of member State financial assistance. The parts of the CompetitionRx Report addressing this matter focus on EADS' *projected future* cash positions in late 2006 and projected debt-capacity analyses based on these projections. We evaluate the probative value of this aspect of the CompetitionRx Report in more detail further below.

6.1563. We detect certain other record evidence suggesting that Airbus and EADS perceived their financial position in late 2006 to be strong enough to enable EADS to fund the A350XWB programme moving forward without member State assistance. A June 2006 Standard & Poor's report states that EADS' cash generation, cash balances, existing credit facilities, and access to capital markets meant that it could likely "cover operating and financing requirements, including increased R&D spending for the A380 aircraft and, if launched, the A350."[2725] But this statement occurred before Airbus unveiled the A350XWB in July 2006 and before Airbus announced the third round of A380 delays in October 2006. It is also unclear what assumptions the authors had made regarding the likelihood of Airbus receiving member State financial aid in connection with the programme. We note, however, that we detect no similar statement in other Standard & Poor's reports existing in the record after Airbus announced a third round of A380 delays.[2726] In fact, a Standard & Poor's report from mid-October 2006, after Airbus had announced such delays, opined that "the delay of the A380 program could have wider effects, such as delaying introduction of the A350XWB".[2727] Thus, we consider it unlikely that the June Standard & Poor's report anticipated the full extent of EADS' financial problems at the time it was authored.

6.1564. Additionally, an EADS presentation from October 2006 states that EADS' credit rating currently enabled it to have "continuous access to capital markets", while also noting EADS' "strong liquidity position", "limited maturing debt in the coming years", and EADS' intent to

[2723] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), pp. 66-70 and 72. We note that the relevance of the CompetitionRx Report's debt-capacity analysis rests on the assumption that EADS would have made its financial resources available to Airbus for the purpose of funding the A350XWB programme. As discussed further below, we consider this assumption to be valid.

[2724] We note that the CompetitionRx Report relevant financial analyses do not account for the impact of the indirect effects of pre-A350XWB LA/MSF on Airbus' and EADS' financial position. We discuss these effects further below in this Report.

[2725] Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS Outlook Revised to Negative Due to A380 Delivery Disruption; 'A' Ratings Affirmed*, 14 June 2006, (Exhibit USA-508).

[2726] See Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: 'A/A-1' Ratings Placed On Credit Watch Negative On Further A380 Delays*, 3 October 2006, (Exhibit USA-510); Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: S&PCORRECT: EADS Rating Cut To 'A-/A-2', L-T Still On Watch Neg, On Further Restructure Delay*, 12 October 2006, (Exhibit USA-511); Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS Long-Term Ratings Remain On Watch Neg After Profit Warning*, 17 January 2007, (Exhibit USA-512); Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS L-T CCR Cut to 'BBB+'; Off Watch Neg; Outlook Stable; Teleconf May 11 @ 2:30PM BST*, 10 May 2007, (Exhibit USA-513); Standard & Poor's Global Credit Portal Ratings Direct, *European Aeronautic Defence and Space Co. N.V.*, 14 October 2009, (Exhibit USA-514); Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: European Aeronautic Defence and Space Co. N.V. Long-Term Rating Raised to 'A-' On Lower Project Risks; Outlook Stable*, 22 September 2010, (Exhibit USA-516); and Standard & Poor's Global Credit Portal Ratings Direct, *Research update: Aeronautic defence company EADS short-term rating raised to 'A-1' based on our criteria; outlook still positive*, 2 October 2012, (Exhibit EU-186).

[2727] Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: S&PCORRECT: EADS Rating Cut To 'A-/A-2', L-T Still On Watch Neg, On Further Restructure Delay*, 12 October 2006, (Exhibit USA-511), p. 2.

"keep its strong liquidity position and conservative balance sheet".[2728] The same presentation also describes a financial "roadmap" for EADS, which included plans to "{i}ncrease focus on cash generation (Power8)", protect EADS' "conservative balance sheet structure", "{a}void unnecessary capital increase", "{m}aintain strong liquidity position (minimum 3 bn € cash)", and "{r}etain strong credit rating", stating furthermore that: "Hybrid envisageable if funding need materializes".[2729] However, the information and considerations revealed in this presentation do not appear to indicate whether any perceived financial strengths of EADS were sufficient to enable it to fully fund the A350XWB programme unsupported by the member States, or whether EADS could achieve its stated financial goals without the assumption of member State financial assistance. Indeed, and as we discuss in more detail below, the A350XWB business case presentation – presented to the EADS Board of Directors only one month after this presentation was authored – **[***]**. Insofar as **[***]**, we consider it noteworthy that an EADS presentation in October 2006 discussing EADS' financial position, including its access to market financing, would also refer to a financing instrument that was assumed to involve member State intervention.[2730]

6.1565. We also note that, in November 2006, EADS and Airbus then-CFO Mr Hans Peter Ring reportedly stated that "{i}t's not so much the question of whether we are able to finance the {A350XWB} program or not", but rather a question of having sufficient engineering resources.[2731] However, this statement postdates the authorship of the A350XWB Business Case. As described in the following section, the Business Case demonstrates that Airbus and EADS assumed the receipt of significant member State financial assistance in connection with the A350XWB programme. We detect no reasonable scenario under which Mr Ring, as Airbus and EADS CFO, would have been unaware of the assumed receipt of such financial assistance. Therefore, we consider it very likely that Mr Ring, in making this statement, was operating under the assumption that Airbus would receive such assistance. Thus, it is unclear whether Mr Ring would have had the same opinion regarding the programme's fundability in the absence of that assumption.

6.1566. Finally, we note a Goldman Sachs report authored in November 2006 that "estimate{s} that Airbus can fund the {A350XWB} programme".[2732] However, this report does not specify from where such funding was expected to come. Given the significant media coverage predating this report regarding Airbus' expected eventual request for financial assistance, the member States' reported support for the A350XWB programme, and Airbus' consistent history of receiving LA/MSF in connection with its previous LCA programmes, it cannot be excluded that Goldman Sachs most likely assumed the potential provision of some kind of financial assistance to Airbus by the member States in connection with the A350XWB programme. Thus, we consider this statement to be of limited probative value.

Conclusions – the pre-launch period

6.1567. In our view, the evidence arising in the pre-launch period reveals several relevant overall themes. First, during the pre-launch period serious financial difficulties had arisen for Airbus and EADS that adversely affected their financial condition moving forward. Second, although it was forecast to be a very expensive programme, Airbus deemed the A350XWB important enough to pursue because of, *inter alia*, its considerable strategic importance to Airbus. Third, during this time Airbus and EADS pursued multiple strategies to put themselves in a position in which they could be sufficiently confident of their ability to fund the A350XWB programme, one of which was to secure commitments from the member States regarding the future provision of some sort of financial assistance in connection with the A350XWB programme. Fourth, such strategies allowed Airbus and EADS to overcome the financial problems they faced to the point where they were prepared to proceed with an A350XWB launch decision.

[2728] Hans Peter Ring, Chief Financial Officer, "A New Base for the Future", EADS presentation, Global Investor Forum, 19-20 October 2006, (Exhibit EU-180), slide 7.

[2729] Hans Peter Ring, Chief Financial Officer, "A New Base for the Future", EADS presentation, Global Investor Forum, 19-20 October 2006, (Exhibit EU-180), slide 11.

[2730] Given that this presentation and the A350XWB Business Case Presentation were authored within roughly a month of each other, we consider that it is highly likely that this presentation's mention of "**[***]**" was in fact referring to the **[***]** mentioned in the A350XWB Business Case Presentation.

[2731] "Cancelled A380 Orders raises red flags for Airbus", *Aviation Week*, 29 October 2007, (Exhibit EU-178).

[2732] Goldman Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future, in our view*, 21 November 2006, pp. 20-22, (Exhibit USA-30), p. 20.

ii Launch and the A350XWB Business Case

6.1568. The European Union has explained that, in preparation for the launch of the A350XWB, the A350XWB Business Case presentation was presented to the EADS Board of Directors on **[***]**.[2733] Reportedly, EADS had scheduled a shareholder meeting for 24 November at which the EADS Board intended to decide whether to launch the A350XWB, but it was called off because of disagreement among EADS' shareholders over how the A350XWB would be financed.[2734] We note that, according to the European Union, in December 2006, approximately half of EADS' shares were held or controlled by Lagardère, DaimlerChrysler, and the French and Spanish States.[2735] One press report indicates that the dispute was "in part due to France's reluctance to provide the project with repayable finance … . France and Germany are also awaiting guarantees on Airbus' turnaround plan".[2736] On 30 November 2006, however, the *Financial Times* reported that EADS shareholders had resolved their differences and approved a financing package for the A350XWB, clearing the way for launch of the project.[2737] The article specifically reported that the "French government, which holds 15 per cent of EADS, was on Thursday night understood to have agreed to provide a state guarantee for part of the financing plan."[2738] The following day, on Friday, 1 December 2006, EADS officially approved the launch of the A350XWB on the basis of the Business Case.[2739]

6.1569. The A350XWB Business Case presentation includes a NPV analysis of a contemplated A350XWB family of aircraft.[2740] In the base case, the Business Case projected that the non-recurring costs (NRCs) of the A350XWB programme would be EUR **[***]**[2741] (although the Business Case itself gives serious reasons to doubt that this was considered a reliable figure[2742]), calculates an HSBI IRR for the programme[2743] and an HSBI NPV[2744] that is significantly positive for the programme assuming a certain number of aircraft delivered over a certain number of years.[2745] The Business Case also assumes the use of a particular kind of state-supported financial instrument to help fund the A350XWB programme, specifically **[***]** (the Launch Financing Instrument).[2746] The Business Case describes this as "**[***]**" and states that the **[***]** would be **[***]**.[2747] The Business Case assumes that the **[***]** would total EUR **[***]**.[2748] The Business Case indicates that the Launch Financing Instrument would contribute a specific monetary value to

[2733] European Union's response to Panel question No. 47, para. 132. See also A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), cover slide.

[2734] "Airbus formally launches wide-body A350", *Businessweek*, 4 December 2006, (Exhibit USA-136); "Board approval of Airbus A350XWB launch delayed as EADS shareholder funding concerns dominate", *Flightglobal News*, 24 November 2006, (Exhibit USA-137); and Peggy Hollinger, "Deal struck on Airbus A350 funding", *Financial Times*, 30 November 2006, (Exhibit USA-334).

[2735] European Union's second written submission, para. 1073.

[2736] "Board approval of Airbus A350XWB launch delayed as EADS shareholder funding concerns dominate", *Flightglobal News*, 24 November 2006, (Exhibit USA-137).

[2737] Peggy Hollinger, "Deal struck on Airbus A350 funding", *Financial Times*, 30 November 2006, (Exhibit USA-334).

[2738] Peggy Hollinger, "Deal struck on Airbus A350 funding", *Financial Times*, 30 November 2006, (Exhibit USA-334).

[2739] See EADS Press Release, "A350XWB Family receives industrial go-ahead", 1 December 2006, (Exhibit EU-181); and Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.296.

[2740] We note that the United States does not materially question the validity of the Business Case's NPV analysis. (See United States' comments on the European Union's response to Panel question No. 127, para. 45 (indicating that the Panel should rely on the Business Case's NPV analysis))

[2741] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 56. We note that the parties' submissions and documents in evidence reflect a consistent practice of using the programme's NRC as reflecting the programme's "cost". This Report adopts this convention. We note, however, that the European Union has indicated that the A350XWB programme entails certain other costs, such as recurring costs and continuing development and support costs. (See European Union's response to Panel question No. 138, para. 289)

[2742] See A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 55.

[2743] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 68 (second to last line of text).

[2744] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 67 (last column in chart).

[2745] The number of aircraft and the number of years are HSBI. (A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 50 (first bullet))

[2746] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 65 (title and first bullet).

[2747] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 65 (first and second sub-bullets).

[2748] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 65 (third sub-bullet).

the programme's projected NPV.[2749] The Business Case further states that it **[***]**.[2750] The Business Case also conducts a sensitivity analysis and a worst case scenario analysis. All such analyses assume the use of the Launch Financing Instrument.[2751] The Business Case calculates that the programme NPV would be **[***]**.[2752]

6.1570. The assumption of the Launch Financing Instrument permeates all commercial analyses that the Business Case performs. We conclude, therefore, that Airbus did not contemplate or provide for the possibility of launching the A350XWB in the absence of government financial assistance. However, we note that such member State financial assistance to Airbus never materialized in the form of the Launch Financing Instrument[2753], instead materializing later as A350XWB LA/MSF.

6.1571. The Business Case also outlines a number of risks associated with the A350XWB programme. For instance, in this context we note certain highly relevant HSBI statements in the Business Case, *inter alia*, explaining the circumstances under which the Business Case was being presented to the EADS Board of Directors.[2754] The Business Case also identifies other, more specific risks associated with the programme that are HSBI.[2755] In our view, these risks appear significant on their face. We further recall the significant development and marketing risks associated with the A350XWB.[2756]

6.1572. Additionally, the Business Case discusses two scenarios in which Airbus did not proceed with the A350XWB launch in December 2006, i.e. if Airbus failed to launch the A350XWB entirely and if Airbus **[***]**.[2757] The consequences that the Business Case assumes would result from such scenarios (in particular, the former scenario) appear serious, albeit temporary[2758], for Airbus' competitive position at large. Other evidence on the record supports this assessment. As early as March 2006, Mr Steven Udvar-Hazy reportedly warned that, "{i}f Airbus sticks with {the Original A350} … it will wind up with as little as 25 percent market share against the 787."[2759] Also, in November 2006, Goldman Sachs predicted that without the A350XWB, Airbus' overall market share could fall to 35%, thus characterizing it as "essential for Airbus to remain a mainstream competitor to Boeing".[2760] Significantly, the Goldman Sachs report also indicates that a failure to launch the A350XWB would not only harm Airbus' twin-aisle market presence, but could also result in a lower single-aisle market presence "as many airlines may want commonality, and buy larger

[2749] The specific amount is HSBI. (A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 67 (second to last column in chart))

[2750] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 66 (seventh bullet, second sub-bullet).

[2751] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 66 (seventh bullet, first sub-bullet), 69, and 72-74.

[2752] The specific amount is HSBI. (A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 73 (last column in chart)).

[2753] See European Union's response to Panel question No. 47, para. 167; and UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 21.

[2754] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 47 (third bullet) and 47-48.

[2755] See e.g. A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 42 (text under third bullet), 44 (text box), 47 (third bullet), 48 (third bullet, third sub-bullet) and 71 (text under second main bullet).

[2756] For a discussion regarding the range of risks associated with the A350XWB programme, see generally above para. 6.431 et seq.

[2757] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 53 and 90-94.

[2758] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 92 (first bullet).

[2759] Dominic Gates, "Airplane Kingpins tell Airbus: Overhaul A350", *The Seattle Times*, 29 March 2006, (Exhibit USA-24).

[2760] Goldman Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future, in our view*, 21 November 2006, pp. 20-22, (Exhibit USA-30). See also Aude Lagorce, "Airbus refuses to rule out state loans on the A350XWB", *MarketWatch,* 4 December 2006, (Exhibit USA-359) (reporting that the A350XWB was considered essential for Airbus to compete with Boeing in the market for mid-size, long range jets). The European Union asserts that the A350XWB programme was essential to Airbus because the aircraft would compete in an extremely lucrative market. (See e.g. Responses by the European Union to the Second Set of Questions by the Panel, Introduction para. 3). In making this argument, it is not always entirely clear in what product "market" the European Union assumes the aircraft would compete. However, it is undisputed that the global twin-aisle LCA market is a very lucrative one, and we accept that this fact underlies the apparently severe consequences Airbus expected to suffer if it did not proceed with the A350XWB, which are already discussed above.

and smaller aircraft in packages".[2761] In our view, contemplation of such consequences indicates that, although the failure to launch the A350XWB would likely not present an existential threat to Airbus and EADS, the companies considered the A350XWB programme to be essential to Airbus' continued relevance as a healthy competitor to Boeing in all market segments at least through the foreseeable future.

6.1573. We take particular note of certain aspects of these events. First, according to different press reports, disagreements among EADS' shareholders regarding how the A350XWB programme would be funded delayed the A350XWB's launch, and such disagreements were resolved, at least in part, with a French guarantee to provide certain financial support for the programme. Second, the assumption that the A350XWB programme would be funded in part with financing that involved member State **[***]** permeated the A350XWB Business Case. Finally, the Business Case highlighted both risks and strategic benefits associated with the A350XWB programme.

iii The post-launch period

6.1574. In this subsection, we examine certain events surrounding the A350XWB programme occurring after the A350XWB's launch through the Contracting Period. In our view, the evidence from this period mainly pertains to four material topics: (a) the developmental status of the A350XWB programme; (b) Airbus' and EADS' financial position during this time; (c) negotiations between Airbus and the member States concerning financial assistance for the A350XWB programme, generally, and A350XWB LA/MSF, specifically; and (d) certain government documents discussing the importance of member State financial assistance in connection with the A350XWB programme.

Post-launch development progress

6.1575. After launch, Airbus continued to develop the A350XWB under the DARE programme. The European Union argues that the progress that Airbus made in the design and development of the A350XWB before the First Contract Date demonstrates that "Airbus was committed to the A350XWB programme regardless of whether there would be funding from the member States, on subsidised terms or otherwise."[2762] The United States argues that Airbus' development progress on the A350XWB programme before the measures were concluded was limited, and, in any case, the European Union's arguments in this context ignore the fact that "the member States intervened with LA/MSF at a time when the program could not go forward as planned in its absence."[2763]

6.1576. The A350XWB Chief Engineering Statement indicates that Airbus completed significant design and development work on the A350XWB programme by the First Contract Date.[2764] The European Union asserts that such progress cost a significant amount[2765] and enabled Airbus to book more than 400 A350XWB orders by that time.[2766] For the European Union, the implication of such evidence is that Airbus, having made such investments in the programme coupled with the aircraft's strategic importance to Airbus (discussed above), had reached the point of no return in the A350XWB programme by the First Contract Date, and therefore would have continued with the programme as planned at the First Contract Date even if A350XWB LA/MSF had not materialized.

6.1577. The United States does not necessarily disagree that Airbus had demonstrated significant commitment to the A350XWB programme by the First Contract Date. Rather, the United States argues that because the member States had already promised, in principle, to provide financial assistance to Airbus, any commitments that Airbus made to the programme before the First

[2761] Goldman Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future, in our view*, 21 November 2006, pp. 20-22, (Exhibit USA-30), p. 21. See also Andrea Rothman, "Airbus Struggles to Win Orders, End Nosedive Triggered by A380", Bloomberg, 17 June 2007, (Exhibit USA-361) (reporting that one industry analyst stated that the A350XWB "'is absolutely vital to the future of Airbus strategy'").

[2762] European Union's first written submission, para. 1088.

[2763] United States' comments on the European Union's response to Panel question No. 47, para. 148.

[2764] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 44-53.

[2765] European Union's first written submission, para. 1128 (second HSBI reference).

[2766] European Union's first written submission, para. 1088. See also Ascend database, Orders, data request as of 26 June 2012, (Exhibit EU-19) (supporting the European Union's claim). The European Union has explained that Airbus was able to begin offering the A350XWB to customers shortly after launch at a date that is HSBI. (A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 45 (line 1))

Contract Date should not be understood to demonstrate Airbus' confidence regarding its ability to proceed with the programme in the absence of any such financial assistance. This is especially so, the United States argues, because as of the First Contract Date, Airbus still had the vast majority of the programme to fund. The United States supports this point with a statement by Mr Larry Schneider, Vice President of Product Development for Boeing Commercial Aircraft (the Schneider Declaration). The Schneider Declaration discusses the "relationship between expenditures and the stages of new aircraft development"[2767], specifically "the relative expenditures associated with the two key stages of technology maturation associated with a new aircraft launch."[2768] Mr Schneider explains that there are two relevant key stages associated with LCA development: (a) "the higher-risk but relatively low-cost technology maturation required to make the initial selection of a technology for inclusion in a new aircraft program"; and (b) "the lesser-risk and extremely resource-intensive testing and scaling-up of those technologies in order to achieve full-scale commercial production of the new aircraft."[2769] It explains that "the bulk of a manufacturer's development expenditures are spent only after the design concept is frozen and it begins to manufacture … and scale-up operations for commercial production".[2770] The implication is that Airbus, at the First Contract Date, was at or near the boundary between the two general phases of LCA production that the Schneider Declaration describes, and not only had yet to incur the great majority of its absolute expenses in connection with the A350XWB programme, but was also set to significantly increase its spending rate on the programme.

6.1578. The record supports these implications. First, the European Union does not dispute the validity of the Schneider Declaration's explanations regarding the relationships between expenditures and the stages of aircraft production discussed above, which further appear to accord with both reason and logic. Second, the European Union has asserted facts that, in conjunction with the Schneider Declaration's explanations, indicate that Airbus was at or near the transition between the two stages of production described in the Schneider Declaration at the First Contract Date. The European Union has explained that, by the First Contract Date, Airbus had frozen the A350XWB's design and had demonstrated that the A350XWB's relevant technologies were ready to enter the manufacturing phase of production.[2771] Further, it is clear that Airbus had not yet incurred the great majority of the A350XWB programme's forecast costs as of the First Contract Date. The amount that the European Union claims that Airbus had spent on the programme by the First Contract Date − while in and of itself considerable − is significantly less than the total cost of the programme that Airbus forecast as of the First Contract Date, which, as discussed further below, was approximately EUR 12 billion. Other record evidence similarly indicates that EADS expected its funding levels on the programme to increase around the First Contract Date. An EADS press release on 1 December 2006 stated that the "bulk of spending {on the A350XWB programme will occur} in 2010-2013."[2772] Moreover, a press report from December 2006 quotes Airbus then-CEO and EADS then-co-CEO Mr Louis Gallois as stating that "'{t}he peak of our financing needs for the {A350XWB} will be in the {*sic*} 2010'".[2773] These statements accord with certain HSBI evidence regarding Airbus' contemporaneous expectations regarding when its future funding needs would be greatest.[2774]

6.1579. In sum, the record demonstrates that, at the First Contract Date, although Airbus had made significant investments in the A350XWB programme, it still had the great majority of the programme's expenses to fund and was significantly ramping up its spending on the programme. The evidence indicates that Airbus had anticipated this general situation arising around this time from the beginning of the programme.

[2767] Schneider Declaration, (Exhibit USA-354) (BCI), para. 2.
[2768] Schneider Declaration, (Exhibit USA-354) (BCI), para. 39.
[2769] Schneider Declaration, (Exhibit USA-354) (BCI), para. 39.
[2770] Schneider Declaration, (Exhibit USA-354) (BCI), para. 42.
[2771] European Union's second written submission, para. 890 and fns 1297-1298 (citing A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 51 and 52).
[2772] EADS Press Release, "A350 XWB launch: EADS Gives Go Ahead for Airbus to Launch the A350 XWB", 1 December 2006, (Exhibit USA-569).
[2773] Aude Lagorce, "Airbus refuses to rule out state loans on the A350XWB", *MarketWatch,* 4 December 2006, (Exhibit USA-359).
[2774] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 58; and CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 212 and figures 6-8.

Airbus/EADS financial position post-launch

6.1580. The financial problems that EADS had encountered in the pre-launch period continued to affect EADS' financial position in the post-launch period. As a January 2007 S&P report stated, "{i}n the short term, a high level of uncertainty clouds {EADS'} financial performance and future credit profile."[2775] The report further indicated that, pending a review of the company, EADS' long-term credit rating could also suffer a downgrade.[2776] The results of this review were apparently reflected four months later in May 2007 when Standard & Poor's further downgraded EADS' long-term debt rating to a BBB+ rating − where it remained until September 2010, after the end of the Contracting Period[2777] − citing factors such as structural reorganizations of the company, the A380 delays, the aborted Original A350 programme, and a weak US dollar.[2778] In this context we further note certain highly relevant HSBI statements made in the CompetitionRx Report.[2779]

6.1581. The record indicates that such problems persisted during the post-launch period. An *Aviation Week* article from February 2010 reported that "Airbus remains mired in addressing A380 production problems" "that left Airbus close to €6 billion … in lost revenues in the 2007-10 period alone."[2780] The A400M programme also continued to impair EADS' performance. A June 2009 *Financial Times* article reported that EADS had recently undergone a reorganization that came "in response to the debacle over the development of the A400M military transport aircraft, which is already running at least three years late with billions of euros of extra costs and with work almost halted, while EADS and its seven European government customers haggle over the future of the project."[2781] Further, an October 2009 S&P report indicated that EADS' performance in the first half of 2009 suffered due to "less favorable exchange rates".[2782] The European Union has further explained that in 2010 EADS' financial performance suffered, in part, due to a weak US dollar.[2783]

6.1582. The onset of the financial crisis caused further financial issues for EADS. A December 2009 *Financial Times* article reported that EADS then-CEO Mr Louis Gallois "confirmed that the decision to scale back production on the … A380 and some older aircraft models amid one of the most severe recessions in recent memory would take its toll on the group's cash cushion" and that aircraft deferrals "'are creating an impact on the cash situation of Airbus'".[2784] Thus, the article reports that "EADS is facing a potential cash crunch on the … A350", and that "{a}nalysts say that the group's cash pile could melt rapidly … raising questions over the longer term financing of its new aircraft programmes".[2785] Moreover, a December 2009 report prepared by a research and consulting firm for the European Commission's Directorate-General for Enterprise and Industry explained that:

> The financial crisis affects the {European aerospace industry} in two ways. The first is worsened access to credit, which endangers the funding of the operating business (short-term) as well as the participation in large (long-term) aircraft programmes. Scarce funding has a negative impact on the launch of projects and the allocation of

[2775] Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS Long-Term Ratings Remain On Watch Neg After Profit Warning*, 17 January 2007, (Exhibit USA-512), p. 2.

[2776] Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS Long-Term Ratings Remain On Watch Neg After Profit Warning*, 17 January 2007, (Exhibit USA-512), pp. 2-3.

[2777] Screenshots from Bloomberg Terminal Regarding Credit Ratings, (Exhibit USA-568).

[2778] Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS L-T CCR Cut to 'BBB+'; Off Watch Neg; Outlook Stable; Teleconf May 11 @ 2:30PM BST*, 10 May 2007, (Exhibit USA-513), p. 2.

[2779] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 313 (first and second sentences).

[2780] Jens Flottau, "Déjà vu: More problems beset the A350 program, but schedule margins are now razor thin, a situation the manufacturer has faced before", *Aviation Week & Space Technology*, 15 February 2010, (Exhibit USA-515).

[2781] Kevin Done and Peggy Hollinger, "Airbus set to gain aid for A350", *Financial Times*, 15 June 2009, (Exhibit USA-7). See also UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 12 (second bullet).

[2782] Standard & Poor's Global Credit Portal Ratings Direct, *European Aeronautic Defence and Space Co. N.V.*, 14 October 2009, (Exhibit USA-514), p. 2.

[2783] European Union's first written submission, para. 1237.

[2784] Pilita Clark and Peggy Hollinger, "Deferrals to take toll on EAD's cash pile", *Financial Times*, December 2009, (Exhibit USA-153).

[2785] Pilita Clark and Peggy Hollinger, "Deferrals to take toll on EAD's cash pile", *Financial Times*, December 2009, (Exhibit USA-153).

> resources and aggravates the situation induced by problems and delays in recent programmes. This incorporates the *potential to force the industry to reschedule new projects (A350*, New Short Range).[2786] (emphasis added)

6.1583. The United States argues that such evidence indicates that Airbus and EADS continued to understand during this time that their financial positions moving forward would deteriorate to the point where they would ultimately be unable to fully fund the A350XWB programme in the absence of member State financial assistance. The European Union disputes this assertion and offers evidence which allegedly indicates that at least EADS − but not necessarily Airbus − was in a strong financial position at the First Contract Date and, furthermore, that EADS expected to be in a strong enough financial position in the foreseeable future to independently fund the A350XWB programme even in the absence of member State financial assistance.

6.1584. Again, the main piece of evidence the European Union offers on this front is the CompetitionRx Report. We recall that the CompetitionRx Report purportedly demonstrates EADS' financial health at the time of the A350XWB's launch by examining EADS' financial data, and EADS' projected ability to carry additional debt moving forward. The CompetitionRx Report performs the same analyses with respect to EADS' financial health at the First Contract Date, and again reaches the conclusion that EADS was in a strong financial position at this time, with the ability to carry substantial additional debt if the need arose.[2787] We make the same observations regarding these analyses as we did with respect to those that the CompetitionRx Report performed *vis-à-vis* EADS' financial position at the time of launch. That is, although a snapshot of EADS' financial situation at the First Contract Date is certainly relevant, its relevance should not be overstated because EADS also had to fund the programme years into the future, and therefore its projected financial position moving forward from that date is very important. Indeed, as discussed above, EADS still had the vast majority of the A350XWB programme to fund at this time. The CompetitionRx Report addresses this question by revealing EADS' projected future cash positions at the First Contract Date and setting out a projected debt-capacity analysis based on such projections. We evaluate these aspects of the CompetitionRx Report in more detail below.

6.1585. While the evidence discussed above suggests that EADS found itself with considerable financial difficulties during the Contracting Period, other evidence indicates that in the post-launch period EADS continued to pursue with some success the strategies it had begun to implement in the pre-launch period intended to combat its financial difficulties. It appears that in the post-launch period Airbus began to realize cost savings as a result of ongoing implementation of Power8. From its inception in late 2006, EADS had envisioned that Power8 would take several years to implement, with goals of "achieving EBIT contributions of €2.1 billion from 2010 onwards and an additional €5 billion of cumulative cash flow from 2007 to 2010."[2788] In this context, we note a press report from March 2007 indicates that "{t}he core elements of the {Power8} plan should be in place within 12-18 months".[2789] An Airbus presentation from June 2007 that provided an update on the Power8 strategy indicated that it was "on track" for "2007 quick wins > €200 million".[2790] The CompetitionRx Report maintains that Power8 produced approximately EUR 1.3 billion in savings in 2008.[2791] A Standard & Poor's report from September 2010 − which postdates the end of the Contracting Period − also reported that EADS had made progress on the Power 8 programme by that time.[2792] Further, the European Union has explained that, by the First Contract Date, Airbus had signed agreements with the "vast majority" of its A350XWB RSPs[2793],

[2786] "Competitiveness of the EU Aerospace Industry with focus on Aeronautics Industry, within the framework contract of sectoral competitiveness studies ENTR/06/054", Ecorys, December 2009, (Exhibit USA-151), p. 27.

[2787] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), pp. 58-65, 67-68, 70, and 72.

[2788] EADS Press Release, "A350 XWB launch: EADS Gives Go Ahead for Airbus to Launch the A350 XWB", 1 December 2006, (Exhibit USA-569), p. 12.

[2789] Robert Wall, "Will It Fly? Eyes are on Airbus as it overhauls industrial setups and supplier relations to regain competitive footing, financial health", *Aviation Week & Space Technology*, 5 March 2007, (Exhibit USA-523).

[2790] Fabrice Brégier, Chief Operating Officer, Airbus, "Power8 and A350XWB Updates", slides from EADS presentation, Paris, 20 June 2007, (Exhibit USA-143).

[2791] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), annex E (para. 2).

[2792] Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: European Aeronautic Defence and Space Co. N.V. Long-Term Rating Raised to 'A-' On Lower Project Risks; Outlook Stable*, 22 September 2010, (Exhibit USA-516), p. 2.

[2793] European Union's first written submission, para. 1088.

which, we recall, were expected to take on roughly EUR 1.8 billion of the programme's development costs. Such evidence suggests that EADS' confidence regarding its ability to address its financial issues may have been growing during this time-period, and perhaps increasing EADS' confidence regarding its future financial fortunes.

6.1586. There is also evidence suggesting that EADS' financial situation going forward from the First Contract Date would display strength, although such evidence generally arises after the First Contract Date and therefore, at least to some extent, may reflect the fact that Airbus had begun concluding agreements with the member States for A350XWB LA/MSF. An October 2009 Standard & Poor's research report assessed EADS' credit outlook as stable, and listed several notable strengths of EADS, including its "strong financial flexibility".[2794] Another press report from December 2009 reported that an industry analyst stated that EADS' "better-than-expected cash management meant that EADS could potentially defer the need for extra liquidity until markets recovered" and that EADS then-CEO Mr Gallois reportedly stated that the A350XWB LA/MSF Programme was "'fine'". The same press report, however, indicated that "{a}nalysts estimate that EADS will receive government loans €3bn-€3.3bn {in connection with the A350XWB programme}."[2795] Further, a Standard & Poor's report from September 2010 – which somewhat postdates the end of the Contracting Period – notes an upgrade of EADS' credit rating to an "A-" and indicates that by that time EADS "has financially digested most of the negative effects" of the A380 and A400M programs, and further expected EADS to "benefit from more favorable foreign exchange hedge rates in the future."[2796]

6.1587. In our view, the evidence regarding Airbus' and EADS' financial condition in the post-launch period discussed above displays four general themes. First, the companies faced the persistence of significant financial difficulties concerning issues that had initially arisen in the pre-launch period. Second, the companies displayed ongoing efforts to combat such troubles, which succeeded to some degree. Third, the companies' efforts to combat their financial troubles were upset somewhat by the onset of the financial crisis. Fourth, EADS maintained a credit rating during this time that it found only marginally acceptable – until it was upgraded sometime after the First Contract Date.

LA/MSF negotiations

6.1588. Evidence from the post-launch period reveals that EADS and Airbus explored their options regarding how to fund the A350XWB programme, including the possibility of seeking financial assistance from the member States. Part of this body of evidence is in the form of statements of Airbus and EADS officers. On 4 December 2006, the Monday following the A350XWB's launch, Airbus then-CEO and EADS then-co-CEO Mr Gallois made a speech that included the following relevant excerpts:

> The EADS Board has approved the Airbus proposal as a value proposition. The board is satisfied that we will be able to afford the investment through a blend of EADS' internal financial resources, associating partnerships, and, if and when the need arises, from funds raised on the world's capital markets. …
>
> …
>
> There is much talk out there about government funding.
>
> In your heart, and in my heart, we are all aware that the B787 is a highly subsidized aircraft. It is the core of the European case in the WTO conflict. Our competitor has tried to divert attention from this fact by attacking what really is an extraordinarily transparent, and hence vulnerable, European direct funding scheme in front of the

[2794] Standard & Poor's Global Credit Portal Ratings Direct, *European Aeronautic Defence and Space Co. N.V.*, 14 October 2009, (Exhibit USA-514), pp. 2 and 4-5.

[2795] Pilita Clark and Peggy Hollinger, "Deferrals to take toll on EAD's cash pile", *Financial Times*, December 2009, (Exhibit USA-153).

[2796] Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: European Aeronautic Defence and Space Co. N.V. Long-Term Rating Raised to 'A-' On Lower Project Risks; Outlook Stable*, 22 September 2010, (Exhibit USA-516), p. 2.

> WTO. You also know what our position is: there is government funding for our industry on both sides of the Atlantic. The US and the EU should better agree on an acceptable scheme for us all. But the time for that has not yet come.
>
> You are asking now how we want to compete against the subsidized B787. Well, we are *currently discussing with governments how to secure the level playing field in aircraft manufacturing for the future*. I believe that future R+T funding will play a key role. But other options are also on the table. I will not exclude anything and will not be more specific at this point. We have no imminent funding need, we are only asking for a level playing field. Hence, no decision has been taken or is even imminent.[2797] (emphasis added)

6.1589. A concurrent press report from *MarketWatch* also quotes Mr Gallois as stating that the EADS Board had asked Airbus to look at all the funding options for the A350XWB, "'not excluding any of them'", and reported that Airbus "refused to rule out government loans to fund the 10-billion euro A350-XWB".[2798] Mr Gallois also reportedly emphasized that "Airbus is determined to reach a level-playing field with Boeing."[2799] In June 2007 a Bloomberg article reported that Mr Gallois was "counting on some form of European government assistance" in connection with the A350XWB programme even though "the need for cash isn't urgent" because "Airbus has several {financing options}".[2800]

6.1590. Other indications that EADS and Airbus would continue to explore the possibility of receiving member State financial assistance comes from member State government officials. A December 2006 press report indicates that French Economy and Finance Minister Thierry Breton confirmed that "France didn't exclude participating in a capital increase as part of the financing of the wide-body aircraft" and that "'{t}he four governments concerned have announced that they would provide guarantees at similar conditions.'"[2801] Further, a December 2006 *La Tribune* article reported a French official as stating that all four relevant member State governments would provide "guarantees" in connection with the A350XWB project, but that half the financing of the A350XWB would come from savings produced by the Power8 programme.[2802] Also in December 2006, the UK Minister for Industry and the Regions Margaret Hodge responded to a question from a member of the British Parliament in the following manner:

[2797] Speech by Louis Gallois, "Industrial launch of the A350XWB", Paris, 4 December 2006, (Exhibit EU-179). "In considering the above evidence, we recognize that the public statements of Airbus or participant company executives and public officials as to the need for LA/MSF in order to launch a given aircraft may involve a degree of self-interest." (Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1919)

[2798] Aude Lagorce, "Airbus refuses to rule out state loans on the A350XWB", *MarketWatch,* 4 December 2006, (Exhibit USA-359).

[2799] Aude Lagorce, "Airbus refuses to rule out state loans on the A350XWB", *MarketWatch,* 4 December 2006, (Exhibit USA-359).

[2800] Andrea Rothman, "Airbus Struggles to Win Orders, End Nosedive Triggered by A380", Bloomberg, 17 June 2007, (Exhibit USA-361).

[2801] Aude Lagorce, "Airbus refuses to rule out state loans on the A350XWB", *MarketWatch,* 4 December 2006, (Exhibit USA-359).

[2802] "*Nous sommes prêts à prendre nos responsabilités*", *La Tribune*, 4 December 2006, (Exhibit USA-37):

> Le gouvernement français a toujours été en faveur du lancement de l'A350. C'est une bonne décision, qui se fait dans des conditions financières qui peuvent être supportées par l'entreprise. Les quatre gouvernements concernés [Allemagne, Espagne, Grande-Bretagne, France] ont déclaré qu'ils apporteraient les garanties à leur niveau dans des conditions similaires. Mais pour l'instant, elles ne sont pas arrêtées. La moitié du financement de ce plan doit être apporté, comme l'a dit EADS, par les économies réalisées dans le cadre du plan d'économie Power 8. L'autre moitié le sera par des financements dans lesquels les parties prenantes, voire les actionnaires, seront sollicitées.
>
> Vous n'excluez pas une augmentation de capital?
>
> C'est ce qui a été dit. En tout cas, nous jouerons clairement notre rôle au prorata de nos engagements. Nous accompagnerons ce financement.

> We will have to negotiate our way forward with {Airbus}. It faces considerable challenges at present, but I agree with the hon. Gentleman that it has a good long-term future. If we can see it through its immediate problems, and work with it and the other countries that have an interest in ensuring that there is a good European aerospace capacity to compete with the American capacity, that will be of benefit to ourselves and to the company.[2803]

6.1591. Further, the UK Department of Trade and Industry noted in its 1 April 2006 to 31 March 2007 summary:

> In this role over the last year, the Shareholder Executive continued to lead Government involvement in Bombardier Aerospace (an application for launch investment in connection with the proposed C Series aircraft) and Airbus (also an application for launch investment in connection with the A350).[2804]

6.1592. There is also evidence suggesting that Airbus' pursuit of member State financial aid, generally, and in the form of LA/MSF, specifically, was, at least in part, driven by a lack of other options. We first recall that the Business Case stated that the use of the Launch Financing Instrument was intended to **[***]** but, of course, the Launch Financing Instrument never materialized. We also note certain highly relevant HSBI statements in the Chief Engineering Statement in this context.[2805] Moreover, the UK Appraisal (discussed in more detail further below) indicates that Airbus had explored the possibility of using certain alternate strategies that are HSBI to fund the programme[2806], but for unexplained reasons Airbus had apparently abandoned such strategies. In our view, this information suggests that Airbus attempted, but failed, to access certain market financing sources. Additionally, in March 2007, members of the British House of Commons, Mark Russell of the UK Shareholder Executive, and UK Minister for Industry and the Regions Margaret Hodge had the following exchange regarding A350XWB LA/MSF:

> **Q138 Mr Binley**: Minister, do you intend to provide Launch Aid support for the A350 XWB?
>
> ***Margaret Hodge***: We are clearly in discussion with EADS and Airbus on the sort of support that might be required with developing the new model.
>
> **Q139 Mr Binley**: Minister, the question was, do you intend? I recognise you are in the discussions but is it your intention to provide Launch Aid support for the A350?
>
> ***Margaret Hodge***: I am sorry. I do not think I can tell you more, with the greatest respect, than I have said in that statement. We are in negotiation and discussion. We have a good record of supporting Airbus in the development of all its new models. We have put £1.2 billion of Launch Aid in and secured a return so far of £1.3 billion for that £1.2 billion investment, and we are in discussion with Airbus, as are the other countries, around what further support they require.
>
> **Q140 Mr Binley**: Let me put my question a slightly different way. You are in discussions. You are either in discussions because you want to do something or you are in discussions because you want to stop something. Is the emphasis on the former

[2803] UK House of Commons Hansard Debates, Column 104WH, Colloquy of Mr Steve Webb and Minister for Industry and the Regions, Margaret Hodge, 6 December 2006, (Exhibit USA-303/USA-360 (exhibited twice)).

[2804] UK Department of Trade and Industry Annual Report 2006-2007, p. 107, (Exhibit USA-38). It is unclear exactly what this "application" was or when it occurred. However, we note that this exhibit predates the date on which the European Union claims that Airbus formally applied to the United Kingdom for financial assistance. Thus, it is possible that this "application" refers to an Airbus application for LA/MSF for the Original A350.

[2805] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 55 (last sentence of paragraph).

[2806] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 21 (lines 1-2). It is not, however, entirely clear to what extent the document was assuming that the member States would participate in such funding strategies.

or the latter? Are Airbus pressing you to put money in or are you intending to put money in in a more positive manner?

Margaret Hodge: We want to support the continuation of Airbus within the UK, so we are just engaged in negotiations. I am sorry I cannot be more specific to you, but clearly that would be inappropriate at this delicate time.

...

Margaret Hodge: We have in principle expressed pretty positively our support for the development of the A350 wide-bodied aircraft. We have not yet, it may surprise you to hear, had a specific request from EADS around the new model but we are in discussion with them. The only other thing to say to you, as I am sure the Committee is well aware, is that we have to be very conscious of the WTO rules and constraints in the support we choose to give to the development of this new model.

...

Margaret Hodge: *We are discussing a whole range of options in the way in which one could possibly provide support*, and I think probably Mark, who is leading on that, might be the best person to answer it.

Mr Russell: I think it is fair to say that Airbus have been through a great deal over the last few months and the future financing of Airbus has not been top of their agenda. Power8 and management changes have been really what have been using management time. *There is no doubt, if you look out on the financing of Airbus, that there will come a point where they will need to raise additional capital. They have not yet provided us with detailed forecasts so we do not precisely know, but in terms of analysts' reviews of the business it is pretty clear that they will need some sort of support. It is not clear whether they may not just be able to raise that money from shareholders and the capital markets. I think at the moment they are going through precisely that process of trying to understand whether they can finance it themselves. If they conclude that they cannot then I think they will probably have a fuller conversation with the governments.* They have made it very clear that the one form of support they would like is R&T support.

Q144 Chairman: Which we will be asking you about in some detail later, of course.

Mr Russell: Yes, of course. In terms of other sorts of support, such as launch investment or something equivalent to launch investment, given the WTO issues, so far they have been non-specific.[2807] (bold text and bold-italicized text original; italics added)

6.1593. Also in March 2007, members of the British House of Commons and Airbus UK Managing Director Iain Gray had the following exchange regarding A350XWB LA/MSF:

Chairman: We will move on to the Government funding issue, as much as I would like to probe you a bit further on that.

Q39 Rob Marris: You said this morning, Mr Gray, that the prospects of Airbus moving forward were very good. You said it had a rosy future. You said: "The Wing Centre of Excellence will continue to remain here in the UK", that was one of the quotes from you. You talked about EADS making significant investments at Filton and Broughton, and regarding partners you said there is interest. As I understand it, you announced the A350 XWB last December and it is due to go into service some time in 2013. Do I take it from what you said this morning that Airbus, certainly in the UK, does not need any financial support from the Government?

[2807] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume II: Oral and written evidence, 25 July 2007, (Exhibit EU-177).

> ***Mr Gray***: No, what I have said is in terms of looking forward, there are two different aspects. There is the competitiveness which we, as industry, are responsible for, and there is competitiveness in a more macro sense in terms of government, industry and academia working in partnership, and that is hugely important for us all as we move forward. I have not made specific comment on particular mechanisms of how that support may come about. What I would want to place very, very strong emphasis on is investment in new technologies. I believe that from a UK competitiveness point of view moving forward, an absolutely fundamental aspect is related to investment in new technology. That is an area where government, industry, the supply chain and academia do need to work very closely together.
>
> **Q40 Rob Marris**: Clearly you wish for that support, do you need it?
>
> ***Mr Gray***: *We do need it, unambiguously we do need that*.[2808] (bold text and bold-italicized text original; italics added)

6.1594. The content of certain other press reports during this time-period is generally consistent with the position that A350XWB LA/MSF was viewed as important for the A350XWB programme's future. For instance, a September 2009 Bloomberg article reporting that Airbus "needs the funds {from the German A350XWB LA/MSF contract} to help it pay for engineering and tools required to build prototypes of the A350 and begin production."[2809] Further, a March 2010 article from a German publication reported that "Airbus is put under strain because politicians can not only bring forward wishes to the enterprise; but even have a direct influence. The enterprise needs support from the state to finance its major projects."[2810]

6.1595. Airbus' recourse to seeking financial assistance from the member States appeared to come to a head in late 2008. In January 2008, the *New York Times* reported that:

> Airbus expects to begin discussions with European governments in the second half of this year about providing some of the initial financing for its new widebody jet, the A350-XWB, company executives said Wednesday, a move that risks heightening trade tensions with the United States over state aid to their respective aerospace industries.
>
> ...
>
> According to one Airbus executive, once the detailed blueprints for the plane are defined, the company will be in position to present Germany, France and other European governments with concrete requests for financing the A350-XWB, which is expected to cost at least €10.5 billion, or $15.4 billion, to develop.

[2808] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume II: Oral and written evidence, 25 July 2007, (Exhibit EU-177). This statement by Mr Gray is somewhat ambiguous. The United States argues that Mr Gray's statement should be taken as meaning that Airbus, as a whole, needed financial support in connection with the A350XWB programme. (United States' second written submission, para. 608). In contrast, the European Union argues that the statement should be taken as meaning that the UK Airbus subsidiary needed government support if it wished to remain competitive within the Airbus group. (European Union's first written submission, para. 1135). In our view, given the context, Mr Gray was indicating that the UK Airbus subsidiary needed government support if it were to pursue the development of new technologies in the context of the A350XWB programme. It is unclear whether Mr Gray considered that, in the absence of such UK Government support, other Airbus subsidiaries could have pursued such technologies in the absence of member State financial assistance. However, we consider that the Airbus UK subsidiary's inability to pursue A350XWB technologies in the absence of member State aid at least suggests that other Airbus subsidiaries would similarly not be able to do so in the absence of member State financial assistance. Thus, we consider that Mr Gray's statement generally supports the position that Airbus felt that it needed government support to pursue the A350XWB programme as envisioned.

[2809] Andrea Rothman and Brian Parkin, "Airbus A350 Loan Projects at Least 1,500 Deliveries (Update1)", Bloomberg, 17 September 2009, (Exhibit USA-45).

[2810] J. Hartmann and J. Hildebrand, "*Wie Airbus und Boeing um die Luftoheit kampfen*", *Welt* Online, 22 March 2010, (Exhibit USA-67).

> Talks with national governments over so-called launch aid "could already begin in the summer," said the executive, who requested anonymity because of the political sensitivity of the issue and because he was not authorized to discuss the matter.
>
> ...
>
> Company executives say that any government loans would have to be carefully structured so as to be able to stand up against a possible legal challenge from Boeing and the U.S. trade representative.[2811]

6.1596. The *New York Times* article proved accurate, and Airbus and the member States started formalized negotiations regarding A350XWB LA/MSF in late 2008. Executive Vice President, Programmes at Airbus SAS, Mr Tom Williams, who was a member of the Airbus team that negotiated the A350XWB LA/MSF measures with the member States, has explained via a declaration that Airbus formally requested A350XWB LA/MSF on **[***]** at a meeting with the member State representatives.[2812] Mr Williams further explains how the different member States responded to the request[2813] and the general trajectories that ensuing negotiations took with the respective member States.[2814]

6.1597. Mr Williams' statement does not address why Airbus picked the time that it did to request such formal negotiations. We recall, however, that EADS had anticipated from launch that its funding needs for the A350XWB programme would begin reaching their peak levels around the First Contract Date. Additionally, in June 2006 a senior Airbus executive had reportedly "stressed that any decision to ask for the loans would be largely symbolic at first, since it would take at least *a year* before any such aid could be drawn upon."[2815] We further note that Airbus began drawing funds under the A350XWB LA/MSF contracts almost exactly a year following its formal request for A350XWB LA/MSF from the member States.[2816] Such evidence strongly suggests that Airbus timed its request for initiation of formal A350XWB LA/MSF negotiations with the member States to allow for conclusion of the A350XWB LA/MSF contracts before or around the time at which Airbus expected its funding needs for the A350XWB programme to be the greatest.

6.1598. In our view, the evidence discussed in this section confirms that, around the time of launch, the member States had given assurances to Airbus that they would financially support the A350XWB programme if and when Airbus requested it. It further demonstrates that Airbus and the member States were in continual contact regarding the possibility of receiving such financial aid, and although Airbus appears to have considered options other than A350XWB LA/MSF for financing the programme, Airbus eventually requested LA/MSF-type measures from the member States. The evidence also suggests the importance of receiving such financial assistance from the member States. Certain government documents from the European Union and its member States offer further insight into how necessary the governments believed such aid to be. We discuss these documents next.

Government appraisals

6.1599. When assessing to what extent a company needed significant subsidies to launch and bring to market a particular product, we would normally expect to find helpful guidance regarding this issue in the contemporaneous assessments that the grantor(s) of such subsidies would

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[2811] Nicola Clark, "Airbus to seek government aid for A350 in second half", *The New York Times*, 16 January 2008, (Exhibit USA-434).

[2812] Statement by Tom Williams, Executive Vice President, Programmes, Airbus SAS, 17 May 2013, (Exhibit EU-354) (BCI), para. 3 (stating that this meeting occurred in "early December 2008"); and European Union's response to Panel question No. 101, para. 408 (clarifying that the meeting occurred on **[***]**, specifically).

[2813] Statement by Tom Williams, Executive Vice President, Programmes, Airbus SAS, 17 May 2013, (Exhibit EU-354) (BCI), para. 5.

[2814] Statement by Tom Williams, Executive Vice President, Programmes, Airbus SAS, 17 May 2013, (Exhibit EU-354) (BCI), para. 4.

[2815] Katrin Bennhold, "Airbus looks likely to seek state assistance", *International Herald Tribune*, 18 June, 2006, (Exhibit USA-357). (emphasis added)

[2816] See European Union's response to Panel question No. 133, fn 182 and accompanying text; and response to Panel question No. 86, para. 335.

presumably have prepared in determining whether to provide the subsidies to the relevant company. As already noted elsewhere in this Report[2817], the Panel requested that the European Union submit any such assessments that the member States prepared in determining whether to grant A350XWB LA/MSF subsidies to Airbus. As further explained above, however, the European Union informed the Panel that France, Germany and Spain prepared no such assessments. Rather, only the UK prepared a contemporaneous written assessment of the merits of Airbus' request for A350XWB LA/MSF (the UK Appraisal). We discuss this assessment directly below. We then discuss two other types of government documents that, while not taking the form of assessments of whether to provide A350XWB LA/MSF to Airbus, nonetheless contain certain relevant content regarding the A350XWB programme and/or Airbus' potential financing options in the absence of A350XWB LA/MSF subsidies, i.e. the French ONERA Agreement and certain European Commission State Aid Decisions.

The UK Appraisal

6.1600. The UK Appraisal[2818] is dated **[***]**.[2819] Its stated "issue" is "{c}ommencing negotiations with Airbus on Repayable Launch Investment support for the A350 XWB".[2820] It ultimately recommends that "officials should now enter negotiations with Airbus" regarding launch investment.[2821] The document contains discussion regarding the importance of A350XWB LA/MSF for the A350XWB programme, including the likely consequences for the programme if no LA/MSF were forthcoming from the member States.

6.1601. The European Union questions the UK Appraisal's relevance. First, the European Union argues that the document is immaterial to the United States' argument that Airbus could not have funded the A350XWB programme in the absence of LA/MSF because its administrative purpose is to address a "much narrower question − whether the programme would go forward *in the UK* without an MSF loan *from the UK*."[2822] Further, the European Union argues that the Panel should disregard or minimize the weight of the UK Appraisal because "whatever the views of the UK Government, the Panel has before it contemporaneous data enabling it to objectively assess" the United States' arguments, and cites the A350XWB Business Case and CompetitionRx Report in support of this statement.[2823]

6.1602. Before addressing the European Union's specific arguments, we first examine the most material aspects of the UK Appraisal's content. The UK Appraisal states that the UK Government based its analysis of whether to provide A350XWB LA/MSF on "**[***]**".[2824] Although it is not always clear which entities analysed what specific issues discussed in the UK Appraisal, it appears that the document's conclusions regarding the financial positions of EADS and Airbus was based on analysis provided by **[***]**.[2825] The Appraisal notes that the A350XWB project is "a sound project

[2817] For a discussion regarding this subject, see above para. 6.635 et seq.

[2818] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI). We note UK House of Commons Hansard, written answers for 29 June 2009, (Exhibit USA-152), which reveals that in 2009, Mr Ian Lucas, then-Parliamentary Under-Secretary of State for the Department of Business, Innovation and Skills, stated in the UK House of Commons that the UK Government "carried out a detailed assessment of the possible provision of support to Airbus for the A350 XWB aircraft", which included a "detailed analysis of the company's business case, technical viability of the project, the potential market, and anticipated benefits to the UK industry and the wider economy." The European Union has explained that the "detailed analysis" referred to in the above quotation is the UK Appraisal. (European Union's response to Panel question No. 123, para. 60). The European Union has also explained that the referenced "business case" should not be read to refer to the A350XWB Business Case, but rather to a general body of "factors subject to the UK Government's 'assessment' and 'analysis', culminating" in the UK Appraisal. (European Union's response to Panel question No. 123, para. 43) (emphasis original). However, insofar as the term "business case" could be read to refer to a document, the European Union asserts that the document would be Exhibit EU-(Article 13)-35. (European Union's response to Panel question No. 123, para. 45). For a further discussion regarding this subject, see generally above para. 6.635 et seq.

[2819] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), p. 1.

[2820] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), p. 1.

[2821] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), p. 1.

[2822] European Union's response to Panel question No. 47, para. 149. (emphasis original)

[2823] European Union's response to Panel question No. 123, para. 67. (footnote omitted)

[2824] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 4. We note that the European Union has provided an HSBI explanation regarding the nature of **[***]**. (European Union's response to Panel question No. 123, fn 119 (lines 3-4))

[2825] See UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 11.

of great strategic importance to Airbus."[2826] The Appraisal provides an HSBI estimate of the A350XWB programme's cost[2827] that is **[***]** Airbus' estimate at the time (i.e. EUR 12 billion). The UK Appraisal also provides HSBI statements regarding EADS' and Airbus' current[2828] and expected future financial condition.[2829] More specifically, the UK Appraisal contains HSBI comments regarding EADS' financial resources that strongly suggest that it would have been very challenging for EADS to fully and effectively fund the A350XWB programme in the absence of all A350XWB LA/MSF from all four member States.[2830]

6.1603. We recall that the UK Appraisal indicates that Airbus had explored the possibility of using certain alternate strategies that are HSBI to fund the programme, but for unexplained reasons Airbus had apparently abandoned such strategies, and that certain such strategies, in our view, suggest that Airbus attempted, but failed, to access certain market financing sources.[2831] The document explains that "**[***]**".[2832] Finally, the UK Appraisal also notes that another risk associated with EADS' financial condition involved continuing financial difficulties **[***]**.[2833]

6.1604. We now turn to evaluate the European Union's specific criticisms of the document. We first address the European Union's argument that the sole question the UK Appraisal addresses is "whether the programme would go forward *in the UK* without an MSF loan *from the UK*."[2834] The European Union therefore argues that "the document does not, and indeed cannot consistent with its authors' remit, answer the question whether EADS and Airbus would and could launch the A350XWB programme altogether without MSF loans from all four EU member States."[2835] We dismiss this argument for two reasons. First, the UK Appraisal contains HSBI statements that plainly and directly address the very question that the European Union believes that the document leaves unanswered.[2836] Second, the European Union does not appear to fully appreciate the full implications of the questions that the UK Appraisal was intended to answer. We therefore place the UK Appraisal in proper context. The European Union claims[2837], and the United States does not dispute, that the document providing this context is the so-called Green Book, published by the UK Treasury, which describes "the techniques and issues that should be considered when carrying out assessments" of "{a}ll new policies, programmes and projects, whether revenue, capital or regulatory", e.g. the UK Appraisal.[2838] The role of such appraisals is to determine "whether a proposal is worthwhile."[2839] In order to make this determination, the government must first establish "a clearly identified need".[2840] Such need "is usually founded in either market failure or where there are clear government distributional objectives that need to be met."[2841] The

[2826] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 4.
[2827] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 11 (first bullet).
[2828] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 11 (second line, words 4-6).
[2829] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 11 (last two lines of paragraph).
[2830] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), paras. 13 and 16. See also UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), paras. 4 (second bullet) (expressing similar conclusions) and 11 (second bullet) (discussing another source of financial uncertainty for EADS).
[2831] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 21 (lines 1-3). It is not, however, entirely clear to what extent the document was assuming that the member States would participate in such funding strategies. (See also UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 12 (first bullet) (discussing a risk to the programme that appears to further underscore the difficulty of securing market financing for the A350XWB programme)).
[2832] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 20.
[2833] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 12 (second bullet).
[2834] European Union's response to Panel question No. 47, para. 149. (emphasis original)
[2835] European Union's response to Panel question No. 47, para. 149.
[2836] See e.g. UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 16 (lines 2-4).
[2837] European Union's response to Panel question No. 47, para. 149.
[2838] UK Treasury, "The Green Book: appraisal and evaluation in Central Government", 2003 edn, updated in July 2011, (Exhibit EU-352), para. 1.1. (footnote omitted)
[2839] UK Treasury, "The Green Book: appraisal and evaluation in Central Government", 2003 edn, updated in July 2011, (Exhibit EU-352), para. 2.3.
[2840] UK Treasury, "The Green Book: appraisal and evaluation in Central Government", 2003 edn, updated in July 2011, (Exhibit EU-352), para. 2.6.
[2841] UK Treasury, "The Green Book: appraisal and evaluation in Central Government", 2003 edn, updated in July 2011, (Exhibit EU-352), para. 3.2. "Distributional objectives" appear focussed on social equities, rather than on the economic performance of the UK economy. (UK Treasury, "The Green Book: appraisal and evaluation in Central Government", 2003 edn, updated in July 2011, (Exhibit EU-352), paras. 5.33-5.41). Thus, we do not believe that the term "distributional objectives" should be read as referring to the needs or desires of specific segments of UK industry that may benefit financially from work that would be done in the United Kingdom on the A350XWB project. It therefore appears most likely that the document

government must then establish whether the project "is likely to be worth the cost."[2842] In doing so, such appraisals "should take account of all benefits to the UK."[2843]

6.1605. Therefore, placed in its proper context, it appears entirely appropriate that the UK Appraisal would consider the implications for the A350XWB programme of all four relevant member States supplying or failing to supply A350XWB LA/MSF to Airbus. This is so for the simple reason that, as discussed in the UK Appraisal itself, Airbus' *need* for UK A350XWB LA/MSF and the *benefits* to the UK of the UK supplying A350XWB LA/MSF to Airbus depend in large part on the extent to which the other member State governments were also expected to grant similar financial aid to Airbus.[2844] Therefore, we detect no reason to discount any discussions in the UK Appraisal of such topics under the theory that, by including such discussions, the authoring institution exceeded its administrative mandate.[2845]

6.1606. We thus turn to the European Union's second criticism of the UK Appraisal, i.e. that we should discount or dismiss the UK Appraisal's financial analysis of the A350XWB programme because "whatever the views of the UK Government, the Panel has before it contemporaneous data {i.e. data contained in the A350XWB Business Case and the CompetitionRx Report} enabling it to objectively assess" the United States' arguments.[2846] We afford this argument little weight. First, we note that while certain relevant *data* in the CompetitionRx Report may be "contemporaneous", the report itself was prepared by the European Union for the purpose of this litigation, while the UK Appraisal was prepared prior to the provision of LA/MSF as the basis for the UK's decision whether to provide such LA/MSF.[2847] We further note that the UK Appraisal was prepared a mere **[***]** before the First Contract Date. Under these circumstances, we are inclined to accord the UK Appraisal significant weight. Second, and as noted above, the UK Appraisal does not merely state unsubstantiated "views" of the UK Government. Rather, its conclusions are based on analyses performed by **[***]**.[2848] In its second round of written questions to the parties, the Panel asked the European Union to produce these analyses. The European Union failed do so and offered no explanation for this failure. Instead, the European Union indicated that the substance of the analyses was already adequately reflected elsewhere in the record.[2849] In short, the European Union, after failing to produce, without explanation, the data upon which the UK Appraisal relies, appears to suggest that the UK Appraisal fails to support its views with data and/or to criticize the UK Document for relying on data that had become outdated and unreliable by the First Contract Date. The United States asks the Panel "to draw the appropriate inferences with regard to the information requested but not supplied."[2850]

6.1607. In addressing this situation we first recall that Article 13(1) of the DSU provides that "{a} Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate." The Appellate Body has further explained that "{w}here a party refuses to provide information requested by a panel under Article 13.1 of the DSU, that refusal will be one of the relevant facts of record, and indeed an important fact, to be

would generally direct the institution appraising Airbus' request for A350XWB LA/MSF to focus on whether Airbus' need for A350XWB LA/MSF is based on "market failure". We consider that the UK Appraisal's content and conclusions are generally consistent with this reasoning.

[2842] UK Treasury, "The Green Book: appraisal and evaluation in Central Government", 2003 edn, updated in July 2011, (Exhibit EU-352), para. 2.6.

[2843] UK Treasury, "The Green Book: appraisal and evaluation in Central Government", 2003 edn, updated in July 2011, (Exhibit EU-352), para. 5.25. (footnote omitted)

[2844] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), paras. 4 and 16.

[2845] We also note certain HSBI statements in the UK Appraisal suggesting that a concern of the UK Government was the extent to which Airbus may shift A350XWB production activity away from the United Kingdom in the event that the UK Government did not provide A350XWB LA/MSF. (See e.g. UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), paras. 4 (fourth bullet), 14 (third bullet, last sentence) and 16 (line 9 through end of paragraph)). The fact that the UK Government expected that Airbus might go as far as geographically shifting significant A350XWB production activities based on which countries provide LA/MSF suggests that the UK Government understood that Airbus placed considerable importance on the receipt of LA/MSF.

[2846] European Union's response to Panel question No. 123, para. 67. (footnote omitted)

[2847] We emphasize that, at this point, we do not weigh the probative value of the CompetitionRx Report against that of the UK Appraisal in any relevant manner.

[2848] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 4.

[2849] European Union's response to Panel question No. 123, para. 65 (second sentence).

[2850] United States' comments on the European Union's response to Panel question No. 123, para. 20.

taken into account in determining the appropriate inference to be drawn."[2851] In this instance, under its powers granted by Article 13.1 of the DSU, the Panel requested the European Union to produce the analyses underlying the UK Appraisal's views regarding the status of the A350XWB programme, including its financial status. The European Union failed to produce these documents without offering any obstacle to production. Considering this failure, in conjunction with other relevant evidence in the record, we feel it appropriate to draw certain inferences regarding the character of the UK Appraisal analyses the European Union has failed to produce.

6.1608. First, we infer that the analyses upon which the UK Appraisal bases its views regarding the A350XWB programme − which are generally adverse to the European Union's arguments in this context − are rigorous, professional, and, therefore, reliable. This inference is supported by the apparently professional character of the entities that performed such analyses and the fact that the UK Government saw fit to rely upon them to evaluate an extremely important question that would have significant implications for the UK economy. We further lack any evidence calling into question the objectivity or professionalism of these entities. We also infer that the analyses rely on data that allow for an accurate evaluation of the status of the A350XWB programme at the First Contract Date. This inference is supported by the fact that the time difference between the authorship of the UK Appraisal and the First Contract Date is only roughly **[***]**. Under the circumstances, we feel that these two inferences are reasonable and appropriate.

6.1609. In our view, the UK Appraisal's content, especially considered in light of the two inferences drawn immediately above, strongly supports the proposition that it would have been very difficult for Airbus and EADS to effectively fund the A350XWB programme, as envisioned at launch, in the absence of A350XWB LA/MSF.[2852] We further note that this interpretation of the UK Appraisal accords with other relevant record evidence surrounding the grant of UK A350XWB LA/MSF. Most notably, the United States has produced a UK Government report from March 2010 containing, *inter alia*, testimony of Mr Ian Lucas MP, then-Parliamentary Under-Secretary of State, before the UK House of Commons. The report explains that the government "explored with witnesses whether {LA/MSF} was addressing a real market failure, or whether it was merely done to maintain a level playing field with our competitors. Mr Lucas strongly argued that the scheme was there to address the specific problems of long-term investment".[2853] The report notes that the industry representative indicated that the need for LA/MSF was primarily to secure a level playing field with other LCA manufacturers that also received state support.[2854] However, we note that elsewhere the report states that LA/MSF "is designed to address the unwillingness of capital markets to fund projects with high product development costs, high technological and market risks and long pay back periods on investment."[2855] The report notes that the UK Government had provided LA/MSF in connection with the A350XWB programme, and then explains that in order to receive LA/MSF, "{e}ach applicant has to demonstrate … that government investment is *essential for* the *project to proceed on the scale and in the timeframe specified*".[2856] This report, therefore, strongly suggests that the data on which the UK Appraisal relied in making its recommendation to provide A350XWB LA/MSF to Airbus should have demonstrated that A350XWB LA/MSF was "essential" for the A350XWB programme "to proceed on the scale and in the timeframe specified".

[2851] Appellate Body Report, *US − Wheat Gluten*, para. 174.

[2852] We recognize that the UK Appraisal's conclusions regarding the ease with which Airbus could effectively fund the A350XWB programme in the absence of member State financial assistance were apparently formulated on the basis of assumptions regarding aspects of the likely costs and performance of the A350XWB programme that differed materially, but perhaps not drastically, from Airbus' contemporaneous expectations. See UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), paras. 7 (lines 5-6) and 9 (line1).

[2853] UK House of Commons Business, Innovation and Skills Committee, "Full Speed ahead: maintaining UK excellence in motorsport and aerospace", Sixth Report of Session 2009-10, Report, formal minutes, and oral and written evidence, 9 March 2010, (Exhibit USA-44), para. 20.

[2854] UK House of Commons Business, Innovation and Skills Committee, "Full Speed ahead: maintaining UK excellence in motorsport and aerospace", Sixth Report of Session 2009-10, Report, formal minutes, and oral and written evidence, 9 March 2010, (Exhibit USA-44), para. 20.

[2855] UK House of Commons Business, Innovation and Skills Committee, "Full Speed ahead: maintaining UK excellence in motorsport and aerospace", Sixth Report of Session 2009-10, Report, formal minutes, and oral and written evidence, 9 March 2010, (Exhibit USA-44), para. 17. See also "Repayable Launch Investment", UK Department for Business, Innovation and Skills website, accessed February 2012, (Exhibit USA-63) (making similar statement); and "Aerospace and Defence Industries Launch Investment", UK Department of Trade and Industry website, 2006, accessed 21 October 2006, (Original Exhibit US-106), (Exhibit USA-120) (same).

[2856] UK House of Commons Business, Innovation and Skills Committee, "Full Speed ahead: maintaining UK excellence in motorsport and aerospace", Sixth Report of Session 2009-10, Report, formal minutes, and oral and written evidence, 9 March 2010, (Exhibit USA-44), para. 18. (emphasis added)

The ONERA Agreement

6.1610. While we do not have before us any contemporaneous assessments by the French Government that would assist us in understanding the extent to which France considered LA/MSF to be necessary in order for the A350XWB to proceed, the United States argues that France has a standing policy to only grant LA/MSF when commercial funding is unavailable. In support of this argument, the United States offers the ONERA Agreement, a French regulation dated 31 July 2010, setting forth the conditions under which the French Government makes certain investments in aeronautics research. The ONERA Agreement states, in relevant part, that "{l}es avances récupérables permettent un partage entre l'Etat et l'industrie du risque lié au développement de nouveaux aéronefs. Compte tenu de l'intensité capitalistique requise par ces opérations de développement, le recours à ce dispositif est généralement nécessaire pour compléter les concours financiers de marché."[2857] The United States asserts that this language makes clear that the "fundamental rationale of LA/MSF is to provide loans for capital-intensive undertakings that are not commercially available".[2858]

6.1611. The European Union argues that the ONERA Agreement "is making general statements about financing provided by France. In making such statements, it is not surprising that a government would wish to inform taxpayers that … its policy is to use monies … responsibly and productively."[2859] The European Union also argues that the Panel should give the ONERA Agreement's language little weight in this context because its vague statement that LA/MSF is "generally" used to supplement market financing is contrary to other and more specific evidence, such as the CompetitionRx Report.[2860]

6.1612. The extent to which the ONERA Agreement technically regulates the grant and thus subsequent disbursements of French A350XWB LA/MSF to Airbus is unclear to us, given that the ONERA Agreement, as submitted by the United States, postdates the conclusion of the French A350XWB LA/MSF contract. We further recognize that the ONERA Agreement neither forbids providing financial assistance to a company in connection with a project if such aid is not deemed essential for the project to exist, nor does it conclude that the A350XWB programme, specifically, would not go forward in the absence of member State financial assistance. Nevertheless, in the absence of any evidence pointing to the contrary, we consider that the French State's opinion that financial assistance of the character of LA/MSF "est généralement nécessaire pour compléter les concours financiers de marché" is consistent with the view that this was likely the French State's position with respect to A350XWB LA/MSF.

The State Aid Decisions

6.1613. The United States presents portions of certain decisions, dated from 2009 to 2011, of the European Commission regarding whether to approve the provision of financial assistance to certain Airbus' suppliers in connection with their work on projects related to the A350XWB (the State Aid Decisions).[2861] The United States asserts that eight of the State Aid Decisions address applications

[2857] ONERA Agreement, (Exhibit USA-54), art. 1.2. A subsequent amendment in 2011 appears to clarify that the ONERA Agreement also regulates French A350XWB LA/MSF to some degree. (*Avenant no 1 à la convention 'recherche dans le domaine de l'aéronautique' du programme d'investissements d'avenir en date du 29 juillet 2010 publiée au Journal officiel de la République française du 31 juillet 2010,* PRMX1113852X, 20 May 2011, (Exhibit USA-42) (amending the ONERA Agreement in certain respects to make specific reference to investment in the A350XWB programme)). We further note that the ONERA Agreement states that among the main criteria used to determine which projects would receive French State aid is the "existence et intensité des cofinancements privés", and also states that "{l}es principaux critères retenus lors de la sélection des projets devront faire l'objet d'engagements chiffrés précis". (ONERA Agreement, (Exhibit USA-54), art. 2.2).

[2858] United States' second written submission, para. 624.

[2859] European Union's second written submission, para. 1039.

[2860] European Union's second written submission, para. 1040 (citing the CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI)).

[2861] European Commission, Decision C(2001) 6498 final, State aid N493/2010 − Spain − R&D aid to *Industria de Turbopropulsores,* S.A. (ITP) for Trent XWB LPT, 20 September 2011, (Exhibit USA-154); European Commission, Decision C(2011) 995 final, State aid (SA.30282) N204/2010 − Sweden − R&D aid to Volvo Aero, S.A. (ITP) for Trent XWB ICC, 23 February 2011, (Exhibit USA-155); European Commission, Decision C(2010) 2141 final, Aide d'état N527/2009 − France − Daher-Socata *"Trappes de train principal A350 XWB" (projet MLGD)*, 14 April 2011, (Exhibit USA-156); European Commission, Decision C(2010) 6472 final,

for State Aid by Airbus RSPs, and that these RSPs received a total of approximately EUR 458 million of state aid as a result of such applications.[2862] The European Union does not materially contest these assertions.

6.1614. Before discussing the specific content of the State Aid Decisions, we first put them in proper context by identifying the ultimate issues that the decisions seek to resolve. Neither party explicitly identifies what these issues are. However, judging from the Decisions' contents, it appears that they are intended to determine whether the State aid in question is "necessary to achieve an objective of common interest as an exception to the general prohibition of State aid"[2863] in the EC Treaty. Many variables appear relevant to these analyses.[2864] Among these appear to be the risks associated with the projects and whether the applicant would be able to pursue the project without State aid. Indeed, one decision explains that the applicant should demonstrate the unavailability of alternative means of financing the project:

> The aid scheme … provides for strict criteria as regards the presence of a concrete market failure affecting R&D-projects: The existence of a market failure shall be made plausible by adequate documentation in each concrete case. In particular, the unavailability of other (bank-) financing documentation {*sic*} shall be evidenced by documentation. Therefore, the aid is obviously intended to address duly substantiated market failures.[2865]

State aid N 4/2010 and N7/2010 − Spain − Individual R&D aid to Alestis Aerospace S.L., 29 September 2010, (Exhibit USA-157); European Commission, Decision C(2009) 6874 final, State aid N357/2009 − United Kingdom − Individual R&D aid to GKN ASL, 15 September 2009, (Exhibit USA-158); European Commission, Decision C(2011) 264 final, State aid (SA.30169) N3/2010 − Spain − State loan for R&D to AERNNOVA, 26 January 2011, (Exhibit USA-159); European Commission, Decision C(2010) 4937 final, State aid N5/2010 and N6/2010 − Spain − State loan for R&D to ARESA, 20 July 2010, (Exhibit USA-160); European Commission, Decision C(2009) 9960 final, State aid N296/2009 'F2F' and N297/2009 'Airducts', 2 Individual aeronautics R&D-aids to Diehl Aircabin GmbH, Germany, 15 December 2009, (Exhibit USA-161); European Commission, Decision C(2011) 6496 final, Aide d'État N414/2010 − Belgique − *Aide au projet de 'Flap Support Structures' de SABCA ('Projet FSS')*, 5 October 2011, (Exhibit USA-441); and European Commission, Decision C(2010) 2140 final, Aide d'État N525/2009 − France − *Aide au projet de case de train principal de Sogerma (Projet MLGB)*, 14 April 2010, (Exhibit USA-444).

[2862] United States' second written submission, para. 637 (identifying AERNNOVA, ALESTIS, ARESA, Daher-Socata, Diehl Aircabin GmbH, GKN, SABCA, and SOGERMA as RSPs). The United States cites to portions of the State Aid Decisions, as well as the content of other exhibits, to demonstrate that these eight suppliers are RSPs. (United States' second written submission, fns 1075-1082). Upon inspection, it appears that certain such citations refer to material that the United States failed to include in its exhibits. Nevertheless, we find evidence that at least six such entities are indeed A350XWB RSPs. See European Commission, Decision C(2010) 6472 final, State aid N 4/2010 and N7/2010 − Spain − Individual R&D aid to Alestis Aerospace S.L., 29 September 2010, (Exhibit USA-157), paras. 54 and 60 (indicating that ALESTIS is a RSP); François Caudron, Vice President, Head of A350 Customer and Business Development, "A350XWB Programme Update", Airbus presentation to Deutsche Bank, 1 July 2010, (Exhibit USA-443) (indicating that GKN is a RSP); European Commission, Decision C(2011) 264 final, State aid (SA.30169) N3/2010 − Spain − State loan for R&D to AERNNOVA, 26 January 2011, (Exhibit USA-159), paras. 55 and 60 (indicating that AERNNOVA is a RSP); European Commission, Decision C(2010) 4937 final, State aid N5/2010 and N6/2010 − Spain − State loan for R&D to ARESA, 20 July 2010, (Exhibit USA-160) (indicating that ARESA is a RSP); François Caudron, Vice President, Head of A350 Customer and Business Development, "A350XWB Programme Update", Airbus presentation to Deutsche Bank, 1 July 2010, (Exhibit USA-443) (indicating that Diehl Aircabin is a RSP); and European Commission, Decision C(2010) 2140 final, Aide d'État N525/2009 − France − *Aide au projet de case de train principal de Sogerma (Projet MLGB)*, 14 April 2010, (Exhibit USA-444), paras. 34-36 (discussing repayment structure of aid that suggests that SOGERMA is a RSP). We further note that the European Union does not contest that any of the eight entities identified by the United States are RSPs.

[2863] European Commission, Decision C(2009) 6874 final, State aid N357/2009 − United Kingdom − Individual R&D aid to GKN ASL, 15 September 2009, (Exhibit USA-158), para. 107.

[2864] See European Commission, Decision C(2011) 264 final, State aid (SA.30169) N3/2010 − Spain − State loan for R&D to AERNNOVA, 26 January 2011, (Exhibit USA-159), para. 88; European Commission, Decision C(2010) 4937 final, State aid N5/2010 and N6/2010 − Spain − State loan for R&D to ARESA, 20 July 2010, (Exhibit USA-160), para. 94; and European Commission, Decision C(2009) 9960 final, State aid N296/2009 'F2F' and N297/2009 'Airducts', 2 Individual aeronautics R&D-aids to Diehl Aircabin GmbH, Germany, 15 December 2009, (Exhibit USA-161), paras. 104-113.

[2865] European Commission, Decision C(2009) 9960 final, State aid N296/2009 'F2F' and N297/2009 'Airducts', 2 Individual aeronautics R&D-aids to Diehl Aircabin GmbH, Germany, 15 December 2009, (Exhibit USA-161), para. 104. (footnote omitted)

6.1615. With this framework in mind, we now turn to the decisions' specific relevance to this case. The United States contends that the State Aid Decisions illustrate: (a) "{t}he high risks involved in the LCA industry generally and for the A350 XWB program in particular"; (b) "{t}he inability to obtain commercial financing for the A350 XWB program, a problem exacerbated by the global financial crisis"; and (c) that "{a}id for the A350 XWB program has had the effect of transferring risk from the recipient to the supporting government, thereby increasing the project's returns and net present value, and allowing the project to proceed where it would not in the absence of such aid."[2866]

6.1616. The European Union argues that the State Aid Decisions are immaterial because they "do not concern *Airbus'* access to funds, but … instead focus{} on *various other entities*".[2867] Thus, "{t}he impact of 'LA/MSF or interest-free loans' on the business case for a given company that may participate as a *supplier* for the A350XWB says nothing about the viability of the *Airbus business case* for the A350XWB in 2006 or in 2009".[2868] Further, the European Union argues that even if certain suppliers could not have undertaken their projects with respect to the A350XWB without state aid, that "is not a relevant consideration in this context, because the United States does not challenge these measures, or the effects of any such supplier funding, in these proceedings."[2869] Finally, the European Union argues that the State Aid Decisions "consider whether or not, absent the state aid, the specific notified project would not occur *in the notifying EU member State or the EU*. They do *not* address the more general question of whether, absent the state aid, the project would occur elsewhere."[2870]

6.1617. The European Union is correct that the State Aid Decisions do not specifically address the ultimate question that we must resolve, i.e. whether Airbus would have proceeded with the A350XWB programme in the absence of A350XWB LA/MSF. Rather, the decisions more specifically address the value of State aid to certain Airbus suppliers tasked with performing discrete projects associated with the A350XWB programme. Moreover, because the United States does not claim that any State aid instrument granted to any Airbus supplier constitutes a specific subsidy, we will not consider such instruments' impact on the A350XWB programme as part of any relevant causation analysis.[2871]

[2866] United States' first written submission, para. 390. (emphasis omitted)

[2867] European Union's first written submission, para. 1135. (emphasis original)

[2868] European Union's first written submission, para. 1153 (emphasis original). We note that the United States claims that the eight RSPs that the State Aid Decisions address received either "below-market loans" or "LA/MSF". (United States' second written submission, para. 637). The State Aid Decisions in question generally either refer to the potential grant of State aid in the form of "interest free loans" or "repayable advances", the latter of which appear to have characteristics similar to those of LA/MSF. (See European Commission, Decision C(2001) 6498 final, State aid N493/2010 − Spain − R&D aid to *Industria de Turbopropulsores,* S.A. (ITP) for Trent XWB LPT, 20 September 2011, (Exhibit USA-154), paras. 84 and 88; European Commission, Decision C(2010) 2141 final, Aide d'état N527/2009 − France − Daher-Socata *"Trappes de train principal A350 XWB" (projet MLGD)*, 14 April 2011, (Exhibit USA-156), para. 1; European Commission, Decision C(2010) 6472 final, State aid N 4/2010 and N7/2010 − Spain − Individual R&D aid to Alestis Aerospace S.L., 29 September 2010, (Exhibit USA-157), para. 1; European Commission, Decision C(2009) 6874 final, State aid N357/2009 − United Kingdom − Individual R&D aid to GKN ASL, 15 September 2009, (Exhibit USA-158), paras. 111 and 124-125; European Commission, Decision C(2011) 264 final, State aid (SA.30169) N3/2010 − Spain − State loan for R&D to AERNNOVA, 26 January 2011, (Exhibit USA-159), para. 1; European Commission, Decision C(2010) 4937 final, State aid N5/2010 and N6/2010 − Spain − State loan for R&D to ARESA, 20 July 2010, (Exhibit USA-160), para. 1; European Commission, Decision C(2009) 9960 final, State aid N296/2009 'F2F' and N297/2009 'Airducts', 2 Individual aeronautics R&D-aids to Diehl Aircabin GmbH, Germany, 15 December 2009, (Exhibit USA-161), paras. 34-38; European Commission, Decision C(2011) 6496 final, Aide d'État N414/2010 − Belgique − *Aide au projet de 'Flap Support Structures' de SABCA ('Projet FSS')*, 5 October 2011, (Exhibit USA-441), para. 1; and European Commission, Decision C(2010) 2140 final, Aide d'État N525/2009 − France − *Aide au projet de case de train principal de Sogerma (Projet MLGB)*, 14 April 2010, (Exhibit USA-444), para. 1).

[2869] European Union's second written submission, para. 1080.

[2870] European Union's second written submission, para. 1054. (emphasis original)

[2871] In this context we recall the European Union's point that even if certain Airbus suppliers could not have participated in the A350XWB programme without State aid it does not mean that there may have been other available suppliers that could have done so in the absence of State aid. The relevance of this point is somewhat unclear to us. As referenced above, because the United States does not challenge the state aid instruments, we will not consider such instruments' impact on the A350XWB programme as part of any relevant causation analysis. The European Union's point may, however, be that insofar as the State Aid Decisions discuss systemic challenges facing aerospace companies in obtaining market financing in connection

6.1618. Nevertheless, in our view, the State Aid Decisions are still material in three related ways. First, the State Aid Decisions contain a significant amount of discussion concerning the risks associated with the projects under consideration. In many cases, such risks appear to be intrinsic to the projects themselves rather than to the lack of capability or competence of the applicant suppliers that wish to perform them. Such discussion is relevant because the risks associated with the A350XWB programme constituent parts are inevitably, to some degree, risks for the programme as a whole. In other words, if the A350XWB components that such suppliers build are delayed or deficient, the A350XWB itself will necessarily be delayed or deficient, likely causing problems for not just the supplier but also Airbus.[2872] Second, and relatedly, the State Aid Decisions are relevant insofar as they discuss the perceived risks associated with the A350XWB programme in general, which many do. Finally, the State Aid Decisions are relevant insofar as they discuss the difficulties the applicant companies had in obtaining market financing in connection with their A350XWB projects, especially when such difficulties are caused by issues systemic to the aerospace industry, of which Airbus and EADS are a part. Such discussions, to some extent, would appear to also bear on the challenges Airbus and EADS would be likely to confront in securing market financing in the absence of A350XWB LA/MSF.[2873]

6.1619. We explore the content of the State Aid Decisions with respect to these three relevant topics below. We do so by providing exemplary excerpts from the State Aid Decisions concerning such topics. Thus, such excerpts are not intended to, and do not, exhaust all relevant discussion of such topics in the State Aid Decisions.

Supplier project risks

6.1620. The State Aid Decisions refer to the risky nature of the projects under consideration:

- "There are significant internal and technological risks associated with the project. … ITP is required to accept the technical specification of a not yet developed {low pressure turbine} module … which presents major technological risks". The decision also emphasizes that "{l}aunching a new engine programme entails many uncertainties."[2874]

- "The development of the next generation technologies for large composite aero-structures requires designing a new manufacturing process, new tooling, new moulds and new machines. According to Spain, a significant technological risk is due to the exacting

with their projects, such challenges are for some reason not faced by a certain segment of aerospace companies that Airbus could have used as A350XWB suppliers. Or, in other words, such systemic challenges are not truly systemic, but company-specific. We find nothing in the State Aid Decisions or other record evidence supporting this position, however.

[2872] We do not have any of Airbus' contracts with its suppliers before us. Airbus may have had provisions in such contracts that enabled it to pass on, for example, certain penalties for late deliveries caused by deficient supplier work to suppliers under certain circumstances. But even assuming the existence of such contractual provisions, we perceive no reasonable commercial scenario in which Airbus could have remained financially unaffected in the face of substantial A350XWB delays or malfunctions even if such problems were caused by suppliers. We further detect no evidence in the record that indicates that Airbus considered this to be the case.

[2873] We recall the United States' argument that the State Aid Decisions illustrate that A350XWB LA/MSF transfers risk from Airbus onto the member States, thereby affecting the A350XWB programme's NPV. We have before us none of the documents containing the terms and conditions under which State aid was granted as a result of the State Aid Decisions. Therefore, although it does appear from the State Aid Decisions that the funding mechanisms under consideration would transfer risk from the applicant onto the member State granting the aid, and certain of their aspects may resemble those in the A350XWB LA/MSF contracts, we consider this an uncertain foundation upon which to draw parallels between the functioning of these State aid mechanisms and A350XWB LA/MSF. Further, the United States' general point regarding how A350XWB LA/MSF affects the programme's expected returns is treated further below in the sections of this Report addressing the viability of the A350XWB. We therefore decline to address the United States' assertions regarding risk-transferring qualities of LA/MSF at this stage.

[2874] European Commission, Decision C(2001) 6498 final, State aid N493/2010 − Spain − R&D aid to *Industria de Turbopropulsores,* S.A. (ITP) for Trent XWB LPT, 20 September 2011, (Exhibit USA-154), paras. 51 and 56. See also European Commission, Decision C(2011) 995 final, State aid (SA.30282) N204/2010 − Sweden − R&D aid to Volvo Aero, S.A. (ITP) for Trent XWB ICC, 23 February 2011, (Exhibit USA-155), para. 52 (noting that "there is a considerable degree of uncertainty concerning the Trent XWB engine due to technical and commercial risks related to the engine.").

requirements for the application of new materials and new manufacturing concepts. The main technical risk lies in the maturity of the technologies."[2875]

- "A repayable advance was considered to be the most appropriate {state aid} instrument taking into account … the high level of commercial and technical risks involved" with the GKN A350XWB project.[2876]

- "The {AERNNOVA} project is capital-intensive with high technical and commercial risks".[2877]

Risks for A350XWB programme

6.1621. The State Aid Decisions also note that the A350XWB programme as a whole was subject to systemic risk:

- "{L}es projets R&D liés au développement des appareils A350 XWB sont exposés à un risque systémique associé à ce programme."[2878]

- "{I}l y a de nombreux risques liés au secteur aéronautique en général. Ces risques comprennent des exigences extensives à la R&D, des importants investissements au début des activités … et des risques à caractère général, comme des coûts élevés ou des retards, qui accompagnent l'introduction de nouvelles technologies et matériaux et leur certification."[2879]

- "{D}esign failures which can not be attributed to any particular partner, should be borne by all the partners in the programme".[2880]

- "As noted in previous Commission decisions, there is a considerable degree of uncertainty regarding the commercial success of the A350 XWB. Despite a good launch base, the final completion date is unpredictable, given repeated delays in previous programmes. Besides, there is a possibility that Boeing will update its 777 aircraft to become a closer competitor to the A350 XWB. Finally, the economic downturn may affect aircraft deliveries … and lower profit margins."[2881]

- "In addition to technical risks, the projects face market and commercial risks, stemming from the programme itself (difficulties likely to have an impact on the A350 XWB

[2875] European Commission, Decision C(2010) 6472 final, State aid N 4/2010 and N7/2010 − Spain − Individual R&D aid to Alestis Aerospace S.L., 29 September 2010, (Exhibit USA-157), para. 56. The A350XWB projects under consideration in this decision pertained to the tailcone section and the belly fairing. (European Commission, Decision C(2010) 6472 final, State aid N 4/2010 and N7/2010 − Spain − Individual R&D aid to Alestis Aerospace S.L., 29 September 2010, (Exhibit USA-157), para. 1)

[2876] European Commission, Decision C(2009) 6874 final, State aid N357/2009 − United Kingdom − Individual R&D aid to GKN ASL, 15 September 2009, (Exhibit USA-158), para. 111. The United States claims that the GKN A350XWB project under examination pertained to the rear spars and fixed trailing edges. (United States' second written submission, para. 637)

[2877] European Commission, Decision C(2011) 264 final, State aid (SA.30169) N3/2010 − Spain − State loan for R&D to AERNNOVA, 26 January 2011, (Exhibit USA-159), para. 56. The AERNNOVA A350XWB project under consideration pertained to the horizontal tail plane fixed parts and elevator and the main landing gear bay pressure bulkhead. (European Commission, Decision C(2011) 264 final, State aid (SA.30169) N3/2010 − Spain − State loan for R&D to AERNNOVA, 26 January 2011, (Exhibit USA-159), para. 1)

[2878] European Commission, Decision C(2011) 6496 final, Aide d'État N414/2010 − Belgique − *Aide au projet de 'Flap Support Structures' de SABCA ('Projet FSS')*, 5 October 2011, (Exhibit USA-441), para. 52.

[2879] European Commission, Decision C(2011) 6496 final, Aide d'État N414/2010 − Belgique − *Aide au projet de 'Flap Support Structures' de SABCA ('Projet FSS')*, 5 October 2011, (Exhibit USA-441), para. 53.

[2880] European Commission, Decision C(2001) 6498 final, State aid N493/2010 − Spain − R&D aid to *Industria de Turbopropulsores,* S.A. (ITP) for Trent XWB LPT, 20 September 2011, (Exhibit USA-154), para. 57(a).

[2881] European Commission, Decision C(2011) 995 final, State aid (SA.30282) N204/2010 − Sweden − R&D aid to Volvo Aero, S.A. (ITP) for Trent XWB ICC, 23 February 2011, (Exhibit USA-155), para. 51 (footnote omitted). We note that this decision, discussing commercial risks associated with the A350XWB programme, was authored in 2011.

programme due to technological, industrial or commercial choices made by Airbus and all its partners and subcontractors)".[2882]

- "{T}he inherent risks linked to the aircraft sector are numerous".[2883]

- "{L}es programmes aéronautiques comme l'A 350 XWB mené par Airbus et dont Daher-Socata est partenaire, apparaissent comme particulièrement risqués".[2884]

Finance Challenges in Aerospace Sector

6.1622. The State Aid Decisions consistently reference the challenges that LCA and aerospace companies face in finding financing for their projects given their risks and long timelines, a trend that the financial crisis apparently accentuated:

- "The general difficulty of companies in the aeronautic sector to obtain external financing from the markets has been recognised is several previous State aid decisions".[2885]

- "Given the technological complexity of the R&D activities to be carried out within the projects, financial institutions do not dispose of a sufficient visibility in order to properly estimate the risks or the profitability perspectives of the projects. The projects, therefore, suffer from financial constraints which can be explained by this asymmetric information."[2886]

- "The Commission has come to the conclusion that the market could not have financed the project alone without State aid, given the responses of the financial market to these types of risky projects, with a significant long-term return perspective and high initial investment."[2887]

- "{T}he evidence in this case seems to confirm the general conclusion reached by the Commission in previous decisions: the aeronautic sector faces specific issues (e.g. exceptionally long duration and high costs of the R&D projects), which makes it difficult, if not impossible, to obtain bank funding for projects like the one in question."[2888]

- "{T}here seems to be a general lack of financing in the aeronautic industry that prevents the concerned enterprises to realize all the necessary adaptations to become risk-sharing Tier-1 suppliers. The current economic and financial crisis largely worsened the phenomenon."[2889]

- "In the present case, potential financial partners would be reticent to provide sufficient finance to fund the project due to its capital-intensive nature, the technical and commercial risks, the long pay-back period and the moderate and uncertain profitability."[2890]

[2882] European Commission, Decision C(2010) 6472 final, State aid N 4/2010 and N7/2010 − Spain − Individual R&D aid to Alestis Aerospace S.L., 29 September 2010, (Exhibit USA-157), para. 58.
[2883] European Commission, Decision C(2011) 264 final, State aid (SA.30169) N3/2010 − Spain − State loan for R&D to AERNNOVA, 26 January 2011, (Exhibit USA-159), para. 54.
[2884] European Commission, Decision C(2010) 2141 final, Aide d'état N527/2009 − France − Daher-Socata *"Trappes de train principal A350 XWB" (projet MLGD)*, 14 April 2011, (Exhibit USA-156), para. 66.
[2885] European Commission, Decision C(2001) 6498 final, State aid N493/2010 − Spain − R&D aid to *Industria de Turbopropulsores,* S.A. (ITP) for Trent XWB LPT, 20 September 2011, (Exhibit USA-154), para. 60.
[2886] European Commission, Decision C(2010) 6472 final, State aid N 4/2010 and N7/2010 − Spain − Individual R&D aid to Alestis Aerospace S.L., 29 September 2010, (Exhibit USA-157), para. 59.
[2887] European Commission, Decision C(2009) 6874 final, State aid N357/2009 − United Kingdom − Individual R&D aid to GKN ASL, 15 September 2009, (Exhibit USA-158), para. 106.
[2888] European Commission, Decision C(2011) 264 final, State aid (SA.30169) N3/2010 − Spain − State loan for R&D to AERNNOVA, 26 January 2011, (Exhibit USA-159), para. 65. (footnote omitted)
[2889] European Commission, Decision C(2011) 264 final, State aid (SA.30169) N3/2010 − Spain − State loan for R&D to AERNNOVA, 26 January 2011, (Exhibit USA-159), para. 55.
[2890] European Commission, Decision C(2001) 6498 final, State aid N493/2010 − Spain − R&D aid to *Industria de Turbopropulsores,* S.A. (ITP) for Trent XWB LPT, 20 September 2011, (Exhibit USA-154), para. 48.

- The decisions generally emphasize that the applicants would not pursue the projects in the absence of state aid because the market was unwilling to offer necessary financing or, relatedly, the projects' expected returns in the absence of state aid were too low.[2891]

6.1623. In sum, the State Aid Decisions indicate that the A350XWB programme and certain of its constituent projects entailed significant risks, and that securing market financing to fund certain such constituent projects was infeasible due, at least in part, to systemic problems faced by companies in the LCA and aerospace industries, in which Airbus and EADS are participants. Therefore, in our view, the State Aid Decisions support the proposition that EADS would have faced considerable challenges finding market financing to fund the portions of the A350XWB programme that were not allocated to RSPs in the absence of A350XWB LA/MSF. We recognize, however, that the State Aid Decisions do not specifically discuss EADS' ability to obtain market financing. Thus, the decisions do not take into account any potential strengths of EADS (e.g. diversified business segments) that might allow it to overcome the financial challenges that aerospace companies, including certain A350XWB RSPs, generally faced.

Conclusions – the post-launch period

6.1624. In our view, the evidence pertaining to the post-launch period reveals several relevant themes. First, as of the First Contract Date, EADS had experienced certain successes with efforts to mitigate its financial problems that had arisen in the pre-launch period, but EADS continued to face financial problems moving forward. Second, although Airbus had completed significant work on the A350XWB in the absence of A350XWB LA/MSF, the most cash-intensive portions of the programme began to occur around or shortly after the First Contract Date. Third, statements made by certain UK and Airbus officials, certain government appraisals including the State Aid Decisions, and especially the UK Appraisal, support the proposition that it would have been extremely difficult for Airbus and EADS to effectively fund the A350XWB programme in the absence of A350XWB LA/MSF. Finally, the evidence appears to demonstrate that Airbus and the member States continued to be in close contact regarding the eventual receipt of member State financial assistance in connection with the A350XWB programme, and there is no material evidence that Airbus ever questioned its assumption at launch that such financial aid would be forthcoming if requested.

iv The A350XWB LA/MSF measures

6.1625. To conclude our factual narrative of the origins and initial development of the A350XWB programme, we recall certain key features of the A350XWB LA/MSF contracts, which have already been discussed at length elsewhere in this Report.[2892] First, Airbus concluded an A350XWB LA/MSF contract with each of the four relevant member States during the Contracting Period. Second, like the relevant LA/MSF contracts examined in the original proceeding, the A350XWB LA/MSF contracts are provided on unsecured, back-loaded, success-dependent and below-market interest rate repayment terms. Third, Airbus is entitled to approximately EUR **[***]** under those contracts.[2893] This represented roughly **[***]** and **[***]** of the A350XWB's forecast development

[2891] See e.g. European Commission, Decision C(2001) 6498 final, State aid N493/2010 − Spain − R&D aid to *Industria de Turbopropulsores,* S.A. (ITP) for Trent XWB LPT, 20 September 2011, (Exhibit USA-154), paras. 59-60 and 84-85; European Commission, Decision C(2010) 2141 final, Aide d'état N527/2009 − France − Daher-Socata *"Trappes de train principal A350 XWB" (projet MLGD)*, 14 April 2011, (Exhibit USA-156), paras. 78 and 82; European Commission, Decision C(2010) 6472 final, State aid N 4/2010 and N7/2010 − Spain − Individual R&D aid to Alestis Aerospace S.L., 29 September 2010, (Exhibit USA-157), para. 64; European Commission, Decision C(2009) 6874 final, State aid N357/2009 − United Kingdom − Individual R&D aid to GKN ASL, 15 September 2009, (Exhibit USA-158), paras. 103 and 106; European Commission, Decision C(2011) 264 final, State aid (SA.30169) N3/2010 − Spain − State loan for R&D to AERNNOVA, 26 January 2011, (Exhibit USA-159), paras. 63-64; European Commission, Decision C(2010) 4937 final, State aid N5/2010 and N6/2010 − Spain − State loan for R&D to ARESA, 20 July 2010, (Exhibit USA-160), paras. 70-71; European Commission, Decision C(2009) 9960 final, State aid N296/2009 'F2F' and N297/2009 'Airducts', 2 Individual aeronautics R&D-aids to Diehl Aircabin GmbH, Germany, 15 December 2009, (Exhibit USA-161), paras. 107-113; and European Commission, Decision C(2010) 2140 final, Aide d'État N525/2009 − France − *Aide au projet de case de train principal de Sogerma (Projet MLGB)*, 14 April 2010, (Exhibit USA-444), para. 63.

[2892] For a discussion regarding this subject, see above para. 6.225 et seq.

[2893] This includes the approximate value of the GBP to which Airbus is entitled under the UK A350XWB LA/MSF measure at the time Airbus concluded the UK A350XWB LA/MSF measure.

costs at the time of launch and at the First Contract Date, respectively. The European Union has explained that Airbus was able to and did, in fact, start receiving funds under certain contracts as early as **[***]**, reflecting a design that enabled Airbus to receive funds promptly upon their conclusion.[2894]

6.1626. We note that the European Union has submitted evidence indicating that, at least as of January 2013, Airbus had not yet received roughly EUR **[***]** to which it is entitled under the A350XWB LA/MSF contracts.[2895] The European Union asserts that this fact supports its argument that Airbus could have funded the A350XWB without A350XWB LA/MSF.[2896] In our view, this argument carries little weight. It is necessarily premised on the assumption that Airbus has, in fact, replaced or will replace a *portion* of the funds to which it was entitled under the A350XWB LA/MSF measures with funds from other sources, and it can therefore be inferred that Airbus could have replaced *all* the LA/MSF funds from other sources. The record does not support this assumption. Even if Airbus has not received the monies that the European Union claims, Airbus has still already received the majority of the monies to which it is entitled under the contracts. Further, we detect no evidence demonstrating that Airbus either cannot or will not pursue its right to receive the rest of the funds to which it is entitled under the contracts, which were structured to provide Airbus with the right to draw funds under the contracts over several years. This incremental disbursement structure, of course, is consistent with the fact that Airbus would incur the A350XWB programme's costs over time as well.[2897]

b Impact

6.1627. Having reviewed the history of the A350XWB programme and the conclusion of the A350XWB LA/MSF contracts, we now turn to assess the extent to which the A350XWB LA/MSF subsidies had an impact on the ability of the Airbus company that *actually existed* in the 2006 to 2010 period to launch and bring to market the A350XWB programme. The parties' arguments raise essentially three core questions in this context: (a) whether the A350XWB LA/MSF measures had any impact at all on the *launch* of the programme in December 2006 given that they were entered into only after that date; (b) whether the A350XWB programme was *viable* in the absence of A350XWB LA/MSF; and (c) whether Airbus could have effectively *funded* the A350XWB programme in the absence of A350XWB LA/MSF.

6.1628. We consider these questions in two parts. First, we evaluate the merits of the parties' arguments concerning the *timing* of the impact of the A350XWB LA/MSF measures. Second, we assess whether the A350XWB programme would have been *viable* in the absence of the impact of A350XWB LA/MSF, analysing the question of *fundability* as part of this assessment.

i The timing of the A350XWB LA/MSF

6.1629. The parties contest when the impact of the A350XWB LA/MSF measures on the A350XWB programme began. The United States argues that Panel may and should find that the impact of A350XWB LA/MSF began as early as the A350XWB's *launch* even though the measures did not formally exist on that date.[2898] In contrast, the European Union argues that any impact could begin no earlier than the *First Contract Date*.[2899]

6.1630. At the outset, we recall that Airbus launched the A350XWB on 1 December 2006. The first A350XWB LA/MSF contract was not concluded until roughly two-and-a-half years later, on the

[2894] European Union's response to Panel question Nos. 86 (para. 335) and 133 (fn 182 and accompanying text). We further recall in this context that the terms of the **[***]** A350XWB LA/MSF contract allowed Airbus to claim reimbursement for certain expenses that Airbus had incurred in connection with the A350XWB programme even **[***]**. See French A350XWB *Protocole*, (Exhibit EU-(Article 13)-01) (BCI), art. 2.3; Annex 2 to the French A350XWB *Protocole*, (Exhibit EU-(Article 13)-03) (BCI), para. 1; and French A350XWB *Convention*, (Exhibit EU-(Article 13)-11) (BCI), art. 2.

[2895] See European Union's second written submission, paras. 276-277 (citing certain relevant BCI and HSBI information).

[2896] See European Union's second written submission, paras. 276-277.

[2897] See e.g. CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), figures 6 and 7; and A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 58 and 70.

[2898] See e.g. United States' first written submission, para. 359.

[2899] See e.g. European Union's first written submission, para. 1086.

First Contract Date. We have previously concluded that by the time of launch, Airbus had secured commitments from the member States to financially support the A350XWB programme. The Business Case reflects such commitments in its inclusion of the Launch Financing Instrument, assuming its specific monetary value and certain other of its basic terms. However, the Launch Financing Instrument never came into fruition, with member State financial assistance eventually taking the form of A350XWB LA/MSF instead. The United States has provided no letters of intent, loan contracts or other documents predating the First Contract Date that contain clear legal commitments to provide Airbus with LA/MSF on the terms under which it ultimately was provided in those LA/MSF instruments.

6.1631. The parties disagree on how the relevant disciplines on the SCM Agreement apply to such a fact pattern, and offer two general analytic approaches based on the application of a bright-line test and a fact-based assessment. We understand the European Union to offer and advocate the former. In particular, the European Union observes that the SCM Agreement disciplines only the effects of "subsidies", but not the effects of "threats", "expectations" or "promises" of subsidies.[2900] In this instance, the European Union argues that because it would nonsensical to say that a subsidy can have an effect before it exists, the impact of the A350XWB LA/MSF subsidies can only be said to have begun at the time at which the evidence establishes that the first LA/MSF contract came into being, i.e. the First Contract Date. Thus, given that the First Contract Date postdates the launch date, the European Union argues that the A350XWB LA/MSF measures cannot have impacted the launch of the A350XWB.

6.1632. The United States, in contrast, maintains that we may and should find that the A350XWB LA/MSF subsidies can be said to have impacted the launch of the A350XWB under a more fact-based approach. In pursuing this argument, the United States does not assert that the A350XWB LA/MSF measures or any measure containing the specific terms and conditions that are challenged in this compliance proceeding existed at the time of launch *per se*. Rather, the United States focusses on certain factual considerations that it argues evidence a sufficient nexus between the member States' commitments to provide financial assistance to Airbus at the time of launch, on the one hand, and the A350XWB LA/MSF contracts that ultimately resulted from those commitments, on the other hand. According to the United States, the existence of this connection would allow the Panel to find that the impact of the member States' financing commitments on the A350XWB programme can effectively be treated as the impact of the A350XWB LA/MSF contracts. In particular, the United States asserts that the member States had, by the launch date, *committed* to providing A350XWB financial assistance to Airbus, most likely on subsidized terms.[2901] Second, the United States argues that Airbus *expected* to receive subsidized financial assistance from the member States in connection with the A350XWB programme, and, based on the member States' pattern of providing such assistance in the form of LA/MSF subsidies in the past, Airbus must have expected that the financial assistance would eventually materialize specifically as LA/MSF subsidies again.[2902] Third, the United States observes that the promised and expected member State A350XWB financial assistance *did in fact materialize* in the form of LA/MSF subsidies.[2903] Finally, the United States recalls a number of the LA/MSF contracts at issue in the original proceeding were found to have impacted the launch of Airbus LCA even though they were concluded after the relevant aircraft were launched.[2904] Thus, the United States essentially argues that the impact of the pre-launch negotiations surrounding the financing that ultimately materialized as A350XWB LA/MSF (including the impact that the expected receipt of the Launch Financing Instrument had on Airbus' decision to launch the A350XWB) is part of the impact of the A350XWB LA/MSF measures themselves.

[2900] European Union's first written submission, para. 1101 and fn 1380.

[2901] United States' second written submission, paras. 591 and 602; and opening statement (non-public), para. 12.

[2902] United States' second written submission, paras. 591; and opening statement (non-public), para. 12.

[2903] United States' second written submission, para. 591.

[2904] United States' second written submission, para. 591. In our view, the original panel's findings were consistent under a fact-based approach. Most notably, the LA/MSF measures in the original dispute arose under a relatively coherent institutional framework that likely created legitimate expectations of receipt of such specific measures at the launch of LCA at issue in that dispute. See e.g. Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.533-7.562 (explaining certain aspects of this institutional framework).

6.1633. The European Union disputes many aspects of the United States' factual assertions on this front. The European Union appears to stop short of arguing that the member States had provided no commitments to Airbus by the time of launch to provide *some kind* of A350XWB financial assistance. However, the European Union argues that there is insufficient evidence to demonstrate, at the time of launch, either that Airbus specifically expected to receive LA/MSF-type measures in connection with the A350XWB programme or that it would eventually receive any sort of MSF on better-than-market terms.[2905] The European Union also argues that the original panel's acceptance that certain LA/MSF contracts impacted the preceding launches of certain LCA is immaterial because the time difference between the conclusion of such LA/MSF contracts and the relevant LCA launches was much shorter than the time difference between the A350XWB's launch and the First Contract Date.[2906]

6.1634. As a general matter, we detect advantages and disadvantages associated with both the bright-line and fact-based approaches. For example, while the bright-line approach appears to be administratively easier to apply and perhaps offer more certainty regarding when the effects of subsidies may be said to have begun in a manner that can be disciplined under the SCM Agreement, we are concerned that it may insufficiently recognize the reality that firms can and do meaningfully alter their behaviour based on justified expectations of government actions even where the government has not legally committed to nor spelled out in final detail those actions. The approach may therefore open the door to potential circumvention of the relevant disciplines of the SCM Agreement through, for example, strategic sequencing of government commitments to subsidy recipients.[2907] Likewise, while the fact-based approach is perhaps more flexible, we are concerned that it may not provide a sufficiently principled basis upon which to govern the application of disciplines of the technical and consequential nature that are contained in the SCM Agreement.

6.1635. Ultimately, however, we consider that we do not need to come to any definitive view on whether it would be best to apply either the bright-line or fact-based approach to resolve this matter because irrespective of the approach we take, we reach the same material conclusion regarding the impact of A350XWB LA/MSF on the A350XWB programme. We discuss this conclusion in detail below by considering the impact of the A350XWB LA/MSF on the A350XWB programme's viability with respect to *both* the launch date and the First Contract Date.

ii Viability

6.1636. In this section, we evaluate whether the A350XWB programme was viable at launch and at the First Contract Date in the absence of A350XWB LA/MSF. At the outset, we note that it is sometimes unclear to us what aspects of the programme the parties assume should be factored into an analysis of its "viability". The European Union's CompetitionRx Report, for example, appears to use the term in a relatively narrow manner, relating only to the base-case NPV of the programme where a positive forecast NPV means the programme is viable and a negative forecast NPV means the programme is non-viable.[2908] The United States appears to treat viability as a somewhat broader inquiry, including consideration of, for example, the risks associated with unfavourable non-base-case scenarios.[2909]

[2905] European Union's second written submission, paras. 893-948 and 959; and response to Panel question No. 47, para. 171.

[2906] European Union's second written submission, para. 892; and PwC Rebuttal Report, (Exhibit EU-120) (BCI), pp. 20-24.

[2907] We note that the bright-line approach did not appear to be the approach used by the parties, the original panel, or the Appellate Body in the original proceeding *vis-à-vis* any relevant causation analysis. (See United States' second written submission, para. 591 (making this point)). Indeed, although they disagree on the details of certain dates, the parties agree that many of the LA/MSF contracts analysed in the original proceeding were concluded *after* the launch of the relevant LCA. (See United States' second written submission, para. 594; and PwC Rebuttal Report, (Exhibit EU-120) (BCI), table 2). Despite this, such LA/MSF measures were found to have affected the "launch" of those LCA. (Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1949 and 7.2025 (concluding that LA/MSF enabled Airbus to "launch" the LCA at issue as and when Airbus did)). To our knowledge, no party ever questioned the propriety of this approach in the manner that is now before us.

[2908] See e.g. CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 46.

[2909] See e.g. United States' comments on the European Union's response to Panel question No. 127, para. 45 (arguing that the European Union's viability analyses inadequately "account for project risk").

6.1637. Nowhere in the record do we discern in the parties' arguments any authoritative definition of the term "viability". Thus, we consider that the content of the term "viability" should be fashioned in a manner most befitting the context in which we must use it, i.e. for the purpose of assessing the impact of A350XWB LA/MSF on the manner in which Airbus proceeded with the A350XWB programme. We consider that this assessment can be appropriately made with reference to the following question: In the absence of the impact of A350XWB LA/MSF, was the A350XWB programme sufficiently attractive for Airbus to pursue at the relevant times in the light of the alternative funding sources that were expected to be available on market terms? We consider that a convenient shorthand formulation of this question is to ask whether the A350XWB programme was "viable" in the absence of A350XWB LA/MSF.

6.1638. In our view, the record reveals four main aspects of the A350XWB programme that bear on this issue: (a) Airbus' expected ability to effectively fund the programme with financing on market terms; (b) the programme's base-case forecast NPV; (c) the strategic reasons for Airbus to pursue the programme not already taken into account in the base-case NPV; and (d) the programme's risks. With respect to Airbus' ability to effectively fund the programme, we note that neither the European Union nor the United States appear to treat this topic as part of the viability issue. Rather, the parties analyse the viability of the programme, on the one hand, and Airbus' ability to fund the programme, on the other, as relatively discrete topics.[2910] We recognize that this binary approach may make sense as a practical matter under certain circumstances. However, as our formulation of the viability issue above implies, we consider that it is more helpful to conceive of the fundability inquiry as a part of the overall viability inquiry. This is so because, as a conceptual matter, it would seem difficult to meaningfully characterize a project as viable if the company undertaking the programme lacked the resources with which to pursue it. Further, from a more technical standpoint, we note that both parties treat the NPV of the A350XWB programme as a focal point of the viability issue. Although we do not know what specific methods Airbus used to calculate the NPV of the A350XWB programme at any relevant time − including in the A350XWB Business Case − it is our understanding that NPVs, when calculated with respect to a particular business project, may include certain assumptions regarding how that project will be funded.[2911] The A350XWB Business Case appears to specifically support this understanding, as it assumes that the Launch Financing Instrument would affect the NPV of the A350XWB programme to a significant degree. In other words, it appears clear to us that the methods with which a company anticipates financing a project can have material impacts on the forecast NPV − and, in turn, the viability − of that programme from the company's perspective. For these reasons, we consider it appropriate to consider the fundability of the A350XWB programme in the absence of A350XWB LA/MSF as a topic to be explored within the context of an analysis of the A350XWB programme's viability.

6.1639. This section therefore proceeds in the following parts. First, we examine Airbus' and EADS' ability to effectively fund the A350XWB programme in the absence of A350XWB LA/MSF. Second, we analyse the above-mentioned three factors pertaining to the viability issue with reference to the time of launch of the A350XWB and with reference to the First Contract Date.[2912]

Ability to fund

6.1640. In this section, we evaluate whether, at launch and beginning at the First Contract Date, Airbus would have had sufficient confidence in its ability to effectively fund the A350XWB programme moving forward such that Airbus would have continued as and how it did with the programme even in the absence of A350XWB LA/MSF.[2913] We stress that the European Union

[2910] See e.g. United States' opening statement (non-public), para. 10 ("Because Airbus would have been unable to proceed with the A350 XWB absent LA/MSF, the EU's assertions about the viability, or attractiveness, of the project are beside the point. However rosy the A350's baseline sales projections might be, willingness must not be confused with ability; *wanting* to market an aircraft means little without the *means* to do so.") (emphasis original; footnotes omitted); and CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI) (segregating its viability and fundability analyses).

[2911] See e.g. Stephen A. Ross, Randolph W. Westerfield, and Jeffrey Jaffe, *Corporate Finance*, 7th edn (McGraw Hill, October 2002), pp. 477-489, (Exhibit USA-495) (describing certain methods used to calculate NPVs).

[2912] We note that this analytic structure generally comports with how the parties have presented their evidence and arguments with respect to these issues.

[2913] We recall that, at the time of launch, reportedly "EADS ha{d} stated clearly that it will only agree to launch the A350{XWB} when it is satisfied that the development can be both funded and staffed." (Goldman

never argues that, in the absence of A350XWB LA/MSF, Airbus could have effectively funded the A350XWB programme on its own. Rather, the European Union only argues that Airbus could have funded the programme in the absence of A350XWB LA/MSF with the help of its parent company, EADS. We therefore note that although the increased use of RSPs appears to be an option that Airbus would likely be expected to accomplish on its own, all the other options the European Union enumerates appear to allow for the possibility of, or rely on, EADS' involvement. Thus, before analysing the availability of the potential sources of funding listed above, we first determine whether it is reasonable to believe that Airbus could have accessed EADS' financial resources to help fund the A350XWB programme in the absence of A350XWB LA/MSF.

6.1641. The United States argues that the original panel and Appellate Body already rejected the notion that Airbus could rely on EADS' resources to fund its LCA programmes.[2914] The United States therefore considers the matter settled. The European Union, in contrast, argues that the Panel should find that Airbus could have relied on EADS' financial resources to help fund the A350XWB programme for two main reasons.[2915] First, the European Union recalls that the A350XWB Business Case was presented to the EADS Board for approval, indicating that EADS was satisfied that the programme could be properly financed.[2916] Second, the European Union asserts that, given Airbus' importance to EADS as a business unit, EADS would never have allowed Airbus to languish under the commercial conditions that would have arisen if Airbus had failed to bring the A350XWB to market. On this score, the European Union asserts that "{o}ver the 2006-2009 period, Airbus consistently accounted for around 65 percent of EADS' revenues" and that the CompetitionRx Report demonstrates that "in this period, Airbus' order book grew significantly faster than other divisions of EADS" such that "{i}n 2005, Airbus accounted for 80 percent of EADS' total order book; by 2008/2009, this proportion had increased to almost 90 percent. Over this period, almost all of the net increase in orders held by EADS (EUR 137.7 billion) could be attributed to increases in the Airbus order book (EUR 135.9 billion)."[2917]

6.1642. We begin by examining the relevant findings of the original panel and Appellate Body on this score. In the original proceeding, the European Union argued on appeal that the panel had "ignored the totality of the evidence allegedly demonstrating that Airbus SAS' parent companies, EADS and BAE Systems, had the financial resources necessary to fund the {A380} in the absence of LA/MSF."[2918] The Appellate Body explained that "{t}he only evidence that the European Union provide{ed} in support of its contention that capital of EADS would be directed to the A380 project {was} the general statement, in the 'Use of Proceeds' section of EADS' Offering Memorandum, that '{a} stronger financial position would also enable EADS to timely adapt its development and investment programs, notably in new aircraft'."[2919] The Appellate Body then rejected the European Union's argument:

> Even if the documents show that EADS and BAE Systems had financial resources available, it does not necessarily follow that those resources would have been directed to the A380 project. Both EADS and BAE Systems were large companies with several business units beyond aircraft production, all of which would have competed for internal financial resources. We are reluctant to disturb the Panel's analysis on the basis of general statements about the overall financial situation of BAE Systems and EADS. In order for us to interfere with the Panel's assessment of the facts, we would

Sachs Investment Analysis, *A350: Not an option but essential for Airbus' future, in our view*, 21 November 2006, pp. 20-22, (Exhibit USA-30), p. 20).

[2914] United States' second written submission, para. 627.

[2915] European Union's second written submission, para. 1113. The European Union also argues that many pieces of evidence on which the United States relies to show that the Airbus could not have funded the A350XWB in the absence of A350XWB LA/MSF "concern{} EADS, as often as, if not more often than, statements concerning Airbus." (European Union's second written submission, para. 1120). We consider that the fact that certain pieces of evidence that the United States relies on in this context reference EADS is unremarkable. It is of little surprise that EADS, as Airbus' parent company, was participating on some level in decisions concerning Airbus and/or the A350XWB even if it never planned to finance the A350XWB without member State assistance. Thus, without more specific criticisms from the European Union as to the relevance of certain pieces of evidence, this general argument is unpersuasive.

[2916] European Union's second written submission, para. 1115.

[2917] European Union's second written submission, para. 1116 (citing CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), paras. 329-333).

[2918] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1339.

[2919] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, fn 2939.

> have to be satisfied that the European Communities had not only submitted documents describing the overall financial situation of these companies but also provided explanations as to why it was reasonable to expect that EADS and BAE Systems would have directed substantial additional funds to the A380 to self-finance the project in the absence of LA/MSF.[2920] (footnote omitted)

6.1643. The relevant rulings of the original panel and the Appellate Body were, therefore, rather limited. Neither categorically rejected the possibility of EADS assisting Airbus in funding LCA programmes. Rather, the issue pertained to the persuasive weight of evidence surrounding EADS' willingness to do so with respect to the A380 programme. Thus, we see no bar to now evaluating the question of whether there is sufficient evidence demonstrating that it is reasonable to expect that EADS would have directed substantial additional funds to the A350XWB to finance the programme in the absence of LA/MSF.

6.1644. We answer this question in the affirmative. On the one hand, there appears to be little direct evidence in the record that EADS had planned to step in and channel billions of euros in funding to Airbus if Airbus did not receive member State financial assistance. This may not be surprising, however, considering that Airbus appeared relatively certain from the time of launch that it would receive some form of member State financial support in connection with the A350XWB programme. On the other hand, we feel that several other considerations weigh in favour of the European Union's position in this context. The A350XWB programme was a strategically critical aircraft for Airbus, with the Business Case outlining severe consequences for Airbus if the programme did not go forward as proposed. The EADS Board received and presumably understood such information. Further, the European Union has presented evidence demonstrating the significant importance of Airbus to EADS as a business unit, a reality that we also recognized above in our discussion of the financial situation of Airbus and EADS in the pre-launch period. EADS, therefore, surely understood that if Airbus failed to bring the A350XWB to market, Airbus and EADS would share the financial fallout. Moreover, the European Union claims that "EADS has allocated significant monies secured from the entirety of its funding toolbox to fund Airbus' LCA development activities for both the A380 and the A350XWB."[2921] We recall that the original panel described how EADS used a loan from the European Investment Bank (EIB) to help finance the A380's development.[2922] This indicates, at least to some degree, EADS' historic willingness to assist Airbus in financing LCA programmes. Finally, we recall that EADS was a **[***]** A350XWB LA/MSF contracts. This provides evidence of EADS' willingness to involve itself in the financing of the A350XWB programme.

6.1645. In our view, such evidence sufficiently demonstrates that Airbus could have accessed EADS' financial resources to help fund the A350XWB programme in the absence of A350XWB LA/MSF. We emphasize that, at present, we draw no conclusions regarding the extent of such resources. To evaluate that issue, we turn to evaluate the availability of the specific sources of funding that the European Union claims Airbus could have used to fund the A350XWB programme in the absence of member State financial assistance. These sources are: (a) increased use of RSPs; (b) disposal of non-core assets; (c) increased profitability and cash generation; (d) a reduction in shareholder distributions; (e) equity-related financing; (f) cash reserves; and (g) increased debt.[2923] Where we detect material differences with respect to the potential availability of such sources *vis-à-vis* the launch date and the First Contract Date, they are noted.

Risk-sharing partners

6.1646. The European Union argues that Airbus could have replaced at least a portion of the funds it received from the A350XWB LA/MSF measures by increasing Airbus' reliance on RSPs in connection with the A350XWB programme. In support of this argument, the European Union asserts that "the United States has offered no evidence suggesting that Airbus could not have raised an additional 15 percent of the development cost from risk-sharing suppliers – which would

[2920] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1343.
[2921] European Union's response to Panel question No. 135, para. 116.
[2922] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.730.
[2923] European Union's first written submission, paras. 1143-1144; second written submission, para. 1068; and response to Panel question No. 47, para. 155.

amount to approximately 75 percent of the amount raised by Boeing" from its own RSPs in connection with the 787.[2924]

6.1647. The United States responds that it is unreasonable to assume that Airbus could have increased its reliance on its RSPs to any significant degree. The United States argues that raising an additional 15% of the A350XWB's development costs "amounts to … an 88 per cent increase over the actual risk-sharing supplier contribution of €1.8 billion."[2925] The United States asserts that the European Union's arguments that Airbus could have increased RSP participation rates in this manner are flawed because: (a) the European Union's reliance on Boeing's 787 experience was already rejected by the original panel and the Appellate Body; (b) increasing RSP contributions would have upset Airbus' "make vs. buy" strategy for the A350XWB programme; (c) the European Union fails to account for how the absence of LA/MSF to Airbus would have increased the risks faced, and returns demanded, by RSPs; (d) many of Airbus' RSPs needed European Union State aid just to participate in the A350XWB programme at their actual levels; and (e) some A350XWB Airbus RSPs are EADS subsidiaries, and, just as in the original dispute, the European Union has not provided any evidence showing that EADS would have diverted additional resources from other uses to the A350XWB programme.[2926]

6.1648. In addressing this issue, there are two pieces of information of threshold relevance, namely, the A350XWB's forecast development costs at launch and at the First Contract Date and the portion of the A350XWB's development costs that Airbus' RSPs actually covered. We recall that at the time of launch, the expected development cost of the A350XWB programme was EUR **[***]** and was approximately EUR 12 billion at the First Contract Date. Further, we recall that Airbus consistently expected its RSPs to cover approximately EUR 1.8 billion of the programme's development costs. Thus, in order to cover an additional 15% of the A350XWB's forecast development costs at either launch or the First Contract Date, Airbus' RSPs would have had to roughly double their investment in the programme.

6.1649. Against this background, we now consider the United States' more specific criticisms of the European Union's argument. First, we consider that the extent to which Boeing relied on its RSPs to help finance the 787 is of limited probative value. During the original proceeding, the European Union similarly argued that Airbus could have relied on its RSPs to a greater extent than it did in connection with the A380 programme in light of the level of RSP reliance that Boeing displayed in its 787 programme. The original panel rejected this argument as unsupported by sufficient evidence[2927] and was affirmed by the Appellate Body.[2928] As it did in the original proceeding with respect to the A380, the European Union has provided us with no evidence that merely because, reportedly, Boeing was able to finance a significant portion of the NRCs of development of the 787 through risk-sharing supplier arrangements, Airbus would necessarily have been able to do the same with respect to the A350XWB. Airbus and Boeing are separate and competing companies, and there is no evidence before us to suggest that they organize or operate their LCA businesses in the same or similar way. Neither is there any evidence before us indicating that Airbus' financial position was the same as Boeing's at the relevant time or that the 787 and A350XWB programmes were equally amenable to the same or a similar degree of outsourcing. We therefore find that the European Union's argument is unsupported by sufficient evidence.

6.1650. Second, we evaluate the United States' argument that doubling Airbus' reliance on its RSPs would have upset Airbus' A350XWB development strategy. The European Union argues that the United States' argument depends on the assumption "that the European Union's counterfactual relies on Airbus replacing *all* A380 and A350XWB MSF with financing from risk-sharing suppliers *in a manner that would have matched Boeing's use* of risk-sharing suppliers for the 787 programme."[2929] We consider that this interpretation is incorrect. Rather, the United States'

[2924] European Union's first written submission, para. 1142.
[2925] United States' second written submission, para. 633.
[2926] United States' second written submission, para. 633.
[2927] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1947 ("Likewise, the European Communities has submitted no evidence to support the contention that merely because, reportedly, Boeing was able to finance a significant portion of the non-recurring costs of development of the 787 through risk-sharing supplier arrangements, Airbus would necessarily have been able to do the same with respect to the A380.").
[2928] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1349.
[2929] European Union's second written submission, para. 1079. (emphasis original)

argument in this respect is that if Airbus had increased its reliance on RSPs in the manner *described by the European Union*, it would likely have upset Airbus' A350XWB development strategy. We have previously indicated that, in our view, Airbus appeared to aggressively enhance its reliance on RSPs relative to its previous LCA programmes (which entailed significant risks to the programme), that Airbus appeared to employ RSPs to the maximum extent Airbus deemed feasible (i.e. the amount of outsourcing and supplier involvement was at saturation), and that enhanced use of RSPs would have been problematic from a general administrative standpoint.[2930] In our view, such evidence demonstrates that materially increasing reliance on RSPs in the absence of A350XWB LA/MSF, even if Airbus had been willing to do so, would have entailed significant risks for the programme and would have been difficult.[2931]

6.1651. Third, we consider the United States' argument that the RSPs would be less willing to participate in the A350XWB programme if Airbus had not received A350XWB LA/MSF because LA/MSF "increases the probability that the A350 XWB program will be successful, thereby decreasing risk for {RSPs}".[2932] We recall the Appellate Body's explanation that LA/MSF reduces the risks associated with an LCA programme from the perspective of RSPs, and therefore RSPs will demand lesser rates of return for their participation in the presence of LA/MSF than in its absence.[2933] We also recall that the European Union has explained that Airbus secured most, but not all, of its A350XWB RSPs before the First Contract Date.[2934] Therefore, even if we measure the impact of LA/MSF from the First Contract Date instead of launch, it is plain that it would have been more expensive and thus more difficult for Airbus to secure at least some of the RSPs that it is in fact using. Although we do not know when Airbus would have secured the additional RSP involvement that it argues it could have in the absence of A350XWB LA/MSF, we perceive no scenario in which the removal of the impact of A350XWB LA/MSF, from whenever we measure it, would not have made the A350XWB programme more risky from the standpoint of a RSP. Therefore, we similarly reason that, at least to some extent, it would have been more costly and more difficult for Airbus to secure additional RSP involvement in the absence of A350XWB LA/MSF.

6.1652. Fourth, the United States argues that certain RSPs received State aid from the European Union without which they would not have been able to participate in the A350XWB project. The United States therefore argues that they could not have participated in the A350XWB project at enhanced levels without enhanced state aid, and there is no evidence that such additional State aid would have been forthcoming.[2935] The European Union argues that the United States' argument is irrelevant "because the United States does not challenge these measures, or the effects of any such supplier funding, in these proceedings."[2936] Further, the European Union argues that, "{i}n any event, even if some suppliers had decided that, absent support, they would not participate in the programme, this would not mean that other companies around the world might not have stepped in to fill that void."[2937]

6.1653. In our view, we have insufficient data with which to evaluate the significance of the parties' arguments on this issue. This is so because we lack any meaningful evidence regarding the presence or absence of RSPs in the marketplace that had not only the financial, but also the technical, capacity to take on additional A350XWB projects. However, we recall that the State Aid Decisions not only outlined certain difficulties that the specific RSPs under discussion had encountered when attempting to access market financing in connection with their respective A350XWB projects, but also certain systemic challenges that aerospace companies faced in accessing market financing to fund the types of projects that the RSPs under discussion were pursuing *vis-à-vis* the A350XWB programme. Such discussions suggest that RSPs would have encountered challenges in accessing market financing that would have allowed them to increase their involvement in the A350XWB programme in the absence of A350XWB LA/MSF.[2938]

[2930] See, e.g. above paras. 6.502 and 6.1555, and evidence cited therein.
[2931] For a discussion regarding this subject, see above para. 6.500 et seq.
[2932] United States' second written submission, para. 636.
[2933] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 899.
[2934] European Union's first written submission, para. 1088.
[2935] United States' second written submission, para. 642.
[2936] European Union's second written submission, para. 1080.
[2937] European Union's second written submission, para. 1080. (footnote omitted)
[2938] We note that the European Union is correct that the State aid measures provided to Airbus RSPs have not been challenged as subsidies in this dispute and no finding exists that they are subsidies. However,

6.1654. Finally, we evaluate the significance of the United States' assertion that some of Airbus' RSPs were EADS subsidiaries. Specifically, the United States cites evidence indicating that AEROLIA, Premium AERO TEC, and EADS SOGERMA are all A350XWB RSPs and are wholly-owned subsidiaries of EADS.[2939] The United States argues that "to postulate additional risk-sharing contributions from these suppliers, the EU must suppose that EADS would divert even more resources from other uses to facilitate the A350 XWB program", and the Appellate Body had already rejected the notion that EADS would divert resources to assist Airbus in its LCA programmes.[2940] The European Union does not contest that these three entities are EADS subsidiaries. However, in addition to its general argument that it is reasonable to assume that EADS would have directed additional resources to the A350XWB programme in the absence of A350XWB LA/MSF, the European Union counters that the United States' argument "misses the point", because even if such subsidiaries had dropped out as RSPs "Airbus … would have had access to a world-wide network of unrelated suppliers to replace the role of sister companies".[2941]

6.1655. The United States' point appears to be that if Airbus had increased its reliance on its pre-existing RSPs, to the extent such RSPs were EADS subsidiaries, the strategy would not meaningfully shift any costs or risks away from EADS at all. This is plainly correct, and we detect two relevant implications that flow from it. The first is that any consideration of the further availability of these subsidiaries' resources to the A350XWB programme is effectively subsumed in our analyses regarding EADS' resources at large. We therefore need not address that consideration any further at present. Second, and relatedly, it appears proper to exclude these three RSPs from any presumed set of RSPs that were willing and able to shoulder further A350XWB development costs and thereby shift such costs away from EADS. The significance of this exclusion, however, is unclear. Again, we lack any meaningful evidence regarding the presence or absence of other RSPs in the marketplace who had both the technical capacity and financial resources to shoulder additional RSP responsibilities.

6.1656. In summary, our consideration of the parties' arguments and evidence concerning the extent to which Airbus could have involved a greater number of RSPs in the A350XWB programme in the absence of LA/MSF leads us to conclude that, while it was theoretically possible for Airbus to do so by some degree, we are not persuaded that Airbus could have in practice relied upon them to a level that would have come anywhere close to doubling their involvement compared to the actual situation.

Disposal of non-core assets

6.1657. The European Union argues that EADS could have raised additional funds via the disposal of non-core assets. In support of this assertion, the European Union refers to an EADS presentation dated April 2009. One slide of the presentation refers to "{d}isposal of non-core assets" as an option to "{p}rotect {EADS'} conservative balance sheet structure".[2942] The European Union, however, has produced no evidence indicating what non-core assets EADS considered expendable, under what circumstances EADS would sell such assets, or the value of such assets. Thus, while we accept that the disposal of certain non-core assets may have been an option for EADS, and one that could likely have been pursued to some degree, the extent to which this was a credible source of funding for the A350XWB programme in the absence of A350XWB LA/MSF at any relevant time remains speculative.

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we do not believe − and the European Union does not argue − that this means that it would be proper for us to assume that the ability of any RSP to take on additional A350XWB-related projects in the absence of A350XWB LA/MSF can rely on the prospect of such RSPs benefitting from financial intervention by the member States, including with additional State aid (e.g. interest-free loans).

[2939] United States' second written submission, para. 643 (citing "The Group", SOGERMA website, accessed 10 October 2012, (Exhibit USA-446), and AEROLIA/EADS press release, "Birth of the French Aerostructures Leader and world No. 2 for Nose Fuselage subassemblies" 6 January 2009, (Exhibit USA-447)).

[2940] United States' second written submission, para. 643.

[2941] European Union's second written submission, para. 1081.

[2942] Gerard Adsuar, Corporate Executive, EADS Finance and Treasury, "Cash Drivers and Enterprise Value", EADS presentation, Global Investor Forum, 1-2 April 2009, (Exhibit USA-33), slide 16.

Increased profitability and cash generation

6.1658. The same EADS presentation that mentions the disposal of non-core assets, discussed immediately above, also lists increased "profitability and cash generation" as a method of protecting EADS' balance sheet.[2943] Under this heading, the presentation lists what appear to be cost-cutting measures, such as Power8, R&D reductions, working capital stretch targeting, production resizing, capital expenditures reductions, and budget cuts.[2944] We believe that EADS' ability to further cut costs must be evaluated in the context of its ongoing Power8 programme.

6.1659. We recall that Power8 was a response to the considerable financial challenges faced by Airbus and EADS in the fall of 2006 and was reportedly "aimed at slashing costs by 30%".[2945] Evidence in the record indicates that this was an aggressive goal and one that entailed significant implementation risks. EADS' own documents reveal that implementation of Power8 entailed certain risks (e.g. work stoppages due to labour renegotiations), concluding that "EADS' future results of operation and financial condition may be negatively affected."[2946] In March 2007 an *Aviation Week* article reported that one financial analyst opined that "Power8 is 'astonishingly radical' in terms of its scope" and that "the program is 'very complex' and given the large amount of production and development work at stake, the risks are 'huge.'"[2947] Further, a March 2007 Moody's report stated that the Power8 programme "faces a number of challenges".[2948] Moreover, in May 2007, a Standard & Poor's report indicated that "{t}he successful implementation of Power8 involves considerable risk given its depth and scale".[2949] We further note a Standard & Poor's report from October 2009 indicating that the Power8 programme had not yet been fully implemented[2950], which appears to comport with Airbus' original expectations that it would take several years to fully implement the Power8 programme upon its inception in late 2006.[2951] Thus, it appears that the Power8 programme had not been fully implemented by the First Contract Date, and presumably continued to entail significant risks as of that date.[2952] Therefore, it is far from clear to us that EADS was in a position to further cut significant costs from its budget at any relevant time, at least without inviting disruptions and other potential problems to its operations.

[2943] Gerard Adsuar, Corporate Executive, EADS Finance and Treasury, "Cash Drivers and Enterprise Value", EADS presentation, Global Investor Forum, 1-2 April 2009, (Exhibit USA-33), slide 16.

[2944] It is unclear to us whether the term "profitability and cash generation" is meant to include anything beyond these enumerated activities.

[2945] Aaron Karp, "Airbus/EADS officials concede Boeing advantage, question A350 viability", *Air Transport World Daily News*, 6 October 2006, (Exhibit USA-9).

[2946] EADS Press Release, "A350 XWB launch: EADS Gives Go Ahead for Airbus to Launch the A350 XWB", 1 December 2006, (Exhibit USA-569), p. 12.

[2947] Robert Wall, "Will It Fly? Eyes are on Airbus as it overhauls industrial setups and supplier relations to regain competitive footing, financial health", *Aviation Week & Space Technology*, 5 March 2007, (Exhibit USA-523).

[2948] Moody's Investors Service, Global Credit Research, *Credit Opinion: European Aeronautic Defence & Space Co. EADS*, 12 March 2007, (Exhibit USA-518). This Moody's report appears to treat the increased use of RSPs as part of the Power8 programme. At least one other S&P report appears to do so as well. (Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS L-T CCR Cut to 'BBB+'; Off Watch Neg; Outlook Stable; Teleconf May 11 @ 2:30PM BST*, 10 May 2007, (Exhibit USA-513), p. 2 (referring to the programme's aim to "transfer … risk to new partners")). Further, an Airbus press release appears to treat the enhanced use of RSPs as part of the overall Power8 programme. (Airbus Press Release, "Power8 prepares way for 'new Airbus'", 20 February 2007, (Exhibit USA-94)). Insofar as we are discussing outright cost reductions, it is unclear to us to what extent this is appropriate. As discussed, RSPs are not necessarily expected to relieve Airbus of its development costs *per se*, but, rather, to generally delay Airbus' payments for such costs until Airbus can bear them. However, we note that, insofar as increasing the use of RSPs were expected to reduce costs for Airbus, their increased use, which we already have determined would have been extremely difficult to implement, would have been an avenue for doing so.

[2949] Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS L-T CCR Cut to 'BBB+'; Off Watch Neg; Outlook Stable; Teleconf May 11 @ 2:30PM BST*, 10 May 2007, (Exhibit USA-513), p. 2.

[2950] Standard & Poor's Global Credit Portal Ratings Direct, *European Aeronautic Defence and Space Co. N.V.*, 14 October 2009, (Exhibit USA-514), pp. 4 and 5.

[2951] See also A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 107 (performing cost comparison that appears to support the notion that Power8 was expected to be continuing to ramp up in 2009).

[2952] See also "Noel Forgeard and the A380", *Commercial Aviation Report*, 15 January 2007, (Original Exhibit US-297), (Exhibit USA-148), p. 11 ("The {Power8} programme aims at annual cost savings of at least €2bn from *2010* onwards."). (emphasis added)

Reduction in shareholder distributions

6.1660. The European Union argues that EADS could have at least partially replaced A350XWB LA/MSF funding with reductions in shareholder distributions. The European Union asserts that EADS "distributed approximately €3.4 billion to shareholders as dividends and share repurchases" from July 2000 through year-end 2011.[2953] The European Union also asserts that EADS, as of May 2013, was engaged in a voluntary share repurchase programme worth EUR 4.875 billion.[2954] The United States responds that EADS would have been reluctant to cut dividends because cutting dividends generally lowers an enterprise's stock price. The United States claims that companies' stock prices fall, on average, 9% on days on which they announce dividend cuts or omissions[2955], and argues that EADS would not have been willing to incur this cost when its stock price had already fallen by roughly 50% from June 2006 to June 2009.[2956] The United States further asserts that "'some investor groups may count on dividends being paid out every year, and skipping these dividends will force them to liquidate part of their portfolio, leading to unnecessary transaction costs.'"[2957] Finally, the United States argues that it would have been difficult for the EADS Board to agree to cut dividends due to routine infighting among EADS shareholders regarding such issues.[2958]

6.1661. The European Union replies that the market would have interpreted a decision to cut dividends to fund a "robust" programme like the A350XWB favourably, because such reinvestment would yield increased, rather than decreased, future cash flows resulting from the A350XWB's sales.[2959] The European Union also argues that, "{i}n December 2006, and thereafter", approximately half of EADS' shares were owned by Lagardère, DaimlerChrysler, and the French and Spanish states, and the remaining portion owned substantially by sophisticated institutional investors, all of whom would be indifferent between receiving dividends or accepting the capital gains from an increased EADS share price resulting from a successful A350XWB programme.[2960] The European Union further rejects the United States' assertion that the EADS Board would not be able to agree to cut dividends when it would mean the pursuit of a valuable programme that was in the best interests of the company.[2961]

6.1662. We first note that the data supplied by the European Union is only partially relevant. Our task is to determine whether EADS and Airbus could have funded the A350XWB programme if commitments of MSF had failed to materialize either at launch or beginning at the First Contract Date. Therefore, the relevant shareholder distribution amounts are those occurring not from the year 2000, but from either year-end 2006 or 2009 through 2011, the last year for which we have such data. The former amount is approximately EUR 1.07 billion, and the latter amount is approximately EUR 349 million.[2962]

[2953] European Union's first written submission, para. 1139 (citing EADS Distributions to Shareholders, EADS Consolidated Financial Statements (Statement of Cash Flows) for Years ended 2000-2011, (Exhibit EU-91)); and second written submission, para. 1069 (same).

[2954] European Union's response to Panel question No. 47, para. 158.

[2955] United States' second written submission, para. 630 (quoting Tim Koller, Marc Goedhart, and David Wessels, *Valuation: Measuring and Managing the Value of Companies*, 4th edn (Wiley, 2005), (Exhibit USA-442), p. 500). We note that this exhibit explains that "{u}nless management has very compelling arguments for withholding dividends to invest in future growth, investors are likely to react negatively to dividend cuts. … Finally, the amount of funding freed up by cutting dividends is limited, so dividend cuts alone are unlikely to resolve more substantial funding shortages."

[2956] United States' second written submission, para. 630 (citing Chart of share price, EADS website, accessed 20 September 2013, (revised) (Exhibit USA-437)).

[2957] United States' second written submission, para. 630 (quoting Tim Koller, Marc Goedhart, and David Wessels, *Valuation: Measuring and Managing the Value of Companies*, 4th edn (Wiley, 2005), (Exhibit USA-442), p. 500).

[2958] United States' second written submission, para. 631. See also Axel Flaig, Head of Aerodynamics, Airbus, "Airbus A380: Solutions to the Aerodynamic Challenges of Designing the World's Largest Passenger Aircraft", Airbus presentation to Royal Aeronautical Society, Hamburg Branch, January 2008, (Exhibit USA-362) (reporting that the EADS "board … has been unable to agree … on a dividend policy … because of continuing conflict among its core shareholders.").

[2959] European Union's second written submission, para. 1071.

[2960] European Union's second written submission, para. 1073.

[2961] European Union's second written submission, para. 1074.

[2962] EADS Distributions to Shareholders, EADS Consolidated Financial Statements (Statement of Cash Flows) for Years ended 2000-2011, (Exhibit EU-91).

6.1663. The probative value of this data, however, is limited by two considerations. First, the figures the European Union provides reflect *actual* distributions to shareholders and share repurchases, and so do not necessarily reflect what EADS' *expectations* were regarding the future availability of such funds that it could have anticipated directing to the A350XWB programme at either launch or the First Contract Date. Second, the extent to which EADS would have been willing to channel such funds to the A350XWB programme, even if EADS had anticipated their availability, is speculative. On the one hand, we note an EADS presentation from April 2009 that lists "{r}educed dividends" as an option to help "{p}rotect {EADS'} conservative balance sheet"[2963] and we accept that EADS' investors would likely have understood that the success of the A350XWB programme was important to EADS' financial health. Yet, that being the case, we see no reason to believe that a decision to cut shareholder distributions would have been without consequences. Indeed, we see little reason to doubt the United States' evidence or argument that such a decision would have been, at least in part, interpreted as an indicator of EADS' financial fragility by the market. Thus, it is still unclear to us the *extent* to which EADS would have felt comfortable reducing shareholder distributions such as dividends to help fund the A350XWB programme, and we detect no evidence of a historic practice by EADS of sacrificing shareholder distributions to help finance specific projects. Further, we note that EADS' 2013 share repurchase is being performed years after either of our reference dates and is being performed in the presence of A350XWB LA/MSF. In our view, therefore, it is of limited probative value.

6.1664. Thus, in our view, while we accept that the reduction of shareholder distributions may have been an option for EADS, and one that could likely have been pursued to some degree, the extent to which this was a credible source of funding for the A350XWB programme in the absence of A350XWB LA/MSF at any relevant time remains speculative.

Equity-related financing

6.1665. The European Union argues that EADS could have raised additional funds for the A350XWB project via equity-related financing. In support of its argument, the European Union refers to an EADS presentation from April 2009 which states that "{e}quity related financing" was in the EADS "Funding Toolbox". This presentation describes such financing in the following terms: "Equity, convertible bonds, hybrids[2964] if simulated stressed credit metrics signal a potential need to strengthen the capital structure."[2965]

6.1666. We detect little evidence on the record upon which to assess the EADS' ability to raise funds in this manner in the absence of A350XWB LA/MSF. What evidence does exist appears ambiguous. In this context, we recall the March 2007 testimony of Mr Russell of the UK Shareholder Executive before the British House of Commons:

> There is no doubt, if you look out on the financing of Airbus, that there will come a point where they will need to raise additional capital. They have not yet provided us with detailed forecasts so we do not precisely know, but in terms of analysts' reviews of the business it is pretty clear that they will need some sort of support. It is not clear whether they may not just be able to raise that money *from shareholders* and the capital markets.[2966] (emphasis added)

6.1667. Further, the UK Appraisal mentions the possibility of EADS raising equity-type financing, it does not discuss the ease with which EADS could do so, and does not appear to suggest that it would have been a viable alternative to receiving A350XWB LA/MSF.[2967] Moreover, in December 2009, EADS then-CEO Mr Gallois reportedly denied that the A350XWB would require additional "shareholder" funding.[2968] Assuming that the shareholder financing Mr Gallois had in

[2963] Gerard Adsuar, Corporate Executive, EADS Finance and Treasury, "Cash Drivers and Enterprise Value", EADS presentation, Global Investor Forum, 1-2 April 2009, (Exhibit USA-33), slide 16.

[2964] We recall that, insofar as the term "hybrid" refers to **[***]**.

[2965] Gerard Adsuar, Corporate Executive, EADS Finance and Treasury, "Cash Drivers and Enterprise Value", EADS presentation, Global Investor Forum, 1-2 April 2009, (Exhibit USA-33), slide 15.

[2966] UK House of Commons Trade and Industry Committee, "Recent Developments with Airbus", Ninth Report of Session 2006-07, Volume II: Oral and written evidence, 25 July 2007, (Exhibit EU-177).

[2967] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 13.

[2968] Pilita Clark and Peggy Hollinger, "Deferrals to take toll on EAD's cash pile", *Financial Times*, December 2009, (Exhibit USA-153).

mind may amount to equity-like financing, this report suggests that EADS was considering this financing option. However, Mr Gallois made this statement after the conclusion of certain A350XWB LA/MSF measures, and therefore any confidence he may have had at this time regarding the ability to raise such financing was likely to have been affected by the presence of those contracts.

6.1668. In our view, this evidence suggests that EADS was at least contemplating the option of raising funds via equity-like financing, but provides almost no insight into EADS' willingness or ability to do so in the absence of A350XWB LA/MSF. Thus, while we accept that raising equity-related financing may have been an option for EADS, and one that could likely have been pursued to some degree, the extent to which this was a credible source of funding for the A350XWB programme in the absence of A350XWB LA/MSF at any relevant time remains somewhat speculative.

EADS cash

6.1669. The European Union argues that EADS could have funded, at least in part, the A350XWB project with cash in the absence of A350XWB LA/MSF. In support of its argument, the European Union refers to the CompetitionRx Report, which provides HSBI projections of EADS' gross and net cash positions from 2007 through 2011 taken from the 2007 Operating Plan[2969], and projections of EADS' gross and net cash positions from 2009 through 2013 taken from the 2009 Operating Plan.[2970] The CompetitionRx Report also provides EADS' actual gross and net cash positions for the years 2006 through 2009.[2971] The Supplemental CompetitionRx Report further contains EADS' actual quarterly gross and net cash balances for **[***]** (the Quarterly EADS Cash Balances).[2972] Further, the European Union provides EADS' actual gross cash balances for the years 2000 through 2011.[2973]

6.1670. Given the manner in which the parties have structured their arguments in this context, we find it most helpful to assess the issues associated with these cash positions in three parts. First, we consider issues associated with the nature of *gross* and *net* cash (actual and projected) positions. Second, in light of the issues discussed in the first part, we assess issues associated with the *actual* and *projected* net cash positions. Finally, based on these discussions, we then identify what conclusions we can draw from the offered cash positions.

Gross and net cash

6.1671. The United States argues that EADS' gross cash positions are misleading because "{g}ross cash is very different from funds that could easily be diverted to the A350 XWB program, because it does not reflect the uses to which the gross cash was put, either directly through commitments to other EADS activities or indirectly by providing investors with confidence that EADS has sufficient financial cushion to address future contingencies."[2974] The European Union rejects the United States' assertion that EADS' gross cash positions are irrelevant. The European Union argues that because "{t}he difference between gross and net cash is the amount of financing liabilities", then "{a}s long as these can be replaced when they fall due − for example a corporate bond that is replaced by a new corporate bond, as EADS did in 2009 − gross cash is a relevant consideration."[2975]

6.1672. Gross cash is the cash, cash equivalents and securities that a company has at a given time without deducting financial liabilities.[2976] However, funds that must cover such liabilities cannot reasonably be diverted to other uses. Thus, EADS' gross cash positions do not reliably

[2969] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), table 42 and annex G.1 (para. 14 and table 3) (Net cash positions can be calculated from subtracting "Financing liabilities" from "Cash, cash equivalent and securities").
[2970] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), table 39.
[2971] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 340 and table 36.
[2972] Supplemental CompetitionRx Report, (Exhibit EU-420) (BCI/HSBI), table 2.
[2973] EADS Gross Cash Status, EADS Corporate Finance 2000-2011, (Exhibit EU-88) (BCI).
[2974] United States' second written submission, para. 628.
[2975] European Union's second written submission, fn 1612.
[2976] See CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 317; and United States' comments on the European Union's response to Panel question No. 47, para. 135.

approximate how much cash was free to direct to the A350XWB programme. We note the European Union's argument that "{a}s long as {EADS' financial liabilities} can be replaced when they fall due − for example a corporate bond that is replaced by a new corporate bond, as EADS did in 2009 − gross cash is a relevant consideration."[2977] The European Union's point appears to be that EADS' gross cash levels meaningfully approximate how much cash was free to divert to the A350XWB programme because whatever amounts of cash were directed to pay for financial liabilities EADS would simply replace them with new monies. We detect two ways EADS could have done this. First, EADS could replace the cash with that raised from debt. We address EADS' ability to finance the A350XWB programme with debt further below, so we need not address this possibility here. Second, EADS could replace the monies with revenues. However, we detect no basis upon which to simply assume that EADS' scheduled payments of financial liabilities coincided with incoming positive cash streams in any meaningful way. Thus, this argument does not, in our view, salvage the materiality of EADS' gross cash positions in this context.

6.1673. We next evaluate the relevance of EADS' net cash positions. Net cash is a company's gross cash less financial liabilities at a given time.[2978] At the outset, we take note of how the character of net cash positions interacts with the European Union's argument in this context. EADS' net cash position at any point in time is simply the accumulated result of its positive and negative cash flows up until that time, less financial liabilities. Thus, if EADS were to have financed the A350XWB programme in the absence of A350XWB LA/MSF with net cash, EADS would have had to have, at any given time, a net cash balance capable of covering not only the A350XWB-related expenses that had accrued up until that point that had been covered by member State financial assistance but also all its other relevant cash needs. With this in mind, we note that at year-end 2006 and 2009, EADS had net cash balances of approximately EUR 4.2 billion and EUR 9.8 billion, respectively, which exceed the total amount of monies to which Airbus is entitled under the A350XWB LA/MSF measures.[2979] The net cash projections contained in the 2007 and 2009 Operating Plans likewise indicate expected net cash levels that appear in excess of the total sum of monies received by Airbus under the A350XWB LA/MSF contracts for almost every year for which they contain net cash projections.[2980] Thus, it appears likely that, at least for the years such figures cover, EADS either had or was expected to have sufficient net cash levels that − on their face − were capable of covering the A350XWB-related expenses Airbus had accrued up until such times that A350XWB LA/MSF had instead covered.

6.1674. It appears clear to us, however, that the face value of these net cash positions does not actually represent the amount of cash that EADS could or would have directed to the A350XWB programme. First, we note that the record reflects that EADS was hesitant to substantially deplete its cash reserves during the relevant times. An EADS presentation from October 2006 states EADS' goal of protecting its conservative balance sheet structure and maintaining a minimum EUR 3 billion in "cash"[2981]; EADS' 2006 year-end gross and net cash positions were approximately EUR 10 billion and EUR 4.2 billion, respectively.[2982] In January 2009 − after Airbus had formally requested A350XWB LA/MSF measures − EADS then-CEO Mr Gallois reportedly stated that, even though EADS had "cash reserves" of approximately EUR 9 billion, "preserving that cash balance is a 'top priority' as funding dries up in the credit crunch."[2983] Further, an EADS presentation from

[2977] European Union's second written submission, fn 1612.

[2978] See CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 318; and United States' comments on the European Union's response to Panel question No. 47, para. 135.

[2979] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), table 36.

[2980] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), table 39 and annex G.1 (table 2). Of course, as explained above, we do not know to what extent these projected cash balances were impacted by the assumed receipt of member State financial assistance that materialized as A350XWB LA/MSF.

[2981] Hans Peter Ring, Chief Financial Officer, "Safe Harbor Statement", "Roadmap", and "Recent Press Quotes", slides 2, 11 and 12 from "A New Base for the Future", EADS presentation, Global Investor Forum, 19-20 October 2006, (Exhibit USA-358), slide 11.

[2982] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), table 36.

[2983] Emma Vandore, "Airbus A350 development on track" *The Associated Press*, 14 January 2009, (Exhibit USA-139). We note that EADS' 2008 year-end net cash balance was approximately EUR 9 billion, and therefore the above-quoted report, and likely Mr Gallois, appeared to be referring to net cash. (CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), table 36). In contrast, EADS' 2008 year-end gross cash balance was roughly EUR 13.7 billion. (CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), table 36)

April 2009 indicated EADS' focus on protecting its conservative balance sheet structure and its specific goal of maintaining a minimum of EUR 5 billion gross cash.[2984]

6.1675. In our view, the record reflects compelling reasons as to why EADS would be hesitant to deplete its cash reserves to a significant degree. For instance, EADS may well have needed the cash to cover contingencies arising from not only its non-LCA businesses but also cost overruns and/or revenue shortfalls associated with Airbus' LCA programmes. We recall that unexpected A380 delays that accumulated in the latter part of 2006 had massive expected impacts on EADS' cash positions for multiple years into the future. Further, we recall that the A350XWB programme itself carried significant risks, the occurrence of which would put further strain on EADS' financial resources. In short, not only were the net cash projections themselves subject to uncertainties, but it was also uncertain as to what specific cash needs EADS would have in the future.

6.1676. Moreover, maintaining certain minimum levels of net cash was important for EADS' predicted ability to raise debt while maintaining an acceptable credit rating. The CompetitionRx Report explains that "{a}n important aspect of the S&P methodology {which measures EADS' debt-carrying capacity} for both 'A' and 'BBB+' ratings for EADS, is that EADS should hold a minimum amount of Net Cash."[2985] At launch and the First Contract Date, these minimum amounts were EUR 2 billion and EUR 2.4 billion, respectively.[2986] Therefore, it is reasonably clear to us that at least a portion of EADS' net cash positions would have to be held in reserve in order to maintain a proper balance between its ability to raise debt and its maintenance of an acceptable credit rating.[2987]

6.1677. Additionally, EADS likely had aspirations for the use of such cash beyond spending it on the A350XWB programme, even if such aspirations had not yet resulted in financial liabilities at the time the relevant net cash positions were calculated. As the Appellate Body explained, "EADS … {is a} large compan{y} with several business units beyond aircraft production, all of which would have competed for internal financial resources."[2988] We note the European Union's assertion that EADS could have de-prioritized other programmes and channelled more resources to the A350XWB.[2989] This may be, but the extent to which this could have occurred is not clear.

6.1678. Finally, we note the United States' argument that EADS' net cash positions are flawed because they are not less EADS' outstanding LA/MSF liabilities.[2990] Insofar as this argument addresses the impact of pre-A350XWB LA/MSF on EADS' cash positions, we save such considerations for the later section of this Report analysing the impact of those measures on the A350XWB programme. Insofar as this argument addresses the A350XWB LA/MSF measures, we consider this argument immaterial. As explained more fully in the subsection immediately below, the only fully relevant cash position before us that likely reflects A350XWB LA/MSF disbursements is EADS' actual 2009 year-end cash position, but that impact is immaterial as a practical matter to our analysis of EADS' cash positions.[2991]

Actual and projected cash positions

6.1679. As is apparent from the discussion immediately above, EADS' net cash positions provide substantially more reliable − albeit far from perfect − bases upon which to conduct our current inquiry than do EADS' gross cash positions. Therefore, in this section, we focus on EADS' actual and projected *net* cash positions.

[2984] Gerard Adsuar, Corporate Executive, EADS Finance and Treasury, "Cash Drivers and Enterprise Value", EADS presentation, Global Investor Forum, 1-2 April 2009, (Exhibit USA-33), slide 16.
[2985] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 319.
[2986] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), paras. 319 and 320.
[2987] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), annex G.1 (para. 14) (Indicating interplay between these financial considerations).
[2988] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, para. 1343.
[2989] European Union's response to Panel question Nos. 126 (paras. 160-173) and 135 (para. 117).
[2990] United States' comments on the European Union's response to Panel question No. 47, para. 135.
[2991] The impact of the Operating Plans' likely presumed receipt of member State financial aid in a form other than A350XWB LA/MSF on its financial projections' reliability has already been discussed further above.

6.1680. We first recall our earlier observations as to why a snapshot of EADS' finances, including actual net cash positions, in 2006 and 2009 are of limited utility in the context of our present inquiry. That is, because EADS had to fund the A350XWB programme over a long period of time going forward from either 2006 or 2009 and therefore had to be comfortable not only with its present financial situation but also with how that situation would evolve over time.

6.1681. The United States further argues that the use of EADS' actual year-end 2009 cash balance amounts to an improper *ex post* perspective on EADS' ability to fund the A350XWB programme because such data postdate the First Contract Date.[2992] We recall that the Contracting Period extended beyond year-end **[***]**. Therefore, EADS would have had its actual year-end **[***]** cash balances in hand before it concluded certain A350XWB LA/MSF contracts. Thus, in our view, EADS' **[***]** actual year-end cash position is, at least to some extent, relevant.[2993]

6.1682. Second, the United States argues that EADS' actual cash position in 2009 reflects disbursements made under the A350XWB LA/MSF contracts, and therefore cannot be used to demonstrate EADS' ability to fund the A350XWB programme in the absence of A350XWB LA/MSF.[2994] According to the European Union, Airbus received approximately EUR **[***]** from the A350XWB LA/MSF contracts in **[***]**.[2995] This, however, represents less than **[***]** of EADS' gross and net 2009 year-end cash balances, which were approximately EUR 15.1 billion and EUR 9.8 billion[2996], respectively. In our view, this amount is too small to meaningfully impact these cash positions. We therefore consider the United States' point, while technically valid, to be immaterial as a practical matter in terms of adjusting such aggregate net cash positions.[2997]

6.1683. The United States also argues that the CompetitionRx Report does not test and verify as reasonable the assumptions underlying the Operating Plans' financial projections, which include EADS' projected net cash positions.[2998] The European Union argues that this criticism is misplaced. The European Union explains that the Operating Plans are EADS' "most important financial planning tool"[2999] because:

> {T}he EADS operating plan expresses … the commercially sensitive financial implications of the detailed operating results forecast for each of its businesses and its planned investments. The plan informs management of the timing of expected cash flows from operations, and of cash requirements to fund investments. This enables the company to decide on the timing and amount of its investments, and to structure its

[2992] United States' comments on the European Union's response to Panel question No. 47, para. 137.

[2993] The European Union makes the point that the 2009 Operating Plan's projection of what EADS' cash balance would be at the end of 2009 turned out to be less than EADS' actual year-end 2009 cash balance. Therefore, the European Union asserts that EADS' view of its cash position was somewhat more optimistic at the end of 2009 than it had been at the beginning of the year. (European Union's response to Panel question No. 127, paras. 260-261). We accept this assertion as likely correct.

[2994] United States' comments on the European Union's response to Panel question No. 133, para. 67.

[2995] European Union's response to Panel question No. 133, fn 182 and accompanying text. See also European Union's response to Panel question No. 86, para. 335.

[2996] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 340 and table 36.

[2997] The European Union appears to argue that such a correction is in any event unnecessary because "the funds received {from LA/MSF} are spent on development costs, and are thus reflected not in gross cash, but in the assets and expenses that result from the development process of a new aircraft." (European Union's response to Panel question No. 133, para. 101). Further, we note that the European Union argues that A350XWB LA/MSF payments could not have affected EADS' actual cash balances because "absent EU member State financing for the … A350XWB, EADS and Airbus would nonetheless have launched … {the} aircraft programme{}, and would have financed {its} development" via avenues that did not involve expending cash, e.g. RSP financing and raising debt. (European Union's response to Panel question No. 133, para. 102). Given our conclusion that the United States' argument that these points address is immaterial with respect to the impact of A350XWB LA/MSF disbursements on certain of EADS' actual cash positions, we need neither accept nor reject the European Union's assertions in this context. We question, however, whether the European Union's former argument makes sense in light of the fungible nature of money, and observe that its second seems to assume that we will reach certain conclusions regarding Airbus' ability to fund the A350XWB in the absence of LA/MSF.

[2998] United States' comments on the European Union's response to Panel question No. 47, para. 136.

[2999] European Union's response to Panel question No. 127, fn 414.

> dividend policy and long- and short-term borrowing so that it has the means to operate its businesses while maintaining its target minimum cash balances.[3000]

6.1684. The European Union has also explained that the Operating Plans cover all of EADS' operations including Airbus.[3001] Therefore, the European Union argues that EADS only has incentives to prepare reliable Operating Plans.[3002] The Operating Plans themselves are not before us, nor does the CompetitionRx Report perform any analysis regarding the reliability of the documents' financial projections. However, given that EADS is a sophisticated company we presume that it understands its businesses. Further, given the Operating Plans' importance to EADS, we see no reason to believe that the Operating Plans' financial projections represent anything but EADS' best informed judgment regarding what its future financial position will be in the years covered by the plans.

6.1685. These conclusions, however, give us pause regarding the probative value of the Operating Plans' financial projections in this context. If the Operating Plans are meant to provide EADS with a best guess of what its financial condition would be in certain future years, then we see no reason to doubt that such projections would include monies obtained from instruments involving member State involvement, assuming that EADS had an expectation of such involvement at the time the Operating Plans were authored.[3003] In our view, EADS almost certainly had such expectations.[3004] The CompetitionRx Report states that the 2007 and 2009 Operating Plans were authored in **[***]** 2006 and **[***]** 2008, respectively.[3005] Therefore, EADS authored the 2007 Operating Plan contemporaneously with the A350XWB Business Case, which assumed the receipt of the Launch Financing Instrument. Moreover, at the time EADS authored its 2009 Operating Plan, Airbus was on the cusp of formally requesting financial support for the A350XWB programme in the form of LA/MSF measures, specifically, from the member States. Thus, in our view, it is extremely likely that the 2007 and 2009 Operating Plans' financial projections, including their cash projections, were formulated in the presence of expectations that Airbus would fund the A350XWB programme, at least in part, with instruments involving member State support that manifested themselves as A350XWB LA/MSF.

6.1686. To be clear, we do not believe it necessarily to be the case that the Operating Plans anticipated the receipt of LA/MSF-type measures, specifically, in connection with the A350XWB programme. Indeed, the A350XWB Business Case assumed at the time of launch that A350XWB member State financial assistance would take a form other than LA/MSF measures, and EADS authored both Operating Plans before Airbus formally requested A350XWB LA/MSF from the member States, let alone negotiated or concluded them. Moreover, we recognize that the CompetitionRx Report states that the Operating Plans do not contain "revenue streams" for any *LA/MSF specifically* associated with the A350XWB.[3006] In our view, however, this makes it no less likely that the Operating Plans expected *some form* of A350XWB member State financial assistance and factored that assumption into its financial projections. This is problematic because the correctness of this assumption necessarily flowed from the receipt of A350XWB LA/MSF, and insofar as the projections assumed the receipt of some other form of member State financial support they are flawed because such other support never materialized. In either instance, the accuracy of the projections for our purposes is diminished unless we are able to control for the influence of those assumptions.

[3000] European Union's response to Panel question No. 127, para. 256. (footnote omitted)

[3001] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 307.

[3002] European Union's response to Panel question No. 127, paras. 254-258 and 268.

[3003] We note that the CompetitionRx Report states that the 2007 and 2009 Operating Plans "include" "{t}he A350XWB development programme". (CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 307)

[3004] We further note that the Business Case assumed that the Launch Financing Instrument would be drawn upon in certain years covered by both the 2007 and 2009 Operating Plans. (A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 65 (third bullet, first sub-bullet))

[3005] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), paras. 342, 345, and 351.

[3006] We note that the CompetitionRx Report explains that the Operating Plans reflects LA/MSF "{reimbursable launch investment (RLI)} funding flows for programmes *other than* the A350XWB". (CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 307) (emphasis added). It is clear to us from this statement, and other record evidence, that the term "RLI" is interchangeable with "LA/MSF". (See e.g. A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 65 (referring to **[***]** granted in connection with previous Airbus LCA); and UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), p. 1 (referring to negotiations regarding "Repayable Launch investment")).

6.1687. Unfortunately, we lack any insight into how such assumptions regarding the receipt of member State financial assistance played out in the Operating Plans' financial projections. Neither the European Union nor the CompetitionRx Report explains how the Operating Plans assumed the A350XWB programme would be funded and it appears questionable whether the CompetitionRx Report's authors were given access to such information. The CompetitionRx Report indicates that the authors had only been given "extracts" from the Operating Plans[3007], and had not been given access to "the assumptions on which the Operating Plans are based" − other than projected Airbus LCA deliveries − or "the business/financial model which was used to create the {Profit and Loss summary}, Balance Sheet and Cash Flow information that {they} received."[3008] However, we detect no reasonable basis to presume that the expected financial involvement of the member States leading to the receipt of perhaps billions of euros would have no material impact on EADS' financial projections, including projected cash positions.[3009]

6.1688. In sum, we consider it most likely that EADS prepared the Operating Plans' financial projections, including the cash position projections, while assuming the presence of significant financial assistance from the member States. We consider it most reasonable to conclude that such an assumption affected those financial projections, albeit in an unknown manner and to an unknown degree. We have explained above why this is problematic in this context. It is unclear to us, therefore, the extent to which the projected cash positions are reliable in determining the extent to which EADS could have funded the A350XWB programme with cash in the absence of A350XWB LA/MSF.

6.1689. Finally, we note a further significant limitation of the net cash projections offered by the European Union in this context. The A350XWB programme is a multi-year programme. Further, the European Union has explained that the Operating Plans only perform financial projections for a limited number of years because such projections become too uncertain after that temporal horizon.[3010] The costs associated with the A350XWB programme, however, were projected to continue to arise after the temporal horizon of even the 2009 Operating Plan's projections, and, in fact, that temporal horizon did not even extend to the point in time at which the A350XWB programme was expected to begin generating a positive cash flow[3011] let alone to the point in time years later when the project was expected to reach its overall financial break-even point for Airbus.[3012] In sum, during the 2006-2009 period, EADS was unable to project its own finances through the time-period in which EADS expected itself to be most exposed to the significant costs (and associated risks) of the A350XWB programme. We further make special note that this time-period was the same one in which EADS observed other Airbus programmes (e.g. the A380 and A400M) experience serious development and production problems.[3013]

Conclusions regarding EADS cash

6.1690. Given our above discussions, in our view, the *most* relevant cash positions at our disposal for purposes of our present inquiry are the 2007 and 2009 Operating Plans' net cash projections, EADS' actual end-of-year net cash balances from 2006 and 2009, and the net Quarterly EADS Cash Balances. These positions, however, have certain issues associated with them that call into question their reliability as bases upon which to conduct our present inquiry. Despite these questions, however, given the magnitude of EADS' relevant cash positions discussed above, we consider that moving forward from either the time of launch or the First Contract Date EADS had

[3007] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 15.

[3008] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 309.

[3009] We recall that the Business Case assumed that the Launch Financing Instrument would be fully drawn by **[***]**, and **[***]** rather than as **[***]**. (A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 65). This makes it unclear to us whether EADS would have considered the Launch Financing Instrument, or any other presumed financing instrument it would receive from the member States, as a financial liability, and therefore to what extent inclusion of such an instrument in the Operating Plans' financial projections would impact gross and/or net cash positions. Indeed, we recall that EADS does not treat LA/MSF loans as financial liabilities due to their peculiar nature. (See Supplemental CompetitionRx Report, (Exhibit EU-420) (BCI/HSBI), paras. 99-102).

[3010] European Union's response to Panel question No. 127, para. 266.

[3011] See CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), p. 40 (figure 8).

[3012] See A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 70.

[3013] The 2007 Operating Plan would have been even less useful on this front, as its projections ended at roughly the same time as the A350XWB's spending profile was set to increase as its entered production phases.

significant cash that it could have diverted to the A350XWB programme. Given the uncertainties surrounding its future cash positions at each of these dates, however, and given the competing pressures on its cash reserves, doing so would have entailed significant risks for EADS − risks that unsecured, back-loaded and success-dependent instruments like LA/MSF tend to shift away from EADS.

EADS debt capacity

6.1691. The European Union argues that, in the absence of A350XWB LA/MSF, EADS could have funded the A350XWB programme, at least in part, with debt. In support of this argument, the European Union offers the CompetitionRx Report, which performs two funding analyses, the purpose of which are to measure "the amount of additional financial debt EADS could incur while maintaining its current credit rating" or the amount of additional financial debt EADS could incur if it were willing to accept a certain other relative credit rating (which is HSBI)[3014] at the time of launch and as of the First Contract Date.[3015]

6.1692. In doing so, the CompetitionRx Report uses the so-called S&P methodology[3016], and bases its analysis on financial projections in the 2007 and 2009 Operating Plans. The report first calculates what EADS' additional debt capacity would be for each of the five years 2007-2011 and 2009-2013 if EADS were to maintain a "BBB+" credit rating or an "A" credit rating.[3017] Then, the report again performs those calculations, but under the assumption that EADS was operating in a "worst case scenario" laid out in the CompetitionRx Report.[3018] The results of such calculations are HSBI. However, the CompetitionRx Report concludes that, in the absence of A350XWB LA/MSF, EADS had significant debt capacity with which to fund the A350XWB programme even under the worst case scenario at each reference date.[3019]

6.1693. We note several aspects of this debt-capacity analysis. First, the CompetitionRx Report's funding analyses rely on the EADS Operating Plans' financial projections, including projected cash positions.[3020] We have already explained our reservations about the value of these projections in any purported demonstration of EADS' ability to fund the A350XWB programme in the absence of A350XWB LA/MSF. These reservations stem from the fact that such projections likely assume the presence of member State financial support for the A350XWB programme, support that manifested itself as A350XWB LA/MSF. We therefore have similar reservations regarding the probative value of these debt-capacity analyses.

6.1694. Second, the CompetitionRx Report's calculations of EADS' additional debt capacity while maintaining an "A" S&P credit rating are of unclear probative value to us. The purpose of the CompetitionRx Report's funding analysis is to measure "the amount of additional financial debt EADS could incur while maintaining its current credit rating"[3021] or the amount of debt EADS could raise if it were willing to accept a certain other relative credit rating (which is HSBI).[3022] The relevant times with respect to which this calculation should be performed are the launch date and the Contracting Period. But EADS' S&P credit rating was below an "A" rating from the time of launch − when it was an "A-" − through the Contracting Period, by which time it had been furthered lowered to a "BBB+/stable".[3023] Thus, analysing what EADS' additional debt capacity

[3014] Supplemental CompetitionRx Report, (Exhibit EU-420) (BCI/HSBI), para. 101(ii).

[3015] The United States generally argues that the CompetitionRx Report redacts too much of the specific data underlying its own conclusions, and therefore the Panel cannot effectively verify those conclusions. (United States' comments on the European Union's response to Panel question No. 47, para. 113). We consider this argument immaterial in this context. The CompetitionRx Report was significantly redacted when originally submitted. The European Union, at the Panel's request, submitted a revised version with certain redactions removed, but others remain. The remaining redactions in the CompetitionRx Report generally pertain to the report's viability analyses, however, which we have already found we need neither accept nor reject.

[3016] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), section 7.3.

[3017] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), section 9.3.

[3018] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), sections 5.4 and 9.4.

[3019] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), paras. 381, 386, 389, and 391-396.

[3020] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), paras. 312, 314, and 403; and Supplemental CompetitionRx Report, (Exhibit EU-420) (BCI/HSBI), para. 96.

[3021] Supplemental CompetitionRx Report, (Exhibit EU-420) (BCI/HSBI), para. 101(i).

[3022] Supplemental CompetitionRx Report, (Exhibit EU-420) (BCI/HSBI), para. 101(ii).

[3023] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), table 41. Certain statements in the CompetitionRx Report convince us that we should focus on what EADS' S&P rating was in this context, rather

would be with an "A" S&P credit rating appears to satisfy neither stated purpose of the funding analyses, unless we assume that the "A" rating is meant to be generalized to include an "A-" rating as well. However, because EADS' calculated debt capacity is lower assuming an "A" rating, as opposed to a "BBB+" rating, the former calculation still appears relevant in that it could be interpreted as a conservative debt-capacity calculation, evidencing EADS' capacity to raise debt even assuming the presence of restrictive conditions.[3024] That being said, it also appears important to note in this context that the S&P and other credit ratings related reports in the record illustrate that EADS' debt load is only one of many factors that affect its credit rating.[3025] Thus, even if EADS could have raised significantly more debt and not be necessarily *disqualified* from maintaining a specific credit rating due to carrying that specific debt load, it does *not* mean that EADS would have been *entitled* to that credit rating while carrying that specific debt load.

6.1695. Third, the United States argues that the CompetitionRx Report's claim that it evaluates EADS' debt capacity under the report's "worst case scenario" is misleading because the report assumes that certain negative portions of that scenario, especially the "deep recession" aspect of the scenario, occur after the latest year addressed in the report's debt-capacity analyses, i.e. 2013.[3026] The European Union argues that, although the United States' argument is factually correct, HSBI information indicates that by the occurrence of the "deep recession" aspect of the worst case scenario the A350XWB programme would have changed in material respects so as to make this United States argument immaterial.[3027] It is true that the worst case scenario that the CompetitionRx Report contemplates temporally extends beyond the years for which the report calculates EADS' worst-case-scenario projected debt capacities.[3028] In our view, however, this argument highlights a limitation on the utility of the Operating Plans' financial projections in projecting EADS' ability to fund long-term projects like the A350XWB, i.e. the costly project lasts longer than EADS is willing to project its own finances.

6.1696. Fourth, according to the CompetitionRx Report, at the time of launch and at the First Contract Date, EADS had three pre-existing debt facilities, i.e. the Euro Medium Term Note (EMTN) Programme, a commercial paper programme and a Revolving Syndicated Credit Facility.[3029] The CompetitionRx Report further indicates that there was still EUR 1.5 billion and EUR 500 million in undrawn funds under the EMTN programme at approximately the time of launch and the First Contract Date, respectively.[3030] The European Union argues that the presence of such undrawn amounts is evidence that EADS could indeed have raised enough debt to fund the A350XWB programme in the absence of A350XWB LA/MSF.[3031] We accept that the presence of such undrawn funds suggests EADS ability to raise at least some additional debt in the relevant time-periods.

6.1697. Fifth, we recognize that the CompetitionRx Report's projections of EADS' additional debt capacity are just that − projections. Projections are subject to uncertainties. We have discussed the many and significant uncertainties EADS and Airbus faced at launch and the First Contract

than ratings promulgated by, for example, Fitch or Moody's. (CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 313)

[3024] We note that certain HSBI information indicates that it would be improper to consider what EADS' debt capacity would be at a rating lower than a BBB+. (CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 313)

[3025] See e.g. Moody's Investors Service, Global Credit Research, *Rating Action: Moody's places EADS' Ratings Under Review for Possible Downgrade*, 22 September 2006, (Exhibit USA-509); Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: 'A/A-1' Ratings Placed On Credit Watch Negative On Further A380 Delays*, 3 October 2006, (Exhibit USA-510); Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: S&PCORRECT: EADS Rating Cut To 'A-/A-2', L-T Still On Watch Neg, On Further Restructure Delay*, 12 October 2006, (Exhibit USA-511); Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS Long-Term Ratings Remain On Watch Neg After Profit Warning*, 17 January 2007, (Exhibit USA-512); Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: EADS L-T CCR Cut to 'BBB+'; Off Watch Neg; Outlook Stable; Teleconf May 11 @ 2:30PM BST*, 10 May 2007, (Exhibit USA-513); Standard & Poor's Global Credit Portal Ratings Direct, *European Aeronautic Defence and Space Co. N.V.*, 14 October 2009, (Exhibit USA-514); and Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: European Aeronautic Defence and Space Co. N.V. Long-Term Rating Raised to 'A-' On Lower Project Risks; Outlook Stable*, 22 September 2010, (Exhibit USA-516).

[3026] United States' comments on the European Union's response to Panel question No. 47, para. 138.

[3027] European Union's response to Panel question No. 127, para. 263.

[3028] See CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), part 5.3.

[3029] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 358.

[3030] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), table 40.

[3031] European Union's response to Panel question No. 135, paras. 114-115.

Date, including significant risks associated with the A350XWB programme. Therefore, in order for EADS to fund the programme with significant new debt at either launch or the First Contract Date, one must assume that EADS would have been confident that it could effectively carry such debt going forward despite the financial uncertainties it faced. Moreover, as discussed already, EADS would have had to do so when EADS very well would have had to carry such debt for a longer period of time than it was comfortable projecting its own finances in the Operating Plans.

6.1698. Sixth, we note that the CompetitionRx Report supports its conclusion that EADS could have funded the A350XWB programme by raising additional debt by asserting that, in August 2009, EADS placed a EUR 1 billion, seven-year bond on the capital markets that was nine times over-subscribed during its 30-minute offer period.[3032] While such an accomplishment does suggest EADS' ability to raise significant debt during the Contracting Period, we note that this offering occurred after the First Contract Date, and therefore the market likely had factored the grant of at least some A350XWB LA/MSF, and likely more to come, into its reaction to the bond offering. Therefore, we consider its probative value to be somewhat limited.[3033]

6.1699. Finally, we note that the CompetitionRx Report's conclusions that EADS could comfortably have raised enough debt to fund the A350XWB programme in the absence of A350XWB LA/MSF contradict certain language in the UK Appraisal. We recall that we had no material reservations regarding the objectivity or reliability of the UK Appraisal's analysis on this score.[3034] We did, however, have certain reservations concerning the reliability of the data upon which the CompetitionRx Report relies for its debt-funding analyses. Perhaps most notably, the Operating Plans' financial projections upon which such debt-funding analyses are based most likely assume the presence of member State financial support for the A350XWB, support that manifested itself as A350XWB LA/MSF. The temporal duration of the Operating Plans' projections are, as explained above, also somewhat limited in scope.

6.1700. In sum, we have reservations regarding the probative value of the CompetitionRx Report's debt-capacity analyses. Nevertheless, we detect little evidence that EADS would have had *no* appreciable debt-raising capacity in the relevant time periods in the absence of A350XWB LA/MSF. Thus, we accept that this was likely an option that could have been pursued to at least some material degree.

The A350XWB's base-case NPV, strategic benefits and risks

6.1701. Above, we examined EADS' and Airbus' ability to effectively fund the A350XWB programme. Here, we examine the other factors that we enumerated as part of our viability inquiry. These are the programme's base-case NPV, the programme's strategic benefits, and the programme's risks. We examine these three issues together *vis-à-vis* the date of launch and the First Contract Date in turn.

[3032] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), para. 404.

[3033] We note that the European Union argues that it would have been easy for EADS to raise market financing for the A350XWB programme because the A350XWB would compete in a lucrative market. (European Union's second written submission, para. 1065). In our view, this is too simplistic and assumes too much. For one, this argument directly conflicts with the fact that certain Airbus suppliers could not find market sources to finance their A350XWB projects, as described in the State Aid Decisions. We also recall that the A350XWB faced competition from the Boeing 777 and 787, and was assumed to be subject to significant risks. Indeed, even the Business Case outlined a plausible worst case scenario in which the programme would have a **[***]**. Further, we recall that the original panel found that Airbus could not have launched certain of its prior LCA as and when it did without direct LA/MSF – programmes that Airbus presumably believed would be lucrative.

[3034] UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), paras. 13 and 16 (lines 2-4). While we take special note of the numeric amount referenced in paragraph 13 of the UK Appraisal and how it relates to the total amount to which Airbus ultimately received under the A350XWB LA/MSF contracts, we further recall that the UK Appraisal's conclusions regarding the ease with which Airbus could effectively fund the A350XWB programme in the absence of member State financial assistance were apparently formulated on the basis of assumptions regarding the likely costs of the A350XWB programme that differed materially, but perhaps not drastically, from Airbus' contemporaneous expectations. See UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), paras. 7 (lines 5-6) and 9 (line1).

Launch

6.1702. We recall our earlier conclusion that, at the time of launch, Airbus and EADS assumed the receipt of A350XWB member State financial assistance in the form of the Launch Financing Instrument. Therefore, we evaluate the impact of the Launch Financing Instrument on the viability of the A350XWB programme on 1 December 2006.[3035]

6.1703. We recall that the A350XWB Business Case calculated that the Launch Financing Instrument would contribute a specific monetary value[3036] to the programme's projected NPV in the base case. Without this contribution, the United States argues that, given the high risks associated with the A350XWB programme, the base-case NPV would have been too low to yield a viable programme.[3037] The European Union argues that the A350XWB programme was viable at launch even without the NPV effects of the Launch Financing Instrument. The European Union points out that even without the instrument's NPV contribution the programme still had a significant positive NPV, and that the strategic considerations of the programme would also have proven a powerful incentive for Airbus to have launched the A350XWB in the absence of the Launch Financing Instrument.[3038] The European Union further asserts that the perceived risks associated with the programme were already factored into the programme's forecast NPV in the base case and therefore could not alter the programme's viability in the manner that the United States argues.[3039]

6.1704. The A350XWB Business Case forecasts a significant positive NPV for the programme in the base case even without the Launch Financing Instrument's contribution.[3040] This alone, however, does not necessarily convince us that the A350XWB was viable in the absence of the Launch Financing Instrument. The A350XWB programme was subject to significant risks and uncertainties at the time of launch. Such risks and uncertainties are explained at length in sections above, and we recall that many are stated in the Business Case itself. We accept that such risks were considered in the base case, which reflects the conditions that Airbus believed would result if the risks associated with the A350XWB programme materialized in the most likely manner. But this does not exhaust the relevance of such risks in a viability assessment, as the European Union suggests.[3041] This is so because the possibility of unfavourable scenarios occurring − even if they are not considered to be the most likely scenarios − and the severity of their downside will obviously influence Airbus' choices regarding whether to pursue an LCA programme.[3042] We

[3035] To be clear, we do not understand the United States to argue that either Airbus or EADS assumed at the time of launch that the Launch Financing Instrument was a LA/MSF-type instrument. Further, the United States does not challenge the Launch Financing Instrument, as a discrete measure, as a subsidy in this compliance proceeding. Rather, it is our understanding that the United States argues that the factual circumstances surrounding the A350XWB's launch and Airbus' later receipt of A350XWB LA/MSF compel the Panel to treat any expectations that Airbus had at the time of launch regarding the eventual receipt of member State financial assistance *vis-à-vis* the A350XWB programme as attributable to the A350XWB LA/MSF measures challenged in this compliance proceeding. We accept the United States' position *arguendo* in this section because, as explained below, even if we do so, it yields the same material conclusion as to the impact of A350XWB LA/MSF on the A350XWB programme as does adopting the European Union's bright-line approach, i.e. evaluating the impact of A350XWB LA/MSF starting from the First Contract Date.

[3036] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 67 (second to last column in chart).

[3037] United States' second written submission, paras. 550 and 645-671; opening statement (non-public) (BCI/HSBI), para. 16; and comments on the European Union's response to Panel question No. 47, paras. 152-155.

[3038] European Union's response to Panel question No. 47, paras. 133 and 140.

[3039] European Union's response to Panel question No. 47, paras. 183-188.

[3040] We note that the Business Case enumerates several key assumptions in the Business Case that enable the launch to be "feasible". (A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 79). The receipt of the Launch Financing Instrument is not among these considerations. Of course, this may simply be due to the fact that Airbus did not perceive the non-receipt of member State financial assistance to be a material risk worth considering.

[3041] See European Union's response to Panel question No. 47, para. 186 ("Thus, in each instance, the worst case would have to be *the most likely outcome − i.e. it would have to become the base case* − to undermine the viability of the business case."). (emphasis original)

[3042] For instance, a company may calculate that there is a 49% chance that it would go bankrupt if it launched a product and a 51% chance it would make a small amount of money. Alternately, the company may calculate that there is a 1% chance that the company would lose a small amount of money if it launched a product and a 99% chance that it will make an enormous amount of money. Neither loss scenario is the base

therefore recall that the "worst case scenario" in the Business Case, without the NPV effects of the Launch Financing Instrument, **[***]**. We further note that the European Union has explained that the "worst case scenario" used in the A350XWB Business Case was based on Airbus' actual experiences with problems arising in relation to certain of its predecessor LCA programmes.[3043]

6.1705. Such high risks and uncertainties would normally give us considerable pause regarding an LCA programme's viability. However, as described at length in our factual narrative above, the A350XWB was far from a normal LCA programme to Airbus, and had significant strategic importance for Airbus' overall competitive position in the LCA markets. We recall that the Business Case outlined severe strategic disadvantages and costs to Airbus that were assumed to accrue in the absence of the A350XWB programme[3044], and less severe but still apparently significant costs for Airbus in the event of a **[***]** in the programme.[3045] In our view, such considerations provided sufficient incentive to go ahead with the programme assuming that it could be effectively funded, notwithstanding the risks associated with the programme.

6.1706. We further note that, as explained further above, we consider it likely that the positive NPV that the Business Case projects in the absence of the Launch Financing Instrument included assumptions regarding how Airbus would in fact fund the programme. Insofar as this is true, it would appear to imply that Airbus assumed that it *could* in fact fund the programme in the absence of the assumed receipt of member State financial assistance, i.e. with financing on market terms, although the record does not indicate what specific form(s) Airbus assumed such alternate financing would take.[3046] The validity of this assumption, therefore, would appear to be a prerequisite for us to accept the base-case NPV as reliable. At this point, therefore, we note that further below we conclude that Airbus and EADS most likely had the necessary financial resources to fund the A350XWB programme with financing on market terms in the absence of member State financial assistance in the form of A350XWB LA/MSF. We further note that the United States has presented no evidence, and we detect none in the record, indicating that Airbus' utilization of any combination of alternate financial resources we find to have been at Airbus' disposal would require a material downward adjustment to the Business Case's forecast NPV for the programme. In our view, therefore, we see no basis upon which to call the Business Case's calculated base-case NPV in the absence of the Launch Financing Instrument into material question as representative of what Airbus and EADS considered the NPV of the A350XWB to be at the time of launch in the absence of member State financial assistance.

6.1707. We also note that the CompetitionRx Report contains an *ex post facto* viability analysis of the A350XWB programme at launch apparently assuming the absence of member State financial assistance. The CompetitionRx Report finds that the programme had a significantly higher NPV at launch than the Business Case concluded.[3047] The parties contest the soundness of this viability analysis. We consider it unnecessary to either accept or reject this viability analysis at this point. We see no reason to believe that the A350XWB Business Case represents anything but Airbus' best efforts under the circumstances to analyse the programme's NPV at launch. The United States never argues to the contrary and in fact endorses the reliability of the analysis to some degree.[3048] However, the CompetitionRx Report does not purport to justify the Business Case's NPV analysis as reasonable, but instead independently calculates an entirely new NPV for the programme. We fail to see the materiality of an *ex post facto* business case that, on its face, does not reflect

case, yet a company will obviously be more tentative about launching the former product than the latter, especially if it lacks confidence in its calculated chances of success.

[3043] Declaration of Agnès Luquet, 10 September 2013, (Exhibit EU-422) (HSBI), para 4.

[3044] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 53 and 91-94.

[3045] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 90. The European Union has indicated that it is appropriate to consider such strategic considerations separate from the Business Case's NPV assessment of the A350XWB programme. (See European Union's second written submission, para. 986 (HSBI)). We detect no reason to doubt the propriety of this approach. The risks of the programme must further be discounted by the potential upsides of the programme that the Business Case assumes might materialize that would presumably increase the forecast NPV. (A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 71 (first main bullet))

[3046] We recall that the Business Case states that it assumes the use of **[***]**. (A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 66 (seventh bullet, second sub-bullet)). Thus, we note that any financing methods the Business Case assumed Airbus would use to fund the A350XWB programme in the absence of the Launch Financing Instrument would have been non-project specific.

[3047] CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), part 1.

[3048] United States' comments on the European Union's response to Panel question No. 127, para. 45.

Airbus' or EADS' thinking at the time of launch, and indeed, contradicts it to a significant degree. Thus, under the circumstances, we decline to consider the CompetitionRx Report's NPV analysis of the A350XWB's viability at launch any further.[3049]

First Contract Date

6.1708. The United States argues that the A350XWB LA/MSF measures had a material impact on the A350XWB programme's viability upon their conclusion beginning on the First Contract Date. We understand the United States to make two related arguments in this context. The United States' first argument appears to be that the A350XWB Business Case demonstrates that the A350XWB programme would have been non-viable in the absence of A350XWB LA/MSF as of the First Contract Date. The United States frames this argument in somewhat vague terms. The United States recalls that the Business Case assumed the receipt of the Launch Financing Instrument, which was assumed to impact the A350XWB programme's NPV by a specific amount.[3050] The United States then appears to ask the Panel to conclude that, without the effects of the Launch Financing Instrument, the programme would have been non-viable at launch[3051], and that the forecast NPV effects of the Launch Financing Instrument approximate, or perhaps are exceeded by, the actual effect that the A350XWB LA/MSF had on the programme's forecast NPV.[3052] Thus, the United States, apparently projecting the Business Case from the time of launch to the First Contract Date, concludes that the A350XWB programme would be non-viable without A350XWB LA/MSF as well. The United States' second argument is that the Dorman Report[3053] – discussed at length in the original proceeding[3054] and re-submitted by the United States in this compliance proceeding – demonstrates that the A350XWB LA/MSF measures enhanced the NPV of the A350XWB programme, thereby making Airbus more likely to continue to pursue the programme than Airbus would have in the measures' absence.[3055]

6.1709. In order to meaningfully address these arguments, we must first place this inquiry into its proper context. Above, we determined that, at the time of launch, the A350XWB programme's base-case NPV and strategic benefits provided Airbus and EADS with sufficient motivation to pursue the programme assuming that it could be effectively funded, even in the presence of significant programme risks and in the absence of any presumed receipt of member State financial assistance. Therefore, if we hold all such things constant with respect to the programme from the time of launch through the Contracting Period, then we see no reason to think that the same conclusion would not continue to hold true through the Contracting Period in the absence of A350XWB LA/MSF. In other words, at this point in our analysis, in order for the United States to demonstrate that the A350XWB programme had become non-viable at some point during the Contracting Period in the absence of the A350XWB LA/MSF contracts, the United States must demonstrate that something relevant changed with respect to the programme between launch and, at the latest, the end of the Contracting Period that made member State financial assistance suddenly necessary to produce a viable programme. More specifically, the United States must show that the attractiveness of the programme decreased in Airbus' eyes over this time-period, a trend for which the A350XWB LA/MSF contracts could potentially compensate. We therefore recall that our viability analysis at this point focusses on three aspects of the A350XWB programme, i.e. its base-case NPV, its risks, and its strategic importance to the Airbus' business as a whole. The United States' arguments do not address how any such factors changed for the worse in Airbus' eyes from the time of launch through the end of the Contracting Period. Therefore, even assuming that the A350XWB LA/MSF contracts had the NPV effects that the United States claims,

[3049] We note that the European Union produced a Supplemental CompetitionRx Report that expands upon the viability analyses performed in the original CompetitionRx Report. (Supplemental CompetitionRx Report, (Exhibit EU-420) (BCI/HSBI)). Our conclusions regarding the original CompetitionRx Report's viability analysis similarly apply to the Supplementary CompetitionRx Report's related viability analyses.

[3050] United States' response to Panel question No. 117, para. 30(c) (HSBI).

[3051] United States' second written submission, paras. 550 and 645-671; opening statement (non-public) (BCI/HSBI), para. 16; and comments on the European Union's response to Panel question No. 47, paras. 152-155.

[3052] See generally United States' second written submission, paras. 645-672; and response to Panel question No. 117, para. 31.

[3053] Dr Gary J. Dorman, NERA, "The Effect of Launch Aid on the Economics of Commercial Airplane Programs", 6 November 2006, (Dorman Report), (Exhibit USA-299) (BCI).

[3054] See e.g. Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1882-7.1912; and Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1245-1254.

[3055] See generally United States' response to Panel question No. 117.

it has offered insufficient evidence with which to support its viability theories at the First Contract Date.

6.1710. We further emphasize that, in our view, the record does not otherwise support the United States' argument in this context. First, we discern no persuasive evidence that the A350XWB programme's base-case NPV, as calculated in the Business Case in the absence of member State financial assistance, materially deteriorated from launch through the Contracting Period. Of the economic factors that the Business Case discussed in its sensitivity analysis, we find evidence that only one such factor had changed in a manner adverse to Airbus during this time. Specifically, the forecast NRC of the programme had **[***]** from EUR **[***]**[3056] at launch to approximately EUR 12 billion at the First Contract Date.[3057] This likely had some negative impact on the forecast NPV of the A350XWB programme. However, it is important not to overstate this impact. Even if this NRC shift had negatively affected the programme's base-case NPV, we consider that this effect would be offset by the likely somewhat lessening of risks associated with the programme and especially the increased strategic importance of continuing with the programme, discussed below.[3058]

6.1711. Second, we detect little information on the record indicating that the programme's risks materially increased from launch through the Contracting Period. We do note that certain evidence indicates that, during the Contracting Period, Airbus may have begun to anticipate delays in the programme, although not of the magnitude of the A380 delays.[3059] We further note, however, that the European Union argues that the development progress Airbus had achieved with the A350XWB programme by the First Contract Date meant that Airbus had materially reduced developmental risks associated with the A350XWB by that time.[3060] The United States does not materially contest the general assertion that risks associated with an LCA programme decrease to some degree as the manufacturer completes developmental work with respect to that LCA, and we see no particular reason to doubt it.[3061] Thus, the risks associated with the programme most likely improved to some degree from Airbus' perspective during the relevant time.[3062]

6.1712. Third, we detect little in the record indicating that the strategic consequences for Airbus of failing to pursue the A350XWB programme, as articulated in the Business Case, had lessened from launch through the Contracting Period. In fact, certain negative consequences for Airbus of

[3056] A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 56 (second to last column in chart).

[3057] Pilita Clark and Peggy Hollinger, "Deferrals to take toll on EAD's cash pile", *Financial Times*, December 2009, (Exhibit USA-153) (reporting that EADS then-CEO Louis Gallois indicated that EADS expected the cost of the A350XWB project to be approximately EUR 12 billion). HSBI evidence supports the accuracy of this figure. (European Union's response to Panel question No. 138, paras. 288-289 (HSBI))

[3058] We consider that this is so notwithstanding the United States' assertions that the A350XWB's NRCs had risen beyond EUR 12 billion by the First Contract Date, and that another relevant expectation regarding the A350XWB programme had also deteriorated by this time. (See HSBI version of the United States' comments on the European Union's response to Panel question No. 127, para. 37; and UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), paras. 7 (lines 5-6) and 9 (line1)). In so arguing, however, the United States relies on data in the UK Appraisal. In our view, the focus of any viability analysis is properly on Airbus' and/or EADS' perceptions regarding the A350XWB programme for the simple reason that they determined the course of the programme. There is no evidence that either Airbus or EADS endorsed such analyses in the UK Appraisal. Further, there is evidence that neither Airbus nor EADS shared the UK Appraisal's view that the other relevant expectation that the United States identifies in this context had deteriorated between launch and the First Contract Date. (Compare A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 50 (first bullet), with Business case-related document, (Exhibit EU-(Article 13)-35) (HSBI), slide 12, and CompetitionRx Report, (Exhibit EU-127) (BCI/HSBI), tables 5 and 6).

[3059] Jens Flottau, "Déjà vu: More problems beset the A350 program, but schedule margins are now razor thin, a situation the manufacturer has faced before", *Aviation Week & Space Technology*, 15 February 2010, (Exhibit USA-515) (reporting that certain analysts expected a roughly half-year delay of the A350XWB entry into service, although it also reports that Airbus then-COO Fabrice Bregier stated that Airbus believed that it could still make the mid-2013 goal); and Daniel Michaels, "Airbus Tries New Way of Building Its Planes", *The Wall Street Journal*, 12 July 2012, (Exhibit EU-417), p. 13 (reporting that in November 2010 Airbus "disclosed a delay of roughly six months").

[3060] See e.g. European Union's first written submission, para. 1126.

[3061] Indeed, we recall that the United States' Schneider Declaration indicated that this developmental period was generally characterized by relatively high risks. See above para. 6.1577.

[3062] This does not, in our view, contradict our earlier finding in any way that significant developmental risks remained regarding the A350XWB programme at the time the A350XWB LA/MSF contracts were being negotiated and concluded. See above para. 6.525 et seq.

abandoning the A350XWB programme at the First Contract Date had likely grown significantly since launch. For example, Airbus had significantly more orders for the A350XWB at the First Contract Date than it had for the Original A350 at the time of launch.[3063] It follows that failing to progress with the A350XWB at the First Contract Date would likely have created far greater contractual liabilities for Airbus than would have cancelling the programme in December 2006. Further, Airbus would have sacrificed its considerable sunk costs in the programme if it had failed to proceed with it at the First Contract Date, along with the associated costs of re-orienting the company away from A350XWB production. We also consider that the reputational damage from cancelling not one, but two A350 programmes for Airbus would have been significant. It therefore appears that the strategic considerations associated with the A350XWB programme likely weighed significantly more in favour of continuing with the programme during the Contracting Period than they did at launch.

c Conclusions with respect to viability and the direct effects of A350XWB LA/MSF

6.1713. It is apparent that the A350XWB programme was of significant strategic importance to Airbus and, in the short-term, critical for Airbus' ability to continue to be a mainstream competitor against Boeing. The evidence shows that around the time of launch, Airbus was of the view that it needed to develop a new generation of twin-aisle aircraft in the near term in order to compete effectively against the Boeing 777 and 787, not only to maintain market share in the twin-aisle segment, but also to avoid losing ground in other markets with respect to customers interested in fleet commonality. It was also important for Airbus to launch the A350XWB programme to avoid contractual penalties arising from potential cancellations of Original A350 orders.[3064] In our view, these considerations would have provided Airbus with a strong commercial incentive to go ahead with the A350XWB programme, assuming that it could find appropriate financing.

6.1714. Similarly, after pursuing the A350XWB programme for any appreciable length of time following launch (e.g. from December 2006 to the First Contract Date), we believe that EADS and Airbus would have been, as a practical matter, committed to the A350XWB programme. The economic and reputational costs of stopping the programme in mid-stream would likely have been extremely high and would have given the companies even greater incentive to pursue the programme than existed at the time of launch.[3065]

6.1715. Nevertheless, although strategically important, the launch and development of the A350XWB programme in the absence of A350XWB LA/MSF would have been more complicated, more costly and riskier than with A350XWB LA/MSF.[3066] While we believe, on balance, that the assortment of financial resources that Airbus, via EADS, had at its disposal would have been, collectively, sufficient to effectively replace the monies Airbus is entitled to under the actual A350XWB LA/MSF contracts, we do not share the European Union's optimism regarding how easily EADS could have martialled those resources for the purpose of the A350XWB programme. Each of the potentially available − and to some degree speculative − funding options would have carried its

[3063] Compare Ascend database, Orders, data request as of 26 June 2012, (Exhibit EU-19) (indicating that Airbus had secured over 400 orders for the A350XWB by the First Contract Date), with A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 53 (stating that Airbus had **[***]** at that time).

[3064] See generally above paras. 6.1542 et seq. ("A350XWB origins") (discussing, *inter alia*, the circumstances that led Airbus to believe that it had to abandon the Original A350 in favour of the A350XWB), 6.1568 et seq. ("Launch and the A350XWB Business Case") (discussing, *inter alia*, the Business Case's assessment of the A350XWB's strategic importance), 6.1602 (discussing UK Appraisal's assessment of the A350XWB's strategic importance to Airbus) and 6.1701 et seq. (discussing the strategic importance of the A350XWB to a viability analysis).

[3065] See generally, above paras. 6.1547 et seq. ("Pre-launch development progress") (discussing the development progress made by Airbus on the A350XWB programme by the First Contract Date) and 6.1708 et seq. (discussing consequences for Airbus if it had terminated the A350XWB programme at or around the First Contract Date).

[3066] We note, in this respect, that our conclusions concerning EADS' ability to fund the A350XWB programme in the absence of A350XWB LA/MSF closely approximate those found in the UK Appraisal, which − given the apparent rigour of its underlying analysis, timeliness, and objective context − in our view represents the most credible source (albeit imperfect, particularly given the European Union's failure to produce the underlying due diligence by **[***]** of analysis in the record regarding EADS' ability to proceed with the A350XWB programme in the absence of A350XWB LA/MSF.

own risks, costs and/or difficulties.[3067] In our view, any single one of the potentially available options would have been insufficient on its own to replace either the absolute monetary value[3068] or the relative financial security provided through the generally back-loaded, unsecured and success-dependent repayment terms of A350XWB LA/MSF. This is especially so because none of the potentially available funding options would have provided Airbus with the same significant "risk-sharing" features as LA/MSF.[3069] Moreover, we cannot assess the availability of each option in a vacuum; implementation of one would have generally limited the availability of others. For example, reducing EADS' cash reserves could have put EADS' credit rating at further risk.[3070] Enhancing RSP involvement could invite production disruptions or at least required additional or a diversion of management resources, which could, in turn, have adversely impacted Airbus' other aircraft programmes and/or possibly even EADS' expected cash flows.[3071] Cutting dividends may have shaken investor confidence in the company, making raising debt or equity more difficult.[3072] Moreover, we recall that EADS' financial situation, at the time of launch through the Contracting Period, displayed considerable problems.[3073]

6.1716. In sum, 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. All this suggests that had EADS pursued the A350XWB programme at any relevant time in the absence of either: (a) assurances from the member States regarding their willingness to help finance the programme or (b) the A350XWB LA/MSF measures themselves, EADS would have had to accept that it may have been putting the overall health of the company at greater and, we believe considerable, risk. This, in turn, leads us to believe that it is highly likely that, in the absence of A350XWB LA/MSF, 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.[3074]

[3067] See generally, above paras. 6.1588 et seq. ("LA/MSF negotiations") (discussing, *inter alia*, evidence suggesting that EADS' desire for LA/MSF measures stemmed from the lack of other options), 6.1600 et seq. ("The UK Appraisal") (discussing certain EADS' ability to fund the A350XWB programme in the absence of government assistance), 6.1613 et seq. ("The State Aid Decisions") (discussing, *inter alia*, challenges for aerospace companies in accessing market financing for projects) and 6.1640 et seq. ("Ability to fund") (discussing funding options and specific issues with such options).

[3068] This accords with certain statements by the European Union itself regarding how the A350XWB programme would have been funded in the absence of A350XWB LA/MSF. (See e.g. European Union's response to Panel question No. 135, para. 118 (arguing that "with the assistance of its financial advisors, EADS would put in place a *mix of financing* … that meets the financing requirement and maximises the profits of the programme.") (emphasis added))

[3069] We note that the European Union never argues that Airbus or EADS would have funded the A350XWB programme in any part with financing instruments resembling the A350XWB LA/MSF measures in the absence of A350XWB LA/MSF. We further recall that the A350XWB Business Case **[***]**. A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 66 (seventh bullet, second sub-bullet)

[3070] See above para. 6.1676.

[3071] See above para. 6.1646 et seq. ("Risk-sharing partners") (discussing, *inter alia*, risks associated with enhanced use of RSPs).

[3072] See above para. 6.1660 et seq. ("Reduction in shareholder distributions") (discussing, *inter alia*, evidence regarding market reactions to companies that announce dividend reductions).

[3073] See generally, above paras. 6.1550 et seq. ("Airbus/EADS financial position pre-launch"), 6.1580 et seq. ("Airbus/EADS financial position post-launch") and 6.1600 et seq. ("The UK Appraisal") (discussing the UK Appraisal that contains certain relevant HSBI assessments of EADS' financial position). See also above para. 6.1689 (discussing significant limitations of the EADS Operating Plans' financial projections that existed during these times).

[3074] Making such compromises would, in our view, be a way to reduce costs and/or risk associated with the programme. Further, we note several pieces of evidence in the record indicating how financial troubles may delay an LCA programme. (See e.g. UK Appraisal, (Exhibit EU-(Article 13)-34) (HSBI), para. 16 (lines 2-4); UK House of Commons Business, Innovation and Skills Committee, "Full Speed ahead: maintaining UK excellence in motorsport and aerospace", Sixth Report of Session 2009-10, Report, formal minutes, and oral and written evidence, 9 March 2010, (Exhibit USA-44), para. 18 (explaining that "{e}ach {LA/MSF} applicant has to demonstrate … that government investment is *essential* for the project to proceed on the *scale* and in the *timeframe specified*") (emphasis added); "Competitiveness of the EU Aerospace Industry with focus on Aeronautics Industry, within the framework contract of sectoral competitiveness studies ENTR/06/054", Ecorys, December 2009, (Exhibit USA-151), p. 27 (discussing the possibility of delays in A350XWB programme in light of economic conditions brought about by the financial crisis); Pilita Clark and Peggy Hollinger, "Deferrals to take toll on EAD's cash pile", *Financial Times*, December 2009, (Exhibit USA-153) (reporting that industry analysts had doubts regarding EADS' ability to pursue its new LCA programmes); Standard & Poor's Global Credit Portal Ratings Direct, *Research Update: S&PCORRECT: EADS Rating Cut To 'A-/A-2', L-T Still On Watch*

6.1717. Thus, on balance, although we believe that the alternative funding options available to Airbus coupled with the strong strategic reasons it had for launching and developing a new generation twin-aisle aircraft meant that the A350XWB programme would have been sufficiently attractive and, therefore, *viable* to Airbus even without A350XWB LA/MSF, we consider that the evidence demonstrates that pursuing the programme in the absence of A350XWB LA/MSF would have been a more complicated, more costly and riskier endeavour. On this basis, we find that, in the absence of A350XWB LA/MSF, whether we measure its impact from the time of launch or from the First Contract Date, the Airbus company that *actually existed* in the 2006 to 2010 period would have been able to launch and bring to market the A350XWB or an A350XWB-type aircraft. However, in our view, *without* A350XWB LA/MSF, the Airbus company that *actually existed* could have pursued such a programme only by a narrow margin, with a high likelihood that it 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.

d Implication of our findings for determining whether a non-subsidized Airbus operating in the "unlikely" counterfactual scenarios would have launched and brought to market the A350XWB

6.1718. In our view, it follows from our findings with respect to the impact of A350XWB LA/MSF on the subsidized Airbus entity's ability to launch and bring to market the A350XWB that a *non-subsidized* Airbus operating in the "unlikely" counterfactual scenarios would have been unable to launch the A350XWB or an A350XWB-type aircraft by the end of 2006.

6.1719. We recall that under both "unlikely" counterfactual scenarios a non-subsidized Airbus operating in the 2001 to 2006 period would have been a "much weaker" company "with at best a more limited offering of LCA models". A non-subsidized Airbus would not have launched the A300, A310 and A340; and while both an A320-type *and* an A330-type aircraft might have been launched sometime *after* 1987 and 1991, respectively, this would have been on the basis of no previous LCA experience at all with respect to the former, and considerably less experience and know-how than was the case with the original A330 in respect of the latter. In this regard, we note that a *subsidized* Airbus actually needed 15 years of combined experience in the development, production and sale of the its first *two* LCA, the A300 and A310 (launched in 1969 and 1978 respectively), before it was in a position to launch the A320 in 1984. Similarly, the A330 was launched by a *subsidized* Airbus, in conjunction with the A340, three years later in 1987 − that is, after 18 years of combined experience with its first *two twin-aisle* aircraft.

6.1720. In our view, these facts suggest that the A320-type aircraft that a non-subsidized Airbus could have been selling in 2006 would have been significantly less competitive to the version that was being marketed at the same time by the subsidized Airbus. Likewise, to the extent that a non-subsidized Airbus would have been able to launch an A330-type aircraft before the end of 2006, it is difficult to imagine, in the light of the actual experiences of a *subsidized* Airbus, how this would have been possible *only three years* after the launch of an A320-type aircraft. This also leads us to believe that any A330-type aircraft that a non-subsidized Airbus could have been selling in 2006 would have been significantly less advanced to the version that was being marketed at the same time by the subsidized Airbus.

6.1721. Turning to the A380, we recall that the Appellate Body rejected the European Union's contention that a non-subsidized Airbus operating in the "unlikely" counterfactual scenarios would have launched the A380 in 2000, *even assuming* that an A320-type *and* an A330-type aircraft had been launched in 1987 and 1991, respectively. In our view, given what we know about the LCA sector and the relevant aircraft actually developed by a *subsidized* Airbus, these findings are a sufficient basis to conclude that a non-subsidized Airbus existing in the "unlikely" counterfactual scenarios could *not* have launched an A380-type aircraft even by the end of 2006. While it is possible that a non-subsidized Airbus would have been a stronger competitor at the end of 2006 (when the A350XWB was actually launched) compared to the year 2000 (when the A380 was

Neg, On Further Restructure Delay, 12 October 2006, (Exhibit USA-511), p. 2 (discussing possibility of launch delay); and A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 90 (contemplating a **[***]** even in the presence of the assumed receipt of the Launch Financing Instrument, but also outlining costs of such a delay)).

actually launched)[3075], it would still have lacked the relevant experience and financial resources needed to launch a programme as risky and ambitious as the A380 actually was in the absence of LA/MSF. In this regard, it is important to recall that, in the "unlikely" counterfactual scenarios, any A320-type and A330-type aircraft would be, respectively, Airbus' *first* LCA of any kind and Airbus' *first* twin-aisle aircraft. However, the A380 was actually launched by Airbus only after having developed, brought to market and sold *four* models (including several derivatives) of *subsidized* twin-aisle aircraft. The A380 was Airbus' *fifth subsidized* twin-aisle LCA and its development was not free of significant complications and delays even for a producer as sophisticated as Airbus. In our view, these facts suggest that a *non-subsidized* Airbus existing in the "unlikely" counterfactual scenarios could *not* have launched an A380-type aircraft by the end of 2006.

6.1722. In the light of these considerations, it is apparent that a non-subsidized Airbus operating in the "unlikely" counterfactual scenarios at the end of the 2006 would not have had the same range and quality of aircraft on the market that the subsidized Airbus did at the time of the launch of the A350XWB. It follows, therefore, that a non-subsidized Airbus operating in the "unlikely" counterfactual scenarios would have had neither the technical or managerial expertise nor the financial resources that were available to the Airbus company that actually existed at the end of 2006. Accordingly, a *non-subsidized* Airbus existing in the "unlikely" counterfactual scenarios could *not* have launched the A350XWB or an A350XWB-type aircraft by the end of 2006.

6.1723. This conclusion is, we believe, confirmed when we consider the extent to which the *indirect effects* of *pre-A350XWB LA/MSF* contributed to the ability of the *subsidized* Airbus company that actually existed over the relevant period to undertake the A350XWB programme as and when it did. We describe the nature and impact of these indirect effects in the analysis that follows.

The impact of the *indirect effects* of pre-A350XWB LA/MSF (confirmation of our conclusion with respect to the "unlikely" counterfactual scenarios)

6.1724. As explained earlier in this Report, the *indirect effects* of LA/MSF take the form of "learning" effects, scope effects and financial effects. In this proceeding, the United States argues that the A350XWB programme benefitted from the following types of indirect effects:

> (1) financial effects, whereby the previous subsidized financing enables launches of subsequent models by alleviating the capital burdens that would otherwise exist; (2) the technology and learning effects, where there is a transfer of technology, knowledge and production processes that benefit subsequent LCA programs and that otherwise would not exist; (3) economies of scope and scale effects; and (4) revenue effects in the form of sales of earlier subsidized LCA that provide Airbus with revenue to help fund new launches that would not have been launched in the absence of LA/MSF to the earlier programs.[3076]

6.1725. In our analysis, we consider it most helpful to collectively refer to the "technology and learning effects" as "Learning Effects", the "financial effects" and "revenue effects" identified by the United States as "Financial Effects", and "economies of scope and scale" as "Scope and Scale Effects". We consider each in turn.

a Learning Effects

6.1726. The parties have advanced a large volume of evidence regarding the extent to which the A350XWB programme benefitted from the Learning Effects of pre-A350XWB LA/MSF arising from Airbus' previous, subsidized LCA programmes. Such evidence may be conceived of as falling into

[3075] Another possibility is, of course, that in the light of its less competitive product offering or offerings, the commercial position of a non-subsidized Airbus could have deteriorated between 2000 and 2006. We recall in this regard, that in one of the two "unlikely" counterfactual scenarios, a non-subsidized Airbus would have been in competition with two other, established, United States LCA producers. We found in the original proceeding that competition in this scenario could very well be "more fierce than competition between a subsidized new entrant … and an incumbent producer". (Panel Report*, EC and certain member States – Large Civil Aircraft*, paras. 7.1984 and 7.1995)

[3076] United States' second written submission, para. 401. See also United States' first written submission, paras. 375-378 (discussing indirect effects).

two general categories. First, the United States and the European Union present a series of duelling expert reports addressing Learning Effects.[3077] Second, there is historical record evidence in the form of press reports, the A350XWB Business Case, Airbus/EADS presentations and other materials. We examine each category of evidence in turn below with a view to determining the extent to which the A350XWB programme benefitted from Learning Effects arising from pre-A350XWB LA/MSF.

i Expert reports

A350XWB Chief Engineering Statement

6.1727. The A350XWB Chief Engineering Statement addresses three major relevant topics: (a) challenges Airbus faces when designing a composite aircraft like the A350XWB; (b) the new development processes that Airbus implemented to design and construct the A350XWB; and (c) the A350XWB's technological novelties.

6.1728. The Statement explains in detail the systemic and novel challenges that Airbus faced when constructing, for the first time, an LCA with a composite fuselage. The statement explains that such use of composites presented major challenges for Airbus in designing the A350XWB. It asserts that "{r}eaching the point where we could launch the A350XWB in 2006 was the result of a two-year process of pre-launch research and development"[3078] during which Airbus had engaged in a "continuous development of composite-based technologies".[3079] This development is defined by a "step-by-step process" whereby Airbus begins with many different materials, tests them, eliminates relatively poorly performing materials, and eventually chooses a final material for a given component.[3080] Such testing starts "with very simple structures such as rods, flat plates, or flat sandwich structures" and then gradually moves onto more complex structures.[3081]

6.1729. The statement also describes the DARE programme that Airbus implemented in developing the A350XWB, including novel ways in which Airbus employed RSPs.[3082] The DARE programme is discussed in more detail in previous sections of this Report.[3083]

6.1730. The statement then describes certain A350XWB technological novelties. The statement first explains that the "key novelties that make the A350XWB so innovative were selected between the end of concept (MG3) (the date of which is HSBI)[3084] and the freeze of the aircraft's architecture (MG5)"[3085] (which began at an HSBI date but concluded in April 2009).[3086] The main such novelty was the inclusion of CFRP wings and a pressurized CFRP fuselage.[3087] The statement also explains that, largely as a result of such composite structures, the fuselage, wings, nose section, and tail section of the A350XWB employ novel designs and are manufactured using new production methods.[3088] Moreover, the A350XWB's cruising speed would be faster than previous Airbus LCA, requiring a new aerodynamic shape for the wing.[3089] Further, the statement highlights certain new features the A350XWB has, such as new wing-tip devices, and a new fuel system, and

[3077] We note that such expert reports cite to historical record evidence at times to support their arguments.
[3078] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 15.
[3079] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 15.
[3080] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 22.
[3081] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 22.
[3082] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 35-58.
[3083] For discussions regarding the DARE programme, see generally above paras. 6.498 et seq. and 6.1548 et seq.
[3084] The exact date is HSBI. A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 43 (line 3).
[3085] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 60.
[3086] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 50. See also Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428) (reporting that MG5 for the A350XWB-900 baseline variant was reached in late 2008, while Airbus was expected to reach MG5 with respect to other A350XWB variants later).
[3087] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 63.
[3088] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 69-111.
[3089] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 68.

a new-concept landing gear system.[3090] However, the statement concedes that the A350XWB's high-lift system shares certain similarities with the A380's.[3091]

6.1731. The statement also describes novelties in the A350XWB's on-board systems. The statement explains that these novelties, like the structural novelties, were selected between MG3 and MG5.[3092] The statement stresses that many systems novelties were required due to the knock-on effects of using a pressurized composite fuselage.[3093] The statement also indicates that the A350XWB will use a 2H2E (2 hydraulic / 2 electric) system to control the aircraft, although it is unclear to us to what extent the statement considers this is to be a novelty.[3094]

Boeing Schneider Declaration

6.1732. The United States relies heavily on the Boeing Schneider Declaration in this context. In relevant part, the Schneider Declaration concedes that the A350XWB incorporates "a set of new technologies, manufacturing tools, and production methods."[3095] However, the declaration stresses that Airbus' experience with prior LCA programmes would still be of critical importance to the A350XWB development process in three main respects: (a) general commercial aircraft development experience; (b) prior experience with composite structures; and (c) prior experience with on-board systems.[3096]

6.1733. The Schneider Declaration first emphasizes the importance of prior commercial aircraft programme experience when developing a new LCA. It explains that LCA are "incredibly complex machines", and therefore "it is almost impossible to overstate the paramount importance of prior commercial aircraft program experience, regardless of how many new technologies, new materials and new designs may be utilized on the new aircraft program."[3097] The declaration asserts that prior LCA programme experience is the only way for an LCA manufacturer to gain vital experience with respect to:

> (1) the commercial implications of technology trade-offs and integration across the entire range of systems that go into a commercial aircraft; (2) the design, integration and production of an aircraft at a reasonable cost and in a reasonable time, including the efficient use of computer-aided design software and commercial-scale manufacturing tools, and (3) the management of supplier, customer and shareholder relationships.[3098]

6.1734. The Schneider Declaration indicates that the manner in which Airbus' experience with the A380 programme benefitted the A350XWB programme provides an example of the value of prior LCA programme experience. The declaration asserts that the A380 programme exposed flaws in Airbus' design and development processes, allowing Airbus to learn from such mistakes and fix them before they could manifest themselves in the complex A350XWB DARE process.[3099] The declaration further stresses that "when a company sets an ambitious development schedule for a new aircraft program {i.e. DARE} … it puts a premium on all of its prior program experience."[3100] This is so because "prior commercial program experience is precisely what gives a manufacturer the ability (and the credibility to sell its ability) to utilize and integrate new technologies successfully"[3101] and "{u}nder tight program development timelines, every bit of prior commercial expertise matters immensely in helping engineers to select and assess the commercial viability of technologies (both proven and new) to be included on the new platform."[3102]

[3090] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 103-111.
[3091] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 107.
[3092] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 113.
[3093] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), paras. 115-116.
[3094] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 128.
[3095] Schneider Declaration, (Exhibit USA-354) (BCI), para. 15.
[3096] Schneider Declaration, (Exhibit USA-354) (BCI), para. 16.
[3097] Schneider Declaration, (Exhibit USA-354) (BCI), para. 17.
[3098] Schneider Declaration, (Exhibit USA-354) (BCI), para. 18.
[3099] Schneider Declaration, (Exhibit USA-354) (BCI), para. 19.
[3100] Schneider Declaration, (Exhibit USA-354) (BCI), para. 21.
[3101] Schneider Declaration, (Exhibit USA-354) (BCI), para. 20.
[3102] Schneider Declaration, (Exhibit USA-354) (BCI), para. 21.

6.1735. The Schneider Declaration also stresses the importance of Airbus' prior experience with composite structures. The declaration concedes that the A350XWB is the first Airbus LCA "to utilize a composite fuselage and composite-metallic hybrid wing."[3103] Thus, Boeing "appreciate{s} that significant design and manufacturing work is required to resolve the … challenges created by the decision to use composite technology in these applications."[3104] However, the declaration claims that even when designing a composite fuselage, the experiences gained from manufacturing metallic fuselages is still useful because "it provides the baseline against which to compare the advantages and disadvantages of composites."[3105] Moreover, the declaration asserts that Airbus' prior experience with composite structures would nonetheless be of significant value to Airbus in the A350XWB programme.[3106] The declaration notes that the A350XWB would build on Airbus' evolutionary track of increased use of composite structures: (a) composite leading edges of tailfins on the A300; (b) composite rudders on the A300 and A310 and composite vertical stabilizers on the A310-300; (c) all-composite tail on the A320; (d) composite horizontal stabilizer on the A340 and carbon-fibre keel beam and aft pressure bulkhead on the A340-500/600; and (e) composite vertical tail, horizontal stabilizers, centre wing box, aft pressure bulkhead, and rear fuselage sections on the A380.[3107] The declaration asserts that the A380's composite structures, given their large size and diversity, gave Airbus "its most significant commercial composites experience" because Airbus had learned to "not just to design very large-scale composite parts, but also to manufacture such large composite structures at a reasonable cost", and developed "'in flight'" data regarding the performance of such composite structures in addition to the service performance data it accumulated through its use of composites on previous LCA.[3108] The declaration also specifically claims that the A350XWB's single-piece composite engine inlet **[***]**, and Airbus gained experience with certain tools used in A350XWB composite-part production from its A380 programme.[3109] Finally, the declaration claims that certain Airbus production facilities have specialized in certain composite production tasks over time, and have used such specialized knowledge in connection with the A350XWB programme. For example, the Airbus **[***]** built the composite centre wing box for the A380 and will do the same for the A350XWB.[3110]

6.1736. The Schneider Declaration also identifies A350XWB systems and components that it claims are derived from those used on prior Airbus LCA. These include the **[***]**[3111], certain aerodynamic systems such as the **[***]**[3112], and certain aspects of the nose section (e.g. **[***]**, a 6-pane flight deck window system (A380), **[***]**, and a **[***]**.[3113] The statement also identifies certain other systems, structures, and development processes used in connection with the A350XWB that it claims benefitted from Airbus' prior LCA experience.[3114]

Boeing Bair Declaration

6.1737. The United States submits the Declaration of Michael Bair, the Senior Vice President of Marketing for Boeing Commercial Aircraft, asserting, in relevant part, that it is extremely difficult for potential new entrants in the LCA market (i.e. Bombardier, COMAC, Mitsubishi Aircraft Corporation, Sukhoi, and United Aircraft Corporation) to convince customers to purchase their LCA because, lacking a track record of success, such new entrants' LCAs are perceived as being relatively more risky.[3115]

A350XWB Chief Engineering Rebuttal

6.1738. In response to the Schneider Declaration, the European Union produces a rebuttal statement by Mr Gordon McConnell and his colleagues at Airbus engineering (the A350XWB Chief

[3103] Schneider Declaration, (Exhibit USA-354) (BCI), para. 22.
[3104] Schneider Declaration, (Exhibit USA-354) (BCI), para. 22. (footnote omitted)
[3105] Schneider Declaration, (Exhibit USA-354) (BCI), para. 29.
[3106] The Schneider Declaration asserts that Boeing drew heavily on its own prior experiences with composite structures when manufacturing the 787. (Schneider Declaration, (Exhibit USA-354) (BCI), para. 22)
[3107] Schneider Declaration, (Exhibit USA-354) (BCI), paras. 23-24.
[3108] Schneider Declaration, (Exhibit USA-354) (BCI), paras. 24 and 27.
[3109] Schneider Declaration, (Exhibit USA-354) (BCI), para. 26.
[3110] Schneider Declaration, (Exhibit USA-354) (BCI), para. 28.
[3111] Schneider Declaration, (Exhibit USA-354) (BCI), para. 31.
[3112] Schneider Declaration, (Exhibit USA-354) (BCI), para. 32.
[3113] Schneider Declaration, (Exhibit USA-354) (BCI), para. 33.
[3114] Schneider Declaration, (Exhibit USA-354) (BCI), paras. 31-38.
[3115] Bair Declaration, (Exhibit USA-339) (BCI), para. 30.

Engineering Rebuttal).[3116] The rebuttal asserts that the Schneider Declaration's assertions regarding the importance of Airbus' prior LCA programme experience when producing the A350XWB are flawed for two main reasons. First, it claims that even if Airbus did benefit somewhat from the use of components and systems derived from those previously used on prior Airbus LCA, "they are of minor significance compared to the biggest technological challenge … of the A350 XWB: its innovative composite fuselage, wing and related systems."[3117] Second, the rebuttal argues that Mr Schneider overestimates the benefits of Airbus' "general" prior LCA experience because such experience was largely not relevant when building the composite structures of the A350XWB.[3118] This is so because composites have different characteristics than metals[3119], leading to different design and production challenges.[3120]

6.1739. The rebuttal first addresses the relevance of prior LCA programme experience in connection with the A350XWB. It asserts that Airbus never recorded "in flight" data regarding the A380's pressurized composite structures, and therefore Airbus could not have benefitted from such information as the Schneider Declaration claims it did.[3121] It notes that the use of a pressurized fuselage is a first for Airbus, the addition of which presented significant engineering challenges, and that previous composite structures on Airbus LCA were only non-pressurized.[3122] Such new experiences with composites called for new engineering skills.[3123] Such experiences made the Airbus "engineers' previous experience with metallic aircraft considerably less relevant for the design, integration and production of the A350 XWB."[3124]

6.1740. The rebuttal statement then discusses the Schneider Declaration's more specific alleged links between the A350XWB and previous Airbus LCA programmes. We consider the following discussions particularly relevant:

- The statement addresses Mr Schneider's contention that the A350XWB derived its flight control architecture from the A380, and the United States' implication that the A350XWB's 2H2E system was derived from the A380's. The statement claims that the A380 had a 2H2E design, but the A350XWB uses a "2 hydraulic/*1 electric* (2H/1E)" design.[3125] Thus, the rebuttal statement argues that the A350XWB does not "reuse" the A380 system. However, the statement concedes that the United States is correct that the A350XWB's hydraulics will operate at 5,000 psi, the same as on the A380.[3126]

- The statement argues that the A350XWB wing design did not benefit from the A380's. It claims that the A350XWB's wings are characterized by a specific and unique high aspect ratio and low taper ratio, thus resulting in a new aerodynamic shape, developed using methods unavailable when Airbus designed the A380.[3127]

- The statement responds to the argument that the A350XWB programme benefitted from the lessons Airbus learned from its experience with cracks in the A380 wings. It indicates that the lessons were irrelevant because the problems "were specific to the A380 design" and because the cracks in the A380's wings were discovered only after the A350XWB design had been frozen.[3128]

[3116] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 1.
[3117] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 3.
[3118] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), paras. 4-5.
[3119] See generally NASA contractor report 159296, "Design considerations for composite fuselage structure of commercial transport aircraft", March 1981, (Exhibit EU-187).
[3120] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), paras. 5-8.
[3121] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 9.
[3122] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 10. We note that the fact that all pre-A350XWB Airbus LCA composite structures were *non-pressurized* renders the statement's previous assertion that Airbus gathered no in-flight data regarding the A380's *pressurized* composite structures hollow, and does not therefore rebut the Schneider Declaration's assertion that Airbus has been able to gain in-flight data regarding the performance of composite structures, generally, from its A380 experience.
[3123] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 12.
[3124] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 14.
[3125] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 17. (emphasis original)
[3126] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), fn 22.
[3127] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 20.
[3128] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 21.

- The statement argues that the only similarity between the A380 and the A350XWB composite engine inlets "is the single piece design concept."[3129] However, the two use different materials and design solutions, including the use of materials on the A350XWB's inlet that received patents.

- The statement argues that the composite centre wing boxes of the A350XWB and the A380 are dissimilar because they have a different architecture, material composition, size, and features.[3130]

- The statement argues that the United States exaggerates the extent to which the A350XWB benefitted from certain aerodynamic systems used on the A380, specifically the **[***]** which the statement concedes is similar to the A380's.[3131]

- The statement claims that the nose sections of the A350XWB and A380 are different because they are made of different materials.[3132] Further, the statement argues that the only similarity between the flight deck systems of the two aircraft is the number of window panes, i.e. six. However, the windows' designs and functionalities are different, most notably that the A350XWB's windows do not open, whereas the A380's do.[3133] Moreover, although the A350XWB's forward-swinging nose wheel is standard on Airbus and Boeing aircraft, it required re-design for the A350XWB.[3134]

- The statement argues that the A350XWB's advanced systems and flight deck components are either commercially available from suppliers (including the head-up display, dual integrated standby instrument system, and on-board airport navigation system) or standard on most Boeing and Airbus LCA (including the "brake to vacate" function, fly-by-wire, side-stick controls, internal displays, pilot interface with cursor control device and keyboard, features that comprise the "common flight deck" used on other Airbus LCA).[3135]

- The statement asserts that certain tools and facilities that Airbus used to design the A350XWB are owned by other entities, and are also used by other industry sectors, such as the automobile industry in the case of wind tunnels.[3136]

- The statement claims that a number of other A350XWB systems that the United States mentions in this context have "nothing in common with the corresponding systems on the A380".[3137] These include the variable frequency generators, which have different power, systems architecture, and were developed by a different supplier than the system used on the A380).[3138] Further, the "integrated modular avionics system, interactive cockpit concept with modular systems, and the Air Data and Inertial Reference System (ADIRS) on the A350XWB differ from those on the A380."[3139] For example, the A350XWB ADIRS system was developed by a different supplier than it was for the A380. Moreover, the cockpit screens are larger on the A350XWB than on the A380, and the A350XWB uses a different systems architecture including a new Information System Architecture.[3140]

- The statement analyses the A350XWB's passenger/crew oxygen system, explaining that it uses a different tank layout throughout the cabin than does the A380's.[3141]

- The statement responds to the Schneider Declaration's contention that Airbus reorganized its design methods as a result of its problems with the A380. The statement explains that

[3129] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 23. (footnote omitted)
[3130] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), paras. 24-25.
[3131] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 26.
[3132] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 27.
[3133] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 27.
[3134] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 28.
[3135] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 29 and fn 41.
[3136] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 30.
[3137] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 31.
[3138] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 31.
[3139] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 31. (footnote omitted)
[3140] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 31.
[3141] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 31.

the A380 and A350XWB programmes used different versions of the relevant design software, which is commercially available, but adapted specifically for the A350XWB project.[3142] The rebuttal statement also explains that the A350XWB is the first Airbus LCA to make use of advanced computational fluid dynamics software codes, and that Airbus used new tools to develop the A350XWB due to its new composite structures.[3143]

- The statement addresses the A350XWB's **[***]**[3144], which the statement concedes were derived from the A380 and A340.[3145] The statement, however, asserts that no technology or component has a "1:1 application" between any two aircraft because all aircraft differ to a certain degree.[3146]

A350XWB Production Statement

6.1741. The European Union also produces a statement by Philippe Launay, Vice President Head of A350XWB Programme Management (the A350XWB Production Statement).[3147] The A350XWB Production Statement: (a) "outlines … the innovative steps Airbus took to implement the production of the A350 XWB, and outlines how these compare to, and differ from, the production of previous, non-composite-based Airbus aircraft"[3148]; and (b) "describes in more detail the differences in production systems and processes between Airbus' Final Assembly Line ('FAL') and Sub-Assembly Lines ('SAL') for the A350 XWB and those of earlier Airbus programmes".[3149] The A350XWB Production Statement asserts that such innovations and differences in A350XWB production were necessary largely because of the aircraft's heavy use of composite structures and Airbus' desire to accelerate the A350XWB's production rate relative to predecessor LCA programmes.[3150]

6.1742. The production statement asserts that Airbus and its suppliers invested heavily in new buildings and infrastructure in order to build the A350XWB. More specifically, the production statement claims that "Airbus invested in an entirely new FAL, and also made significant investments in its sub-assembly lines. Airbus and key Risk-Sharing Partners built 10 new factories in Europe and the United States, and made extensions to three existing facilities to accommodate the A350 XWB FAL and SAL"[3151], at a significant cost.[3152] The production statement claims that with "very few exceptions", Airbus is using different facilities to construct the A350XWB than it did for the A320, A330, A340, or A380 programmes.[3153] Airbus also invested heavily in new testing facilities for the A350XWB.[3154] The production statement also stresses that Airbus and its suppliers invested heavily in new jigs and tools to produce the composite structures for the A350XWB[3155], and describes how Airbus and certain of its suppliers had to implement new design and production processes with respect to the A350XWB and its composite structures.[3156]

6.1743. The production statement also asserts that, "{i}n order to continuously reduce costs and reduce lead time for supply of aircraft sub-components, Airbus has changed its supplier relationships."[3157] With respect to the A350XWB programme, this "evolution" of relationships resulted in **[***]** RSPs and an **[***]** of suppliers.[3158] Such new arrangements reduce Airbus' costs and increases efficiency.[3159] The statement also explains that Airbus used much more

[3142] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 32.
[3143] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), paras. 33-34.
[3144] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 35.
[3145] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 35.
[3146] A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 35.
[3147] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI).
[3148] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 6.
[3149] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 7.
[3150] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), paras. 2-5 and 10-11.
[3151] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 12.
[3152] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 13 (line 1).
[3153] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 13.
[3154] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 21.
[3155] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), paras. 22-26.
[3156] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 29.
[3157] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 37.
[3158] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 37 and accompanying graphic.
[3159] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), paras. 38 and 40.

procurement than it had in previous programmes, and the RSP projects were "**[***]**" than those in previous programmes.[3160] Further, Airbus' suppliers even "**[***]**" in certain instances.[3161]

6.1744. Further, the production statement also claims that "Airbus developed new streamlined assembly processes for the A350 XWB."[3162] Such processes have required certain Airbus suppliers to invest in their own supply chains and production processes which employ certain innovative technologies.[3163] The production statement claims that one supplier's experience manufacturing 787 parts facilitated the manufacturing of the A350XWB's composite fuselage.[3164] Further, the production statement claims that the relatively heavy use of composite structures in the A350XWB required Airbus and its suppliers to change existing production facilities at both the sub-assembly and final-assembly levels, making use of new production methods.[3165] Moreover, final assembly of the A350XWB will occur in a new facility in Toulouse, France, using a streamlined assembly process designed to allow enhanced production rates relative to its earlier LCA programmes.[3166]

ii Historical record evidence

6.1745. With respect to historical record evidence, we first note the following arising before the launch of the A350XWB:

- A September 2005 press article by *NetComposites* reporting that the composite engine inlet designed for the A380 was to be modified and used in the A350.[3167]

- A September 2006 Bloomberg News article entitled "Airbus Vows Computers Will Speak Same Language After A380 Delay". It reports that:

> In a two-page memo to Airbus employees dated Sept. 11, {Airbus CEO} Streiff, 52, highlighted software as a key challenge in fixing wiring problems that were "even more complex that the company envisaged earlier."
>
> Airbus has begun putting in place "electrical engineering IT tools" common to the French and German teams and training the Hamburg engineers on them, he wrote in the memo obtained by Bloomberg News. "Together, as 'one Airbus,' we will overcome these challenges," he wrote.[3168]

- An October 2006 *BusinessWeek* article reporting that the reason behind the significant A380 delays was that Airbus facilities in Germany and France working on the project were using incompatible design software. Further, the report indicates that "{a}nother stumbling block was the lack of a full digital mock-up of the A380."[3169]

6.1746. Certain information, including HSBI information, contained in the A350XWB Business Case supports the position that Airbus expected to reap, and to some extent already had reaped,

[3160] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 42.
[3161] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 49.
[3162] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 50.
[3163] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), paras. 56 and 62.
[3164] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 58. The United States has confirmed that this supplier helped produce the 787's fuselage, wing, and pylon, all of which contain composite materials. (United States' response to Panel question No. 156, para. 112). Although the 787 is not an Airbus LCA programme affected by pre-A350XWB LA/MSF, this statement supports the position that companies can and do gain experience with composite structures useful on subsequent LCA programmes even when such LCAs materially differ.
[3165] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), paras. 70 and 73-112.
[3166] A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), paras. 100-112.
[3167] "Airbus' "Silent Secret" to Engine Noise Reduction", *Netcomposites*, 2 September 2005, (Exhibit USA-464).
[3168] Andrea Rothman, "Airbus vows computers will speak same language after A380 delay", Bloomberg, 28 September 2006, (Exhibit USA-430).
[3169] Carol Matlack, Stanley Holmes and Gail Edmondson, "Wayward Airbus", *Businessweek*, 23 October 2006, (Original Exhibit US-299), (Exhibit USA-147).

Learning Effects from previous Airbus LCA programmes in connection with a variety of issues.[3170] We further note the following relevant evidence arising after launch:

- A December 2006 *Flug Revue* article quoting Airbus then-CEO Christian Streiff as stating that, in the wake of the A380 wiring design problems, Airbus would harmonize its design software.[3171]

- A December 2006 EADS press release stating that the A350XWB "will have handling and flight deck operational commonality allowing airlines to benefit from the Airbus family concept of cross crew qualification and mixed fleet flying."[3172]

- A December 2006 Airbus presentation indicating that the A350XWB will have: (a) "A380 Systems and Cockpit commonality"; (b) "New systems" that are "Derived from the A380"; (c) 2 hydraulic / 2 electric (2H2E) flight control architecture that had been "Proven in A380 flight-test"; (d) "A380 Interactive Cockpit Concept with modular server systems", and explaining that the A350XWB's "advanced systems & flight deck", including the cockpit's heads-up display, dual integrated standby instrument system, vertical display, on-board information system, brake to vacate function, and the on-board airport navigation system were "Building on A380 experience".[3173]

- A January 2007 *Aero-News Network* article reporting that wiring issues were responsible for delays in the A380 project, and that such wiring issues arose from Airbus' promise to its customers that they could customize entertainment systems for each aircraft.[3174] Other evidence discussed below refers to the A350XWB's relatively limited customization options.

- A January 2007 *Commercial Aviation Report* article reporting that the A380 delays were caused by Airbus facilities using incompatible software, and that Airbus was trying to improve and streamline its operations as a result.[3175]

- A June 2007 Airbus presentation regarding the A350XWB indicating that Airbus had received composite wing experience from the A380 and composite fuselage experience from the A340-500/600 and A380 and stating: "Advanced cockpit based on A380 design".[3176]

[3170] See e.g. A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 11 (referencing the use of "A380 cockpit/systems"), 20 (referencing three "A380 systems solutions re-used for A350" (i.e. the **[***]**) and one A380 system that was rejected for use on the A350), 23 (referencing the "A380 interactive cockpit"), 32 (first bullet in text box), 43 (two text boxes at bottom of slide, bolded titles and first bullets in each), 45 (second bullet, third sub-bullet), 55 (first bullet), 57 (third bullet, second sub-bullet), 78 (first and fourth shaded text boxes from top of slide), 80 (text accompanying first and second underlined headers), 82 (text accompanying "(a)" subparagraph), and 84 (text accompanying "(a)" subparagraph).

[3171] Sebastian Steinke, "A380 cable problems threaten Airbus", *Flug Revue*, December 2006, (Original Exhibit US-298), (Exhibit USA-149).

[3172] EADS Press Release, "A350 XWB Family Receives Industrial Go-Ahead", 1 December 2006, (Exhibit USA-145).

[3173] "Taking the lead: the A350 XWB", EADS/Airbus presentation, 4 December 2006, (Exhibit EU-106), slides 2, 4, 10, and 11. The United States apparently submitted parts of this presentation in three different exhibits. ("Building on A380 experience", slide 11 from "Taking the lead: the A350 XWB" EADS/Airbus presentation, 4 December 2006, (Exhibit USA-144/USA-439 (exhibited twice)); and "A350 XWB systems", slide 10 from "Taking the lead: the A350 XWB", EADS/Airbus presentation, 4 December 2006, (Exhibit USA-366)). The European Union later explained that such exhibits were all parts of this single presentation, and submitted it in complete form as Exhibit EU-106. This presentation is undated but both parties date it to December 2006.

[3174] "Airbus Says Wiring Issues Resolved For A380", *Aero-news Network*, 23 January 2007, (Exhibit USA-146).

[3175] "Noel Forgeard and the A380", *Commercial Aviation Report*, 15 January 2007, (Original Exhibit US-297), (Exhibit USA-148), pp. 10-11.

[3176] Fabrice Brégier, Chief Operating Officer, Airbus, "Power8 and A350XWB Updates", slides from EADS presentation, Paris, 20 June 2007, (Exhibit USA-143). The European Union asserts that the Panel should not rely on this presentation because it contains only "generic headings". (European Union's first written submission, para. 1174). We see no reason to think that the relevant statements in this exhibit are untrue simply because they could have been more detailed. The European Union also argues that Airbus gained no relevant "CFRP experience" from the A380 composite wing. (European Union's first written submission, para. 1185). The European Union asserts that the A380's wing is not made of composite materials. Rather,

- A July 2007 *FlightGlobal News* article reporting that:

> Airbus says it will further develop the integrated modular avionics (IMA) concept developed for the A380 …
>
> …
>
> As for the A350 flightdeck appearance, Airbus says: "We'll probably have slightly larger information displays at the side, but otherwise it is very much an A380 cockpit."[3177]

- A September 2007 *FlightGlobal News* article reporting that Airbus had recently changed the design of the A350XWB's nose to "a configuration derived from the A380 with a forward-mounted nosegear bay and new cockpit window-glazing." Also, the new design would have "a more conventional six-panel flightdeck windscreen similar to its big sister {i.e. the A380}."[3178]

- A September 2007 Airbus presentation regarding the A350XWB. One slide is dedicated to explaining Airbus' "step by step gain of composite experience", and referencing "primary structures" on the A310-300, A320, A330/A340, A380, and A350XWB.[3179] It also indicates that the A350XWB will have a "A380-type Nose Landing Gear bay" and that the A350XWB derived its interactive cockpit and avionics from the A380, generally stresses the "A380 experience" coupled with "enhanced functionalities", and notes that the "Advanced cockpit based on A380 design with dual HUD option". The exhibit also indicates that Airbus conducted certain wind-tunnel tests at Airbus facilities.[3180]

- An October 2007 Airbus presentation describing the "{e}volution composite application at Airbus". The exhibit describes composite structures on the A300, A310, A320, A330/A340, A340-600, A380 and A350. It also states that "{d}uring the past 30 years, AIRBUS has **continuously** and **progressively** introduced composite technology as a consequence of successful experience accumulated."[3181]

- A 2008 Airbus presentation regarding Airbus' experience with composites. The presentation emphasises Airbus' "step by step gain of composite experience" with primary structures. The presentation indicates that Airbus' gains in this area included experiences with the A310-300, A320, A330/A340, A340-600, and A380. Among the presentation's conclusions are that Airbus has "Long-term and unique **experience** in composite technologies" and has "Comprehensive experience of primary composite parts: **design**, **certification**, and **maintenance**".[3182]

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only the A380's centre wing box connecting the wing to the fuselage was made of composites. (European Union's first written submission, fn 1549). The United States acknowledges this as true, but asserts that the exhibit's reference to composite wing experience gained from the A380 should be read as referring to the experience with this wing box, rather than the entire wing. (United States' second written submission, fn 919). We accept the United States' explanation, rather than believe that Airbus had mistakenly believed that the A380 had a composite wing when authoring this presentation. We further note, however, that at least two other Airbus presentations indicate that the A380 had composite wing ribs in addition to a composite centre wing box. (Olivier Criou, "A350XWB Family and Technologies", Airbus Presentation at Hamburg University of Applied Sciences, 20 September 2007, (Exhibit USA-463); and "Evolution composite application at Airbus", slide from "Composite Training", Airbus presentation, VPD Conference, 17 October 2007, (Exhibit USA-493))

[3177] David Learmount, "A350 avionics to expand on A380 systems", *Flightglobal News*, 24 July 2007, (Exhibit USA-471).

[3178] Max Kingsley-Jones, "Airbus confirms switch to A380 style nose for A350XWB", *Flight Global*, 21 September 2007, (Exhibit USA-467).

[3179] The slide also includes a reference to another pre-A350XWB LCA but its name is illegible.

[3180] Olivier Criou, "A350XWB Family and Technologies", Airbus Presentation at Hamburg University of Applied Sciences, 20 September 2007, (Exhibit USA-463). This exhibit does not appear to contain the date to which the United States ascribes to it, although the European Union does not contest that date.

[3181] "Evolution composite application at Airbus", slide from "Composite Training", Airbus presentation, VPD Conference, 17 October 2007, (Exhibit USA-493). (emphasis original)

[3182] Guy Hellard and Dr Roland Thévenin, "Composites in Airbus: a long story of innovations and experiences", Airbus presentation, Global Investor Forum 2008, (Exhibit EU-189/USA-440 (exhibited twice)),

- A January 2009 *Associated Press* article quoting Airbus then-CEO Tom Enders as saying that Airbus had learned some "'tough lessons'" from previous and A380 programmes that had put Airbus "'in a much stronger position'".[3183]

- A June 2009 *Avionics Today* article reporting that "{m}any of the avionics systems on the A350 represent a technology continuum from systems developed for the A380, its larger sister, which also will contribute to earlier systems maturity." The article also reports that several specific A350XWB systems were derived from the A380, such as the A350XWB's integrated modular avionics (IMA) platform, the weather radar, and the Avionics Data Network. It also contains statements from Greg Albert, Vice President for Airbus Programs at Honeywell Aerospace, explaining that, regarding Honeywell's activities in connection with the A350XWB, the company viewed its experience with the A380 as a "'stepping stone'", and that "'{t}he goal of maintaining hardware commonality between the A380 and A350 – that has a lot of benefits in running an A350 development program and focusing on early maturity'". He is also quoted as saying that, as between the A380 and A350XWB, "'we'll keep the hardware common at the end of the day'" despite differences between the two aircraft.[3184]

- A June 2009 *FlightGlobal News* article indicating that A350XWB "integration testing will be carried out using … development simulators along similar lines to the A380 programme", and that A350 programme chief Didier Evrard stated that Airbus "'decided to go for a lot of reuse'" with respect to the A350XWB's systems. It further indicates that the A350XWB's flight control "'2H2E' (two hydraulic and two electric) architecture" had been "developed for the A380, including the dual 345bar … hydraulic system." Further, the report states that the A350XWB's "air system … is evolved from earlier Airbus aircraft" and the "'brake to vacate' autobrake function under development for the A380 will also be standard."[3185]

- A December 2009 *Financial Times* article quoting EADS then-CEO Louis Gallois as stating that the extensive production problems that Airbus experienced in connection with the A380 was "'a lesson learned for the A350'" and that customer modification options for the A350 will be limited.[3186]

- A May 2010 *FlightGlobal News* article, entitled "A350 is a study in lessons learned by Airbus on the A380". The article reports that "Airbus is trying to avoid the mistakes of the A380". It also reports that:

> Perhaps its most direct application of its lessons learned on A380, Airbus is building a physical mockup of the A350 in addition to the digital mock up (DMU) built with CATIA V5 to validate in reality what has been designed in virtual reality. When building the A380, differing versions of CATIA produced mismatching wire bundles throughout the superjumbo, requiring early aircraft to be custom wired.
>
> In this same vein, Airbus has moderated itself on the customization of the A350 cabin … .[3187]

- A January 2012 *Wall Street Journal* article quoting Airbus then-COO Fabrice Bregier that the main risks to the A350XWB programme arose from small suppliers faced with the need to

slides 4-6 and 24 (emphasis original). The document is undated, but both parties date the presentation to 2008.

[3183] Emma Vandore, "Airbus A350 development on track" *The Associated Press*, 14 January 2009, (Exhibit USA-139).

[3184] Bill Carey, "A350: Extra Wide Responsibility" *Avionics Magazine*, 1 June 2009, (Exhibit EU-406/USA-429 (exhibited twice)). The document is undated but the European Union does not contest the date the United States' ascribes to it.

[3185] Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428).

[3186] Pilita Clark and Peggy Hollinger, "Gallois unperturbed by pessimists", *Financial Times*, December 2009, (Exhibit USA-150).

[3187] John Ostrower, "A350 is a study in lessons learned by Airbus on A380", *Flightglobal News*, 11 May 2010, (Exhibit USA-432).

manufacture complex components, and reports that Airbus had delayed the A350XWB programme six months to ensure that, unlike the A380, the aircraft is "mature before it gets to the industrial stage". The article also quotes Mr Bregier as saying that "'{w}e learned our lessons from the A380'".[3188]

- A February 2012 Reuters article quoting Airbus then-CEO Tom Enders as stating: "'Are we learning from this? Absolutely. We are taking lessons from the A380 programme for the A350 programme'" and that Airbus has "'a thorough investigation underway on how we could make these mistakes in the first place and to eradicate the sources of the mistakes'".[3189]

- An April 2012 Airbus presentation espousing the A350XWB's "Commonality and Innovations" and stating that the A350XWB had the "{b}enefit of A380 evolutions".[3190]

- An undated article taken from the Airbus website in May 2012 indicating that the Airbus' "Nantes {facility} specialises in centre wing boxes for all Airbus aircraft, including the A380 and A350 XWB. This site also is a leader in the manufacturing of structural parts in carbon fibre reinforced plastic, such as the keel beam for the A350 XWB and A340-500/600, and the centre wing box for the A380 – representing an industry first."[3191]

- A July 2012 *Aerospace International* article stating that:

> First up it is clear that the company has learnt significant lessons from the A380 and is incorporating them into the design of the A350XWB. It has already, according to Tom Williams {Airbus Executive VP Programmes}, scoured the A350 design and replaced any instances of the lighter 7449 aluminium with the stronger 7010. Secondly, the company will be doing extra thermal testing to assess fatigue. One of the issues of the A380 wing cracks was that the implications of temperature changes from low tempreture {*sic*} at altitude, and the aircraft baking on a hot ramp in the sun, had not been fully investigated or assessed … In short, the advances in the understanding of materials and composites over the past decade, along with these hard lessons from the A380, should insulate the A350XWB from any similar faults.[3192]

- Material taken from the Aerolia website in late 2012. The material indicates that a certain Aerolia facility in Picardie, France is "specialised in the production of nose sections for the whole Airbus family" including the A350XWB.[3193]

- Material taken from Airbus' website in late 2012. Such material indicates that "{m}any of {the A350XWB's onboard} systems are derived from Airbus' A380". Further, the material states that the A350XWB's "variable frequency generators … were first introduced with the A380" and that "{a}nother A380-proven concept is the use of two hydraulic circuits". "In addition, A350 XWB's hydraulics will be operated at the higher pressure level of 5,000 psi., which also is used on the A380." Finally, the material states that the A350XWB's "advanced wing design … combines aerodynamic enhancements already validated on the A380".[3194]

- Material taken from the Airbus website in late 2012, indicating that Airbus, who "pioneered the use of composites and other advanced materials in aircraft design and manufacturing"

[3188] David Pearson, "Supply chain continuity is main risk for Airbus A350 Program", *The Wall Street Journal*, 17 January 2012, (Exhibit USA-431).
[3189] Harry Suhartono and Tim Hepher, "Airbus learns from A380 saga", Reuters, 15 February 2012, (Exhibit USA-433).
[3190] Harry Nelson, Experimental Test Pilot, "A350 and NEO update", Airbus presentation, April 2012, (Exhibit USA-379).
[3191] "Airbus centres of excellence", Airbus website, accessed 21 May 2012, (Exhibit USA-306).
[3192] Tim Robinson, "Winning the X(WB) factor", *Aerospace International*, July 2012, (Exhibit USA-367).
[3193] "Méaulte Site", Aerolia website, accessed 10 November 2012, (Exhibit USA-469).
[3194] "A350XWB – Technology", Airbus website, accessed 3 October 2012, (Exhibit USA-427).

was "continuously developing technologies to improve the speed of composite manufacturing".[3195]

- An undated Airbus presentation apparently accessed online in late 2012 concerning the A350XWB specifications. It states that "{b}uilding on technologies from the Airbus A380, the A350 XWB will have the same fly by wire technology" and that the "Integrated Modular Avionics (IMA) found on the A380 will be improved upon".[3196]

iii Summary of learning effects on the A350XWB programme

6.1747. In our view, the evidence discussed above demonstrates that the A350XWB programme significantly benefitted from Learning Effects arising from previous, subsidized Airbus LCA programmes, especially (but not only) the A380 programme.

6.1748. The A350XWB was a novel aircraft in many ways, particularly with respect to its use of composite materials to construct the wing and pressurized fuselage. Such novelties had certain knock-on effects that required Airbus to not only modify other structures and systems on the A350XWB from those on its prior LCA, but also required Airbus to adopt new tools and production techniques to build the A350XWB. Thus, it is evident that the A350XWB's novelties rendered Airbus' accumulated experience with its prior LCA programmes less applicable *vis-à-vis* the A350XWB programme than a more conventional LCA programme. This does not, however, mean that the A350XWB did not benefit from any Learning Effects attributable to Airbus' previous LCA programmes. Indeed, as we found in the original proceeding, "learning effects" play a significant role in LCA development and production, and are fundamental to shaping the ability of any entrant to compete in the market. As we explain in more detail below, although novel in many ways compared with Airbus' previous programmes, the A350XWB was no exception to this generally recognized feature of the LCA industry.

6.1749. Before describing the manifestations of specific relevant Learning Effects, we address two general lines of argument that the European Union advances. We recall that the architecture of the A350XWB was not frozen until April 2009.[3197] The European Union argues that the Panel should therefore discount any evidence that arose before that date indicating that Airbus expected to apply lessons learned from previous LCA programmes in the A350XWB programme because on-going changes to the A350XWB's design could, and in some cases did, invalidate such expectations.[3198] The European Union further goes to great lengths in its submissions to explain differences between aspects of the A350XWB programme and those of previous Airbus LCA programmes, from the LCA themselves to the production techniques used to manufacture them. The implication appears to be that the ultimate presence of such differences eliminates or at least significantly diminishes the probative value of evidence − or at least evidence arising before the A350XWB's architecture freeze − indicating that those aspects of the A350XWB programme were expected to benefit from Learning Effects.

6.1750. In our view, this implication is weak. We have no doubt that many, and perhaps most, aspects of the A350XWB programme display differences *vis-à-vis* those of prior Airbus LCA programmes, and that the atomization and explanation of such differences would fill volumes. But the presence of similarities and differences between LCA programmes are not mutually exclusive. Neither is it impossible for a "difference" or a "novelty" itself to be, at least in part, the product of Learning Effects. Indeed, as reason and logic suggest, and as the evidence above confirms, many "different" aspects of the A350XWB benefitted from certain evolutionary processes attributable to predecessor Airbus LCA programmes. In other words, even when confronting novel challenges in the design, development or production of the A350XWB, Airbus did not do so in a vacuum, but with decades of LCA experience made possible because of the effects of LA/MSF. Therefore, in order to effectively rebut the evidence indicating that the A350XWB programme was expected to benefit from Learning Effects arising from Airbus' experience with its prior LCA programmes, in addition to showing the presence of differences between the aspects at issue, the European Union

[3195] "Innovative Materials", Airbus website, accessed 10 November 2012, (Exhibit USA-473).
[3196] "Airbus A350 XWB Specifications", Bintang.site11.com website, accessed 10 November 2012, (Exhibit USA-468).
[3197] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 50.
[3198] See European Union's response to Panel question No. 47, paras. 197-207.

must also explain why such differences negated the original expectation of beneficial Learning Effects accruing with respect to those aspects, whenever that expectation was expressed. The European Union has, however, failed to perform this crucial latter step in many instances. Further, even if the expected benefits of certain Learning Effects did not ultimately materialize, Airbus would obviously have been able to pursue the A350XWB programme with more confidence in the presence of such expectations than it would have in their absence. In this manner, such Learning Effects would still have benefitted Airbus to some degree.

6.1751. The European Union further attempts to downplay the significance of relevant Learning Effects by arguing:

> In the rare circumstances where there are similarities between the A350XWB's technologies and those of previous aircraft, they are limited and insignificant in comparison to the engineering challenges Airbus successfully mastered with the design, integration and production of the A350XWB's novel composite fuselage, novel composite wing and novel systems.[3199]

6.1752. In other words, because the "biggest" features of the A350XWB (e.g. fuselage and wings) display "big" differences from Airbus' prior LCA, and only "smaller" features display "small" similarities to prior Airbus LCA, the latter similarities are therefore insignificant to a causation analysis. We find this unpersuasive for three reasons. First, casting the importance of LCA features in this relative manner is of limited use in the species of causation analysis in which we currently engage. This is so because it is our task to determine whether Learning Effects had a significant *overall* impact on the A350XWB programme. The presence of bigger or more costly novelties is of limited conceptual relevance to resolving that issue, especially when considering how costly and complex the A350XWB programme was overall. Second, we do not believe that the similarities between certain features of the A350XWB and prior Airbus LCA are always small or the importance of such features to be insignificant. Finally, the European Union's argument overlooks the evidence indicating that Airbus' prior LCA experiences helped Airbus create even "novel" features.

6.1753. We now turn to the specific types of Learning Effects that we feel the evidence demonstrates materially benefitted the A350XWB programme. This discussion should be read as informed by our more detailed description of the evidence regarding Learning Effects, above. We emphasize that, in drawing the conclusions below, we rely heavily on Airbus' and EADS' own materials and officers' statements.

6.1754. First, Airbus gained *managerial know-how* from its prior subsidized LCA programmes. The original panel and Appellate Body both recognized the principle that an experienced LCA manufacturer will understand how to build LCA better than will a new LCA manufacturer, thus limiting risks and costs. In this compliance proceeding, we feel that the Schneider Declaration has convincingly restated this principle as applicable even in the context of a programme like the A350XWB, which displays significant differences from previous Airbus LCA programmes. The record also contains specific, concrete examples of how Airbus used its experience with prior LCA to help plan and execute the A350XWB's development. These include lessons evident in HSBI found in the A350XWB Business Case[3200], evidence that Airbus would change its design and testing processes to avoid problems it had encountered on the A380, and evidence that Airbus' previous managerial experience contributed to its ability to institute its new development processes.[3201] We

[3199] European Union's second written submission, para. 1170.

[3200] See e.g. A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 43 (two text boxes at bottom of slide, bolded titles and first bullets in each), 45 (second bullet, third sub-bullet), 55 (first bullet), 80 (text accompanying first and second underlined headers) and 91 (third bullet).

[3201] See e.g. Emma Vandore, "Airbus A350 development on track" *The Associated Press*, 14 January 2009, (Exhibit USA-139); "Airbus Says Wiring Issues Resolved For A380", *Aero-news Network*, 23 January 2007, (Exhibit USA-146); "Noel Forgeard and the A380", *Commercial Aviation Report*, 15 January 2007, (Original Exhibit US-297), (Exhibit USA-148); Sebastian Steinke, "A380 cable problems threaten Airbus", *Flug Revue*, December 2006, (Original Exhibit US-298), (Exhibit USA-149); Pilita Clark and Peggy Hollinger, "Gallois unperturbed by pessimists", *Financial Times*, December 2009, (Exhibit USA-150); Tim Robinson, "Winning the X(WB) factor", *Aerospace International*, July 2012, (Exhibit USA-367); Andrea Rothman, "Airbus vows computers will speak same language after A380 delay", Bloomberg, 28 September 2006, (Exhibit USA-430); David Pearson, "Supply chain continuity is main risk for Airbus A350 Program", *The Wall Street Journal*, 17 January 2012, (Exhibit USA-431); John Ostrower, "A350 is a study in lessons learned by Airbus on A380", *Flightglobal News*, 11 May 2010, (Exhibit USA-432); and Harry Suhartono

further note the A350XWB Chief Engineering Statement's explanation that the development of the A350XWB actually began in 2004, i.e. during the development stage of the Original A350 and long before the A350XWB was even unveiled in mid-2006.[3202] Further, the A350XWB Chief Engineering Rebuttal describes how Airbus used the same software, called CATIA, in designing the A350XWB as well as prior Airbus LCA.[3203]

6.1755. The A350XWB programme also benefitted somewhat from Airbus' *pre-existing infrastructure and engineering resources* used for the purpose of LCA that would not have been developed and brought to market in the absence of LA/MSF. The evidence indicates that Airbus re-used pre-existing facilities in connection with the A350XWB programme.[3204] Moreover, there is evidence that certain Airbus and Airbus suppliers' facilities (e.g. Airbus' Nantes facility and Aerolia's Picardie facility) had become specialized in manufacturing certain LCA structures by virtue of their experience with prior Airbus programmes, and applied such skills in connection with the A350XWB programme.[3205] Further, there is evidence that Airbus had the ability to re-direct certain existing resources from other LCA programmes to the A350XWB programme, therefore saving Airbus the time and expense of marshalling such resources from external sources.[3206]

6.1756. The A350XWB programme also benefitted from Airbus' *experience with composite materials*. It is undisputed that the A350XWB was the first Airbus LCA to use composite materials to the extent that it did, mainly due to the fact that the aircraft is the first Airbus LCA to have a composite wing and pressurized composite fuselage. However, Airbus' competence and confidence to use composite materials to this extent were not borne in a vacuum, but were in part the result of Airbus' self-professed evolutionary experience with composite materials and structures. Airbus documents describe how Airbus has used composite structures in its LCA over time in an incremental fashion, using smaller, non-pressurized structures (i.e. relatively simple structures) in its earlier LCA, and gradually adding composite structures to its subsequent LCA programmes, eventually using larger and pressurised composite structures (i.e. more complex structures) in the A350XWB programme.[3207] Certain such documents tout such experience in the context of

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and Tim Hepher, "Airbus learns from A380 saga", Reuters, 15 February 2012, (Exhibit USA-433). We note the European Union's argument as to why relevant Learning Effects could not accrue from Airbus' experience with the A380 wing cracks. (A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 21). In our view, this argument carries little weight. While the cracks in the A380's wings may have been a design-specific problem, they still alerted Airbus to the general risks posed by thermal problems to new wing designs. Moreover, we find the European Union's suggestion that because the A380 wing cracks were only discovered after the A350XWB's design had been frozen Airbus would not have used such knowledge to avoid similar problems if Airbus thought they might materialize at any point in the design or production process to be unpersuasive.

[3202] See e.g. A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 15. Although there is no finding that the Original A350 was a subsidized LCA, this statement still reinforces the principle that Airbus can and did gain valuable experience from certain pre-A350XWB LCA programmes that differed in material respects.

[3203] See e.g. A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 32. The statement also explains that: (a) Airbus used a different version of CATIA in designing the A350XWB, and (b) made further adjustments to the software for use on the A350XWB programme, as Airbus had done to CATIA in connection with prior LCA programmes. However, different versions of the same software surely have commonalities with which a prior user would be familiar. Further, prior experience manipulating software is surely beneficial for a company seeking to do it again.

[3204] See e.g. A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 57 (third bullet, second sub-bullet); and A350XWB Production Statement, (Exhibit EU-129) (BCI/HSBI), para. 13. Certain evidence states that Airbus used its own wind tunnel facilities in connection with the A350XWB development. (See Olivier Criou, "A350XWB Family and Technologies", Airbus Presentation at Hamburg University of Applied Sciences, 20 September 2007, (Exhibit USA-463) (noting that wind tunnel testing occurred in Airbus facilities))

[3205] See e.g. "Airbus centres of excellence", Airbus website, accessed 21 May 2012, (Exhibit USA-306); and "Méaulte Site", Aerolia website, accessed 10 November 2012, (Exhibit USA-469).

[3206] See e.g. A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 78 (first and fourth shaded text boxes from top of slide), 82 (text accompanying "a)" subparagraph) 84 (text accompanying "a)" subparagraph), and 91 (first and second bullets). See also Airbus Press Release, "A300, A310 Final Assembly To Be Completed by July 2007", 7 March 2006, (Exhibit EU-116) (indicating that engineering resources previously dedicated to the A300 and A310 programmes could be re-directed to the Original A350 programme).

[3207] See e.g. Fabrice Brégier, Chief Operating Officer, Airbus, "Power8 and A350XWB Updates", slides from EADS presentation, Paris, 20 June 2007, (Exhibit USA-143); Olivier Criou, "A350XWB Family and Technologies", Airbus Presentation at Hamburg University of Applied Sciences, 20 September 2007, (Exhibit USA-463); "Innovative Materials", Airbus website, accessed 10 November 2012, (Exhibit USA-473); and

discussing the A350XWB programme, specifically.[3208] The Schneider Declaration similarly describes the value of Airbus' evolutionary experience with composite materials.[3209] Moreover, Airbus' own documents provide a concrete example of the benefits of Airbus' prior composite experiences, explaining that Airbus' Nantes facility gained specialized knowledge of composite materials at least in part due to its experience with prior Airbus LCA programmes, and applied that knowledge to the A350XWB programme.[3210]

6.1757. Moreover, *specific structural features* of the A350XWB benefitted from Airbus' prior LCA experience. Airbus concedes that certain components of the A350XWB were at least in part derived from components on predecessor LCA models, such as the **[***]**[3211], the **[***]**[3212], the **[***]**[3213], the flight deck's use of a six-window configuration[3214], and engine inlets.[3215] Moreover, Airbus materials state that the A350XWB wing benefitted from the A380's aerodynamic designs.[3216] Further, the A350XWB Chief Engineering Statement also concedes that the A350XWB wings' high-lift system bears similarities to the A380's.[3217]

6.1758. Certain of the A350XWB's *on-board systems* similarly benefitted from Airbus' prior LCA experience. These include: variable frequency generators, use of two hydraulic circuits, specific hydraulic pressure levels[3218], fly-by-wire technology, integrated modular avionics, a common flight deck, flight control architecture[3219], interactive cockpit, cockpit heads-up display, dual integrated

"Evolution composite application at Airbus", slide from "Composite Training", Airbus presentation, VPD Conference, 17 October 2007, (Exhibit USA-493). See also Guy Hellard and Dr Roland Thévenin, "Composites in Airbus: a long story of innovations and experiences", Airbus presentation, Global Investor Forum 2008, (Exhibit EU-189/USA-440 (exhibited twice)), slides 4-6 and 24.

[3208] See e.g. also Tim Robinson, "Winning the X(WB) factor", *Aerospace International*, July 2012, (Exhibit USA-367) (discussing how A350XWB would benefit from Airbus' history of work with composite materials).

[3209] See e.g. Schneider Declaration, (Exhibit USA-354) (BCI), paras. 22-29.

[3210] See e.g. "Airbus centres of excellence", Airbus website, accessed 21 May 2012, (Exhibit USA-306). We further note the A350XWB Chief Engineering Statement's explanation that the A350XWB benefitted from Airbus' "continuous development of composite-based technologies since 2004", i.e. before the A350XWB was even unveiled in mid-2006. (A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 15). Although there is no finding that the Original A350 was subsidized, this is also evidence that the A350XWB programme could and did benefit from Airbus' experience with composite materials in the context of a different, predecessor LCA programme.

[3211] Schneider Declaration, (Exhibit USA-354) (BCI), para. 31; and A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 35.

[3212] Schneider Declaration, (Exhibit USA-354) (BCI), para. 32; and A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 26.

[3213] Schneider Declaration, (Exhibit USA-354) (BCI), para. 33; and A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 35. See also Max Kingsley-Jones, "Airbus confirms switch to A380 style nose for A350XWB", *Flight Global*, 21 September 2007, (Exhibit USA-467). We also note that Airbus states that the A350XWB's forward-swinging nose wheel is standard on Airbus and Boeing LCA, and that the A350XWB and A380 both use metals to construct their nose sections, although the A350XWB's nose uses certain new "advanced" metals in combination with composite panels. (A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), paras. 27 and 28)

[3214] Schneider Declaration, (Exhibit USA-354) (BCI), para. 33; and A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 27.

[3215] Schneider Declaration, (Exhibit USA-354) (BCI), para. 26; and A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 23. See also "Airbus' "Silent Secret" to Engine Noise Reduction", *Netcomposites*, 2 September 2005, (Exhibit USA-464).

[3216] "A350XWB − Technology", Airbus website, accessed 3 October 2012, (Exhibit USA-427).

[3217] A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 107.

[3218] The A350XWB Chief Engineering Rebuttal concedes that the A350XWB and A380's hydraulics both operate at 5000 psi. (A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), fn 22. See also "A350XWB − Technology", Airbus website, accessed 3 October 2012, (Exhibit USA-427)).

[3219] The A350XWB Chief Engineering Rebuttal claims that the A350XWB uses a 2H*1E* system. (A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), para. 17). This contradicts the A350XWB Chief Engineering Statement, which states that the A350XWB uses a 2H2E system. (A350XWB Chief Engineering Statement, (Exhibit EU-18) (BCI/HSBI), para. 128). The European Union does not explain this contradiction. Other evidence indicates that the A350XWB would use a 2H2E system. (See e.g. A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slide 20; "Taking the lead: the A350 XWB", EADS/Airbus presentation, 4 December 2006, (Exhibit EU-106); and Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428)). For its part, the A350XWB Chief Engineering Rebuttal states that Exhibit EU-106 contains a "typographical error", but does not specify what this error is. (A350XWB Chief Engineering Rebuttal, (Exhibit EU-128) (BCI/HSBI), fn 21). However, even if the alleged error yields the

standby instrument system, avionics, air system, information system, brake to vacate function, and the airport navigation system.[3220]

6.1759. We also have little doubt that Airbus benefitted from its prior LCA experience in the form of being able to *effectively market* its LCA, as described by the Bair Declaration. As recognized in the original proceeding, "entry barriers into the LCA market are formidable. The design, testing certification, production, *marketing* and after-delivery support of LCA is an enormously complex and expensive undertaking".[3221] We further recall in this context that even after decades of experience with LCA programmes, Airbus' A380 programme was affected by significant difficulties. Such problems serve as a stark reminder of the risks that purchasers face in buying LCAs from even trusted manufacturers with an established track record of success. We also recall our previous discussion further above in the section of this Report that addresses whether the A350XWB contracts confer a benefit to Airbus regarding the considerable marketing risks of the A350XWB programme. The Bair Declaration's explanation that buyers are less willing to purchase complex LCA from unproven manufacturers therefore appears entirely reasonable and materially unrebutted. In this manner, Airbus' efforts to market the complex and risky A350XWB could only have benefitted from Airbus' pre-existing stature in the marketplace.

6.1760. In our view, these considerations reveal that the Learning Effects of the pre-A350XWB LA/MSF subsidies were wide-ranging and significant, and their accumulation central and critical to the ability of Airbus to launch and bring the A350XWB to market as and when it did.[3222]

b Financial effects

6.1761. In this subsection, we evaluate the extent to which the A350XWB programme benefitted from Financial Effects arising from pre-A350XWB LA/MSF. The United States offers arguments and

following: "2 hydraulic / 1 electric (2H/1E) flight control architecture" "{p}roven in A380 test flight" ("Taking the lead: the A350 XWB", EADS/Airbus presentation, 4 December 2006, (Exhibit EU-106)), this does not appear to aid the European Union's cause. We further note that online Airbus material accessed in 2012 states that one "A380-proven concept is the use of *two hydraulic* circuits". ("A350XWB – Technology", Airbus website, accessed 3 October 2012, (Exhibit USA-427) (emphasis added). Thus, it may be that whether the A350XWB used one or two *electrical* circuits is beside the point. Rather, the material relevant similarity may be the use of 2 *hydraulic* circuits. In any event, as discussed, no matter how many electrical circuits the A350XWB's systems used, the evidence indicates that such systems benefitted from Airbus experience with similar A380 systems.

[3220] See e.g. Fabrice Brégier, Chief Operating Officer, Airbus, "Power8 and A350XWB Updates", slides from EADS presentation, Paris, 20 June 2007, (Exhibit USA-143); EADS Press Release, "A350 XWB Family Receives Industrial Go-Ahead", 1 December 2006, (Exhibit USA-145); Harry Nelson, Experimental Test Pilot, "A350 and NEO update", Airbus presentation, April 2012, (Exhibit USA-379); "A350XWB – Technology", Airbus website, accessed 3 October 2012, (Exhibit USA-427); Max Kingsley-Jones, "Paris Air Show: A350 XWB ready to rock", *FlightGlobal News*, 5 June 2009, (Exhibit USA-428); Bill Carey, "A350: Extra Wide Responsibility" *Avionics Magazine*, 1 June 2009, (Exhibit EU-406/USA-429 (exhibited twice)); "Airbus A350 XWB Specifications", Bintang.site11.com website, accessed 10 November 2012, (Exhibit USA-468); David Learmount, "A350 avionics to expand on A380 systems", *Flightglobal News*, 24 July 2007, (Exhibit USA-471); "Taking the lead: the A350 XWB", EADS/Airbus presentation, 4 December 2006, (Exhibit EU-106); and A350XWB Business Case Presentation, (Exhibit EU-130) (HSBI), slides 11, 20, and 23. We note that, at various times, the European Union argues that certain A350XWB structures and systems are standard across Airbus LCA or commercially available. However, we consider commonality across Airbus LCA as direct evidence of Learning Effects. Further, the extent to which a particular feature is commercially available detracts nothing from Airbus' prior experience with that feature.

[3221] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1981. (emphasis added)

[3222] We note that it appears difficult to materially attribute the same degree of importance to any Learning Effects from the A300 and A310 LA/MSF subsidies. The specific A350XWB components and systems that we found to have benefitted from Learning Effects generally appear to be derivations of similar components and systems used on more recent Airbus LCA programmes such as the A380. Further, the remaining Learning Effects we recognized, although more generalized and difficult to attribute to any specific pre-A350XWB LCA, appear most reasonably to relate to more recent Airbus LCA. For example, given the age of the A300 and A310 programmes, the managerial know-how, marketing knowledge, experience with composite technologies, and infrastructure and engineering skills gained from such programmes were likely supplanted by similar Learning Effects accumulated from Airbus' experiences with subsequent LCA programmes. This is so even though we detect some evidence in the record indicating that Airbus could re-direct certain engineering resources previously dedicated to the A300 and A310 programmes to the A350XWB programme. (See Airbus Press Release, "A300, A310 Final Assembly To Be Completed by July 2007", 7 March 2006, (Exhibit EU-116) (indicating that engineering resources previously dedicated to the A300 and A310 programmes could be re-directed to the *Original* A350 programme)).

evidence identifying a number of specific Financial Effects that allegedly benefitted the A350XWB programme.[3223] In particular, the United States maintains that pre-A350XWB LA/MSF made EADS more attractive to investors because of certain effects it allegedly had on EADS' enterprise value and EADS' return on capital employed (ROCE).[3224] Moreover, according to the United States, the A350XWB programme also benefitted from pre-A350XWB LA/MSF because the structure of LA/MSF "insulated Airbus from the crises presented by the A380 program and the dire situation it was facing with its A340 programs", thereby making it easier for Airbus to launch the A350XWB.[3225] Furthermore, the United States also argues that if Airbus had financed all of its pre-A380 LCA with market financing instead of LA/MSF, Airbus would have been had a debt burden that would have made it impossible to launch the A350XWB when it did.[3226] Finally, the United States submits that insofar as Airbus used its own funds to finance the A350XWB programme, such funds were attributable to revenues generated from sales of previous LCA that would most likely not have existed but for LA/MSF.[3227] We examine each of the United States' submissions in turn.

i Enterprise value

6.1762. The United States argues that pre-A350XWB LA/MSF made EADS more attractive to investors by positively impacting EADS' enterprise value. The United States asserts that an accepted method of calculating a company's performance is to compare its earnings before interest and taxes (EBIT) to its enterprise value. Under this methodology, the United States claims that given two companies with identical EBIT, the company with the lower enterprise value will appear to be performing better, and thus appear more attractive to investors. The United States further argues that the structural peculiarities of LA/MSF allow EADS to exclude the value of outstanding LA/MSF from its enterprise value − whereas EADS would have to include the outstanding value of a commercial loan − and thereby artificially lowering its enterprise value without affecting its EBIT.[3228] The United States therefore notes an April 2009 EADS investor presentation which states, in relevant part, that EADS' enterprise value was EUR 2.6 billion without including the then-outstanding amount of LA/MSF (i.e. EUR 4.9 billion) and EUR 7.5 billion with that outstanding amount included.[3229]

6.1763. We feel that the United States has insufficiently substantiated its argument. We note that the very investor presentation that the United States relies on in this context includes the enterprise value of EADS *with and without* outstanding LA/MSF, allowing investors the choice of which to use. We further detect no evidence, and we see no reason to believe, that investors of the type that would want to scrutinize aspects of EADS' financial performance, such as its EBIT and enterprise value, would fail to account for outstanding LA/MSF as that investor would deem most appropriate.

ii ROCE

6.1764. The United States argues that pre-A350XWB LA/MSF allows EADS to alter its ROCE[3230] to make itself appear more attractive to investors. The United States argues that in December 2011, EADS' Chief Strategy and Marketing Officer compared EADS' 2010 ROCE to the ROCE of other large aerospace and defence companies.[3231] In doing so, the United States claims that "he had to make EADS 'comparable' to those other companies by removing LA/MSF − the bulk of which is to

[3223] We note that certain of these alleged financial effects go beyond the financial effects that the original panel and Appellate Body articulated in the original proceeding.
[3224] United States' first written submission, paras. 355-357.
[3225] United States' first written submission, para. 372.
[3226] United States' second written submission, paras. 543-545.
[3227] United States' first written submission, paras. 373-374.
[3228] United States' response to Panel question No. 120, paras. 41-43.
[3229] Gerard Adsuar, Corporate Executive, EADS Finance and Treasury, "Cash Drivers and Enterprise Value", EADS presentation, Global Investor Forum, 1-2 April 2009, (Exhibit USA-33). The presentation actually uses the term "refundable advances", but the European Union appears to accept that this term refers to LA/MSF. (See European Union's first written submission, paras. 1227-1233).
[3230] A company's ROCE is calculated by dividing its earnings by its invested capital. (See generally Carliss Y. Baldwin, "Fundamental Enterprise valuation: Return on Investment Capital (ROIC)", Harvard Business School, 3 July 2002, (Original Exhibit US-1322), (Exhibit USA-135)).
[3231] Marwan Lahoud, Chief Strategy and Marketing Officer, "Views on EADS Strategy and Value Creation", EADS Presentation, Global Investor Forum, 15 and 16 December 2011, (Exhibit USA-13), slide 4.

Airbus LCA − from EADS' return on capital."[3232] The United States asserts that EADS' resulting ROCE was 5%, which is lower than EADS' and Airbus' weighted average cost of capital (WACC) in 2010.[3233] The United States argues that this relationship is "an indicator that, without LA/MSF, EADS is destroying value rather than creating value for its commercial investors."[3234] The United States argues that EADS, as an unsubsidized, value-destroying business would be uncompetitive over the long-term.[3235]

6.1765. The European Union responds that the United States has misinterpreted the relevant facts. The European Union asserts that EADS' ROCE "did *not* fall below its cost of capital by removing the effects of MSF from earnings. Instead, for the single year considered for the presentation at this investor conference − i.e. 2010 − EADS' ROCE was below its cost of capital with and without MSF."[3236] The European Union argues that this fall was due primarily to a weakening US dollar in 2010 and EADS intense development spending during 2010, two factors that suppressed reported earnings for the relevant period.[3237] Moreover, the European Union asserts that "the effects of the MSF were removed from the analysis by deducting MSF from invested capital. Thus, removing MSF increased the ROCE, not the reverse, as the United States erroneously asserts."[3238]

6.1766. Again, we feel that the United States has insufficiently substantiated its argument. The United States points to nothing in the record indicating that when EADS presents its ROCE to investors, it excludes LA/MSF from that calculation in any manner that would lead investors to mistakenly believe EADS' ROCE is higher than it should be. Indeed, the very investor presentation upon which the United States relies in this context discloses that the calculated ROCE "{e}xcludes launch aid".[3239] We further see no reason to believe that, in the presence of such disclosure, investors of the type that would scrutinize EADS' ROCE would fail to account for outstanding LA/MSF as that investor would deem most appropriate.[3240]

iii Mitigation of A380 and A340 programme issues

6.1767. The United States argues that the back-loaded and delivery-based repayment terms of Airbus' outstanding balances of pre-A350XWB LA/MSF partially insulated Airbus from the financial fallout from the problems Airbus experienced with its A380 and A340 programmes, thereby making it easier for Airbus to launch the A350XWB.[3241] As we found in the original proceeding, the back-loaded and delivery-based repayment terms of the pre-A350XWB LA/MSF serve to shift a portion of the finance risk of Airbus' LCA programmes away from Airbus and onto the member States. We have no doubt that such terms would have helped Airbus pursue future LCA programmes by limiting its financial exposure to the potential underperformance of LCA programmes such as the A340 and A380. However, we do not understand this "core" feature of the LA/MSF measures to be one of its *indirect effects*.

[3232] United States' first written submission, para. 356.
[3233] United States' first written submission, para. 357.
[3234] United States' first written submission, para. 357. (footnote omitted)
[3235] United States' first written submission, para. 357.
[3236] European Union's first written submission, para. 1235. (emphasis original; footnote omitted)
[3237] European Union's first written submission, paras. 1237-1239.
[3238] European Union's first written submission, fn 1625.
[3239] Marwan Lahoud, Chief Strategy and Marketing Officer, "Views on EADS Strategy and Value Creation", EADS Presentation, Global Investor Forum, 15 and 16 December 2011, (Exhibit USA-13), slide 4.
[3240] We further note that the European Union's explanation that including LA/MSF in EADS' invested capital when calculating its ROCE would further decrease it appears accurate. This is so because, by virtue of such inclusion, EADS would appear to be making the same returns on more invested capital, indicating a less efficient use of capital. Therefore, we see no reason to doubt the European Union's assertion that, because EADS had a 5% ROCE in 2010 with LA/MSF *excluded*, if EADS had *included* its outstanding LA/MSF balance in its ROCE calculation, that resulting ROCE would similarly have been below EADS' and Airbus' 2010 WACC. (See generally Stephen A. Ross, Randolph W. Westerfield, Jeffrey Jaffe, *Corporate Finance*, 7th edn (McGraw Hill, October 2002), pp. 343-345, (Exhibit USA-134) (explaining calculation and significance of ROCE); and Carliss Y. Baldwin, "Fundamental Enterprise valuation: Return on Investment Capital (ROIC)", Harvard Business School, 3 July 2002, (Original Exhibit US-1322), (Exhibit USA-135) (same)).
[3241] United States' first written submission, para. 372.

iv The Wessels Report

6.1768. The United States argues that if Airbus had launched its subsidized LCA programmes using market financing, Airbus' resulting debt burden would have been so great as to prohibit the launch and development of the A350XWB at any relevant time. In this context the United States offers a report by Professor David Wessels of the Wharton Business School (the Wessels Report).[3242] The Wessels Report purports to demonstrate that, had Airbus launched its pre-A380 subsided LCA with financing on market terms, Airbus' resulting debt burden would have been approximately EUR 24.3 billion.[3243] The Wessels Report concludes that this debt burden is so massive that it would have prohibited Airbus from launching either the A380 or the A350XWB until at least 2019.[3244] The European Union criticizes the Wessels Report's methodology for calculating Airbus' hypothetical debt burden under the circumstances that the report assumes.[3245]

6.1769. At its core, the Wessels Report restates what the original panel, as affirmed by the Appellate Body, already found. That is, even assuming that Airbus had launched all its pre-A380 LCA with market financing rather than LA/MSF, Airbus' resulting debt burden would have made it extremely difficult, and perhaps impossible, for Airbus to launch the A380 as and when it did. We see no reason to question the original findings on this matter. Furthermore, we note that the original panel found that the LA/MSF measures directed at the A380 were subsidies and, therefore, replacing them with market financing would have been more expensive for Airbus. Thus, the original panel's relevant findings, as affirmed by the Appellate Body and as substantively restated in the Wessels Report, lead us to conclude that, if Airbus had financed all its pre-A350XWB LCA with market financing, its resulting debt burden would have made it extremely difficult, and most likely impossible, to launch the A350XWB as and when it did.

v Revenues

6.1770. We recall that, at the time of launch, Airbus projected that the A350XWB programme's non-recurring costs would be EUR **[***]**, although there were reasons to doubt that this represented a reliable figure at the time. That projected cost later rose to EUR 12 billion by the First Contract Date. Airbus and EADS were, of course, responsible for funding the portion of the A350XWB programme that would not be covered by monies received under the A350XWB LA/MSF measures or covered by RSPs, amounting to billions of euros, with their own financial resources.[3246] Those financial resources − revenue streams and accumulated cash positions, in particular − necessarily derived in large part from Airbus' LCA sales. This is so because, as an LCA manufacturer, Airbus derives its revenues primarily from LCA sales, and we have already established the importance of Airbus to EADS as a business unit earlier in this Report.[3247]

vi Summary of Financial Effects on the A350XWB programme

6.1771. In our view, the evidence discussed above demonstrates that the A350XWB programme significantly benefitted from two of the five Financial Effects of the pre-A350XWB LA/MSF subsidies, which enabled Airbus to launch and bring to market all of its existing Airbus LCA programmes − namely, the enhanced revenue and debt reduction effects.[3248]

[3242] Professor David Wessels, "Assessing Airbus' Capacity to Fund Large Scale Projects Without LA/MSF", 17 October 2012, (Wessels Report), (Exhibit USA-364)

[3243] Wessels Report, (Exhibit USA-364), p. 3.

[3244] Wessels Report, (Exhibit USA-364), p. 6.

[3245] See e.g. European Union's second written submission, paras. 1125-1126.

[3246] We note that the European Union itself asserts that, with the help of risk-sharing suppliers/risk-sharing partners (RSS/RSPs), Airbus and EADS self-funded the programme up until the time they began receiving monies to which they were entitled under the A350XWB LA/MSF contracts. (European Union's first written submission (HSBI), para. 1128)

[3247] See above para. 6.1641 et seq. (discussing this issue). The European Union's general response to the United States' line of argument regarding revenues is that it is improper for the Panel to consider the effects of pre-A350XWB LA/MSF in this compliance proceeding. (European Union's first written submission, paras. 1098 and 1131-1132). We have already rejected this position.

[3248] We note that it appears difficult to materially attribute such Financial Effects related to revenues to the A300 and A310 programmes. As described further above, the last deliveries of the A300-600 occurred in July 2007, with the last delivery of the A310 having taken place in 1998. Airbus terminated both programmes in 2007 − shortly following the A350XWB's launch − at which point they ceased producing any meaningful

c Scope and scale effects

6.1772. The importance of economies of scope and scale in the LCA industry was discussed in the original proceeding, with the Appellate Body recalling the panel's findings that "'{e}conomies of scale arising from the huge sunk development cost give incumbent firms a considerable competitive advantage' and '{l}earning effects induce dynamic economies of scale which reinforce incumbents' advantage.'"[3249] Similarly, the Appellate Body also noted the panel's finding that "'static and dynamic ('learning curve') economies of scope and scale achieved in the context of one model of LCA are an important part of the development and production of other LCA models'"[3250], making it difficult for a new producer to enter only one market segment.[3251]

6.1773. The United States' submissions concerning the scope and scale effects of the pre-A350XWB LA/MSF measures on the A350XWB appear to generally rely on these and other similar findings without referring to any specific evidence. While we can accept that the A350XWB must have benefitted from the scope and scale effects of pre-A350XWB LA/MSF arising from the existence of Airbus' pre-existing models of LCA, the fact that the United States has not specifically identified such effects in relation to the A350XWB means that we can give this line of argument only limited weight in our considerations.[3252]

d Conclusion with respect to the indirect effects of pre-A350XWB LA/MSF

6.1774. On the basis of the above evaluation of the parties' submissions and evidence, we find that the *indirect effects* of pre-A350XWB LA/MSF were fundamental to Airbus' ability to launch and develop the A350XWB programme. In particular, we have found that the Learning Effects arising from the pre-A350XWB programmes that would not have existed in the absence of pre-A350XWB LA/MSF were wide-ranging, significant and critical to the A350XWB programme. Likewise, the Financial Effects of pre-A350XWB LA/MSF, in the form of significant revenue generation through the sale of Airbus LCA and reduced financing costs (resulting in a reduced debt burden), were also instrumental to the A350XWB programme. Had Airbus not benefitted from these *indirect effects* of the pre-A350XWB LA/MSF measures, we have no doubt that it would not have been possible to launch and bring to market the A350XWB.

6.1775. In our view, these findings confirm our conclusion that the non-subsidized Airbus entity operating in the "unlikely" counterfactual scenarios at the end of the 2006 could not have launched and brought to market the A350XWB or an A350XWB-type LCA. Although it is apparent that, because of its presence on the market by the end of 2006 with one, possibly two, models of LCA, a non-subsidized Airbus entity operating in the unlikely counterfactual scenarios would have generated its own Learning Effects and revenues[3253], we have no doubt that these would have been far from sufficient to put it in a position to launch the A350XWB or an A350XWB-type LCA. In this regard, we once again recall that a non-subsidized Airbus entity operating in the "unlikely" counterfactual scenarios would have been a "much weaker" competitor "with at best a more limited offering of LCA models" than the subsidized Airbus company that *actually existed* at the end of 2006. It would have had some experience with an A320-type LCA, and possibly, much more

revenues for Airbus. (See above para. 6.1505. Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1622; United States' second written submission, para. 183; and European Union's first written submission, paras. 168 and 172). Thus, it stands to reason that revenues that Airbus gained from such programmes have dissipated over time and have been replaced by revenues generated from sales of subsequent Airbus LCA, especially those being marketed in connection with ongoing programmes.

[3249] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1276 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1717).

[3250] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1281 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1936).

[3251] See Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1269 (quoting Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1717).

[3252] We recognize, however, that the impact of economies of scope and scale may be somewhat intertwined and overlap with Learning Effects and Financial Effects. Thus, the extent to which the A350XWB concretely benefitted from the economies of scope and scale that were made possible by the pre-A350XWB LA/MSF measures is likely to have been accounted for in our above discussion of those two types of indirect effects.

[3253] We note that, although we do not specifically know what the debt burden of a "much weaker" Airbus would have been, financing LCA on market terms would necessarily result in a higher debt burden per LCA *relative* to the debt burden associated with LCA funding in the form of LA/MSF subsidies.

limited experience with an A330-type LCA. The "much weaker" non-subsidized Airbus entity would not have had the ability to launch and bring to market an A380-type LCA. It is apparent, therefore, that a non-subsidized Airbus would have had neither the technical expertise nor the financial resources that were available to the actual Airbus company operating at the end of 2006 as a result of the *indirect effects of pre-A350XWB LA/MSF*. In our view, the advanced technologies and new generation concepts incorporated into the A350XWB would have represented far too great a leap for a non-subsidized Airbus operating in the "unlikely" counterfactual scenarios in 2006. Accordingly, we find that our assessment of the *indirect effects* of the pre-A350XWB LA/MSF measures on the A350XWB confirms our conclusion that a non-subsidized Airbus operating in the "unlikely" counterfactual scenarios could *not* have launched and brought to market the A350XWB or an A350XWB-type aircraft.

Overall conclusion with respect to the "product" effects of LA/MSF on the A350XWB

6.1776. We recall that, in the light of the "plausible" counterfactual scenarios adopted in the original proceeding, the A350XWB could not have been launched at the end of 2006 and brought to market in the way that it was, simply because Airbus would not have existed in 2006; and there is, furthermore, no evidence before us to suggest (and indeed the European Union does not argue) that a non-subsidized Airbus would have come into being any time thereafter. Thus, under the "plausible" counterfactual scenarios adopted in the original proceeding, there is no doubt that the A350XWB could not have been launched and brought to market in the absence of LA/MSF.

6.1777. Although we consider our views on the merits of the parties' arguments in the context of the "plausible" counterfactual scenarios to provide a sufficient basis to resolve the relevant issues for the purpose of this part of our findings in this compliance dispute[3254], in keeping with the approach adopted in the original proceeding to evaluating the merits of the United States' submissions concerning the alleged "product" effects of LA/MSF, we have also in this part of our Report examined the effects of LA/MSF on the ability of Airbus to launch and bring to market the A350XWB using the *"unlikely"* counterfactual scenarios as the starting point of our analysis. We have found in this respect that the "much weaker" Airbus company that would exist in the "unlikely" counterfactual scenarios could not have launched and brought to market the A350XWB.

6.1778. Thus, using all four of the adopted counterfactual scenarios from the original proceeding concerning the effects of the pre-A350XWB LA/MSF subsidies until the end of 2006 as the starting point of our analysis, it is apparent that the A350XWB could not have been launched and brought to market in the absence of LA/MSF.

The impact of the continued "product" effects of the LA/MSF subsidies in the relevant product markets

Introduction

6.1779. In the previous subsection of our analysis, we found that the effects of the challenged LA/MSF subsidies continue to be a "genuine and substantial" cause of the current market presence of the A320, A330, A380, and A350XWB families of LCA. We concluded that in the absence of the challenged LA/MSF subsidies, Airbus would not be selling and/or delivering any of its *existing* models of aircraft today, thereby accepting the United States' submissions concerning the continued "*product*" effects of LA/MSF in the light of all four "plausible" and "unlikely" counterfactual scenarios. Our task in this subsection is to determine the extent to which the LA/MSF subsidies, through their continued "product" effects, are a "genuine and substantial" cause of the lost sales, and market impedance and displacement the United States claims it is suffering. For the reasons explained elsewhere in this Report, we will make this determination with respect to the alleged instances of lost sales, and market impedance and displacement occurring only in the *post-implementation period*.[3255] Moreover, consistent with our view that the conclusions we have already reached on the merits of the parties' submissions in the context of the "plausible" counterfactual scenarios are a sufficient basis to discharge our duty to conduct an "objective assessment of the matter", we will limit our assessment to evaluating the merits of the

[3254] See above paras. 6.1475-6.1479.
[3255] See above para. 6.1444.

United States' claims in the light of the findings we have made with respect to the "product" effects of LA/MSF in the "plausible" counterfactual scenarios.

The United States' serious prejudice claims

Significant lost sales

6.1780. Before proceeding to evaluate the parties' specific "lost sales" arguments, it is useful to recall what must be established in order to find that the effect of a subsidy is "significant" "lost sales" within the meaning of Article 6.3(c) of the SCM Agreement. In the original proceeding, the Appellate Body explained how a determination of "lost sales" should proceed in the context of applying a "unitary" counterfactual analysis in the following terms:

> {U}nder Article 6.3(c), "lost sales" are sales that suppliers of the complaining Member "failed to obtain" and that instead were won by suppliers of the respondent Member. It is a relational concept and its assessment requires consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales. The assessment can focus on a specific sales campaign when such an approach is appropriate given the particular characteristics of the market or it may look more broadly at aggregate sales in the market. The complainant must show that the lost sales are significant to succeed in its claim. Where lost sales are assessed under a two-step approach such as the one adopted by the Panel in this case, the finding of lost sales in the first step is necessarily preliminary and of limited significance in coming to a conclusion under Article 6.3(c). Similarly to the phenomena of displacement under Article 6.3(a) and (b), a definitive determination under Article 6.3(c) must await consideration of whether such lost sales are the effect of the challenged subsidy. While a two-step approach to the assessment of lost sales is permissible, in our view, the most appropriate approach to assess whether lost sales are the *effect* of the challenged subsidy is through a unitary counterfactual analysis. This would involve a comparison of the sales actually made by the competing firm(s) of the complaining Member with a counterfactual scenario in which the firm(s) of the respondent Member would not have received the challenged subsidies. There would be lost sales where the counterfactual analysis shows that, in the absence of the challenged subsidy, sales won by the subsidized firm(s) of the respondent Member would have been made instead by the competing firm(s) of the complaining Member.[3256] (emphasis original)
>
> With respect to the meaning of "significant", the Appellate Body has noted that this term means "important, notable or consequential", and has both quantitative and qualitative dimensions.[3257] (footnote omitted)

6.1781. The United States argues that, in the light of the continued "product" effects of the challenged LA/MSF subsidies and the conditions of competition in the LCA industry, eight orders for 380 individual Airbus LCA made *after* 1 December 2011 constitute "lost sales" within the meaning of Article 6.3(c) of the SCM Agreement.[3258] In addition, because of the allegedly strategic importance of many of these sales to both Boeing and Airbus and their monetary value of billions of USD, the United States argues that the "lost sales" it has experienced are also "significant".[3259]

[3256] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1220.

[3257] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1052 (quoting Appellate Body Reports, *US – Upland Cotton*, para. 426; and citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1218).

[3258] United States' first written submission, para. 413; second written submission, paras. 699-709; response to Panel question Nos. 67 and 162; Summary Table of US Significant Lost Sales, (Exhibit USA-164); Ascend database, Boeing and Airbus Deliveries in Units 2001-2013 (Q1), Commercial Operators, data request as of 27 April 2013, (Exhibit USA-546). In fact, the United States submits evidence of 115 orders for approximately 1300 Airbus LCA made between 2001 and 2013, arguing that all such orders represent "lost sales" to the United States LCA industry, within the meaning of Article 6.3(c) of the SCM Agreement. The United States argues that they should all be considered for the purpose of establishing whether the European Union has complied with the rulings and recommendations of the DSB. We have decided, however, to examine only claims of "lost sales" occurring in the post-implementation period. See above para. 6.1444.

[3259] United States' first written submission, para. 413-414; and second written submission, paras. 699-709.

The United States' "lost sales" claims occurring in the post-implementation period are identified in the following table.

Table 19: United States' "Lost Sales" Claims in the Post-Implementation Period

Product Market / Customer	LCA model	No. of Orders 2012	No. of Orders 2013
Single-Aisle			
China Aircraft Leasing Company	A320ceo/A321ceo	28/8	
easyJet	A320ceo/A320neo		35/100
Norwegian Air Shuttle	A320neo	100	
Twin-Aisle			
Cathay Pacific Airways	A350XWB-1000	10[3260]	
Singapore Airways	A350XWB-900		30
United Airlines	A350XWB-1000		10[3261]
Very Large Aircraft			
Emirates	A380		50
Transaero Airlines	A380	4	

6.1782. The European Union dismisses the United States' claims, advancing a number of general and sales-specific arguments which it considers show that the challenged subsidies are not a "genuine and substantial" cause of the "lost sales".[3262] In terms of the former, the European Union argues that the United States has failed to establish that had Airbus not won the specific "lost sales" in question, Boeing or another United States producer would have won them, *as opposed to another non-United States producer of LCA*. The European Union emphasizes that this alleged shortcoming in the United States' submissions is particularly important in the context of the "lost sales" alleged to have taken place in the market for single-aisle aircraft, where according to the European Union, other LCA manufacturers such as Bombardier have attempted to enter.[3263] The European Union also argues that the challenged subsidies cannot be a "genuine and substantial" cause of the alleged "lost sales" because "any remaining subsidy benefits" in the post-implementation period have been absorbed by "high labour costs". The European Union explains this line of argument in the following terms:

> {T}he United States has failed to take account of what it otherwise refers to as the *quid pro quo* for the subsidies: local employment. Given that the measures, *inter alia*, compensate for the higher costs associated with local employment, they do not impact Boeing any more than environmental subsidies granted to a firm to reduce carbon emissions to required levels would impact foreign competitors not subject to such constraints. With high labour costs absorbing any remaining subsidy benefits, other

[3260] Cathay Pacific Airways also ordered 16 additional A350XWB-1000 aircraft in 2012. We note, however, that these were *conversions* of 16 A350XWB-900 aircraft that Cathay Pacific Airways had already *ordered* in 2010 – i.e. before the end of the implementation period. We recall that the A350XWB-900 and A350XWB-1000 are two closely-related aircraft, launched together as part of the same family of LCA. Moreover, there are no facts before us to suggest that Cathay Pacific Airways intended to cancel or was considering cancelling the orders made in 2010. In our view, these facts suggest that the actual competition between Airbus and Boeing for the 16 (converted) orders made in 2012 did not actually take place in 2012, but in 2010. We have therefore decided to treat only the ten new orders made by Cathay Pacific Airways in 2012 as part of the United States' claims of "lost sales" in the post-implementation period.

[3261] United Airlines also ordered 25 additional A350XWB-1000 aircraft in 2013. We note, however, that these were *conversions* of 25 A350XWB-900 aircraft that United Airlines had already *ordered* in 2010 – i.e. before the end of the implementation period. We recall that the A350XWB-900 and A350XWB-1000 are two closely-related aircraft, launched together as part of the same family of LCA. Moreover, there are no facts before us to suggest that United Airlines intended or was considering to cancel the orders made in 2010. In our view, these facts suggest that the actual competition between Airbus and Boeing for the 25 (converted) orders made in 2013 did not actually take place in 2013, but in 2010. We have therefore decided to treat only the 10 new orders made by United Airlines in 2013 as part of the United States' claims of "lost sales" in the post-implementation period.

[3262] The European Union's submissions cover the entirety of the orders forming the basis of the United States' "lost sales" claims, both pre- and post-implementation period. In this subsection, we examine only those general arguments presented by the European Union which we have not already addressed elsewhere in our Report, as well as the sales-specific submissions relating to the alleged "lost sales" occurring in the post-implementation period only.

[3263] European Union's first written submission, paras. 822-823.

> factors must be causing the present market phenomena of which the United States complains.[3264]

6.1783. Although we feel that the European Union has not fully explained the *rationale* behind this line of argument, we understand it to be essentially the following: because, according to the European Union, the "remaining … benefits" of the LA/MSF subsidies in the post-implementation period will be inevitably used by Airbus to pay for the allegedly "higher labour costs of local employment", the effects of those subsidies will not be felt through the market presence of the aircraft products themselves, implying that the challenged LA/MSF subsidies cannot be found to be a "genuine and substantial" cause of the "lost sales". We are not persuaded by this argument for a number of reasons. First, by focusing on the "remaining subsidy benefits", the European Union's argument appears to be premised on the notion that the effects of the LA/MSF subsidies must coincide with the continued *existence* of the "benefit" of the LA/MSF subsidies. However, as previously explained, the nature of the LA/MSF subsidies is such that their effects are profound and long-lasting, typically enduring beyond the existence of their "benefit" in the sense of Article 1.1(b) of the SCM Agreement. Second, even assuming that part of the subsidies were used to pay for "higher labour costs of local employment", the fact remains that those local employees will be involved in the design, development, production and sale of Airbus LCA. Finally, to the extent that the European Union's argument should be understood to suggest that, in the absence of LA/MSF, Airbus would have developed its full range of aircraft, or even one of them in a jurisdiction other than one of the four member States that have supported it since 1969, there is no factual basis to substantiate such a position.

6.1784. However, we agree with the European Union when it argues that in order to demonstrate that the "product" effects of LA/MSF are a "genuine and substantial" cause of the "lost sales" occurring in the post-implementation period, it must not only be established that *Airbus* would not have won those sales in the absence of the subsidies, but also that *Boeing or another United States LCA manufacturer* (as opposed to a non-United States LCA producer) would have won those sales. In this respect, we understand the United States' general position to be that nothing has happened since the end of 2006 to suggest that the conditions of competition used as the basis for the two "plausible" counterfactual scenarios in the original proceeding should change in any material way for the purpose of the post-implementation period. Thus, according to the United States, the sales won by Airbus in the post-implementation period are "lost sales" within the meaning of Article 6.3(c) of the SCM Agreement, because in the "plausible" counterfactual scenarios, Boeing or a duopoly involving Boeing and another United States manufacturer of LCA (possibly McDonnell Douglas) would continue to be the only players in the LCA industry after 1 December 2011.

6.1785. We recall that the two "plausible" counterfactuals adopted in the original proceeding envisaged that, in the absence of the effects of LA/MSF, there would be either a Boeing monopoly or a duopoly consisting of Boeing and another United States manufacturer of LCA (possibly McDonnell Douglas) existing between 2001 and 2006. Moreover, we have concluded above that in the light of the long-lasting and profound "product" effects of the LA/MSF subsidies, Airbus would not have been able to have the same aircraft present on the market in the post-implementation period. Indeed, the European Union has not even argued that Airbus would have come into existence any time after 2006 in the absence of LA/MSF. Thus, the question that we must now answer is whether in the absence of Airbus, another *non-United States producer* of LCA would have entered the LCA industry in the years following 2006, such that it could have been a source of competition to Boeing in the "plausible" monopoly counterfactual scenario or Boeing and another United States manufacturer of LCA in the "plausible" duopoly counterfactual scenario.

6.1786. As explained elsewhere in this Report, both parties have noted that several non-United States companies, including Bombardier (Canada), COMAC (China), Mitsubishi Aircraft Corporation (Japan), Sukhoi (Russia) and United Aircraft Corporation (Russia), are attempting to enter the LCA industry with single-aisle aircraft having around 100-150 seats. Other evidence reveals that another non-United States company, Embraer (Brazil), is also trying to enter the lower-seating-capacity-end of the single-aisle market space.[3265] However, both parties have

[3264] European Union's second written submission, para. 1228. See also European Union's first written submission, para. 643.

[3265] Glennon J. Harrison, "Challenge to the Boeing-Airbus Duopoly in Civil Aircraft: Issues for Competitiveness", US Congressional Research Services, 25 July 2011, (Exhibit USA-117), p. 25.

emphasized the relative weakness of these potential new entrants, with Boeing's Vice President for Commercial Airplanes, Michael Bair, asserting that "it will be several years before any of {their} products compete in a significant way with Airbus and Boeing single-aisle LCA"[3266], "as customers perceive significant, and often prohibitive, risks in ordering {their} aircraft".[3267] Moreover, the European Union "agrees that 'other single-aisle market entrants do not, at present, 'play a significant role in LCA competition … during the period at issue and are unlikely to do so in the immediate future'".[3268] Of course, the difficulty of potential new entrants to compete effectively with Airbus and Boeing reflects the high barriers to entry and significant advantages of incumbency in the LCA industry, a fact we believe was recognized by Embraer's CEO, Frederico Curado, who it was reported stated in 2011 that:

> Going up against Boeing and Airbus in head-to-head competition is really tough, not only because of their size, but because of their existing product line and industrial capacity. They can have a very quick response and literally flood the market.[3269]

6.1787. In our view, these facts about the nature of competition from potential new entrants in the *current* duopoly consisting of Airbus and Boeing strongly suggest that it would have been highly unlikely for a non-United States producer to have entered the LCA market in the "plausible" counterfactual scenario that envisages a duopoly involving Boeing and another United States manufacturer of LCA. There is no evidence or argument before us to suggest that any one or more of the above-mentioned non-United States companies would have been in a better competitive position *vis-à-vis* a duopoly involving Boeing and another United States manufacturer of LCA than they actually are in the present-day Airbus-Boeing duopoly. In this light, we believe it is reasonable to conclude that competition from potential new entrants in this counterfactual scenario would have been the same or similar to what it is today – very weak and limited to the smaller-seating-capacity-end of the single-aisle product market or in the words of Airbus' Vice President for Contracts, Christophe Mourey: "not yet … significant or widespread".[3270]

6.1788. We come to a similar conclusion in relation to how we believe the other "plausible" counterfactual scenario (the Boeing monopoly) would have evolved between 2006 and the present day. As a monopolist, it is reasonable to assume that Boeing would have been in a stronger competitive position relative to any potential new entrant than in a duopoly situation. Boeing's incumbency advantages would have therefore been more difficult to overcome. Nevertheless, the very existence of a monopoly would have created strong incentives for new entrants to materialize as well as for potential customers to purchase newly introduced products. Moreover, in the face of increasing demand, Boeing may not have been able to satisfy all potential customers. However, given the expensive, technologically complex and uncertain nature of LCA production, it is likely that any new LCA company entering a market dominated by a Boeing monopoly could only have done so in the single-aisle segment and only with respect to products that, technology-wise, would have been inferior to Boeing's more advanced offerings. In our view, it is very difficult to conceive that any new entrant (even one with years of experience in the smaller regional aircraft sector) could have developed and brought to market by the beginning of the post-implementation period the same range and quality of LCA that are in competition with Boeing's LCA today. Accordingly, we find that it may well have been possible for one of the more experienced, above-mentioned, non-United States aircraft producers to enter the LCA market by the time of the post-implementation period in a "plausible" counterfactual scenario where Boeing is a monopolist. However, it is likely that in the limited period of time from the end of 2006 to the beginning of the post-implementation period, such an entity would have only been able to enter the single-aisle segment with aircraft that, as a general matter, could only impose weak competitive constraints on Boeing.

6.1789. We now apply the two "plausible" counterfactuals we have posited above to the "lost sales" claimed by the United States. The first point we note is that only three of the eight

[3266] Bair Declaration, (Exhibit USA-339) (BCI), para. 9.
[3267] Bair Declaration, (Exhibit USA-339) (BCI), para. 30.
[3268] European Union's first written submission, fn 753 (quoting United States' first written submission, para. 315).
[3269] Glennon J. Harrison, "Challenge to the Boeing-Airbus Duopoly in Civil Aircraft: Issues for Competitiveness", US Congressional Research Services, 25 July 2011, (Exhibit USA-117), p. 25 (quoting "Airbus Ends Air Show With Huge Order", *Wall Street Journal*, 23 June 2011).
[3270] Mourey Statement, (Exhibit EU-8) (BCI), fn 23.

instances of "lost sales" concern single-aisle aircraft. In the light of our finding that any market presence of a new entrant operating in the post-implementation period would be, if anything, limited to the market for *single-aisle LCA*, it must necessarily follow that the sales won by Airbus in the twin-aisle and very large LCA markets were "lost sales" to the United States' industry in both "plausible" counterfactual scenarios. Although the European Union has advanced numerous, allegedly "non-subsidy", reasons to explain why Airbus won these sales, it is apparent that almost all of those reasons are, in fact, based on the effects of the LA/MSF subsidies because they are premised on Airbus being present in all five of the relevant sales campaigns as exactly the same competitor selling identical aircraft to those it markets today.

6.1790. The European Union submits that in the competition that led Cathay Pacific Airways to order ten additional A350XWB-1000 aircraft in 2012, Airbus had pre-existing commonality advantages over Boeing.[3271] The European Union also argues, using evidence that is HSBI, that Airbus LCA had certain other product-related advantages over Boeing LCA in this sales campaign.[3272] Likewise, in the campaign that led Singapore Airlines to order 30 A350XWBs in 2013, the European Union argues that Airbus had an advantage over Boeing because: (a) there was allegedly uncertainty about the specifications, performance and availability of the 787-10 relative to the A350XWB-900; (b) the A350XWB had an advantage in terms of "the delivery positions themselves"; and (c) the terms of Airbus' offer provided Singapore Airlines with higher benefits of commonality and lower fleet complexity in the long run in case that "Singapore Airlines would opt for the A350XWB-1000".[3273] Similarly, the European Union maintains that Airbus was successful in the sales campaign that led United Airlines to order ten additional A350XWB-1000 aircraft in 2013 because the A350XWB-1000 was, for various reasons, "the only aircraft that could satisfy the airline's requirement{s}" at the relevant time.[3274] Finally, the European Union submits that Transaero and Emirates chose the A380 over the 747-8 in the orders they placed in 2012 and 2013 because of *inter alia*, the A380's more advanced technologies and greater size compared with the 747-8, which enabled it to satisfy both customers' very specific requirements.[3275]

6.1791. Obviously, Airbus would not have had any of these advantages in the above campaigns for twin-aisle and very large LCA in the "plausible" counterfactual scenarios because it simply would not have existed. In this regard, we recall that the Appellate Body found in the original proceeding that it was not necessary for the panel to have explored the non-attribution arguments advanced by the European Union in the context of the two "plausible" counterfactual scenarios posited in that proceeding because:

> Without the subsidies, Airbus would not have existed under these scenarios and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred. As Boeing (or the other US manufacturer envisaged by the Panel) would be the only supplier(s) of LCA, it (or they) would have made the sales instead. Thus, the conclusion under {the two "plausible" counterfactual} scenarios … satisfies, without more, the "genuine and substantial relationship" standard articulated by the Appellate Body in *US – Upland Cotton*. This chain of reasoning establishes that the subsidies are a sufficient cause of the lost sales and the displacement. The additional questions that the European Union asserts the Panel should have considered would be moot. It would be pointless to attempt delineating the features of something that would not have existed without the subsidies. It would be unnecessary to consider: (i) what particular aircraft Airbus would have launched; (ii) their level of technology; (iii) prices; (iv) any commonality advantage or disadvantage; or (v) any non-attribution factors.

[3271] European Union's second written submission, para. 1365.

[3272] European Union's second written submission, paras. 1360-1364 (HSBI) (citing, *inter alia*, **[[**HSBI**]]** Exhibit USA-370 (HSBI); **[[**HSBI**]]** Exhibit EU-251 (HSBI); and **[[**HSBI**]]** Exhibit EU-256 (HSBI)).

[3273] European Union's comments on the United States' response to Panel question No. 162 (HSBI) (citing *inter alia*, **[[**HSBI**]]** Exhibit EU-529 (HSBI); **[[**HSBI**]]** Exhibit EU-530 (HSBI); **[[**HSBI**]]** and Exhibit EU-538 (HSBI)).

[3274] European Union's comments on the United States' response to Panel question No. 162 (HSBI).

[3275] European Union's second written submission, paras. 1550-1555 (HSBI) (citing *inter alia*, Exhibit EU-332 (HSBI); and Exhibit EU-333 (HSBI)); comments on the United States' response to Panel question No. 162 (HSBI) (citing, *inter alia*, **[[**HSBI**]]** Exhibit EU-547 (HSBI); **[[**HSBI**]]** Exhibit EU-548 (HSBI); and **[[**HSBI**]]** Exhibit EU-549 (HSBI)).

> As regards the non-attribution factors in particular, we note that the effects of other factors can be assessed as part of a properly designed counterfactual that adjusts for the subsidies while maintaining everything else equal. … Moreover, we agree with the Panel that in the particular circumstances of this case the need to fully examine the particular non-attribution factors raised by the European Communities depended on whether a non-subsidized Airbus would have had any aircraft available to sell at the time the relevant sales were made. If Airbus had not existed without the subsidies, the airlines involved in the relevant sales campaigns would have had a limited choice: purchase aircraft from Boeing or possibly from the other US manufacturer envisaged in the Panel's counterfactual scenario … We have difficulty understanding how the non-attribution factors raised by the European Communities could have led an airline in those circumstances not to purchase the desired aircraft from Boeing or the other US manufacturer. For example, the European Union underscores that Boeing had mishandled its relationships with some customers and that one government may have been unhappy with Boeing over a joint venture. However, the fact remains that, in the absence of Airbus, these airlines would have had no choice but to purchase aircraft from Boeing or the other US manufacturer. Thus, these non-attribution factors would not be relevant under {the} scenarios … referred to above (under which a non-subsidized Airbus would not have entered the market). The European Communities also mentioned "the severe downturn in the market in 2001-2003" following the events of the 11 September 2001 attacks on the World Trade Center ("9/11"), and exacerbated by the start of the war in Iraq and the outbreak of SARS in Asia. Because Airbus LCA would not have been available in the absence of subsidies, those airlines that purchased LCA during the "downturn" could only have purchased them from Boeing or the other US manufacturer under {the "plausible"} scenarios … .[3276] (footnotes omitted)

6.1792. The European Union does, however, advance one non-attribution argument in the context of the Singapore Airlines orders that we believe may be characterised as not being premised on the existence and market presence of Airbus in the post-implementation period. According to the European Union, Singapore Airlines chose the A350XWB in 2013 because it wanted to split its order for twin-aisle LCA between Airbus and Boeing. The European Union notes that Singapore Airlines committed to an order of 30 787-10 aircraft at the same time as it ordered the 30 Airbus A350WXB-900 aircraft.[3277] The European Union argues that one of the reasons why Singapore Airlines did this was to secure the delivery of a larger number of aircraft over a particular period of time. While the European Union's assertion may be correct, the fact that Singapore Airlines may have wanted to split its 2013 order between both aircraft manufacturers does not help the European Union, because in the "plausible" counterfactual scenarios we have posited, not only would Airbus not have existed, but the only other *twin-aisle* competitor would have been a United States company. As such, to the extent that the evidence shows that Singapore Airlines would have wanted to split its order between two LCA producers, those producers would have been from the United States LCA industry.

6.1793. Turning to the three instances of "lost sales" in the *single-aisle* LCA segment, we note that the Airbus aircraft actually purchased (the A320 and A321) offer a seating capacity that is in excess of what a new entrant could have reasonably offered. Moreover, 200 of the 271 individual aircraft ordered were new generation aircraft − A320neos. In our view, these facts demonstrate that in the two "plausible" counterfactual scenarios we have posited above, Boeing would have had a very strong competitive advantage over any new entrant in all three sales campaigns, as it could have offered single-aisle LCA with characteristics that closely matched those demanded and ultimately chosen by the relevant customers. Likewise, as an incumbent producer with long-standing experience, it is apparent that the other United States LCA producer operating in one of the two "plausible" counterfactuals would have also had a superior product offering compared with any new entrant. While we recognize that seating capacity and operating cost efficiency are not the only two factors that influence a customer's purchase decision, we find it difficult to see how any new entrant could have developed a credible single-aisle LCA offering that was sufficiently advanced such that it could overcome its competitive disadvantage in these sales campaigns by

[3276] Appellate Body Report, *EC and certain member States − Large Civil Aircraft*, paras. 1264-1265.

[3277] European Union's comments on the United States' response to Panel question No. 162; and Singapore Airlines Press Release, "SIA To Order US$17 Billion Worth Of Aircraft From Airbus & Boeing", 30 May 2013, (Exhibit EU-531).

2012 and 2013. We recall in this regard our finding that in the "plausible" counterfactual scenario where Boeing and another US producer would exist, it is likely that any new entrant could not impose a greater competitive constraint on the two incumbent producers than the competitive constraint that the non-US companies currently trying to enter the LCA market actually do against Airbus and Boeing today (which in the words Airbus' Vice President for Contracts, Christophe Mourey, is not "significant or widespread"[3278]). Likewise, the fact that the smaller, less advanced single-aisle aircraft that would have been offered by a new entrant in the Boeing monopoly scenario would be that company's first ever LCA suggests that it would have had a difficult time to overcome its competitive disadvantage over Boeing in the three sales campaigns in question, particularly those where the customer purchased the A320neo. Moreover, apart from suggesting that a new entrant such as Bombardier might have won the particular sales instead of Boeing, the European Union has identified nothing about the particular sales in question that would make any possible new entrant's single-aisle LCA more attractive than the incumbents' LCA, given the additional risks and uncertainty that would have been associated with its offerings.

6.1794. Again, the European Union advances a number of allegedly "non-subsidy" reasons to explain why the LA/MSF subsidies did not cause the "lost sales" in the single-aisle campaigns. However, in our view, almost all of the European Union's submissions are premised on Airbus being present in all three of the sales campaigns as exactly the same competitor selling identical aircraft to those it markets today. In particular, the European Union argues that Airbus was able to win the Norwegian Air Shuttle order for 100 A320neos in 2012 because of their fuel efficiency, the alleged lack of "technical specification" of the 737MAX compared with the A320neo and a number of other product-related advantages that it was able to offer.[3279] Likewise, the European Union submits that China Aircraft Leasing Company chose Airbus over Boeing for a number of product-related reasons that are mainly HSBI, some of which stemmed from Airbus' previous experiences with this customer, certain characteristics of the A320 and A321, and the terms Airbus' offer.[3280] Finally, the European Union maintains that Airbus won the 2013 easyJet order for 100 A320neos and 35 A320ceos because of the fuel efficiency of the former, the availability and flexibility that Airbus showed in respect of delivery positions and the overall superior economics of the Airbus offer compared with Boeing.[3281]

6.1795. Because Airbus would not have existed in the post-implementation period in the absence of the effects of the LA/MSF subsidies, it is apparent that the European Union's arguments relating to Airbus' product offering or actual experiences in the sales campaigns are of no relevance to the question we must answer. As explained by the Appellate Body in the original proceeding, it "would be pointless to attempt delineating the features of something that would not have existed without subsidies."[3282]

6.1796. However, as it did in relation to the 2013 Singapore Airlines order for the A350XWBs, the European Union advances one non-attribution argument in the context of the Norwegian Air Shuttle order that we believe may be characterised as not being premised on the existence and market presence of Airbus in the post-implementation period. According to the European Union, Norwegian Air Shuttle chose the A320neo in 2013 because it wanted to split its order between Airbus and Boeing single-aisle offerings. The European Union notes that Norwegian Air Shuttle ordered 100 737MAX and 22 737NGs at the same time that it ordered the 100 A320neos.[3283] According to the European Union, Norwegian Air Shuttle decided to take this action because it considered that a "split order {between Airbus and Boeing} ensures capacity and encourages competition", allowing the company to "hedge their bets … with regard to new and different technologies".[3284] While the European Union's assertion may be correct, the fact remains that

[3278] Mourey Statement, (Exhibit EU-8) (BCI), fn 23.

[3279] European Union's second written submission, paras. 1297-1298 (HSBI) (citing, *inter alia*, **[[**HSBI**]]** Exhibit EU-228 (HSBI); and **[[**HSBI**]]** Exhibit EU-229 (HSBI)).

[3280] European Union's second written submission, paras. 1240-1242 (HSBI) (citing, *inter alia*, **[[**HSBI**]]** Exhibit EU-195 (HSBI); **[[**HSBI**]]** Exhibit EU-196 (HSBI); **[[**HSBI**]]** Exhibit EU-197 (HSBI); **[[**HSBI**]]** Exhibit EU-198 (HSBI); and **[[**HSBI**]]** Exhibit USA-376 (HSBI)).

[3281] European Union's comments on the United States' response to Panel question No. 62 (HSBI) (citing, *inter alia*, Easyjet Press Release, "Easyjet plc announces fleet plans 18 June 2013" 18 June 2013, (Exhibit EU-518); **[[**HSBI**]]** Exhibit EU-521 (HSBI); **[[**HSBI**]]** Exhibit EU-522 (HSBI); **[[**HSBI**]]** Exhibit EU-524 (HSBI); **[[**HSBI**]]** Exhibit EU-525 (HSBI); **[[**HSBI**]]** Exhibit EU-527 (HSBI); and **[[**HSBI**]]** Exhibit EU-528 (HSBI)).

[3282] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1264.

[3283] European Union's second written submission, para. 1295.

[3284] European Union's second written submission, para. 1301.

Norwegian Air Shuttle purchased A320neos from Airbus. The new entrant that might have existed in the post-implementation period would not have been able to produce a credible competitor aircraft in either of the two "plausible" counterfactual scenarios. As already noted, in the counterfactual scenario where there would be two US incumbent producers, the aircraft at the disposition of the new producer would not have been dissimilar to what the non-US companies trying to enter the market today have at their disposition. Similarly, in the "plausible" counterfactual where Boeing would have been a monopolist, the fact that the smaller, less advanced single-aisle aircraft that would have been offered by the new entrant would be that company's first ever LCA suggests that it would have had a difficult time to overcome its competitive disadvantage over Boeing, particularly as regards the 737MAX, which we recall is the closest competitor to the A320neo. Again, apart from suggesting that a new entrant such as Bombardier might have won the particular sales instead of Boeing, the European Union has identified nothing about the particular sales in question that would make any possible new entrant's single-aisle LCA more attractive than Boeing's, given the additional risks and uncertainty that would have been associated with its offerings.

6.1797. Thus, to the extent that any non-US producer would have entered the LCA market in the post-implementation period under either of the two "plausible" counterfactual scenarios, it is apparent that this would have been possible only in the market for single-aisle LCA. Moreover, in the light of the considerations we have outlined above, it is unlikely that any such competitor could impose greater competitive constraints on the incumbent United States producers than those actually imposed by any of the non-US companies trying to enter the LCA market today. This implies that in the China Aircraft Leasing Company, easyJet and Norwegian Air Shuttle sales campaigns, a new entrant could not have prevented any of the incumbent US LCA producers from winning the relevant sales in the absence of Airbus.

6.1798. Finally, we note that "lost sales", within the meaning of Article 6.3(c) of the SCM Agreement, must be "significant". In the original proceeding, the panel "found that, in the light of the number of aircraft and the dollar amounts involved in the sales, their strategic importance, the learning effects and economies of scale they generate, and the advantages of incumbent supplier provided by the sales, the{ lost sales in the 2001-2006 period} were significant."[3285] In our view, this description regarding the significance of losing LCA sales to a rival LCA producer, which we note was not specifically appealed or otherwise disturbed by the Appellate Body, remains, on the whole, an accurate depiction of the significance of losing LCA sales to a rival LCA producer today, and we incorporate it *mutatis mutandis* into this Report. We furthermore see no reason, based on the record before us, to decline to characterize the lost sales in the post-implementation period as "significant" based on this description. Accordingly, we find that all of the orders identified in Table 19 represent "significant" "lost sales" to the United States LCA industry and, therefore, that the challenged LA/MSF subsidies continue to be a "genuine and substantial" cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement.

Impedance and displacement in the relevant markets

6.1799. We begin our analysis by reviewing the guidance the Appellate Body has provided on how to determine whether the effect of a subsidy is to impede or displace the imports or exports of a like product into a relevant market within the meaning of Articles 6.3(a) and 6.3(b) of the SCM Agreement. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body summarized its previous statements on the concepts of impedance and displacement in the following terms:

> In *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that "displacement" refers to an economic mechanism in which exports of a like product are replaced by the sales of the subsidized product. Specifically, it found that "displacement" connotes that there is "a substitution effect between the subsidized product and the like product of the complaining Member" and, in the context of Article 6.3(b), "displacement arises where exports of the like product of the complaining Member are substituted in a third country market by exports of the subsidized product." The existence of displacement depends upon there being a competitive relationship between these two sets of products in that market and, when

[3285] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1212 (citing Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1845).

> this is the case, certain behaviour such as "{a}ggressive pricing" may "lead to displacement of exports … in {that} particular market". An analysis of displacement should assess whether this phenomenon is discernible by examining trends in data relating to export volumes and market shares over an appropriately representative period. With respect to "impedance", the Appellate Body expressed the view that this concept may involve a broader range of situations than displacement and arises both in "situations where the exports or imports of the like product of the complaining Member would have expanded had they not been 'obstructed' or 'hindered' by the subsidized product", as well as when such exports or imports "did not materialize at all because production was held back by the subsidized product". While there may be some overlap between the concepts, "displacement" and "impedance" are therefore not interchangeable concepts.[3286] (footnotes omitted)

6.1800. In terms of the framework that should be applied to evaluate a claim of impedance or displacement, the Appellate Body explained in the original proceeding that:

> {T}he most appropriate approach to assess the effect of a subsidy under Article 6.3 of the SCM Agreement is through a unitary counterfactual analysis. In the case of displacement and impedance, the counterfactual analysis would involve estimating what the sales of the complaining Member would have been in the absence of the challenged subsidy. The counterfactual sales of the complaining Member would then be compared to its actual sales. Displacement or impedance would arise where the counterfactual analysis shows that the sales of the complaining Member would have declined less or would have been higher in the absence of the challenged subsidy.[3287]

6.1801. The United States claims that, in the light of the continued "product" effects of the challenged LA/MSF subsidies and the conditions of competition in the LCA industry, the United States LCA industry currently suffers serious prejudice in the form of displacement and/or impedance of its LCA products in all three relevant product markets in the European Union, and in 11 third country product markets, within the meaning of Articles 6.3(a) and 6.3(b) of the SCM Agreement.[3288] To support its claims, the United States has introduced evidence of Airbus and Boeing delivery volumes and market shares in all relevant product markets for each year from 2001 to 2013. Relying upon these data, the United States argues that in the absence of the "product" effects of LA/MSF, the United States LCA industry's delivery volumes and market shares would have been higher than they actually were in each of the relevant markets.[3289]

6.1802. The European Union rejects the United States claims, advancing multiple lines of argument to support its view that the LA/MSF subsidies are not a "genuine and substantial" cause of the claimed instances of impedance or displacement in the relevant product markets. One of the core submissions made by the European Union in this regard is that the United States has failed to demonstrate any clearly discernible *trends* (in the form of clearly *declining* delivery volumes and market shares) to show that sales of United States LCA have been either substituted in the relevant markets or obstructed from entering those markets.[3290]

6.1803. An analysis of the *trends* in the evolution of a complainant's competitive position in a relevant market over time may reveal *inter alia* that its volume of sales and market share have generally: (a) remained stagnant; (b) decreased; (c) increased; or (d) fluctuated. Non-attribution factors aside, the European Union maintains that the United States' displacement and impedance claims may succeed *only* if the relevant data clearly demonstrated the second of these four

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[3286] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1071 (citing Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1119, 1160-1161, 1165-1166, and 1170).

[3287] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1163.

[3288] The United States also makes one conditional claim: that the United States' LCA industry is *threatened* with displacement and/or impedance in the European Union product market for single-aisle LCA, should the Panel reject its present serious prejudice claims in that market. (United States' first written submission, para. 514; second written submission, para. 720; and response to Panel question No. 162)

[3289] United States' first written submission, paras. 520-532.

[3290] European Union' first written submission, paras. 845, 851, 854, 855, 951, 955, 959, 963, 1061, 1063, 1067, 1073, 1077, and 1079; second written submission, paras. 1562, 1600-1606, 1612, 1619, 1624, 1628, 1638, 1646, 1647, 1655-1656, 1658, 1661, 1667, 1674, 1678, 1681, 1685, 1688, and 1691; and comments on the United States' response to Panel question No. 162.

possibilities. We are not persuaded by this argument as it implies that there can be no displacement or impedance in a relevant market in a situation where the effect of a subsidy is to prevent the like product from achieving a higher volume of sales and market share than would otherwise be the case in the absence of the subsidy.

6.1804. While it is true that the Appellate Body faulted parts of the panel's *displacement* analysis in the original proceeding because of its failure to identify *trends* showing *declining* market shares[3291], it is important to recall that the Appellate Body made these findings only after having: (a) explained that the identification of *declining trends* was a necessary element of the *first part* of the panel's *two-step* approach to causation[3292]; and (b) decided to limit its assessment of the panel's *displacement* analysis for this purpose to the same question entertained by the panel – namely, "whether there was an observable decline in the sales of Boeing".[3293] However, as we are now undertaking a "*unitary analysis*" of the effects of the challenged subsidies for the purpose of claims of *both* displacement *and* impedance, the Appellate Body's statements from the original proceeding which the European Union draws support from do not appear to be entirely relevant to the situation at hand.[3294] Indeed, the position advocated by the European Union that would require the United States to identify *declining trends* even in the context of a "unitary analysis" of causation is at odds with the very guidance explicitly provided by the Appellate Body in the original proceeding, when (as already noted) it clarified that displacement or impedance will arise where:

> Displacement or impedance would arise where the {unitary} counterfactual analysis shows that the sales of the complaining Member would have declined less or *would have been higher* in the absence of the challenged subsidy.[3295] (emphasis added)

6.1805. Turning to the "appropriate{} representative period", we note that the United States has submitted data for the period from 2001 to 2013.[3296] For the reasons we have explained elsewhere in this Report, we will focus on data from the post-implementation period, i.e. December 2011 through 2013 inclusive. When this is done, the volume of deliveries and market share information we must consider in relation to the different product markets is the following:

[3291] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1188-1190 and 1193-1198.

[3292] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1170 ("{W}here a complainant puts forward a case based on the existence of displacement as a directly observable phenomenon *and the panel opts to examine it under a two-step approach, as was done in this dispute*, displacement arises under Article 6.3(a) of the *SCM Agreement* where imports of a like product of the complaining Member are declining in the market of the subsidizing Member, and are being substituted by the subsidized product. … The identification of displacement under *this approach* should focus on *trends* in the markets, looking at both volumes and market shares.") (emphasis added) and 1188 ("{W}e have explained that, *under the Panel's two-step approach*, the analysis of displacement required an assessment of *trends* over the entire reference period."). (emphasis added)

[3293] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1179 ("We recall that the Panel entertained the United States' claim of displacement on the basis of an assessment of whether there was an observable decline in the sales of Boeing. Thus, we will limit our assessment to the question of whether a decline in the sales of Boeing during the reference period can be observed from the data.").

[3294] Moreover, even in the context of an analysis of displacement undertaken in a *two-step* approach to causation, any assessment of *trends* in sales volumes and market share would have to be such that could shed light on the market situation *with* and *without* the subsidies.

[3295] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1163.

[3296] See United States' response to Panel question Nos. 40 and 162; and Summary table of updated Ascend Aircraft database, (Exhibit USA-578) (BCI).

Table 20: Market for single-aisle LCA

	European Union			Australia			China			India		
Delivery Data	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**
Boeing Volume (Units)	10[3297]	59	29	4[3298]	21	14	4[3299]	73	123	1[3300]	8	17
Boeing Market Share	83.3%	49.6%	29.0%	80%	77.8%	51.9%	33.3%	41.7%	55.9%	33.3%	26.7%	43.6%
Airbus Volume (Units)	2[3301]	60	71[3302]	1[3303]	6	13	8[3304]	102	97[3305]	2[3306]	22	22
Airbus Market Share	16.7%	50.4%	71.0%	20%	22.2%	48.1%	66.7%	58.3%	44.1%	66.7%	73.3%	56.4%

Table 21: Market for twin-aisle LCA

	European Union			China			Korea			Singapore		
Delivery Data	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**
Boeing Volume (Units)	1[3307]	8	15	1[3308]	7	19	0	2	3	0	0	2
Boeing Market Share	100%	30.8%	65.2%	50%	30.4%	47.5%	-	50.0%	50.0%	-	-	25.0%
Airbus Volume (Units)	0	18	8	1[3309]	16	21	0	2	3	0	0	6
Airbus Market Share	0.0%	69.2%	34.8%	50%	69.6%	52.5%	-	50.0%	50.0%	-	-	75.0%

[3297] Boeing delivered two 737NGs to Ryanair on 2 December 2011, two 737NGs to Ryanair on 6 December 2011, one 737NG to Ryanair on 15 December 2011, one 737NG to Ryanair on 16 December 2011, two 737NGs to Ryanair on 20 December 2011, one 737NG to Thomson Airways on 21 December 2011, and one 737NG to Air Berlin on 30 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3298] Boeing delivered one 737NG to Qantas on 6 December 2011, one 737NG to Virgin Australia on 12 December 2011, one 737NG to Virgin Australia on 21 December 2011, and one 737NG to Qantas on 27 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3299] Boeing delivered one 737NG to Air China on 8 December 2011, one 737NG to China Southern Airlines on 13 December 2011, one 737NG to Hainan Airlines on 15 December 2011, and one 737NG to Nanshan Jet on 16 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3300] Boeing delivered one 737NG to SpiceJet on 22 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3301] Airbus delivered one A320 to Air Berlin on 21 December 2011 and one A321 to Lufthansa on 27 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3302] The European Union claims that this number should be 72, not 71. (European Union's comments on the United States' response to Panel question No. 162, para. 59).

[3303] Airbus delivered one A320 to Qantas/Jetstar on 5 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3304] Airbus delivered one A321 to Air China on 6 December 2011, one A320 to Hainan Airlines on 13 December 2011, one A320 to China Eastern Airlines on 21 December 2011, one A320 to Air China on 22 December 2011, one A320 to Spring Airlines on 23 December 2011, one A320 to China Southern Airlines on 23 December 2011, one A320 to Air Lease Corporation on 29 December 2011, and one A319 to Sanay Group Company on 30 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3305] The European Union claims that this number should be 99, not 97. (European Union's comments on the United States' response to Panel question No. 162, para. 71).

[3306] Airbus delivered two A320s to IndiGo on 6 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3307] Boeing delivered one 777 to GECAS on 9 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3308] Boeing delivered one 777 to Air China on 12 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3309] Airbus delivered one A330 to China Eastern Airlines on 5 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

Table 22: Market for very large LCA

	European Union			Australia			China		
Delivery Data	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**
Boeing Volume (Units)	0	5	5	0	0	0	0	0	0
Boeing Market Share	-	55.6%	55.6%	0.0%	-	-	0.0%	0.0%	0.0%
Airbus Volume (Units)	0	4	4	1[3310]	0	0	1[3311]	2	1
Airbus Market Share	-	44.4%	44.4%	100%	-	-	100%	100%	100%

	Korea			Singapore			United Arab Emirates		
Delivery Data	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**	**Dec. 2011**	**2012**	**2013**
Boeing Volume (Units)	0	0	0	0	0	0	0	0[3312]	0
Boeing Market Share	-	0.0%	0.0%	-	0.0%	-	0.0%	0.0%	0.0%
Airbus Volume (Units)	0	1	2	0	5	0	2[3313]	11	13
Airbus Market Share	-	100%	100%	-	100%	-	100%	100%	100%

6.1806. In the light of the two "plausible" counterfactual scenarios we have elaborated in the previous subsection, it is apparent that in the absence of the effects of the challenged LA/MSF subsidies, the volume of deliveries and market shares that would have been achieved by the United States' LCA industry would have been higher than its actual level. First, we recall that in both "plausible" counterfactual scenarios, any new non-US LCA competitor would have only entered the market with a *single-aisle* LCA, implying that the twin-aisle and VLA markets would have been supplied by the United States' industry alone. Second, while it is possible that any new non-US LCA producer entering the market after the end of 2006 might well have been able to win a relatively small number of single-aisle aircraft orders between 1 December 2011 and the end of 2013, we have strong doubts about whether such a new entrant could have also made *deliveries* over these years. In this regard, we recall that deliveries of new LCA will lag their order date by typically *at least* three years, and usually many more years in respect of *newly launched* aircraft. Moreover, recent experience shows that delays in the delivery of newly launched aircraft often arise even for well-resourced and expert producers such as Airbus and Boeing.[3314] In order to accept that a new producer entering the LCA market for the first time after 2006 could have delivered a single-aisle LCA between 1 December 2011 and the end of 2013, we would have to be satisfied that it would have been able to launch, develop, sell, produce and deliver a single-aisle LCA within approximately six years, at most. In our view, such an achievement would be difficult for even Airbus and Boeing to realize. Thus, we do not believe that any new non-United States LCA producer entering the market in 2007, at the earliest, could have *delivered* a single-aisle LCA between 1 December 2011 and the end of 2013.

[3310] Airbus delivered one A380 to Qantas on 15 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3311] Airbus delivered one A380 to China Southern Airlines on 16 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3312] The European Union claims that this number should be one, not zero. (European Union's comments on the United States' response to Panel question No. 162, para. 145. See also European Union's comments on the United States' response to Panel question No. 40, fn 321 (also noting this discrepancy in previously offered delivery data)).

[3313] Airbus delivered one A380 to Emirates on 2 December 2011 and another A380 to Emirates on 16 December 2011. (Ascend database, Deliveries made, data request as of 7 April 2014, (Exhibit EU-512))

[3314] See above paras. 6.509-6.510, 6.528-6.531 (A380), 6.478 (787), and 6.1711 and fns 3059 and 3188 (A350XWB).

6.1807. The European Union submits that the United States cannot demonstrate that its LCA have been displaced or impeded from the relevant markets without first establishing that it has "lost sales" in those markets. In other words, the European Union argues that in order for the United States to make out its displacement and impedance claims, it must demonstrate that the deliveries underlying the relevant market shares are attributable to "significant lost sales … found during the original proceeding, or even lost sales as claimed by the United States during these compliance proceedings".[3315]

6.1808. We are not convinced by the European Union's submission. In our view, there is no textual basis in the SCM Agreement on which to reason that a showing of displacement and impedance in a particular market for the purpose of Article 6.3(a) and (b) must be based on findings of significant lost sales in the same market under Article 6.3(c). We fail to understand what would be the purpose of defining market displacement and impedance, and significant lost sales, as *separate* causes of action available to WTO Members under the terms of Article 6.3, if establishing the former required demonstrating the latter. We recall in this regard that in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body stressed the distinct features of market displacement and impedance claims, compared with significant lost sales, rejecting the notion of a "dependent relationship between"[3316] them:

> We do not agree with the implication of the Panel's reasoning that the phenomena of displacement and impedance necessarily follow from a finding of significant lost sales. In *EC and certain member States – Large Civil Aircraft,* the Appellate Body acknowledged the potential overlap of lost sales, and displacement and impedance, in that both phenomena relate to a firm's sales. The Appellate Body, however, also identified distinctions between these concepts. For example, the Appellate Body observed that the assessment of displacement or impedance "has a well-defined geographic focus", whereas the relevant geographic market for assessing lost sales is not similarly confined, and may even extend to the world market. The Appellate Body also noted that the fact that lost sales must be "significant" implies that the assessment must have both quantitative and qualitative dimensions, whereas the assessment of displacement and impedance is primarily quantitative in nature.[3317] (footnotes omitted)

6.1809. Furthermore, we note that in the original proceeding, the Appellate Body upheld the panel's finding that the challenged LA/MSF subsidies were a "genuine and substantial" cause of displacement in certain geographic markets *without* ever establishing that all of the delivery data underlying the United States' claims were based on orders of Airbus LCA found to constitute "significant lost sales". In particular, in the light of the original panel's two-step causation analysis, the Appellate Body first reviewed delivery volumes and market share data in the relevant geographic markets in order to discern trends in the data evidencing displacement. In the second step of its analysis, the Appellate Body examined whether the subsidies were a "genuine and substantial" cause of the displacement it had found to exist in the relevant geographic markets. The Appellate Body reasoned that, in the light of the "plausible" counterfactual scenarios, none of the Airbus deliveries would have occurred and, "{a}s Boeing (or the other US manufacturer envisaged by the Panel) would be the only supplier(s) of LCA, it (or they) would have made the sales instead". For the Appellate Body, this was enough to "satisf{y}, without more, the 'genuine and substantial relationship' standard articulated by the Appellate Body in *US – Upland Cotton*."[3318] Thus, we can see no merit in the European Union's submission that the United States cannot establish its claims of displacement or impedance for the purpose of Article 6.3(a) and (b) of the SCM Agreement, without also demonstrating that all of the Airbus deliveries made in any particular market constitute "significant lost sales" within the meaning of Article 6.3(c).

6.1810. The European Union argues that the United States has failed to establish that the effect of the LA/MSF subsidies was to displace or impede Boeing's LCA from the Indian market for *single-aisle* LCA in the 2011 to 2013 period because, according to the European Union, "almost all" of the

[3315] European Union's first written submission, paras. 853, 855, 857, 952, 956, 960, 964, and 1068; response to Panel question 36; and comments on the United States' response to Panel questions 36, 39, and 162.

[3316] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1240.

[3317] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1241.

[3318] Appellate Body Report, *EC and certain member States – Large Civil aircraft*, para. 1264.

relevant deliveries in those years resulted from an order for A320s made by IndiGo Airlines in 2005, and Boeing had been "unwilling to sell aircraft to IndiGo Airlines in 2005".[3319] One of the pieces of evidence the European Union relies upon to substantiate these assertions is an article in the Seattle Times in which Boeing's "chief sales executive for India" is quoted as having stated that "his team had also negotiated with IndiGo {in relation to the 2005 order for 100 A320s}, but had refused to sell them so many airplanes in one purchase". The article quotes the same sales executive as having also said that Boeing "told them it didn't make sense for an airline that hadn't flown one flight yet'" to order 100 single-aisle LCA, given that at the relevant time, all "Indian airlines together … have a combined fleet of 165 airliners … {a}nd even at that number, the Indian airport infrastructure is strained to accommodate them and there is a big shortage of pilots".[3320] Similar scepticism about the extent to which IndiGo Airlines "will ever take delivery of the 100 A320s" ordered in 2005 was expressed by Boeing's Vice President for marketing in an interview appearing in Airline Fleet & Network Management, where he is quoted as having said: "We would think {the delivery of the 100 A320s} is a low probability, though that doesn't mean it can't happen. One of the big challenges … is infrastructure: if infrastructure is constraining you it's difficult to grow".[3321]

6.1811. It is apparent from these two accounts of Boeing's views of the Airbus sale to IndiGo Airlines that Boeing did not believe IndiGo Airlines would be able to accept delivery of all of the 100 single-aisle LCA ordered in 2005, and for this reason, "refused" to agree to make a sale involving that number of LCA. In our view, however, this fact does not demonstrate that the deliveries of Airbus A320s made into the Indian market for single-aisle LCA do not represent lost market share to the United States' LCA industry.

6.1812. We recall that in the "plausible" counterfactuals which served as the basis of the adopted findings in the original proceeding, Airbus would not have existed in 2005 in the absence of the pre-A350XWB LA/MSF subsidies, and there would have been either a Boeing monopoly or a duopoly involving Boeing and another United States manufacturer serving LCA customers. On the basis of these findings alone, it is evident that Airbus could not have made the relevant deliveries between 1 December 2011 and the end of 2013. Had Boeing refused to make *all* of those sales and IndiGo Airlines maintained its request, IndiGo Airlines would have, no doubt, sought to fill its order by approaching the other United States' producer operating in the "plausible" duopoly counterfactual scenario. On the other hand, had Boeing refused to make the desired number of sales in the "plausible" monopoly scenario, it is difficult to see what else IndiGo Airlines could have done but to negotiate a smaller order that would have been acceptable to both parties or, possibly, spread out the delivery of 100 single-aisle LCA over a longer period of time that might have addressed Boeing's perceptions about the potential lack of infrastructure. Thus, it is, in our view, apparent that not only were the pre-A350XWB LA/MSF subsidies a "genuine and substantial" cause of the deliveries made by Airbus into the Indian market for single-aisle LCA in between 1 December 2011 and the end of 2013, but also that in the absence of those subsidies, those deliveries would have been made by the United States' LCA industry.

6.1813. Finally, the European Union advances three additional reasons why it considers that the United States has failed to demonstrate that the LA/MSF subsidies, as opposed to other non-subsidy factors, are a "genuine and substantial" cause of the alleged displacement and impedance in the different LCA markets. First, the European Union submits that the United States has ignored the fact that "present" Airbus deliveries into the Australian market for single-aisle LCA resulted from an order for A320s made by Jetstar (Qantas Group) in 2007 "because A320s 'were the core aircraft in Jetstar's short haul fleet'", which made it possible for Jetstar to "avoid{} switching costs and could benefit from the advantages of commonality".[3322] Second, the European Union argues that the United States has failed to address "any political involvement in China that resulted in orders and subsequent deliveries" of single-aisle LCA or "the fact that many of the A320 family aircraft delivered to Chinese customers are, in fact, assembled in China − strengthening the

[3319] European Union's second written submission, para. 1595; and comments on the United States' response to Panel question No. 162.

[3320] "Airbus boasts of orders that trounce Boeing deals", *Seattle Times*, 17 June 2005, (Exhibit EU-340).

[3321] "AF&NM interview: Randy Baseler, VP Marketing, Boeing Commercial Airplanes", *Airline Fleet and Network Management*, January/February 2006, pp. 60-63, (Exhibit EU-341),p. 62.

[3322] European Union's second written submission, paras. 1587-1589 (quoting Qantas Press Release, "Qantas unveils short haul fleet plan for the next decade", 14 November 2007, (Exhibit EU-335)); and comments on the United States' response to Panel question No. 162.

demand for these aircraft in China for reasons wholly unrelated to the alleged subsidies".[3323] Third, the European Union maintains that the United States has failed to account for the effect of the development and production delays affecting the 787 and the 747-8 on the limited number of sales achieved by Boeing in the markets for twin-aisle and very large LCA, respectively.[3324]

6.1814. In our view, all three of the additional reasons the European Union relies upon are either entirely or partly premised on the existence of Airbus as a competitive LCA producer offering a full range of LCA in all three LCA product markets. We have found, however, that in the "plausible" counterfactual scenario, Airbus would not have existed at the relevant times. Thus, the fact that "many" of the A320 sales made in China were influenced by the fact that Airbus has local assembly operations, is not a non-subsidy reason that can explain those sales. On the contrary, the very fact that Airbus would not have existed at the relevant times in the absence of the effects of the LA/MSF subsidies means that Airbus could not have invested in Chinese assembly operations and, therefore, that LA/MSF subsidies must be a "genuine and substantial" cause of the post-implementation period deliveries of A320 into China.

6.1815. Similarly, the fact that Jetstar's 2007 order of A320s was made because of the advantages of commonality resulting from Jetstar's *existing fleet of Airbus LCA* also clearly demonstrates that the "product" effects of the LA/MSF subsidies were a "genuine and substantial" cause of the deliveries in question. Moreover, the fact that political considerations favouring a producer from the European Union, as opposed to the United States, *may* have influenced some of the sales of Airbus single-aisle LCA into China[3325] is, in our view, irrelevant under the "plausible" counterfactual where the only LCA producers would be from the United States.

6.1816. Lastly, we do not see the delays in the development and production of the 787 and the 747-8 to mean that, in the absence of the "product" effects of the LA/MSF subsidies, Boeing or the United States' LCA industry would not have won the orders corresponding to the deliveries made in the different markets for twin-aisle and very large LCA. The fact that Airbus would not have existed in the absence of the LA/MSF subsidies means that customers that could not wait for the 787 and 747-8 to become available would have turned to either Boeing's other twin-aisle LCA, the 767 and the 777[3326], or the twin-aisle LCA of the other United States' LCA producer.

6.1817. Thus, for all of the above reasons, we find that in the absence of the "product" effects of the challenged LA/MSF subsidies, the volume of deliveries and market shares that would have been achieved by the United States' LCA industry between 1 December 2011 and the end of 2013 would have been higher than its actual level in all relevant product markets. Accordingly, we find that the United States has established that the "product" effects of the challenged LA/MSF subsidies are a "genuine and substantial" cause of displacement and/or impedance of United States LCA in the markets for single-aisle LCA in the European Union, Australia, China and India; twin-aisle LCA in the European Union, China, Korea and Singapore; and very large LCA in the European Union, Australia, China, Korea, Singapore and the United Arab Emirates.

6.1818. In the light of these findings, we make no determination of the United States' claim of *threat* of displacement and impedance in the market for single-aisle LCA in the European Union,

[3323] European Union's second written submission, para. 1625; and comments on the United States' response to Panel question No. 162.

[3324] European Union's first written submission, paras. 519, 1061-1062, 1064, 1067, 1073, 1077, and 1079; second written submission, paras. 1634, 1641, 1650, 1662, 1669, and 1672; and comments on the United States' response to Panel question Nos. 40, 43, 155, and 162.

[3325] We note, in this regard, that the European Union does not specifically identify exactly which orders of Airbus single-aisle LCA were achieved in China because of alleged political considerations, arguing only generally that "politics in selling aircraft to Chinese customers, and in particular in obtaining governmental approval for the purchase deal" is important. (European Union's second written submission, para. 1625; and comments on the United States' response to Panel question No. 162 (citing Elizabeth Dwoskin, "How to sell an airplane in China", Bloomberg Businessweek, 18 October 2012, (Exhibit EU-343)))

[3326] We recall that we have found that the 767 and the 777 compete in the same twin-aisle product market as the 787, and that there is evidence that the larger versions of the 777 may also at times challenge for sales in the market for very large LCA.

given that the United States requested the Panel to consider this claim only if we rejected its claims of *present* serious prejudice.[3327]

6.6.4.5.4.5 The effects of the non-LA/MSF subsidies

Introduction

6.1819. Having found that the challenged LA/MSF subsidies are a "genuine and substantial" cause of serious prejudice to the interests of the United States, within the meaning of Article 6.3(a), (b) and (c) of the SCM Agreement, we now turn to examine whether the United States has demonstrated that the effects of the *non-LA/MSF subsidies* are a "*genuine*" cause of the same forms of serious prejudice, such that they may be "cumulated" with those of the LA/MSF subsidies.

6.1820. We recall that the original panel "cumulated" the effects of the non-LA/MSF subsidies after having found that those effects "complemented and supplemented" the effects of the pre-A350XWB LA/MSF subsidies.[3328] The Appellate Body upheld the original panel's causation findings in relation to all of the non-LA/MSF measures with respect to which it had confirmed the original panel's subsidization findings, with the exception of the R&TD subsidies.[3329] In this proceeding, the United States requests that we come to essentially the same conclusion with respect to the allegedly ongoing effects of the following non-LA/MSF subsidies: (a) the French Government's equity infusions into Aérospatiale in 1987, 1988, 1992 and 1994; (b) the German Government's acquisition of a 20% interest in Deutsche Airbus in 1989 and its subsequent transfer to MBB in 1992; and (c) 11 German and Spanish infrastructure-related regional development grants.[3330]

6.1821. Recalling the Appellate Body's affirmation of the original panel's findings concerning the effects of these non-LA/MSF subsidies, the United States submits that their effects should be once again "cumulated" with those of the challenged LA/MSF subsidies because they continue to "complement and supplement" the "product" effects of LA/MSF, thereby "genuinely" contributing to the causation of serious prejudice to the United States' interests in the post-implementation period. Thus, the United States argues that "{j}ust as it was in the period examined by the original panel, Airbus in the current period has been in a position to offer its LCA product line in part because the equity infusions 'guarantee{d} the continued existence and financial stability of Aérospatiale and Dasa, and enchanc{ed} those companies' borrowing capacity in the wake of further investments in the production and development of particular models of LA/MSF-financed Airbus LCA'".[3331] Likewise, the United States asserts that the Appellate Body "reached a similar conclusion with respect to the infrastructure subsidies", namely, that they "'all have a genuine causal link with the creation or expansion of production facilities for various models of Airbus LCA'".[3332] The United States maintains that nothing material has changed since the original proceeding that could justify departing from these conclusions today.[3333]

[3327] United States' first written submission, para. 514; second written submission, para. 720; and response to Panel question No. 162.

[3328] Appellate Body Report, *United States – Large Civil Aircraft (2nd complaint)*, para. 1288.

[3329] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1381-1413. The original panel's analysis of the effects of the non-LA/MSF subsidies included the 1998 transfer by the French Government of its 45.76% interest in Dassault Aviation to Aérospatiale and certain infrastructure measures relating to the Aéroconstellation industrial site and associated EIG facilities. On appeal, the Appellate Body found that these measures did not amount to "subsidies" within the meaning of the SCM Agreement and, therefore, declared the original panel's causation findings with respect to these measures "moot and of no legal effect". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 993, 1026-1027, 1385, 1396, and fn 3064)

[3330] As already noted, the United States' non-compliance claims do not include the Bremen Airport runway extension measure and the lease on the Mühlenberger Loch industrial site, both of which were found to be non-LA/MSF subsidies "complementing and supplementing" the effects of the pre-A350XWB LA/MSF subsidies in the original proceeding.

[3331] United States' first written submission, para. 403 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1390).

[3332] United States' first written submission, para. 404 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1397).

[3333] United States' first written submission, paras. 400-406; second written submission, para. 383; and response to Panel question No. 38.

6.1822. The European Union responds to the United States specific arguments in essentially one paragraph, submitting that the United States has failed to "provide arguments and evidence that {would} enable a panel to decide whether or not to cumulate any effects" of the non-LA/MSF subsidies with those of the LA/MSF subsidies.[3334] Furthermore, in response to a question from the original panel, the European Union explained that although not disagreeing with the United States' view that, in principle, the effects of the non-LA/MSF subsidies may be cumulated with those of the LA/MSF subsidies, according to the European Union, such cumulation would be legitimate only in relation to the effects of the non-LA/MSF subsidies that *continue to exist*.[3335]

6.1823. As we have already evaluated and dismissed the European Union's submissions concerning the purported requirement to demonstrate the continued existence of a subsidy (i.e. "present subsidization") in the context of Article 7.8 of the SCM Agreement[3336], we see no need to revisit the European Union's line of argument for the purpose of our analysis of the United States' request to "cumulate" the effects of the non-LA/MSF subsidies with the effects of the LA/MSF subsidies. We therefore focus our assessment of the merits of the United States' "cumulation" arguments on the extent to which the United States has shown that the effects of the non-LA/MSF subsidies continue to "complement and supplement" the effects of the LA/MSF subsidies, thereby, constituting a "genuine" cause of the instances of serious prejudice that are the subject of the United States' claims under Article 6.3(a), (b) and (c) of the SCM Agreement.

6.1824. We start our analysis by recalling the guidance provided by the Appellate Body in *US – Large Civil Aircraft (2nd complaint)* in relation to the circumstances in which it would be appropriate to "cumulate" the effects of one set of subsidies with the effects of another set of subsidies for the purpose of serious prejudice claims advanced under Articles 5(c) and 6.3 of the SCM Agreement.

The Appellate Body's guidance on the "cumulation" of subsidy effects

6.1825. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body clarified that there are at least two ways of conducting a collective assessment of the effects of multiple subsidies for the purpose of conducting a serious prejudice analysis within the meaning of Articles 5(c) and 6.3 of the SCM Agreement – "aggregation" and "cumulation".[3337] Elsewhere in this Report, we have explained the core principles which underpin the "aggregation" of the effects of multiple subsidies and applied those principles to our assessment of the effects of the challenged LA/MSF subsidies in this proceeding.[3338] Having found that the aggregated effects of the challenged LA/MSF subsidies are a "genuine and substantial" cause of serious prejudice to the United States' interests, we must now determine whether the effects of the relevant non-LA/MSF subsidies may be "cumulated" with the effects of the LA/MSF subsidies. The Appellate Body has described the process of "cumulation" as follows:

> {A} panel may begin by analyzing the effects of a *single* subsidy, or an *aggregated* group of subsidies, in order to determine whether it constitutes a genuine and substantial cause of adverse effects. Having reached that conclusion, a panel may then assess whether *other* subsidies—either individually or in aggregated groups—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 phenomena. The other subsidies have to be a "genuine" cause, but they need not, in themselves, amount to a "substantial" cause in order for their effects to be combined with those of the first subsidy or group of subsidies that, alone, has been found to be a genuine and substantial cause of the adverse effects.
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> ...

[3334] European Union's first written submission, para. 714.
[3335] European Union's response to Panel question No. 38; and comments on the United States' response to Panel question No. 38.
[3336] See above at Section 6.6.2.
[3337] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1284-1288.
[3338] See above paras. 6.1445-6.1451.

> Considerations that may bear upon a panel's assessment of whether a genuine causal connection exists include the design, structure, magnitude, and operation of the subsidy, as well as the nexus between the subsidy and the subsidized product. In our view, a genuine causal connection may be established in different ways. One way is to demonstrate that the subsidy or subsidies cause effects that follow the same causal pathway as a subsidy that has already been found to be a genuine and substantial cause of the alleged market phenomena under Article 6.3 of the *SCM Agreement*. We do not, however, consider that this is the only way in which the requisite genuine causal connection can be established. A genuine causal connection may also be found when a complainant succeeds in demonstrating that, even though other subsidies do not operate along the same causal pathway, those subsidies nevertheless, either singly or in combination, meaningfully contribute to, and thereby complement and supplement, the adverse effects, within the meaning of Article 6.3, caused by the first subsidy. In other words, the effects of such other subsidy or group of subsidies must be shown to be non-trivial in order to be found to supplement or complement effects for which a genuine and substantial connection has already been established.[3339] (emphasis original)

6.1826. With this guidance in mind, we now turn to evaluate whether it is appropriate to cumulate the effects of non-LA/MSF subsidies with the effects of the LA/MSF subsidies. We start by first of all recalling the findings made in the original proceeding with respect to the effects of the non-LA/MSF subsidies the United States challenges in this proceeding before going on to examine the extent to which those effects continue in the post-implementation period, such that it would be appropriate to conclude that they remain a "genuine" cause of serious prejudice to the United States' interests.

French and German capital contributions

Findings of the original panel and the Appellate Body

6.1827. The French government equity infusions that are the subject of the United States' complaint were comprised of three investments into the capital of Aérospatiale in 1987, 1988 and 1994 amounting to FF 1.25 billion, FF 1.25 billion and FF 2 billion, respectively, and a 1992 acquisition through Crédit Lyonnais, at the time controlled by the French Government, of a 20% equity interest in Aérospatiale amounting to FF 1.4 billion.[3340]

6.1828. The original panel and the Appellate Body described the design, structure, magnitude and operation of these equity infusions in detail, as well as their nexus with Airbus LCA, finding that the subsidies were provided at a time when Aérospatiale "required the additional equity to fund investments in fixed assets and inventory, and advances to suppliers, in connection with the development of new aircraft".[3341] The original panel explained that Aérospatiale "required additional equity capital … in order to fund new investments, such as the ramp-up for manufacture of the A320 … and the launch of the A330/A340".[3342] Indeed, in its arguments to the original panel, the European Communities had acknowledged that Aérospatiale could not have undertaken these investments without the government subsidies.[3343] Moreover, at all relevant times, the evidence reviewed by the original panel revealed that Aérospatiale's financial condition was relatively poor, with only uncertain prospects for the immediate future.[3344]

6.1829. Turning to the German Government's 1989 capital contribution and share transfer, the original panel explained that these took place in the context of the German Government's 1989 restructuring of Deutsche Airbus, which was prompted by Deutsche Airbus' near failure and the desire on the part of the German Government to "create a realistic chance of placing the Airbus program under full private industry responsibility over the longer term and thus reducing the level

[3339] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1287 and 1292.
[3340] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 630 (citing Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1324).
[3341] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1957.
[3342] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1364 (citing the European Communities' first written submission, paras. 1134-1135).
[3343] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1957.
[3344] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1363-7.1375.

of state financial assistance for Airbus."[3345] As part of the German Government's restructuring plan, it was agreed that Deutsche Airbus would, *inter alia*, receive a DM 505 million capital contribution from KfW, and in return, KfW would hold a 20% interest in Deutsche Airbus for ten years, after which it would be sold to MBB.[3346] Moreover, for at least the first eight years of this investment, KfW agreed that any profits generated by Deutsche Airbus would be used first to build up Deutsche Airbus' capital base and to form a special reserve to compensate Deutsche Airbus for exchange rate losses.[3347] At the time, Deutsche Airbus "anticipated that it would require additional financing for the A320 programme, and the start-up of the A330/A340 programme"[3348], with its financial position being "exceedingly poor".[3349] Indeed, the European Communities had acknowledged that by 1989, Deutsche Airbus was on "the verge of bankruptcy".[3350]

6.1830. As regards the 1992 transfer of KfW's 20% interest in Deutsche Airbus to MBB, the original panel found that the earlier than expected (1992 instead of 1999) transfer was triggered by the German Government's decision to cancel the DM 4.1 billion exchange rate loss insurance scheme agreed under the 1989 restructuring plan. In essence, the early transfer of KfW's 20% interest was one of the measures designed to compensate Deutsche Airbus for the loss of this assistance, which had been anticipated to continue until 2000.[3351] Thus, it is apparent that the 1992 share transfer transaction was inherently connected to the 1989 restructuring plan, and in particular the exchange rate insurance measure, which we understand was not limited to any one or more specific LCA products.

6.1831. In the light of these factual findings, the original panel concluded that the aggregated effects of the capital contribution subsidies provided by the French and German governments "complemented and supplemented" the "product" effects of the pre-A350XWB LA/MSF subsidies because:

> The equity investments and share transfer measures of the French and German governments ensured the continued existence and financial stability of the respective national entities engaged in the Airbus enterprise. Those entities were a necessary element of the overall Airbus effort, as it is clear to us that without their participation in the overall effort, Airbus would not have been able to continue to develop, launch and produce LCA in fulfilment of the goal of developing a full range of LCA for the market. Moreover, as noted above, Aérospatiale required the additional equity to fund investments in fixed assets and inventory, and advances to suppliers, in connection with the development of new aircraft. As the European Communities acknowledges that Aérospatiale could not have undertaken these investments without the government's assistance through equity infusions, it seems clear to us that these equity investments directly supported the development of LCA in a manner that was as direct as LA/MSF.[3352] (footnotes omitted)

6.1832. On appeal, the Appellate Body evaluated various aspects of the original panel's causation analysis, including whether it was proper to have cumulated the effects of the capital contribution subsidies with those of the pre-A350XWB LA/MSF subsidies. The Appellate Body upheld the original panel's findings in all material respects. In doing so, the Appellate Body first of all noted that the relevant subsidies:

[3345] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1247. (internal quotation marks omitted; footnote omitted)

[3346] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1248.

[3347] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1265.

[3348] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1247.

[3349] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1276.

[3350] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1276.

[3351] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1298.

[3352] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1957. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1386-1391 (upholding the Panel's relevant findings in this context). Although the original panel did not explicitly state that it was considering the *aggregated* effects of the relevant subsidies, it is apparent from the absence of panel (or Appellate Body) findings in relation to the effects of each of the subsidy measures individually that this is precisely what the original panel did. In our view, the similarities between the design, structure and operation of the subsidies, as articulated in the original panel's factual findings, are such that it would be appropriate to continue to consider their effects in the aggregate.

> {W}ere capital investments that were not necessarily tied to the development of any particular model of Airbus LCA. However, the equity infusions at issue were … undertaken with the specific purpose of addressing the undercapitalization of both Aérospatiale and Deutsche Airbus, which, during the 1990s, threatened the investment capacity—and indeed the very existence—of both companies. As the Panel correctly noted, these equity infusions "ensured the continued existence and financial stability" of Aérospatiale and Deutsche Airbus. Given the nature and structure of the Airbus consortium, it would have been unlikely that Airbus could have continued to develop and bring to the market its successive models of LCA without the participation of each of the national companies engaged in the Airbus enterprise.[3353] (footnotes omitted)

6.1833. The Appellate Body then opined that the original panel had made adequate factual findings to support the conclusion:

> {T}hat Aérospatiale and Dasa were responsible for fundamental portions of the assembly of certain models of Airbus LCA, in particular the A300, A310, A319, A320, and A321. The Panel further observed that the evidence suggested that "this division of labour continued with subsequent models of Airbus LCA." This, in our view, supports the Panel's conclusion that Aérospatiale and Dasa "were a necessary element of the overall Airbus effort", and that without their participation "Airbus would not have been able to continue to develop, launch and produce LCA in fulfilment of the goal of developing a full range of LCA for the market".[3354] (footnotes omitted)

6.1834. The Appellate Body further noted that statements by the European Communities made in the course of the original proceeding bolstered the validity of the original panel's conclusions in this context[3355], ultimately agreeing with the original panel that:

> "Aérospatiale required the additional equity to fund investments in fixed assets and inventory, and advances to suppliers, in connection with the development of new aircraft." The European Communities acknowledged that "{i}nternally generated cash flow was not sufficient" and that "a prudent debt-to-equity ratio placed limits on the amount of new debt that could be borne". Therefore, the Panel considered that Aérospatiale could not have undertaken further investment in LCA development had it not obtained the equity infusions by the French Government. This, in our view, supports the Panel's conclusion that "these equity investments directly supported the development of LCA in a manner as direct as LA/MSF".
>
> Based on the above, we consider that the Panel had a sufficient basis to conclude that the French and German equity infusions into Aérospatiale had a genuine connection to Airbus' ability to develop and bring to the market particular models of LCA, both by guaranteeing the continued existence and financial stability of Aérospatiale and Dasa, and by enhancing those companies' borrowing capacity in the wake of further investments in the production and development of particular models of LA/MSF-financed Airbus LCA. We consider that these equity infusions provided support to Airbus' efforts in developing and bringing to the market those models of Airbus LCA, with corresponding effects on Boeing's LCA sales.[3356] (footnotes omitted)

6.1835. Accordingly, the aggregated effects of the French and German capital contribution subsidies were found to be a "genuine" cause of serious prejudice to the United States' interests in the 2001 to 2006 reference period.

Effects in the post-implementation period

6.1836. The question we must answer in this part of our analysis is whether the aggregated effects of the capital contribution subsidies continue to be a "genuine" cause of serious prejudice to

[3353] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1386.
[3354] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1387.
[3355] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1388.
[3356] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1389-1390.

the United States' interests, notwithstanding the time that has passed since the findings made in the original proceeding.

6.1837. We recall that elsewhere in this Report we explained that we were willing to accept, for the purpose of evaluating the merits of the United States' non-compliance claims, that the European Union has demonstrated that the *ex ante* "lives" of the capital contribution subsidies came to an end prior to 1 June 2011, that is, before the date of the adoption of the recommendations and rulings by the DSB in the original proceeding.[3357] However, as already noted, the extent to which the *effects* of a subsidy will dissipate with the passage of time and eventually come to an end will be a *fact-specific* matter that may be informed, but *not necessarily defined*, by how the "life" of that subsidy has evolved over time.

6.1838. The findings of the original panel, as upheld by the Appellate Body, established that the aggregated effects of the capital contribution subsidies not only ensured that Airbus would be able to continue the A320 programme and launch and develop the A330/A340 programme, but they also secured the *very existence* of a financially stable Airbus Consortium going forward and, thereby, Airbus' ability to continue to launch, develop and produce *other models of LCA*. In our view, the aggregated effects of the capital contribution subsidies played a fundamental role in the market presence of Airbus' full range of LCA *in the post-implementation period* in much the same (although not identical) way as the *direct* and *indirect* effects of the LA/MSF subsidies. In particular, by securing the very existence of a financially stable Airbus Consortium and providing significant support at a crucial time for Airbus to pursue its development and production work on the A320 and A330/A340 programmes, the capital contribution subsidies meaningfully contributed to the development of new Airbus LCA products in much the same way as the *direct effects* of the LA/MSF subsidies. Likewise, to the extent that the launch, development and production of LCA supported in part by the capital contribution subsidies gave rise to "learning", scope and scale, and financial effects, it is apparent that the capital contribution subsidies must have also generated effects that were not unlike the *indirect effects* of the LA/MSF subsidies. These considerations lead us to conclude that, just as in the original proceeding, the aggregated effects of the capital contribution subsidies continue to "complement and supplement" the "product" effects of the LA/MSF subsidies today by operating along a similar causal pathway. Accordingly, we find that the aggregated effects of the capital contribution subsidies are a "genuine" cause of the "product" effects of the challenged LA/MSF subsidies and, consequently, also the relevant instances of serious prejudice to the United States interests caused by those subsidies in the relevant product markets.

Infrastructure-related regional development subsidies

Findings of the original panel and the Appellate Body

6.1839. The original panel did not make individual findings with respect to the effects of the 11 infrastructure-related regional development subsidies that are the subject of the United States' non-compliance complaint. Rather, the original panel made one finding covering the effects of all of the challenged infrastructure subsidies considered together, including the Mühlenberger Loch lease agreement and the Bremen Airport runway extension measure (neither of which the United States challenges in this proceeding[3358]) and the four Spanish regional development grants to EADS-CASA's San Pablo South facilities (which we have decided to exclude from our evaluation of the merits of the United States' non-compliance complaint).[3359] Nevertheless, the original panel did make the following findings, which we believe are relevant to the analysis we must perform in this part of our Report: (a) that the EUR 6.14 million grant by the German Land of Lower Saxony to Airbus Germany was used "for the extension of Airbus Germany's existing manufacturing site in Nordenham"[3360]; (b) that the grants totalling EUR 75.3 million[3361] by Spanish national and local

[3357] See above para. 6.893.

[3358] See United States' first written submission, fns 13 and 64; and second written submission, para. 265.

[3359] See above paras. 6.899-6.900.

[3360] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1206.

[3361] This amount takes into account the clarifications provided in the PwC Amortization Report about the proportions of the 2003 grant of EUR 17.5 million for Airbus' facilities in Puerto Real, and the 2004 grant of EUR 7.6 million to Airbus Spain for its facility in Illescas, that were financed via the European Regional Development Fund and, therefore, "specific" within the meaning of Article 2.2 of the SCM Agreement. (PwC

authorities to Airbus Spain and EADS-CASA were for investments in new or existing facilities related to Airbus' LCA activities[3362]; and (c) that all of the infrastructure subsidies (including those not considered in this dispute) "provided essential support to the development and production of Airbus LCA, relieving Airbus of significant expenses in connection with the development of facilities … and thus enabling it to continue with the launch of successive models of LCA".[3363] On this basis, the original panel went on to conclude that all of the infrastructure subsidies "had the same effect on Airbus' ability to launch the LCA it launched at the time that it did"[3364] thus "complement{ing} and supplement{ing}" the "product" effect of LA/MSF, thereby establishing a "sufficient nexus" with Airbus LCA and with the types of serious prejudice alleged by the United States.[3365]

6.1840. On appeal, the Appellate Body indicated that the extent to which the 11 regional development grants at issue in the original proceeding had benefitted Airbus' LCA programmes was "less clear" than certain other infrastructure subsidies, stating that "{i}t would have been useful had the Panel elaborated in its analysis how these infrastructure measures supplemented and complemented the effects of LA/MSF".[3366] Ultimately, however, the Appellate Body opined that the factual findings made by the original panel provided "a sufficient basis for concluding that such regional grants were used to expand Airbus' manufacturing sites or EADS-CASA's LCA-related activities, thus supporting the Panel's inference that such regional grants '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 LCA.[3367]

Effects in the post-implementation period

6.1841. As with the capital contribution subsidies, the question we must answer in this part of our analysis is whether the aggregated effects of the seven remaining regional development grant subsidies continue to be a "genuine" cause of serious prejudice to the United States' interests, notwithstanding the time that has passed since the findings made in the original proceeding.

6.1842. We recall that elsewhere in this Report we explained that the European Union does not argue that the *ex ante* "lives" of these subsidies came to an end before the end of the implementation period. Indeed, even accepting the European Union's approach to determining the *ex ante* "lives" of the regional development grant subsidies, Airbus would be continuing to "benefit" from significant portions of the grants provided by the Spanish authorities for decades to come, with the "benefit" of the German regional development grant amortizing in 2014.[3368] This suggests that even by the European Union's own standards[3369], the effects of all but the German regional development grant subsidies that were found to exist in the original proceeding are likely to continue to be felt *today*.[3370]

6.1843. That the effects of the regional development grants, including the subsidies provided by the German authorities, continue to play a meaningful role in the current market presence of

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Amortization Report, (Exhibit EU-5) (BCI/HSBI), table 21 and fn 51. See also Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1236 and fn 4276). The United States has not contested PwC's clarifications in this context.

[3362] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1207-7.1218.

[3363] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1958.

[3364] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1956.

[3365] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1956 and 7.1961.

[3366] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1399.

[3367] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1399. Although the original panel did not explicitly state that it was considering the *aggregated* effects of the infrastructure subsidies, it is apparent from the absence of panel (or Appellate Body) findings in relation to the effects of each of the subsidy measures individually that this is precisely what the original panel did. In our view, the similarities between the design, structure and operation of the seven regional development grant subsidies that are now before us (discussed further below), are such that it would be appropriate to continue to consider their effects in the aggregate.

[3368] See above para. 6.906.

[3369] We recall that the European Union argues that for the purpose of Article 7.8 of the SCM Agreement, a subsidy that no longer exists must be found to have been "withdrawn" and cannot be found to cause "adverse effects". See above paras. 6.794-6.795.

[3370] According to the European Union, therefore, the effects of the German regional development grant would have been present in the period from 1 December 2011 to end of 2013, which is the period with respect to which we have made our findings of present serious prejudice to the United States' interests.

Airbus LCA is, in our view, confirmed by examining the specific facts informing the nature and operation of those subsidies.

6.1844. We recall that all seven of the regional development grants were provided to Airbus over a four-year period for the purpose of covering a range of LCA-related expenses incurred or to be incurred by Airbus Germany, Airbus Spain and EADS-CASA. While the total amount of all seven grants represents a relatively smaller proportion of the costs associated with the funded activities compared with the LA/MSF subsidies and the capital contribution subsidies, it is nevertheless significant and non-trivial, amounting to approximately EUR 81.5 million. The 2002 grant of EUR 6.14 million to Airbus Germany's facility in Nordenham was to be spent on capital assets that would be used to contribute to the establishment of production facilities that are used only for A380 manufacturing activities.[3371] The PwC Amortization Report reveals that each of the Spanish regional development grants was intended to be spent on "some or all of four different" categories of LCA-related expenses, namely: "land and property"; "constructions"; "capital assets"; and/or "planning, engineering and project management".[3372] The PwC Amortization Report states that "the {Spanish regional development grants} *were used to establish production facilities for LCA* … {although} there is no link to the *development* of a particular product/aircraft program."[3373] Other record evidence indicates that Airbus' Illescas and Puerto Real sites − recipients of four of the six Spanish grants − manufacture parts and components for all Airbus LCA sold in the post-implementation period. In this context, we note in 2012, Airbus' website identified Puerto Real and Illescas as Airbus "Centres of Excellence" that, taken together, contribute to development and production of components for all Airbus LCA.[3374] We further note a summary of Airbus' activities in Spain, taken from Airbus' website and also dated 2012, that contains the following statements:

> Getafe shares responsibility for the A380 horizontal tail plane with the Airbus site in Puerto Real, which performs its final assembly and testing. These activities include fuel testing, assembly of the rudder, elevators, and belly fairing, and the delivery of the complete horizontal tail plane and belly fairing to France for final assembly with the aircraft.
>
> The some 500 employees at Puerto Real also focus on structural assemblies of lifting surfaces in carbon fibre and metallic materials, as well as in passenger doors, main landing gear doors and fuselage panels for all Airbus aircraft.
>
> Some of the most innovative technologies in the world are utilised in Illescas at Airbus' Advanced Composites Centre, which manufactures horizontal tail plane and other aircraft parts constructed of carbon fibre reinforced plastic (CFRP). Thirty kilometres from Madrid and home to 500 employees, Illescas specialises in automated production processes for advanced composite materials and in the manufacturing of large lifting surfaces. The site is equipped with the most advanced systems and processes for the design, manufacturing, inspection and repair of all types of composite material structures.
>
> In addition, parts for the A380 horizontal tail plane are manufactured at Illescas before being initially assembled at Getafe.[3375]

6.1845. In our view, the above facts reveal that the regional development grant subsidies continue to make a meaningful contribution to Airbus' ability to develop and produce parts and

[3371] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 122 and 132-134, and table 23.
[3372] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 137-138, and table 24.
[3373] PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 131. (first emphasis added) See also PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), para. 124 (explaining that the Spanish Remaining Regional Grants "were used for civil purposes").
[3374] "Airbus centres of excellence", Airbus website, accessed 21 May 2012, (Exhibit USA-306). We note that although pages two and three of this exhibit contain certain text which is somewhat incomplete, in our view, the exhibit is nonetheless sufficiently clear on this score. The PwC Amortization Report also states that the Illescas site − which received two of the Spanish regional development grants − manufactures Airbus LCA parts and components. (PwC Amortization Report, (Exhibit EU-5) (BCI/HSBI), paras. 125, 127 (explaining that the 2003 grant by the government of Andalusia was intended to be used for the "expansion and modernisation of Airbus' facilities in Puerto Real") and 128).
[3375] "Airbus In Spain" Airbus website, accessed 11 October 2012, (Exhibit USA-459).

components of, especially, the A380, but also other non-specified Airbus LCA in the post-implementation period. To this extent, we believe that, as in the original proceeding, the aggregated effects of the regional development grants continue to "complement and supplement" the "product" effects of the LA/MSF subsidies in two ways. First, the grants "complement and supplement" the *direct* effects of LA/MSF insofar as they meaningfully contribute to Airbus' ability to produce the LCA connected to the LCA programmes that would not have existed as and when they did in the absence of LA/MSF. Second, the grants "complement and supplement" the *indirect* effects arising from LA/MSF because they meaningfully contribute to Airbus' ability to produce its relevant LCA, the development *and production* of which both give rise to the accumulation of the beneficial "learning", scale and scope, and financial effects described earlier in this Report.

6.1846. While we believe that, ultimately, the effects of the regional development grant subsidies operate via a "product"-creating causal pathway similar to the LA/MSF subsidies and the capital contribution subsidies, it is apparent that the regional development grants are not "product" creating or existence subsidies themselves. We detect no evidence before us indicating that Airbus or any of its range of LCA would not have existed in the absence of the regional development grant subsidies. Nevertheless, by meaningfully contributing to Airbus' ongoing LCA development and production efforts in the ways described above, we believe that the regional development grants continue to be a "genuine" cause of the "product" effects of the challenged LA/MSF subsidies and, consequently, also the relevant instances of serious prejudice to the United States' interests caused by those subsidies in the relevant product markets.[3376]

Conclusion

6.1847. For all of the above reasons, we find that the aggregated effects of the capital contribution subsidies and the aggregated effects of the seven regional development grant subsidies that are before us continue to "complement and supplement" the "product" effects of the LA/MSF subsidies. In our view, the effects of the non-LA/MSF subsidies continue to be a "genuine" cause of serious prejudice to the United States' interests and can, therefore, be "cumulated" with the effects of the challenged LA/MSF subsidies.

7 CONCLUSIONS AND RECOMMENDATIONS

7.1. In the light of the reasoning and findings set out in this Report, we reach the following conclusions:

a. In relation to ***the 36 alleged compliance "steps"*** notified by the European Union in its Compliance Communication of 1 December 2011 −

   i. two can be characterized as "actions" concerning the degree of *ongoing subsidization* of Airbus LCA in response to the recommendations and rulings adopted in the original proceeding − namely, "step" 28, the imposition of additional fees for the use of the Bremen Airport runway extension, and "step" 29, revision of the terms of the Mühlenberger Loch lease agreement[3377];

   ii. the remaining 34 alleged compliance "steps" are not "actions" relating to the ongoing (or even past) subsidization of Airbus LCA, but rather the *assertion of facts* or the *presentation of arguments* for the purpose of supporting the European Union's theory of compliance. Thus, apart from the "actions" identified in "steps" 28 and 29, the European Union's affirmation of compliance is not grounded in any specific conduct on the part of the European Union and certain member States with respect to the subsidies provided to Airbus or the adverse effects those subsidies were found to have caused in the original proceeding. Rather, fundamentally, the European Union's assertion of full compliance is based on its understanding of the scope and nature of its obligations arising out of the adopted recommendations and rulings as well as its own interpretation of the applicable law and legal provisions, including Article 7.8 of the SCM Agreement.

[3376] See above paras. 6.1797-6.1817.
[3377] As already noted, the United States ultimately included neither of these two measures in its claims of non-compliance against the European Union and certain member States in this dispute.

b. In relation to the European Union's requests for preliminary rulings concerning ***the scope of this compliance proceeding*** −

   i. the French, German, Spanish and UK A350XWB LA/MSF measures are within the scope of this compliance proceeding;

   ii. the United States' prohibited subsidy claims against the French, German, Spanish and UK A380 LA/MSF measures under Article 3.1(a) of the SCM Agreement are within the scope of this compliance proceeding;

   iii. the United States' prohibited subsidy claims against the French, German, Spanish and UK A380 LA/MSF measures under Article 3.1(b) of the SCM Agreement are outside the scope of this compliance proceeding; and

   iv. the United States' claims of threat of displacement and impedance under Article 6.3(a) are within the scope of this compliance proceeding.

c. In relation to the United States' ***prohibited subsidy claims*** against the A380 and A350XWB LA/MSF measures −

   i. The United States has demonstrated that the French, German, Spanish and UK A350XWB LA/MSF measures are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement;

   ii. The United States has failed to demonstrate that the French, German, Spanish and UK A350XWB LA/MSF subsidies are prohibited export and/or prohibited import substitution subsidies within the meaning of Articles 3.1 and 3.2 of the SCM Agreement; and

   iii. The United States has failed to demonstrate that the French, German, Spanish and UK A380 LA/MSF subsidies are prohibited export subsidies within the meaning of Articles 3.1(a) and 3.2 of the SCM Agreement.

d. In relation to *the United States'* ***claim that the European Union and certain member States have failed to comply with Article 7.8 of the SCM Agreement*** −

   i. the fact that one or more of the subsidies challenged in this proceeding may have ceased to exist prior to 1 June 2011 does not *ipso facto* mean that the European Union and certain member States do not have a compliance obligation under the terms of Article 7.8 of the SCM Agreement in relation to those subsidies;

      - <u>As regards the "lives" of the pre-A350XWB LA/MSF subsidies</u>

   ii. the European Union has demonstrated that the *ex ante* "lives" of the French, German and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, A330/A340, the UK LA/MSF subsidies for the A320 and A330/A340, and the capital contribution subsidies, "expired" before 1 June 2011;

   iii. the European Union has demonstrated that the *ex ante* "lives" of the French LA/MSF subsidies for the A330-200 and the French and Spanish LA/MSF subsidies for the A340-500/600 "expired", respectively, in **[***]** and **[***]**;

   iv. even accepting the entirety of the European Union's assertions, the *ex ante* "lives" of five of the regional development grant subsidies will not "expire" until sometime between 2054 and 2058, with the other two having "expired" around 2014;

   v. the European Union's submissions concerning the alleged "extraction" of subsidies were already considered and rejected by both the panel and the Appellate Body in the original proceeding and, for this reason, the European Union is not entitled to have the Panel evaluate the merits of the same arguments, for a second time, in this compliance dispute;

vi. the European Union has failed to demonstrate that the alleged partial privatization of Aérospatiale in 1999, the transactions leading to the creation of EADS in 2000, and BAE Systems' 2006 sale of its 20% ownership stake in Airbus SAS to EADS, were "intervening events" that resulted in the "extinction" of the benefit of all of the subsidies at issue in this proceeding that were granted prior to those transactions, in the light of each of the three separate opinions expressed by the Appellate Body Division serving in the original proceeding on the question whether "partial privatizations and private-to-private sales" transactions can "extinguish" prior subsidies; and

vii. the *ex ante* "lives" of the subsidies identified in subparagraphs ii, iii, and iv have "expired" *not* because they were somehow brought to a *premature* end by, for example, having been repaid or because of the alignment of their terms with a market benchmark, but rather simply because the total period of time over which their "projected value" was expected to "materialize" has transpired in the absence of any "intervening event". In other words, the *ex ante* "lives" of the relevant subsidies have "expired" simply because they have been fully provided to Airbus as originally planned and expected.

- As regards whether the European Union and certain member States have complied with the obligation to "withdraw the subsidy"

viii. the fact that the *ex ante* "lives" of the subsidies identified in subparagraphs ii, iii, and iv *passively* "expired" before the end of the implementation period does not amount to the "withdrawal" of those subsidies by the European Union and certain member States for the purpose of Article 7.8 of the SCM Agreement;

ix. the European Union and certain member States have, therefore, failed to comply with the obligation to "withdraw the subsidy" for the purpose of Article 7.8 of the SCM Agreement;

- As regards whether the European Union and certain member States have complied with the obligation to "take appropriate steps to remove the adverse effects"

x. the European Union has failed to establish that the United States' claims under Article 6.3(b) and (c) of the SCM Agreement should be rejected on the grounds that the United States' like product is not "unsubsidized" within the meaning of Articles 6.4 and 6.5 of the SCM Agreement;

xi. the United States has brought its continued adverse effects claims with respect to appropriately defined product markets for LCA, namely, the global markets for single-aisle LCA, twin-aisle LCA and VLA;

xii. the *direct* and *indirect* effects of the aggregated pre-A350XWB LA/MSF subsidies continue to be a "genuine and substantial" cause of the current market presence of the A320, A330 and A380 families of Airbus LCA using either the "plausible" or "unlikely" counterfactual scenarios adopted in the original proceeding in relation to the effects of the same subsidies in the 2001 to 2006 period as the starting point of the analysis;

xiii. the *direct* and *indirect* effects of the aggregated LA/MSF subsidies, with the exception of the LA/MSF subsidies provided for the A300 and A310, are a "genuine and substantial" cause of the current market presence of the A350XWB family of Airbus LCA using either the "plausible" or "unlikely" counterfactual scenarios adopted in the original proceeding in relation to the effects of the pre-A350XWB LA/MSF subsidies in the 2001 to 2006 period as the starting point of the analysis;

xiv. the "product" effects of the LA/MSF subsidies identified in subparagraphs xii and xiii are a "genuine and substantial" cause of the displacement and/or impedance of the imports of a like product of the United States into the markets for single-aisle, twin-

aisle and very large LCA in the European Union, within the meaning of Article 6.3(a) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement;

xv. the "product" effects of the LA/MSF subsidies identified in subparagraphs xii and xiii are a "genuine and substantial" cause of the displacement and/or impedance of exports from the market for single-aisle LCA in Australia, China and India, the market for twin-aisle LCA in China, Korea and Singapore and the market for very large LCA in Australia, China, Korea, Singapore and the United Arab Emirates, within the meaning of Article 6.3(b) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement;

xvi. the "product" effects of the LA/MSF subsidies identified in subparagraphs xii and xiii are a "genuine and substantial" cause of significant lost sales in the global markets for single-aisle, twin-aisle and very large LCA, within the meaning of Article 6.3(c) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement;

xvii. the effects of the aggregated capital contribution subsidies and certain regional development grants "complement and supplement" the "product" effects of the aggregated LA/MSF subsidies and, therefore, are a "genuine" cause of serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement;

xviii. the United States has failed to demonstrate that the regional development grants provided for the San Pablo facility in Spain that is used for Airbus' military aircraft activities benefit Airbus' LCA activities, thereby failing to establish that those subsidies "complement and supplement" the "product" effects of the LA/MSF subsidies; and

xix. having found that the United States has established that the challenged subsidies cause *present* serious prejudice to its interests within the meaning of Article 5(c) of the SCM Agreement, we make no findings with respect the United States' conditional claim that the challenged subsidies *threaten to cause* serious prejudice to its interests.

7.2. By continuing to be in violation of Articles 5(c) and 6.3(a), (b) and (c) of the SCM Agreement, the European Union and certain member States have failed to comply with the DSB recommendations and rulings and, in particular, the obligation under Article 7.8 of the SCM Agreement "to take appropriate steps to remove the adverse effects or … withdraw the subsidy".

7.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the SCM Agreement, they have nullified or impaired benefits accruing to the United States under that Agreement.

7.4. We therefore conclude that the European Union and certain member States have failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the SCM Agreement. To the extent that the European Union and certain member States have failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative.

WORLD TRADE ORGANIZATION

WT/DS316/RW/Add.1

22 September 2016

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EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to G to the Report of the Panel to be found in document WT/DS316/RW.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following working procedures shall apply.

2. The Panel shall conduct its internal deliberations in closed session. The parties to the dispute, and interested third parties, shall be present at the meetings only when invited by the Panel to appear before it.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. At the request of either party, the Panel will consider adopting additional procedures for the protection of confidential information. The Panel will consider proposals from the parties as to the content of any such procedures, and will consult with the parties in this regard.

5. Before the substantive meeting of the Panel with the parties to the dispute, the parties shall transmit to the Panel written submissions, and subsequently written rebuttals, in which they present the facts of the case and their arguments, and their counter-arguments, respectively. Third parties may transmit to the Panel written submissions after the first written submissions of the parties have been submitted but before the rebuttals of the parties are submitted.

6. All third parties which have notified their interest in the dispute to the Dispute Settlement Body shall be invited in writing to present their views during a session of the substantive meeting of the Panel set aside for that purpose. All such third parties may be present during the entirety of that session.

7. At its substantive meeting with the parties, the Panel will ask the United States to present its case. Subsequently, and still at the same meeting, the Panel will ask the European Union to present its point of view. The Panel thereafter will ask third parties to present their views at the separate session of the same meeting set aside for that purpose. The parties will then be allowed an opportunity for final statements, with the United States presenting its statement first.

8. The Panel may at any time put questions to the parties and to the third parties, and ask them for explanations either in the course of the substantive meeting with the parties and/or third parties, or in writing. Written answers to questions shall be submitted by a date to be specified by the Panel.

9. The parties and third parties shall make all submissions in a WTO working language. Where the original language of an exhibit or of text quoted in submissions or responses to questions is not a WTO working language, the submitting party or third party shall submit a translation of the exhibit or text into a WTO working language at the same time as the original language version. The Panel may grant extensions of time for the translation of exhibits or text into a WTO working language upon a showing of good cause. Any objection as to the accuracy of a translation shall be raised in writing and at the earliest possible moment. Any objection shall be accompanied by an explanation of the grounds of objection and, if possible, an alternative translation.

10. A party to the dispute shall make available to the Panel and the other party a written version of its oral statement not later than the first working day following the end of the meeting of the Panel at which the oral statement was presented. Third parties to the dispute shall make available to the Panel, the parties and all other third parties a written version of their oral statements not

later than the first working day following the end of the meeting of the Panel at which the oral statement was presented. Parties and third parties are encouraged to provide the Panel and other participants at the meeting with a provisional written version of their oral statements at the time that the statements are made.

11. In the interest of full transparency, oral presentations by a party shall be made in the presence of the other party. Moreover, each party's submissions, including responses to questions put by the Panel, shall be made available to the other party. Submissions by third parties, including responses to questions put by the Panel, shall also be made available to the parties. Third parties shall receive copies of the parties' first written submissions and rebuttals.

12. The parties shall provide the Secretariat with executive summaries of the claims and arguments contained in their written submissions and oral presentations. The executive summaries of the first written submissions and rebuttal written submissions shall be limited to 10 pages each, and the executive summaries of the oral statements at the meetings shall be limited to 5 pages each. Third parties are requested to provide the Panel with executive summaries of their written submissions and oral statements, of no more than 5 pages each. The executive summaries shall not serve in any way as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. Any executive summary shall be submitted to the Secretariat within ten days of the date on which the original submission is submitted or the original oral statement is submitted in written form. Paragraph 20 shall apply to the service of executive summaries.

13. The descriptive part of the Panel's report will include the procedural and factual background of the present dispute. Description of the main arguments of the parties and third parties will consist of the executive summaries referred to in paragraph 12, which will be attached to the report of the Panel as annexes.

14. Parties shall submit any requests for preliminary rulings not later than in their first written submissions to the Panel. If the United States requests such a ruling, the European Union shall submit its response to the request in its first submission. If the European Union requests such a ruling, the United States shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure may be granted upon a showing of good cause.

15. Parties shall submit all factual evidence to the Panel no later than their first written submissions, other than evidence necessary for purposes of rebuttals and answers to questions. Exceptions to this procedure may be granted upon a showing of good cause. In such a case, the other party shall be accorded a period of time for comment on the newly submitted evidence, as the Panel deems appropriate.

16. To facilitate the maintenance of the record of the dispute, and for ease of reference to exhibits submitted by the parties, parties are requested to number their exhibits sequentially throughout the course of the dispute. For example, exhibits submitted by the United States should be numbered USA-1, USA-2, etc., and exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission of the European Union, for example, was numbered EU-5, the first exhibit of the next submission thus would be numbered EU-6.

17. The parties and third parties may submit exhibits, and serve them on each other, as electronic files saved on CD-ROMs. If a party or third party chooses to submit exhibits as electronic files, it shall, in addition, submit 3 paper copies of such exhibits to the Secretariat, and one paper copy of such exhibits to each party and third party.

18. The parties and third parties to this proceeding have the right to determine the composition of their own delegations. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings. Each party and third party shall provide a list of the members of its delegation before or at the beginning of the meeting with the Panel to the Secretary of the Panel, Mr. XXX.

19. Following the issuance of the interim report, the parties shall have three weeks to submit written requests to review precise aspects of the interim report. Following receipt of any written request for review, each party shall have two weeks to submit written comments on the other party's written request for review. Such comments shall be strictly limited to commenting on the other party's written request for review.

20. The following procedures regarding service of documents shall apply:

a. Each party shall serve its submissions directly on the other party. Each party shall, in addition, serve its first written submission and written rebuttal submission on the third parties. Each third party shall serve its submissions on the parties and all other third parties. Each party and third party shall confirm in writing that copies have been served as required, at the time it provides each submission to the Panel.

b. The parties and third parties should provide their submissions to the Secretariat by 5:30 p.m. (Geneva time) on the due dates established by the Panel, unless a different time is set by the Panel.

c. Each party and third party shall provide the Panel with eight (8) paper copies of all documents submitted to the Panel. Where a party or a third party submits exhibits as electronic files on CD-ROMs, it shall provide to the Panel four (4) CD-ROMS containing such files, as well as three (3) paper copies. All of these copies shall be filed with the Dispute Settlement Registrar, Mr. XXX (office number xxxx).

d. Each party and third party shall also provide to the Panel an electronic version of all documents at the time that it provides the paper copies, in a format compatible with that used by the Secretariat, either on a CD-ROM or diskette or as an e-mail attachment. E-mail attachments shall be sent to the Dispute Settlement Registry (xxxx@wto.org), with copies to XXXXX. If the electronic version is provided by diskette or CD-ROM, four (4) copies shall be delivered to Mr. XXX (office number xxxx).

e. The Panel will endeavour to provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

PROCEDURES FOR THE PARTIAL OPENING TO THE PUBLIC OF THE SUBSTANTIVE MEETING WITH THE PANEL

(4 April 2013)

1. The Panel's meeting with the parties will start at 10:00 a.m. on 16 April 2013. The Panel will invite the United States to first present its full opening oral statement before the floor is given to the European Union to present its full opening oral statement. The oral statements will be videotaped for later viewing, as set out in paragraph 6 below. If at any point during its oral statement a party intends to utter BCI or HSBI, it shall request that the videotaping be discontinued for the relevant portion of the oral statement, after which videotaping will be resumed. A party may first deliver the part of its oral statement that contains no BCI or HSBI, and then ask for the videotaping to be discontinued, before delivering a second part of its oral statement containing BCI or HSBI.

2. BCI or HSBI in the texts of the oral statements provided to the panel and the other party during the meeting and prior to the delivery of the oral statements shall be bracketed in accordance with the BCI/HSBI Procedures. BCI should be contained within single brackets. HSBI should be contained within double brackets and deleted. In addition, a party including HSBI in its oral statement shall provide, prior to delivery of the oral statement, one paper copy to the panel and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission.

3. During the meeting with the parties, the following persons will be admitted into the meeting room: (1) the Panel; (2) all BCI/HSBI-approved members of the delegations of the parties; (3) BCI/HSBI-approved WTO Secretariat staff assisting the Panel; and (4) the team hired by the WTO Secretariat to videotape the proceedings. If at any point during its oral statement a party intends to utter HSBI, those individuals not having HSBI approval shall be asked to exit the room. If at any point a party intends to utter either BCI or HSBI, the team hired by the WTO Secretariat to videotape the proceedings shall be asked to exit the room.

4. After each oral statement has been delivered, the Panel will ask the parties whether they can confirm that no BCI or HSBI was pronounced during the videotaped portion of the oral statement. If both parties so confirm, the showing of the videotape will proceed according to schedule. If either party requests to review the videotape, both parties will be invited to attend that review, accompanied by a representative of the Secretariat and the technician responsible for editing, on the premises of the WTO at an appropriate time after the meeting. Therefore, parties should be prepared to advise the technician which portion of the oral presentation presents a concern, and limit review to those portions of the videotape to the maximum extent possible. If either party considers that a specific portion of the videotape must be deleted − because it is BCI or HSBI − the specific portion of the videotape will be deleted.

5. The third party session will start at 14:00 on 17 April 2013. Third parties shall indicate to the Panel, not later than close of business on 5 April 2013, whether they consent to the videotaping of their oral statements for later viewing. The Panel will start the third party session with the statements of those third parties so consenting. After such third parties have made their statements, any questions or comments from the parties, other third parties or the Panel concerning these statements shall be made. The Panel shall then proceed to a third party closed session during which the rest of the third parties shall make their statements. The Panel or any party or third party may pose questions to any third party or make comments concerning these statements. **Should any third party intend to include BCI in its oral statement or otherwise to refer to BCI during the third party session, it is requested to inform the Panel by close of business on 11 April 2013** so that appropriate arrangements can be made to protect the confidentiality of that information.

6. The showing of the videotape of the oral statements of the parties and third parties shall take place on 18 and 19 April 2013. The showing will be open to officials of WTO Members and Observers, to accredited journalists, and to accredited representatives of non-governmental organizations, upon presentation of their official badges. The Secretariat will place a notice by on the WTO website by **4 April 2013** informing the public of the showing. The notice shall include a link through which members on the public can register directly with the WTO. The deadline for public registration shall be close of business on **11 April 2013.**

ANNEX A-3

ADDITIONAL PROCEDURES TO PROTECT BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION

(12 July 2012)

I. GENERAL

The following Procedures apply to all business confidential information ("BCI") and highly sensitive business information ("HSBI") on the Panel record. These Procedures do not diminish the rights and obligations of the parties to request and disclose any information within the scope of the *SCM Agreement* and Article 13 of the *DSU*.

II. DEFINITIONS

For the purposes of these Procedures,

1. **"Approved Persons"** means Representatives or Outside Advisors of a Party, when designated in accordance with these procedures.

2. **"Business Confidential Information"** or "BCI" means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as BCI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause harm to the originators of the information. Each Party and Third Party shall act in good faith and exercise restraint in designating information as BCI, and will endeavour to designate information as BCI only if its disclosure would cause harm to the originators of the information.

3. **"Conclusion of the Panel Process"** means the earliest to occur of the following events:

   a. pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report;

   b. a Party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU;

   c. pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses; or

   d. pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB.

4. **"Designated as BCI"** means:

   a. for printed information, text that is set off with bold square brackets in a document clearly marked with the notation 'BUSINESS CONFIDENTIAL INFORMATION' and with the name of the Party or Third Party that submitted the information;

   b. for electronic information, characters that are set off with bolded square brackets (or with a heading with bolded square brackets on each page) in an electronic file that contains the notation 'BUSINESS CONFIDENTIAL INFORMATION', has a file name that contains the letters "BCI", and is stored on a storage medium with a label marked 'BUSINESS CONFIDENTIAL INFORMATION' and indicating the name of the Party or Third Party that submitted the information; and

c. for uttered information, declared by the speaker to be "Business Confidential Information" prior to utterance.[1]

d. In case either Party objects to the designation of information as BCI under paragraphs 4(a)-(c), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as BCI, the submitting Party or Third Party may either designate it as non-BCI or withdraw the information. The Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI information previously designated by that Party or Third Party as BCI.

This paragraph shall apply to all submissions, including exhibits, by a Party or Third Party.

5. **"Designated as HSBI"** means:

a. for electronic information, in characters that are set off with double bolded square brackets (or a heading with double bolded square brackets on each page) in an electronic file that contains the notation 'HIGHLY SENSITIVE BUSINESS INFORMATION', has a file name that contains the letters "HSBI", and is stored on a storage medium with a label marked 'HIGHLY SENSITIVE BUSINESS INFORMATION' and indicating the name of the Party or Third Party that submitted the information; and

b. for uttered information, declared by the speaker to be "Highly Sensitive Business Information" prior to utterance.[2]

This paragraph shall apply to all submissions, including exhibits, by a Party or Third Party.

6. **"Electronic information"** means any information stored in an electronic form (including but not limited to binary-encoded information).

7. **"Highly Sensitive Business Information"** or **"HSBI"** means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as HSBI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause exceptional harm to its originators. Each Party and Third Party shall act in good faith and exercise the utmost restraint in designating information as HSBI. Each Party and Third Party may at any time designate as non-BCI/HSBI or as BCI information designated by that Party or Third Party as HSBI.

a. The following categories of information may be Designated as HSBI:

i. information indicating the actual selling or offered price of any large civil aircraft (LCA) manufacturer's products or services[3], and, except as provided in subparagraph 7(d)(i) below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;

ii. information gathered or produced in the context of LCA sales campaigns;

iii. information concerning market forecasts, analyses, business plans and share/business valuations generated by LCA producers, consultants, investment banks or the European Investment Bank, with regard to LCA products; or

[1] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the BCI in question.

[2] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the HSBI in question.

[3] This category includes (but is not limited to) information on individual LCA prices, prices per seat, or information allowing the operating cost per seat of an LCA to be determined, calculated or reflected; the negotiated or offered prices for the airframe; all concessions offered or agreed to by an LCA manufacturer including financing, spare parts, maintenance, pilot training, asset value and other guarantees, buy back options, remarketing arrangements or other forms of credit support. This category shall also include the actual pricing information relating to any number of individual LCA offers and prices (including concessions) aggregated by model or other category.

iv. information concerning an LCA manufacturer's costs of production, including but not limited to data regarding pricing by suppliers.

b. Each Party and Third Party may also Designate as HSBI other categories of business information that is not otherwise available in the public domain and the disclosure of which could, in the Party's view, cause exceptional harm to its originators.

c. Each Party and Third Party shall Designate as HSBI any information described in subparagraph 7(a) that pertains to LCA produced by an LCA manufacturer headquartered within the territorial jurisdiction of either of the Parties.

d. The following categories of information may not be Designated as HSBI:

i. aggregated pricing data for a particular LCA model or family of LCA within a particular market that is indexed (i.e., does not reflect actual prices but rather movements in prices off a base of 100 for a particular year). Such data shall be treated as BCI;

ii. general legal conclusions based on HSBI (e.g., that HSBI demonstrates that a producer engaged in price undercutting). Such conclusions shall be treated as neither BCI nor HSBI;

iii. contracts on the granting of launch aid or reimbursable launch investment and project appraisal documents relating thereto, other than information described in subparagraph 7(a);

iv. the terms and conditions of loans, other than information described in subparagraph (7)a; and

v. intergovernmental agreements and government decisions, other than information described in subparagraph (7)a.

e. Information may not be Designated as HSBI simply because it is subject to bank secrecy or banker-client confidentiality.

f. In case either Party objects to the designation of information as HSBI under paragraphs 7(a)-(e), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as HSBI, the submitting Party or Third Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. The Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that Party or Third Party as HSBI.

8. **"HSBI Approved Person"** means Approved Persons specifically designated by the Parties as having the right to access HSBI (according to the procedures laid down in Section IV).

9. **"HSBI location"** means a room to be kept locked when not occupied and the access to which shall be possible only for HSBI Approved Persons, located:

a. for HSBI submitted by the United States, on the premises of the United States Mission to the European Union in Brussels;

b. for HSBI submitted by the European Union, on the premises of the Delegation of the European Union to the United States in Washington;

c. for HSBI submitted by a Third Party, on the premises of its Geneva Mission to the WTO.

10. **"Locked CD"** means a CD-ROM that is not rewritable.

11. **"Outside Advisor"** means a legal counsel or other advisor of a Party or Third Party, who:

a. advises a Party or Third Party in the course of the dispute;

b. is not an employee, officer or agent of an entity or an affiliate of an entity engaged in the manufacture of LCA, the provision of supplies to an entity engaged in the manufacture of LCA, or the supply of air transportation services; and

c. is subject to an enforceable code of professional conduct that includes an obligation to protect confidential information, or has been retained by another outside advisor who assumes responsibility for compliance with these procedures and is subject to such a code of professional conduct.

For purposes of this paragraph, outside legal counsel representing an LCA producer headquartered in the territory of one of the Parties or Third Parties in connection with these proceedings or outside consultants who have been retained by such counsel to provide advice with regard to these proceedings are not considered agents of an entity listed in subparagraph (b).

12. **"Panel"** means the DS316 compliance panel composed on 13 April 2012.

13. **"Party"** means the European Union or the United States.

14. **"Party-BCI"** means BCI originally submitted by a Party.

15. **"Representative"** means an employee of a Party or Third Party.

16. **"Sealed laptop computer"** means a laptop computer having (software and hardware) characteristics considered necessary by the submitting Party for protection of that HSBI, provided that it has software installed that permits such HSBI to be searched and printed in accordance with the provisions of Section VI. However, HSBI may not be edited on the sealed laptop computer.

17. **"Secure site"** means a facility to be kept locked when not occupied and the access to which shall be possible only for Approved Persons, located:

a. in the case of the European Union, the offices of WTO Team of the Legal Service of the European Commission (Rue de la Loi 200, Brussels, Belgium), the offices of Directorate General for Trade of the European Commission (Rue de la Loi 170, Brussels, Belgium), the offices of the Permanent Mission of the European Union to the International Organisations in Geneva (Rue du Grand-Pré 66, 1202 Geneva, Switzerland), and three additional sites specified in accordance with subparagraph (c);

b. in the case of the United States, the offices of the General Counsel of the Office of the United States Trade Representative (600 17th Street, NW, Washington, DC, USA), the offices of the Import Administration, United States Department of Commerce (600 17th Street, NW, Washington, DC, USA), the Mission of the United States to the World Trade Organization (11, route de Pregny, 1292 Chambésy, Switzerland), and three additional sites specified in accordance with subparagraph (c); and

c. three sites other than a government office that are designated by each Party for use by its Outside Advisors; provided that the identity of those sites has been submitted to the other Party and the Panel, and the other Party has not objected to the designation of that site within ten days of such submission.

d. Any objections raised under subparagraph (c) may be resolved by the Panel.

18. **"Stand-alone computer"** means a computer that is not connected to a network.

19. **"Stand-alone printer"** means a printer that is not connected to a network.

20. **"Submission"** means any written, electronic, or uttered information transmitted to the Panel, including but not limited to, correspondence, written submissions, exhibits, oral statements, and answers to questions.

21. **"Third party"** means a Member having notified its interest in the dispute to the DSB pursuant to DSU Article 10.

22. **"Third Party BCI Approved Person"** means a representative or Outside Advisor of a third party granted access to BCI pursuant to paragraphs 30, 37, 38 and 44.

23. **"WTO Approved Persons"** means the Panel members, PGE members or experts appointed by the Panel who in the opinion of the Panel require access to BCI, and persons employed or appointed by the Secretariat who have been authorized by the Secretariat to work on the dispute (and includes translators and interpreters as well as any transcribers present at Panel meetings involving BCI and/or HSBI).

24. **"WTO Reading Room"** means a room, located on the premises of the WTO, which a Third Party BCI Approved Person may use to access a Party's submission that contains Party BCI.

25. **"WTO Rules of Conduct"** means the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1).

III. SCOPE

26. These procedures apply to all BCI and HSBI received by an Approved Person and by WTO Approved Persons as a result of the Panel process, and to all BCI reviewed, in accordance with these procedures, by a Third Party BCI Approved Person.

27. Unless specifically otherwise provided herein, these procedures do not apply to a Party's or Third Party's treatment of its own BCI and HSBI.

28. The Panel is aware that the European Union may need to submit information that it internally classifies as "EU Top Secret", "EU Secret" or "EU Confidential". The Panel will to the extent possible implement procedures for the protection of such classified information in the event that either Party informs the Secretariat that it will be submitting such classified information and has not already designated it as BCI or HSBI. In such cases, the submitting Party shall propose appropriate procedures for the protection of such classified information.

IV. DESIGNATION OF APPROVED PERSONS

29. At the latest on 18 May 2012, each Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors who need access to BCI submitted by the other Party and/or Third Parties and whom it wishes to have designated as Approved Persons, along with any clerical or support staff that would have access to the BCI. On that list, each Party shall indicate which Approved Persons need access to HSBI submitted by the other Party and/or Third Parties and whom it wishes to have designated as HSBI Approved Persons. Each Party may submit amendments to their list of Approved Persons by submitting such amendments to the other Party and Third Parties, and to the Panel.

30. There shall be no Third Party HSBI Approved Persons. The designation of Third Party BCI Approved Persons shall be governed by paragraphs 37 and 38.

31. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate no more than a total of 30 Representatives and 20 Outside Advisors as "HSBI Approved Persons".

32. WTO Approved Persons shall have access to BCI. The Director-General of the WTO, or his designee, shall submit to the Parties and Third Parties, and to the Panel, a list of the WTO Approved Persons and shall identify which of those WTO Approved Persons shall additionally have access to HSBI.

33. Unless a Party objects to the designation of an Outside Advisor of the other Party, the Panel shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list

under paragraph 29 that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days.

34. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

35. The Parties or the Director-General of the WTO, or his designee, may submit amendments to their lists at any time, subject to the overall limits set out in paragraph 31 and to objections for the addition of new Approved Persons in accordance with paragraphs 33 and 34.

V. BCI

36. Only Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons may have access to BCI submitted in this proceeding. Third Party BCI Approved Persons may not have access to Party-BCI other than that included in the submissions. Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons shall use BCI only for the purposes of this dispute. No Approved Person or WTO Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. No Third Party BCI Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. These obligations apply indefinitely.

37. Each Third Party that wants to access Party-BCI contained in the first or rebuttal submission of a Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors (including clerical or support staff) who need access to such BCI and whom it wishes to have designated as Third Party BCI Approved Persons. Each Third Party shall keep the number of Third Party BCI Approved Persons as limited as possible. Each Third Party may designate no more than a total of 5 Representatives and Outside Advisors as Third Party BCI Approved Persons.

38. Unless a Party objects to the designation of an Outside Advisor of a Third Party, the Panel shall designate those persons as Third Party BCI Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 37 above that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

39. A Party shall make no more than one copy of any BCI submitted by the other Party or a Third Party for each Secure site provided for that Party in paragraph 17.

40. Parties may incorporate BCI in internal memoranda for the exclusive use of Approved Persons. Any memorandum and the BCI it contains shall be marked in accordance with paragraph 4.

41. BCI submitted by Approved Persons or by Third Party BCI Approved Persons pursuant to these procedures shall not be copied, distributed, or removed from the Secure site, except as necessary for submission to the Panel.

42. The treatment in a Party's submissions to the Panel of any BCI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to BCI.

a. Parties may incorporate BCI in submissions to the Panel, marked as indicated in paragraph 4. In exceptional cases, parties may include BCI in an appendix to a submission.

b. A Party submitting a submission or appendix containing BCI shall also submit, within a time period to be set by the Panel, a version redacting any BCI. This shall be referred to as the "Non-BCI Version". However, a Party is not required to submit a "Non-BCI Version" of any exhibit containing BCI, unless specifically directed to do so by the Panel;

c. A Non-BCI Version shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Non-BCI Version:

   i. A Party may request the Party that originally submitted the BCI, as soon as possible, to indicate with precision portions of documents containing BCI that may be included in the non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, produce a Non-BCI summary in sufficient detail to achieve this aim.

   ii. Upon receipt of such a request, the Party that originally submitted the BCI shall, as soon as possible, indicate with precision portions of documents containing BCI that may be included in the Non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, produce a Non-BCI summary in sufficient detail to achieve this aim.

   iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the BCI failed to indicate with sufficient precision portions of documents containing BCI that may be included in the Non-BCI Version and to produce, if necessary, a Non-BCI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

d. The responding Party may designate the personal offices of up to four of its Approved Persons as additional Secure sites for the sole purpose of storing and permitting review of the BCI versions of the Parties' submissions to the Panel. All of the protections applicable to BCI under these procedures, including the storage rules in Paragraph 46, shall apply to such submissions. BCI exhibits to submissions may not be stored or reviewed at these additional Secure sites. The responding Party shall submit the address (including room number) of each of the additional Secure sites to the Panel and the complaining Party.

43. Any document containing BCI shall not be copied in excess of the number of copies required by the Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies shall be avoided whenever possible. Such documents may be transmitted electronically only by using secure e-mail. If a Party or Third Party submits to the Panel an original document that cannot be transmitted electronically, it shall on the day of submission deliver a copy of that document to one of the Secure sites listed in paragraph 17. The Parties shall designate one of the Secure sites listed in paragraph 17 for this purpose.

44. Notwithstanding paragraph 20 of the Working Procedures[4], the following procedures apply to the access by Third Parties to a Party's submission that contains Party-BCI.

a. A Party's Submission containing Party-BCI shall not be serviced to Third Parties unless both Parties agree otherwise.

b. Third Party BCI Approved Persons may view Party-BCI contained in a Party's first written submission only in a Secure site or in the WTO Reading Room. Third Party BCI Approved Persons may not bring into such room any electronic recording or transmitting devices. Third Party BCI Approved Persons may not remove a Party's Submission containing Party-BCI from such room, but may take handwritten notes of the Party-BCI contained therein. Such notes shall be used exclusively for this dispute (that is, DS316). Each person viewing a Party's Submission containing Party-BCI shall complete and sign a log identifying the submission the person reviewed. The Party responsible for maintaining the particular Secure site, and the WTO Secretariat in the case of the WTO Reading Room, shall maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving the room, Outside Advisors who are Third Party BCI Approved Persons may be subject to appropriate controls.

[4] Concerning service of documents.

c. If a Third Party BCI Approved Person removes from the Secure site or the WTO Reading Room a handwritten memo in accordance with subparagraph 44(b) above, that Third Party BCI Approved Person shall store the memo only in a locked security container. Such memo shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. The content of such memo shall not be incorporated, electronically or in handwritten form, into the Non-BCI Version, as defined in paragraph 42(b).

d. All Third Parties that have designated Third Party BCI Approved Persons must inform the Parties of the identity of the specific room (including the address and the room number) in which the locked security container, as referred to in subparagraph (c) above, is located.

e. If a Third Party BCI Approved Person removes from the Secure site or the WTO Reading Room a handwritten memo in accordance with subparagraph 44(b) above, such memo shall not be copied in excess of the number of copies required by the Third Party BCI Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies of such memo shall be prohibited.

f. A Third Party may not incorporate into the body of its submission any Party-BCI. If a Third Party wishes to refer to any Party-BCI, the relevant arguments including such BCI should be incorporated into a separate Appendix. Such Appendix shall not be serviced to other Third Parties.

g. On the date determined by the Panel as the deadline to make the Third Party submission, a Third Party shall service its submission only to the Parties and to the Panel. The submission shall be serviced to the other Third Parties only after the Parties have confirmed that the submission does not contain or disclose Party-BCI. A Party shall make this confirmation or otherwise advise of any necessary change to the relevant Third Party within 2 working days of receiving the submissions of Third Parties.

45. A Party or Third Party that wishes to submit or refer to BCI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not Approved Persons, WTO Approved Persons or, as appropriate, Third Party BCI Approved Persons from the meeting for the duration of the submission and discussion of BCI.

46. Approved Persons and WTO Approved Persons shall store BCI only in locked security containers. In the case of BCI submitted to the Panel, such locked security containers shall be kept on the WTO Secretariat's premises, except that Panel members may maintain a copy of all relevant documents and materials containing BCI at their places of residence. Such documents and materials shall be stored in locked security containers when not in use. BCI shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. All work papers (*e.g.*, draft submissions, worksheets, etc.) containing BCI shall, when no longer needed, be shredded or burned consistent with normal government practice for destroying sensitive documents.

47. The Panel shall not disclose BCI in its report, but may make statements or draw conclusions that are based on the information drawn from the BCI.

VI. HSBI

48. Unless otherwise provided below, HSBI shall be subject to all the restrictions in Section V applicable to BCI.

49. HSBI shall be submitted to the Panel in electronic form, using locked CDs or two Sealed laptop computers connectable to 19" - 21" monitors, or in hard copy form, for access by WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI. All such HSBI shall be stored in a combination safe in a designated secure location on the premises of the WTO Secretariat. Any computer in that room shall be a Stand-alone computer. WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI may view HSBI only in the designated secure location referred to above. A Stand-alone printer may be

used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a combination safe at the designated secure location referred to above, or destroyed at the end of the relevant working session. HSBI shall not be removed from this designated secure location, except (i) in the form of handwritten notes that may be used only on the WTO Secretariat's premises and which shall be destroyed once no longer in use; and (ii) subject to appropriate precautions, for purposes of meetings of the Panel with the Parties and any internal deliberations of the Panel, as provided for in paragraph 58(j).

50. Each Party shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the other Party, in the HSBI location listed in paragraph 9 located within the other Party's territory. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI location, or destroyed at the end of the relevant working session.

51. If a Third Party submits HSBI, it shall notify the Parties of the fact that such submission has been made. Each Third Party submitting HSBI shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the Parties, in the HSBI location listed in paragraph 9. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI location, or destroyed at the end of the relevant working session.

52. Except as otherwise provided in these procedures, HSBI shall not be stored, transmitted or copied either in written or electronic form.

53. HSBI Approved Persons may view HSBI on the Sealed laptop computer maintained by the other Party or a Third Party or, in the case of HSBI submitted on Locked CDs on a Stand-alone computer, only in a designated room at one of the HSBI locations indicated in paragraph 9, or at the designated secure location on the premises of the WTO Secretariat referred to in paragraph 49, unless otherwise mutually agreed by the Parties. The designated room shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. during official working days at the respective HSBI location. The designated secure location referred to in paragraph 49 shall be available to HSBI Approved Persons by prior arrangement with the WTO Secretariat. HSBI Approved Persons may not bring into such room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from such room, except in the form of handwritten notes or aggregated information generated on a Stand-alone computer. In either case, such notes or information shall be used exclusively for this dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI location or designated secure location referred to in paragraph 49 shall complete and sign a log identifying the HSBI that the person reviewed or, alternatively, such a log can be generated automatically. Each Party shall, for the HSBI location within its territory referenced in paragraph 9, maintain such log until one year after the Conclusion of the Panel Process. The WTO Secretariat shall, for the designated secure location referred to in paragraph 49, maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving such room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls.

54. No HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 32 as being additionally authorized to access HSBI shall disclose HSBI to any person except another HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 32 as being additionally authorized to access HSBI, and then only for the purpose of this dispute. This obligation applies indefinitely.

55. HSBI may be processed only on Stand-alone computers. Any memorandum containing HSBI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

56. A Party or Third Party that wishes to submit or refer to HSBI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not HSBI Approved Persons or WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI from the meeting for the duration of the submission and discussion of HSBI.

57. All HSBI shall be stored in a safe at the relevant HSBI location or in accordance with paragraph 49.

58. The treatment in a Party's submissions to the Panel of any HSBI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to HSBI.

a. HSBI may be incorporated into a separate appendix to, but not the body of, a Party's submission, which appendix shall be comprehensible in itself. The document containing the HSBI shall be referred to as the "Full HSBI Version Appendix";

b. A Party submitting an appendix containing HSBI shall also submit, within a time period to be set by the Panel, a version redacting any HSBI. This shall be referred to as the "Redacted Version Appendix";

c. At the request of a Party, information contained in the Redacted Version Appendix may be treated as BCI, in accordance with the provisions of Section V;

d. A Redacted Version Appendix shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Redacted Version Appendix:

   i. A Party may request that the Party that originally submitted the HSBI, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   ii. Upon receipt of such a request, the Party that originally submitted the HSBI shall, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the HSBI failed to indicate with sufficient precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and to produce, if necessary, a non-HSBI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

e. The Full HSBI Version Appendix shall be kept in an HSBI location and in the designated secure location referred to in paragraph 49, as appropriate, in the form of a locked CD. If it is not practical to keep the Full HSBI Version Appendix in an HSBI location, the Party may keep it in a locked security container in a Secure site in the form of a locked CD.

f. The locked CD containing the Full HSBI Version Appendix shall bear the label marked 'FULL VERSION OF HSBI APPENDIX TO SUBMISSION' and indicate the name of the Party that submitted the HSBI. In addition, the HSBI Appendix itself shall be marked with heading with double bolded square brackets on each page in an electronic file that contains the notation 'FULL VERSION OF HSBI APPENDIX TO SUBMISSION'. The electronic file containing the HSBI Appendix shall have a file name that contains the letters "HSBI VERSION".

g. The Party shall submit one copy of the Full HSBI Version Appendix to the Panel (through Mr. XXX) and two copies to the other Party in the form of two locked CDs. The Full HSBI Version Appendix shall not be transmitted via e-mail. Parties shall agree between themselves beforehand on the name of the Approved Person that is to receive the locked CD.

h. The Party shall commence transfer of the locked CDs containing the Full HSBI Version Appendix no later than the deadline for the submission concerned, and, at the same time, provide the Panel and the other Party with proof that this has been done.

i. No more than one working day in advance of a Panel meeting with the parties, a Party may, exclusively at that Party's Permanent Mission in Geneva, use the locked CD to produce no more than one hard copy of the Full HSBI Version Appendix for each HSBI Approved Person planning to attend that Panel meeting. All paper versions produced pursuant to this subparagraph shall be collected by the Party concerned and destroyed immediately after the conclusion of the meeting.

j. WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI may, exclusively on the WTO premises, produce paper versions of the Full HSBI Version Appendix for the purpose of, and immediately prior to, a Panel meeting with the parties and/or an internal meeting. When not in use, these paper versions shall be stored in a locked container in the designated secure location referred to in paragraph 49. All paper versions produced pursuant to this subparagraph shall be destroyed after the Conclusion of the Panel Process as defined in paragraph 3.

k. Parties are encouraged to submit versions of exhibits containing HSBI from which all HSBI has been deleted. Such exhibits shall be referred to as "HSBI-Redacted Version Exhibits". HSBI-Redacted Version Exhibits may contain BCI.

   i. A Party may submit HSBI-Redacted Version Exhibits prepared by that Party to the Panel, and serve them on the other Party in accordance with the applicable procedures, at the time it serves the submission to which the exhibit relates.

   ii. If a HSBI-Redacted Version Exhibit is not submitted by the Party submitting the exhibit, an HSBI-Approved Person representing the other Party may prepare an HSBI-Redacted Version Exhibit of any such exhibit.

   iii. HSBI-Redacted Version Exhibits may be prepared by an HSBI-Approved person, at an HSBI location, by deleting the HSBI in the exhibit (identified by double brackets) from such exhibit and either printing or photo-copying the resulting document containing no HSBI. The deletion of HSBI from the resulting document shall be verified by a person authorized for this purpose by the Party that submitted the exhibit(s) in question. The resulting document containing no HSBI (but which may contain BCI) will constitute the HSBI-Redacted Version Exhibit of such exhibit, and may be removed from the HSBI location.

   iv. The Parties shall cooperate to the maximum extent possible to make available necessary facilities, including printers, photo-copiers, and physical means for the deletion of text from a document, to enable the preparation of HSBI-Redacted Version Exhibits, including making available an HSBI-Approved Person for purposes of the verification provided for in paragraph (iii) above. HSBI-Redacted Version Exhibits may be prepared by HSBI-Approved Persons upon request during the times the designated room at the relevant HSBI location is available, as provided for in paragraph 51 of these Procedures.

   v. The Panel shall resolve any disagreement arising from the operation of this sub-paragraph, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

l. The Panel reserves the right, after consulting the parties, to amend the provisions of this paragraph at any time in order to accommodate situations arising during Panel meetings, and the preparation of the interim report and the final report.

59. The Panel shall not disclose HSBI in its report, but may make statements or draw conclusions that are based on the information drawn from the HSBI.

VII. RESPONSIBILITY FOR COMPLIANCE

60. Each Party and Third Party is responsible for ensuring that its Approved Persons and Third Party BCI Approved Persons comply with these procedures to protect BCI and HSBI submitted by each Party and Third Party, as well as with enforceable codes of professional conduct to which its Approved Persons or other Outside Advisors are subject. WTO Approved Persons shall comply with these procedures to protect BCI and HSBI submitted by a Party or Third Party. WTO Approved Persons are covered by the WTO Rules of Conduct. As provided for in the WTO Rules of Conduct, evidence of breach of these Rules may be submitted to the Chair of the DSB or to the Director-General of the WTO, or his designee, as appropriate, for appropriate action pursuant to Section VIII of the WTO Rules of Conduct.

VIII. ADDITIONAL PROCEDURES

61. After consulting with the Parties, the Panel may apply any other additional procedures that it considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures.

62. The Panel may, with the consent of both Parties, waive any part of these procedures. Such "waiver" shall be specifically set forth in writing and signed by a representative of both Parties.

IX. RETURN AND DESTRUCTION

63. Except as provided for in paragraph 64, after the Conclusion of the Panel Process as defined in paragraphs 3(a), 3(c) or 3(d), or as contemplated in paragraph 65, within a period to be fixed by the Panel, WTO Approved Persons, the Parties and Third Parties (along with all Approved Persons) shall destroy or return all documents (including electronic material) or other recordings containing BCI to the Party or Third Party that submitted such documents or other recordings. At the same time, WTO Approved Persons and the Parties shall destroy and/or return any electronic material submitted by a Party or Third Party that contains HSBI.

64. The WTO Secretariat shall retain one hard copy and one electronic version of any final report of the Panel containing BCI, and one electronic version of all documents containing BCI submitted to the Panel, recorded on locked CD(s), to be kept in sealed containers in a locked cabinet on the premises of the WTO Secretariat.

65. After the Conclusion of the Panel Process as defined in paragraph 3(b), the Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. Following the adoption by the DSB of the Appellate Body report pursuant to Article 17.14 of the DSU, or a decision by the DSB by consensus not to adopt the Appellate Body Report pursuant to Article 17.14 of the DSU, the provisions of paragraphs 63 and 64 shall apply.

66. The hard drive of each Stand-alone computer and all media used to back up such computers shall be destroyed at the Conclusion of the Panel Process.

ANNEX B

ARGUMENTS OF THE UNITED STATES

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

1. Last year, the World Trade Organization ("WTO") ruled that the European Union ("EU") and certain member States had subsidized the development of every single Airbus[1] aircraft over the course of 36 years, resulting in adverse effects to the United States, to the detriment of the sole remaining U.S. producer of large civil aircraft, The Boeing Company ("Boeing"). The Dispute Settlement Body ("DSB") recommended that the relevant Members withdraw the subsidies or take appropriate steps to remove their adverse effects by December 1, 2012.[2] Instead, the EU and the other relevant Members did the opposite − they continued and even expanded their subsidization. They did essentially nothing to remove the adverse effects of the subsidies, and in fact conferred additional subsidies (with additional adverse effects) after the period covered by the rulings of the DSB. They have accordingly failed to comply with the recommendations and rulings of the DSB and continue to maintain WTO-inconsistent subsidies.

2. At this stage, there is no dispute about the nature and effect of the subsidies, most of which came in the form of billions of dollars of financing granted by France, Germany, Spain, and the United Kingdom for the development of Airbus aircraft. Whether called "launch aid," or "member State Financing," or "LA/MSF" (the compromise term adopted by the original Panel), this financing shares the same key features:

(1) **unsecured:** the lenders have no recourse against Airbus's assets, such that repayment depends on the success of the model financed.[3]

(2) **success-dependent:** full repayment occurs only if the model in question is a commercial success;

(3) **levy-based:** repayment takes the form of per-aircraft levies tied to deliveries of the large civil aircraft financed; and

(4) **back-loaded:** the producer receives subsidies early during the development of the aircraft, but repayments become due later, after deliveries commence, with a graduated repayment schedule in some instances.

The financing confers a benefit in the sense of Article 1.1(b) of the SCM Agreement in that the relevant EU member States charged less, and typically far less, interest than a commercial lender would have charged for financing on these terms.

3. The effect of these subsidies on Airbus has been critical. The original Panel found, and the Appellate Body concurred, that absent the subsidies, Airbus would be a "much weaker LCA manufacturer," and would have had "at best a more limited offering of LCA models."[4] Under the most likely counterfactual scenarios, "Airbus would not have existed . . . and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred."[5] The effect on Boeing was stark − tens of billions of dollars of lost sales and displacement of imports and exports from markets around the world.

4. Based on these findings, the EU and the relevant member States had an obligation to withdraw the subsidies, or take appropriate steps to remove their adverse effects, by December 1, 2011. Clearly, if they neglected to do either of these things, they would fail to comply

[1] For purposes of this submission, "Airbus" has the meaning set out in *EC – Large Civil Aircraft*: Airbus SAS, Airbus GIE, and current and predecessor affiliated companies of both Airbus SAS and Airbus GIE. *EC – Large Civil Aircraft (Panel)*, para. 7.191.

[2] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 June 2011, WT/DSB/M/247, para. 28 (11 July 2011). *EC – Large Civil Aircraft (Panel)*, para. 8.7; *EC – Large Civil Aircraft (AB)*, para. 1418.

[3] *EC – Large Civil Aircraft (Panel)*, paras. 7.374-7.375; *EC – Large Civil Aircraft (AB)*, para. 604.

[4] *EC – Large Civil Aircraft (AB)*, paras. 1269 and 1270.

[5] *EC – Large Civil Aircraft (AB)*, para. 1264.

with the obligation. They would also fail to comply if they granted new subsidies with a "close relationship" to the actionable subsidies at issue in the original dispute,[6] introduced new subsidies that *replaced* the actionable subsidies already found to exist,[7] or introduced measures that *circumvented* the DSB's recommendations and rulings.[8]

5. However, the EU's response to these massive subsidies and their adverse effects was to keep on doing what it did in the 36 years covered by the original Panel's deliberations: give subsidized funds to Airbus aircraft that took sales and market share from its U.S. competitor. On the December 1, 2011, deadline for compliance with the DSB recommendations and rulings, the EU transmitted a document to the United States and to the DSB (the "EU Notification") asserting that it had taken 36 "steps" to bring its measures into conformity with its WTO obligations. However, these steps did nothing to move toward WTO compliance:

- The EU Notification never mentions the $4 billion in LA/MSF for the A380, one of the largest LA/MSF subsidies Airbus ever received, and one that the Appellate Body confirmed as "a necessary precondition for Airbus' launch in 2000 of the A380."[9]

- The only "repayment" referenced, €1,704 billion in step 25, is no change at all, as it consists almost entirely of funds Airbus paid to the German government in 1997 and 1998.

- Steps 1 through 24 report the "termination" of LA/MSF contracts related to the A300, A310, A320, A330, and A340, without explaining what the term means. Mere "termination" is a meaningless formality without repayment of past subsidies, which the EU has neither claimed nor established. If the "termination" resulted in an effective forgiveness of amounts due, it would actually confer a new subsidy.

- Steps 31 through 33 note the "termination" of subsidized Airbus models,[10] a development rendered meaningless by the subsidization of the models that replaced them − the A330 and A350 XWB. Termination of the A340 program actually boosted Airbus earnings by €460 million[11] − scarcely an action that would eliminate subsidies or their adverse effects on U.S. interests.

- With one exception, the remaining steps reflect EU inaction based on the theory that the passage of time or other intervening events would result in the subsidies or their adverse effects fading to insignificance, without any attempt to explain why this would be so.[12]

6. Airbus has itself been frank about the pointlessness of this exercise. Hans Peter Ring, the Chief Financial Officer of EADS, Airbus' parent company, has confessed that Airbus retains every franc, mark, peseta, pound, and euro of WTO-inconsistent subsidy that it received:

> Q: "If I look at some of the articles about the WTO and complying with the WTO ruling, it would suggest that you feel that you've now done something which makes you now compliant, ex-A350, which is another debate. What exactly did you do? Have you paid any money back?"
>
> Hans Peter Ring: "No."[13]

7. This statement provides a one-word summary of the EU's plan of inaction. Instead of modifying its behavior, the EU has made light of the DSB recommendations and rulings. Where the Appellate Body found that without the subsidies, Airbus would most likely not exist at all,[14] the EU

[6] *E.g.*, *US − Softwood Lumber CVDs (21.5) (AB)*, para. 77.
[7] *US − Upland Cotton (AB)*, paras. 237-238.
[8] *US − Softwood Lumber CVDs (21.5) (AB)*, para. 71.
[9] *EC − Large Civil Aircraft (AB)*, para. 1414(q).
[10] EU Notification (Exhibit USA-001).
[11] EADS Financial Statements 2011, p. 65 (Exhibit USA-014).
[12] The one exception to this is the infrastructure-related subsidy for the Bremen airport runway. The United States is not challenging the EU's compliance with the DSB recommendations and rulings with regard to this subsidy.
[13] Webcast, Q&A from Global Investor Forum 2011, EADS (Dec. 15, 2011), min. 21 ff. (Exhibit USA-002).
[14] *EC − Large Civil Aircraft (Panel)*, para. 7.1984.

concluded that "the economic impact of these support measures in the Large Civil Aircraft (LCA) market has been found to be very limited."[15] For its part, Airbus saw "no significant consequences for Airbus or the European support system from today's decision." [16] In fact, Airbus has interpreted the rulings as an affirmation of past funding practices − a "big victory for Europe."[17] Airbus CEO Tom Enders reacted to the Appellate Body's findings with the following statement:

> It is good to see that the WTO has *fully green lighted* the public-private partnership instruments with France, Germany, Spain and the UK. We now can and will continue this kind of partnership on future development programs.[18]

8. The EU apparently agrees. Aside from generating the list of 36 ineffectual "steps" to comply with the DSB recommendations and rulings, the responding parties' only substantive response has been to give €3.5 billion in new LA/MSF for the newest Airbus model, the A350 XWB.[19] The EU and the relevant member States have striven to keep information on the terms of the funding from public scrutiny, apparently to avoid revealing information that would suggest inconsistencies with its WTO obligations.[20] However, public documents make clear that Airbus received its new LA/MSF on the same key terms and conditions as its predecessors: unsecured, success-dependent, levy-based, and back-loaded. Government statements further confirm that the relevant member States granted the funding on better-than-commercial terms. Thus, it is clear that LA/MSF for the A350 XWB means that the EU has failed to comply with the recommendations and rulings of the DSB because the funding is closely related to the subsidies already found inconsistent with the SCM Agreement, replaces other actionable subsidies, and results in circumvention of the EU's compliance obligations.

9. The original Panel noted many examples of how the subsidies operated to create a full Airbus product line that caused the U.S. large civil aircraft industry to lose numerous sales and market share.[21] Recent developments in the twin-aisle segment of the market provide another concrete example of how LA/MSF allows Airbus to brush off its mistakes, and keeps Boeing from enjoying its successes. The EU conceded in the original Panel proceeding that the 300-400 seat A340 and its subsequent derivates were aircraft that never would have been launched when they were without LA/MSF.[22] Even so, the A340 and A340-500/600 failed commercially, yielding only 375 sales over a 19-year period, well below the 600 sales that manufacturers treat as the minimum necessary for a successful large civil aircraft.[23] Given these realities, the A340's failure should have been a big blow to Airbus, particularly as it unfolded alongside the A380's weak

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[15] EU Press Release, *WTO Airbus Case − Appellate Body overturns key findings of the Panel in favour of the EU* (May 18, 2011).

[16] Airbus Press Release, *WTO final ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit USA-004).

[17] Airbus Press Release, *WTO Final Ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit USA-004).

[18] EADS Statement, *WTO final ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit US-005) (emphasis added). Similarly, Ranier Ohler, Airbus' Head of Public Affairs and Communications, said: "'WTO confirmation of the European loan system is a big victory for Europe. We see no significant consequences for Airbus or the European support system from today's decision, as the WTO has now fully and finally rejected most of the US claims. Therefore, the WTO findings are likely to require only limited changes in European policies and practices.'" Press Release, *WTO final ruling: Decisive victory for Europe*, Airbus (May 18, 2011) (Exhibit USA-002).

[19] *E.g.*, Kevin Done and Peggy Hollinger, *Airbus set to gain aid for A350*, Financial Times (June 15, 2009) (Exhibit USA-007).

[20] Letter from Amb. Ron Kirk to Commissioner Karel Degucht (Aug. 5, 2011) (Exhibit USA-300).

[21] *E.g.*, *EC − Large Civil Aircraft (Panel)*, para. 7.1993:

> We consider that Airbus' market presence during the period 2001-2006, as reflected in its share of the EC and certain third country markets and the sales it won at Boeing's expense, is clearly an effect of the subsidies in this dispute. We therefore conclude that the displacement of United States' LCA from the EC and certain third country markets and lost sales we have found during the period 2001-2006 are an effect of the specific subsidies to Airbus that we have found."

[22] *EC − Large Civil Aircraft (AB)*, para. 1273 ("The European Union . . . accepts that a non-subsidized Airbus would not have been able to launch the A300, A310, and A340 LCA projects by the 2001-2006 reference period."); *EC − Large Civil Aircraft (Panel)*, para. 7.1939 ("LA/MSF was necessary for Airbus to have launched the A330/A340 in 1987, with LA/MSF covering between 60 and 90 percent of its development costs."); *id.* para. 7.1940 ("LA/MSF was also essential to the development of the A340-500/600.").

[23] *EC − Large Civil Aircraft (Panel)*, para. 7.1717 (finding that developing large civil aircraft "is an enormously complex and expensive undertaking" fraught with risk, where typically "at least 600 airplanes of a new model must be sold before the revenues for a programme exceed the costs.").

commercial performance and calamitous production problems.[24] At the same time, Boeing should have been able to enjoy the fruits of the unsubsidized development of the 777 and that aircraft's huge success in the 300-400 seat market segment, with more than 1300 sales in the 1995-2011 period.

10. But Airbus did not suffer from the commercial failure of the A340, and Boeing did not fully enjoy the commercial rewards for developing the 777 without subsidies. LA/MSF for the A340, A380, and other models meant that the subsidizing governments bore a significant part of the costs and risks of failure. Airbus fell far short of the number of A340 deliveries necessary to repay the LA/MSF it received − even at below-market interest rates − but far from hurting Airbus, the A340 cancellation boosted income by €406 million (€312 million net) as it cleared LA/MSF liabilities from its books. [25]

11. The preferential, success-dependent repayment terms of LA/MSF gave Airbus the flexibility to put its A340 mistakes behind it and try again in the 300-400 seat segment with the A350 XWB-900 and -1000. Before launching the A350 XWB in 2006, Airbus was "seriously questioning" whether it had the ability to finance such a program,[26] especially as it was still mired in the "monumental task" of bringing the A380 into commercial service.[27] But LA/MSF − both for prior models and for the A350 XWB itself − allowed Airbus to pass through this difficult time without having to sacrifice its key product initiatives. Based on 40-plus years of consistent subsidization, the company maintained its position as the world's largest civil aircraft manufacturer, delivered the A380, discarded the A340, and launched the all-new A350 XWB as a challenger to both the 787 and 777. On the last point, Airbus Chief Operating Officer, Customers, John Leahy is very clear about the commercial impact the company expects the A350 to have on the 777:

> "I've got to give (Boeing) credit on the 777; if you need lift in the long-range widebody market now, that's the plane," Leahy said, according to Bloomberg News. "The day we deliver the first A350-1000, the 777-300ER will become obsolete."[28]

12. The broader effect of these subsidies also appears in key market indicators, as Airbus itself noted in a series of presentations it made to investors in early 2012. With Boeing's share of gross orders falling from 81 percent in 1995 to 36 percent by year-end 2011, Airbus's market share grew from 19 percent to 64 percent: [29]

[24] *E.g.*, *Time for a new, improved model: Airbus gets to work on its medium sized aircraft, but deeper problems remain*, Economist (July 20, 2006) (Exhibit USA-028) (noting that in light of problems with the A340 and the A380, "{t}his is . . . a horrible time for Airbus to be launching such an ambitious new project.").

[25] EADS Financial Statements 2011, p. 65 (Exhibit USA-14); Hans Peter Ring, Webcast, Q&A from 9m Results 2011, min. 41 ff. (Exhibit USA-015):

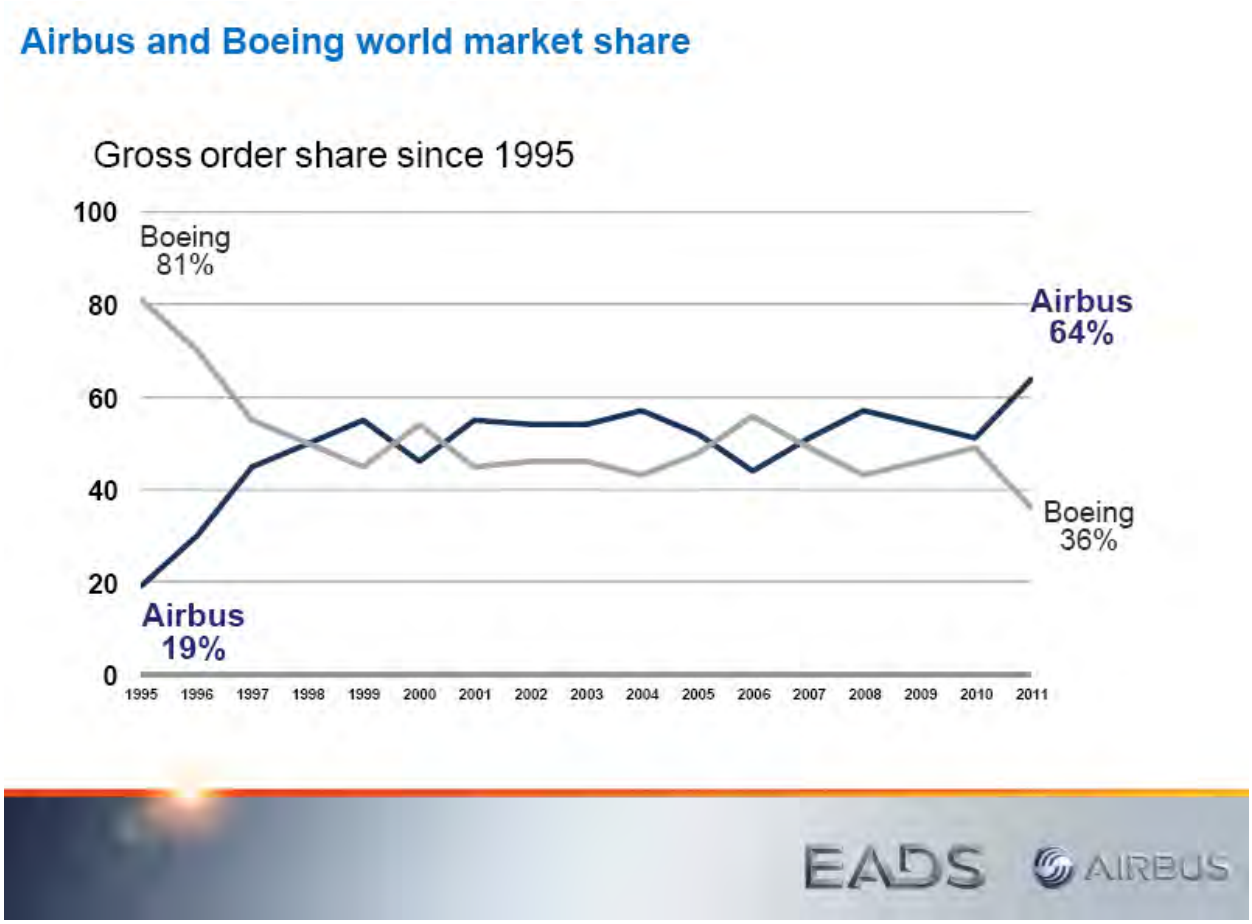
> Ring: To start with your wording, 'the launch aid balance': actually it's repayable launch investments, as we call them. I mean it's indeed that we are, I would say, adapting ourselves to reality. We have not sold 340s since almost I think two years now, after we had announced that we would build aircraft to order. So we were extremely successful as you know on the 330 and on the 350, but 380 {sic} was not selling, and that means that *there is a liability in the balance sheet which is released*, if you like, with this assessment, and that's the reason why it has a positive impact on the P&L, in EBIT, and in net income, as you've heard.

[26] Thomas Enders Interview, Le Monde (Oct. 13, 2007) (USA-008); Aaron Karp, *Airbus/EADS officials concede Boeing advantage, question A350 viability*, Air Transport World Daily News (Oct. 6, 2006) (Exhibit USA-009).

[27] Mark Piling, *Dream date,* Airline Business (Apr. 1, 2004) (Exhibit USA-010).

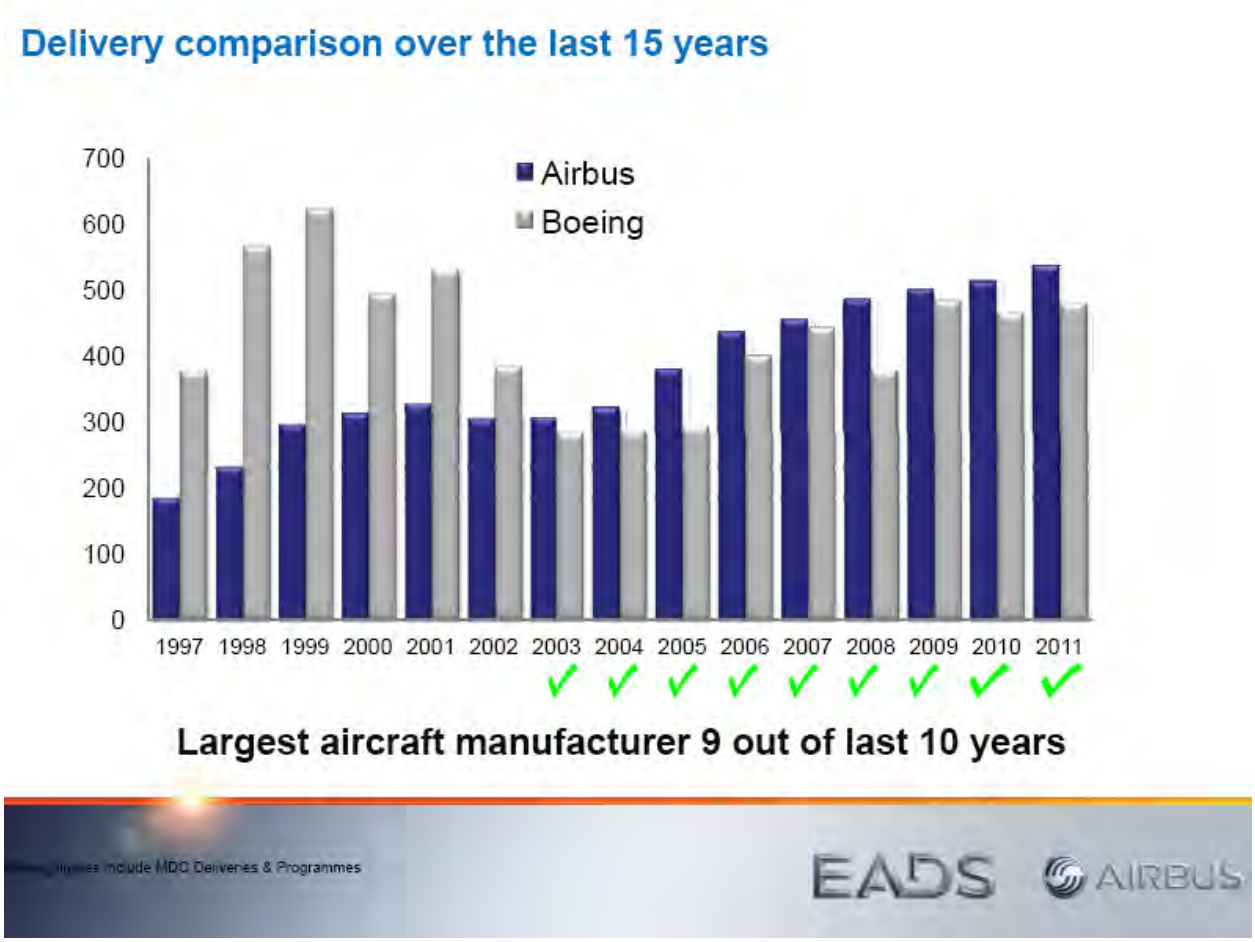
[28] Dominic Gates, *Boeing may overtake Airbus as No. 1 jet-maker in 2012*, Seattle Times (Jan. 17, 2012), (Exhibit USA-011).

[29] EADS Airbus, *New Year Press Conference 2012 – Commercial review*, slide 7 (Jan. 17, 2012) (Exhibit USA-012).



13. Airbus also trumpeted its perennial success as the "largest aircraft manufacturer" in terms of deliveries from 2003 through 2011: [30]

[30] EADS Airbus, *New Year Press Conference 2012 – Commercial review*, slide 18 (Jan. 17, 2012) (Exhibit USA-012).



14. As the graph shows, it was in the 2001-2006 period examined by the original panel that Airbus finally achieved its goal of splitting the market roughly in half with Boeing. In December 2011, Airbus described this market split as "the most important balance" for it to maintain.[31] However, as the original Panel found, and the Appellate Body concurred, without LA/MSF, Airbus would not have been able to achieve or maintain this strong market position,[32] and quite probably would not have existed at all.[33]

15. Country markets and individual sales campaigns parallel these broad market trends. Airbus continues to displace Boeing in EU and third country product markets, just as it causes significant lost sales for Boeing in a number of sales campaigns involving hundreds of orders and tens of billions of dollars.

16. From a compliance standpoint, the situation is largely the same as it was in the original proceeding. LA/MSF has not been withdrawn. Airbus still supplies the market with a product line that it would not have without LA/MSF. Consequently, Boeing continues to lose sales and market

[31] Marwan Lahoud, *Views on EADS Strategy and Value Creation*, slide 8 (Dec. 15-16, 2011) (Exhibit USA-013).

[32] *EC – Large Civil Aircraft (AB)*, para. 1270 ("As we see it, the Panel's conclusion that a non-subsidized Airbus would not have 'achieved the market presence it did over the period 2001 to 2006', which followed from its views that a non-subsidized Airbus would be a 'much weaker LCA manufacturer' with 'at best a more limited offering of LCA models', provided enough of a basis to establish a 'genuine and substantial relationship of cause and effect' in this case.").

[33] *EC – Large Civil Aircraft (AB)*, para. 1263 ("{The EU's appeal} is premised exclusively on scenarios 3 and 4, on which the {EU} claims the Panel focused. We do not agree that this is a proper characterization of the Panel's findings. In fact, the Panel found that scenarios 3 and 4, in which Airbus would have entered the market without subsidies, were 'unlikely'."); *ibid.*, para. 1264 ("Under scenarios 1 and 2, there was no need for the Panel to proceed further in its counterfactual analysis. Without the subsidies, Airbus would not have existed under these scenarios and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred.").

share worth many billions of dollars. The only material change is a *worsening* of the compliance situation, with the relevant EU member States in the midst of providing €3.5 billion in LA/MSF to Airbus for the A350 XWB. Accordingly, and in light of the evidence and argumentation presented, the United States respectfully requests that the compliance Panel work quickly to address the EU's failure to comply with the DSB's recommendations and rulings in *EC – Large Civil Aircraft*. Almost eight years after the commencement of this dispute, an end to LA/MSF as usual is long overdue.

17. Therefore, the United States respectfully asks the Panel to find that:

- With the exception of the Bremen airport runway subsidy, the EU and relevant member States have not withdrawn the subsidies covered by the DSB recommendations and rulings;

- French, German, Spanish, and UK LA/MSF for the A350 XWB is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement;

- French, German, Spanish, and UK LA/MSF for the A380 and the A350 XWB confers (1) an export subsidy inconsistent with Article 3.1(a) of the SCM Agreement, and (2) an import substitution subsidy inconsistent with Article 3.1(b) of the SCM Agreement;

- the EU and relevant member States have not removed the adverse effects covered by the DSB recommendations and rulings;

- the United States continues to experience serious prejudice in the form of significant lost sales under Article 6.3(c) of the SCM Agreement, including sales where the customer ordered the A350 XWB;

- the United States continues to experience serious prejudice in the form of displacement and impedance, and/or threat thereof, of its large civil aircraft imports into the EU market under Article 6.3(a) of the SCM Agreement;

- the United States continues to experience serious prejudice in the form of displacement and impedance of its large civil aircraft exports to 11 third-country markets under Article 6.3(b) of the SCM Agreement;

- all subsidies provided to Airbus large civil aircraft, including LA/MSF provided to the A350 XWB, have a genuine and substantial causal relationship with the effects found; and

- the European Union has failed to comply with the recommendations and rulings of the DSB by withdrawing the subsidies or taking appropriate steps to remove the adverse effects.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The European Union's ("EU") first written submission provides a spirited defense of . . . doing nothing.

2. More specifically, the EU asserts that, after panel and Appellate Body findings that Airbus received WTO-inconsistent subsidized financing worth billions of euros, with tens of billions of dollars of adverse effects to U.S. interests, the EU could come into compliance by doing essentially nothing. The EU goes even further to argue that the only meaningful acts it did take with regard to large civil aircraft subsidies, grants of €3.5 billion in *new* subsidies for the A350 XWB, were immune from review by this compliance panel. In any event, these new subsidies only brought the EU further from compliance with its WTO obligations.

3. This was not what the original Panel and the Appellate Body called for when they found that the EU had conferred subsidies inconsistent with Article 5 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and consequently had an obligation under Article 7.8 of the SCM Agreement to withdraw the subsidies or take appropriate steps to remove their adverse effects. The Appellate Body has found that compliance with this obligation "will usually involve some action by the respondent Member. This affirmative action would be directed at effecting the withdrawal of the subsidy or the removal of the adverse effects." The reverse is also true: "A Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own."

4. Yet that is exactly what the EU proposes. It's first written submission makes clear what the EU Notification[1] strongly implied − that the measures the EU has taken either are doing nothing, or are so small as to do nothing. (In fact, the EU essentially concedes that 12 of the LA/MSF-related measures listed in the EU Notification are meaningless, as its first written submission does not reference them.) In short, for purposes of Article 21.5 of the *Understanding Governing Rules and Procedures for the Settlement of Disputes* ("DSU"), the measures taken to comply either do not exist or, in the case of LA/MSF for the A350 XWB, exacerbate the WTO inconsistencies.

II. ANALYTIC FRAMEWORK

5. After adoption of the Panel and Appellate Body Reports in *EC − Large Civil Aircraft*, the EU had an obligation to comply with the Dispute Settlement Body ("DSB") recommendation to withdraw the subsidies or take appropriate steps to remove their adverse effects. The question before this panel, in considering a manner referred to it pursuant to Article 21.5 of the DSU, is whether the responding party's declared (or undeclared) measures taken to comply with the recommendations and rulings of the DSB exist or are themselves WTO-inconsistent. The recommendations and rulings of the DSB provide the measurement for judging compliance.

6. Article 21.5 instructs a panel to evaluate "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings," which include the underlying panel and Appellate Body findings, in effect, taking them as a given. It is equally significant that Article 21.5 does not invite compliance panels to reopen or reconsider the DSB recommendations and rulings. Indeed, it is difficult to see how a compliance proceeding could function if the recommendations and rulings, which provide the basis for analyzing compliance, could be subject to challenge. Thus, the DSB recommendations and rulings, including as embodied in the panel and Appellate Body findings, are obviously important in identifying whether a measure taken to comply exists, and in evaluating whether any unchanged elements of a measure are consistent with the covered agreements. They can also play an important role in evaluating whether a revised measure is inconsistent with the covered agreements.

[1] Letter from the European Union to the United States (Dec. 1, 2011) ("EU Notification").

III. THE SCOPE OF THIS COMPLIANCE PROCEEDING

7. **Threat of serious prejudice claims.** The EU argues that the case presented in the U.S. first written submission "contains arguments regarding alleged *threats* of displacement and impedance," while "the United States' Article 21.5 Panel Request referred only to *actual*, rather than threatened, displacement and impedance of imports." Footnote 13 to Article 5(c) of the SCM Agreement explicitly provides that "'serious prejudice'…includes threat of serious prejudice." The U.S. panel request frames the U.S. claim in terms of "adverse effects" (which include threat of serious prejudice) and "subsidies . . . inconsistent with Articles 5(c), 6.3(a), 6.3(b), and 6.3(c)" (which include threat of serious prejudice). Thus, the U.S. panel request includes any claims of threat of serious prejudice embodied in the U.S. first written submission.

8. **LA/MSF for the A350 XWB.** The EU does not contest that LA/MSF for the A350 XWB has the same four core terms as all previous LA/MSF, or that LA/MSF for the A350 XWB has the effect of negating the EU's compliance with the DSB recommendations and rulings in this dispute, or that the legal instruments conferring A350 XWB LA/MSF were issued from June 2009 onward, and that disbursements occurred continually from 2009 to 2012. Rather, the EU invents and then subjects the U.S. claims to an "overarching measure" test that has no basis in the text of the DSU or previous panel or Appellate Body reports. The EU also raises several tangential issues regarding the nature, effects, and timing of LA/MSF for the A350 XWB, but these are either contrary to past Appellate Body reports or irrelevant to the issues before the Panel. Therefore, the EU has failed to undermine the U.S. demonstration that LA/MSF for the A350 XWB is properly in the scope of this proceeding because it satisfies the "close nexus" test.

9. **Prohibited subsidy claims.** The United States raised claims under Article 3.1(a) of the SCM Agreement against LA/MSF for the A380 during the original proceeding, but the Appellate Body ultimately did not resolve them. It is well established that a compliance panel may consider claims in this procedural posture. Therefore, the EU's argument that these claims fall outside the Panel's terms of reference should be rejected. The EU also argues that the U.S. claim against LA/MSF for the A380 under Article 3.1(b) falls outside of this compliance Panel's terms of reference. However, the United States could not have raised its Article 3.1(b) claim at the time of the original panel, so this closely related claim is within this Panel's terms of reference.

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

A. Alleged Repayment on Subsidized Terms or "Termination" of Agreements Did Not Cause the Subsidies to Expire

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

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

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

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

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

13. **The Dasa and CASA transactions.** The original Panel found that the Dasa and CASA transactions did not extract or extinguish prior subsidies, and the Appellate Body upheld that finding. That should end the inquiry; the EU had a chance but failed to make its case, and is accordingly precluded from raising the issue again in an Article 21.5 proceeding. In any event, if the Panel decides to revisit this question, the EU's arguments regarding the Dasa and CASA transactions fail at this stage for the same reason they failed before the original Panel and the Appellate Body − the EU has not satisfied any of the elements of the test for establishing the extraction of subsidies from Airbus. It has not shown that the cash transfers actually "extracted" anything of value from EADS in the first place. It has also failed to show that the cash involved was actually related to the value of past subsidies, rather than some other element in the value of EADS. Thus, even if the Panel were to find that the Dasa and CASA transactions were properly before it, the EU has not met its burden of proof for the proposition that the Dasa and CASA transactions reduced or eliminated the benefit from past subsidies to Airbus.

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

D. The Appellate Body's Findings in *EC – Large Civil Aircraft* Preclude Treatment of the Removal of the Financial Contribution, or the Expiration of Subsidies Alleged by the EU as Withdrawing the Subsidies

15. The Appellate Body found that the role of the LA/MSF, capital, and regional subsidies in creating the A300, A310, A320, A330, A340, and A380 established a genuine and substantial causal link between the subsidies and the lost sales and displacement experienced by Boeing between 2001 and 2006. The Appellate Body also found that the expiration of subsidies prior to the reference period would not necessarily preclude a finding that they had adverse effects during that time. The Appellate Body made explicit findings that the extractions alleged by the EU did not affect the value of past subsidies, but made no findings with regard to other transactions or events. In short, the possibility that subsidies had expired did not prevent the original Panel and the Appellate Body from finding those subsidies inconsistent with Article 5 of the SCM Agreement due to their continuing adverse effects. Thus, as a compliance matter, the alleged expiration of those same subsidies did not "withdraw" them or otherwise excuse the EU from the Article 7.8 obligation triggered by its earlier violations of Article 5.

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

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

economic analyses performed by NERA and included in the U.S. second written submission. The EU explicitly concedes that LA/MSF for the A350 XWB was a financial contribution, so there is no dispute on that point.

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

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

18. As the U.S. first written submission demonstrated, LA/MSF for both the A380 and the A350 XWB are contingent in fact upon anticipated export performance. The design, structure, and operation of the subsidies themselves, which led to high levels of export sales, support this conclusion. The U.S. first written submission also demonstrated that the Airbus governments granted LA/MSF for the A380 and the A350 XWB in anticipation that Airbus would manufacture aircraft components domestically, using domestic (rather than imported) goods and labor, and that such components would be used to construct the aircraft. The United States demonstrated that the grant of A380 and A350 XWB LA/MSF was made contingent upon such anticipated use of domestic goods, making them prohibited under Article 3.1(b) of the SCM Agreement.

19. The EU failed to rebut the U.S. *prima facie* demonstration of inconsistency with Articles 3.1(a) and 3.1(b). First, the United States demonstrates that none of the EU's attempted jurisdictional challenges regarding the A380 has any merit, in light of the unique procedural posture and procedural history of the U.S. claims involved. Second, the United States reaffirms its original presentation of the Appellate Body's interpretation of the standard for *de facto* export contingency, as well as its demonstration that A380 and A350 XWB LA/MSF meet that standard. Third, the United States demonstrates that the EU's brief comments on import substitution are contradicted by prior Appellate Body reports, fail to engage with the U.S. claims under Article 3.1(b), and fail to undermine the United States' *prima facie* case.

VI. THE UNITED STATES HAS DEMONSTRATED THAT THE EU HAS NOT TAKEN APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS OF ITS SUBSIDIES, AND THE EU HAS FAILED TO REBUT THE U.S. CASE

A. Introduction

20. The Panel's assessment of the EU's claim of compliance with the recommendations and rulings of the DSB should be straightforward. The original Panel found, and the Appellate Body affirmed, that the EU gave Airbus billions of euros in subsidized financing − the largest amount of subsidized financing in the history of the WTO and the GATT 1947 − resulting in tens of billions of dollars of adverse effects to the U.S. LCA industry. The DSB adopted these findings. As with the subsidy findings, the EU response to the adverse effects findings against it was to do nothing that would resolve the dispute. Where it did take action, it was to provide yet another round of LA/MSF, this time to enable Airbus to launch and bring to market the A350 XWB in a manner that would have been impossible otherwise. This is manifestly inappropriate. Under Article 7.8 of the SCM Agreement, the EU needed to take action to remedy the situation. Because it has not done so, the Panel should find that the EU has failed to comply.

21. With its first written submission, the EU confirmed that it relies overwhelmingly on inaction in asserting that it has taken appropriate steps to remove the adverse effects. In the face of the DSB's rulings and recommendations, the EU attempts to justify its inaction by citing two factors: (1) withdrawal of prior subsidies, and (2) the passage of time. Neither supports the EU's claim of compliance. The United States has demonstrated that the EU has not withdrawn the subsidies. The United States also demonstrates that the passage of time has not invalidated the underlying findings or eliminated the causal link between the subsidies and adverse effects, notwithstanding the EU's baseless assertions regarding Airbus's current financial situation, changes in conditions of competition, and technological advances. As found by the original Panel and the Appellate Body, Airbus's entire product line, the technologies applied on those products, and indeed Airbus's

financial condition are genuine and substantially related to the LA/MSF subsidies. Nothing has happened since the reference period to undermine that conclusion. Therefore, the EU has failed to comply with Article 7.8 of the SCM Agreement and with the rulings and recommendation of the DSB.

B. The Analytical Framework Advocated by the EU is Deeply Flawed

22. ***The starting point in a compliance proceeding is the recommendations and rulings of the DSB. This is not a "new" case.*** The EU seeks to treat this compliance proceeding as a new, entirely independent dispute. It argues that the United States must show present adverse effects, presently caused, independent from and without any regard to the EU's past conduct or to the past measures and adverse effects at issue in the original dispute. The EU also contends that the Panel should not look to any facts that pre-date December 1, 2011, as they are not "relevant to the showing that the United States must make in these compliance proceedings." For its part, the EU considers itself free to ignore and/or re-litigate the original Panel and Appellate Body findings, adopted by the DSB, that the EU gave billions of euros in subsidized financing to create a line of Airbus aircraft that causes billions of dollars in adverse effects to the interests of the United States. The EU is mistaken in each respect. The approach urged by the EU would require a prevailing Member to obtain new findings in a new dispute without regard to the recommendations and rulings adopted by the DSB in the original dispute. The EU approach is fundamentally at odds with the nature of a proceeding under Article 21.5 of the DSU. The starting point must be the DSB's recommendations and rulings.

23. In this case, the Appellate Body concurred with the original Panel's conclusion that under the most likely counterfactual scenario in the absence of the subsidies, "Airbus would not have existed . . . and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred." At a minimum, absent the subsidies, Airbus would be a "'much weaker LCA manufacturer,'" and would have had "'at best a more limited offering of LCA models.'" The original Panel and the Appellate Body made clear findings as to the product effects of LA/MSF, which enabled Airbus to develop and bring to market each of its models of LCA as and when it did. The original Panel and the Appellate Body recognized that the primary effects of LA/MSF to a given Airbus model was to cause that model to be launched when and as it was and to thereby inject supply into the market that would not exist otherwise. The presence of such subsidized aircraft enabled and continues to enable Airbus to capture sales and market share at the expense of the U.S. industry.

24. The EU has not fulfilled the mandate of Article 7.8 of the SCM Agreement and the requirement to "take appropriate steps to remove adverse effects." The United States demonstrates again the continued validity of the underlying findings – including the causal link – in the current market situation, the absence of any meaningful action by the EU to address the situation, and the unabated, continuing present adverse effects in the form of significant lost sales and displacement and impedance, and threat thereof. None of the EU's asserted compliance steps did anything to address, let alone remove, LA/MSF's adverse effects. In fact, the sole notable action that the EU did undertake was to compound the adverse effects by giving yet another round of LA/MSF to the A350 XWB.

C. Conditions of Competition and Product Markets

25. In its first written submission, the EU largely does not dispute the conditions of competition found by the original Panel and the Appellate Body and cited by the United States. The notable exception is that the EU for the first time asserts the existence of *seven* wholly separate product markets, four of which are purportedly monopoly markets with no competition. This is contrary to adopted Appellate Body findings, in which the Appellate Body agreed with the EU's prior position that LCA could properly be divided into three appropriate product markets – single aisle, twin aisle, and very large aircraft. The EU's approach in this compliance proceeding does not bear any resemblance to real patterns of competition involving large civil aircraft.

D. The EU Has Failed to Rebut the U.S. Demonstration that EU Subsidies to Airbus Continue to Cause Present Adverse Effects

26. In its first written submission, the United States demonstrated a causal link based on the findings of the original Panel and the Appellate Body, the absence of any meaningful action by the EU to address the situation, and the fact that lost sales and lost market share have continued unabated. The U.S. demonstration that LA/MSF continues to cause adverse effects is based on three principal points. *First*, the original Panel and the Appellate Body found that LA/MSF had "product effects," enabling Airbus to supply the market with aircraft that it would not otherwise have had when and as it did, and these aircraft took sales and market share from the U.S. industry. *Second,* none of the EU's asserted compliance steps did anything to address, let alone remove, the product effects of LA/MSF. In fact, the sole notable action that the EU did undertake was to compound the product effects of LA/MSF by giving yet another round of it to the A350 XWB. *Third*, the pattern of lost sales and lost market share has persisted from the original reference period up through the present, despite the EU's claims of compliance.

27. The EU's first written submission confirms that it has not taken meaningful compliance steps to remove the adverse effects that LA/MSF causes. Its submission is devoid of reference to EU action that could remove or even mitigate the effects of LA/MSF that continue to so severely distort competition in the LCA industry. Unable to rely on real compliance action, the EU tries to rebut the U.S. causation demonstration in four ways: (1) the supposed withdrawal, through expiration or extraction, of LA/MSF to all Airbus LCA from the A300 through the A340 (it argues the same for the A380 LA/MSF, although its arguments betray a lack of confidence that it has withdrawn LA/MSF to the A380); (2) subsequent investment by Airbus and its suppliers in the A320 and A330; (3) Airbus's supposed ability to launch the A380 in the absence of LA/MSF; and (4) Airbus's supposed ability to launch the A350 XWB in the absence of LA/MSF. All of these arguments fail.

28. Indeed, as is clear from its argument, the EU concedes that it did nothing to break the causal relationship between the LA/MSF and other subsidies and serious prejudice to the United States. Rather, it argues that conditions have changed such that an entirely new assessment of causation must take place. But the causal mechanism identified by the original Panel and confirmed by the Appellate Body still operates, including through LA/MSF to the A350 XWB. The EU's portrayal of the causal nexus as non-existent is incorrect, as the evidence confirms.

E. The EU has Failed to Rebut the U.S. Demonstration of Significant Lost Sales

29. The United States continues to experience significant lost sales. In its first written submission, the United States documented over one thousand lost sales, together worth tens of billions of dollars of lost revenues for the U.S. LCA industry. This pattern has continued unabated from the original reference period through the end of the RPT, December 1, 2011, and on to the date of referral of this matter to the compliance Panel. Since that time the United States has also lost significant sales campaigns involving Hong Kong Airlines and Norwegian Air Shuttle, as demonstrated in the first written submission, and also three additional sales campaigns that have occurred since the filing of the U.S. first written submission.

30. This consistent pattern of continuing significant lost sales reflects the absence of any meaningful action by the EU to remove the adverse effects of the WTO-inconsistent subsidies at issue in this dispute. Indeed, the EU does not claim to have taken any steps on its own initiative to remove adverse effects in the form of lost sales. Rather, the EU points to the "delivery" of Airbus aircraft and Airbus's termination of the A340 program as compliance "steps". These arguments are misplaced. The EU itself had an obligation itself to take appropriate steps to remove the adverse effects, and is not entitled to rely on Airbus's independent business decisions to satisfy this obligation. In any event, Airbus's completion of deliveries and the termination of the A340 program have not removed the adverse effects caused by LA/MSF.

31. Given the persistence of lost sales and the absence of meaningful compliance action, the EU has nothing to offer in rebuttal beyond erroneous arguments regarding purported "non-attribution factors." For example, the EU argues that Airbus's first sale to an airline customer generates a "strong disposition" to buy Airbus aircraft in the future and that this disposition is a "non-attribution factor," without explaining how Airbus could have offered any of the LCA it sold to that

customer without LA/MSF. In addition, according to the EU, if an airline customer purchases an Original A350, this is another "non-attribution factor" with respect to subsequent A350 orders. These are not valid "non-attribution factors." They in no way alter the fact that Airbus obtained these sales with aircraft that it would have been unable to offer in the absence of the LA/MSF and other subsidies. The EU's so-called non-attribution factors are *themselves* the effects of LA/MSF, as any incumbency advantages that Airbus enjoys by virtue of previously obtained sales are the direct result of earlier LA/MSF.

F. The EU has Failed to Rebut the U.S. Demonstration of Displacement, Impedance, and Threat Thereof in the EU Market and Certain Third Country Markets

32. The U.S. LCA industry continues to suffer adverse effects in the form of displacement, impedance, and/or the threat thereof within the meaning of Article 6.3(a) and (b) of the SCM Agreement. The U.S. first written submission demonstrated that such adverse effects are presently occurring in the EU market and 11 third-country markets. These adverse effects have continued during the first half of 2012, and the continued existence of displacement and impedance underscores the EU's failure to take any meaningful steps to remove the adverse effects at issue in this dispute.

33. In its second written submission, the United States presents updated data demonstrating displacement, impedance, and/or threat thereof in the EU market and 11 third-country markets continuing through the date of referral of the matter to the compliance Panel and to the present. These data supplement the data tables in the U.S. first written submission for the time period 2001-2011, with the inclusion of additional market activity in the first half of 2012. Data for the first half of 2012 generally reinforce the conclusions drawn from the data in the U.S. first written submission.

34. The use by the United States of pre-December 2011 market data as evidence to demonstrate continuing displacement and impedance in no way implies that WTO remedies are "retroactive," as the EU erroneously suggests. Rather, the data relied on by United States serve as evidence of present market displacement and impedance, as they demonstrate long-term market trends, and confirm that the U.S. LCA industry continues to suffer displacement and impedance during the 2001-2012 time period as a result of LA/MSF. The EU does not dispute the accuracy of the data underlying the U.S. demonstration of presently continuing market displacement and impedance. Separately, many of the EU's arguments are contradicted by points the United States made in its first written submission.

35. The remaining so-called "non-attribution factor" suggested by the EU − "Boeing's high market share" − is also an argument without merit. Nothing in the text of the SCM Agreement indicates that a WTO Member may not bring a claim for adverse effects resulting from WTO-inconsistent subsidies in markets where its industry enjoys a high market share.

36. This leaves the market data presented by the United States in its first written submission and updated in the second written submission. The data, viewed in the context of LA/MSF's product effects, demonstrate that displacement and impedance continue as a result of the EU's failure to take appropriate steps to remove the adverse effects of LA/MSF and other subsidies to Airbus. The EU contends that such data are insufficient and that independent narratives detailing evidence of lost sales campaigns are necessary to support these claims. To the contrary, such a requirement would effectively subordinate or convert displacement and impedance claims into lost sales claims, even though these explicitly are two separate and independent forms of serious prejudice under Article 6.3 of the SCM Agreement. Furthermore, in the original proceeding, the DSB adopted findings of displacement in China and Korea notwithstanding the lack of any specific findings of lost sales involving Chinese or Korean airline customers. There is simply no basis for the EU to challenge U.S. displacement and impedance claims because they may be unaccompanied by corresponding lost sales claims. And finally, there is no dispute between the parties about the underlying data.

37. In any event, the United States *has also* demonstrated particular lost sales in the EU single-aisle, twin-aisle, and very large aircraft markets (those of easyJet, Air Berlin/NIKI, Czech Airlines, Norwegian Air Shuttle, Iberia Airlines, Air France − KLM, and British Airways); the Australian single-aisle and very large aircraft markets (Qantas and Qantas Airlines/Jetstar Airways); the

Korean twin-aisle and very large aircraft markets (Korean Air and Asiana Airlines); the Singaporean twin-aisle and very large aircraft markets (Singapore Airlines); and the United Arab Emirates very large aircraft market (Emirates).

VII. CONCLUSION

38. The EU first written submission does not change the key facts of this compliance dispute: LA/MSF and other subsidies have not been withdrawn; additional LA/MSF has been provided to the A350 XWB on the same core terms and conditions as all prior LA/MSF to Airbus, including on better-than-commercial terms; Airbus still supplies the market with a product line that it would not have without LA/MSF, and that product line is now even more competitive with the market entry of the A350 XWB; and, consequently, Boeing continues to lose sales and market share worth many billions of dollars.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF THE UNITED STATES AT THE PANEL MEETING

1. What is most remarkable about this dispute is how little has changed in the last eight years. In spite of the longest, most complex WTO dispute ever, and the largest-ever findings of subsidization and serious prejudice, the EU has done nothing to change its WTO-inconsistent behavior. It has withdrawn only a few tiny subsidies, and has taken no meaningful steps to remove the adverse effects of the $15 billion in subsidized financing that it left untouched. And then, just as the original panel was completing its work, the EU granted Airbus more than $4 billion in subsidized financing for the A350 XWB with the same core terms as LA/MSF for earlier aircraft, and once again with a massive benefit.

I. THE EU'S FAILURE TO WITHDRAW THE LA/MSF SUBSIDIES AND GRANT OF NEW SUBSIDIES FOR THE A350XWB

2. The Appellate Body has found that, as used in Article 7.8, "withdraw" means "to 'remove' or 'take away' and 'to take away what has been enjoyed; to take from.'"[1] It elaborated in *US – Upland Cotton* that this obligation implies "affirmative action" by the responding Member, which "would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own."[2] The EU argues that the "accrual and diminishment of the subsidy" by itself "accomplished withdrawal."[3] But the Appellate Body explicitly found that the accrual and diminution of a subsidy is a matter for the analysis of the *effects* of the subsidy.[4]

3. Application of this analysis to the compliance measures identified by the EU establishes that they did not withdraw the subsidies found to exist.

- The supposed termination of LA/MSF contracts, which the EU now asserts as evidence that Airbus and EU member States "recogniz{e}" withdrawal of subsidies through other means, are simply their interpretation of WTO rules, and entitled to no evidentiary weight.

- EU "repayments" covered only the below-market interest rates charged by the EU member States and, accordingly, did not withdraw the subsidy, which includes the benefit conferred by those subsidies.

- The Appellate Body has identified the end of the life of a subsidy as a matter for the adverse effects analysis, not withdrawal. And, even if the life of the subsidy were relevant to the question of withdrawal, the proper measurement of that life is the actual life of the subsidized aircraft program, which means that the subsidies in question have not ended.

- As a factual and legal matter, the transactions cited by the EU did not "extinguish" subsidies or "extract" them from Airbus.

4. We now turn to the EU's latest subsidies to Airbus, more than $4 billion in LA/MSF for the A350 XWB. As we have pointed out, this financing operates just like traditional LA/MSF for earlier aircraft programs. It has the same four core terms, confers a benefit to Airbus, and has the effect of enabling aircraft launches that would otherwise not occur. These characteristics establish a close relationship with previous grants of LA/MSF that justifies including them all in the scope of this proceeding. They also establish that there is no market instrument that shifts risk in the way and on the terms that LA/MSF does.

[1] *EC – Large Civil Aircraft (AB)*, para. 754.
[2] *US – Upland Cotton (21.5) (AB)*, para. 236.
[3] EU SWS, para. 86.
[4] *EC – Large Civil Aircraft (AB)*, para. 714.

5. Dr. Jordan demonstrated that all four instances of LA/MSF for the A350 XWB are subsidies.[5] In a report appended to the EU second written submission, Prof. Whitelaw presents a number of criticisms of Dr. Jordan's approach. It is significant, however, that Prof. Whitelaw never disagrees with Dr. Jordan's ultimate conclusion: that LA/MSF for the A350 XWB conferred a benefit. In fact, performing the calculations described (but not performed) by Prof. Whitelaw, with only one non-controversial correction, demonstrates that LA/MSF for the A350 XWB is a subsidy.

II. THE EU HAS GRANTED PROHIBITED SUBSIDIES TO AIRBUS.

6. Consistent with the Appellate Body's guidance, the United States has demonstrated that the anticipated export ratio in contemplation of receiving the A380 and A350 XWB LA/MSF, respectively, is significantly higher than the corresponding baseline ratio in the absence of the respective subsidies. Thus, the granting of the A380 and A350 XWB subsidies was tied to anticipated export performance or export earnings and, therefore, runs afoul of Article 3.1(a) of the SCM Agreement.

7. LA/MSF for the A350 XWB is also prohibited under Article 3.1(b) of the SCM Agreement. As a condition of receiving LA/MSF, Airbus, in producing the A350 XWB, is contractually required to use a variety of domestic, and not imported, goods. In addition, Airbus agreed to certain employment requirements, which could only be fulfilled by producing in the EU the goods for downstream use. Furthermore, there is no vertical integration exception to Article 3.1(b). The evidence demonstrates clearly that the EU made the granting of LA/MSF for the A350 XWB contingent upon the use of domestic over imported goods, the epitome of what Article 3.1(b) prohibits.

III. THE EUROPEAN UNION HAS FAILED TO REMOVE THE ADVERSE EFFECTS AND CAUSED ADDITIONAL ADVERSE EFFECTS BY PROVIDING NEW SUBSIDIES TO THE A350 XWB.

8. The original panel found, and the Appellate Body affirmed, that given the tremendous costs and risks associated with the development of large civil aircraft, Airbus would not have launched any of its large civil aircraft absent LA/MSF.[6] Because Airbus did receive LA/MSF, the U.S. LCA industry experienced adverse effects on a massive scale: The significant lost sales findings cover more than 400 aircraft orders worth many billions of dollars, and the displacement findings cover seven major country markets.

9. The situation is no better today. Rather than withdraw the subsidies or remove their adverse effects, the EU has carried on as if it is business as usual with LA/MSF. The latest iteration: billions of euros in LA/MSF provided to Airbus for the A350 XWB.[7] As a result, the United States continues to suffer serious prejudice, and the United States continues to be deprived of an appropriate remedy under Article 7.8 of the SCM Agreement.

10. For example, the original panel found, and the Appellate Body upheld, that "either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380."[8] Nothing has changed since the original Panel's finding. The EU has not withdrawn the LA/MSF that, indirectly and directly, was a necessary precondition for the launch of the A380. The EU's counter-argument regarding causation otherwise has already been rejected by the original Panel and the Appellate Body.[9] Thus the EU cannot establish now what it tried and failed to establish in the original dispute, and so its A380 causation arguments should once again be rejected *even if* the Panel were to ignore the effects of pre-A380 LA/MSF (which the United States contends is not appropriate).[10]

11. The Appellate Body found that WTO-inconsistent subsidies to the EU resulted in the displacement of Boeing like products based on three product markets: single aisle, twin aisle, and

[5] NERA, *Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks*, Oct. 18, 2012 (Exhibit USA-475(BCI/HSBI)) ("Jordan Report").

[6] *EC – Large Civil Aircraft (Panel),* paras. 7.1934 (A300), 7.1936 (A310), 7.1938 (A320), 7.1939 (A330/A340), 7.1940 (A330-200), 7.1941-7.1942 (A340-500/600), 7.1948 (A380); *EC – Large Civil Aircraft (AB),* paras. 1273 (A300, A310, A340, A340-500/600), 1275 (A320, A330), 1356 (A380).

[7] *See* US FWS, Summary of U.S. Lost Sales Claims Demonstrating EU Failure to Take Appropriate Steps to Remove Adverse Effects (Exhibit USA-164).

[8] *EC – Large Civil Aircraft (Panel)*, para. 7.1948; *see EC – Large Civil Aircraft (AB)*, para. 1356.

[9] *EC – Large Civil Aircraft (Panel)*, para. 7.1948; *see EC – Large Civil Aircraft (AB)*, paras. 1352-1353.

[10] US SWS, paras. 526-547.

very large aircraft. The EU argues that there are now seven distinct product markets, four of which are monopoly markets, and one non-market. The EU does not − and cannot possibly − explain how, in a few short years, fierce competition in the twin-aisle market has given way to a total absence of any competition. The EU has given no valid reason to depart from the Appellate Body's framework consisting of three product markets.

12. The original Panel also found, and the Appellate Body upheld, that the subsidies that enabled Airbus to launch the original A320 and A330 were genuinely and substantially linked to the improved and derivative A320 and A330 aircraft that it was selling during the 2001-2006 period.[11] Thus while the EU has presented an assortment of improvements to the A320 and A330 aircraft, it fails to identify any real change in the fundamental conditions of competition in the LCA industry such that the same causal link established between subsidies and Airbus's 2000-2006 market presence remains intact. Therefore, the evidence confirms that there is a genuine and substantial link between the subsidies that Airbus has received and the current A320 and A330 models, and that further investments by Airbus − including those since 2006 − do not eliminate that link.

13. Lastly, LA/MSF constituted a necessary precondition for Airbus's recent decision to launch the A350 XWB. First, the A350 XWB program was not, as the EU argues, a can't-miss project immune to the effects of LA/MSF. Rather, it was a project that faced, and continues to face, significant risks. Second, EU support for the A350 XWB has been ever-present, from the period prior to the program's launch, through the finalization of the LA/MSF contracts, to the ongoing funding of its development costs. Indeed, the A350 XWB program could not have gone forward as planned without LA/MSF, including the effects of prior LA/MSF, without which Airbus would not have had the financial, industrial, and technological attributes that it had when it launched the A350 XWB. Finally, because Airbus would have been unable to proceed with the A350 XWB absent LA/MSF, the EU's assertions about the viability, or attractiveness, of the project[12] are beside the point. However rosy the A350's baseline sales projections might be,[13] willingness must not be confused with ability; *wanting* to market an aircraft means little without the *means* to do so. In short, the effects of prior LA/MSF worked in combination with the latest round of LA/MSF to cause Airbus to launch and bring to market the A350 XWB as and when it did, thereby becoming a genuine and substance cause of serious prejudice to the U.S. LCA industry.

14. The United States has further demonstrated that adverse effects from LA/MSF and other subsidies persist through the present. The United States has presented the Panel with evidence of significant lost sales amounting to tens of billions of dollars in lost revenue for the U.S. LCA industry, all caused by subsidies that enabled Airbus to offer and sell LCA that would have been unavailable otherwise.[14] The United States has also presented the Panel with evidence of displacement, impedance, and threat thereof, of its products, in the European Union market and 11 third-country markets.[15] Airbus retains a product line that it likely would not have absent subsidies. Now that product line is even stronger thanks to new infusions of LA/MSF that helped Airbus to launch and market the A350 XWB. The A350 XWB and other Airbus LCA continue to take sales and market share from Boeing, such that the United States continues to experience serious prejudice that would not have occurred had the EU implemented the DSB's recommendations and rulings and complied with Article 7.8 of the SCM Agreement.

15. The EU has failed to provide a valid reason for departing from the Appellate Body's product market framework, and thus the U.S. displacement and impedance claims based on this framework − single-aisle, twin-aisle, and very large aircraft − remain valid. The EU also has failed to provide a valid reason for severing the causal connection between the subsidies and the aircraft sold by Airbus, and thus the U.S. lost sales claims likewise remain valid. Finally, the EU has failed to provide a sound reason for revisiting the non-subsidized like product rule that the Panel rejected in the original dispute.

16. The Panel recalled that the original panel rejected the EU's non-subsidized like product rule, and that that decision was not appealed, and was therefore adopted by the DSB. Nevertheless, the EU forges ahead with the same argument in this compliance proceeding. The EU's alternative

[11] *EC − Large Civil Aircraft (Panel)*, para. 7.1934, 7.1940-41; *see EC − Large Civil Aircraft (AB)*, paras. 1270.
[12] EU SWS, para. 1030.
[13] *Cf.* EU SWS, para. 1030.
[14] US FWS, Section VI.G.2; US SWS, paras. 673-709; and Exhibit USA-164.
[15] US FWS, Section VI.H.3. and US SWS, paras. 718-747.

strategy is to distort the original panel's reasoning, ignoring that the Panel actually found that the EU's position had "no basis in the text" of the SCM Agreement. The EU should not be allowed to reopen a settled issue, nor should it be permitted to divert the Panel's attention from its unceasing WTO-inconsistent subsidization of Airbus.

17. In conclusion, the United States appears before the Panel because the situation has not gotten better, it's gotten worse:

- The EU has refused to withdraw the subsidies.
- EU member States have provided additional LA/MSF to the A350 XWB.
- Airbus still supplies the market with a product line that it would not have without LA/MSF.
- Consequently, Boeing continues to lose sales and market share worth many billions of dollars.

18. The United States was forced to begin this proceeding by the fact that after getting these recommendations from the DSB, the EU has done nothing. Its intransigence has left us with no other choice but to bring this issue back to the WTO dispute settlement system. It is clear now that the EU will not comply with its obligations in the normal course of events. It is going to need the impetus of another finding from another panel to do what they should have done the first time around. Our request for you today is to quickly and forcefully validate the recommendations and ruling of the DSB and find that the EU has failed to comply with its obligations. Thank you.

ANNEX C

ARGUMENTS OF THE EUROPEAN UNION

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN
SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. The US First Written Submission in this case is remarkable for the extraordinary intensity of forceful presumption reflected throughout, both with respect to what it contains, and with respect to what it does not contain. It can be summarised in one line of overbearing assertion: the European Union subsidised Airbus in the past; all subsidies (except those granted by the United States) are objectionable; nothing has changed; Airbus (or its products) should not exist; all Airbus sales injure the United States; and this will always be so until Airbus (or its products) cease to exist. This is hardly a recipe for finding a satisfactory settlement of the matter, which is, after all, the objective here.

2. Forceful presumption is not, of course, what these legal proceedings are about. Rather, they are about a calm, meticulous, rational, reasonable, balanced and objective assessment of the law, the evidence (or lack of it) and the arguments (or lack of them). The European Union will demonstrate, in this First Written Submission, that the United States has failed to provide arguments, evidence, or a legal framework sufficient to state valid claims in these compliance proceedings.

II. THRESHOLD ISSUES

3. The European Union addresses several threshold issues, before addressing the individual elements of the United States' claims.

4. *First*, we address the *burden of proof*. It is not controversial, and the United States does not contest, that the complaining Member, the United States in this case, has the burden of proof in these compliance proceedings, which proceed under the terms of Article 21.5 of the DSU and Article 7.8 of the *SCM Agreement*. Indeed, in *SCM Agreement* cases as in any other case, in compliance proceedings, as in original proceedings, the burden of proof rests entirely with the complaining Member, and there is nothing in Article 7.8 of the *SCM Agreement*, just as there is nothing in Article 19.1 of the DSU, capable of justifying a different conclusion.

5. It is equally uncontroversial and uncontested that the Panel may not make the case for either party. In order to make a *prima facie* case, the complaining Member must: make a claim; assert facts; adduce evidence; and develop argument. The United States has failed to do so. Absent a *prima facie* case, a panel must find in favour of the responding Member, without the responding Member ever coming under any obligation to rebut a case that has not been made.

6. *Second*, we note the nature of the compliance obligation placed on the European Union in this dispute. With respect to actionable subsidies, Article 7.8 of the *SCM Agreement* provides for *two* compliance mechanisms: withdrawal (as in the case of Article 3.7 of the DSU) of the subsidy *or* removal of the adverse effects.

7. These two compliance mechanisms operate <u>independently</u>, meaning that, if the United States fails to demonstrate the existence of a subsidy, taking into account the facts relating to withdrawal, it has failed to demonstrate non-compliance. Alternatively, if the United States fails to demonstrate the existence of presently arising and presently caused adverse effects, it has failed to demonstrate non-compliance. These two compliance mechanisms also operate <u>cumulatively</u>, meaning that, if the European Union has *complied* by withdrawing a subsidy, that subsidy cannot play *any part* in an assertion or finding of *non-compliance*, based on allegedly presently caused and presently arising adverse effects. Alternatively, if the United States does succeed in demonstrating subsidies, but only of a smaller magnitude and/or greater age, the Panel must consider if the United States has demonstrated that this *different* basket of subsidies presently causes presently arising adverse effects. The United States has failed to consider or address these factors.

8. *Third*, we address the concept of "withdrawal", in Article 7.8 of the *SCM Agreement*. Withdrawal of either the financial contribution or the benefit entails withdrawal of the subsidy. A subsidy may be withdrawn or cease to exist for example through repayment of principal and interest, alignment with a market benchmark, or extinction and extraction. Affirmative action is not always required in order for a subsidy to be withdrawn or to cease to exist; a subsidy can be "withdrawn" through the passage of time. In such a case, the complaining Member can no longer demonstrate that the responding Member is "granting or maintaining" a subsidy under Article 7.8, and the responding Member has "otherwise" complied with the recommendation, within the meaning of Article 22.2 of the DSU. The United States has failed to consider or address these factors.

9. *Fourth*, we note that the United States must demonstrate presently arising adverse effects during a period following 1 December 2011, and must demonstrate a present genuine and substantial relationship of cause and effect with respect to presently arising adverse effects during the same period, taking into account intervening events (non-attribution factors). The United States has failed in this regard.

III. THE US CHALLENGE INCLUDES MEASURES AND CLAIMS THAT ARE OUTSIDE OF THE COMPLIANCE PANEL'S JURISDICTION

10. The US attempt to force certain financing agreements relating to the A350XWB into these compliance proceedings, notwithstanding the absence of any overarching programme, and in direct breach of the EU's due process rights, must be rejected. Additionally, the United States cannot presume to resurrect, in these compliance proceedings, export subsidy and domestic content claims that it lost or abandoned in the original proceedings. Moreover, the United States cannot presume to introduce threat claims that are nowhere to be found in its compliance panel request.

11. The European Union requests that the Panel find that none of the four separate A350XWB financing agreements is a "measure{} taken to comply" within the meaning of Article 21.5 of the DSU, and that they are therefore outside the scope of the Panel's jurisdiction.

12. The European Union further requests that the Panel find that the US claims that the four A380 financing agreements violate Articles 3.1(a) and (b) of the *SCM Agreement* are likewise outside the scope of the Panel's jurisdiction under Article 21.5 of the DSU, for two primary reasons: first, those claims do not relate to any "measures taken to comply"; and, second, no element of the "recommendations and rulings" of the DSB relates to Articles 3.1(a) and (b) of the *SCM Agreement*, or obliges the European Union to withdraw the measure pursuant to Article 4.7 of the *SCM Agreement*.

13. In addition, the European Union requests the Panel to find that the US Panel Request fails to satisfy the requirements of Article 6.2 of the DSU, as the United States is attempting to advance legal claims in its First Written Submission related to the alleged *threat* of displacement and impedance of imports pursuant to Article 6.3(a) of the *SCM Agreement*, that are not covered by the legal summary in the US Panel Request.

IV. ALLEGED SUBSIDIES

14. The United States cannot presume to ignore the express terms of Article 7.8 of the *SCM Agreement*, which give the responding Member the option to comply by withdrawing the subsidy, that is, by removing either the financial contribution or the benefit. A benefit may, in turn, cease to exist (i) where the Member that granted the financial contribution modifies its terms and conditions such that, going forward, it is aligned with a market benchmark and, hence, no longer confers a benefit, or (ii) where, through the passage of time, the subsidy ceases to confer a benefit on the recipient. In this context, the United States cannot presume to ignore repayments of principal and interest, alignment with a market benchmark, extinction, extraction or amortisation.

15. In *EC – LCA*, the Appellate Body found that the "removal of the financial contribution" results in the "life" of a subsidy coming "to an end".[1] This is consistent with the definition of a

[1] Appellate Body Report, *EC – Large Civil Aircraft*, para. 709.

subsidy in Article 1.1 of the *SCM Agreement*, which includes a "financial contribution" as one of the constituent elements of a subsidy. The complete removal of a financial contribution from a recipient brings the subsidy to an end.

16. In its First Written Submission, the United States has failed to demonstrate the existence of subsidies, taking into account the EU compliance measures, which address repayments of principal and interest, alignment with a market benchmark, extinction, extraction and amortisation.

17. With respect to *repayment of principal and interest*, the United States has not established that the financial contributions under a variety of the subsidies found in the original proceedings exist, despite the fact that the principal and interest due under the relevant agreements has been fully repaid, such that it has failed to establish an essential element of its *prima facie* case. Recalling that the burden of proof to establish these elements falls on the United States, the European Union establishes the circumstances that have led to the full repayment of principal and interest due under a series of UK, Spanish and French MSF agreements at issue in the original proceedings.

18. With respect to *modification of the terms and conditions of measures* adopted as part of the EU measures taken to comply, the United States has failed to establish that the recipient enjoys the financial contribution on terms and conditions that are more favourable than those available to the recipient at market. Specifically, with respect to the lease agreement for the land in the Mühlenberger Loch in Hamburg, the United States has failed to demonstrate that the terms and conditions, as amended through the EU's measure taken to comply, confer a "benefit". The same principles apply with respect to the amended take-off and landing fees at Bremen airport.

19. With respect to *amortisation*, we recall the Appellate Body's statements that the life of a subsidy comes to an end, and its benefit expires, over a period of time that must be determined *ex ante*.[2] For the vast majority of the subsidies implicated by the original proceedings, the benefits have expired and the subsidies have reached the end of their lives. It is for the United States to establish that these subsidies exist after 1 December 2011, in light of the Appellate Body's statements, and in light of the significant time that has passed since the grant of the many of these measures. Yet, the United States fails to even address the matter. Keeping in mind that the burden rests with the United States, the European Union provides evidence establishing that the lives of the vast majority of the MSF, regional development and capital contribution measures at issue in the original proceedings have come to an end.

20. With respect to *extraction and extinction*, the Appellate Body has confirmed that "intervening events" such as cash extractions and share transactions serving to extract or extinguish subsidy benefits may bring a subsidy to an end.[3] In light of the guidance provided by the Appellate Body, the European Union addresses a series of such intervening events which demonstrate that the United States has failed to establish the existence of current adverse effects from subsidies allegedly maintained after the end of the implementation period.

V. ALLEGED PROHIBITED SUBSIDIES

A. ALLEGED CONTINGENCY ON EXPORT PERFORMANCE

21. The United States attempts to re-iterate its original *de facto* export subsidy claims with respect to French, German, Spanish and UK financing for the A380. The United States also makes new claims with respect to French, German, Spanish and UK financing for the A350XWB. Grouping all of the measures together without distinction, the United States asserts that export contingency arises, because the "grantors" of financing anticipated exports, and because the "anticipated ratio" of domestic to export sales with the financing allegedly exceeds the "baseline ratio" that would be achieved by a hypothetical profit-maximising firm without subsidy.

22. The US claims fail. The United States' characterisation of this mechanistic approach as constitutive of a "test" set out by the Appellate Body is inaccurate. The US approach does *nothing* to explain why the design, structure and modalities of operation *set out in the measure*, assessed in the context of *the total configuration of facts* constituting and surrounding the grant,

[2] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 706, 707, 709, 710, 713, 1236.
[3] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 709, 710, 725, 745, 1236.

demonstrate that the alleged subsidies are *geared to induce the promotion of future exports* by the recipient, which is the standard repeatedly described by the Appellate Body.[4] The United States does not explain how its "evidence" demonstrates that *the financing agreements at issue induced Airbus to prefer an export over a domestic sale*, in ways that are *not simply reflective of the conditions of supply and demand* in the domestic and export markets.

B. ALLEGED CONTINGENCY ON THE USE OF DOMESTIC OVER IMPORTED GOODS

23. The United States alleges that French, German, Spanish and UK financing for the A380 and the A350XWB was, in each case, granted in exchange for a commitment by Airbus to locate a fixed share of the total development or production work for the aircraft in the relevant country. Specifically, the United States asserts that these "… LA/MSF agreements confirm that the granting of the subsidy was made contingent – in fact and in law – upon the location of certain specific production within specific EU member States, and/or the use and maintaining of certain EU jobs".[5] The United States submits that, by definition, this means that Airbus must use domestic components and not imports, or in other words that the subsidies exclusively benefit domestic producers.[6]

24. Assessing each of the financing agreements individually, the European Union explains that the US arguments merely demonstrate that the investment is in a French, German, Spanish or UK firm, that is, one that will develop and produce the aircraft and have a minimum of activities and employment in France, Germany, Spain or the UK. An employee is not a good. Furthermore, neither domestic development nor production is to be equated with "the use of domestic over imported goods". Thus, the financing agreements to which the United States refers do not demonstrate that the subsidy is conditioned upon the use of domestic over imported goods.

VI. ALLEGED ADVERSE EFFECTS

25. The United States has not established that there exist, at present, any subsidies. Accordingly, the EU adverse effects arguments are in the alternative only. The United States has failed to establish a number of threshold elements to sustain its claims of adverse effects:

26. *First*, Article 7.8 of the *SCM Agreement* precludes the United States from attempting to establish present adverse effects from withdrawn subsidies. *Second*, the United States fails to demonstrate that alleged present subsidies from the financing agreements may be aggregated.

27. *Third*, the United States fails to demonstrate that, following the EU measures taken to comply, there remain subsidies that, at present, cause adverse effects presently arising (after the end of the implementation period on 1 December 2011) given "current factual conditions".[7] *Fourth*, the United States fails to establish its adverse effects claims based on "markets", whose geographical, product and temporal scope are supported by evidence.

28. *Fifth*, the United States fails to demonstrate a present causal link by taking into account previous causal links no longer existing today, or that are too remote through the passage of time and the effects of intervening causes and other non-attribution factors. *Sixth*, the United States fails to demonstrate that its "like products" are "non-subsidised". Neither the United States nor the compliance Panel may ignore the established fact that the alleged U.S. "like products" are heavily subsidised. *Seventh*, the United States fails to demonstrate that any cumulation of adverse effects is warranted.

A. ALLEGED ADVERSE EFFECTS RELATED TO THE A320 FAMILY LCA

29. The subsidies that were found to have caused Airbus to launch the A320 family LCA as and when it did, have been withdrawn in full. Thus, the European Union addresses the US adverse effects arguments relating to the A320 family solely in the alternative.

[4] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1044, 1063, 1067, 1084, 1086, 1101.
[5] US FWS, para. 239. *See also Id.*, paras. 202, 203, 209, 213, 218, 219, and Title V.B.3.
[6] US FWS, paras. 203, 219, and Title V.B.2.a.
[7] Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.104 and 10.248 (emphasis omitted).

30. *First*, the United States fails to recognise that A320 family LCA aircraft compete in two different markets. Recently, both Airbus and Boeing made very substantial technological enhancements to their existing single-aisle LCA – in the form of Airbus' A320 new engine option ("A320neo") launched in December 2010 and Boeing's 737MAX launched in August 2011. The modifications applied to the previous A320 and 737NG family LCA mean that there is extremely limited competition between the presently-delivered aircraft and these presently marketed improved aircraft.

31. *Second*, the withdrawal of subsidies related to the launch and production of the A320 creates a significant burden for the United States to establish A320-related lost sales and displacement claims, as the United States has claimed no new subsidies for the A320. *Third*, even if none of the original A320 subsidies are withdrawn, the United States fails to address evidence that these decades old subsidies no longer cause *genuine* and *significant* present adverse effects.

32. *Fourth*, the A320 "product" launched in 1984 is not the same product sold and delivered by Airbus in 2012. Since its launch, there have been massive and ongoing private investments into the A320 programme by Airbus and its suppliers, resulting in significant technological modifications and production improvements between 1995 and 2008. Additional significant investments and changes are in the process of being implemented to the A320 family LCA, including those related to the "Sharklet" and A320neo, which have led to significant sales since 2009. Absent its investments, Airbus would no longer be able to compete against the improved Boeing 737NG, let alone the new 737MAX. Cumulatively, these investments and the resulting product and production enhancements are the "*substantial*" causes for Airbus' present and future sales and deliveries of its A320 family LCA – not any alleged remaining A320 subsidies.

33. With respect to US lost sales claims, Airbus' present sales of the original A320 and A320neo are secured by significant product and production enhancements, not by the effect of any non-withdrawn subsidies. There is no basis for US allegations of present effects from sales Boeing's 737NG lost during the 2001-2006 reference period, because all such sales have now been delivered. The US failure to challenge 2001-2006 sales to *other* Airbus customers precludes any presumption that undelivered follow-on orders by such other customers constitute present lost sales. And US claims that hundreds of A320neo orders caused lost sales to the 737NG fail to recognise that the A320neo is not in the same market as the 737NG.

34. Regarding US claims of displacement or impedance, there is no jurisdictional basis for the US claim of *threat* of displacement or impedance in the EU market. On the substance, the US claims of impedance and displacement fail to evaluate 2012 market share data, erroneously rely on historical delivery trends not reflecting present market shares and deliveries, ignore the absence of displacement, identify no reliable or discernible trends, and fail to establish how historical, unchallenged sales of the A320 family LCA presently impede deliveries of 737NG.

B. ALLEGED ADVERSE EFFECTS RELATED TO THE A330 FAMILY LCA

35. The subsidies that were found to have caused Airbus to launch the A330 family LCA, as and when it did, have been withdrawn in full. Thus, the European Union addresses the US adverse effects arguments relating to the A330 family solely in the alternative.

36. *First*, the United States fails to recognise that the A330 family LCA aircraft compete in conditions that give them a virtual temporal monopoly for smaller twin-aisle aircraft that are available for near-term delivery. The competitive realities place the A330 in a market separate from most other twin-aisle aircraft and are a key non-attribution factor to consider in evaluating US lost sales and displacement or impedance claims.

37. *Second*, the withdrawal of A330-related subsidies creates a significant burden for the United States to overcome, as the United States challenges no new subsidies for the A330. *Third*, even if none of the original A330 subsidies are withdrawn, the United States fails to address evidence regarding the passage of considerable time.

38. *Fourth*, the United States fails to recognise that the A330 launched in 1987 is not the same product that is being sold, and delivered, by Airbus in 2012. Since the subsidised development of the A330, there have been massive and ongoing private, non-subsidised investments to the

aircraft by Airbus and its suppliers. These investments have increased the maximum take-off weight and range of the A330, resulting in significant present market demand.

39. By contrast, Boeing made no significant investments to enhance the performance and operating efficiency of the 40-year-old 767. The 767, or Boeing's 777, are too large and heavy an LCA to be attractive to airlines seeking a smaller, economically-efficient twin-aisle aircraft with a medium range. And the 787 has been plagued by delivery delays and a huge order backlog precluding the availability of any near-term delivery slots. Thus, the genuine and substantial cause of any present Airbus sales and market share related to the A330 sales are Airbus' timely and significant investments in upgrading the range and take-off weight and reducing the operating costs of the A330 − not the effects of any remaining, decades-old subsidies related to the A330.

40. Turning to the US lost sales claims, the United States offers no explanation for claiming such lost sales today when it made no such allegations during the 2001-2006 reference period. Nor does the United States address the fact that the A330 is not in the same market as the 777, that Airbus secured A330 sales based on strong airline preference for the A330 from airlines that require a smaller twin-aisle aircraft with a more medium range, and that continued low sales of the 767 are due to Boeing's failure to invest in upgrading the aircraft's 40-year-old technology.

41. The US displacement or impedance claims fail because they are based on distorted market share tables that improperly combine deliveries spanning a number of twin-aisle aircraft product markets, and ignore that the A330 is not in the same market as other twin-aisle aircraft. The US third country impedance claims ignore the absence of displacement, are not based on any relevant market trends, and fail to explain how historical, non-challenged sales of A330 LCA presently impede 767 and 777 deliveries.

C. ALLEGED ADVERSE EFFECTS RELATED TO THE A380 FAMILY LCA

42. For the A380, the United States fails to demonstrate present adverse effects that are presently caused after the end of the implementation period. Again, the United States fails to take account of the withdrawal of pre-A380 subsidies that the original panel found were the principal cause of any lost sales existing in the 2001-2006 reference period.

43. In the alternative, the United States fails to establish that any allegedly remaining subsidies benefiting the development and production of the A380 (financing from France, Germany, Spain and the UK, or regional development grants) are sufficient to constitute a present genuine and substantial link to the alleged present adverse effects. This is particularly critical because the original panel did <u>not</u> find that Airbus could not have launched the A380, as and when it did, without A380 MSF and without the regional development grants.[8]

44. Even without the A380-related subsidies, EADS would have had funds sufficient to finance the development of the A380. Moreover, the A380 business case would also have been viable absent MSF for the A380. In these circumstances, any existing subsidies benefiting the A380 are not a substantial cause of its launch and, thus, are not a substantial cause of any alleged adverse effects presently arising.

45. Any adverse effects from the US A380-related lost sales claims arising from the 2001-2006 reference period are removed by deliveries. The US lost sales claims fail because the 747-8 and A380 operate in separate markets, and because the United States ignores the very particular demands and needs of particular airlines for the operating, performance, revenue-generating and cost-savings attributes of the A380, compared to any Boeing LCA (and the 747-8 in particular).

46. US claims of displacement or impedance also fail because the A380 and 747-8 are in different markets, and in any event, there are no identifiable or reliable trends due, in part, to production and development delays for the 747-8. US claims of impedance suffer from a lack of any identifiable or reliable trends or any evidence that airlines demand particular attributes of Boeing LCA compared to the A380.

[8] Panel Report, *EC − Large Civil Aircraft*, para. 7.1948.

D. ALLEGED ADVERSE EFFECTS RELATED TO THE A350XWB FAMILY LCA

47. For the A350XWB, the United States fails to demonstrate that financing agreements for the aircraft are properly within the scope of these compliance proceedings, or that these loans constitute subsidies. On the basis of these infirmities alone, the compliance Panel could reject the US adverse effects claims relating to the A350XWB.

48. In the alternative, the US fails to establish a genuine and substantial causal link between financing for the A350XWB and any alleged present adverse effects, through the alleged product launch effect of the subsidies on the existence of the A350XWB. In particular, Airbus committed to the launch of the A350XWB, and began its development, accepted orders and signed up risk-sharing and other suppliers two and a half years before the signature of the first financing agreement. Moreover, EADS would have had the funds to finance the development of the A350XWB, even without the financing agreements for the A380 and the A350XWB.

49. Finally, the European Union establishes the dramatic technological differences between the A380 and the A350XWB, rebutting the US assertions that the aircraft benefited significantly from developments that Airbus implemented on its A380. In these circumstances, there is no basis for a finding of a presently existing causal link.

50. Moreover, there is no basis for US lost sales claims involving the A350XWB based on contractual settlements and conversions to that aircraft by airlines that had ordered the later-cancelled original A350. Since the United States has not challenged these sales in the original proceedings, there is no legal basis for it to challenge them now in these compliance proceedings. US lost sales claims related to the A350XWB also fail because the United States fails to take into account the existence of several twin-aisle markets and the distinctive demands of customers for particular types of large and smaller twin-aisle LCA that significantly limit competition between these aircraft.

51. Finally, the European Union notes that, presently, there have been no deliveries of A350XWB LCA. Consequently, there can be no present displacement or impedance based on present deliveries of A350XWB LCA. And since the United States has not raised (and cannot now do so) a threat of displacement or impedance, the Panel should reject the US displacement and impedance claims relating to the A350XWB.

E. ALLEGED ADVERSE EFFECTS RELATED TO THE A300, A310 AND A340 FAMILY LCA

52. With respect to the A300, A310, and A340, the subsidies that caused the launch of these aircraft, as and when they were launched, are fully withdrawn, such that the United States has secured the remedy it is due, and no assessment of any alleged present adverse effects is warranted. In any event, it is difficult to understand how any adverse effects could accrue to US interests from any existing subsidies for these three LCA programmes, since Airbus no longer sells nor delivers A300, A310 or A340 LCA and has, in fact, terminated these LCA programmes.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. In Section II, the EU recalls the legal framework governing these proceedings, including, in particular, the question of the burden of proof. In Section III, the EU addresses the scope of these proceedings. Section IV addresses the US failure to establish the existence of subsidies after the end of the implementation period, in light of EU measures taken to comply. Section V rebuts the US claims of prohibited subsidies. Section VI addresses the US failure to establish present adverse effects presently caused after the end of the implementation period.

II. THRESHOLD ISSUES

2. In its SWS, the US continues to shrug off its burden of proof. The US continues its failure to demonstrate present subsidies, as well as presently arising adverse effects presently caused.

III. THE US CHALLENGE INCLUDES MEASURES AND CLAIMS THAT ARE OUTSIDE OF THE COMPLIANCE PANEL'S JURISDICTION

3. None of the A350XWB financing agreements challenged by the US is a "measure{} taken to comply", such that they are outside the scope of the Panel's jurisdiction under Article 21.5 of the DSU. The US claims against the four A380 financing agreements under Articles 3.1(a) and (b) of the *SCM Agreement* are likewise outside the scope of the Panel's jurisdiction. Finally, the US Panel Request fails to satisfy Article 6.2 of the DSU; the US Panel Request does not cover claims concerning an alleged *threat* of displacement and impedance of imports pursuant to Article 6.3(a) of the *SCM Agreement*.

IV. ALLEGED PRESENT SUBSIDIES

4. Article 7.8 of the *SCM Agreement* affords an implementing Member the option to withdraw the subsidy, or to take appropriate steps to remove adverse effects. By 1 December 2011, the EU had procured withdrawal of most of the subsidies covered by the recommendations and rulings of the DSB, taking heed of the Appellate Body's statement that a subsidy is brought to an end "either through the removal of the financial contribution and/or the expiration of the benefit". Certain subsidies were withdrawn through removal of the financial contribution; certain subsidies were withdrawn through expiration or cessation of the benefit; and, withdrawal of some subsidies was accomplished through both of these means.

A. Horizontal issues

5. First, Article 7.8 permits a respondent to achieve compliance by, *inter alia*, withdrawing the subsidy. In proceedings implicating Article 7.8, a fundamental question is whether "subsidies that the DSB has already found to exist", indeed exist after the end of the implementation period, in light of, *inter alia*, any "measures taken to comply". If the complainant fails to establish, in light of the respondent's measures taken to comply, that the subsidies exist after the end of the implementation period, then it has failed to demonstrate that withdrawal has not occurred.

6. Second, the US asserts that unless *all* subsidies have been withdrawn, the withdrawal of *some* subsidies is not relevant under Article 7.8. The US errs. "Subsidy" is a defined term, consisting of three elements set out in Article 1 of the *SCM Agreement*. The existence of subsidies is not established "collectively", but is instead a matter of establishing these three elements, for each measure, individually. When Article 7.8 affords the option to comply by withdrawing "the subsidy", the term bears the meaning set out in Article 1. Thus, the EU is entitled to comply by establishing, *inter alia*, that it has withdrawn one or more of the constituent elements leading to a finding, in the original proceedings, that a given measure pursued by the US was a "subsidy".

7. Third, and recalling Appellate Body statements that withdrawing the subsidy or removing the adverse effects will "usually" or "normally" involve affirmative action by the respondent, the US argues that the EU may not rely on the passage of time to establish withdrawal (because the benefit has expired, or the life of the subsidy has otherwise come to an end). The US errs. The Appellate Body's statements beg the question whether the temporal features of this dispute are "usual" or "normal". The role the passage of time "usually" or "normally" plays in assessing compliance under Article 7.8 must be assessed in the specific temporal context in which it arises. Here, the US challenged subsidies that were provided up to 43 years ago. Moreover, the Appellate Body also stated that a subsidy has a "finite life", which "accrues and diminishes over time" and "comes to an end". The EU has provided an expert report using established methodologies charting the accrual and diminishment of the subsidies at issue over time.

8. Fourth, the US asserts that events marking the end of a subsidy's life that arise "before the finding of WTO inconsistency cannot satisfy the EU's obligation to withdraw the subsidies". The US errs. Panels and the Appellate Body have expressly ruled that "measures taken to comply" may be taken *before* a finding of WTO inconsistency is adopted by the DSB. The Appellate Body has found that "compliance with the recommendations and rulings of the DSB can be achieved before the recommendations and rulings of the DSB are adopted".

B. Termination of instruments providing the terms of subsidies

9. Termination of an instrument is an additional piece of evidence, even if not necessary or sufficient in and of itself, constituting recognition by the parties of withdrawal (or cessation of adverse effects). As such, the EU does not accept, as the US suggests, that terminations of loan agreements are irrelevant. The EU additionally notes that certain of the terminations listed by the US, while not accompanying withdrawal of the subsidy *by virtue of repayment of principal and interest* of the underlying loans, still accompany withdrawal of the subsidy, albeit *by means other than repayment*.

C. Repayment of principal and interest

10. The Appellate Body found that the "removal of the financial contribution" results in the "life" of a subsidy coming "to an end". The EU has established that the principal of a series of EU member State loans, plus the interest due, has been repaid, such that the financial contributions were returned, and the life of the subsidies brought to an end. Thus, the US has failed to demonstrate the existence of the subsidies at issue after the end of the implementation period, because they have been withdrawn. The US argues that, to make the removal of the financial contribution meaningful, the repayment effected would have to remove the "benefit" element of subsidy. However, arguing that effecting repayment of principal and interest does not remove the "benefit" of the MSF loans relative to market is, however, a response to an argument the EU has not made.

D. Amortisation

11. The US takes a number of erroneous legal positions and makes unsupported factual assertions regarding the amortisation of subsidies − or in other words, the *ex ante* trajectory of the life of the subsidies, or the accrual and diminishment of the subsidies over time. The EU demonstrates that, contrary to the US assertion, the original panel made no findings regarding present subsidisation during the original reference period. The EU then rebuts the US assertion that amortisation is not relevant under Article 7.8 to assess whether a subsidy has been "withdraw{n}". Next, the EU addresses erroneous US arguments regarding the *ex post*, rather than *ex ante*, determination of an amortisation period, and the relevance of the actual terms of the subsidies for establishing their amortisation period. Finally, the EU addresses a number of additional errors in the US amortisation arguments for specific subsidies. In summary, the US has failed to establish that, in light of amortisation, the subsidies exist after the end of the implementation period and have not been withdrawn.

E. Extinction and extraction

12. The US does not dispute that the "extinction events" are properly before the Panel, but asserts that the "extraction events" were rejected and are not properly before the Panel. The US

errs. Under Article 21.5, there is a disagreement between the Parties "as to the existence" of a measure taken to comply (the cash extractions), and "as to the consistency" of that measure with a "covered agreement", namely Article 7.8. Moreover, the Appellate Body did not resolve the question whether the cash extractions remove "all or part of a subsidy", but said it is a question to be dealt with by a compliance panel. Thus, both the extinction and extraction events are properly before the Panel.

13. Turning to the substance, the EU has established that the cash extractions removed value. Specifically, the value of the German and Spanish assets received by EADS upon its creation was lower than the value of the assets held by DASA and CASA respectively prior to the transaction. Moreover, the EU has explained how the subsidies were reflected in the companies' balance sheets, and how the cash extractions removed the remaining value of the subsidies by reducing the companies' net asset value, which reflected, indirectly, the value of these subsidies.

14. With respect to the share transactions, the US asserts that the EU "relies on an incorrect legal test" and that "the facts at issue do not satisfy the correct test". Both assertions are wrong. First, the Appellate Body set out three criteria to establish the presumption that a transaction extinguishes the residual value of subsidies, despite the US attempt to add an additional criterion. Moreover, all three share transactions at issue meet the three criteria; as the US has not provided evidence to rebut the resulting presumption, the Panel should find that the three transactions extinguish the residual value of the subsidies. Accordingly, the US has failed to establish the existence of the subsidies, which have been withdrawn.

F. A350XWB financing agreements

15. The US claims that financing agreements concluded between Airbus and France, Germany, Spain and the United Kingdom in relation to the A350XWB are subsidies that are prohibited, and that cause adverse effects. However, the US has failed to establish that the agreements confer "benefits", under Article 1.1(b) of the *SCM Agreement*. The US has abandoned its argument that the A350XWB loans confer benefits because they allegedly represent an instrument not otherwise available at market. Moreover, in assessing the terms of the loans, the US improperly understates the rates of return implied in the loan agreements, and provides a flawed benchmark that it inaccurately ascribes to Professor Whitelaw, and that overstates required market rates of return.

V. ALLEGED PROHIBITED SUBSIDIES

A. The United States has not demonstrated the existence of any subsidy contingent in fact upon anticipated export

16. The US asserts that French, German, Spanish and UK financing for the A380 and the A350XWB are subsidies contingent in fact upon anticipated export. The US compares the anticipated ratio of domestic to export sales with the subsidy, to a "baseline" ratio of domestic to export sales that would be achieved by a hypothetical profit-maximising firm without subsidy, and concludes that changes in the ratios demonstrate that the financing agreements for the A380 and the A350XWB must be subsidies contingent in fact upon anticipated export.

17. The EU establishes that the ratios calculated by the US are riddled with errors, and do not represent what the US asserts they represent. The errors in the US approach are more fundamental, however. The US presents its arguments as if it were simply a question of providing "the final piece of evidence" or "filling the gap" in order to "confirm" an inconsistency. This is untrue. In the original proceedings, the Appellate Body reversed the legal standard adopted by the panel, sweeping away the prior associated US legal argument. Consequently, the US must *demonstrate* export contingency, and not just fill in a "final piece" of or gap in the evidence allegedly remaining after the original proceedings.

18. The Appellate Body clarified that: (i) mere anticipation of exports is not sufficient to demonstrate contingency; (ii) the analysis must focus on the design, structure and modalities of operation *set out in the measure*, assessed in the context of the total configuration of facts surrounding the grant; (iii) nothing in the design, structure and modalities of operation set out in the financing agreements demonstrates or supports the existence of export contingency; and (iv) nothing in the other evidence demonstrates or supports the existence of export contingency.

19. Notwithstanding this guidance, the US attempts to pursue its claims by mischaracterising the Appellate Body's "indicative", "illustrative" "numerical examples" as a "test", re-iterating assertions about "anticipation", re-cycling evidence that has already been considered and rejected, and by relying upon "baseline ratios" that are defective in several respects. This mechanistic approach leads the US to the absurdly implausible proposition that any *benefit* in the financing agreements was anticipated to cause and in fact caused foreign airlines to massively increase *their* demand (which is in fact driven by *their* customer base and generally higher demand growth in non-EU markets). As in the original proceedings, the latest US argument does nothing to demonstrate why the granting of the subsidy might be considered geared to induce the promotion of future export performance by the recipient, in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets.

B. The United States has not demonstrated the existence of any subsidy contingent, in law or in fact, upon the use of domestic over imported goods

20. The US brings claims of subsidies contingent in fact upon the use of domestic over imported goods with respect to French, German, Spanish and UK financing for the A380 and the A350XWB. According to the US, in each case the financing was "granted" "in exchange for a commitment" by Airbus to locate a fixed share of the total development or production work for the aircraft in the relevant country. The US argues that the financing agreements thus require Airbus to produce specific "sub-assemblies and components" or "parts" in the territory of the EU, which accordingly become "domestic products" of the EU, and then use those "domestic products" as "manufacturing inputs" in the production of the finished aircraft.

21. Article 3.1(b) of the *SCM Agreement* requires the contingency to be demonstrated with respect to the "use of domestic over imported goods". Thus, the term "use of … goods" circumscribes what is prohibited. The Agreement does not use the terms "development" or "production". Accordingly, a subsidy contingent upon domestic development or production is not prohibited. Such a subsidy might or might not have adverse effects on imported goods; however, if within the scope of the *SCM Agreement*, that is a matter to be addressed under Part III. Members are not *prohibited* from tying their subsidies to domestic production, that is, granting them exclusively to domestic producers; they must only ensure that such subsidies do not *cause* adverse effects to the interests of other Members.

22. This feature of subsidies law is enshrined in the text of the GATT 1994, as interpreted in the *SCM Agreement*. In particular, Article III:8(b) is essential context for understanding the proper scope of Article 3.1(b). In exercising its rights under Article III:8(b), it is for the granting Member to select the domestic producers (that is, the firms producing particular goods) to be subsidised. Thus, if a Member merely grants a subsidy (for example to an aircraft producer), and in doing so restricts it exclusively to a domestic producer, declining to grant it to foreign producers, it benefits from the safe harbour of Article III:8(b), as interpreted in the *SCM Agreement*, and does not violate Article 3.1(b). Such a subsidy might influence the *location* of a firm (as permitted by Article III:8(b)), but, taking the location of the firm as a given, it does not create a mechanism that incentivises or favours a substitution of imported inputs with domestic inputs.

23. Article 3.1(b) does not address subsidies where the product that receives the subsidy is *the same* as the good that it is alleged must be used; nor where the producer of a downstream product that receives the subsidy is *the same* as the producer of the upstream good that it is alleged must be used. A firm *uses* an *input*; it does not *use* an *output*; and the same thing cannot be, at the same time and for the same firm, both an *input* and an *output*. It can only be one or the other. Nor can the producer of the downstream and upstream products be *the same*, because in that case there is simply no relevant *input*. To construe Article 3.1(b) in the manner argued for by the US is to trespass on the domain of Article III:8(b).

VI. ALLEGED PRESENT ADVERSE EFFECTS

24. The US claims that the EU allegedly failed to remove the adverse effects, within the meaning of Article 7.8. At the outset, the EU recalls that these claims must fail for lack of evidence of any present subsidisation, as discussed in Section IV, above. The US has failed to demonstrate that any of the subsidies exist after the end of the implementation period, and are not withdrawn. In these circumstances, compliance has been achieved; under Article 7.8, there is no basis for the

compliance Panel to find present adverse effects from subsidies that have been withdrawn, and for which compliance has been achieved.

25. Should the Panel find that there are present subsidies, the EU also explains that the US has failed to establish the existence of present adverse effects, presently caused by such subsidies after the end of the implementation period. Specifically, the US has failed to establish a present genuine and substantial causal link for each of the Airbus products for which it raises adverse effects claims:

- With respect to the A320 and A330, the US has failed to demonstrate a *present* and *substantial* causal link between any presently existing subsidies and alleged present adverse effects, given, in particular, its failure to consider the passage of considerable time since the grant of the subsidies, during which Airbus made significant non-subsidised investments in the A320 and the A330.

- With respect to the A380, the US erroneously relies on the effects of withdrawn pre-A380 subsidies to try to establish a present causal link, and ignores evidence demonstrating that EADS and Airbus could and would have launched the A380 absent EU member State financing for the A380.

- With respect to the A350XWB, the US has failed properly to account for the fact that the financing agreements were not concluded until well after Airbus had launched, partially developed and accepted 500 orders for the aircraft. Moreover, the evidence establishes that the A350XWB was economically viable without the financing agreements, that compelling strategic considerations would have led EADS and Airbus to launch the programme without those agreements, and that the companies had the financial means to fund launch and development absent those agreements. Finally, the evidence establishes that any remaining effects from any allegedly non-withdrawn pre-A350XWB subsidies are insufficient to establish a substantial causal link due to the dramatic technological differences between the A350XWB and prior Airbus aircraft.

- With respect to the A300, A310 and A340, it is difficult to understand how any adverse effects could accrue to US interests, since Airbus no longer sells nor delivers these LCA, and has terminated the programmes.

26. In addition, the specific failures in the US lost sales claims are legion, including, notably, its failure to account for non-attribution factors affecting groups of and individual sales, which make any causal link non-substantial. Similarly, the US has failed to raise present displacement and impedance (or threat thereof) claims based on properly established product markets, has failed to establish the required present trends in the flawed product markets it does identify, and has ignored non-attribution factors that affect the markets at issue.

ANNEX C-3

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE EUROPEAN UNION AT THE PANEL MEETING

Mr. Chairman, distinguished Members of the Panel,

1. We come to this hearing as the Party that has filed the most recent written submission, which, like our first written submission, is a substantial document. You may be relieved to hear that we therefore have a relatively short oral statement for you today.

2. So what is it that we should say to you today? We are not in a position to react, in this oral statement, to the submission just delivered by the United States, although we will of course do so in due course, in response to your written questions. You have already seen our written submissions, in which we explain how and why we have complied with the recommendations and rulings of the DSB, and we do not want to repeat ourselves. This is an oral statement, not a written submission, and we do not wish to burden you with inappropriate and excessive detail.

3. How, then, should we use the time available to us in this hearing most profitably? It seems evident to us that we should rather focus on the big picture. In particular, we would like to focus on some broad cross-cutting shortcomings and attempted (but failed) short-cuts in the overall structure of the US case.

4. That does not mean that what we have to say today is mere rhetoric, detached from the specific legal determinations you are charged with making. Rather, we take this approach in order to highlight a pattern in the US arguments in these proceedings. Specifically, when the matters in dispute get refined down to the detailed point of adjudication, the United States tends to have recourse, expressly or by implication, to one of the big picture issues we address today, attempting to use it, subjectively, to mask a shortcoming in its evidence, or to colour the adjudication in its favour. You, in contrast, are charged with making an *objective* assessment of the matter at hand. These big picture issues are, therefore, highly pertinent to the assessment that you are called upon to make in this case, in the sense that they need to be *brought out of the shadows*, *challenged* and *dispelled*. That is what we set out to do in this oral statement.

5. Were we to encapsulate these issues in one word, that word would probably be "assumption". It is sometimes said that the devil is in the detail. Well, as I have already indicated, we think we have covered the detail in our written submissions, and we would say that what is in that detail is the truth, or at least as close as one can reasonably get to it. In the case of the US submissions, we would rather say that *the devil is in the assumptions* – the subjective assumptions – that litter the entire US case. People say that the bigger the assumption the more likely it is to be believed. Thankfully, such assertions carry no weight in the WTO's unflinching rules-based system, which is based on an *objective* assessment of the matter, and particularly of the evidence.

6. What sort of subjective assumptions are we speaking of? Here are a few of them, taken from the US' submissions and public statements:

- The WTO found that the amount of the subsidies at issue in this dispute is USD 18 billion.[1]

- The complainant does not have the burden of proof in compliance proceedings involving subsidies. Accordingly, the United States need not demonstrate that subsidies exist after the end of the implementation period, in order to show that the subsidies have not been withdrawn. Nor need the United States demonstrate present adverse effects presently caused, in order to show that the adverse effects have not been removed.

[1] "In April 2012, the United States initiated compliance panel proceedings due to the EU's apparent failure to comply with the WTO's 2011 findings that $18 billion in subsidies conferred on Airbus by the EU and member countries were WTO inconsistent". The President's 2013 Trade Policy Agenda, available at: http://www.ustr.gov/sites/default/files/Chapter%20I%20-%20The%20President's%20Trade%20Policy%20Agenda.pdf.

- Although a responding Member enjoys the choice between withdrawing a subsidy or removing the adverse effects, WTO implementation obligations are more stringent for subsidies than for other types of measure, such that the respondent remains responsible for allegedly lingering adverse effects from withdrawn subsidies.

- The market never engages in project finance, and risk-sharing cannot be priced at market.

- In competitive markets, *every* subsidy causes adverse effects.

- In particular, financing extended by the EU member States always causes an LCA programme to be launched, even where the programme was economically viable without the alleged subsidy, and even where the recipient could have funded the launch without the alleged subsidy, as long as newspaper articles and the generic Dorman model say so.

- A complainant can assume that subsidies benefiting one product cause economic harm to another product, without *evidence and analysis* demonstrating that the two products fall into the same product market.

- The adverse effects from an actionable subsidy do not dissipate, but instead increase, with time, for as long as a subsidised product, and any subsequent products, are in the market.

- Without the subsidies, there would be no EU LCA industry, or at least none of Airbus' current or future products would exist.

- The United States never grants subsidies, has never granted subsidies to Boeing, and in any event this is irrelevant.

7. These subjective and erroneous assumptions permeate the entire US case, expressly or by implication. When the overall effect is considered, the US approach is simply jaw-dropping, remote as it is from the requirements set out within the four corners of the *SCM Agreement*.

8. Well, we have covered these issues in our written submissions, and as I have said, we do not want to repeat ourselves. But let us take a couple of points by way of example, to illustrate what we mean.

9. Consider the proposition that where two firms compete, each and every subsidy to one must be *assumed* to cause adverse effects to the other. That is exactly what the United States does in this dispute: it asks you to accept the assumption that each and every alleged subsidy to Airbus causes adverse effects to Boeing, because the two companies compete for LCA sales.

10. Now, the WTO has indeed found that some EU member States have provided repayable loans to finance portions of Airbus' development costs. But there is no such thing as a free lunch − and this is a pertinent observation here in two senses.

11. First, these loans are not grants given without any repayment obligation in return (like the funds provided by the United States to Boeing) − they are *repayable.* Why then does the United States insist on asserting that the WTO has found that the amount of the subsidies is USD 18 billion? Every person in this room knows this assertion to be false. The WTO has "found" no such thing. The United States appears to refer to what it alleges to be the amount of the *principal* involved. But the *objective* facts and evidence reveal more − that the agreements *require repayment* (and in fact many of the loans have been *repaid*, with *interest*). The US *assumption* about USD 18 billion worth of subsidies is thus untenable, and directly contradicted by the facts and the *evidence*.

12. Second, even if the United States would have established that the interest rate on any of the loans was below a market benchmark, there has still been a ***quid pro quo***. And that *quid pro quo* is ***location*** − that is, *the* ***additional costs*** to Airbus in being constrained to develop and produce the aircraft in Europe as opposed to elsewhere.

13. As in the United States, including with respect to Boeing, a cornerstone of European industrial policy is creating and maintaining high quality jobs. We are not ashamed of that, any

more than is the United States − and a great many statements to that effect have been made by both the US authorities and by Boeing.

14. The covered agreements do not suggest that this type of measure, which is conceptually similar to financing the additional costs of adapting to more stringent local environmental standards, is particularly problematic. Quite the contrary. The *SCM Agreement* expressly recognises that government assistance for various purposes is widely provided by Members, and that the mere fact that such assistance may not be non-actionable does not restrict the ability of Members to provide it.[2] Environmental subsidies were temporarily non-actionable,[3] and even today, like all other subsidies, and by way of an additional requirement compared to other types of measure, a complaining Member must *demonstrate*, with evidence, that a subsidy *causes* serious prejudice.

15. Accordingly, if a Member finances the cost of fitting a scrubber to a firm's chimney to comply with local environmental standards in its jurisdiction, a panel bound by the requirement to undertake an objective assessment of the matter cannot *assume* that this causes serious prejudice to a firm in another jurisdiction that is not subject to the same environmental standard.

16. That observation is *just as pertinent* to the case before you today, and triggers a critical question. Even if the EU member States' financing *offsets* Airbus' *additional costs* in being constrained to develop and produce the aircraft in Europe as opposed to elsewhere, how can it be used to *cause* serious prejudice to US interests, that is, to Boeing?

17. In a rules-based dispute settlement system, the answer to this question cannot be that, because Airbus and Boeing compete in various product and geographic markets, every subsidy to one must be *assumed* to have "created" the recipient or one of its products, and for this reason, to have caused serious prejudice to the other. Rather, the existence of a subsidy to one causing adverse effects to the other must be *proven*, with *evidence*, on the basis of a reasonable and appropriately calibrated causal mechanism.

18. Rather than undertaking the required task of *demonstrating* that net funds remain, and are used to price down LCA and trigger one of the enumerated forms of serious prejudice listed in Article 6.3 of the *SCM Agreement*, the United States has resorted to various attempted short-cuts, which collectively amount to little more than a leap of faith. This is particularly true of the US' cascading "creation" causation argument, which culminates with the alleged effect of European government financing on the launch of the A350XWB. Specifically, the United States argues that EU member State financing caused Airbus to launch an aircraft that it would not otherwise have launched, and that that launch taught Airbus things that caused *subsequent* aircraft to be launched, and that each of these launches caused Airbus to win sales and take market share from Boeing, and that this harm persists for as long as *any* Airbus aircraft, including those that may subsequently be developed and launched, are sold.

19. In short, the alleged subsidy itself is not shown, with evidence, to cause any of the enumerated forms of serious prejudice listed in Article 6.3. Instead, the starting point − that Airbus received EU member State financing − and the ending point − that Boeing has made some sales but not others and has a particular market share − are simply fused together. The middle, or how those two points are bridged, is murky, and joined through attempted short-cuts, artifice and mere assumption.

20. We are not saying that an attenuated causal chain involving multiple links from alleged subsidy to alleged adverse effects is impossible to construct. But the longer and more attenuated the alleged chain, the more diligent and rigorous a complainant must be if it is to succeed, and the more demanding the adjudicator should be. In this case, the United States is asserting a particularly attenuated causal chain, in an attempt to jump the gap from alleged subsidy to alleged adverse effects, particularly by employing a series of attempted short-cuts, which are simply not supported by the evidence. It is a leap of faith that fails.

21. Thus, we are calling the US bluff. We are raising our hand and saying that the emperor has no clothes. A rules-based system requires *proof* of claims made. An *intuition* that an alleged

[2] *SCM Agreement*, footnote 23.
[3] *SCM Agreement*, Article 8.2(c).

subsidy to one firm harms a competing firm is *not enough*. A rules-based system requires *objective evidence establishing* the alleged causal links the United States asserts, rather than attempted short-cuts and assumption. What does this mean in practice in this case?

22. First, it means holding the United States to its procedural obligations. We know that the United States is trying to back-load these proceedings and deprive the European Union of its due process rights by ambushing us, and constraining our ability to respond. This tactic began by filing a first written submission that lacked any real substance and that challenged as actionable subsidies measures it had not even seen, on the false assumption that it lacked the procedural means to seek evidence in advance, through Annex V, or questions posed pursuant to Article 13.1 of the DSU. The tactic has had a knock-on effect, such that, only today, we are hearing for the first time evidence and argument that should, consistent with the United States' burden as complainant, have been provided to us and to you nearly 12 months ago. We say that untimely material must simply be rejected.

23. Second, it means holding the United States to the law, as clarified by prior disputes. When the United States sets out, as it has done in other instances, such as with respect to Annex V, to challenge the Appellate Body − the agreed final adjudicator in our treaty system − its submissions need to be dealt with accordingly. We note in this regard the United States' refusal to accept the Appellate Body's express finding, in this dispute, that a subsidy has a finite life, set on an *ex ante* basis at the time of grant. Similarly, the United States challenges the Appellate Body's finding that the repayment of the financial contribution (for example in the form of principal and interest) brings a subsidy to an end. Moreover, it challenges the Appellate Body's finding that the effects of subsidies dissipate over time, asserting instead that the effects of any subsidies to Airbus exist for as long as Airbus sells and delivers any and all of its products.

24. Third, and perhaps above all, it means holding the United States to its burden of proof and persuasion. The United States had a job to do in these proceedings, as a function of its role as complainant in a dispute governed by the DSU and Article 7.8 of the *SCM Agreement*. That was to *demonstrate* that subsidies exist after the end of the implementation period − such that they have not been withdrawn − and that those subsidies presently cause present adverse effects − such that those adverse effects have not been removed. It has shirked the task, in favour of the types of attempted short-cuts and subjective assumptions we have already mentioned.

25. Shirking that task is a choice, and the United States is free to have made it. You, however, are not free to accept it. You are charged with *objectively* assessing the *evidence*, to determine whether it supports the claims advanced by the United States. That the US gamble involves high stakes is no reason to substitute subjective assumptions for objective and detailed assessment, based on *evidence*. WTO dispute settlement is not a game of poker. It is an international legal adjudication. As I have already said, we are calling the US bluff, and we respectfully ask you to do the same. If this means rejecting the US case, then that is entirely right and proper, as a response to a strategic choice by the United States to employ attempted short-cuts and subjective assumptions instead of evidence.

26. In closing our oral statement, it is worth recalling that we evidently did not choose to bring this dispute, or the companion dispute involving US subsidies to Boeing, to the WTO. We recognise that it places a huge burden on the WTO dispute settlement system. Moreover, these disputes, triggered by a US objection to an alleged location subsidy to create jobs in the European Union, do nothing to advance trade − something evident from the mutual requests for countermeasures involving tens of billions of US dollars annually. It appears that, for Boeing, this litigation may be a relatively cheap option to pursue commercial interests by other means, with potentially substantial results. It suits Boeing to paint Airbus as "the bad guy" for domestic reasons, including US government procurement, asserting alleged WTO findings that Airbus received USD 18 billion of subsidies, whilst Boeing has, as the story goes, received none.

27. Everyone understands perfectly well that resolving the underlying issues may require an agreement of some kind, and one that may well be of interest to or involve other Members. We understand that. This is the multilateral way forward, capable of adequately reflecting the trade interests of all WTO Members. The European Union is ready to engage in it, on balanced terms. The imbalanced and unsupported assumptions that underpin the US case − to the effect that Airbus should not even exist − and which appear to be driven by an agenda that is not conducive

to trade, are fundamentally at odds with such a rational outcome, and we ask you to reject them, in favour of an objective assessment of the evidence.

Mr. Chairman, distinguished Members of the Panel, we thank you for your attention, and stand ready to answer any questions you may have.

ANNEX C-4

EXECUTIVE SUMMARY OF THE CLOSING STATEMENT
OF THE EUROPEAN UNION AT THE PANEL MEETING

Mr Chairman, distinguished Members of the Panel, in our Closing Statement, we would like to address selected points that were raised over the past few days.

I. OPTION TO WITHDRAW THE SUBSIDY UNDER ARTICLE 7.8 OF THE *ASCM*

1. The AB has found that, in original proceedings involving claims under Articles 5 and 6 of the *ASCM*, it is possible for an adjudicator to find that expired subsidies have contributed to adverse effects. On Tuesday, the Panel asked whether, in that circumstance, allowing a respondent in compliance proceedings to refer to the expiry of the subsidy as a means of achieving withdrawal and compliance with Article 7.8 of the *ASCM* would make the recommendation in the original proceedings declaratory in nature.

2. To begin, the situation described by the Panel should not arise. Specifically, whatever the merits of a *finding*, no recommendation to withdraw a subsidy or to remove its adverse effects is necessary in that circumstance. Where a recommendation to withdraw the subsidy or to remove the adverse effects from a *group* of subsidies, some of which had expired, is nonetheless issued, that recommendation "do{es} not concern" the expired subsidies. After all, Article 7.8 applies only to the extent the respondent is "granting or maintaining" the subsidy. If the subsidy is no longer "maintained", because it has been withdrawn, any recommendation is unnecessary, and if made, does not apply to the withdrawn subsidy. The AB has noted that an interpreter must "give meaning and effect to the term 'maintain', which is distinct from the term 'grant', and has also been included in" Article 7.8.

3. Moreover, even if a recommendation to withdraw the subsidy or to remove its adverse effects could be said to apply to expired subsidies, *quod non*, withdrawal can be achieved through actions or events pre-dating the DSB's adoption of that recommendation. The AB has, again, explicitly confirmed that "compliance with the recommendations and rulings of the DSB can be achieved before the recommendations and rulings of the DSB are adopted".

4. In these compliance proceedings, your inquiry is governed by Article 7.8, which gave the EU a choice between withdrawing the subsidy or removing the adverse effects. The AB found that the assessment of whether withdrawal has occurred and, thus, compliance achieved, is "best left to" you, as the compliance Panel operating under Article 7.8. Contradicting the AB, the US asserts that, where a subsidy has expired before a recommendation to withdraw the subsidy or remove the adverse effects has been made, the choice expressly provided for in Article 7.8 no longer applies, because withdrawing the subsidy is no longer possible.

5. However, the only reason why withdrawing the subsidy is not possible is because *it has already been withdrawn*, in furtherance of "the first objective of the dispute settlement mechanism". While the Parties agree that withdrawal of a *prohibited* subsidy is a complete remedy, the US position is premised on the argument that achieving compliance through the withdrawal of merely *actionable* subsidies is not painful enough on the respondent. To the US, Article 7.8 always requires "affirmative action" by a respondent, such that when the subsidy is expired (e.g., through amortisation), affirmative action to achieve withdrawal is no longer possible, and the only affirmative action remaining is to remove the adverse effects.

6. In considering the US position, we have asked you to bear in mind that Article 7.8 triggers the *responsibility* of the respondent to ensure that compliance is achieved, through withdrawal of the subsidy or removal of the adverse effects. If compliance is *not* achieved, *despite* affirmative action by the respondent, its responsibility for non-compliance *persists*. Equally, if compliance *is* achieved *without* affirmative action, the respondent's responsibility is *discharged*. The requirement is that compliance with Article 7.8 is achieved, regardless whether it is achieved through the actions of the responsible State, or instead through other events that accomplish withdrawal of the subsidy or removal of the adverse effects.

7. As a closing point on the option of withdrawal, the US now argues that the phrase "withdraw the subsidy" means something different in Article 7.8, than it does in Article 4.7 of the *ASCM*. However, we recall that a "subsidy" is defined in Article 1 "{f}or the purpose of this Agreement", including both Articles 4 and 7. Withdrawing the subsidy involves "removing" or "taking away" one of the component elements of "subsidy" defined in Article 1, whether pursuant to Article 4.7, or instead Article 7.8. The US position is inconsistent with the text of the *ASCM*, as well as with the position it has taken elsewhere. It is also premised on the US assertion that compliance obligations under Part III of the *ASCM* are more stringent than compliance obligations under other agreements that form part of the WTO single undertaking, such as, for example, fiscal or regulatory measures − a proposition that is obviously incorrect.

II. AMORTIZATION

8. For the US, the expiration of the life of a subsidy through amortisation is a concept relevant solely to the assessment of whether adverse effects have been removed, but not to the question of whether a subsidy has been withdrawn. Undertaking a proper adverse effects analysis does require consideration of the degree to which a subsidy is amortised. However, amortisation is equally relevant to an assessment of whether a subsidy has been removed, taken away, expired, ceased to exist, or in other words, withdrawn. As Brazil suggested in its statement, if it's a dead subsidy, it's a dead subsidy.

9. On a related issue, on Tuesday, the US argued that amortisation over the actual life of an LCA programme is required, and is *ex ante* rather than *ex post*, on the *assumption* that the "payments under LA/MSF contracts in most cases continue over the actual life of the aircraft". This assumption is simply wrong as a matter of fact. The agreements anticipate repayment of principal and interest over an expected delivery profile that does not correspond to the life of the aircraft programme, either as anticipated at the time the agreements are concluded, or as the life of the programme unfolds with time (if different). It is simply incorrect to say that the agreements foresee repayment over the entire life of the programme.

10. In any event, the AB unambiguously stated that the finite life of a subsidy, as distinct from the period over which that subsidy causes effects, must be assessed on an *ex ante* basis. The concepts of subsidy and effects must not be "conflate{d}". Yet this is precisely what the US does when it insists on an amortization period defined by the actual life of a product allegedly created by that subsidy, destroying the choice in Article 7.8 in the process.

III. JURISDICTION OVER A350XWB MSF AGREEMENTS

11. The EU has explained that the A350XWB MSF agreements are outside the scope of the compliance Panel's jurisdiction, as they are not "measures taken to comply", within the meaning of Article 21.5 of the DSU. Indeed, the US attempt to bring the A350XWB agreements within the scope of these compliance proceedings is tantamount to rearguing the existence of "an unwritten LA/MSF Programme" − a claim that the original panel had previously rejected. Were the Panel to find that the A350XWB agreements are within the scope of these proceedings, it would be going further than the AB has ever gone in affirming jurisdiction under Article 21.5. Doing so would disrupt the delicate balance between due process and prompt settlement that the AB has faithfully maintained in its interpretation and analyses under Article 21.5.

12. In the past few days, the US has made several important admissions that confirm the EU's position on scope. First, the US has conceded for the first time that the A350XWB agreements are not part of any overarching measure. Second, the US has acknowledged the important overlap between, on the one hand, the factors relied upon by the original panel in finding that there was no LA/MSF programme, and, on the other hand, the factors of the traditional "close nexus" analysis. When considered together, these US admissions are fatal to its attempt to force the A350XWB agreements into the scope of these proceedings. Consequently, there is no need to consider further any of the US claims related to the A350XWB agreements.

IV. ALLEGED BENEFIT FROM A350XWB MSF

13. The US makes two arguments concerning an alleged "benefit" from A350XWB MSF that are difficult to reconcile. First, the US argues that, as asserted in the Dorman/Terris and Terris reports,

the market will not offer "risk-sharing" or "risk shifting", such that MSF confers a "benefit" on Airbus *per se*. Second, the US "advoca{tes}", with the assistance of Dr. Jordan, a "constructed benchmark", arguing that "rates charged on LA/MSF for the A350 XWB are below" rates the market would charge for the risk-sharing or risk-shifting characteristics of MSF. The second argument unquestionably accepts, as did the original panel, that it is possible to quantify the "rate", or price, that the market would charge for the risk-sharing attributes of MSF.

14. In essence, the US appears to be advancing two arguments in the alternative, or the second conditioned on the outcome of the first. First, the US argues that pricing the alleged benefit in A350XWB financing is *impossible*. Second, the US submits that, in case you do not accept the first argument, the alleged benefit must be priced against a market benchmark of "X". We lawyers do love our arguments, and hedging our bets. But there are some circumstances in which two arguments *cannot* co-exist, and this is one of them. This is because the second US argument *demonstrates* that pricing is *possible* relative to market. The very making of this second argument thus demonstrates, *on its own terms*, that the first argument is necessarily false. The only dispute between the Parties thus relates to the pricing of the market benchmark. The proposition that the market would not price risk-sharing on any terms, by definition abandoned by Ellis and Jordan, has no further role to play in these proceedings.

V. PRODUCT MARKET DELINEATION

15. The AB emphasised that a proper product market delineation is "a prerequisite for assessing" whether adverse effects exist. If a subsidised product and a like product do not compete in the same market, the subsidy cannot, without more, be a cause of lost sales or displacement suffered by the like product.

16. In contrast, the US identifies sales that a Boeing LCA lost to an allegedly subsidised Airbus LCA, and assumes, from that fact alone, that the subsidy caused the loss. This turns the AB's directive on its head, by *assuming* causation without first establishing the "prerequisite" that the subsidised product is *capable* of causing the lost sale. The allegedly subsidised Airbus LCA is only capable of causing the lost sale if the Airbus and Boeing LCA compete sufficiently closely to exercise significant competitive constraints on one another, such that they are in the same market. It may be that the Boeing LCA lost because it did not meet the requirements of the purchaser, and was not considered sufficiently substitutable for the Airbus LCA – in other words, the Boeing LCA was not in the same product market as the Airbus LCA. Without a proper product market assessment that looks at cross-elasticity of demand, the US assertion of causation is nothing more than an assumption divorced from the reality of the absence of any competition between specific LCA models.

VI. CAUSATION FINDING

17. On Tuesday, the Parties discussed their respective reading of the basis for the original panel's and the AB's causation finding. As explained, neither paragraphs 1261, 1267 nor 1299 of the AB Report, nor the underlying findings by the original panel referenced by the US, support its view that the causation findings in the original proceedings were based on the effect of subsides *creating* Airbus LCA. Instead, the findings were based on the effects of subsidies accelerating the launch of such LCA. An objective and comprehensive reading of these findings compels the conclusion that they offer no support for the new US *creation* theory.

18. In any event, whatever the basis for the findings of the original panel and the AB, the question in these compliance proceedings is different, and is dictated by the terms of Article 7.8. The question before this Panel is whether, *in light of the withdrawal of the subsidies*, there remains any basis on which to find present adverse effects presently caused by *subsidies allegedly existing after the end of the implementation period*.

19. For example, assume that a Member is found to have granted 10 subsidies that cause a particular adverse effect in the original reference period, such as a lost sale. If nine of those subsidies are withdrawn by the end of the implementation period, Article 7.8 requires a compliance panel to inquire whether the one remaining subsidy that is maintained presently causes, by itself, a new adverse effect in the new reference period, after the end of the implementation period. Alleged present effects of subsidies that are withdrawn, and for which compliance has been

achieved, cannot form any part of a finding of non-compliance based on present adverse effects allegedly caused, or contributed to, by such withdrawn subsidies.

VII. ECONOMIC VIABILITY OF THE A350XWB, AND EADS' CAPACITY TO FUND THE PROGRAMME

20. As in its previous submissions, the US argues that MSF for the A350XWB is a genuine and substantial cause of adverse effects to US interests because it "was a necessary precondition for the ... launch and subsequent market presence" of the aircraft. In other words, the US argues that, absent MSF for the A350XWB, the programme would not have been launched, because it was not economically viable, and could not have been funded.

21. In making this assertion, the US relies on, and distorts, a series of press articles and other statements offering the *subjective* views of reporters and parties to the MSF agreements. In contrast, the EU has offered *quantitative* evidence, built on data *contemporaneous* with the launch and funding decisions. Although not the EU's burden, that evidence *objectively* establishes the economic viability of the programme, and EADS' ability to fund its launch and development, while simultaneously pursuing all of its other objectives. Only by ignoring this evidence can the US posit, for example, the following:

- That the A350XWB programme was viable and fundable only because of the potential use of certain financing – which the US, without *any* support whatsoever apart from "assum{ption}", describes as "subsidized". In fact, the objective evidence specifically demonstrates that the programme was viable and fundable *without* such financing (or, for that matter, MSF).

- That business case sensitivities implicating less favourable outcomes, result in non-viability of the programme. In fact, the objective evidence tests for these very sensitivities and scenarios, establishing that the programme was economically viable, even absent both the referenced financing and MSF.

- That projections for A350XWB deliveries are unduly "rosy" and mask non-viability simply because they exceed historic levels of wide-body programme deliveries. In fact, at the time of launch to the present, Airbus' forecast for wide-body LCA demand has been and is consistent with Boeing's market forecast, as well as that of others. And Airbus' delivery forecast for the A350XWB are conservative.

- That a "crisis" at the company, and the global financial crisis more generally, prevented it from launching the A350XWB without certain financing or MSF, at least without "divert{ing} funds from other uses". In fact, the objective evidence establishes that, absent particular financing or MSF, and despite the financial crisis, the company's financial position was sufficiently strong to comfortably enable it to fund the programme, while simultaneously pursuing all of its other objectives.

- That the company could only have funded the A350XWB programme by "getting risk-sharing suppliers to nearly double their contributions". In fact, the objective evidence establishes that the company could have funded the programme without any increase in financing from risk-sharing suppliers.

- That the company "knew" it was "guaranteed" financing in the form of MSF, and on subsidised terms, at the time it launched the A350XWB. In fact, the objective evidence establishes that the company launched the programme in 2006, before *any* of the terms for any financing from the EU member States were *negotiated*, much less agreed. That evidence also establishes that, following launch, the company has achieved an advanced stage of development for the programme while not drawing the full amount available.

22. The US has addressed none of this objective evidence. It is not the EU that confuses "willingness" or "wanting" to launch the A350XWB with the "ability" or the "means" to do so. Instead, it is the US that is *ignoring* objective evidence establishing, on a quantitative basis and in light of contemporaneous data, that the company indeed had both the ability and the means to comfortably launch and develop an economically viable A350XWB programme, absent MSF. On

this "decisive point", it is the US, and not the EU, that ignores "indisputable" evidence, instead replacing it with mere assertion and assumption. And the US does this with respect to measures that are not even within the scope of these compliance proceedings.

VIII. RELEVANCE OF DOWN-SIDE SCENARIOS FOR ASSESSING PROJECT VIABILITY

23. Finally, in its Opening Statement, the US takes the untenable position that *any* risk that returns from a project could fall below the hurdle rate will lead a firm to decide *not to invest at all* in the project, for fear of the risk materialising. On the US view, every downside risk scenario necessarily becomes the project's base case.

24. This is a ludicrous position. It is inconsistent with "the real world" in which people decide to invest despite uncertainty about what the future holds. The US position can be compared to a family's considerations of its holiday plans, where the expectations of plenty of sunshine and days at the beach will be evaluated on the basis of a long-term weather forecast. The fact that there could be one day with rain out of 14 will not be a serious deterrent. Only a relatively high probability of persistent rain and little sunshine will lead the family to seek out alternative locations. Only a higher probability of widespread and persistent catastrophic conditions will lead the family to cancel their holiday plans altogether.

25. Similarly, Airbus assessed the relative probabilities of a base case, and that of unfavourable events, in evaluating the economic viability of the A350XWB programme over its expected duration. Airbus concluded that the project is viable because the likelihood of unfavourable events that would undermine the base case was relatively low. That assessment also took account of the likelihood that events may turn out to be *more favourable* than the conservative assessments made in the base case − something the US ignores.

26. In performing an independent comprehensive sensitivity and scenario analysis of the A350XWB, CompetitionRx concluded that the programme is viable because the base case is robust and the probability of unfavourable events is not sufficiently high to undermine the project's expected return. As both Airbus and CompetitionRx determined, the extreme circumstances captured in a "worst case" scenario, which combines multiple downside factors, would result in a return below the cost of capital. Since the probability of this combination of events is very low, however, the worst case scenario did not alter the conclusion that the A350XWB programme is economically viable. Both holiday takers and industrial investors realise that even the most carefully evaluated plan may result in days of torrential rain and worse-than-anticipated financial performance. If *absolute certainty*, as the US would have it, of sunny days and profitable returns were required before we vacationed or invested, we would all stay at home protecting the cash stuffed in our mattresses.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE STATEMENT OF AUSTRALIA AT THE PANEL MEETING

Mr. Chairman, Members of the Panel

1. Thank you for the opportunity to present Australia's views on this dispute.

2. This proceeding raises a number of important issues concerning the scope of proceedings under Article 21.5 of the *Dispute Settlement Understanding* and the appropriate steps that must be taken by a Member to comply with Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*). Australia will make some brief remarks in relation to these issues.

Scope of these proceedings

3. Australia agrees with the United States (US) that the Launch Aid/ Member State Finance (LA/MSF) support for the A350XWB is within this Panel's terms of reference. Australia supports the three legal bases provided by the US for the consideration by this Panel of the A350XWB LA/MSF measure.[1]

4. Australia does not accept, as posited by the EU, that because the A350XWB financing agreements do not form part of the EU's compliance report as a "measure taken to comply"[2] or the Appellate Body was unable to discern the presence of an "overarching measure" in the original proceedings,[3] that these measures do not fall within the jurisdiction of this Panel.

5. The Appellate Body has made it clear that the limits on the scope of Article 21.5 proceedings should not allow the effective circumvention by Members of those provisions by allowing them to comply through one measure, while at the same time negating compliance through another.[4] In Australia's view, an overly narrow approach to Article 21.5 proceedings could undermine the effectiveness of the dispute settlement process.

6. Australia would encourage this Panel to consider the LA/MSF measure for the A350XWB as within its terms of reference.

Compliance

7. Under paragraph 7.8 of the *Agreement on Subsidies and Countervailing Measures*, the EU had six months, subsequent to the 1 June 2011 adoption of the Appellate Body and Panel Reports, to take "appropriate steps to remove the adverse effects" of the actionable subsidies identified by the Panel and the Appellate Body, or to withdraw the subsidies.

8. In complying with this obligation, the EU was, in Australia's view, required to take affirmative action to withdraw all current subsidies to Airbus that had been found to be non-compliant, or to take affirmative action to remove the adverse effects of those subsidies.[5]

9. Australia does not take a position on whether the specific actions taken by the EU are sufficient for the purposes of Article 7.8 of the SCM Agreement. In Australia's view, the role of this Panel is to determine the extent to which the EU has addressed these obligations. In examining compliance, Australia believes that where a complaining Member has shown a lack of appropriate action by the implementing Member, it will have established a *prima facie* case of non-compliance. The burden of demonstrating the intervening events which break the nexus between the non-

[1] US First Written Submission, Sections IV.D-E and US Second Written Submission, para. 113.
[2] EU Second Written Submission, Section III.A, para. 50.
[3] EU Comments on US Request for Preliminary Decision, Section VIII, para. 84.
[4] *US – Softwood Lumber (IV) (Article 21.5 – Canada)* (WT/DS257/AB/RW), paras. 71-72.
[5] *US – Upland Cotton (Article 21.5)* (WT/DS267/AB/RW), para. 236.

compliant measures, the adverse effects, and bringing the measures into compliance should then rest with the implementing member.

10. Mr. Chairman and Members of the Panel, this concludes Australia's remarks. Thank you for the opportunity to provide these comments.

ANNEX D-2

EXECUTIVE SUMMARY OF THE WRITTEN
SUBMISSION OF BRAZIL

I. INTRODUCTION

1. This Panel's interpretation of the relevant provisions of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*") is critical to ensuring the effectiveness of multilateral disciplines on the use of subsidies, particularly in the civil aircraft sector.

2. Brazil's comments focus on the following issues raised by the United States in its first written submission: (1) the proper interpretation and application of the requirement imposed by Article 7.8 of the *SCM Agreement* to "take appropriate steps to remove to adverse effects" or to "withdraw the subsidy"; (2) the appropriate scope of implementation proceedings under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"); and (3) the proper approach to determining the existence of *de facto* export contingency.

II. LEGAL ARGUMENT

A. THE OBLIGATION TO "TAKE APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS" OR TO "WITHDRAW THE SUBSIDY" REQUIRES A POSITIVE ACTION EITHER TO REVERSE THE COMPETITIVE ADVANTAGE THAT WAS GAINED AS A RESULT OF THE SUBSIDY OR TO PUT AN END TO THE SUBSIDY

3. The European Union was required to "take appropriate steps to remove the adverse effects" or to "withdraw" the actionable subsidies identified by the Panel and the Appellate Body within six months following the 1 June 2011 date of adoption of the Panel and Appellate Body Reports. Brazil does not take a position on whether the specific measures taken by the EU were sufficient for purposes of Article 7.8 of the *SCM Agreement* and Article 19 of the DSU. In this submission, Brazil instead focuses on the proper interpretation of the important obligation under Article 7.8 of the *SCM Agreement* to "take appropriate steps" to "remove the adverse effects" or to "withdraw the subsidy."

4. Brazil finds the jurisprudence of *US – Upland Cotton (Article 21.5 – Brazil)* to be enlightening as to the proper interpretation of the terms "shall take appropriate steps" in relation to the actions to be taken by the implementing Member. The Member is expected to take an affirmative, appropriate action and cannot be considered as having complied with the obligation of Article 7.8 of the *SCM Agreement* if it does not actively intervene to remove the adverse effects.[1]

5. The focus of Article 7.8 of the *SCM Agreement* is to remedy the specific problem found to exist that nullified or impaired the benefits under the *SCM Agreement* accruing to the complaining Member. The focus in Part III of the *SCM Agreement* on "actionable subsidies" is on the adverse effects caused by the use of a subsidy, not on the existence of the subsidy itself.

6. The fact that a subsidy was granted in the past, that the "benefit" has expired, and that the subsidy no longer exists does not prevent a finding of adverse effects caused by past subsidies. This is particularly relevant for launch aid subsidies, which may continue to cause adverse effects long after they have been granted and repaid due to the presence of aircraft models that otherwise would not have been competing in the market.

7. The question before this Panel is thus which "steps" the EU has taken and whether these steps are "appropriate to remove the adverse effects." The steps will only be "appropriate" if they impact the specific adverse effects found to exist and are likely to lead to the removal of the specific adverse competitive advantage that resulted from the use of the subsidy.

8. In a situation where one subsidy replaces another, the Panel will need to examine the consistency of the new measure taken to comply with the obligations imposed by the *SCM*

[1] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236.

Agreement. This will require the Panel to examine whether the new measure is a subsidy and whether the adverse effects continue to exist in the context of the new subsidy measure. This will likely be the case if the implementing Member has not taken any other steps to remove the adverse effects found to exist and has simply replaced one subsidy measure with another.

B. LA/MSF SUPPORT FOR THE A350XWB IS WITHIN THIS PANEL'S TERMS OF REFERENCE AS A "MEASURE TAKEN TO COMPLY" BECAUSE IT HAS A SUFFICIENTLY CLOSE NEXUS WITH THE ORIGINAL MEASURES ADDRESSED IN THE PANEL AND APPELLATE BODY REPORTS AND WITH THE MEASURES TAKEN TO COMPLY

9. Brazil considers that the it is the task of the compliance Panel to ultimately determine the appropriate scope of its own jurisdiction in a given dispute, and that it is thus not for the implementing Member to define what it considers to be the measures taken to comply.[2] Brazil suggests the Panel should not adopt an overly formalistic approach in setting its terms of reference, with a view toward protecting the effectiveness of the WTO dispute settlement process and ensuring prompt compliance and effective resolution of the dispute. These principles argue in favor of including in the scope of this Article 21.5 proceeding new LA/MSF support for the A350XWB which, in terms of its nature, timing, and effects, is very similar and thus closely related to the measures that were to be brought into conformity with the Dispute Settlement Body (DSB) recommendations.

10. The Appellate Body has observed that a panel reviewing a claim under Article 21.5 of the DSU may address not only the measures the responding Member identifies as taken to comply with the recommendations and rulings of the DSB, but also any other measures with a particularly close relationship to the declared measures taken to comply and to the recommendations and rulings of the DSB.[3] This certainly includes measures that are very closely connected because they concern the same analysis of subsidies for the same category of products and may thus undermine compliance with those recommendations and rulings.[4]

11. Brazil believes the Panel should put substance over form and focus on the nature and effects of the challenged measures in comparison with the measures taken to comply and the original measures. In Brazil's view, a very similar type of subsidy, supporting a very similar product, produced by the same company around the time that closely related subsidy measures were found to be WTO-inconsistent, is a measure that can and must be included in an examination of "measures taken to comply".

C. DEMONSTRATING EXPORT CONTINGENCY DOES NOT REQUIRE THE CONSTRUCTION OF HYPOTHETICAL SALES RATIOS

12. In the current implementation proceeding, the US requests the Panel to re-visit the question of *de facto* export contingency of the LA/MSF support for the A380 and by extension for the A350XWB. The US seeks to apply the "geared-to-induce-future-export" test as put forward by the Appellate Body in the original proceeding in order to demonstrate that the LA/MSF support was *de facto* export contingent and consequently a prohibited subsidy within the meaning of Article 3.1(a) of the *SCM Agreement*.

13. Brazil considers that a review of the Appellate Body's findings in the original proceeding demonstrates that the Appellate Body's analytical framework for considering a *de facto* export contingency claim does not *require* a hypothetical ratio-scenario that the US is now providing to the Panel. In Brazil's view, the ratio approach proposed by the Appellate Body is one possible piece of additional evidence that could provide meaningful information when it involves one of the conditions of the subsidy. However, in many situations, as demonstrated in *Canada – Aircraft*, no such additional evidence is necessary or appropriate to make the essential finding of conditionality in law or in fact.[5]

14. Brazil understands that the Appellate Body was simply indicating in the numerical example relating to sales ratios what could, in certain circumstances, be one type of evidence to bridge the gap between anticipation and conditionality in order to support, as part of the total configuration of

[2] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73.
[3] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.
[4] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 205.
[5] Appellate Body Report, para. 1037, referring to Appellate Body Report, *Canada – Aircraft*, paras. 167, 171.

the facts, a conclusion that the granting of the subsidy was in fact tied to anticipated export performance. An approach that would *require* evidence of a sales ratio change or potential change would unjustifiably impose a different standard in the context of *de facto* export contingency than the one used in a determination of *de jure* export contingency and would seek to impose an unwarranted trade effects test.

III. CONCLUSIONS

15. Brazil has focused its comments on several important issues raised in this dispute. First, Brazil considers that the obligation to "take appropriate steps to remove the adverse effects" or to "withdraw the subsidy" will usually require a positive action either to reverse the competitive advantage that was gained as a result of the subsidy or to put an end to the subsidy in a manner that is appropriate to remove the adverse effects.

16. Second, Brazil considers that the scope of a compliance proceeding under Article 21.5 of the DSU must be sufficiently broad to include measures which have a close nexus with the original measure addressed in the Panel and Appellate Body reports and with the measures taken to comply, including in this dispute LA/MSF support for the A350XWB.

17. Finally, in respect of the test for export contingency, Brazil is of the view that demonstrating export contingency does not require the construction of hypothetical sales ratios. Brazil submits that whether a measure is *de facto* contingent upon export performance depends on the conditions that are in law or in fact imposed at the time of granting the subsidy, and that this analysis should not be limited to the effect on sales ratios.

ANNEX D-3

EXECUTIVE SUMMARY OF THE STATEMENT OF
BRAZIL AT THE PANEL MEETING

I. INTRODUCTION

1. In its oral intervention Brazil focused on two main issues that it considers of particular relevance:

- The scope of the obligation under Article 7.8 to withdraw the subsidy or take appropriate steps to remove the adverse effects of the subsidy;
- The scope of this Article 21.5 proceeding in light of the panel's decision of March 27, 2013.

II. THE OBLIGATION TO "WITHDRAW THE SUBSIDY" OR TO TAKE "APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS" REQUIRES CAREFUL CONSIDERATION WHEN EXAMINING PAST SUBSIDIES

2. The overriding issue in this compliance proceeding regards the question of how a defendant should comply with the obligation of Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects" or "to withdraw the subsidy." Brazil reaffirms its views put forth in its submission that, usually, this obligation requires that a Member take affirmative, appropriate action to remove the adverse effects of the subsidy or to withdraw that subsidy, as the Appellate Body found in *US – Upland Cotton*.[1]

3. Yet, Brazil understands that in order to properly address this issue, different scenarios may be taken into consideration by implementation panels:

> Scenario A: A portion of the subsidy (LA/MSF) has been disbursed, the aircraft development project is ongoing, and no royalty payments have been made. In this situation, the responding Member could simply withdraw the subsidy by modifying the terms and conditions of the remaining disbursements and royalty payments so that they reflect market conditions. If the Member were to choose, instead, to remove the adverse effects of the subsidy, the Member may find that other steps are appropriate.
>
> Scenario B: The subsidy (LA/MSF) has been fully disbursed, but part of the royalty payments remain outstanding. The recipient therefore has already received the entire financial contribution, but there is still an opportunity for the responding Member to withdraw the "prospective portion" of the subsidy by modifying the terms of the outstanding royalty payments to reflect market conditions.
>
> Scenario C: LA/MSF has been fully disbursed and all of the royalty payments have been paid in full. This scenario poses a greater challenge for it seems that the only way that the responding Member could withdraw the subsidy would be to seek repayment of the benefit already received from and repaid by the recipient company. We recall, for instance, that in the *Australia – Leather* dispute (DS126), the panel recommended that withdrawal of a subsidy that had already been disbursed required the repayment of the subsidy. Yet this recommendation was criticized by various Members as being an inappropriate "retroactive" remedy, not covered by Article 7.8.

4. Given these complexities, one way out could be to restate the "genuine and substantial" relationship analysis (between the granting of a subsidy and its adverse effects) in order to evaluate the concrete effects of past subsidies, which have been fully disbursed and repaid. If the causal pathways which led to a situation of adverse effects through the use of subsidies can no longer be established, and other causal factors have since intervened significantly, there may be

[1] Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, 809 ("*US – Upland Cotton (Article 21.5 – Brazil)*"), para. 236.

exceptional circumstances where the obligations of Article 7.8 may prove difficult to comply with. In the current proceedings, the AB conceded, for instance, that "LA/MSF for the A300 and A310 are likely to cause minimal, if any, adverse effects during the reference period 2001-2006."[2]

5. Brazil is of the view that this panel has an important opportunity to clarify how Members are expected to comply with rulings on adverse effects relating to non-recurring subsidies, which have sometimes been granted many years ago and fully disbursed, but which may continue to cause adverse effects in the market, taking into account that the main goal of compliance with the subsidies disciplines is to restore the level playing field.

III. THE SCOPE OF ARTICLE 21.5 PROCEEDINGS CANNOT BE USED TO RE-LITIGATE CLAIMS DECIDED BY THE APPELLATE BODY

6. Brazil recognizes that it is for the compliance panel to determine the appropriate scope of its own jurisdiction and that an overly narrow approach to an Article 21.5 panel's terms of reference would undermine the effectiveness of the dispute settlement process. It believes, however, that it is also important that compliance proceedings not be used as an instance to re-litigate matters that were decided by the Appellate Body. This would amount to use it as a "remand" proceeding not foreseen in the Dispute Settlement Understanding.

7. In this sense, in the absence of reasons underpinning the preliminary decision, on March 27, 2013, that included in its jurisdiction the claims regarding the A380 as an export subsidy, Brazil would expect the panel to exercise its jurisdictional powers carefully in order to prevent it from re-analyzing claims already rejected by the Appellate Body.

8. In any case, Brazil once again insisted that demonstrating *de facto* export contingency should not require evidence of a hypothetical sales ratio-scenario such as the one that the United States has provided to the panel. It should require rather examining the total configuration of facts surrounding the granting of the subsidy.

[2] Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*, para. 1241.

ANNEX D-4

EXECUTIVE SUMMARY OF THE WRITTEN
SUBMISSION OF CANADA

I. INTRODUCTION

1. Canada is participating in these compliance proceedings because the findings of the Panel will have important consequences for the way in which the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) are interpreted and applied in future disputes.

II. PROHIBITED EXPORT SUBSIDIES

2. The United States has failed to demonstrate that Launch Aid/Member State Financing (LA/MSF) for the A380 and A350XWB granted by France, Germany, Spain and the United Kingdom is contingent in fact upon export performance in violation of Article 3.1(a) of the SCM Agreement.

3. In the initial proceedings in this dispute, the Appellate Body established the following test to determine whether a subsidy is *de facto* contingent on anticipated exportation: "is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?"

4. The Appellate Body held that the standard for *de facto* export contingency would be met when "the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy". According to the Appellate Body, *de facto* export contingency "must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy".

5. The United States fails to explain how the total configuration of the facts constituting and surrounding the grant of LA/MSF supports its position. Moreover, as indicated below, the United States' calculation of ratios does not accord with the framework set out by the Appellate Body.

A. THE UNITED STATES USES WRONG INFORMATION WHEN CALCULATING RATIOS

6. The Appellate Body provided a framework for assessing whether the granting of a subsidy is in fact tied to anticipated exportation: "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product that would come about in consequence of the granting of the subsidy, and, on the other hand, the situation in the absence of the subsidy". The United States uses the terms "anticipated ratio" (the anticipated ratio of export sales to domestic sales for the subsidized product) and "baseline ratio" (the ratio of export sales to domestic sales in the absence of a subsidy) to describe the ratios used.

7. With respect to the anticipated ratio, the United States' reliance on the Airbus 2000 Global Market Forecast is inappropriate because the GMF does not provide a forecast for the specific subsidized product (A380), as required by the Appellate Body, but rather provides a forecast for the entire class of very large aircraft.

8. The United States also uses wrong information when calculating the baseline ratio. With respect to the calculation of the baseline ratio, the Appellate Body held that "the assessment must be on the basis of historical sales of the same product by the recipient in the domestic and export markets before the subsidy was granted". The United States fails to demonstrate how the use of historical sales data for the Boeing 747 and Boeing 777 are appropriate substitutes in the absence of historical sales data for the A380 and A350XWB, respectively.

B. THE UNITED STATES' POSITION DOES NOT ACCOUNT FOR CHANGES IN MARKET CONDITIONS

9. In comparing the anticipated and baseline ratios for both the A380 and A350XWB, the United States does not address whether, apart from the existence of LA/MSF, all other relevant factors remain the same. In fact, the United States provides evidence that suggests that it is more likely a change in market conditions, rather than subsidization, that accounts for the anticipated increase in export sales relative to domestic sales in the very large aircraft market segment.

III. IMPORT-SUBSTITUTION SUBSIDIES

10. The United States claims that LA/MSF for the A380 and the A350XWB is contingent upon the use of domestic over imported goods as certain LA/MSF requirements oblige Airbus to use Airbus-produced intermediate goods in the production of its finished aircraft.

11. The prohibition in Article 3.1(b) of the SCM Agreement covers situations where the granting of a subsidy is contingent on the recipient *purchasing* domestic over imported goods. In Canada's view, the United States' position improperly expands the scope of Article 3.1(b) to cover subsidies contingent on the recipient *producing* a particular intermediate good.

12. Given that most manufacturers produce intermediate goods as part of the production of their final goods, the United States' position would negate the right of a subsidizing Member to require a subsidy recipient to produce goods, as defined by the subsidizing Member, in its territory in order to receive a subsidy.

13. The Appellate Body decision in *Canada – Autos* demonstrates that the United States' position is incorrect.

IV. SERIOUS PREJUDICE

14. The United States takes the position in these compliance proceedings that the European Union has neither withdrawn the subsidies nor removed their adverse effects. The United States submits that LA/MSF provided for all Airbus aircraft is still causing serious prejudice given that without LA/MSF, the Airbus aircraft at issue would not be in the market to the same extent and Boeing's sales would therefore be higher.

15. Canada submits that this Panel should limit its serious prejudice analysis to an assessment of the impact of the subsidies existing at the end of the reasonable period of time the European Union had to comply with the Dispute Settlement Body's (DSB) recommendations.

16. Canada sets out below the legal framework that this Panel should use in assessing whether the European Union complies with its obligations under Articles 5, 6 and 7.8 of the SCM Agreement. Canada also makes observations as to how this framework should be applied to the facts of this dispute.

17. Article 7.8 of the SCM Agreement provides that when a panel or the Appellate Body finds that a subsidy has resulted in adverse effects to the interests of a complaining Member, the subsidizing Member must either withdraw the subsidy or remove its adverse effects. These alternatives provide a logical remedy to a Member's breach of its obligations under Articles 5 and 6. If a Member chooses the first option, there is no longer a subsidy. If a Member chooses the second option, although the subsidy may still be present, it no longer causes adverse effects.

18. Canada examines each of these two options below.

A. WITHDRAWAL OF SUBSIDY

19. By withdrawing a subsidy that was found to cause serious prejudice, a Member complies with its obligations under Articles 5, 6 and 7.8 of the SCM Agreement. Article 1.1 of the SCM Agreement defines a subsidy as a financial contribution (or any form of income or price support) that confers a benefit. The Appellate Body in *Brazil – Aircraft (Article 21.5 – Canada*) indicated that "withdrawal" of a subsidy refers to the "removal" or "taking away" of that subsidy. Given the bipartite nature of its definition, a subsidy may be withdrawn by removing either the financial contribution or the benefit.

20. In this dispute, the United States acknowledges that the European Union actually withdrew an infrastructure-related subsidy by increasing the fee charged to Airbus for using the Bremen airport runway. The fact that the European Union properly withdrew the subsidy by removing the benefit that it would otherwise have conferred in the future, but without removing the benefit it conferred in the past, is consistent with the prospective nature of remedies in WTO compliance proceedings.

21. There are similarities between the situation where the benefit provided by a subsidy has expired and that where the benefit has been withdrawn. In both cases, a benefit is no longer being conferred on the recipient and, as a result, a subsidy no longer exists. Therefore, if a subsidy has expired, the Member should also be found to have complied with its obligations.

22. In these compliance proceedings, the United States argues that all LA/MSF provided for Airbus aircraft continues to cause serious prejudice to the interests of the United States in the form of lost sales and market displacement and impedance suffered by Boeing. Canada submits that, when LA/MSF for a given aircraft model has been withdrawn or the benefit provided by that LA/MSF has expired, LA/MSF provided for that aircraft model cannot be found to cause serious prejudice.

B. REMOVAL OF THE ADVERSE EFFECTS

23. When a subsidy has been found to cause serious prejudice and the subsidy has neither expired nor been withdrawn, Article 7.8 of the SCM Agreement requires the subsidizing Member to remove the serious prejudice. In other words, the subsidizing Member should ensure that the subsidy no longer causes serious prejudice.

24. Canada submits that only subsidies that have neither expired nor been withdrawn by the end of the reasonable period of time provided to a Member to implement DSB recommendations should serve as the basis of the analysis of serious prejudice in compliance proceedings. There must be consistency between the two options available to a Member under Article 7.8 of the SCM Agreement, namely, a Member must either withdraw the subsidies that cause adverse effects or remove the adverse effects caused by those subsidies, by the end of the reasonable period of time it has to comply with the DSB recommendations. If a subsidy has been withdrawn or has expired, a Member cannot be asked to remove the adverse effects of that subsidy.

25. Once the subsidies at issue in the compliance proceedings have been identified, the panel should proceed with its causation analysis to assess whether the identified subsidies cause serious prejudice to the interests of the complaining Member.

26. As is the case in initial proceedings, the proper method to make this assessment in compliance proceedings is to conduct a counterfactual analysis to determine what would be the situation in the absence of the subsidies at issue. Therefore, a compliance panel should analyse what the situation would be if these subsidies had been withdrawn. It is only if a panel finds that the subsidies cause serious prejudice or threaten to cause serious prejudice that a subsidizing Member should be found to violate Articles 5, 6 and 7.8 of the SCM Agreement.

27. In the single-aisle Large Civil Aircraft (LCA) product market, this Panel should first determine whether there were any subsidies still existing with respect to the A320 at the end of the reasonable period of time. Second, if there were subsidies still existing, the Panel should determine the impact of these subsidies and whether they cause serious prejudice.

28. With respect to the Very Large Aircraft product market, Canada disagrees with the European Union that the purpose of the Panel's counterfactual analysis should be to determine whether in the absence of LA/MSF for the A380 this aircraft would still have been launched.

29. Canada submits that the proper counterfactual analysis consists in assessing what the situation would be if the European Union had withdrawn the subsidy by the end of the reasonable period of time. The withdrawal could have been performed by increasing the rate of return on the A380 LA/MSF to a market level.

30. Canada's observations with respect to the proper counterfactual analysis to perform in the Very Large Aircraft product market also apply to the twin-aisle LCA product market. If LA/MSF for the A350XWB constitutes a subsidy, the Panel should focus on the impact that the withdrawal of that subsidy by the end of the reasonable period of time would have had on the twin-aisle LCA product market.

ANNEX D-5

EXECUTIVE SUMMARY OF THE STATEMENT OF
CANADA AT THE PANEL MEETING

I. INTRODUCTION

1. In our statement, we first address issues related to the conduct of a serious prejudice analysis in compliance proceedings. We then consider the United States' claims that certain Launch Aid/Member State Financing (LA/MSF) constitutes a prohibited export subsidy or import-substitution subsidy.

II. LEGAL FRAMEWORK TO USE IN DETERMINING COMPLIANCE WITH ARTICLE 7.8 OF THE SCM AGREEMENT

2. In its written submission, Canada has set out the legal framework a panel should use in determining whether a subsidizing Member has complied with its obligations under Article 7.8 of the SCM Agreement. The United States and the European Union have set out certain arguments before the Panel that are inconsistent with that framework.

3. Pursuant to Article 7.8 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), where a panel or an Appellate Body report is adopted in which it is determined that a subsidy has resulted in adverse effects, the subsidizing Member shall take appropriate steps to remove the adverse effects or withdraw the subsidy. The wording of this provision is clear: the subsidizing Member must either withdraw the subsidy or remove its adverse effects. These are two distinct alternatives, each of which can lead to compliance.

4. The first alternative available to a Member facing obligations under Article 7.8 of the SCM Agreement is to withdraw the subsidy. As we know, Article 1.1 of the SCM Agreement defines a subsidy as a financial contribution that confers a benefit. That is, without a financial contribution that confers a benefit, there is no subsidy. Yet, the United States argues that a subsidy can only be withdrawn if the benefit is withdrawn. This ignores the bipartite nature of the definition of a subsidy. The withdrawal of the financial contribution that has given rise to a benefit should, necessarily, also amount to the withdrawal of the subsidy.

5. An example illustrates Canada's position. Let us consider a loan provided to a recipient at an interest rate below that available on the market. The increase in the interest rate to market level would constitute withdrawal of the benefit. The reimbursement of the capital by the recipient would, in effect, constitute withdrawal of the financial contribution. Moreover, in this latter case, a benefit would no longer be conferred. Indeed, a recipient cannot be said to benefit from a loan that is no longer outstanding. Therefore, whether through an increase in interest rate or the reimbursement of the loan, the subsidy would be withdrawn.

6. The effect of the expiry of the benefit conferred by a financial contribution is equivalent to that of the withdrawal of a benefit. In both cases, there is no longer a benefit, nor a subsidy. In both cases, the Member that provided the subsidy should be found to have complied with its obligations under Article 7.8 of the SCM Agreement.

7. The second alternative available to a Member facing obligations under Article 7.8 of the SCM Agreement is to remove the adverse effects of the subsidy.

8. Determining whether "removal" has taken place requires a panel to assess whether the subsidies at issue cause serious prejudice. To make this assessment, a panel will have to, first, identify the subsidies at issue and, second, conduct a counterfactual analysis to determine the effects of those subsidies.

9. Canada submits that the only subsidies the effects of which must be assessed in compliance proceedings under Article 7.8 are subsidies in existence at the end of the six-month implementation period within which a subsidizing Member must remove adverse effects.

10. In this dispute, the United States argues that a subsidizing Member must remove the effects not only of subsidies outstanding at the end of that implementation period, but also those of expired and withdrawn subsidies. Adverse effects would always need to be removed. This interpretation of Article 7.8 must be rejected given that it would render the option of withdrawing the subsidy meaningless.

11. An examination of Articles 4.7 and 7.8 of the SCM Agreement further demonstrates the flaw in the United States' position.

12. Article 4.7 specifies that a Member that provides a prohibited subsidy must withdraw that subsidy. Although prohibited subsidies are generally seen as being, by their very nature, trade-distortive, there is no requirement that the effects of a prohibited subsidy that may continue past the withdrawal be removed.

13. For its part, as acknowledged by the United States, Article 7.8 provides separate options: a subsidizing Member may withdraw the subsidy or remove its adverse effects.

14. With respect to both types of subsidies, prohibited and actionable, the withdrawal of the subsidy is an appropriate remedy. If the withdrawal of a subsidy that is prohibited satisfies the obligations of a Member, withdrawal of a subsidy that causes adverse effects should also be satisfactory. Remedies against actionable subsidies cannot be more stringent than those against prohibited subsidies.

15. The proper identification of the subsidies subject to the serious prejudice analysis will affect the nature of the counterfactual analysis that must be conducted. The alternatives provided by Article 7.8 shed light on this identification. If a subsidizing Member can satisfy its obligations under Article 7.8 by withdrawing certain subsidies before the end of the implementation period, it is logical that, in assessing whether serious prejudice caused by subsidies has been removed, it is the effect of these same subsidies that will be analysed.

16. The proper counterfactual analysis to perform under Article 7.8 is, therefore, as follows: in the absence of the subsidies that existed at the end of the implementation period, what would be the situation of the relevant producers? That situation can then be compared to the actual situation of the relevant producers in order to determine whether the subsidies have caused serious prejudice.

17. The United States' position does not accord with this analysis. In its submissions, the United States argues that the Panel should take into account the effects of all LA/MSF provided to Airbus even if some LA/MSF may have been withdrawn or have expired. The Panel should reject the United States' position and identify which subsidies existed at the end of the implementation period. It is the effects of those subsidies − and those subsidies only − that should be analysed in determining whether the European Union has complied with its obligation under Article 7.8 of the SCM Agreement.

18. The counterfactual analysis presented by the European Union with respect to the LA/MSF for the A380 is also inconsistent with the analysis proposed by Canada. The European Union argues that the Panel should assess whether, in the absence of the LA/MSF for the A380, the aircraft would have been launched in 2000. This position overlooks the fact that, by withdrawing the subsidy provided by the A380 LA/MSF, and other smaller subsidies, by the end of the implementation period, the European Union would have satisfied its obligations under Article 7.8 of the SCM Agreement. Taking this fact into account, the proper counterfactual analysis should instead be: what would be the situation of Airbus and Boeing in the market in which the A380 competes if the European Union had withdrawn the subsidy provided through the A380 LA/MSF by December 1, 2011, for example by increasing the rate of return of the A380 LA/MSF to a market level?

III. PROHIBITED EXPORT SUBSIDIES

19. The United States claims that LA/MSF for the A380 and A350XWB granted by France, Germany, Spain and the United Kingdom is contingent in fact upon export performance in violation of Article 3.1(a) of the SCM Agreement.

20. In presenting its evidence the United States fails to explain how the total configuration of the facts constituting and surrounding the grant of LA/MSF supports its position. Moreover, the evidence is based on a calculation of ratios that does not accord with the framework set out by the Appellate Body.

21. In the initial proceedings in this dispute, the Appellate Body indicated that an assessment of whether the granting of the subsidy is in fact tied to anticipated exportation could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales *of the subsidized product* that would come about as a consequence of the granting of the subsidy (anticipated ratio), and, on the other hand, the situation in the absence of the subsidy (baseline ratio).

22. The United States uses the wrong information when calculating these ratios. For example, with respect to the calculation of the baseline ratio, the Appellate Body held that "the assessment must be on the basis of historical sales *of the same product by the recipient* in the domestic and export markets before the subsidy was granted". The United States fails to demonstrate how the use of historical sales data for the Boeing 747 and Boeing 777 are appropriate substitutes in the absence of historical sales data for the A380 and A350XWB, respectively.

23. Moreover, in comparing the anticipated and baseline ratios for both the A380 and A350XWB, the United States does not address whether, apart from the existence of LA/MSF, all other relevant factors remain the same. In fact, with respect to the very large aircraft market segment, the United States provides evidence suggesting that it is more likely a change in market conditions, rather than subsidization, that accounts for the anticipated increase in export sales relative to domestic sales.

IV. IMPORT-SUBSTITUTION SUBSIDIES

24. Finally, Canada addresses the specific claim by the United States that LA/MSF for the A350XWB is contingent upon the use of domestic over imported goods, given that certain LA/MSF requirements oblige Airbus to use Airbus-produced intermediate goods in the production of its finished aircraft.

25. The United States' position improperly expands the scope of Article 3.1(b) of the SCM Agreement to cover subsidies contingent on the recipient producing a particular intermediate good.

26. Nothing in the General Agreement on Tariffs and Trade or the SCM Agreement prohibits a subsidizing Member from making the granting of a subsidy contingent on a recipient producing goods in its territory. In fact, Article III:8(b) of GATT 1994 explicitly allows WTO Members to provide subsidies only to their domestic producers.

27. Given that many manufacturers produce intermediate goods as part of the production of their final goods, the United States' position would negate the right of a subsidizing Member to require a subsidy recipient to produce goods, as defined by the subsidizing Member, in its territory in order to receive a subsidy.

28. As indicated in Canada's written submission, the Appellate Body decision in *Canada – Autos* demonstrates that the United States' position is incorrect.

ANNEX D-6

EXECUTIVE SUMMARY OF THE
WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. In this submission, China will present its views on the following two issues:

(i) whether LA/MSF for the A350 XWB is within the terms of reference of these compliance proceedings; and

(ii) whether claims that grants of LA/MSF for the A380 and A350 XWB are prohibited subsidies are within the terms of reference of these compliance proceedings.

II. LA/MSF FOR THE A350 XWB IS NOT WITHIN THE TERMS OF REFERENCE OF THESE COMPLIANCE PROCEEDINGS

2. China submits that in order for a measure to be subject to review by an Article 21.5 panel, it has to fall under one or more of the following: (i) a declared "measure taken to comply"; (ii) a measure otherwise constituting a "measure taken to comply" because of its "express link" with the DSB's recommendations and rulings made in the original proceedings; (iii) a measure not in itself a "measure taken to comply" but having a "particularly close relationship" to the declared measure taken to comply and the DSB's recommendations and rulings; and (iv) in a subsidy case, a replacement subsidy which replaces the one found to be WTO-inconsistent in the original proceedings. China notes that the alleged LA/MSF for the A350 XWB falls under none of the four situations, and therefore is not within the terms of reference of these compliance proceedings.

1. Declared Measure Taken to Comply

3. In China's view, where a Member has adopted a measure to implement its obligations, and has so declared, it is necessary for a compliance panel to review such a measure in order to ascertain whether the measure at issue is actually in existence, and if so, whether it is compliant with the covered agreement. In this dispute, there is no "measure taken to comply" declared by EU in respect of A350 XWB.[1] Thus, the alleged LA/MSF for the A350 XWB could not possibly be included in the terms of reference of these compliance proceedings for the reason that it is a "declared" measure taken to comply.

2. Other Measures Taken to Comply

4. In light of the Appellate Body's analysis in *US –Lumber CVDs Final (Article 21.5)*, other measures may nevertheless constitute part of the "measures taken to comply" if an "express link" exists between those measures and the DSB's recommendations and rulings.[2] China recalls that no rulings or recommendations concerning the alleged LA/MSF for the A350 have ever been made in the original proceedings. Therefore, it is not possible for any measure, including the alleged LA/MSF for the A350 XWB, to have an "express link" to the non-existing DSB's recommendations and rulings concerning A350.

3. Other Measures Having a Particularly Close Relationship

5. In *US – Zeroing (Article 21.5 – EC)*, the Appellate Body has made it clear that, a measure not by itself a "measure taken to comply" may also fall within the scope of review under Article 21.5 of the DSU if the required particularly close relationship exists between that measure and the declared measures taken to comply and the DSB's recommendations and rulings.[3]

[1] In the document circulated by EU ("EU Notification") regarding its implementation of the DSB's recommendations and rulings, nowhere is any "measure taken to comply" regarding A350 (XWB) declared. See *EC – Large Civil Aircraft*, *Communication from the European Union*, WT/DS316/17, dated 5 December 2011.

[2] Appellate Body Report, *US – Lumber CVDs Final (Article 21.5 – Canada)*, para. 68.

[3] Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 204.

6. As no relevant rulings or recommendations have ever been made concerning the LA/MSF for the A350 in the original proceedings, EU bears no obligation to adopt any "measures taken to comply" and indeed EU mentions none regarding A350 in the EU Notification. In this context, as one end of the "particularly close relationship" − the declared measures taken to comply and the DSB's recommendations and rulings − does not even exist, it is, therefore, impossible to establish that any measure could have "a particularly close relationship" with this non-existing end.

7. The U.S. argues that, for the alleged LA/MSF for the A350 XWB, a "particularly close relationship" could be established, not with the unestablished LA/MSF for the A350, but with LA/MSF for all twin aisle LCA found to be inconsistent in the original proceedings.

8. However, China notes that, in the original proceedings, (i) the DSB's findings on each LA/MSF on the basis of individual Airbus LCA models shows that the respective LA/MSF measure for each model is *separate* from and *parallel* to others; (ii) there were no findings on an "LA/MSF Programme" allegedly covering all models of Airbus LCA, not to mention a particular "LA/MSF Programme" for twin aisle LCA. Therefore, findings of a "particularly close relationship" regarding such a measure ought to be conducted within the orbit of each individual LCA model.

9. Therefore, there is no basis for the U.S. to assert that the LA/MSF for the A350 XWB has a particularly close relationship to either LA/MSF for the A350, or all other LA/MSF for twin aisle LCA.

4. Replacement Subsidy

10. The U.S. relies on the Appellate Body's conclusion in *US − Upland Cotton (21.5 − Brazil)*[4] to assert that the alleged LA/MSF for the A350 XWB is within the terms of reference of these compliance proceedings, because it is a replacement subsidy for any earlier WTO-inconsistent LA/MSF measures that the EU claims to have withdrawn. However, the U.S. ignores that the facts of *US − Upland Cotton (21.5 − Brazil)* are fundamentally different from those of the present dispute.

11. Unlike the payments at issue in *US − Upland Cotton (21.5 − Brazil)*, in the present dispute, those LA/MSF measures for respective LCA models have not been found to be provided under the same framework (a single "LA/MSF Programme"). In addition, payments made under the challenged LA/MSF are not recurring. Therefore, there is no factual basis to establish that the alleged LA/MSF for the A350 XWB is a "replacement subsidy" in relation to "any earlier WTO-inconsistent LA/MSF measures" which are actually all separate from and parallel to each other.

5. Excluding LA/MSF for the A350 XWB Circumvents the EU's Obligation

12. To assert that excluding the alleged LA/MSF for the A350 XWB from the terms of reference of these proceedings circumvents the EU's obligation, the U.S. relies on a statement made by the Appellate Body in *US − Lumber CVDs Final (Article 21.5 − Canada)* that "[limits on the claims] should not allow circumvention by Members by allowing them to comply through one measure, while at the same time, negating compliance through another."[5]

13. However, China submits that this quoted statement was made in the process of Appellate Body's integrated analysis of the "particularly close relationship" test. The U.S. incorrectly relies on the alleged "circumvention" test, which is never a separate or distinct legal standard for determining the scope of review under Article 21.5 proceedings.

[4] Appellate Body Report, *US − Upland Cotton (21.5 − Brazil)*, paras. 235-238.

[5] Appellate Body Report, *US − Lumber CVDs Final (Article 21.5 − Canada)*, para. 71, quoted in US First Written Submission, Para. 163.

III. CLAIMS THAT GRANTS OF LA/MSF FOR THE A380 AND A350 XWB ARE PROHIBITED SUBSIDIES ARE NOT WITHIN THE TERMS OF REFERENCE OF THESE COMPLIANCE PROCEEDINGS

1. The U.S. Claims against the LA/MSF for the A380

14. China recalls that, in *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body opined that, unlike any new measures that are, or should be taken to comply with the DSB's recommendations and rulings, the old and unchanged measures in the original proceedings are not the appropriate subject of the Article 21.5 proceedings.[6]

15. Therefore, to the extent that the LA/MSF for the A380 remains unchanged ever since the original proceedings and no new measure has been taken, the LA/MSF for the A380 shall not fall under the terms of reference of these Article 21.5 proceedings. Thus, claims against the LA/MSF for the A380, including both the alleged export subsidies and the import substitution subsidies claims, shall not be reviewed in these proceedings.

16. Specifically for the claim of alleged export subsidies, China is of the view that the U.S. misapplies the legal standards established in *US – OCTG (Article 21.5 – Argentina)*. In that case, the fundamental reason for the Appellate Body to include an issue on which no findings have been made in the original proceedings into the scope of review under Article 21.5 is that, the Appellate Body found it to be part of the "measures taken to comply".[7]

17. In the present dispute, in contrast, there were no findings and relevant DSB recommendations and rulings made in the original proceedings on the alleged export subsidies provided for the A380. As a result, no new measures have been taken by the EU regarding the LA/MSF for the A380. Consequently, the U.S. argument that a party may simply raise an issue with no findings in the original proceedings again in Article 21.5 proceedings does not stand in this dispute.

18. From another perspective, it is noteworthy that the function of Article 21.5 proceedings should not be confused with that of the original proceedings. To have an unchanged measure be re-litigated in the Article 21.5 proceedings serves no extra procedural value because no further recommendations will be made regarding that measure. Notably, it amounts to converting the Article 21.5 proceedings into a remand procedure under which the complainant is granted a second chance to challenge the same measure, and the respondent has to defend it anew. Clearly, this is not the intended purpose of Article 21.5 proceedings.

2. The U.S. Claims against the LA/MSF for the A350 XWB

19. China has submitted above that the LA/MSF for the A350 is not within the terms of reference of these proceedings. On the basis of the conclusion made by the Appellate Body in *EC –Bed Linen (Article 21.5 – India)* that "if a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings"[8], China further submits that, the claims challenging the LA/MSF for the A350 XWB "cannot properly be raised in Article 21.5 proceedings".

IV. CONCLUSION

20. In conclusion, China is of the opinion that,

(i) LA/MSF for the A350 XWB is not within the terms of reference of these compliance proceedings, because it does not fall under any one of the following: (i) a measure taken to comply declared by the EU, (ii) a measure otherwise constituting a "measure taken to comply" because of its "express link" with the DSB's recommendations and rulings made in original proceedings; (iii) a measure not in itself a "measure taken to comply" but having a "particularly close relationship" to the declared measure taken to comply and the DSB's recommendations and

[6] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.
[7] Appellate Body Report, *US – OCTG (Article 21.5 – Argentina)*, para. 143-145, 146 and 152.
[8] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78.

rulings; and (iv) a replacement subsidy which replaces the one found to be WTO-inconsistent in the original proceedings.

(ii) Claims that grants of LA/MSF for the A380 and A350 XWB are prohibited subsidies are not within the terms of reference of these compliance proceedings, because for LA/MSF for the A380, it is unchanged ever since the original proceedings and should not be brought into the Article 21.5 proceedings. The U.S. arguments in this respect do not stand and are difficult to reconcile with the objectives and aims of Article 21.5 of the DSU. For claims regarding LA/MSF for the A350 XWB, because the measure itself − the LA/MSF for the A350 XWB − is not within the terms of reference of Article 21.5 proceedings, any claims challenging that measure shall not be reviewed in these proceedings.

ANNEX D-7

EXECUTIVE SUMMARY OF THE STATEMENT OF CHINA AT THE PANEL MEETING

1. Mr. Chairman, members of the Panel, it is my honor to appear before you today to present the views of China as a third party. In this oral statement, China will focus its views on whether LA/MSF for the A350 XWB, and the claim that grants of LA/MSF for the A350 XWB are prohibited subsidies, are within the terms of reference of these compliance proceedings.

2. China submits that in order for a measure to be subject to review by an Article 21.5 panel, it has to fall under one or more of the following: (i) a declared "measure taken to comply"; (ii) a measure otherwise constituting a "measure taken to comply" because of its "express link" with the DSB's recommendations and rulings made in the original proceedings; (iii) a measure not in itself a "measure taken to comply" but having a "particularly close relationship" to the declared measure taken to comply and the DSB's recommendations and rulings; and (iv) in a subsidy case, a subsidy which replaces the one found to be WTO-inconsistent in the original proceedings.

3. China notes that the alleged LA/MSF for the A350 XWB falls under none of the four situations, and therefore is not within the terms of reference of these compliance proceedings.

4. ***First***, in China's view, where a Member has adopted a measure to implement its obligations, and has so declared, it is necessary for a compliance panel to review such a measure. In this dispute, there is no "measure taken to comply" declared by EU in respect of A350 XWB. Thus, the alleged LA/MSF for the A350 XWB could not possibly be included in the terms of reference of these compliance proceedings for it's a "declared" measure taken to comply.

5. ***Second***, in light of the Appellate Body's analysis in *US –Lumber CVDs Final (Article 21.5)*, other measures may nevertheless constitute part of the "measures taken to comply" if an "express link" exists between those measures and the DSB's recommendations and rulings.[1] China recalls that no rulings or recommendations concerning the alleged LA/MSF for the A350 have ever been made in the original proceedings. Therefore, it is not possible for any measure, including the alleged LA/MSF for the A350 XWB, to have an "express link" to the non-existing DSB's recommendations and rulings concerning A350.

6. ***Third***, according to the Appellate Body in *US – Zeroing (Article 21.5 – EC)*, a measure not by itself a "measure taken to comply" may fall within the scope of review under Article 21.5 of the DSU, and the prerequisites are (i) the establishment of a "particularly close relationship"; and (ii) such relationship must exist between, on the one hand, the measure at issue, and on the other, the declared measures taken to comply and the DSB's recommendations and rulings.[2]

7. In the original proceedings, no rulings or recommendations have ever been made concerning the LA/MSF for the A350. Thus, EU bears no obligation to adopt any "measures taken to comply" and indeed EU mentions none regarding A350 in the EU Notification. In this context, as one end of the "particularly close relationship" – the declared measures taken to comply and the DSB's recommendations and rulings – does not even exist, it is, therefore, impossible to establish that any measure could have a "particularly close relationship" with this non-existing end.

8. While putting quite much strength on the close relationship test itself, the U.S. does not seem to care enough about where such a relationship should be established. The U.S. simply stresses that, by comparing the nature, effects and timing, a particularly close relationship has been established between the alleged LA/MSF for the A350 XWB, and LA/MSF for twin aisle LCA, or even "all previous LA/MSF grants".

9. However, China notes that, in the original proceedings, (i) the DSB's findings on each LA/MSF on the basis of individual Airbus LCA models shows that the respective LA/MSF measure

[1] Appellate Body Report, *US – Lumber CVDs Final (Article 21.5 – Canada)*, para. 68.
[2] Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 204.

for each model is *separate* from and *parallel* to others; and (ii) there were no findings on an "LA/MSF Programme" allegedly covering all models of Airbus LCA, not to mention a particular "LA/MSF Programme" for twin aisle LCA. Therefore, findings of a "particularly close relationship" regarding such a measure ought to be conducted within the orbit of each individual LCA model.

10. Therefore, there is no basis for the U.S. to assert that the LA/MSF for the A350 XWB has a particularly close relationship to either LA/MSF for the A350, or LA/MSF for twin aisle LCA, or "all previous LA/MSF grants".

11. The U.S. assertions effectively disregards the Appellate Body's explicit instruction that the close relationship should be established with "the declared measures taken to comply and the DSB's recommendations and rulings". Inevitably, it would overly expand the scope of these compliance proceedings and cause imbalance between the competing interest in prompt settlement of disputes and the interest in due process.

12. ***Fourth***, the U.S. also relies on the Appellate Body's conclusion in *US – Upland Cotton (21.5 – Brazil)*[3] to assert that the alleged LA/MSF for the A350 XWB is within the terms of reference of these compliance proceedings, because it is a replacement subsidy for any earlier WTO-inconsistent LA/MSF measures that the EU claims to have withdrawn. However, the U.S. ignores that the facts of *US – Upland Cotton (21.5 – Brazil)* are fundamentally different from those of the present dispute.

13. Unlike the payments at issue in *US – Upland Cotton (21.5 – Brazil)*, in the present dispute, those LA/MSF measures for respective LCA models have not been found to be provided under the same framework (a single "LA/MSF Programme"). In addition, payments made under the challenged LA/MSF are not recurring. Therefore, there is no factual basis to establish that the alleged LA/MSF for the A350 XWB is a "replacement subsidy" in relation to "any earlier WTO-inconsistent LA/MSF measures" which are actually all separate from and parallel to each other.

14. ***Finally***, to assert that excluding the alleged LA/MSF for the A350 XWB from the terms of reference of these proceedings circumvents the EU's obligation, the U.S. relies on a statement made by the Appellate Body in *US – Lumber CVDs Final (Article 21.5 – Canada)* that "[limits on the claims] should not allow circumvention by Members by allowing them to comply through one measure, while at the same time, negating compliance through another."[4]

15. However, China submits that this quoted statement was made in the process of Appellate Body's integrated analysis of the "particularly close relationship" test. The U.S. incorrectly relies on the alleged "circumvention" test, which is never a separate or distinct legal standard for determining the scope of review under Article 21.5 proceedings.

16. In light of the above, China submits that the LA/MSF for the A350 is not within the terms of reference of these proceedings. Further, on the basis of the conclusion made by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* that "if a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings"[5], China submits that the claims challenging the LA/MSF for the A350 XWB "cannot properly be raised in Article 21.5 proceedings".

17. ***In conclusion***, China is of the opinion that, LA/MSF for the A350 XWB is not within the terms of reference of these compliance proceedings, because it does not fall under any one of the four possible ways by which a measure may be reviewed by the compliance Panel. Because the measure itself – the LA/MSF for the A350 XWB – is not within the terms of reference of Article 21.5 proceedings, any claims challenging that measure shall not be reviewed in these proceedings.

[3] Appellate Body Report, *US – Upland Cotton (21.5 – Brazil)*, paras. 235-238.

[4] Appellate Body Report, *US – Lumber CVDs Final (Article 21.5 – Canada)*, para. 71, quoted in US First Written Submission, Para. 163.

[5] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78.

ANNEX D-8

EXECUTIVE SUMMARY OF THE
WRITTEN SUBMISSION OF JAPAN

I. FIRST ISSUE: THE UNITED STATES FAILS TO PRESENT A SUFFICIENT FACTUAL BASIS FOR ITS CALCULATION OF ANTICIPATED AND BASELINE RATIOS

A. ANTICIPATED RATIO OF EXPORT TO DOMESTIC SALES OF A350 XWB AND A380 LACKS FACTUAL BASIS

1. Japan considers that the Panel should proceed cautiously with the United States' submission that the sales data for the market in "*Very Large Aircraft*" (*i.e.*, the Airbus A380 and the Boeing 747) are appropriate inputs for the calculation of the anticipated ratio[1]. The Appellate Body did not recommend the use of data from the wider product market; only data pertaining to the subsidized company itself is cited as relevant in the Appellate Body's Report.[2] In Japan's opinion, the United States neither presents a compelling enough argument nor a sufficient factual basis to support its submission that anticipated sales trends from the market for Very Large Aircraft should be used as the basis for the anticipated ratio for the A380.

2. Moreover, in arguing that the Airbus report generates an anticipated ratio of 4:1 while the equivalent report from Boeing demonstrates a 5:1 predicted ratio of exports to domestic sales[3], the United States uses the former ratio with no explanation as to why the latter is validly supportive of the former.[4]

3. Further, it would have been reasonable to assume at the time of granting the subsidies that demand for Very Large Aircraft would be split between the Airbus A380 and the Boeing 747, particularly given the latter's longstanding monopoly over the market for aircraft of a 400+ passenger capacity. On that ground, Japan is of the view that the Panel should request that the United States clarify the basis on which it assumes that Airbus would have anticipated sales of the A380 in proportion to the size of the European and non-European markets respectively, because the reality is that the market demand differs depending on the market. The United States' sales forecasts of the A380 are too remote to constitute sufficient *prima facie* factual evidence.[5]

4. Insofar as the United States' proposed anticipated sales ratio for the A350 XWB is concerned, its arguments are also factually untenable. By examining Airbus' order book at the end of 2009, the United States is interpreting the order trends *before* the subsidies had been granted (*i.e.* the actual orders, before the alleged subsidies had been in operation). This information does not correspond to the Appellate Body's finding that the necessary data should be based on Airbus' *anticipated* performance at the time the subsidies were granted, not its *actual* performance thereafter.[6]

B. BASELINE RATIO OF EXPORT TO DOMESTIC SALES OF A350 XWB AND A380 LACKS FACTUAL BASIS

5. As the Appellate Body concluded, the baseline ratio can be based either on the *recipient's historical sales data* of the same product or, in the absence of such data, on what the performance of a profit-maximizing firm would be expected to achieve hypothetically and without subsidization in the same market for the same product.[7] However, in spite of the Appellate Body's findings, the

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[1] *First Written Submission of the United States, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft: Recourse to Article 21.5 of the DSU by the United States* (DS316), 6 June 2012 [US First Written Submission], at paras. 183 - 185.

[2] See Appellate Body Report, European Communities and Certain Member States – Measures affecting Trade in Large Civil Aircraft, WT/DS316/AB/R [EC-Aircraft], at para. 1047, where the Appellate Body states *that "[t]he situation in the absence of the subsidy may be understood on the basis of historical sales of the same product by the recipient in the domestic and export markets*" [Underlining added].

[3] US First Written Submission, at paras. 183 -185.

[4] US First Written Submission, at para. 188

[5] *i.e.* they cite only a quotation that foresees that "*over half of the projected deliveries [of the A380 are] expected to go to airlines domiciled in the Asia-Pacific region*"; see US First Written Submission, at para. 185.

[6] Appellate Body Report, *EC-Aircraft*, at para. 1049.

[7] Appellate Body Report, *EC-Aircraft*, at para. 1047.

United States has submi*tted that the sales data of Boein*g's 747 constitute an appropriate baseline ratio because it was the only comparable passenger aircraft before the launch of the A380.

6. Firstly, Japan notes that there is no historical sales data of Airbus' A380. The two models could have different strengths and weaknesses, their producers may utilize different marketing strategies for particular markets, and the markets have different consumer preferences. Other factors which may cause differences in sales include aircraft pricing strategies, warranty coverage, and maintenance needs, such as those linked to fleet interoperability. Accordingly, the market outcome may differ between these products.

7. In this connection, Japan notes that the original panel and Appellate Body made findings of actionable subsidies conferred by the United States on Boeing, including 747 Large Freight Aircraft. Moreover, Boeing operated an effective monopoly in the 400+ passenger capacity civil aircraft market before the introduction of the A380 by Airbus. On these grounds, Japan considers the use of data pertaining to Boeing's 747 is not an appropriate source for the calculation of the baseline ratio. The United States does not present any compelling reason or fact to support the hypothesis that Airbus could have sold the A380 according to the same patterns and with the same export to domestic sales ratio.

8. Japan repeats this same proposition in relation to the United States' proposed baseline ratio for the Airbus A350 XWB. Japan therefore considers: (i) that Boeing's actual historical sales trends are therefore too remote to base an assumption of how Airbus would have behaved in the absence of the subsidies; and (ii) that recourse to Boeing's historical data is not endorsed by the Appellate Body's findings.

9. Secondly, Japan notes that the United States has undertaken the calculation of both ratios using different data sources[8], but has not explained why the comparison is valid despite the differences in data sources.

10. Lastly, Japan wishes to note that the input sales data used in the ratio calculations for both the A380 and the A350 XWB are not contemporaneous.

C. HIGHER ANTICIPATED RATIO THAN BASELINE RATIO INCONCLUSIVE OF *DE FACTO* CONTINGENCY

11. As the Appellate Body pointed out, the fact that the subsidizing governments anticipated a proportional increase in export sales is insufficient to determine contingency, as the assessment on this point should be objective rather than subjective.[9]

12. The Panel should recall that the Appellate Body stressed that the subsidy must cause exports to behave in a way that "is not reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[10] The United States has not pleaded that the trends pertaining to the export to domestic sales ratios have caused the necessary *distortion* on the market. Therefore, Japan considers that, at present, the Panel should contemplate that Airbus' rise in export sales in proportion to domestic sales either: (i) was not necessarily the result of subsidization whose objective design and structure is to incentivize exports; or (ii) may not be accountable for any distortion of the market for passenger aircraft in favour of exports.

II. SECOND ISSUE: LA/MSF FOR THE A380 AND A350 XWB ARE IMPORT SUBSTITUTION SUBSIDIES

A. CONTINGENCY IN LAW UPON IMPORT SUBSTITUTION

13. Japan notes that the United States itself admits that "*the requirement to produce and use domestic components was not explicit*" with respect to German, Spanish and UK (and French) LA/MSF for the A380[11] and that with respect to LA/MSF for the A350 XWB, the United States does

[8] US First Written Submission, at paras 183-188 and 194-199.
[9] Appellate Body Report, *EC- Aircraft*, at para. 1050.
[10] Appellate Body Report, *EC-Aircraft*, at para. 1045.
[11] US First Written Submission, at para. 219.

not argue that these measures are *de jure* inconsistent with Article 3.1(b) of the *SCM Agreement*.[12]

14. Japan acknowledges that even if a challenged measure does not explicitly require the use of domestic components, the subsidy contingent in law on the use of domestic over imported goods could be found. In this connection, the Appellate Body explicitly confirmed that the standard for establishing contingency in law, which can be derived by necessary implication from the words actually used in the measure, under Article 3.1(a) of the *SCM Agreement* also applies for establishing contingency under Article 3.1(b) of the *SCM Agreement*.[13] However, Japan is of the view that an overly broad interpretation to the notion of implicit contingency in law should not be given for the following two reasons.

15. First, to establish implicit contingency in law, the Appellate Body made it clear that "*conditionality can be derived by necessary implication from the words actually used in the measure*."[14] [Underlining added] As such, what matters are the words actually used in the measure and not, as the United States appears to argue, factors not linked to the words actually used in the measure such as the structure of Airbus' productive facilities, applications by Airbus for LA/MSF from member States, press reports and other public discussions.

16. Second, as the original panel already pointed out in *EC – Aircraft*, an overly broad interpretation of the notion of implicit contingency in law would obfuscate the conditions for a finding of contingency in law with the conditions for a finding of contingency in fact[15].

B. CONTINGENCY IN FACT UPON IMPORT SUBSTITUTION

17. As far as concerns French, German, Spanish and UK LA/MSF for the A380 and the A350 XWB, the United States argues, as the main argument with respect to French LA/MSF and as an alternative argument with respect to German, Spanish and UK LA/MSF, that these are subsidies contingent in fact on the use of domestic over imported goods pursuant to Article 3.1(b) of the *SCM Agreement* and therefore prohibited import substitution subsidies.

18. Japan considers that the Panel should apply, when examining whether the LA/MSF measures granted to Airbus for the development of the A380 and the A350 XWB were contingent in fact upon the use of domestic goods over imports, the same standard as the Appellate Body set out in *EC – Aircraft* with respect to *de facto* export contingency. In other words, whether the subsidies granted to Airbus are/were in fact contingent upon the use of domestic over imported goods needs to be determined by assessing the subsidy itself, in the light of the relevant factual measures such as the design and the structure of the measure granting the subsidy; the modalities of operation set out in the subsidy measure; and the relevant factual circumstances surrounding the granting of the subsidy, and not on the basis of government motivation.

19. Japan is concerned that the standard of the permissibility of such subsidies based on a government's motivation risks being over-inclusive owing to overzealous drafting on the part of a government. Motivation is therefore an inappropriate tool to determine the WTO-permissibility of an alleged subsidy.

C. LINK BETWEEN THE LA/MSF MEASURES AND THE WORKSHARE AGREEMENTS

20. On the United States' argument that the existence of workshare agreements was a condition for the LA/MSF subsidies to be granted to Airbus and therefore the LA/MSF measures constitute impermissible import substitution schemes under Article 3.1(b) of the *SCM Agreement*, the Panel should examine carefully whether a grant of the LA/MSF measures is indeed conditioned on the existence of such workshare agreements and examine whether the workshare agreements indeed required the use of domestic products over imported products. In this regard, the Panel should examine whether the recipi*ents of the subsidie*s at issue are conditioned by the workshare agreements.

[12] US First Written Submission, at para. 230.

[13] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000 [*Canada – Autos*], at para. 123.

[14] Appellate Body Report, *Canada – Autos*, at para. 123.

[15] See the panel's findings in para. 7.692-7.716 of its report in EC – Aircraft.

21. In this connection, Japan wishes to point out that even if the Panel would find that the workshare agreements are WTO-inconsistent agreements, this does not necessarily imply that the LA/MSF measures at issue are by definition inconsistent with the EU's WTO commitments, since there may not be a link between WTO-inconsistent workshare agreements and the granting of the LA/MSF measures.

III. THIRD ISSUE: THE REMOVAL OF ADVERSE EFFECTS IN THE CONTEXT OF ARTICLE 7.8 OF THE *SCM AGREEMENT*

A. JAPAN'S VIEW OF THE MEANING OF "*REMOVAL*" OF ADVERSE EFFECTS

22. Japan considers that the removal of adverse effects under Article 7.8 of the *SCM Agreement* would mean: *if the Member granting a beneficial financial contribution makes it no longer possible for the grantee enterprise to use the benefits conferred by the financial contribution to lower the sales price of its products, for example, by having the benefit returned to the grantor government, then the adverse effects of the subsidies should be considered to have been removed*. In this situation, if the grantee enterprise is still commercially able to sell its products at a competitive price, it would be, by definition, more economically efficient to allow it to do that, rather than to disable it to do that.

23. This position is consistent with, and supported by, the Appellate Body's previous rulings in *EC-Aircraft*, and *US – Upland Cotton (Article 21.5 – Brazil)*[16].

B. THE REMOVAL OF ADVERSE EFFECTS AND THE CONTINUED EXISTENCE OF AIRBUS

24. In discussing what action the European Union should take to remove the adverse effects of the subsidies at issue, the United States repeatedly refers to the finding of the Appellate body in *EC - Aircraft* that "*[w]ithout LA/MSF, Airbus likely would not exist at all.*"[17] It appears that the United States effectively argues, or its argument is tantamount to arguing, that the adverse effects cannot be removed as long as Airbus continues to exist, since Airbus would not exist in its present form had it not received LA/MSF. This position seems to be extreme. Further, as noted above, it appears unreasonable to request that Airbus cease to exist even if it has been rendered no longer possible that Airbus will use the benefit conferred by the subsidies at issue to lower the sales prices of its products.

25. The United States' assertion in the context of remedies that Airbus likely would not currently exist but for the LA/MSF[18] is also at odds with the United States' submission in *Australia – Automobile Leather II (21.5 – US)*.[19] In this case, the United States took a prospective, forward-looking approach towards the remedy it sought under the *SCM Agreement*. By contrast, in the present proceeding the United States appears to be fixated on the theoretical continued existence of Airbus in the absence of receiving LA/MSF.

26. Therefore, Japan is apprehensive about the risk of establishing impossible standard for "removal of adverse effects" in the context of Article 7.8 of the *SCM Agreement.*

[16] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil),* WT/DS267/AB/RW, adopted 21 March 2005.

[17] US First Written Submission, at para. 323. See also at para. 243.

[18] US First Written Submission, at para. 243 and 323.

[19] Panel Report, *Australia — Automotive Leather II (Article 21.5 — US)*, WT/DS126/RW, adopted 11 February 2000.

ANNEX D-9

EXECUTIVE SUMMARY OF THE STATEMENT OF JAPAN
AT THE PANEL MEETING

I. WITHDRAWAL OF A SUBSIDY AND REMOVAL OF THE ADVERSE EFFECTS OF A SUBSIDY

1. Pursuant to Article 7.8 of the *SCM Agreement*, a subsidizing government is required to withdraw the subsidy or remove the adverse effects which still remain in the present. This conclusion follows from the general principle that remedies in WTO law are generally understood to be prospective in nature,[1] which has been followed in numerous cases.

2. Japan would like to draw the Panel's attention to the language of Article 7.8 of the *SCM Agreement*. Under this provision, a Member has an option of either withdrawing the subsidy or removing the adverse effects of the subsidy. It follows from the structure of this provision a Member that has withdrawn the subsidies at issue is deemed to have taken appropriate steps to remove the adverse effects within the meaning of this provision.

3. Japan further submits that assessing whether the subsidies at issue are presently causing adverse effects requires a proper understanding of the "life" of subsidies, as referred to by the Appellate Body. Under Article 1.1 of the SCM Agreement, a subsidy is deemed to exist if there is a financial contribution by a government or any public body and a benefit is thereby conferred. As the Appellate Body noted in *Brazil – Aircraft*, a financial contribution and benefit are two separate legal elements, and both must exist for there to be subsidy.[2]

4. Given that under Article 1.1 of the *SCM Agreement* it is only when a financial contribution confers a benefit that such a financial contribution qualifies as a subsidy, the structure of the *SCM Agreement* demonstrates that the existence of a benefit is crucial for the ability of the subsidy received by a recipient to cause adverse effects. Indeed, the *SCM Agreement* contemplates that the recipient of subsidies, through utilizing the benefit, may cause adverse effects on the like products of another Member. The Appellate Body in *EC – Aircraft* clearly held that the *SCM Agreement* requires a finding of a "genuine and substantial relationship of cause and effect" between the subsidy and the observed adverse effects.[3]

5. Japan notes that Article 7.8 of the *SCM Agreement* must be properly read to imply that the subsidizing government discharges its obligation either by the removal of the financial contribution or the benefit. The Appellate Body confirmed in *EC – Aircraft* by acknowledging the "basic proposition that a subsidy has a life, which may come to an end, either through the removal of the financial contribution and/or the expiration of the benefit."[4] Thus, in order to withdraw the subsidy it should be asked how the benefit can be removed.

1. Removal of a Benefit

6. In respect of the removal of the benefit, Japan would like to comment on the expiration of the benefit. The United States submits that the "the life of a product creation subsidy, like LA/MSF, lasts at least as long as the commercial life of the product it creates, and beyond in certain instances."[5] Japan believes that this statement conflates the concepts of the "benefit" and "effect" of a subsidy.

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[1] Appellate Body Report, *US – Subsidies on Upland Cotton (Article 21.5 – Brazil)*, WT/DS267/AB/RW, [*US – Upland Cotton (Article 21.5 – Brazil)*], at footnote 494 to para. 243.

[2] Appellate Body Report, *Brazil – Export Financing Program for Aircraft*, WT/DS46/AB/R [*Brazil – Aircraft*], at para. 157.

[3] See Appellate Body Report, *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, [*EC – Aircraft*], at para. 1232.

[4] *Ibid*., at para. 709.

[5] US Second Written Submission, para. 175.

7. First of all, under the *SCM Agreement*, a "benefit" is capable of being calculated and quantified, and is expendable over time.[6] At the time when a subsidy is granted, the subsidizing government contemplates that this quantifiable and expendable "benefit" of the subsidy will materialize and be consumed over a certain period of time to achieve the relevant policy objectives. This approach falls squarely within the framework of the Appellate Body's reasoning that "at the time of the grant of a subsidy, the subsidy will necessarily be projected to have a finite life and to be utilized over that finite period."[7]

8. Moreover, the Appellate Body has confirmed that the determination of a benefit under the *SCM Agreement* is an *ex ante* analysis that does not depend on how the particular financial contribution actually performed after it was granted.[8] Furthermore, the Appellate Body has observed that "the nature, amount, and projected use of the challenged subsidy may be relevant factors to consider in an assessment of the period over which the benefit from a financial contribution might be expected to flow."[9] Consequently, for the analysis as to whether the benefit has expired or ceased to exist, the materialization and consumption of the benefit usually are functions of the policy objectives of subsidies as depicted in the structure and nature of any particular subsidy.

9. In line with this proposition, the Appellate Body offered a number of factors which might be used to assess the life of a benefit, including the period of time over which the subsidy is expected to be used for future production.[10] Japan submits that the weight allocated to each factor mentioned by the Appellate Body would depend on the structure and nature of the particular subsidy. For example, the period of time over which the subsidy is expected to be used to lower the price levels of products may be relevant for the assessment of the life of research and development (R&D) subsidies. Japan understands that the function of R&D subsidies is, for example, to lower, to the extent of the "benefit" amount, the sales price of products incorporating the results of the research activities down to a competitive level. Even without such subsidies, the recipient were able to conduct such research activities successfully, and sell such products at a competitive level, a government would have little incentive to grant subsidies. If, however, the recipient had no technological potential to conduct the research activities successfully, neither would a government have little incentive to grant subsidies. A government provides R&D subsidies because the government considers that the recipient has technological potential to conduct such research activities successfully, but it will not be able to sell products incorporating the result of the research activities at a competitive level.

10. This function of such R&D subsidies contemplates that its benefit will normally be consumed as the recipient accordingly sells the product for the development of which the subsidy was provided at a price level which is lower than the anticipated price level in the absence of subsidization. Consequently, when the "benefit" is consumed in full, the recipient will no longer be able to lower price levels at the cost of further consuming the "benefit".

11. Japan would like to emphasize, however, that the assessment of the period of the life of the "benefit" should focus on the projected period or sales amount properly anticipated by granting Member when the subsidy is granted.

2. Removal of Adverse Effects

12. Japan doubts that, for the purposes of Article 7.8 of the *SCM Agreement*, a presently-existing adverse effect may be found to exist if the "benefit" has been withdrawn or consumed and the recipient is no longer able to lower the price of products by the benefit. Indeed, with respect to R&D subsidies, the recipients can use new technology which has been invented by the subsidies, even after its benefits have been removed or utilized. In Japan's view, however, the obligation to remove adverse effects should normally be limited to the price effects of R&D subsidies.

13. As mentioned above, the structure of R&D subsidies is ultimately aimed at lowering production costs so as to enable firms to lower prices to a level which is competitive in the marketplace. The fact that a recipient has invented a particular technology likely reveals that it

[6] See Article 14 of the *SCM Agreement.*
[7] Appellate Body Report, *EC – Aircraft*, at para. 709.
[8] *Ibid*., at para. 706.
[9] *Ibid*., at para. 707.
[10] *Ibid*.

must have had a technological potential to do so, but merely could not afford to do so. In this situation, the proper counterfactual is that the recipient, as a business entity, would have had to offer products using newly-invented technology at a higher price (and consequently, would have had more difficulty selling them in the market), rather than that the recipient could not have invented that technology, and thus, that product.

14. Therefore, in Japan's opinion, a finding regarding adverse effects and serious prejudice should stem primarily from the effects of the pricing policy of the firm in question with relation to the subsidized products including those incorporating new technology for the development of which the subsidy was granted, and not from the mere fact that new technology has been invented.

15. In support of this proposition, Japan submits that the *SCM Agreement* contemplates that a benefit would result in the reduction of costs of production and, therefore, cause price effects. In particular, this reality is, *inter alia*, evident from the intended purpose of countervailing duties, which effectively increase the import prices of subsidized imports. The WTO disciplines regarding the determination of injury are equally informative in this regard. Japan directs the Panel's attention to Article 15.1 of the *SCM Agreement* and Article 15.2 of the *SCM Agreement*.

16. In Japan's opinion, the adverse effects of subsidies enumerated in Article 5 of the *SCM Agreement* are ultimately related to the ability of a recipient to charge lower prices by utilizing a subsidy benefit. Therefore, Japan is of the view that it is necessary to examine carefully whether the *SCM Agreement* further addresses any other effect of subsidies that may remain after their benefit – i.e. their price effects – is accordingly consumed in full.

II. THE "ANTICIPATED EXPORT RATIO TEST"

17. The United States submits that the grants of LA/MSF for the A380 and the A350 XWB constitute prohibited subsidies, since these grants are contingent in fact upon export performance and relies on the "anticipated export ratio test" provided by the Appellate Body in *EC- Aircraft*, whereby the ratio of anticipated export and domestic sales of the subsidized product that would come about as a consequence of the granting of the subsidy is compared to the same ratio in the absence of the subsidy.

18. While Japan prefers to refrain from submitting comments regarding whether the grants of LA/MSF for the A380 and the A350 XWB are properly before the Panel, Japan has two concerns with respect to the approach proposed by the United States. First, Japan is concerned that the United States' claim regarding export contingency relies too heavily on market forecast data, thereby raising doubts whether the United States has presented a sufficient *prima facie* factual basis to support its claims. Second, Japan has a conceptual concern with respect to the "anticipated export ratio" test as proposed by the United States.

1. Applicable Legal Framework

19. The Appellate Body clarified the standard for finding *de facto* export contingency under Article 3.1(a) of the SCM Agreement in *EC – Aircraft*. The Appellate Body held that "anticipation" of exports is in itself insufficient as proof that the granting of a subsidy is tied to the anticipation of exportation and established the following test: "is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?"[11] The Appellate Body subsequently found that this test is met when "the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[12] The Appellate Body also explained that the existence of *de facto* export contingency must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy.[13]

20. The Appellate Body indicated that, where relevant evidence exists, the assessment of whether the granting of a subsidy is geared to induce the promotion of future export performance by the recipient could be based on a comparison between the ratio of anticipated export and

[11] *Ibid*., at para. 1044.
[12] *Ibid*., at para. 1045.
[13] *Ibid*., at para. 1046.

domestic sales of the subsidized product that would come about as a consequence of the granting of the subsidy and the situation in the absence of the subsidy. The situation in the absence of the subsidy may be understood on: (1) the basis of historical data; or (2) in the absence of "untainted" historical data, on the performance that a profit-maximizing firm would hypothetically be expected to achieve in the export and domestic markets in the absence of a subsidy.

2. Concerns Whether Sufficient *Prima Facie* Evidence has been Submitted

21. Japan notes that, in order to establish the "baseline ratio", the Appellate Body referred to historical sales of the recipient firm or the performance that a profit-maximizing firm would hypothetically be expected to achieve.[14] The data used by the United States to establish the baseline ratio, is, however, not based on Airbus' historical sales data but on Boeing's sales of 747 and 777 aircraft. In this respect, Japan considers that Boeing's sales data pertaining to the 747 freight aircraft and 777 aircraft are "tainted by subsidies" insofar as Boeing was in receipt of actionable subsidies during this period as per the WTO Panel's and Appellate Body's findings. Japan thus questions whether Boeing's sales data can be used to establish the baseline.

22. Japan invites the Panel to carefully examine whether the United States has provided sufficient *prima facie* evidence to support its claim that the grants of LA/MSF for the A380 and the A350 XWB constitute prohibited export subsidies. In this regard, Japan recalls that the Appellate Body itself inserted a qualifier when presenting the numerical example to illustrate whether the granting of a subsidy may be geared to induce promotion of future exports. The Appellate Body made a comparison between the anticipated ratio of export and domestic sales with the baseline ratio subject to the existence of "relevant evidence".[15]

3. Methodological Concern with Respect to the "Anticipated Export Ratio" Test

23. Japan also has a methodological concern with respect to the "anticipated export ratio" test. To be clear, Japan does not dispute that a subsidy measure providing recipients an incentive to export products abroad rather than sell them on the domestic market is likely to increase the anticipated ratio of export sales to domestic. However, the test posited by the United States may result in a finding of *de facto* export contingency even in the absence of any incentive given to recipients to increase the anticipated ratio of export sales to domestic sales when − because of certain market developments, such as higher cross-price elasticity of demand on export markets − the anticipated ratio of export sales to domestic sales is higher than the baseline ratio of export sales to domestic sales.

24. The methodological concern Japan has in this respect is that the "anticipated export ratio" test as put forward by the United States in this proceeding reduces the standard for a finding of *de facto* export contingency, as set out by the Appellate Body in *EC − Aircraft*, to a mere comparison between the anticipated ratio and the baseline ratio. Japan considers that this is not the appropriate legal standard for establishing *de facto* export contingency. Japan recalls the legal standard set out by the Appellate Body for determining *de facto* export contingency[16] and that this standard is met "when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[17]

25. Whether a subsidy is geared to induce the promotion of future export performance "must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy"[18] and the Appellate Body provided its relevant factors in this respect.[19]

26. Yet the "anticipated export ratio" test put forward by the United States hollows out the legal standard set out by the Appellate Body to a simple comparison between the anticipated ratio and the baseline ratio, even though the Appellate Body was quite clear that "the standard for determining [*de facto* export contingency] is an objective standard, to be established on the basis

[14] *Ibid*.
[15] *Ibid*., at para. 1047.
[16] *Ibid*., at para. 1044.
[17] *Ibid*., at para. 1045.
[18] *Ibid*., at para. 1046. [Underlining added]
[19] *Ibid*.

of the total configuration of facts constituting and surrounding the granting of the subsidy, including the design, structure, and modalities of the measure granting the subsidy."[20]

27. Therefore, Japan submits that while a comparison between the anticipated ratio and the baseline ratio may be one of the "facts constituting and surrounding the granting of the subsidy", it cannot be determinative of whether a given subsidy measure is *de facto* export contingent. In this respect, Japan refers to the finding of the Appellate Body that "the assessment could be based"[21] on a comparison between the anticipated ratio and the baseline ratio and that such a comparison, if supported by evidence showing an incentive to skew anticipated sales towards exports, "would be an indication"[22] of *de facto* export contingency. Should the Panel endorse the "anticipated export ratio" test to determine whether a subsidy is *de facto* export contingent, Japan is concerned that such an endorsement may result in three unintended consequences.

28. First, allowing WTO Members to establish *de facto* export contingency based only on a comparison between anticipated and baseline ratios would contradict the Appellate Body's previous finding that "proving *de facto* export contingency is a much more difficult task [than proving *de jure* export contingency]*.*"[23] Indeed, the Appellate Body in *EC – Aircraft* endorsed this conclusion regarding the complexity of establishing *de facto* export contingency.[24]

29. Second, the importance of the baseline ratio in determining whether a subsidy is *de facto* export contingent carries the risk that one and the same subsidy is considered *de facto* export contingent if the baseline ratio is set in year/period X, whereas it is not considered *de facto* export contingent if the baseline ratio is set in year/period Y. Indeed, due to changes in the market situation, the ratio between exports and domestic sales in any given year or period may be substantially different from any other year or period.

30. Third, WTO Members with small domestic markets, for whom changes in baseline ratios from one year or period to another may be more pronounced, may be more vulnerable to a finding of *de facto* export contingency compared to WTO Members with larger domestic markets. Japan believes that all WTO Members, without regard to the size of their own domestic markets, should enjoy equal treatment in terms of the restrictions on subsidies.

31. Therefore, Japan respectfully invites the Panel to examine the Appellate Body's findings set out in *EC – Aircraft*, and particularly the explicit guidance that whether a subsidy is geared to induce the promotion of the future export performance must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, when assessing whether the grants of LA/MSF for the A380 and the A350 XWB constitute prohibited export subsidies.

[20] *Ibid*., at para. 1050. [Underlining added]
[21] *Ibid*., at para. 1047. [Underlining added]
[22] *Ibid*. [Underlining added]
[23] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, at para. 167.
[24] Appellate Body Report, *EC – Aircraft*, at para. 1038. [Underlining added]

ANNEX D-10

EXECUTIVE SUMMARY OF THE STATEMENT OF THE REPUBLIC OF KOREA AT THE PANEL MEETING

Mr. Chairman and members of the Panel,

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party in this dispute. The decision of the Panel in this dispute will provide important guidelines to the WTO Members in making their policy decisions and formulating their respective government programs in a manner consistent with the relevant rules of the WTO.

2. While the parties to the dispute and third parties raise several important issues, Korea would like to briefly focus on the following two systemic points. First point is whether this Panel's terms of reference include LA/MSF for the A350XWB. Second point is whether LA/MSF for the A380 and the A350XWB constitutes subsidies contingent upon the use of domestic over imported goods, prohibited under Article 3.1(b) of the SCM Agreement.

3. To begin with, we would like to note that the issue of a compliance Panel's terms of reference has a close bearing with the enforceability of the WTO Agreements. This is so, because a compliance panel's decision will have two significant aspects. On the one hand, a compliance panel's decision is directly related to the security and predictability of the WTO dispute settlement mechanism. Without a certain limitation on the scope of a compliance panel's terms of reference, a complainant might want to re-litigate in a compliance proceeding issues it could and should have claimed in the original proceeding. This virtual re-litigation would constitute an abuse of the compliance proceeding by the complainant. On the other hand, a compliance panel should also ensure that an implementing Member does not attempt to circumvent its obligation to implement the recommendations and rulings of the DSB, by being allowed to take essentially the same measure simply because it was not included in the original proceeding.

4. In short, if a compliance panel's terms of reference are overly broad, it may open a back door for measures, which could and should have been included in the original panel proceeding (but were excluded by a complainant), to come to a compliance proceeding. On the other hand, should a compliance panel's terms of reference be overly narrow an implementing Member may attempt to introduce a new measure which share the characteristics of the impugned measure in all material respects, thereby effectively avoiding its obligation to comply with the recommendations and rulings of the DSB. Thus, a balance should be struck between the two competing considerations.

5. In determining the scope of terms of reference of the present proceeding, this Panel should carefully examine and apply the WTO jurisprudence on this issue. In Korea's view, WTO jurisprudence accumulated so far offers important guidelines in this regard.

6. First of all, Korea notes that the WTO jurisprudence has acknowledged a panel's broad authority to identify measures taken to comply. The Appellate Body has ruled that panels have a duty to examine issues of a "fundamental nature," issues that go to the root of their jurisdiction on their own motion *even* if the parties to the dispute remain silent on those issues.[1] Where the parties to the dispute identified measures, a compliance panel still has to determine which of the measures listed in the request for its establishment are indeed "measures taken to comply."[2] Hence, the WTO jurisprudence has provided a compliance panel with extensive authority not merely to be confined to the measures raised by the parties to the dispute.

7. That being said, the Appellate Body in *US – Softwood Lumber IV (Article 21.5 - Canada)* provides us with a guideline directly on point. It considered measures other than the declared

[1] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5)*, para. 36, quoted in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.35.

[2] Appellate Body Report, *EC – Bed Linen*, para. 78.

measures taken to comply with an original WTO decision. According to the Appellate Body, terms of reference of a compliance panel are not merely limited to the measures declared to comply by an implementing party.[3] It thus stated that "some measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel, acting under Article 21.5."[4] The Appellate Body further opined that in order to determine whether there is a close relationship between the declared measures taken to comply and other measures, a compliance panel must examine the timing, nature, and effects of the other measures.[5] At the same time, a compliance panel must also "examine the factual and legal background against which a declared 'measure taken to comply' is adopted."[6]

8. It seems that the parties to this dispute and third parties all agree that the applicable test here should be whether or not there exists a "close relationship," as pronounced by the Appellate Body. Thus, the question is whether LA/MSF for the A350XWB meets the "close relationship" test. As the Panel is well aware, examining the timing, nature, and effects of other measures poses complex factual questions. Indeed, the parties maintain different positions regarding the timing, nature and effects of other measures at issue, even if they agree upon the same legal test of "close relationship." Thus, Korea requests the Panel to carefully review the facts of the dispute as a trier of facts and determine whether LA/MSF for the A350XWB can be regarded as a measure closely related to the measures taken to comply by the EU, in accordance with the jurisprudence of the Appellate Body.

9. Secondly, another issue Korea would like to raise concerns interpretation and application of Article 3.1(b) of the SCM Agreement. The United States argues that LA/MSF for the A380 and the A350XWB constitute prohibited subsidies because they are subsidies contingent upon the use of domestic goods. Article 3.1(b) of the SCM Agreement indeed prohibits "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."

10. In general, Korea agrees with the statement of the United States that "[i]f the receipt of a subsidy requires a manufacturer to use domestically produced manufacturing inputs rather than foreign manufacturing inputs, then the subsidy violates" Article 3.1(b).[7] Korea believes that such a statement appropriately encapsulates the object and purpose of Article 3.1(b), which is to prevent the profoundly distortive effect of an import substitution subsidy on international trade.

11. That being said, however, Korea submits that a careful scrutiny is necessary to determine whether LA/MSF for the A380 and the A350XWB does fall under the situation of Article 3.1(b). In Korea's view, it seems that the U.S. argument does not fully detail how the workshare agreements among the Airbus countries required and imposed a condition upon the use of domestic over imported goods. Although the U.S. concluded that the workshare agreements "meant that the access to the subsidy was contingent upon the use of domestic goods over imports,"[8] it does not seem clear to us whether one could pinpoint a direct linkage between the agreements and a condition to use domestic over imported goods within the meaning of Article 3.1(b). At most, examples presented by the complainant seem to concern the Airbus countries' share, ownership rights, and job creation − somewhat general discussions and consideration of the participating countries as opposed to some sort of specific conditions.

12. The situation of the UK provides a good example in this regard. The United States argues that through the workshare agreements "the UK government anticipated that LA/MSF for the 350XWB would induce local production of particular large civil aircraft components, local employment, and *the use of domestically produced manufacturing inputs as a result of that local employment*."[9] Put differently, the argument of local content substitution is basically premised upon the alleged local employment. One would find it difficult, however, to see any direct linkage

[3] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 77.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] US First Written Submission, para. 211.
[8] *Id*. para. 239.
[9] *Id*. para. 234.

between the local employment and the alleged import substitution. Considering the strategic features of the LCA industry and the highly confidential nature of the technologies involved, the United States should first prove that there do exist substitutable parts that are being imported, and that the LA/MSF program prevented Airbus from using such imported parts because of the program. In our view, such a scheme does not seem to be reflective of the nature of the business at issue here. In order to establish a direct linkage, therefore, it seems critical for the complainant to prove why and how the local employment can be regarded as a specific condition for the utilization of domestic goods over imported goods.

13. Again, Korea appreciates this opportunity to present its view and would be happy to take questions you might have. Thank you.

ANNEX E

RULINGS WITH RESPECT TO DSU ARTICLE 13 REQUEST

ANNEX E-1

THE UNITED STATES' ARTICLE 13 REQUEST OF 20 JULY 2012

(Panel ruling issued on 4 September 2012)

1. By letter dated 20 July 2012, the United States requests the Panel to exercise its authority under Article 13 of the Understanding on Rules and Procedures governing the Settlement of Disputes ("DSU") to seek information from the European Union with regard to specific assertions allegedly made by the European Union in its first written submission.[1]

2. Specifically, the United States requests the Panel to seek the following four categories of documents from the European Union, which the United States considers will assist the Panel in evaluating the evidence before it and in clarifying and distilling the legal arguments advanced by the parties, particularly those of the European Union[2]:

a. All agreements (including all amendments, attachments, and exhibits) between any of the EU member States and EADS/Airbus, related to the development and/or financing of the Original A350 or A350XWB;

b. All applications for financing for the Original A350 or A350XWB; any related project appraisals by the member States, and any other written communications between any of the EU member States and EADS/Airbus, related to the development and/or financing of the Original A350 or A350XWB;

c. All A350 business cases provided by Airbus or EADS to the member States and/or any of Airbus' risk-sharing suppliers; and

d. Documentation of any loans extended to Airbus/EADS by the *Kreditanstalt für Wiederaufbau* ("KfW") for the development and/or financing of the Original A350 or A350XWB, as well as documentation of any disbursements pursuant to such loans in 2009, 2010, 2011, or 2012.

3. Following letters from the European Union dated 20 July 2012[3], a response by the United States dated 23 July 2012[4], and a further letter from the European Union dated 24 July 2012[5], the Panel issued a communication in which it requested the European Union to respond to the United States' request by 6 August 2012.[6] This date was, at the request of the European Union, subsequently extended by the Panel to 9 August 2012.[7] On 9 August 2012, the European Union submitted a detailed response to the United States' Article 13 request, in which it asks the Panel to reject the request "at least until the written procedure is complete."[8] The United States replied to the European Union's comments on 16 August 2012.[9] In response to a request by the European Union, also dated 16 August 2012[10], the Panel granted the European Union until 23 August 2012 to submit a response to the United States' reply, limiting its response to the fresh assertions and arguments with respect to the United States' request which

[1] Letter of the United States to Chairman of the Panel, dated 20 July 2012 (hereafter, "Article 13 request").
[2] Article 13 request, p. 2. Moreover, the United States considers that the Panel may be unable to make an objective assessment of the arguments and assertions raised by the European Union in the absence of these documents.
[3] Letter of the European Union to the Chairman of the Panel, dated 20 July 2012.
[4] Letter of the United States to the Chairman of the Panel, dated 23 July 2012.
[5] Letter of the European Union to the Chairman of the Panel, dated 24 July 2012.
[6] Communication of the Panel to the Parties, dated 24 July 2012.
[7] Letter of the European Union to the Chairman of the Panel, dated 27 July 2012; Communication of the Panel to the Parties, dated 30 July 2012.
[8] European Union, Comments on the US Request for a Preliminary Ruling Decision, 9 August 2012 (hereafter "EU Comments, 9 August 2012"), paras. 1 and 112.
[9] United States' Reply to the European Union's comments on the US Request for a Preliminary Decision, 16 August 2012 (hereafter, "US Reply, 16 August 2012").
[10] Letter of the European Union to the Chairman of the Panel, dated 16 August 2012.

the European Union asserts that the United States has made in its reply.[11] The European Union submitted this response on 23 August 2012.[12] The Panel has taken into consideration all of the arguments made by the parties in the foregoing exchanges and advises the parties as follows:

4. Article 13.1 of the DSU provides:

> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it seems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

5. Article 13 of the DSU makes a grant of discretionary authority to panels enabling them to seek information from any relevant source, as they deem appropriate in a particular case.[13] The Appellate Body has stated that Article 13.1 imposes no conditions on the exercise of this discretionary authority.[14] Moreover, in *Canada – Aircraft*, the Appellate Body observed that there is nothing in either the DSU or the SCM Agreement to support the assumption that a Member's duty to respond promptly and fully to a panel's request for information arises only after the opposing party to the dispute has established a *prima facie* case that its complaint or defence is meritorious.[15] As the Appellate Body stated:

> To the contrary, a panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence.[16]

6. Finally, in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body stated that in considering whether to exercise its authority under Article 13 of the DSU, particularly where a party has made an explicit request that it do so, a panel should have regard to considerations such as what information is needed to complete the record, whose possession it lies within, what other reasonable means might be used to procure it, why it has not been produced, whether it is fair to request the party in possession of the information to submit it, and whether the information or evidence in question is likely to be necessary to ensure due process and a proper adjudication of the relevant claim(s).[17]

7. In its first written submission, the United States argues that France, Germany, Spain and the United Kingdom have given €3.5 billion in new LA/MSF for the A350XWB and that this new LA/MSF is a failure to comply with the recommendations and rulings of the DSB in the original proceeding.[18] The United States further alleges that the new LA/MSF has been granted by the relevant EU member States on the same core terms and conditions as grants of LA/MSF for previous Airbus aircraft (i.e. unsecured, success-dependent, levy-based and back-loaded) and on

[11] Communication of the Panel to the Parties, dated 17 August 2012.

[12] European Union, Comments on the US Response to the EU Comments on the US Request for a Preliminary Decision, 23 August 2012 (hereafter, "EU Comments, 23 August 2012").

[13] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84; Appellate Body Report, *EC – Hormones*, para. 147; Appellate Body Report, *US – Shrimp*, para. 106.

[14] Appellate Body Report, *Canada – Aircraft*, para. 185.

[15] Appellate Body Report, *Canada – Aircraft*, para. 192.

[16] Appellate Body Report, *Canada – Aircraft*, para. 192 (original emphasis).

[17] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1140.

[18] United States' first written submission, para. 8. The United States argues that LA/MSF for the A350XWB is a "measure taken to comply" in that it is closely related to the subsidies already found inconsistent with the SCM Agreement in the original proceeding, it essentially replaces the A330/A340 LA/MSF agreements that the European Union claims to have terminated, and results in circumvention of the European Union's compliance obligations; United States' first written submission, paras. 6, 105.

better-than-commercial terms.[19] In addition, the United States argues that LA/MSF for the A350XWB is contingent in fact on export performance, contrary to Article 3.1(a) of the SCM Agreement as well as an import substitution subsidy contrary to Article 3.1(b) of the SCM Agreement. The United States makes various assertions as to the nature, structure and modalities of operation of LA/MSF for the A350XWB in support of these arguments.[20]

8. In its first written submission, the European Union requests the Panel to find that none of the four separate A350XWB financing agreements is a "measure taken to comply" within the meaning of Article 21.5 of the DSU and that they are therefore outside the scope of this compliance proceeding.[21] The European Union argues that in determining whether there is a "close nexus" between a challenged (undeclared) measure, the measures at issue in the original proceeding, and the recommendations and rulings of the DSB in the original proceeding, it must first be established that the undeclared measure can be linked to a "common overarching measure" at issue before the original panel, and then whether there is a sufficiently close nexus in terms of timing, nature and effects, between the undeclared measure, the measures at issue in the original proceeding, and the recommendations and rulings of the DSB.[22] According to the European Union, the United States has failed to satisfy both of these requirements with regard to the LA/MSF for the A350XWB. Moreover, the European Union argues that the United States has failed to establish that the LA/MSF for the A350XWB confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.[23] The European Union also disputes the United States' claims that LA/MSF for the A350XWB is contingent in fact on export performance contrary to Article 3.1(a) or an import substitution subsidy contrary to Article 3.1(b) of the SCM Agreement.[24]

9. Based on the arguments presented by the parties in their first written submissions, we consider it likely that the Panel will have to evaluate the nature, timing, and effects of the provision of LA/MSF by France, Germany, Spain and the United Kingdom in connection with the A350XWB in order to address the European Union's preliminary ruling request that the Panel find that the financing agreements for the A350XWB are outside the scope of this proceeding.[25] Moreover, should the Panel reach the United States' substantive claims with respect to LA/MSF for the A350XWB, information with respect to the nature, timing and substance of the provision of LA/MSF in connection with the A350XWB will be essential in determining whether any subsidies exist, the nature, magnitude, and effects of such subsidies, and whether any such subsidies are in fact contingent on export performance or import substitution subsidies.[26]

10. The European Union argues that for the Panel to request the information the subject of the United States' Article 13 request at this stage in the proceeding would be inconsistent with the principles regarding burden of proof and the prohibition on a panel making a case for a party. The European Union submits that the Panel will only be in a position to know whether it is necessary to clarify contradictory facts that may be relevant to addressing the European Union's preliminary

[19] United States' first written submission, para. 117.
[20] United States' first written submission, paras. 189-209, 230-239.
[21] European Union's first written submission, para. 57.
[22] European Union's first written submission, paras. 57-92.
[23] European Union's first written submission, paras. 368-379. The European Union asserts that the United States has failed to offer any evidence that LA/MSF for the A350XWB has been provided at rates that are below market, and that its argument that "unsecured, success-dependent, and back-loaded" financing is not available at market is contradicted by the evidence.
[24] European Union's first written submission, paras. 421-430, 471-475.
[25] See, United States' first written submission, paras. 139-165; European Union's first written submission, paras. 57-113. We note the European Union's position that, as the responding party, it has advanced no "claims" in this dispute. However, in raising jurisdictional objections to the Panel's consideration of financing for the A350XWB, the European Union has made a number of assertions concerning the nature and timing of that financing, which the Panel will have to resolve, which requires it to have an adequate evidentiary basis for its analysis.
[26] We note in this context that the underlying documents concerning the grant of LA/MSF for each of the models of Airbus aircraft at issue in the original proceeding, including *inter alia* business cases, contracts, schedules, annexes, and intergovernmental agreements, were essential in the Panel's evaluation of the United States' subsidy claims in the original dispute. See, e.g., Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.367-7.380 and 7.403-7.431 and associated footnotes. Some of this information was made available in the Annex V process in that dispute, but additional documents were submitted as exhibits by the European Communities in its submissions and in response to requests made in questions from the Panel. Panel Report, *EC and certain member States – Large Civil Aircraft*, footnotes 2436, 2517, 2533.

ruling request after the parties have submitted their rebuttal submissions.[27] However, given the nature of the issues concerning the alleged provision of LA/MSF in respect of the A350XWB which are before the Panel, and the absence from the record of the key information that is likely to be of direct relevance to the Panel's evaluation of those issues, it is already clear to us that we will need to carefully examine the actual LA/MSF agreements, project appraisals and business cases pertaining to the A350XWB in order to carry out our obligation under Article 11 of the DSU to make an objective assessment of the matter before us.[28] We consider the issues to be sufficiently delineated on the basis of the parties' first written submissions and that it is efficient and appropriate for the Panel to request those documents at this stage of the proceeding.[29] We regard the due process interests of both parties as being best served by the Panel requesting the information prior to the parties' respective rebuttal submissions, so that both parties have the opportunity to refer to that information in their rebuttals, at the meeting with the Panel, and in any written answers to questions that may also be put to them by the Panel.[30]

11. We are not persuaded by the European Union's arguments that to request the information at this point in the proceeding would result in unfairness to the European Union.[31] The European Union characterizes the United States' request that the Panel exercise its authority to request information pursuant to Article 13 of the DSU as an untimely request for a preliminary ruling, or preliminary "decision". However, as we have previously indicated, we do not share this understanding of the United States' request.[32] Requests for preliminary rulings ask a panel to resolve certain matters in dispute between the parties definitively prior to addressing other matters in dispute. By contrast, consideration of a request from a party that the Panel exercise its authority under Article 13 of the DSU involves a decision by the Panel as to whether the *Panel itself* will do something; namely, seek particular information which it deems appropriate and necessary to its resolution of matters in dispute - including preliminary matters. The United States has clarified that it does not seek a preliminary ruling on whether the European Union has met its burden of proof. We see no basis for treating the Article 13 request made by the United States as a request for a preliminary ruling and no basis for the conclusion that the United States' request is untimely in light of paragraph 14 of the Working Procedures adopted in this dispute.[33]

12. The European Union also characterizes the United States' Article 13 request as a unilateral attempt by the United States to amend the agreed timetable by pre-empting the Panel's plan to put questions to the parties at the stage of preparation for the substantive meeting with the parties.[34] We do not agree. Such a characterization incorrectly presumes that a panel's authority

[27] EU Comments, 23 August 2012, para. 16.

[28] While parties carry the burden of adducing evidence in support of their claims and defences, there are circumstances in which a party cannot reasonably be expected to meet that burden by adducing all relevant evidence required to make out its case; notably, when the information is in the exclusive possession of the opposing or a third party. As the Appellate Body has recognized, in such circumstances, a panel may be unable to make an objective assessment of the matter without exercising its authority under Article 13 of the DSU to seek out that information; Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1139-1140.

[29] We note that while panels have delayed making requests under Article 13 when asked to do so at an early stage of the proceedings, before written submissions have been filed, in this case, the first written submissions have been filed, and the issues in dispute have been clarified by the parties to the extent that it is clear to the Panel that it will not be able to address those issues without particular information which is not currently on the record. Due process and the "prompt settlement of situations" called for in Article 3 of the DSU do not require a panel to delay seeking information merely because it has been prompted to consider the question by a party, rather than coming to the issue on its own. In this regard, even assuming that the United States' request were somehow untimely, we do not consider that this alone would warrant declining to exercise our authority to seek information pursuant to Article 13.

[30] The European Union argues that the Panel should first rule on its request for a preliminary ruling that LA/MSF is outside the scope of this proceeding, thereby rendering the United States' Article 13 request moot; EU Comments, 9 August 2012, para. 111. However, in order to discharge our obligation under Article 11 of the DSU, the Panel will require certain information in order to address the European Union's preliminary ruling request. It is therefore logical and necessary to request this information prior to evaluating the request for a preliminary ruling.

[31] EU Comments, 9 August 2012, paras. 36 and 43; EU Comments, 23 August 2012, para. 6.

[32] Communication of the Panel to the Parties, dated 24 July 2012, page 2.

[33] Moreover, even if the United States' request were considered to be untimely, we would not consider it appropriate to deny it solely for that reason. In our view, and in light of the Appellate Body's decision in *US – Large Civil Aircraft (2nd Complaint)*, a panel must take a request that it seek information under Article 13 of the DSU seriously, and consider the substantive question of whether it can make a decision consistently with Article 11 of the DSU in the absence of the requested information before denying such a request.

[34] EU Comments, 9 August 2012, paras. 36-43.

to seek information pursuant to Article 13 of the DSU is exercised through its ability to put questions to the parties. The authority vested in panels by Article 13 of the DSU is independent of the ability of panels to put questions to the parties, which is provided for in paragraph 8 of the Appendix 3 Working Procedures.[35] That the Panel indicated its intention to put questions to the parties prior to the substantive meeting does not limit whether or when it may seek information pursuant to Article 13 of the DSU.[36] Conversely, whether or not a panel seeks information pursuant to Article 13 of the DSU does not affect the panel's ability to put questions to the parties at any time.

13. Accordingly, pursuant to the authority provided us under Article 13 of the DSU we hereby request the European Union to provide the following documents to the Panel:

a. Agreements between the governments of France, Germany, Spain and the United Kingdom and EADS/Airbus (including any amendments, schedules, annexes and exhibits thereto), related to the development and/or financing of the A350XWB;

b. Related project appraisals by the governments of France, Germany, Spain and the United Kingdom related to the development and/or financing of the A350XWB;

c. Business cases provided by EADS/Airbus to the governments of France, Germany, Spain and the United Kingdom, or to any of Airbus' risk-sharing suppliers, regarding the A350XWB;

d. Documentation of any loans extended to EADS/Airbus by the *Kreditanstalt für Wiederaufbau* (including any amendments, schedules, annexes and exhibits thereto) for the development and/or financing of the A350XWB, and of disbursements pursuant to such loans for 2009, 2010, 2011 and 2012.

14. We consider this information to be necessary to ensure a proper adjudication of the relevant claims, including the European Union's request for preliminary rulings regarding the scope of this compliance proceeding.[37] This information is not publicly available and we see no means that

[35] Paragraph 8 of the Appendix 3 Working Procedures provides:

> The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

This provision is replicated in paragraph 8 of the Working Procedures adopted by the Panel in this proceeding.

[36] We note in this regard that the Panel indicated, in a communication conveying the draft timetable to the parties, that, "although not specified in the draft timetable, the Panel plans to send questions to the parties in advance of the meeting with the parties in order to assist the parties in preparing for the meeting." This statement does not suggest that the Panel was limiting its own authority to put questions to the parties "at any time" as provided for in the Working Procedures. Still less does it suggest that the Panel had determined to refrain from seeking information pursuant to its authority under Article 13 of the DSU until such time as it had put questions to the parties. Moreover, even had the Panel indicated such an intention, it has the authority to alter the timetable, and may do so of its own volition as circumstances may warrant (including as a result of an unrelated action or request of a party), or if directly requested to do so by a party. As the Appellate Body in *US – Shrimp* stated:

> It is also pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties to the dispute. … The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to the facts.

Appellate Body Report, *US – Shrimp*, paras. 105-106.

[37] The Panel's request is narrower in scope than the United States' Article 13 request. We do not regard our request as being unreasonably broad in scope or unclear. We note that the European Union refers in several places in its first written submission to the "four A350XWB financing agreements" and also refers to the MSF loan extended by KfW to Airbus Operations GmbH, implying knowledge of the documents in question. See for example, European Union's first written submission, paras. 94, 95, 102, 103, 105, 107-109, 111,112 (referring to the four A350 XWB financing agreements) and 367 (referring to the MSF loan extended by KfW to Airbus Operations GmbH). Moreover, given the background of this proceeding, and the arguments and conclusions in the original Panel Report, we consider that the meaning of terms such as "EADS/Airbus" and "Airbus' risk-sharing suppliers" is sufficiently clear to allow the European Union to determine where the documents in question may be found.

might be used to procure it other than seeking it in accordance with Article 13 of the DSU.[38] Even if the information in question is not now physically within the possession of the European Union, it is in the possession of the relevant EU member States, or private parties in those member States, whose interests are being represented in this proceeding by the European Union.[39]

15. In the original proceeding, the Panel had the LA/MSF and other financing agreements, related project appraisals, and business cases for the Airbus aircraft at issue. In that proceeding, the DSB initiated an Annex V procedure at the United States' request in which the European Communities was asked, in the first instance, 352 questions by the United States and given six weeks to respond. Of those questions, 37 related to information concerning LA/MSF, and those questions covered all grants of LA/MSF since 1969 for all models of Airbus aircraft, and associated documentation. Given that the information which the Panel now seeks is much more limited in scope, we consider that a period of three weeks is adequate time to allow the European Union to submit the information. The European Union is therefore requested to provide the above information by the close of business on 25 September 2012.[40]

16. The European Union raises two further issues that we wish to address. The first is the concern expressed by the European Union as to the United States' apparent failure to destroy EU HSBI and BCI documents from the original proceeding as the European Union alleges it was required to do.[41] The European Union requests the Panel to resolve this issue before requesting any further confidential information from the European Union. The United States argues that there is no basis to criticize it for retaining BCI and HSBI that it was never instructed to destroy.[42]

17. Paragraph 57 of the Additional Working Procedures adopted in the original proceeding requires the destruction or return of documents containing BCI and HSBI after the Conclusion of the Panel Process as defined in paragraphs 3(a), (c), or (d), but makes no reference to paragraph 3(b). Paragraph 3(b) of those Procedures defines the "Conclusion of the Panel Process" as occurring when a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, as happened in the original proceeding. We recall that paragraph 58 of the Additional Working Procedures adopted in the original proceeding provides as follows:

> After the Conclusion of the Panel Process as defined in paragraph 3(b), the Panel will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible.

[38] It appears that the United States sought to procure the information in question by asking for it during consultations. The European Union has not indicated why the information requested during the consultations was not provided and there is no basis for the Panel to conclude that the failure to produce the information was justified, or that we are prevented from seeking that information under Article 13 of the DSU. Additionally, irrespective of whether the United States was entitled to request initiation of an Annex V procedure for this proceeding (an issue we need not decide), we note that paragraph 9 of Annex V expressly provides that nothing in the Annex V information-gathering process "shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process." See also Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, footnote 1117. We see no basis to require a WTO Member to resort to municipal law processes to procure information for purposes of WTO dispute settlement, as suggested by the European Union, even assuming such processes would be available and effective, something which we cannot assess. We emphasize that we seek the requested information because we consider it appropriate to do so in light of our responsibilities in this dispute.

[39] We make no conclusions as to whether the European Union formally "represents" its member States, or any commercial stakeholders with interests at stake in this dispute. However, as in the original proceeding, it is the European Union which is appearing before the Panel and making submissions, not its individual member States. See, Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.169-7.177 (Decision on Proper Respondent). We recall that in the original proceeding, the European Communities was able to produce documents of the nature and type requested in this proceeding, both in the Annex V process and in response to requests from the Panel.

[40] We also note that original language documents in French, Spanish and English were submitted in the original proceeding without translation in many instances. As regards documents in German, which is not a working language of the WTO, the Panel is prepared to address specific concerns identified by the European Union regarding translation of German-language documents by this date.

[41] European Union's first written submission, para. 48, EU Comments, 9 August 2012, para. 110; EU Comments, 23 August 2012, paras. 32-38.

[42] US Reply, 16 August 2012, para 25.

The question of destruction or return of documents containing BCI and HSBI after adoption of Panel and Appellate Body reports following the conclusion of the appellate process is not explicitly addressed in the Additional Working Procedures adopted by the Panel in the original dispute.

18. We therefore request the United States to respond to the European Union's allegations in paragraph 48 of its first written submission, with specific reference to the materials cited at footnotes 40-43, and the terms of the Additional Working Procedures adopted in the original dispute. We will then invite the European Union to comment, if it so wishes, on the United States' response. In each case, the Panel would like the parties to suggest what actions, if any, this Panel should now take in respect of the BCI/HSBI from the original proceeding, including with respect to any evidence submitted in this compliance proceeding which was BCI/HSBI in the original proceeding.

19. However, we regard the issue of whether BCI/HSBI material submitted in the original dispute has been dealt with in conformity with the Additional Working Procedures in that proceeding to be separate from the question whether it is appropriate for this Panel to request information pursuant to Article 13 of the DSU for purposes of this proceeding. There is no allegation that the United States has disclosed confidential information to persons not authorized to view it, which might implicate the confidentiality of any new information submitted at this stage.[43] We consider allegations of non-compliance with the procedures put in place to protect the confidentiality of certain information in the original dispute to be extremely serious. However, we do not consider it necessary to resolve whether the United States failed to destroy confidential information in the record of the original dispute in violation of an obligation to do so before seeking information from the European Union information which we consider necessary for us to discharge our obligations in this proceeding.

20. The second issue raised by the European Union is its request that, should the Panel request the European Union to provide information pursuant to Article 13 of the DSU at this stage of the proceeding, it equally and within the same timeframe, should request the United States to produce certain information concerning the financing, and/or development of the Boeing 787 and other Boeing large civil aircraft, including business cases relating to those aircraft.[44] The European Union submits that such documents are critical for the Panel to conduct a thorough review of the claims made by the United States, which involve unsupported assertions regarding the Boeing 787 and other Boeing aircraft and the circumstances in which they were financed, developed, produced and marketed. The United States asserts that there is no substantive need for the information in question, asserting that it raises no claims regarding financing to Boeing, and that the European Union's arguments regarding findings of subsidization in *US – Large Civil Aircraft (2nd Complaint)* do not require additional evidence for the Panel to evaluate them.[45]

21. We understand that the information requested by the European Union relates to alleged subsidization of Boeing LCA, and is sought in connection with the European Union's arguments concerning "non-subsidized like product" in Article 6.4 of the SCM Agreement. Unlike the situation before us with respect to the United States' allegations concerning the financing of the A350XWB, and the European Union's response to those arguments, the United States has not yet had an opportunity to respond to the European Union's arguments concerning the alleged subsidization of Boeing LCA. Presumably it will do so in its rebuttal submission, at which point it would have the opportunity to submit relevant documents. In addition, we recall that in the original dispute, the Panel concluded that Article 6.4 is not the exclusive means for demonstrating displacement or impedance of exports for purposes of a finding of serious prejudice under Articles 6.3(b) of the SCM Agreement. The United States did not rely on Article 6.4, and the Panel therefore did not address the question whether there was a "non-subsidized like product" and made no determinations in that regard. Thus, the Panel rejected the arguments of the European Communities that subsidization of Boeing LCA precluded a finding of serious prejudice in the form of displacement or impedance of exports.[46] That decision by the Panel was not appealed, and was therefore adopted by the DSB. While acknowledging the lack of Appellate Body review in its first

[43] Notwithstanding its assertion concerning the United States' alleged failure to comply with the Additional Working Procedures adopted in the original proceeding, the European Union submitted BCI and HSBI in connection with its first written submission in this proceeding.

[44] EU Comments, 9 August 2012, paras. 116-117.

[45] US Reply, 16 August 2012, para. 30.

[46] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1764-7.1771, 7.1798-7.1800.

written submission[47], the European Union argues that in light of the decision in *US – Large Civil Aircraft (2nd Complaint)*, a multilateral determination that the "like products" to which the United States refers in this case are subsidized, the situation has changed and that the Panel should therefore consider this matter.[48]

22. However, it is not yet clear to us that the Panel will have to make a substantive determination as to whether the 787, or any other Boeing LCA, benefits from subsidies and we consider that it is premature to request information relevant to an issue which it is not apparent the Panel will have to address.[49] In these circumstances, because we cannot at this juncture conclude that the requested information is likely to be necessary to ensure due process and a proper adjudication of the relevant claim, we decline to seek the information requested by the European Union at this stage of the proceeding.[50]

[47] European Union's first written submission, para. 656,

[48] European Union's first written submission, para. 658.

[49] Assuming the Panel were to accept the European Union's argument and consider this matter, it would seem that the determination in *US – Large Civil Aircraft (2nd Complaint)* would be binding on the question of subsidization of at least some models of Boeing LCA. In this regard, we note that the European Communities made similar arguments concerning subsidization of Boeing LCA having been determined on a multilateral basis in WTO dispute settlement, referring to "tens of millions of dollars" received by Boeing pursuant to prohibited export subsidies applied to LCA. Panel Report, *EC and certain member States – Large Civil Aircraft*, footnote 5262. On the other hand, assuming the Panel were to conclude that the United States is once again not proceeding under Article 6.4 of the SCM Agreement, the question of a "non-subsidized like product" would not be a matter necessitating resolution, as it was not in the original dispute.

[50] We also note the breadth of the European Union's request, which covers all Boeing large civil aircraft, and is unlimited in time.

ANNEX E-2

THE EUROPEAN UNION'S ARTICLE 13 REQUEST OF 23 NOVEMBER 2012

(Panel ruling issued on 14 December 2012)

1 Introduction

1. By letter dated 23 November 2012, the European Union requested the Panel to exercise its authority under Article 13 of the Understanding on Rules and Procedures governing the Settlement of Disputes ("DSU") to seek information from the United States.[1] The United States responded to the European Union's request on 29 November 2011.[2] The European Union submitted its reply to the United States response on 6 December 2012.[3]

2. The Panel has carefully considered all the arguments made by the parties in the foregoing exchanges as well as all relevant claims and arguments made in the United States' first and second written submissions and the European Union's first written submission. The Panel has concluded that the requested information is not necessary for its evaluation of the United States' allegations of lost sales and displacement. The Panel therefore denies the European Union's Article 13 request and declines to seek the information requested by the European Union at this stage of the proceeding.

2 Article 13 of the DSU

3. Article 13.1 of the DSU provides:

> "Each panel shall have the right to seek information and technical advice from any individual or body which it seems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information."

4. Article 13.1 makes a grant of discretionary authority to panels enabling them to seek information from any relevant source, as they deem appropriate in a particular case.[4] The Appellate Body has stated that Article 13.1 imposes no conditions on the exercise of this discretionary authority.[5] Moreover, in *Canada – Aircraft*, the Appellate Body observed that there is nothing in either the DSU or the SCM Agreement to support the assumption that a Member's duty to respond promptly and fully to a panel's request for information arises only after the opposing party to the dispute has established a *prima facie* case that its complaint or defence is meritorious.[6] As the Appellate Body stated:

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[1] Letter of the European Union to Chairman of the Panel, dated 23 November 2012 (hereafter, "EU Article 13 request").

[2] Letter of the United States to the Chairman of the Panel, dated 29 November 2012 (hereafter "US response". The Panel had previously given the United States until 4 December 2012 to respond, and allowed for a reply from the European Union no later than 11 December. Communication from the Panel to the Parties, dated 28 November 2012. In light of the early response from the United States, and having been requested by the United States to do so, the Panel amended the deadline for the European Union to reply to 6 December 2012. Communication from the Panel to the Parties, dated 30 November 2012.

[3] European Union, Comments on the US Comments on EU request for Article 13.1 Questions and EU Request to fix the new time-limit for the filing of the EU Second Written Submission at 31 January 2013, 6 December 2012 (hereafter, "EU Comments, 6 December 2012").

[4] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84; Appellate Body Report, *EC – Hormones*, para. 147; Appellate Body Report, *US – Shrimp*, para. 106.

[5] Appellate Body Report, *Canada – Aircraft*, para. 185.

[6] Appellate Body Report, *Canada – Aircraft*, para. 192.

> "To the contrary, a panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence."[7]

5. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body stated that in considering whether to exercise its authority under Article 13 of the DSU, particularly where a party has made an explicit request that it do so, a panel should have regard to considerations such as what information is needed to complete the record, whose possession it lies within, what other reasonable means might be used to procure it, why it has not been produced, whether it is fair to request the party in possession of the information to submit it, and whether the information or evidence in question is likely to be necessary to ensure due process and a proper adjudication of the relevant claim(s).[8]

3 Parties' Arguments with respect to the information request

6. The European Union has requested that the Panel seek information which, it asserts generally, is necessary for the Panel to evaluate the United States' claims of lost sales and displacement. Specifically, according to the European Union,

a. the requested information on the pace of development and anticipated entry into service dates for Boeing 787 aircraft is necessary for the Panel's objective assessment of the US lost sales and displacement claims, as it will help the Panel assess whether there exist any disincentives for airlines seeking near-term delivery of an aircraft to purchase 787 aircraft, and to take those considerations into account when assessing the US lost sales and displacement claims;

b. the requested information on entry into service for 737MAX aircraft is necessary to enable the Panel, in assessing US lost sales and displacement claims, to take into account uncertainty surrounding first delivery positions for Boeing's 737 MAX programme, and whether that uncertainty functions as a disincentive for airlines to purchase these aircraft;

c. the requested information on possible 787 delivery dates is necessary for the Panel to take into account Boeing's ability to deliver 787 aircraft and the pace of those deliveries, which will help the Panel assess whether there exist any disincentives for airlines seeking near-term delivery of an aircraft to purchase 787 aircraft, and to take those considerations into account when assessing the US lost sales and displacement claims;

d. the requested information on possible 737MAX delivery dates is necessary for the Panel to take into account Boeing's alleged inability to deliver 737 MAX aircraft, and the pace of those deliveries, which will help the Panel assess whether there exist any disincentives for airlines seeking delivery of an aircraft to purchase 737 MAX aircraft and to take those considerations into account when assessing the US lost sales and displacement claims;

e. the requested documentation of Boeing's final offers to AirAsiaX, AirAsia, Asiana, and Cebu Pacific Air is necessary for the Panel's objective assessment of the US lost sale claims to these carriers involving A320neo aircraft and A350XWB aircraft, which would appear to turn in substantial part on the availability of delivery positions and other terms of Boeing's final offer;

f. the requested documentation of Boeing's final offer to Malaysia Airlines is necessary for the Panel's objective assessment of the US lost sale claim for Malaysia Airlines involving the A330-200F, which would appear to turn in substantial part on the quality of the 767 Freighter aircraft and other terms of Boeing's final offer;

[7] Appellate Body Report, *Canada – Aircraft*, para. 192 (original emphasis).
[8] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1140.

g. the requested documentation of Boeing's final offer to Cathay Pacific is necessary for the Panel's objective assessment of the US lost sale claim involving A350XWB aircraft, which would appear to turn in substantial part on Boeing's ability to actually offer for sale the aircraft allegedly offered, and the terms of Boeing's offer;

h. the requested extracts from the Boeing purchase agreement with Ethiopian Airlines for the 787 is necessary for the Panel's objective assessment of the US lost sale claim for Ethiopian Airlines, which would appear to turn in substantial part on the 787 model(s) it initially ordered in 2005;

i. the requested Boeing presentations provided to potential customers outlining Boeing's views concerning the strengths, weaknesses, critical issues and strategic issues for its proposed aircraft for a number of its lost sales claims are necessary because the United States has provided such documentation for some but not all of its lost sales claims. The information for each of the orders alleged to be lost sales is necessary to enable the Panel to undertake an objective assessment of the US claims, which will require it to assess why the United States has chosen to withhold this document for certain sales covered by its lost sales claims, including to assess whether the documents reveal non-attribution factors;

j. the requested information regarding Boeing's 2012 standard marketing presentations for each of its 767, 777 and 747-8 is necessary for the Panel to objectively assess the alleged competition between Airbus and Boeing freighter aircraft; and

k. the requested presentations made to Boeing's Board of Directors during 2011 and 2012 addressing the possibility of the launch of a stretched version of the 787 and an improved version of the 777 are necessary to enable the Panel to objectively assess the US lost sales claims in light of US allegations, in the context of a number of its lost sales claims, that Boeing offered a stretched version of the 787 or an improved version of the 777, without proffering other information that would help the Panel assess whether Boeing had decided for reasons other than the alleged subsidies to defer the launch of these aircraft.[9]

7. The United States does not consider the information to be relevant to its arguments relating to lost sales and displacement in the second written submission, and asserts that the European Union does not need the information to argue that the United States has failed to make a *prima facie* case with respect to its claims.[10] Moreover, the United States contends that it is inappropriate to use Article 13 to provide information to enable the European Union to make its own case. In addition, the United States considers that it is late in the proceedings for this request, given that the United States' claims of lost sales and displacement were set out in its first written submission, filed in May, and asserts that the request is an effort to delay these proceedings.

4 Information requested with respect to the United States' allegations of lost sales

8. The Appellate Body has stated, with respect to what constitutes a "lost" sale within the meaning of Article 6.3(c) of the SCM Agreement:

> "We consider that a sale that is "lost" is one that a supplier "failed to obtain". We further understand lost sales to be a relational concept that includes consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales."[11]

[9] EU Article 13 request, Appendix.

[10] The United States did not respond individually to the European Union's questions and justifications, but did indicate that it would provide detailed comments should the Panel request it to do so, asking that any such process not result in any further delay to this proceeding. US Response, page 4.

[11] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1214, *quoting New Shorter Oxford English Dictionary*, p. 1632. *See also*, Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1052.

> "{A} lost sales claim may be supported with evidence of lost sales taking place throughout a geographical and product market, or with evidence of particular sales campaigns occurring within that market. "[12]

Lost sales are "significant" under Article 6.3(c) if they are "important, notable or consequential."[13]

9. In terms of possible approaches for analyzing a claim of significant lost sales, the Appellate Body observed that:

> "While a two-step approach to the assessment of lost sales is permissible, in our view, the most appropriate approach to assess whether lost sales are the *effect* of the challenged subsidy is through a unitary counterfactual analysis. This would involve a comparison of the sales actually made by the competing firm(s) of the complaining Member with a counterfactual scenario in which the firm(s) of the respondent Member would not have received the challenged subsidies. There would be lost sales where the counterfactual analysis shows that, in the absence of the challenged subsidy, sales won by the subsidized firm(s) of the respondent Member would have been made instead by the competing firm(s) of the complaining Member."[14]

10. In *EC and certain member States – Large Civil Aircraft,* the Appellate Body considered how the concept of a "lost" sale applies under the conditions of competition in the LCA industry when it rejected the European Union's challenge to the original Panel's finding that Boeing lost the A380 launch order placed by Emirates Airlines:

> "Given the conditions of competition in the LCA industry, it was not necessary for Boeing to have made a formal offer to Emirates Airlines – or "turn up" to use the European Union's expression – for the sales to qualify as sales that Boeing "failed to obtain." As the Panel explained, even in the absence of a formal offer from Boeing, Emirates could be expected to have considered the products manufactured by Boeing before making its purchase decision."[15]

11. In the context of an analysis of the alleged lost sales in accordance with the above elements, we fail to see the relevance of the information sought by the European Union to the question whether the effect of alleged subsidies to Airbus LCA was lost sales of competing Boeing LCA. The European Union does not dispute that Boeing "failed to obtain" the sales in question, or that Airbus was successful in winning the relevant sales. Nor does the European Union dispute the significance of the sales allegedly lost, in the sense of their importance to Boeing. Arguably, the European Union appears to be seeking the information in order to make the point that in each of the specific alleged lost sales at issue, potential entry into service or delivery dates, or details concerning the features and qualities of the particular Boeing LCA being offered, or the specific possibilities with respect to potential to-be-developed Boeing LCA offered, might have constituted a disincentive to ordering from Boeing. However, even assuming that this information might demonstrate weaknesses in the Boeing offer in a particular sales campaign, it is difficult, in the light of the interpretation of "lost sales" and the analytical framework outlined above, to see how this might undermine the conclusion that the sales at issue were lost by Boeing.[16]

12. The question for the Panel then is whether the United States can establish that any of the allegedly lost sales were caused by the alleged subsidies. In particular, the question before the Panel is whether, in the absence of the alleged subsidies, the sales made by Airbus would have been made by Boeing. Our understanding is that the basic premise of the United States' claims of lost sales caused by subsidies is that, as the Appellate Body concluded with respect to the lost sales found in the original dispute, absent the subsidies, Airbus would not have been able to offer

[12] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1230.
[13] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1052.
[14] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1220.
[15] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1223.
[16] The European Union does argue that Boeing and Airbus LCA do not compete in the three product markets identified by the United States, and thus that in some of the alleged lost sales, the LCA offered by Boeing were not competitive, and thus that the sale cannot be considered to have been lost. However, this line of argument does not rest on an evaluation of the specifics of any given sales campaign, but on an evaluation of the relevant products and competition. Moreover, we note that the European Union has not argued that, or how, the requested information is relevant to such an analysis.

the LCA it did offer in these sales campaigns, and thus, as the only other competitor in the market, Boeing[17] would have made those sales.[18] Since this counterfactual analysis rests on the effect of subsidies on the introduction of Airbus LCA to the market, we fail to see the relevance of the requested information to the analysis of lost sales in line with the considerations set out by the Appellate Body. Even assuming for purposes of this discussion that the information requested might relate to "non-attribution" factors, we fail to see how this would affect the consideration of an argument that, in the absence of subsidies, Airbus would not have been able to offer the LCA that were ultimately purchased by the customers involved in the alleged lost sales, and thus the US LCA industry would not have lost those sales. Finally, we fail to see the relevance to our task of evaluating the United States' lost sales claims of information concerning Boeing's own views concerning the strengths, weaknesses, critical issues and strategic issues for proposed aircraft, 2012 standard Boeing marketing presentations, and presentations to Boeing's Board of Directors in 2011 and 2012 concerning the possible launch of variant aircraft to an evaluation of lost sales in line with the considerations set out by the Appellate Body. We therefore conclude that the information sought by the European Union is not necessary to the Panel's proper evaluation of the United States' allegations of lost sales.

5 Information requested with respect to the United States' allegations of displacement

13. With respect to the "displacement" of imports or exports of the like product, the Appellate Body stated in *EC and certain member States – Large Civil Aircraft* that:

> "{W}e understand the term displacement to connote that there is a substitution effect between the subsidized product and the like product of the complaining Member. This means that displacement arises under subparagraph (a) of Article 6.3 where the effect of the subsidy is that imports of a like product of the complaining Member are substituted by the subsidized product in the market of the subsidizing Member. Similarly, under subparagraph (b), displacement arises where exports of the like product of the complaining Member are substituted in a third country market by exports of the subsidized product."[19]

14. The Appellate Body explained that "where a complainant puts forward a case based on the existence of displacement as a directly observable phenomenon and the panel opts to examine it under a two-step approach, as was done in this dispute, displacement arises under Article 6.3(a) of the SCM Agreement where imports of a like product of the complaining Member are declining in the market of the subsidizing Member, and are being substituted by the subsidized product."[20] The same standard would apply for Article 6.3(b) according to the Appellate Body: "displacement arises where exports of the like product of the complaining Member are declining in the third country market concerned, and are being substituted by exports of the subsidized product."[21] The Appellate Body also noted, regarding the elements of displacement, that displacement must be "discernible," the identification of displacement "should focus on trends in the markets, looking at both volumes and market shares," and the trend has to be "clearly identifiable and an assessment based on a static comparison of the situation of the subsidized product and the like product at the beginning and at the end of the reference period would be inadequate."[22]

15. In the context of an analysis of displacement based on the foregoing elements, we fail to see the relevance of information concerning anticipated dates of entry into service of Boeing LCA or delivery positions to the question whether the effect of subsidies to Airbus LCA was displacement of competing Boeing LCA in certain geographic markets. A finding of displacement would be based on an evaluation of trends in the specified geographic markets based on the number of aircraft actually delivered during a relevant reference period. Similarly, since an evaluation of

[17] Or, in the event of a US LCA industry comprising Boeing and competitor(s) (one of the other counterfactual scenarios posited by the Panel in the original dispute), by the US LCA industry.

[18] The European Union refers, in the context of alleged lost sales in the single-aisle market, to the potential market entry of other aircraft manufacturers (specifically, Bombardier). However, there is no allegation or evidence that any other aircraft manufacturer was involved in any of the sales campaigns at issue in the United States' lost sales allegations, much less any argument or evidence to suggest that any such manufacturer would have obtained any sales not made by Airbus, rather than Boeing.

[19] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1160.

[20] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1170.

[21] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1170.

[22] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1170-71.

displacement is based on aggregated data for competing products in a particular geographical market, we fail to see the relevance of specific aspects of the competition between LCA manufacturers in any given sales campaign to the determination. Again, we understand the United States' argument to be essentially that, in the absence of the subsidies, Airbus would not have had the LCA it was able to deliver, and thus Airbus LCA would not have displaced exports or imports of Boeing (or US LCA industry) aircraft. We fail to see how consideration of the requested information concerning delivery positions and entry into service dates would affect our evaluation of the United States' claims of displacement in line with the considerations set out by the Appellate Body. We therefore conclude that the information sought by the European Union is not necessary to the Panel's proper evaluation of the United States' allegations of displacement.

6 Other issues

16. The European Union's arguments indicate that, in its view, the United States should have put the requested information on the record with its second written submission, having failed to do so with its first written submission. The United States clearly considers the information not relevant to support its claims and arguments, and that therefore there was no reason to submit it. We see no basis for a conclusion that the United States should have somehow predicted that the European Union might wish to raise arguments it had not made in its first written submission, and should have submitted, of its own volition, evidence that might support such arguments with its second written submission.

17. The United States argues that, to the extent the European Union argues that the United States has failed to make a *prima facie* case, additional information is not necessary to enable the European Union to respond to the United States' claims. The United States points out that, with the exception of one question which refers to an alleged lost sale discussed in the United States' second written submission, all of the information requested by the European Union relates to lost sales and displacement claims and arguments set out in the United States' first written submission, and that the European Union responded to those claims and arguments in its first written submission with no indication that it was lacking necessary information to do so. The European Union justifies the timing of its request on the basis that the need for the information requested only became apparent during the process of reviewing the US second written submission, filed on 19 October 2012. The European Union implies that this process prevented it from realizing earlier the lack of necessary information on the record, and notes that it is still in the process of reviewing the United States' second written submission.[23] The European Union contends that the information is needed to ensure it has an adequate opportunity to prepare its own second written submission.

18. We consider it noteworthy that the European Union responded fully to the United States' first written submission, in which the facts and arguments supporting the United States' lost sales and displacement claims were set out, and for which supporting evidence was submitted, without any indication that additional evidence might be necessary for it to rebut the United States' claims. Indeed, the European Union's first line of argument is that the United States failed to make a *prima facie* case of, *inter alia*, lost sales and displacement, an argument which does not require additional evidentiary support. There is very little further elaboration with respect to those claims in the United States' second written submission, and certainly nothing that would prompt a need for additional information, as requested by the European Union, that did not previously exist. In our view, the requested information is at most relevant to possible European Union's arguments seeking to demonstrate that the alleged lost sales and displacement were not caused by subsidies, but by other factors.[24] We do not consider that the European Union was entitled to wait until after the United States filed it second written submission, which did not elaborate on the claims, arguments, and evidence concerning lost sales and displacement, to request a broad array of information of little relevance to our evaluation of the claims and arguments put forward by the

[23] The European Union asserts that the US second written submission is "a very substantial document" and includes numerous exhibits, some of which are "lengthy and substantial", as well as alleging that the submission filed on 19 October "transpired to be the preliminary version" of the US second written submission, requiring "detailed and sustained" exchanges of views, further versions, and the submission of revised exhibits, over a three week period. The United States, in opposing the European Union's separate request for an extension of time to file its second written submission, contends the complexity of issues, the length of the submission, and the submission of export reports as exhibits are not "unexpected development[s]."

[24] We recall that the European Union did not, for the most part, address the circumstances of the individual alleged lost sales in its first written submission, choosing to make its arguments more generally.

United States. Whether or not to grant an Article 13 request for information is governed by a panel's need for the information to evaluate the claims and arguments of the parties consistently with its obligations under Article 11 of the DSU, and as discussed above, we do not consider that such a need is the case here. In our view, at this stage of the proceeding, where the European Union, the party seeking information, has already had a full opportunity to respond to the claims and arguments of the United States, and the information requested relates almost exclusively to matters fully addressed in the first written submission of the United States, it would not be fair or appropriate for us to request information that might enable the European Union to make arguments in its rebuttal which it never sought to make in its first written submission, and which have no basis in the United States' second written submission to which it is now preparing a response.[25]

7 Conclusion

19. In light of the foregoing, it is clear to the Panel that the requested information is not likely to be necessary to ensure due process and a proper adjudication of the relevant claims. We therefore deny the European Union's request and decline to seek the information requested by the European Union at this stage of the proceeding.

[25] We stress that we do not suggest that the European Union was required to make a *prima facie* case before asking the Panel to exercise its Article 13.1 authority to request information. However, in our view, a party is generally not entitled to have the Panel seek information from the other party at this stage of the proceeding without having presented some claim, defence, or argument for the consideration of which the information is likely to be necessary for the Panel. We also note the breadth of the European Union's request.

ANNEX F

MAIN PROCEDURAL RULINGS OF THE PANEL

ANNEX F-1

THE EUROPEAN UNION'S REQUEST CONCERNING THE QUESTION WHETHER THE UNITED STATES WAS REQUIRED TO RETURN OR DESTROY MATERIALS CONTAINING BCI AND HSBI FROM THE ORIGINAL PROCEEDING

(Panel ruling issued on 24 October 2012)

1. The Panel is in receipt of the response of the United States to EU allegations regarding the handling of BCI/HSBI information, dated 5 October 2012[1], submitted in response to a request from the Panel in its communication of 4 September 2012.[2] The Panel is also in receipt of the comments of the European Union on the US Response, dated 16 October 2012[3], which were submitted in response to a communication from the Panel dated 11 October 2012.[4]

2. At issue between the parties is whether BCI/HSBI submitted in the original proceeding should have been returned or destroyed such that the United States may not refer to it for purposes of this compliance proceeding. We recall that BCI/HSBI was submitted in the original proceeding pursuant to the BCI/HSBI Procedures adopted by the panel in that proceeding.[5] The interpretive question before the Panel is whether the Original BCI/HSBI Procedures required the parties to destroy or return BCI/HSBI submitted in the original proceeding.

3. The United States considers that they do not, based on the text of paragraphs 57, 58 and the defined term "Conclusion of the Panel Process" in paragraph 3 of those procedures. Thus, according to the United States, it has not acted inconsistently with the Original BCI/HSBI Procedures in referring to such information in its first written submission in this compliance proceeding. Indeed, the United States considers that it is free to refer to BCI/HSBI submitted in the original proceeding in its other submissions to the Panel in this proceeding. The United States considers that this interpretation makes sense, because BCI/HSBI that was before the panel in the original proceeding will clearly be relevant to the compliance Panel's assessment of whether there has in fact been compliance with the recommendations and rulings of the DSB in the original proceeding.

4. The European Union considers that the United States' interpretation of the Original BCI/HSBI Procedures would mean that, because the original Panel Report was appealed, there was and is no obligation on the parties to return or destroy BCI/HSBI submitted during the original proceeding. Such an interpretation is unreasonable and contrary to the whole rationale of the procedures for protection of confidential information. The European Union requests the Panel to adopt a different interpretation of the Original BCI/HSBI Procedures, which would require the United States to have returned or destroyed BCI/HSBI submitted during the original proceeding within a reasonable period following adoption of the original Panel Report, as modified by the Appellate Body Report. The consequence of such an interpretation is that the United States is not authorized to refer to BCI/HSBI submitted during the original proceeding in this compliance proceeding (a circumstance that the European Union is exceptionally prepared to overlook with respect to the United States' first written submission only). Had the United States wanted to refer to such information in the compliance proceeding, it should have requested it from the European Union through an Annex V procedure.

5. The Original BCI/HSBI Procedures are drafted in such a way that the obligation to destroy or return BCI/HSBI documents applies depending on the way in which the panel proceeding is concluded. Where the "Conclusion of the Panel Process", as defined in paragraph 3, is through an

[1] United States' Response to EU allegations regarding the handling of BCI/HSBI information, dated 5 October 2012 (hereafter "US Response").

[2] Communication of the Panel to the Parties, 4 September 2012, para. 18.

[3] European Union's letter to the Chairman of the Panel, dated 16 October 2012 (hereafter "EU Comments").

[4] Communication of the Panel to the Parties, 11 October 2012.

[5] Additional Working Procedures for DS316 - Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information, 9 November 2007 (hereafter, "Original BCI/HSBI Procedures").

appeal to the Appellate Body, paragraph 58 applies. The plain language of paragraph 58 does not contain any obligation to destroy or return BCI/HSBI, but merely refers to the transmission to the Appellate Body of BCI/HSBI separately from the rest of the record. It is only where the panel process concludes in the manner envisaged in subparagraphs (a), (c) or (d) that there is an express obligation, as clearly set out in paragraph 57, to destroy or return BCI/HSBI.

6. The European Union argues that following the appeal, the Panel Report was adopted, as modified by the Appellate Body Report, and thus that there was a "Conclusion of the Panel Process" as described in subparagraph 3(a) at that point, and a consequent obligation to return or destroy under paragraph 57. However, paragraph 3 defines the "Conclusion of the Panel Process" as the *earliest* to occur of the situations described in subparagraphs (a) through (d). Our reading of the Original BCI/HSBI Procedures is that, when the Panel Report was adopted as modified by the Appellate Body Report, subparagraph (a) was not applicable as this was not the earliest to occur of the events in (a) through (d). Plainly, the situation in subparagraph (b), namely, notifying the DSB of an appeal pursuant to Article 16.4 of the DSU, had already occurred. We are unable to agree with the interpretation of paragraphs 3 and 57 of the Original BCI/HSBI Procedures proposed by the European Union because it requires overlooking the reference to "earliest to occur" in paragraph 3.

7. In sum, the Original BCI/HSBI Procedures do not, in our understanding, impose an obligation on the parties to destroy or return BCI/HSBI in the situation in which the Panel Report was appealed. We note that this gap is addressed in the BCI/HSBI Procedures adopted by the Panel in this compliance proceeding (the New BCI/HSBI Procedures).[6]

8. Based on the foregoing, we conclude the United States did not breach the Original BCI/HSBI Procedures in referring in its submissions in this compliance proceeding to BCI/HSBI submitted during the original proceeding. No further action is required on our part in this regard, and both parties are free to refer to BCI/HSBI submitted during the original proceeding in the context of this proceeding, provided, of course, that the New BCI/HSBI Procedures are respected.[7]

9. The United States has further requested that the Panel consider revising the New BCI/HSBI Procedures to require the parties to destroy or return BCI/HSBI submitted during the compliance proceeding only at the conclusion of subsequent proceedings (including under Article 22.6 of the DSU) in this dispute. In our view, paragraphs 63 and 65 of the New BCI/HSBI Procedures make clear that, following adoption by the DSB of an Appellate Body Report in this compliance proceeding, there is an obligation to destroy or return all documents within a period to be fixed by the Panel. Indeed, we consider that paragraph 65 of the New BCI/HSBI Procedures was revised specifically in order to establish such an obligation in view of the lack of such obligation in the Original BCI/HSBI Procedures in the situation in which the report of the compliance Panel is appealed

10. Consequently, we do not consider it necessary or appropriate to make the requested revision to the New BCI/HSBI Procedures at this time. We would encourage the parties to discuss this issue with a view to arriving at a mutually acceptable arrangement for the use of BCI/HSBI in any subsequent proceedings that arise from this dispute.

[6] Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information, dated 12 July 2012 (hereafter "New BCI/HSBI Procedures"). Paragraph 65 of the New BCI/HSBI Procedures (which is the equivalent provision to paragraph 58 of the Original BCI/HSBI Procedures) expressly provides that following adoption by the DBS of the Appellate Body report pursuant to Article 17.4 of the DSU, or a decision by the DSB by consensus not to adopt the Appellate Body report pursuant to Article 17.4 of the DSU, the provisions of, inter alia, paragraph 63 (requiring destruction or return of all material containing BCI/HSBI within a period to be fixed by the Panel) shall apply.

[7] We note that there is no allegation that the BCI or HSBI information at issue has been disclosed to any person not authorized to have access to such information in this proceeding.

ANNEX F-2

THE EUROPEAN UNION'S REQUESTS OF 28 MAY 2013 CONCERNING: (I) THE UNITED STATES' FULL HSBI VERSION APPENDIX AND HSBI EXHIBITS SUBMITTED IN CONJUNCTION WITH ITS ANSWERS TO THE PANEL'S FIRST SET OF QUESTIONS; AND (II) THE UNITED STATES' ALLEGED VIOLATIONS OF THE BCI/HSBI PROCEDURES

(Panel ruling issued on 5 June 2013)

1. The Panel refers to the European Union's request for an interim ruling of 28 May 2013 concerning a number of matters related to the United States' answers to the Panel's questions to the parties issued on 23 April 2013 ("Panel's questions"), and the United States' comments on the European Union's request, which were received on Friday 31 May 2013.

2. In this communication, the Panel addresses the European Union's requests for rulings with respect to: (i) the United States' Full HSBI Version Appendix ("HSBI Appendix") submitted in conjunction with its answers to the Panel's questions; (ii) the United States' HSBI exhibits submitted in conjunction with its answers to the Panel's questions; and (iii) alleged violations of the Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information ("BCI/HSBI Procedures").

3. The European Union has also requested the Panel to reject certain arguments and evidence on the grounds that they should have been addressed by the United States earlier in these proceedings.[1] The Panel will rule on this aspect of the request as soon as possible.

1 THE UNITED STATES' FULL HSBI VERSION APPENDIX

4. The European Union asserts that, on 24 May 2013, the United States provided the European Union with only one locked CD containing the HSBI Appendix submitted in conjunction with its answers to the Panel's questions. The European Union submits that paragraph 58(g) of the BCI/HSBI Procedures requires the United States to provide two such CDs. The European Union explains that the United States' failure to provide two CDs means that its agents for this dispute do not have access to the HSBI Appendix in the short time available to prepare comments on the United States' answers to the Panel's questions. The European Union argues that extending the deadline for the parties to comment on each other's answers to the Panel's questions beyond 12 June 2013 will exacerbate the prejudice it has suffered, as members of its delegation have scheduled commitments in the two weeks following 12 June 2013, and thereafter, on 27 June 2013, the European Union will receive the United States' first written submission in the *US – Large Civil Aircraft (Article 21.5)* dispute. In addition, the European Union argues that any extension of the deadline for both parties would allow the United States to benefit from their own breach of the rules. Thus, the European Union requests that the Panel reject the United States' HSBI Appendix as untimely filed.[2]

5. The United States expresses regret for this oversight but points out that the European Union could have advised the United States of this problem on 24 May when it received the first CD, with a view to arranging with the United States for delivery of the second CD to Geneva or Brussels by 27 May 2013. Instead, the European Union chose to formally complain to the Panel on 28 May; a choice which was not geared to minimize delay or any prejudice arising from such delay. The United States advises that it has consulted with the European Union and has made arrangements to deliver a second copy of its HSBI Appendix directly to a European Union representative in Brussels.[3]

6. The Panel agrees with the European Union, and the United States acknowledges, that paragraph 58(g) of the BCI/HSBI Procedures required the United States to provide two copies of

[1] European Union, Request for Interim Ruling of 28 May 2013, paras. 11-21.
[2] European Union, Request for Interim Ruling of 28 May 2013, paras. 3-5.
[3] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 3.

its HSBI Appendix in the form of two locked CDs to the European Union. The Panel notes that this HSBI Appendix includes information relating to nine of the 72 questions that were answered by the United States. The United States' failure to provide a second CD as required means that some of the European Union's agents, which the European Union has explained operate out of at least two cities, Geneva and Brussels, could not access the HSBI Appendix at the time they were entitled to. Although it appears that arrangements have been made to deliver the second CD to a European Union representative in Brussels, the delay occasioned by this oversight nonetheless could adversely affect the European Union's ability to prepare its comments to the United States' answers to the Panel's questions within the deadline set by the Panel.

7. As a usual matter, providing an extension of time to compensate for a delay in the submission of information would be the logical way to ensure that a party is able to fully respond to late-submitted information. However, the European Union argues that extending the deadline in this case would "only serve to heighten the prejudice suffered by the European Union"[4], as members of its delegation have scheduled certain (unspecified) commitments in the two weeks following the current deadline of 12 June 2013, and immediately thereafter will receive the United States' first written submission in *US – Large Civil Aircraft (Article 21.5)*. While the Panel is sympathetic to the demands that this large and complex dispute places upon delegations, especially as it is running in parallel to *EC – Large Civil Aircraft (Article 21.5)*,[5] we see no reason to believe that with an adequate extension of time the European Union would be unable to respond fully to the information in question. Nor do we consider the United States' oversight so egregious as to warrant the rejection of the HSBI Appendix where, as here, it is not necessary in order to protect the European Union's ability to participate fully in this dispute.

8. The Panel observes that the United States' failure to follow the instructions in paragraph 58(g) of the BCI/HSBI Procedures means that the European Union will receive the second CD several days after it was entitled to receive it under the BCI/HSBI Procedures. In this light, the Panel decides as follows. *First*, the Panel directs the United States to deliver the second CD as soon as possible, if it has not already done so, and to inform the Panel as soon as it has been delivered. *Second*, the Panel extends the deadline for the European Union to submit its comments on the United States' answers to questions to Wednesday, 26 June 2013, that is, an extension of 14 days. While the Panel considers that this should compensate for the delays in the United States' response, if the European Union considers that it is unable to respond fully in this time, the Panel will consider any justified request for a further extension. *Third*, we direct the United States to submit, *only to the Panel and not the European Union*, its comments on the European Union's answers to the Panel's questions as per the current deadline, on 12 June 2013; the United States is requested to submit the same document to the European Union on 26 June 2013 in accordance with the relevant procedures.

2 THE UNITED STATES' HSBI EXHIBITS

9. The European Union raises three objections concerning the submission by the United States of HSBI exhibits with its responses to questions from the Panel. First, the United States filed the HSBI exhibits during the afternoon of Friday, 24 May 2013, rather than the due date for the answers to the Panel's questions, which was Wednesday 22 May. Second, the United States had indicated, in response to an inquiry by the European Union, that it would not be making the HSBI exhibits available for viewing on a secure laptop at the United States' Mission to the European Union in Brussels until 28 May 2013. Third, the United States failed to provide an HSBI version of Exhibit US-505.[6] The European Union requests that, in light of these problems, which it asserts have seriously hampered its ability to prepare comments on the United States' answers to the Panel's questions by 12 June 2013, the United States' HSBI exhibits should be rejected as untimely filed.[7]

[4] European Union, Request for Interim Ruling of 28 May 2013, para. 4.

[5] Throughout these proceedings, the parties have at times had to work on both disputes simultaneously. In this respect, we note that the European Union's first written submission in *US – Large Civil Aircraft (Article 21.5)* was received by the United States two weeks before the substantive meeting with the Panel in this dispute. Moreover, the Panel in this dispute asked the United States to respond to 72 direct questions following the substantive meeting, during a period when the United States was no doubt preparing its first written submission in *US – Large Civil Aircraft (Article 21.5)*.

[6] James V. Jordan, NERA, Reply to Professor Whitelaw's Response to Jordan Report, 19 May, 2013.

[7] European Union, Request for Interim Ruling of 28 May 2013, para. 10.

2.1 United States' HSBI Exhibits Filed with the Secretariat on 24 May

10. The HSBI exhibits cited by the United States in its answers to the Panel's questions were filed at the WTO in Geneva on 24 May 2013. The European Union objects that the US HSBI exhibits were not filed by the due date for the submission, which was 22 May 2013. The European Union argues that, while paragraph 58(h) of the BCI/HSBI procedures requires only that a party shall have commenced transfer of the locked CDs containing the HSBI *Appendix* to a submission no later than the deadline for submission (and thus contemplates that such HSBI may be received one to two days after the filing deadline), no such allowance is made for HSBI *exhibits*.[8]

11. The United States responds that it makes every effort to send HSBI documents early so that they arrive in Geneva on the submission date, even though the quickest delivery option is for arrival on the second day after transmission. Nevertheless, for a lengthy written submission containing HSBI, exhibits are usually finalized along with the submission. The United States considers that it would be unfair to require the United States to complete all such submissions two days earlier than the deadline solely because the distance between the United States and Geneva is greater than the distance between Brussels and Geneva.[9]

12. Paragraphs 49 and 50 of the BCI/HSBI Procedures require the United States to make its HSBI available, in electronic or hard copy form, at both the WTO Secretariat and at the United States mission in Brussels. These provisions do not, however, indicate precisely when such HSBI must be made available at these locations. Guidance as to the timing of the submission of the HSBI *Appendix* may be found in paragraph 58(h) of the BCI/HSBI Procedures. Paragraph 58(h) requires parties to "commence transfer" of the locked CDs containing the HSBI Appendix no later than the deadline for the submission concerned. This rule permits a party, if necessary, to prepare the HSBI Appendix up until the date of deadline for its submission, meaning that it is possible that there will be a delay of a day or two after the deadline until receipt of the HSBI Appendix by the other party.[10]

13. Paragraph 58(h) does not explicitly refer to HSBI *exhibits*. However, a party's HSBI Appendix will necessarily make reference to HSBI exhibits.[11] It would be incongruous to permit a party to continue with the preparation of its HSBI Appendix up until the due date for the submission, but to require that HSBI exhibits, which must also comply with the special transfer requirements for HSBI set forth in paragraphs 49 and 50 of the BCI/HSBI Procedures, be received by the other party by the due date for the submission. Such an interpretation would mean that a party would need to have "commenced transfer" of HSBI exhibits one to two days before it had finalized the HSBI Appendix that refers to those exhibits. In practice, this would mean that parties would need to finalize their HSBI Appendix prior to the deadline for its completion envisaged in paragraph 58(h). In this light, the BCI/HSBI Procedures must be interpreted to permit parties to submit HSBI exhibits at the same time as they submit the HSBI Appendix. For this reason, we do not consider that the United States' HSBI exhibits submitted to the WTO Secretariat on 24 May 2013 to be untimely filed.

2.2 United States Failure to Make Available US HSBI Exhibits at the US HSBI Location in Brussels

14. The European Union notes that, in scheduling an appointment for EU HSBI Approved Persons at the United States' HSBI location in Brussels on 24 May 2013, the European Union was informed that the United States' HSBI exhibits would not be uploaded to the secure laptop until 28 May 2013. The United States responds that the HSBI exhibits were delivered to Brussels on 27 May 2013, which was a holiday in the United States and was not a business day for the United States Mission to the European Union in Brussels. The HSBI exhibits were thus available for

[8] European Union, Request for Interim Ruling of 28 May 2013, para. 7, footnote 4.
[9] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 4.
[10] HSBI cannot be submitted via email. It is transmitted to the Panel in electronic form using locked CDs or sealed laptops. Parties are required to keep electronic or hard copies of HSBI it submits to the Panel in its HSBI location, for access by HSBI Approved Persons of the other party, see paragraphs 49 and 50 of the BCI/HSBI Procedures.
[11] There were a total of nine questions in which the United States referred to HSBI in the answers, and thus which were part of the US Full HSBI Version Appendix. In responding to these nine questions, the United States referred to a total of 33 HSBI exhibits.

viewing, and were viewed by the European Union, on 28 May 2013.[12] The United States submits that the HSBI material is a small portion of the overall submission, and in the "unlikely" event that a short delay in access to the HSBI exhibits would adversely affect the European Union, the United States would be flexible in providing a solution consistent with the BCI/HSBI Procedures.

15. Paragraph 50 of the BCI/HSBI Procedures requires the United States to make its HSBI available for access by EU HSBI Approved Persons at the United States Mission to the European Union in Brussels.[13] As noted above, we understand paragraph 58(h) of the BCI/HSBI Procedures to apply to HSBI exhibits as well as to the HSBI Appendix, and the United States' obligation was thus to "commence transfer" of its HSBI exhibits to Brussels by Wednesday 22 May 2013. Although the United States has not directly spoken to this point, we would have expected that the United States would have been able have those HSBI exhibits delivered to Brussels and uploaded by Friday 24 May 2013, as in the case of Geneva. The United States' failure to do so is problematic. That impact of that failure was exacerbated by the fact that 27 May was an official holiday in the United States and that the United States Mission in Brussels was closed.[14] As a result, the European Union's access to the United States' HSBI exhibits was delayed by four days, a not insignificant period given that the European Union's comments were due nine days later, on 12 June 2013.

2.3 United States Failure to Provide a HSBI Version of Exhibit US-505

16. The European Union objects to the United States' failure to provide an HSBI version of Exhibit US-505, which is a report prepared by a US consultant addressing alleged benefits from LA/MSF for the A350XWB challenged by the United States.[15] The United States submitted a BCI version of this report on 22 May 2013, but the European Union notes that calculations and data on which the consultant appears to rely are treated as HSBI and redacted from the BCI version. This being so, the BCI version is of little use to facilitate the preparation of the European Union's comments, because the European Union cannot review the HSBI calculations and data on which the consultant and the United States appear to rely. For the reasons already outlined above, the European Union believes that an extension of the deadline for it to comment would not remedy the prejudice it has suffered as a result of not having access to the HSBI version of Exhibit US-505 (BCI). Accordingly, the European Union requests that the Panel reject Exhibit US-505 (BCI) as being untimely filed.

17. The United States advises that it has corrected this oversight.[16] The United States argues that, when an oversight causes a minor delay, the obvious fix, if a fix is necessary, is to grant a short extension, rather than to reject probative evidence. A rejection of probative evidence because of professed commitments of one party would be highly unusual, patently unfair and not in the interest of an objective determination by the Panel.

18. The Panel observes the HSBI version of Exhibit US-505 (BCI), like the other HSBI exhibits filed with the United States HSBI Appendix, should have been made available in Geneva and in Brussels by 24 May 2013. The United States advises that it has now corrected its oversight, by which the Panel assumes that the United States is making available the HSBI version of Exhibit US-505 (BCI), at the WTO Secretariat and at the United States Mission to the European Union in Brussels, by Wednesday 3 June 2013. Indeed, the United States made this exhibit available at the WTO Secretariat in Geneva yesterday, 4 June 2013. While the Panel welcomes the United States' corrective action, the fact remains that the European Union's ability to review the HSBI version of this exhibit has been delayed by 11 days.

2.4 Conclusion

19. The Panel considers that the United States' failure to make available the HSBI exhibits at its HSBI location in Brussels by 24 May 2013 and to provide an HSBI version of Exhibit US-505 (BCI) could adversely affect the European Union's ability to prepare its comments to the United States'

[12] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 5.
[13] The "HSBI location" identified in paragraph 9 of the BCI/HSBI Procedures.
[14] Paragraph 53 of the BCI/HSBI Procedures provides that the "designated room" in which HSBI is kept at this location shall be available from 9 am until 5 pm during official working days at that HSBI location.
[15] James V. Jordan, NERA, Reply to Professor Whitelaw's Response to Jordan Report, 19 May 2013.
[16] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 6.

answers to the Panel's questions by the 12 June 2013 deadline set by the Panel. However, we consider that our decision to extend the deadline for the European Union to submit its comments on the United States' answers to questions to Wednesday, 26 June 2013 sufficiently addresses the risk of any such prejudice arising. We further recall that, if the European Union considers that it is unable to respond fully by that date, the Panel will consider any justified request for a further extension. Under these circumstances, we do not consider that the failures on the part of the United States merit the Panel's rejection of the United States' HSBI exhibits as untimely filed.

20. More generally, the Panel has found in sections 1 and 2 of this ruling that the United States has failed on a number of occasions to provide information in a timely manner pursuant to the requirements of the BCI/HSBI Procedures applicable in this case. Such failures are unfortunate, and the Panel strongly urges the United States to redouble its efforts to fully comply with these Procedures. At the same time, the Panel is conscious of the unusual scale of this case, which involves thousands of pages of submissions and thousands of exhibits, and that application of highly complex BCI/HSBI Procedures in this context is a challenge. Under these circumstances, and in the absence of any indication that the errors committed by the United States were intentional, our focus is properly on ensuring that the Procedures are applied correctly going forward, and that the ability of the European Union to properly defend its case not be compromised. We see no reason to take punitive action that would prevent this Panel from accepting evidence and argument that could assist us in performing our task of performing an objective examination of the matter before us.

3 ALLEGED VIOLATIONS OF THE BCI/HSBI PROCEDURES

3.1 Alleged Transmission of BCI by Non-Secure Email

21. The European Union objects that the United States transmitted the BCI versions of its answers to the Panel's questions by "non-secure" email, in a departure from prior practice in which BCI versions of submissions have been made by delivery of CDs. The European Union requests the Panel to take remedial action to reassure stakeholders from whom BCI originates that breaches of the BCI Procedures will not be tolerated.

22. The United States advises that the transmittal on 22 May 2013 of the United States answers to the Panel's questions containing BCI by email was an inadvertent error. To avoid any repetition, it has sent instructions to all United States' BCI and HSBI Approved Persons in this dispute emphasizing proper procedures regarding electronic transmission of BCI. The United States considers that the warning and reminder are sufficient to assure future compliance, and that any further action is unnecessary.[17]

23. Paragraph 43 of the BCI/HSBI Procedures provides that documents containing BCI may be transmitted electronically only by using "secure" email. The BCI/HSBI Procedures do not define what is meant by "secure" e-mail. The European Union does not explain why the United States' transmission by e-mail of its answers to the Panel's questions (containing BCI) was not by "secure" email, although it appears that the United States agrees that the email transmission of its answers to the Panel's questions was erroneous. The Panel welcomes the parties' suggestions as to email protocols that would be acceptably secure, with a view to amending the BCI/HSBI Procedures to include a clear definition as to what is meant by "secure" email. In the meantime, the Panel takes note of the action that the United States has taken to remind its agents of the proper procedures regarding electronic transmission of BCI and has decided not to take any further action at present.

3.2 Alleged Access to European Union BCI and HSBI by Somebody Other than an Approved Person

24. The European Union notes that the United States' answers to the Panel's questions refer to a report by Dr Chetan Sanghvi which refers in multiple places to two EU BCI and HSBI exhibits.[18]

[17] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 12.

[18] Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013, Exhibit US-530. The two EU exhibits to which Dr Sanghvi's report refers are Christophe Mourey, "Statement on Current Competitive Conditions in the LCA Industry" 4 July 2012, Exhibit EU-8, which was submitted as BCI and Christophe Mourey, "Supplemental Statement on current competitive conditions in the LCA industry", 12 December 2012, Exhibit EU-124, which was submitted as HSBI with a BCI version prepared also.

The United States notified Dr Sanghvi as a person approved to access BCI and HSBI only on 15 May 2013, while his report is dated 21 May 2013. The European Union considers it unlikely that Dr Sanghvi prepared the report in the six days between 15 and 21 May 2013. Moreover, the European Union notes that it did not prepare a redacted version of the two exhibits and that Dr Sanghvi did not access the delegation of the European Union to the United States (the EU HSBI location) subsequent to 15 May 2013. The European Union considers that the foregoing factors demonstrate that US Approved Persons provided Dr Sanghvi with access to BCI and HSBI prior to his designation as a BCI or HSBI Approved Person, in violation of the BCI/HSBI Procedures. The European Union requests that Dr Sanghvi be removed from the Approved Person's list, and that his report be rejected. In addition, the European Union requests that the Panel seek information from the United States regarding the identity of the Approved Persons who disclosed EU BCI and HSBI to Dr Sanghvi, that those persons be removed from the Approved Persons list because of their disregard for the BCI/HSBI Procedures, and that the Panel notify the panel in *US – Large Civil Aircraft* of the identity of the US Approved Persons found to have violated the BCI/HSBI Procedures. Finally, the European Union requests the Panel to take any further action it deems necessary and appropriate to reassure the stakeholders from whom BCI and HSBI originates in these proceedings that breaches of the BCI/HSBI Procedures will not be tolerated.

25. The United States characterizes the European Union's accusation that US Approved Persons disclosed EU BCI and HSBI to Dr Sanghvi before notifying him as an Approved Person as "completely unfounded" and "absolutely false".[19] The United States criticizes the European Union for not first seeking an explanation and assurance from the United States regarding Dr Sanghvi's access to BCI and HSBI before making "reckless" assertions to the Panel. The United States asserts that Dr Sanghvi did much of his work based on extensive non-BCI, and did not have access to BCI or HSBI prior to 15 May 2013.

26. The European Union makes serious allegations against the United States and US Approved Persons. The United States strenuously denies those allegations. The Panel recognizes that its ability to conduct an objective assessment of the matter in this proceeding depends in large part on the quality of the evidence that the parties place before it, and thus understands the importance of assuring stakeholders that commercially-sensitive material will be handled strictly in accordance with the BCI/HSBI Procedures. Given the circumstances outlined by the European Union, and the importance that both parties have full confidence in the integrity of these confidential information submitted in this dispute, the Panel requests the United States to provide, by 10 June 2013, a fuller explanation of the manner in which Dr Sanghvi's report was prepared, given Dr Sanghvi's late status as an approved person. The Panel will defer its decision on this aspect of the European Union's request until it has considered the United States' explanation.

4 CONCLUSION

27. In summary, after carefully considering the European Union's request for an interim ruling and the United States' response, the Panel has decided to:

a. With respect to the European Union's request to reject the United States' Full HSBI Version Appendix as untimely -

   i. decline the European Union's request;

   ii. direct the United States to deliver the second CD to a European Union representative in Brussels as soon as possible, if it has not already done so, and to inform the Panel as soon as it has been delivered;

   iii. extend the deadline for the European Union to submit its comments on the United States' answers to questions to Wednesday, 26 June 2013, that is, and extension of 14 days; and

   iv. direct the United States to submit, only to the Panel and not the European Union, its comments on the European Union's answers to the Panel's questions as per the current deadline, on 12 June 2013. The United States is also directed to submit the

[19] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 13.

same document filed with the Panel on 12 June 2013 to the European Union on 26 June 2013 in accordance with the relevant procedures.

b. With respect to the European Union's request to reject the United States' HSBI Exhibits as untimely -

   i. decline the European Union's request;

   ii. direct the United States to provide, at the US HSBI location in Brussels, a HSBI version of Exhibit US-505 (BCI) as soon as possible, if it has not already done so, and to inform the Panel when it has done so;

   iii. extend the deadline for the European Union to submit its comments, as indicated in paragraph 26(a)(iii) and (iv) above.

c. With respect to the European Union's allegations of violations of the BCI/HSBI Procedures -

   i. decline the European Union's requests for remedial action concerning the use of non-secure email to transmit the BCI versions of the United States' answers to the Panel's questions;

   ii. request the United States to provide, by 10 June 2013, a fuller explanation of the manner in which Dr Sanghvi's report was prepared, given Dr Sanghvi's late status as an approved person, and to defer the European Union's requests until it has considered the United States' explanation.

28. Finally, the Panel recalls that the European Union's request for an interim ruling also asks the Panel to reject certain arguments and evidence on the grounds that they should have been addressed by the United States earlier in these proceedings. As noted above, the Panel will issue a ruling on this request as soon as possible. In the meantime, both parties should proceed on the basis that the information that is the subject of the European Union's request continues to be part of the record of this dispute.

ANNEX F-3

THE EUROPEAN UNION'S REQUESTS OF 28 MAY 2013 CONCERNING: (I) THE UNITED STATES' ALLEGED FAILURE TO MAKE A PRIMA FACIE CASE AND THE "BACK-LOADING" OF ARGUMENTS AND EVIDENCE; AND (II) THE UNITED STATES' ALLEGED UNAUTHORIZED ACCESS TO EUROPEAN UNION BCI/HSBI

(Panel ruling issued on 12 June 2013)

1. The Panel refers to the European Union's request for an interim ruling of 28 May 2013 concerning a number of matters related to the United States' answers to the Panel's questions to the parties issued on 23 April 2013 ("Panel's Questions") and the United States' comments on the European Union's request, which were received on Friday 31 May 2013. The Panel recalls that it has previously issued rulings on two of the four requests made by the European Union.[1] In this communication, the Panel informs the parties of its rulings with respect to the European Union's remaining requests, namely, that certain arguments and evidence of the United States be rejected on the grounds that they should have been addressed by the United States earlier in these proceedings, and that the Panel should reject a report by an outside advisor on the grounds that the advisor was given access to BCI/HSBI prior to designation as a BCI/HSBI Approved Person.[2]

1 THE EUROPEAN UNION'S COMPLAINTS CONCERNING THE "BACKLOADING" OF EVIDENCE

2. The European Union argues that the prompt provision of evidence is particularly important in compliance cases, and that in this case "the United States' belated provision of evidence necessary to support the elements of its *prima facie* case is legion." Even assuming that the United States had previously submitted evidence sufficient to establish the elements of its claims, the European Union argues, the United States made a "strategic decision" in these proceedings to forego the "first opportunity" available to it to respond to certain evidence and argument advanced by the European Union in its second written submission, and its attempt to provide a response to these European Union submissions in its answers to the Panel's Questions following the substantive meeting is untimely, prejudices its own ability to defend its interests as well as the Panel's ability to discharge its duties, and for these reasons should be rejected.[3] The European Union points to three specific instances where it considers the United States' alleged "backloading" of argument and evidence has compromised the European Union's ability to make its defence as well as the Panel's ability to conduct an objective assessment.

3. The first concerns the Expert Declaration of Dr Chetan Sanghvi, submitted by the United States as Exhibit US-530 (the "Sanghvi Report"). According to the European Union, the Sanghvi Report purports to set out a comprehensive product market delineation on behalf of the United States "for the first time".[4] The European Union recalls that, in the original proceeding in this dispute, the Appellate Body found that establishing the relevant product market or markets at issue is a "prerequisite for assessing whether" adverse effects "could be found to exist as alleged by the United States".[5] The European Union argues that, given that the proper delineation of the product markets is a prerequisite for the United States' adverse effects claims, it is not acceptable for the United States to "withhold evidence" purporting to offer a comprehensive evaluation of the relevant LCA product markets until all written submissions and the meeting with the Panel have passed. The European Union therefore requests that the Panel reject the Sanghvi Report, "lest the Panel be seen as making the case for the United States".[6]

[1] Communication from the Panel, dated 5 June 2013.
[2] European Union, Request for Interim Ruling of 28 May 2013, paras. 11-21.
[3] European Union, Request for Interim Ruling of 28 May 2013, paras. 13, 17, 19 and 21.
[4] Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013, Exhibit US-530 ("Sanghvi Report"), see European Union, Request for Interim Ruling of 28 May 2013, para. 15.
[5] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1128. See also Appellate Body Report, *Canada – Renewable Energy*, para. 5.169.
[6] European Union, Request for Interim Ruling of 28 May 2013, para. 17.

4. The second and third instances of alleged "backloading" by the United States concern part of the United States' answer to Panel Question 67, and the Reply to Professor Whitelaw's Response to the Jordan Report, submitted by the United States as Exhibit US-505 ("Jordan Reply to Whitelaw's Response Report"), respectively.[7] In relation to the first alleged instance of "backloading", the European Union objects particularly to the fact that, in addition to answering the Panel's question, the United States response to Panel Question 67 addresses the campaign-specific arguments of the European Union that appeared in its second written submission.[8] Similarly, the European Union explains that the Jordan Reply to Whitelaw's Response Report addresses a number of issues that were raised in a report by Professor Robert Whitelaw and submitted by the European Union as an exhibit to its second written submission.[9]

5. The European Union argues that in both instances, the United States had 13 weeks from the filing by the European Union of its second written submission to the date of the meeting with the Panel to develop its comments on the relevant arguments, and was fully capable of delivering them in its opening statement at the meeting with the Panel. The European Union submits that responding to its arguments during the meeting with the Panel would have permitted both the Panel and the European Union to engage with the United States' arguments at the meeting, and would have provided an opportunity for the Panel to consider additional questions to the parties about any assertions made by the United States at the meeting. According to the European Union, the United States instead made a "strategic decision" to "withhold its comments" on the European Union's arguments concerning the campaign-specific lost sales allegations and the alleged benefits of LA/MSF for the A350XWB (as articulated in the Jordan Reply to Whitelaw's Response Report) until after the substantive meeting with the Panel.

6. The European Union considers that there should be consequences for the United States' "backloading", "lest it undermine the Panel's ability to make an objective assessment, and the European Union's ability to make its defense".[10] Accordingly, the European Union requests that the Panel reject: (a) any material included in the United States answer to Panel Question 67 that addresses, in addition to the Panel's Question, the United States' response to the campaign-specific European Union arguments that appeared in its second written submission; and (b) the Jordan Reply to Whitelaw's Response Report submitted by the United States as Exhibit US-505.[11]

2 THE UNITED STATES' RESPONSE TO THE EUROPEAN UNION'S COMPLAINTS

7. The United States denies that it has "backloaded" evidence and argues that it is not barred from submitting additional evidence and argumentation after its first written submission to rebut the European Union's arguments, and to respond to questions from the Panel.[12] The United States argues that paragraph 15 of the Working Procedures demonstrates that the Panel envisaged at the outset that the parties would submit factual information through their responses to questions from the Panel.[13] If the parties did nothing more in their responses to the Panel's questions than repeat statements they had previously made, the question process would be futile and unhelpful to the Panel.[14]

8. As to the specific instances of "backloading" alleged by the European Union, the United States responds, first, that the Sanghvi Report was submitted in direct response to: (a) questions from the Panel about product markets, and particularly with respect to the application of competition law concepts to the product market inquiry; and (b) the European Union's arguments, made in its

[7] James V. Jordan, NERA, Reply to Professor Whitelaw's Response to Jordan Report, 19 May 2013, Exhibit US-505 (BCI/HSBI) ("Jordan Reply to Whitelaw Response Report").
[8] United States, Answer to Panel Question 67.
[9] Robert Whitelaw, Response to Dr Jordan's Report on the Benefits of MSF, 3 December 2012, Exhibit EU-121 (BCI/HSBI) ("Whitelaw Response to Jordan Report").
[10] European Union, Request for Interim Ruling of 28 May 2013, paras. 19 and 21.
[11] European Union, Request for Interim Ruling of 28 May 2013, paras. 19-21.
[12] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 7.
[13] Paragraph 15 of the Panel's Working Procedures provides that "parties shall submit all factual evidence to the Panel no later than their first written submissions, other than evidence necessary for purposes of rebuttals and answers to questions."
[14] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 7.

second written submission and at the meeting with the Panel, concerning the proper delineation of the product markets which it had supported by reference to a consultant's NPV calculations.[15]

9. Second, the United States notes that Panel Question 67 sought the identification of the airlines involved in specific sales campaigns and whether Boeing LCA were considered. The United States argues that this inquiry clearly implicates the United States' lost sales claims related to the sales campaigns identified in paragraphs 417 through 503 of the United States' first written submission. The United States submits that it was appropriate and helpful to the Panel's task of making an objective assessment, to address the European Union's arguments about those sales campaigns. The United States rejects the suggestion that it was precluded from making such arguments because it had not done so in the same detail in its opening statement at the meeting with the Panel. The United States argues that a rule in which parties effectively waived any argument omitted from their oral statements would force them to mention every potential argument in their oral statement. Moreover, no such rule appears in the Panel's Working Procedures.[16]

10. Third, with respect to the submission by the United States in its answers to the Panel's questions of the Jordan Reply to Whitelaw's Response Report, the United States notes that, while the Panel had described the United States' opening statement at the meeting with the Panel as the "first opportunity" at which the United States could have responded to the Whitelaw Response to Jordan Report, it nowhere found that it was also the last opportunity.

3 EVALUATION BY THE PANEL

3.1 General Considerations

11. We note at the outset that the European Union does not assert that the alleged "backloading" of arguments and evidence by the United States has been made contrary to the Working Procedures. Paragraph 15 of the Working Procedures provides that the parties shall submit all factual evidence to the Panel no later than their first written submissions, *other than evidence necessary for purposes of rebuttals and answers to questions*.[17] The European Union does not allege that the Sanghvi Report, the United States answer to Panel Question 67 or the Jordan Reply to Whitelaw's Response Report were not submitted in accordance with paragraph 15 of the Working Procedures as evidence necessary for purposes of rebuttals and answers to questions. Indeed, we consider that the Sanghvi Report, the United States' answer to Panel Question 67 and the Jordan Reply to Whitelaw Report were submitted in conformity with paragraph 15 of the Working Procedures.[18]

12. However, in conducting an objective assessment of the matter as required by Article 11 of the DSU, the Panel is bound to ensure that due process is respected.[19] Although panel working procedures should embody and reinforce due process, the question whether a panel has guaranteed due process in any specific situation is not simply a question of whether the working procedures have been complied with.[20]

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[15] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 9.

[16] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 10.

[17] Paragraph 15 further provides that exceptions to this procedure may be granted upon a showing of good cause. In such a case, the other party shall be accorded a period of time for comment on the newly submitted evidence, as the Panel deems appropriate.

[18] The United States' explanations countering the European Union's campaign-specific arguments in its answer to Panel Question 67 are contained in paragraphs 269, 270, 271, 272, 273, 274, 275, 276, 279, 281, 282, 283, 284, 285, 286, 287, 289, 290, 291, 292, 293, 294, 295, 297, 298, 299, 301, 302, 303, 306, 308, 310, 311, 313, 314 and 315. Our review of this information shows that it consists essentially of: (a) re-statements of the United States' arguments concerning lost sales contained its first and second written submissions; (b) references to the panel's and the Appellate Body's findings in the original DS316 dispute; and (c) specific responses to some arguments made by the European Union in its second written submission concerning lost sales.

[19] Due process is a fundamental principle of WTO dispute settlement. The Appellate Body has stated that due process is intrinsically connected to notions of fairness, impartiality and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules, see Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.

[20] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 148.

13. It is well established that a panel must not make a "*prima facie* case" for a party who bears the burden of proof in relation to a claim or a defence.[21] However, this does not mean that a panel must make a specific finding that a complainant has met its burden to establish a *prima facie* case in respect of a particular claim, or that a respondent has effectively rebutted a *prima facie* case.[22] Similarly, a panel is not required to make a finding as to whether a complainant has established a *prima facie* case before it examines the respondent's arguments and evidence.[23] Indeed, WTO dispute settlement proceedings do not involve any particular temporal sequence of proof. Both parties will adduce evidence in support of their own arguments or to rebut the arguments made by the other at various stages of a dispute, sometimes simultaneously, throughout the entirety of a proceeding.

14. The "objective assessment of the matter" that a panel is called upon to perform under Article 11 of the DSU requires it to carefully and independently scrutinize the parties' arguments and any evidence submitted in support of those arguments, with a view to clarifying their meaning and exploring their implications for the particular claims being made. Consistent with this obligation, and in the light of the extremely voluminous and complex issues that have been raised in this dispute, we believe that our evaluation of the merits of the United States' claims must be conducted on the basis of a full appreciation of *all* of the parties' arguments and the evidence adduced in support of those arguments throughout the course of this proceeding. The fact that we must discharge this responsibility in a compliance proceeding in which it was envisaged that the parties would hold only one substantive meeting with the Panel raises particular complications. This is one reason why we decided to pose a relatively large number of questions to the parties following the meeting, and why we informed the parties at the end of the substantive meeting in April 2013 that we may well need to pose additional questions and/or hold an additional meeting with the parties as our analysis of the arguments and evidence progresses.[24]

15. Needless to say, it is a basic requirement of due process that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. This due process interest must be balanced against other interests, including systemic interests such as those reflected in Articles 3.3 and 12.2 of the DSU.[25] As the Appellate Body has stated, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU.[26]

16. With these considerations in mind, we now turn to address the European Union's particular requests.

3.2 The United States' Alleged "Strategic Decision" to "Withhold" Evidence and Argument

17. The European Union makes a number of specific objections to the United States' introduction of certain pieces of evidence and related arguments in its answers to the Panel's Questions. Underlying the European Union's particular complaints, however, is a broader assertion that the

[21] See, for instance, Appellate Body Report, *Japan – Agricultural Products II*, para. 129; and Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 300. A *prima facie* case has been described by the Appellate Body as one that, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case. Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14; and Appellate Body Report, *EC – Hormones*, para. 104. The evidence and arguments underlying a *prima facie* case must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision. Appellate Body Report, *US – Gambling*, para. 141.

[22] Appellate Body Report, *Thailand – H-Beams,* para. 134.

[23] Appellate Body Report, *India – Quantitative Restrictions*, para. 142.

[24] In this regard, we note that it is well established that "a panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding member has established its complaint or defence on a *prima facie* basis." Appellate Body Report, *Canada – Aircraft*, para. 192. Moreover, the Appellate Body has previously explained that "panels are entitled to ask questions of the parties that they deem relevant to the consideration of issues before them". Appellate Body Report, *Thailand – H-Beams*, para. 135.

[25] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

[26] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

United States has made a "strategic decision" in this dispute to "withhold" relevant evidence and argument until its answers to the Panel's Questions in a manner which undermines the Panel's ability to make an objective assessment, and the European Union's ability to make its defense.[27] We see no reason to accept this characterization of how the United States has proceeded in this dispute. Rather, as we explain in the sections that follow, the evidence and arguments that are the subject of the European Union's objections were made as part of the process of engagement between the parties and with the Panel that typically characterizes WTO dispute settlement, whereby arguments and evidence are explored and tested, and positions clarified and/or further developed, with a view to informing the Panel's objective assessment of the matter before it.

3.3 The Sanghvi Report (Exhibit US-530)

18. The European Union's argument that the Panel should reject the Sanghvi Report appears to be premised on the view that all evidence pertaining to issues that are a "prerequisite" or "precondition" to establishing adverse effects must be submitted by a party at an early point in the proceeding, and in any case before the stage at which all written submissions have been received and the substantive meeting with the parties has taken place. Moreover, in suggesting that the Panel's receipt of the Sanghvi Report at this stage of the proceeding could be seen as the Panel making the case for the United States, it would appear that the European Union considers that the Panel's questioning of the parties that led the United States to submit the Sanghvi Report was inappropriate in the circumstances, and that the Panel should reject evidence responsive to those questions.

19. The Sanghvi Report was submitted by the United States in response to a series of questions posed by the Panel concerning the parties' diverging positions as to the proper delineation of the relevant product markets.[28]

20. In its first written submission, the United States sought to demonstrate that the European Union had not removed the adverse effects of the subsidies the subject of the recommendations and rulings of the DSB by reference to the three product markets identified by the Appellate Body for purposes of its analysis of the United States' displacement claims on appeal.[29] The European Union responded in its first written submission that the United States' reliance on these three product markets was insufficient, not least because of the recent developments relating to the competitive situation in these product markets.[30] The European Union proposed an alternative delineation of the relevant product markets, relying on a statement by Mr Christophe Mourey, among other evidence, to support its arguments.[31] The United States in its second written submission challenged the European Union's identification of the relevant product markets, submitting in support of its arguments, among other evidence, a declaration from Mr Michael Bair.[32] The European Union sought to rebut the United States' arguments and evidence concerning the relevant product markets in its second written submission, arguing that the United States had failed to apply factors relevant to assessing the existence of a product market, and to provide relevant evidence to establish the existence of the three product markets it purported to identify.[33] In so doing, the European Union submitted, among other evidence, a supplemental statement by Mr Christophe Mourey.[34] Although the parties addressed each other's arguments concerning product markets at the substantive meeting with the Panel, neither submitted any further evidence at that meeting. The Panel posed a number of oral questions to the parties on product markets at the meeting for the purpose of clarifying the parties' arguments on specific issues. These questions were subsequently transmitted to the parties in writing together with several other questions on the same matter directed to both parties, to the United States and to the European Union. The United States submitted the Sanghvi Report in support of its answers to several of those questions.[35] The Sanghvi Report refers in various places to the Mourey

[27] European Union, Request for Interim Ruling of 28 May 2013, paras. 13-14, 17, 19 and 21.
[28] The United States referred to the Sanghvi Report in its answers to Panel Questions 48-51, 54, 55, 60, 61, 63, 64 and 67.
[29] United States' first written submission, para. 290-294.
[30] European Union's first written submission, paras. 569-570.
[31] European Union's first written submission, paras. 577-633; Mourey Statement, Exhibit EU-8 (BCI).
[32] United States' second written submission, paras. 438-493; Declaration of Michael Bair, Exhibit US-339 (BCI).
[33] European Union's second written submission, paras. 608-705.
[34] Supplemental Mourey Statement, Exhibit EU-124 (BCI/HSBI).
[35] See above, footnote 28.

statement, submitted by the European Union as an exhibit with its first written submission and to the supplemental Mourey statement, submitted by the European Union as an exhibit with its second written submission.

21. We recall that in *EC – Large Civil Aircraft*, the Appellate Body faulted the panel for deferring to the United States' subsidized product allegations rather than making its own independent assessment of whether all Airbus LCA should be treated as a single subsidized product.[36] The Appellate Body considered that, in the absence of such a determination, the panel did not have a proper basis for assessing whether the alleged subsidized and like products competed in the same market or multiple markets, which it described as a prerequisite for assessing whether displacement within the meaning of Articles 6.3(a) and 6.3(b) could be found to exist as alleged by the United States.[37] However, nothing in the Appellate Body's delineation of the substantive requirement to make a product market determination suggests to us that a complaining party must establish any particular elements of the claim at any specific point in the proceeding. In other words, the fact that the Panel will need to first define the relevant product markets in order to determine whether the United States has demonstrated the existence of adverse effects does not mean that, in seeking to fulfil our obligation under Article 11 of the DSU, we may not pose questions to the parties regarding the relevant product markets after the receipt of written submissions and the substantive meeting. Nor does it mean that the parties are prevented from submitting information responsive to the any questions we may ask after the substantive meeting, or that we must reject such evidence as having been presented at too late a stage in these proceedings, subject of course to any justified due process concerns.

22. In the present proceeding, the United States claims that adverse effects from LA/MSF and other subsidies, in the form of significant lost sales and displacement, impedance and threat thereof, continue through the present, based on the product markets on which the DSB's recommendations and rulings in the original proceeding are based. The United States has made arguments and presented evidence throughout this proceeding in support of that claim. In making an objective assessment of the United States' submissions we are required to assess the conflicting arguments and evidence presented by the parties concerning the proper delineation of the product markets in which Airbus and Boeing LCA compete.[38] In our view, it is therefore appropriate, in discharging our responsibility under Article 11 of the DSU, to not only put to the parties the questions asked on 23 April 2013 concerning the identification of the relevant product markets, but also to evaluate the arguments and evidence submitted by the parties in response to those questions.

23. Thus, for all of the above reasons, we see no basis for agreeing with the European Union's contention that it would be inappropriate for the Panel to consider the Sanghvi Report, which was submitted by the United States in response to the Panel's Questions. We therefore decline the European Union's request to reject the Sanghvi Report.

3.4 The United States' answer to Panel Question 67 and the Jordan Reply to Whitelaw's Response Report (Exhibit US-505 (BCI/HSBI))

24. The European Union's requests that the Panel reject: (a) the "material" included in the United States' response to Panel Question 67 addressing campaign-specific arguments made by the European Union in its second written submission; and (b) the Jordan Reply to Whitelaw's Response Report, are based on the assertion that the United States failed to make these submissions at the "first opportunity" available to do so, namely, in its opening statement at the substantive meeting with the Panel in April 2013.[39] The European Union argues that the United States' attempt to present such "material" in response to the Panel's Questions following the Panel's substantive meeting with the parties undermines the Panel's ability to make an objective assessment and the European Union's ability to make its defence.[40]

25. The European Union's reference to the "first opportunity" appears to derive from our communication to the parties of 23 April 2013, enclosing the list of 109 Panel Questions. In that

[36] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1128.
[37] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1128.
[38] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1131.
[39] European Union, Request for Interim Ruling of 28 May 2013, paras. 19 and 21.
[40] European Union, Request for Interim Ruling of 28 May 2013, paras. 19 and 21.

communication, we recalled that at the meeting with the parties on 18 April 2013, the European Union objected to the United States' attempt to submit certain hand-written HSBI calculations in support of the statements it made in paragraph 24 of its confidential oral statement on the grounds that to receive them would be inconsistent with the Panel's Working Procedures. We then noted that:

> "… the Whitelaw Response to the Jordan Report was submitted to the Panel as an exhibit to the European Union's second written submission, that the United States' oral statement was its first opportunity to address that Response, and that the United States' calculations go directly to the significance of that Response. Under these circumstances, the Panel considers that it is appropriate for it to now seek these calculations from the United States, and has done so in the attached questions."[41]

26. In stating that the United States' oral statement was the first opportunity at which the United States could have addressed the Whitelaw Response to Jordan Report, but in proceeding to ask the United States to provide that response in the course of answering the Panel's Questions, we did not suggest that a party is prevented from advancing argument or adducing evidence that was not presented at the "first opportunity". Rather, our reference to the "first opportunity" was simply intended to emphasize that the United States did not have a chance to respond to the relevant submissions any earlier than at the substantive meeting with the Panel. Our statement was therefore not intended to preclude the possibility that the United States could address the relevant submissions at a later stage in the proceeding, particularly were we to request the United States to do so. In this connection, we note that the European Union does not refer to any rule of procedure or other principle of due process that requires a party in a WTO dispute settlement proceeding to present its arguments and evidence at the "first opportunity" such that a failure to do so requires a panel to reject such arguments and evidence as untimely.

27. Turning to the particular United States' submissions that are the focus of the European Union's request for an interim ruling, we note that Panel Question 67 asked the United States to clarify certain aspects of the information submitted at paragraphs 417 to 503 of the United States' first written submission. These paragraphs of the United States' first written submission introduced and discussed evidence which the United States submits helps establish its claims of serious prejudice in the form of lost sales. The European Union responded to the United States' allegations in various parts of its first written submission; and both parties engaged with each other's lost sales arguments in their respective second written submissions. At the substantive meeting, the United States noted that the European Union had made "a host of campaign-specific arguments" in its second written submission, arguing that these did not "change the basic facts surrounding the demonstrated lost sales".[42] The European Union's oral statement did not specifically address the United States' submissions with respect to lost sales. However, the relevance of sales campaign evidence to the question of identifying the appropriate product markets was raised by the Panel in the questions posed to the parties at the substantive meeting, and the parties provided oral answers. Subsequently, a series of written questions were transmitted to both parties relating to various aspects of the United States' claims of lost sales. These questions included Panel Question 67. In answering this question, the United States sought to provide the Panel with the requested information as well as address some of the arguments made by the European Union with respect to lost sales in its second written submission. In our view, the entirety of the United States' answer to Panel Question 67 is not only related to the subject matter of that question, but it also concerns a matter with respect to which the parties have engaged and exchanged contrasting views throughout these proceedings. The European Union's comments on the United States' answer to Panel Question 67 will represent another moment in this proceeding when this engagement will take place, and as we have noted above,[43] there may well be others.

28. The United States introduced the Jordan Reply to Whitelaw's Response Report in its answer to Panel Question 92, and it was referred to in the United States' answers to Panel Questions 94, 102, 103, 105, 106 and 108. By its own words, the Jordan Reply to Whitelaw's Response Report is intended to comment on the Whitelaw Response to Jordan Report in order to "respon[d] to and in the light of the Panel's questions of April 23, 2013, as well as the hearing with the Parties of

[41] Communication from the Panel, dated 23 April 2013.
[42] United States, Non-Confidential Oral Statement, para. 105.
[43] See above, para. 14.

April 16-18, 2013".[44] The European Union submitted the Whitelaw Response to Jordan Report as Exhibit EU-121 (BCI and HSBI) with its second written submission.

29. All six of the Panel Questions within which the United States cited the Jordan Reply to Whitelaw's Response Report form part of a series of questions asked to clarify certain aspects of the parties' submissions made up until and including the substantive meeting with the parties in relation to the United States' argument that the LA/MSF measures for the A350XWB constitute subsidies. In our view, the matters addressed in the Jordan Reply to Whitelaw's Response Report go directly to the issues with respect to which the Panel sought clarification in its questions. These are the very same issues with respect to which the parties have exchanged views throughout these proceedings. The European Union's comments on the United States' answers to these questions, including the Jordan Reply to Whitelaw's Response Report, will represent another moment in this proceeding when this engagement will take place, and, again, as we have noted above,[45] there may well be others.

30. As explained above, we are of the view that our evaluation of the merits of the United States' claims in this dispute must be conducted on the basis of a full appreciation of *all* of the parties' arguments and the evidence adduced in support of those arguments throughout the course of this proceeding. We see the parties' exchange of views on the matters covered by the questions asked on 23 April 2013 to be an important part of this process. To this end, and the light of the relatively large number of questions posed, we allowed the parties more than four weeks to respond to our questions, and a full three weeks to comment on each other's responses. Further, in response to the difficulties of the European Union to review the United States' Full HSBI Appendix and certain other US HSBI Exhibits submitted with its answers to the Panel's Questions, we extended the deadline for the European Union to comment on the United States' answers by 14 additional days and informed the European Union that if it considered that it is unable to respond fully by that date, we would consider any justified request for a further extension. Under these circumstances, we do not consider that the European Union's ability to make its defense has in any way been compromised.

31. Thus, for all of the above reasons, we see no basis for agreeing with the European Union's contention that it would be inappropriate for the Panel to consider the entirety of the United States' answer to Panel Question 67 or the Jordan Reply to Whitelaw's Response Report. We therefore decline the European Union's request to reject these submissions.

4 ALLEGED UNAUTHORIZED ACCESS TO EUROPEAN UNION BCI/HSBI

32. The European Union notes that the United States' answers to the Panel's questions refer to a report by Dr Chetan Sanghvi which refers in multiple places to two EU BCI and HSBI exhibits.[46] The United States notified Dr Sanghvi as a person approved to access BCI and HSBI only on 15 May 2013, while his report is dated 21 May 2013. The European Union considers it unlikely that Dr Sanghvi prepared the report in the six days between 15 and 21 May 2013. Moreover, the European Union notes that it did not prepare a redacted version of the two exhibits and that Dr Sanghvi did not access the EU HSBI location in Washington, D.C. after 15 May 2013. The European Union considers that these factors demonstrate that US Approved Persons provided Dr Sanghvi with access to BCI and HSBI prior to his designation as an Approved Person, in violation of the BCI/HSBI Procedures. The European Union requests that Dr Sanghvi be removed from the Approved Persons list, and that his report be rejected. In addition, the European Union requests that the Panel seek information from the United States regarding the identity of the Approved Persons who disclosed EU BCI and HSBI to Dr Sanghvi, remove those persons from the Approved Persons list, and notify the Panel in *US – Large Civil Aircraft* of the identity of the US Approved Persons found to have violated the BCI/HSBI Procedures.[47]

[44] Jordan Reply to Whitelaw's Response Report, para. 1. Exhibit US-505 (BCI/HSBI).
[45] See above, para. 14.
[46] Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013, Exhibit US-530. The two EU exhibits to which Dr Sanghvi's report refers are Christophe Mourey, "Statement on Current Competitive Conditions in the LCA Industry" 4 July 2012, Exhibit EU-8, which was submitted as BCI and Christophe Mourey, "Supplemental Statement on current competitive conditions in the LCA industry", 12 December 2012, Exhibit EU-124, which was submitted as HSBI with a BCI version.
[47] European Union, Request for Interim Ruling of 28 May 2013, paras. 25-28.

33. In its initial response, the United States characterizes the European Union's accusation that US Approved Persons disclosed EU BCI and HSBI to Dr Sanghvi before notifying him as an Approved Person as "completely unfounded" and "absolutely false".[48] The United States asserts that Dr Sanghvi did much of his work based on extensive non-BCI, and did not have access to BCI or HSBI prior to 15 May 2013. In response to our request for a fuller explanation of the manner in which Dr Sanghvi's report was prepared[49], the United States indicates that Dr Sanghvi was retained in late April and that Outside Advisors provided him a variety of non-BCI documents, including non-BCI information from the two exhibits referred to by the European Union, which allowed him to make substantial progress before being notified as a BCI/HSBI Approved Person. The United States reiterates that only after he was notified as an Approved Person was Dr Sanghvi given access to EU BCI/HSBI. The United States notes that most of the "fundamental errors" in the European Union's general approach to product market definition were apparent with no access to EU BCI/HSBI, that Dr Sanghvi's report itself contains no BCI/HSBI and that the report did not address flaws in NPV calculations in the EU exhibits that might have required more extensive consideration of EU BCI/HSBI.[50]

34. We are conscious of the importance placed by both parties on the protection of sensitive business information, as reflected in the unprecedented BCI/HSBI Procedures applicable in this proceeding, and we take very seriously any allegations of possible violations of those Procedures. It is for this reason that we sought an explanation from the United States regarding the manner in which Dr Sanghvi's report was prepared. Having received that explanation, and in the light of the United States' categorical denial of the European Union's allegations, we see no basis to doubt the United States' contention that Dr Sanghvi had no access to BCI or HSBI prior to being notified by the United States as a BCI/HSBI Approved Person. Accordingly, we deny the European Union's request that we, *inter alia*, remove Dr Sanghvi as an Approved Person and reject his report.

5 CONCLUSION

35. In summary, after carefully considering the European Union's request for an interim ruling and the United States' response, the Panel has decided, on the basis of the foregoing considerations, to

a. with respect to the alleged "backloading" of evidence, decline the European Union's request to reject: (a) the Sanghvi Report (Exhibit US-530); (b) the "material" contained in the United States' answer to Panel Question 67 that is the focus of the European Union's objection; and (c) the Jordan Reply to Whitelaw's Response Report (Exhibit US-505);

b. with respect to alleged unauthorized access to EU BCI/HSBI, decline the European Union's request that we remove Dr Sanghvi as an Approved Person and reject his Report (Exhibit US-530).

[48] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 13.
[49] Communication from the Panel, 5 June 2013, para. 27(c)(ii).
[50] Communication from the United States, 10 June 2013.

ANNEX F-4

THE EUROPEAN UNION'S REQUEST OF 14 JUNE 2012 TO EXCLUDE CERTAIN UNTIMELY UNITED STATES' EXHIBITS

(Panel ruling issued on 28 June 2013)

1. On 10 June 2013, the United States submitted to the Panel and to the European Union by email certain documents which it referred to as "copies of exhibits referenced in the U.S. oral statement". On 14 June 2013, the European Union responded by email to the United States' submission. The European Union notes that the United States purports to provide, for the first time, the text of certain documents that it describes as exhibits to its Opening Oral Statement delivered on 16 April, that is, 55 days earlier. The European Union asks the Panel to confirm that the text of these documents does not form part of the record and that the text of these documents requires no response from the European Union, as their submission did not comply with the requirements of paragraphs 7 and 10 of the Panel's Working Procedures, paragraph 1 of the Procedures for the Partial Opening to the Public of the Meeting of the Panel and the Panel's communication of 12 April 2013.

2. In its 19 June 2013 response, the United States asserts that it did not realize until recently that it had neglected to file the exhibits referenced in its Oral Statement, and that this failure was inadvertent and due to human error. The United States notes however that the exhibits merely demonstrate that the material cited in the Oral Statement originated from EADS or Airbus documents, or from information already in the public domain. It further notes that certain of the exhibits appear in the body of the Oral Statement, that the European Union has not challenged the accuracy of the referenced material and that both the material discussed in the Oral Statement and the exhibits themselves are uncontested. The United States contends that as the exhibits were supplied to confirm the accuracy of uncontested information in the Oral Statement, and as the European Union has not been substantially prejudiced by the delay in filing copies of the exhibits, the Panel may find that its Working Procedures do not preclude if from retaining the exhibits on the record. Alternatively, the United States suggests that the Panel could consider that only those portions of the exhibits that correspond to material already quoted or cited in the Oral Statement form part of the record.

3. The Panel notes that, in its Opening Oral Statement at the meeting of the Panel with the parties on 16 April 2013, the United States quoted from, cited to or, in two cases, partially reproduced, seven documents, which it referred to as exhibits USA-492 to USA-498 (non-BCI) in the provisional written version of its Oral Statement that was distributed to the Panel and the European Union at the meeting. These documents are comprised of seven slides from three presentations prepared by EADS/Airbus employees, two pages of order/delivery information downloaded from an Airbus website, an extract from an EADS' financial statement, pages from a Corporate Finance textbook and a table of historical exchange rates, none of which contain BCI or HSBI. Although the underlying documents are identified in the Oral Statements with specific exhibit numbers, the United States does not appear to have distributed the documents themselves during the meeting, nor to have submitted them to the Panel and the European Union on 23 or 30 April 2013 at the time that it submitted the public, BCI and HSBI final written versions of its Opening Oral Statement as delivered.

4. From these facts, it is clear to us, and we do not understand the United States to contest, that it has not complied with the Panel's rules and procedures in regard to these documents. In our fax dated 12 April 2013 regarding the conduct of our substantive meeting with the parties, we requested the parties to provide paper copies of their prepared statements, and paragraph 10 of our Working Procedures required the parties to submit a written version of its Oral Statement not later than the first working day following the end of the meeting. Although the Procedures do not specifically refer to exhibits associated with the parties' Oral Statements, we consider it implicit that where an Oral Statement refers to exhibits those exhibits are to be made available at the time of the Statement. In this case, the United States did not provide the referenced documents with the provisional written version of its Oral Statement, nor at the time the Oral Statement was

delivered, nor at the time it submitted the final written versions of its Oral Statement. Indeed, these documents were only submitted 55 days after the Panel meeting. In short, it is evident to us that these documents were not timely submitted.

5. The question facing the Panel is thus not whether the United States has acted inconsistently with the Panel's rules and procedures in late-submitting these documents, but what consequences should flow from that fact. The European Union would have us "confirm" that the relevant documents do not form part of the record and that the European Union need not respond to them. We do not doubt the authority of a panel to decline to include in the record argument or evidence submitted by a party on the grounds that it was untimely filed or otherwise not submitted in accordance with the panel's rules and procedures. At the same time, we do not consider that the untimely filing of a document should necessarily result in its exclusion.[1] Rather, we believe that it is incumbent upon us, in exercising our discretion in the management of this proceeding, to determine an appropriate course of action after examining the behaviour in question in light of all the circumstances, including the extent to which the procedural error prejudices the interests of the other party or parties to the dispute or impedes the ability of the Panel to perform an objective assessment of the manner pursuant to Article 11 of the DSU.[2]

6. We recall the Appellate Body's injunction that due process requires each party to be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party.[3] In this case, the European Union does not assert that the untimely filing by the United States has impeded its ability to comment on these documents or otherwise to present its defence in this proceeding. This may reflect the fact that the seven documents at issue were offered primarily to confirm the source and accuracy of factual information that was incorporated in the body of the United States' Oral Statement itself. Indeed, for two of the documents the relevant slide was reproduced in the United States' Oral Statement,[4] while in a third case, the relevant statements were quoted in the United States' Oral Statement.[5] It is perhaps for this reason that, although the European Union in its answers to the Panel's Questions of 23 April 2013 addressed in detail those parts of the United States' Oral Statement containing references to all but one of the documents in question[6], it never indicated to the Panel or the United States any concern that it could not identify the documents referred to in the United States' Oral Statement.[7]

7. While Exhibits USA-492 to USA-498 (non-BCI) were offered primarily to confirm the source and accuracy of information incorporated in the United States' Oral Statement, and to which the European Union has had an opportunity to respond in its answers to the Panel's questions, the possibility remains that the European Union might want to respond to some aspect of these documents themselves, and due process demands the European Union be afforded the ability to do so. Accordingly, we will accord the European Union upon request such reasonable additional time as it considers it might require should it desire to further address the content of these documents. In the alternative, and should the European Union prefer, we note that we anticipate posing follow-

[1] Appellate Body Report, *Thailand – Cigarettes (Philippines),* para. 148.

[2] The European Union does not allege that the United States' untimely submission of Exhibits USA-492 to USA-498 (non-BCI) was intentional. The United States asserts that "it did not realize until recently that it had neglected to file the exhibits" referenced in its Oral Statement and describes its failure to do so as "inadvertent and due to human error". We see no reason to doubt the United States' assertions in this regard. Accordingly, this is not a case where a sanction is required to address wilful misconduct. Rather, it involves an oversight on the part of the United States, albeit quite a significant one.

[3] Appellate Body Report, *Thailand – Cigarettes (Philippines),* para. 150.

[4] Exhibits USA-492, USA-493.

[5] Exhibit USA-494. The European Union specifically responded to the quoted language from this exhibit in its answer to Panel Question 47, para. 146.

[6] All but one of the exhibits (Exhibit US-492) related to the role of LA/MSF in the launch and subsequent progress of the A350XWB, an issue explored by the Panel in its question 47 and to which the European Union responded extensively in paragraphs 129-212 of its answers submitted on 22 May 2013. Exhibit US-492 relates to whether the A380 and 7478-I are in the same product markets. Although we did not pose a question directly related to this document, the area of product markets was explored in the Panel Questions 48-79.

[7] We assume that the European Union, like the Panel, did not notice that the documents cited as exhibits in the United States' Oral Statement, and listed in its list of exhibits, were not submitted and that this is why it did not bring the failure of the United States to submit these exhibits to the attention of the Panel or the United States.

up questions to the parties in late August;[8] the European Union is free to address the content of these documents at the same time as it responds to those questions.

8. Of course, procedural rules serve not only to ensure the right of an interested party to respond to the case made against it, but also to ensure the efficient and prompt settlement of disputes. Indeed, the Appellate Body has explained that "due process may also require a panel to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek recourse in a timely manner, and the need for proceedings to be brought to a close.[9] In this case, however, we do not believe that the late submission of these documents will have any significant implications for the efficient conduct of this dispute. As noted, the Panel expects to pose follow-up questions to the parties so any further time needed by the European Union to address the documents in question should not delay the Panel's work. In any event, as the respondent in this case, the European Union has not suggested that it would be prejudiced by any delay in these proceedings that might be occasioned by the United States' late submission of the relevant documents.[10] To the contrary, as we see it, any such delay would rather prejudice the interests of the United States as complainant.

9. We do not preclude that a panel might decide to exclude late-submitted information from the record in a dispute, even in a case such as this one where the late submission resulted from an oversight, did not prejudice the other party's ability to respond and did not cause undue delay in the proceeding. Indeed, a panel might conclude that exclusion is warranted in a given case to provide an appropriate incentive to a party to abide by deadlines, or indeed to deliver a systemic message about the importance of respecting procedural rules. This Panel has however been guided by a commitment to reach a sound judgement on the merits in this dispute, through an objective examination of the evidence and arguments put before it by the parties. To exclude potentially relevant evidence put before it by a party on purely procedural grounds is not a decision to be taken lightly and, although this is a close case, we have decided that, on balance, such action is not required at this time.

10. Although we have decided that we will not exclude Exhibits USA-492 to USA-498 (non-BCI) from the record in this dispute, we nevertheless would like to express our deep concern. To err is of course human, and in a highly complex proceeding such as this one, involving enormous submissions, nearly a thousand exhibits and elaborate rules regarding confidential information, some mistakes are perhaps inevitable. However, the United States has been responsible for a larger number of procedural errors in this proceeding than can be easily justified even in a case such as this one. In order to avoid further situations which could require the Panel to take stronger action, we call upon the United States to take all necessary steps to ensure compliance with the deadlines and other applicable procedures in this proceeding.

11. In conclusion, we decline the European Union's request to confirm that the text of Exhibits USA-492 to USA-498 (non-BCI) does not form part of the record and that the text of these documents requires no response from the European Union. In order to provide the European Union with a meaningful opportunity to comment upon the content of the exhibits, we will accord the European Union upon request such reasonable additional time as it considers it might require should it desire to further address the content of these documents. In the alternative, the European Union is free to address the content of these documents at the same time as it responds to follow-up questions from the Panel which we expect to pose in late August.[11]

[8] The Panel recalls that it has, on a number of occasions, informed the parties that it may need to pose additional questions on (or even hold an additional meeting with the parties to discuss) certain factual or legal matters arising in this dispute. The Panel announced this possibility to the parties at the end of the substantive meeting, as well as its cover letter to the questions posed following the substantive meeting with the parties, and its communication of 12 June 2013.

[9] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, Ibid.

[10] Indeed, the European Union itself has expressed concerns about a "procedural gap" between the timetable for this proceeding and that in *US – Large Civil Aircraft* (Art. 21.5 - EU)(DS353), and has requested that this Panel extend its timetable to reflect extensions in the other proceeding. Letter from the European Union to the Panel dated 4 April 3013.

[11] The Panel is conscious that delegations often take holidays during this period, and will set a timetable for reply to its questions that takes this factor into account.

ANNEX F-5

THE EUROPEAN UNION'S REQUESTS OF 28 JUNE 2013 CONCERNING THE UNITED STATES' "CRITIQUE" TO THE COMPETITIONRX REPORT PRESENTED IN THE UNITED STATES' COMMENTS TO THE EUROPEAN UNION'S ANSWERS TO THE PANEL'S FIRST SET OF QUESTIONS

(Panel ruling issued on 8 July 2013)

1. The Panel refers to the European Union's letter of 28 June 2013 concerning the United States' "critique" of the Expert Report on the Financial Viability and Funding Implications of the A350XWB Development Programme (the "Competition Rx Report", Exhibit EU-127 (BCI and HSBI)) set out in the United States' comments on the European Union's answer to Panel Question 47. In its letter, the European Union asks the Panel to either: (i) reject the United States' "critique" as being untimely filed, in the absence of any "showing of good cause"; or alternatively, (ii) afford the European Union a meaningful opportunity to comment on the United States' "critique", were the Panel to decide that the United States has shown "good cause" for its allegedly belated submission. In such a case, the European Union submits that it should be granted an amount of time to respond to the United States' "critique" that is equal to the time it has taken for the United States to respond to the CompetitionRx Report since it was filed (i.e. 23 weeks).

2. In its response to the European Union's letter, the United States asks the Panel to reject the entirety of the European Union's requests on the grounds that: (i) the United States' comments on the European Union's answer to Panel Question 47 were not the first submissions made by the United States concerning the argument advanced in the CompetitionRx Report, namely, that LA/MSF was not critical to the 2006 launch of the A350XWB; and (ii) the United States' "critique" of the CompetitionRx Report does not qualify as "evidence", but is rather argumentation provided in response to an explicit request from the Panel to comment upon the European Union's answer to Panel Question 47.

1 THE EUROPEAN UNION'S REQUEST TO REJECT THE UNITED STATES' "CRITIQUE" OF THE COMPETITIONRX REPORT AS UNTIMELY FILED, WITHOUT A SHOWING OF "GOOD CAUSE"

1.1 Introduction

3. The Panel understands the European Union's concerns about the timing of the United States' "critique" to be not unlike those it raised in its request for an interim ruling of 28 May 2013 with respect to the alleged "backloading of evidence" by the United States in its answers to the Panel's questions of 23 April 2013.[1] Thus, the Panel understands the European Union to be of the view that the United States was required to submit its "critique" of the CompetitionRx Report earlier in these proceedings, and that the United States' alleged "strategic decision" not to do so has not only prejudiced the European Union's ability to defend its interests but also the Panel's ability to engage with the parties and therefore properly discharge its duty to make an objective assessment of the matter. In addition, the European Union argues that the United States' "critique" of the CompetitionRx Report amounted to "evidence", which in the light of certain statements and observations of the Appellate Body in *Thailand – Cigarettes (Philippines)*, cannot be accepted by the Panel at this "late" stage in the proceedings, without any showing by the United States of "good cause".

4. We recall that in our Decision of 12 June 2013 addressing the European Union's "backloaded evidence" allegations we observed that:

[1] European Union, Letter of 28 June 2013, p. 3 and footnote 17 ("Accordingly, for reasons explained in this letter and in its 28 May 2013 Interim Ruling Request[17], the European Union requests that the Panel reject the US critique as not timely filed, without any showing of good cause") (emphasis added). Footnote 17 refers to paragraphs 11-14 of the European Union's Interim Ruling Request of 28 May 2013.

> "… it is a basic requirement of due process that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. This due process interest must be balanced against other interests, including systemic interests such as those reflected in Articles 3.3 and 12.2 of the DSU.{} As the Appellate Body has stated, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU.{}"[2]

5. With these and other important due process considerations in mind,[3] we reviewed the substance and the relevant facts surrounding the introduction of the Sanghvi Report, the United States' answer to Panel Question 67 and the Jordan Reply to Whitelaw's Response Report, and decided to decline the European Union's specific requests to reject these United States' submissions, *inter alia*, because:

> "… in discharging our responsibility under Article 11 of the DSU, {it was, in our view, appropriate} to not only put to the parties the questions asked on 23 April 2013 concerning the identification of the relevant product markets, but also to evaluate the arguments and evidence {including the Sanghvi Report} submitted by the parties in response to those questions."[4]

> "… the entirety of the United States' answer to Panel Question 67 is not only related to the subject matter of that question, but it also concerns a matter with respect to which the parties have engaged and exchanged contrasting views throughout these proceedings. … "[5] and

> "… the matters addressed in the Jordan Reply to Whitelaw's Response Report go directly to the issues with respect to which the Panel sought clarification in its questions. These are the very same issues with respect to which the parties have exchanged views throughout these proceedings. …".[6]

6. In each of the above instances, we saw no reason to accept the European Union's allegation that the United States' had taken a "strategic decision" to "withhold" the relevant evidence and argument in a manner that undermined the Panel's ability to make an objective assessment of the matter before it, or the European Union's ability to make its defense. Rather, we considered the United States' submissions to have been made as "part of the process of engagement between the parties and with the Panel that typically characterized WTO dispute settlement, whereby arguments and evidence are explored and tested, and positions clarified and/or further developed, with a view to informing the Panel's objective assessment of the matter before it".[7] For the reasons explained below, we come to a similar conclusion with respect to the "critique" of the CompetitionRx Report that was set out in the United States' comments on the European Union's answer to Panel Question 47.

1.2 Relevant Facts

7. The CompetitionRx Report was prepared pursuant to a contract between Airbus SAS and CompetitionRx, requiring the latter to "undertake a study and to assess (i) the economic and financial viability of the Business Case for the development of the A350XWB, and (ii) the funding implications of the development of the A350XWB for Airbus and its parent company EADS".[8] The

[2] Decision of the Panel, 12 June 2013, para. 15 (footnotes omitted).
[3] Decision of the Panel, 12 June 2013, paras. 11-15.
[4] Decision of the Panel, 12 June 2013, para. 22.
[5] Panel's Decision of 12 June 2013, para. 27. The Panel did not explain, as the European Union asserts, that "as long as a party is expressing a view on 'a matter with respect to which the parties have engaged and exchanged contrasting views', … it may do so at any point in the proceedings". European Union, Letter of 28 June 2013, p. 2.
[6] Panel's Decision of 12 June 2013, para. 29. Again, the Panel did not explain, as the European Union asserts, that "a party need not restrict itself to answering specific questions put to it by a panel, but may instead offer expansive observations that speak more generally to 'the issues' implicated by a particular question or series of questions". European Union, Letter of 28 June 2013, pp. 2-3 and footnote 6.
[7] Panel's Decision of 12 June 2013, para. 17.
[8] CompetitionRx Report, para. 6, Exhibit EU-127 (BCI and HSBI).

European Union first submitted the CompetitionRx Report, and the A350XWB Launch Business Case which is a principal focus of that Report,[9] with its second written submission, primarily to support its rebuttal of the United States' submissions concerning the necessity of government financing for the "launch and market presence" of the A350XWB.[10]

8. The United States did not explicitly address the analyses or conclusions of the CompetitionRx Report in its Oral Statements at the substantive meeting with the parties in April 2013. However, one aspect of the CompetitionRx Report was at least indirectly criticised by the United States in its Oral Statements;[11] and as noted by the United States, elsewhere in its Oral Statements, the United States continued to elaborate its views on the extent to which LA/MSF for the A350XWB was necessary for the launch and market presence of the A350XWB, drawing *inter alia* from two HSBI documents.[12] The European Union specifically addressed the United States' submissions in its Closing Oral Statement, arguing that they misrepresented the contents of the relevant documents and/or ignored the "objective" evidence presented in its second written submission, which included the CompetitionRx Report.[13]

9. The Panel decided that it wanted to explore the European Union's responses to the United States' submissions in more detail and therefore asked the European Union in Panel Question 47 to respond to four specific arguments made by the United States in its Confidential Oral Statement, in the light of the two HSBI documents referred to by the United States in paragraph 1 of its Confidential Oral Statement, namely, the A350XWB Launch Business Case (Exhibit EU-130 (HSBI)) and the UK Government Document relating to the A350XWB (Exhibit US-498 (HSBI)). The four arguments, as described in Panel Question 47, were: (i) "that the A350XWB project would not have gone forward without LA/MSF"; (ii) "that Airbus launched the A350XWB while making certain key assumptions related to LA/MSF"; (iii) "that the risks associated with the A350XWB launch made it likely that subsidies affected Airbus's decision to proceed with the project"; and (iv) "that the HSBI evidence confirms that prior LA/MSF had substantial effects on the A350XWB project that made the A350XWB's launch - at the time that it was launched - possible". The parties were informed at the time that the Panel asked its questions that they would be given three weeks to comment on each other's answers, and a specific deadline was set for this purpose.[14]

10. In its 27-page response to Panel Question 47, the European Union advanced a number of arguments intended to rebut the submissions made by the United States in its confidential Oral Statement. In doing so, the European Union relied upon *inter alia* the CompetitionRx Report, explicitly referring to it 11 times, in nine paragraphs and 14 footnotes. The European Union's answer draws upon various analyses undertaken, and conclusions reached, in the CompetitionRx Report to support its view that the A350XWB programme was, contrary to the position advanced by the United States, economically viable and would have proceeded even without any financing

[9] A350XWB Launch Business Case, Exhibit EU-130 (HSBI). The European Union asserts, in response to Panel Question 96, that it did not provide the A350XWB Launch Business Case earlier in response to the Panel's request under Article 13 DSU for "[a]ll A350 business cases provided by Airbus or EADS to the member States and/or any of Airbus' risk-sharing suppliers" because this document was never presented to the member States or to Airbus' risk-sharing partners. The European Union explained that it submitted that document with its second written submission because it was "relevant to the rebuttal of certain US assertions that the business case would not be viable absent financing from the EU member States".

[10] See, in particular, sections VI.E.3-4 of the European Union's second written submission.

[11] In paragraph 9 of its Confidential Opening Oral Statement, the United States cross-referred to certain paragraphs in the European Union's second written submission where the CompetitionRx Report was relied upon by the European Union to support its view that the United States "has failed to demonstrate that EADS and Airbus were unable 'to obtain adequate commercial funds' to launch the A350XWB". (European Union, SWS, heading to section VI.E.4.a). The United States relies upon the HSBI document referred to in paragraph 9 of its Confidential Opening Oral Statement to argue that one of the conclusions reached in the CompetitionRx Report should be rejected. United States, Confidential Opening Oral Statement, para. 9, (HSBI) and footnote 18. noting "e.g., EU SWS, paras. 1027, 1030, 1038".

[12] United States, Non-Confidential Opening Oral Statement, paras. 81-89; and United States, Confidential Opening Oral Statement, paras. 4-23.

[13] European Union, Closing Oral Statement (BCI and HSBI), paras. 20-22.

[14] The European Union was subsequently granted an additional two weeks to prepare its comments. Decision of the Panel, 5 June 2013.

from the French, German, Spanish and UK governments, both at the time of the project launch and in [2009].[15]

11. Both parties submitted extensive comments on the other party's answers to the Panel's Questions.[16] In the introductory paragraph to its comments on the European Union's answer to Panel Question 47, the United States submitted that the European Union's answer confirmed "its failure to rebut the U.S. demonstration that LA/MSF is a genuine and substantial cause of the launch and market presence of the A350XWB". The United States explained that the European Union could not, in its view, "avoid this conclusion by distorting the meaning of a UK government document,{} downplaying the significant effects of LA/MSF to earlier models,{} touting the badly flawed CompetitionRx Report,{} and rehashing its arguments about timing of Airbus's request for and receipt of LA/MSF"{}.[17] The United States followed this introductory paragraph with 22 pages of comments through which it responded to the European Union's answer to Panel Question 47. These comments included ten pages devoted to setting out the reasons why the United States' considers the CompetitionRx Report to be "badly flawed".

1.3 Evaluation by the Panel

12. In our view, it is sufficiently clear from the above exposition of the facts surrounding the United States' submission of its "critique" of the CompetitionRx Report that it was introduced into these proceedings as part of the ongoing, and anticipated,[18] exchange of views between the parties with respect to the United States' allegations concerning the relevance of LA/MSF for the "launch and market presence" of the A350XWB. Not only were certain specific aspects of these allegations the subject matter of Panel Question 47, but the CompetitionRx Report was explicitly and extensively relied upon by the European Union to answer that question. In these circumstances, the fact that the United States' "critique" of the CompetitionRx Report was not presented on either of the two previous occasions available for the United States to have possibly introduced it on its own initiative, namely, at the substantive meeting with the parties or in the United States' answers to the Panel's questions,[19] does not mean that the United States should be prevented from doing so in its comments on the European Union's answer to Panel Question 47. To reject the United States' "critique" on this basis would, in our view, undermine the whole purpose of the Panel's decision to pose the parties questions and afford each party an opportunity to comment on each other's answers.

13. The European Union appears to argue, however, that the United States is not entitled to present its "critique" of the CompetitionRx Report at this "late" stage in the proceeding, because it qualifies as "evidence", which cannot be accepted by the Panel without "any showing of good cause".[20] The European Union finds support for this view in certain statements and observations made by the Appellate Body in *Thailand – Cigarettes (Philippines)*. In particular, according to the European Union, the Appellate Body in *Thailand – Cigarettes (Philippines)* noted that "'the submission of factual evidence at the very last stage of the proceedings, that is, in a party's comments on the other party's answers to questions by the Panel following the second substantive meeting … should be unusual' because it is 'so late in the proceedings'".[21] Furthermore, the European Union maintains that the Appellate Body found that for "rebuttal evidence", which the European Union submits was "labelled a 'residual category' of evidence" in *Thailand – Cigarettes (Philippines)*, "'the submitting party must show good cause' for untimely filing".[22] In our view, the European Union's reliance on the Appellate Body's findings in *Thailand – Cigarettes (Philippines)* is not only partly based on a mischaracterization of the relevant Appellate Body statements, but it is

[15] European Union, Answer to Panel Question 47, paras. 136-138, 140, 153, 187-189 and 191.
[16] The United States' submitted 98 pages of comments on the European Union's answers, while the European Union submitted 283 pages of comments on the answers of the United States.
[17] United States, Comments on the European Union's Answer to Panel Question 47, para. 97 (footnotes omitted).
[18] See above, para. 9.
[19] We note that the Panel's questions of 23 April 2013 did not explicitly ask the United States to respond to any particular aspect of the CompetitionRx Report.
[20] European Union, Letter of 28 June 2013, pp. 2-3.
[21] European Union, Letter of 28 June 2013, p. 2, citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 154 and footnote 242.
[22] European Union, Letter of 28 June 2013, p. 2, citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 153.

also misplaced given the significant differences that exist between the facts of that dispute and the situation that is now before the Panel in this proceeding.

14. First, we note that the observations of the Appellate Body in *Thailand – Cigarettes (Philippines)* that are relied upon by the European Union concerned paragraph 15 of the working procedures of the panel in that dispute. The Appellate Body characterized this paragraph as allowing for the submission of "factual evidence at the very last stage of the proceedings" - namely, in the party's comments on each other party's answers to questions after the second substantive meeting of the panel with the parties. The European Union does not, however, allege that the United States has failed to comply with what is a very similar rule of procedure set out in paragraph 15 of the Panel's Working Procedures in this dispute. Moreover, and perhaps more importantly, the United States' "critique" of the CompetitionRx Report does not, in our view, introduce any *new factual evidence.* Rather, as we read it, the United States' "critique" articulates its *arguments* concerning the credibility and relevance of the CompetitionRx Report to the particular issues that were the subject of Panel Question 47 and the European Union's answer, in the light of *evidence that has already been adduced* by both parties. Likewise, the United States' "critique" of the CompetitionRx Report was not submitted at the "very last stage" of these proceedings, because as communicated to the parties on 28 June 2013,[23] the Panel intends to ask the parties a series of follow-up questions towards the end of August 2013.[24] Thus, the observations of the Appellate Body in *Thailand – Cigarettes (Philippines)* that are relied upon by the European Union were made in the context of resolving an issue that does not arise in the present circumstances.[25]

15. Second, and in any case, there is nothing in the Appellate Body's observations that are relied upon by the European Union, to suggest that a panel must *necessarily reject* any factual evidence that is submitted at the "very last stage" of a proceeding. While noting that such a situation "should be unusual",[26] the Appellate Body also clearly contemplated the possibility that there may be circumstances when a panel may decide to accept such factual evidence even without offering the other party an opportunity to comment:

> "As set out above, due process generally demands that each party be afforded a meaningful opportunity to comment on evidence adduced by the other party. At the same time, a number of different considerations will need to be factored into a panel's effort to protect due process in a particular dispute, and these may include the need for a panel, in pursuing prompt resolution of the dispute, to exercise control over the proceedings in order to bring an end to the back and forth exchange of competing evidence by the parties."[27]

16. Thus, after examining a number of "considerations that {were} germane" to its assessment of Thailand's Article 11 DSU claim, the Appellate Body found that the panel in *Thailand – Cigarettes (Philippines)* had not infringed any principles of due process when it accepted Exhibit PHL-289, submitted by the Philippines with its comments on Thailand's answers to the panel's questions after the second substantive meeting, *without offering Thailand a meaningful opportunity to comment on the contents of that exhibit*.[28]

[23] The Panel appreciates that this communication was transmitted to the parties only after the European Union's letter of 28 June 2013 was received.

[24] The Panel recalls that, prior to its communication of 28 June 2013, it had, on a number of occasions, informed the parties that it may need to pose additional questions on (or even hold an additional meeting with the parties to discuss) certain factual or legal matters arising in this dispute. The Panel announced this possibility to the parties at the end of the substantive meeting, as well as in its cover letter to the questions posed following the substantive meeting with the parties, and its communication of 12 June 2013.

[25] Indeed, as we see it, the issue before the Appellate Body in *Thailand – Cigarettes (Philippines)* was significantly different to the one that is before us in this proceeding, as it related to the extent to which the panel in that dispute was entitled to accept a piece of *new factual evidence* as part of the Philippines' comments to Thailand's answers to the panel's questions after the second substantive meeting of the parties without giving Thailand an opportunity to comment upon this *new factual evidence*. Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 141-146.

[26] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, footnote 242.

[27] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 155.

[28] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 156-160.

17. Finally, and contrary to what is argued by the European Union, the Appellate Body in *Thailand – Cigarettes (Philippines)* did not qualify "rebuttal evidence" as a "residual category" of evidence that can only be accepted "late in the proceedings" or "at the very last stage" of a proceeding if "good cause" is shown. Rather, in reviewing the rules for submitting factual evidence found in paragraph 15 of the panel's working procedures in that dispute, the Appellate Body explained that "rebuttal evidence" fell within the scope of the first category of evidence identified in those procedures, and that this category encompassed "evidence that is submitted no later than the first substantive meeting, as well as evidence that, albeit submitted at a later stage, is necessary for purposes of rebuttal, answers to questions, or comments on answers to questions".[29] The "residual category" of evidence identified by the Appellate Body did not include "rebuttal evidence" because the former comprised "evidence that does not fall within the scope of the first sentence" of the panel's working procedures. It was only with respect to the introduction of this "second category" of evidence that the Appellate Body found there was a requirement in the panel's working procedures to show "good cause". Thus, even assuming that the United States' "critique" of the CompetitionRx Report could be qualified as "rebuttal evidence", the Appellate Body's interpretation of the panel's working procedures in *Thailand – Cigarettes (Philippines)* does not stand for the proposition that the United States should have shown "good cause" in order to introduce that "critique" at the time that it commented on the European Union's answer to Panel Question 47.

18. Thus, for all of the foregoing reasons, we decline the European Union's request to reject the United States' "critique" of the CompetitionRx Report on the grounds that it was untimely filed, without any showing of "good cause".

2 THE EUROPEAN UNION'S REQUEST TO BE PROVIDED WITH A "MEANINGFUL OPPORTUNITY" (23 WEEKS) TO COMMENT ON THE UNITED STATES' "CRITIQUE"

19. The Panel recalls that it has already informed the parties that it will pose a series of follow-up questions towards the end of August 2013. With these questions, both parties will be afforded further opportunities to make submissions with respect to each other's views on a number of issues on which the Panel desires further clarification. This will include the extent to which LA/MSF was necessary for the "launch and market presence" of the A350XWB. The parties will also be given an opportunity to make any comments on each other's answers to the Panel's questions. Thus, while the Panel does not agree with the European Union's contention that, in order to secure its due process rights, it must be given the same amount of time to respond to the United States' "critique" of the CompetitionRx Report as it took the United States to make that "critique", the Panel will provide the European Union, through the questions and answers process that is expected to begin towards the end of August, ample opportunity and time to respond to the United States' "critique" of the CompetitionRx Report.

3 CONCLUSION

20. In summary, after carefully considering the European Union's request to reject the United States' "critique" of the CompetitionRx Report, and the United States' response, the Panel has decided, on the basis of the foregoing considerations, to:

a. decline the European Union's request to reject the United States' "critique" of the CompetitionRx Report; and

b. decline the European Union's request to be afforded exactly 23 weeks to respond to the United States' "critique" of the CompetitionRx Report. Nevertheless, the Panel notes that the European Union will be provided with ample opportunity and time to respond to the United States' "critique" of the CompetitionRx Report in the questions and answers process that it has previously communicated to the parties will begin towards the end of August 2013.

[29] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 153 (emphasis added).

ANNEX F-6

THE EUROPEAN UNION'S REQUESTS OF 2, 4 AND 11 SEPTEMBER 2013 CONCERNING THE ADOPTION OF ADDITIONAL INFORMATION CONFIDENTIALITY PROCEDURES FOR THE PURPOSE OF RESPONDING TO PANEL QUESTION 126

(Panel ruling issued on 16 September 2013)

1. The Panel refers to the European Union's communications of 2, 4 and 11 September 2013 concerning the information requested in Panel Question 126, and the United States' response of 4 September 2013. In its communications, the European Union asked the Panel to adopt more stringent confidentiality rules with respect to the information sought by the Panel in Question 126. The United States' objected to the European Union's request.

2. Before turning to address the merits of the European Union's request, the Panel would like to firstly recall the particular context which led it to ask the European Union for the information identified in Question 126. The redacted information Question 126 asks the European Union to disclose is found in two Exhibits that were introduced into this proceeding by the European Union for the specific purpose of rebutting the United States' submission that the A350XWB programme would not have been viable without LA/MSF. The United States has on a number of occasions raised the redactions of information from the HSBI versions of these Exhibits with the Panel, complaining that some (but not all) have hampered its ability to fully respond to the European Union's arguments. The United States has also suggested that the same redactions could hinder the Panel's own task of making an objective assessment of the matter. Panel Question 96(c) asked the European Union to explain why it had redacted certain information from one of the two Exhibits, the A350XWB Launch Business Case (Exhibit EU-130 (HSBI)). After carefully considering the European Union's response, as well as the United States' comments on this and other European Union answers to questions, the Panel decided that in order for it to conduct an objective assessment of the matter, it would need to review and consider the information requested in Panel Question 126.

3. The Panel does not understand the parties to disagree with the notion that where a party submits evidence to substantiate an argument it is making in WTO dispute settlement proceedings, it is up to that party to disclose all of the information necessary for a panel to make an objective assessment of the probative value of the evidence it relies upon. A party's submission of evidence must also take into account the due process rights of the opposing party. As in the original proceedings, both parties in this dispute have, to differing degrees, redacted certain information from parts of the evidence presented to substantiate their respective arguments. The parties have explained their actions by *inter alia* referring to the extraordinarily commercially sensitive nature of the information at issue. The Panel recalls, however, that it was to address precisely these types of concerns that it adopted, on request and after consultation with the parties, the existing BCI/HSBI Procedures. These procedures, which represent the most stringent and far reaching confidentiality rules ever applied in the history of WTO dispute settlement, were specifically designed to facilitate the parties' abilities to submit commercially sensitive information in these proceedings, including in response to all Panel requests for information considered necessary to the task of conducting an objective assessment of the claims and issues before it.

4. The Panel appreciates the seriousness of the concerns raised by the European Union with respect to the information requested in Panel Question 126. The Panel also recognizes the efforts the European Union has undertaken since its communication of 2 September 2013 to endeavour to respond to the entirety of the Panel's information request. The Panel understands from the European Union's letter of 11 September 2013 that despite its earlier reservations, the European Union is now ready to provide all of the requested information, with the exception of certain recurring cost and revenue data, under the protection of the existing BCI/HSBI Procedures. Given the exceptional nature of the European Union's acute sensitivities to disclosing the specified recurring cost and revenue data, the Panel has decided to grant the European Union's request to exclude this information, as identified in its letter of 11 September 2013, from its answer to Panel Question 126. The Panel does so, however, without prejudice to further consideration of this

matter at a later stage in these proceedings, should the Panel conclude that the information not provided by the European Union is necessary for it to complete its work.

5. On this basis, the Panel requests that the European Union provide all of the information requested in Question 126 with the exception of the following:

- Revenue data from the CompetitionRx Report (Exhibit EU-127 (HSBI)), in particular, paragraph 139; figure 4; tables 16 and 17; and the tables in Annexes C and D; and

- Recurring cost data from slide 59 of the A350XWB Launch Business Case (Exhibit EU-130 (HSBI)); as well as from paragraph 193; tables 12, 15, 16, 17; figures 6 and 7; and the tables in Annex D of the CompetitionRx Report (Exhibit EU-127 (HSBI)).

6. The Panel understands that the European Union is in a position to submit this information at the same time as its answers to all other Panel Questions, i.e. by 20 September 2013.

ANNEX F-7

THE EUROPEAN UNION'S REQUEST OF 24 MARCH 2014 CONCERNING THE PANEL'S DECISION TO POSE SIX ADDITIONAL WRITTEN QUESTIONS TO THE PARTIES

(Panel ruling issued on 31 March 2014)

The Panel refers to the European Union's letter of 24 March 2014, and the United States' reply of 26 March 2014, concerning its intention to pose six additional questions to the parties, including a number of questions concerning the alleged subsidization of the A350XWB.

The Panel has carefully considered the parties' submissions, and for the reasons explained in following pages, has decided to maintain its request. Given the relatively small number of questions[1], the Panel had originally envisaged to invite the parties to submit their answers by close of business on **Tuesday, 15 April 2014**, subject to any reasonable and justified request for an extension. Now that the questions have been provided, and in the light of the European Union's stated resource constraints, the parties are requested to confirm by close of business on **Wednesday, 2 April 2014**, whether it would be possible to meet the 15 April 2014 deadline. Should either party consider that it will be unable to provide the requested information and/or explanations within this time-limit, it should inform the Panel and request an extension, proposing an alternative date. The parties will be invited to submit any comments they may have on each other's answers to the Panel's questions on a date to be set by the Panel in the light of the responses submitted by the parties on 2 April 2014.

[1] Of the six additional questions, three are posed only to the European Union, two only to the United States, and one question is posed to both parties.

1 THE PANEL'S DECISION TO POSE ADDITIONAL QUESTIONS

1. In its letter of 24 March 2014, the European Union requests that the Panel reconsider its decision to ask additional questions with respect to the "alleged subsidization of the A350XWB". According to the European Union, "the time is now long past for this debate to come to an end";[2] and any request on the part of the Panel for the parties to answer additional questions on this issue would "at this juncture risk{} further breaching enumerated limits on the Panel's use of its interrogative powers, including notably, to make good either Party's failure to articulate and substantiate its case".[3]

2. The United States opposes the European Union's request. While the United States shares the European Union's view that the Panel has afforded the parties "ample opportunity" to address the issues presented in this dispute, it does not believe that this precludes the possibility that the Panel may need additional clarification of the parties' views or the relevant facts before it.[4] For the United States, the Panel is entitled to ask additional questions provided that it fulfils its responsibilities under the DSU, while minimizing undue delay in the proceedings.[5]

3. We recognize that the parties in a typical Article 21.5 dispute would probably not expect to receive a set of questions from the panel 11 months after the one and only substantive meeting. We are fully conscious of the 90 day deadline for a compliance panel to circulate its report,[6] and that the prompt settlement of disputes is essential to the effective functioning of the WTO and the dispute settlement mechanism.[7] However, as the parties are well aware, the present dispute is not an ordinary Article 21.5 proceeding, a fact that is reflected in *inter alia* the parties' decisions to designate over 150 government representatives and outside advisors as Approved Persons,[8] to file first and second written submissions totalling 1470 pages (not to mention scores of lesser submissions on a wide range of matters), to submit numerous expert reports and to put before the Panel some 1100 exhibits.[9] Indeed, on more than one occasion we have explained that the complex issues and voluminous arguments and evidence submitted in these proceedings create particular challenges for its work given the one-meeting format of compliance disputes. It should therefore come as no surprise that given the limited resources available in the Secretariat to assist the Panel carry out its mandate, the fine details of a number of matters at issue in this dispute have only been clearly identified and fully considered by the Panel relatively recently, much later than would otherwise be the case in an average Article 21.5 proceeding.

4. It was with these particular challenges in mind that we informed the parties on each previous occasion it decided to pose written questions that: (i) it could not "exclude that as it continue{d} to deliberate on the merits of the United States' claims, it may find it necessary to pose further questions on factual or legal issues"; and (ii) that it would "ensure that were any such further questions to be asked, the parties [would] be notified in advance and given sufficient time to respond."[10] Consistent with this stated approach, our communication of 20 March 2014 gave the parties 11 days' notice of our intention to pose six additional questions to the parties, a "number" of which may require the parties to call upon the experts they have thus far used to make submissions on the alleged subsidization of the A350XWB. All six of the additional questions were prompted by our ongoing consideration of the parties' arguments and evidence, which has led us to conclude that there are a number of important matters that need to be clarified and/or further elaborated in order for it to conduct an objective assessment of the matter. However, for the European Union, the Panel would risk doing precisely the opposite by deciding to ask any

[2] European Union's Letter to the Panel of 24 March 2014, p. 3.
[3] European Union's Letter to the Panel of 24 March 2014, p. 3.
[4] United States Response of 26 March 2014 to the European Union's Letter of 24 March 2014, p. 1.
[5] United States Response of 26 March 2014 to the European Union's Letter of 24 March 2014, p. 2.
[6] Article 21.5, DSU.
[7] Article 3.3, DSU.
[8] European Union Approved Persons List of 17 September 2013 (41 government representatives / 36 outside advisers); United States Approved Persons Lists of 7 May 2013 (33 government representatives / 47 outside advisers).
[9] The parties' written submissions in this dispute have also included answers, and comments on each other's answers, to 160 questions (often with multiple sub-parts) posed by the Panel.
[10] See cover note to the Panel's Questions to the Parties of 23 April and 23 August 2013. The Panel made a similar statement at the end of the substantive meeting with the parties, as well as in its communication of 12 June 2013 concerning the European Union's request for an interim ruling of 28 May 2013, para. 14.

additional questions with respect to the alleged subsidization of the A350XWB at this stage of the proceeding.[11] In our view, there is no basis to the European Union's concerns.

5. We are aware of no rule that, as a general matter, would prevent a panel from posing written questions to the parties in a dispute *at any stage* of a proceeding. Indeed, as we have previously noted,[12] it is well established that "a panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding member has established its complaint or defence on a *prima facie* basis."[13] Moreover, the Appellate Body has explained that "panels are entitled to ask questions of the parties that they deem relevant to the consideration of issues before them".[14] It follows that a panel's discretion to pose questions to the parties must be first and foremost guided by its obligation to conduct an objective assessment of the matter. Obviously, any decision to exercise this discretion relatively late in a proceeding must also take account of the need to settle disputes in a timely manner, particularly in the context of Article 21.5 proceedings. However, the objective of achieving a prompt settlement of disputes cannot alone dictate when a panel is entitled to request the parties to provide information and/or explanations that are considered necessary to perform its function. Thus, to accept that the Panel in this compliance dispute cannot ask the parties to answer six additional questions simply because 22 months have passed since the United States filed its first written submission (in a proceeding that is undeniably one of the most legally complex and factually intensive Article 21.5 disputes in the history of the WTO dispute settlement mechanism) would artificially and arbitrarily constrain the Panel's ability to discharge its duty and thereby bring it into conflict with the standards of the DSU. As we have previously explained:

> "The 'objective assessment of the matter' that a panel is called upon to perform under Article 11 of the DSU requires it to carefully and independently scrutinize the parties' arguments and any evidence submitted in support of those arguments, with a view to clarifying their meaning and exploring their implications for the particular claims being made. Consistent with this obligation, and in the light of the extremely voluminous and complex issues that have been raised in this dispute, we believe that our evaluation of the merits of the United States' claims must be conducted on the basis of a full appreciation of *all* of the parties' arguments and the evidence adduced in support of those arguments throughout the course of this proceeding."[15]

6. Thus, contrary to the European Union's contentions, we see no obstacle to or risk in posing any number of additional questions to the parties concerning the alleged subsidization of the A350XWB at any stage in this proceeding, provided that we consider the information sought by any such questions to be necessary to our task of making an objective assessment of the United States' claims. Rather than tainting the neutrality of our findings in this dispute, the information and/or explanations that are requested in the additional questions we have asked the parties will, in our view, only serve to ensure that the standards of Article 11 of the DSU are respected.

7. Finally, we note that of the five additional questions asked with respect to the alleged subsidization of the A350XWB, it became necessary to pose three of them because the methodologies and underlying data used by the European Union to calculate the IRRs and Macaulay durations of the challenged LA/MSF contracts yet to be fully explained and/or completely disclosed. Had such explanations and data been provided when the relevant calculations were first submitted,[16][17] or when the Panel explicitly requested them,[18] the Panel might not have had to pose some of the questions it now seeks to have answered.

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[11] We note that the European Union's objection to the Panel's intention to ask additional questions is limited to the "number" of questions the Panel stated in its fax of 20 March 2014 it wanted to ask in respect of the alleged subsidization of the A350XWB. The European Union does not take issue with the Panel's intention to ask questions concerning any other matter at this stage of the proceeding.

[12] See Panel's communication of 12 June 2013 concerning the European Union's request for an interim ruling of 28 May 2013, para. 14.

[13] Appellate Body Report, *Canada – Aircraft*, para. 192 (underline added).

[14] Appellate Body Report, *Thailand – H-Beams*, para. 135.

[15] Panel's communication of 12 June 2013 concerning the European Union's request for an interim ruling of 28 May 2013, para. 14 (underline added).

[16] The first presentation of the final numerical values of the IRRs relied upon by the European Union was made in its second written submission on 15 January 2013 (table at para. 300) and the accompanying

2 DEADLINE TO RESPOND TO THE PANEL'S ADDITIONAL QUESTIONS

8. In its letter of 24 March 2014, the European Union revealed that were the Panel to decide to pose the additional questions, the European Union would be "unable to marshall the expert resources necessary to address questions on this issue" between 12 April and 4 May 2014, "in light of long-standing professional and personal commitments." The European Union requests that the Panel "take this factor, as well as the demands of due process, into account in considering how to proceed".[19]

9. The United States submits that the unavailability of certain "expert resources" from 12 April 2014 to 5 May 2014 does not warrant any special accommodations for responding to questions. The United States notes that these dates would leave "almost two working weeks" to answer the Panel's questions. According to the United States, this amount of time would be in "line with what the Panel has provided in previous rounds of questions, which included many more than six questions". Furthermore, the United States suggests that "given the late stage of the proceeding and the importance of resolving the dispute promptly, it would not appear to be necessary to provide for comments to answers to questions".[20]

10. In providing the parties with advance notice on 20 March 2014 of its intention to ask additional questions, the Panel had wanted to give the parties a reasonable period of time to organize their resources in order to be in a position to fully respond to its questions. Given that almost six months have passed since the parties' last submissions in this dispute, we can certainly appreciate that it may not be easy for the parties to assemble all of the relevant resources and expertise in sufficient time. However, bearing in mind that the European Union's unidentified "expert resource{}" constraints were expressed without having seen the relevant questions, and that the Panel had in any case intended to invite the parties to submit their answers by close of business on **Tuesday, 15 April 2014**, subject to any reasonable and justified request for an extension, the parties are requested to review the questions that are now before them and confirm by close of business on **Wednesday 2 April 2014**, whether it would be possible to meet the 15 April 2014 deadline. Should either party consider that it will be unable to provide the requested information and/or explanations within this time-limit, it should inform the Panel and request an extension, proposing an alternative date.

11. We do not agree with the United States when it suggests that "it would not appear to be necessary to provide for comments to answers to questions". In our view, the United States' suggestion would undermine both parties' fundamental due process right to an opportunity to comment on any submissions made by the other. Thus, the parties will be invited to submit any comments they may have on each other's answers to the Panel's questions on a date to be set by the Panel in the light of the responses the parties will submit on 2 April 2014.

Whitelaw Response to Jordan Report (table at para. 12), Exhibit EU-121(BCI). The underlying data and specific methodology used to derive the IRRs was not disclosed. It was only eight months later, in its answers to the Panel's second set of questions submitted on 20 September 2013, that the European Union revealed *part* of the data used to derive the IRRs in the Further Report by Professor Whitelaw, Exhibit EU-421 (HSBI).

[17] The European Union's Macaulay duration calculations were first submitted in Exhibit EU-380 (HSBI) on 22 May 2013, as part of the European Union's Answer to Panel Question 92. The first explanation and justification provided by Professor Whitelaw for the use of these calculations was provided in Exhibit EU-396 (BCI/HSBI) on 25 June 2013, as part of the European Union's Comments on the United States' Answers to the first set of Questions. Professor Whitelaw's explanation did not, however, fully disclose the methodology used to derive the calculations with respect to each of the relevant LA/MSF contracts.

[18] See, in particular, Panel Question 132 to the European Union, which read: "*Please explain Professor Whitelaw's calculations of the IRRs of the A350XWB LA/MSF Agreements. Please provide all underlying data for these calculations, showing the figures and describing the methodology used with respect to all contracts, including amendments, as well as anticipated cash flows to and from the member States and any assumptions with regards to revenues, prices and/or royalties (e.g. were list prices used or actual/anticipated negotiated prices?). Please explain the extent to which the methodology used by Professor Whitelaw differs or is similar to that used by the European Union to calculate the IRRs of the LA/MSF Agreements in the original proceeding.*"

[19] European Union's Letter to the Panel of 24 March 2014, p. 4.

[20] United States Response of 26 March 2014 to the European Union's Letter of 24 March 2014, p. 2.

ANNEX G

THE EUROPEAN UNION'S COMPLIANCE COMMUNICATION OF 1 DECEMBER 2011

ANNEX G-1

THE EUROPEAN UNION'S COMPLIANCE COMMUNICATION OF 1 DECEMBER 2011

(WT/DS316/17)

1. The European Union refers to the recommendations and rulings of the WTO Dispute Settlement Body (DSB) with respect to the dispute *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316). The European Union would like to inform the DSB that it has taken appropriate steps to bring its measures fully into conformity with its WTO obligations, and to comply with the DSB's recommendations and rulings.

2. In considering appropriate steps to bring its measures into conformity with its WTO obligations, the European Union took note of all elements of the DSB's recommendations and rulings, including, in particular, the Appellate Body's guidance on the way in which subsidies and adverse effects expire, dissipate, terminate or are otherwise removed or withdrawn. In undertaking this review, we consulted, among others, independent experts in: financial economics; investor behaviour; financial and cost auditing, accounting and controlling; product engineering; and Large Civil Aircraft (LCA) fleet management. We have also closely monitored and assessed LCA product and market developments in the months and years following the period covered by the Panel's review.

3. As a result of this review, the European Union has adopted a course of action that addresses all forms of adverse effects, all categories of subsidies, and all models of Airbus aircraft covered by the DSB's recommendations and rulings.

4. Specifically, in bringing its measures into conformity with its WTO obligations, the European Union has addressed all categories of subsidy covered by the DSB's recommendations and rulings: Member State Financing (MSF) loans, capital contributions, infrastructure support and regional aid. Amongst others, the European Union has secured repayment of MSF loans and terminated MSF agreements, increased fees and lease payments on infrastructure support to accord with market principles, and ensured that capital contributions and regional aid subsidies have, in the Appellate Body's words, "come to an end" and are no longer capable of causing adverse effects. Additionally, the course of action adopted by the European Union affects Airbus' A300, A310, A320, A330, A340 and A380 aircraft, as well as derivatives thereof, as implicated by the DSB's recommendations and rulings. Finally, as a result of these steps and other intervening market events, the European Union has addressed the forms of adverse effects covered by the DSB's rulings. Information concerning the steps that have been taken by the European Union is provided in the attached list.

5. In short, by having taken appropriate steps to bring our measures into conformity with our WTO obligations, as required by Article 7.8 of the *SCM Agreement* and Article 19.1 of the DSU, the European Union has ensured full implementation of the DSB's recommendations and rulings.

1. Termination of French MSF agreement for A300B;

2. Termination of French MSF agreement for A300B2/B4;

3. Termination of French MSF agreement for A300-600;

4. Termination of German MSF agreement for A300B;

5. Termination of German MSF agreement for A300B2/B4;

6. Termination of German MSF agreement for A300-600;

7. Termination of Spanish MSF agreement for A300B;

8. Termination of Spanish MSF agreement for A300B2/B4;

9. Termination of Spanish MSF agreement for A300-600;

10. Termination of French MSF agreement for A310;

11. Termination of French MSF agreement for A310-300;

12. Termination of German MSF agreement for A310;

13. Termination of German MSF agreement for A310-300;

14. Termination of Spanish MSF agreement for A310;

15. Termination of Spanish MSF agreement for A310-300;

16. Termination of French MSF agreements for A320;

17. Termination of German MSF agreement for A320;

18. Termination of Spanish MSF agreement for A320;

19. Termination of French MSF agreement for A330/A340 Basic;

20. Termination of German MSF agreement for A330/A340 Basic;

21. Termination of Spanish MSF agreement for A330/A340 Basic;

22. Termination of French MSF agreement for A330-200;

23. Termination of French MSF agreement for A340-500/600;

24. Termination of Spanish MSF agreement for A340-500/600;

25. Payment by Airbus, other than on deliveries under previously existing contractual terms, with respect to outstanding MSF obligations in the amount of approximately EUR 1,704,775,000;

26. Bringing "to an end"[1] the 1987, 1988, 1992 and 1994 French capital contributions into Aérospatiale; the 1989 capital contribution by Kreditanstalt für Wiederaufbau ("KfW") into Deutsche Airbus GmbH and the subsequent 1992 transfer of KfW's shares; the French MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320, A330/A340 Basic, A330-200 and A340-500/600; the German MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320 and A330/A340; the Spanish MSF agreements for the A300B, A300B2/B4,

[1] Appellate Body Report, *EC – Aircraft*, para. 709.

A300-600, A310, A310-300, A320, A330/A340 Basic and A340-500/600; the UK MSF agreements for the A320 and A330/A340 Basic; the regional development grant for an A380-related facility of Airbus Deutschland GmbH (now Premium AEROTEC GmbH) in Nordenham, Germany; and, the regional development grants for largely A380-related facilities of EADS/CASA in Tablada and Puerto de Santa Maria, Spain, and of Airbus España, S.L. (now Airbus Operations, S.L.) in Illescas and Puerto Real, Spain;

27. Isolation of Spanish regional development grants to the EADS/CASA facility at La Rinconada/San Pablo, Spain, from use for LCA purposes;

28. Amendment of take-off and landing fee schedule for use of the runway extensions at Bremen Airport;

29. Amendment of the lease agreement between Airbus Deutschland GmbH and Projektierungsgesellschaft Finkenwerder mbH & Co. KG for an A380-related Airbus Deutschland GmbH facility in Hamburg Finkenwerder;

30. Subsequent share transactions and cash extractions involving subsidy recipients;

31. Termination of the A300 LCA programme;

32. Termination of the A310 LCA programme;

33. Termination of the A340 LCA programme;

34. Completed deliveries of relevant LCA to markets for which displacement was found and completed performance of sales contracts for A319s with easyJet, A320s with Air Berlin, A319s and A320s with Czech Airlines, A320s with Air Asia, A340-600s with Iberia, A340-300s and A340-600s with South African Airways, A340-500s and A340-600s with Thai Airways International, A380s with Emirates Airlines, A380s with Singapore Airlines, and A380s with Qantas;

35. Non-subsidised subsequent investments in Airbus' A320 and A330 LCA programmes;[2]

36. Attenuation, through the actions or steps taken with respect to the subsidies and through further intervening causes, of any causal link to the point that it no longer constitutes "'a genuine and substantial relationship of cause and effect' between the subsidies and the alleged market phenomenon".[3]

[2] Appellate Body Report, *EC – Aircraft*, para. 1233.
[3] Appellate Body Report, *EC – Aircraft*, paras. 1232-1233.

WORLD TRADE ORGANIZATION

WT/DS316/RW/Add.1

22 September 2016

(16-4969)

Original: English

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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to G to the Report of the Panel to be found in document WT/DS316/RW.

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THE EUROPEAN UNION'S COMPLIANCE COMMUNICATION OF 1 DECEMBER 2011

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

1. In its proceedings the Panel shall follow the relevant provisions of the Dispute Settlement Understanding (DSU). In addition, the following working procedures shall apply.

2. The Panel shall conduct its internal deliberations in closed session. The parties to the dispute, and interested third parties, shall be present at the meetings only when invited by the Panel to appear before it.

3. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. At the request of either party, the Panel will consider adopting additional procedures for the protection of confidential information. The Panel will consider proposals from the parties as to the content of any such procedures, and will consult with the parties in this regard.

5. Before the substantive meeting of the Panel with the parties to the dispute, the parties shall transmit to the Panel written submissions, and subsequently written rebuttals, in which they present the facts of the case and their arguments, and their counter-arguments, respectively. Third parties may transmit to the Panel written submissions after the first written submissions of the parties have been submitted but before the rebuttals of the parties are submitted.

6. All third parties which have notified their interest in the dispute to the Dispute Settlement Body shall be invited in writing to present their views during a session of the substantive meeting of the Panel set aside for that purpose. All such third parties may be present during the entirety of that session.

7. At its substantive meeting with the parties, the Panel will ask the United States to present its case. Subsequently, and still at the same meeting, the Panel will ask the European Union to present its point of view. The Panel thereafter will ask third parties to present their views at the separate session of the same meeting set aside for that purpose. The parties will then be allowed an opportunity for final statements, with the United States presenting its statement first.

8. The Panel may at any time put questions to the parties and to the third parties, and ask them for explanations either in the course of the substantive meeting with the parties and/or third parties, or in writing. Written answers to questions shall be submitted by a date to be specified by the Panel.

9. The parties and third parties shall make all submissions in a WTO working language. Where the original language of an exhibit or of text quoted in submissions or responses to questions is not a WTO working language, the submitting party or third party shall submit a translation of the exhibit or text into a WTO working language at the same time as the original language version. The Panel may grant extensions of time for the translation of exhibits or text into a WTO working language upon a showing of good cause. Any objection as to the accuracy of a translation shall be raised in writing and at the earliest possible moment. Any objection shall be accompanied by an explanation of the grounds of objection and, if possible, an alternative translation.

10. A party to the dispute shall make available to the Panel and the other party a written version of its oral statement not later than the first working day following the end of the meeting of the Panel at which the oral statement was presented. Third parties to the dispute shall make available to the Panel, the parties and all other third parties a written version of their oral statements not

later than the first working day following the end of the meeting of the Panel at which the oral statement was presented. Parties and third parties are encouraged to provide the Panel and other participants at the meeting with a provisional written version of their oral statements at the time that the statements are made.

11. In the interest of full transparency, oral presentations by a party shall be made in the presence of the other party. Moreover, each party's submissions, including responses to questions put by the Panel, shall be made available to the other party. Submissions by third parties, including responses to questions put by the Panel, shall also be made available to the parties. Third parties shall receive copies of the parties' first written submissions and rebuttals.

12. The parties shall provide the Secretariat with executive summaries of the claims and arguments contained in their written submissions and oral presentations. The executive summaries of the first written submissions and rebuttal written submissions shall be limited to 10 pages each, and the executive summaries of the oral statements at the meetings shall be limited to 5 pages each. Third parties are requested to provide the Panel with executive summaries of their written submissions and oral statements, of no more than 5 pages each. The executive summaries shall not serve in any way as a substitute for the submissions of the parties and third parties in the Panel's examination of the case. Any executive summary shall be submitted to the Secretariat within ten days of the date on which the original submission is submitted or the original oral statement is submitted in written form. Paragraph 20 shall apply to the service of executive summaries.

13. The descriptive part of the Panel's report will include the procedural and factual background of the present dispute. Description of the main arguments of the parties and third parties will consist of the executive summaries referred to in paragraph 12, which will be attached to the report of the Panel as annexes.

14. Parties shall submit any requests for preliminary rulings not later than in their first written submissions to the Panel. If the United States requests such a ruling, the European Union shall submit its response to the request in its first submission. If the European Union requests such a ruling, the United States shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure may be granted upon a showing of good cause.

15. Parties shall submit all factual evidence to the Panel no later than their first written submissions, other than evidence necessary for purposes of rebuttals and answers to questions. Exceptions to this procedure may be granted upon a showing of good cause. In such a case, the other party shall be accorded a period of time for comment on the newly submitted evidence, as the Panel deems appropriate.

16. To facilitate the maintenance of the record of the dispute, and for ease of reference to exhibits submitted by the parties, parties are requested to number their exhibits sequentially throughout the course of the dispute. For example, exhibits submitted by the United States should be numbered USA-1, USA-2, etc., and exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission of the European Union, for example, was numbered EU-5, the first exhibit of the next submission thus would be numbered EU-6.

17. The parties and third parties may submit exhibits, and serve them on each other, as electronic files saved on CD-ROMs. If a party or third party chooses to submit exhibits as electronic files, it shall, in addition, submit 3 paper copies of such exhibits to the Secretariat, and one paper copy of such exhibits to each party and third party.

18. The parties and third parties to this proceeding have the right to determine the composition of their own delegations. The parties and third parties shall have responsibility for all members of their delegations and shall ensure that all members of their delegations act in accordance with the rules of the DSU and the Working Procedures of this Panel, particularly in regard to confidentiality of the proceedings. Each party and third party shall provide a list of the members of its delegation before or at the beginning of the meeting with the Panel to the Secretary of the Panel, Mr. XXX.

19. Following the issuance of the interim report, the parties shall have three weeks to submit written requests to review precise aspects of the interim report. Following receipt of any written request for review, each party shall have two weeks to submit written comments on the other party's written request for review. Such comments shall be strictly limited to commenting on the other party's written request for review.

20. The following procedures regarding service of documents shall apply:

a. Each party shall serve its submissions directly on the other party. Each party shall, in addition, serve its first written submission and written rebuttal submission on the third parties. Each third party shall serve its submissions on the parties and all other third parties. Each party and third party shall confirm in writing that copies have been served as required, at the time it provides each submission to the Panel.

b. The parties and third parties should provide their submissions to the Secretariat by 5:30 p.m. (Geneva time) on the due dates established by the Panel, unless a different time is set by the Panel.

c. Each party and third party shall provide the Panel with eight (8) paper copies of all documents submitted to the Panel. Where a party or a third party submits exhibits as electronic files on CD-ROMs, it shall provide to the Panel four (4) CD-ROMS containing such files, as well as three (3) paper copies. All of these copies shall be filed with the Dispute Settlement Registrar, Mr. XXX (office number xxxx).

d. Each party and third party shall also provide to the Panel an electronic version of all documents at the time that it provides the paper copies, in a format compatible with that used by the Secretariat, either on a CD-ROM or diskette or as an e-mail attachment. E-mail attachments shall be sent to the Dispute Settlement Registry (xxxx@wto.org), with copies to XXXXX. If the electronic version is provided by diskette or CD-ROM, four (4) copies shall be delivered to Mr. XXX (office number xxxx).

e. The Panel will endeavour to provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

PROCEDURES FOR THE PARTIAL OPENING TO THE PUBLIC OF THE SUBSTANTIVE MEETING WITH THE PANEL

(4 April 2013)

1. The Panel's meeting with the parties will start at 10:00 a.m. on 16 April 2013. The Panel will invite the United States to first present its full opening oral statement before the floor is given to the European Union to present its full opening oral statement. The oral statements will be videotaped for later viewing, as set out in paragraph 6 below. If at any point during its oral statement a party intends to utter BCI or HSBI, it shall request that the videotaping be discontinued for the relevant portion of the oral statement, after which videotaping will be resumed. A party may first deliver the part of its oral statement that contains no BCI or HSBI, and then ask for the videotaping to be discontinued, before delivering a second part of its oral statement containing BCI or HSBI.

2. BCI or HSBI in the texts of the oral statements provided to the panel and the other party during the meeting and prior to the delivery of the oral statements shall be bracketed in accordance with the BCI/HSBI Procedures. BCI should be contained within single brackets. HSBI should be contained within double brackets and deleted. In addition, a party including HSBI in its oral statement shall provide, prior to delivery of the oral statement, one paper copy to the panel and one paper copy to the other party, on coloured paper, with the HSBI included in double brackets. This document shall be subject to the same confidentiality rules as an HSBI Appendix to a written submission.

3. During the meeting with the parties, the following persons will be admitted into the meeting room: (1) the Panel; (2) all BCI/HSBI-approved members of the delegations of the parties; (3) BCI/HSBI-approved WTO Secretariat staff assisting the Panel; and (4) the team hired by the WTO Secretariat to videotape the proceedings. If at any point during its oral statement a party intends to utter HSBI, those individuals not having HSBI approval shall be asked to exit the room. If at any point a party intends to utter either BCI or HSBI, the team hired by the WTO Secretariat to videotape the proceedings shall be asked to exit the room.

4. After each oral statement has been delivered, the Panel will ask the parties whether they can confirm that no BCI or HSBI was pronounced during the videotaped portion of the oral statement. If both parties so confirm, the showing of the videotape will proceed according to schedule. If either party requests to review the videotape, both parties will be invited to attend that review, accompanied by a representative of the Secretariat and the technician responsible for editing, on the premises of the WTO at an appropriate time after the meeting. Therefore, parties should be prepared to advise the technician which portion of the oral presentation presents a concern, and limit review to those portions of the videotape to the maximum extent possible. If either party considers that a specific portion of the videotape must be deleted − because it is BCI or HSBI − the specific portion of the videotape will be deleted.

5. The third party session will start at 14:00 on 17 April 2013. Third parties shall indicate to the Panel, not later than close of business on 5 April 2013, whether they consent to the videotaping of their oral statements for later viewing. The Panel will start the third party session with the statements of those third parties so consenting. After such third parties have made their statements, any questions or comments from the parties, other third parties or the Panel concerning these statements shall be made. The Panel shall then proceed to a third party closed session during which the rest of the third parties shall make their statements. The Panel or any party or third party may pose questions to any third party or make comments concerning these statements. **Should any third party intend to include BCI in its oral statement or otherwise to refer to BCI during the third party session, it is requested to inform the Panel by close of business on 11 April 2013** so that appropriate arrangements can be made to protect the confidentiality of that information.

6. The showing of the videotape of the oral statements of the parties and third parties shall take place on 18 and 19 April 2013. The showing will be open to officials of WTO Members and Observers, to accredited journalists, and to accredited representatives of non-governmental organizations, upon presentation of their official badges. The Secretariat will place a notice by on the WTO website by **4 April 2013** informing the public of the showing. The notice shall include a link through which members on the public can register directly with the WTO. The deadline for public registration shall be close of business on **11 April 2013.**

ANNEX A-3

ADDITIONAL PROCEDURES TO PROTECT BUSINESS CONFIDENTIAL INFORMATION AND HIGHLY SENSITIVE BUSINESS INFORMATION

(12 July 2012)

I. GENERAL

The following Procedures apply to all business confidential information ("BCI") and highly sensitive business information ("HSBI") on the Panel record. These Procedures do not diminish the rights and obligations of the parties to request and disclose any information within the scope of the *SCM Agreement* and Article 13 of the *DSU*.

II. DEFINITIONS

For the purposes of these Procedures,

1. **"Approved Persons"** means Representatives or Outside Advisors of a Party, when designated in accordance with these procedures.

2. **"Business Confidential Information"** or "BCI" means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as BCI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause harm to the originators of the information. Each Party and Third Party shall act in good faith and exercise restraint in designating information as BCI, and will endeavour to designate information as BCI only if its disclosure would cause harm to the originators of the information.

3. **"Conclusion of the Panel Process"** means the earliest to occur of the following events:

   a. pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report;

   b. a Party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU;

   c. pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses; or

   d. pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB.

4. **"Designated as BCI"** means:

   a. for printed information, text that is set off with bold square brackets in a document clearly marked with the notation 'BUSINESS CONFIDENTIAL INFORMATION' and with the name of the Party or Third Party that submitted the information;

   b. for electronic information, characters that are set off with bolded square brackets (or with a heading with bolded square brackets on each page) in an electronic file that contains the notation 'BUSINESS CONFIDENTIAL INFORMATION', has a file name that contains the letters "BCI", and is stored on a storage medium with a label marked 'BUSINESS CONFIDENTIAL INFORMATION' and indicating the name of the Party or Third Party that submitted the information; and

c. for uttered information, declared by the speaker to be "Business Confidential Information" prior to utterance.[1]

d. In case either Party objects to the designation of information as BCI under paragraphs 4(a)-(c), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as BCI, the submitting Party or Third Party may either designate it as non-BCI or withdraw the information. The Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI information previously designated by that Party or Third Party as BCI.

This paragraph shall apply to all submissions, including exhibits, by a Party or Third Party.

5. **"Designated as HSBI"** means:

a. for electronic information, in characters that are set off with double bolded square brackets (or a heading with double bolded square brackets on each page) in an electronic file that contains the notation 'HIGHLY SENSITIVE BUSINESS INFORMATION', has a file name that contains the letters "HSBI", and is stored on a storage medium with a label marked 'HIGHLY SENSITIVE BUSINESS INFORMATION' and indicating the name of the Party or Third Party that submitted the information; and

b. for uttered information, declared by the speaker to be "Highly Sensitive Business Information" prior to utterance.[2]

This paragraph shall apply to all submissions, including exhibits, by a Party or Third Party.

6. **"Electronic information"** means any information stored in an electronic form (including but not limited to binary-encoded information).

7. **"Highly Sensitive Business Information"** or **"HSBI"** means any business information regardless of whether contained in a document provided by a public or private body that a Party or Third Party has "Designated as HSBI" because it is not otherwise available in the public domain and its disclosure could, in the Party's or Third Party's view, cause exceptional harm to its originators. Each Party and Third Party shall act in good faith and exercise the utmost restraint in designating information as HSBI. Each Party and Third Party may at any time designate as non-BCI/HSBI or as BCI information designated by that Party or Third Party as HSBI.

a. The following categories of information may be Designated as HSBI:

i. information indicating the actual selling or offered price of any large civil aircraft (LCA) manufacturer's products or services[3], and, except as provided in subparagraph 7(d)(i) below, any graphs or other use of the data which reflect the movement of prices, pricing trends or actual prices of an LCA model or a family of LCA;

ii. information gathered or produced in the context of LCA sales campaigns;

iii. information concerning market forecasts, analyses, business plans and share/business valuations generated by LCA producers, consultants, investment banks or the European Investment Bank, with regard to LCA products; or

[1] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the BCI in question.

[2] The erroneous failure by a speaker to make such a prior declaration shall not affect the designation of the HSBI in question.

[3] This category includes (but is not limited to) information on individual LCA prices, prices per seat, or information allowing the operating cost per seat of an LCA to be determined, calculated or reflected; the negotiated or offered prices for the airframe; all concessions offered or agreed to by an LCA manufacturer including financing, spare parts, maintenance, pilot training, asset value and other guarantees, buy back options, remarketing arrangements or other forms of credit support. This category shall also include the actual pricing information relating to any number of individual LCA offers and prices (including concessions) aggregated by model or other category.

iv. information concerning an LCA manufacturer's costs of production, including but not limited to data regarding pricing by suppliers.

b. Each Party and Third Party may also Designate as HSBI other categories of business information that is not otherwise available in the public domain and the disclosure of which could, in the Party's view, cause exceptional harm to its originators.

c. Each Party and Third Party shall Designate as HSBI any information described in subparagraph 7(a) that pertains to LCA produced by an LCA manufacturer headquartered within the territorial jurisdiction of either of the Parties.

d. The following categories of information may not be Designated as HSBI:

i. aggregated pricing data for a particular LCA model or family of LCA within a particular market that is indexed (i.e., does not reflect actual prices but rather movements in prices off a base of 100 for a particular year). Such data shall be treated as BCI;

ii. general legal conclusions based on HSBI (e.g., that HSBI demonstrates that a producer engaged in price undercutting). Such conclusions shall be treated as neither BCI nor HSBI;

iii. contracts on the granting of launch aid or reimbursable launch investment and project appraisal documents relating thereto, other than information described in subparagraph 7(a);

iv. the terms and conditions of loans, other than information described in subparagraph (7)a; and

v. intergovernmental agreements and government decisions, other than information described in subparagraph (7)a.

e. Information may not be Designated as HSBI simply because it is subject to bank secrecy or banker-client confidentiality.

f. In case either Party objects to the designation of information as HSBI under paragraphs 7(a)-(e), the dispute shall be resolved by the Panel. If the Panel disagrees with designation of information as HSBI, the submitting Party or Third Party may either designate it as BCI, as non-BCI/HSBI or withdraw the information. The Panel shall either destroy such information or return it to the submitting Party or Third Party. Each Party or Third Party may at any time designate as non-BCI/HSBI or as BCI information previously designated by that Party or Third Party as HSBI.

8. **"HSBI Approved Person"** means Approved Persons specifically designated by the Parties as having the right to access HSBI (according to the procedures laid down in Section IV).

9. **"HSBI location"** means a room to be kept locked when not occupied and the access to which shall be possible only for HSBI Approved Persons, located:

a. for HSBI submitted by the United States, on the premises of the United States Mission to the European Union in Brussels;

b. for HSBI submitted by the European Union, on the premises of the Delegation of the European Union to the United States in Washington;

c. for HSBI submitted by a Third Party, on the premises of its Geneva Mission to the WTO.

10. **"Locked CD"** means a CD-ROM that is not rewritable.

11. **"Outside Advisor"** means a legal counsel or other advisor of a Party or Third Party, who:

a. advises a Party or Third Party in the course of the dispute;

b. is not an employee, officer or agent of an entity or an affiliate of an entity engaged in the manufacture of LCA, the provision of supplies to an entity engaged in the manufacture of LCA, or the supply of air transportation services; and

c. is subject to an enforceable code of professional conduct that includes an obligation to protect confidential information, or has been retained by another outside advisor who assumes responsibility for compliance with these procedures and is subject to such a code of professional conduct.

For purposes of this paragraph, outside legal counsel representing an LCA producer headquartered in the territory of one of the Parties or Third Parties in connection with these proceedings or outside consultants who have been retained by such counsel to provide advice with regard to these proceedings are not considered agents of an entity listed in subparagraph (b).

12. **"Panel"** means the DS316 compliance panel composed on 13 April 2012.

13. **"Party"** means the European Union or the United States.

14. **"Party-BCI"** means BCI originally submitted by a Party.

15. **"Representative"** means an employee of a Party or Third Party.

16. **"Sealed laptop computer"** means a laptop computer having (software and hardware) characteristics considered necessary by the submitting Party for protection of that HSBI, provided that it has software installed that permits such HSBI to be searched and printed in accordance with the provisions of Section VI. However, HSBI may not be edited on the sealed laptop computer.

17. **"Secure site"** means a facility to be kept locked when not occupied and the access to which shall be possible only for Approved Persons, located:

a. in the case of the European Union, the offices of WTO Team of the Legal Service of the European Commission (Rue de la Loi 200, Brussels, Belgium), the offices of Directorate General for Trade of the European Commission (Rue de la Loi 170, Brussels, Belgium), the offices of the Permanent Mission of the European Union to the International Organisations in Geneva (Rue du Grand-Pré 66, 1202 Geneva, Switzerland), and three additional sites specified in accordance with subparagraph (c);

b. in the case of the United States, the offices of the General Counsel of the Office of the United States Trade Representative (600 17th Street, NW, Washington, DC, USA), the offices of the Import Administration, United States Department of Commerce (600 17th Street, NW, Washington, DC, USA), the Mission of the United States to the World Trade Organization (11, route de Pregny, 1292 Chambésy, Switzerland), and three additional sites specified in accordance with subparagraph (c); and

c. three sites other than a government office that are designated by each Party for use by its Outside Advisors; provided that the identity of those sites has been submitted to the other Party and the Panel, and the other Party has not objected to the designation of that site within ten days of such submission.

d. Any objections raised under subparagraph (c) may be resolved by the Panel.

18. **"Stand-alone computer"** means a computer that is not connected to a network.

19. **"Stand-alone printer"** means a printer that is not connected to a network.

20. **"Submission"** means any written, electronic, or uttered information transmitted to the Panel, including but not limited to, correspondence, written submissions, exhibits, oral statements, and answers to questions.

21. **"Third party"** means a Member having notified its interest in the dispute to the DSB pursuant to DSU Article 10.

22. **"Third Party BCI Approved Person"** means a representative or Outside Advisor of a third party granted access to BCI pursuant to paragraphs 30, 37, 38 and 44.

23. **"WTO Approved Persons"** means the Panel members, PGE members or experts appointed by the Panel who in the opinion of the Panel require access to BCI, and persons employed or appointed by the Secretariat who have been authorized by the Secretariat to work on the dispute (and includes translators and interpreters as well as any transcribers present at Panel meetings involving BCI and/or HSBI).

24. **"WTO Reading Room"** means a room, located on the premises of the WTO, which a Third Party BCI Approved Person may use to access a Party's submission that contains Party BCI.

25. **"WTO Rules of Conduct"** means the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1).

III. SCOPE

26. These procedures apply to all BCI and HSBI received by an Approved Person and by WTO Approved Persons as a result of the Panel process, and to all BCI reviewed, in accordance with these procedures, by a Third Party BCI Approved Person.

27. Unless specifically otherwise provided herein, these procedures do not apply to a Party's or Third Party's treatment of its own BCI and HSBI.

28. The Panel is aware that the European Union may need to submit information that it internally classifies as "EU Top Secret", "EU Secret" or "EU Confidential". The Panel will to the extent possible implement procedures for the protection of such classified information in the event that either Party informs the Secretariat that it will be submitting such classified information and has not already designated it as BCI or HSBI. In such cases, the submitting Party shall propose appropriate procedures for the protection of such classified information.

IV. DESIGNATION OF APPROVED PERSONS

29. At the latest on 18 May 2012, each Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors who need access to BCI submitted by the other Party and/or Third Parties and whom it wishes to have designated as Approved Persons, along with any clerical or support staff that would have access to the BCI. On that list, each Party shall indicate which Approved Persons need access to HSBI submitted by the other Party and/or Third Parties and whom it wishes to have designated as HSBI Approved Persons. Each Party may submit amendments to their list of Approved Persons by submitting such amendments to the other Party and Third Parties, and to the Panel.

30. There shall be no Third Party HSBI Approved Persons. The designation of Third Party BCI Approved Persons shall be governed by paragraphs 37 and 38.

31. Each Party shall keep the number of Approved Persons as limited as possible. Each Party may designate no more than a total of 30 Representatives and 20 Outside Advisors as "HSBI Approved Persons".

32. WTO Approved Persons shall have access to BCI. The Director-General of the WTO, or his designee, shall submit to the Parties and Third Parties, and to the Panel, a list of the WTO Approved Persons and shall identify which of those WTO Approved Persons shall additionally have access to HSBI.

33. Unless a Party objects to the designation of an Outside Advisor of the other Party, the Panel shall designate those persons as Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list

under paragraph 29 that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days.

34. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

35. The Parties or the Director-General of the WTO, or his designee, may submit amendments to their lists at any time, subject to the overall limits set out in paragraph 31 and to objections for the addition of new Approved Persons in accordance with paragraphs 33 and 34.

V. BCI

36. Only Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons may have access to BCI submitted in this proceeding. Third Party BCI Approved Persons may not have access to Party-BCI other than that included in the submissions. Approved Persons, WTO Approved Persons and Third Party BCI Approved Persons shall use BCI only for the purposes of this dispute. No Approved Person or WTO Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. No Third Party BCI Approved Person shall disclose BCI, or allow it to be disclosed, to any person except another Approved Person, WTO Approved Person or Third Party BCI Approved Person. These obligations apply indefinitely.

37. Each Third Party that wants to access Party-BCI contained in the first or rebuttal submission of a Party shall submit to the other Party and Third Parties, and to the Panel, a list of the names and titles of any Representatives and Outside Advisors (including clerical or support staff) who need access to such BCI and whom it wishes to have designated as Third Party BCI Approved Persons. Each Third Party shall keep the number of Third Party BCI Approved Persons as limited as possible. Each Third Party may designate no more than a total of 5 Representatives and Outside Advisors as Third Party BCI Approved Persons.

38. Unless a Party objects to the designation of an Outside Advisor of a Third Party, the Panel shall designate those persons as Third Party BCI Approved Persons. A Party also may object within ten days of becoming aware of information that was not available to the Party at the time of the filing of a list under paragraph 37 above that would suggest that designation of an individual is not appropriate. If a Party objects, the Panel shall decide on the objection within ten working days. An objection may be based on the failure to satisfy the definition of "Outside Advisor" or on any other compelling basis, including conflicts of interest.

39. A Party shall make no more than one copy of any BCI submitted by the other Party or a Third Party for each Secure site provided for that Party in paragraph 17.

40. Parties may incorporate BCI in internal memoranda for the exclusive use of Approved Persons. Any memorandum and the BCI it contains shall be marked in accordance with paragraph 4.

41. BCI submitted by Approved Persons or by Third Party BCI Approved Persons pursuant to these procedures shall not be copied, distributed, or removed from the Secure site, except as necessary for submission to the Panel.

42. The treatment in a Party's submissions to the Panel of any BCI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to BCI.

a. Parties may incorporate BCI in submissions to the Panel, marked as indicated in paragraph 4. In exceptional cases, parties may include BCI in an appendix to a submission.

b. A Party submitting a submission or appendix containing BCI shall also submit, within a time period to be set by the Panel, a version redacting any BCI. This shall be referred to as the "Non-BCI Version". However, a Party is not required to submit a "Non-BCI Version" of any exhibit containing BCI, unless specifically directed to do so by the Panel;

c. A Non-BCI Version shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Non-BCI Version:

   i. A Party may request the Party that originally submitted the BCI, as soon as possible, to indicate with precision portions of documents containing BCI that may be included in the non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, produce a Non-BCI summary in sufficient detail to achieve this aim.

   ii. Upon receipt of such a request, the Party that originally submitted the BCI shall, as soon as possible, indicate with precision portions of documents containing BCI that may be included in the Non-BCI Version and, if necessary to permit a reasonable understanding of the substance of the information, produce a Non-BCI summary in sufficient detail to achieve this aim.

   iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the BCI failed to indicate with sufficient precision portions of documents containing BCI that may be included in the Non-BCI Version and to produce, if necessary, a Non-BCI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

d. The responding Party may designate the personal offices of up to four of its Approved Persons as additional Secure sites for the sole purpose of storing and permitting review of the BCI versions of the Parties' submissions to the Panel. All of the protections applicable to BCI under these procedures, including the storage rules in Paragraph 46, shall apply to such submissions. BCI exhibits to submissions may not be stored or reviewed at these additional Secure sites. The responding Party shall submit the address (including room number) of each of the additional Secure sites to the Panel and the complaining Party.

43. Any document containing BCI shall not be copied in excess of the number of copies required by the Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies shall be avoided whenever possible. Such documents may be transmitted electronically only by using secure e-mail. If a Party or Third Party submits to the Panel an original document that cannot be transmitted electronically, it shall on the day of submission deliver a copy of that document to one of the Secure sites listed in paragraph 17. The Parties shall designate one of the Secure sites listed in paragraph 17 for this purpose.

44. Notwithstanding paragraph 20 of the Working Procedures[4], the following procedures apply to the access by Third Parties to a Party's submission that contains Party-BCI.

a. A Party's Submission containing Party-BCI shall not be serviced to Third Parties unless both Parties agree otherwise.

b. Third Party BCI Approved Persons may view Party-BCI contained in a Party's first written submission only in a Secure site or in the WTO Reading Room. Third Party BCI Approved Persons may not bring into such room any electronic recording or transmitting devices. Third Party BCI Approved Persons may not remove a Party's Submission containing Party-BCI from such room, but may take handwritten notes of the Party-BCI contained therein. Such notes shall be used exclusively for this dispute (that is, DS316). Each person viewing a Party's Submission containing Party-BCI shall complete and sign a log identifying the submission the person reviewed. The Party responsible for maintaining the particular Secure site, and the WTO Secretariat in the case of the WTO Reading Room, shall maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving the room, Outside Advisors who are Third Party BCI Approved Persons may be subject to appropriate controls.

[4] Concerning service of documents.

c. If a Third Party BCI Approved Person removes from the Secure site or the WTO Reading Room a handwritten memo in accordance with subparagraph 44(b) above, that Third Party BCI Approved Person shall store the memo only in a locked security container. Such memo shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. The content of such memo shall not be incorporated, electronically or in handwritten form, into the Non-BCI Version, as defined in paragraph 42(b).

d. All Third Parties that have designated Third Party BCI Approved Persons must inform the Parties of the identity of the specific room (including the address and the room number) in which the locked security container, as referred to in subparagraph (c) above, is located.

e. If a Third Party BCI Approved Person removes from the Secure site or the WTO Reading Room a handwritten memo in accordance with subparagraph 44(b) above, such memo shall not be copied in excess of the number of copies required by the Third Party BCI Approved Persons. All copies of such documents shall be consecutively numbered. The making of electronic copies of such memo shall be prohibited.

f. A Third Party may not incorporate into the body of its submission any Party-BCI. If a Third Party wishes to refer to any Party-BCI, the relevant arguments including such BCI should be incorporated into a separate Appendix. Such Appendix shall not be serviced to other Third Parties.

g. On the date determined by the Panel as the deadline to make the Third Party submission, a Third Party shall service its submission only to the Parties and to the Panel. The submission shall be serviced to the other Third Parties only after the Parties have confirmed that the submission does not contain or disclose Party-BCI. A Party shall make this confirmation or otherwise advise of any necessary change to the relevant Third Party within 2 working days of receiving the submissions of Third Parties.

45. A Party or Third Party that wishes to submit or refer to BCI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not Approved Persons, WTO Approved Persons or, as appropriate, Third Party BCI Approved Persons from the meeting for the duration of the submission and discussion of BCI.

46. Approved Persons and WTO Approved Persons shall store BCI only in locked security containers. In the case of BCI submitted to the Panel, such locked security containers shall be kept on the WTO Secretariat's premises, except that Panel members may maintain a copy of all relevant documents and materials containing BCI at their places of residence. Such documents and materials shall be stored in locked security containers when not in use. BCI shall be appropriately protected against improper inspection and eavesdropping when being consulted and will be transmitted in sealed heavy duty double envelopes only. All work papers (*e.g.*, draft submissions, worksheets, etc.) containing BCI shall, when no longer needed, be shredded or burned consistent with normal government practice for destroying sensitive documents.

47. The Panel shall not disclose BCI in its report, but may make statements or draw conclusions that are based on the information drawn from the BCI.

VI. HSBI

48. Unless otherwise provided below, HSBI shall be subject to all the restrictions in Section V applicable to BCI.

49. HSBI shall be submitted to the Panel in electronic form, using locked CDs or two Sealed laptop computers connectable to 19" - 21" monitors, or in hard copy form, for access by WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI. All such HSBI shall be stored in a combination safe in a designated secure location on the premises of the WTO Secretariat. Any computer in that room shall be a Stand-alone computer. WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI may view HSBI only in the designated secure location referred to above. A Stand-alone printer may be

used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a combination safe at the designated secure location referred to above, or destroyed at the end of the relevant working session. HSBI shall not be removed from this designated secure location, except (i) in the form of handwritten notes that may be used only on the WTO Secretariat's premises and which shall be destroyed once no longer in use; and (ii) subject to appropriate precautions, for purposes of meetings of the Panel with the Parties and any internal deliberations of the Panel, as provided for in paragraph 58(j).

50. Each Party shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the other Party, in the HSBI location listed in paragraph 9 located within the other Party's territory. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI location, or destroyed at the end of the relevant working session.

51. If a Third Party submits HSBI, it shall notify the Parties of the fact that such submission has been made. Each Third Party submitting HSBI shall maintain an additional copy (electronic or hard) of the HSBI it submits to the WTO, for access by HSBI Approved Persons acting on behalf of the Parties, in the HSBI location listed in paragraph 9. A Stand-alone printer may be used to make hard copies of any HSBI. Such hard copies shall be made on distinctively colored paper. Such hard copies shall either be stored in a safe at the relevant HSBI location, or destroyed at the end of the relevant working session.

52. Except as otherwise provided in these procedures, HSBI shall not be stored, transmitted or copied either in written or electronic form.

53. HSBI Approved Persons may view HSBI on the Sealed laptop computer maintained by the other Party or a Third Party or, in the case of HSBI submitted on Locked CDs on a Stand-alone computer, only in a designated room at one of the HSBI locations indicated in paragraph 9, or at the designated secure location on the premises of the WTO Secretariat referred to in paragraph 49, unless otherwise mutually agreed by the Parties. The designated room shall be available to HSBI Approved Persons from 9:00 a.m. to 5:00 p.m. during official working days at the respective HSBI location. The designated secure location referred to in paragraph 49 shall be available to HSBI Approved Persons by prior arrangement with the WTO Secretariat. HSBI Approved Persons may not bring into such room any electronic recording or transmitting devices. HSBI Approved Persons may not remove HSBI from such room, except in the form of handwritten notes or aggregated information generated on a Stand-alone computer. In either case, such notes or information shall be used exclusively for this dispute in connection with which the HSBI has been submitted. Each person viewing the HSBI in the HSBI location or designated secure location referred to in paragraph 49 shall complete and sign a log identifying the HSBI that the person reviewed or, alternatively, such a log can be generated automatically. Each Party shall, for the HSBI location within its territory referenced in paragraph 9, maintain such log until one year after the Conclusion of the Panel Process. The WTO Secretariat shall, for the designated secure location referred to in paragraph 49, maintain such log until one year after the Conclusion of the Panel Process. Before entering and when leaving such room, Outside Advisors who are HSBI Approved Persons may be subject to appropriate controls.

54. No HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 32 as being additionally authorized to access HSBI shall disclose HSBI to any person except another HSBI Approved Person or WTO Approved Person designated pursuant to paragraph 32 as being additionally authorized to access HSBI, and then only for the purpose of this dispute. This obligation applies indefinitely.

55. HSBI may be processed only on Stand-alone computers. Any memorandum containing HSBI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

56. A Party or Third Party that wishes to submit or refer to HSBI at a Panel meeting shall so inform the Panel and the other Party, and Third Parties as appropriate. The Panel shall exclude persons who are not HSBI Approved Persons or WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI from the meeting for the duration of the submission and discussion of HSBI.

57. All HSBI shall be stored in a safe at the relevant HSBI location or in accordance with paragraph 49.

58. The treatment in a Party's submissions to the Panel of any HSBI shall be governed by the provisions of this paragraph, which shall prevail to the extent of any conflict with the other provisions of the Working Procedures (including these Procedures) relating to HSBI.

a. HSBI may be incorporated into a separate appendix to, but not the body of, a Party's submission, which appendix shall be comprehensible in itself. The document containing the HSBI shall be referred to as the "Full HSBI Version Appendix";

b. A Party submitting an appendix containing HSBI shall also submit, within a time period to be set by the Panel, a version redacting any HSBI. This shall be referred to as the "Redacted Version Appendix";

c. At the request of a Party, information contained in the Redacted Version Appendix may be treated as BCI, in accordance with the provisions of Section V;

d. A Redacted Version Appendix shall be sufficient to permit a reasonable understanding of its substance. In order to prepare such a Redacted Version Appendix:

   i. A Party may request that the Party that originally submitted the HSBI, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   ii. Upon receipt of such a request, the Party that originally submitted the HSBI shall, as soon as possible, indicate with precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and, if necessary to permit a reasonable understanding of the substance of the information, produce a non-HSBI summary in sufficient detail to achieve this aim.

   iii. The Panel shall resolve any disagreement as to whether the Party that originally submitted the HSBI failed to indicate with sufficient precision portions of documents containing HSBI that may be included in the Redacted Version Appendix and to produce, if necessary, a non-HSBI summary in sufficient detail to permit a reasonable understanding of the substance of the information, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

e. The Full HSBI Version Appendix shall be kept in an HSBI location and in the designated secure location referred to in paragraph 49, as appropriate, in the form of a locked CD. If it is not practical to keep the Full HSBI Version Appendix in an HSBI location, the Party may keep it in a locked security container in a Secure site in the form of a locked CD.

f. The locked CD containing the Full HSBI Version Appendix shall bear the label marked 'FULL VERSION OF HSBI APPENDIX TO SUBMISSION' and indicate the name of the Party that submitted the HSBI. In addition, the HSBI Appendix itself shall be marked with heading with double bolded square brackets on each page in an electronic file that contains the notation 'FULL VERSION OF HSBI APPENDIX TO SUBMISSION'. The electronic file containing the HSBI Appendix shall have a file name that contains the letters "HSBI VERSION".

g. The Party shall submit one copy of the Full HSBI Version Appendix to the Panel (through Mr. XXX) and two copies to the other Party in the form of two locked CDs. The Full HSBI Version Appendix shall not be transmitted via e-mail. Parties shall agree between themselves beforehand on the name of the Approved Person that is to receive the locked CD.

h. The Party shall commence transfer of the locked CDs containing the Full HSBI Version Appendix no later than the deadline for the submission concerned, and, at the same time, provide the Panel and the other Party with proof that this has been done.

i. No more than one working day in advance of a Panel meeting with the parties, a Party may, exclusively at that Party's Permanent Mission in Geneva, use the locked CD to produce no more than one hard copy of the Full HSBI Version Appendix for each HSBI Approved Person planning to attend that Panel meeting. All paper versions produced pursuant to this subparagraph shall be collected by the Party concerned and destroyed immediately after the conclusion of the meeting.

j. WTO Approved Persons designated pursuant to paragraph 32 as being additionally authorized to access HSBI may, exclusively on the WTO premises, produce paper versions of the Full HSBI Version Appendix for the purpose of, and immediately prior to, a Panel meeting with the parties and/or an internal meeting. When not in use, these paper versions shall be stored in a locked container in the designated secure location referred to in paragraph 49. All paper versions produced pursuant to this subparagraph shall be destroyed after the Conclusion of the Panel Process as defined in paragraph 3.

k. Parties are encouraged to submit versions of exhibits containing HSBI from which all HSBI has been deleted. Such exhibits shall be referred to as "HSBI-Redacted Version Exhibits". HSBI-Redacted Version Exhibits may contain BCI.

   i. A Party may submit HSBI-Redacted Version Exhibits prepared by that Party to the Panel, and serve them on the other Party in accordance with the applicable procedures, at the time it serves the submission to which the exhibit relates.

   ii. If a HSBI-Redacted Version Exhibit is not submitted by the Party submitting the exhibit, an HSBI-Approved Person representing the other Party may prepare an HSBI-Redacted Version Exhibit of any such exhibit.

   iii. HSBI-Redacted Version Exhibits may be prepared by an HSBI-Approved person, at an HSBI location, by deleting the HSBI in the exhibit (identified by double brackets) from such exhibit and either printing or photo-copying the resulting document containing no HSBI. The deletion of HSBI from the resulting document shall be verified by a person authorized for this purpose by the Party that submitted the exhibit(s) in question. The resulting document containing no HSBI (but which may contain BCI) will constitute the HSBI-Redacted Version Exhibit of such exhibit, and may be removed from the HSBI location.

   iv. The Parties shall cooperate to the maximum extent possible to make available necessary facilities, including printers, photo-copiers, and physical means for the deletion of text from a document, to enable the preparation of HSBI-Redacted Version Exhibits, including making available an HSBI-Approved Person for purposes of the verification provided for in paragraph (iii) above. HSBI-Redacted Version Exhibits may be prepared by HSBI-Approved Persons upon request during the times the designated room at the relevant HSBI location is available, as provided for in paragraph 51 of these Procedures.

   v. The Panel shall resolve any disagreement arising from the operation of this sub-paragraph, and may take appropriate action to ensure that the provisions of this paragraph are satisfied.

l. The Panel reserves the right, after consulting the parties, to amend the provisions of this paragraph at any time in order to accommodate situations arising during Panel meetings, and the preparation of the interim report and the final report.

59. The Panel shall not disclose HSBI in its report, but may make statements or draw conclusions that are based on the information drawn from the HSBI.

VII. RESPONSIBILITY FOR COMPLIANCE

60. Each Party and Third Party is responsible for ensuring that its Approved Persons and Third Party BCI Approved Persons comply with these procedures to protect BCI and HSBI submitted by each Party and Third Party, as well as with enforceable codes of professional conduct to which its Approved Persons or other Outside Advisors are subject. WTO Approved Persons shall comply with these procedures to protect BCI and HSBI submitted by a Party or Third Party. WTO Approved Persons are covered by the WTO Rules of Conduct. As provided for in the WTO Rules of Conduct, evidence of breach of these Rules may be submitted to the Chair of the DSB or to the Director-General of the WTO, or his designee, as appropriate, for appropriate action pursuant to Section VIII of the WTO Rules of Conduct.

VIII. ADDITIONAL PROCEDURES

61. After consulting with the Parties, the Panel may apply any other additional procedures that it considers necessary to provide additional protections to the confidentiality of BCI or HSBI or other types of information not explicitly covered by these Procedures.

62. The Panel may, with the consent of both Parties, waive any part of these procedures. Such "waiver" shall be specifically set forth in writing and signed by a representative of both Parties.

IX. RETURN AND DESTRUCTION

63. Except as provided for in paragraph 64, after the Conclusion of the Panel Process as defined in paragraphs 3(a), 3(c) or 3(d), or as contemplated in paragraph 65, within a period to be fixed by the Panel, WTO Approved Persons, the Parties and Third Parties (along with all Approved Persons) shall destroy or return all documents (including electronic material) or other recordings containing BCI to the Party or Third Party that submitted such documents or other recordings. At the same time, WTO Approved Persons and the Parties shall destroy and/or return any electronic material submitted by a Party or Third Party that contains HSBI.

64. The WTO Secretariat shall retain one hard copy and one electronic version of any final report of the Panel containing BCI, and one electronic version of all documents containing BCI submitted to the Panel, recorded on locked CD(s), to be kept in sealed containers in a locked cabinet on the premises of the WTO Secretariat.

65. After the Conclusion of the Panel Process as defined in paragraph 3(b), the Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. Following the adoption by the DSB of the Appellate Body report pursuant to Article 17.14 of the DSU, or a decision by the DSB by consensus not to adopt the Appellate Body Report pursuant to Article 17.14 of the DSU, the provisions of paragraphs 63 and 64 shall apply.

66. The hard drive of each Stand-alone computer and all media used to back up such computers shall be destroyed at the Conclusion of the Panel Process.

ANNEX B

ARGUMENTS OF THE UNITED STATES

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

1. Last year, the World Trade Organization ("WTO") ruled that the European Union ("EU") and certain member States had subsidized the development of every single Airbus[1] aircraft over the course of 36 years, resulting in adverse effects to the United States, to the detriment of the sole remaining U.S. producer of large civil aircraft, The Boeing Company ("Boeing"). The Dispute Settlement Body ("DSB") recommended that the relevant Members withdraw the subsidies or take appropriate steps to remove their adverse effects by December 1, 2012.[2] Instead, the EU and the other relevant Members did the opposite − they continued and even expanded their subsidization. They did essentially nothing to remove the adverse effects of the subsidies, and in fact conferred additional subsidies (with additional adverse effects) after the period covered by the rulings of the DSB. They have accordingly failed to comply with the recommendations and rulings of the DSB and continue to maintain WTO-inconsistent subsidies.

2. At this stage, there is no dispute about the nature and effect of the subsidies, most of which came in the form of billions of dollars of financing granted by France, Germany, Spain, and the United Kingdom for the development of Airbus aircraft. Whether called "launch aid," or "member State Financing," or "LA/MSF" (the compromise term adopted by the original Panel), this financing shares the same key features:

(1) **unsecured:** the lenders have no recourse against Airbus's assets, such that repayment depends on the success of the model financed.[3]

(2) **success-dependent:** full repayment occurs only if the model in question is a commercial success;

(3) **levy-based:** repayment takes the form of per-aircraft levies tied to deliveries of the large civil aircraft financed; and

(4) **back-loaded:** the producer receives subsidies early during the development of the aircraft, but repayments become due later, after deliveries commence, with a graduated repayment schedule in some instances.

The financing confers a benefit in the sense of Article 1.1(b) of the SCM Agreement in that the relevant EU member States charged less, and typically far less, interest than a commercial lender would have charged for financing on these terms.

3. The effect of these subsidies on Airbus has been critical. The original Panel found, and the Appellate Body concurred, that absent the subsidies, Airbus would be a "much weaker LCA manufacturer," and would have had "at best a more limited offering of LCA models."[4] Under the most likely counterfactual scenarios, "Airbus would not have existed . . . and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred."[5] The effect on Boeing was stark − tens of billions of dollars of lost sales and displacement of imports and exports from markets around the world.

4. Based on these findings, the EU and the relevant member States had an obligation to withdraw the subsidies, or take appropriate steps to remove their adverse effects, by December 1, 2011. Clearly, if they neglected to do either of these things, they would fail to comply

[1] For purposes of this submission, "Airbus" has the meaning set out in *EC – Large Civil Aircraft*: Airbus SAS, Airbus GIE, and current and predecessor affiliated companies of both Airbus SAS and Airbus GIE. *EC – Large Civil Aircraft (Panel)*, para. 7.191.

[2] Dispute Settlement Body, Minutes of Meeting held in the Centre William Rappard on 1 June 2011, WT/DSB/M/247, para. 28 (11 July 2011). *EC – Large Civil Aircraft (Panel)*, para. 8.7; *EC – Large Civil Aircraft (AB)*, para. 1418.

[3] *EC – Large Civil Aircraft (Panel)*, paras. 7.374-7.375; *EC – Large Civil Aircraft (AB)*, para. 604.

[4] *EC – Large Civil Aircraft (AB)*, paras. 1269 and 1270.

[5] *EC – Large Civil Aircraft (AB)*, para. 1264.

with the obligation. They would also fail to comply if they granted new subsidies with a "close relationship" to the actionable subsidies at issue in the original dispute,[6] introduced new subsidies that *replaced* the actionable subsidies already found to exist,[7] or introduced measures that *circumvented* the DSB's recommendations and rulings.[8]

5. However, the EU's response to these massive subsidies and their adverse effects was to keep on doing what it did in the 36 years covered by the original Panel's deliberations: give subsidized funds to Airbus aircraft that took sales and market share from its U.S. competitor. On the December 1, 2011, deadline for compliance with the DSB recommendations and rulings, the EU transmitted a document to the United States and to the DSB (the "EU Notification") asserting that it had taken 36 "steps" to bring its measures into conformity with its WTO obligations. However, these steps did nothing to move toward WTO compliance:

- The EU Notification never mentions the $4 billion in LA/MSF for the A380, one of the largest LA/MSF subsidies Airbus ever received, and one that the Appellate Body confirmed as "a necessary precondition for Airbus' launch in 2000 of the A380."[9]

- The only "repayment" referenced, €1,704 billion in step 25, is no change at all, as it consists almost entirely of funds Airbus paid to the German government in 1997 and 1998.

- Steps 1 through 24 report the "termination" of LA/MSF contracts related to the A300, A310, A320, A330, and A340, without explaining what the term means. Mere "termination" is a meaningless formality without repayment of past subsidies, which the EU has neither claimed nor established. If the "termination" resulted in an effective forgiveness of amounts due, it would actually confer a new subsidy.

- Steps 31 through 33 note the "termination" of subsidized Airbus models,[10] a development rendered meaningless by the subsidization of the models that replaced them − the A330 and A350 XWB. Termination of the A340 program actually boosted Airbus earnings by €460 million[11] − scarcely an action that would eliminate subsidies or their adverse effects on U.S. interests.

- With one exception, the remaining steps reflect EU inaction based on the theory that the passage of time or other intervening events would result in the subsidies or their adverse effects fading to insignificance, without any attempt to explain why this would be so.[12]

6. Airbus has itself been frank about the pointlessness of this exercise. Hans Peter Ring, the Chief Financial Officer of EADS, Airbus' parent company, has confessed that Airbus retains every franc, mark, peseta, pound, and euro of WTO-inconsistent subsidy that it received:

> Q: "If I look at some of the articles about the WTO and complying with the WTO ruling, it would suggest that you feel that you've now done something which makes you now compliant, ex-A350, which is another debate. What exactly did you do? Have you paid any money back?"
>
> Hans Peter Ring: "No."[13]

7. This statement provides a one-word summary of the EU's plan of inaction. Instead of modifying its behavior, the EU has made light of the DSB recommendations and rulings. Where the Appellate Body found that without the subsidies, Airbus would most likely not exist at all,[14] the EU

[6] *E.g.*, *US − Softwood Lumber CVDs (21.5) (AB)*, para. 77.
[7] *US − Upland Cotton (AB)*, paras. 237-238.
[8] *US − Softwood Lumber CVDs (21.5) (AB)*, para. 71.
[9] *EC − Large Civil Aircraft (AB)*, para. 1414(q).
[10] EU Notification (Exhibit USA-001).
[11] EADS Financial Statements 2011, p. 65 (Exhibit USA-014).
[12] The one exception to this is the infrastructure-related subsidy for the Bremen airport runway. The United States is not challenging the EU's compliance with the DSB recommendations and rulings with regard to this subsidy.
[13] Webcast, Q&A from Global Investor Forum 2011, EADS (Dec. 15, 2011), min. 21 ff. (Exhibit USA-002).
[14] *EC − Large Civil Aircraft (Panel)*, para. 7.1984.

concluded that "the economic impact of these support measures in the Large Civil Aircraft (LCA) market has been found to be very limited."[15] For its part, Airbus saw "no significant consequences for Airbus or the European support system from today's decision." [16] In fact, Airbus has interpreted the rulings as an affirmation of past funding practices − a "big victory for Europe."[17] Airbus CEO Tom Enders reacted to the Appellate Body's findings with the following statement:

> It is good to see that the WTO has *fully green lighted* the public-private partnership instruments with France, Germany, Spain and the UK. We now can and will continue this kind of partnership on future development programs.[18]

8. The EU apparently agrees. Aside from generating the list of 36 ineffectual "steps" to comply with the DSB recommendations and rulings, the responding parties' only substantive response has been to give €3.5 billion in new LA/MSF for the newest Airbus model, the A350 XWB.[19] The EU and the relevant member States have striven to keep information on the terms of the funding from public scrutiny, apparently to avoid revealing information that would suggest inconsistencies with its WTO obligations.[20] However, public documents make clear that Airbus received its new LA/MSF on the same key terms and conditions as its predecessors: unsecured, success-dependent, levy-based, and back-loaded. Government statements further confirm that the relevant member States granted the funding on better-than-commercial terms. Thus, it is clear that LA/MSF for the A350 XWB means that the EU has failed to comply with the recommendations and rulings of the DSB because the funding is closely related to the subsidies already found inconsistent with the SCM Agreement, replaces other actionable subsidies, and results in circumvention of the EU's compliance obligations.

9. The original Panel noted many examples of how the subsidies operated to create a full Airbus product line that caused the U.S. large civil aircraft industry to lose numerous sales and market share.[21] Recent developments in the twin-aisle segment of the market provide another concrete example of how LA/MSF allows Airbus to brush off its mistakes, and keeps Boeing from enjoying its successes. The EU conceded in the original Panel proceeding that the 300-400 seat A340 and its subsequent derivates were aircraft that never would have been launched when they were without LA/MSF.[22] Even so, the A340 and A340-500/600 failed commercially, yielding only 375 sales over a 19-year period, well below the 600 sales that manufacturers treat as the minimum necessary for a successful large civil aircraft.[23] Given these realities, the A340's failure should have been a big blow to Airbus, particularly as it unfolded alongside the A380's weak

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[15] EU Press Release, *WTO Airbus Case − Appellate Body overturns key findings of the Panel in favour of the EU* (May 18, 2011).

[16] Airbus Press Release, *WTO final ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit USA-004).

[17] Airbus Press Release, *WTO Final Ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit USA-004).

[18] EADS Statement, *WTO final ruling: Decisive victory for Europe* (May 18, 2011) (Exhibit US-005) (emphasis added). Similarly, Ranier Ohler, Airbus' Head of Public Affairs and Communications, said: "'WTO confirmation of the European loan system is a big victory for Europe. We see no significant consequences for Airbus or the European support system from today's decision, as the WTO has now fully and finally rejected most of the US claims. Therefore, the WTO findings are likely to require only limited changes in European policies and practices.'" Press Release, *WTO final ruling: Decisive victory for Europe*, Airbus (May 18, 2011) (Exhibit USA-002).

[19] *E.g.*, Kevin Done and Peggy Hollinger, *Airbus set to gain aid for A350*, Financial Times (June 15, 2009) (Exhibit USA-007).

[20] Letter from Amb. Ron Kirk to Commissioner Karel Degucht (Aug. 5, 2011) (Exhibit USA-300).

[21] *E.g.*, *EC − Large Civil Aircraft (Panel)*, para. 7.1993:

> We consider that Airbus' market presence during the period 2001-2006, as reflected in its share of the EC and certain third country markets and the sales it won at Boeing's expense, is clearly an effect of the subsidies in this dispute. We therefore conclude that the displacement of United States' LCA from the EC and certain third country markets and lost sales we have found during the period 2001-2006 are an effect of the specific subsidies to Airbus that we have found."

[22] *EC − Large Civil Aircraft (AB)*, para. 1273 ("The European Union . . . accepts that a non-subsidized Airbus would not have been able to launch the A300, A310, and A340 LCA projects by the 2001-2006 reference period."); *EC − Large Civil Aircraft (Panel)*, para. 7.1939 ("LA/MSF was necessary for Airbus to have launched the A330/A340 in 1987, with LA/MSF covering between 60 and 90 percent of its development costs."); *id.* para. 7.1940 ("LA/MSF was also essential to the development of the A340-500/600.").

[23] *EC − Large Civil Aircraft (Panel)*, para. 7.1717 (finding that developing large civil aircraft "is an enormously complex and expensive undertaking" fraught with risk, where typically "at least 600 airplanes of a new model must be sold before the revenues for a programme exceed the costs.").

commercial performance and calamitous production problems.[24] At the same time, Boeing should have been able to enjoy the fruits of the unsubsidized development of the 777 and that aircraft's huge success in the 300-400 seat market segment, with more than 1300 sales in the 1995-2011 period.

10. But Airbus did not suffer from the commercial failure of the A340, and Boeing did not fully enjoy the commercial rewards for developing the 777 without subsidies. LA/MSF for the A340, A380, and other models meant that the subsidizing governments bore a significant part of the costs and risks of failure. Airbus fell far short of the number of A340 deliveries necessary to repay the LA/MSF it received − even at below-market interest rates − but far from hurting Airbus, the A340 cancellation boosted income by €406 million (€312 million net) as it cleared LA/MSF liabilities from its books. [25]

11. The preferential, success-dependent repayment terms of LA/MSF gave Airbus the flexibility to put its A340 mistakes behind it and try again in the 300-400 seat segment with the A350 XWB-900 and -1000. Before launching the A350 XWB in 2006, Airbus was "seriously questioning" whether it had the ability to finance such a program,[26] especially as it was still mired in the "monumental task" of bringing the A380 into commercial service.[27] But LA/MSF − both for prior models and for the A350 XWB itself − allowed Airbus to pass through this difficult time without having to sacrifice its key product initiatives. Based on 40-plus years of consistent subsidization, the company maintained its position as the world's largest civil aircraft manufacturer, delivered the A380, discarded the A340, and launched the all-new A350 XWB as a challenger to both the 787 and 777. On the last point, Airbus Chief Operating Officer, Customers, John Leahy is very clear about the commercial impact the company expects the A350 to have on the 777:

> "I've got to give (Boeing) credit on the 777; if you need lift in the long-range widebody market now, that's the plane," Leahy said, according to Bloomberg News. "The day we deliver the first A350-1000, the 777-300ER will become obsolete."[28]

12. The broader effect of these subsidies also appears in key market indicators, as Airbus itself noted in a series of presentations it made to investors in early 2012. With Boeing's share of gross orders falling from 81 percent in 1995 to 36 percent by year-end 2011, Airbus's market share grew from 19 percent to 64 percent: [29]

[24] *E.g.*, *Time for a new, improved model: Airbus gets to work on its medium sized aircraft, but deeper problems remain*, Economist (July 20, 2006) (Exhibit USA-028) (noting that in light of problems with the A340 and the A380, "{t}his is . . . a horrible time for Airbus to be launching such an ambitious new project.").

[25] EADS Financial Statements 2011, p. 65 (Exhibit USA-14); Hans Peter Ring, Webcast, Q&A from 9m Results 2011, min. 41 ff. (Exhibit USA-015):

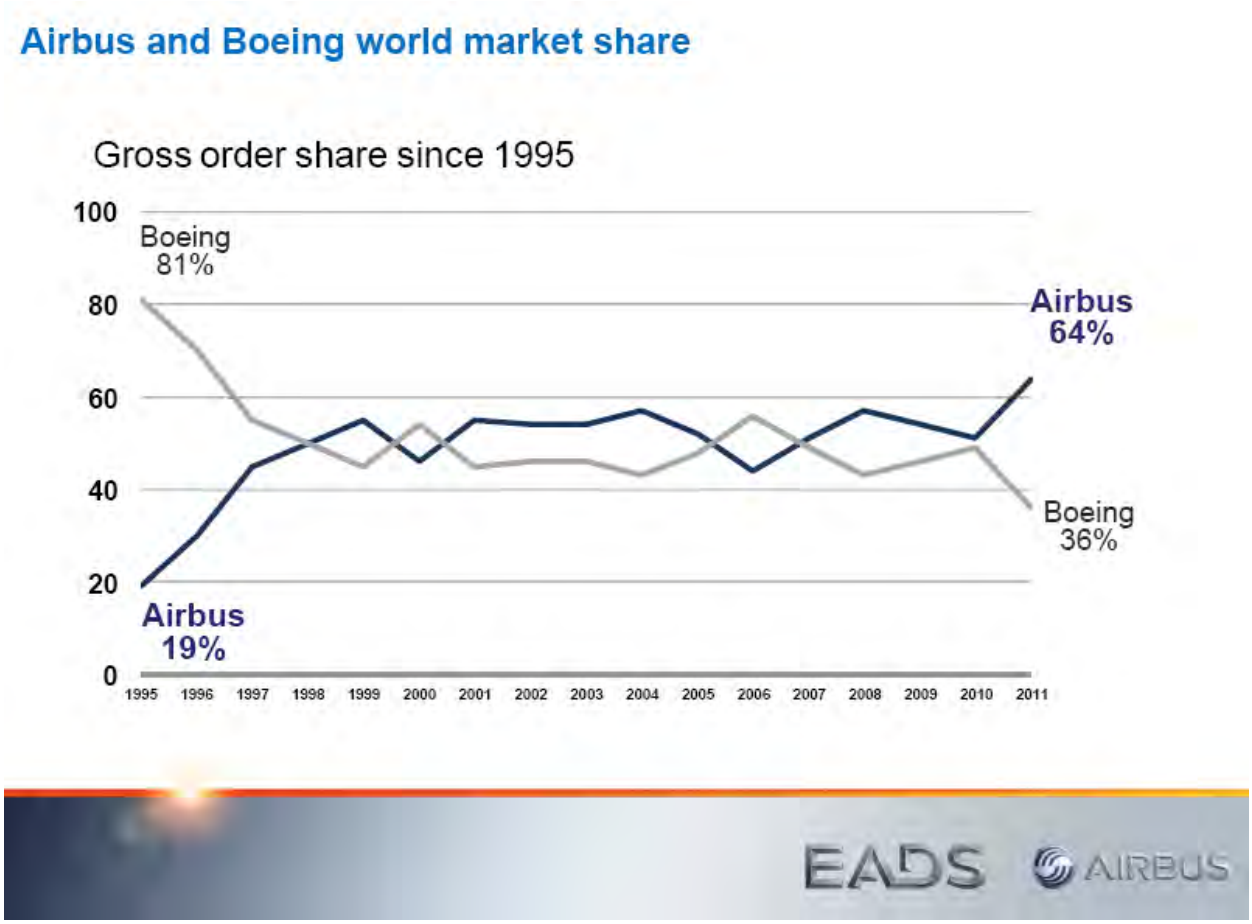
> Ring: To start with your wording, 'the launch aid balance': actually it's repayable launch investments, as we call them. I mean it's indeed that we are, I would say, adapting ourselves to reality. We have not sold 340s since almost I think two years now, after we had announced that we would build aircraft to order. So we were extremely successful as you know on the 330 and on the 350, but 380 {sic} was not selling, and that means that *there is a liability in the balance sheet which is released*, if you like, with this assessment, and that's the reason why it has a positive impact on the P&L, in EBIT, and in net income, as you've heard.

[26] Thomas Enders Interview, Le Monde (Oct. 13, 2007) (USA-008); Aaron Karp, *Airbus/EADS officials concede Boeing advantage, question A350 viability*, Air Transport World Daily News (Oct. 6, 2006) (Exhibit USA-009).

[27] Mark Piling, *Dream date,* Airline Business (Apr. 1, 2004) (Exhibit USA-010).

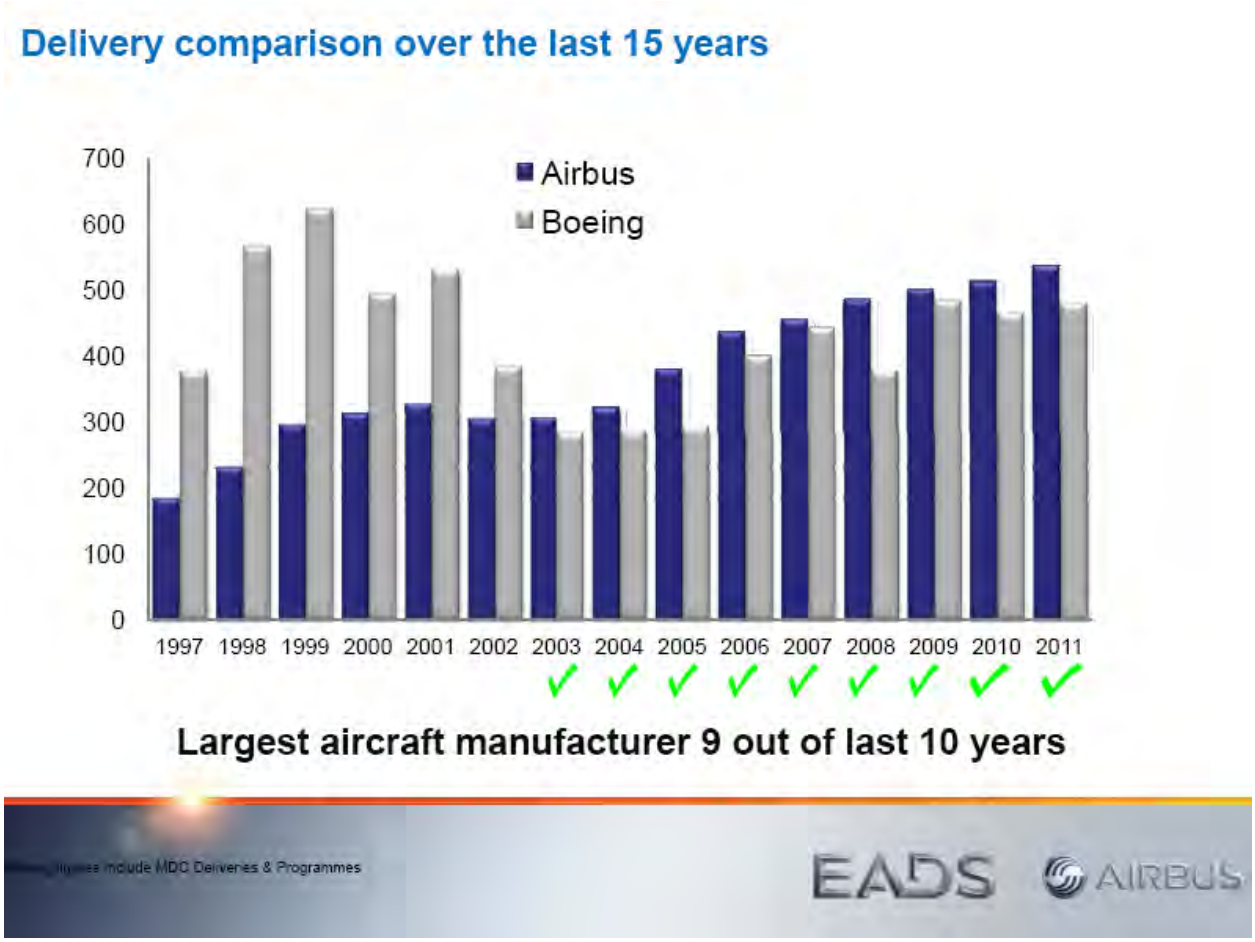
[28] Dominic Gates, *Boeing may overtake Airbus as No. 1 jet-maker in 2012*, Seattle Times (Jan. 17, 2012), (Exhibit USA-011).

[29] EADS Airbus, *New Year Press Conference 2012 – Commercial review*, slide 7 (Jan. 17, 2012) (Exhibit USA-012).



13. Airbus also trumpeted its perennial success as the "largest aircraft manufacturer" in terms of deliveries from 2003 through 2011: [30]

[30] EADS Airbus, *New Year Press Conference 2012 – Commercial review*, slide 18 (Jan. 17, 2012) (Exhibit USA-012).



14. As the graph shows, it was in the 2001-2006 period examined by the original panel that Airbus finally achieved its goal of splitting the market roughly in half with Boeing. In December 2011, Airbus described this market split as "the most important balance" for it to maintain.[31] However, as the original Panel found, and the Appellate Body concurred, without LA/MSF, Airbus would not have been able to achieve or maintain this strong market position,[32] and quite probably would not have existed at all.[33]

15. Country markets and individual sales campaigns parallel these broad market trends. Airbus continues to displace Boeing in EU and third country product markets, just as it causes significant lost sales for Boeing in a number of sales campaigns involving hundreds of orders and tens of billions of dollars.

16. From a compliance standpoint, the situation is largely the same as it was in the original proceeding. LA/MSF has not been withdrawn. Airbus still supplies the market with a product line that it would not have without LA/MSF. Consequently, Boeing continues to lose sales and market

[31] Marwan Lahoud, *Views on EADS Strategy and Value Creation*, slide 8 (Dec. 15-16, 2011) (Exhibit USA-013).

[32] *EC – Large Civil Aircraft (AB)*, para. 1270 ("As we see it, the Panel's conclusion that a non-subsidized Airbus would not have 'achieved the market presence it did over the period 2001 to 2006', which followed from its views that a non-subsidized Airbus would be a 'much weaker LCA manufacturer' with 'at best a more limited offering of LCA models', provided enough of a basis to establish a 'genuine and substantial relationship of cause and effect' in this case.").

[33] *EC – Large Civil Aircraft (AB)*, para. 1263 ("{The EU's appeal} is premised exclusively on scenarios 3 and 4, on which the {EU} claims the Panel focused. We do not agree that this is a proper characterization of the Panel's findings. In fact, the Panel found that scenarios 3 and 4, in which Airbus would have entered the market without subsidies, were 'unlikely'."); *ibid.*, para. 1264 ("Under scenarios 1 and 2, there was no need for the Panel to proceed further in its counterfactual analysis. Without the subsidies, Airbus would not have existed under these scenarios and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred.").

share worth many billions of dollars. The only material change is a *worsening* of the compliance situation, with the relevant EU member States in the midst of providing €3.5 billion in LA/MSF to Airbus for the A350 XWB. Accordingly, and in light of the evidence and argumentation presented, the United States respectfully requests that the compliance Panel work quickly to address the EU's failure to comply with the DSB's recommendations and rulings in *EC – Large Civil Aircraft*. Almost eight years after the commencement of this dispute, an end to LA/MSF as usual is long overdue.

17. Therefore, the United States respectfully asks the Panel to find that:

- With the exception of the Bremen airport runway subsidy, the EU and relevant member States have not withdrawn the subsidies covered by the DSB recommendations and rulings;

- French, German, Spanish, and UK LA/MSF for the A350 XWB is a specific subsidy within the meaning of Articles 1 and 2 of the SCM Agreement;

- French, German, Spanish, and UK LA/MSF for the A380 and the A350 XWB confers (1) an export subsidy inconsistent with Article 3.1(a) of the SCM Agreement, and (2) an import substitution subsidy inconsistent with Article 3.1(b) of the SCM Agreement;

- the EU and relevant member States have not removed the adverse effects covered by the DSB recommendations and rulings;

- the United States continues to experience serious prejudice in the form of significant lost sales under Article 6.3(c) of the SCM Agreement, including sales where the customer ordered the A350 XWB;

- the United States continues to experience serious prejudice in the form of displacement and impedance, and/or threat thereof, of its large civil aircraft imports into the EU market under Article 6.3(a) of the SCM Agreement;

- the United States continues to experience serious prejudice in the form of displacement and impedance of its large civil aircraft exports to 11 third-country markets under Article 6.3(b) of the SCM Agreement;

- all subsidies provided to Airbus large civil aircraft, including LA/MSF provided to the A350 XWB, have a genuine and substantial causal relationship with the effects found; and

- the European Union has failed to comply with the recommendations and rulings of the DSB by withdrawing the subsidies or taking appropriate steps to remove the adverse effects.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The European Union's ("EU") first written submission provides a spirited defense of . . . doing nothing.

2. More specifically, the EU asserts that, after panel and Appellate Body findings that Airbus received WTO-inconsistent subsidized financing worth billions of euros, with tens of billions of dollars of adverse effects to U.S. interests, the EU could come into compliance by doing essentially nothing. The EU goes even further to argue that the only meaningful acts it did take with regard to large civil aircraft subsidies, grants of €3.5 billion in *new* subsidies for the A350 XWB, were immune from review by this compliance panel. In any event, these new subsidies only brought the EU further from compliance with its WTO obligations.

3. This was not what the original Panel and the Appellate Body called for when they found that the EU had conferred subsidies inconsistent with Article 5 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and consequently had an obligation under Article 7.8 of the SCM Agreement to withdraw the subsidies or take appropriate steps to remove their adverse effects. The Appellate Body has found that compliance with this obligation "will usually involve some action by the respondent Member. This affirmative action would be directed at effecting the withdrawal of the subsidy or the removal of the adverse effects." The reverse is also true: "A Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own."

4. Yet that is exactly what the EU proposes. It's first written submission makes clear what the EU Notification[1] strongly implied − that the measures the EU has taken either are doing nothing, or are so small as to do nothing. (In fact, the EU essentially concedes that 12 of the LA/MSF-related measures listed in the EU Notification are meaningless, as its first written submission does not reference them.) In short, for purposes of Article 21.5 of the *Understanding Governing Rules and Procedures for the Settlement of Disputes* ("DSU"), the measures taken to comply either do not exist or, in the case of LA/MSF for the A350 XWB, exacerbate the WTO inconsistencies.

II. ANALYTIC FRAMEWORK

5. After adoption of the Panel and Appellate Body Reports in *EC − Large Civil Aircraft*, the EU had an obligation to comply with the Dispute Settlement Body ("DSB") recommendation to withdraw the subsidies or take appropriate steps to remove their adverse effects. The question before this panel, in considering a manner referred to it pursuant to Article 21.5 of the DSU, is whether the responding party's declared (or undeclared) measures taken to comply with the recommendations and rulings of the DSB exist or are themselves WTO-inconsistent. The recommendations and rulings of the DSB provide the measurement for judging compliance.

6. Article 21.5 instructs a panel to evaluate "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings," which include the underlying panel and Appellate Body findings, in effect, taking them as a given. It is equally significant that Article 21.5 does not invite compliance panels to reopen or reconsider the DSB recommendations and rulings. Indeed, it is difficult to see how a compliance proceeding could function if the recommendations and rulings, which provide the basis for analyzing compliance, could be subject to challenge. Thus, the DSB recommendations and rulings, including as embodied in the panel and Appellate Body findings, are obviously important in identifying whether a measure taken to comply exists, and in evaluating whether any unchanged elements of a measure are consistent with the covered agreements. They can also play an important role in evaluating whether a revised measure is inconsistent with the covered agreements.

[1] Letter from the European Union to the United States (Dec. 1, 2011) ("EU Notification").

III. THE SCOPE OF THIS COMPLIANCE PROCEEDING

7. **Threat of serious prejudice claims.** The EU argues that the case presented in the U.S. first written submission "contains arguments regarding alleged *threats* of displacement and impedance," while "the United States' Article 21.5 Panel Request referred only to *actual*, rather than threatened, displacement and impedance of imports." Footnote 13 to Article 5(c) of the SCM Agreement explicitly provides that "'serious prejudice'…includes threat of serious prejudice." The U.S. panel request frames the U.S. claim in terms of "adverse effects" (which include threat of serious prejudice) and "subsidies . . . inconsistent with Articles 5(c), 6.3(a), 6.3(b), and 6.3(c)" (which include threat of serious prejudice). Thus, the U.S. panel request includes any claims of threat of serious prejudice embodied in the U.S. first written submission.

8. **LA/MSF for the A350 XWB.** The EU does not contest that LA/MSF for the A350 XWB has the same four core terms as all previous LA/MSF, or that LA/MSF for the A350 XWB has the effect of negating the EU's compliance with the DSB recommendations and rulings in this dispute, or that the legal instruments conferring A350 XWB LA/MSF were issued from June 2009 onward, and that disbursements occurred continually from 2009 to 2012. Rather, the EU invents and then subjects the U.S. claims to an "overarching measure" test that has no basis in the text of the DSU or previous panel or Appellate Body reports. The EU also raises several tangential issues regarding the nature, effects, and timing of LA/MSF for the A350 XWB, but these are either contrary to past Appellate Body reports or irrelevant to the issues before the Panel. Therefore, the EU has failed to undermine the U.S. demonstration that LA/MSF for the A350 XWB is properly in the scope of this proceeding because it satisfies the "close nexus" test.

9. **Prohibited subsidy claims.** The United States raised claims under Article 3.1(a) of the SCM Agreement against LA/MSF for the A380 during the original proceeding, but the Appellate Body ultimately did not resolve them. It is well established that a compliance panel may consider claims in this procedural posture. Therefore, the EU's argument that these claims fall outside the Panel's terms of reference should be rejected. The EU also argues that the U.S. claim against LA/MSF for the A380 under Article 3.1(b) falls outside of this compliance Panel's terms of reference. However, the United States could not have raised its Article 3.1(b) claim at the time of the original panel, so this closely related claim is within this Panel's terms of reference.

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

A. Alleged Repayment on Subsidized Terms or "Termination" of Agreements Did Not Cause the Subsidies to Expire

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

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

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

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

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

13. **The Dasa and CASA transactions.** The original Panel found that the Dasa and CASA transactions did not extract or extinguish prior subsidies, and the Appellate Body upheld that finding. That should end the inquiry; the EU had a chance but failed to make its case, and is accordingly precluded from raising the issue again in an Article 21.5 proceeding. In any event, if the Panel decides to revisit this question, the EU's arguments regarding the Dasa and CASA transactions fail at this stage for the same reason they failed before the original Panel and the Appellate Body − the EU has not satisfied any of the elements of the test for establishing the extraction of subsidies from Airbus. It has not shown that the cash transfers actually "extracted" anything of value from EADS in the first place. It has also failed to show that the cash involved was actually related to the value of past subsidies, rather than some other element in the value of EADS. Thus, even if the Panel were to find that the Dasa and CASA transactions were properly before it, the EU has not met its burden of proof for the proposition that the Dasa and CASA transactions reduced or eliminated the benefit from past subsidies to Airbus.

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

D. The Appellate Body's Findings in *EC – Large Civil Aircraft* Preclude Treatment of the Removal of the Financial Contribution, or the Expiration of Subsidies Alleged by the EU as Withdrawing the Subsidies

15. The Appellate Body found that the role of the LA/MSF, capital, and regional subsidies in creating the A300, A310, A320, A330, A340, and A380 established a genuine and substantial causal link between the subsidies and the lost sales and displacement experienced by Boeing between 2001 and 2006. The Appellate Body also found that the expiration of subsidies prior to the reference period would not necessarily preclude a finding that they had adverse effects during that time. The Appellate Body made explicit findings that the extractions alleged by the EU did not affect the value of past subsidies, but made no findings with regard to other transactions or events. In short, the possibility that subsidies had expired did not prevent the original Panel and the Appellate Body from finding those subsidies inconsistent with Article 5 of the SCM Agreement due to their continuing adverse effects. Thus, as a compliance matter, the alleged expiration of those same subsidies did not "withdraw" them or otherwise excuse the EU from the Article 7.8 obligation triggered by its earlier violations of Article 5.

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

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

economic analyses performed by NERA and included in the U.S. second written submission. The EU explicitly concedes that LA/MSF for the A350 XWB was a financial contribution, so there is no dispute on that point.

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

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

18. As the U.S. first written submission demonstrated, LA/MSF for both the A380 and the A350 XWB are contingent in fact upon anticipated export performance. The design, structure, and operation of the subsidies themselves, which led to high levels of export sales, support this conclusion. The U.S. first written submission also demonstrated that the Airbus governments granted LA/MSF for the A380 and the A350 XWB in anticipation that Airbus would manufacture aircraft components domestically, using domestic (rather than imported) goods and labor, and that such components would be used to construct the aircraft. The United States demonstrated that the grant of A380 and A350 XWB LA/MSF was made contingent upon such anticipated use of domestic goods, making them prohibited under Article 3.1(b) of the SCM Agreement.

19. The EU failed to rebut the U.S. *prima facie* demonstration of inconsistency with Articles 3.1(a) and 3.1(b). First, the United States demonstrates that none of the EU's attempted jurisdictional challenges regarding the A380 has any merit, in light of the unique procedural posture and procedural history of the U.S. claims involved. Second, the United States reaffirms its original presentation of the Appellate Body's interpretation of the standard for *de facto* export contingency, as well as its demonstration that A380 and A350 XWB LA/MSF meet that standard. Third, the United States demonstrates that the EU's brief comments on import substitution are contradicted by prior Appellate Body reports, fail to engage with the U.S. claims under Article 3.1(b), and fail to undermine the United States' *prima facie* case.

VI. THE UNITED STATES HAS DEMONSTRATED THAT THE EU HAS NOT TAKEN APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS OF ITS SUBSIDIES, AND THE EU HAS FAILED TO REBUT THE U.S. CASE

A. Introduction

20. The Panel's assessment of the EU's claim of compliance with the recommendations and rulings of the DSB should be straightforward. The original Panel found, and the Appellate Body affirmed, that the EU gave Airbus billions of euros in subsidized financing − the largest amount of subsidized financing in the history of the WTO and the GATT 1947 − resulting in tens of billions of dollars of adverse effects to the U.S. LCA industry. The DSB adopted these findings. As with the subsidy findings, the EU response to the adverse effects findings against it was to do nothing that would resolve the dispute. Where it did take action, it was to provide yet another round of LA/MSF, this time to enable Airbus to launch and bring to market the A350 XWB in a manner that would have been impossible otherwise. This is manifestly inappropriate. Under Article 7.8 of the SCM Agreement, the EU needed to take action to remedy the situation. Because it has not done so, the Panel should find that the EU has failed to comply.

21. With its first written submission, the EU confirmed that it relies overwhelmingly on inaction in asserting that it has taken appropriate steps to remove the adverse effects. In the face of the DSB's rulings and recommendations, the EU attempts to justify its inaction by citing two factors: (1) withdrawal of prior subsidies, and (2) the passage of time. Neither supports the EU's claim of compliance. The United States has demonstrated that the EU has not withdrawn the subsidies. The United States also demonstrates that the passage of time has not invalidated the underlying findings or eliminated the causal link between the subsidies and adverse effects, notwithstanding the EU's baseless assertions regarding Airbus's current financial situation, changes in conditions of competition, and technological advances. As found by the original Panel and the Appellate Body, Airbus's entire product line, the technologies applied on those products, and indeed Airbus's

financial condition are genuine and substantially related to the LA/MSF subsidies. Nothing has happened since the reference period to undermine that conclusion. Therefore, the EU has failed to comply with Article 7.8 of the SCM Agreement and with the rulings and recommendation of the DSB.

B. The Analytical Framework Advocated by the EU is Deeply Flawed

22. ***The starting point in a compliance proceeding is the recommendations and rulings of the DSB. This is not a "new" case.*** The EU seeks to treat this compliance proceeding as a new, entirely independent dispute. It argues that the United States must show present adverse effects, presently caused, independent from and without any regard to the EU's past conduct or to the past measures and adverse effects at issue in the original dispute. The EU also contends that the Panel should not look to any facts that pre-date December 1, 2011, as they are not "relevant to the showing that the United States must make in these compliance proceedings." For its part, the EU considers itself free to ignore and/or re-litigate the original Panel and Appellate Body findings, adopted by the DSB, that the EU gave billions of euros in subsidized financing to create a line of Airbus aircraft that causes billions of dollars in adverse effects to the interests of the United States. The EU is mistaken in each respect. The approach urged by the EU would require a prevailing Member to obtain new findings in a new dispute without regard to the recommendations and rulings adopted by the DSB in the original dispute. The EU approach is fundamentally at odds with the nature of a proceeding under Article 21.5 of the DSU. The starting point must be the DSB's recommendations and rulings.

23. In this case, the Appellate Body concurred with the original Panel's conclusion that under the most likely counterfactual scenario in the absence of the subsidies, "Airbus would not have existed . . . and there would be no Airbus aircraft on the market. None of the sales that the subsidized Airbus made would have occurred." At a minimum, absent the subsidies, Airbus would be a "'much weaker LCA manufacturer,'" and would have had "'at best a more limited offering of LCA models.'" The original Panel and the Appellate Body made clear findings as to the product effects of LA/MSF, which enabled Airbus to develop and bring to market each of its models of LCA as and when it did. The original Panel and the Appellate Body recognized that the primary effects of LA/MSF to a given Airbus model was to cause that model to be launched when and as it was and to thereby inject supply into the market that would not exist otherwise. The presence of such subsidized aircraft enabled and continues to enable Airbus to capture sales and market share at the expense of the U.S. industry.

24. The EU has not fulfilled the mandate of Article 7.8 of the SCM Agreement and the requirement to "take appropriate steps to remove adverse effects." The United States demonstrates again the continued validity of the underlying findings – including the causal link – in the current market situation, the absence of any meaningful action by the EU to address the situation, and the unabated, continuing present adverse effects in the form of significant lost sales and displacement and impedance, and threat thereof. None of the EU's asserted compliance steps did anything to address, let alone remove, LA/MSF's adverse effects. In fact, the sole notable action that the EU did undertake was to compound the adverse effects by giving yet another round of LA/MSF to the A350 XWB.

C. Conditions of Competition and Product Markets

25. In its first written submission, the EU largely does not dispute the conditions of competition found by the original Panel and the Appellate Body and cited by the United States. The notable exception is that the EU for the first time asserts the existence of *seven* wholly separate product markets, four of which are purportedly monopoly markets with no competition. This is contrary to adopted Appellate Body findings, in which the Appellate Body agreed with the EU's prior position that LCA could properly be divided into three appropriate product markets – single aisle, twin aisle, and very large aircraft. The EU's approach in this compliance proceeding does not bear any resemblance to real patterns of competition involving large civil aircraft.

D. The EU Has Failed to Rebut the U.S. Demonstration that EU Subsidies to Airbus Continue to Cause Present Adverse Effects

26. In its first written submission, the United States demonstrated a causal link based on the findings of the original Panel and the Appellate Body, the absence of any meaningful action by the EU to address the situation, and the fact that lost sales and lost market share have continued unabated. The U.S. demonstration that LA/MSF continues to cause adverse effects is based on three principal points. *First*, the original Panel and the Appellate Body found that LA/MSF had "product effects," enabling Airbus to supply the market with aircraft that it would not otherwise have had when and as it did, and these aircraft took sales and market share from the U.S. industry. *Second,* none of the EU's asserted compliance steps did anything to address, let alone remove, the product effects of LA/MSF. In fact, the sole notable action that the EU did undertake was to compound the product effects of LA/MSF by giving yet another round of it to the A350 XWB. *Third*, the pattern of lost sales and lost market share has persisted from the original reference period up through the present, despite the EU's claims of compliance.

27. The EU's first written submission confirms that it has not taken meaningful compliance steps to remove the adverse effects that LA/MSF causes. Its submission is devoid of reference to EU action that could remove or even mitigate the effects of LA/MSF that continue to so severely distort competition in the LCA industry. Unable to rely on real compliance action, the EU tries to rebut the U.S. causation demonstration in four ways: (1) the supposed withdrawal, through expiration or extraction, of LA/MSF to all Airbus LCA from the A300 through the A340 (it argues the same for the A380 LA/MSF, although its arguments betray a lack of confidence that it has withdrawn LA/MSF to the A380); (2) subsequent investment by Airbus and its suppliers in the A320 and A330; (3) Airbus's supposed ability to launch the A380 in the absence of LA/MSF; and (4) Airbus's supposed ability to launch the A350 XWB in the absence of LA/MSF. All of these arguments fail.

28. Indeed, as is clear from its argument, the EU concedes that it did nothing to break the causal relationship between the LA/MSF and other subsidies and serious prejudice to the United States. Rather, it argues that conditions have changed such that an entirely new assessment of causation must take place. But the causal mechanism identified by the original Panel and confirmed by the Appellate Body still operates, including through LA/MSF to the A350 XWB. The EU's portrayal of the causal nexus as non-existent is incorrect, as the evidence confirms.

E. The EU has Failed to Rebut the U.S. Demonstration of Significant Lost Sales

29. The United States continues to experience significant lost sales. In its first written submission, the United States documented over one thousand lost sales, together worth tens of billions of dollars of lost revenues for the U.S. LCA industry. This pattern has continued unabated from the original reference period through the end of the RPT, December 1, 2011, and on to the date of referral of this matter to the compliance Panel. Since that time the United States has also lost significant sales campaigns involving Hong Kong Airlines and Norwegian Air Shuttle, as demonstrated in the first written submission, and also three additional sales campaigns that have occurred since the filing of the U.S. first written submission.

30. This consistent pattern of continuing significant lost sales reflects the absence of any meaningful action by the EU to remove the adverse effects of the WTO-inconsistent subsidies at issue in this dispute. Indeed, the EU does not claim to have taken any steps on its own initiative to remove adverse effects in the form of lost sales. Rather, the EU points to the "delivery" of Airbus aircraft and Airbus's termination of the A340 program as compliance "steps". These arguments are misplaced. The EU itself had an obligation itself to take appropriate steps to remove the adverse effects, and is not entitled to rely on Airbus's independent business decisions to satisfy this obligation. In any event, Airbus's completion of deliveries and the termination of the A340 program have not removed the adverse effects caused by LA/MSF.

31. Given the persistence of lost sales and the absence of meaningful compliance action, the EU has nothing to offer in rebuttal beyond erroneous arguments regarding purported "non-attribution factors." For example, the EU argues that Airbus's first sale to an airline customer generates a "strong disposition" to buy Airbus aircraft in the future and that this disposition is a "non-attribution factor," without explaining how Airbus could have offered any of the LCA it sold to that

customer without LA/MSF. In addition, according to the EU, if an airline customer purchases an Original A350, this is another "non-attribution factor" with respect to subsequent A350 orders. These are not valid "non-attribution factors." They in no way alter the fact that Airbus obtained these sales with aircraft that it would have been unable to offer in the absence of the LA/MSF and other subsidies. The EU's so-called non-attribution factors are *themselves* the effects of LA/MSF, as any incumbency advantages that Airbus enjoys by virtue of previously obtained sales are the direct result of earlier LA/MSF.

F. The EU has Failed to Rebut the U.S. Demonstration of Displacement, Impedance, and Threat Thereof in the EU Market and Certain Third Country Markets

32. The U.S. LCA industry continues to suffer adverse effects in the form of displacement, impedance, and/or the threat thereof within the meaning of Article 6.3(a) and (b) of the SCM Agreement. The U.S. first written submission demonstrated that such adverse effects are presently occurring in the EU market and 11 third-country markets. These adverse effects have continued during the first half of 2012, and the continued existence of displacement and impedance underscores the EU's failure to take any meaningful steps to remove the adverse effects at issue in this dispute.

33. In its second written submission, the United States presents updated data demonstrating displacement, impedance, and/or threat thereof in the EU market and 11 third-country markets continuing through the date of referral of the matter to the compliance Panel and to the present. These data supplement the data tables in the U.S. first written submission for the time period 2001-2011, with the inclusion of additional market activity in the first half of 2012. Data for the first half of 2012 generally reinforce the conclusions drawn from the data in the U.S. first written submission.

34. The use by the United States of pre-December 2011 market data as evidence to demonstrate continuing displacement and impedance in no way implies that WTO remedies are "retroactive," as the EU erroneously suggests. Rather, the data relied on by United States serve as evidence of present market displacement and impedance, as they demonstrate long-term market trends, and confirm that the U.S. LCA industry continues to suffer displacement and impedance during the 2001-2012 time period as a result of LA/MSF. The EU does not dispute the accuracy of the data underlying the U.S. demonstration of presently continuing market displacement and impedance. Separately, many of the EU's arguments are contradicted by points the United States made in its first written submission.

35. The remaining so-called "non-attribution factor" suggested by the EU − "Boeing's high market share" − is also an argument without merit. Nothing in the text of the SCM Agreement indicates that a WTO Member may not bring a claim for adverse effects resulting from WTO-inconsistent subsidies in markets where its industry enjoys a high market share.

36. This leaves the market data presented by the United States in its first written submission and updated in the second written submission. The data, viewed in the context of LA/MSF's product effects, demonstrate that displacement and impedance continue as a result of the EU's failure to take appropriate steps to remove the adverse effects of LA/MSF and other subsidies to Airbus. The EU contends that such data are insufficient and that independent narratives detailing evidence of lost sales campaigns are necessary to support these claims. To the contrary, such a requirement would effectively subordinate or convert displacement and impedance claims into lost sales claims, even though these explicitly are two separate and independent forms of serious prejudice under Article 6.3 of the SCM Agreement. Furthermore, in the original proceeding, the DSB adopted findings of displacement in China and Korea notwithstanding the lack of any specific findings of lost sales involving Chinese or Korean airline customers. There is simply no basis for the EU to challenge U.S. displacement and impedance claims because they may be unaccompanied by corresponding lost sales claims. And finally, there is no dispute between the parties about the underlying data.

37. In any event, the United States *has also* demonstrated particular lost sales in the EU single-aisle, twin-aisle, and very large aircraft markets (those of easyJet, Air Berlin/NIKI, Czech Airlines, Norwegian Air Shuttle, Iberia Airlines, Air France − KLM, and British Airways); the Australian single-aisle and very large aircraft markets (Qantas and Qantas Airlines/Jetstar Airways); the

Korean twin-aisle and very large aircraft markets (Korean Air and Asiana Airlines); the Singaporean twin-aisle and very large aircraft markets (Singapore Airlines); and the United Arab Emirates very large aircraft market (Emirates).

VII. CONCLUSION

38. The EU first written submission does not change the key facts of this compliance dispute: LA/MSF and other subsidies have not been withdrawn; additional LA/MSF has been provided to the A350 XWB on the same core terms and conditions as all prior LA/MSF to Airbus, including on better-than-commercial terms; Airbus still supplies the market with a product line that it would not have without LA/MSF, and that product line is now even more competitive with the market entry of the A350 XWB; and, consequently, Boeing continues to lose sales and market share worth many billions of dollars.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF THE UNITED STATES AT THE PANEL MEETING

1. What is most remarkable about this dispute is how little has changed in the last eight years. In spite of the longest, most complex WTO dispute ever, and the largest-ever findings of subsidization and serious prejudice, the EU has done nothing to change its WTO-inconsistent behavior. It has withdrawn only a few tiny subsidies, and has taken no meaningful steps to remove the adverse effects of the $15 billion in subsidized financing that it left untouched. And then, just as the original panel was completing its work, the EU granted Airbus more than $4 billion in subsidized financing for the A350 XWB with the same core terms as LA/MSF for earlier aircraft, and once again with a massive benefit.

I. THE EU'S FAILURE TO WITHDRAW THE LA/MSF SUBSIDIES AND GRANT OF NEW SUBSIDIES FOR THE A350XWB

2. The Appellate Body has found that, as used in Article 7.8, "withdraw" means "to 'remove' or 'take away' and 'to take away what has been enjoyed; to take from.'"[1] It elaborated in *US – Upland Cotton* that this obligation implies "affirmative action" by the responding Member, which "would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own."[2] The EU argues that the "accrual and diminishment of the subsidy" by itself "accomplished withdrawal."[3] But the Appellate Body explicitly found that the accrual and diminution of a subsidy is a matter for the analysis of the *effects* of the subsidy.[4]

3. Application of this analysis to the compliance measures identified by the EU establishes that they did not withdraw the subsidies found to exist.

- The supposed termination of LA/MSF contracts, which the EU now asserts as evidence that Airbus and EU member States "recogniz{e}" withdrawal of subsidies through other means, are simply their interpretation of WTO rules, and entitled to no evidentiary weight.

- EU "repayments" covered only the below-market interest rates charged by the EU member States and, accordingly, did not withdraw the subsidy, which includes the benefit conferred by those subsidies.

- The Appellate Body has identified the end of the life of a subsidy as a matter for the adverse effects analysis, not withdrawal. And, even if the life of the subsidy were relevant to the question of withdrawal, the proper measurement of that life is the actual life of the subsidized aircraft program, which means that the subsidies in question have not ended.

- As a factual and legal matter, the transactions cited by the EU did not "extinguish" subsidies or "extract" them from Airbus.

4. We now turn to the EU's latest subsidies to Airbus, more than $4 billion in LA/MSF for the A350 XWB. As we have pointed out, this financing operates just like traditional LA/MSF for earlier aircraft programs. It has the same four core terms, confers a benefit to Airbus, and has the effect of enabling aircraft launches that would otherwise not occur. These characteristics establish a close relationship with previous grants of LA/MSF that justifies including them all in the scope of this proceeding. They also establish that there is no market instrument that shifts risk in the way and on the terms that LA/MSF does.

[1] *EC – Large Civil Aircraft (AB)*, para. 754.
[2] *US – Upland Cotton (21.5) (AB)*, para. 236.
[3] EU SWS, para. 86.
[4] *EC – Large Civil Aircraft (AB)*, para. 714.

5. Dr. Jordan demonstrated that all four instances of LA/MSF for the A350 XWB are subsidies.[5] In a report appended to the EU second written submission, Prof. Whitelaw presents a number of criticisms of Dr. Jordan's approach. It is significant, however, that Prof. Whitelaw never disagrees with Dr. Jordan's ultimate conclusion: that LA/MSF for the A350 XWB conferred a benefit. In fact, performing the calculations described (but not performed) by Prof. Whitelaw, with only one non-controversial correction, demonstrates that LA/MSF for the A350 XWB is a subsidy.

II. THE EU HAS GRANTED PROHIBITED SUBSIDIES TO AIRBUS.

6. Consistent with the Appellate Body's guidance, the United States has demonstrated that the anticipated export ratio in contemplation of receiving the A380 and A350 XWB LA/MSF, respectively, is significantly higher than the corresponding baseline ratio in the absence of the respective subsidies. Thus, the granting of the A380 and A350 XWB subsidies was tied to anticipated export performance or export earnings and, therefore, runs afoul of Article 3.1(a) of the SCM Agreement.

7. LA/MSF for the A350 XWB is also prohibited under Article 3.1(b) of the SCM Agreement. As a condition of receiving LA/MSF, Airbus, in producing the A350 XWB, is contractually required to use a variety of domestic, and not imported, goods. In addition, Airbus agreed to certain employment requirements, which could only be fulfilled by producing in the EU the goods for downstream use. Furthermore, there is no vertical integration exception to Article 3.1(b). The evidence demonstrates clearly that the EU made the granting of LA/MSF for the A350 XWB contingent upon the use of domestic over imported goods, the epitome of what Article 3.1(b) prohibits.

III. THE EUROPEAN UNION HAS FAILED TO REMOVE THE ADVERSE EFFECTS AND CAUSED ADDITIONAL ADVERSE EFFECTS BY PROVIDING NEW SUBSIDIES TO THE A350 XWB.

8. The original panel found, and the Appellate Body affirmed, that given the tremendous costs and risks associated with the development of large civil aircraft, Airbus would not have launched any of its large civil aircraft absent LA/MSF.[6] Because Airbus did receive LA/MSF, the U.S. LCA industry experienced adverse effects on a massive scale: The significant lost sales findings cover more than 400 aircraft orders worth many billions of dollars, and the displacement findings cover seven major country markets.

9. The situation is no better today. Rather than withdraw the subsidies or remove their adverse effects, the EU has carried on as if it is business as usual with LA/MSF. The latest iteration: billions of euros in LA/MSF provided to Airbus for the A350 XWB.[7] As a result, the United States continues to suffer serious prejudice, and the United States continues to be deprived of an appropriate remedy under Article 7.8 of the SCM Agreement.

10. For example, the original panel found, and the Appellate Body upheld, that "either directly or indirectly, LA/MSF was a necessary precondition for Airbus' launch in 2000 of the A380."[8] Nothing has changed since the original Panel's finding. The EU has not withdrawn the LA/MSF that, indirectly and directly, was a necessary precondition for the launch of the A380. The EU's counter-argument regarding causation otherwise has already been rejected by the original Panel and the Appellate Body.[9] Thus the EU cannot establish now what it tried and failed to establish in the original dispute, and so its A380 causation arguments should once again be rejected *even if* the Panel were to ignore the effects of pre-A380 LA/MSF (which the United States contends is not appropriate).[10]

11. The Appellate Body found that WTO-inconsistent subsidies to the EU resulted in the displacement of Boeing like products based on three product markets: single aisle, twin aisle, and

[5] NERA, *Comparison of A350 XWB LA/MSF Interest Rates with Market Benchmarks*, Oct. 18, 2012 (Exhibit USA-475(BCI/HSBI)) ("Jordan Report").

[6] *EC – Large Civil Aircraft (Panel),* paras. 7.1934 (A300), 7.1936 (A310), 7.1938 (A320), 7.1939 (A330/A340), 7.1940 (A330-200), 7.1941-7.1942 (A340-500/600), 7.1948 (A380); *EC – Large Civil Aircraft (AB),* paras. 1273 (A300, A310, A340, A340-500/600), 1275 (A320, A330), 1356 (A380).

[7] *See* US FWS, Summary of U.S. Lost Sales Claims Demonstrating EU Failure to Take Appropriate Steps to Remove Adverse Effects (Exhibit USA-164).

[8] *EC – Large Civil Aircraft (Panel)*, para. 7.1948; *see EC – Large Civil Aircraft (AB)*, para. 1356.

[9] *EC – Large Civil Aircraft (Panel)*, para. 7.1948; *see EC – Large Civil Aircraft (AB)*, paras. 1352-1353.

[10] US SWS, paras. 526-547.

very large aircraft. The EU argues that there are now seven distinct product markets, four of which are monopoly markets, and one non-market. The EU does not − and cannot possibly − explain how, in a few short years, fierce competition in the twin-aisle market has given way to a total absence of any competition. The EU has given no valid reason to depart from the Appellate Body's framework consisting of three product markets.

12. The original Panel also found, and the Appellate Body upheld, that the subsidies that enabled Airbus to launch the original A320 and A330 were genuinely and substantially linked to the improved and derivative A320 and A330 aircraft that it was selling during the 2001-2006 period.[11] Thus while the EU has presented an assortment of improvements to the A320 and A330 aircraft, it fails to identify any real change in the fundamental conditions of competition in the LCA industry such that the same causal link established between subsidies and Airbus's 2000-2006 market presence remains intact. Therefore, the evidence confirms that there is a genuine and substantial link between the subsidies that Airbus has received and the current A320 and A330 models, and that further investments by Airbus − including those since 2006 − do not eliminate that link.

13. Lastly, LA/MSF constituted a necessary precondition for Airbus's recent decision to launch the A350 XWB. First, the A350 XWB program was not, as the EU argues, a can't-miss project immune to the effects of LA/MSF. Rather, it was a project that faced, and continues to face, significant risks. Second, EU support for the A350 XWB has been ever-present, from the period prior to the program's launch, through the finalization of the LA/MSF contracts, to the ongoing funding of its development costs. Indeed, the A350 XWB program could not have gone forward as planned without LA/MSF, including the effects of prior LA/MSF, without which Airbus would not have had the financial, industrial, and technological attributes that it had when it launched the A350 XWB. Finally, because Airbus would have been unable to proceed with the A350 XWB absent LA/MSF, the EU's assertions about the viability, or attractiveness, of the project[12] are beside the point. However rosy the A350's baseline sales projections might be,[13] willingness must not be confused with ability; *wanting* to market an aircraft means little without the *means* to do so. In short, the effects of prior LA/MSF worked in combination with the latest round of LA/MSF to cause Airbus to launch and bring to market the A350 XWB as and when it did, thereby becoming a genuine and substance cause of serious prejudice to the U.S. LCA industry.

14. The United States has further demonstrated that adverse effects from LA/MSF and other subsidies persist through the present. The United States has presented the Panel with evidence of significant lost sales amounting to tens of billions of dollars in lost revenue for the U.S. LCA industry, all caused by subsidies that enabled Airbus to offer and sell LCA that would have been unavailable otherwise.[14] The United States has also presented the Panel with evidence of displacement, impedance, and threat thereof, of its products, in the European Union market and 11 third-country markets.[15] Airbus retains a product line that it likely would not have absent subsidies. Now that product line is even stronger thanks to new infusions of LA/MSF that helped Airbus to launch and market the A350 XWB. The A350 XWB and other Airbus LCA continue to take sales and market share from Boeing, such that the United States continues to experience serious prejudice that would not have occurred had the EU implemented the DSB's recommendations and rulings and complied with Article 7.8 of the SCM Agreement.

15. The EU has failed to provide a valid reason for departing from the Appellate Body's product market framework, and thus the U.S. displacement and impedance claims based on this framework − single-aisle, twin-aisle, and very large aircraft − remain valid. The EU also has failed to provide a valid reason for severing the causal connection between the subsidies and the aircraft sold by Airbus, and thus the U.S. lost sales claims likewise remain valid. Finally, the EU has failed to provide a sound reason for revisiting the non-subsidized like product rule that the Panel rejected in the original dispute.

16. The Panel recalled that the original panel rejected the EU's non-subsidized like product rule, and that that decision was not appealed, and was therefore adopted by the DSB. Nevertheless, the EU forges ahead with the same argument in this compliance proceeding. The EU's alternative

[11] *EC − Large Civil Aircraft (Panel)*, para. 7.1934, 7.1940-41; *see EC − Large Civil Aircraft (AB)*, paras. 1270.
[12] EU SWS, para. 1030.
[13] *Cf.* EU SWS, para. 1030.
[14] US FWS, Section VI.G.2; US SWS, paras. 673-709; and Exhibit USA-164.
[15] US FWS, Section VI.H.3. and US SWS, paras. 718-747.

strategy is to distort the original panel's reasoning, ignoring that the Panel actually found that the EU's position had "no basis in the text" of the SCM Agreement. The EU should not be allowed to reopen a settled issue, nor should it be permitted to divert the Panel's attention from its unceasing WTO-inconsistent subsidization of Airbus.

17. In conclusion, the United States appears before the Panel because the situation has not gotten better, it's gotten worse:

- The EU has refused to withdraw the subsidies.
- EU member States have provided additional LA/MSF to the A350 XWB.
- Airbus still supplies the market with a product line that it would not have without LA/MSF.
- Consequently, Boeing continues to lose sales and market share worth many billions of dollars.

18. The United States was forced to begin this proceeding by the fact that after getting these recommendations from the DSB, the EU has done nothing. Its intransigence has left us with no other choice but to bring this issue back to the WTO dispute settlement system. It is clear now that the EU will not comply with its obligations in the normal course of events. It is going to need the impetus of another finding from another panel to do what they should have done the first time around. Our request for you today is to quickly and forcefully validate the recommendations and ruling of the DSB and find that the EU has failed to comply with its obligations. Thank you.

ANNEX C

ARGUMENTS OF THE EUROPEAN UNION

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN
SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. The US First Written Submission in this case is remarkable for the extraordinary intensity of forceful presumption reflected throughout, both with respect to what it contains, and with respect to what it does not contain. It can be summarised in one line of overbearing assertion: the European Union subsidised Airbus in the past; all subsidies (except those granted by the United States) are objectionable; nothing has changed; Airbus (or its products) should not exist; all Airbus sales injure the United States; and this will always be so until Airbus (or its products) cease to exist. This is hardly a recipe for finding a satisfactory settlement of the matter, which is, after all, the objective here.

2. Forceful presumption is not, of course, what these legal proceedings are about. Rather, they are about a calm, meticulous, rational, reasonable, balanced and objective assessment of the law, the evidence (or lack of it) and the arguments (or lack of them). The European Union will demonstrate, in this First Written Submission, that the United States has failed to provide arguments, evidence, or a legal framework sufficient to state valid claims in these compliance proceedings.

II. THRESHOLD ISSUES

3. The European Union addresses several threshold issues, before addressing the individual elements of the United States' claims.

4. *First*, we address the *burden of proof*. It is not controversial, and the United States does not contest, that the complaining Member, the United States in this case, has the burden of proof in these compliance proceedings, which proceed under the terms of Article 21.5 of the DSU and Article 7.8 of the *SCM Agreement*. Indeed, in *SCM Agreement* cases as in any other case, in compliance proceedings, as in original proceedings, the burden of proof rests entirely with the complaining Member, and there is nothing in Article 7.8 of the *SCM Agreement*, just as there is nothing in Article 19.1 of the DSU, capable of justifying a different conclusion.

5. It is equally uncontroversial and uncontested that the Panel may not make the case for either party. In order to make a *prima facie* case, the complaining Member must: make a claim; assert facts; adduce evidence; and develop argument. The United States has failed to do so. Absent a *prima facie* case, a panel must find in favour of the responding Member, without the responding Member ever coming under any obligation to rebut a case that has not been made.

6. *Second*, we note the nature of the compliance obligation placed on the European Union in this dispute. With respect to actionable subsidies, Article 7.8 of the *SCM Agreement* provides for *two* compliance mechanisms: withdrawal (as in the case of Article 3.7 of the DSU) of the subsidy *or* removal of the adverse effects.

7. These two compliance mechanisms operate <u>independently</u>, meaning that, if the United States fails to demonstrate the existence of a subsidy, taking into account the facts relating to withdrawal, it has failed to demonstrate non-compliance. Alternatively, if the United States fails to demonstrate the existence of presently arising and presently caused adverse effects, it has failed to demonstrate non-compliance. These two compliance mechanisms also operate <u>cumulatively</u>, meaning that, if the European Union has *complied* by withdrawing a subsidy, that subsidy cannot play *any part* in an assertion or finding of *non-compliance*, based on allegedly presently caused and presently arising adverse effects. Alternatively, if the United States does succeed in demonstrating subsidies, but only of a smaller magnitude and/or greater age, the Panel must consider if the United States has demonstrated that this *different* basket of subsidies presently causes presently arising adverse effects. The United States has failed to consider or address these factors.

8. *Third*, we address the concept of "withdrawal", in Article 7.8 of the *SCM Agreement*. Withdrawal of either the financial contribution or the benefit entails withdrawal of the subsidy. A subsidy may be withdrawn or cease to exist for example through repayment of principal and interest, alignment with a market benchmark, or extinction and extraction. Affirmative action is not always required in order for a subsidy to be withdrawn or to cease to exist; a subsidy can be "withdrawn" through the passage of time. In such a case, the complaining Member can no longer demonstrate that the responding Member is "granting or maintaining" a subsidy under Article 7.8, and the responding Member has "otherwise" complied with the recommendation, within the meaning of Article 22.2 of the DSU. The United States has failed to consider or address these factors.

9. *Fourth*, we note that the United States must demonstrate presently arising adverse effects during a period following 1 December 2011, and must demonstrate a present genuine and substantial relationship of cause and effect with respect to presently arising adverse effects during the same period, taking into account intervening events (non-attribution factors). The United States has failed in this regard.

III. THE US CHALLENGE INCLUDES MEASURES AND CLAIMS THAT ARE OUTSIDE OF THE COMPLIANCE PANEL'S JURISDICTION

10. The US attempt to force certain financing agreements relating to the A350XWB into these compliance proceedings, notwithstanding the absence of any overarching programme, and in direct breach of the EU's due process rights, must be rejected. Additionally, the United States cannot presume to resurrect, in these compliance proceedings, export subsidy and domestic content claims that it lost or abandoned in the original proceedings. Moreover, the United States cannot presume to introduce threat claims that are nowhere to be found in its compliance panel request.

11. The European Union requests that the Panel find that none of the four separate A350XWB financing agreements is a "measure{} taken to comply" within the meaning of Article 21.5 of the DSU, and that they are therefore outside the scope of the Panel's jurisdiction.

12. The European Union further requests that the Panel find that the US claims that the four A380 financing agreements violate Articles 3.1(a) and (b) of the *SCM Agreement* are likewise outside the scope of the Panel's jurisdiction under Article 21.5 of the DSU, for two primary reasons: first, those claims do not relate to any "measures taken to comply"; and, second, no element of the "recommendations and rulings" of the DSB relates to Articles 3.1(a) and (b) of the *SCM Agreement*, or obliges the European Union to withdraw the measure pursuant to Article 4.7 of the *SCM Agreement*.

13. In addition, the European Union requests the Panel to find that the US Panel Request fails to satisfy the requirements of Article 6.2 of the DSU, as the United States is attempting to advance legal claims in its First Written Submission related to the alleged *threat* of displacement and impedance of imports pursuant to Article 6.3(a) of the *SCM Agreement*, that are not covered by the legal summary in the US Panel Request.

IV. ALLEGED SUBSIDIES

14. The United States cannot presume to ignore the express terms of Article 7.8 of the *SCM Agreement*, which give the responding Member the option to comply by withdrawing the subsidy, that is, by removing either the financial contribution or the benefit. A benefit may, in turn, cease to exist (i) where the Member that granted the financial contribution modifies its terms and conditions such that, going forward, it is aligned with a market benchmark and, hence, no longer confers a benefit, or (ii) where, through the passage of time, the subsidy ceases to confer a benefit on the recipient. In this context, the United States cannot presume to ignore repayments of principal and interest, alignment with a market benchmark, extinction, extraction or amortisation.

15. In *EC – LCA*, the Appellate Body found that the "removal of the financial contribution" results in the "life" of a subsidy coming "to an end".[1] This is consistent with the definition of a

[1] Appellate Body Report, *EC – Large Civil Aircraft*, para. 709.

subsidy in Article 1.1 of the *SCM Agreement*, which includes a "financial contribution" as one of the constituent elements of a subsidy. The complete removal of a financial contribution from a recipient brings the subsidy to an end.

16. In its First Written Submission, the United States has failed to demonstrate the existence of subsidies, taking into account the EU compliance measures, which address repayments of principal and interest, alignment with a market benchmark, extinction, extraction and amortisation.

17. With respect to *repayment of principal and interest*, the United States has not established that the financial contributions under a variety of the subsidies found in the original proceedings exist, despite the fact that the principal and interest due under the relevant agreements has been fully repaid, such that it has failed to establish an essential element of its *prima facie* case. Recalling that the burden of proof to establish these elements falls on the United States, the European Union establishes the circumstances that have led to the full repayment of principal and interest due under a series of UK, Spanish and French MSF agreements at issue in the original proceedings.

18. With respect to *modification of the terms and conditions of measures* adopted as part of the EU measures taken to comply, the United States has failed to establish that the recipient enjoys the financial contribution on terms and conditions that are more favourable than those available to the recipient at market. Specifically, with respect to the lease agreement for the land in the Mühlenberger Loch in Hamburg, the United States has failed to demonstrate that the terms and conditions, as amended through the EU's measure taken to comply, confer a "benefit". The same principles apply with respect to the amended take-off and landing fees at Bremen airport.

19. With respect to *amortisation*, we recall the Appellate Body's statements that the life of a subsidy comes to an end, and its benefit expires, over a period of time that must be determined *ex ante*.[2] For the vast majority of the subsidies implicated by the original proceedings, the benefits have expired and the subsidies have reached the end of their lives. It is for the United States to establish that these subsidies exist after 1 December 2011, in light of the Appellate Body's statements, and in light of the significant time that has passed since the grant of the many of these measures. Yet, the United States fails to even address the matter. Keeping in mind that the burden rests with the United States, the European Union provides evidence establishing that the lives of the vast majority of the MSF, regional development and capital contribution measures at issue in the original proceedings have come to an end.

20. With respect to *extraction and extinction*, the Appellate Body has confirmed that "intervening events" such as cash extractions and share transactions serving to extract or extinguish subsidy benefits may bring a subsidy to an end.[3] In light of the guidance provided by the Appellate Body, the European Union addresses a series of such intervening events which demonstrate that the United States has failed to establish the existence of current adverse effects from subsidies allegedly maintained after the end of the implementation period.

V. ALLEGED PROHIBITED SUBSIDIES

A. ALLEGED CONTINGENCY ON EXPORT PERFORMANCE

21. The United States attempts to re-iterate its original *de facto* export subsidy claims with respect to French, German, Spanish and UK financing for the A380. The United States also makes new claims with respect to French, German, Spanish and UK financing for the A350XWB. Grouping all of the measures together without distinction, the United States asserts that export contingency arises, because the "grantors" of financing anticipated exports, and because the "anticipated ratio" of domestic to export sales with the financing allegedly exceeds the "baseline ratio" that would be achieved by a hypothetical profit-maximising firm without subsidy.

22. The US claims fail. The United States' characterisation of this mechanistic approach as constitutive of a "test" set out by the Appellate Body is inaccurate. The US approach does *nothing* to explain why the design, structure and modalities of operation *set out in the measure*, assessed in the context of *the total configuration of facts* constituting and surrounding the grant,

[2] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 706, 707, 709, 710, 713, 1236.
[3] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 709, 710, 725, 745, 1236.

demonstrate that the alleged subsidies are *geared to induce the promotion of future exports* by the recipient, which is the standard repeatedly described by the Appellate Body.[4] The United States does not explain how its "evidence" demonstrates that *the financing agreements at issue induced Airbus to prefer an export over a domestic sale*, in ways that are *not simply reflective of the conditions of supply and demand* in the domestic and export markets.

B. ALLEGED CONTINGENCY ON THE USE OF DOMESTIC OVER IMPORTED GOODS

23. The United States alleges that French, German, Spanish and UK financing for the A380 and the A350XWB was, in each case, granted in exchange for a commitment by Airbus to locate a fixed share of the total development or production work for the aircraft in the relevant country. Specifically, the United States asserts that these "… LA/MSF agreements confirm that the granting of the subsidy was made contingent – in fact and in law – upon the location of certain specific production within specific EU member States, and/or the use and maintaining of certain EU jobs".[5] The United States submits that, by definition, this means that Airbus must use domestic components and not imports, or in other words that the subsidies exclusively benefit domestic producers.[6]

24. Assessing each of the financing agreements individually, the European Union explains that the US arguments merely demonstrate that the investment is in a French, German, Spanish or UK firm, that is, one that will develop and produce the aircraft and have a minimum of activities and employment in France, Germany, Spain or the UK. An employee is not a good. Furthermore, neither domestic development nor production is to be equated with "the use of domestic over imported goods". Thus, the financing agreements to which the United States refers do not demonstrate that the subsidy is conditioned upon the use of domestic over imported goods.

VI. ALLEGED ADVERSE EFFECTS

25. The United States has not established that there exist, at present, any subsidies. Accordingly, the EU adverse effects arguments are in the alternative only. The United States has failed to establish a number of threshold elements to sustain its claims of adverse effects:

26. *First*, Article 7.8 of the *SCM Agreement* precludes the United States from attempting to establish present adverse effects from withdrawn subsidies. *Second*, the United States fails to demonstrate that alleged present subsidies from the financing agreements may be aggregated.

27. *Third*, the United States fails to demonstrate that, following the EU measures taken to comply, there remain subsidies that, at present, cause adverse effects presently arising (after the end of the implementation period on 1 December 2011) given "current factual conditions".[7] *Fourth*, the United States fails to establish its adverse effects claims based on "markets", whose geographical, product and temporal scope are supported by evidence.

28. *Fifth*, the United States fails to demonstrate a present causal link by taking into account previous causal links no longer existing today, or that are too remote through the passage of time and the effects of intervening causes and other non-attribution factors. *Sixth*, the United States fails to demonstrate that its "like products" are "non-subsidised". Neither the United States nor the compliance Panel may ignore the established fact that the alleged U.S. "like products" are heavily subsidised. *Seventh*, the United States fails to demonstrate that any cumulation of adverse effects is warranted.

A. ALLEGED ADVERSE EFFECTS RELATED TO THE A320 FAMILY LCA

29. The subsidies that were found to have caused Airbus to launch the A320 family LCA as and when it did, have been withdrawn in full. Thus, the European Union addresses the US adverse effects arguments relating to the A320 family solely in the alternative.

[4] Appellate Body Report, *EC – Large Civil Aircraft*, paras. 1044, 1063, 1067, 1084, 1086, 1101.
[5] US FWS, para. 239. *See also Id.*, paras. 202, 203, 209, 213, 218, 219, and Title V.B.3.
[6] US FWS, paras. 203, 219, and Title V.B.2.a.
[7] Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.104 and 10.248 (emphasis omitted).

30. *First*, the United States fails to recognise that A320 family LCA aircraft compete in two different markets. Recently, both Airbus and Boeing made very substantial technological enhancements to their existing single-aisle LCA – in the form of Airbus' A320 new engine option ("A320neo") launched in December 2010 and Boeing's 737MAX launched in August 2011. The modifications applied to the previous A320 and 737NG family LCA mean that there is extremely limited competition between the presently-delivered aircraft and these presently marketed improved aircraft.

31. *Second*, the withdrawal of subsidies related to the launch and production of the A320 creates a significant burden for the United States to establish A320-related lost sales and displacement claims, as the United States has claimed no new subsidies for the A320. *Third*, even if none of the original A320 subsidies are withdrawn, the United States fails to address evidence that these decades old subsidies no longer cause *genuine* and *significant* present adverse effects.

32. *Fourth*, the A320 "product" launched in 1984 is not the same product sold and delivered by Airbus in 2012. Since its launch, there have been massive and ongoing private investments into the A320 programme by Airbus and its suppliers, resulting in significant technological modifications and production improvements between 1995 and 2008. Additional significant investments and changes are in the process of being implemented to the A320 family LCA, including those related to the "Sharklet" and A320neo, which have led to significant sales since 2009. Absent its investments, Airbus would no longer be able to compete against the improved Boeing 737NG, let alone the new 737MAX. Cumulatively, these investments and the resulting product and production enhancements are the "*substantial*" causes for Airbus' present and future sales and deliveries of its A320 family LCA – not any alleged remaining A320 subsidies.

33. With respect to US lost sales claims, Airbus' present sales of the original A320 and A320neo are secured by significant product and production enhancements, not by the effect of any non-withdrawn subsidies. There is no basis for US allegations of present effects from sales Boeing's 737NG lost during the 2001-2006 reference period, because all such sales have now been delivered. The US failure to challenge 2001-2006 sales to *other* Airbus customers precludes any presumption that undelivered follow-on orders by such other customers constitute present lost sales. And US claims that hundreds of A320neo orders caused lost sales to the 737NG fail to recognise that the A320neo is not in the same market as the 737NG.

34. Regarding US claims of displacement or impedance, there is no jurisdictional basis for the US claim of *threat* of displacement or impedance in the EU market. On the substance, the US claims of impedance and displacement fail to evaluate 2012 market share data, erroneously rely on historical delivery trends not reflecting present market shares and deliveries, ignore the absence of displacement, identify no reliable or discernible trends, and fail to establish how historical, unchallenged sales of the A320 family LCA presently impede deliveries of 737NG.

B. ALLEGED ADVERSE EFFECTS RELATED TO THE A330 FAMILY LCA

35. The subsidies that were found to have caused Airbus to launch the A330 family LCA, as and when it did, have been withdrawn in full. Thus, the European Union addresses the US adverse effects arguments relating to the A330 family solely in the alternative.

36. *First*, the United States fails to recognise that the A330 family LCA aircraft compete in conditions that give them a virtual temporal monopoly for smaller twin-aisle aircraft that are available for near-term delivery. The competitive realities place the A330 in a market separate from most other twin-aisle aircraft and are a key non-attribution factor to consider in evaluating US lost sales and displacement or impedance claims.

37. *Second*, the withdrawal of A330-related subsidies creates a significant burden for the United States to overcome, as the United States challenges no new subsidies for the A330. *Third*, even if none of the original A330 subsidies are withdrawn, the United States fails to address evidence regarding the passage of considerable time.

38. *Fourth*, the United States fails to recognise that the A330 launched in 1987 is not the same product that is being sold, and delivered, by Airbus in 2012. Since the subsidised development of the A330, there have been massive and ongoing private, non-subsidised investments to the

aircraft by Airbus and its suppliers. These investments have increased the maximum take-off weight and range of the A330, resulting in significant present market demand.

39. By contrast, Boeing made no significant investments to enhance the performance and operating efficiency of the 40-year-old 767. The 767, or Boeing's 777, are too large and heavy an LCA to be attractive to airlines seeking a smaller, economically-efficient twin-aisle aircraft with a medium range. And the 787 has been plagued by delivery delays and a huge order backlog precluding the availability of any near-term delivery slots. Thus, the genuine and substantial cause of any present Airbus sales and market share related to the A330 sales are Airbus' timely and significant investments in upgrading the range and take-off weight and reducing the operating costs of the A330 − not the effects of any remaining, decades-old subsidies related to the A330.

40. Turning to the US lost sales claims, the United States offers no explanation for claiming such lost sales today when it made no such allegations during the 2001-2006 reference period. Nor does the United States address the fact that the A330 is not in the same market as the 777, that Airbus secured A330 sales based on strong airline preference for the A330 from airlines that require a smaller twin-aisle aircraft with a more medium range, and that continued low sales of the 767 are due to Boeing's failure to invest in upgrading the aircraft's 40-year-old technology.

41. The US displacement or impedance claims fail because they are based on distorted market share tables that improperly combine deliveries spanning a number of twin-aisle aircraft product markets, and ignore that the A330 is not in the same market as other twin-aisle aircraft. The US third country impedance claims ignore the absence of displacement, are not based on any relevant market trends, and fail to explain how historical, non-challenged sales of A330 LCA presently impede 767 and 777 deliveries.

C. ALLEGED ADVERSE EFFECTS RELATED TO THE A380 FAMILY LCA

42. For the A380, the United States fails to demonstrate present adverse effects that are presently caused after the end of the implementation period. Again, the United States fails to take account of the withdrawal of pre-A380 subsidies that the original panel found were the principal cause of any lost sales existing in the 2001-2006 reference period.

43. In the alternative, the United States fails to establish that any allegedly remaining subsidies benefiting the development and production of the A380 (financing from France, Germany, Spain and the UK, or regional development grants) are sufficient to constitute a present genuine and substantial link to the alleged present adverse effects. This is particularly critical because the original panel did <u>not</u> find that Airbus could not have launched the A380, as and when it did, without A380 MSF and without the regional development grants.[8]

44. Even without the A380-related subsidies, EADS would have had funds sufficient to finance the development of the A380. Moreover, the A380 business case would also have been viable absent MSF for the A380. In these circumstances, any existing subsidies benefiting the A380 are not a substantial cause of its launch and, thus, are not a substantial cause of any alleged adverse effects presently arising.

45. Any adverse effects from the US A380-related lost sales claims arising from the 2001-2006 reference period are removed by deliveries. The US lost sales claims fail because the 747-8 and A380 operate in separate markets, and because the United States ignores the very particular demands and needs of particular airlines for the operating, performance, revenue-generating and cost-savings attributes of the A380, compared to any Boeing LCA (and the 747-8 in particular).

46. US claims of displacement or impedance also fail because the A380 and 747-8 are in different markets, and in any event, there are no identifiable or reliable trends due, in part, to production and development delays for the 747-8. US claims of impedance suffer from a lack of any identifiable or reliable trends or any evidence that airlines demand particular attributes of Boeing LCA compared to the A380.

[8] Panel Report, *EC − Large Civil Aircraft*, para. 7.1948.

D. ALLEGED ADVERSE EFFECTS RELATED TO THE A350XWB FAMILY LCA

47. For the A350XWB, the United States fails to demonstrate that financing agreements for the aircraft are properly within the scope of these compliance proceedings, or that these loans constitute subsidies. On the basis of these infirmities alone, the compliance Panel could reject the US adverse effects claims relating to the A350XWB.

48. In the alternative, the US fails to establish a genuine and substantial causal link between financing for the A350XWB and any alleged present adverse effects, through the alleged product launch effect of the subsidies on the existence of the A350XWB. In particular, Airbus committed to the launch of the A350XWB, and began its development, accepted orders and signed up risk-sharing and other suppliers two and a half years before the signature of the first financing agreement. Moreover, EADS would have had the funds to finance the development of the A350XWB, even without the financing agreements for the A380 and the A350XWB.

49. Finally, the European Union establishes the dramatic technological differences between the A380 and the A350XWB, rebutting the US assertions that the aircraft benefited significantly from developments that Airbus implemented on its A380. In these circumstances, there is no basis for a finding of a presently existing causal link.

50. Moreover, there is no basis for US lost sales claims involving the A350XWB based on contractual settlements and conversions to that aircraft by airlines that had ordered the later-cancelled original A350. Since the United States has not challenged these sales in the original proceedings, there is no legal basis for it to challenge them now in these compliance proceedings. US lost sales claims related to the A350XWB also fail because the United States fails to take into account the existence of several twin-aisle markets and the distinctive demands of customers for particular types of large and smaller twin-aisle LCA that significantly limit competition between these aircraft.

51. Finally, the European Union notes that, presently, there have been no deliveries of A350XWB LCA. Consequently, there can be no present displacement or impedance based on present deliveries of A350XWB LCA. And since the United States has not raised (and cannot now do so) a threat of displacement or impedance, the Panel should reject the US displacement and impedance claims relating to the A350XWB.

E. ALLEGED ADVERSE EFFECTS RELATED TO THE A300, A310 AND A340 FAMILY LCA

52. With respect to the A300, A310, and A340, the subsidies that caused the launch of these aircraft, as and when they were launched, are fully withdrawn, such that the United States has secured the remedy it is due, and no assessment of any alleged present adverse effects is warranted. In any event, it is difficult to understand how any adverse effects could accrue to US interests from any existing subsidies for these three LCA programmes, since Airbus no longer sells nor delivers A300, A310 or A340 LCA and has, in fact, terminated these LCA programmes.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. INTRODUCTION

1. In Section II, the EU recalls the legal framework governing these proceedings, including, in particular, the question of the burden of proof. In Section III, the EU addresses the scope of these proceedings. Section IV addresses the US failure to establish the existence of subsidies after the end of the implementation period, in light of EU measures taken to comply. Section V rebuts the US claims of prohibited subsidies. Section VI addresses the US failure to establish present adverse effects presently caused after the end of the implementation period.

II. THRESHOLD ISSUES

2. In its SWS, the US continues to shrug off its burden of proof. The US continues its failure to demonstrate present subsidies, as well as presently arising adverse effects presently caused.

III. THE US CHALLENGE INCLUDES MEASURES AND CLAIMS THAT ARE OUTSIDE OF THE COMPLIANCE PANEL'S JURISDICTION

3. None of the A350XWB financing agreements challenged by the US is a "measure{} taken to comply", such that they are outside the scope of the Panel's jurisdiction under Article 21.5 of the DSU. The US claims against the four A380 financing agreements under Articles 3.1(a) and (b) of the *SCM Agreement* are likewise outside the scope of the Panel's jurisdiction. Finally, the US Panel Request fails to satisfy Article 6.2 of the DSU; the US Panel Request does not cover claims concerning an alleged *threat* of displacement and impedance of imports pursuant to Article 6.3(a) of the *SCM Agreement*.

IV. ALLEGED PRESENT SUBSIDIES

4. Article 7.8 of the *SCM Agreement* affords an implementing Member the option to withdraw the subsidy, or to take appropriate steps to remove adverse effects. By 1 December 2011, the EU had procured withdrawal of most of the subsidies covered by the recommendations and rulings of the DSB, taking heed of the Appellate Body's statement that a subsidy is brought to an end "either through the removal of the financial contribution and/or the expiration of the benefit". Certain subsidies were withdrawn through removal of the financial contribution; certain subsidies were withdrawn through expiration or cessation of the benefit; and, withdrawal of some subsidies was accomplished through both of these means.

A. Horizontal issues

5. First, Article 7.8 permits a respondent to achieve compliance by, *inter alia*, withdrawing the subsidy. In proceedings implicating Article 7.8, a fundamental question is whether "subsidies that the DSB has already found to exist", indeed exist after the end of the implementation period, in light of, *inter alia*, any "measures taken to comply". If the complainant fails to establish, in light of the respondent's measures taken to comply, that the subsidies exist after the end of the implementation period, then it has failed to demonstrate that withdrawal has not occurred.

6. Second, the US asserts that unless *all* subsidies have been withdrawn, the withdrawal of *some* subsidies is not relevant under Article 7.8. The US errs. "Subsidy" is a defined term, consisting of three elements set out in Article 1 of the *SCM Agreement*. The existence of subsidies is not established "collectively", but is instead a matter of establishing these three elements, for each measure, individually. When Article 7.8 affords the option to comply by withdrawing "the subsidy", the term bears the meaning set out in Article 1. Thus, the EU is entitled to comply by establishing, *inter alia*, that it has withdrawn one or more of the constituent elements leading to a finding, in the original proceedings, that a given measure pursued by the US was a "subsidy".

7. Third, and recalling Appellate Body statements that withdrawing the subsidy or removing the adverse effects will "usually" or "normally" involve affirmative action by the respondent, the US argues that the EU may not rely on the passage of time to establish withdrawal (because the benefit has expired, or the life of the subsidy has otherwise come to an end). The US errs. The Appellate Body's statements beg the question whether the temporal features of this dispute are "usual" or "normal". The role the passage of time "usually" or "normally" plays in assessing compliance under Article 7.8 must be assessed in the specific temporal context in which it arises. Here, the US challenged subsidies that were provided up to 43 years ago. Moreover, the Appellate Body also stated that a subsidy has a "finite life", which "accrues and diminishes over time" and "comes to an end". The EU has provided an expert report using established methodologies charting the accrual and diminishment of the subsidies at issue over time.

8. Fourth, the US asserts that events marking the end of a subsidy's life that arise "before the finding of WTO inconsistency cannot satisfy the EU's obligation to withdraw the subsidies". The US errs. Panels and the Appellate Body have expressly ruled that "measures taken to comply" may be taken *before* a finding of WTO inconsistency is adopted by the DSB. The Appellate Body has found that "compliance with the recommendations and rulings of the DSB can be achieved before the recommendations and rulings of the DSB are adopted".

B. Termination of instruments providing the terms of subsidies

9. Termination of an instrument is an additional piece of evidence, even if not necessary or sufficient in and of itself, constituting recognition by the parties of withdrawal (or cessation of adverse effects). As such, the EU does not accept, as the US suggests, that terminations of loan agreements are irrelevant. The EU additionally notes that certain of the terminations listed by the US, while not accompanying withdrawal of the subsidy *by virtue of repayment of principal and interest* of the underlying loans, still accompany withdrawal of the subsidy, albeit *by means other than repayment*.

C. Repayment of principal and interest

10. The Appellate Body found that the "removal of the financial contribution" results in the "life" of a subsidy coming "to an end". The EU has established that the principal of a series of EU member State loans, plus the interest due, has been repaid, such that the financial contributions were returned, and the life of the subsidies brought to an end. Thus, the US has failed to demonstrate the existence of the subsidies at issue after the end of the implementation period, because they have been withdrawn. The US argues that, to make the removal of the financial contribution meaningful, the repayment effected would have to remove the "benefit" element of subsidy. However, arguing that effecting repayment of principal and interest does not remove the "benefit" of the MSF loans relative to market is, however, a response to an argument the EU has not made.

D. Amortisation

11. The US takes a number of erroneous legal positions and makes unsupported factual assertions regarding the amortisation of subsidies − or in other words, the *ex ante* trajectory of the life of the subsidies, or the accrual and diminishment of the subsidies over time. The EU demonstrates that, contrary to the US assertion, the original panel made no findings regarding present subsidisation during the original reference period. The EU then rebuts the US assertion that amortisation is not relevant under Article 7.8 to assess whether a subsidy has been "withdraw{n}". Next, the EU addresses erroneous US arguments regarding the *ex post*, rather than *ex ante*, determination of an amortisation period, and the relevance of the actual terms of the subsidies for establishing their amortisation period. Finally, the EU addresses a number of additional errors in the US amortisation arguments for specific subsidies. In summary, the US has failed to establish that, in light of amortisation, the subsidies exist after the end of the implementation period and have not been withdrawn.

E. Extinction and extraction

12. The US does not dispute that the "extinction events" are properly before the Panel, but asserts that the "extraction events" were rejected and are not properly before the Panel. The US

errs. Under Article 21.5, there is a disagreement between the Parties "as to the existence" of a measure taken to comply (the cash extractions), and "as to the consistency" of that measure with a "covered agreement", namely Article 7.8. Moreover, the Appellate Body did not resolve the question whether the cash extractions remove "all or part of a subsidy", but said it is a question to be dealt with by a compliance panel. Thus, both the extinction and extraction events are properly before the Panel.

13. Turning to the substance, the EU has established that the cash extractions removed value. Specifically, the value of the German and Spanish assets received by EADS upon its creation was lower than the value of the assets held by DASA and CASA respectively prior to the transaction. Moreover, the EU has explained how the subsidies were reflected in the companies' balance sheets, and how the cash extractions removed the remaining value of the subsidies by reducing the companies' net asset value, which reflected, indirectly, the value of these subsidies.

14. With respect to the share transactions, the US asserts that the EU "relies on an incorrect legal test" and that "the facts at issue do not satisfy the correct test". Both assertions are wrong. First, the Appellate Body set out three criteria to establish the presumption that a transaction extinguishes the residual value of subsidies, despite the US attempt to add an additional criterion. Moreover, all three share transactions at issue meet the three criteria; as the US has not provided evidence to rebut the resulting presumption, the Panel should find that the three transactions extinguish the residual value of the subsidies. Accordingly, the US has failed to establish the existence of the subsidies, which have been withdrawn.

F. A350XWB financing agreements

15. The US claims that financing agreements concluded between Airbus and France, Germany, Spain and the United Kingdom in relation to the A350XWB are subsidies that are prohibited, and that cause adverse effects. However, the US has failed to establish that the agreements confer "benefits", under Article 1.1(b) of the *SCM Agreement*. The US has abandoned its argument that the A350XWB loans confer benefits because they allegedly represent an instrument not otherwise available at market. Moreover, in assessing the terms of the loans, the US improperly understates the rates of return implied in the loan agreements, and provides a flawed benchmark that it inaccurately ascribes to Professor Whitelaw, and that overstates required market rates of return.

V. ALLEGED PROHIBITED SUBSIDIES

A. The United States has not demonstrated the existence of any subsidy contingent in fact upon anticipated export

16. The US asserts that French, German, Spanish and UK financing for the A380 and the A350XWB are subsidies contingent in fact upon anticipated export. The US compares the anticipated ratio of domestic to export sales with the subsidy, to a "baseline" ratio of domestic to export sales that would be achieved by a hypothetical profit-maximising firm without subsidy, and concludes that changes in the ratios demonstrate that the financing agreements for the A380 and the A350XWB must be subsidies contingent in fact upon anticipated export.

17. The EU establishes that the ratios calculated by the US are riddled with errors, and do not represent what the US asserts they represent. The errors in the US approach are more fundamental, however. The US presents its arguments as if it were simply a question of providing "the final piece of evidence" or "filling the gap" in order to "confirm" an inconsistency. This is untrue. In the original proceedings, the Appellate Body reversed the legal standard adopted by the panel, sweeping away the prior associated US legal argument. Consequently, the US must *demonstrate* export contingency, and not just fill in a "final piece" of or gap in the evidence allegedly remaining after the original proceedings.

18. The Appellate Body clarified that: (i) mere anticipation of exports is not sufficient to demonstrate contingency; (ii) the analysis must focus on the design, structure and modalities of operation *set out in the measure*, assessed in the context of the total configuration of facts surrounding the grant; (iii) nothing in the design, structure and modalities of operation set out in the financing agreements demonstrates or supports the existence of export contingency; and (iv) nothing in the other evidence demonstrates or supports the existence of export contingency.

19. Notwithstanding this guidance, the US attempts to pursue its claims by mischaracterising the Appellate Body's "indicative", "illustrative" "numerical examples" as a "test", re-iterating assertions about "anticipation", re-cycling evidence that has already been considered and rejected, and by relying upon "baseline ratios" that are defective in several respects. This mechanistic approach leads the US to the absurdly implausible proposition that any *benefit* in the financing agreements was anticipated to cause and in fact caused foreign airlines to massively increase *their* demand (which is in fact driven by *their* customer base and generally higher demand growth in non-EU markets). As in the original proceedings, the latest US argument does nothing to demonstrate why the granting of the subsidy might be considered geared to induce the promotion of future export performance by the recipient, in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets.

B. The United States has not demonstrated the existence of any subsidy contingent, in law or in fact, upon the use of domestic over imported goods

20. The US brings claims of subsidies contingent in fact upon the use of domestic over imported goods with respect to French, German, Spanish and UK financing for the A380 and the A350XWB. According to the US, in each case the financing was "granted" "in exchange for a commitment" by Airbus to locate a fixed share of the total development or production work for the aircraft in the relevant country. The US argues that the financing agreements thus require Airbus to produce specific "sub-assemblies and components" or "parts" in the territory of the EU, which accordingly become "domestic products" of the EU, and then use those "domestic products" as "manufacturing inputs" in the production of the finished aircraft.

21. Article 3.1(b) of the *SCM Agreement* requires the contingency to be demonstrated with respect to the "use of domestic over imported goods". Thus, the term "use of … goods" circumscribes what is prohibited. The Agreement does not use the terms "development" or "production". Accordingly, a subsidy contingent upon domestic development or production is not prohibited. Such a subsidy might or might not have adverse effects on imported goods; however, if within the scope of the *SCM Agreement*, that is a matter to be addressed under Part III. Members are not *prohibited* from tying their subsidies to domestic production, that is, granting them exclusively to domestic producers; they must only ensure that such subsidies do not *cause* adverse effects to the interests of other Members.

22. This feature of subsidies law is enshrined in the text of the GATT 1994, as interpreted in the *SCM Agreement*. In particular, Article III:8(b) is essential context for understanding the proper scope of Article 3.1(b). In exercising its rights under Article III:8(b), it is for the granting Member to select the domestic producers (that is, the firms producing particular goods) to be subsidised. Thus, if a Member merely grants a subsidy (for example to an aircraft producer), and in doing so restricts it exclusively to a domestic producer, declining to grant it to foreign producers, it benefits from the safe harbour of Article III:8(b), as interpreted in the *SCM Agreement*, and does not violate Article 3.1(b). Such a subsidy might influence the *location* of a firm (as permitted by Article III:8(b)), but, taking the location of the firm as a given, it does not create a mechanism that incentivises or favours a substitution of imported inputs with domestic inputs.

23. Article 3.1(b) does not address subsidies where the product that receives the subsidy is *the same* as the good that it is alleged must be used; nor where the producer of a downstream product that receives the subsidy is *the same* as the producer of the upstream good that it is alleged must be used. A firm *uses* an *input*; it does not *use* an *output*; and the same thing cannot be, at the same time and for the same firm, both an *input* and an *output*. It can only be one or the other. Nor can the producer of the downstream and upstream products be *the same*, because in that case there is simply no relevant *input*. To construe Article 3.1(b) in the manner argued for by the US is to trespass on the domain of Article III:8(b).

VI. ALLEGED PRESENT ADVERSE EFFECTS

24. The US claims that the EU allegedly failed to remove the adverse effects, within the meaning of Article 7.8. At the outset, the EU recalls that these claims must fail for lack of evidence of any present subsidisation, as discussed in Section IV, above. The US has failed to demonstrate that any of the subsidies exist after the end of the implementation period, and are not withdrawn. In these circumstances, compliance has been achieved; under Article 7.8, there is no basis for the

compliance Panel to find present adverse effects from subsidies that have been withdrawn, and for which compliance has been achieved.

25. Should the Panel find that there are present subsidies, the EU also explains that the US has failed to establish the existence of present adverse effects, presently caused by such subsidies after the end of the implementation period. Specifically, the US has failed to establish a present genuine and substantial causal link for each of the Airbus products for which it raises adverse effects claims:

- With respect to the A320 and A330, the US has failed to demonstrate a *present* and *substantial* causal link between any presently existing subsidies and alleged present adverse effects, given, in particular, its failure to consider the passage of considerable time since the grant of the subsidies, during which Airbus made significant non-subsidised investments in the A320 and the A330.

- With respect to the A380, the US erroneously relies on the effects of withdrawn pre-A380 subsidies to try to establish a present causal link, and ignores evidence demonstrating that EADS and Airbus could and would have launched the A380 absent EU member State financing for the A380.

- With respect to the A350XWB, the US has failed properly to account for the fact that the financing agreements were not concluded until well after Airbus had launched, partially developed and accepted 500 orders for the aircraft. Moreover, the evidence establishes that the A350XWB was economically viable without the financing agreements, that compelling strategic considerations would have led EADS and Airbus to launch the programme without those agreements, and that the companies had the financial means to fund launch and development absent those agreements. Finally, the evidence establishes that any remaining effects from any allegedly non-withdrawn pre-A350XWB subsidies are insufficient to establish a substantial causal link due to the dramatic technological differences between the A350XWB and prior Airbus aircraft.

- With respect to the A300, A310 and A340, it is difficult to understand how any adverse effects could accrue to US interests, since Airbus no longer sells nor delivers these LCA, and has terminated the programmes.

26. In addition, the specific failures in the US lost sales claims are legion, including, notably, its failure to account for non-attribution factors affecting groups of and individual sales, which make any causal link non-substantial. Similarly, the US has failed to raise present displacement and impedance (or threat thereof) claims based on properly established product markets, has failed to establish the required present trends in the flawed product markets it does identify, and has ignored non-attribution factors that affect the markets at issue.

ANNEX C-3

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE EUROPEAN UNION AT THE PANEL MEETING

Mr. Chairman, distinguished Members of the Panel,

1. We come to this hearing as the Party that has filed the most recent written submission, which, like our first written submission, is a substantial document. You may be relieved to hear that we therefore have a relatively short oral statement for you today.

2. So what is it that we should say to you today? We are not in a position to react, in this oral statement, to the submission just delivered by the United States, although we will of course do so in due course, in response to your written questions. You have already seen our written submissions, in which we explain how and why we have complied with the recommendations and rulings of the DSB, and we do not want to repeat ourselves. This is an oral statement, not a written submission, and we do not wish to burden you with inappropriate and excessive detail.

3. How, then, should we use the time available to us in this hearing most profitably? It seems evident to us that we should rather focus on the big picture. In particular, we would like to focus on some broad cross-cutting shortcomings and attempted (but failed) short-cuts in the overall structure of the US case.

4. That does not mean that what we have to say today is mere rhetoric, detached from the specific legal determinations you are charged with making. Rather, we take this approach in order to highlight a pattern in the US arguments in these proceedings. Specifically, when the matters in dispute get refined down to the detailed point of adjudication, the United States tends to have recourse, expressly or by implication, to one of the big picture issues we address today, attempting to use it, subjectively, to mask a shortcoming in its evidence, or to colour the adjudication in its favour. You, in contrast, are charged with making an *objective* assessment of the matter at hand. These big picture issues are, therefore, highly pertinent to the assessment that you are called upon to make in this case, in the sense that they need to be *brought out of the shadows*, *challenged* and *dispelled*. That is what we set out to do in this oral statement.

5. Were we to encapsulate these issues in one word, that word would probably be "assumption". It is sometimes said that the devil is in the detail. Well, as I have already indicated, we think we have covered the detail in our written submissions, and we would say that what is in that detail is the truth, or at least as close as one can reasonably get to it. In the case of the US submissions, we would rather say that *the devil is in the assumptions* – the subjective assumptions – that litter the entire US case. People say that the bigger the assumption the more likely it is to be believed. Thankfully, such assertions carry no weight in the WTO's unflinching rules-based system, which is based on an *objective* assessment of the matter, and particularly of the evidence.

6. What sort of subjective assumptions are we speaking of? Here are a few of them, taken from the US' submissions and public statements:

- The WTO found that the amount of the subsidies at issue in this dispute is USD 18 billion.[1]

- The complainant does not have the burden of proof in compliance proceedings involving subsidies. Accordingly, the United States need not demonstrate that subsidies exist after the end of the implementation period, in order to show that the subsidies have not been withdrawn. Nor need the United States demonstrate present adverse effects presently caused, in order to show that the adverse effects have not been removed.

[1] "In April 2012, the United States initiated compliance panel proceedings due to the EU's apparent failure to comply with the WTO's 2011 findings that $18 billion in subsidies conferred on Airbus by the EU and member countries were WTO inconsistent". The President's 2013 Trade Policy Agenda, available at: http://www.ustr.gov/sites/default/files/Chapter%20I%20-%20The%20President's%20Trade%20Policy%20Agenda.pdf.

- Although a responding Member enjoys the choice between withdrawing a subsidy or removing the adverse effects, WTO implementation obligations are more stringent for subsidies than for other types of measure, such that the respondent remains responsible for allegedly lingering adverse effects from withdrawn subsidies.

- The market never engages in project finance, and risk-sharing cannot be priced at market.

- In competitive markets, *every* subsidy causes adverse effects.

- In particular, financing extended by the EU member States always causes an LCA programme to be launched, even where the programme was economically viable without the alleged subsidy, and even where the recipient could have funded the launch without the alleged subsidy, as long as newspaper articles and the generic Dorman model say so.

- A complainant can assume that subsidies benefiting one product cause economic harm to another product, without *evidence and analysis* demonstrating that the two products fall into the same product market.

- The adverse effects from an actionable subsidy do not dissipate, but instead increase, with time, for as long as a subsidised product, and any subsequent products, are in the market.

- Without the subsidies, there would be no EU LCA industry, or at least none of Airbus' current or future products would exist.

- The United States never grants subsidies, has never granted subsidies to Boeing, and in any event this is irrelevant.

7. These subjective and erroneous assumptions permeate the entire US case, expressly or by implication. When the overall effect is considered, the US approach is simply jaw-dropping, remote as it is from the requirements set out within the four corners of the *SCM Agreement*.

8. Well, we have covered these issues in our written submissions, and as I have said, we do not want to repeat ourselves. But let us take a couple of points by way of example, to illustrate what we mean.

9. Consider the proposition that where two firms compete, each and every subsidy to one must be *assumed* to cause adverse effects to the other. That is exactly what the United States does in this dispute: it asks you to accept the assumption that each and every alleged subsidy to Airbus causes adverse effects to Boeing, because the two companies compete for LCA sales.

10. Now, the WTO has indeed found that some EU member States have provided repayable loans to finance portions of Airbus' development costs. But there is no such thing as a free lunch − and this is a pertinent observation here in two senses.

11. First, these loans are not grants given without any repayment obligation in return (like the funds provided by the United States to Boeing) − they are *repayable.* Why then does the United States insist on asserting that the WTO has found that the amount of the subsidies is USD 18 billion? Every person in this room knows this assertion to be false. The WTO has "found" no such thing. The United States appears to refer to what it alleges to be the amount of the *principal* involved. But the *objective* facts and evidence reveal more − that the agreements *require repayment* (and in fact many of the loans have been *repaid*, with *interest*). The US *assumption* about USD 18 billion worth of subsidies is thus untenable, and directly contradicted by the facts and the *evidence*.

12. Second, even if the United States would have established that the interest rate on any of the loans was below a market benchmark, there has still been a ***quid pro quo***. And that *quid pro quo* is ***location*** − that is, *the* ***additional costs*** to Airbus in being constrained to develop and produce the aircraft in Europe as opposed to elsewhere.

13. As in the United States, including with respect to Boeing, a cornerstone of European industrial policy is creating and maintaining high quality jobs. We are not ashamed of that, any

more than is the United States − and a great many statements to that effect have been made by both the US authorities and by Boeing.

14. The covered agreements do not suggest that this type of measure, which is conceptually similar to financing the additional costs of adapting to more stringent local environmental standards, is particularly problematic. Quite the contrary. The *SCM Agreement* expressly recognises that government assistance for various purposes is widely provided by Members, and that the mere fact that such assistance may not be non-actionable does not restrict the ability of Members to provide it.[2] Environmental subsidies were temporarily non-actionable,[3] and even today, like all other subsidies, and by way of an additional requirement compared to other types of measure, a complaining Member must *demonstrate*, with evidence, that a subsidy *causes* serious prejudice.

15. Accordingly, if a Member finances the cost of fitting a scrubber to a firm's chimney to comply with local environmental standards in its jurisdiction, a panel bound by the requirement to undertake an objective assessment of the matter cannot *assume* that this causes serious prejudice to a firm in another jurisdiction that is not subject to the same environmental standard.

16. That observation is *just as pertinent* to the case before you today, and triggers a critical question. Even if the EU member States' financing *offsets* Airbus' *additional costs* in being constrained to develop and produce the aircraft in Europe as opposed to elsewhere, how can it be used to *cause* serious prejudice to US interests, that is, to Boeing?

17. In a rules-based dispute settlement system, the answer to this question cannot be that, because Airbus and Boeing compete in various product and geographic markets, every subsidy to one must be *assumed* to have "created" the recipient or one of its products, and for this reason, to have caused serious prejudice to the other. Rather, the existence of a subsidy to one causing adverse effects to the other must be *proven*, with *evidence*, on the basis of a reasonable and appropriately calibrated causal mechanism.

18. Rather than undertaking the required task of *demonstrating* that net funds remain, and are used to price down LCA and trigger one of the enumerated forms of serious prejudice listed in Article 6.3 of the *SCM Agreement*, the United States has resorted to various attempted short-cuts, which collectively amount to little more than a leap of faith. This is particularly true of the US' cascading "creation" causation argument, which culminates with the alleged effect of European government financing on the launch of the A350XWB. Specifically, the United States argues that EU member State financing caused Airbus to launch an aircraft that it would not otherwise have launched, and that that launch taught Airbus things that caused *subsequent* aircraft to be launched, and that each of these launches caused Airbus to win sales and take market share from Boeing, and that this harm persists for as long as *any* Airbus aircraft, including those that may subsequently be developed and launched, are sold.

19. In short, the alleged subsidy itself is not shown, with evidence, to cause any of the enumerated forms of serious prejudice listed in Article 6.3. Instead, the starting point − that Airbus received EU member State financing − and the ending point − that Boeing has made some sales but not others and has a particular market share − are simply fused together. The middle, or how those two points are bridged, is murky, and joined through attempted short-cuts, artifice and mere assumption.

20. We are not saying that an attenuated causal chain involving multiple links from alleged subsidy to alleged adverse effects is impossible to construct. But the longer and more attenuated the alleged chain, the more diligent and rigorous a complainant must be if it is to succeed, and the more demanding the adjudicator should be. In this case, the United States is asserting a particularly attenuated causal chain, in an attempt to jump the gap from alleged subsidy to alleged adverse effects, particularly by employing a series of attempted short-cuts, which are simply not supported by the evidence. It is a leap of faith that fails.

21. Thus, we are calling the US bluff. We are raising our hand and saying that the emperor has no clothes. A rules-based system requires *proof* of claims made. An *intuition* that an alleged

[2] *SCM Agreement*, footnote 23.
[3] *SCM Agreement*, Article 8.2(c).

subsidy to one firm harms a competing firm is *not enough*. A rules-based system requires *objective evidence establishing* the alleged causal links the United States asserts, rather than attempted short-cuts and assumption. What does this mean in practice in this case?

22. First, it means holding the United States to its procedural obligations. We know that the United States is trying to back-load these proceedings and deprive the European Union of its due process rights by ambushing us, and constraining our ability to respond. This tactic began by filing a first written submission that lacked any real substance and that challenged as actionable subsidies measures it had not even seen, on the false assumption that it lacked the procedural means to seek evidence in advance, through Annex V, or questions posed pursuant to Article 13.1 of the DSU. The tactic has had a knock-on effect, such that, only today, we are hearing for the first time evidence and argument that should, consistent with the United States' burden as complainant, have been provided to us and to you nearly 12 months ago. We say that untimely material must simply be rejected.

23. Second, it means holding the United States to the law, as clarified by prior disputes. When the United States sets out, as it has done in other instances, such as with respect to Annex V, to challenge the Appellate Body − the agreed final adjudicator in our treaty system − its submissions need to be dealt with accordingly. We note in this regard the United States' refusal to accept the Appellate Body's express finding, in this dispute, that a subsidy has a finite life, set on an *ex ante* basis at the time of grant. Similarly, the United States challenges the Appellate Body's finding that the repayment of the financial contribution (for example in the form of principal and interest) brings a subsidy to an end. Moreover, it challenges the Appellate Body's finding that the effects of subsidies dissipate over time, asserting instead that the effects of any subsidies to Airbus exist for as long as Airbus sells and delivers any and all of its products.

24. Third, and perhaps above all, it means holding the United States to its burden of proof and persuasion. The United States had a job to do in these proceedings, as a function of its role as complainant in a dispute governed by the DSU and Article 7.8 of the *SCM Agreement*. That was to *demonstrate* that subsidies exist after the end of the implementation period − such that they have not been withdrawn − and that those subsidies presently cause present adverse effects − such that those adverse effects have not been removed. It has shirked the task, in favour of the types of attempted short-cuts and subjective assumptions we have already mentioned.

25. Shirking that task is a choice, and the United States is free to have made it. You, however, are not free to accept it. You are charged with *objectively* assessing the *evidence*, to determine whether it supports the claims advanced by the United States. That the US gamble involves high stakes is no reason to substitute subjective assumptions for objective and detailed assessment, based on *evidence*. WTO dispute settlement is not a game of poker. It is an international legal adjudication. As I have already said, we are calling the US bluff, and we respectfully ask you to do the same. If this means rejecting the US case, then that is entirely right and proper, as a response to a strategic choice by the United States to employ attempted short-cuts and subjective assumptions instead of evidence.

26. In closing our oral statement, it is worth recalling that we evidently did not choose to bring this dispute, or the companion dispute involving US subsidies to Boeing, to the WTO. We recognise that it places a huge burden on the WTO dispute settlement system. Moreover, these disputes, triggered by a US objection to an alleged location subsidy to create jobs in the European Union, do nothing to advance trade − something evident from the mutual requests for countermeasures involving tens of billions of US dollars annually. It appears that, for Boeing, this litigation may be a relatively cheap option to pursue commercial interests by other means, with potentially substantial results. It suits Boeing to paint Airbus as "the bad guy" for domestic reasons, including US government procurement, asserting alleged WTO findings that Airbus received USD 18 billion of subsidies, whilst Boeing has, as the story goes, received none.

27. Everyone understands perfectly well that resolving the underlying issues may require an agreement of some kind, and one that may well be of interest to or involve other Members. We understand that. This is the multilateral way forward, capable of adequately reflecting the trade interests of all WTO Members. The European Union is ready to engage in it, on balanced terms. The imbalanced and unsupported assumptions that underpin the US case − to the effect that Airbus should not even exist − and which appear to be driven by an agenda that is not conducive

to trade, are fundamentally at odds with such a rational outcome, and we ask you to reject them, in favour of an objective assessment of the evidence.

Mr. Chairman, distinguished Members of the Panel, we thank you for your attention, and stand ready to answer any questions you may have.

ANNEX C-4

EXECUTIVE SUMMARY OF THE CLOSING STATEMENT OF THE EUROPEAN UNION AT THE PANEL MEETING

Mr Chairman, distinguished Members of the Panel, in our Closing Statement, we would like to address selected points that were raised over the past few days.

I. OPTION TO WITHDRAW THE SUBSIDY UNDER ARTICLE 7.8 OF THE *ASCM*

1. The AB has found that, in original proceedings involving claims under Articles 5 and 6 of the *ASCM*, it is possible for an adjudicator to find that expired subsidies have contributed to adverse effects. On Tuesday, the Panel asked whether, in that circumstance, allowing a respondent in compliance proceedings to refer to the expiry of the subsidy as a means of achieving withdrawal and compliance with Article 7.8 of the *ASCM* would make the recommendation in the original proceedings declaratory in nature.

2. To begin, the situation described by the Panel should not arise. Specifically, whatever the merits of a *finding*, no recommendation to withdraw a subsidy or to remove its adverse effects is necessary in that circumstance. Where a recommendation to withdraw the subsidy or to remove the adverse effects from a *group* of subsidies, some of which had expired, is nonetheless issued, that recommendation "do{es} not concern" the expired subsidies. After all, Article 7.8 applies only to the extent the respondent is "granting or maintaining" the subsidy. If the subsidy is no longer "maintained", because it has been withdrawn, any recommendation is unnecessary, and if made, does not apply to the withdrawn subsidy. The AB has noted that an interpreter must "give meaning and effect to the term 'maintain', which is distinct from the term 'grant', and has also been included in" Article 7.8.

3. Moreover, even if a recommendation to withdraw the subsidy or to remove its adverse effects could be said to apply to expired subsidies, *quod non*, withdrawal can be achieved through actions or events pre-dating the DSB's adoption of that recommendation. The AB has, again, explicitly confirmed that "compliance with the recommendations and rulings of the DSB can be achieved before the recommendations and rulings of the DSB are adopted".

4. In these compliance proceedings, your inquiry is governed by Article 7.8, which gave the EU a choice between withdrawing the subsidy or removing the adverse effects. The AB found that the assessment of whether withdrawal has occurred and, thus, compliance achieved, is "best left to" you, as the compliance Panel operating under Article 7.8. Contradicting the AB, the US asserts that, where a subsidy has expired before a recommendation to withdraw the subsidy or remove the adverse effects has been made, the choice expressly provided for in Article 7.8 no longer applies, because withdrawing the subsidy is no longer possible.

5. However, the only reason why withdrawing the subsidy is not possible is because *it has already been withdrawn*, in furtherance of "the first objective of the dispute settlement mechanism". While the Parties agree that withdrawal of a *prohibited* subsidy is a complete remedy, the US position is premised on the argument that achieving compliance through the withdrawal of merely *actionable* subsidies is not painful enough on the respondent. To the US, Article 7.8 always requires "affirmative action" by a respondent, such that when the subsidy is expired (e.g., through amortisation), affirmative action to achieve withdrawal is no longer possible, and the only affirmative action remaining is to remove the adverse effects.

6. In considering the US position, we have asked you to bear in mind that Article 7.8 triggers the *responsibility* of the respondent to ensure that compliance is achieved, through withdrawal of the subsidy or removal of the adverse effects. If compliance is *not* achieved, *despite* affirmative action by the respondent, its responsibility for non-compliance *persists*. Equally, if compliance *is* achieved *without* affirmative action, the respondent's responsibility is *discharged*. The requirement is that compliance with Article 7.8 is achieved, regardless whether it is achieved through the actions of the responsible State, or instead through other events that accomplish withdrawal of the subsidy or removal of the adverse effects.

7. As a closing point on the option of withdrawal, the US now argues that the phrase "withdraw the subsidy" means something different in Article 7.8, than it does in Article 4.7 of the *ASCM*. However, we recall that a "subsidy" is defined in Article 1 "{f}or the purpose of this Agreement", including both Articles 4 and 7. Withdrawing the subsidy involves "removing" or "taking away" one of the component elements of "subsidy" defined in Article 1, whether pursuant to Article 4.7, or instead Article 7.8. The US position is inconsistent with the text of the *ASCM*, as well as with the position it has taken elsewhere. It is also premised on the US assertion that compliance obligations under Part III of the *ASCM* are more stringent than compliance obligations under other agreements that form part of the WTO single undertaking, such as, for example, fiscal or regulatory measures − a proposition that is obviously incorrect.

II. AMORTIZATION

8. For the US, the expiration of the life of a subsidy through amortisation is a concept relevant solely to the assessment of whether adverse effects have been removed, but not to the question of whether a subsidy has been withdrawn. Undertaking a proper adverse effects analysis does require consideration of the degree to which a subsidy is amortised. However, amortisation is equally relevant to an assessment of whether a subsidy has been removed, taken away, expired, ceased to exist, or in other words, withdrawn. As Brazil suggested in its statement, if it's a dead subsidy, it's a dead subsidy.

9. On a related issue, on Tuesday, the US argued that amortisation over the actual life of an LCA programme is required, and is *ex ante* rather than *ex post*, on the *assumption* that the "payments under LA/MSF contracts in most cases continue over the actual life of the aircraft". This assumption is simply wrong as a matter of fact. The agreements anticipate repayment of principal and interest over an expected delivery profile that does not correspond to the life of the aircraft programme, either as anticipated at the time the agreements are concluded, or as the life of the programme unfolds with time (if different). It is simply incorrect to say that the agreements foresee repayment over the entire life of the programme.

10. In any event, the AB unambiguously stated that the finite life of a subsidy, as distinct from the period over which that subsidy causes effects, must be assessed on an *ex ante* basis. The concepts of subsidy and effects must not be "conflate{d}". Yet this is precisely what the US does when it insists on an amortization period defined by the actual life of a product allegedly created by that subsidy, destroying the choice in Article 7.8 in the process.

III. JURISDICTION OVER A350XWB MSF AGREEMENTS

11. The EU has explained that the A350XWB MSF agreements are outside the scope of the compliance Panel's jurisdiction, as they are not "measures taken to comply", within the meaning of Article 21.5 of the DSU. Indeed, the US attempt to bring the A350XWB agreements within the scope of these compliance proceedings is tantamount to rearguing the existence of "an unwritten LA/MSF Programme" − a claim that the original panel had previously rejected. Were the Panel to find that the A350XWB agreements are within the scope of these proceedings, it would be going further than the AB has ever gone in affirming jurisdiction under Article 21.5. Doing so would disrupt the delicate balance between due process and prompt settlement that the AB has faithfully maintained in its interpretation and analyses under Article 21.5.

12. In the past few days, the US has made several important admissions that confirm the EU's position on scope. First, the US has conceded for the first time that the A350XWB agreements are not part of any overarching measure. Second, the US has acknowledged the important overlap between, on the one hand, the factors relied upon by the original panel in finding that there was no LA/MSF programme, and, on the other hand, the factors of the traditional "close nexus" analysis. When considered together, these US admissions are fatal to its attempt to force the A350XWB agreements into the scope of these proceedings. Consequently, there is no need to consider further any of the US claims related to the A350XWB agreements.

IV. ALLEGED BENEFIT FROM A350XWB MSF

13. The US makes two arguments concerning an alleged "benefit" from A350XWB MSF that are difficult to reconcile. First, the US argues that, as asserted in the Dorman/Terris and Terris reports,

the market will not offer "risk-sharing" or "risk shifting", such that MSF confers a "benefit" on Airbus *per se*. Second, the US "advoca{tes}", with the assistance of Dr. Jordan, a "constructed benchmark", arguing that "rates charged on LA/MSF for the A350 XWB are below" rates the market would charge for the risk-sharing or risk-shifting characteristics of MSF. The second argument unquestionably accepts, as did the original panel, that it is possible to quantify the "rate", or price, that the market would charge for the risk-sharing attributes of MSF.

14. In essence, the US appears to be advancing two arguments in the alternative, or the second conditioned on the outcome of the first. First, the US argues that pricing the alleged benefit in A350XWB financing is *impossible*. Second, the US submits that, in case you do not accept the first argument, the alleged benefit must be priced against a market benchmark of "X". We lawyers do love our arguments, and hedging our bets. But there are some circumstances in which two arguments *cannot* co-exist, and this is one of them. This is because the second US argument *demonstrates* that pricing is *possible* relative to market. The very making of this second argument thus demonstrates, *on its own terms*, that the first argument is necessarily false. The only dispute between the Parties thus relates to the pricing of the market benchmark. The proposition that the market would not price risk-sharing on any terms, by definition abandoned by Ellis and Jordan, has no further role to play in these proceedings.

V. PRODUCT MARKET DELINEATION

15. The AB emphasised that a proper product market delineation is "a prerequisite for assessing" whether adverse effects exist. If a subsidised product and a like product do not compete in the same market, the subsidy cannot, without more, be a cause of lost sales or displacement suffered by the like product.

16. In contrast, the US identifies sales that a Boeing LCA lost to an allegedly subsidised Airbus LCA, and assumes, from that fact alone, that the subsidy caused the loss. This turns the AB's directive on its head, by *assuming* causation without first establishing the "prerequisite" that the subsidised product is *capable* of causing the lost sale. The allegedly subsidised Airbus LCA is only capable of causing the lost sale if the Airbus and Boeing LCA compete sufficiently closely to exercise significant competitive constraints on one another, such that they are in the same market. It may be that the Boeing LCA lost because it did not meet the requirements of the purchaser, and was not considered sufficiently substitutable for the Airbus LCA – in other words, the Boeing LCA was not in the same product market as the Airbus LCA. Without a proper product market assessment that looks at cross-elasticity of demand, the US assertion of causation is nothing more than an assumption divorced from the reality of the absence of any competition between specific LCA models.

VI. CAUSATION FINDING

17. On Tuesday, the Parties discussed their respective reading of the basis for the original panel's and the AB's causation finding. As explained, neither paragraphs 1261, 1267 nor 1299 of the AB Report, nor the underlying findings by the original panel referenced by the US, support its view that the causation findings in the original proceedings were based on the effect of subsides *creating* Airbus LCA. Instead, the findings were based on the effects of subsidies accelerating the launch of such LCA. An objective and comprehensive reading of these findings compels the conclusion that they offer no support for the new US *creation* theory.

18. In any event, whatever the basis for the findings of the original panel and the AB, the question in these compliance proceedings is different, and is dictated by the terms of Article 7.8. The question before this Panel is whether, *in light of the withdrawal of the subsidies*, there remains any basis on which to find present adverse effects presently caused by *subsidies allegedly existing after the end of the implementation period*.

19. For example, assume that a Member is found to have granted 10 subsidies that cause a particular adverse effect in the original reference period, such as a lost sale. If nine of those subsidies are withdrawn by the end of the implementation period, Article 7.8 requires a compliance panel to inquire whether the one remaining subsidy that is maintained presently causes, by itself, a new adverse effect in the new reference period, after the end of the implementation period. Alleged present effects of subsidies that are withdrawn, and for which compliance has been

achieved, cannot form any part of a finding of non-compliance based on present adverse effects allegedly caused, or contributed to, by such withdrawn subsidies.

VII. ECONOMIC VIABILITY OF THE A350XWB, AND EADS' CAPACITY TO FUND THE PROGRAMME

20. As in its previous submissions, the US argues that MSF for the A350XWB is a genuine and substantial cause of adverse effects to US interests because it "was a necessary precondition for the ... launch and subsequent market presence" of the aircraft. In other words, the US argues that, absent MSF for the A350XWB, the programme would not have been launched, because it was not economically viable, and could not have been funded.

21. In making this assertion, the US relies on, and distorts, a series of press articles and other statements offering the *subjective* views of reporters and parties to the MSF agreements. In contrast, the EU has offered *quantitative* evidence, built on data *contemporaneous* with the launch and funding decisions. Although not the EU's burden, that evidence *objectively* establishes the economic viability of the programme, and EADS' ability to fund its launch and development, while simultaneously pursuing all of its other objectives. Only by ignoring this evidence can the US posit, for example, the following:

- That the A350XWB programme was viable and fundable only because of the potential use of certain financing – which the US, without *any* support whatsoever apart from "assum{ption}", describes as "subsidized". In fact, the objective evidence specifically demonstrates that the programme was viable and fundable *without* such financing (or, for that matter, MSF).

- That business case sensitivities implicating less favourable outcomes, result in non-viability of the programme. In fact, the objective evidence tests for these very sensitivities and scenarios, establishing that the programme was economically viable, even absent both the referenced financing and MSF.

- That projections for A350XWB deliveries are unduly "rosy" and mask non-viability simply because they exceed historic levels of wide-body programme deliveries. In fact, at the time of launch to the present, Airbus' forecast for wide-body LCA demand has been and is consistent with Boeing's market forecast, as well as that of others. And Airbus' delivery forecast for the A350XWB are conservative.

- That a "crisis" at the company, and the global financial crisis more generally, prevented it from launching the A350XWB without certain financing or MSF, at least without "divert{ing} funds from other uses". In fact, the objective evidence establishes that, absent particular financing or MSF, and despite the financial crisis, the company's financial position was sufficiently strong to comfortably enable it to fund the programme, while simultaneously pursuing all of its other objectives.

- That the company could only have funded the A350XWB programme by "getting risk-sharing suppliers to nearly double their contributions". In fact, the objective evidence establishes that the company could have funded the programme without any increase in financing from risk-sharing suppliers.

- That the company "knew" it was "guaranteed" financing in the form of MSF, and on subsidised terms, at the time it launched the A350XWB. In fact, the objective evidence establishes that the company launched the programme in 2006, before *any* of the terms for any financing from the EU member States were *negotiated*, much less agreed. That evidence also establishes that, following launch, the company has achieved an advanced stage of development for the programme while not drawing the full amount available.

22. The US has addressed none of this objective evidence. It is not the EU that confuses "willingness" or "wanting" to launch the A350XWB with the "ability" or the "means" to do so. Instead, it is the US that is *ignoring* objective evidence establishing, on a quantitative basis and in light of contemporaneous data, that the company indeed had both the ability and the means to comfortably launch and develop an economically viable A350XWB programme, absent MSF. On

this "decisive point", it is the US, and not the EU, that ignores "indisputable" evidence, instead replacing it with mere assertion and assumption. And the US does this with respect to measures that are not even within the scope of these compliance proceedings.

VIII. RELEVANCE OF DOWN-SIDE SCENARIOS FOR ASSESSING PROJECT VIABILITY

23. Finally, in its Opening Statement, the US takes the untenable position that *any* risk that returns from a project could fall below the hurdle rate will lead a firm to decide *not to invest at all* in the project, for fear of the risk materialising. On the US view, every downside risk scenario necessarily becomes the project's base case.

24. This is a ludicrous position. It is inconsistent with "the real world" in which people decide to invest despite uncertainty about what the future holds. The US position can be compared to a family's considerations of its holiday plans, where the expectations of plenty of sunshine and days at the beach will be evaluated on the basis of a long-term weather forecast. The fact that there could be one day with rain out of 14 will not be a serious deterrent. Only a relatively high probability of persistent rain and little sunshine will lead the family to seek out alternative locations. Only a higher probability of widespread and persistent catastrophic conditions will lead the family to cancel their holiday plans altogether.

25. Similarly, Airbus assessed the relative probabilities of a base case, and that of unfavourable events, in evaluating the economic viability of the A350XWB programme over its expected duration. Airbus concluded that the project is viable because the likelihood of unfavourable events that would undermine the base case was relatively low. That assessment also took account of the likelihood that events may turn out to be *more favourable* than the conservative assessments made in the base case − something the US ignores.

26. In performing an independent comprehensive sensitivity and scenario analysis of the A350XWB, CompetitionRx concluded that the programme is viable because the base case is robust and the probability of unfavourable events is not sufficiently high to undermine the project's expected return. As both Airbus and CompetitionRx determined, the extreme circumstances captured in a "worst case" scenario, which combines multiple downside factors, would result in a return below the cost of capital. Since the probability of this combination of events is very low, however, the worst case scenario did not alter the conclusion that the A350XWB programme is economically viable. Both holiday takers and industrial investors realise that even the most carefully evaluated plan may result in days of torrential rain and worse-than-anticipated financial performance. If *absolute certainty*, as the US would have it, of sunny days and profitable returns were required before we vacationed or invested, we would all stay at home protecting the cash stuffed in our mattresses.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE STATEMENT OF AUSTRALIA
AT THE PANEL MEETING

Mr. Chairman, Members of the Panel

1. Thank you for the opportunity to present Australia's views on this dispute.

2. This proceeding raises a number of important issues concerning the scope of proceedings under Article 21.5 of the *Dispute Settlement Understanding* and the appropriate steps that must be taken by a Member to comply with Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*). Australia will make some brief remarks in relation to these issues.

Scope of these proceedings

3. Australia agrees with the United States (US) that the Launch Aid/ Member State Finance (LA/MSF) support for the A350XWB is within this Panel's terms of reference. Australia supports the three legal bases provided by the US for the consideration by this Panel of the A350XWB LA/MSF measure.[1]

4. Australia does not accept, as posited by the EU, that because the A350XWB financing agreements do not form part of the EU's compliance report as a "measure taken to comply"[2] or the Appellate Body was unable to discern the presence of an "overarching measure" in the original proceedings,[3] that these measures do not fall within the jurisdiction of this Panel.

5. The Appellate Body has made it clear that the limits on the scope of Article 21.5 proceedings should not allow the effective circumvention by Members of those provisions by allowing them to comply through one measure, while at the same time negating compliance through another.[4] In Australia's view, an overly narrow approach to Article 21.5 proceedings could undermine the effectiveness of the dispute settlement process.

6. Australia would encourage this Panel to consider the LA/MSF measure for the A350XWB as within its terms of reference.

Compliance

7. Under paragraph 7.8 of the *Agreement on Subsidies and Countervailing Measures*, the EU had six months, subsequent to the 1 June 2011 adoption of the Appellate Body and Panel Reports, to take "appropriate steps to remove the adverse effects" of the actionable subsidies identified by the Panel and the Appellate Body, or to withdraw the subsidies.

8. In complying with this obligation, the EU was, in Australia's view, required to take affirmative action to withdraw all current subsidies to Airbus that had been found to be non-compliant, or to take affirmative action to remove the adverse effects of those subsidies.[5]

9. Australia does not take a position on whether the specific actions taken by the EU are sufficient for the purposes of Article 7.8 of the SCM Agreement. In Australia's view, the role of this Panel is to determine the extent to which the EU has addressed these obligations. In examining compliance, Australia believes that where a complaining Member has shown a lack of appropriate action by the implementing Member, it will have established a *prima facie* case of non-compliance. The burden of demonstrating the intervening events which break the nexus between the non-

[1] US First Written Submission, Sections IV.D-E and US Second Written Submission, para. 113.
[2] EU Second Written Submission, Section III.A, para. 50.
[3] EU Comments on US Request for Preliminary Decision, Section VIII, para. 84.
[4] *US – Softwood Lumber (IV) (Article 21.5 – Canada)* (WT/DS257/AB/RW), paras. 71-72.
[5] *US – Upland Cotton (Article 21.5)* (WT/DS267/AB/RW), para. 236.

compliant measures, the adverse effects, and bringing the measures into compliance should then rest with the implementing member.

10. Mr. Chairman and Members of the Panel, this concludes Australia's remarks. Thank you for the opportunity to provide these comments.

ANNEX D-2

EXECUTIVE SUMMARY OF THE WRITTEN
SUBMISSION OF BRAZIL

I. INTRODUCTION

1. This Panel's interpretation of the relevant provisions of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*") is critical to ensuring the effectiveness of multilateral disciplines on the use of subsidies, particularly in the civil aircraft sector.

2. Brazil's comments focus on the following issues raised by the United States in its first written submission: (1) the proper interpretation and application of the requirement imposed by Article 7.8 of the *SCM Agreement* to "take appropriate steps to remove to adverse effects" or to "withdraw the subsidy"; (2) the appropriate scope of implementation proceedings under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"); and (3) the proper approach to determining the existence of *de facto* export contingency.

II. LEGAL ARGUMENT

A. THE OBLIGATION TO "TAKE APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS" OR TO "WITHDRAW THE SUBSIDY" REQUIRES A POSITIVE ACTION EITHER TO REVERSE THE COMPETITIVE ADVANTAGE THAT WAS GAINED AS A RESULT OF THE SUBSIDY OR TO PUT AN END TO THE SUBSIDY

3. The European Union was required to "take appropriate steps to remove the adverse effects" or to "withdraw" the actionable subsidies identified by the Panel and the Appellate Body within six months following the 1 June 2011 date of adoption of the Panel and Appellate Body Reports. Brazil does not take a position on whether the specific measures taken by the EU were sufficient for purposes of Article 7.8 of the *SCM Agreement* and Article 19 of the DSU. In this submission, Brazil instead focuses on the proper interpretation of the important obligation under Article 7.8 of the *SCM Agreement* to "take appropriate steps" to "remove the adverse effects" or to "withdraw the subsidy."

4. Brazil finds the jurisprudence of *US – Upland Cotton (Article 21.5 – Brazil)* to be enlightening as to the proper interpretation of the terms "shall take appropriate steps" in relation to the actions to be taken by the implementing Member. The Member is expected to take an affirmative, appropriate action and cannot be considered as having complied with the obligation of Article 7.8 of the *SCM Agreement* if it does not actively intervene to remove the adverse effects.[1]

5. The focus of Article 7.8 of the *SCM Agreement* is to remedy the specific problem found to exist that nullified or impaired the benefits under the *SCM Agreement* accruing to the complaining Member. The focus in Part III of the *SCM Agreement* on "actionable subsidies" is on the adverse effects caused by the use of a subsidy, not on the existence of the subsidy itself.

6. The fact that a subsidy was granted in the past, that the "benefit" has expired, and that the subsidy no longer exists does not prevent a finding of adverse effects caused by past subsidies. This is particularly relevant for launch aid subsidies, which may continue to cause adverse effects long after they have been granted and repaid due to the presence of aircraft models that otherwise would not have been competing in the market.

7. The question before this Panel is thus which "steps" the EU has taken and whether these steps are "appropriate to remove the adverse effects." The steps will only be "appropriate" if they impact the specific adverse effects found to exist and are likely to lead to the removal of the specific adverse competitive advantage that resulted from the use of the subsidy.

8. In a situation where one subsidy replaces another, the Panel will need to examine the consistency of the new measure taken to comply with the obligations imposed by the *SCM*

[1] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 236.

Agreement. This will require the Panel to examine whether the new measure is a subsidy and whether the adverse effects continue to exist in the context of the new subsidy measure. This will likely be the case if the implementing Member has not taken any other steps to remove the adverse effects found to exist and has simply replaced one subsidy measure with another.

B. LA/MSF SUPPORT FOR THE A350XWB IS WITHIN THIS PANEL'S TERMS OF REFERENCE AS A "MEASURE TAKEN TO COMPLY" BECAUSE IT HAS A SUFFICIENTLY CLOSE NEXUS WITH THE ORIGINAL MEASURES ADDRESSED IN THE PANEL AND APPELLATE BODY REPORTS AND WITH THE MEASURES TAKEN TO COMPLY

9. Brazil considers that the it is the task of the compliance Panel to ultimately determine the appropriate scope of its own jurisdiction in a given dispute, and that it is thus not for the implementing Member to define what it considers to be the measures taken to comply.[2] Brazil suggests the Panel should not adopt an overly formalistic approach in setting its terms of reference, with a view toward protecting the effectiveness of the WTO dispute settlement process and ensuring prompt compliance and effective resolution of the dispute. These principles argue in favor of including in the scope of this Article 21.5 proceeding new LA/MSF support for the A350XWB which, in terms of its nature, timing, and effects, is very similar and thus closely related to the measures that were to be brought into conformity with the Dispute Settlement Body (DSB) recommendations.

10. The Appellate Body has observed that a panel reviewing a claim under Article 21.5 of the DSU may address not only the measures the responding Member identifies as taken to comply with the recommendations and rulings of the DSB, but also any other measures with a particularly close relationship to the declared measures taken to comply and to the recommendations and rulings of the DSB.[3] This certainly includes measures that are very closely connected because they concern the same analysis of subsidies for the same category of products and may thus undermine compliance with those recommendations and rulings.[4]

11. Brazil believes the Panel should put substance over form and focus on the nature and effects of the challenged measures in comparison with the measures taken to comply and the original measures. In Brazil's view, a very similar type of subsidy, supporting a very similar product, produced by the same company around the time that closely related subsidy measures were found to be WTO-inconsistent, is a measure that can and must be included in an examination of "measures taken to comply".

C. DEMONSTRATING EXPORT CONTINGENCY DOES NOT REQUIRE THE CONSTRUCTION OF HYPOTHETICAL SALES RATIOS

12. In the current implementation proceeding, the US requests the Panel to re-visit the question of *de facto* export contingency of the LA/MSF support for the A380 and by extension for the A350XWB. The US seeks to apply the "geared-to-induce-future-export" test as put forward by the Appellate Body in the original proceeding in order to demonstrate that the LA/MSF support was *de facto* export contingent and consequently a prohibited subsidy within the meaning of Article 3.1(a) of the *SCM Agreement*.

13. Brazil considers that a review of the Appellate Body's findings in the original proceeding demonstrates that the Appellate Body's analytical framework for considering a *de facto* export contingency claim does not *require* a hypothetical ratio-scenario that the US is now providing to the Panel. In Brazil's view, the ratio approach proposed by the Appellate Body is one possible piece of additional evidence that could provide meaningful information when it involves one of the conditions of the subsidy. However, in many situations, as demonstrated in *Canada – Aircraft*, no such additional evidence is necessary or appropriate to make the essential finding of conditionality in law or in fact.[5]

14. Brazil understands that the Appellate Body was simply indicating in the numerical example relating to sales ratios what could, in certain circumstances, be one type of evidence to bridge the gap between anticipation and conditionality in order to support, as part of the total configuration of

[2] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73.
[3] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.
[4] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 205.
[5] Appellate Body Report, para. 1037, referring to Appellate Body Report, *Canada – Aircraft*, paras. 167, 171.

the facts, a conclusion that the granting of the subsidy was in fact tied to anticipated export performance. An approach that would *require* evidence of a sales ratio change or potential change would unjustifiably impose a different standard in the context of *de facto* export contingency than the one used in a determination of *de jure* export contingency and would seek to impose an unwarranted trade effects test.

III. CONCLUSIONS

15. Brazil has focused its comments on several important issues raised in this dispute. First, Brazil considers that the obligation to "take appropriate steps to remove the adverse effects" or to "withdraw the subsidy" will usually require a positive action either to reverse the competitive advantage that was gained as a result of the subsidy or to put an end to the subsidy in a manner that is appropriate to remove the adverse effects.

16. Second, Brazil considers that the scope of a compliance proceeding under Article 21.5 of the DSU must be sufficiently broad to include measures which have a close nexus with the original measure addressed in the Panel and Appellate Body reports and with the measures taken to comply, including in this dispute LA/MSF support for the A350XWB.

17. Finally, in respect of the test for export contingency, Brazil is of the view that demonstrating export contingency does not require the construction of hypothetical sales ratios. Brazil submits that whether a measure is *de facto* contingent upon export performance depends on the conditions that are in law or in fact imposed at the time of granting the subsidy, and that this analysis should not be limited to the effect on sales ratios.

ANNEX D-3

EXECUTIVE SUMMARY OF THE STATEMENT OF
BRAZIL AT THE PANEL MEETING

I. INTRODUCTION

1. In its oral intervention Brazil focused on two main issues that it considers of particular relevance:

- The scope of the obligation under Article 7.8 to withdraw the subsidy or take appropriate steps to remove the adverse effects of the subsidy;
- The scope of this Article 21.5 proceeding in light of the panel's decision of March 27, 2013.

II. THE OBLIGATION TO "WITHDRAW THE SUBSIDY" OR TO TAKE "APPROPRIATE STEPS TO REMOVE THE ADVERSE EFFECTS" REQUIRES CAREFUL CONSIDERATION WHEN EXAMINING PAST SUBSIDIES

2. The overriding issue in this compliance proceeding regards the question of how a defendant should comply with the obligation of Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects" or "to withdraw the subsidy." Brazil reaffirms its views put forth in its submission that, usually, this obligation requires that a Member take affirmative, appropriate action to remove the adverse effects of the subsidy or to withdraw that subsidy, as the Appellate Body found in *US – Upland Cotton*.[1]

3. Yet, Brazil understands that in order to properly address this issue, different scenarios may be taken into consideration by implementation panels:

> Scenario A: A portion of the subsidy (LA/MSF) has been disbursed, the aircraft development project is ongoing, and no royalty payments have been made. In this situation, the responding Member could simply withdraw the subsidy by modifying the terms and conditions of the remaining disbursements and royalty payments so that they reflect market conditions. If the Member were to choose, instead, to remove the adverse effects of the subsidy, the Member may find that other steps are appropriate.
>
> Scenario B: The subsidy (LA/MSF) has been fully disbursed, but part of the royalty payments remain outstanding. The recipient therefore has already received the entire financial contribution, but there is still an opportunity for the responding Member to withdraw the "prospective portion" of the subsidy by modifying the terms of the outstanding royalty payments to reflect market conditions.
>
> Scenario C: LA/MSF has been fully disbursed and all of the royalty payments have been paid in full. This scenario poses a greater challenge for it seems that the only way that the responding Member could withdraw the subsidy would be to seek repayment of the benefit already received from and repaid by the recipient company. We recall, for instance, that in the *Australia – Leather* dispute (DS126), the panel recommended that withdrawal of a subsidy that had already been disbursed required the repayment of the subsidy. Yet this recommendation was criticized by various Members as being an inappropriate "retroactive" remedy, not covered by Article 7.8.

4. Given these complexities, one way out could be to restate the "genuine and substantial" relationship analysis (between the granting of a subsidy and its adverse effects) in order to evaluate the concrete effects of past subsidies, which have been fully disbursed and repaid. If the causal pathways which led to a situation of adverse effects through the use of subsidies can no longer be established, and other causal factors have since intervened significantly, there may be

[1] Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, 809 ("*US – Upland Cotton (Article 21.5 – Brazil)*"), para. 236.

exceptional circumstances where the obligations of Article 7.8 may prove difficult to comply with. In the current proceedings, the AB conceded, for instance, that "LA/MSF for the A300 and A310 are likely to cause minimal, if any, adverse effects during the reference period 2001-2006."[2]

5. Brazil is of the view that this panel has an important opportunity to clarify how Members are expected to comply with rulings on adverse effects relating to non-recurring subsidies, which have sometimes been granted many years ago and fully disbursed, but which may continue to cause adverse effects in the market, taking into account that the main goal of compliance with the subsidies disciplines is to restore the level playing field.

III. THE SCOPE OF ARTICLE 21.5 PROCEEDINGS CANNOT BE USED TO RE-LITIGATE CLAIMS DECIDED BY THE APPELLATE BODY

6. Brazil recognizes that it is for the compliance panel to determine the appropriate scope of its own jurisdiction and that an overly narrow approach to an Article 21.5 panel's terms of reference would undermine the effectiveness of the dispute settlement process. It believes, however, that it is also important that compliance proceedings not be used as an instance to re-litigate matters that were decided by the Appellate Body. This would amount to use it as a "remand" proceeding not foreseen in the Dispute Settlement Understanding.

7. In this sense, in the absence of reasons underpinning the preliminary decision, on March 27, 2013, that included in its jurisdiction the claims regarding the A380 as an export subsidy, Brazil would expect the panel to exercise its jurisdictional powers carefully in order to prevent it from re-analyzing claims already rejected by the Appellate Body.

8. In any case, Brazil once again insisted that demonstrating *de facto* export contingency should not require evidence of a hypothetical sales ratio-scenario such as the one that the United States has provided to the panel. It should require rather examining the total configuration of facts surrounding the granting of the subsidy.

[2] Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*, para. 1241.

ANNEX D-4

EXECUTIVE SUMMARY OF THE WRITTEN
SUBMISSION OF CANADA

I. INTRODUCTION

1. Canada is participating in these compliance proceedings because the findings of the Panel will have important consequences for the way in which the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) are interpreted and applied in future disputes.

II. PROHIBITED EXPORT SUBSIDIES

2. The United States has failed to demonstrate that Launch Aid/Member State Financing (LA/MSF) for the A380 and A350XWB granted by France, Germany, Spain and the United Kingdom is contingent in fact upon export performance in violation of Article 3.1(a) of the SCM Agreement.

3. In the initial proceedings in this dispute, the Appellate Body established the following test to determine whether a subsidy is *de facto* contingent on anticipated exportation: "is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?"

4. The Appellate Body held that the standard for *de facto* export contingency would be met when "the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy". According to the Appellate Body, *de facto* export contingency "must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy".

5. The United States fails to explain how the total configuration of the facts constituting and surrounding the grant of LA/MSF supports its position. Moreover, as indicated below, the United States' calculation of ratios does not accord with the framework set out by the Appellate Body.

A. THE UNITED STATES USES WRONG INFORMATION WHEN CALCULATING RATIOS

6. The Appellate Body provided a framework for assessing whether the granting of a subsidy is in fact tied to anticipated exportation: "where relevant evidence exists, the assessment could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales of the subsidized product that would come about in consequence of the granting of the subsidy, and, on the other hand, the situation in the absence of the subsidy". The United States uses the terms "anticipated ratio" (the anticipated ratio of export sales to domestic sales for the subsidized product) and "baseline ratio" (the ratio of export sales to domestic sales in the absence of a subsidy) to describe the ratios used.

7. With respect to the anticipated ratio, the United States' reliance on the Airbus 2000 Global Market Forecast is inappropriate because the GMF does not provide a forecast for the specific subsidized product (A380), as required by the Appellate Body, but rather provides a forecast for the entire class of very large aircraft.

8. The United States also uses wrong information when calculating the baseline ratio. With respect to the calculation of the baseline ratio, the Appellate Body held that "the assessment must be on the basis of historical sales of the same product by the recipient in the domestic and export markets before the subsidy was granted". The United States fails to demonstrate how the use of historical sales data for the Boeing 747 and Boeing 777 are appropriate substitutes in the absence of historical sales data for the A380 and A350XWB, respectively.

B. THE UNITED STATES' POSITION DOES NOT ACCOUNT FOR CHANGES IN MARKET CONDITIONS

9. In comparing the anticipated and baseline ratios for both the A380 and A350XWB, the United States does not address whether, apart from the existence of LA/MSF, all other relevant factors remain the same. In fact, the United States provides evidence that suggests that it is more likely a change in market conditions, rather than subsidization, that accounts for the anticipated increase in export sales relative to domestic sales in the very large aircraft market segment.

III. IMPORT-SUBSTITUTION SUBSIDIES

10. The United States claims that LA/MSF for the A380 and the A350XWB is contingent upon the use of domestic over imported goods as certain LA/MSF requirements oblige Airbus to use Airbus-produced intermediate goods in the production of its finished aircraft.

11. The prohibition in Article 3.1(b) of the SCM Agreement covers situations where the granting of a subsidy is contingent on the recipient *purchasing* domestic over imported goods. In Canada's view, the United States' position improperly expands the scope of Article 3.1(b) to cover subsidies contingent on the recipient *producing* a particular intermediate good.

12. Given that most manufacturers produce intermediate goods as part of the production of their final goods, the United States' position would negate the right of a subsidizing Member to require a subsidy recipient to produce goods, as defined by the subsidizing Member, in its territory in order to receive a subsidy.

13. The Appellate Body decision in *Canada – Autos* demonstrates that the United States' position is incorrect.

IV. SERIOUS PREJUDICE

14. The United States takes the position in these compliance proceedings that the European Union has neither withdrawn the subsidies nor removed their adverse effects. The United States submits that LA/MSF provided for all Airbus aircraft is still causing serious prejudice given that without LA/MSF, the Airbus aircraft at issue would not be in the market to the same extent and Boeing's sales would therefore be higher.

15. Canada submits that this Panel should limit its serious prejudice analysis to an assessment of the impact of the subsidies existing at the end of the reasonable period of time the European Union had to comply with the Dispute Settlement Body's (DSB) recommendations.

16. Canada sets out below the legal framework that this Panel should use in assessing whether the European Union complies with its obligations under Articles 5, 6 and 7.8 of the SCM Agreement. Canada also makes observations as to how this framework should be applied to the facts of this dispute.

17. Article 7.8 of the SCM Agreement provides that when a panel or the Appellate Body finds that a subsidy has resulted in adverse effects to the interests of a complaining Member, the subsidizing Member must either withdraw the subsidy or remove its adverse effects. These alternatives provide a logical remedy to a Member's breach of its obligations under Articles 5 and 6. If a Member chooses the first option, there is no longer a subsidy. If a Member chooses the second option, although the subsidy may still be present, it no longer causes adverse effects.

18. Canada examines each of these two options below.

A. WITHDRAWAL OF SUBSIDY

19. By withdrawing a subsidy that was found to cause serious prejudice, a Member complies with its obligations under Articles 5, 6 and 7.8 of the SCM Agreement. Article 1.1 of the SCM Agreement defines a subsidy as a financial contribution (or any form of income or price support) that confers a benefit. The Appellate Body in *Brazil – Aircraft (Article 21.5 – Canada*) indicated that "withdrawal" of a subsidy refers to the "removal" or "taking away" of that subsidy. Given the bipartite nature of its definition, a subsidy may be withdrawn by removing either the financial contribution or the benefit.

20. In this dispute, the United States acknowledges that the European Union actually withdrew an infrastructure-related subsidy by increasing the fee charged to Airbus for using the Bremen airport runway. The fact that the European Union properly withdrew the subsidy by removing the benefit that it would otherwise have conferred in the future, but without removing the benefit it conferred in the past, is consistent with the prospective nature of remedies in WTO compliance proceedings.

21. There are similarities between the situation where the benefit provided by a subsidy has expired and that where the benefit has been withdrawn. In both cases, a benefit is no longer being conferred on the recipient and, as a result, a subsidy no longer exists. Therefore, if a subsidy has expired, the Member should also be found to have complied with its obligations.

22. In these compliance proceedings, the United States argues that all LA/MSF provided for Airbus aircraft continues to cause serious prejudice to the interests of the United States in the form of lost sales and market displacement and impedance suffered by Boeing. Canada submits that, when LA/MSF for a given aircraft model has been withdrawn or the benefit provided by that LA/MSF has expired, LA/MSF provided for that aircraft model cannot be found to cause serious prejudice.

B. REMOVAL OF THE ADVERSE EFFECTS

23. When a subsidy has been found to cause serious prejudice and the subsidy has neither expired nor been withdrawn, Article 7.8 of the SCM Agreement requires the subsidizing Member to remove the serious prejudice. In other words, the subsidizing Member should ensure that the subsidy no longer causes serious prejudice.

24. Canada submits that only subsidies that have neither expired nor been withdrawn by the end of the reasonable period of time provided to a Member to implement DSB recommendations should serve as the basis of the analysis of serious prejudice in compliance proceedings. There must be consistency between the two options available to a Member under Article 7.8 of the SCM Agreement, namely, a Member must either withdraw the subsidies that cause adverse effects or remove the adverse effects caused by those subsidies, by the end of the reasonable period of time it has to comply with the DSB recommendations. If a subsidy has been withdrawn or has expired, a Member cannot be asked to remove the adverse effects of that subsidy.

25. Once the subsidies at issue in the compliance proceedings have been identified, the panel should proceed with its causation analysis to assess whether the identified subsidies cause serious prejudice to the interests of the complaining Member.

26. As is the case in initial proceedings, the proper method to make this assessment in compliance proceedings is to conduct a counterfactual analysis to determine what would be the situation in the absence of the subsidies at issue. Therefore, a compliance panel should analyse what the situation would be if these subsidies had been withdrawn. It is only if a panel finds that the subsidies cause serious prejudice or threaten to cause serious prejudice that a subsidizing Member should be found to violate Articles 5, 6 and 7.8 of the SCM Agreement.

27. In the single-aisle Large Civil Aircraft (LCA) product market, this Panel should first determine whether there were any subsidies still existing with respect to the A320 at the end of the reasonable period of time. Second, if there were subsidies still existing, the Panel should determine the impact of these subsidies and whether they cause serious prejudice.

28. With respect to the Very Large Aircraft product market, Canada disagrees with the European Union that the purpose of the Panel's counterfactual analysis should be to determine whether in the absence of LA/MSF for the A380 this aircraft would still have been launched.

29. Canada submits that the proper counterfactual analysis consists in assessing what the situation would be if the European Union had withdrawn the subsidy by the end of the reasonable period of time. The withdrawal could have been performed by increasing the rate of return on the A380 LA/MSF to a market level.

30. Canada's observations with respect to the proper counterfactual analysis to perform in the Very Large Aircraft product market also apply to the twin-aisle LCA product market. If LA/MSF for the A350XWB constitutes a subsidy, the Panel should focus on the impact that the withdrawal of that subsidy by the end of the reasonable period of time would have had on the twin-aisle LCA product market.

ANNEX D-5

EXECUTIVE SUMMARY OF THE STATEMENT OF
CANADA AT THE PANEL MEETING

I. INTRODUCTION

1. In our statement, we first address issues related to the conduct of a serious prejudice analysis in compliance proceedings. We then consider the United States' claims that certain Launch Aid/Member State Financing (LA/MSF) constitutes a prohibited export subsidy or import-substitution subsidy.

II. LEGAL FRAMEWORK TO USE IN DETERMINING COMPLIANCE WITH ARTICLE 7.8 OF THE SCM AGREEMENT

2. In its written submission, Canada has set out the legal framework a panel should use in determining whether a subsidizing Member has complied with its obligations under Article 7.8 of the SCM Agreement. The United States and the European Union have set out certain arguments before the Panel that are inconsistent with that framework.

3. Pursuant to Article 7.8 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), where a panel or an Appellate Body report is adopted in which it is determined that a subsidy has resulted in adverse effects, the subsidizing Member shall take appropriate steps to remove the adverse effects or withdraw the subsidy. The wording of this provision is clear: the subsidizing Member must either withdraw the subsidy or remove its adverse effects. These are two distinct alternatives, each of which can lead to compliance.

4. The first alternative available to a Member facing obligations under Article 7.8 of the SCM Agreement is to withdraw the subsidy. As we know, Article 1.1 of the SCM Agreement defines a subsidy as a financial contribution that confers a benefit. That is, without a financial contribution that confers a benefit, there is no subsidy. Yet, the United States argues that a subsidy can only be withdrawn if the benefit is withdrawn. This ignores the bipartite nature of the definition of a subsidy. The withdrawal of the financial contribution that has given rise to a benefit should, necessarily, also amount to the withdrawal of the subsidy.

5. An example illustrates Canada's position. Let us consider a loan provided to a recipient at an interest rate below that available on the market. The increase in the interest rate to market level would constitute withdrawal of the benefit. The reimbursement of the capital by the recipient would, in effect, constitute withdrawal of the financial contribution. Moreover, in this latter case, a benefit would no longer be conferred. Indeed, a recipient cannot be said to benefit from a loan that is no longer outstanding. Therefore, whether through an increase in interest rate or the reimbursement of the loan, the subsidy would be withdrawn.

6. The effect of the expiry of the benefit conferred by a financial contribution is equivalent to that of the withdrawal of a benefit. In both cases, there is no longer a benefit, nor a subsidy. In both cases, the Member that provided the subsidy should be found to have complied with its obligations under Article 7.8 of the SCM Agreement.

7. The second alternative available to a Member facing obligations under Article 7.8 of the SCM Agreement is to remove the adverse effects of the subsidy.

8. Determining whether "removal" has taken place requires a panel to assess whether the subsidies at issue cause serious prejudice. To make this assessment, a panel will have to, first, identify the subsidies at issue and, second, conduct a counterfactual analysis to determine the effects of those subsidies.

9. Canada submits that the only subsidies the effects of which must be assessed in compliance proceedings under Article 7.8 are subsidies in existence at the end of the six-month implementation period within which a subsidizing Member must remove adverse effects.

10. In this dispute, the United States argues that a subsidizing Member must remove the effects not only of subsidies outstanding at the end of that implementation period, but also those of expired and withdrawn subsidies. Adverse effects would always need to be removed. This interpretation of Article 7.8 must be rejected given that it would render the option of withdrawing the subsidy meaningless.

11. An examination of Articles 4.7 and 7.8 of the SCM Agreement further demonstrates the flaw in the United States' position.

12. Article 4.7 specifies that a Member that provides a prohibited subsidy must withdraw that subsidy. Although prohibited subsidies are generally seen as being, by their very nature, trade-distortive, there is no requirement that the effects of a prohibited subsidy that may continue past the withdrawal be removed.

13. For its part, as acknowledged by the United States, Article 7.8 provides separate options: a subsidizing Member may withdraw the subsidy or remove its adverse effects.

14. With respect to both types of subsidies, prohibited and actionable, the withdrawal of the subsidy is an appropriate remedy. If the withdrawal of a subsidy that is prohibited satisfies the obligations of a Member, withdrawal of a subsidy that causes adverse effects should also be satisfactory. Remedies against actionable subsidies cannot be more stringent than those against prohibited subsidies.

15. The proper identification of the subsidies subject to the serious prejudice analysis will affect the nature of the counterfactual analysis that must be conducted. The alternatives provided by Article 7.8 shed light on this identification. If a subsidizing Member can satisfy its obligations under Article 7.8 by withdrawing certain subsidies before the end of the implementation period, it is logical that, in assessing whether serious prejudice caused by subsidies has been removed, it is the effect of these same subsidies that will be analysed.

16. The proper counterfactual analysis to perform under Article 7.8 is, therefore, as follows: in the absence of the subsidies that existed at the end of the implementation period, what would be the situation of the relevant producers? That situation can then be compared to the actual situation of the relevant producers in order to determine whether the subsidies have caused serious prejudice.

17. The United States' position does not accord with this analysis. In its submissions, the United States argues that the Panel should take into account the effects of all LA/MSF provided to Airbus even if some LA/MSF may have been withdrawn or have expired. The Panel should reject the United States' position and identify which subsidies existed at the end of the implementation period. It is the effects of those subsidies − and those subsidies only − that should be analysed in determining whether the European Union has complied with its obligation under Article 7.8 of the SCM Agreement.

18. The counterfactual analysis presented by the European Union with respect to the LA/MSF for the A380 is also inconsistent with the analysis proposed by Canada. The European Union argues that the Panel should assess whether, in the absence of the LA/MSF for the A380, the aircraft would have been launched in 2000. This position overlooks the fact that, by withdrawing the subsidy provided by the A380 LA/MSF, and other smaller subsidies, by the end of the implementation period, the European Union would have satisfied its obligations under Article 7.8 of the SCM Agreement. Taking this fact into account, the proper counterfactual analysis should instead be: what would be the situation of Airbus and Boeing in the market in which the A380 competes if the European Union had withdrawn the subsidy provided through the A380 LA/MSF by December 1, 2011, for example by increasing the rate of return of the A380 LA/MSF to a market level?

III. PROHIBITED EXPORT SUBSIDIES

19. The United States claims that LA/MSF for the A380 and A350XWB granted by France, Germany, Spain and the United Kingdom is contingent in fact upon export performance in violation of Article 3.1(a) of the SCM Agreement.

20. In presenting its evidence the United States fails to explain how the total configuration of the facts constituting and surrounding the grant of LA/MSF supports its position. Moreover, the evidence is based on a calculation of ratios that does not accord with the framework set out by the Appellate Body.

21. In the initial proceedings in this dispute, the Appellate Body indicated that an assessment of whether the granting of the subsidy is in fact tied to anticipated exportation could be based on a comparison between, on the one hand, the ratio of anticipated export and domestic sales *of the subsidized product* that would come about as a consequence of the granting of the subsidy (anticipated ratio), and, on the other hand, the situation in the absence of the subsidy (baseline ratio).

22. The United States uses the wrong information when calculating these ratios. For example, with respect to the calculation of the baseline ratio, the Appellate Body held that "the assessment must be on the basis of historical sales *of the same product by the recipient* in the domestic and export markets before the subsidy was granted". The United States fails to demonstrate how the use of historical sales data for the Boeing 747 and Boeing 777 are appropriate substitutes in the absence of historical sales data for the A380 and A350XWB, respectively.

23. Moreover, in comparing the anticipated and baseline ratios for both the A380 and A350XWB, the United States does not address whether, apart from the existence of LA/MSF, all other relevant factors remain the same. In fact, with respect to the very large aircraft market segment, the United States provides evidence suggesting that it is more likely a change in market conditions, rather than subsidization, that accounts for the anticipated increase in export sales relative to domestic sales.

IV. IMPORT-SUBSTITUTION SUBSIDIES

24. Finally, Canada addresses the specific claim by the United States that LA/MSF for the A350XWB is contingent upon the use of domestic over imported goods, given that certain LA/MSF requirements oblige Airbus to use Airbus-produced intermediate goods in the production of its finished aircraft.

25. The United States' position improperly expands the scope of Article 3.1(b) of the SCM Agreement to cover subsidies contingent on the recipient producing a particular intermediate good.

26. Nothing in the General Agreement on Tariffs and Trade or the SCM Agreement prohibits a subsidizing Member from making the granting of a subsidy contingent on a recipient producing goods in its territory. In fact, Article III:8(b) of GATT 1994 explicitly allows WTO Members to provide subsidies only to their domestic producers.

27. Given that many manufacturers produce intermediate goods as part of the production of their final goods, the United States' position would negate the right of a subsidizing Member to require a subsidy recipient to produce goods, as defined by the subsidizing Member, in its territory in order to receive a subsidy.

28. As indicated in Canada's written submission, the Appellate Body decision in *Canada – Autos* demonstrates that the United States' position is incorrect.

ANNEX D-6

EXECUTIVE SUMMARY OF THE
WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. In this submission, China will present its views on the following two issues:

(i) whether LA/MSF for the A350 XWB is within the terms of reference of these compliance proceedings; and

(ii) whether claims that grants of LA/MSF for the A380 and A350 XWB are prohibited subsidies are within the terms of reference of these compliance proceedings.

II. LA/MSF FOR THE A350 XWB IS NOT WITHIN THE TERMS OF REFERENCE OF THESE COMPLIANCE PROCEEDINGS

2. China submits that in order for a measure to be subject to review by an Article 21.5 panel, it has to fall under one or more of the following: (i) a declared "measure taken to comply"; (ii) a measure otherwise constituting a "measure taken to comply" because of its "express link" with the DSB's recommendations and rulings made in the original proceedings; (iii) a measure not in itself a "measure taken to comply" but having a "particularly close relationship" to the declared measure taken to comply and the DSB's recommendations and rulings; and (iv) in a subsidy case, a replacement subsidy which replaces the one found to be WTO-inconsistent in the original proceedings. China notes that the alleged LA/MSF for the A350 XWB falls under none of the four situations, and therefore is not within the terms of reference of these compliance proceedings.

1. Declared Measure Taken to Comply

3. In China's view, where a Member has adopted a measure to implement its obligations, and has so declared, it is necessary for a compliance panel to review such a measure in order to ascertain whether the measure at issue is actually in existence, and if so, whether it is compliant with the covered agreement. In this dispute, there is no "measure taken to comply" declared by EU in respect of A350 XWB.[1] Thus, the alleged LA/MSF for the A350 XWB could not possibly be included in the terms of reference of these compliance proceedings for the reason that it is a "declared" measure taken to comply.

2. Other Measures Taken to Comply

4. In light of the Appellate Body's analysis in *US –Lumber CVDs Final (Article 21.5)*, other measures may nevertheless constitute part of the "measures taken to comply" if an "express link" exists between those measures and the DSB's recommendations and rulings.[2] China recalls that no rulings or recommendations concerning the alleged LA/MSF for the A350 have ever been made in the original proceedings. Therefore, it is not possible for any measure, including the alleged LA/MSF for the A350 XWB, to have an "express link" to the non-existing DSB's recommendations and rulings concerning A350.

3. Other Measures Having a Particularly Close Relationship

5. In *US – Zeroing (Article 21.5 – EC)*, the Appellate Body has made it clear that, a measure not by itself a "measure taken to comply" may also fall within the scope of review under Article 21.5 of the DSU if the required particularly close relationship exists between that measure and the declared measures taken to comply and the DSB's recommendations and rulings.[3]

[1] In the document circulated by EU ("EU Notification") regarding its implementation of the DSB's recommendations and rulings, nowhere is any "measure taken to comply" regarding A350 (XWB) declared. See *EC – Large Civil Aircraft*, *Communication from the European Union*, WT/DS316/17, dated 5 December 2011.

[2] Appellate Body Report, *US – Lumber CVDs Final (Article 21.5 – Canada)*, para. 68.

[3] Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 204.

6. As no relevant rulings or recommendations have ever been made concerning the LA/MSF for the A350 in the original proceedings, EU bears no obligation to adopt any "measures taken to comply" and indeed EU mentions none regarding A350 in the EU Notification. In this context, as one end of the "particularly close relationship" − the declared measures taken to comply and the DSB's recommendations and rulings − does not even exist, it is, therefore, impossible to establish that any measure could have "a particularly close relationship" with this non-existing end.

7. The U.S. argues that, for the alleged LA/MSF for the A350 XWB, a "particularly close relationship" could be established, not with the unestablished LA/MSF for the A350, but with LA/MSF for all twin aisle LCA found to be inconsistent in the original proceedings.

8. However, China notes that, in the original proceedings, (i) the DSB's findings on each LA/MSF on the basis of individual Airbus LCA models shows that the respective LA/MSF measure for each model is *separate* from and *parallel* to others; (ii) there were no findings on an "LA/MSF Programme" allegedly covering all models of Airbus LCA, not to mention a particular "LA/MSF Programme" for twin aisle LCA. Therefore, findings of a "particularly close relationship" regarding such a measure ought to be conducted within the orbit of each individual LCA model.

9. Therefore, there is no basis for the U.S. to assert that the LA/MSF for the A350 XWB has a particularly close relationship to either LA/MSF for the A350, or all other LA/MSF for twin aisle LCA.

4. Replacement Subsidy

10. The U.S. relies on the Appellate Body's conclusion in *US − Upland Cotton (21.5 − Brazil)*[4] to assert that the alleged LA/MSF for the A350 XWB is within the terms of reference of these compliance proceedings, because it is a replacement subsidy for any earlier WTO-inconsistent LA/MSF measures that the EU claims to have withdrawn. However, the U.S. ignores that the facts of *US − Upland Cotton (21.5 − Brazil)* are fundamentally different from those of the present dispute.

11. Unlike the payments at issue in *US − Upland Cotton (21.5 − Brazil)*, in the present dispute, those LA/MSF measures for respective LCA models have not been found to be provided under the same framework (a single "LA/MSF Programme"). In addition, payments made under the challenged LA/MSF are not recurring. Therefore, there is no factual basis to establish that the alleged LA/MSF for the A350 XWB is a "replacement subsidy" in relation to "any earlier WTO-inconsistent LA/MSF measures" which are actually all separate from and parallel to each other.

5. Excluding LA/MSF for the A350 XWB Circumvents the EU's Obligation

12. To assert that excluding the alleged LA/MSF for the A350 XWB from the terms of reference of these proceedings circumvents the EU's obligation, the U.S. relies on a statement made by the Appellate Body in *US − Lumber CVDs Final (Article 21.5 − Canada)* that "[limits on the claims] should not allow circumvention by Members by allowing them to comply through one measure, while at the same time, negating compliance through another."[5]

13. However, China submits that this quoted statement was made in the process of Appellate Body's integrated analysis of the "particularly close relationship" test. The U.S. incorrectly relies on the alleged "circumvention" test, which is never a separate or distinct legal standard for determining the scope of review under Article 21.5 proceedings.

[4] Appellate Body Report, *US − Upland Cotton (21.5 − Brazil)*, paras. 235-238.

[5] Appellate Body Report, *US − Lumber CVDs Final (Article 21.5 − Canada)*, para. 71, quoted in US First Written Submission, Para. 163.

III. CLAIMS THAT GRANTS OF LA/MSF FOR THE A380 AND A350 XWB ARE PROHIBITED SUBSIDIES ARE NOT WITHIN THE TERMS OF REFERENCE OF THESE COMPLIANCE PROCEEDINGS

1. The U.S. Claims against the LA/MSF for the A380

14. China recalls that, in *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body opined that, unlike any new measures that are, or should be taken to comply with the DSB's recommendations and rulings, the old and unchanged measures in the original proceedings are not the appropriate subject of the Article 21.5 proceedings.[6]

15. Therefore, to the extent that the LA/MSF for the A380 remains unchanged ever since the original proceedings and no new measure has been taken, the LA/MSF for the A380 shall not fall under the terms of reference of these Article 21.5 proceedings. Thus, claims against the LA/MSF for the A380, including both the alleged export subsidies and the import substitution subsidies claims, shall not be reviewed in these proceedings.

16. Specifically for the claim of alleged export subsidies, China is of the view that the U.S. misapplies the legal standards established in *US – OCTG (Article 21.5 – Argentina)*. In that case, the fundamental reason for the Appellate Body to include an issue on which no findings have been made in the original proceedings into the scope of review under Article 21.5 is that, the Appellate Body found it to be part of the "measures taken to comply".[7]

17. In the present dispute, in contrast, there were no findings and relevant DSB recommendations and rulings made in the original proceedings on the alleged export subsidies provided for the A380. As a result, no new measures have been taken by the EU regarding the LA/MSF for the A380. Consequently, the U.S. argument that a party may simply raise an issue with no findings in the original proceedings again in Article 21.5 proceedings does not stand in this dispute.

18. From another perspective, it is noteworthy that the function of Article 21.5 proceedings should not be confused with that of the original proceedings. To have an unchanged measure be re-litigated in the Article 21.5 proceedings serves no extra procedural value because no further recommendations will be made regarding that measure. Notably, it amounts to converting the Article 21.5 proceedings into a remand procedure under which the complainant is granted a second chance to challenge the same measure, and the respondent has to defend it anew. Clearly, this is not the intended purpose of Article 21.5 proceedings.

2. The U.S. Claims against the LA/MSF for the A350 XWB

19. China has submitted above that the LA/MSF for the A350 is not within the terms of reference of these proceedings. On the basis of the conclusion made by the Appellate Body in *EC –Bed Linen (Article 21.5 – India)* that "if a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings"[8], China further submits that, the claims challenging the LA/MSF for the A350 XWB "cannot properly be raised in Article 21.5 proceedings".

IV. CONCLUSION

20. In conclusion, China is of the opinion that,

(i) LA/MSF for the A350 XWB is not within the terms of reference of these compliance proceedings, because it does not fall under any one of the following: (i) a measure taken to comply declared by the EU, (ii) a measure otherwise constituting a "measure taken to comply" because of its "express link" with the DSB's recommendations and rulings made in original proceedings; (iii) a measure not in itself a "measure taken to comply" but having a "particularly close relationship" to the declared measure taken to comply and the DSB's recommendations and

[6] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.
[7] Appellate Body Report, *US – OCTG (Article 21.5 – Argentina)*, para. 143-145, 146 and 152.
[8] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78.

rulings; and (iv) a replacement subsidy which replaces the one found to be WTO-inconsistent in the original proceedings.

(ii) Claims that grants of LA/MSF for the A380 and A350 XWB are prohibited subsidies are not within the terms of reference of these compliance proceedings, because for LA/MSF for the A380, it is unchanged ever since the original proceedings and should not be brought into the Article 21.5 proceedings. The U.S. arguments in this respect do not stand and are difficult to reconcile with the objectives and aims of Article 21.5 of the DSU. For claims regarding LA/MSF for the A350 XWB, because the measure itself − the LA/MSF for the A350 XWB − is not within the terms of reference of Article 21.5 proceedings, any claims challenging that measure shall not be reviewed in these proceedings.

ANNEX D-7

EXECUTIVE SUMMARY OF THE STATEMENT OF CHINA AT THE PANEL MEETING

1. Mr. Chairman, members of the Panel, it is my honor to appear before you today to present the views of China as a third party. In this oral statement, China will focus its views on whether LA/MSF for the A350 XWB, and the claim that grants of LA/MSF for the A350 XWB are prohibited subsidies, are within the terms of reference of these compliance proceedings.

2. China submits that in order for a measure to be subject to review by an Article 21.5 panel, it has to fall under one or more of the following: (i) a declared "measure taken to comply"; (ii) a measure otherwise constituting a "measure taken to comply" because of its "express link" with the DSB's recommendations and rulings made in the original proceedings; (iii) a measure not in itself a "measure taken to comply" but having a "particularly close relationship" to the declared measure taken to comply and the DSB's recommendations and rulings; and (iv) in a subsidy case, a subsidy which replaces the one found to be WTO-inconsistent in the original proceedings.

3. China notes that the alleged LA/MSF for the A350 XWB falls under none of the four situations, and therefore is not within the terms of reference of these compliance proceedings.

4. ***First***, in China's view, where a Member has adopted a measure to implement its obligations, and has so declared, it is necessary for a compliance panel to review such a measure. In this dispute, there is no "measure taken to comply" declared by EU in respect of A350 XWB. Thus, the alleged LA/MSF for the A350 XWB could not possibly be included in the terms of reference of these compliance proceedings for it's a "declared" measure taken to comply.

5. ***Second***, in light of the Appellate Body's analysis in *US –Lumber CVDs Final (Article 21.5)*, other measures may nevertheless constitute part of the "measures taken to comply" if an "express link" exists between those measures and the DSB's recommendations and rulings.[1] China recalls that no rulings or recommendations concerning the alleged LA/MSF for the A350 have ever been made in the original proceedings. Therefore, it is not possible for any measure, including the alleged LA/MSF for the A350 XWB, to have an "express link" to the non-existing DSB's recommendations and rulings concerning A350.

6. ***Third***, according to the Appellate Body in *US – Zeroing (Article 21.5 – EC)*, a measure not by itself a "measure taken to comply" may fall within the scope of review under Article 21.5 of the DSU, and the prerequisites are (i) the establishment of a "particularly close relationship"; and (ii) such relationship must exist between, on the one hand, the measure at issue, and on the other, the declared measures taken to comply and the DSB's recommendations and rulings.[2]

7. In the original proceedings, no rulings or recommendations have ever been made concerning the LA/MSF for the A350. Thus, EU bears no obligation to adopt any "measures taken to comply" and indeed EU mentions none regarding A350 in the EU Notification. In this context, as one end of the "particularly close relationship" – the declared measures taken to comply and the DSB's recommendations and rulings – does not even exist, it is, therefore, impossible to establish that any measure could have a "particularly close relationship" with this non-existing end.

8. While putting quite much strength on the close relationship test itself, the U.S. does not seem to care enough about where such a relationship should be established. The U.S. simply stresses that, by comparing the nature, effects and timing, a particularly close relationship has been established between the alleged LA/MSF for the A350 XWB, and LA/MSF for twin aisle LCA, or even "all previous LA/MSF grants".

9. However, China notes that, in the original proceedings, (i) the DSB's findings on each LA/MSF on the basis of individual Airbus LCA models shows that the respective LA/MSF measure

[1] Appellate Body Report, *US – Lumber CVDs Final (Article 21.5 – Canada)*, para. 68.
[2] Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 204.

for each model is *separate* from and *parallel* to others; and (ii) there were no findings on an "LA/MSF Programme" allegedly covering all models of Airbus LCA, not to mention a particular "LA/MSF Programme" for twin aisle LCA. Therefore, findings of a "particularly close relationship" regarding such a measure ought to be conducted within the orbit of each individual LCA model.

10. Therefore, there is no basis for the U.S. to assert that the LA/MSF for the A350 XWB has a particularly close relationship to either LA/MSF for the A350, or LA/MSF for twin aisle LCA, or "all previous LA/MSF grants".

11. The U.S. assertions effectively disregards the Appellate Body's explicit instruction that the close relationship should be established with "the declared measures taken to comply and the DSB's recommendations and rulings". Inevitably, it would overly expand the scope of these compliance proceedings and cause imbalance between the competing interest in prompt settlement of disputes and the interest in due process.

12. ***Fourth***, the U.S. also relies on the Appellate Body's conclusion in *US – Upland Cotton (21.5 – Brazil)*[3] to assert that the alleged LA/MSF for the A350 XWB is within the terms of reference of these compliance proceedings, because it is a replacement subsidy for any earlier WTO-inconsistent LA/MSF measures that the EU claims to have withdrawn. However, the U.S. ignores that the facts of *US – Upland Cotton (21.5 – Brazil)* are fundamentally different from those of the present dispute.

13. Unlike the payments at issue in *US – Upland Cotton (21.5 – Brazil)*, in the present dispute, those LA/MSF measures for respective LCA models have not been found to be provided under the same framework (a single "LA/MSF Programme"). In addition, payments made under the challenged LA/MSF are not recurring. Therefore, there is no factual basis to establish that the alleged LA/MSF for the A350 XWB is a "replacement subsidy" in relation to "any earlier WTO-inconsistent LA/MSF measures" which are actually all separate from and parallel to each other.

14. ***Finally***, to assert that excluding the alleged LA/MSF for the A350 XWB from the terms of reference of these proceedings circumvents the EU's obligation, the U.S. relies on a statement made by the Appellate Body in *US – Lumber CVDs Final (Article 21.5 – Canada)* that "[limits on the claims] should not allow circumvention by Members by allowing them to comply through one measure, while at the same time, negating compliance through another."[4]

15. However, China submits that this quoted statement was made in the process of Appellate Body's integrated analysis of the "particularly close relationship" test. The U.S. incorrectly relies on the alleged "circumvention" test, which is never a separate or distinct legal standard for determining the scope of review under Article 21.5 proceedings.

16. In light of the above, China submits that the LA/MSF for the A350 is not within the terms of reference of these proceedings. Further, on the basis of the conclusion made by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* that "if a claim challenges a measure which is not a 'measure taken to comply', that claim cannot properly be raised in Article 21.5 proceedings"[5], China submits that the claims challenging the LA/MSF for the A350 XWB "cannot properly be raised in Article 21.5 proceedings".

17. ***In conclusion***, China is of the opinion that, LA/MSF for the A350 XWB is not within the terms of reference of these compliance proceedings, because it does not fall under any one of the four possible ways by which a measure may be reviewed by the compliance Panel. Because the measure itself – the LA/MSF for the A350 XWB – is not within the terms of reference of Article 21.5 proceedings, any claims challenging that measure shall not be reviewed in these proceedings.

[3] Appellate Body Report, *US – Upland Cotton (21.5 – Brazil)*, paras. 235-238.

[4] Appellate Body Report, *US – Lumber CVDs Final (Article 21.5 – Canada)*, para. 71, quoted in US First Written Submission, Para. 163.

[5] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78.

ANNEX D-8

EXECUTIVE SUMMARY OF THE
WRITTEN SUBMISSION OF JAPAN

I. FIRST ISSUE: THE UNITED STATES FAILS TO PRESENT A SUFFICIENT FACTUAL BASIS FOR ITS CALCULATION OF ANTICIPATED AND BASELINE RATIOS

A. ANTICIPATED RATIO OF EXPORT TO DOMESTIC SALES OF A350 XWB AND A380 LACKS FACTUAL BASIS

1. Japan considers that the Panel should proceed cautiously with the United States' submission that the sales data for the market in "*Very Large Aircraft*" (*i.e.*, the Airbus A380 and the Boeing 747) are appropriate inputs for the calculation of the anticipated ratio[1]. The Appellate Body did not recommend the use of data from the wider product market; only data pertaining to the subsidized company itself is cited as relevant in the Appellate Body's Report.[2] In Japan's opinion, the United States neither presents a compelling enough argument nor a sufficient factual basis to support its submission that anticipated sales trends from the market for Very Large Aircraft should be used as the basis for the anticipated ratio for the A380.

2. Moreover, in arguing that the Airbus report generates an anticipated ratio of 4:1 while the equivalent report from Boeing demonstrates a 5:1 predicted ratio of exports to domestic sales[3], the United States uses the former ratio with no explanation as to why the latter is validly supportive of the former.[4]

3. Further, it would have been reasonable to assume at the time of granting the subsidies that demand for Very Large Aircraft would be split between the Airbus A380 and the Boeing 747, particularly given the latter's longstanding monopoly over the market for aircraft of a 400+ passenger capacity. On that ground, Japan is of the view that the Panel should request that the United States clarify the basis on which it assumes that Airbus would have anticipated sales of the A380 in proportion to the size of the European and non-European markets respectively, because the reality is that the market demand differs depending on the market. The United States' sales forecasts of the A380 are too remote to constitute sufficient *prima facie* factual evidence.[5]

4. Insofar as the United States' proposed anticipated sales ratio for the A350 XWB is concerned, its arguments are also factually untenable. By examining Airbus' order book at the end of 2009, the United States is interpreting the order trends *before* the subsidies had been granted (*i.e.* the actual orders, before the alleged subsidies had been in operation). This information does not correspond to the Appellate Body's finding that the necessary data should be based on Airbus' *anticipated* performance at the time the subsidies were granted, not its *actual* performance thereafter.[6]

B. BASELINE RATIO OF EXPORT TO DOMESTIC SALES OF A350 XWB AND A380 LACKS FACTUAL BASIS

5. As the Appellate Body concluded, the baseline ratio can be based either on the *recipient's historical sales data* of the same product or, in the absence of such data, on what the performance of a profit-maximizing firm would be expected to achieve hypothetically and without subsidization in the same market for the same product.[7] However, in spite of the Appellate Body's findings, the

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[1] *First Written Submission of the United States, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft: Recourse to Article 21.5 of the DSU by the United States* (DS316), 6 June 2012 [US First Written Submission], at paras. 183 - 185.

[2] See Appellate Body Report, European Communities and Certain Member States – Measures affecting Trade in Large Civil Aircraft, WT/DS316/AB/R [EC-Aircraft], at para. 1047, where the Appellate Body states *that "[t]he situation in the absence of the subsidy may be understood on the basis of historical sales of the same product by the recipient in the domestic and export markets*" [Underlining added].

[3] US First Written Submission, at paras. 183 -185.

[4] US First Written Submission, at para. 188

[5] *i.e.* they cite only a quotation that foresees that "*over half of the projected deliveries [of the A380 are] expected to go to airlines domiciled in the Asia-Pacific region*"; see US First Written Submission, at para. 185.

[6] Appellate Body Report, *EC-Aircraft*, at para. 1049.

[7] Appellate Body Report, *EC-Aircraft*, at para. 1047.

United States has submi*tted that the sales data of Boein*g's 747 constitute an appropriate baseline ratio because it was the only comparable passenger aircraft before the launch of the A380.

6. Firstly, Japan notes that there is no historical sales data of Airbus' A380. The two models could have different strengths and weaknesses, their producers may utilize different marketing strategies for particular markets, and the markets have different consumer preferences. Other factors which may cause differences in sales include aircraft pricing strategies, warranty coverage, and maintenance needs, such as those linked to fleet interoperability. Accordingly, the market outcome may differ between these products.

7. In this connection, Japan notes that the original panel and Appellate Body made findings of actionable subsidies conferred by the United States on Boeing, including 747 Large Freight Aircraft. Moreover, Boeing operated an effective monopoly in the 400+ passenger capacity civil aircraft market before the introduction of the A380 by Airbus. On these grounds, Japan considers the use of data pertaining to Boeing's 747 is not an appropriate source for the calculation of the baseline ratio. The United States does not present any compelling reason or fact to support the hypothesis that Airbus could have sold the A380 according to the same patterns and with the same export to domestic sales ratio.

8. Japan repeats this same proposition in relation to the United States' proposed baseline ratio for the Airbus A350 XWB. Japan therefore considers: (i) that Boeing's actual historical sales trends are therefore too remote to base an assumption of how Airbus would have behaved in the absence of the subsidies; and (ii) that recourse to Boeing's historical data is not endorsed by the Appellate Body's findings.

9. Secondly, Japan notes that the United States has undertaken the calculation of both ratios using different data sources[8], but has not explained why the comparison is valid despite the differences in data sources.

10. Lastly, Japan wishes to note that the input sales data used in the ratio calculations for both the A380 and the A350 XWB are not contemporaneous.

C. HIGHER ANTICIPATED RATIO THAN BASELINE RATIO INCONCLUSIVE OF *DE FACTO* CONTINGENCY

11. As the Appellate Body pointed out, the fact that the subsidizing governments anticipated a proportional increase in export sales is insufficient to determine contingency, as the assessment on this point should be objective rather than subjective.[9]

12. The Panel should recall that the Appellate Body stressed that the subsidy must cause exports to behave in a way that "is not reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[10] The United States has not pleaded that the trends pertaining to the export to domestic sales ratios have caused the necessary *distortion* on the market. Therefore, Japan considers that, at present, the Panel should contemplate that Airbus' rise in export sales in proportion to domestic sales either: (i) was not necessarily the result of subsidization whose objective design and structure is to incentivize exports; or (ii) may not be accountable for any distortion of the market for passenger aircraft in favour of exports.

II. SECOND ISSUE: LA/MSF FOR THE A380 AND A350 XWB ARE IMPORT SUBSTITUTION SUBSIDIES

A. CONTINGENCY IN LAW UPON IMPORT SUBSTITUTION

13. Japan notes that the United States itself admits that "*the requirement to produce and use domestic components was not explicit*" with respect to German, Spanish and UK (and French) LA/MSF for the A380[11] and that with respect to LA/MSF for the A350 XWB, the United States does

[8] US First Written Submission, at paras 183-188 and 194-199.
[9] Appellate Body Report, *EC- Aircraft*, at para. 1050.
[10] Appellate Body Report, *EC-Aircraft*, at para. 1045.
[11] US First Written Submission, at para. 219.

not argue that these measures are *de jure* inconsistent with Article 3.1(b) of the *SCM Agreement*.[12]

14. Japan acknowledges that even if a challenged measure does not explicitly require the use of domestic components, the subsidy contingent in law on the use of domestic over imported goods could be found. In this connection, the Appellate Body explicitly confirmed that the standard for establishing contingency in law, which can be derived by necessary implication from the words actually used in the measure, under Article 3.1(a) of the *SCM Agreement* also applies for establishing contingency under Article 3.1(b) of the *SCM Agreement*.[13] However, Japan is of the view that an overly broad interpretation to the notion of implicit contingency in law should not be given for the following two reasons.

15. First, to establish implicit contingency in law, the Appellate Body made it clear that "*conditionality can be derived by necessary implication from the words actually used in the measure*."[14] [Underlining added] As such, what matters are the words actually used in the measure and not, as the United States appears to argue, factors not linked to the words actually used in the measure such as the structure of Airbus' productive facilities, applications by Airbus for LA/MSF from member States, press reports and other public discussions.

16. Second, as the original panel already pointed out in *EC – Aircraft*, an overly broad interpretation of the notion of implicit contingency in law would obfuscate the conditions for a finding of contingency in law with the conditions for a finding of contingency in fact[15].

B. CONTINGENCY IN FACT UPON IMPORT SUBSTITUTION

17. As far as concerns French, German, Spanish and UK LA/MSF for the A380 and the A350 XWB, the United States argues, as the main argument with respect to French LA/MSF and as an alternative argument with respect to German, Spanish and UK LA/MSF, that these are subsidies contingent in fact on the use of domestic over imported goods pursuant to Article 3.1(b) of the *SCM Agreement* and therefore prohibited import substitution subsidies.

18. Japan considers that the Panel should apply, when examining whether the LA/MSF measures granted to Airbus for the development of the A380 and the A350 XWB were contingent in fact upon the use of domestic goods over imports, the same standard as the Appellate Body set out in *EC – Aircraft* with respect to *de facto* export contingency. In other words, whether the subsidies granted to Airbus are/were in fact contingent upon the use of domestic over imported goods needs to be determined by assessing the subsidy itself, in the light of the relevant factual measures such as the design and the structure of the measure granting the subsidy; the modalities of operation set out in the subsidy measure; and the relevant factual circumstances surrounding the granting of the subsidy, and not on the basis of government motivation.

19. Japan is concerned that the standard of the permissibility of such subsidies based on a government's motivation risks being over-inclusive owing to overzealous drafting on the part of a government. Motivation is therefore an inappropriate tool to determine the WTO-permissibility of an alleged subsidy.

C. LINK BETWEEN THE LA/MSF MEASURES AND THE WORKSHARE AGREEMENTS

20. On the United States' argument that the existence of workshare agreements was a condition for the LA/MSF subsidies to be granted to Airbus and therefore the LA/MSF measures constitute impermissible import substitution schemes under Article 3.1(b) of the *SCM Agreement*, the Panel should examine carefully whether a grant of the LA/MSF measures is indeed conditioned on the existence of such workshare agreements and examine whether the workshare agreements indeed required the use of domestic products over imported products. In this regard, the Panel should examine whether the recipi*ents of the subsidie*s at issue are conditioned by the workshare agreements.

[12] US First Written Submission, at para. 230.

[13] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000 [*Canada – Autos*], at para. 123.

[14] Appellate Body Report, *Canada – Autos*, at para. 123.

[15] See the panel's findings in para. 7.692-7.716 of its report in EC – Aircraft.

21. In this connection, Japan wishes to point out that even if the Panel would find that the workshare agreements are WTO-inconsistent agreements, this does not necessarily imply that the LA/MSF measures at issue are by definition inconsistent with the EU's WTO commitments, since there may not be a link between WTO-inconsistent workshare agreements and the granting of the LA/MSF measures.

III. THIRD ISSUE: THE REMOVAL OF ADVERSE EFFECTS IN THE CONTEXT OF ARTICLE 7.8 OF THE *SCM AGREEMENT*

A. JAPAN'S VIEW OF THE MEANING OF "*REMOVAL*" OF ADVERSE EFFECTS

22. Japan considers that the removal of adverse effects under Article 7.8 of the *SCM Agreement* would mean: *if the Member granting a beneficial financial contribution makes it no longer possible for the grantee enterprise to use the benefits conferred by the financial contribution to lower the sales price of its products, for example, by having the benefit returned to the grantor government, then the adverse effects of the subsidies should be considered to have been removed*. In this situation, if the grantee enterprise is still commercially able to sell its products at a competitive price, it would be, by definition, more economically efficient to allow it to do that, rather than to disable it to do that.

23. This position is consistent with, and supported by, the Appellate Body's previous rulings in *EC-Aircraft*, and *US – Upland Cotton (Article 21.5 – Brazil)*[16].

B. THE REMOVAL OF ADVERSE EFFECTS AND THE CONTINUED EXISTENCE OF AIRBUS

24. In discussing what action the European Union should take to remove the adverse effects of the subsidies at issue, the United States repeatedly refers to the finding of the Appellate body in *EC - Aircraft* that "*[w]ithout LA/MSF, Airbus likely would not exist at all.*"[17] It appears that the United States effectively argues, or its argument is tantamount to arguing, that the adverse effects cannot be removed as long as Airbus continues to exist, since Airbus would not exist in its present form had it not received LA/MSF. This position seems to be extreme. Further, as noted above, it appears unreasonable to request that Airbus cease to exist even if it has been rendered no longer possible that Airbus will use the benefit conferred by the subsidies at issue to lower the sales prices of its products.

25. The United States' assertion in the context of remedies that Airbus likely would not currently exist but for the LA/MSF[18] is also at odds with the United States' submission in *Australia – Automobile Leather II (21.5 – US)*.[19] In this case, the United States took a prospective, forward-looking approach towards the remedy it sought under the *SCM Agreement*. By contrast, in the present proceeding the United States appears to be fixated on the theoretical continued existence of Airbus in the absence of receiving LA/MSF.

26. Therefore, Japan is apprehensive about the risk of establishing impossible standard for "removal of adverse effects" in the context of Article 7.8 of the *SCM Agreement.*

[16] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil),* WT/DS267/AB/RW, adopted 21 March 2005.

[17] US First Written Submission, at para. 323. See also at para. 243.

[18] US First Written Submission, at para. 243 and 323.

[19] Panel Report, *Australia — Automotive Leather II (Article 21.5 — US)*, WT/DS126/RW, adopted 11 February 2000.

ANNEX D-9

EXECUTIVE SUMMARY OF THE STATEMENT OF JAPAN
AT THE PANEL MEETING

I. WITHDRAWAL OF A SUBSIDY AND REMOVAL OF THE ADVERSE EFFECTS OF A SUBSIDY

1. Pursuant to Article 7.8 of the *SCM Agreement*, a subsidizing government is required to withdraw the subsidy or remove the adverse effects which still remain in the present. This conclusion follows from the general principle that remedies in WTO law are generally understood to be prospective in nature,[1] which has been followed in numerous cases.

2. Japan would like to draw the Panel's attention to the language of Article 7.8 of the *SCM Agreement*. Under this provision, a Member has an option of either withdrawing the subsidy or removing the adverse effects of the subsidy. It follows from the structure of this provision a Member that has withdrawn the subsidies at issue is deemed to have taken appropriate steps to remove the adverse effects within the meaning of this provision.

3. Japan further submits that assessing whether the subsidies at issue are presently causing adverse effects requires a proper understanding of the "life" of subsidies, as referred to by the Appellate Body. Under Article 1.1 of the SCM Agreement, a subsidy is deemed to exist if there is a financial contribution by a government or any public body and a benefit is thereby conferred. As the Appellate Body noted in *Brazil – Aircraft*, a financial contribution and benefit are two separate legal elements, and both must exist for there to be subsidy.[2]

4. Given that under Article 1.1 of the *SCM Agreement* it is only when a financial contribution confers a benefit that such a financial contribution qualifies as a subsidy, the structure of the *SCM Agreement* demonstrates that the existence of a benefit is crucial for the ability of the subsidy received by a recipient to cause adverse effects. Indeed, the *SCM Agreement* contemplates that the recipient of subsidies, through utilizing the benefit, may cause adverse effects on the like products of another Member. The Appellate Body in *EC – Aircraft* clearly held that the *SCM Agreement* requires a finding of a "genuine and substantial relationship of cause and effect" between the subsidy and the observed adverse effects.[3]

5. Japan notes that Article 7.8 of the *SCM Agreement* must be properly read to imply that the subsidizing government discharges its obligation either by the removal of the financial contribution or the benefit. The Appellate Body confirmed in *EC – Aircraft* by acknowledging the "basic proposition that a subsidy has a life, which may come to an end, either through the removal of the financial contribution and/or the expiration of the benefit."[4] Thus, in order to withdraw the subsidy it should be asked how the benefit can be removed.

1. Removal of a Benefit

6. In respect of the removal of the benefit, Japan would like to comment on the expiration of the benefit. The United States submits that the "the life of a product creation subsidy, like LA/MSF, lasts at least as long as the commercial life of the product it creates, and beyond in certain instances."[5] Japan believes that this statement conflates the concepts of the "benefit" and "effect" of a subsidy.

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[1] Appellate Body Report, *US – Subsidies on Upland Cotton (Article 21.5 – Brazil)*, WT/DS267/AB/RW, [*US – Upland Cotton (Article 21.5 – Brazil)*], at footnote 494 to para. 243.

[2] Appellate Body Report, *Brazil – Export Financing Program for Aircraft*, WT/DS46/AB/R [*Brazil – Aircraft*], at para. 157.

[3] See Appellate Body Report, *European Communities and Certain member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, [*EC – Aircraft*], at para. 1232.

[4] *Ibid*., at para. 709.

[5] US Second Written Submission, para. 175.

7. First of all, under the *SCM Agreement*, a "benefit" is capable of being calculated and quantified, and is expendable over time.[6] At the time when a subsidy is granted, the subsidizing government contemplates that this quantifiable and expendable "benefit" of the subsidy will materialize and be consumed over a certain period of time to achieve the relevant policy objectives. This approach falls squarely within the framework of the Appellate Body's reasoning that "at the time of the grant of a subsidy, the subsidy will necessarily be projected to have a finite life and to be utilized over that finite period."[7]

8. Moreover, the Appellate Body has confirmed that the determination of a benefit under the *SCM Agreement* is an *ex ante* analysis that does not depend on how the particular financial contribution actually performed after it was granted.[8] Furthermore, the Appellate Body has observed that "the nature, amount, and projected use of the challenged subsidy may be relevant factors to consider in an assessment of the period over which the benefit from a financial contribution might be expected to flow."[9] Consequently, for the analysis as to whether the benefit has expired or ceased to exist, the materialization and consumption of the benefit usually are functions of the policy objectives of subsidies as depicted in the structure and nature of any particular subsidy.

9. In line with this proposition, the Appellate Body offered a number of factors which might be used to assess the life of a benefit, including the period of time over which the subsidy is expected to be used for future production.[10] Japan submits that the weight allocated to each factor mentioned by the Appellate Body would depend on the structure and nature of the particular subsidy. For example, the period of time over which the subsidy is expected to be used to lower the price levels of products may be relevant for the assessment of the life of research and development (R&D) subsidies. Japan understands that the function of R&D subsidies is, for example, to lower, to the extent of the "benefit" amount, the sales price of products incorporating the results of the research activities down to a competitive level. Even without such subsidies, the recipient were able to conduct such research activities successfully, and sell such products at a competitive level, a government would have little incentive to grant subsidies. If, however, the recipient had no technological potential to conduct the research activities successfully, neither would a government have little incentive to grant subsidies. A government provides R&D subsidies because the government considers that the recipient has technological potential to conduct such research activities successfully, but it will not be able to sell products incorporating the result of the research activities at a competitive level.

10. This function of such R&D subsidies contemplates that its benefit will normally be consumed as the recipient accordingly sells the product for the development of which the subsidy was provided at a price level which is lower than the anticipated price level in the absence of subsidization. Consequently, when the "benefit" is consumed in full, the recipient will no longer be able to lower price levels at the cost of further consuming the "benefit".

11. Japan would like to emphasize, however, that the assessment of the period of the life of the "benefit" should focus on the projected period or sales amount properly anticipated by granting Member when the subsidy is granted.

2. Removal of Adverse Effects

12. Japan doubts that, for the purposes of Article 7.8 of the *SCM Agreement*, a presently-existing adverse effect may be found to exist if the "benefit" has been withdrawn or consumed and the recipient is no longer able to lower the price of products by the benefit. Indeed, with respect to R&D subsidies, the recipients can use new technology which has been invented by the subsidies, even after its benefits have been removed or utilized. In Japan's view, however, the obligation to remove adverse effects should normally be limited to the price effects of R&D subsidies.

13. As mentioned above, the structure of R&D subsidies is ultimately aimed at lowering production costs so as to enable firms to lower prices to a level which is competitive in the marketplace. The fact that a recipient has invented a particular technology likely reveals that it

[6] See Article 14 of the *SCM Agreement.*
[7] Appellate Body Report, *EC – Aircraft*, at para. 709.
[8] *Ibid*., at para. 706.
[9] *Ibid*., at para. 707.
[10] *Ibid*.

must have had a technological potential to do so, but merely could not afford to do so. In this situation, the proper counterfactual is that the recipient, as a business entity, would have had to offer products using newly-invented technology at a higher price (and consequently, would have had more difficulty selling them in the market), rather than that the recipient could not have invented that technology, and thus, that product.

14. Therefore, in Japan's opinion, a finding regarding adverse effects and serious prejudice should stem primarily from the effects of the pricing policy of the firm in question with relation to the subsidized products including those incorporating new technology for the development of which the subsidy was granted, and not from the mere fact that new technology has been invented.

15. In support of this proposition, Japan submits that the *SCM Agreement* contemplates that a benefit would result in the reduction of costs of production and, therefore, cause price effects. In particular, this reality is, *inter alia*, evident from the intended purpose of countervailing duties, which effectively increase the import prices of subsidized imports. The WTO disciplines regarding the determination of injury are equally informative in this regard. Japan directs the Panel's attention to Article 15.1 of the *SCM Agreement* and Article 15.2 of the *SCM Agreement*.

16. In Japan's opinion, the adverse effects of subsidies enumerated in Article 5 of the *SCM Agreement* are ultimately related to the ability of a recipient to charge lower prices by utilizing a subsidy benefit. Therefore, Japan is of the view that it is necessary to examine carefully whether the *SCM Agreement* further addresses any other effect of subsidies that may remain after their benefit – i.e. their price effects – is accordingly consumed in full.

II. THE "ANTICIPATED EXPORT RATIO TEST"

17. The United States submits that the grants of LA/MSF for the A380 and the A350 XWB constitute prohibited subsidies, since these grants are contingent in fact upon export performance and relies on the "anticipated export ratio test" provided by the Appellate Body in *EC- Aircraft*, whereby the ratio of anticipated export and domestic sales of the subsidized product that would come about as a consequence of the granting of the subsidy is compared to the same ratio in the absence of the subsidy.

18. While Japan prefers to refrain from submitting comments regarding whether the grants of LA/MSF for the A380 and the A350 XWB are properly before the Panel, Japan has two concerns with respect to the approach proposed by the United States. First, Japan is concerned that the United States' claim regarding export contingency relies too heavily on market forecast data, thereby raising doubts whether the United States has presented a sufficient *prima facie* factual basis to support its claims. Second, Japan has a conceptual concern with respect to the "anticipated export ratio" test as proposed by the United States.

1. Applicable Legal Framework

19. The Appellate Body clarified the standard for finding *de facto* export contingency under Article 3.1(a) of the SCM Agreement in *EC – Aircraft*. The Appellate Body held that "anticipation" of exports is in itself insufficient as proof that the granting of a subsidy is tied to the anticipation of exportation and established the following test: "is the granting of the subsidy geared to induce the promotion of future export performance by the recipient?"[11] The Appellate Body subsequently found that this test is met when "the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[12] The Appellate Body also explained that the existence of *de facto* export contingency must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy.[13]

20. The Appellate Body indicated that, where relevant evidence exists, the assessment of whether the granting of a subsidy is geared to induce the promotion of future export performance by the recipient could be based on a comparison between the ratio of anticipated export and

[11] *Ibid*., at para. 1044.
[12] *Ibid*., at para. 1045.
[13] *Ibid*., at para. 1046.

domestic sales of the subsidized product that would come about as a consequence of the granting of the subsidy and the situation in the absence of the subsidy. The situation in the absence of the subsidy may be understood on: (1) the basis of historical data; or (2) in the absence of "untainted" historical data, on the performance that a profit-maximizing firm would hypothetically be expected to achieve in the export and domestic markets in the absence of a subsidy.

2. Concerns Whether Sufficient *Prima Facie* Evidence has been Submitted

21. Japan notes that, in order to establish the "baseline ratio", the Appellate Body referred to historical sales of the recipient firm or the performance that a profit-maximizing firm would hypothetically be expected to achieve.[14] The data used by the United States to establish the baseline ratio, is, however, not based on Airbus' historical sales data but on Boeing's sales of 747 and 777 aircraft. In this respect, Japan considers that Boeing's sales data pertaining to the 747 freight aircraft and 777 aircraft are "tainted by subsidies" insofar as Boeing was in receipt of actionable subsidies during this period as per the WTO Panel's and Appellate Body's findings. Japan thus questions whether Boeing's sales data can be used to establish the baseline.

22. Japan invites the Panel to carefully examine whether the United States has provided sufficient *prima facie* evidence to support its claim that the grants of LA/MSF for the A380 and the A350 XWB constitute prohibited export subsidies. In this regard, Japan recalls that the Appellate Body itself inserted a qualifier when presenting the numerical example to illustrate whether the granting of a subsidy may be geared to induce promotion of future exports. The Appellate Body made a comparison between the anticipated ratio of export and domestic sales with the baseline ratio subject to the existence of "relevant evidence".[15]

3. Methodological Concern with Respect to the "Anticipated Export Ratio" Test

23. Japan also has a methodological concern with respect to the "anticipated export ratio" test. To be clear, Japan does not dispute that a subsidy measure providing recipients an incentive to export products abroad rather than sell them on the domestic market is likely to increase the anticipated ratio of export sales to domestic. However, the test posited by the United States may result in a finding of *de facto* export contingency even in the absence of any incentive given to recipients to increase the anticipated ratio of export sales to domestic sales when − because of certain market developments, such as higher cross-price elasticity of demand on export markets − the anticipated ratio of export sales to domestic sales is higher than the baseline ratio of export sales to domestic sales.

24. The methodological concern Japan has in this respect is that the "anticipated export ratio" test as put forward by the United States in this proceeding reduces the standard for a finding of *de facto* export contingency, as set out by the Appellate Body in *EC − Aircraft*, to a mere comparison between the anticipated ratio and the baseline ratio. Japan considers that this is not the appropriate legal standard for establishing *de facto* export contingency. Japan recalls the legal standard set out by the Appellate Body for determining *de facto* export contingency[16] and that this standard is met "when the subsidy is granted so as to provide an incentive to the recipient to export in a way that is not simply reflective of the conditions of supply and demand in the domestic and export markets undistorted by the granting of the subsidy."[17]

25. Whether a subsidy is geared to induce the promotion of future export performance "must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy"[18] and the Appellate Body provided its relevant factors in this respect.[19]

26. Yet the "anticipated export ratio" test put forward by the United States hollows out the legal standard set out by the Appellate Body to a simple comparison between the anticipated ratio and the baseline ratio, even though the Appellate Body was quite clear that "the standard for determining [*de facto* export contingency] is an objective standard, to be established on the basis

[14] *Ibid*.
[15] *Ibid*., at para. 1047.
[16] *Ibid*., at para. 1044.
[17] *Ibid*., at para. 1045.
[18] *Ibid*., at para. 1046. [Underlining added]
[19] *Ibid*.

of the total configuration of facts constituting and surrounding the granting of the subsidy, including the design, structure, and modalities of the measure granting the subsidy."[20]

27. Therefore, Japan submits that while a comparison between the anticipated ratio and the baseline ratio may be one of the "facts constituting and surrounding the granting of the subsidy", it cannot be determinative of whether a given subsidy measure is *de facto* export contingent. In this respect, Japan refers to the finding of the Appellate Body that "the assessment could be based"[21] on a comparison between the anticipated ratio and the baseline ratio and that such a comparison, if supported by evidence showing an incentive to skew anticipated sales towards exports, "would be an indication"[22] of *de facto* export contingency. Should the Panel endorse the "anticipated export ratio" test to determine whether a subsidy is *de facto* export contingent, Japan is concerned that such an endorsement may result in three unintended consequences.

28. First, allowing WTO Members to establish *de facto* export contingency based only on a comparison between anticipated and baseline ratios would contradict the Appellate Body's previous finding that "proving *de facto* export contingency is a much more difficult task [than proving *de jure* export contingency]*.*"[23] Indeed, the Appellate Body in *EC – Aircraft* endorsed this conclusion regarding the complexity of establishing *de facto* export contingency.[24]

29. Second, the importance of the baseline ratio in determining whether a subsidy is *de facto* export contingent carries the risk that one and the same subsidy is considered *de facto* export contingent if the baseline ratio is set in year/period X, whereas it is not considered *de facto* export contingent if the baseline ratio is set in year/period Y. Indeed, due to changes in the market situation, the ratio between exports and domestic sales in any given year or period may be substantially different from any other year or period.

30. Third, WTO Members with small domestic markets, for whom changes in baseline ratios from one year or period to another may be more pronounced, may be more vulnerable to a finding of *de facto* export contingency compared to WTO Members with larger domestic markets. Japan believes that all WTO Members, without regard to the size of their own domestic markets, should enjoy equal treatment in terms of the restrictions on subsidies.

31. Therefore, Japan respectfully invites the Panel to examine the Appellate Body's findings set out in *EC – Aircraft*, and particularly the explicit guidance that whether a subsidy is geared to induce the promotion of the future export performance must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, when assessing whether the grants of LA/MSF for the A380 and the A350 XWB constitute prohibited export subsidies.

[20] *Ibid*., at para. 1050. [Underlining added]
[21] *Ibid*., at para. 1047. [Underlining added]
[22] *Ibid*. [Underlining added]
[23] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, at para. 167.
[24] Appellate Body Report, *EC – Aircraft*, at para. 1038. [Underlining added]

ANNEX D-10

EXECUTIVE SUMMARY OF THE STATEMENT OF THE REPUBLIC OF KOREA AT THE PANEL MEETING

Mr. Chairman and members of the Panel,

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party in this dispute. The decision of the Panel in this dispute will provide important guidelines to the WTO Members in making their policy decisions and formulating their respective government programs in a manner consistent with the relevant rules of the WTO.

2. While the parties to the dispute and third parties raise several important issues, Korea would like to briefly focus on the following two systemic points. First point is whether this Panel's terms of reference include LA/MSF for the A350XWB. Second point is whether LA/MSF for the A380 and the A350XWB constitutes subsidies contingent upon the use of domestic over imported goods, prohibited under Article 3.1(b) of the SCM Agreement.

3. To begin with, we would like to note that the issue of a compliance Panel's terms of reference has a close bearing with the enforceability of the WTO Agreements. This is so, because a compliance panel's decision will have two significant aspects. On the one hand, a compliance panel's decision is directly related to the security and predictability of the WTO dispute settlement mechanism. Without a certain limitation on the scope of a compliance panel's terms of reference, a complainant might want to re-litigate in a compliance proceeding issues it could and should have claimed in the original proceeding. This virtual re-litigation would constitute an abuse of the compliance proceeding by the complainant. On the other hand, a compliance panel should also ensure that an implementing Member does not attempt to circumvent its obligation to implement the recommendations and rulings of the DSB, by being allowed to take essentially the same measure simply because it was not included in the original proceeding.

4. In short, if a compliance panel's terms of reference are overly broad, it may open a back door for measures, which could and should have been included in the original panel proceeding (but were excluded by a complainant), to come to a compliance proceeding. On the other hand, should a compliance panel's terms of reference be overly narrow an implementing Member may attempt to introduce a new measure which share the characteristics of the impugned measure in all material respects, thereby effectively avoiding its obligation to comply with the recommendations and rulings of the DSB. Thus, a balance should be struck between the two competing considerations.

5. In determining the scope of terms of reference of the present proceeding, this Panel should carefully examine and apply the WTO jurisprudence on this issue. In Korea's view, WTO jurisprudence accumulated so far offers important guidelines in this regard.

6. First of all, Korea notes that the WTO jurisprudence has acknowledged a panel's broad authority to identify measures taken to comply. The Appellate Body has ruled that panels have a duty to examine issues of a "fundamental nature," issues that go to the root of their jurisdiction on their own motion *even* if the parties to the dispute remain silent on those issues.[1] Where the parties to the dispute identified measures, a compliance panel still has to determine which of the measures listed in the request for its establishment are indeed "measures taken to comply."[2] Hence, the WTO jurisprudence has provided a compliance panel with extensive authority not merely to be confined to the measures raised by the parties to the dispute.

7. That being said, the Appellate Body in *US – Softwood Lumber IV (Article 21.5 - Canada)* provides us with a guideline directly on point. It considered measures other than the declared

[1] Appellate Body Report, *Mexico – Corn Syrup (Article 21.5)*, para. 36, quoted in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.35.

[2] Appellate Body Report, *EC – Bed Linen*, para. 78.

measures taken to comply with an original WTO decision. According to the Appellate Body, terms of reference of a compliance panel are not merely limited to the measures declared to comply by an implementing party.[3] It thus stated that "some measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel, acting under Article 21.5."[4] The Appellate Body further opined that in order to determine whether there is a close relationship between the declared measures taken to comply and other measures, a compliance panel must examine the timing, nature, and effects of the other measures.[5] At the same time, a compliance panel must also "examine the factual and legal background against which a declared 'measure taken to comply' is adopted."[6]

8. It seems that the parties to this dispute and third parties all agree that the applicable test here should be whether or not there exists a "close relationship," as pronounced by the Appellate Body. Thus, the question is whether LA/MSF for the A350XWB meets the "close relationship" test. As the Panel is well aware, examining the timing, nature, and effects of other measures poses complex factual questions. Indeed, the parties maintain different positions regarding the timing, nature and effects of other measures at issue, even if they agree upon the same legal test of "close relationship." Thus, Korea requests the Panel to carefully review the facts of the dispute as a trier of facts and determine whether LA/MSF for the A350XWB can be regarded as a measure closely related to the measures taken to comply by the EU, in accordance with the jurisprudence of the Appellate Body.

9. Secondly, another issue Korea would like to raise concerns interpretation and application of Article 3.1(b) of the SCM Agreement. The United States argues that LA/MSF for the A380 and the A350XWB constitute prohibited subsidies because they are subsidies contingent upon the use of domestic goods. Article 3.1(b) of the SCM Agreement indeed prohibits "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods."

10. In general, Korea agrees with the statement of the United States that "[i]f the receipt of a subsidy requires a manufacturer to use domestically produced manufacturing inputs rather than foreign manufacturing inputs, then the subsidy violates" Article 3.1(b).[7] Korea believes that such a statement appropriately encapsulates the object and purpose of Article 3.1(b), which is to prevent the profoundly distortive effect of an import substitution subsidy on international trade.

11. That being said, however, Korea submits that a careful scrutiny is necessary to determine whether LA/MSF for the A380 and the A350XWB does fall under the situation of Article 3.1(b). In Korea's view, it seems that the U.S. argument does not fully detail how the workshare agreements among the Airbus countries required and imposed a condition upon the use of domestic over imported goods. Although the U.S. concluded that the workshare agreements "meant that the access to the subsidy was contingent upon the use of domestic goods over imports,"[8] it does not seem clear to us whether one could pinpoint a direct linkage between the agreements and a condition to use domestic over imported goods within the meaning of Article 3.1(b). At most, examples presented by the complainant seem to concern the Airbus countries' share, ownership rights, and job creation − somewhat general discussions and consideration of the participating countries as opposed to some sort of specific conditions.

12. The situation of the UK provides a good example in this regard. The United States argues that through the workshare agreements "the UK government anticipated that LA/MSF for the 350XWB would induce local production of particular large civil aircraft components, local employment, and *the use of domestically produced manufacturing inputs as a result of that local employment*."[9] Put differently, the argument of local content substitution is basically premised upon the alleged local employment. One would find it difficult, however, to see any direct linkage

[3] Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 77.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] US First Written Submission, para. 211.
[8] *Id*. para. 239.
[9] *Id*. para. 234.

between the local employment and the alleged import substitution. Considering the strategic features of the LCA industry and the highly confidential nature of the technologies involved, the United States should first prove that there do exist substitutable parts that are being imported, and that the LA/MSF program prevented Airbus from using such imported parts because of the program. In our view, such a scheme does not seem to be reflective of the nature of the business at issue here. In order to establish a direct linkage, therefore, it seems critical for the complainant to prove why and how the local employment can be regarded as a specific condition for the utilization of domestic goods over imported goods.

13. Again, Korea appreciates this opportunity to present its view and would be happy to take questions you might have. Thank you.

ANNEX E

RULINGS WITH RESPECT TO DSU ARTICLE 13 REQUEST

ANNEX E-1

THE UNITED STATES' ARTICLE 13 REQUEST OF 20 JULY 2012

(Panel ruling issued on 4 September 2012)

1. By letter dated 20 July 2012, the United States requests the Panel to exercise its authority under Article 13 of the Understanding on Rules and Procedures governing the Settlement of Disputes ("DSU") to seek information from the European Union with regard to specific assertions allegedly made by the European Union in its first written submission.[1]

2. Specifically, the United States requests the Panel to seek the following four categories of documents from the European Union, which the United States considers will assist the Panel in evaluating the evidence before it and in clarifying and distilling the legal arguments advanced by the parties, particularly those of the European Union[2]:

a. All agreements (including all amendments, attachments, and exhibits) between any of the EU member States and EADS/Airbus, related to the development and/or financing of the Original A350 or A350XWB;

b. All applications for financing for the Original A350 or A350XWB; any related project appraisals by the member States, and any other written communications between any of the EU member States and EADS/Airbus, related to the development and/or financing of the Original A350 or A350XWB;

c. All A350 business cases provided by Airbus or EADS to the member States and/or any of Airbus' risk-sharing suppliers; and

d. Documentation of any loans extended to Airbus/EADS by the *Kreditanstalt für Wiederaufbau* ("KfW") for the development and/or financing of the Original A350 or A350XWB, as well as documentation of any disbursements pursuant to such loans in 2009, 2010, 2011, or 2012.

3. Following letters from the European Union dated 20 July 2012[3], a response by the United States dated 23 July 2012[4], and a further letter from the European Union dated 24 July 2012[5], the Panel issued a communication in which it requested the European Union to respond to the United States' request by 6 August 2012.[6] This date was, at the request of the European Union, subsequently extended by the Panel to 9 August 2012.[7] On 9 August 2012, the European Union submitted a detailed response to the United States' Article 13 request, in which it asks the Panel to reject the request "at least until the written procedure is complete."[8] The United States replied to the European Union's comments on 16 August 2012.[9] In response to a request by the European Union, also dated 16 August 2012[10], the Panel granted the European Union until 23 August 2012 to submit a response to the United States' reply, limiting its response to the fresh assertions and arguments with respect to the United States' request which

[1] Letter of the United States to Chairman of the Panel, dated 20 July 2012 (hereafter, "Article 13 request").
[2] Article 13 request, p. 2. Moreover, the United States considers that the Panel may be unable to make an objective assessment of the arguments and assertions raised by the European Union in the absence of these documents.
[3] Letter of the European Union to the Chairman of the Panel, dated 20 July 2012.
[4] Letter of the United States to the Chairman of the Panel, dated 23 July 2012.
[5] Letter of the European Union to the Chairman of the Panel, dated 24 July 2012.
[6] Communication of the Panel to the Parties, dated 24 July 2012.
[7] Letter of the European Union to the Chairman of the Panel, dated 27 July 2012; Communication of the Panel to the Parties, dated 30 July 2012.
[8] European Union, Comments on the US Request for a Preliminary Ruling Decision, 9 August 2012 (hereafter "EU Comments, 9 August 2012"), paras. 1 and 112.
[9] United States' Reply to the European Union's comments on the US Request for a Preliminary Decision, 16 August 2012 (hereafter, "US Reply, 16 August 2012").
[10] Letter of the European Union to the Chairman of the Panel, dated 16 August 2012.

the European Union asserts that the United States has made in its reply.[11] The European Union submitted this response on 23 August 2012.[12] The Panel has taken into consideration all of the arguments made by the parties in the foregoing exchanges and advises the parties as follows:

4. Article 13.1 of the DSU provides:

> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it seems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

5. Article 13 of the DSU makes a grant of discretionary authority to panels enabling them to seek information from any relevant source, as they deem appropriate in a particular case.[13] The Appellate Body has stated that Article 13.1 imposes no conditions on the exercise of this discretionary authority.[14] Moreover, in *Canada – Aircraft*, the Appellate Body observed that there is nothing in either the DSU or the SCM Agreement to support the assumption that a Member's duty to respond promptly and fully to a panel's request for information arises only after the opposing party to the dispute has established a *prima facie* case that its complaint or defence is meritorious.[15] As the Appellate Body stated:

> To the contrary, a panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence.[16]

6. Finally, in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body stated that in considering whether to exercise its authority under Article 13 of the DSU, particularly where a party has made an explicit request that it do so, a panel should have regard to considerations such as what information is needed to complete the record, whose possession it lies within, what other reasonable means might be used to procure it, why it has not been produced, whether it is fair to request the party in possession of the information to submit it, and whether the information or evidence in question is likely to be necessary to ensure due process and a proper adjudication of the relevant claim(s).[17]

7. In its first written submission, the United States argues that France, Germany, Spain and the United Kingdom have given €3.5 billion in new LA/MSF for the A350XWB and that this new LA/MSF is a failure to comply with the recommendations and rulings of the DSB in the original proceeding.[18] The United States further alleges that the new LA/MSF has been granted by the relevant EU member States on the same core terms and conditions as grants of LA/MSF for previous Airbus aircraft (i.e. unsecured, success-dependent, levy-based and back-loaded) and on

[11] Communication of the Panel to the Parties, dated 17 August 2012.

[12] European Union, Comments on the US Response to the EU Comments on the US Request for a Preliminary Decision, 23 August 2012 (hereafter, "EU Comments, 23 August 2012").

[13] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84; Appellate Body Report, *EC – Hormones*, para. 147; Appellate Body Report, *US – Shrimp*, para. 106.

[14] Appellate Body Report, *Canada – Aircraft*, para. 185.

[15] Appellate Body Report, *Canada – Aircraft*, para. 192.

[16] Appellate Body Report, *Canada – Aircraft*, para. 192 (original emphasis).

[17] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1140.

[18] United States' first written submission, para. 8. The United States argues that LA/MSF for the A350XWB is a "measure taken to comply" in that it is closely related to the subsidies already found inconsistent with the SCM Agreement in the original proceeding, it essentially replaces the A330/A340 LA/MSF agreements that the European Union claims to have terminated, and results in circumvention of the European Union's compliance obligations; United States' first written submission, paras. 6, 105.

better-than-commercial terms.[19] In addition, the United States argues that LA/MSF for the A350XWB is contingent in fact on export performance, contrary to Article 3.1(a) of the SCM Agreement as well as an import substitution subsidy contrary to Article 3.1(b) of the SCM Agreement. The United States makes various assertions as to the nature, structure and modalities of operation of LA/MSF for the A350XWB in support of these arguments.[20]

8. In its first written submission, the European Union requests the Panel to find that none of the four separate A350XWB financing agreements is a "measure taken to comply" within the meaning of Article 21.5 of the DSU and that they are therefore outside the scope of this compliance proceeding.[21] The European Union argues that in determining whether there is a "close nexus" between a challenged (undeclared) measure, the measures at issue in the original proceeding, and the recommendations and rulings of the DSB in the original proceeding, it must first be established that the undeclared measure can be linked to a "common overarching measure" at issue before the original panel, and then whether there is a sufficiently close nexus in terms of timing, nature and effects, between the undeclared measure, the measures at issue in the original proceeding, and the recommendations and rulings of the DSB.[22] According to the European Union, the United States has failed to satisfy both of these requirements with regard to the LA/MSF for the A350XWB. Moreover, the European Union argues that the United States has failed to establish that the LA/MSF for the A350XWB confers a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.[23] The European Union also disputes the United States' claims that LA/MSF for the A350XWB is contingent in fact on export performance contrary to Article 3.1(a) or an import substitution subsidy contrary to Article 3.1(b) of the SCM Agreement.[24]

9. Based on the arguments presented by the parties in their first written submissions, we consider it likely that the Panel will have to evaluate the nature, timing, and effects of the provision of LA/MSF by France, Germany, Spain and the United Kingdom in connection with the A350XWB in order to address the European Union's preliminary ruling request that the Panel find that the financing agreements for the A350XWB are outside the scope of this proceeding.[25] Moreover, should the Panel reach the United States' substantive claims with respect to LA/MSF for the A350XWB, information with respect to the nature, timing and substance of the provision of LA/MSF in connection with the A350XWB will be essential in determining whether any subsidies exist, the nature, magnitude, and effects of such subsidies, and whether any such subsidies are in fact contingent on export performance or import substitution subsidies.[26]

10. The European Union argues that for the Panel to request the information the subject of the United States' Article 13 request at this stage in the proceeding would be inconsistent with the principles regarding burden of proof and the prohibition on a panel making a case for a party. The European Union submits that the Panel will only be in a position to know whether it is necessary to clarify contradictory facts that may be relevant to addressing the European Union's preliminary

[19] United States' first written submission, para. 117.
[20] United States' first written submission, paras. 189-209, 230-239.
[21] European Union's first written submission, para. 57.
[22] European Union's first written submission, paras. 57-92.
[23] European Union's first written submission, paras. 368-379. The European Union asserts that the United States has failed to offer any evidence that LA/MSF for the A350XWB has been provided at rates that are below market, and that its argument that "unsecured, success-dependent, and back-loaded" financing is not available at market is contradicted by the evidence.
[24] European Union's first written submission, paras. 421-430, 471-475.
[25] See, United States' first written submission, paras. 139-165; European Union's first written submission, paras. 57-113. We note the European Union's position that, as the responding party, it has advanced no "claims" in this dispute. However, in raising jurisdictional objections to the Panel's consideration of financing for the A350XWB, the European Union has made a number of assertions concerning the nature and timing of that financing, which the Panel will have to resolve, which requires it to have an adequate evidentiary basis for its analysis.
[26] We note in this context that the underlying documents concerning the grant of LA/MSF for each of the models of Airbus aircraft at issue in the original proceeding, including *inter alia* business cases, contracts, schedules, annexes, and intergovernmental agreements, were essential in the Panel's evaluation of the United States' subsidy claims in the original dispute. See, e.g., Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.367-7.380 and 7.403-7.431 and associated footnotes. Some of this information was made available in the Annex V process in that dispute, but additional documents were submitted as exhibits by the European Communities in its submissions and in response to requests made in questions from the Panel. Panel Report, *EC and certain member States – Large Civil Aircraft*, footnotes 2436, 2517, 2533.

ruling request after the parties have submitted their rebuttal submissions.[27] However, given the nature of the issues concerning the alleged provision of LA/MSF in respect of the A350XWB which are before the Panel, and the absence from the record of the key information that is likely to be of direct relevance to the Panel's evaluation of those issues, it is already clear to us that we will need to carefully examine the actual LA/MSF agreements, project appraisals and business cases pertaining to the A350XWB in order to carry out our obligation under Article 11 of the DSU to make an objective assessment of the matter before us.[28] We consider the issues to be sufficiently delineated on the basis of the parties' first written submissions and that it is efficient and appropriate for the Panel to request those documents at this stage of the proceeding.[29] We regard the due process interests of both parties as being best served by the Panel requesting the information prior to the parties' respective rebuttal submissions, so that both parties have the opportunity to refer to that information in their rebuttals, at the meeting with the Panel, and in any written answers to questions that may also be put to them by the Panel.[30]

11. We are not persuaded by the European Union's arguments that to request the information at this point in the proceeding would result in unfairness to the European Union.[31] The European Union characterizes the United States' request that the Panel exercise its authority to request information pursuant to Article 13 of the DSU as an untimely request for a preliminary ruling, or preliminary "decision". However, as we have previously indicated, we do not share this understanding of the United States' request.[32] Requests for preliminary rulings ask a panel to resolve certain matters in dispute between the parties definitively prior to addressing other matters in dispute. By contrast, consideration of a request from a party that the Panel exercise its authority under Article 13 of the DSU involves a decision by the Panel as to whether the *Panel itself* will do something; namely, seek particular information which it deems appropriate and necessary to its resolution of matters in dispute - including preliminary matters. The United States has clarified that it does not seek a preliminary ruling on whether the European Union has met its burden of proof. We see no basis for treating the Article 13 request made by the United States as a request for a preliminary ruling and no basis for the conclusion that the United States' request is untimely in light of paragraph 14 of the Working Procedures adopted in this dispute.[33]

12. The European Union also characterizes the United States' Article 13 request as a unilateral attempt by the United States to amend the agreed timetable by pre-empting the Panel's plan to put questions to the parties at the stage of preparation for the substantive meeting with the parties.[34] We do not agree. Such a characterization incorrectly presumes that a panel's authority

[27] EU Comments, 23 August 2012, para. 16.

[28] While parties carry the burden of adducing evidence in support of their claims and defences, there are circumstances in which a party cannot reasonably be expected to meet that burden by adducing all relevant evidence required to make out its case; notably, when the information is in the exclusive possession of the opposing or a third party. As the Appellate Body has recognized, in such circumstances, a panel may be unable to make an objective assessment of the matter without exercising its authority under Article 13 of the DSU to seek out that information; Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 1139-1140.

[29] We note that while panels have delayed making requests under Article 13 when asked to do so at an early stage of the proceedings, before written submissions have been filed, in this case, the first written submissions have been filed, and the issues in dispute have been clarified by the parties to the extent that it is clear to the Panel that it will not be able to address those issues without particular information which is not currently on the record. Due process and the "prompt settlement of situations" called for in Article 3 of the DSU do not require a panel to delay seeking information merely because it has been prompted to consider the question by a party, rather than coming to the issue on its own. In this regard, even assuming that the United States' request were somehow untimely, we do not consider that this alone would warrant declining to exercise our authority to seek information pursuant to Article 13.

[30] The European Union argues that the Panel should first rule on its request for a preliminary ruling that LA/MSF is outside the scope of this proceeding, thereby rendering the United States' Article 13 request moot; EU Comments, 9 August 2012, para. 111. However, in order to discharge our obligation under Article 11 of the DSU, the Panel will require certain information in order to address the European Union's preliminary ruling request. It is therefore logical and necessary to request this information prior to evaluating the request for a preliminary ruling.

[31] EU Comments, 9 August 2012, paras. 36 and 43; EU Comments, 23 August 2012, para. 6.

[32] Communication of the Panel to the Parties, dated 24 July 2012, page 2.

[33] Moreover, even if the United States' request were considered to be untimely, we would not consider it appropriate to deny it solely for that reason. In our view, and in light of the Appellate Body's decision in *US – Large Civil Aircraft (2nd Complaint)*, a panel must take a request that it seek information under Article 13 of the DSU seriously, and consider the substantive question of whether it can make a decision consistently with Article 11 of the DSU in the absence of the requested information before denying such a request.

[34] EU Comments, 9 August 2012, paras. 36-43.

to seek information pursuant to Article 13 of the DSU is exercised through its ability to put questions to the parties. The authority vested in panels by Article 13 of the DSU is independent of the ability of panels to put questions to the parties, which is provided for in paragraph 8 of the Appendix 3 Working Procedures.[35] That the Panel indicated its intention to put questions to the parties prior to the substantive meeting does not limit whether or when it may seek information pursuant to Article 13 of the DSU.[36] Conversely, whether or not a panel seeks information pursuant to Article 13 of the DSU does not affect the panel's ability to put questions to the parties at any time.

13. Accordingly, pursuant to the authority provided us under Article 13 of the DSU we hereby request the European Union to provide the following documents to the Panel:

a. Agreements between the governments of France, Germany, Spain and the United Kingdom and EADS/Airbus (including any amendments, schedules, annexes and exhibits thereto), related to the development and/or financing of the A350XWB;

b. Related project appraisals by the governments of France, Germany, Spain and the United Kingdom related to the development and/or financing of the A350XWB;

c. Business cases provided by EADS/Airbus to the governments of France, Germany, Spain and the United Kingdom, or to any of Airbus' risk-sharing suppliers, regarding the A350XWB;

d. Documentation of any loans extended to EADS/Airbus by the *Kreditanstalt für Wiederaufbau* (including any amendments, schedules, annexes and exhibits thereto) for the development and/or financing of the A350XWB, and of disbursements pursuant to such loans for 2009, 2010, 2011 and 2012.

14. We consider this information to be necessary to ensure a proper adjudication of the relevant claims, including the European Union's request for preliminary rulings regarding the scope of this compliance proceeding.[37] This information is not publicly available and we see no means that

[35] Paragraph 8 of the Appendix 3 Working Procedures provides:

> The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

This provision is replicated in paragraph 8 of the Working Procedures adopted by the Panel in this proceeding.

[36] We note in this regard that the Panel indicated, in a communication conveying the draft timetable to the parties, that, "although not specified in the draft timetable, the Panel plans to send questions to the parties in advance of the meeting with the parties in order to assist the parties in preparing for the meeting." This statement does not suggest that the Panel was limiting its own authority to put questions to the parties "at any time" as provided for in the Working Procedures. Still less does it suggest that the Panel had determined to refrain from seeking information pursuant to its authority under Article 13 of the DSU until such time as it had put questions to the parties. Moreover, even had the Panel indicated such an intention, it has the authority to alter the timetable, and may do so of its own volition as circumstances may warrant (including as a result of an unrelated action or request of a party), or if directly requested to do so by a party. As the Appellate Body in *US – Shrimp* stated:

> It is also pertinent to note that Article 12.1 of the DSU authorizes panels to depart from, or to add to, the Working Procedures set forth in Appendix 3 of the DSU, and in effect to develop their own Working Procedures, after consultation with the parties to the dispute. … The thrust of Articles 12 and 13, taken together, is that the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to the facts.

Appellate Body Report, *US – Shrimp*, paras. 105-106.

[37] The Panel's request is narrower in scope than the United States' Article 13 request. We do not regard our request as being unreasonably broad in scope or unclear. We note that the European Union refers in several places in its first written submission to the "four A350XWB financing agreements" and also refers to the MSF loan extended by KfW to Airbus Operations GmbH, implying knowledge of the documents in question. See for example, European Union's first written submission, paras. 94, 95, 102, 103, 105, 107-109, 111,112 (referring to the four A350 XWB financing agreements) and 367 (referring to the MSF loan extended by KfW to Airbus Operations GmbH). Moreover, given the background of this proceeding, and the arguments and conclusions in the original Panel Report, we consider that the meaning of terms such as "EADS/Airbus" and "Airbus' risk-sharing suppliers" is sufficiently clear to allow the European Union to determine where the documents in question may be found.

might be used to procure it other than seeking it in accordance with Article 13 of the DSU.[38] Even if the information in question is not now physically within the possession of the European Union, it is in the possession of the relevant EU member States, or private parties in those member States, whose interests are being represented in this proceeding by the European Union.[39]

15. In the original proceeding, the Panel had the LA/MSF and other financing agreements, related project appraisals, and business cases for the Airbus aircraft at issue. In that proceeding, the DSB initiated an Annex V procedure at the United States' request in which the European Communities was asked, in the first instance, 352 questions by the United States and given six weeks to respond. Of those questions, 37 related to information concerning LA/MSF, and those questions covered all grants of LA/MSF since 1969 for all models of Airbus aircraft, and associated documentation. Given that the information which the Panel now seeks is much more limited in scope, we consider that a period of three weeks is adequate time to allow the European Union to submit the information. The European Union is therefore requested to provide the above information by the close of business on 25 September 2012.[40]

16. The European Union raises two further issues that we wish to address. The first is the concern expressed by the European Union as to the United States' apparent failure to destroy EU HSBI and BCI documents from the original proceeding as the European Union alleges it was required to do.[41] The European Union requests the Panel to resolve this issue before requesting any further confidential information from the European Union. The United States argues that there is no basis to criticize it for retaining BCI and HSBI that it was never instructed to destroy.[42]

17. Paragraph 57 of the Additional Working Procedures adopted in the original proceeding requires the destruction or return of documents containing BCI and HSBI after the Conclusion of the Panel Process as defined in paragraphs 3(a), (c), or (d), but makes no reference to paragraph 3(b). Paragraph 3(b) of those Procedures defines the "Conclusion of the Panel Process" as occurring when a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, as happened in the original proceeding. We recall that paragraph 58 of the Additional Working Procedures adopted in the original proceeding provides as follows:

> After the Conclusion of the Panel Process as defined in paragraph 3(b), the Panel will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI/HSBI governed by these Procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible.

[38] It appears that the United States sought to procure the information in question by asking for it during consultations. The European Union has not indicated why the information requested during the consultations was not provided and there is no basis for the Panel to conclude that the failure to produce the information was justified, or that we are prevented from seeking that information under Article 13 of the DSU. Additionally, irrespective of whether the United States was entitled to request initiation of an Annex V procedure for this proceeding (an issue we need not decide), we note that paragraph 9 of Annex V expressly provides that nothing in the Annex V information-gathering process "shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process." See also Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, footnote 1117. We see no basis to require a WTO Member to resort to municipal law processes to procure information for purposes of WTO dispute settlement, as suggested by the European Union, even assuming such processes would be available and effective, something which we cannot assess. We emphasize that we seek the requested information because we consider it appropriate to do so in light of our responsibilities in this dispute.

[39] We make no conclusions as to whether the European Union formally "represents" its member States, or any commercial stakeholders with interests at stake in this dispute. However, as in the original proceeding, it is the European Union which is appearing before the Panel and making submissions, not its individual member States. See, Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.169-7.177 (Decision on Proper Respondent). We recall that in the original proceeding, the European Communities was able to produce documents of the nature and type requested in this proceeding, both in the Annex V process and in response to requests from the Panel.

[40] We also note that original language documents in French, Spanish and English were submitted in the original proceeding without translation in many instances. As regards documents in German, which is not a working language of the WTO, the Panel is prepared to address specific concerns identified by the European Union regarding translation of German-language documents by this date.

[41] European Union's first written submission, para. 48, EU Comments, 9 August 2012, para. 110; EU Comments, 23 August 2012, paras. 32-38.

[42] US Reply, 16 August 2012, para 25.

The question of destruction or return of documents containing BCI and HSBI after adoption of Panel and Appellate Body reports following the conclusion of the appellate process is not explicitly addressed in the Additional Working Procedures adopted by the Panel in the original dispute.

18. We therefore request the United States to respond to the European Union's allegations in paragraph 48 of its first written submission, with specific reference to the materials cited at footnotes 40-43, and the terms of the Additional Working Procedures adopted in the original dispute. We will then invite the European Union to comment, if it so wishes, on the United States' response. In each case, the Panel would like the parties to suggest what actions, if any, this Panel should now take in respect of the BCI/HSBI from the original proceeding, including with respect to any evidence submitted in this compliance proceeding which was BCI/HSBI in the original proceeding.

19. However, we regard the issue of whether BCI/HSBI material submitted in the original dispute has been dealt with in conformity with the Additional Working Procedures in that proceeding to be separate from the question whether it is appropriate for this Panel to request information pursuant to Article 13 of the DSU for purposes of this proceeding. There is no allegation that the United States has disclosed confidential information to persons not authorized to view it, which might implicate the confidentiality of any new information submitted at this stage.[43] We consider allegations of non-compliance with the procedures put in place to protect the confidentiality of certain information in the original dispute to be extremely serious. However, we do not consider it necessary to resolve whether the United States failed to destroy confidential information in the record of the original dispute in violation of an obligation to do so before seeking information from the European Union information which we consider necessary for us to discharge our obligations in this proceeding.

20. The second issue raised by the European Union is its request that, should the Panel request the European Union to provide information pursuant to Article 13 of the DSU at this stage of the proceeding, it equally and within the same timeframe, should request the United States to produce certain information concerning the financing, and/or development of the Boeing 787 and other Boeing large civil aircraft, including business cases relating to those aircraft.[44] The European Union submits that such documents are critical for the Panel to conduct a thorough review of the claims made by the United States, which involve unsupported assertions regarding the Boeing 787 and other Boeing aircraft and the circumstances in which they were financed, developed, produced and marketed. The United States asserts that there is no substantive need for the information in question, asserting that it raises no claims regarding financing to Boeing, and that the European Union's arguments regarding findings of subsidization in *US – Large Civil Aircraft (2nd Complaint)* do not require additional evidence for the Panel to evaluate them.[45]

21. We understand that the information requested by the European Union relates to alleged subsidization of Boeing LCA, and is sought in connection with the European Union's arguments concerning "non-subsidized like product" in Article 6.4 of the SCM Agreement. Unlike the situation before us with respect to the United States' allegations concerning the financing of the A350XWB, and the European Union's response to those arguments, the United States has not yet had an opportunity to respond to the European Union's arguments concerning the alleged subsidization of Boeing LCA. Presumably it will do so in its rebuttal submission, at which point it would have the opportunity to submit relevant documents. In addition, we recall that in the original dispute, the Panel concluded that Article 6.4 is not the exclusive means for demonstrating displacement or impedance of exports for purposes of a finding of serious prejudice under Articles 6.3(b) of the SCM Agreement. The United States did not rely on Article 6.4, and the Panel therefore did not address the question whether there was a "non-subsidized like product" and made no determinations in that regard. Thus, the Panel rejected the arguments of the European Communities that subsidization of Boeing LCA precluded a finding of serious prejudice in the form of displacement or impedance of exports.[46] That decision by the Panel was not appealed, and was therefore adopted by the DSB. While acknowledging the lack of Appellate Body review in its first

[43] Notwithstanding its assertion concerning the United States' alleged failure to comply with the Additional Working Procedures adopted in the original proceeding, the European Union submitted BCI and HSBI in connection with its first written submission in this proceeding.

[44] EU Comments, 9 August 2012, paras. 116-117.

[45] US Reply, 16 August 2012, para. 30.

[46] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1764-7.1771, 7.1798-7.1800.

written submission[47], the European Union argues that in light of the decision in *US – Large Civil Aircraft (2nd Complaint)*, a multilateral determination that the "like products" to which the United States refers in this case are subsidized, the situation has changed and that the Panel should therefore consider this matter.[48]

22. However, it is not yet clear to us that the Panel will have to make a substantive determination as to whether the 787, or any other Boeing LCA, benefits from subsidies and we consider that it is premature to request information relevant to an issue which it is not apparent the Panel will have to address.[49] In these circumstances, because we cannot at this juncture conclude that the requested information is likely to be necessary to ensure due process and a proper adjudication of the relevant claim, we decline to seek the information requested by the European Union at this stage of the proceeding.[50]

[47] European Union's first written submission, para. 656,

[48] European Union's first written submission, para. 658.

[49] Assuming the Panel were to accept the European Union's argument and consider this matter, it would seem that the determination in *US – Large Civil Aircraft (2nd Complaint)* would be binding on the question of subsidization of at least some models of Boeing LCA. In this regard, we note that the European Communities made similar arguments concerning subsidization of Boeing LCA having been determined on a multilateral basis in WTO dispute settlement, referring to "tens of millions of dollars" received by Boeing pursuant to prohibited export subsidies applied to LCA. Panel Report, *EC and certain member States – Large Civil Aircraft*, footnote 5262. On the other hand, assuming the Panel were to conclude that the United States is once again not proceeding under Article 6.4 of the SCM Agreement, the question of a "non-subsidized like product" would not be a matter necessitating resolution, as it was not in the original dispute.

[50] We also note the breadth of the European Union's request, which covers all Boeing large civil aircraft, and is unlimited in time.

ANNEX E-2

THE EUROPEAN UNION'S ARTICLE 13 REQUEST OF 23 NOVEMBER 2012

(Panel ruling issued on 14 December 2012)

1 Introduction

1. By letter dated 23 November 2012, the European Union requested the Panel to exercise its authority under Article 13 of the Understanding on Rules and Procedures governing the Settlement of Disputes ("DSU") to seek information from the United States.[1] The United States responded to the European Union's request on 29 November 2011.[2] The European Union submitted its reply to the United States response on 6 December 2012.[3]

2. The Panel has carefully considered all the arguments made by the parties in the foregoing exchanges as well as all relevant claims and arguments made in the United States' first and second written submissions and the European Union's first written submission. The Panel has concluded that the requested information is not necessary for its evaluation of the United States' allegations of lost sales and displacement. The Panel therefore denies the European Union's Article 13 request and declines to seek the information requested by the European Union at this stage of the proceeding.

2 Article 13 of the DSU

3. Article 13.1 of the DSU provides:

> "Each panel shall have the right to seek information and technical advice from any individual or body which it seems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information."

4. Article 13.1 makes a grant of discretionary authority to panels enabling them to seek information from any relevant source, as they deem appropriate in a particular case.[4] The Appellate Body has stated that Article 13.1 imposes no conditions on the exercise of this discretionary authority.[5] Moreover, in *Canada – Aircraft*, the Appellate Body observed that there is nothing in either the DSU or the SCM Agreement to support the assumption that a Member's duty to respond promptly and fully to a panel's request for information arises only after the opposing party to the dispute has established a *prima facie* case that its complaint or defence is meritorious.[6] As the Appellate Body stated:

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[1] Letter of the European Union to Chairman of the Panel, dated 23 November 2012 (hereafter, "EU Article 13 request").

[2] Letter of the United States to the Chairman of the Panel, dated 29 November 2012 (hereafter "US response". The Panel had previously given the United States until 4 December 2012 to respond, and allowed for a reply from the European Union no later than 11 December. Communication from the Panel to the Parties, dated 28 November 2012. In light of the early response from the United States, and having been requested by the United States to do so, the Panel amended the deadline for the European Union to reply to 6 December 2012. Communication from the Panel to the Parties, dated 30 November 2012.

[3] European Union, Comments on the US Comments on EU request for Article 13.1 Questions and EU Request to fix the new time-limit for the filing of the EU Second Written Submission at 31 January 2013, 6 December 2012 (hereafter, "EU Comments, 6 December 2012").

[4] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 84; Appellate Body Report, *EC – Hormones*, para. 147; Appellate Body Report, *US – Shrimp*, para. 106.

[5] Appellate Body Report, *Canada – Aircraft*, para. 185.

[6] Appellate Body Report, *Canada – Aircraft*, para. 192.

> "To the contrary, a panel is vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs. A panel may need such information before or after a complaining or a responding Member has established its complaint or defence on a *prima facie* basis. A panel may, in fact, need the information sought in order to evaluate evidence already before it in the course of determining whether the claiming or the responding Member, as the case may be, has established a *prima facie* case or defence."[7]

5. In *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body stated that in considering whether to exercise its authority under Article 13 of the DSU, particularly where a party has made an explicit request that it do so, a panel should have regard to considerations such as what information is needed to complete the record, whose possession it lies within, what other reasonable means might be used to procure it, why it has not been produced, whether it is fair to request the party in possession of the information to submit it, and whether the information or evidence in question is likely to be necessary to ensure due process and a proper adjudication of the relevant claim(s).[8]

3 Parties' Arguments with respect to the information request

6. The European Union has requested that the Panel seek information which, it asserts generally, is necessary for the Panel to evaluate the United States' claims of lost sales and displacement. Specifically, according to the European Union,

a. the requested information on the pace of development and anticipated entry into service dates for Boeing 787 aircraft is necessary for the Panel's objective assessment of the US lost sales and displacement claims, as it will help the Panel assess whether there exist any disincentives for airlines seeking near-term delivery of an aircraft to purchase 787 aircraft, and to take those considerations into account when assessing the US lost sales and displacement claims;

b. the requested information on entry into service for 737MAX aircraft is necessary to enable the Panel, in assessing US lost sales and displacement claims, to take into account uncertainty surrounding first delivery positions for Boeing's 737 MAX programme, and whether that uncertainty functions as a disincentive for airlines to purchase these aircraft;

c. the requested information on possible 787 delivery dates is necessary for the Panel to take into account Boeing's ability to deliver 787 aircraft and the pace of those deliveries, which will help the Panel assess whether there exist any disincentives for airlines seeking near-term delivery of an aircraft to purchase 787 aircraft, and to take those considerations into account when assessing the US lost sales and displacement claims;

d. the requested information on possible 737MAX delivery dates is necessary for the Panel to take into account Boeing's alleged inability to deliver 737 MAX aircraft, and the pace of those deliveries, which will help the Panel assess whether there exist any disincentives for airlines seeking delivery of an aircraft to purchase 737 MAX aircraft and to take those considerations into account when assessing the US lost sales and displacement claims;

e. the requested documentation of Boeing's final offers to AirAsiaX, AirAsia, Asiana, and Cebu Pacific Air is necessary for the Panel's objective assessment of the US lost sale claims to these carriers involving A320neo aircraft and A350XWB aircraft, which would appear to turn in substantial part on the availability of delivery positions and other terms of Boeing's final offer;

f. the requested documentation of Boeing's final offer to Malaysia Airlines is necessary for the Panel's objective assessment of the US lost sale claim for Malaysia Airlines involving the A330-200F, which would appear to turn in substantial part on the quality of the 767 Freighter aircraft and other terms of Boeing's final offer;

[7] Appellate Body Report, *Canada – Aircraft*, para. 192 (original emphasis).
[8] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1140.

g. the requested documentation of Boeing's final offer to Cathay Pacific is necessary for the Panel's objective assessment of the US lost sale claim involving A350XWB aircraft, which would appear to turn in substantial part on Boeing's ability to actually offer for sale the aircraft allegedly offered, and the terms of Boeing's offer;

h. the requested extracts from the Boeing purchase agreement with Ethiopian Airlines for the 787 is necessary for the Panel's objective assessment of the US lost sale claim for Ethiopian Airlines, which would appear to turn in substantial part on the 787 model(s) it initially ordered in 2005;

i. the requested Boeing presentations provided to potential customers outlining Boeing's views concerning the strengths, weaknesses, critical issues and strategic issues for its proposed aircraft for a number of its lost sales claims are necessary because the United States has provided such documentation for some but not all of its lost sales claims. The information for each of the orders alleged to be lost sales is necessary to enable the Panel to undertake an objective assessment of the US claims, which will require it to assess why the United States has chosen to withhold this document for certain sales covered by its lost sales claims, including to assess whether the documents reveal non-attribution factors;

j. the requested information regarding Boeing's 2012 standard marketing presentations for each of its 767, 777 and 747-8 is necessary for the Panel to objectively assess the alleged competition between Airbus and Boeing freighter aircraft; and

k. the requested presentations made to Boeing's Board of Directors during 2011 and 2012 addressing the possibility of the launch of a stretched version of the 787 and an improved version of the 777 are necessary to enable the Panel to objectively assess the US lost sales claims in light of US allegations, in the context of a number of its lost sales claims, that Boeing offered a stretched version of the 787 or an improved version of the 777, without proffering other information that would help the Panel assess whether Boeing had decided for reasons other than the alleged subsidies to defer the launch of these aircraft.[9]

7. The United States does not consider the information to be relevant to its arguments relating to lost sales and displacement in the second written submission, and asserts that the European Union does not need the information to argue that the United States has failed to make a *prima facie* case with respect to its claims.[10] Moreover, the United States contends that it is inappropriate to use Article 13 to provide information to enable the European Union to make its own case. In addition, the United States considers that it is late in the proceedings for this request, given that the United States' claims of lost sales and displacement were set out in its first written submission, filed in May, and asserts that the request is an effort to delay these proceedings.

4 Information requested with respect to the United States' allegations of lost sales

8. The Appellate Body has stated, with respect to what constitutes a "lost" sale within the meaning of Article 6.3(c) of the SCM Agreement:

> "We consider that a sale that is "lost" is one that a supplier "failed to obtain". We further understand lost sales to be a relational concept that includes consideration of the behaviour of both the subsidized firm(s), which must have won the sales, and the competing firm(s), which allegedly lost the sales."[11]

[9] EU Article 13 request, Appendix.

[10] The United States did not respond individually to the European Union's questions and justifications, but did indicate that it would provide detailed comments should the Panel request it to do so, asking that any such process not result in any further delay to this proceeding. US Response, page 4.

[11] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1214, *quoting New Shorter Oxford English Dictionary*, p. 1632. *See also*, Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1052.

> "{A} lost sales claim may be supported with evidence of lost sales taking place throughout a geographical and product market, or with evidence of particular sales campaigns occurring within that market. "[12]

Lost sales are "significant" under Article 6.3(c) if they are "important, notable or consequential."[13]

9. In terms of possible approaches for analyzing a claim of significant lost sales, the Appellate Body observed that:

> "While a two-step approach to the assessment of lost sales is permissible, in our view, the most appropriate approach to assess whether lost sales are the *effect* of the challenged subsidy is through a unitary counterfactual analysis. This would involve a comparison of the sales actually made by the competing firm(s) of the complaining Member with a counterfactual scenario in which the firm(s) of the respondent Member would not have received the challenged subsidies. There would be lost sales where the counterfactual analysis shows that, in the absence of the challenged subsidy, sales won by the subsidized firm(s) of the respondent Member would have been made instead by the competing firm(s) of the complaining Member."[14]

10. In *EC and certain member States – Large Civil Aircraft,* the Appellate Body considered how the concept of a "lost" sale applies under the conditions of competition in the LCA industry when it rejected the European Union's challenge to the original Panel's finding that Boeing lost the A380 launch order placed by Emirates Airlines:

> "Given the conditions of competition in the LCA industry, it was not necessary for Boeing to have made a formal offer to Emirates Airlines – or "turn up" to use the European Union's expression – for the sales to qualify as sales that Boeing "failed to obtain." As the Panel explained, even in the absence of a formal offer from Boeing, Emirates could be expected to have considered the products manufactured by Boeing before making its purchase decision."[15]

11. In the context of an analysis of the alleged lost sales in accordance with the above elements, we fail to see the relevance of the information sought by the European Union to the question whether the effect of alleged subsidies to Airbus LCA was lost sales of competing Boeing LCA. The European Union does not dispute that Boeing "failed to obtain" the sales in question, or that Airbus was successful in winning the relevant sales. Nor does the European Union dispute the significance of the sales allegedly lost, in the sense of their importance to Boeing. Arguably, the European Union appears to be seeking the information in order to make the point that in each of the specific alleged lost sales at issue, potential entry into service or delivery dates, or details concerning the features and qualities of the particular Boeing LCA being offered, or the specific possibilities with respect to potential to-be-developed Boeing LCA offered, might have constituted a disincentive to ordering from Boeing. However, even assuming that this information might demonstrate weaknesses in the Boeing offer in a particular sales campaign, it is difficult, in the light of the interpretation of "lost sales" and the analytical framework outlined above, to see how this might undermine the conclusion that the sales at issue were lost by Boeing.[16]

12. The question for the Panel then is whether the United States can establish that any of the allegedly lost sales were caused by the alleged subsidies. In particular, the question before the Panel is whether, in the absence of the alleged subsidies, the sales made by Airbus would have been made by Boeing. Our understanding is that the basic premise of the United States' claims of lost sales caused by subsidies is that, as the Appellate Body concluded with respect to the lost sales found in the original dispute, absent the subsidies, Airbus would not have been able to offer

[12] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1230.
[13] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1052.
[14] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1220.
[15] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1223.
[16] The European Union does argue that Boeing and Airbus LCA do not compete in the three product markets identified by the United States, and thus that in some of the alleged lost sales, the LCA offered by Boeing were not competitive, and thus that the sale cannot be considered to have been lost. However, this line of argument does not rest on an evaluation of the specifics of any given sales campaign, but on an evaluation of the relevant products and competition. Moreover, we note that the European Union has not argued that, or how, the requested information is relevant to such an analysis.

the LCA it did offer in these sales campaigns, and thus, as the only other competitor in the market, Boeing[17] would have made those sales.[18] Since this counterfactual analysis rests on the effect of subsidies on the introduction of Airbus LCA to the market, we fail to see the relevance of the requested information to the analysis of lost sales in line with the considerations set out by the Appellate Body. Even assuming for purposes of this discussion that the information requested might relate to "non-attribution" factors, we fail to see how this would affect the consideration of an argument that, in the absence of subsidies, Airbus would not have been able to offer the LCA that were ultimately purchased by the customers involved in the alleged lost sales, and thus the US LCA industry would not have lost those sales. Finally, we fail to see the relevance to our task of evaluating the United States' lost sales claims of information concerning Boeing's own views concerning the strengths, weaknesses, critical issues and strategic issues for proposed aircraft, 2012 standard Boeing marketing presentations, and presentations to Boeing's Board of Directors in 2011 and 2012 concerning the possible launch of variant aircraft to an evaluation of lost sales in line with the considerations set out by the Appellate Body. We therefore conclude that the information sought by the European Union is not necessary to the Panel's proper evaluation of the United States' allegations of lost sales.

5 Information requested with respect to the United States' allegations of displacement

13. With respect to the "displacement" of imports or exports of the like product, the Appellate Body stated in *EC and certain member States – Large Civil Aircraft* that:

> "{W}e understand the term displacement to connote that there is a substitution effect between the subsidized product and the like product of the complaining Member. This means that displacement arises under subparagraph (a) of Article 6.3 where the effect of the subsidy is that imports of a like product of the complaining Member are substituted by the subsidized product in the market of the subsidizing Member. Similarly, under subparagraph (b), displacement arises where exports of the like product of the complaining Member are substituted in a third country market by exports of the subsidized product."[19]

14. The Appellate Body explained that "where a complainant puts forward a case based on the existence of displacement as a directly observable phenomenon and the panel opts to examine it under a two-step approach, as was done in this dispute, displacement arises under Article 6.3(a) of the SCM Agreement where imports of a like product of the complaining Member are declining in the market of the subsidizing Member, and are being substituted by the subsidized product."[20] The same standard would apply for Article 6.3(b) according to the Appellate Body: "displacement arises where exports of the like product of the complaining Member are declining in the third country market concerned, and are being substituted by exports of the subsidized product."[21] The Appellate Body also noted, regarding the elements of displacement, that displacement must be "discernible," the identification of displacement "should focus on trends in the markets, looking at both volumes and market shares," and the trend has to be "clearly identifiable and an assessment based on a static comparison of the situation of the subsidized product and the like product at the beginning and at the end of the reference period would be inadequate."[22]

15. In the context of an analysis of displacement based on the foregoing elements, we fail to see the relevance of information concerning anticipated dates of entry into service of Boeing LCA or delivery positions to the question whether the effect of subsidies to Airbus LCA was displacement of competing Boeing LCA in certain geographic markets. A finding of displacement would be based on an evaluation of trends in the specified geographic markets based on the number of aircraft actually delivered during a relevant reference period. Similarly, since an evaluation of

[17] Or, in the event of a US LCA industry comprising Boeing and competitor(s) (one of the other counterfactual scenarios posited by the Panel in the original dispute), by the US LCA industry.

[18] The European Union refers, in the context of alleged lost sales in the single-aisle market, to the potential market entry of other aircraft manufacturers (specifically, Bombardier). However, there is no allegation or evidence that any other aircraft manufacturer was involved in any of the sales campaigns at issue in the United States' lost sales allegations, much less any argument or evidence to suggest that any such manufacturer would have obtained any sales not made by Airbus, rather than Boeing.

[19] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1160.

[20] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1170.

[21] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1170.

[22] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 1170-71.

displacement is based on aggregated data for competing products in a particular geographical market, we fail to see the relevance of specific aspects of the competition between LCA manufacturers in any given sales campaign to the determination. Again, we understand the United States' argument to be essentially that, in the absence of the subsidies, Airbus would not have had the LCA it was able to deliver, and thus Airbus LCA would not have displaced exports or imports of Boeing (or US LCA industry) aircraft. We fail to see how consideration of the requested information concerning delivery positions and entry into service dates would affect our evaluation of the United States' claims of displacement in line with the considerations set out by the Appellate Body. We therefore conclude that the information sought by the European Union is not necessary to the Panel's proper evaluation of the United States' allegations of displacement.

6 Other issues

16. The European Union's arguments indicate that, in its view, the United States should have put the requested information on the record with its second written submission, having failed to do so with its first written submission. The United States clearly considers the information not relevant to support its claims and arguments, and that therefore there was no reason to submit it. We see no basis for a conclusion that the United States should have somehow predicted that the European Union might wish to raise arguments it had not made in its first written submission, and should have submitted, of its own volition, evidence that might support such arguments with its second written submission.

17. The United States argues that, to the extent the European Union argues that the United States has failed to make a *prima facie* case, additional information is not necessary to enable the European Union to respond to the United States' claims. The United States points out that, with the exception of one question which refers to an alleged lost sale discussed in the United States' second written submission, all of the information requested by the European Union relates to lost sales and displacement claims and arguments set out in the United States' first written submission, and that the European Union responded to those claims and arguments in its first written submission with no indication that it was lacking necessary information to do so. The European Union justifies the timing of its request on the basis that the need for the information requested only became apparent during the process of reviewing the US second written submission, filed on 19 October 2012. The European Union implies that this process prevented it from realizing earlier the lack of necessary information on the record, and notes that it is still in the process of reviewing the United States' second written submission.[23] The European Union contends that the information is needed to ensure it has an adequate opportunity to prepare its own second written submission.

18. We consider it noteworthy that the European Union responded fully to the United States' first written submission, in which the facts and arguments supporting the United States' lost sales and displacement claims were set out, and for which supporting evidence was submitted, without any indication that additional evidence might be necessary for it to rebut the United States' claims. Indeed, the European Union's first line of argument is that the United States failed to make a *prima facie* case of, *inter alia*, lost sales and displacement, an argument which does not require additional evidentiary support. There is very little further elaboration with respect to those claims in the United States' second written submission, and certainly nothing that would prompt a need for additional information, as requested by the European Union, that did not previously exist. In our view, the requested information is at most relevant to possible European Union's arguments seeking to demonstrate that the alleged lost sales and displacement were not caused by subsidies, but by other factors.[24] We do not consider that the European Union was entitled to wait until after the United States filed it second written submission, which did not elaborate on the claims, arguments, and evidence concerning lost sales and displacement, to request a broad array of information of little relevance to our evaluation of the claims and arguments put forward by the

[23] The European Union asserts that the US second written submission is "a very substantial document" and includes numerous exhibits, some of which are "lengthy and substantial", as well as alleging that the submission filed on 19 October "transpired to be the preliminary version" of the US second written submission, requiring "detailed and sustained" exchanges of views, further versions, and the submission of revised exhibits, over a three week period. The United States, in opposing the European Union's separate request for an extension of time to file its second written submission, contends the complexity of issues, the length of the submission, and the submission of export reports as exhibits are not "unexpected development[s]."

[24] We recall that the European Union did not, for the most part, address the circumstances of the individual alleged lost sales in its first written submission, choosing to make its arguments more generally.

United States. Whether or not to grant an Article 13 request for information is governed by a panel's need for the information to evaluate the claims and arguments of the parties consistently with its obligations under Article 11 of the DSU, and as discussed above, we do not consider that such a need is the case here. In our view, at this stage of the proceeding, where the European Union, the party seeking information, has already had a full opportunity to respond to the claims and arguments of the United States, and the information requested relates almost exclusively to matters fully addressed in the first written submission of the United States, it would not be fair or appropriate for us to request information that might enable the European Union to make arguments in its rebuttal which it never sought to make in its first written submission, and which have no basis in the United States' second written submission to which it is now preparing a response.[25]

7 Conclusion

19. In light of the foregoing, it is clear to the Panel that the requested information is not likely to be necessary to ensure due process and a proper adjudication of the relevant claims. We therefore deny the European Union's request and decline to seek the information requested by the European Union at this stage of the proceeding.

[25] We stress that we do not suggest that the European Union was required to make a *prima facie* case before asking the Panel to exercise its Article 13.1 authority to request information. However, in our view, a party is generally not entitled to have the Panel seek information from the other party at this stage of the proceeding without having presented some claim, defence, or argument for the consideration of which the information is likely to be necessary for the Panel. We also note the breadth of the European Union's request.

ANNEX F

MAIN PROCEDURAL RULINGS OF THE PANEL

ANNEX F-1

THE EUROPEAN UNION'S REQUEST CONCERNING THE QUESTION WHETHER THE UNITED STATES WAS REQUIRED TO RETURN OR DESTROY MATERIALS CONTAINING BCI AND HSBI FROM THE ORIGINAL PROCEEDING

(Panel ruling issued on 24 October 2012)

1. The Panel is in receipt of the response of the United States to EU allegations regarding the handling of BCI/HSBI information, dated 5 October 2012[1], submitted in response to a request from the Panel in its communication of 4 September 2012.[2] The Panel is also in receipt of the comments of the European Union on the US Response, dated 16 October 2012[3], which were submitted in response to a communication from the Panel dated 11 October 2012.[4]

2. At issue between the parties is whether BCI/HSBI submitted in the original proceeding should have been returned or destroyed such that the United States may not refer to it for purposes of this compliance proceeding. We recall that BCI/HSBI was submitted in the original proceeding pursuant to the BCI/HSBI Procedures adopted by the panel in that proceeding.[5] The interpretive question before the Panel is whether the Original BCI/HSBI Procedures required the parties to destroy or return BCI/HSBI submitted in the original proceeding.

3. The United States considers that they do not, based on the text of paragraphs 57, 58 and the defined term "Conclusion of the Panel Process" in paragraph 3 of those procedures. Thus, according to the United States, it has not acted inconsistently with the Original BCI/HSBI Procedures in referring to such information in its first written submission in this compliance proceeding. Indeed, the United States considers that it is free to refer to BCI/HSBI submitted in the original proceeding in its other submissions to the Panel in this proceeding. The United States considers that this interpretation makes sense, because BCI/HSBI that was before the panel in the original proceeding will clearly be relevant to the compliance Panel's assessment of whether there has in fact been compliance with the recommendations and rulings of the DSB in the original proceeding.

4. The European Union considers that the United States' interpretation of the Original BCI/HSBI Procedures would mean that, because the original Panel Report was appealed, there was and is no obligation on the parties to return or destroy BCI/HSBI submitted during the original proceeding. Such an interpretation is unreasonable and contrary to the whole rationale of the procedures for protection of confidential information. The European Union requests the Panel to adopt a different interpretation of the Original BCI/HSBI Procedures, which would require the United States to have returned or destroyed BCI/HSBI submitted during the original proceeding within a reasonable period following adoption of the original Panel Report, as modified by the Appellate Body Report. The consequence of such an interpretation is that the United States is not authorized to refer to BCI/HSBI submitted during the original proceeding in this compliance proceeding (a circumstance that the European Union is exceptionally prepared to overlook with respect to the United States' first written submission only). Had the United States wanted to refer to such information in the compliance proceeding, it should have requested it from the European Union through an Annex V procedure.

5. The Original BCI/HSBI Procedures are drafted in such a way that the obligation to destroy or return BCI/HSBI documents applies depending on the way in which the panel proceeding is concluded. Where the "Conclusion of the Panel Process", as defined in paragraph 3, is through an

[1] United States' Response to EU allegations regarding the handling of BCI/HSBI information, dated 5 October 2012 (hereafter "US Response").

[2] Communication of the Panel to the Parties, 4 September 2012, para. 18.

[3] European Union's letter to the Chairman of the Panel, dated 16 October 2012 (hereafter "EU Comments").

[4] Communication of the Panel to the Parties, 11 October 2012.

[5] Additional Working Procedures for DS316 - Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information, 9 November 2007 (hereafter, "Original BCI/HSBI Procedures").

appeal to the Appellate Body, paragraph 58 applies. The plain language of paragraph 58 does not contain any obligation to destroy or return BCI/HSBI, but merely refers to the transmission to the Appellate Body of BCI/HSBI separately from the rest of the record. It is only where the panel process concludes in the manner envisaged in subparagraphs (a), (c) or (d) that there is an express obligation, as clearly set out in paragraph 57, to destroy or return BCI/HSBI.

6. The European Union argues that following the appeal, the Panel Report was adopted, as modified by the Appellate Body Report, and thus that there was a "Conclusion of the Panel Process" as described in subparagraph 3(a) at that point, and a consequent obligation to return or destroy under paragraph 57. However, paragraph 3 defines the "Conclusion of the Panel Process" as the *earliest* to occur of the situations described in subparagraphs (a) through (d). Our reading of the Original BCI/HSBI Procedures is that, when the Panel Report was adopted as modified by the Appellate Body Report, subparagraph (a) was not applicable as this was not the earliest to occur of the events in (a) through (d). Plainly, the situation in subparagraph (b), namely, notifying the DSB of an appeal pursuant to Article 16.4 of the DSU, had already occurred. We are unable to agree with the interpretation of paragraphs 3 and 57 of the Original BCI/HSBI Procedures proposed by the European Union because it requires overlooking the reference to "earliest to occur" in paragraph 3.

7. In sum, the Original BCI/HSBI Procedures do not, in our understanding, impose an obligation on the parties to destroy or return BCI/HSBI in the situation in which the Panel Report was appealed. We note that this gap is addressed in the BCI/HSBI Procedures adopted by the Panel in this compliance proceeding (the New BCI/HSBI Procedures).[6]

8. Based on the foregoing, we conclude the United States did not breach the Original BCI/HSBI Procedures in referring in its submissions in this compliance proceeding to BCI/HSBI submitted during the original proceeding. No further action is required on our part in this regard, and both parties are free to refer to BCI/HSBI submitted during the original proceeding in the context of this proceeding, provided, of course, that the New BCI/HSBI Procedures are respected.[7]

9. The United States has further requested that the Panel consider revising the New BCI/HSBI Procedures to require the parties to destroy or return BCI/HSBI submitted during the compliance proceeding only at the conclusion of subsequent proceedings (including under Article 22.6 of the DSU) in this dispute. In our view, paragraphs 63 and 65 of the New BCI/HSBI Procedures make clear that, following adoption by the DSB of an Appellate Body Report in this compliance proceeding, there is an obligation to destroy or return all documents within a period to be fixed by the Panel. Indeed, we consider that paragraph 65 of the New BCI/HSBI Procedures was revised specifically in order to establish such an obligation in view of the lack of such obligation in the Original BCI/HSBI Procedures in the situation in which the report of the compliance Panel is appealed

10. Consequently, we do not consider it necessary or appropriate to make the requested revision to the New BCI/HSBI Procedures at this time. We would encourage the parties to discuss this issue with a view to arriving at a mutually acceptable arrangement for the use of BCI/HSBI in any subsequent proceedings that arise from this dispute.

[6] Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information, dated 12 July 2012 (hereafter "New BCI/HSBI Procedures"). Paragraph 65 of the New BCI/HSBI Procedures (which is the equivalent provision to paragraph 58 of the Original BCI/HSBI Procedures) expressly provides that following adoption by the DBS of the Appellate Body report pursuant to Article 17.4 of the DSU, or a decision by the DSB by consensus not to adopt the Appellate Body report pursuant to Article 17.4 of the DSU, the provisions of, inter alia, paragraph 63 (requiring destruction or return of all material containing BCI/HSBI within a period to be fixed by the Panel) shall apply.

[7] We note that there is no allegation that the BCI or HSBI information at issue has been disclosed to any person not authorized to have access to such information in this proceeding.

ANNEX F-2

THE EUROPEAN UNION'S REQUESTS OF 28 MAY 2013 CONCERNING: (I) THE UNITED STATES' FULL HSBI VERSION APPENDIX AND HSBI EXHIBITS SUBMITTED IN CONJUNCTION WITH ITS ANSWERS TO THE PANEL'S FIRST SET OF QUESTIONS; AND (II) THE UNITED STATES' ALLEGED VIOLATIONS OF THE BCI/HSBI PROCEDURES

(Panel ruling issued on 5 June 2013)

1. The Panel refers to the European Union's request for an interim ruling of 28 May 2013 concerning a number of matters related to the United States' answers to the Panel's questions to the parties issued on 23 April 2013 ("Panel's questions"), and the United States' comments on the European Union's request, which were received on Friday 31 May 2013.

2. In this communication, the Panel addresses the European Union's requests for rulings with respect to: (i) the United States' Full HSBI Version Appendix ("HSBI Appendix") submitted in conjunction with its answers to the Panel's questions; (ii) the United States' HSBI exhibits submitted in conjunction with its answers to the Panel's questions; and (iii) alleged violations of the Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information ("BCI/HSBI Procedures").

3. The European Union has also requested the Panel to reject certain arguments and evidence on the grounds that they should have been addressed by the United States earlier in these proceedings.[1] The Panel will rule on this aspect of the request as soon as possible.

1 THE UNITED STATES' FULL HSBI VERSION APPENDIX

4. The European Union asserts that, on 24 May 2013, the United States provided the European Union with only one locked CD containing the HSBI Appendix submitted in conjunction with its answers to the Panel's questions. The European Union submits that paragraph 58(g) of the BCI/HSBI Procedures requires the United States to provide two such CDs. The European Union explains that the United States' failure to provide two CDs means that its agents for this dispute do not have access to the HSBI Appendix in the short time available to prepare comments on the United States' answers to the Panel's questions. The European Union argues that extending the deadline for the parties to comment on each other's answers to the Panel's questions beyond 12 June 2013 will exacerbate the prejudice it has suffered, as members of its delegation have scheduled commitments in the two weeks following 12 June 2013, and thereafter, on 27 June 2013, the European Union will receive the United States' first written submission in the *US – Large Civil Aircraft (Article 21.5)* dispute. In addition, the European Union argues that any extension of the deadline for both parties would allow the United States to benefit from their own breach of the rules. Thus, the European Union requests that the Panel reject the United States' HSBI Appendix as untimely filed.[2]

5. The United States expresses regret for this oversight but points out that the European Union could have advised the United States of this problem on 24 May when it received the first CD, with a view to arranging with the United States for delivery of the second CD to Geneva or Brussels by 27 May 2013. Instead, the European Union chose to formally complain to the Panel on 28 May; a choice which was not geared to minimize delay or any prejudice arising from such delay. The United States advises that it has consulted with the European Union and has made arrangements to deliver a second copy of its HSBI Appendix directly to a European Union representative in Brussels.[3]

6. The Panel agrees with the European Union, and the United States acknowledges, that paragraph 58(g) of the BCI/HSBI Procedures required the United States to provide two copies of

[1] European Union, Request for Interim Ruling of 28 May 2013, paras. 11-21.
[2] European Union, Request for Interim Ruling of 28 May 2013, paras. 3-5.
[3] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 3.

its HSBI Appendix in the form of two locked CDs to the European Union. The Panel notes that this HSBI Appendix includes information relating to nine of the 72 questions that were answered by the United States. The United States' failure to provide a second CD as required means that some of the European Union's agents, which the European Union has explained operate out of at least two cities, Geneva and Brussels, could not access the HSBI Appendix at the time they were entitled to. Although it appears that arrangements have been made to deliver the second CD to a European Union representative in Brussels, the delay occasioned by this oversight nonetheless could adversely affect the European Union's ability to prepare its comments to the United States' answers to the Panel's questions within the deadline set by the Panel.

7. As a usual matter, providing an extension of time to compensate for a delay in the submission of information would be the logical way to ensure that a party is able to fully respond to late-submitted information. However, the European Union argues that extending the deadline in this case would "only serve to heighten the prejudice suffered by the European Union"[4], as members of its delegation have scheduled certain (unspecified) commitments in the two weeks following the current deadline of 12 June 2013, and immediately thereafter will receive the United States' first written submission in *US – Large Civil Aircraft (Article 21.5)*. While the Panel is sympathetic to the demands that this large and complex dispute places upon delegations, especially as it is running in parallel to *EC – Large Civil Aircraft (Article 21.5)*,[5] we see no reason to believe that with an adequate extension of time the European Union would be unable to respond fully to the information in question. Nor do we consider the United States' oversight so egregious as to warrant the rejection of the HSBI Appendix where, as here, it is not necessary in order to protect the European Union's ability to participate fully in this dispute.

8. The Panel observes that the United States' failure to follow the instructions in paragraph 58(g) of the BCI/HSBI Procedures means that the European Union will receive the second CD several days after it was entitled to receive it under the BCI/HSBI Procedures. In this light, the Panel decides as follows. *First*, the Panel directs the United States to deliver the second CD as soon as possible, if it has not already done so, and to inform the Panel as soon as it has been delivered. *Second*, the Panel extends the deadline for the European Union to submit its comments on the United States' answers to questions to Wednesday, 26 June 2013, that is, an extension of 14 days. While the Panel considers that this should compensate for the delays in the United States' response, if the European Union considers that it is unable to respond fully in this time, the Panel will consider any justified request for a further extension. *Third*, we direct the United States to submit, *only to the Panel and not the European Union*, its comments on the European Union's answers to the Panel's questions as per the current deadline, on 12 June 2013; the United States is requested to submit the same document to the European Union on 26 June 2013 in accordance with the relevant procedures.

2 THE UNITED STATES' HSBI EXHIBITS

9. The European Union raises three objections concerning the submission by the United States of HSBI exhibits with its responses to questions from the Panel. First, the United States filed the HSBI exhibits during the afternoon of Friday, 24 May 2013, rather than the due date for the answers to the Panel's questions, which was Wednesday 22 May. Second, the United States had indicated, in response to an inquiry by the European Union, that it would not be making the HSBI exhibits available for viewing on a secure laptop at the United States' Mission to the European Union in Brussels until 28 May 2013. Third, the United States failed to provide an HSBI version of Exhibit US-505.[6] The European Union requests that, in light of these problems, which it asserts have seriously hampered its ability to prepare comments on the United States' answers to the Panel's questions by 12 June 2013, the United States' HSBI exhibits should be rejected as untimely filed.[7]

[4] European Union, Request for Interim Ruling of 28 May 2013, para. 4.

[5] Throughout these proceedings, the parties have at times had to work on both disputes simultaneously. In this respect, we note that the European Union's first written submission in *US – Large Civil Aircraft (Article 21.5)* was received by the United States two weeks before the substantive meeting with the Panel in this dispute. Moreover, the Panel in this dispute asked the United States to respond to 72 direct questions following the substantive meeting, during a period when the United States was no doubt preparing its first written submission in *US – Large Civil Aircraft (Article 21.5)*.

[6] James V. Jordan, NERA, Reply to Professor Whitelaw's Response to Jordan Report, 19 May, 2013.

[7] European Union, Request for Interim Ruling of 28 May 2013, para. 10.

2.1 United States' HSBI Exhibits Filed with the Secretariat on 24 May

10. The HSBI exhibits cited by the United States in its answers to the Panel's questions were filed at the WTO in Geneva on 24 May 2013. The European Union objects that the US HSBI exhibits were not filed by the due date for the submission, which was 22 May 2013. The European Union argues that, while paragraph 58(h) of the BCI/HSBI procedures requires only that a party shall have commenced transfer of the locked CDs containing the HSBI *Appendix* to a submission no later than the deadline for submission (and thus contemplates that such HSBI may be received one to two days after the filing deadline), no such allowance is made for HSBI *exhibits*.[8]

11. The United States responds that it makes every effort to send HSBI documents early so that they arrive in Geneva on the submission date, even though the quickest delivery option is for arrival on the second day after transmission. Nevertheless, for a lengthy written submission containing HSBI, exhibits are usually finalized along with the submission. The United States considers that it would be unfair to require the United States to complete all such submissions two days earlier than the deadline solely because the distance between the United States and Geneva is greater than the distance between Brussels and Geneva.[9]

12. Paragraphs 49 and 50 of the BCI/HSBI Procedures require the United States to make its HSBI available, in electronic or hard copy form, at both the WTO Secretariat and at the United States mission in Brussels. These provisions do not, however, indicate precisely when such HSBI must be made available at these locations. Guidance as to the timing of the submission of the HSBI *Appendix* may be found in paragraph 58(h) of the BCI/HSBI Procedures. Paragraph 58(h) requires parties to "commence transfer" of the locked CDs containing the HSBI Appendix no later than the deadline for the submission concerned. This rule permits a party, if necessary, to prepare the HSBI Appendix up until the date of deadline for its submission, meaning that it is possible that there will be a delay of a day or two after the deadline until receipt of the HSBI Appendix by the other party.[10]

13. Paragraph 58(h) does not explicitly refer to HSBI *exhibits*. However, a party's HSBI Appendix will necessarily make reference to HSBI exhibits.[11] It would be incongruous to permit a party to continue with the preparation of its HSBI Appendix up until the due date for the submission, but to require that HSBI exhibits, which must also comply with the special transfer requirements for HSBI set forth in paragraphs 49 and 50 of the BCI/HSBI Procedures, be received by the other party by the due date for the submission. Such an interpretation would mean that a party would need to have "commenced transfer" of HSBI exhibits one to two days before it had finalized the HSBI Appendix that refers to those exhibits. In practice, this would mean that parties would need to finalize their HSBI Appendix prior to the deadline for its completion envisaged in paragraph 58(h). In this light, the BCI/HSBI Procedures must be interpreted to permit parties to submit HSBI exhibits at the same time as they submit the HSBI Appendix. For this reason, we do not consider that the United States' HSBI exhibits submitted to the WTO Secretariat on 24 May 2013 to be untimely filed.

2.2 United States Failure to Make Available US HSBI Exhibits at the US HSBI Location in Brussels

14. The European Union notes that, in scheduling an appointment for EU HSBI Approved Persons at the United States' HSBI location in Brussels on 24 May 2013, the European Union was informed that the United States' HSBI exhibits would not be uploaded to the secure laptop until 28 May 2013. The United States responds that the HSBI exhibits were delivered to Brussels on 27 May 2013, which was a holiday in the United States and was not a business day for the United States Mission to the European Union in Brussels. The HSBI exhibits were thus available for

[8] European Union, Request for Interim Ruling of 28 May 2013, para. 7, footnote 4.
[9] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 4.
[10] HSBI cannot be submitted via email. It is transmitted to the Panel in electronic form using locked CDs or sealed laptops. Parties are required to keep electronic or hard copies of HSBI it submits to the Panel in its HSBI location, for access by HSBI Approved Persons of the other party, see paragraphs 49 and 50 of the BCI/HSBI Procedures.
[11] There were a total of nine questions in which the United States referred to HSBI in the answers, and thus which were part of the US Full HSBI Version Appendix. In responding to these nine questions, the United States referred to a total of 33 HSBI exhibits.

viewing, and were viewed by the European Union, on 28 May 2013.[12] The United States submits that the HSBI material is a small portion of the overall submission, and in the "unlikely" event that a short delay in access to the HSBI exhibits would adversely affect the European Union, the United States would be flexible in providing a solution consistent with the BCI/HSBI Procedures.

15. Paragraph 50 of the BCI/HSBI Procedures requires the United States to make its HSBI available for access by EU HSBI Approved Persons at the United States Mission to the European Union in Brussels.[13] As noted above, we understand paragraph 58(h) of the BCI/HSBI Procedures to apply to HSBI exhibits as well as to the HSBI Appendix, and the United States' obligation was thus to "commence transfer" of its HSBI exhibits to Brussels by Wednesday 22 May 2013. Although the United States has not directly spoken to this point, we would have expected that the United States would have been able have those HSBI exhibits delivered to Brussels and uploaded by Friday 24 May 2013, as in the case of Geneva. The United States' failure to do so is problematic. That impact of that failure was exacerbated by the fact that 27 May was an official holiday in the United States and that the United States Mission in Brussels was closed.[14] As a result, the European Union's access to the United States' HSBI exhibits was delayed by four days, a not insignificant period given that the European Union's comments were due nine days later, on 12 June 2013.

2.3 United States Failure to Provide a HSBI Version of Exhibit US-505

16. The European Union objects to the United States' failure to provide an HSBI version of Exhibit US-505, which is a report prepared by a US consultant addressing alleged benefits from LA/MSF for the A350XWB challenged by the United States.[15] The United States submitted a BCI version of this report on 22 May 2013, but the European Union notes that calculations and data on which the consultant appears to rely are treated as HSBI and redacted from the BCI version. This being so, the BCI version is of little use to facilitate the preparation of the European Union's comments, because the European Union cannot review the HSBI calculations and data on which the consultant and the United States appear to rely. For the reasons already outlined above, the European Union believes that an extension of the deadline for it to comment would not remedy the prejudice it has suffered as a result of not having access to the HSBI version of Exhibit US-505 (BCI). Accordingly, the European Union requests that the Panel reject Exhibit US-505 (BCI) as being untimely filed.

17. The United States advises that it has corrected this oversight.[16] The United States argues that, when an oversight causes a minor delay, the obvious fix, if a fix is necessary, is to grant a short extension, rather than to reject probative evidence. A rejection of probative evidence because of professed commitments of one party would be highly unusual, patently unfair and not in the interest of an objective determination by the Panel.

18. The Panel observes the HSBI version of Exhibit US-505 (BCI), like the other HSBI exhibits filed with the United States HSBI Appendix, should have been made available in Geneva and in Brussels by 24 May 2013. The United States advises that it has now corrected its oversight, by which the Panel assumes that the United States is making available the HSBI version of Exhibit US-505 (BCI), at the WTO Secretariat and at the United States Mission to the European Union in Brussels, by Wednesday 3 June 2013. Indeed, the United States made this exhibit available at the WTO Secretariat in Geneva yesterday, 4 June 2013. While the Panel welcomes the United States' corrective action, the fact remains that the European Union's ability to review the HSBI version of this exhibit has been delayed by 11 days.

2.4 Conclusion

19. The Panel considers that the United States' failure to make available the HSBI exhibits at its HSBI location in Brussels by 24 May 2013 and to provide an HSBI version of Exhibit US-505 (BCI) could adversely affect the European Union's ability to prepare its comments to the United States'

[12] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 5.
[13] The "HSBI location" identified in paragraph 9 of the BCI/HSBI Procedures.
[14] Paragraph 53 of the BCI/HSBI Procedures provides that the "designated room" in which HSBI is kept at this location shall be available from 9 am until 5 pm during official working days at that HSBI location.
[15] James V. Jordan, NERA, Reply to Professor Whitelaw's Response to Jordan Report, 19 May 2013.
[16] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 6.

answers to the Panel's questions by the 12 June 2013 deadline set by the Panel. However, we consider that our decision to extend the deadline for the European Union to submit its comments on the United States' answers to questions to Wednesday, 26 June 2013 sufficiently addresses the risk of any such prejudice arising. We further recall that, if the European Union considers that it is unable to respond fully by that date, the Panel will consider any justified request for a further extension. Under these circumstances, we do not consider that the failures on the part of the United States merit the Panel's rejection of the United States' HSBI exhibits as untimely filed.

20. More generally, the Panel has found in sections 1 and 2 of this ruling that the United States has failed on a number of occasions to provide information in a timely manner pursuant to the requirements of the BCI/HSBI Procedures applicable in this case. Such failures are unfortunate, and the Panel strongly urges the United States to redouble its efforts to fully comply with these Procedures. At the same time, the Panel is conscious of the unusual scale of this case, which involves thousands of pages of submissions and thousands of exhibits, and that application of highly complex BCI/HSBI Procedures in this context is a challenge. Under these circumstances, and in the absence of any indication that the errors committed by the United States were intentional, our focus is properly on ensuring that the Procedures are applied correctly going forward, and that the ability of the European Union to properly defend its case not be compromised. We see no reason to take punitive action that would prevent this Panel from accepting evidence and argument that could assist us in performing our task of performing an objective examination of the matter before us.

3 ALLEGED VIOLATIONS OF THE BCI/HSBI PROCEDURES

3.1 Alleged Transmission of BCI by Non-Secure Email

21. The European Union objects that the United States transmitted the BCI versions of its answers to the Panel's questions by "non-secure" email, in a departure from prior practice in which BCI versions of submissions have been made by delivery of CDs. The European Union requests the Panel to take remedial action to reassure stakeholders from whom BCI originates that breaches of the BCI Procedures will not be tolerated.

22. The United States advises that the transmittal on 22 May 2013 of the United States answers to the Panel's questions containing BCI by email was an inadvertent error. To avoid any repetition, it has sent instructions to all United States' BCI and HSBI Approved Persons in this dispute emphasizing proper procedures regarding electronic transmission of BCI. The United States considers that the warning and reminder are sufficient to assure future compliance, and that any further action is unnecessary.[17]

23. Paragraph 43 of the BCI/HSBI Procedures provides that documents containing BCI may be transmitted electronically only by using "secure" email. The BCI/HSBI Procedures do not define what is meant by "secure" e-mail. The European Union does not explain why the United States' transmission by e-mail of its answers to the Panel's questions (containing BCI) was not by "secure" email, although it appears that the United States agrees that the email transmission of its answers to the Panel's questions was erroneous. The Panel welcomes the parties' suggestions as to email protocols that would be acceptably secure, with a view to amending the BCI/HSBI Procedures to include a clear definition as to what is meant by "secure" email. In the meantime, the Panel takes note of the action that the United States has taken to remind its agents of the proper procedures regarding electronic transmission of BCI and has decided not to take any further action at present.

3.2 Alleged Access to European Union BCI and HSBI by Somebody Other than an Approved Person

24. The European Union notes that the United States' answers to the Panel's questions refer to a report by Dr Chetan Sanghvi which refers in multiple places to two EU BCI and HSBI exhibits.[18]

[17] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 12.

[18] Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013, Exhibit US-530. The two EU exhibits to which Dr Sanghvi's report refers are Christophe Mourey, "Statement on Current Competitive Conditions in the LCA Industry" 4 July 2012, Exhibit EU-8, which was submitted as BCI and Christophe Mourey, "Supplemental Statement on current competitive conditions in the LCA industry", 12 December 2012, Exhibit EU-124, which was submitted as HSBI with a BCI version prepared also.

The United States notified Dr Sanghvi as a person approved to access BCI and HSBI only on 15 May 2013, while his report is dated 21 May 2013. The European Union considers it unlikely that Dr Sanghvi prepared the report in the six days between 15 and 21 May 2013. Moreover, the European Union notes that it did not prepare a redacted version of the two exhibits and that Dr Sanghvi did not access the delegation of the European Union to the United States (the EU HSBI location) subsequent to 15 May 2013. The European Union considers that the foregoing factors demonstrate that US Approved Persons provided Dr Sanghvi with access to BCI and HSBI prior to his designation as a BCI or HSBI Approved Person, in violation of the BCI/HSBI Procedures. The European Union requests that Dr Sanghvi be removed from the Approved Person's list, and that his report be rejected. In addition, the European Union requests that the Panel seek information from the United States regarding the identity of the Approved Persons who disclosed EU BCI and HSBI to Dr Sanghvi, that those persons be removed from the Approved Persons list because of their disregard for the BCI/HSBI Procedures, and that the Panel notify the panel in *US – Large Civil Aircraft* of the identity of the US Approved Persons found to have violated the BCI/HSBI Procedures. Finally, the European Union requests the Panel to take any further action it deems necessary and appropriate to reassure the stakeholders from whom BCI and HSBI originates in these proceedings that breaches of the BCI/HSBI Procedures will not be tolerated.

25. The United States characterizes the European Union's accusation that US Approved Persons disclosed EU BCI and HSBI to Dr Sanghvi before notifying him as an Approved Person as "completely unfounded" and "absolutely false".[19] The United States criticizes the European Union for not first seeking an explanation and assurance from the United States regarding Dr Sanghvi's access to BCI and HSBI before making "reckless" assertions to the Panel. The United States asserts that Dr Sanghvi did much of his work based on extensive non-BCI, and did not have access to BCI or HSBI prior to 15 May 2013.

26. The European Union makes serious allegations against the United States and US Approved Persons. The United States strenuously denies those allegations. The Panel recognizes that its ability to conduct an objective assessment of the matter in this proceeding depends in large part on the quality of the evidence that the parties place before it, and thus understands the importance of assuring stakeholders that commercially-sensitive material will be handled strictly in accordance with the BCI/HSBI Procedures. Given the circumstances outlined by the European Union, and the importance that both parties have full confidence in the integrity of these confidential information submitted in this dispute, the Panel requests the United States to provide, by 10 June 2013, a fuller explanation of the manner in which Dr Sanghvi's report was prepared, given Dr Sanghvi's late status as an approved person. The Panel will defer its decision on this aspect of the European Union's request until it has considered the United States' explanation.

4 CONCLUSION

27. In summary, after carefully considering the European Union's request for an interim ruling and the United States' response, the Panel has decided to:

a. With respect to the European Union's request to reject the United States' Full HSBI Version Appendix as untimely -

   i. decline the European Union's request;

   ii. direct the United States to deliver the second CD to a European Union representative in Brussels as soon as possible, if it has not already done so, and to inform the Panel as soon as it has been delivered;

   iii. extend the deadline for the European Union to submit its comments on the United States' answers to questions to Wednesday, 26 June 2013, that is, and extension of 14 days; and

   iv. direct the United States to submit, only to the Panel and not the European Union, its comments on the European Union's answers to the Panel's questions as per the current deadline, on 12 June 2013. The United States is also directed to submit the

[19] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 13.

same document filed with the Panel on 12 June 2013 to the European Union on 26 June 2013 in accordance with the relevant procedures.

b. With respect to the European Union's request to reject the United States' HSBI Exhibits as untimely -

   i. decline the European Union's request;

   ii. direct the United States to provide, at the US HSBI location in Brussels, a HSBI version of Exhibit US-505 (BCI) as soon as possible, if it has not already done so, and to inform the Panel when it has done so;

   iii. extend the deadline for the European Union to submit its comments, as indicated in paragraph 26(a)(iii) and (iv) above.

c. With respect to the European Union's allegations of violations of the BCI/HSBI Procedures -

   i. decline the European Union's requests for remedial action concerning the use of non-secure email to transmit the BCI versions of the United States' answers to the Panel's questions;

   ii. request the United States to provide, by 10 June 2013, a fuller explanation of the manner in which Dr Sanghvi's report was prepared, given Dr Sanghvi's late status as an approved person, and to defer the European Union's requests until it has considered the United States' explanation.

28. Finally, the Panel recalls that the European Union's request for an interim ruling also asks the Panel to reject certain arguments and evidence on the grounds that they should have been addressed by the United States earlier in these proceedings. As noted above, the Panel will issue a ruling on this request as soon as possible. In the meantime, both parties should proceed on the basis that the information that is the subject of the European Union's request continues to be part of the record of this dispute.

ANNEX F-3

THE EUROPEAN UNION'S REQUESTS OF 28 MAY 2013 CONCERNING: (I) THE UNITED STATES' ALLEGED FAILURE TO MAKE A PRIMA FACIE CASE AND THE "BACK-LOADING" OF ARGUMENTS AND EVIDENCE; AND (II) THE UNITED STATES' ALLEGED UNAUTHORIZED ACCESS TO EUROPEAN UNION BCI/HSBI

(Panel ruling issued on 12 June 2013)

1. The Panel refers to the European Union's request for an interim ruling of 28 May 2013 concerning a number of matters related to the United States' answers to the Panel's questions to the parties issued on 23 April 2013 ("Panel's Questions") and the United States' comments on the European Union's request, which were received on Friday 31 May 2013. The Panel recalls that it has previously issued rulings on two of the four requests made by the European Union.[1] In this communication, the Panel informs the parties of its rulings with respect to the European Union's remaining requests, namely, that certain arguments and evidence of the United States be rejected on the grounds that they should have been addressed by the United States earlier in these proceedings, and that the Panel should reject a report by an outside advisor on the grounds that the advisor was given access to BCI/HSBI prior to designation as a BCI/HSBI Approved Person.[2]

1 THE EUROPEAN UNION'S COMPLAINTS CONCERNING THE "BACKLOADING" OF EVIDENCE

2. The European Union argues that the prompt provision of evidence is particularly important in compliance cases, and that in this case "the United States' belated provision of evidence necessary to support the elements of its *prima facie* case is legion." Even assuming that the United States had previously submitted evidence sufficient to establish the elements of its claims, the European Union argues, the United States made a "strategic decision" in these proceedings to forego the "first opportunity" available to it to respond to certain evidence and argument advanced by the European Union in its second written submission, and its attempt to provide a response to these European Union submissions in its answers to the Panel's Questions following the substantive meeting is untimely, prejudices its own ability to defend its interests as well as the Panel's ability to discharge its duties, and for these reasons should be rejected.[3] The European Union points to three specific instances where it considers the United States' alleged "backloading" of argument and evidence has compromised the European Union's ability to make its defence as well as the Panel's ability to conduct an objective assessment.

3. The first concerns the Expert Declaration of Dr Chetan Sanghvi, submitted by the United States as Exhibit US-530 (the "Sanghvi Report"). According to the European Union, the Sanghvi Report purports to set out a comprehensive product market delineation on behalf of the United States "for the first time".[4] The European Union recalls that, in the original proceeding in this dispute, the Appellate Body found that establishing the relevant product market or markets at issue is a "prerequisite for assessing whether" adverse effects "could be found to exist as alleged by the United States".[5] The European Union argues that, given that the proper delineation of the product markets is a prerequisite for the United States' adverse effects claims, it is not acceptable for the United States to "withhold evidence" purporting to offer a comprehensive evaluation of the relevant LCA product markets until all written submissions and the meeting with the Panel have passed. The European Union therefore requests that the Panel reject the Sanghvi Report, "lest the Panel be seen as making the case for the United States".[6]

[1] Communication from the Panel, dated 5 June 2013.
[2] European Union, Request for Interim Ruling of 28 May 2013, paras. 11-21.
[3] European Union, Request for Interim Ruling of 28 May 2013, paras. 13, 17, 19 and 21.
[4] Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013, Exhibit US-530 ("Sanghvi Report"), see European Union, Request for Interim Ruling of 28 May 2013, para. 15.
[5] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1128. See also Appellate Body Report, *Canada – Renewable Energy*, para. 5.169.
[6] European Union, Request for Interim Ruling of 28 May 2013, para. 17.

4. The second and third instances of alleged "backloading" by the United States concern part of the United States' answer to Panel Question 67, and the Reply to Professor Whitelaw's Response to the Jordan Report, submitted by the United States as Exhibit US-505 ("Jordan Reply to Whitelaw's Response Report"), respectively.[7] In relation to the first alleged instance of "backloading", the European Union objects particularly to the fact that, in addition to answering the Panel's question, the United States response to Panel Question 67 addresses the campaign-specific arguments of the European Union that appeared in its second written submission.[8] Similarly, the European Union explains that the Jordan Reply to Whitelaw's Response Report addresses a number of issues that were raised in a report by Professor Robert Whitelaw and submitted by the European Union as an exhibit to its second written submission.[9]

5. The European Union argues that in both instances, the United States had 13 weeks from the filing by the European Union of its second written submission to the date of the meeting with the Panel to develop its comments on the relevant arguments, and was fully capable of delivering them in its opening statement at the meeting with the Panel. The European Union submits that responding to its arguments during the meeting with the Panel would have permitted both the Panel and the European Union to engage with the United States' arguments at the meeting, and would have provided an opportunity for the Panel to consider additional questions to the parties about any assertions made by the United States at the meeting. According to the European Union, the United States instead made a "strategic decision" to "withhold its comments" on the European Union's arguments concerning the campaign-specific lost sales allegations and the alleged benefits of LA/MSF for the A350XWB (as articulated in the Jordan Reply to Whitelaw's Response Report) until after the substantive meeting with the Panel.

6. The European Union considers that there should be consequences for the United States' "backloading", "lest it undermine the Panel's ability to make an objective assessment, and the European Union's ability to make its defense".[10] Accordingly, the European Union requests that the Panel reject: (a) any material included in the United States answer to Panel Question 67 that addresses, in addition to the Panel's Question, the United States' response to the campaign-specific European Union arguments that appeared in its second written submission; and (b) the Jordan Reply to Whitelaw's Response Report submitted by the United States as Exhibit US-505.[11]

2 THE UNITED STATES' RESPONSE TO THE EUROPEAN UNION'S COMPLAINTS

7. The United States denies that it has "backloaded" evidence and argues that it is not barred from submitting additional evidence and argumentation after its first written submission to rebut the European Union's arguments, and to respond to questions from the Panel.[12] The United States argues that paragraph 15 of the Working Procedures demonstrates that the Panel envisaged at the outset that the parties would submit factual information through their responses to questions from the Panel.[13] If the parties did nothing more in their responses to the Panel's questions than repeat statements they had previously made, the question process would be futile and unhelpful to the Panel.[14]

8. As to the specific instances of "backloading" alleged by the European Union, the United States responds, first, that the Sanghvi Report was submitted in direct response to: (a) questions from the Panel about product markets, and particularly with respect to the application of competition law concepts to the product market inquiry; and (b) the European Union's arguments, made in its

[7] James V. Jordan, NERA, Reply to Professor Whitelaw's Response to Jordan Report, 19 May 2013, Exhibit US-505 (BCI/HSBI) ("Jordan Reply to Whitelaw Response Report").
[8] United States, Answer to Panel Question 67.
[9] Robert Whitelaw, Response to Dr Jordan's Report on the Benefits of MSF, 3 December 2012, Exhibit EU-121 (BCI/HSBI) ("Whitelaw Response to Jordan Report").
[10] European Union, Request for Interim Ruling of 28 May 2013, paras. 19 and 21.
[11] European Union, Request for Interim Ruling of 28 May 2013, paras. 19-21.
[12] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 7.
[13] Paragraph 15 of the Panel's Working Procedures provides that "parties shall submit all factual evidence to the Panel no later than their first written submissions, other than evidence necessary for purposes of rebuttals and answers to questions."
[14] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 7.

second written submission and at the meeting with the Panel, concerning the proper delineation of the product markets which it had supported by reference to a consultant's NPV calculations.[15]

9. Second, the United States notes that Panel Question 67 sought the identification of the airlines involved in specific sales campaigns and whether Boeing LCA were considered. The United States argues that this inquiry clearly implicates the United States' lost sales claims related to the sales campaigns identified in paragraphs 417 through 503 of the United States' first written submission. The United States submits that it was appropriate and helpful to the Panel's task of making an objective assessment, to address the European Union's arguments about those sales campaigns. The United States rejects the suggestion that it was precluded from making such arguments because it had not done so in the same detail in its opening statement at the meeting with the Panel. The United States argues that a rule in which parties effectively waived any argument omitted from their oral statements would force them to mention every potential argument in their oral statement. Moreover, no such rule appears in the Panel's Working Procedures.[16]

10. Third, with respect to the submission by the United States in its answers to the Panel's questions of the Jordan Reply to Whitelaw's Response Report, the United States notes that, while the Panel had described the United States' opening statement at the meeting with the Panel as the "first opportunity" at which the United States could have responded to the Whitelaw Response to Jordan Report, it nowhere found that it was also the last opportunity.

3 EVALUATION BY THE PANEL

3.1 General Considerations

11. We note at the outset that the European Union does not assert that the alleged "backloading" of arguments and evidence by the United States has been made contrary to the Working Procedures. Paragraph 15 of the Working Procedures provides that the parties shall submit all factual evidence to the Panel no later than their first written submissions, *other than evidence necessary for purposes of rebuttals and answers to questions*.[17] The European Union does not allege that the Sanghvi Report, the United States answer to Panel Question 67 or the Jordan Reply to Whitelaw's Response Report were not submitted in accordance with paragraph 15 of the Working Procedures as evidence necessary for purposes of rebuttals and answers to questions. Indeed, we consider that the Sanghvi Report, the United States' answer to Panel Question 67 and the Jordan Reply to Whitelaw Report were submitted in conformity with paragraph 15 of the Working Procedures.[18]

12. However, in conducting an objective assessment of the matter as required by Article 11 of the DSU, the Panel is bound to ensure that due process is respected.[19] Although panel working procedures should embody and reinforce due process, the question whether a panel has guaranteed due process in any specific situation is not simply a question of whether the working procedures have been complied with.[20]

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[15] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 9.

[16] United States, Reply to EU Request for an Interim Ruling, 31 May 2013, para. 10.

[17] Paragraph 15 further provides that exceptions to this procedure may be granted upon a showing of good cause. In such a case, the other party shall be accorded a period of time for comment on the newly submitted evidence, as the Panel deems appropriate.

[18] The United States' explanations countering the European Union's campaign-specific arguments in its answer to Panel Question 67 are contained in paragraphs 269, 270, 271, 272, 273, 274, 275, 276, 279, 281, 282, 283, 284, 285, 286, 287, 289, 290, 291, 292, 293, 294, 295, 297, 298, 299, 301, 302, 303, 306, 308, 310, 311, 313, 314 and 315. Our review of this information shows that it consists essentially of: (a) re-statements of the United States' arguments concerning lost sales contained its first and second written submissions; (b) references to the panel's and the Appellate Body's findings in the original DS316 dispute; and (c) specific responses to some arguments made by the European Union in its second written submission concerning lost sales.

[19] Due process is a fundamental principle of WTO dispute settlement. The Appellate Body has stated that due process is intrinsically connected to notions of fairness, impartiality and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules, see Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.

[20] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 148.

13. It is well established that a panel must not make a "*prima facie* case" for a party who bears the burden of proof in relation to a claim or a defence.[21] However, this does not mean that a panel must make a specific finding that a complainant has met its burden to establish a *prima facie* case in respect of a particular claim, or that a respondent has effectively rebutted a *prima facie* case.[22] Similarly, a panel is not required to make a finding as to whether a complainant has established a *prima facie* case before it examines the respondent's arguments and evidence.[23] Indeed, WTO dispute settlement proceedings do not involve any particular temporal sequence of proof. Both parties will adduce evidence in support of their own arguments or to rebut the arguments made by the other at various stages of a dispute, sometimes simultaneously, throughout the entirety of a proceeding.

14. The "objective assessment of the matter" that a panel is called upon to perform under Article 11 of the DSU requires it to carefully and independently scrutinize the parties' arguments and any evidence submitted in support of those arguments, with a view to clarifying their meaning and exploring their implications for the particular claims being made. Consistent with this obligation, and in the light of the extremely voluminous and complex issues that have been raised in this dispute, we believe that our evaluation of the merits of the United States' claims must be conducted on the basis of a full appreciation of *all* of the parties' arguments and the evidence adduced in support of those arguments throughout the course of this proceeding. The fact that we must discharge this responsibility in a compliance proceeding in which it was envisaged that the parties would hold only one substantive meeting with the Panel raises particular complications. This is one reason why we decided to pose a relatively large number of questions to the parties following the meeting, and why we informed the parties at the end of the substantive meeting in April 2013 that we may well need to pose additional questions and/or hold an additional meeting with the parties as our analysis of the arguments and evidence progresses.[24]

15. Needless to say, it is a basic requirement of due process that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. This due process interest must be balanced against other interests, including systemic interests such as those reflected in Articles 3.3 and 12.2 of the DSU.[25] As the Appellate Body has stated, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU.[26]

16. With these considerations in mind, we now turn to address the European Union's particular requests.

3.2 The United States' Alleged "Strategic Decision" to "Withhold" Evidence and Argument

17. The European Union makes a number of specific objections to the United States' introduction of certain pieces of evidence and related arguments in its answers to the Panel's Questions. Underlying the European Union's particular complaints, however, is a broader assertion that the

[21] See, for instance, Appellate Body Report, *Japan – Agricultural Products II*, para. 129; and Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 300. A *prima facie* case has been described by the Appellate Body as one that, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case. Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14; and Appellate Body Report, *EC – Hormones*, para. 104. The evidence and arguments underlying a *prima facie* case must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision. Appellate Body Report, *US – Gambling*, para. 141.

[22] Appellate Body Report, *Thailand – H-Beams,* para. 134.

[23] Appellate Body Report, *India – Quantitative Restrictions*, para. 142.

[24] In this regard, we note that it is well established that "a panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding member has established its complaint or defence on a *prima facie* basis." Appellate Body Report, *Canada – Aircraft*, para. 192. Moreover, the Appellate Body has previously explained that "panels are entitled to ask questions of the parties that they deem relevant to the consideration of issues before them". Appellate Body Report, *Thailand – H-Beams*, para. 135.

[25] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

[26] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 150.

United States has made a "strategic decision" in this dispute to "withhold" relevant evidence and argument until its answers to the Panel's Questions in a manner which undermines the Panel's ability to make an objective assessment, and the European Union's ability to make its defense.[27] We see no reason to accept this characterization of how the United States has proceeded in this dispute. Rather, as we explain in the sections that follow, the evidence and arguments that are the subject of the European Union's objections were made as part of the process of engagement between the parties and with the Panel that typically characterizes WTO dispute settlement, whereby arguments and evidence are explored and tested, and positions clarified and/or further developed, with a view to informing the Panel's objective assessment of the matter before it.

3.3 The Sanghvi Report (Exhibit US-530)

18. The European Union's argument that the Panel should reject the Sanghvi Report appears to be premised on the view that all evidence pertaining to issues that are a "prerequisite" or "precondition" to establishing adverse effects must be submitted by a party at an early point in the proceeding, and in any case before the stage at which all written submissions have been received and the substantive meeting with the parties has taken place. Moreover, in suggesting that the Panel's receipt of the Sanghvi Report at this stage of the proceeding could be seen as the Panel making the case for the United States, it would appear that the European Union considers that the Panel's questioning of the parties that led the United States to submit the Sanghvi Report was inappropriate in the circumstances, and that the Panel should reject evidence responsive to those questions.

19. The Sanghvi Report was submitted by the United States in response to a series of questions posed by the Panel concerning the parties' diverging positions as to the proper delineation of the relevant product markets.[28]

20. In its first written submission, the United States sought to demonstrate that the European Union had not removed the adverse effects of the subsidies the subject of the recommendations and rulings of the DSB by reference to the three product markets identified by the Appellate Body for purposes of its analysis of the United States' displacement claims on appeal.[29] The European Union responded in its first written submission that the United States' reliance on these three product markets was insufficient, not least because of the recent developments relating to the competitive situation in these product markets.[30] The European Union proposed an alternative delineation of the relevant product markets, relying on a statement by Mr Christophe Mourey, among other evidence, to support its arguments.[31] The United States in its second written submission challenged the European Union's identification of the relevant product markets, submitting in support of its arguments, among other evidence, a declaration from Mr Michael Bair.[32] The European Union sought to rebut the United States' arguments and evidence concerning the relevant product markets in its second written submission, arguing that the United States had failed to apply factors relevant to assessing the existence of a product market, and to provide relevant evidence to establish the existence of the three product markets it purported to identify.[33] In so doing, the European Union submitted, among other evidence, a supplemental statement by Mr Christophe Mourey.[34] Although the parties addressed each other's arguments concerning product markets at the substantive meeting with the Panel, neither submitted any further evidence at that meeting. The Panel posed a number of oral questions to the parties on product markets at the meeting for the purpose of clarifying the parties' arguments on specific issues. These questions were subsequently transmitted to the parties in writing together with several other questions on the same matter directed to both parties, to the United States and to the European Union. The United States submitted the Sanghvi Report in support of its answers to several of those questions.[35] The Sanghvi Report refers in various places to the Mourey

[27] European Union, Request for Interim Ruling of 28 May 2013, paras. 13-14, 17, 19 and 21.
[28] The United States referred to the Sanghvi Report in its answers to Panel Questions 48-51, 54, 55, 60, 61, 63, 64 and 67.
[29] United States' first written submission, para. 290-294.
[30] European Union's first written submission, paras. 569-570.
[31] European Union's first written submission, paras. 577-633; Mourey Statement, Exhibit EU-8 (BCI).
[32] United States' second written submission, paras. 438-493; Declaration of Michael Bair, Exhibit US-339 (BCI).
[33] European Union's second written submission, paras. 608-705.
[34] Supplemental Mourey Statement, Exhibit EU-124 (BCI/HSBI).
[35] See above, footnote 28.

statement, submitted by the European Union as an exhibit with its first written submission and to the supplemental Mourey statement, submitted by the European Union as an exhibit with its second written submission.

21. We recall that in *EC – Large Civil Aircraft*, the Appellate Body faulted the panel for deferring to the United States' subsidized product allegations rather than making its own independent assessment of whether all Airbus LCA should be treated as a single subsidized product.[36] The Appellate Body considered that, in the absence of such a determination, the panel did not have a proper basis for assessing whether the alleged subsidized and like products competed in the same market or multiple markets, which it described as a prerequisite for assessing whether displacement within the meaning of Articles 6.3(a) and 6.3(b) could be found to exist as alleged by the United States.[37] However, nothing in the Appellate Body's delineation of the substantive requirement to make a product market determination suggests to us that a complaining party must establish any particular elements of the claim at any specific point in the proceeding. In other words, the fact that the Panel will need to first define the relevant product markets in order to determine whether the United States has demonstrated the existence of adverse effects does not mean that, in seeking to fulfil our obligation under Article 11 of the DSU, we may not pose questions to the parties regarding the relevant product markets after the receipt of written submissions and the substantive meeting. Nor does it mean that the parties are prevented from submitting information responsive to the any questions we may ask after the substantive meeting, or that we must reject such evidence as having been presented at too late a stage in these proceedings, subject of course to any justified due process concerns.

22. In the present proceeding, the United States claims that adverse effects from LA/MSF and other subsidies, in the form of significant lost sales and displacement, impedance and threat thereof, continue through the present, based on the product markets on which the DSB's recommendations and rulings in the original proceeding are based. The United States has made arguments and presented evidence throughout this proceeding in support of that claim. In making an objective assessment of the United States' submissions we are required to assess the conflicting arguments and evidence presented by the parties concerning the proper delineation of the product markets in which Airbus and Boeing LCA compete.[38] In our view, it is therefore appropriate, in discharging our responsibility under Article 11 of the DSU, to not only put to the parties the questions asked on 23 April 2013 concerning the identification of the relevant product markets, but also to evaluate the arguments and evidence submitted by the parties in response to those questions.

23. Thus, for all of the above reasons, we see no basis for agreeing with the European Union's contention that it would be inappropriate for the Panel to consider the Sanghvi Report, which was submitted by the United States in response to the Panel's Questions. We therefore decline the European Union's request to reject the Sanghvi Report.

3.4 The United States' answer to Panel Question 67 and the Jordan Reply to Whitelaw's Response Report (Exhibit US-505 (BCI/HSBI))

24. The European Union's requests that the Panel reject: (a) the "material" included in the United States' response to Panel Question 67 addressing campaign-specific arguments made by the European Union in its second written submission; and (b) the Jordan Reply to Whitelaw's Response Report, are based on the assertion that the United States failed to make these submissions at the "first opportunity" available to do so, namely, in its opening statement at the substantive meeting with the Panel in April 2013.[39] The European Union argues that the United States' attempt to present such "material" in response to the Panel's Questions following the Panel's substantive meeting with the parties undermines the Panel's ability to make an objective assessment and the European Union's ability to make its defence.[40]

25. The European Union's reference to the "first opportunity" appears to derive from our communication to the parties of 23 April 2013, enclosing the list of 109 Panel Questions. In that

[36] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1128.
[37] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1128.
[38] Appellate Body Report, *EC – Large Civil Aircraft*, para. 1131.
[39] European Union, Request for Interim Ruling of 28 May 2013, paras. 19 and 21.
[40] European Union, Request for Interim Ruling of 28 May 2013, paras. 19 and 21.

communication, we recalled that at the meeting with the parties on 18 April 2013, the European Union objected to the United States' attempt to submit certain hand-written HSBI calculations in support of the statements it made in paragraph 24 of its confidential oral statement on the grounds that to receive them would be inconsistent with the Panel's Working Procedures. We then noted that:

> "… the Whitelaw Response to the Jordan Report was submitted to the Panel as an exhibit to the European Union's second written submission, that the United States' oral statement was its first opportunity to address that Response, and that the United States' calculations go directly to the significance of that Response. Under these circumstances, the Panel considers that it is appropriate for it to now seek these calculations from the United States, and has done so in the attached questions."[41]

26. In stating that the United States' oral statement was the first opportunity at which the United States could have addressed the Whitelaw Response to Jordan Report, but in proceeding to ask the United States to provide that response in the course of answering the Panel's Questions, we did not suggest that a party is prevented from advancing argument or adducing evidence that was not presented at the "first opportunity". Rather, our reference to the "first opportunity" was simply intended to emphasize that the United States did not have a chance to respond to the relevant submissions any earlier than at the substantive meeting with the Panel. Our statement was therefore not intended to preclude the possibility that the United States could address the relevant submissions at a later stage in the proceeding, particularly were we to request the United States to do so. In this connection, we note that the European Union does not refer to any rule of procedure or other principle of due process that requires a party in a WTO dispute settlement proceeding to present its arguments and evidence at the "first opportunity" such that a failure to do so requires a panel to reject such arguments and evidence as untimely.

27. Turning to the particular United States' submissions that are the focus of the European Union's request for an interim ruling, we note that Panel Question 67 asked the United States to clarify certain aspects of the information submitted at paragraphs 417 to 503 of the United States' first written submission. These paragraphs of the United States' first written submission introduced and discussed evidence which the United States submits helps establish its claims of serious prejudice in the form of lost sales. The European Union responded to the United States' allegations in various parts of its first written submission; and both parties engaged with each other's lost sales arguments in their respective second written submissions. At the substantive meeting, the United States noted that the European Union had made "a host of campaign-specific arguments" in its second written submission, arguing that these did not "change the basic facts surrounding the demonstrated lost sales".[42] The European Union's oral statement did not specifically address the United States' submissions with respect to lost sales. However, the relevance of sales campaign evidence to the question of identifying the appropriate product markets was raised by the Panel in the questions posed to the parties at the substantive meeting, and the parties provided oral answers. Subsequently, a series of written questions were transmitted to both parties relating to various aspects of the United States' claims of lost sales. These questions included Panel Question 67. In answering this question, the United States sought to provide the Panel with the requested information as well as address some of the arguments made by the European Union with respect to lost sales in its second written submission. In our view, the entirety of the United States' answer to Panel Question 67 is not only related to the subject matter of that question, but it also concerns a matter with respect to which the parties have engaged and exchanged contrasting views throughout these proceedings. The European Union's comments on the United States' answer to Panel Question 67 will represent another moment in this proceeding when this engagement will take place, and as we have noted above,[43] there may well be others.

28. The United States introduced the Jordan Reply to Whitelaw's Response Report in its answer to Panel Question 92, and it was referred to in the United States' answers to Panel Questions 94, 102, 103, 105, 106 and 108. By its own words, the Jordan Reply to Whitelaw's Response Report is intended to comment on the Whitelaw Response to Jordan Report in order to "respon[d] to and in the light of the Panel's questions of April 23, 2013, as well as the hearing with the Parties of

[41] Communication from the Panel, dated 23 April 2013.
[42] United States, Non-Confidential Oral Statement, para. 105.
[43] See above, para. 14.

April 16-18, 2013".[44] The European Union submitted the Whitelaw Response to Jordan Report as Exhibit EU-121 (BCI and HSBI) with its second written submission.

29. All six of the Panel Questions within which the United States cited the Jordan Reply to Whitelaw's Response Report form part of a series of questions asked to clarify certain aspects of the parties' submissions made up until and including the substantive meeting with the parties in relation to the United States' argument that the LA/MSF measures for the A350XWB constitute subsidies. In our view, the matters addressed in the Jordan Reply to Whitelaw's Response Report go directly to the issues with respect to which the Panel sought clarification in its questions. These are the very same issues with respect to which the parties have exchanged views throughout these proceedings. The European Union's comments on the United States' answers to these questions, including the Jordan Reply to Whitelaw's Response Report, will represent another moment in this proceeding when this engagement will take place, and, again, as we have noted above,[45] there may well be others.

30. As explained above, we are of the view that our evaluation of the merits of the United States' claims in this dispute must be conducted on the basis of a full appreciation of *all* of the parties' arguments and the evidence adduced in support of those arguments throughout the course of this proceeding. We see the parties' exchange of views on the matters covered by the questions asked on 23 April 2013 to be an important part of this process. To this end, and the light of the relatively large number of questions posed, we allowed the parties more than four weeks to respond to our questions, and a full three weeks to comment on each other's responses. Further, in response to the difficulties of the European Union to review the United States' Full HSBI Appendix and certain other US HSBI Exhibits submitted with its answers to the Panel's Questions, we extended the deadline for the European Union to comment on the United States' answers by 14 additional days and informed the European Union that if it considered that it is unable to respond fully by that date, we would consider any justified request for a further extension. Under these circumstances, we do not consider that the European Union's ability to make its defense has in any way been compromised.

31. Thus, for all of the above reasons, we see no basis for agreeing with the European Union's contention that it would be inappropriate for the Panel to consider the entirety of the United States' answer to Panel Question 67 or the Jordan Reply to Whitelaw's Response Report. We therefore decline the European Union's request to reject these submissions.

4 ALLEGED UNAUTHORIZED ACCESS TO EUROPEAN UNION BCI/HSBI

32. The European Union notes that the United States' answers to the Panel's questions refer to a report by Dr Chetan Sanghvi which refers in multiple places to two EU BCI and HSBI exhibits.[46] The United States notified Dr Sanghvi as a person approved to access BCI and HSBI only on 15 May 2013, while his report is dated 21 May 2013. The European Union considers it unlikely that Dr Sanghvi prepared the report in the six days between 15 and 21 May 2013. Moreover, the European Union notes that it did not prepare a redacted version of the two exhibits and that Dr Sanghvi did not access the EU HSBI location in Washington, D.C. after 15 May 2013. The European Union considers that these factors demonstrate that US Approved Persons provided Dr Sanghvi with access to BCI and HSBI prior to his designation as an Approved Person, in violation of the BCI/HSBI Procedures. The European Union requests that Dr Sanghvi be removed from the Approved Persons list, and that his report be rejected. In addition, the European Union requests that the Panel seek information from the United States regarding the identity of the Approved Persons who disclosed EU BCI and HSBI to Dr Sanghvi, remove those persons from the Approved Persons list, and notify the Panel in *US – Large Civil Aircraft* of the identity of the US Approved Persons found to have violated the BCI/HSBI Procedures.[47]

[44] Jordan Reply to Whitelaw's Response Report, para. 1. Exhibit US-505 (BCI/HSBI).
[45] See above, para. 14.
[46] Expert Declaration of Dr Chetan Sanghvi, NERA, 21 May 2013, Exhibit US-530. The two EU exhibits to which Dr Sanghvi's report refers are Christophe Mourey, "Statement on Current Competitive Conditions in the LCA Industry" 4 July 2012, Exhibit EU-8, which was submitted as BCI and Christophe Mourey, "Supplemental Statement on current competitive conditions in the LCA industry", 12 December 2012, Exhibit EU-124, which was submitted as HSBI with a BCI version.
[47] European Union, Request for Interim Ruling of 28 May 2013, paras. 25-28.

33. In its initial response, the United States characterizes the European Union's accusation that US Approved Persons disclosed EU BCI and HSBI to Dr Sanghvi before notifying him as an Approved Person as "completely unfounded" and "absolutely false".[48] The United States asserts that Dr Sanghvi did much of his work based on extensive non-BCI, and did not have access to BCI or HSBI prior to 15 May 2013. In response to our request for a fuller explanation of the manner in which Dr Sanghvi's report was prepared[49], the United States indicates that Dr Sanghvi was retained in late April and that Outside Advisors provided him a variety of non-BCI documents, including non-BCI information from the two exhibits referred to by the European Union, which allowed him to make substantial progress before being notified as a BCI/HSBI Approved Person. The United States reiterates that only after he was notified as an Approved Person was Dr Sanghvi given access to EU BCI/HSBI. The United States notes that most of the "fundamental errors" in the European Union's general approach to product market definition were apparent with no access to EU BCI/HSBI, that Dr Sanghvi's report itself contains no BCI/HSBI and that the report did not address flaws in NPV calculations in the EU exhibits that might have required more extensive consideration of EU BCI/HSBI.[50]

34. We are conscious of the importance placed by both parties on the protection of sensitive business information, as reflected in the unprecedented BCI/HSBI Procedures applicable in this proceeding, and we take very seriously any allegations of possible violations of those Procedures. It is for this reason that we sought an explanation from the United States regarding the manner in which Dr Sanghvi's report was prepared. Having received that explanation, and in the light of the United States' categorical denial of the European Union's allegations, we see no basis to doubt the United States' contention that Dr Sanghvi had no access to BCI or HSBI prior to being notified by the United States as a BCI/HSBI Approved Person. Accordingly, we deny the European Union's request that we, *inter alia*, remove Dr Sanghvi as an Approved Person and reject his report.

5 CONCLUSION

35. In summary, after carefully considering the European Union's request for an interim ruling and the United States' response, the Panel has decided, on the basis of the foregoing considerations, to

a. with respect to the alleged "backloading" of evidence, decline the European Union's request to reject: (a) the Sanghvi Report (Exhibit US-530); (b) the "material" contained in the United States' answer to Panel Question 67 that is the focus of the European Union's objection; and (c) the Jordan Reply to Whitelaw's Response Report (Exhibit US-505);

b. with respect to alleged unauthorized access to EU BCI/HSBI, decline the European Union's request that we remove Dr Sanghvi as an Approved Person and reject his Report (Exhibit US-530).

[48] United States, Reply to EU Request for Interim Ruling, 31 May 2013, para. 13.
[49] Communication from the Panel, 5 June 2013, para. 27(c)(ii).
[50] Communication from the United States, 10 June 2013.

ANNEX F-4

THE EUROPEAN UNION'S REQUEST OF 14 JUNE 2012 TO EXCLUDE CERTAIN UNTIMELY UNITED STATES' EXHIBITS

(Panel ruling issued on 28 June 2013)

1. On 10 June 2013, the United States submitted to the Panel and to the European Union by email certain documents which it referred to as "copies of exhibits referenced in the U.S. oral statement". On 14 June 2013, the European Union responded by email to the United States' submission. The European Union notes that the United States purports to provide, for the first time, the text of certain documents that it describes as exhibits to its Opening Oral Statement delivered on 16 April, that is, 55 days earlier. The European Union asks the Panel to confirm that the text of these documents does not form part of the record and that the text of these documents requires no response from the European Union, as their submission did not comply with the requirements of paragraphs 7 and 10 of the Panel's Working Procedures, paragraph 1 of the Procedures for the Partial Opening to the Public of the Meeting of the Panel and the Panel's communication of 12 April 2013.

2. In its 19 June 2013 response, the United States asserts that it did not realize until recently that it had neglected to file the exhibits referenced in its Oral Statement, and that this failure was inadvertent and due to human error. The United States notes however that the exhibits merely demonstrate that the material cited in the Oral Statement originated from EADS or Airbus documents, or from information already in the public domain. It further notes that certain of the exhibits appear in the body of the Oral Statement, that the European Union has not challenged the accuracy of the referenced material and that both the material discussed in the Oral Statement and the exhibits themselves are uncontested. The United States contends that as the exhibits were supplied to confirm the accuracy of uncontested information in the Oral Statement, and as the European Union has not been substantially prejudiced by the delay in filing copies of the exhibits, the Panel may find that its Working Procedures do not preclude if from retaining the exhibits on the record. Alternatively, the United States suggests that the Panel could consider that only those portions of the exhibits that correspond to material already quoted or cited in the Oral Statement form part of the record.

3. The Panel notes that, in its Opening Oral Statement at the meeting of the Panel with the parties on 16 April 2013, the United States quoted from, cited to or, in two cases, partially reproduced, seven documents, which it referred to as exhibits USA-492 to USA-498 (non-BCI) in the provisional written version of its Oral Statement that was distributed to the Panel and the European Union at the meeting. These documents are comprised of seven slides from three presentations prepared by EADS/Airbus employees, two pages of order/delivery information downloaded from an Airbus website, an extract from an EADS' financial statement, pages from a Corporate Finance textbook and a table of historical exchange rates, none of which contain BCI or HSBI. Although the underlying documents are identified in the Oral Statements with specific exhibit numbers, the United States does not appear to have distributed the documents themselves during the meeting, nor to have submitted them to the Panel and the European Union on 23 or 30 April 2013 at the time that it submitted the public, BCI and HSBI final written versions of its Opening Oral Statement as delivered.

4. From these facts, it is clear to us, and we do not understand the United States to contest, that it has not complied with the Panel's rules and procedures in regard to these documents. In our fax dated 12 April 2013 regarding the conduct of our substantive meeting with the parties, we requested the parties to provide paper copies of their prepared statements, and paragraph 10 of our Working Procedures required the parties to submit a written version of its Oral Statement not later than the first working day following the end of the meeting. Although the Procedures do not specifically refer to exhibits associated with the parties' Oral Statements, we consider it implicit that where an Oral Statement refers to exhibits those exhibits are to be made available at the time of the Statement. In this case, the United States did not provide the referenced documents with the provisional written version of its Oral Statement, nor at the time the Oral Statement was

delivered, nor at the time it submitted the final written versions of its Oral Statement. Indeed, these documents were only submitted 55 days after the Panel meeting. In short, it is evident to us that these documents were not timely submitted.

5. The question facing the Panel is thus not whether the United States has acted inconsistently with the Panel's rules and procedures in late-submitting these documents, but what consequences should flow from that fact. The European Union would have us "confirm" that the relevant documents do not form part of the record and that the European Union need not respond to them. We do not doubt the authority of a panel to decline to include in the record argument or evidence submitted by a party on the grounds that it was untimely filed or otherwise not submitted in accordance with the panel's rules and procedures. At the same time, we do not consider that the untimely filing of a document should necessarily result in its exclusion.[1] Rather, we believe that it is incumbent upon us, in exercising our discretion in the management of this proceeding, to determine an appropriate course of action after examining the behaviour in question in light of all the circumstances, including the extent to which the procedural error prejudices the interests of the other party or parties to the dispute or impedes the ability of the Panel to perform an objective assessment of the manner pursuant to Article 11 of the DSU.[2]

6. We recall the Appellate Body's injunction that due process requires each party to be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party.[3] In this case, the European Union does not assert that the untimely filing by the United States has impeded its ability to comment on these documents or otherwise to present its defence in this proceeding. This may reflect the fact that the seven documents at issue were offered primarily to confirm the source and accuracy of factual information that was incorporated in the body of the United States' Oral Statement itself. Indeed, for two of the documents the relevant slide was reproduced in the United States' Oral Statement,[4] while in a third case, the relevant statements were quoted in the United States' Oral Statement.[5] It is perhaps for this reason that, although the European Union in its answers to the Panel's Questions of 23 April 2013 addressed in detail those parts of the United States' Oral Statement containing references to all but one of the documents in question[6], it never indicated to the Panel or the United States any concern that it could not identify the documents referred to in the United States' Oral Statement.[7]

7. While Exhibits USA-492 to USA-498 (non-BCI) were offered primarily to confirm the source and accuracy of information incorporated in the United States' Oral Statement, and to which the European Union has had an opportunity to respond in its answers to the Panel's questions, the possibility remains that the European Union might want to respond to some aspect of these documents themselves, and due process demands the European Union be afforded the ability to do so. Accordingly, we will accord the European Union upon request such reasonable additional time as it considers it might require should it desire to further address the content of these documents. In the alternative, and should the European Union prefer, we note that we anticipate posing follow-

[1] Appellate Body Report, *Thailand – Cigarettes (Philippines),* para. 148.

[2] The European Union does not allege that the United States' untimely submission of Exhibits USA-492 to USA-498 (non-BCI) was intentional. The United States asserts that "it did not realize until recently that it had neglected to file the exhibits" referenced in its Oral Statement and describes its failure to do so as "inadvertent and due to human error". We see no reason to doubt the United States' assertions in this regard. Accordingly, this is not a case where a sanction is required to address wilful misconduct. Rather, it involves an oversight on the part of the United States, albeit quite a significant one.

[3] Appellate Body Report, *Thailand – Cigarettes (Philippines),* para. 150.

[4] Exhibits USA-492, USA-493.

[5] Exhibit USA-494. The European Union specifically responded to the quoted language from this exhibit in its answer to Panel Question 47, para. 146.

[6] All but one of the exhibits (Exhibit US-492) related to the role of LA/MSF in the launch and subsequent progress of the A350XWB, an issue explored by the Panel in its question 47 and to which the European Union responded extensively in paragraphs 129-212 of its answers submitted on 22 May 2013. Exhibit US-492 relates to whether the A380 and 7478-I are in the same product markets. Although we did not pose a question directly related to this document, the area of product markets was explored in the Panel Questions 48-79.

[7] We assume that the European Union, like the Panel, did not notice that the documents cited as exhibits in the United States' Oral Statement, and listed in its list of exhibits, were not submitted and that this is why it did not bring the failure of the United States to submit these exhibits to the attention of the Panel or the United States.

up questions to the parties in late August;[8] the European Union is free to address the content of these documents at the same time as it responds to those questions.

8. Of course, procedural rules serve not only to ensure the right of an interested party to respond to the case made against it, but also to ensure the efficient and prompt settlement of disputes. Indeed, the Appellate Body has explained that "due process may also require a panel to take appropriate account of the need to safeguard other interests, such as an aggrieved party's right to have recourse to an adjudicative process in which it can seek recourse in a timely manner, and the need for proceedings to be brought to a close.[9] In this case, however, we do not believe that the late submission of these documents will have any significant implications for the efficient conduct of this dispute. As noted, the Panel expects to pose follow-up questions to the parties so any further time needed by the European Union to address the documents in question should not delay the Panel's work. In any event, as the respondent in this case, the European Union has not suggested that it would be prejudiced by any delay in these proceedings that might be occasioned by the United States' late submission of the relevant documents.[10] To the contrary, as we see it, any such delay would rather prejudice the interests of the United States as complainant.

9. We do not preclude that a panel might decide to exclude late-submitted information from the record in a dispute, even in a case such as this one where the late submission resulted from an oversight, did not prejudice the other party's ability to respond and did not cause undue delay in the proceeding. Indeed, a panel might conclude that exclusion is warranted in a given case to provide an appropriate incentive to a party to abide by deadlines, or indeed to deliver a systemic message about the importance of respecting procedural rules. This Panel has however been guided by a commitment to reach a sound judgement on the merits in this dispute, through an objective examination of the evidence and arguments put before it by the parties. To exclude potentially relevant evidence put before it by a party on purely procedural grounds is not a decision to be taken lightly and, although this is a close case, we have decided that, on balance, such action is not required at this time.

10. Although we have decided that we will not exclude Exhibits USA-492 to USA-498 (non-BCI) from the record in this dispute, we nevertheless would like to express our deep concern. To err is of course human, and in a highly complex proceeding such as this one, involving enormous submissions, nearly a thousand exhibits and elaborate rules regarding confidential information, some mistakes are perhaps inevitable. However, the United States has been responsible for a larger number of procedural errors in this proceeding than can be easily justified even in a case such as this one. In order to avoid further situations which could require the Panel to take stronger action, we call upon the United States to take all necessary steps to ensure compliance with the deadlines and other applicable procedures in this proceeding.

11. In conclusion, we decline the European Union's request to confirm that the text of Exhibits USA-492 to USA-498 (non-BCI) does not form part of the record and that the text of these documents requires no response from the European Union. In order to provide the European Union with a meaningful opportunity to comment upon the content of the exhibits, we will accord the European Union upon request such reasonable additional time as it considers it might require should it desire to further address the content of these documents. In the alternative, the European Union is free to address the content of these documents at the same time as it responds to follow-up questions from the Panel which we expect to pose in late August.[11]

[8] The Panel recalls that it has, on a number of occasions, informed the parties that it may need to pose additional questions on (or even hold an additional meeting with the parties to discuss) certain factual or legal matters arising in this dispute. The Panel announced this possibility to the parties at the end of the substantive meeting, as well as its cover letter to the questions posed following the substantive meeting with the parties, and its communication of 12 June 2013.

[9] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, Ibid.

[10] Indeed, the European Union itself has expressed concerns about a "procedural gap" between the timetable for this proceeding and that in *US – Large Civil Aircraft* (Art. 21.5 - EU)(DS353), and has requested that this Panel extend its timetable to reflect extensions in the other proceeding. Letter from the European Union to the Panel dated 4 April 3013.

[11] The Panel is conscious that delegations often take holidays during this period, and will set a timetable for reply to its questions that takes this factor into account.

ANNEX F-5

THE EUROPEAN UNION'S REQUESTS OF 28 JUNE 2013 CONCERNING THE UNITED STATES' "CRITIQUE" TO THE COMPETITIONRX REPORT PRESENTED IN THE UNITED STATES' COMMENTS TO THE EUROPEAN UNION'S ANSWERS TO THE PANEL'S FIRST SET OF QUESTIONS

(Panel ruling issued on 8 July 2013)

1. The Panel refers to the European Union's letter of 28 June 2013 concerning the United States' "critique" of the Expert Report on the Financial Viability and Funding Implications of the A350XWB Development Programme (the "Competition Rx Report", Exhibit EU-127 (BCI and HSBI)) set out in the United States' comments on the European Union's answer to Panel Question 47. In its letter, the European Union asks the Panel to either: (i) reject the United States' "critique" as being untimely filed, in the absence of any "showing of good cause"; or alternatively, (ii) afford the European Union a meaningful opportunity to comment on the United States' "critique", were the Panel to decide that the United States has shown "good cause" for its allegedly belated submission. In such a case, the European Union submits that it should be granted an amount of time to respond to the United States' "critique" that is equal to the time it has taken for the United States to respond to the CompetitionRx Report since it was filed (i.e. 23 weeks).

2. In its response to the European Union's letter, the United States asks the Panel to reject the entirety of the European Union's requests on the grounds that: (i) the United States' comments on the European Union's answer to Panel Question 47 were not the first submissions made by the United States concerning the argument advanced in the CompetitionRx Report, namely, that LA/MSF was not critical to the 2006 launch of the A350XWB; and (ii) the United States' "critique" of the CompetitionRx Report does not qualify as "evidence", but is rather argumentation provided in response to an explicit request from the Panel to comment upon the European Union's answer to Panel Question 47.

1 THE EUROPEAN UNION'S REQUEST TO REJECT THE UNITED STATES' "CRITIQUE" OF THE COMPETITIONRX REPORT AS UNTIMELY FILED, WITHOUT A SHOWING OF "GOOD CAUSE"

1.1 Introduction

3. The Panel understands the European Union's concerns about the timing of the United States' "critique" to be not unlike those it raised in its request for an interim ruling of 28 May 2013 with respect to the alleged "backloading of evidence" by the United States in its answers to the Panel's questions of 23 April 2013.[1] Thus, the Panel understands the European Union to be of the view that the United States was required to submit its "critique" of the CompetitionRx Report earlier in these proceedings, and that the United States' alleged "strategic decision" not to do so has not only prejudiced the European Union's ability to defend its interests but also the Panel's ability to engage with the parties and therefore properly discharge its duty to make an objective assessment of the matter. In addition, the European Union argues that the United States' "critique" of the CompetitionRx Report amounted to "evidence", which in the light of certain statements and observations of the Appellate Body in *Thailand – Cigarettes (Philippines)*, cannot be accepted by the Panel at this "late" stage in the proceedings, without any showing by the United States of "good cause".

4. We recall that in our Decision of 12 June 2013 addressing the European Union's "backloaded evidence" allegations we observed that:

[1] European Union, Letter of 28 June 2013, p. 3 and footnote 17 ("Accordingly, for reasons explained in this letter and in its 28 May 2013 Interim Ruling Request[17], the European Union requests that the Panel reject the US critique as not timely filed, without any showing of good cause") (emphasis added). Footnote 17 refers to paragraphs 11-14 of the European Union's Interim Ruling Request of 28 May 2013.

> "… it is a basic requirement of due process that each party be afforded a meaningful opportunity to comment on the arguments and evidence adduced by the other party. This due process interest must be balanced against other interests, including systemic interests such as those reflected in Articles 3.3 and 12.2 of the DSU.{} As the Appellate Body has stated, panels are best situated to determine how this balance should be struck in any given proceeding, provided that they are vigilant in the protection of due process and remain within the bounds of their duties under Article 11 of the DSU.{}"[2]

5. With these and other important due process considerations in mind,[3] we reviewed the substance and the relevant facts surrounding the introduction of the Sanghvi Report, the United States' answer to Panel Question 67 and the Jordan Reply to Whitelaw's Response Report, and decided to decline the European Union's specific requests to reject these United States' submissions, *inter alia*, because:

> "… in discharging our responsibility under Article 11 of the DSU, {it was, in our view, appropriate} to not only put to the parties the questions asked on 23 April 2013 concerning the identification of the relevant product markets, but also to evaluate the arguments and evidence {including the Sanghvi Report} submitted by the parties in response to those questions."[4]

> "… the entirety of the United States' answer to Panel Question 67 is not only related to the subject matter of that question, but it also concerns a matter with respect to which the parties have engaged and exchanged contrasting views throughout these proceedings. … "[5] and

> "… the matters addressed in the Jordan Reply to Whitelaw's Response Report go directly to the issues with respect to which the Panel sought clarification in its questions. These are the very same issues with respect to which the parties have exchanged views throughout these proceedings. …".[6]

6. In each of the above instances, we saw no reason to accept the European Union's allegation that the United States' had taken a "strategic decision" to "withhold" the relevant evidence and argument in a manner that undermined the Panel's ability to make an objective assessment of the matter before it, or the European Union's ability to make its defense. Rather, we considered the United States' submissions to have been made as "part of the process of engagement between the parties and with the Panel that typically characterized WTO dispute settlement, whereby arguments and evidence are explored and tested, and positions clarified and/or further developed, with a view to informing the Panel's objective assessment of the matter before it".[7] For the reasons explained below, we come to a similar conclusion with respect to the "critique" of the CompetitionRx Report that was set out in the United States' comments on the European Union's answer to Panel Question 47.

1.2 Relevant Facts

7. The CompetitionRx Report was prepared pursuant to a contract between Airbus SAS and CompetitionRx, requiring the latter to "undertake a study and to assess (i) the economic and financial viability of the Business Case for the development of the A350XWB, and (ii) the funding implications of the development of the A350XWB for Airbus and its parent company EADS".[8] The

[2] Decision of the Panel, 12 June 2013, para. 15 (footnotes omitted).
[3] Decision of the Panel, 12 June 2013, paras. 11-15.
[4] Decision of the Panel, 12 June 2013, para. 22.
[5] Panel's Decision of 12 June 2013, para. 27. The Panel did not explain, as the European Union asserts, that "as long as a party is expressing a view on 'a matter with respect to which the parties have engaged and exchanged contrasting views', … it may do so at any point in the proceedings". European Union, Letter of 28 June 2013, p. 2.
[6] Panel's Decision of 12 June 2013, para. 29. Again, the Panel did not explain, as the European Union asserts, that "a party need not restrict itself to answering specific questions put to it by a panel, but may instead offer expansive observations that speak more generally to 'the issues' implicated by a particular question or series of questions". European Union, Letter of 28 June 2013, pp. 2-3 and footnote 6.
[7] Panel's Decision of 12 June 2013, para. 17.
[8] CompetitionRx Report, para. 6, Exhibit EU-127 (BCI and HSBI).

European Union first submitted the CompetitionRx Report, and the A350XWB Launch Business Case which is a principal focus of that Report,[9] with its second written submission, primarily to support its rebuttal of the United States' submissions concerning the necessity of government financing for the "launch and market presence" of the A350XWB.[10]

8. The United States did not explicitly address the analyses or conclusions of the CompetitionRx Report in its Oral Statements at the substantive meeting with the parties in April 2013. However, one aspect of the CompetitionRx Report was at least indirectly criticised by the United States in its Oral Statements;[11] and as noted by the United States, elsewhere in its Oral Statements, the United States continued to elaborate its views on the extent to which LA/MSF for the A350XWB was necessary for the launch and market presence of the A350XWB, drawing *inter alia* from two HSBI documents.[12] The European Union specifically addressed the United States' submissions in its Closing Oral Statement, arguing that they misrepresented the contents of the relevant documents and/or ignored the "objective" evidence presented in its second written submission, which included the CompetitionRx Report.[13]

9. The Panel decided that it wanted to explore the European Union's responses to the United States' submissions in more detail and therefore asked the European Union in Panel Question 47 to respond to four specific arguments made by the United States in its Confidential Oral Statement, in the light of the two HSBI documents referred to by the United States in paragraph 1 of its Confidential Oral Statement, namely, the A350XWB Launch Business Case (Exhibit EU-130 (HSBI)) and the UK Government Document relating to the A350XWB (Exhibit US-498 (HSBI)). The four arguments, as described in Panel Question 47, were: (i) "that the A350XWB project would not have gone forward without LA/MSF"; (ii) "that Airbus launched the A350XWB while making certain key assumptions related to LA/MSF"; (iii) "that the risks associated with the A350XWB launch made it likely that subsidies affected Airbus's decision to proceed with the project"; and (iv) "that the HSBI evidence confirms that prior LA/MSF had substantial effects on the A350XWB project that made the A350XWB's launch - at the time that it was launched - possible". The parties were informed at the time that the Panel asked its questions that they would be given three weeks to comment on each other's answers, and a specific deadline was set for this purpose.[14]

10. In its 27-page response to Panel Question 47, the European Union advanced a number of arguments intended to rebut the submissions made by the United States in its confidential Oral Statement. In doing so, the European Union relied upon *inter alia* the CompetitionRx Report, explicitly referring to it 11 times, in nine paragraphs and 14 footnotes. The European Union's answer draws upon various analyses undertaken, and conclusions reached, in the CompetitionRx Report to support its view that the A350XWB programme was, contrary to the position advanced by the United States, economically viable and would have proceeded even without any financing

[9] A350XWB Launch Business Case, Exhibit EU-130 (HSBI). The European Union asserts, in response to Panel Question 96, that it did not provide the A350XWB Launch Business Case earlier in response to the Panel's request under Article 13 DSU for "[a]ll A350 business cases provided by Airbus or EADS to the member States and/or any of Airbus' risk-sharing suppliers" because this document was never presented to the member States or to Airbus' risk-sharing partners. The European Union explained that it submitted that document with its second written submission because it was "relevant to the rebuttal of certain US assertions that the business case would not be viable absent financing from the EU member States".

[10] See, in particular, sections VI.E.3-4 of the European Union's second written submission.

[11] In paragraph 9 of its Confidential Opening Oral Statement, the United States cross-referred to certain paragraphs in the European Union's second written submission where the CompetitionRx Report was relied upon by the European Union to support its view that the United States "has failed to demonstrate that EADS and Airbus were unable 'to obtain adequate commercial funds' to launch the A350XWB". (European Union, SWS, heading to section VI.E.4.a). The United States relies upon the HSBI document referred to in paragraph 9 of its Confidential Opening Oral Statement to argue that one of the conclusions reached in the CompetitionRx Report should be rejected. United States, Confidential Opening Oral Statement, para. 9, (HSBI) and footnote 18. noting "e.g., EU SWS, paras. 1027, 1030, 1038".

[12] United States, Non-Confidential Opening Oral Statement, paras. 81-89; and United States, Confidential Opening Oral Statement, paras. 4-23.

[13] European Union, Closing Oral Statement (BCI and HSBI), paras. 20-22.

[14] The European Union was subsequently granted an additional two weeks to prepare its comments. Decision of the Panel, 5 June 2013.

from the French, German, Spanish and UK governments, both at the time of the project launch and in [2009].[15]

11. Both parties submitted extensive comments on the other party's answers to the Panel's Questions.[16] In the introductory paragraph to its comments on the European Union's answer to Panel Question 47, the United States submitted that the European Union's answer confirmed "its failure to rebut the U.S. demonstration that LA/MSF is a genuine and substantial cause of the launch and market presence of the A350XWB". The United States explained that the European Union could not, in its view, "avoid this conclusion by distorting the meaning of a UK government document,{} downplaying the significant effects of LA/MSF to earlier models,{} touting the badly flawed CompetitionRx Report,{} and rehashing its arguments about timing of Airbus's request for and receipt of LA/MSF"{}.[17] The United States followed this introductory paragraph with 22 pages of comments through which it responded to the European Union's answer to Panel Question 47. These comments included ten pages devoted to setting out the reasons why the United States' considers the CompetitionRx Report to be "badly flawed".

1.3 Evaluation by the Panel

12. In our view, it is sufficiently clear from the above exposition of the facts surrounding the United States' submission of its "critique" of the CompetitionRx Report that it was introduced into these proceedings as part of the ongoing, and anticipated,[18] exchange of views between the parties with respect to the United States' allegations concerning the relevance of LA/MSF for the "launch and market presence" of the A350XWB. Not only were certain specific aspects of these allegations the subject matter of Panel Question 47, but the CompetitionRx Report was explicitly and extensively relied upon by the European Union to answer that question. In these circumstances, the fact that the United States' "critique" of the CompetitionRx Report was not presented on either of the two previous occasions available for the United States to have possibly introduced it on its own initiative, namely, at the substantive meeting with the parties or in the United States' answers to the Panel's questions,[19] does not mean that the United States should be prevented from doing so in its comments on the European Union's answer to Panel Question 47. To reject the United States' "critique" on this basis would, in our view, undermine the whole purpose of the Panel's decision to pose the parties questions and afford each party an opportunity to comment on each other's answers.

13. The European Union appears to argue, however, that the United States is not entitled to present its "critique" of the CompetitionRx Report at this "late" stage in the proceeding, because it qualifies as "evidence", which cannot be accepted by the Panel without "any showing of good cause".[20] The European Union finds support for this view in certain statements and observations made by the Appellate Body in *Thailand – Cigarettes (Philippines)*. In particular, according to the European Union, the Appellate Body in *Thailand – Cigarettes (Philippines)* noted that "'the submission of factual evidence at the very last stage of the proceedings, that is, in a party's comments on the other party's answers to questions by the Panel following the second substantive meeting … should be unusual' because it is 'so late in the proceedings'".[21] Furthermore, the European Union maintains that the Appellate Body found that for "rebuttal evidence", which the European Union submits was "labelled a 'residual category' of evidence" in *Thailand – Cigarettes (Philippines)*, "'the submitting party must show good cause' for untimely filing".[22] In our view, the European Union's reliance on the Appellate Body's findings in *Thailand – Cigarettes (Philippines)* is not only partly based on a mischaracterization of the relevant Appellate Body statements, but it is

[15] European Union, Answer to Panel Question 47, paras. 136-138, 140, 153, 187-189 and 191.
[16] The United States' submitted 98 pages of comments on the European Union's answers, while the European Union submitted 283 pages of comments on the answers of the United States.
[17] United States, Comments on the European Union's Answer to Panel Question 47, para. 97 (footnotes omitted).
[18] See above, para. 9.
[19] We note that the Panel's questions of 23 April 2013 did not explicitly ask the United States to respond to any particular aspect of the CompetitionRx Report.
[20] European Union, Letter of 28 June 2013, pp. 2-3.
[21] European Union, Letter of 28 June 2013, p. 2, citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 154 and footnote 242.
[22] European Union, Letter of 28 June 2013, p. 2, citing Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 153.

also misplaced given the significant differences that exist between the facts of that dispute and the situation that is now before the Panel in this proceeding.

14. First, we note that the observations of the Appellate Body in *Thailand – Cigarettes (Philippines)* that are relied upon by the European Union concerned paragraph 15 of the working procedures of the panel in that dispute. The Appellate Body characterized this paragraph as allowing for the submission of "factual evidence at the very last stage of the proceedings" - namely, in the party's comments on each other party's answers to questions after the second substantive meeting of the panel with the parties. The European Union does not, however, allege that the United States has failed to comply with what is a very similar rule of procedure set out in paragraph 15 of the Panel's Working Procedures in this dispute. Moreover, and perhaps more importantly, the United States' "critique" of the CompetitionRx Report does not, in our view, introduce any *new factual evidence.* Rather, as we read it, the United States' "critique" articulates its *arguments* concerning the credibility and relevance of the CompetitionRx Report to the particular issues that were the subject of Panel Question 47 and the European Union's answer, in the light of *evidence that has already been adduced* by both parties. Likewise, the United States' "critique" of the CompetitionRx Report was not submitted at the "very last stage" of these proceedings, because as communicated to the parties on 28 June 2013,[23] the Panel intends to ask the parties a series of follow-up questions towards the end of August 2013.[24] Thus, the observations of the Appellate Body in *Thailand – Cigarettes (Philippines)* that are relied upon by the European Union were made in the context of resolving an issue that does not arise in the present circumstances.[25]

15. Second, and in any case, there is nothing in the Appellate Body's observations that are relied upon by the European Union, to suggest that a panel must *necessarily reject* any factual evidence that is submitted at the "very last stage" of a proceeding. While noting that such a situation "should be unusual",[26] the Appellate Body also clearly contemplated the possibility that there may be circumstances when a panel may decide to accept such factual evidence even without offering the other party an opportunity to comment:

> "As set out above, due process generally demands that each party be afforded a meaningful opportunity to comment on evidence adduced by the other party. At the same time, a number of different considerations will need to be factored into a panel's effort to protect due process in a particular dispute, and these may include the need for a panel, in pursuing prompt resolution of the dispute, to exercise control over the proceedings in order to bring an end to the back and forth exchange of competing evidence by the parties."[27]

16. Thus, after examining a number of "considerations that {were} germane" to its assessment of Thailand's Article 11 DSU claim, the Appellate Body found that the panel in *Thailand – Cigarettes (Philippines)* had not infringed any principles of due process when it accepted Exhibit PHL-289, submitted by the Philippines with its comments on Thailand's answers to the panel's questions after the second substantive meeting, *without offering Thailand a meaningful opportunity to comment on the contents of that exhibit*.[28]

[23] The Panel appreciates that this communication was transmitted to the parties only after the European Union's letter of 28 June 2013 was received.

[24] The Panel recalls that, prior to its communication of 28 June 2013, it had, on a number of occasions, informed the parties that it may need to pose additional questions on (or even hold an additional meeting with the parties to discuss) certain factual or legal matters arising in this dispute. The Panel announced this possibility to the parties at the end of the substantive meeting, as well as in its cover letter to the questions posed following the substantive meeting with the parties, and its communication of 12 June 2013.

[25] Indeed, as we see it, the issue before the Appellate Body in *Thailand – Cigarettes (Philippines)* was significantly different to the one that is before us in this proceeding, as it related to the extent to which the panel in that dispute was entitled to accept a piece of *new factual evidence* as part of the Philippines' comments to Thailand's answers to the panel's questions after the second substantive meeting of the parties without giving Thailand an opportunity to comment upon this *new factual evidence*. Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 141-146.

[26] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, footnote 242.

[27] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 155.

[28] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 156-160.

17. Finally, and contrary to what is argued by the European Union, the Appellate Body in *Thailand – Cigarettes (Philippines)* did not qualify "rebuttal evidence" as a "residual category" of evidence that can only be accepted "late in the proceedings" or "at the very last stage" of a proceeding if "good cause" is shown. Rather, in reviewing the rules for submitting factual evidence found in paragraph 15 of the panel's working procedures in that dispute, the Appellate Body explained that "rebuttal evidence" fell within the scope of the first category of evidence identified in those procedures, and that this category encompassed "evidence that is submitted no later than the first substantive meeting, as well as evidence that, albeit submitted at a later stage, is necessary for purposes of rebuttal, answers to questions, or comments on answers to questions".[29] The "residual category" of evidence identified by the Appellate Body did not include "rebuttal evidence" because the former comprised "evidence that does not fall within the scope of the first sentence" of the panel's working procedures. It was only with respect to the introduction of this "second category" of evidence that the Appellate Body found there was a requirement in the panel's working procedures to show "good cause". Thus, even assuming that the United States' "critique" of the CompetitionRx Report could be qualified as "rebuttal evidence", the Appellate Body's interpretation of the panel's working procedures in *Thailand – Cigarettes (Philippines)* does not stand for the proposition that the United States should have shown "good cause" in order to introduce that "critique" at the time that it commented on the European Union's answer to Panel Question 47.

18. Thus, for all of the foregoing reasons, we decline the European Union's request to reject the United States' "critique" of the CompetitionRx Report on the grounds that it was untimely filed, without any showing of "good cause".

2 THE EUROPEAN UNION'S REQUEST TO BE PROVIDED WITH A "MEANINGFUL OPPORTUNITY" (23 WEEKS) TO COMMENT ON THE UNITED STATES' "CRITIQUE"

19. The Panel recalls that it has already informed the parties that it will pose a series of follow-up questions towards the end of August 2013. With these questions, both parties will be afforded further opportunities to make submissions with respect to each other's views on a number of issues on which the Panel desires further clarification. This will include the extent to which LA/MSF was necessary for the "launch and market presence" of the A350XWB. The parties will also be given an opportunity to make any comments on each other's answers to the Panel's questions. Thus, while the Panel does not agree with the European Union's contention that, in order to secure its due process rights, it must be given the same amount of time to respond to the United States' "critique" of the CompetitionRx Report as it took the United States to make that "critique", the Panel will provide the European Union, through the questions and answers process that is expected to begin towards the end of August, ample opportunity and time to respond to the United States' "critique" of the CompetitionRx Report.

3 CONCLUSION

20. In summary, after carefully considering the European Union's request to reject the United States' "critique" of the CompetitionRx Report, and the United States' response, the Panel has decided, on the basis of the foregoing considerations, to:

a. decline the European Union's request to reject the United States' "critique" of the CompetitionRx Report; and

b. decline the European Union's request to be afforded exactly 23 weeks to respond to the United States' "critique" of the CompetitionRx Report. Nevertheless, the Panel notes that the European Union will be provided with ample opportunity and time to respond to the United States' "critique" of the CompetitionRx Report in the questions and answers process that it has previously communicated to the parties will begin towards the end of August 2013.

[29] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 153 (emphasis added).

ANNEX F-6

THE EUROPEAN UNION'S REQUESTS OF 2, 4 AND 11 SEPTEMBER 2013 CONCERNING THE ADOPTION OF ADDITIONAL INFORMATION CONFIDENTIALITY PROCEDURES FOR THE PURPOSE OF RESPONDING TO PANEL QUESTION 126

(Panel ruling issued on 16 September 2013)

1. The Panel refers to the European Union's communications of 2, 4 and 11 September 2013 concerning the information requested in Panel Question 126, and the United States' response of 4 September 2013. In its communications, the European Union asked the Panel to adopt more stringent confidentiality rules with respect to the information sought by the Panel in Question 126. The United States' objected to the European Union's request.

2. Before turning to address the merits of the European Union's request, the Panel would like to firstly recall the particular context which led it to ask the European Union for the information identified in Question 126. The redacted information Question 126 asks the European Union to disclose is found in two Exhibits that were introduced into this proceeding by the European Union for the specific purpose of rebutting the United States' submission that the A350XWB programme would not have been viable without LA/MSF. The United States has on a number of occasions raised the redactions of information from the HSBI versions of these Exhibits with the Panel, complaining that some (but not all) have hampered its ability to fully respond to the European Union's arguments. The United States has also suggested that the same redactions could hinder the Panel's own task of making an objective assessment of the matter. Panel Question 96(c) asked the European Union to explain why it had redacted certain information from one of the two Exhibits, the A350XWB Launch Business Case (Exhibit EU-130 (HSBI)). After carefully considering the European Union's response, as well as the United States' comments on this and other European Union answers to questions, the Panel decided that in order for it to conduct an objective assessment of the matter, it would need to review and consider the information requested in Panel Question 126.

3. The Panel does not understand the parties to disagree with the notion that where a party submits evidence to substantiate an argument it is making in WTO dispute settlement proceedings, it is up to that party to disclose all of the information necessary for a panel to make an objective assessment of the probative value of the evidence it relies upon. A party's submission of evidence must also take into account the due process rights of the opposing party. As in the original proceedings, both parties in this dispute have, to differing degrees, redacted certain information from parts of the evidence presented to substantiate their respective arguments. The parties have explained their actions by *inter alia* referring to the extraordinarily commercially sensitive nature of the information at issue. The Panel recalls, however, that it was to address precisely these types of concerns that it adopted, on request and after consultation with the parties, the existing BCI/HSBI Procedures. These procedures, which represent the most stringent and far reaching confidentiality rules ever applied in the history of WTO dispute settlement, were specifically designed to facilitate the parties' abilities to submit commercially sensitive information in these proceedings, including in response to all Panel requests for information considered necessary to the task of conducting an objective assessment of the claims and issues before it.

4. The Panel appreciates the seriousness of the concerns raised by the European Union with respect to the information requested in Panel Question 126. The Panel also recognizes the efforts the European Union has undertaken since its communication of 2 September 2013 to endeavour to respond to the entirety of the Panel's information request. The Panel understands from the European Union's letter of 11 September 2013 that despite its earlier reservations, the European Union is now ready to provide all of the requested information, with the exception of certain recurring cost and revenue data, under the protection of the existing BCI/HSBI Procedures. Given the exceptional nature of the European Union's acute sensitivities to disclosing the specified recurring cost and revenue data, the Panel has decided to grant the European Union's request to exclude this information, as identified in its letter of 11 September 2013, from its answer to Panel Question 126. The Panel does so, however, without prejudice to further consideration of this

matter at a later stage in these proceedings, should the Panel conclude that the information not provided by the European Union is necessary for it to complete its work.

5. On this basis, the Panel requests that the European Union provide all of the information requested in Question 126 with the exception of the following:

- Revenue data from the CompetitionRx Report (Exhibit EU-127 (HSBI)), in particular, paragraph 139; figure 4; tables 16 and 17; and the tables in Annexes C and D; and

- Recurring cost data from slide 59 of the A350XWB Launch Business Case (Exhibit EU-130 (HSBI)); as well as from paragraph 193; tables 12, 15, 16, 17; figures 6 and 7; and the tables in Annex D of the CompetitionRx Report (Exhibit EU-127 (HSBI)).

6. The Panel understands that the European Union is in a position to submit this information at the same time as its answers to all other Panel Questions, i.e. by 20 September 2013.

ANNEX F-7

THE EUROPEAN UNION'S REQUEST OF 24 MARCH 2014 CONCERNING THE PANEL'S DECISION TO POSE SIX ADDITIONAL WRITTEN QUESTIONS TO THE PARTIES

(Panel ruling issued on 31 March 2014)

The Panel refers to the European Union's letter of 24 March 2014, and the United States' reply of 26 March 2014, concerning its intention to pose six additional questions to the parties, including a number of questions concerning the alleged subsidization of the A350XWB.

The Panel has carefully considered the parties' submissions, and for the reasons explained in following pages, has decided to maintain its request. Given the relatively small number of questions[1], the Panel had originally envisaged to invite the parties to submit their answers by close of business on **Tuesday, 15 April 2014**, subject to any reasonable and justified request for an extension. Now that the questions have been provided, and in the light of the European Union's stated resource constraints, the parties are requested to confirm by close of business on **Wednesday, 2 April 2014**, whether it would be possible to meet the 15 April 2014 deadline. Should either party consider that it will be unable to provide the requested information and/or explanations within this time-limit, it should inform the Panel and request an extension, proposing an alternative date. The parties will be invited to submit any comments they may have on each other's answers to the Panel's questions on a date to be set by the Panel in the light of the responses submitted by the parties on 2 April 2014.

[1] Of the six additional questions, three are posed only to the European Union, two only to the United States, and one question is posed to both parties.

1 THE PANEL'S DECISION TO POSE ADDITIONAL QUESTIONS

1. In its letter of 24 March 2014, the European Union requests that the Panel reconsider its decision to ask additional questions with respect to the "alleged subsidization of the A350XWB". According to the European Union, "the time is now long past for this debate to come to an end";[2] and any request on the part of the Panel for the parties to answer additional questions on this issue would "at this juncture risk{} further breaching enumerated limits on the Panel's use of its interrogative powers, including notably, to make good either Party's failure to articulate and substantiate its case".[3]

2. The United States opposes the European Union's request. While the United States shares the European Union's view that the Panel has afforded the parties "ample opportunity" to address the issues presented in this dispute, it does not believe that this precludes the possibility that the Panel may need additional clarification of the parties' views or the relevant facts before it.[4] For the United States, the Panel is entitled to ask additional questions provided that it fulfils its responsibilities under the DSU, while minimizing undue delay in the proceedings.[5]

3. We recognize that the parties in a typical Article 21.5 dispute would probably not expect to receive a set of questions from the panel 11 months after the one and only substantive meeting. We are fully conscious of the 90 day deadline for a compliance panel to circulate its report,[6] and that the prompt settlement of disputes is essential to the effective functioning of the WTO and the dispute settlement mechanism.[7] However, as the parties are well aware, the present dispute is not an ordinary Article 21.5 proceeding, a fact that is reflected in *inter alia* the parties' decisions to designate over 150 government representatives and outside advisors as Approved Persons,[8] to file first and second written submissions totalling 1470 pages (not to mention scores of lesser submissions on a wide range of matters), to submit numerous expert reports and to put before the Panel some 1100 exhibits.[9] Indeed, on more than one occasion we have explained that the complex issues and voluminous arguments and evidence submitted in these proceedings create particular challenges for its work given the one-meeting format of compliance disputes. It should therefore come as no surprise that given the limited resources available in the Secretariat to assist the Panel carry out its mandate, the fine details of a number of matters at issue in this dispute have only been clearly identified and fully considered by the Panel relatively recently, much later than would otherwise be the case in an average Article 21.5 proceeding.

4. It was with these particular challenges in mind that we informed the parties on each previous occasion it decided to pose written questions that: (i) it could not "exclude that as it continue{d} to deliberate on the merits of the United States' claims, it may find it necessary to pose further questions on factual or legal issues"; and (ii) that it would "ensure that were any such further questions to be asked, the parties [would] be notified in advance and given sufficient time to respond."[10] Consistent with this stated approach, our communication of 20 March 2014 gave the parties 11 days' notice of our intention to pose six additional questions to the parties, a "number" of which may require the parties to call upon the experts they have thus far used to make submissions on the alleged subsidization of the A350XWB. All six of the additional questions were prompted by our ongoing consideration of the parties' arguments and evidence, which has led us to conclude that there are a number of important matters that need to be clarified and/or further elaborated in order for it to conduct an objective assessment of the matter. However, for the European Union, the Panel would risk doing precisely the opposite by deciding to ask any

[2] European Union's Letter to the Panel of 24 March 2014, p. 3.
[3] European Union's Letter to the Panel of 24 March 2014, p. 3.
[4] United States Response of 26 March 2014 to the European Union's Letter of 24 March 2014, p. 1.
[5] United States Response of 26 March 2014 to the European Union's Letter of 24 March 2014, p. 2.
[6] Article 21.5, DSU.
[7] Article 3.3, DSU.
[8] European Union Approved Persons List of 17 September 2013 (41 government representatives / 36 outside advisers); United States Approved Persons Lists of 7 May 2013 (33 government representatives / 47 outside advisers).
[9] The parties' written submissions in this dispute have also included answers, and comments on each other's answers, to 160 questions (often with multiple sub-parts) posed by the Panel.
[10] See cover note to the Panel's Questions to the Parties of 23 April and 23 August 2013. The Panel made a similar statement at the end of the substantive meeting with the parties, as well as in its communication of 12 June 2013 concerning the European Union's request for an interim ruling of 28 May 2013, para. 14.

additional questions with respect to the alleged subsidization of the A350XWB at this stage of the proceeding.[11] In our view, there is no basis to the European Union's concerns.

5. We are aware of no rule that, as a general matter, would prevent a panel from posing written questions to the parties in a dispute *at any stage* of a proceeding. Indeed, as we have previously noted,[12] it is well established that "a panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs. A panel may need such information before or after a complaining or a responding member has established its complaint or defence on a *prima facie* basis."[13] Moreover, the Appellate Body has explained that "panels are entitled to ask questions of the parties that they deem relevant to the consideration of issues before them".[14] It follows that a panel's discretion to pose questions to the parties must be first and foremost guided by its obligation to conduct an objective assessment of the matter. Obviously, any decision to exercise this discretion relatively late in a proceeding must also take account of the need to settle disputes in a timely manner, particularly in the context of Article 21.5 proceedings. However, the objective of achieving a prompt settlement of disputes cannot alone dictate when a panel is entitled to request the parties to provide information and/or explanations that are considered necessary to perform its function. Thus, to accept that the Panel in this compliance dispute cannot ask the parties to answer six additional questions simply because 22 months have passed since the United States filed its first written submission (in a proceeding that is undeniably one of the most legally complex and factually intensive Article 21.5 disputes in the history of the WTO dispute settlement mechanism) would artificially and arbitrarily constrain the Panel's ability to discharge its duty and thereby bring it into conflict with the standards of the DSU. As we have previously explained:

> "The 'objective assessment of the matter' that a panel is called upon to perform under Article 11 of the DSU requires it to carefully and independently scrutinize the parties' arguments and any evidence submitted in support of those arguments, with a view to clarifying their meaning and exploring their implications for the particular claims being made. Consistent with this obligation, and in the light of the extremely voluminous and complex issues that have been raised in this dispute, we believe that our evaluation of the merits of the United States' claims must be conducted on the basis of a full appreciation of *all* of the parties' arguments and the evidence adduced in support of those arguments throughout the course of this proceeding."[15]

6. Thus, contrary to the European Union's contentions, we see no obstacle to or risk in posing any number of additional questions to the parties concerning the alleged subsidization of the A350XWB at any stage in this proceeding, provided that we consider the information sought by any such questions to be necessary to our task of making an objective assessment of the United States' claims. Rather than tainting the neutrality of our findings in this dispute, the information and/or explanations that are requested in the additional questions we have asked the parties will, in our view, only serve to ensure that the standards of Article 11 of the DSU are respected.

7. Finally, we note that of the five additional questions asked with respect to the alleged subsidization of the A350XWB, it became necessary to pose three of them because the methodologies and underlying data used by the European Union to calculate the IRRs and Macaulay durations of the challenged LA/MSF contracts yet to be fully explained and/or completely disclosed. Had such explanations and data been provided when the relevant calculations were first submitted,[16][17] or when the Panel explicitly requested them,[18] the Panel might not have had to pose some of the questions it now seeks to have answered.

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[11] We note that the European Union's objection to the Panel's intention to ask additional questions is limited to the "number" of questions the Panel stated in its fax of 20 March 2014 it wanted to ask in respect of the alleged subsidization of the A350XWB. The European Union does not take issue with the Panel's intention to ask questions concerning any other matter at this stage of the proceeding.

[12] See Panel's communication of 12 June 2013 concerning the European Union's request for an interim ruling of 28 May 2013, para. 14.

[13] Appellate Body Report, *Canada – Aircraft*, para. 192 (underline added).

[14] Appellate Body Report, *Thailand – H-Beams*, para. 135.

[15] Panel's communication of 12 June 2013 concerning the European Union's request for an interim ruling of 28 May 2013, para. 14 (underline added).

[16] The first presentation of the final numerical values of the IRRs relied upon by the European Union was made in its second written submission on 15 January 2013 (table at para. 300) and the accompanying

2 DEADLINE TO RESPOND TO THE PANEL'S ADDITIONAL QUESTIONS

8. In its letter of 24 March 2014, the European Union revealed that were the Panel to decide to pose the additional questions, the European Union would be "unable to marshall the expert resources necessary to address questions on this issue" between 12 April and 4 May 2014, "in light of long-standing professional and personal commitments." The European Union requests that the Panel "take this factor, as well as the demands of due process, into account in considering how to proceed".[19]

9. The United States submits that the unavailability of certain "expert resources" from 12 April 2014 to 5 May 2014 does not warrant any special accommodations for responding to questions. The United States notes that these dates would leave "almost two working weeks" to answer the Panel's questions. According to the United States, this amount of time would be in "line with what the Panel has provided in previous rounds of questions, which included many more than six questions". Furthermore, the United States suggests that "given the late stage of the proceeding and the importance of resolving the dispute promptly, it would not appear to be necessary to provide for comments to answers to questions".[20]

10. In providing the parties with advance notice on 20 March 2014 of its intention to ask additional questions, the Panel had wanted to give the parties a reasonable period of time to organize their resources in order to be in a position to fully respond to its questions. Given that almost six months have passed since the parties' last submissions in this dispute, we can certainly appreciate that it may not be easy for the parties to assemble all of the relevant resources and expertise in sufficient time. However, bearing in mind that the European Union's unidentified "expert resource{}" constraints were expressed without having seen the relevant questions, and that the Panel had in any case intended to invite the parties to submit their answers by close of business on **Tuesday, 15 April 2014**, subject to any reasonable and justified request for an extension, the parties are requested to review the questions that are now before them and confirm by close of business on **Wednesday 2 April 2014**, whether it would be possible to meet the 15 April 2014 deadline. Should either party consider that it will be unable to provide the requested information and/or explanations within this time-limit, it should inform the Panel and request an extension, proposing an alternative date.

11. We do not agree with the United States when it suggests that "it would not appear to be necessary to provide for comments to answers to questions". In our view, the United States' suggestion would undermine both parties' fundamental due process right to an opportunity to comment on any submissions made by the other. Thus, the parties will be invited to submit any comments they may have on each other's answers to the Panel's questions on a date to be set by the Panel in the light of the responses the parties will submit on 2 April 2014.

Whitelaw Response to Jordan Report (table at para. 12), Exhibit EU-121(BCI). The underlying data and specific methodology used to derive the IRRs was not disclosed. It was only eight months later, in its answers to the Panel's second set of questions submitted on 20 September 2013, that the European Union revealed *part* of the data used to derive the IRRs in the Further Report by Professor Whitelaw, Exhibit EU-421 (HSBI).

[17] The European Union's Macaulay duration calculations were first submitted in Exhibit EU-380 (HSBI) on 22 May 2013, as part of the European Union's Answer to Panel Question 92. The first explanation and justification provided by Professor Whitelaw for the use of these calculations was provided in Exhibit EU-396 (BCI/HSBI) on 25 June 2013, as part of the European Union's Comments on the United States' Answers to the first set of Questions. Professor Whitelaw's explanation did not, however, fully disclose the methodology used to derive the calculations with respect to each of the relevant LA/MSF contracts.

[18] See, in particular, Panel Question 132 to the European Union, which read: "*Please explain Professor Whitelaw's calculations of the IRRs of the A350XWB LA/MSF Agreements. Please provide all underlying data for these calculations, showing the figures and describing the methodology used with respect to all contracts, including amendments, as well as anticipated cash flows to and from the member States and any assumptions with regards to revenues, prices and/or royalties (e.g. were list prices used or actual/anticipated negotiated prices?). Please explain the extent to which the methodology used by Professor Whitelaw differs or is similar to that used by the European Union to calculate the IRRs of the LA/MSF Agreements in the original proceeding.*"

[19] European Union's Letter to the Panel of 24 March 2014, p. 4.

[20] United States Response of 26 March 2014 to the European Union's Letter of 24 March 2014, p. 2.

ANNEX G

THE EUROPEAN UNION'S COMPLIANCE COMMUNICATION OF 1 DECEMBER 2011

ANNEX G-1

THE EUROPEAN UNION'S COMPLIANCE COMMUNICATION OF 1 DECEMBER 2011

(WT/DS316/17)

1. The European Union refers to the recommendations and rulings of the WTO Dispute Settlement Body (DSB) with respect to the dispute *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316). The European Union would like to inform the DSB that it has taken appropriate steps to bring its measures fully into conformity with its WTO obligations, and to comply with the DSB's recommendations and rulings.

2. In considering appropriate steps to bring its measures into conformity with its WTO obligations, the European Union took note of all elements of the DSB's recommendations and rulings, including, in particular, the Appellate Body's guidance on the way in which subsidies and adverse effects expire, dissipate, terminate or are otherwise removed or withdrawn. In undertaking this review, we consulted, among others, independent experts in: financial economics; investor behaviour; financial and cost auditing, accounting and controlling; product engineering; and Large Civil Aircraft (LCA) fleet management. We have also closely monitored and assessed LCA product and market developments in the months and years following the period covered by the Panel's review.

3. As a result of this review, the European Union has adopted a course of action that addresses all forms of adverse effects, all categories of subsidies, and all models of Airbus aircraft covered by the DSB's recommendations and rulings.

4. Specifically, in bringing its measures into conformity with its WTO obligations, the European Union has addressed all categories of subsidy covered by the DSB's recommendations and rulings: Member State Financing (MSF) loans, capital contributions, infrastructure support and regional aid. Amongst others, the European Union has secured repayment of MSF loans and terminated MSF agreements, increased fees and lease payments on infrastructure support to accord with market principles, and ensured that capital contributions and regional aid subsidies have, in the Appellate Body's words, "come to an end" and are no longer capable of causing adverse effects. Additionally, the course of action adopted by the European Union affects Airbus' A300, A310, A320, A330, A340 and A380 aircraft, as well as derivatives thereof, as implicated by the DSB's recommendations and rulings. Finally, as a result of these steps and other intervening market events, the European Union has addressed the forms of adverse effects covered by the DSB's rulings. Information concerning the steps that have been taken by the European Union is provided in the attached list.

5. In short, by having taken appropriate steps to bring our measures into conformity with our WTO obligations, as required by Article 7.8 of the *SCM Agreement* and Article 19.1 of the DSU, the European Union has ensured full implementation of the DSB's recommendations and rulings.

1. Termination of French MSF agreement for A300B;

2. Termination of French MSF agreement for A300B2/B4;

3. Termination of French MSF agreement for A300-600;

4. Termination of German MSF agreement for A300B;

5. Termination of German MSF agreement for A300B2/B4;

6. Termination of German MSF agreement for A300-600;

7. Termination of Spanish MSF agreement for A300B;

8. Termination of Spanish MSF agreement for A300B2/B4;

9. Termination of Spanish MSF agreement for A300-600;

10. Termination of French MSF agreement for A310;

11. Termination of French MSF agreement for A310-300;

12. Termination of German MSF agreement for A310;

13. Termination of German MSF agreement for A310-300;

14. Termination of Spanish MSF agreement for A310;

15. Termination of Spanish MSF agreement for A310-300;

16. Termination of French MSF agreements for A320;

17. Termination of German MSF agreement for A320;

18. Termination of Spanish MSF agreement for A320;

19. Termination of French MSF agreement for A330/A340 Basic;

20. Termination of German MSF agreement for A330/A340 Basic;

21. Termination of Spanish MSF agreement for A330/A340 Basic;

22. Termination of French MSF agreement for A330-200;

23. Termination of French MSF agreement for A340-500/600;

24. Termination of Spanish MSF agreement for A340-500/600;

25. Payment by Airbus, other than on deliveries under previously existing contractual terms, with respect to outstanding MSF obligations in the amount of approximately EUR 1,704,775,000;

26. Bringing "to an end"[1] the 1987, 1988, 1992 and 1994 French capital contributions into Aérospatiale; the 1989 capital contribution by Kreditanstalt für Wiederaufbau ("KfW") into Deutsche Airbus GmbH and the subsequent 1992 transfer of KfW's shares; the French MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320, A330/A340 Basic, A330-200 and A340-500/600; the German MSF agreements for the A300B, A300B2/B4, A300-600, A310, A310-300, A320 and A330/A340; the Spanish MSF agreements for the A300B, A300B2/B4,

[1] Appellate Body Report, *EC – Aircraft*, para. 709.

A300-600, A310, A310-300, A320, A330/A340 Basic and A340-500/600; the UK MSF agreements for the A320 and A330/A340 Basic; the regional development grant for an A380-related facility of Airbus Deutschland GmbH (now Premium AEROTEC GmbH) in Nordenham, Germany; and, the regional development grants for largely A380-related facilities of EADS/CASA in Tablada and Puerto de Santa Maria, Spain, and of Airbus España, S.L. (now Airbus Operations, S.L.) in Illescas and Puerto Real, Spain;

27. Isolation of Spanish regional development grants to the EADS/CASA facility at La Rinconada/San Pablo, Spain, from use for LCA purposes;

28. Amendment of take-off and landing fee schedule for use of the runway extensions at Bremen Airport;

29. Amendment of the lease agreement between Airbus Deutschland GmbH and Projektierungsgesellschaft Finkenwerder mbH & Co. KG for an A380-related Airbus Deutschland GmbH facility in Hamburg Finkenwerder;

30. Subsequent share transactions and cash extractions involving subsidy recipients;

31. Termination of the A300 LCA programme;

32. Termination of the A310 LCA programme;

33. Termination of the A340 LCA programme;

34. Completed deliveries of relevant LCA to markets for which displacement was found and completed performance of sales contracts for A319s with easyJet, A320s with Air Berlin, A319s and A320s with Czech Airlines, A320s with Air Asia, A340-600s with Iberia, A340-300s and A340-600s with South African Airways, A340-500s and A340-600s with Thai Airways International, A380s with Emirates Airlines, A380s with Singapore Airlines, and A380s with Qantas;

35. Non-subsidised subsequent investments in Airbus' A320 and A330 LCA programmes;[2]

36. Attenuation, through the actions or steps taken with respect to the subsidies and through further intervening causes, of any causal link to the point that it no longer constitutes "'a genuine and substantial relationship of cause and effect' between the subsidies and the alleged market phenomenon".[3]

[2] Appellate Body Report, *EC – Aircraft*, para. 1233.
[3] Appellate Body Report, *EC – Aircraft*, paras. 1232-1233.